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Windstream v. Canada: How Regulatory Winds of Change Affected a Clean Energy Project

Article By:

Mary T. Hernandez

A recently-published NAFTA arbitration award in *Windstream Energy LLC v. Government of Canada* illustrates the perils of investing in clean energy projects in jurisdictions with ever evolving regulatory and policy frameworks. The case is also a good reminder of the importance of investing in foreign jurisdictions through vehicles incorporated in countries that have adequate investment-protection treaties with the host country, including access to international arbitration in the event of disputes.

Windstream Energy LLC, a U.S. company dedicated to the development of renewable energy, was awarded more than $20 million in compensation and $2.9 million in legal costs after a NAFTA tribunal found that Canada failed to provide Windstream fair and equitable treatment as required by NAFTA Article 1105(1). (Windstream had sought damages of $500 million approximately.) Notably, the tribunal determined that Article 1105(1) requires "fair and equitable treatment" consistent with the minimum standard of treatment under customary international law, and rejected the notion that breach of such standard can arise only from egregious conduct, as set forth in the 1926 *Neer* decision.

Background

The case involved an offshore wind electricity generation project in Ontario designed by Windstream under the Feed-in-Tariff Program (FIT Program) implemented by the Ontario Power Authority (OPA), a corporation established by the Government of Ontario and responsible for, *inter alia*, the procurement of new generation capacity through long-term power purchase agreements. To attract investors, the FIT Program established a 20-year fixed-premium price to be paid by OPA to producers of energy from renewable resources, including onshore and offshore wind, hydroelectric, solar, biogas, biomass, and landfill gas. The goal of the FIT Program was to help energy project developers secure financing for their projects. To that end, OPA developed so called FIT Contracts, which were long-term fixed-price contracts that provided standard terms and conditions applicable to all FIT projects.

In 2010, OPA offered Windstream a FIT Contract for its offshore wind energy project. The FIT Contract required Windstream to begin commercial operations by May 4, 2015 (the Milestone Date for Commercial Operation). Although the FIT Contract permitted delays due to *force majeure* events,

the contract could be unilaterally terminated by either party if those events delayed the project for more than two years beyond the Milestone Date for Commercial Operation.

In February 2011, the Government of Ontario announced a moratorium on offshore wind projects until further research on the potential environmental impact of those projects was completed and an adequate policy framework was developed. OPA recognized that the delays imposed on the Windstream project as a consequence of the moratorium constituted a valid *force majeure* event as of November 2010, when Windstream was notified that it could not carry out wind testing while the government's policy review was ongoing.

Windstream complained that the government's moratorium on offshore wind projects had rendered Windstream's project worthless and not financeable. According to Windstream, even if the moratorium was lifted, the project could no longer be built by the Milestone Date for Commercial Operation, exposing Windstream to the potential unilateral termination of the FIT Contract by OPA. Windstream further alleged that even if OPA were to waive its right unilaterally to terminate the contract, none of the strategic partners and banks would be willing to finance the project, given the legal uncertainty created by the moratorium, which appeared to be motivated by the impact these projects would have on the then-upcoming 2011 elections.

Canada denied that the moratorium was politically motivated and argued that the delay was needed to allow sufficient research to be completed for the government to develop an adequately informed policy framework. Canada also asserted that while OPA tried to accommodate Windstream in the context of the deferral (by offering a five-year extension of the Milestone Date for Commercial Operations), Windstream rejected those offers, and made unreasonable and unrealistic demands.

Windstream's Fair and Equitable Treatment Claim

Windstream contended, *inter alia*, that Canada breached Article 1105(1) of NAFTA by (i) imposing the moratorium on the development of offshore wind projects, which was in breach of its legitimate expectations, which were based on the representations and commitments Canada had made when it encouraged Windstream to invest in its project; and (ii) by failing to respect its promise to ensure that Windstream would not be penalized by the moratorium. Canada denied these allegations.

Canada contended that a breach of Article 1105(1) required evidence of egregious conduct, as set forth in the 1926 *Neer* decision by the Mexico-United States Claims Commission. Canada argued that, at most, the legitimate expectations of Windstream would only be one factor in assessing egregious behavior under customary international law. Canada further noted that the development of offshore wind projects was deferred to ensure that the regulatory framework would be backed by solid research.

The Tribunal's Analysis and Conclusions

The Tribunal observed that the parties had the burden of proving the content of the "minimum standard of treatment" through evidence of state practice and *opinio juris*. The Tribunal rejected Canada's suggestion that the 1926 *Neer* decision was direct evidence of state practice, noting that it did not deal with treatment of foreign investors. Because the parties failed to submit evidence of actual state practice and *opinio juris*, the Tribunal relied on "indirect evidence," including decisions of other NAFTA tribunals and relevant legal commentary, to determine the minimum standard of treatment.

The Tribunal observed that Article 1105(1) expressly requires "fair and equitable treatment," and that the Free Trade Commission of NAFTA interpreted "fair and equitable treatment" to mean only the "customary international law minimum standard of treatment." Accordingly, the Tribunal observed, the treatment required under Article 1105(1) is "fair and equitable treatment" consistent with the minimum standard of treatment under customary international law. The Tribunal further stated that the determination of whether Canada's conduct was unfair or inequitable under the customary international law minimum standard of treatment had to be determined based on the facts of the case, not in the abstract.

The Tribunal found that the government of Ontario's moratorium on offshore wind development was not, in itself, wrongful, because, *inter alia*, the decision was driven by a genuine policy concern.

But the Tribunal found reproachable, however, that, following the moratorium, the government did little to address the scientific uncertainty surrounding offshore wind projects that it had relied upon as the main publicly-cited reason for the moratorium. Many of the research projects that the government planned to conduct did not go forward and, during the arbitration proceeding, counsel for Canada confirmed that the government did not plan to conduct any further studies. More importantly, according to the Tribunal, Canada did little to address the "legal and contractual limbo" in which Windstream found itself after the moratorium. The Tribunal also found that the government failed either promptly to complete the scientific research required to develop its policy framework or exclude offshore wind as a source of renewable energy and terminate Windstream's FIT Contract. The Tribunal concluded that the government's failure to take the necessary measures within a reasonable time after the imposition of the moratorium to bring clarity to the regulatory uncertainty pertaining to the Windstream project constituted a breach of Article 1105(1) of NAFTA.

The decision of the *Windstream v. Canada* tribunal is consistent with other tribunals that have recognized that the minimum standard of treatment under customary international law has evolved towards granting greater protection to investors. *See Bilcon v. Canada*, PCA Case — NAFTA/UNCITRAL No. 2009-04, Award on Jurisdiction and Liability, paras. 435, 438 (17 March 2015). In *Merrill & Ring*, for instance, the tribunal concluded that "today's minimum standard is broader than that defined in the *Neer* case and its progeny" and "the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness." Merrill & Ring Forestry L.P. v. Canada, NAFTA/UNCITRAL, Award, paras. 210, 213 (31 March 2010). And in *ADF v. United States*, the tribunal also noted the dynamic nature of the minimum standard of treatment under customary international law, which is "constantly in a process of development," and rejected the view that "the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors." ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, paras. 179-181 (9 January 2003).

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