Kluwer Arbitration Blog

2022 Year in Review: Canada and Investor-State Dispute Settlement

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The past year has seen several victories for Canada on the ISDS front, a conclusion of a decade-long NAFTA arbitration, and much more. If 2022 is any indication, readers will have many more developments to look forward to during 2023.

Canada comes out of 2022 mostly on top in ISDS

Of the cases surveyed, Canada seems to have come out of 2022 a winner on the ISDS front. While some victories were primarily on jurisdictional grounds, others have had been decided in light of the current conversation surrounding the state's right to regulate, especially when it comes to transition to greener sources of energy.

In the ICSID-administered *Westmoreland Mining Holdings v. Canada* case, an UNCITRAL tribunal declined jurisdiction because the US claimant was not incorporated at the time of the alleged breach. In 2018, Westmoreland Coal Company ("*WCC*") alleged that Canada had breached NAFTA through Alberta's decision to phase out coal energy by 2030. After WCC filed for bankruptcy, it withdrew its claim. In 2019, the US claimant (Westmoreland Mining Holdings), owned by WCC's creditors, filed a new claim, which was rejected since the claimant did not exist at the time of the alleged breach.

In *Resolute Forest Products v. Canada*, a tribunal majority dismissed NAFTA claims on the merits. The US claimant argued that the Assistance Measures, taken by Nova Scotia to avoid a local paper mill plant's shutdown, affected Resolute's operation in Quebec. The tribunal found that several of those measures were under the public procurement exception of Article 1108(7) NAFTA, while the remaining ones were found to not be in breach of the non-discrimination or minimum standard of treatment.

In *Tennant Energy, LLC v. Canada*, an UNCITRAL tribunal dismissed the minimum standard of treatment claim on the jurisdictional grounds that the US-based claimant was not a qualifying investor at the time of the alleged NAFTA breach, because Tennant became an investor only months after. Ontario had declined to grant a feed-in tariff contract critical to Tennant's wind power project. The tribunal found insufficient evidence that Tennant benefited from an "oral trust" or that Tennant's principal controlled the investment. Moreover, the tribunal did not find evidence

that Tennant suffered any loss.

In an award yet to be published in *Lone Pine Resources v. Canada*, an ICSID-administered UNCITRAL tribunal rejected a US claimant's NAFTA claim over a revoked fracking permit for the exploration of shale gas, amid Quebec's previous actions ultimately leading to the ban on fracking. Canada had argued that this was a legitimate public interest non-discriminatory measure. Along with other cases, there are mounting claims by investors as states attempt to move toward green energy. This win for Canada can also be seen as a win for ISDS amid the criticisms it is receiving in the face of the state's right to regulate.

CUSMA: NAFTA's Sunset Period for legacy claims ends on June 30, 2023

CUSMA's three-year Sunset Period ends on June 30, 2023.[1)] If they qualified as investors under NAFTA (until June 30, 2020), claimants could still bring arbitration claims thereunder. However, for expropriation claims, investors must have served the host state with a notice of intent to arbitrate at least six months before June 30, 2023. For other claims, investors will have to communicate this notice at least 90 days before June 30, 2023. At least two Sunset claims involving Canadian investors are pending, both concerning the axing of the Keystone XL pipeline, namely TC Energy Corporation and TransCanada PipeLines Limited v. United States, and *Alberta Petroleum Marketing Commission v. United States*, in which Alberta submitted a Notice of Intent to Submit a Claim to Arbitration. The latter would mark the first time under NAFTA that a provincial government brings a claim as an investor. These cases are also an opportunity for tribunals to address the question on whether measures adopted after NAFTA's termination could be brought as legacy claims, considering CUSMA's silence on the matter. This question was previously analysed here.

To recall, Canada opted out of the ISDS mechanism under CUSMA. While ISDS disputes between Mexico and Canada could still be brought under the CPTPP, disputes involving Canada as host state or Canadians under CUSMA will have to be brought by the investor's state. The first state-to-state dispute under CUSMA was resolved in January 2022 regarding Canada's administration of tariff-rate quotas (TRQs) for dairy imports.

Highlights from Canadian courts: The ISDS "afterlife"

Investor-State disputes oftentimes live on in domestic courts in the form of recognition or set aside proceedings. Such was the case with two NAFTA matters: Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04 ("*Clayton*"), and Joshua Dean Nelson and Jorge Blanco v. United Mexican States, ICSID Case No. UNCT/17/1 ("*Nelson*"). The Ontario Superior Court, which was seized of set aside applications in both cases, upheld the 2019 *Clayton* Award on Damages and the 2020 *Nelson* Final Award. Investors in both proceedings argued they had been denied natural justice and procedural fairness in contravention of Article 34(2)(a)(ii) of the UNCITRAL Model Law.

In *Nelson* the investor reproached the tribunal for: (i) basing the award on a theory of the case not pleaded or argued by either of the parties, and (ii) ignoring or failing to take the applicant's expert

evidence into account on issues which formed the basis of the tribunal's award (para. 2). After evaluating whether "the tribunal's conduct [was] 'sufficiently serious to offend our most basic notions of morality and justice' and 'that it cannot be condoned under the law of the enforcing State'", which has been the standard of review under Article 34(2)(a)(ii) (para. 33), the Court dismissed the investor's application.

Similarly, in *Clayton* (which was previously discussed on this blog), the investor argued that the tribunal denied the right to file two rejoinder expert reports in response to what was allegedly "case splitting by Canada". The procedural order envisaged two rounds of submissions for each party; the parties' reply and rejoinder could contain only evidence that was responsive to the other disputing party's last preceding submission. When the respondent's rejoinder expert report allegedly responded to the investor's first submission, the investor filed two additional expert reports a month before the hearing, without previously seeking the tribunal's permission. Considering the prejudice that such a late submission could ensue to respondent and the absence of any exceptional circumstances that would warrant the admission of these reports, the tribunal refused to allow them. Nonetheless, it invited the investor to move to strike the evidence it deemed improper (which it had not). The investor's omissions did not go unnoticed by the Court (especially in light of its counsel's admission that, had the allegedly improper evidence been struck from the record, there would not have been a breach of procedural fairness). Finding that the investor "engineered the problem that was facing the Tribunal […] through their choices", that the "Tribunal fashioned a solution that, had the applicants taken advantage of it, could have addressed the [alleged] unfairness", and that the investor "did not take advantage of the offer", the Court dismissed the set aside application (paras. 55-75). The investor also unsuccessfully challenged the award on grounds of excess of jurisdiction (34(2)(a)(iii)) and public policy (34(2)(b)(ii)). Dismissing those arguments as well, the Court once again confirmed Mexico v. Cargill, Inc. (previously discussed here) as the leading case on setting aside international arbitral awards (para. 21).

A non-NAFTA-related proceeding unravelling in Québec courts that is worth mentioning relates to the PCA-administered CC/Devas (Mauritius) Ltd. et al. v. India. Other than seeking recognition and enforcement of two arbitral awards, investors have also sought to seize funds held by non-parties to the arbitration, which has produced a plethora of judgments from all levels of provincial courts. The Supreme Court of Canada ("SCC") may also have a chance to opine on the case, as the investors have sought leave to appeal to the SCC. In the meantime, in its latest judgment, the Québec Superior Court dismissed India's motion to dismiss the investors' applications for recognition and enforcement, finding that the State was not immune from the Court's jurisdiction.

Canada's 2021 Model FIPA in action?

Since the Model FIPA was published in 2021, Canada has not concluded any FIPAs in 2022, despite a few ongoing exploratory discussions and negotiations, such as those between Canada and Taiwan, which are reported to have been largely successful over the past year.

What's in store for 2023?

With the end of the Sunset Period approaching, legacy claims under NAFTA could be expected to

surge in the coming months. Canada could also be getting closer to concluding more treaties, this time based on its 2021 Model FIPA. During 2023, closer attention will be paid to CUSMA and how investors are reacting to it, particularly its state-to-state dispute resolution mechanism, with Canada's choice to opt out of ISDS.

** The views expressed herein are those of the authors and do not necessarily reflect the views of Woods LLP or its partners.*

This post is part of Kluwer Arbitration Blog's 2022 in Review series. Other posts in the series can be seen here.

References

?1 CUSMA, Annex 14-C, Article 14.C.3.

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