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Preserving NAFTA Legacy Rights Requires Immediate Action

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Investors from the United States, Mexico or Canada in the territory of one of the other two investment hosting states, who may have been adversely affected by the host government's measures, need to act by the end of March 2023 to preserve NAFTA rights. If the investment was made between January 1, 1994 and July 1, 2020, and qualifies under the 1994 North American Free Trade Agreement (NAFTA), an investor can avail itself of the right to arbitration of so-called "legacy claims". However, the sunset provision in NAFTA's successor treaty found in Annex 14-C of the United States-Mexico-Canada Agreement (USMCA) is about to expire.

July 1, 2023, three years after what is considered the date of termination of NAFTA and, simultaneously, three years from the entry into force of the USMCA, is not the critical date. As a prerequisite to pursuing legacy claims, an investor must file a notice of intention to submit such claim at least 90 days before initiating arbitration, which is on or before Sunday, April 2, 2023. The last working day preceding 90 days before July 1, 2023, is March 31, 2023.

This timeline is especially relevant for US and Mexican investors in Canada and Canadian investors in the United States and Mexico. Canada has not signed Annex 14-E of the USMCA, which addresses investor-State dispute settlement. Past July 1, 2023, absent other agreements to arbitrate, US and Mexican investors in Canada and Canadian investors in Mexico and the United States, no longer have access to investor-state arbitration under the USMCA.

For US-Mexican cross-border investments, the urgency may not be as dire for all other NAFTA investors. But that would require the respective investments to be deemed "covered government contracts" in "covered sectors". Those qualifying enjoy a privileged investment protection regime, both in terms of the substantive claims they may bring as well as the procedural requirements needed to commence arbitration beyond the above-mentioned deadline.

"Covered sectors" include: (i) oil and natural gas, (ii) power generation, (iii) telecommunications, (iv) transportation, and (v) infrastructure.[1] In addition to operating in a covered sector, an investor must have a covered government contract with a national authority of the other party to fully benefit from the substantive protections available under the "new NAFTA".[2] Of note, the USMCA defines "national authority" as an authority at the "central level of government",[3] which is then further defined as the federal level of governments for both the United States and Mexico.[4]

For the "privileged" investors, the more robust substantive rights include a minimum standard of treatment provided by the host state, protection against indirect expropriation and transfer, and exemptions from the prerequisite of court proceedings prior to initiating investment arbitration. In the future, all other US/Mexican investors in the territory of the other state, respectively, may only arbitrate a limited number of claims under the USMCA, based on a violation of one or more of the following standards of investment protection: (1) national treatment, (2) most-favored nation treatment, or (3) direct expropriation, and only after having first defended their claims in local courts as a prerequisite to commencing arbitration.[5] Absent a covered government contract for an investment made in a covered sector, US-Mexican investors will not be able to pursue claims for the two most-frequent treaty violations, namely, breach of fair and equitable treatment and indirect expropriation.

Going forward, US, Canadian and Mexican investors may also benefit from their respective government's support by means of state-to-state dispute resolution under Chapter 31 of the USMCA. In January 2023, the US established a dispute settlement panel regarding Canada's dairy tariff-rate quota (TRQ) allocation measures and in July 2022, the US requested USMCA dispute settlement consultations with Mexico concerning certain measures by Mexico that undermine American companies and US-produced energy in favor of Mexico's state-owned electrical utility, CFE, and state-owned oil and gas company, PEMEX.

At all times, investors could also consider (re)structuring their investment to access other international investment agreements and protections available therein. For Canadian-Mexican investments in particular, Articles 9.4 to 9.8 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the CPTPP, provide for an investor-state arbitration regime.

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[1] USMCA, Annex 14-E: Mexico-United States Investment Disputes Related to Covered Government Contracts. Paragraph 6(b) defines "covered sectors".

[2] USMCA, Annex 14-E, Section 6(a).

[3] USMCA, Annex 14-E, Section 6(c).

[4] USMCA, Chapter 1, Section B.

[5] USMCA, Article 14.D.5, Section 1(a).