Intelligence MEMOS

From: Jon Johnson

To: Keystone Saga Watchers

Date: October 27, 2023

Re: NAFTA/CUSMA Investor/State Disputes – Fading Away or Out with a Bang

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The claim brought by TC Energy (formerly TransCanada Pipelines) under the CUSMA procedures for NAFTA investor/state claims is massive: US$15 billion plus interest.

The claim, relating to TC Energy's construction of the Keystone XL pipeline in the US, has a tortured history. The pipeline project, which had received initial approval, faced growing opposition under the Obama administration that, ultimately, cancelled TC Energy's permit. On January 6, 2016, TC Energy filed a NAFTA investor/state claim against the US.

A year later, the new Trump administration invited TC Energy to resubmit an application, which it promptly approved. TC Energy withdrew its NAFTA claim and resumed work on the pipeline. However, upon his arrival in the White House, President Biden signed Executive Order 13990 on January 20, 2021, rescinding the approval. TC Energy filed a new investor/state claim on November 21, 2021.

The US filed a jurisdictional challenge, arguing that the facts giving rise to the claim (the rescinding of the permit on January 20, 2021) arose after CUSMA came into effect (July 1, 2020). The US and TC Energy have now filed detailed memorials respecting when the facts giving rise to a claim must occur for the case to proceed on its substance.

NAFTA rules continue under CUSMA Annex 14-C respecting "legacy investments" (those established while NAFTA was in effect from January 1, 1994 to July 1, 2020). Notwithstanding NAFTA's termination on July 1, 2020, Annex 14-C extended the time for filing claims under the NAFTA Chapter 11 provisions until July 1, 2023.

The US Memorial maintains that while a claim could be filed any time up to July 1, 2023, the facts giving rise to the claim must occur while NAFTA was still in effect (i.e., before July 1, 2020.) Its positions is that the TC Energy claim must be dismissed because Biden cancelled the Keystone permit on January 20, 2021, well after NAFTA terminated on July 1, 2020.

While there is nothing in the CUSMA text directly supporting the US position, there is an indirect textual basis for it.

CUSMA Article 14 establishes investment obligations different from those of NAFTA Chapter 11. The US maintains that under the TC Energy interpretation with substantive NAFTA investment obligations continuing in effect until July 1, 2023, investors and their investments will be governed by two different sets of investment obligations – those under NAFTA and those under CUSMA. The US interpretation resolves this inconsistency with the NAFTA substantive investment obligations ceasing to have effect on the date (July 1, 2020) that the CUSMA obligations became effective.

The TC Energy Counter-Memorial maintains that the US position has no basis. According to TC Energy, Annex 14-C is an arbitration agreement, and points to a provision in the Protocol bringing CUSMA into effect stating that the fact that CUSMA supersedes NAFTA is without prejudice to the NAFTA provisions referred to in Annex 14-C. These are Articles 1102 (national treatment), 1103 (most-favoured-nation treatment), 1105 (minimum standard of treatment), and 1110 (expropriation and compensation), the provisions upon which the TC Energy claim is based.

Based on the TC Energy theory that Annex 14-C is in an arbitration agreement between a claiming investor and a defending NAFTA country, the effect is that the TC Energy claim will be governed by the NAFTA provisions identified in Annex 14-C. The fact that these provisions are no longer in effect is irrelevant because those are the provisions that have been chosen to govern the dispute.

Mexico filed a Submission supporting the US. It maintains that the NAFTA parties agreed to change the investment-related protections offered to investors as of the entry into force of the CUSMA. Thus, CUSMA Annex 14-C cannot be used by investor to override that decision and extend the substantive obligations of NAFTA Chapter 11.

While decisions of tribunals in NAFTA investor/state cases are binding only on the parties to the arbitration, a decision that the breach must have occurred before the NAFTA terminated on July 1, 2020 would for all practical purposes end NAFTA claims depending on breaches occurring after July 1, 2020

Regardless of the decision in this case, other outstanding NAFTA investor/state claims will be settled, withdrawn, or proceed to a damages award. The time for filing new claims has now passed and NAFTA investor/state will fade away.

However, the TC Energy claim is unique in its sheer magnitude. The claimant is a major Canadian corporation with extensive US interests. If TC Energy prevails in the jurisdictional challenge and the case proceeds on the merits, the damages awarded could be considerable and far in excess of those in any NAFTA investor/state case.

If TC Energy is successful, NAFTA investor/state procedures will go out with a bang.

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