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From: Todd Weiler [tweiler@naftaclaims.com]
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To: news@naftalaw.org
Subject: NAFTA News - Volume IV, Issue 2

Dear NAFTA News subscribers:

I recently had some difficulty with the subscriber list for this newsletter and I have accordingly repopulated the list from my address book. For those of you who have never received this free newsletter before, do not despair. I only added you because we either met or we attended an international law related conference together, and in repopulating the list I decided that you might like to receive my views on NAFTA investment arbitration approximately four or five times per year. If you do not wish to receive any further newsletters, just reply to this email and tell me so.

There have been some interesting procedural developments lately in the world of NAFTA arbitration, which I outline below. In addition, I would like to alert you to a new resource on international investment law and arbitration. So without further adieu...

1. New Web Site

I am proud to announce the launch of a new web site devoted to the publication of investor-state tribunal orders and awards: www.investmentclaims.com. I co-founded the site with my colleague Ian Laird, in order to provide you with a one-stop-shop for all orders and awards. In addition to orders and awards issued in investor-state arbitration (whether treaty- or contract-based), www.investmentclaims.com also includes all publicly-available insurance claims decisions issued by the Overseas Private Investment Corporation, a US state enterprise that provides political risk insurance to US investors. The inclusion of these decisions recognizes their contribution to the concept of expropriation in international law (because OPIC decisions often involve consideration of the same issues that one could find if the claim had been brought before a treaty-based tribunal rather than under a contract of insurance).

[Investmentclaims.com](http://www.investmentclaims.com) also includes awards not found anywhere else on the web, and it will always remain up-to-date.

Please note, however, that [Naftaclaims.com](http://www.naftaclaims.com) will continue to provide you with orders and awards, as well as all available written submissions made available in NAFTA Chapter 11 arbitrations.

2. Glamis v. USA

Earlier this month, the NAFTA/UNCITRAL Tribunal sitting in Glamis v. USA issued its first procedural order, which can be found at: www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Tribunal-Order-One.pdf. The order memorialised the agreement of the parties concerning issues such as the place of arbitration, openness of the proceedings, and the service of documents. It also issued a timeline for the proceedings which would have the entire case heard within the span of approximately fourteen months, unless the Tribunal determines that a bifurcation of the proceedings is in order, based upon any legitimate objections to its jurisdiction being raised by the US in its statement of defence. The Tribunal ordered the US to deliver its statement of defence within 30 days. On the whole the Tribunal's approach appears to be consonant with a typical investor-state arbitration proceeding under the UNCITRAL

Rules, which require the issuance of a statement of defence in short order (to close the initial pleadings and identify all potential jurisdictional objections immediately) and suitably short timelines for the expeditious hearing of claims.

3. Grand River Enterprises et al v. USA

I act as co-counsel in this case. At the end of this month, the Tribunal - which is also proceeding under the UNCITRAL Rules - will hold a preliminary, procedural meeting (and presumably issue its "Order No. 1" shortly thereafter).

The statement of claim and future documents generated from the arbitration will remain available at: naftaclaims.com/grand_river.htm.

4. Canadian Cattlemen for Fair Trade v. USA

I am also serving as co-counsel in the CCFT case, which involves the claims of hundreds of investors in the North American cattle and beef industry against the USA. Last week, the first five of over one hundred pending statements of claim were filed by members of the Canadian Cattlemen for Fair Trade against the United States of America for failure to provide national treatment to them as investors in the North American Free Trade Area. In a nutshell, the claimants have been greatly harmed by the arbitrary imposition of a border ban which has divided a heretofore integrated industry, creating economic winners and losers among Canadian and American cattlemen. The remaining 110 claims will be filed in the coming weeks.

A redacted electronic copy of the first of these many CCFT claims will be made available in the coming weeks through www.naftaclaims.com. For the time being, more information on case can be found at: www.cfft.info.

5. Methanex v. USA

"Missing: one Final Award. If you have seen or heard of this final award, please contact the entire investment treaty arbitration community. It has been sorely missed by many of us over the past year and we are all awaiting its arrival with bated breath."

The entire record of the Methanex case can be found at: naftaclaims.com/disputes_us/disputes_us_6.htm.

6. Canfor v. USA, Tembec v. USA & Terminal v. USA

I have provided advice to counsel for the Claimant on the Canfor v. USA case.

One of the tribunal members in the Canfor v. USA NAFTA claim, Conrad Harper, has decided to step down from the Tribunal. Mr. Harper serves on the Board of Directors that effectively manages the business affairs of Harvard University. Harvard University is currently engaged with the United States Government in unrelated domestic litigation that has apparently entered the damages phase and Mr. Harper is apparently involved in the direction of Harvard's defence in that litigation.

Articles 13 and 7 of the UNCITRAL Rules provide 30 days for a party to an UNCITRAL arbitration (such as the Canfor v. US arbitration) to appoint a replacement in the event of an arbitrator's resignation. The United States accordingly has approximately two to three weeks remaining during which to designate a new arbitrator to continue in Mr. Harper's stead.

Following notification of Mr. Harper's decision to step down from the Canfor Tribunal, the United States exercised its right under NAFTA Article 1126 to request the Secretary General of the ICSID to appoint a tribunal with respect to the three separate claims filed against the US by three different Canadian investors in the North American softwood lumber industry: Canfor, Tembec and Terminal. A copy of the US request can be found at:

www.naftaclaims.com/Disputes/USA/Canfor/Softwood_Consolidation_Request.pdf.

At the time of Mr. Harper's resignation, the Canfor Tribunal was in the midst of deliberations - having received extensive oral and written submissions on the US Government's objection to its jurisdiction to hear the claim. At the very end of those hearings, the Tribunal asked the parties about the potential applicability of Article 1126 for its work. Copies of the hearing transcripts, and the written submissions of both parties, can be found at: naftaclaims.com/disputes_us/disputes_us_2.htm.

Currently, the Tribunal hearing the Tembec claim is in the midst of receiving written arguments on the US Government's objection to its jurisdiction to hear that claim. No tribunal has been established to hear the Terminal claim. The Tembec record can be found at:

naftaclaims.com/disputes_us/disputes_us_8.htm.

NAFTA Article 1126 provides, in part:

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

...

5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators...

...

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

...

7. The Mexican Consolidation

The US request in respect of the Canfor, Tembec and Terminal cases was not the first under NAFTA Article 1126. In September 2004, the Government of Mexico invoked NAFTA Article 1126 with respect to the ADM and CPI claims, both of which involve investments in the Mexican sugar industry. Only the latter is mentioned on the Mexican Government's NAFTA Chapter 11 web site, although the existence of the former is noted on the ICSID web site. Rumour has it that the parties involved have reached an agreement on the composition of, and limited role for, a three-member tribunal. I also hear that the tribunal already established to hear the CPI claim has thus far not been disbanded.

8. UPS v. Canada

Rumour has it that the parties in the UPS claim are slowly but surely moving towards the delivery of their merits memorials during the first half of 2005. Both sides have apparently engaged in long and hard-fought battles over the discovery of evidence. It will be very interesting to see the parties finally engage in oral arguments, hopefully before the year is over. A record of the skirmishes thus far

completed can be found at: naftaclaims.com/disputes_canada/disputes_canada_ups.htm.

Kindest regards,

TJW

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