The New NAFTA: Scaled-Back Arbitration in the USMCA

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In December 2018, the United States, Mexico, and Canada entered into the United States-Mexico-Canada Agreement (USMCA), a new multilateral investment agreement to replace the 1994 North America Free Trade Agreement (NAFTA). This article summarizes the differences between the investor-state dispute settlement (ISDS) provisions provided in Chapter 11 of NAFTA and those covered in Chapter 14 of the USMCA from the perspective of the United States, Mexico and Canada. This article covers when an investor can assert claims under the USMCA (including NAFTA claims for legacy investments), what kind of claims can be brought, and what rules govern in USMCA arbitrations. The authors of this article conclude that the USMCA provides diluted ISDS provisions compared to NAFTA's Chapter 11.

1 INTRODUCTION

In December 2018, the United States, Mexico, and Canada entered a new multilateral investment agreement – the United States-Mexico-Canada Agreement (USMCA).[1] Among other things, the USMCA will 'REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement' that will 'ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning.'[2]

As with the 1994 North America Free Trade Agreement (NAFTA) and other bilateral investment treaties (BITs), part of the predictable legal framework the USMCA establishes investor–state dispute settlement (ISDS) provisions in Chapter 14. Those provisions, however, are materially different in many ways

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1 United States–Mexico–Canada Agreement (30 Nov. 2018), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between. (accessed 8 Aug. 2019)

2 USMCA, Preamble.

Garcia-Barragan, Daniel; Mitretodis, Alexandra & Tuck, Andrew. 'The New NAFTA: Scaled-Back Arbitration in the USMCA'. *Journal of International Arbitration* 36, no. 6 (2019): 739–754.

from the provisions contained in Chapter 11 of NAFTA. Each country has signed the USMCA, however, each country must now follow its own domestic procedures to ratify the USMCA before these new provisions take effect. Until then, the original NAFTA continues to govern trade relations among the parties. This article summarizes the new and to a large extent diluted ISDS provisions in the USMCA.

2 BACKGROUND

Arbitration is a critical tool supporting foreign direct investment – that is, a party in one country investing in business in another country. It provides a mechanism for a foreign investor to seek redress from an international arbitral tribunal against a host country that has mistreated the investor in covered ways, for example, by arbitrary or discriminatory treatment, or by expropriating the investor's property. These arbitrations typically arise from ISDS provisions commonly found in bilateral and multilateral investment treaties between countries. NAFTA is one such treaty, as is the USMCA. Studies have shown mixed results as to whether ISDS provisions in treaties promote cross-border investment in the signatory countries.[3] However, ISDS provisions may be particularly helpful 'when they can substitute for weak domestic legal and regulatory institutions in the host country.'[4]

In 1994, the United States, Mexico, and Canada entered NAFTA, which included ISDS provisions in Chapter 11. Chapter 11 provided protection for signatory-country investors making investments in other signatory countries, for example:

- the host must treat the foreign investor and its investments with 'treatment no less favorable than that it accords, in like circumstances, to its own investors' (Article 1102) or 'to investors of any other [country]' (Article 1103);
- the host must provide investments the better of the treatment accorded to its own investors or to the investors of any other country (Article 1104);
- the host must provide investments 'fair and equitable treatment and full protection and security' (Article 1105);
- the host is prohibited from imposing certain trade distorting performance requirements such as requiring a given level of domestic content (Article 1106);

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[3] Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, Y.B. Int'l Inv. L. & Pol'y 2009-2010 539, 544 (2010).

[4] Matthias Busse, Jens Königer & Peter Nunnenkamp, *FDI Promotion Through Bilateral Investment Treaties: More than a Bit?*, 146 Rev. World Econ. 147 (2010) as cited in Lindsay Oldenski, *What Do the Data Say About the Relationship Between Investor-State Dispute Settlement Provisions and FDI?* (2015), https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state (accessed 8 Aug. 2019).

- the host is prohibited from requiring a foreign enterprise to appoint individuals of a particular nationality to senior management positions. However, the host may require that the majority of the board of directors be of a particular nationality or resident of the host country, subject to certain conditions (Article 1107);
- the host has the ability to exclude certain measures from certain obligations in Chapter 11, as well as the ability to maintain public policy flexibility in certain areas (Article 1108);
- the host is required to permit all transfers, relating to an investment of a foreign investor, freely and without delay and in a freely convertible currency (Article 1109);
- the host must not 'directly or indirectly nationalize or expropriate an investment' or 'take a measure tantamount to nationalization or expropriation,' with various exceptions requiring fair-market-value compensation (Article 1110).

NAFTA did not require that any investor exhaust remedies in the local court system before bringing the arbitration claim; instead, the investor needed only to waive its rights to proceed in any other administrative tribunal or court (Article 1121). Very few BITs and treaties with investment provisions require the exhaustion of local remedies. However, a few treaties that do require the exhaustion of local remedies include the 1976 Germany-Israel BIT, the 1981 Romania-Sri Lanka BIT and the 2007 Albania-Lithuania BIT.[5]

Against this backdrop, the parties negotiated the USMCA. Its provisions differ in significant respects from NAFTA, including which countries are covered (for reasons discussed below, Canada is not party to the USMCA's ISDS provisions), what pre-suit proceedings and conditions apply, what claims are available, and how the proceedings are conducted pursuant to the treaties' miscellaneous procedural features.

3 WHICH COUNTRIES' ARBITRATIONS DOES THE USMCA COVER?

Unlike NAFTA, under the USMCA investor–state arbitration is limited to the United States and Mexico. Article 14.2(4) provides that an investor may only submit a claim to arbitration under Chapter 14 as provided for in the USMCA's annexes, and Annex 14-D addresses investment disputes for only the United States and

5 Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law* 7 (2017), www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf (accessed 8 Aug. 2019).

Mexico. Accordingly, United States and Mexican investors will continue to have recourse to investor–state arbitration.

Canada, on the other hand, is not a party to Annex 14-D. Accordingly, Canadian investors in the United States and United States investors in Canada will no longer have the option to commence direct arbitration proceedings against the state in which they have invested. Other forms of potential recourse are discussed further below.

Why did Canada not join Annex 14-D? Possibly because Canada has had a bleak scorecard when it comes to success in investor-state arbitrations. Not only has Canada been subject to more investor-state claims under NAFTA Chapter 11 than either the United States or Mexico, but Canada has lost eight such cases. In contrast, the United States has never lost a NAFTA Chapter 11 case. Further, Canadian investors who have brought claims against foreign states have also had a low success rate. When balancing how much Canada has paid to foreign investors in comparison to how much Canadians have received against other states, it is not surprising that Canada has been looking to reform or withdraw from Chapter 11 of NAFTA for some time.

Canada's withdrawal from ISDS provisions under the USMCA also reflects the broader global push to reform ISDS.[6] These trends are also present in the Comprehensive Economic and Trade Agreement (CETA), concluded between Canada, the European Union and its Member States in 2016. CETA makes a number of reforms, the most significant being a new adjudication system. In most treaties, ISDS are generally heard by an arbitral tribunal that is appointed on a case-by-case basis. CETA reforms this process by creating a standing investment court with more stringent qualification requirements for tribunal members than found in most treaties. CETA tribunal members are required to possess qualifications for appointment to judicial office in their respective countries and must have demonstrated expertise in public international law. During the negotiation of the USMCA, Canada had proposed the ISDS framework in CETA be used as a starting point.[7] However, Canadian negotiators were unable to achieve this and decision-makers likely concluded the costs of the Annex 14-D simply outweighed the benefits.

4 WHEN CAN AN INVESTOR ASSERT CLAIMS?

4.1 NAFTA claims for legacy investments

Annex 14-C of the USMCA provides that arbitration remains available for legacy investments in accordance with NAFTA Chapter 11. The USMCA provides that

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[6] Graham Coop & Gunjan Sharma, *Chapter IV: Investment Arbitration, Procedural Innovations to ISDS in Recent Trade and Investment Treaties: A Comparison of the USMCA and CETA* 467–68 (C. Clausegger et al. eds 2019), Austria Y.B. Int. Arb..

[7] *Ibid.*, at 474.

'legacy investment[s]' are those established or acquired between 1 January 1994 and the termination of NAFTA and in existence at the time the USMCA comes into force. Investors from the United States, Mexico, and Canada may still use NAFTA Chapter 11 for these legacy investments so long as they commence an arbitration proceeding against a host state within three years of NAFTA's termination. These claims will remain subject to the three-year limitation period, a six-month 'cooling off' period and a ninety-day notice period provided for in NAFTA Chapter 11.

As an example, the administration of Mexican President Andrés Manuel López Obrador recently terminated the New International Airport of Mexico City (Nuevo Aeropuerto Internacional de la Ciudad de Mexico) – a project with MXN 6 billion (approximately USD 300 million) in secured bonds for financing. If the bondholders acquired these secured bonds before the date of entry into force of the USMCA the secured bonds would be considered legacy investments. Therefore, as long as the investors commence a claim within three years of NAFTA's termination they will be subject to the proceedings set forth under NAFTA Chapter 11 as opposed to the USMCA.

4.2 Pre-suit proceedings

In a similar fashion as NAFTA Article 1118, the USMCA provides that the parties should initially seek to resolve the dispute through consultation and negotiation. The USMCA goes a step further and requires that such parties may refer the dispute to non-binding, third-party procedures such as good offices, conciliation, or mediation.

Furthermore, and also mirroring a similar provision contained in NAFTA Article 1119, the USMCA provides that a party seeking to submit a claim to arbitration under Annex 14-D shall deliver the respondent a written notice of its intention to submit a dispute to arbitration, which is known as the 'cooling off' period. The cooling off period allows parties to have additional time to attempt settlement before commencing arbitration. The potential plaintiff must submit the notice of intent at least ninety days before submitting the claim to arbitration, which – in turn – allows parties to further attempt to negotiate or carry out any of the third-party procedures set forth in USMCA Article 14.D.2.

One of the most significant changes in the USMCA's ISDS provisions is that Article 5 of Annex 14-D requires claimants to initiate and maintain domestic litigation proceedings for thirty months (or to a final decision) before being able to initiate arbitration, with a limited exception if domestic recourse would be obviously futile.

The provisions set forth under Article 5 of Annex 14-D of the USMCA give rise to several questions that will be interpreted and decided by national courts and USMCA tribunals in the near future, such as overlap of decision on the same matters and double recovery issues between decisions rendered by national courts and investment tribunals, as well as the coexistence of the 'fork in the road' provisions with the requirement to pursue domestic litigation.

The first issue that arises from Article 5 of Annex 14-D has to do with a potential scenario under which a plaintiff, in accordance with Article 5, obtains a favourable judgment from the domestic courts of last resort and further pursues an arbitration. In a majority of investor–state cases, the jurisdiction of these arbitral tribunals is not limited to the violation of ISDS substantive provisions or provisions of international law but also extends to contract claims. Furthermore, umbrella clauses also provide investment tribunals the opportunity to decide purely contractual claims within the arbitration proceeding which, in turn, may have been decided by the domestic courts.

In the case of the USMCA, Annex 14-E provides for a restricted version of an umbrella clause that incorporates certain 'Covered Government Contracts,'[8] termination of which contrary to the protections set forth under Annex 14 may give rise to arbitration under the rules of Annex 14-D. NAFTA did not contain an umbrella clause of any kind, and thus it did not present the problem of parallel proceedings, *lis pendens*, and res judicata.

By requiring local courts to render a judgment before arbitration can move forward, the USMCA is potentially enabling an overlap of decisions on the same matters and which may be decided under the same legal basis (such as purely contractual claims). Furthermore, if tribunals were to interpret that a plaintiff is not entitled to pursue arbitration (or limited only to a 'denial of justice' claim) if it obtained a judgment before the local courts, such plaintiff could be prevented from obtaining full justice under the applicable international law standards. The latter is not a problem exclusive to the USMCA, as parallel proceedings has been a central issue in a relevant number of investor-state arbitration proceedings,[9] and which does not seem to have a uniform solution to date.

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8 The USMCA defines a 'Covered Government Contract' as a written agreement, on which the covered investment or investor relies in establishing or acquitting a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector. Furthermore, 'Covered Sector' strictly includes activities with respect to oil and natural gas, supply of power generation, telecommunications, and transportation services to the public, as well as ownership or management or railroads, railways, bridges or canals, that are not for the exclusive or predominant use and benefit of the government.

9 *See CME v. Czech Republic*, UNCITRAL, Final Award of 14 Mar. 2003, 9 ICSID Reports (2006); *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Award of 16 Aug. 2017; *Helnan v. Egypt*, ICSID Case No. 05/19, Award of 3 July 2008, among others.

Furthermore, if such plaintiff obtained a favourable decision from domestic courts, such judgment could be taken into account by the arbitral tribunal when allocating damages, or even deciding the merits on certain acts considered to be a violation of domestic law. In this vein, certain arbitral tribunals have considered that domestic decisions should be given a binding effect in the arbitration proceeding based on res judicata, when considered 'an authoritative expression of national law,'[10] or 'determined strictly by considerations pertaining to contractual issues.'[11]

In addition to these issues, Appendix 3 to Annex 14-D provides that a U.S. investor may not submit an arbitration claim against Mexico, to the extent that such claim for the breach of USMCA obligations has been submitted before a court or administrative tribunal of Mexico. The latter constitutes a one-of-a-kind asymmetrical fork in the road provision that aims to prevent parallel claims by U.S. investors taking litigation in Mexican courts, as well as before international arbitration tribunals, arising out of the same conduct and based under the same legal provisions.

In other words, while Article 5 of Annex 14-D requires as a condition precedent to arbitration that the investor obtain a judgment before domestic courts, or litigates the matter for thirty months, Appendix 3 establishes a fork-in-the-road provision that prevents a U.S. investor from moving forward with such arbitration if the USMCA claim is heard by Mexican courts or administrative tribunals.

While Mexican judicial courts and administrative tribunals do not have jurisdiction to decide on a breach of USMCA obligations, it remains to be seen how tribunals will interpret Appendix 3 when a similar or identical protection is provided for under Mexican domestic law, as well as the USMCA (such as expropriation protections), to determine if the plaintiff alleged a breach of the international treaty in domestic proceedings and thus would be prevented from initiating an arbitration.

In those cases where the investor has not yet obtained a final judgment from domestic courts, the USMCA requires that the notice of arbitration be accompanied by a written waiver of any right to initiate or continue a dispute settlement procedure before a local court or administrative tribunal that challenges a measure that may constitute a breach of the protections contained in Article 14.D.3. While this provision avoids the risk of double recovery or contradicting judgments between domestic and international proceedings, it also raises the question of

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10 *Gami Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award of 15 Nov. 2004, para. 41.

11 *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award of 3 July 2008, para. 107.

strictly domestic claims that arise from the state's 'measure alleged to constitute a breach referred to in Article 14.D.3' of the USMCA.

In other words, while waiver provisions (as a mechanism for regulating parallel proceedings) generally cover situations in which the sources of the claims asserted in parallel proceedings are not identical,[12] Article 14.D.5 of the USMCA requires the waiver to encompass any pending or not yet existent proceeding related to any and all state measures, which may constitute a breach of the treaty's protections and, thus, truly operates as a fork-in-the-road clause in connection with the state action.

Under the prevailing decisions of ISDS arbitral tribunals, 'the loss of access to international arbitration applies only if the same dispute has been previously submitted by the same party to the domestic courts'[13] and, thus, to the extent that the dispute settlement proceeding referred to in Article 14.D.5 revolves around strictly domestic actions, such waiver could be considered as ineffective and not prevent an arbitral tribunal from assuming jurisdiction from treaty claims arising out of a state measure. As decided in *CMS Gas Transmission v. Argentina*, 'as contractual claims are different from treaty claims, even if there has been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration.'[14]

Notwithstanding these pre-suit requirements, Article 14.D.5 provides an exception for interim injunctive relief that does not involve the payment of monetary damages. A party can seek such relief in claims arising out of Article 14.D.3.1 and when its sole purpose is preserving the investor's rights and interests during the pendency of the arbitration.

Notably, a special pre-suit requirement arises when a US or Mexican claimant asserts an expropriation claim arising from a taxation measure. While Chapter 32 expressly establishes that the expropriation and compensation protection contemplated in Article 14.8 does in fact apply to taxation measures, it requires a plaintiff to refer such issue to the 'designated authorities' of such plaintiff, as well as of the respondent state at the time the notice of intent is filed.[15] In this vein, to the extent that such authorities do not consider the issue, or fail to consider that it is not an expropriation within six months from the referral, the investor may submit the claim to investor–state arbitration under the proceeding set forth in Annex 14.D.

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12 *See* Hanno Wehland, *The Regulation of Parallel Proceedings in Investor-State Disputes*, 31 ICSID Rev. 576 (1 Oct. 2016).

13 James Crawford, *State Responsibility* 645 (Cambridge University Press 2013).

14 *CMS Gas Transmission Co. v. Argentina*, Decision on Jurisdiction, 7 ICSID Reports 492, 511 (2003).

15 In the case of Mexico, 'designated authorities' mean the Deputy Minister of Revenue of the Ministry of Finance and Public Credit (Subsecretario de Ingresos), while for the United States it is the Assistant Secretary of the Treasury.

It is yet to be seen how arbitral tribunals interpret these decisions from authorities regarding the existence of expropriation arising from taxation measures, especially when the claimant did not have an opportunity to present its case before any of those authorities and the decision-maker does not belong to an independent power such as the judiciary but instead is a member of the executive branch.

Another precedent condition provided for under the USMCA to submit a claim to arbitration refers to the existing time period since the investor acquired, or should have first acquired, knowledge of the breach of any of the protections contemplated in Chapter 14 of the instrument, as well as knowledge that such investor had incurred loss or damages. This provision mirrors the one set forth in NAFTA Article 1116 and encompasses the jurisdiction *ratione temporis* requirement for arbitral tribunals.

The USMCA extended this time-limitation period from three to four years, which may be a response to the strict interpretation to which it had mostly been subject by NAFTA tribunals, who disregarded breaches before the cut-off date, and determined their admissibility only to support other timely claims.

5 WHAT CLAIMS CAN BE BROUGHT?

Under NAFTA experience, tribunals interpreted that the three-year limitation period to make a claim commenced from the moment the claimant knew it had suffered a harm and notwithstanding it failed to know exactly the extent of its harm, or its quantification.[16] Furthermore, in connection with continuous breaches to NAFTA protections, while each new breach renewed the three-year limitation period to assert a claim, tribunals also found that recovery was limited to the harm suffered during the past three years from the moment such claim was made.[17]

5.1 General investments

To qualify for the USMCA's substantive protections, the claimant must first establish the existence of a 'covered investment' – defined in Article 14.1 as an investment in one Party's territory by an investor of another Party, where 'investment' includes 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.'

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[16] *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award of 11 Oct. 2001, para. 87.

[17] *United Parcel Service of America Inc. (UPS) v. Government of Canada*, UNCITRAL Arbitration Rules, Award on the Merits of 24 May 2007.

Once a covered investment is established, the substantive protections provided in Article 14 of the USMCA are largely consistent with the protections in NAFTA, described above, including that the host must accord the foreign investor and its investments 'treatment no less favorable than that it accords, in like circumstances, to its own investors' (Article 14.4) or 'to investors of any other [country]' (Article 14.5). The host must provide investments 'fair and equitable treatment and full protection and security' (Article 14.6). And the host must not 'expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation)' with various exceptions requiring fair-market-value compensation (Article 14.8).

5.2 Government contracts

As opposed to the treaty protection structure provided under NAFTA Chapter 11, the USMCA contains an Annex 14-E related to Mexico–United States investments arising out of government contracts. This annex provides specific protections for claimants who are a 'party to a covered government contract' or 'engaged in activities in the same covered sector in the territory as an enterprise of the respondent that the claimant owns or controls directly or indirectly and that is a party to a covered government contract.'

It should be noted that, as opposed to the general regime of investment disputes, those related to covered government contracts are not subject to the same restrictions, which allows investors to benefit from a broader range of protections such as indirect expropriation and fair and equitable treatment. Furthermore, protected investors considered parties to a covered government contract shall only be subject to a six-month cooling-off period, without the need to resort to domestic courts. In other words, claims arising out of certain government contracts will not be subject to the substantive limitations set forth by the USMCA in connection with the protections available for investors.

The sectors included under Annex 14-E for such government contracts are:

(1) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale;
(2) the supply of power generation services to the public on behalf of an Annex Party;
(3) the supply of telecommunications services to the public on behalf of an Annex Party;
(4) the supply of transportation services to the public on behalf of an Annex Party; or

(5) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party.

5.3 Canada, gone but not forgotten

As discussed, arbitration claims under Chapter 14, Annex 14-D are restricted to claims by investors from the United States and Mexico. Mexican investors in Canada and Canadian investors in Mexico still have recourse to investor–state arbitration provisions under the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP). The CPTPP is a new free trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Both Mexico and Canada have consented to investor–state arbitration in the CPTPP. The United States withdrew from the original Trans-Pacific Partnership (TPP) agreement in 2017. In late 2018, a sufficient number of countries, including Canada and Mexico, ratified the CPTPP for it to come into effect. Like the USMCA, the CPTPP contains language that is less investor-friendly.

Two forms of recourse remain for Canadian investors in the United States and U.S. investors in Canada. First, Canada remains a party to Chapter 31 of the USMCA. Chapter 31 replaced Chapter 20 of NAFTA and addresses state-to-state dispute resolution provisions. Canadian investors with a claim that falls under the scope of Chapter 31 can try and convince the Canadian government to commence a claim against the United States government. These types of claims could include governmental interference in violation of the treaty. Similarly, U.S. investors with a claim that falls under the scope of Chapter 31 can try and convince the United States government to commence a claim against the Canadian government. Chapter 31 applies to claims between the United States and Mexico as well.

Article 31.2 provides that the dispute settlement provisions of Chapter 31 apply in the following circumstances:

> (a) with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of [the USMCA];
> (b) when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of [the USMCA] or that another Party has otherwise failed to carry out an obligation of [the USMCA]; or
> (c) when a Party considers that a benefit it could reasonably have expected to accrue to it under Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Agriculture), Chapter 4 (Rules of Origin), Chapter 5 (Origin Procedures), Chapter 6 (Textile and Apparel Goods), Chapter 7 (Customs Administration and Trade Facilitation), Chapter 9 (Sanitary and Phytosanitary Measures), Chapter 11 (Technical Barriers to Trade), Chapter 13 (Government Procurement), Chapter 15 (Cross-Border Trade in Services), or Chapter 20 (Intellectual Property Rights), is being nullified or

> impaired as a result of the application of a measure of another Party that is not inconsistent with [the USMCA].

Accordingly, it appears that a claim against Canada by either a U.S. or Mexican investor under Chapter 14 cannot be brought using Chapter 31. Similarly, a claim against the United States or Mexico by a Canadian investor under Chapter 14 cannot be brought using Chapter 31.

Second, Canadian and U.S. investors with a claim that substantive investment rights were breached can still commence a claim in domestic courts.

It remains to be seen whether U.S. and Mexican investors in Canada will be able to bring private claims against the government of Canada for breaches of the treaty in the domestic Canadian courts. This will largely depend on the implementing legislation in Canada.

6 WHAT RULES GOVERN IN USMCA ARBITRATIONS?

6.1 Claimant's choice: ICSID or UNCITRAL (or mutually agreed alternative)

Article 14.D.3 follows a much closer approach to the selection of the arbitration rules than the previous NAFTA text, allowing parties to summit the claim in accordance with (1) the ICSID (International Centre for Settlement of Investment Disputes) Convention, (2) the ICSID Additional Facility Rules, or (3) the UNCITRAL (United Nations Commission on International Trade Law) Rules. Notably, Mexico adopted the ICSID Convention by means of the execution of the instrument on 12 January 2018, an action ratified by the Mexican Senate on 26 April 2018, and deposited before the World Bank on 27 July 2018. Mexico-United States disputes therefore do not need to be conducted in accordance with the ICSID Additional Facility Rules, but instead may be referred to ICSID's Rules of Procedure for Arbitration Proceedings.

While the option to submit a claim under the UNCITRAL Arbitration Rules still stands under the USMCA, the USMCA also expanded the possibility to refer the dispute to any other arbitral institution, or arbitration rules, to the extent that the corresponding investor and state agree on the matter.

In a very similar fashion to NAFTA, the USMCA provides that, unless agreed otherwise by the disputing parties, the arbitral tribunal shall comprise three arbitrators, one appointed by each of the disputing parties and the third, who shall act as president, by agreement of the parties.

Furthermore, the Secretary-General of the treaty remains the appointing authority if the parties are unable to constitute the arbitral tribunal. As opposed to the ninety-day period provided for under NAFTA, Article 14.D.6 of the USMCA established that the Secretary-General, at the request of any of the parties, shall appoint any and all arbitrators not yet appointed within seventy-five days after a claim is submitted by arbitration. Furthermore, the USMCA does not allow the Secretary-General to appoint a presiding arbitrator that is a national of the state of the respondent or claimant without previous agreement of the parties.

Notably, the roster-based mechanism established under NAFTA for the appointment of the presiding arbitrator was eliminated under the USMCA and, thus, the Secretary-General has further discretion to make such appointment to the extent that it complies with the nationality criteria set forth under the USMCA, as well as the nationality restrictions provided by the ICSID Convention or the ICSID Additional Facility Rules, when applicable.

Also, the USMCA adopts the IBA Guidelines on Conflicts of Interest in International Arbitration, as well as any guidelines regarding direct or indirect conflict of interests adopted by Mexico or the United States, and its mandatory compliance by any arbitrator appointed under USMCA Annex 14-D. Furthermore, the mandatory conflict rules set forth by the USMCA prevent arbitrators from taking instructions from any organization or government in connection with the dispute and addresses the 'double hatting' dilemma in ISDS by prohibiting such arbitrators from acting as counsel, party-appointed experts, or witnesses in any pending NAFTA/USMCA cases for the duration of the proceeding. The adoption of the IBA Guidelines is consistent with continuing concerns expressed internationally that ISDS arbitration lacks sufficient mechanisms to ensure independence and impartiality of arbitrators.[18]

Another distinctive feature of the USMCA arbitration regime has to do with Article 14.D.13, which regulates the available awards and forms of relief. In principle, and following the standard form of relief provided for under ISDS provisions, Article 14.D.13 allows tribunals, separately or in combination, to award (1) monetary damages and applicable interest, and (2) restitution of property, allowing the respondent state to pay monetary damages and interest in lieu of such restitution. It should be noted that footnote 27 to Chapter 14 of the USMCA clearly limits any tribunal from ordering a respondent state to take any other

[18] For example, the UNCITRAL 'Draft Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session' notes at para. 70 that issues relating to an actual or apparent lack of independence or impartiality arise from 'repeat appointments, instances of conflict of interest and/or so-called issue conflicts, as well as the practice of individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings.' The Draft Report characterizes treaty adoption of soft-law standards like the IBA Guidelines as 'a useful step forward and it was said that those instruments guided the conduct of decision makers in many current ISDS proceedings.' *Ibid.*, para. 76. At the same time, the Draft Report states that 'more could be done particularly in the ISDS context including the preparation of a uniform code of ethics.' *Ibid.*

actions, such as taking or not taking actions, including amending, repealing, adopting, or implementing any law or regulation.

Furthermore, Article 14.D.13 clarifies or limits the criteria, as well as establishes the burden of proof under which a tribunal may order a respondent state to pay damages to an investor, i.e. 'satisfactory evidence … that is not inherently speculative.' And damages are expressly limited to those suffered by the claimant 'in its capacity as an investor of an Annex Party.'

This annex also includes a prohibition of punitive damages, which, while it is a new feature from NAFTA Chapter 11, is not uncommon in ISDS provisions. This may simplify the interpretation challenge arising from disputes between the United States and Mexico, each of which applies a radically different approach to punitive damages.

Following customary practice of ISDS arbitration, the USMCA provides arbitral tribunals with broad discretion to award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceeding, as well as the manner in which the costs and fees shall be paid.

The provisions regarding the award also expressly state that the binding force of an award is strictly limited to the disputing parties and the specific case.

The USMCA provides for timing limitations for the enforcement of awards, depending on the rules or institution under which the proceeding was conducted. Those timing limitations may be a result of the voluntary compliance that Mexico has had with NAFTA awards, and the fact that the United States has never lost a NAFTA case and thus may not be said to resist voluntary compliance of those awards.

In the case of an ICSID arbitration, an award may only be enforced after 120 days have elapsed after the day it was rendered and so long as no party has requested revision or annulment, or else 120 days after revision or annulment proceedings have been completed.

As for ICSID Additional Facility Rules, as well as UNCITRAL Arbitration Rules, a successful party must wait ninety days from the date the award was rendered and no disputing party must have commenced a proceeding to revise, set aside, or annul the award, or ninety days from the day a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

6.2 Miscellaneous

Annex 14-D also provides other miscellaneous procedural mechanisms for the conduct of arbitrations. Article 14.D.7(1) governs the place of arbitration and provides that the parties may agree to any such place or leave it to the tribunal to determine under the applicable rules – with a requirement that the place of arbitration be in a state that is party to the New York Convention.

The annex also provides opportunities for various non-parties to weigh in on a particular dispute. For instance, Article 14.D.7(2) provides rights for oral and written submissions by the 'non-disputing Annex Party,' i.e. the United States in an investment dispute involving Mexico, and Mexico in an investment dispute involving the United States. And similarly, Article 14.D.7(3) allows the tribunal to seek the assistance of amicus curiae.

Respondents also have avenues to pursue early, expedited relief on certain defenses. Under Article 14.D.7(4), 'a tribunal shall address and decide as a preliminary question' any objection that (1) 'as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made,' or (2) the claims are 'manifestly without legal merit.' If such an objection is made, the tribunal must 'suspend any proceedings on the merits' and set a schedule for deciding the objection. In addition, Article 14.D.7(5) provides that a respondent may request, within forty-five days of the tribunal being constituted, an expedited ruling on an objection to the tribunal's competence, including jurisdiction. Whether under Article 14.D.7(4) or Article 14.D.7(5), the tribunal has discretion to award costs and attorney's fees to the prevailing party under Article 14.D.7(6) before proceeding.

Lastly, the annex provides for notice and comment on the arbitral award by the parties. Article 14.D.7(12) directs the tribunal, at the request of any party, to submit a proposed decision or award to the parties and leave them sixty days for comment. The tribunal must then consider those comments within forty-five days of the end of the sixty-day comment period.

7 CONCLUSION

The USMCA's ISDS provisions represent a departure from NAFTA's Chapter 11. Various provisions appear to be poised to limit the use of arbitration – most notably the absence of Canada as a party to the ISDS Annex and the requirement that investors first submit claims to domestic courts. Whether that appearance becomes reality and how courts and tribunals will deal with other issues arising from the USMCA remain to be seen. As with NAFTA, it may take years before the dry provisions in the signed agreement become a framework through which parties can resolve disputes.