

Canfor/ Tembec/ Terminal v United States (NAFTA Chapter 11)

AREAS OF POLICY AFFECTED: international trade (lumber imports, countervailing and anti-dumping duties).

CASE SUMMARY: Three Canadian lumber companies sued the United States under NAFTA Chapter 11. The lawsuit challenged the imposition of U.S. countervailing duties and anti-dumping measures against Canada in a longstanding softwood lumber dispute. Underlying the dispute was the question of whether timber harvested in Canada and exported to the U.S. would be processed into lumber in Canada or in the U.S. More specifically, the lawsuit challenged the U.S. Byrd Amendment of 2000, which provided that duties assessed on imports would be distributed annually to affected U.S. domestic producers.

The three lawsuits were consolidated by a NAFTA Chapter 11 tribunal. The lawsuits were later withdrawn by the claimants as a condition of the Canada-U.S. Softwood Lumber Agreement of 2006, by which Canada committed to voluntarily limit its lumber exports to the U.S.

COMMENT: The case shows how steps taken by a government in an international trade dispute can trigger investor claims under an investment treaty. NAFTA Chapter 11 tribunals have concluded that investors can bring claims against a NAFTA government where their assets are affected by a steps taken in a trade dispute, even though NAFTA contains other chapters governing trade in goods and services. These other chapters are subject to state-state arbitration, not investor-state arbitration.

The case also contradicted theories advanced by commentators that investment treaties like NAFTA created freestanding “rights” for investors. In this case, it was clear that investors could have their ability to bring an investment treaty claim limited or removed, even in the course of an ongoing arbitration, by an agreement between their home state and the respondent state.

Source: www.iiapp.org (February 2011), based on information in publicly-available awards and materials in known investment arbitrations (for texts of awards, see www.italaw.com). This report was produced by a research team coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada. Please see the disclaimer and statement on terms of use available at www.iiapp.org. © Gus Van Harten 2011. *You may forward or re-publish the information in this report with attribution to www.iiapp.org.*