

# NAFTA's Closing Window: Investment Dispute Settlement Under the New United States-Mexico-Canada Agreement

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Last Sunday the governments of the United States, Mexico, and Canada announced the conclusion of the renegotiation of the North American Free Trade Agreement (NAFTA)<sup>1</sup> and released a draft of a replacement treaty with the preliminary title "United States-Mexico-Canada Agreement" (USMCA), which is still subject to non-substantive adjustments.<sup>2</sup> NAFTA remains in effect until this text is signed and internal constitutional requirements are fulfilled in each of the three countries, including congressional approval in the United States—which, some commentators argue, is still uncertain.<sup>3</sup> The deal is likely to be signed before November 30<sup>th</sup>—the last day of the term of current Mexican President Enrique Peña Nieto.<sup>4</sup>

The released USMCA is a detailed text with provisions impacting individual industries, as well as several across-the-board new chapters that deserve attention, including Digital Trade, Anticorruption, Environmental, Small and Medium Enterprises, and Labor. But one of the biggest changes is found in the investment dispute settlement mechanism, which has narrowed the scope of the remedies available under the existing NAFTA. The main changes, now located in chapter 14 of the USMCA draft,<sup>5</sup> are the following:

## **Exclusion of Canada from investment arbitration**

If the proposed text prevails, Canadian investors in the United States and United States investors in Canada will no longer be able to bring treaty-based claims before an arbitration panel against either country. While the USMCA contemplates that Canada and the United States will afford investors national treatment, most-favored-nation treatment, minimum standard of treatment obligations, and limits upon expropriation, investors will have to raise their claims before national courts<sup>6</sup> and/or convince their governments to pursue relief through the State-to-State dispute resolution mechanism, which subsists under chapter 31 of USMCA.

## **Reduced Mexico-related investment arbitration causes of action**

While the USMCA permits United States investors in Mexico and Mexican investors in the United States to pursue treaty-based claims through international investment arbitration, the agreement's dispute settlement mechanism is less favorable to investors than the one contained in NAFTA.<sup>7</sup>

For most investors, the USMCA contemplates that only breaches of the duties of national treatment, most-favored-nation treatment, and direct expropriation can be pursued through investment treaty arbitration. This deprives many investors of a whole host of protections. For instance, most investors will not be able to bring a claim predicated on an indirect (i.e., creeping) expropriation of their investment. Nonetheless, investors from certain industry groups will be able to enforce a broader set of rights. The exempted businesses are those that enter into government contracts related to hydrocarbons, power generation, telecommunications, transportation services, and ownership or management of infrastructure.<sup>8</sup> In addition to the foregoing, the USMCA introduces a number of procedural features that are less friendly to investors. Most notably, investors will now be required to pursue a proceeding in national courts for at least 30 months before pursuing arbitration.<sup>9</sup>

## Closing window to utilize NAFTA mechanisms

Anticipating the need for investors to adapt to the new legal framework, the USMCA leaves open a window to utilize NAFTA dispute settlement mechanisms for legacy investments—that is, investments already existing when the USMCA enters into force.<sup>10</sup> This window will last three years after such entry into force. Given the differences between the USMCA and NAFTA, businesses with potential claims will want to move quickly to take advantage of the more favorable provisions of the NAFTA.

## Conclusion

The USMCA generally offers investors fewer protections than the NAFTA treaty it may ultimately replace. The three-year delayed entry into force of this treaty provides investors an opportunity to plan their investment strategy, including structuring their investments in ways that will maximize their investment protections while preserving tax positions. Investors would do well to take advantage of this time to consider all their options.

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<sup>1</sup> U.S. Trade Representative Office, Press Release, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-united-states>

<sup>2</sup> The USMCA.

<sup>3</sup> Megan Casella, *How a Democratic Congress could derail Trump's NAFTA dreams*, Politico, October 1, 2018 <https://www.politico.com/story/2018/10/01/democrats-midterms-nafta-819127>

<sup>4</sup> Everett Rosenfeld, Joanna Tan and Liz Moyer, *Canada and US reach trade deal to replace NAFTA*, CNBC, October 1, 2018, <https://www.cnbc.com/2018/10/01/us-canada-nafta-trade-talks.html>

<sup>5</sup> U.S. Trade Representative, USMCA ch. 14, *Investment*

<sup>6</sup> USMCA, Art. 14.2.4.

<sup>7</sup> USMCA, Annex 14-D, 3(1)(a)(i).

<sup>8</sup> USMCA, Annex 14-E, 6(b).

<sup>9</sup> USMCA, Annex 14-D, 5(b).

<sup>10</sup> USMCA, Annex 14-C.

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