Kluwer Arbitration Blog

Is the System Working: What Lessons Can Be Learned From A Canadian Trilogy Of Investor Claims (AbitibiBowater, Chemtura, First Quantum Minerals)?

Andrew de Lotbinière McDougall (White & Case) · Wednesday, September 15th, 2010 · White & Case

Three different investors, with three different claims, in three different situations, have recently been in the news. All three disputes have a Canadian connection. Two involved claims by foreign investors against Canada, one that settled and one that Canada defeated. The third involves a claim by a Canadian investor against the Democratic Republic of Congo.

Among the lessons learned from these three claims are that good investment treaty protection really is important to foreign investors; where investment protection is in place, it can be shown to be doing its job; and where it is not in place the investor can be in a difficult position if problems arise with the host state.

The outcomes of the first two claims also appear to provide compelling evidence to refute assertions recently that investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes.

AbitibiBowater v. Canada

Canada and AbitibiBowater recently settled an expropriation claim brought under Chapter 11 of the NAFTA for Cdn $130 million. The settlement shows that the investment treaty protection system under the NAFTA worked. While there has been some public and political questioning in Canada of the settlement and its amount, Canada had the courage to settle the claim on a basis acceptable to both sides without requiring the investor to go through all the hoops of a full arbitration process. Sometimes it is easier for governments to avoid the potential political heat from a settlement and instead let the system run its course, knowing that it may be easier to distance themselves from the decision of three arbitrators than a decision made to settle. Here, that did not happen.

The settlement also highlights a particular challenge of investment treaties in federal states like Canada. In this case, the actions leading to the claim were actions of one of Canada's provinces, Newfoundland and Labrador. However, it was the federal state,

Canada, against which the claim was properly brought and which was required to defend and settle the claim. This shows vividly how a state can end up on the hook for the actions of one of its constituent territories, provinces or states – or municipalities – and may be left financially naked, having to pay for actions that it did not take and had no constitutional authority to prevent.

There is no arrangement yet between Canada's federal government and its provincial and territorial governments over the financial responsibility within Canada for investment treaty obligations. The federal government is responsible under Canada's international treaties for its own actions and arguably those of its provinces and territories. There are other pending claims against Canada relating to actions by levels of government within the country other than the federal government. While the Canadian Prime Minister is reported as stating after the AbitibiBowater settlement that "I have indicated that in future, should provincial actions cause significant legal obligations for the government of Canada, the government of Canada will create a mechanism so that it can reclaim monies lost through international trade processes" (The Globe and Mail, August 27, 2010, page B3), what that mechanism would be, or whether it could be imposed unilaterally, he did not say.

With other claims pending, a resolution may not be able to wait. Indeed, a lead editorial in one of Canada's principal mainstream newspapers called for a solution now: "the federal government should not simply wait for the next problem of this kind to come up. It should diplomatically, but firmly, make clear to the provinces that it is thinking about specific options. The taxpayers of Canada need some concrete assurance that they will not have to pick up another such tab" (The Globe and Mail, August 30, 2010, page A12).

Of course, the potential liability of a province or territory to pay raises questions of its direct and indirect roles in the defense of the claim, if any, and its responsibilities to cooperate and assist in the defence.

It appears that these issues will need to be dealt with in Canada sooner rather than later – one way or another – if not for other reasons, for political reasons.

It does not appear that either of Canada's NAFTA partners, the United States and Mexico, both of which are federal states, has developed a comprehensive solution to this issue.

Chemtura v. Canada

At about the same time as the AbitibiBowater settlement, Canada defeated Chemtura's claim against it, which was based on a Canadian decision to phase out use of a fungicide (lindane) because of health concerns. The arbitral tribunal (Prof. Gabrielle Kaufmann-Kohler, Hon. Charles N. Brower, and Prof. James R. Crawford) held that the measures taken by Canada "did not amount to a substantial deprivation" of Chemtura's investment (para. 265) and in any event "the measures . . . constituted a valid exercise of [Canada's] police powers . . . and as a result, does not constitute an expropriation" (para. 266). The tribunal further held that the measures were within the regulatory body's mandate and were taken "in a non-discriminatory manner,

motivated by the increasing awareness of the dangers presented by lindane for human health and the environment" (para. 266). Chemtura was ordered to pay Canada almost Cdn $3 million to cover one-half of its fees and costs in connection with the arbitration (para. 273). The result shows that – contrary to the concerns raised by critics of investment protection – a state can successfully defend investor claims based on health and environment protection regulatory actions of the state. (See http://ita.law.uvic.ca/documents/ChemturaAward_000.pdf)

Here, like in the AbitibiBowater case, the system appears to have worked.

First Quantum Minerals v. Democratic Republic of Congo

First Quantum Minerals is a different story.

First Quantum, a Canadian mining company, has made claims about the actions of the government of the Democratic Republic of the Congo (DRC) in relation to a project it has in the DRC. Canada does not have a bilateral investment treaty with the DRC. However, the DRC is a member of ICSID and provides for ICSID arbitration through its Mining Code.

If Canada were a member of ICSID, First Quantum would have investment treaty protection through ICSID available to it. However, Canada has not yet ratified the ICSID Convention, which it signed almost four years ago.

Instead, First Quantum has had to resort to trying to get its own state, Canada, to assert its case for it on the international stage, as well as, according to media reports, possibly bringing an arbitration under ICSID's Additional Facility (which of course would yield an award that would not have the same standing as an ICSID award).

Until Canada ratifies ICSID (the subject of our Kluwer Arbitration Blog on 24 August 2010), Canadian investors like First Quantum investing abroad cannot get disputes resolved by way of an ICSID award. The same is the case for foreign investors coming into Canada – a claim against Canada cannot be resolved by way of an ICSID award either.

Here, some fixing is needed.

Andrew McDougall (amcdougall@perlaw.ca) and Barry Leon (bleon@perlaw.ca) are Partners in the International Arbitration Group with Perley-Robertson, Hill & McDougall LLP (www.perlaw.ca).

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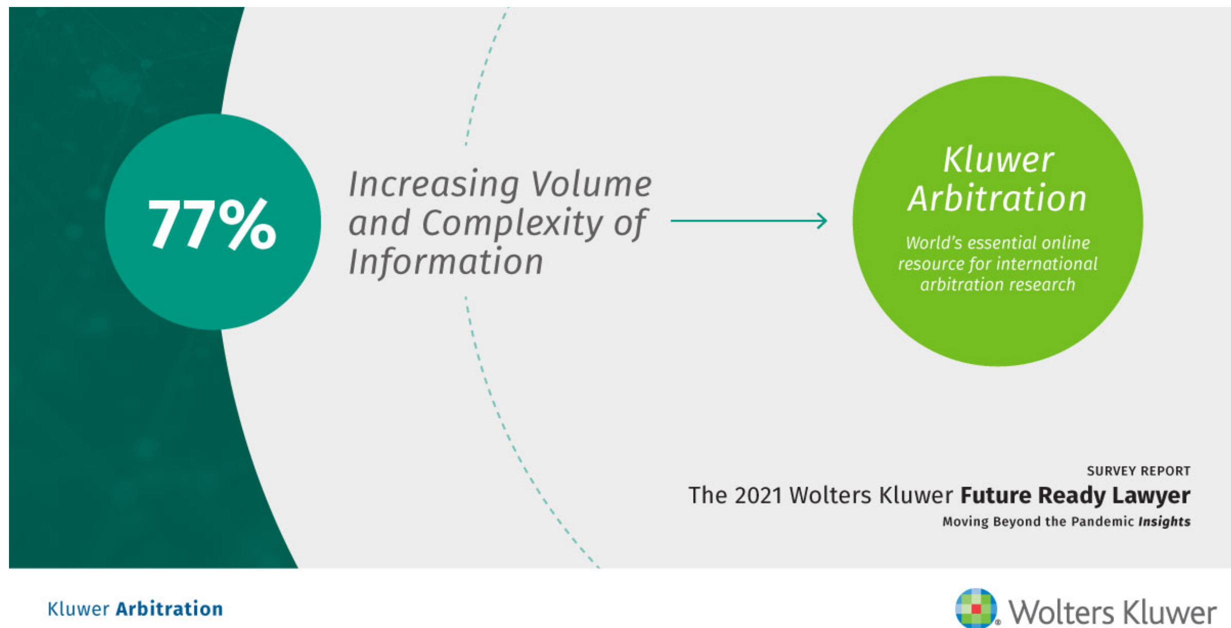

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