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From: Todd Weiler [tweiler@naftalaw.org]
Sent: 6-Jun-04 2:09 AM
To: twailer@naftalaw.org
Subject: NAFTA News for June 5th, 2004 - Now Look Who is Busy...

Dear NAFTA News subscribers:

In my last message I mentioned how busy lawyers working for the Mexican government had been defending NAFTA claims lately. Times have changed, and now the Americans have found themselves rather busy. The Americans are facing new arbitrations involving claims from Canadian softwood lumber companies, a group of Native American investors, and a Canadian company seeking compensation for its frustrated mining venture in rural California. The two most interesting arbitrations were started earlier, one of them (Methanex v. USA) much earlier.

This week marks the start of one of the most anticipated oral hearings in the short history of NAFTA Chapter 11. As demonstrated in the numerous submissions of both parties and the various orders emanating from the tribunal in the run up to the hearing, it promises to be an extremely hard fought battle. As the hearings will be open to the public, anybody planning to be in the DC area in the coming week may want to make their way down to the World Bank complex to catch some of the action. Given the large amount of time secured by the State Department to make its arguments (much more than the claimants sought, and arguably more than necessary given the volumes of written argument already exchanged between the parties), one would be well advised to plan to attend the days when the parties' witnesses will be cross-examined on their written statements. Both parties challenged portions of each other's evidence as inadmissible and both engaged in arguments over the scope of discovery. Understandably, the Tribunal did not appear disposed to exclude evidence; instead reserving its authority to weigh the evidence appropriately.

The past few months even saw an exchange of arguments on the claimant's motion to have the tribunal actually reconsider some of its key earlier findings, contained within the Award on Jurisdiction and Admissibility. The Tribunal reserved judgment in favour of hearing further oral arguments on the issue during next week's hearings. To be sure, the numerous pre-hearing clashes promise to make the cross examinations very interesting – particularly given the importance attached by the Tribunal for Methanex to prove its case, contained within its Award on Jurisdiction and Admissibility.

Another very interesting issue which has arisen in the Methanex case has also just arisen in the Canfor case, but with somewhat different results. In the Methanex case, it appears that the tribunal has not addressed the issue yet, but in the Canfor case the decision has been made. The issue is whether all of the documents generated in the process of negotiation of NAFTA Chapter 11 (and the rest of the treaty, for that matter), should continue to be withheld from the public by the three NAFTA Parties. Methanex marks the third Chapter 11 case where the claimant has sought access to the informal negotiating texts of the NAFTA and the responding NAFTA Party has refused. In the Damages Award for Pope & Talbot v. Canada, the Tribunal strongly rebuked the Government of Canada for withholding the very existence of any negotiating texts from the Tribunal, and then failing to identify or provide all of the related negotiating documents that the Tribunal believed did exist. The documents that were made available to the claimant were never released to the public – as was every other document produced in the arbitration process not containing sensitive commercial information – through an agreement made between the claimant and Canada.

In Canfor, the United States made certain factual assertions about what the negotiators apparently intended behind various provisions of NAFTA Chapters 11 and 19 in its motion to quash the claim for want of jurisdiction. The Tribunal suggested in an early procedural order that the parties should discuss the relevance of negotiating texts. The claimant sought copies of the relevant texts and was initially granted various drafts of them. It additionally sought the production of US documents produced by negotiators that might evidence their intent in the drafting, as well as any other documents reflecting communications between the negotiating teams. When the US refused, the latter was ordered to be produced by the Tribunal. The documents that have been provided thus far may not be made public either.

What the Methanex Tribunal will order may depend upon its perception of the particular circumstances of that case and what it perceives to be the relative assistance that access to negotiating documents could provide. There is a larger question at play however, and I have raised it in earlier newsletters. For governments that claim that they favour openness and transparency in international trade policy, the United States and Canada frankly have demonstrated a funny way of showing it. Indeed, for all of the rhetoric about how the times have changed since the WTO protests in Seattle approximately five years ago it would appear that the real conduct of trade policy is still firmly held within the grip of government lawyers and diplomats. What could possibly be the valid public policy reason for these governments' continuing efforts to keep the texts of negotiations that took place over ten years ago from public view? While it may certainly be necessary to maintain "diplomatic quiet" in terms of negotiating treaty texts (in order to get a deal done), it seems that the only interests to be protected by keeping what are now largely historical documents confidential are those of the people who negotiated them and the people responsible for defending new claims through making definitive statements about what the "final product" really was supposed to mean.

Given that Article 1131 affords the three NAFTA Parties the power to issue "binding" interpretations about what any portion of the NAFTA means, it would seem that the only good reason for one to argue that historical negotiating materials should not be made available to the public – and not just claimants who convince a particular tribunal in a particular dispute of the relevance of a particular set of documents (whose identity and content remain the sole province of government officials) – is to safeguard the ability to issue and enforce "binding" interpretations that fly in the face of the intent otherwise revealed in those documents.

And if – as one could suspect in many cases – the full set of negotiating materials does not reveal any new insights about the intent of those who drafted the final NAFTA text over ten years ago, what on earth could be the harm of releasing them? Perhaps the answer lies in the old adage that information is power. Those who maintain exclusive control of information may well believe that they are thereby consolidating their power.

*** Editorial Note – I have been involved in the Canfor and Pope & Talbot cases, although I was no longer involved with the latter case during the arguments made over costs or at any point thereafter (including the settlement which led to satisfaction of the award and agreement on the release of documents). I am not involved in the Methanex matter. All of the aforementioned documents are available on: www.naftalaw.org.

Also available on www.naftalaw.org is the new Model Investment Treaty of the Government of Canada. It contains a useful set of enhanced procedural requirements that will hopefully achieve a better recognition that mixed claims arbitration is not exactly the same thing as international commercial arbitration. These procedural enhancements will likely allow for better public access and participation in the dispute settlement process, which is welcome (so long as it does not overburden the process and thus result in too cumbersome or unbalanced a proceeding). At the very least, setting out these procedural rules in the treaty text itself (rather than leaving them to be developed on an ad hoc basis by each successive tribunal) should provide some degree of certainty to investors. The same can be said for the various "tweaks" made to substantive obligations such as the minimum standard of treatment, which seem largely unchanged from the emerging jurisprudence of NAFTA and other investment treaty arbitrations.

That being said, the drafting of the new Model does appear to be unnecessarily repetitive at times, most likely in response to the continued concerns emanating from the policy communities who either do not support, or have called for dramatic changes to, the world's international trade and investments regimes. One could certainly see this response as a form of risk aversion on the part of its drafters, who have attempted to ensure that their political masters will be well-covered from any attack that could be mounted by anti-trade activists both inside and outside of government. While this is an understandable approach to the drafting of communiqués and "ministerial" statements, it does not always lead to the most concise treaty text.

For example, the Model contains an annex on expropriation which appears to be completely unnecessary in light of the addition of a "GATT Article XX" provision to the Model text. In fact, the combination of the general exception provision and the annex might well render the expropriation obligation superfluous for all but direct takings. Because the annex suggests that a claimant must prove the existence of either discrimination or a lack of good faith in the imposition of an expropriatory measure, the drafters of the Model may be seen as having eliminated any potential gap between the circumstances where the minimum standard of treatment will apply and those where the expropriation obligation will apply. Until now, the difference between the minimum standard and an expropriation provision was that the latter applied only to substantial interferences with an investment (i.e. takings), regardless of whether the measure was of general application, non-discriminatory and implemented in accordance with good faith and due process norms. The former applied to any interference resulted in loss, but only if designed or implemented in a manner that was discriminatory or violative of good faith or due process

norms. In other words, why even include an expropriation provision which purports to cover indirect takings if the terms of the Annex require conduct that would violate the minimum standard anyway?

One might also ask if an expropriation provision reflects nothing more than that which is required under customary international law, and the only thing that a minimum standard includes is protection against violations of customary international law, why include expropriation on this ground too (but that depends upon one's reading of the minimum standard's content as being dictated solely by the rules of customary international law, rather than the standard itself merely being one of those rules – whatever its applicable content in any given case)?

Another example of over-drafting in the Model text results from a combined reading of the national treatment and general exception provisions. If the concept of "like circumstances" includes more than just consideration of the nature of the industry in which two comparators have received treatment (as Canada argued as recently as last month in its Article 1128 submission to the Tribunal in *Thunderbird v. Mexico*), why on earth should one apply a general exception provision to the obligation? The result of applying a GATT Article XX style provision to the investment treaty version of the national treatment principle clearly suggests that treatment of investors "in like circumstances" can only possibly refer to a market definition exercise, because the general exception provision provides a specific list of circumstances in which differential treatment will be permitted. The perverse result of including a general exception provision (with a specifically defined list of objectives which will validate a measure that provides more favourable treatment as between competing investors, as found in provisions such as GATT Article XX) could be to render the national treatment obligation in future Canadian investment treaties stronger than those found in earlier bilateral investment treaties or the NAFTA. This is because these earlier national treatment provisions require a tribunal to ask whether there is ANY legitimate government objective that would explain why more favourable treatment should be given in the "circumstances" of the case. Under the new treaty, the tribunal would be presumably limited to consulting the objectives specifically listed in the general exception provision (thus offering less protection for unforeseen, future public policy objectives).

The moral of this story is that one should never draft treaty text as if it was primarily political text – so long as one plans to subject the interpretation of the text to active interpretation in hotly contested disputes.

Kindest regards,

TJ

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