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Arbitration Watch:  
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1. NAFTA Tribunal Dismisses Loewen Claim Against United States,  
By Luke Eric Peterson

A NAFTA Tribunal has rejected in its entirety a claim brought by a funeral home company, the Loewen Group, Inc., against the United States government. The claim arose out of a controversial Mississippi court ruling which had levied an unprecedented damages award against the Loewen Group.

In an arbitral award handed down on Thursday June 26th, a NAFTA Tribunal denied jurisdiction in the case, and further indicated that the claim would have been rejected on its merits.

Loewen had argued that a (US) \$500 million dollar jury verdict in a commercial dispute with a Mississippi-based competitor, Mr. Jerry O'Keefe - and a subsequent requirement that a bond of \$625 million be posted in order to mount an appeal - violated the NAFTA's provisions on national treatment, minimum standards of treatment and expropriation.

In 1996, the firm reached a settlement agreement with Mr. O'Keefe, and then launched a NAFTA claim against the US Government in an effort to recoup its losses.

In its award this week, the Tribunal had no difficulty concluding that Loewen had been the victim of a "miscarriage of justice". Indeed, the Tribunal was scathing in its analysis of the trial proceedings:

"By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr. Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due."

In particular, the Tribunal pointed to numerous instances where counsel for the opposition sought to contrast the foreign nationality of the Loewen Group (a Canadian firm with some Asian backing) with that of Mississippi-born Mr. O'Keefe. The Tribunal also noted that Mr. O'Keefe's legal team attempted to curry favor with a jury which consisted of a majority of African-Americans, by intimating that Mr. O'Keefe did business with black and white customers alike, whilst the Loewen Group catered only to white clients.

Nevertheless, Loewen's NAFTA claim foundered on two key issues.

During the course of the arbitration process, the firm filed for bankruptcy and restructured all of its business interests and assets into a single US corporation. Mindful of its outstanding NAFTA claim, the new firm assigned all rights related to that claim to a purpose-built Canadian corporate entity called Nafcano.

Nevertheless, the Tribunal ruled that the Group effectively pulled the rug out from under its NAFTA claim. The Tribunal noted that any ruling in favor of Nafcano would clearly accrue to its US-owner, and therefore there was no longer any Canadian investor. Because the NAFTA requires a "diversity of nationalities" for claims to be arbitrable, the Tribunal held that it no longer had jurisdiction to hear the Loewen claim.

Even if the claimant's arguments on jurisdiction had been upheld, the

Tribunal made clear that its substantive claim would have failed. Although the Tribunal believed that the failure to accord a fair trial to Loewen could not be squared with the United State's NAFTA obligations to provide minimum standards of international treatment and fair and equitable treatment to foreign investors, the Tribunal held that it needed to examine the full judicial process open to Loewen before finding a violation of the NAFTA.

And on this analysis, the Tribunal was not convinced that Loewen lacked reasonable alternatives for appeal.

In particular, the Tribunal noted that if a foreign investor were to claim successfully that a judicial decision served to violate the NAFTA, then it must be clear that the claimant lacked any domestic avenue for an "effective and adequate appeal". Only where the judicial system had made its final decision, would there be a prospect for a tribunal to find that the decision violated international law.

Accordingly, the Tribunal examined whether Loewen enjoyed a reasonably available right of appeal. And it was here that the Tribunal ruled that Loewen had "failed to present evidence disclosing its reasons for entering into the settlement agreement (with O'Keefe in 1996) in preference to pursuing other options".

Although the Tribunal did acknowledge that the available legal avenues may have harbored financial risks for Loewen, in the absence of further evidence about these risks -and Loewen's assessment of them - the Tribunal was unable to determine that these avenues were genuinely unviable in the circumstances.

As a consequence, the Tribunal indicated that the US government could not be held in violation of its NAFTA Article 1105 obligation. Related claims of violation of the NAFTA's provisions on expropriation and national treatment were also dismissed by the Tribunal with much less discussion.

Sources:

INVEST-SD Interviews

The Loewen Group, Inc. and Raymond L. Loewen (Claimants) and United States of America (Respondent), ICSID Case No. ARB(AF)/98/3

"Bittersweet victory for Ray Loewen: NAFTA says the undertaker was shafted by U.S. courts but awards him no compensation", Vancouver Sun, By David Baines, June 28, 2003

## 2. Dutch Investor Threatens Treaty Claim Against Czechs For Environmental Damage, By Luke Eric Peterson

In what could be a reversal of a common trend in international investment treaty arbitration, Dutch investors in the Czech Republic may lodge a claim for compensation as a result of environmental damage sustained to their investment.

Although a number of recent investor claims have been mounted under the NAFTA and other bilateral investment treaties by investors which seek to challenge the imposition of what host governments consider to be health or environmental measures, a looming dispute brought by the Dutch owners of the Knizeci Dvur tree farm may mark the first known instance where an investor will use an investment treaty to hold a state liable for environmental damage suffered by that foreign investor.

According to Czech media reports the investor is contemplating an arbitration under a Czech-Dutch investment protection treaty, following a recent legal setback in Czech courts.

The investor's grievance relates to a chlorine leak from the Spolana chemical plant in July of 2000, which is alleged to have damaged and despoiled the investors' tree farm.

Although a Czech court recently ruled that the investor failed to establish a causal link between the chemical discharge and the damage to its tree farm, the Dutch investors say they plan to appeal the court's decision and are also considering a separate international arbitration.

The Spolana chemical factory has long been at the center of controversy, as environmental activists have lobbied for clean-up of mercury contaminated soil and carcinogenic PCBs and dioxins which have leaked from the factory into the nearby Elbe river.

In the summer of 2002, the plant which is owned by the State-controlled Unipetrol conglomerate, made international headlines when the floods which ravaged Eastern and Central Europe engulfed the plant and led to several discharges of hazardous chemicals into the environment.

INVEST-SD News Bulletin will monitor legal developments in the case.

Sources:

"Dutch Consider Arbitration Over Dispute With Spolana", CTK National News Wire, Prague, June 24, 2003

"Prague Plant Leaks Killer Chlorine", CNN.com, August 26, 2002, available at:

<http://edition.cnn.com/2002/WORLD/europe/08/26/czech.chemicals/>

"Nature Reserve Cerninovsky Near Czech Chemical Factory Spolana Polluted with Dioxins and PCBs", Greenpeace Czech Republic, Press Release, May 13 2002, available at: <http://www.greenpeace.cz/release/03/030513e.htm>

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Negotiations Watch:  
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3. In Nod to Foreign Investors, Malaysia Drops Affirmative Action for Ethnic Malays,  
By Luke Eric Peterson

The Malaysian Government has abandoned a 30-year old policy designed to promote the economic empowerment of its ethnic Malay majority, in an effort to cater to foreign investors.

The move will allow foreign investors to take 100% equity stakes in manufacturing operations; heretofore, investors were required to set aside a 30% stake for ethnic Malay investors.

Although the so-called bumpiputra policy still applies to the Malaysian service sector, a recent report in the financial Times indicates that this sector may also see changes.

The affirmative action policy traces its origins to a series of race riots which engulfed the nation in the late 1960s and early 1970s, as ethnic Malays protested the domination of the economy by the ethnic Chinese community.

In recent years, the policy has been criticized for imposing barriers which are not present in other neighbouring nations, including China, which compete with Malaysia for foreign direct investment.

The Singapore Business Times reports that Malaysian Trade Minister Rafidah Aziz told reporters, "We are meeting the aspiration of today's investors, where everywhere they go, they are given 100 per cent equity without restriction."

Recently, the South African government has come under fire from multinational firms for introducing an affirmative action policy which requires that existing investors divest minority stakes in mining operations. Plans are also afoot, for a broader economy-wide affirmative action program to promote black economic empowerment.

These moves have been criticized by some as contravening undertakings in bilateral investment treaties negotiated by the South African Government. (See: "South Africa's Plans for Black Economic Empowerment Confronting Foreign Investor Rights", By Luke Eric Peterson, INVEST-SD News Bulletin, May 9, 2003)

As yet, there have been no known arbitrations mounted by foreign investors in an effort to challenge the South African Government's affirmative action policy.

Sources:

"Malaysia to Allow Foreigners Full Ownership in Manufacturing", By John Burton, The Financial Times, June 24, 2003

"Jury Still Out on KL's Drive to Free Manufacturing Sector; Measures May Not Be Aggressive Enough to Raise Cost Competitiveness", By Eddie Toh, The Singapore Business Times, June 24, 2003

"KL drops Bumi Policy in Manufacturing Sector; Sector Completely Freed Up for 100% Foreign Ownership", By Eddie Toh, The Singapore Business Times, June 23, 2003

#### 4. Geneva, Brussels Briefing Sessions to Discuss WTO and Investment This Week

Several half-day briefing sessions will be held next week in Geneva and Brussels, in order to survey and discuss the role of investment as an issue in the WTO Doha trade negotiations.

Earlier this year, the Royal Institute of International Affairs (RIIA) and the International Institute for Sustainable Development (IISD) convened a Chatham House experts' workshops on this theme.

The purpose of the workshop had been to identify policy options that could help advance the objectives of environmental protection, poverty eradication and economic development within particular core areas

defined by the Doha Declaration.

Details for next week's briefing sessions in Geneva and Brussels follow.

- Investment Rules, Sustainable Development and the WTO  
Geneva: July 2, Maison International de l'Environnement, Chatelaine,  
9h30 - 12h30, contact: acosbey@iisd.ca; cmartinet@iisd.ca.

Brussels: July 3, as part of the EU's Civil Society Dialogue;  
information and registration at  
[http://trade-info.cec.eu.int/civil\\_soc/intro1.php](http://trade-info.cec.eu.int/civil_soc/intro1.php), "Future Meetings"

Presenters: Aaron Cosbey, Luke Eric Peterson, IISD

This briefing session will focus first on our many years of experience with the bilateral investment treaties, and the NAFTA's investment provisions, asking whether there are lessons for the WTO negotiations, and what the relationship would be between the existing treaties and a WTO agreement.

It will then ask whether investment agreements might be designed which would foster quality investment? And what would be the challenges faced by the WTO in trying to broker an agreement with such a focus?

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INVEST-SD Bulletin is edited in Boston, Massachusetts by Luke Eric Peterson for IISD. Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to [lpeterson@iisd.ca](mailto:lpeterson@iisd.ca)

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