



INVESTORS' RIGHT TO BRING INVESTMENT CLAIMS UNDER THE NAFTA INVESTMENT CHAPTER EXPIRES SOON

The United States–Mexico–Canada Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA) on July 1, 2020, kept alive NAFTA’s Investment Chapter (Chapter 11) for a 3–year period allowing investors to submit legacy investment claims to arbitration under NAFTA within that survival period.

Yet, since NAFTA requires an investor to file a Notice of Intent at least 90 days before an investment claim is submitted to arbitration, **investors must now take urgent action to notify any investment claim by 31 March 2023 and to submit their request for arbitration before July 1, 2023.**

THE USMCA LEGACY CLAUSE

The USMCA’s transitional provisions set out at USMCA Annex 14–C allows investors with a “legacy investment” (i.e., investments established or acquired between January 1, 1994, and July 1, 2020) to submit a claim to arbitration under NAFTA Chapter 11 (“legacy clause”).

However, the USMCA Parties consented to submit these legacy investment claims to NAFTA Chapter 11 arbitration only for three years after the termination of NAFTA, which took place on July 1, 2020. Accordingly, the legacy clause will expire on July 1, 2023 and any claim must therefore be submitted before July 1, 2023.

Moreover, under NAFTA Chapter 11, investors must submit their notice of intent to arbitration at least 90 days before the claim is submitted.

Thus, to be able to submit a claim to arbitration under the legacy clause, an investor must submit such notice at the latest on Saturday April 1, 2023 (but preferably by Friday 31 March 2023, being the last working day before the deadline). Any notice of intent submitted after this date will not comply with the 90 days requirement and may prevent an investor from submitting a valid claim to arbitration.

CONSEQUENCES OF THE EXPIRY OF THE LEGACY CLAUSE

On or after July 1, 2023, investors will only be able to submit an investment claim to arbitration in accordance with the investor–State dispute settlement mechanism under the USMCA. This applies only to claims for alleged breaches that took place after the date of entry into force of the USMCA (i.e., July 1, 2020).

There are a number of important implications of the expiry of the legacy clause, which investors should be aware of:

Canadian investors in the US and/or Mexico and investors in Canada from the US and/or Mexico will not have access to the investment protection provisions under USMCA. Whilst Canadian investors could initiate disputes against Mexico or Mexican investors against Canada under the Comprehensive and Progressive Agreement for Trans–Pacific Partnership (CPTPP), Canadian investors will have no access to ISDS against US measures and US investors will have no access to ISDS against Canadian measures.

Whilst the USMCA does apply to investment disputes between US investors and Mexico (and

vice versa), there are a number of limitations in the USMCA which did not exist under NAFTA. Unlike NAFTA, the ISDS mechanism under USMCA requires investors that do not have a covered government contract in a covered sector (i.e. a written agreement with a national authority of the US or Mexico, on which the investor relies in establishing or acquiring an investment in the five sectors covered by USMCA Annex 14-E) to pursue local proceedings before submitting a claim to arbitration. This will not only delay any ISDS claim but could also increase costs.

Unlike NAFTA, under the USMCA ISDS mechanism, US and Mexican investors that do not have a covered government contract in a covered sector will only be able to submit claims for alleged breaches of national treatment, most favored nation treatment, and direct expropriation. Thus, claims in respect of breaches of the minimum standard of treatment and other substantive obligations or indirect expropriation will be excluded.

CONCLUSIONS

US, Mexican and Canadian investors with qualifying investments affected by governmental measures will see their rights of recourse to investor-State arbitration substantially limited after July 1, 2023.

It is therefore crucial that investors should urgently consider the implications of the expiry of the USMCA legacy clause and how their rights may be affected.

Canadian, Mexican or US investors, affected by measures taken by Mexico, US or Canada respectively, which won't have access to ISDS (or the same level of access to ISDS) after the expiry of the legacy clause should consider carefully whether to submit a legacy claim under NAFTA before July 1, 2023. Since this will also require submission of a notice of intent at least 90 days before submission of the claim, such assessments must be undertaken very urgently and any notice of intent filed before the end of this month at the latest.

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Nicholas Lawn leads Van Bael & Bellis' London-based International Dispute Resolution team. He specialises in international arbitration and litigation with a particular focus on investment arbitration and public international law. Over the course of nearly 20 years, he has advised a range of clients – both investors and governments – in relation to international disputes across numerous sectors and under a variety of different arbitral rules. Nicholas has won some of the largest and most notable investment arbitration awards of recent years. Most recently, he successfully acted for Vodafone in its landmark US\$5.5 billion arbitral victory against the Republic of India. He was also involved in Cyprus successful defence of a BIT claim arising out of the State's treatment of a major bank during the financial crisis. For a number of years, Nicholas has been identified as one of London's leading investment arbitration practitioners. Most recently, he was included in the International Arbitration Powerlist (2019) and was named as a Rising Star for International Arbitration and Public International Law by The Legal 500 UK (2021).

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Adriana Pérez-Gil is an Associate in Van Bael & Bellis' Brussels office, specialising in international dispute resolution with a particular focus on investment disputes and international trade. Prior to joining Van Bael & Bellis, Adriana worked at the General Counsel of International Trade of the Ministry of Economy of Mexico for over six years, representing the Mexican Government in 10 investor-State disputes (1 as non-respondent, 5 cases under the North America Free Trade Agreement and 4 other under bilateral investment treaties). Adriana also participated in around 10 international trade and investment negotiations, including those with North America, the European Union and the European Free Trade Association, in which she led the negotiations relating to investor-State and State-to-State dispute settlement issues.

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Ricardo Ramírez is the founding partner of RRH Consultores, a boutique law firm specialized in international trade law and litigation. Ricardo Ramírez has 25 years of experience gained in more than 70 international disputes under different trade and investment agreements as counsel, arbitrator and Member of the WTO Appellate Body. On June 2009, Ricardo Ramírez was appointed as Member of the Appellate Body of the World Trade Organization. He was elected by his peers as Chair for two consecutive terms: January – December 2013 and 2014. On September 2017, he was designated to serve on the ICSID Panel of Arbitrators by the Chairman of the ICSID Administrative Council for a term of six years. From 2006 to 2009 Mr. Ramírez was head of the International Trade Practice for Latin America at Chadbourne & Parke, S.C., where he focused his practice focused on a full range of trade matters, including unfair trade practices and safeguards; trade facilitation and customs procedures; international standards and regulatory compliance; foreign investment and antitrust matters. Prior to Chadbourne & Parke, he was Deputy General Counsel for Trade Negotiations of the Ministry of Economy in Mexico. For more than 11 years, Mr. Ramírez provided advice on trade and competition policy matters related to all trade agreements signed by Mexico.

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Samantha Atayde Arellano focuses her practice on international trade and investment law and arbitration. Prior to joining RRH Consultores S.C., she worked at the Office of the General Legal Counsel for International Trade of the Ministry of Economy for over 13 years advising the Government on trade negotiations and dispute settlement proceedings (investor – State and State–State). In September 2016, she was appointed General Legal Counsel and was in charge of defending the Mexican State in 10 investment disputes under different investment treaties (NAFTA, Mexico – Panama BIT, Mexico – France BIT, Mexico – Singapore BIT and Mexico – Argentina BIT). In that capacity, she was Lead Counsel for the negotiations of the USMCA and the Modernization of the Mexico – EU FTA. She participated as a representative of Mexico before international organizations such as WTO, ICSID and OECD. Recently, she has been appointed as panelist before the WTO.

Hugo Romero Martínez Partner

Hugo Romero Martínez focuses his practice on international trade and investment law, as well as in arbitration. Prior to joining RRH Consultores S.C., he worked at the Office of the General Legal Counsel for International Trade or the Ministry of Economy for over 10 years and for over 5 years as Counsellor at the Permanent Mission of Mexico to the WTO in Geneva, Switzerland. He was part of the team of defense of Mexico in international trade and investment dispute at different stages. He was part of Mexico's team negotiating the USMCA – as Lead of Mexico in the Trade Remedies Group and as member of Mexico's team in the Legal and Institutional Group –, Modernization of the Mexico – EU FTA (Investment Chapter), CPTPP, Mexico – Peru FTA, Mexico – Central America FTA among others, as well as many BITs. Additionally, he provided advise on international trade and investment law. He participated as a delegate of Mexico before international organizations such as WTO, UNCITRAL (Group III), UNCTAD, OECD and APEC. He is member of the ISDS Academic Forum, UNCITRAL. He is professor and holds the Chair of International Trade Law and NAFTA at the Faculty of Law of the National Autonomous University of Mexico (UNAM). He is member of the arbitrators list of the Central American Economic Integration Secretariat (SIECA), where he has been arbitrator in two cases. He is member of the Mexico' List of Panelists of Chapter 10, Trade Remedies, of the USMCA.



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