Foreign Investment in the United States: The Dawning of a New Era in NAFTA Investor-State Dispute Settlement

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The year 1999 saw the beginning of a steady flow of NAFTA investor-state disputes involving investments in the United States, as well as the continued use of NAFTA provisions by U.S. investors seeking compensation for damages incurred to their investments in Mexico and Canada.

The U.S. State Department began 1999 preparing its response to a statement of claim delivered one month earlier by Raymond Loewen and The Loewen Group, Inc. The Loewen claim resulted from a Mississippi jury award of $500,000,000 and a Mississippi court requirement that the appellants post an appeal bond worth 125 percent of the judgment. The investors argued that the court case and the appeal bond requirement seriously harmed their investment and that they were imposed on a discriminatory and arbitrary basis, in breach of articles 1102, 1105, and 1110 of NAFTA.[1]

In September 1999, another arbitration was launched against the United States by a different Canadian investor, Mondev International Ltd., concerning court proceedings with respect to a commercial property development in the metropolitan Boston area. This claim also included allegations of discrimination on the basis of nationality, contrary to NAFTA article 1102, denial of justice contrary to article 1105, and expropriation contrary to NAFTA article 1110.[2] Both of these cases hold the prospect of an international tribunal reviewing the conduct and quality of domestic court proceedings, including a decision by the U.S. Supreme Court not to grant leave to appeal in the Mondev case.

Perhaps the most significant investor-state dispute, however, was triggered by the delivery of a notice of intent to submit a claim to arbitration by Canadian-based Methanex Corporation on June 15, 1999. With its notice of intent, Methanex commenced a mandatory

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1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., arts. 1102, 1105, and 1110, 32 I.L.M. 605 (1993).

2. *Id.*

negotiation period of at least ninety days concerning a declaration by the Governor of California that a gasoline additive for which Methanex supplies the primary ingredient, MTBE, would be banned from use within a couple of years. While it was California legislation that triggered the dispute, it is the responsibility of the federal government to handle the dispute, and to ultimately pay any compensation awarded by a tribunal.

Methanex is rumored to have already filed its statement of claim, alleging that the California measure constitutes an expropriation of its investment under NAFTA article 1110, and was not imposed in accordance with minimum international regulatory standards under NAFTA article 1105. To support its claim, Methanex has also become the first corporation to petition the NAFTA Council on Environmental Cooperation for a finding that California has failed to enforce its gasoline storage regulations (which, Methanex might argue, is largely to blame for any environmental problems with MTBE—not the safe use of the additive itself).

Meanwhile, American investors in Mexico and Canada pressed forward with at least a half-dozen claims concerning everything from an allegedly confiscatory tax measure applied to a cigarette manufacturer, to an unfair and discriminatory implementation of the Canada-U.S. Softwood Lumber Agreement, to the arbitrary imposition of an export ban to protect domestic PCB waste remediators from superior American competition.

In response to this increasing number of cases, special interest groups, particularly in the environmental community, have begun to agitate for changes to the NAFTA text. These interest groups were not alone; in 1999, even the government of Canada asked its NAFTA partners to consider making changes that would limit the effect of the expropriation provision, article 1110, and make the arbitration process more transparent. The Canadian government's position appeared somewhat inconsistent, however, as its practice continues to be to make public the existence of notices or claims when it is politically advantageous to do so, but not to publish awards or tribunal orders in which it was not the winning party.

It was rumored in 1999 that a minority of federal government officials, including some in the Environmental Protection Agency (EPA), were sympathetic to the Canadian request. However, the position of both the Mexican government and officials within the State Department and U.S. Trade Representative (USTR)—allowing arbitration panels to actually hear the cases and interpret the relevant NAFTA provisions before deciding if any changes were needed—appears to have won the day. Nonetheless, it has been rumored that cases such as the Methanex arbitration gave some cause for federal officials to reconsider whether any changes are necessary to the U.S. Model Bilateral Investment Treaty (BIT), and may even have had an impact on the completion of a new BIT between the United States and South Korea. Some members of the business community remain concerned, therefore, that their investment rights may be unnecessarily weakened to provide more room for regulators to regulate as they see fit, rather than in accordance with sound international principles of regulatory treatment.

The year 2000 promises to be even more interesting, as a number of the existing arbitrations are either settled or awards are handed down. Federal and state legislators and interest groups will likely continue to clamor for a more transparent system that would notify them that a notice of intent has been filed or a statement of claim delivered. As the issue gathers steam, the federal government may be forced to at least change the way in which it deals with making the existence of these disputes public.