
Subject: NAFTA News

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Conversation: NAFTA News

Dear NAFTA News Subscribers:

Much has transpired since I sent out my last news brief. What follows below is a case-by-case update of active NAFTA cases since that time.

First, however, I must apologise to those of you who have received this note in error. Unfortunately, I was forced to re-populate the entire NAFTA News subscriber list from my personal address book. While I have attempted to weed out addresses of those unlikely to be interested in receiving this message, there are bound to be some in this list of more than 1000 who are not "excited" by the NAFTA or investor-state arbitration.

Claims Against the United States of America

1. Canfor v. USA; Tembec v. USA; and Terminal v. USA

After the resignation of the tribunal member it had appointed in the Canfor claim, the USA petitioned the ICSID to establish a tribunal under NAFTA Article 1126 – to consider consolidating these three claims. After receiving submissions from the claimants and from the USA, a tribunal established by the ICSID (and chaired by Albert Jan Van den Berg) decided to consolidate and hear the three arbitrations. Rumour has it that ICSID officials found it quite difficult to make the appointments in this case, because so many members of the bars of both the USA and Canada (from whom it would appoint one tribunal member each) have had something to do with the perennial softwood lumber dispute between Canada and the USA, out of which these arbitrations sprang. Needless to say, this interesting anecdote is not a commentary upon the two panel members finally chosen, who are both eminently qualified to sit on an international arbitral tribunal.

I served as an adviser to counsel for the claimants in one of the cases that was subsequently consolidated, so I will refrain from commenting upon the merits of this consolidated claim. Presently, the Tribunal is considering how to proceed with the consolidated arbitrations. The Canfor tribunal was deep into its deliberations on a US jurisdictional motion when the consolidation request was made. The Terminal arbitration, being managed by the same counsel as in Canfor, had not progressed to the appointment of a tribunal; while the Tembec arbitration was very close to a hearing taking place on a similar objection to jurisdiction.

2. The Canadian Cattlemen for Fair Trade v. USA

This case involves an informal consolidation of over 100 claims arising out of the US Government's May 2003 decision to prevent cattlemen located in Canada from selling live cattle in the US portion of the North American market. I am serving as co-counsel for the claimants and accordingly will refrain from commenting upon the merits of the case. The parties are currently addressing the logistical issues involved in managing the case, including the establishment of a tribunal. Copies of

all of the notices of arbitration, which are very similar for many of the claimants, can be found at: www.ccftr.info/notices.htm

3. Loewen v. USA

A US District Court judge based in Washington DC has just dismissed an application by Raymond Loewen for annulment of the Tribunal's final award. A copy of the recently-issued decision can be found at the bottom of the following page: www.naftaclaims.com/disputes_us_5.htm

The judge's reasoning, unfortunately, leaves much to be desired. In a nutshell, the application was dismissed for being filed too late, given that the final award was issued in June 2003 and the application was not filed until December 2004. While it is true that the application was filed long after the three-month statutory bar had expired, NAFTA watchers will immediately note that the reason Loewen took so long to file his application was that the Tribunal failed to provide reasons specifically addressing the disposition of his claim in its Final Award. It then proceeded to take an unacceptable period of time to issue a clarification that succinctly (to put it charitably) ended the matter. Loewen's application was made within three months of his finding out that he indeed did lose. Obviously this should have been the appropriate date against which the time bar should have been applied.

For the judge to actually dismiss Loewen's application for want of timeliness simply defies logic, because this reasoning would have required Loewen to file his application before knowing whether one even needed to be filed. If this decision is the final word on the saga of Loewen's NAFTA claim, it will perhaps be fitting. After having been denied justice in Mississippi, and having received a very questionable decision at the hands of a NAFTA Tribunal, is that surprising that this DC judge would have decided any differently?

Hopefully this decision will not be the last word, however, for while the question of whether his annulment application should succeed remains open, there is no doubt that – at long last – Mr. Loewen should have been given a full and fair hearing on the merits of his case.

4. Methanex v. USA

As most subscribers will likely know, the celebrated/infamous NAFTA claim by Vancouver-based Methanex Corporation – arising out of California measures designed to ban the use of a fuel additive for which it provided a key ingredient – is over. As was widely expected in many quarters, Methanex lost. The surprises that lay in the final award, however, included its sheer size (befitting of the fact that it was issued in hard cover form to the parties) and the costs order that it contained against the claimants (which will ultimately be in the range of approximately \$3.5 million).

Unfortunately, the reasoning provided by the tribunal for its costs decision were too brief. If one finds the time to read the more than 300 pages of the final award, however, it becomes apparent that many of the litigation tactics employed by the claimant did not sit well with the Tribunal. More unfortunate, however, is that the Tribunal chose to provide a very unsatisfactory analysis of the substantive claims made by Methanex, even though the Tribunal rightly determined that the case failed for want of sufficient legal nexus (i.e. proximate cause) between the targeted measures and alleged harm.

Interested readers should pick up a copy of the next issue of the Journal of World Investment, edited by Jacques Werner, to read in more detail exactly why I found this portion of the Tribunal's award so unsatisfying.

5. Grand River Enterprises et al v. USA

Again, because I am serving as co-counsel in this case I will refrain from commenting upon the merits of this case. The arbitration is proceeding forth, however, with the Tribunal recently having issued an order for the parties to submit arguments in respect of one of the preliminary objections made by the United States on the grounds of jurisdiction/admissibility. That issue, to be determined in the Spring of 2006, is whether the claims are time-barred under NAFTA Articles 1116 and 1117.

6. Glamis Gold v. USA

I am serving as counsel to one of the non-parties interested in this claim, which concerns a Canadian company's claim that its right to mine gold on Federally-controlled land located in rural California has been effectively taken by State regulation. My client is the Quechan Indian Nation, whose members regard that same land to be part of their ancestral homeland. We made the first submission ever accepted by a tribunal under the guidelines established by the NAFTA Free Trade Commission. A copy is available at www.naftaclaims.com/glamis.htm

A joint submission has also been made more recently by Earth Justice Canada and Earth Justice USA. This latter submission may really test the scope of the FTC guidelines on non-party participation, as these petitioners did not submit pleadings stemming from their expertise on the environment or environmental law. Such would be the normal fare offered by this kind of amicae, arguing that the Respondent Government's brief would either omit, or at least under-represent, their views with its submissions. This particular submission, however, focused instead upon whether the corporate Claimant possessed the appropriate nationality, under the NAFTA definitions and customary international law, to bring its claim.

Claims Against Canada

1. UPS v. Canada

This long-running arbitration is finally entering the home stretch of its merits phase, with a hearing scheduled for December 2005 to take place in Washington, DC. The hearing will most likely be open the public, and the primary legal issue to be determined is the applicability of the national treatment obligation under Article 1102. The final two submissions, available at: www.naftaclaims.com/disputes_canada_ups.htm, came from opposing amicae (with a union and an anti-free-trade group on one side and the US Chamber of Commerce on the other).

While I have not been involved in the claim for a number of years now, I will nonetheless refrain from commenting upon it because I was involved in the first year of its existence.

Claims Against the United Mexican States

1. Thunderbird International Gaming v. Mexico

The hearing on liability and damages was held in the Summer of 2004. Additional evidence and arguments were admitted by the Tribunal early in the Fall of 2004. A Final Award is still pending. As I served as co-counsel in this claim I will refrain from commenting upon its merits.

2. Corn Products v. Mexico and ADM/Tate v. Mexico

In contrast to the Award of the Softwood Lumber Consolidation Tribunal, the Sweetener Products Tribunal's far more succinct order declined Mexico's request for consolidation. Given the different stages and jurisdictional arguments confronting the two claimants in these cases, a refusal to consolidate was to be expected. What was more interesting was the fact that the Tribunal was established by the ICSID under Article 1126 of the NAFTA, even though its mandate – by agreement of the parties – was more narrow than that which would normally be enjoyed by a tribunal established under that provision. Most notably, the consolidation tribunal did not have any authority to continue hearing the claims if it had decided that they should have been consolidated.

As this state of affairs was the will of the parties, and arbitration is – at its root – founded upon the consensus and equality of disputing parties, ICSID officials clearly made the correct decision in allowing this tribunal to proceed with ICSID's effective "blessing" - notwithstanding the fact that its powers were not exactly those originally envisaged by the drafters of NAFTA Article 1126. The tribunal members enjoyed the confidence of the parties to the case, and that was most likely the most important factor weighed in allowing the tribunal to proceed.

3. Bayview Irrigation District v. Mexico (a.k.a. "The Texas Water Claims")

These claims were brought by Texas-based agricultural producers who hold usage rights in a binational watershed shared between Mexico and the USA. They argue that the misuse of available water – upriver in Mexico, by users authorized by the Government of Mexico – has resulted in a breach of international obligations owed by Mexico to the USA (and, by extension, these claimants as US nationals). Their claims were registered by the ICSID, under the Additional Facility Rules, in July 2005 – approximately six months after it was filed. The arbitration is slowly proceeding forward.

If you would like to be removed from this list, please let me know.

Otherwise, best wishes to all.

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