

Mexico Defeats Half a Billion ISDS Arbitration Claim Under NAFTA

Tereposky & DeRose had the privilege of assisting the Secretaría de Economía represent Mexico in a claim seeking US\$472 million plus interest and costs brought by a US national pursuant to Chapter 11 of the North American Free Trade Agreement (NAFTA). By award dated June 5, 2020, the UNCITRAL rules Tribunal in Joshua Dean Nelson v. The United Mexican States dismissed all of the investor's claims and ordered the Claimant to pay over US\$2 million in costs to Mexico.

The Claimant alleged that his investment in a telecommunications company called Tele Fácil México S.A. de C.V. (Tele Fácil) had been unlawfully expropriated. Specifically, the Claimant alleged that Mexico had expropriated Tele Fácil's rights to interconnect with Telmex (pursuant to a purported Interconnection Agreement between Tele Fácil and Telmex) and to earn revenues on that Interconnection Agreement. The Claimant also alleged that the fair and equitable treatment provisions of NAFTA were breached by a purported denial of justice in the Mexican courts. The Tribunal unanimously rejected all of the claims on the merits.

In dismissing those claims, the Tribunal made the following observations:

- Tele Fácil failed to provide convincing evidence as to the existence of an Interconnection Agreement between Telmex and Tele Fácil. The “inevitable conclusion” is that Tele Fácil had no rights under the purported Interconnection Agreement with Telmex. In this context, “Claimant cannot claim that a right it does not have under Mexican law is capable of being expropriated”;
- “Tele Fácil had, at best, a business opportunity, a bet based on its own interpretations and speculations, that was proven wrong”;
- “The speculative nature of the business opportunity that Claimant unsuccessfully attempts to qualify as “rights” at the core of the business of Tele Fácil is further confirmed by the overwhelming evidence on the record”;
- “Claimant cannot ask this Tribunal to find Respondent liable for Tele Fácil having failed on a bet supported on assumptions and speculations that were proven incorrect”;
- “The main lines of business of Tele Fácil were completely unrelated with what Claimant now portrays as the core business of Tele Fácil (the differential in the rates) and Tele Fácil simply decided, with no reasonable business explanation, to abandon such main lines of business”;
- “If Tele Fácil or the shares lost value, such loss is the result of a business decision of Tele Fácil and its shareholders and not of actions or omissions of Respondent”;

- The “conspiracy theories” submitted by Claimant “are mere speculations and the evidence submitted in no way supports the serious accusations made by the Claimant”;
- The evidence of the record does not support Claimant’s “conspiracy theory to favor Telmex” or “a plot to deprive Tele Fácil” from the rights that it allegedly had under the purported Interconnection Agreement;
- “The unprecedented situation was created by Tele Fácil’s conduct and the risks it decided to assume to bet for a business opportunity”; and
- “It is not for this Tribunal to second-guess the decisions made by domestic courts or to act as a court of appeals. Claimant’s allegations do not evidence a serious flaw or malice in the application of the law but simply a disagreement on the reasoning.”

With respect to costs, the Claimant’s arbitration costs, including legal fees and expenses, totalled just over US\$6.4 million. By contrast, Mexico’s total arbitration costs were just over \$US2.5 million. The Tribunal ordered that the Claimant pay Mexico over \$US2 million in costs.

The Tereposky & DeRose defence team was composed of Partners Jennifer Radford and Vince DeRose, Senior Counsel Cameron Mowatt, Economist Alejandro Barragán, and Mexican Legal Counsel Ximena Iturriaga.

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