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To: NAFTA News Recipients

Dear Colleagues and NAFTA News Readers:

It has been a long time since my last news brief, for which I apologise. There has been sufficient activity in a number of cases lately, however, and so now appeared to be a good time to comment upon a few of them.

On the whole, Canada has recently experienced much preliminary activity in NAFTA disputes, whereas the United States has been involved with more advanced arbitrations. By contrast, Mexico has been experiencing a relative lull in 'NAFTA action.' I will therefore start with Canada, move to the USA and complete this edition with some time on Mexico.

Last month Canada was greeted with over \$50 million in potential claims from two potential claimants. The would-be claimants were US oil companies involved in the notorious Hibernia Oil Project off the eastern coast of Canada's tenth province, Newfoundland. As described in the identical notices of intent that can be found at naftaclaims.com, earlier this year, the Premier of Newfoundland, Danny Williams, effectively abrogated the existing arrangements involving the project and indicated that the project would not proceed without various performance requirements being adopted by the Province and accepted by all investors in it, including Mobil Oil and Murphy Oil, the would-be claimants. A prominent requirement heavily reported upon in the Canadian and international financial press included the Province being granted a significant equity stake, in addition to considerable royalty payments, to be contributed by the project consortium's private investors. Given that a new arrangement was recently announced by the Province and its private sector partners in respect of the project, notably just prior to an upcoming provincial election, one might suppose that these two would-be claimants may not be proceeding with any NAFTA claim.

The Government of Canada has also been recently involved in negotiations involving the establishment of tribunals in four NAFTA arbitrations: *Gallo v Canada*; *GL Farms and Adams v Canada*; *Chemtura v Canada*; and *Merrill & Ring v Canada*. Tribunals have already been confirmed as having been established in two of the four, including *Chemtura*, formerly known as *Crompton*. This latter case came back to life recently, having originally started five years ago. It concerns the question of whether the Government of Canada should pay compensation for its ban of an insecticide product, Lindane, as well as the manner in which that ban took place. It is being pursued by Canada's leading international commercial arbitration firm, Ogilvy Renault.

Given this news, it appears that we can expect the Government of Canada to be busy in the arbitration field over the next two to three years. This period of activity follows one of relative calm, following the Government of Canada's success in defending the long-running NAFTA claim brought by United Parcel Services concerning the actions and treatment of the government-owned postal carrier, Canada Post Corporation. By a two to one margin, the Tribunal issued a highly fact-intensive award dismissing most of the claims on the basis that some were reserved under the NAFTA and that those actions attributed to Canada Post (which favoured its own captive courier business over that of UPS and other competitors) had been undertaken under the guise of its commercial responsibilities, rather than through the exercise of delegated governmental authority, and were thus not capable of breaching the relevant NAFTA provisions concerning conduct by state enterprises. The well-written dissent, by Ronald Cass, concerned the Majority's finding that Canada had not breached its obligation to provide national treatment to UPS, even though it was providing more favourable customs administration and enforcement treatment to Canada Post, because it was allegedly obliged to do so under international postal agreements.

As such, while the Majority's finding was essentially 'light' on doctrinal explanation or guidance, the result in the case - coupled with a well-articulated dissent - suggest that the UPS award conforms with the three-step approach to national treatment taken by most international economic tribunals. That approach effectively involves determining the appropriate comparators; determining whether better treatment was conferred upon the domestic comparator; and finally determining whether there was a valid reason for such comparison. Whereas some effectively believe that this final prong should (or even "must") involve an inquiry as to whether the less-favourable treatment was provided on the basis of, or in relation

to, nationality, and it is possibly that the members of the UPS Tribunal disagreed on this point, the ratio of the case appears to fall on a disagreement as to a simple factual finding: i.e. whether Canada was obliged to provide better treatment under a different international agreement. The Majority said yes and Arbitrator Cass said no.

The Government of the United States has been busy this Autumn with two cases: *Glamis Gold v. USA* and *Canadian Cattlemen for Fair Trade (CCFT) v. USA*. I should caution that am involved in both cases (as advisor to counsel for the amicus in the former and as co-counsel in the latter. I should also mention that I was involved as a member of the counsel team in *UPS v Canada* many years ago, but ceased working on it around May 2000.

The CCFT claim proceeds to a hearing on jurisdiction early next month. Given the circumstances, it would be inappropriate to write about it at this time. Those interested in the arguments can find them at NAFTAClaims.com.

The Glamis case involves allegations of a breach of the NAFTA 'minimum standard' provision and failure to pay compensation for indirect expropriation. Final hearings were conducted last month and earlier this week. I will again caution that I have an obvious 'favourite' in the dispute, which is why I am choosing to devote so much of this new brief to it. The case is effectively about whether the burden of understanding and respecting the cultural context into which an investment has been proposed falls upon the investor, the host State or both?

In this case, the cultural context is characterised, in part, by the existence of an historic, religiously sacred trail with associated ceremonial features on the traditional territorial lands of the Quechan Indian Nation, whose exact location - because of its very nature as sacred - had always been held in strict confidence by the Tribe to protect it from inadvertent or intentional desecration. The investment would have been an open pit cyanide heap leach gold mine that the Quechan have consistently argued would have destroyed portions of their sacred Trail of Dreams and other religious properties.

The Claimant has basically alleged that it was entitled to rely on a governmental approval process set in place by the Bush Administration which over-ruled a Clinton Administration approach that would have denied approval to construct and operate a mine on the site. The claim was brought after the California State Government imposed a complete backfilling requirement that Glamis has claimed effectively destroyed the value of the property rights it had in the proposed mine.

Glamis pointed to a later governmental decision to approve a natural gas pipeline, which impacted areas of other trails, for which tribes, including the Quechan, had expressed concern, but not the same great level of concern for religious beliefs as the proposed mine site. The company pointed to the Bush Administration's approval process, and past practice regarding mining regulation federally and in the State of California, as a ground for its entitlement to hold a legitimate expectation to carry on with its project without having to comply with the State Regulation, which it claimed was expropriatory and discriminatorily directed at it and its investment. The gist of its argument was that the Quechan Tribe's objections could not be a valid basis upon which to prevent the investment from proceeding.

Rather than picking up on one of the Quechan's arguments, contained in an amicus brief filed with the Tribunal, that the USA (at all levels of government) is obliged under customary international law to protect the sacred places of indigenous peoples living within its borders, the primary thrust of the Respondent's argument was that Glamis had failed to prove that detrimental reliance on legitimate expectations formed on the basis of a host State's regulatory framework is even a ground of responsibility under customary international law minimum standard of treatment it says is codified with Article 1105. It further argued that the Claimant had failed to prove expropriation (under NAFTA Article 1110) because the State Regulation did not, in fact, substantially interfere with the proposed investment and that Glamis failed to take the necessary steps to proceed under Federal Law, thus rendering the claim insufficiently ripe for the Tribunal's consideration.

At any rate, it is not clear why a separate claim for breach of Article 1105 was brought in this case, given that the expropriation provision, Article 1110 specifically refers to treatment in accordance with Article 1105 and due process, specifically, as part of the evaluation of a taking and that the Claimant did not appear to pursue a separate damages theory apart from a fair market value for destruction of the investment opportunity. Numerous other investment treaty tribunals have concerned the issue of legitimate expectation as part of their analyses of regulatory takings claims, rendering the issue redundant in a case, such as this, where the only claim is effectively for the destruction of the investment.

Finally, although I am a well-known proponent of investor-state arbitration, I must admit that this is a case which may truly demonstrate the serious, potential weaknesses of this kind of dispute settlement as a vehicle of international public policy. This is a case where the interests of a sovereign indigenous nation cannot be fully represented in an international dispute over sacred land protected under customary international law, and as so very recently recognized by the General Assembly of the United Nations, with its Declaration on the protection of the property rights of indigenous peoples. As the dispute was launched by a private party seeking damages from a State for the breach of a treaty, and as the claim was based, in part, on the investor's alleged reliance upon a Bush Administration decision to over-rule a Clinton Administration decision to respect the sovereign rights of these indigenous peoples to preserve their sacred lands, it seems highly inappropriate that those same indigenous peoples have no direct right to participate in the proceeding. Rather, they could only participate, as amicus petitioners, at the discretion of the Tribunal and the parties (one of whom wanted to conduct extensive mining operations on the site and the other that must act under the direction of the same Administration that attempted to facilitate those wishes – without even requiring the remediation later imposed – and appropriately so – by the State Government of California).

Other news from the United States involves a pending challenge, by the Respondent, to the service of celebrated international human rights scholar, Professor James Anaya, on the Tribunal hearing the Grand River Enterprises et al v USA case. While this case is proceeding under the UNCITRAL Arbitration Rules, as the NAFTA designates the Secretary General of the ICSID as the appointing authority for NAFTA arbitrations, the challenge is being entertained by ICSID officials. Because I serve as co-counsel in the case, I will not write further about the challenge proceeding. Those interested may review the submissions made by the parties and the challenged arbitrator at NAFTAClaims.com.

The Grand River arbitration is currently in the document production stage, with the Tribunal having issued a decision on jurisdiction late last year. That decision dismissed certain of the investors' claims as time-barred while maintaining others. The case involves, the sale of tobacco products by the claimants in the USA that have been subjected to various measures employed by most US state governments as part of an agreement with other tobacco companies, especially the largest manufacturer/marketers, with whom the claimants are in competition. The claim proceeds in respect of all measures applied to sales of the claimants' products made on sovereign indigenous lands and in respect of only certain measures applied more recently to sales of the claimants' products by an exclusive non-indigenous distributor in a smaller number of specific state markets.

The final, interesting procedural development involving a NAFTA claim against the United States Government is that of the Consolidated Softwood Lumber proceedings. A very long and detailed award was rendered in which a significant costs award was made in favour of the United States in respect of one of the three claimants. The other two and the United States had agreed that each would be responsible for their own costs. While it appears that costs awards are very fact-dependent, some of the reasoning in this decision nonetheless suggests that there is a segment of the arbitral community that no longer wishes to see investor-state arbitrations treated more like judicial review proceedings are treated in my country (i.e. where the public interest apparent in having such proceedings transpire is believed to be served best by only awarding costs in rare cases where the circumstances warrant, thus preventing a prohibitive 'costs-chill' from being imposed on all but the most deep-pocketed of potential claimants).

I should note that I served as an advisor for two of the claimants in an earlier stage of the Softwood case, but not the one against whom the costs award was made. I must also note that I was involved as co-counsel in another NAFTA case in which a large costs award was rendered against the claimant, in absence of any finding of sharp or inappropriate practice in respect of that arbitration. The case was International Thunderbird Gaming v Mexico. I was not involved in the judicial review proceeding that ended with the award being upheld by a US court, but the result is notable because it was the first US court to entertain and dismiss an annulment application on the merits. A copy of the Court's reasons for decision can be found at naftaclaims.com.

There is not much other news from Mexico. I hear that cases involving the long-standing sugar dispute between the US and Mexico (which includes investor-state claims) continues, but I have little information about the proceedings – which do not appear to be proceeding in as transparent a manner as are most of the other cases against the Canadian and US Governments. This may be owing, at least in part, to the fact that these cases were established before it became politically unpalatable for either claimants or respondents (and it depends on the facts of a case as to who is most interested in confidentiality) to publicly eschew a fully transparent proceeding.

This past summer, another NAFTA Tribunal also issued an award in favour of Mexico. The case concerned the claims of a group of Texas business people who claimed rights to the use of water flowing from international agreements between the USA and Mexico, in respect of how Mexico was allegedly obliged to manage consumption of certain watersheds in Mexico. These alleged water use rights were considered by the claimants to be intangible property akin to investments in the territory of Mexico. The Tribunal determined that these water usage rights could not constitute investments in Mexico and therefore dismissed the claim. Faced with pre-hearing questions from Tribunal indicating the likely outcome of the case, the claimants also made arguments at the hearing (and in post-hearing submissions) that they were entitled to receive both national treatment AND fair and equitable treatment regardless of where their investments were located (i.e. not in Mexico). On this point the Tribunal held, in a nutshell, that because the investors had brought their claims in respect of how Mexican Government actions related to their investments under NAFTA Article 1101(1)(b) - as opposed how the measures related to them as investors under NAFTA Article 1101(1)(a) - it was simply not open to them to seek protection for their investments (under the applicable national treatment provision or the minimum standard of treatment required under customary international law and Article 1105), if those investments were not located in the territory of Mexico.

The only other interesting development concerning Mexico recently was the issuance of an award in favour of Mexico in the Fireman's Fund case, which only became available – in redacted form – this past summer. The case involved financial services measures and thus was restricted by the Tribunal, albeit on the facts of the particular case, to a claim for compensation for expropriation. The Tribunal essentially found that while the treatment received by the claimant was discriminatory, the claimant was precluded from bringing a claim for discrimination alone – and that without proof of substantial interference, as required for a finding of expropriation, its claim would fail. The redacted copy of the award can be found on naftaclaims.com.

Please look for your next NAFTA News brief mid-way through 2008.

Kindest regards,

TGW

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