DOI:10.1017/ilm.2023.49

BRIEFLY NOTED

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Judicial and Similar Proceedings

1. Canada – Dairy Tariff Rate Quota Allocation Measures (C.P.T.P.P. Panel – September 5, 2023)

<https://www.worldtradelaw.net/document.php?id=fta/panel/canada-dairytrq(cptpp).pdf>

On September 5, 2023, the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership Panel (CPTPP Panel or the Panel) issued its first decision. The case was initiated in May 2022 by New Zealand which claimed that Canada's system for the administration of its tariff rate quotas on dairy projects is inconsistent with Canada's obligations under the Partnership Agreement. After consultations with Canada failed, New Zealand requested that a panel under Article 28.7 of the Agreement be established to examine the issue. There was a dispute about the role to be played by a prior decision of the US-Mexico-Canada Agreement (USMCA) Panel on similar issues. New Zealand felt that the USMCA Panel decision was "highly pertinent" because of the similarities between relevant provisions in the two agreements, but Canada disagreed, arguing that not only is the USMCA decision irrelevant but that its interpretation of the relevant provisions was incorrect. Australia, which intervened as a third party participant, agreed with New Zealand, pointing to the need to ensure consistent decisions concerning what it deemed were identical provisions in the two agreements. Japan, another third party participant, suggested that the panel ensure that its decision was made in reliance on Articles 31 and 32 of the Vienna Convention on the Law of Treaties (concerning rules of interpretation).

Though the Panel "took note" of the USMCA panel decision and said that it was "informative," it found that decisions from the Panel are not binding on the CPTPP Panel and reiterated that none of the provisions in the USMCA have been incorporated into the CPTPP. Therefore, the CPTPP Panel conducted its own assessment of the claims. Ultimately, the Panel found Canada's system to be inconsistent with its obligation under the CPTPP Agreement.

2. Held v. Montana (1st Judicial District Court Lewis & Clark County – August 14, 2023)

<https://dailymontanan.com/wp-content/uploads/2023/08/Findings-of-Fact-Conclusions-of-Law-and-Order.pdf>

On August 14, 2023, the Montana First Judicial District Court invalidated a state law based on the right to a clean and healthful environment in the Montana Constitution. *Held v. Montana* addresses the Montana Environmental Policy Act (MEPA) and its prohibition on considering GHG emissions in the context of energy and mining project reviews. According to the Court, the prohibition violates the Montana Constitution because it "categorically limits" what the government can consider in order to safeguard the environment. Moreover, the state failed to produce "evidence of a compelling governmental interest" in the MEPA prohibition. The judgment will, at least temporarily, allow states to once again consider the impact of GHG emissions and climate change when reviewing energy and mining projects. However, the state of Montana has indicated that it intends to appeal the judgment.

3. Fuld v. Palestine Liberation Organization and Waldman v. Palestine Liberation Organization (U.S. Court of Appeals for the Second Circuit – September 8, 2023)

Fuld: <https://ww3.ca2.uscourts.gov/decisions/isysquery/c37ffe7a-b8f4-4dd7-b16a-24c416a34eb4/33/doc/22-76_opn.pdf#xml=https://ww3.ca2.uscourts.gov/decisions/isysquery/c37ffe7a-b8f4-4dd7-b16a-24c416a34eb4/33/hilite/>

Waldman: <https://ww3.ca2.uscourts.gov/decisions/isysquery/c37ffe7a-b8f4-4dd7-b16a-24c416a34eb4/34/doc/15-3135_opn_2.pdf#xml=https://ww3.ca2.uscourts.gov/decisions/isysquery/c37ffe7a-b8f4-4dd7-b16a-24c416a34eb4/34/hilite/>

On September 8, 2023, the Second Circuit Court of Appeals dismissed claims brought by U.S. nationals against the Palestinian Liberation Organization (PLO) under the Anti-Terrorism Act (ATA) and the

Promoting Security and Justice for Victims of Terrorism Act (PSJVTA). As reported by Maggie Gardner in *Transnational Litigation Blog*, the Second Circuit's decisions in *Fuld v. Palestine Liberation Organization* and *Waldman v. Palestine Liberation Organization*, declared the PSJVTA unconstitutional "because it asserts personal jurisdiction based on activity that cannot be understood as consent to jurisdiction." The PSJVTA attempted to create consent to personal jurisdiction for anyone sending money to any "individual . . . imprisoned for committing an act of terrorism that injured or killed a U.S. national or to the family of an individual who died while committing" such an act.

Waldman had followed a long path before the Second Circuit's final decision this month. As relayed by Gardner, the suit initially arose in 2004 under the ATA and went to trial in 2015, where the Plaintiffs were successful. On appeal, the Court of Appeals decided for the defendants finding a lack of general and specific personal jurisdiction. The Court found no general jurisdiction because "the PLO and the Palestinian National Authority (PA) are not 'at home' in the United States, but 'in Palestine, where these entities are headquartered and from where they are directed'" (*Waldman II* quoting *Waldman I*). Specific jurisdiction was lacking "given the absence of any 'substantial connection' between their 'suit-related conduct – their role in the six terror attacks at issue – [and] . . . the forum.'" (*Waldman II* citing *Walden v. Fiore*). The Plaintiffs filed a petition for certiorari with the Supreme Court which it granted before remanding the case to the Second Circuit, which in turn remanded back to the District Court (S.D.N.Y.). The District Court denied the Plaintiff's claims and declared that the PSJVTA "does not establish constitutionally valid personal jurisdiction over the defendants."

Fuld commenced in April of 2020 following the passage of the PSJVTA and the Supreme Court's remanding of *Waldman II. Fuld's* only basis for jurisdiction was the PSJVTA, and the PLO and PA moved to dismiss for lack of personal jurisdiction and failure to state a claim. The District Court of the S.D.N.Y agreed, writing that "the predicate activities under the PSJVTA do not 'even remotely signal approval or acceptance of,' or an 'intent to submit to,' jurisdiction in the United States . . .,' and the consent jurisdiction allegedly allowed by the PSJVT "is not 'consistent with the requirements of due process . . . .'"

The decisions of the District Court in *Waldman II* and *Fuld* were upheld by the Second Circuit, with the Appeals Court deciding *Fuld* first as a basis for its decision in *Waldman II*. Discussing the Second Circuit's reasoning, Gardner noted that the Court had "[drawn] heavily from *Insurance Corp. of Ireland v. Compagnie des Bauxites* (1982)" to describe "ways that consent to suit can be established." Consent can be established via contracts, stipulations entered into by a defendant, arbitration agreements, voluntary use of certain state procedures, and through other avenues. According to the Second Circuit in *Fuld*, consent can only be established when the defendant has "accepted some in-forum benefit in return for an agreement to be amenable to suit in the United States." The PLO and PA never could have consented to personal jurisdiction under the PSJVTA because "the statute does not offer *any* in-forum benefit, right, or privilege . . . ." Moreover, "Congress cannot, by legislative fiat, simply 'deem' activities to be 'consent' when the activities themselves cannot plausibly be construed as such." Despite the PSJVTA's attempts to create consent to personal jurisdiction through the sending of money to a certain class of individuals, that activity "cannot reasonably be understood as signifying the defendants' consent [and] the statute does not effect a valid waiver of the defendants' due process protection against the 'coercive power' of a foreign forum's courts."

https://doi.org/10.1017/ilm.2023.49 Published online by Cambridge University Press