JUNE-IN-REVIEW

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Investor-State Dispute Settlement

1. MEXICO DEFEATS HALF A BILLION ISDS ARBITRATION CLAIM UNDER NAFTA

Tereposky & DeRose had the privilege of assisting the Secretaría de Economía represent Mexico in a claim seeking US$472 million plus interest and costs brought by a US national pursuant to Chapter 11 of the North American Free Trade Agreement (NAFTA). By award dated June 5, 2020, the UNCITRAL rules Tribunal in Joshua Dean Nelson v. The United Mexican States dismissed all of the investor's claims and ordered the Claimant to pay over US$2 million in costs to Mexico.

The Claimant alleged that his investment in a telecommunications company called Tele Fácil México S.A. de C.V. (Tele Fácil) had been unlawfully expropriated. Specifically, the Claimant alleged that Mexico had expropriated Tele Fácil's rights to interconnect with Telmex (pursuant to a purported Interconnection Agreement between Tele Fácil and Telmex) and to earn revenues on that Interconnection Agreement. The Claimant also alleged that the fair and equitable treatment provisions of NAFTA were breached by a purported denial of justice in the Mexican courts. The Tribunal unanimously rejected all of the claims on the merits.

In dismissing those claims, the Tribunal made the following observations:

- Tele Fácil failed to provide convincing evidence as to the existence of an Interconnection Agreement between Telmex and Tele Fácil. The "inevitable conclusion" is that Tele Fácil had no rights under the purported Interconnection Agreement with Telmex. In this context, "Claimant cannot claim that a right it does not have under Mexican law is capable of being expropriated";
- "Tele Fácil had, at best, a business opportunity, a bet based on its own interpretations and speculations, that was proven wrong";
- "The speculative nature of the business opportunity that Claimant unsuccessfully attempts to qualify as "rights" at the core of the business of Tele Fácil is further confirmed by the overwhelming evidence on the record";
- "Claimant cannot ask this Tribunal to find Respondent liable for Tele Fácil having failed on a bet supported on assumptions and speculations that were proven incorrect";
- "The main lines of business of Tele Fácil were completely unrelated with what Claimant now portraits as the core business of Tele Fácil (the differential in the rates) and Tele Fácil simply decided, with no reasonable business explanation, to abandon such main lines of business";
- "If Tele Fácil or the shares lost value, such loss is the result of a business decision of Tele Fácil and its shareholders and not of actions or omissions of Respondent";

- The "conspiracy theories" submitted by Claimant "are mere speculations and the evidence submitted in no way supports the serious accusations made by the Claimant";
- The evidence of the record does not support Claimant's "conspiracy theory to favor Telmex" or "a plot to deprive Tele Fácil" from the rights that it allegedly had under the purported Interconnection Agreement;
- "The unprecedent situation was created by Tele Fácil's conduct and the risks it decided to assume to bet for a business opportunity"; and
- "It is not for this Tribunal to second-guess the decisions made by domestic courts or to act as a court of appeals. Claimant's allegations do not evidence a serious flaw or malice in the application of the law but simply a disagreement on the reasoning."

With respect to costs, the Claimant's arbitration costs, including legal fees and expenses, totalled just over US$6.4 million. By contrast, Mexico's total arbitration costs were just over $US2.5 million. The Tribunal ordered that the Claimant pay Mexico over $US2 million in costs.

The Tereposky & DeRose defence team was composed of Partners Jennifer Radford and Vince DeRose, Senior Counsel Cameron Mowatt, Economist Alejandro Barragán, and Mexican Legal Counsel Ximena Iturriaga.

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International Trade

2. CANADA'S IMPLEMENTATION OF THE REGULATORY INFRASTRUCTURE FOR THE NEW NORTH AMERICAN FREE TRADE AGREEMENT (USMCA/CUSMA/T-MEC)

On July 1st, 2020, the new North American free trade agreement will enter into force. The new agreement is referred to as the "USMCA" in the United States (i.e., the *United States-Canada-Mexico Agreement*), the "CUSMA" in Canada (i.e., *Canada, United States and Mexico Agreement*), and the "T-MEC" in Mexico (i.e., *Tratado entre México, Estados Unidos y Canadá*).

In accordance with the *Protocol replacing the NAFTA with the USMCA* (which functions as described), the new agreement will supersede the *North American Free Trade Agreement* (NAFTA) upon entering into force (except to the extent that provisions in the new agreement refer back to provisions in the NAFTA).

Implementation of the provisions of the new agreement into domestic laws, regulations and administrative policies has been an ongoing process. For example, the Government of Canada published over twenty new regulations and regulatory amendments in the *Canada Gazette, Part II* (Volume 154, number 9) on 29 April 2020. These instruments serve to incorporate the CUSMA/USMCA/T-MEC into Canada's regulatory regimes while removing references to the NAFTA, effective July 1st.

More recently, the Uniform Regulations covering trade in goods under the new agreement were issued. The provisions of the Uniform Regulations elaborate upon the rights and obligations set forth in Chapters Four through Seven of the trade agreement, specifying the requirements and conditions that must be met for cross-border shipments of goods to receive preferential market access. For the most part, the Uniform Regulations are devoted to the interpretation, application and administration of the rules of origin, and the text helpfully includes extensive examples and explanations (*provided in italics*) to illustrate how the rules actually work in different factual scenarios.

For companies who currently participate in North American value chains under the NAFTA rules, examination of the Uniform Regulations is essential to understand what has changed and what has remained the same. There may be new opportunities to re-optimize value in production processes (e.g., under the new cumulation rules). Conversely, there may be new restrictions or thresholds on regional value content that need to be taken into account in order to ensure that shipments continue to qualify for preferential treatment. These assessments must be undertaken on a product-by-product basis because the rules apply differently to different goods and under different circumstances.

Tereposky & DeRose regularly provides advice on the interpretation, application, and implementation of international trade agreements. Should you have any questions regarding the CUSMA/USMCA/T-MEC or any other trade matter, we are at your disposal.

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3. FAREWELL TO THE NAFTA AND WELCOME TO THE USMCA / CUSMA /T-MEC

After more then twenty-five years, the highly successful North American Free Trade Agreement (NAFTA) will enter into retirement on July 1st, 2020, as it is replaced and superseded by the new regional trade agreement between Canada, Mexico, and the United States.

The NAFTA has been an important source of stability and opportunity for businesses throughout North America, establishing a system of rights, obligations and rules that have liberalized cross-border trade and investment in a predictable manner, reflecting the negotiated outcomes of its members. Although the NAFTA has not been without its challenges, including the adverse effects of supply chain consolidations as an integrated North American market emerged, it has generally enhanced the competitiveness and profitability of the stakeholders that have leveraged its benefits. It remains one of the earliest and most successful examples of a modern regional trade agreement.

This is by no means the end of an era. The NAFTA has established the very foundation of the new agreement, which is variously referred to as the "USMCA" in the United States, the "CUSMA" in Canada, and the "T-MEC" in Mexico.

That said, there are many new provisions and changes that will enter into force with the new agreement, and some of these differences — as well as how they will interact with one another — will not become fully apparent to stakeholders until they are encountered in practice. For all market participants, there are bound to be some interesting times ahead.

Tereposky & DeRose regularly provides advice on the interpretation, application, and implementation of international trade agreements. Should you have any questions regarding the CUSMA/USMCA/T-MEC or any other trade matter, we are at your disposal.

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