Kluwer Arbitration Blog

Can a Legacy Investment Claim Be Made under the USMCA for Measures that Were Adopted after the Termination of NAFTA?

Céline Lévesque (University of Ottawa Faculty of law) · Thursday, July 28th, 2022

This question of first impression under the **United States-Mexico-Canada Agreement** (USMCA) has been brought to the fore with the spring 2022 publication of the **Request for Arbitration** ("Request") submitted by **TC Energy Corporation and TransCanada PipeLines Limited against United States** (dated November 22, 2021) and the **Notice of Intent** ("Notice") submitted by **Alberta Petroleum Marketing Commission against the United States** (dated February 9, 2022). These claims relate to the **revocation, on January 20, 2021, of the presidential permit** for the building of the Keystone XL pipeline, a measure adopted after the termination of the **North American Free Trade Agreement** (NAFTA) on June 30, 2020.

Whether an investor-State arbitration tribunal has jurisdiction to hear a "legacy investment claim" brought by investors under these circumstances has particular significance in relation to claims made by Canadian investors against the United States and claims made by U.S. investors against Canada. Indeed, after a transition period of three years such claims will no longer be permitted.[1)]

Annex 14-C of the USMCA providing for "legacy investment claims and pending claims" addresses some aspects of temporal application, but it does not explicitly address its coverage of measures adopted only before or also after NAFTA's termination. Paragraph 1 of Annex 14-C provides that:

> "1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994; (…)" (footnotes omitted)

In turn, the term "legacy investment" is defined at paragraph 6 of Annex-C as follows: "means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement".

The time limitation to the States' consent is provided at paragraph 3 of Annex-C: "A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994." In other words, for claims submitted up to June 30, 2023.

As such, the Claimants in relation to the Keystone XL project, for instance, have emphasised in their respective Request and Notice the existence of their investments at the relevant times (to meet the definition of legacy investment claim) and the timing of the claims themselves. Nothing is said on the time of adoption of the measures.

Yet, a tribunal's jurisdiction over such a legacy investment claim would depend on a determination of this question.

In this case, one might say that the "silence" is in the eye of the beholder. Indeed, much can be brought to bear on the issue, as a matter of treaty interpretation and in reliance on general principles of international law.

First, the USMCA Parties were clearly mindful of the principle of non-retroactivity of treaties (see Article 28 of the **Vienna Convention on the Law of Treaties** (VCLT)), when they provided the temporal scope of application of Chapter 14 (Investment) at Article 14.2(3) as follows: "For greater certainty, this Chapter, *except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims)* does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist *before* the date of entry into force of this Agreement." (emphasis added)

This provision indeed clarifies the extent to which the Parties consented to be bound for acts (in this context for measures adopted) *before* the entry into force of the USMCA (e.g. ***Koch v. Canada*** would fall under this category of claims).

The principle of intertemporal law also finds application as a matter of State responsibility, as reflected in Article 13 of the **Draft articles on Responsibility of States for Internationally Wrongful Acts** (ILC Articles), which provides that: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." For our purposes, however, the issue is not whether the State Parties were bound to respect the provisions of Chapter 14 in relation to measures adopted *after* the entry into force of the USMCA (they are),[2)] but whether the United States and Canada provided their consent to have investors from the other State bring claims against them under the terms of Annex-C for legacy investment claims. (For recent discussions at the International Court of Justice regarding jurisdiction *ratione temporis* and lapses in instruments of consent, see the case of ***Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)***, in particular the dissenting opinions of **Judge Nolte**, and **Judge *ad hoc* McRae**).

Second, if the USMCA Parties had wanted to minimise discussion regarding measures adopted *after* the termination of NAFTA, they could have made their intentions more explicit, as was done in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) in relation to **bilateral investment treaties (BITs) applicable between Canada and Member States of the European Union** after the entry into force of CETA. Chapter 30 (final provisions) provides as follows:

> **Article 30.8 – Termination, suspension or incorporation of other existing agreements**

> 1. The agreements listed in Annex 30-A [i.e. the BITs] shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement.
>
> 2. Notwithstanding paragraph 1, a claim may be submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if:
>
>> - the *treatment* that is object of the claim was *accorded when the agreement was not terminated*; and
>>
>> - no more than three years have elapsed since the date of termination of the agreement. (emphasis added)

While this text might not prevent all debates (as one can imagine arguments related to continuing or composite acts playing out), it has the benefit of addressing the issue explicitly.

In our case, tribunals facing the question of temporal application would rely on principles of treaty interpretation to ascertain the intentions of the USMCA Parties, considering "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (under Article 31 VCLT).

Potential considerations for tribunals when interpreting Annex 14-C:

- In relation to the definition of "legacy investment" provided at para. 6 (cited above):
  - What should be read into the fact that the Parties focused on investments made between the entry into force of NAFTA on January 1, 1994 and its termination on June 30, 2020 *and* in existence as of July 1, 2020? Presumably, the Parties wanted to respect the expectations created in NAFTA investors that their investments would benefit from protection for the duration of the agreement, including access to ISDS (while limiting the protection to current as compared to past investments).
- In relation to the Parties' consent with respect to legacy investment claims provided at para. 1 (cited above):
  - What should be the import of footnote 21 providing that: "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)." Consistent with the Article 14.2 scope provision at paragraph 3 (cited above), for an investor to be "eligible" to submit a claim under Annex-E, the challenged measures would have to be adopted *after* the entry into force of the USMCA. This text would seem to imply that such challenges can be made also under Annex-C, otherwise there would be no need for the exclusion in the footnote. However, this interpretation puts into question why investors

under Annex-D (Mexico-United States Investment Disputes) would have a choice of recourse (between Annex-C and D) for three years, while those under Annex-E do not? Put differently, since Annex-E provides broader and fuller protection to admissible investors than Annex D, why would those falling under the latter have access to the preferable mechanism of Annex-C (i.e. NAFTA) in the transition period?

- In relation to the three years time limitation to the States' consent provided at paragraph 3 (cited above):
    - What should be read into the fact that the three years time-bar mirrors the architecture for claims provided under NAFTA Chapter 11? One reading is that the Parties wanted to **reproduce the same mechanism as operated under NAFTA Articles 1116 & 1117**. In other words, whether an investor became aware of the breach and damages arising from it on June 30, 2017 or June 30, 2020, it would have the *same period* of three years to submit its claim. This would seem internally consistent with the objective of the provision. However, if the provision is read to allow claims for legacy investments to be made for measures adopted *after* the termination of NAFTA for a period of three years, this would mean that an investor would have less time to make its claim with every passing day. For example, an investor could complain of a measure that has yet to be adopted, say in late 2022, and as long as it respects the deadlines under NAFTA Articles 1119 (90 days) & 1120 (6 months), it could still validly submit a legacy claim.
    - Contrary to the point made above in relation to the (legitimate) expectations of existing investors, in the case of United States-Canada claims, the effect of such an interpretation would be to provide investors protections for measures adopted *after* ISDS was no longer supposed to apply between the Parties, i.e., after the termination of NAFTA.

Conclusion

The tribunal or tribunals constituted to hear the legacy investment claims related to the Keystone XL pipeline may be the first to have to rule on a *ratione temporis* jurisdictional objection based on the fact that the revocation of the presidential permit at issue occurred *after* the termination of NAFTA. As discussed, recourse to applicable rules of international law, including the VCLT, will help the tribunal(s) interpret the silence left by the Parties. As needed, recourse could be had to supplementary means of interpretation under VCLT Article 32, including consideration of the circumstances of the USMCA's conclusion. The USMCA Parties could also adopt a binding interpretation of Annex-C via the Free Trade Commission (FTC). Such a prospect raises **politically and legally sensitive issues**, as the NAFTA Parties found out with the FTC's **2001 Interpretation of NAFTA Article 1105**.

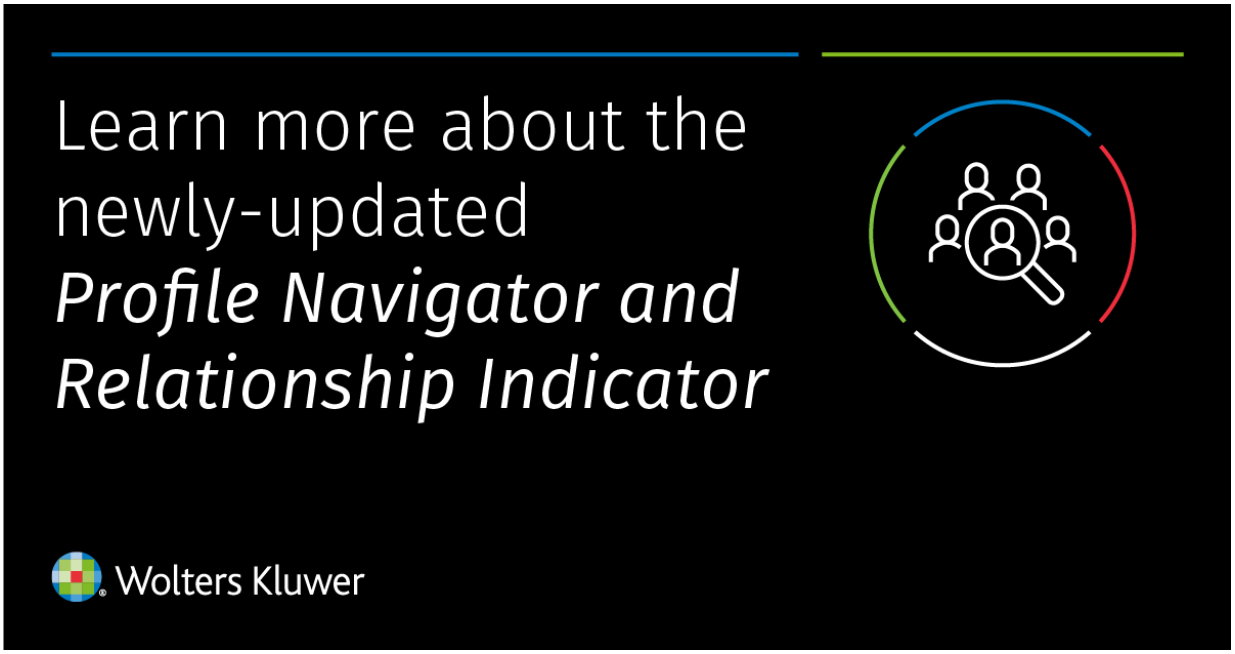
So much for the wish expressed by the USMCA Parties in their transitional provision from NAFTA 1994 at Article 34.1 that: "The Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement."

* *The author would like to thank Christian Schmid for his research assistance and the LLM students in her 2022 International Economic Law Case Studies Course for lively discussions of this topic.*

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



References

?1 The issues raised by legacy investment claims are somewhat different with regard to the United States-Mexico relationship, as new provisions apply to investor-State arbitration brought by their respective investors under the USMCA going forward, in some cases during as well as beyond the three-year transition. The Canada-Mexico relationship has yet different implications, as investor-State claims are covered under the CPTTP.

?2 Indeed, the United States or Canada could have recourse to Chapter 31 (State-State) Dispute Settlement in relation to such measures.

This entry was posted on Thursday, July 28th, 2022 at 8:01 am and is filed under Canada, Investment Arbitration, NAFTA, USMCA
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.