

Intelligence MEMOS



From: Lawrence Herman
To: Canadians Concerned About Trade
Date: February 25, 2022
Re: ALBERTA BREAKS NEW GROUND IN ITS KEYSTONE APPEAL

Earlier this month, the Alberta government launched a NAFTA investment arbitration suit against the US, seeking \$1.3 billion as compensation for President Joe Biden's cancellation of the Keystone XL pipeline. TC Energy, the company behind KXL, has filed its own NAFTA case, and Alberta is now seeking compensation for the province's investment in the pipeline.

The case is groundbreaking because for the first time it involves one government – albeit a provincial one – suing another government under the NAFTA investment provisions. This has implications for other investment disputes around the world.

When the Canada-US-Mexico agreement replaced NAFTA on July 1, 2020, it phased out the right of Canadian and US investors to bring forward these disputes. However, carry-over provisions allow claims regarding investments made before July 1, 2020, such as Alberta's, to be filed until a July 1, 2023, cut-off date.

The NAFTA provisions are similar to investor-state dispute settlement provisions in hundreds of bilateral treaties around the world. They give investors the right to invoke binding arbitration when governments are alleged to have breached treaty obligations, allowing the investors to bypass local courts in favour of neutral, third-party dispute settlement.

Bilateral investment treaties originated back in the 1970s as a way of encouraging private capital to flow from industrialized countries to the developing world. To help backstop these foreign investments in uncertain or shaky localities, the treaties included guarantees by recipient or “host” states of non-discriminatory and “fair and equitable” treatment, plus guarantees against asset seizures or confiscation. By one estimate, there are now about 2,300 of these bilateral agreements around the globe.

A key part of these agreements are ISDS rights that investors can invoke when host-state guarantees are not met. This makes sense as a way of providing an element of risk reduction for private capital. The idea, however, did not envisage that governments, or subnational governments such as Alberta, would seek to qualify as investors and invoke those same arbitration rights.

By claiming these rights, the Alberta government can choose its own arbitration forum, including at the World Bank, the one most frequently used. The advantage is that if Alberta wins, the US is legally bound to pay up. There's no avenue of appeal. The arbitrators have the final word.

The case was started with formal notice filed with the CUSMA Secretariat, but detailed arguments won't be fully revealed until Alberta files its legal submissions in a few months. But judging from what we know from TC Energy's separate NAFTA suit, Alberta will argue that the permit process was politicized and that its cancellation was to mollify Democratic politicians and supporters in the pro-environment, anti-fossil-fuel lobby.

The legal arguments will probably revolve around allegations of failure by the US to provide “fair and equitable” treatment under international law. Even if subject to some qualifications, including the right of the US to enact legitimate environmental measures, the permit cancellation will be presented as unfair and arbitrary.

One can wager that the Biden White House will pull out all stops in defending the action, putting Alberta up against the full legal resources of the US government. It will almost certainly challenge Alberta's standing as an investor, arguing it's not a Canadian “national” or an “enterprise” as defined under NAFTA. The US will go on to defend KXL's cancellation as a legitimate carbon-reduction measure based on sound environmental science, and that political factors were irrelevant.

All of these points will be adjudicated by the yet-to-be-appointed NAFTA panel, which will examine all these arguments in fine detail over many months.

As the process unfolds, the case could raise the temperature in the bilateral relationship, not only because it's brought by a Canadian provincial government, but because it strikes at the centre of Mr. Biden's fossil-fuel reduction and climate-change plans. It's about much more than the compensation claim of \$1.3 billion itself, admittedly a hefty sum.

One also wonders what impact the suit will have on Alberta's ability to influence American policy makers in other areas of provincial interest. While there's a view that governments can litigate against one another without it spilling over into the wider political domain, given the nature of this case, Alberta could face both legal and political headwinds.

As to the international ramifications, there have been almost no reported cases of one government, national or subnational, bringing an investment dispute against another government. Should Alberta succeed as an investor, it could change the global legal landscape for these ISDS cases in a major way.

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A version of this memo first appeared in [The Globe and Mail](#).