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Dear NAFTA New Subscribers:

It has been an interesting start to 2004, particularly for my friends at the United States Department of State. Whereas things seem to have quieted down for the lawyers at Canada's Department of International Trade, at least in terms of responding to new NAFTA investment disputes, their colleagues in Mexico and the United States continue to deal with ongoing arbitrations.

First, my understanding is that Mexico's SECOB lawyers have been busy, although their web site people seem a little slow in publicizing their documents online. Of course, it may also be that some of their arbitrations are still being conducted under the "old game rules" (i.e. they are being conducted in camera, rather than in public, because there was a time when neither the NAFTA governments nor all claimants were uniformly resolute on the openness of all hearings). My case against Mexico, International Thunderbird Gaming, goes to hearings late next month. It is a very interesting detrimental reliance case (if I do say so myself), with a "typical" national treatment claim also in play.

The real fun appears to be happening in Washington DC, however. First off, two other Canadian lumbers companies, with integrated US investments, have joined Canfor Corp. in launching disputes against the United States for the allegedly arbitrary and discriminatory manner in which Administration officials are administering antidumping and countervailing duty laws. To be clear, the United States is permitted to maintain these types of laws under the WTO Agreements and the NAFTA; the question is whether they can be applied in what the claimants argue is a manifestly abusive manner. In its preliminary statements in the Canfor case, now memorialized in a statement of defence, the United States has effectively argued that it can administer these laws in whatever manner it chooses, and that only a NAFTA Chapter 19 panel can say otherwise. In other words, State Department officials are arguing, with the help of their friends at the USTR, that investors are simply not entitled to seek compensation for any harm suffered by them or their US-based investment enterprises, no matter how these laws have been administered. A preliminary hearing on these issues should hopefully take place in the Canfor arbitration before year's end.

I am writing specifically about the Canfor arbitration because it is the most advanced of the softwood lumber cases. Interestingly enough, although the United States appears to have contemplated engaging Article 1126 of the NAFTA – which permits a party to an arbitration to ask the NAFTA appointing authority (i.e. the ICSID Secretary General) to appoint a new tribunal to hear a consolidation of NAFTA claims – it has chosen not to do so. Similarly, neither Canfor nor Tembec (both of whom have ongoing arbitrations against the USA arising out of the application of essentially the same trade remedy measures) have sought to establish a consolidation tribunal to hear all or part of their claims. Accordingly, it appears as if Article 1126 will remain untested this time around.

Even more interesting have been the activities surrounding the Methanex case, which was the subject of an Preliminary Award on Jurisdiction and Admissibility way back in August of 2002. The award contained a somewhat controversial finding that Methanex's claims, particularly under Articles 1105 and 1110, could not be sustained unless a stronger legal connection could be drawn between the measures at issue and the investments allegedly being harmed. In a nutshell, the tribunal appeared to be saying that it doubted whether sufficient proximate cause existed between the measures (effectively banning the use of the gasoline additive MTBE in California) and the business of the investor and its investment (making a primary ingredient of MTBE: methanol). The preliminary award appeared to wipe out a large portion of the case, leaving only the question of whether evidence existed of the intent to favour Methanex's erstwhile competitors, such as the US-based maker of ethanol, ADM – because both the claimant and the respondent had agreed that under such circumstances a sufficient legal nexus (i.e. proximate cause) would exist.

Following the delivery of an amended, supplemental statement of defence late last year, Methanex recently

delivered its reply. That reply contained something of a bomb shell; Methanex asked the Tribunal to reconsider its preliminary award in its entirety. The grounds for reconsideration were apparently simple enough: after the award was issued, Methanex challenged the ability of Former Secretary of State, Warren Christopher, to sit as the US appointee on the tribunal. Given that Mr. Christopher subsequently resigned (although he certainly did not admit any bias in having done so), the claimant effectively says that the previous – albeit unanimous – award was irrevocably tainted. As the award was issued unanimously, one wonders whether the claimant truly believes that this attempt to revisit the preliminary award will be successful (regardless of whether one agrees that the original tribunal members were correct in their reasoning). The new member of the tribunal, who replaced Mr. Christopher, was also appointed by the United States (although the allegation of bias went to the relationship between Mr. Christopher's law firm and the former Governor of California, Gray Davis). Is Methanex's legal team merely putting a marker down for a potential judicial review of the final award? There can be no doubt that they believe the first award went too far (effectively prohibiting a downstream supplier from claiming losses for a measure severely impacting upon the primary use for its product), but little else has changed since August 2002, when two of the remaining tribunal members made their decision in agreement with the now-departed Mr. Christopher. Only time will tell what their reasons were, but things have certainly become interesting on the file. Copies of the correspondence involving the challenge to Mr. Christopher, and his response, are available at www.naftalaw.org.

The Methanex case is also becoming increasingly interesting, regardless of whether the preliminary award is revisited during the merits hearing, because two amicus submissions have actually been filed by four interested bystanders. This is the first time that such submissions have been made to a tribunal, following upon the issuance of an advisory note by the three NAFTA governments last year about when and how such submissions could be entertained by any given tribunal in any given case.

Also of interest is a renewed request by Methanex for the Tribunal to issue an order in support of Methanex's desire to petition a US Federal Court to issue subpoenas for the production of evidence from officials at ADM and the Government of California. This would be the first time that a local court would have been asked to act in support of a NAFTA arbitration, although the practice is not uncommon in other forms of international commercial arbitration. One assumes that the lawyers for Methanex would prefer to have their Tribunal's blessing before going off to a local court (so as to avoid the appearance of any sort of turf war), and that lawyers for the State Department just wish the subject would go away. Under normal circumstances, claimants involved in a mixed-arbitration would not call upon the assistance of a local court because: (a) the failure to produce evidence reasonably requested can lead to the drawing of an adverse inference on the available evidence, which happened in Feldman v. Mexico; and (b) not all local courts can be counted upon to issue discovery orders that can be enforced against the officials of the respondent state in any event. Neither condition applies in this case, however, where necessity (brought about by the tribunal's preliminary award) has forced Methanex to seek out the evidence that lies behind why California actually imposed its measure; and where US courts can be counted upon to issue orders which would be of considerable assistance to the claimants' counsel in uncovering the evidence that they rightly claim is necessary to make their case.

If this request is granted, and there appears to be no good reason to deny it (especially if the preliminary award is upheld as written), we will witness how investor-state arbitration can follow a slightly divergent path from state-to-state arbitration in terms of arbitral process. In WTO dispute settlement (the Cadillac of state-to-state arbitration) panels simply do not deign to pierce what I would call "the government veil" by looking into the mechanics of a government measure (i.e. the so-called "intent" of that decision). They would prefer to make findings based upon the effects of a measure, and perhaps draw the occasional adverse inference - but only if truly necessary. More importantly, the parties in such cases obviously are reticent to dig into each other's dirty linens, based upon the old legal maxim that "what goes around comes around." Given the direction set for this case by the preliminary award, the intent behind California's measure is certainly at play, and any discovery process that would aid the tribunal in having the best possible evidence before it must seriously be considered.

Finally, please note that it is not too late to register for our March 22nd NAFTA Chapter 11 book launch and conference, taking place at American University's Washington College of Law. You can register by visiting www.naftalaw.org or by e-mailing me at the address found there. The book can be ordered by conference participants for $50 off the $125 cover price. It will also be available at the ASIL general meeting and from www.amazon.com or at: www.transnationalpubs.com/showbook.cfm?bookid=10260.

Kindest regards,

TJW

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