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From NAFTA to USMCA: Modifications to Investment Protections, a Guide for Lawyers and Foreign Investors by S. Castillero

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From NAFTA to USMCA: Modifications to Investment Protections, a Guide for Lawyers and Foreign Investors

By Sophia Castillero Suarez[*]

Executive Summary

The following article discusses the changes in investment protections resulting from the 2018 adoption of the United States–Mexico–Canada Agreement (USMCA), a new treaty between the three neighboring countries, to replace the 1994 North American Free Trade Agreement (NAFTA).

It begins with an introduction to NAFTA, its contributions to the field of international investment law, and the emergence and rise of USMCA.

The article then follows with a comparative legal analysis of the modifications to investment protections from NAFTA to USMCA, with a focus on the following topics: (1) investment arbitration availability; (2) legacy and pending claims; (3) scope of available investment protections; (4) available investment protections; (5) procedural matters.

The article concludes that NAFTA did a good job of not only inducing investment in its three member nations. Additionally, NAFTA was indeed a pioneer in treaty law, as it has been appropriated by other bilateral and multilateral investment agreements. Although there are substantial investment provisions in the new treaty, USMCA contains less investment protections than its predecessor NAFTA. However, even though investment protections are considerably reduced, USMCA still grants substantial foreign investment protections to investors from Mexico and the United States. The article also offers relevant insight for investors on how to navigate these changes and mitigate the political risk intertwined with foreign investment and doing business abroad, in light of the new multilateral treaty at hand.

I. Introduction

1. The Importance of NAFTA

The North America Free Trade Agreement (NAFTA) was among the first *regional* trade agreements to codify expanded substantial investor rights. For example, the concepts of

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indirect expropriation and fair and equitable treatment were propelled and established thanks to NAFTA and its subsequent arbitration jurisprudence.[1]

NAFTA's purpose was to create a vast free trade zone in North America, and eventually, all the other countries in the world ended up benefitting from it (directly or indirectly). As a result, global trade expanded regionally and worldwide.[2] Since NAFTA entered into effect, trade in North America only has more than tripled, reaching up to US $1.1 trillion in 2016.[3]

NAFTA has been protecting cross border protections in North America since 1994. The Investment Chapter of NAFTA (Chapter 11) facilitated the free trade agreement's main objectives: (1) breaking down barriers to foreign investment; (2) instilling investor confidence throughout the region with clear, balanced, and fair rules; and (3) eliminating political elements, which might hinder success in the resolution of complex disputes arising out of these enormous and complex investment transactions.[4]

NAFTA provided North American investors with modern tools for managing the sovereign risks attached to investing in a foreign country. It granted substantial protections to foreign investors by limiting the right of the host State to take adverse actions such as seizure of an operation or changing the regulatory framework of a particular sector or industry. These protections were guaranteed by a qualifying investor's right to bring a claim directly against the State hosting its investment through binding and neutral international arbitration (as opposed to having to decide any dispute in the local courts of the host State).

NAFTA's Chapter 11 was negotiated and signed in the early 1990s and has had a significant influence on the subsequent development and understanding of the law applicable to States and investors of other States.[5] In the words of Meg Kinnear, Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) and former General Counsel of the Trade Law Bureau of Canada "This influence is attributable not only to the specific provisions of

[1] A. COSBEY, "Chapter 6: Investment Protections in NAFTA's Chapter 11", in *International Investment for Sustainable Development*, 151 (2005); *see also* Article 1110 of NAFTA stating that "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except…"; "Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law"; *see also* NAFTA Article 1105 stating that "Each Party shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".

[2] USTR, The U.S.-Mexico-Canada (USMCA) entered into force on July 1, 2020 replacing the North America Free Trade Agreement (NAFTA) 2020, <https://www.trade.gov/north-american-free-trade-agreement-nafta> (02/13/2022).

[3] J. MCBRIDE et al., NAFTA's Economic Impact, The Council on Foreign Relations 2017 <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/CFR-NAFTA's%20Economic%20Impact.pdf> (02/13/2022).

[4] C. BROWER et al., "Who Then Should Judge: Developing the International Rule of Law under NAFTA Chapter 11", *Chicago Journal of International Law*, Vol. 1, Issue 1, pp. 193–194 (2001); *see also* F. ABBOTT, "North American Free Trade Agreement Dispute Settlement", *Max Planck Encyclopedia of Public International Law*, para. 18 (2014).

[5] A. ANDERSON et al., "The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?", pp. 119 – 136 (2020).

Chapter Eleven, but also to the decisions and awards issued in NAFTA arbitrations and the systemic approach taken by the three NAFTA Parties."[6]

NAFTA´s negotiations were driven by the political and economic context of its time, that is, an agreement negotiated between two developed Nations (the U.S. and Canada) and one emerging economy (Mexico); plus a very involved private sector able to navigate national politics in all three countries; plus the inclusion of multinational players strongly supporting the Agreement; plus the nature of the Parties' domestic institutions.[7] All these actors, added to the respective bargaining power of the NAFTA State parties, certainly left their mark on the Agreement. The result was a compromise among the three (3) State parties on the 'rules of the game' and the mechanism for dispute resolution (binding international arbitration).[8]

But more importantly, NAFTA Chapter 11 created a systemic international investment law in North America, contributing to the development of investment law around the world.[9]

Besides NAFTA, Canada, Mexico, and the United States (U.S.) have all negotiated other Bilateral Investment Treaties (BITs) and Foreign Trade Agreements (FTAs) with numerous other partners around the world, in which texts can be found many elements of NAFTA's Chapter 11. For example, the U.S. Model BIT and the Canadian Foreign Investment Promotion and Protection Agreement Model (FIPA), both have very similar starting points for investment negotiations to NAFTA's Chapter 11, with some modifications to account for case litigation experience under Chapter 11. In addition, Mexico's current practice in investment treaties also contains similar clarifications derived from the NAFTA experience.[10]

NAFTA parties also issued binding notes on treaty interpretation to guide arbitration tribunals into what the parties meant when drafting the treaty.[11]

As a result, this first generation of direct descendants of NAFTA's Investment Chapter (that is the Model U.S. and Canadian BIT), served as the basis for many of the most important investment agreements of the past years, some of which are currently in place like the Central American Free Trade Agreement (CAFTA-DR), the Comprehensive and Progressive

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[6] M. KINNEAR et al., "NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration", *ICSID Review - Foreign Investment Law Journal Vol. 25, No. 2*, p. 225, 2010 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1859466> (02/13/2022).

[7] M. CAMERON et al., The Making of NAFTA: How the Deal Was Done, pp. 7, 51 (2000).

[8] NAFTA Article 1116 and subsequent establish binding arbitration as a dispute settlement mechanism between foreign investors and host States.

[9] Evidence of the North American scope of influence is seen in the 2004 U.S. Model BIT <https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> (02/13/2022); *see also* the 2003 Canada Model Foreign Investment Promotion and Protection Agreement [hereinafter "Canada Model FIPA"] <https://www.international-arbitration-attorney.com/wp-content/uploads/2014/08/205arbitrationlawCanadianFIPA_001.pdf> (02/13/2022).

[10] The Agreement between Japan and Mexico for the Strengthening of the Economic Partnership 2004 <https://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf> (02/13/2022) at Article 60 (General Treatment), also reflects the interpretative note on Article 1105 of NAFTA: "This Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party."

[11] M. KINNEAR et al., No. 6 (2006); *see also* NAFTA Notes of Interpretation of Certain Chapter 11 Provisions 2001, <https://www.international-arbitration-attorney.com/wp-content/uploads/2014/08/205arbitrationlawCanadianFIPA_001.pdf> (02/13/2022) stating "NAFTA created the world's largest free trade area, and the amount of foreign investment protected by the Agreement is one of the greatest of any see also NAFTA Free Trade Commission."

Agreement for Trans-Pacific Partnership (CTPPP), and the Canada-European Union Trade Agreement (CETA).[12] In fact, an analysis of the TPP's investment chapter (the predecessor of the CTPPP) noted that "81% of the text has been taken from previous U.S. investment treaties, with 58% of its text similar or identical to the NAFTA itself."[13]

Furthermore, NAFTA was the inspiration point for the investment chapter of the Free Trade Agreement of the Americas (FTAA) – an ambitious project involving the U.S. and Latin American countries that was never materialized.[14] Moreover, a generation of investment treaty negotiators in North and Latin America learned how to negotiate BITs and FTAs, with NAFTA serving as inspiration for a new range of next proposals when possible.[15]

NAFTA is a ***historic*** treaty. When launched, NAFTA's Chapter 11 Investor-State Dispute Settlement (ISDS) framework was considered historic because through NAFTA, the U.S. and Canada submitted themselves to binding international arbitration to resolve foreign investment claims in a forum other than their own domestic courts. In the 1990s, this was unprecedented. However, this happened because, as explained by Judge Charles N. Brower in 2001, before NAFTA, most BITs were North to South, between capital-exporting countries and capital-importing countries, and the private investors who actually have benefited from such treaties have been those from the North.[16]

NAFTA was also considered historic because it included various innovative procedural provisions aimed at avoiding the duplication of proceedings, maintaining procedural efficiency, and encouraging substantive coherence in the decision-making process. For example: (1) a No-U-Turn Model allowing foreign investors to bring claims without prior exhaustion of local remedies and, in some circumstances, allowing for parallel use of domestic and other international fora; (2) the power of the State parties granted by Article 2001 of together issuing binding interpretations of the agreement, a unique procedural device of NAFTA; (3) transparency measures granting public access to information and proceedings, most likely the biggest legacy of NAFTA´s Chapter 11; (4) allowing non-respondent parties to make submissions to a tribunal on matters of treaty interpretation; and (5) consolidation of proceedings.[17]

In sum, NAFTA matters in investment law because it developed a whole system composed by treaty law, binding interpretation opinions issued by the State parties, transparency rules, and robust ***jurisprudence constant***, that then went and influenced other cases and decisions outside the "NAFTA system", contributing to the development of foreign investment law around the world. The first NAFTA cases (Ethyl, Metalclad, Myers, Pope & Talbot, ADF, Loewen, and

[12] B. LEGUM et al., The USMCA/CUSMA/T-MEC's Entry into Force: An Obituary for NAFTA's Investment Chapter 2020 <http://arbitrationblog.kluwerarbitration.com/2020/06/23/the-usmca-cusma-t-mecs-entry-into-force-an-obituary-for-naftas-investment-chapter/> (02/13/2022).

[13] W. ALSCHNER et al., "The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe", ***Journal of World Investment & Trade***, Vol. 17, pp.339-373 (2015).

[14] Rooted in the 'Enterprise for the Americas Initiative' during the administration of U.S. President George H.W. Bush in 1990, The Free Trade Agreement of the Americas (FTTA) proposed a free-trade zone encompassing all of the Americas. The initiative was blocked by the Latin American countries with opposite views on everything except for market access, and negotiations eventually were suspended; ***see*** BRITANNICA, "Free Trade Agreement of the Americas", <https://www.britannica.com/topic/Free-Trade-Area-of-the-Americas> (02/13/2022); ***see also*** C. JACKSON, "The Free Trade Agreement of the Americas and Legal Harmonization", ***ASIL Insights Vol. 1 Issue 3*** (1996).

[15] B. LEGUM et al., No. 12 (2020).

[16] C. BROWER et al., No. 4 (2001).

[17] M. KINNEAR et al., No. 6 (2006).

Waste Management) and the transparency rules of NAFTA´s ISDS mechanism, brought awareness and visibility to investment arbitration in a way that it expanded its use and application all over the world, and encouraged respect for the international rule of law in a way that other treaties and conventions did not, even from the least abiding nations.[18] To date, there have been over seventy six (76) claims under NAFTA. Nineteen (19) against the United States, thirty (30) against Canada, and twenty seven (27) against Mexico.[19]

Additionally, NAFTA cases developed and solidified some of the most important (and contentious) concepts in international investment law, like None-Discrimination, National Treatment, or Fair and Equitable Treatment, that are applied today by tribunals in the field of investment arbitration.[20]

2. The Call for "Renegotiations"

When NAFTA entered into force on January 1st 1994, it was considered *remarkable* for the increased trade it facilitated across North America. To increase investor confidence, NAFTA Chapter 11 provided for a dispute resolution mechanism of binding arbitration among the Parties' investors and the host State.[21] The remedies available included damages, restitution, and cost award.[22]At the time, this was considered a novel procedure in multilateral agreements.[23] In the words of Daniel Price "[NAFTA's] Chapter 11 alters the traditional, hierarchical relationship between foreign investors and host states in two ways. First, it prohibits certain exercises of sovereignty at the expense of foreign investors. Second, it creates a mechanism for resolving investment disputes that places foreign investors and their host States on a more equal footing, because investors do not have to rely on the mercy of their host States or their home States for protection. Chapter 11 redistributes bargaining power in a manner more reminiscent of relationships between commercial actors. The point of this

[18] E. WHITSITT, NAFTA fifteen years later: the successes, failures and future prospects of Chapter 11 (2009) <https://www.iisd.org/itn/en/2009/02/17/nafta-fifteen-years-later-the-successes-failures-and-future-prospects-of-chapter-11/> (02/13/2022).

[19] UNCTAD, Investment Policy Hub, Investment Dispute Settlement Navigator <https://investmentpolicy.unctad.org/investment-dispute-settlement> (09/15/2022).

[20] E. WHITSITT, No. 18 (2009).

[21] Under Article 1120 of NAFTA, investors may initiate an arbitration proceeding by filing ***a Notice of Intent to Commence Arbitration***. The arbitration can be conducted under one of the following sets of rules: (a) the ICSID Convention Arbitration Rules, provided that both the disputing Party and the Party of the investor are parties to the Convention; (b) the Additional Facility Arbitration Rules of ICSID, provided that either the disputing Party or the Party of the investor are party to the ICSID Convention; or (c) the UNCITRAL Commercial Arbitration Rules; ***see also*** F. ABBOTT, "NAFTA and the Legalization of World Politics: A Case Study", ***in Legalization and World Politics***, pp. 135, 148, 149, 158 (2001).

[22] Article 1135 of NAFTA states "Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs in accordance with the applicable arbitration rules."

[23] M. KINNEAR et al., No. 6 (2006).

D. POSIN, "The Multi- Faceted Investment Arbitration Rules of NAFTA, 13 World Arbitration & Mediation Review. Vol. 13, No. 1, p. 15 (2002) expressing "the ability of a private corporation, citizen of one country, to 'bring to heel,' so to speak, a government of another country by compelling it to participate in an arbitration, without permission of its own government, is unprecedented in the international legal community"; ***see also*** B. LEGUM et al., No. 12 (2020) stating "NAFTA is not a radical departure from earlier mechanisms…[t]he combination of direct claims, comprehensive investment protection, prospective application, contracting States with substantial two-way capital exchange, and ad hoc tribunals is not one previously encountered in international claims law."

exercise is to remove investment disputes from the political realm and put them more into the realm of commercial arbitration."[24] At a later time, this turned to be controversial.[25]

NAFTA Chapter 11 provided an ISDS mechanism with protections comparable to those in many 1990s-era FTAs.[26] U.S. and Canadian trade negotiators anticipated that the ISDS mechanism would protect their investors from risks posed by Mexico's legal system.[27] They did not expect ISDS claims against their own governments, concerning everything from their environmental legislation to their national judicial processes.[28]

During the tenure of NAFTA Chapter 11, dozens of investor claims were brought against each of the host States. This was unexpected for the U.S. and Canadian governments. Both, as previously stated, expected NAFTA to protect investors from their own countries, rather than trigger claims that they would have to defend.[29] This is the practical reality of NAFTA. Investor protections, which originally worked in theory, proved to be challenging for host States to manage after less than ten years of implementation.

As explained by Ian Laird in 2001 "The main response of government officials who negotiated Chapter 11, or act on the government side of disputes, is that 'we did not intend NAFTA to mean that.' What they are really saying is that Chapter 11 was intended to protect Canadian and U.S. investments from the arbitrary or discriminatory conduct of the Mexican government, and that Canada and the U.S. should never attract claims. They never thought that their own governments might violate international treatment obligations."[30]

Similarly, in 1993 David A. Gantz shared that "the focus on litigation between Canada and the United States was probably not anticipated by the Canadian and U.S. negotiators of Chapter 11, although perhaps it should have been. It is only as both the U.S. and Canadian governments gain experience in defending their respective governments that the magnitude of the potential problems become clear."[31]

So after more than two decades of investment disputes, added to a heated political, social and economic climate in the United States, the circumstances altogether called for a renegotiation of the terms of the treaty; a renegotiation that later became a full replacement of NAFTA with the USMCA.[32]

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[24] D. PRICE, *"Chapter 11 - Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?"*, Canada-U.S. Law Journal Vol. 26, Issue 107, p. 112 (2002).

[25] Public Citizen, NAFTA Chapter 11 Investor-State Cases: Bankrupting Democracy (2001) <https://www.citizen.org/wp-content/uploads/acf186.pdf> (02/13/2022).

[26] C. BROWER et al., No.4 (2001); *see also* F. ABBOTT, No. 4 (2014).

[27] F. ABBOTT, No. 4 (2014)*; see also* I. LAIRD, "NAFTA Chapter 11 Meets Chicken Little", *Chicago Journal of International Law Vol. 2*, pp. 223, 230 (2001); *see also* L. HECHT et al., "Managing Risks in Mexico*", Harvard Business Review* (1993) "In fact, many business people still question how adequately Mexico's legal system will support a market economy or ensure the security of foreign businesses"; *see also* J. SMITH et al., "Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*", U.S.-Mexico Law Journal Vol. 85* (1993).

[28] D. GANTZ, "Resolution of Investment Disputes under the North American Free Trade Agreement", *Arizona Journal of International and Comparative Law Vol. 10*, pp. 335, 341–342 (1993).

[29] F. ABBOTT, No. 4 (2014)*;* see also D. GANTZ, NO. 27 (1993).

[30] I. LAIRD, No. 26 (2001).

[31] D. GANTZ, NO. 27 (1993).

[32] Some critics say that NAFTA caused loss of manufacturing jobs in the U.S., increased inflation, increased inequality, increased the U.S. trade deficit, and overall caused discontent among the public. For example, see

A country's decision to include foreign investment protections such as binding international arbitration for dispute settlements in its investment agreements reflects its own exclusive prerogative as a sovereign to surrender a portion of its sovereignty to attract foreign investment and increase its own foreign trade and development. Granting foreign investors with the right to assert a claim directly against a national government (a privilege that not even the host State's own national investors can sometimes aspire to have) does infringe on the sovereign's right to legislate, enforce, and adjudicate according to its own laws. Within the history of international relations, this exercise is fairly new, it certainly entails some trial and error, and NAFTA during twenty-seven years was definitely put to the test.[33]

From the host states' point of view, NAFTA proved inadequate because it paid little regard to environmental or sustainable protection principles, the need for the protection of health and safety, and labor rights.[34]

From an investment law perspective, the big challenges of NAFTA's Chapter 11 developed only through experience as host States defended against various investor claims. Equally important are the politics behind 'the deal,' in a moment where social, economic and political reasons played a huge role in the U.S. decision of negotiating a new treaty. The 'America First' campaign promise of Donald Trump reflected the concerns of U.S. workers on social inequality, economic stagnation, and lack of job creation, and NAFTA became then ***the one to blame*** for Trump's presidential campaign and economic recovery plan.[35] Soon upon entering office, U.S. President Trump announced his intention to renegotiate the terms of NAFTA, and the rest is history.[36]

The United States, Mexico, and Canada renegotiated the 25-year-old North American Free Trade Agreement (NAFTA) in 2018.[37] As a result of these renegotiations, the parties agreed

Public Citizen, NAFTA's Legacy: Lost Jobs, Lower Wages, Increased inequality (2018) <https://www.citizen.org/wp-content/uploads/nafta_factsheet_deficit_jobs_wages_feb_2018_final.pdf> (02/13/2022).

[33] The first BIT was signed on 25 November 1959 by the Federal Republic of Germany and the Islamic Republic of Pakistan, signed on 1 December 2009; UNCTAD, World Investment Report 2009 <https://unctad.org/system/files/official-document/wir2009_en.pdf> (02/13/2022).

[34] J. PAULSON et al., "Labor Rights and Environmental Protections under NAFTA and other U.S. Free Trade Agreements", *The University of Miami Inter-American Law Review* (2009) <https://www.jstor.org/stable/pdf/41307719.pdf?refreqid=excelsior%3Af9e49d565df1b8514c7a9cfc5cef3114&ab_segments=&origin=&acceptTC=1> (09/20/2022).

[35] K. AMADEO, "President Donald Trump's Economic Plan", *The Balance 2019* <https://www.thebalance.com/donald-trump-economic-plan-3994106> (02/13/2022); *see also* TRADE WARS, "Trump Tariffs and Protectionism Explained," *BBC 2019* <https://www.bbc.com/news/world-43512098> (02/13/2022). ; *see also* F. MAYER, "The Politics of NAFTA Have Been Driven More by Story than by Facts", *The Hill* <https://thehill.com/blogs/pundits-blog/international/347078-the-politics-of-nafta-have-been-driven-more-by-story-than-by/> (08/18/2017); *see also* D. IKENSON, "USMCA: A Marginal NAFTA Upgrade at a High Cost," *Cato Institute 2019* <https://www.cato.org/commentary/usmca-marginal-nafta-upgrade-high-cost# (02/13/2022).

[36] USTR, "Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement" (05/18/2017) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces> (02/13/2022).

[37] A. SWANSON et al., "Trump Just Signed the USMCA. Here's What's in the New NAFTA", *The Salt Lake City Tribune* (01/20/2020) <https://www.sltrib.com/news/nation-world/2020/01/30/trump-signed-usmca-heres/> (02/13/2022).

on new terms to formulate "NAFTA 2.0," a whole new different treaty, as opposed to an amendment or renegotiate the existing text.[38]

On September 30th 2018, the United States, Canada and Mexico agreed to the terms of a new trade deal to modify NAFTA. On November 30th 2018 at the G20 summit in Buenos Aires, Argentina, the parties signed the new agreement, the United States-Mexico-Canada Agreement USMCA.[39] On July 1st 2020 USMCA came into force, and USMCA Chapter 14 replaced NAFTA Chapter 11.[40]

For avoidance of doubt, the new treaty (USMCA) also carries two other names: Canada has adopted it as the Canada – United States – Mexico Agreement (CUSMA), while Mexico settled on the title "El Tratado entre México, Estados Unidos y Canadá (T-MEC)". Regardless of the name, the new trade deal serves as the successor to NAFTA.

3. The Rise of USMCA

USMCA is an ***evolutionary*** treaty because it departs from NAFTA, but with major changes to its ISDS mechanism, by retaining some form of ISDS as opposed to eliminating it, which was the parties' original plan.[41] There is no investment arbitration with Canada, and there is limited investment arbitration between the U.S. and Mexico. For example: (1) it narrows the scope of protected investors;[42] (2) it limits the type of disputes that may be brought by investors of investments made between the U.S. and Mexico; and (3) it prioritizes some investors over others, by putting in place a complex dual system in which some investors are required to file claims in national courts first, and then wait 30 months before initiating arbitration, while other investors are exempt to do so, if the investor has a ***contract with the government*** relating to a ***covered sector*** expressly specified in the treaty.[43]

Nonetheless, considering the rhetoric from the Trump Administration of eliminating investment protection, its mere existence is remarkable. Ultimately, it reminds, or informs

[38] J. BALLANTYNE, "Revised "new NAFTA" signed in Mexico", ***Global Arbitration Review (GAR)*** (12/11/2019) <https://globalarbitrationreview.com/article/revised-new-nafta-signed-in-mexico> (02/13/2022).
[39] K. LAMARQUE, "USMCA: Trump Signs New Trade Agreement with Mexico and Canada to Replace NAFTA", ***NPR*** (09/30/2018) <https://text.npr.org/672150010> (02/13/2022); CNN ESPAÑOL, "Cumbre del G20: momento de la firma del nuevo tratado de Libre Comercio, USMCA", <https://cnnespanol.cnn.com/video/firma-tratado-libre-comercio-usmca-tmec-donald-trump-justin-trudeau-enrique-pena-nieto-vo-grabriela-frias-cafe/> (09/20/2022).
[40] A. SWANSON, "As New NAFTA takes effect, much remains undone", ***The New York Times*** (07/01/2020) <https://www.nytimes.com/2020/07/01/business/economy/usmca-takes-effect.html> (02/13/2022); ***see also*** D. ORTA et al., "Investment Treaty Arbitration in the Americas", Global Arbitration Review of the Americas (2020) <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/investment-treaty-arbitration-in-the-americas> (02/13/2022).
[41] B. DAVIS, "U.S. Bid to Exit NAFTA Arbitration Panels Draws Ire From Businesses", ***The Wall Street Journal*** (08/22/2017) <https://www.wsj.com/articles/u-s-bid-to-exit-nafta-arbitration-panels-draws-ire-from-businesses-1503423680> (02/13/2022); T. MACCHARLES, "Canada cheers the end of corporate NAFTA challenges in new deal", ***Toronto Star*** (10/02/2018) <https://www.thestar.com/politics/federal/2018/10/02/canada-cheers-the-end-of-corporate-nafta-challenges-in-new-deal.html> (02/13/2022); INSIDE U.S. TRADE, "Canada to propose eliminating ISDS in NAFTA; USTR to agree", ***World Trade Online*** (02/23/2018) <https://insidetrade.com/inside-us-trade/sources-canada-propose-eliminating-isds-nafta-ustr-agree> (02/13/2022).
[42] D. CIURIAK, "From NAFTA to USMCA and the Evolution of US Trade Policy", ***Institute CD Howe*** (2019) <https://www.cdhowe.org/public-policy-research/nafta-usmca-and-evolution-us-trade-policy> (02/13/2022).
[43] See Annexes 14-D and 14-E of Chapter 14 in USMCA.

beneficiaries that the grant of investment protection is a political decision made in the context of larger political and economic considerations."[44]

At the same time, USMCA is an *innovative* treaty in the way that it incorporates NAFTA's jurisprudence and interpretation notes within the text of the treaty. For example: (1) it expands on the definition of expropriation to formally include the concept of indirect expropriation;[45] (2) it uses specific examples given for interpretation of the Minimum Standard of Treatment (MST) provided in the new Article 14.6 (previously Article 1105 in NAFTA) and the implication that a State's actions which fulfill "public welfare objectives" will be considered in the new Articles 14.4 on National Treatment and 14.5 on the Most Favored Nation standard in determining whether treatment was accorded in "like circumstances".

From a policy perspective, the Mexico-U.S. investment provisions protect U.S. investors in a selective matter, most noticeably favoring investors in the oil, gas, and power generation sectors where there has been significant investment in the last five years.[46] Obviously, this disparity concerns investors and practitioners, but it has to be viewed within the context of the original position of the Trump Administration, which was at the time, no investment arbitration at all.[47]

USMCA is indeed a far less inclusive treaty. By restricting the scope of investment protections available, the new treaty strengthens the host State's position against the investor when it comes to dispute settlement. Clearly, the drafters were trying to correct some previously un-anticipated mistakes experienced with NAFTA. For example, having U.S. investors successfully suing Canada in investment arbitration, while Canadian investors suing the U.S. winning none.[48]

The new USMCA is in line with UNCTAD's Road Map for IIA Reform, putting in place safeguards to preserve the host States' right to regulate on behalf of public welfare objectives, including the rights of the hosts States to regulate on matters such as sustainable development, human rights public health, public policy, public safety, and the environment.[49]

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[44] M. HODGSON, "The USMCA/CUSMA/T-MEC's Entry into Force: USMCA and U.S. Investors – A reversal of Fortune?", ***Kluwer Arbitration Blog*** (06/25/2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/26/the-usmca-cusma-t-mecs-entry-into-force-investment-arbitration-in-the-financial-services-chapter-what-changed-and-what-remains/> (02/13/2022).

[45] Article 110.1 of NAFTA states "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation") …", while Articles 14-B.2 and 14-B.3 state "… [Expropriation and Compensation] addresses two situations. The first is direct expropriation, in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. The second situation … is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."

[46] See USMCA Chapter 14 Annex 14-E on the Mexico-U.S. regime for investment disputes related to covered government contracts.

[47] B. DAVIS, "U.S. Bid to Exit NAFTA Arbitration Panels Draws Ire from Businesses", ***The Wall Street Journal*** (08/22/2017) <https://www.wsj.com/articles/u-s-bid-to-exit-nafta-arbitration-panels-draws-ire-from-businesses-1503423680> (02/13/2022).

[48] K. GORE et al., "The Rise of NAFTA 2.0: A Case Study in Effective ISDS Reform", in A. ANDERSON et al. (eds.), ***The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?***, Kluwer Law International (2019).

[49] UNCTAD, "Investment Policy Framework for Sustainable Development 2015", <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf> (09/20/2022); See also USMCA Article 14.4.4.

From the U.S. draft model used as the foundation for NAFTA to the final text of USMCA, considerable modifications have been introduced to the dispute settlement mechanism.

The next part consists of an in depth comparative analysis on the most important changes in investment protections from NAFTA to USMCA on the following topics: (1) investment arbitration availability; (2) legacy and pending claims; (3) scope of available investment protections; (4) available investment protections; (5) procedural matters.

II. Comparative Legal Analysis

1. Investment Arbitration Availability

Although USMCA appears as a tri-partite treaty, Chapter 14 applies only to the U.S. and Mexico. In other words, Chapter 14 only protects Mexican nationals investing in the U.S. and U.S. nationals investing in Mexico.

Articles 1116 through 1139 of NAFTA Chapter 11 provided for investment arbitration as the dispute settlement mechanism between the parties' investors and the host State (that is, investors from Canada, Mexico and the U.S. equally). That changes completely in the new treaty.

Chapter 14 of USMCA represents a major change to the ISDS landscape between the U.S., Canada and Mexico. It appears to impose many new limitations on the parties' substantive obligations with respect to investment, and parties considering cross-border investments or potential claims under USMCA will need to carefully contemplate the impact of these new restrictions.

Firstly and as previously mentioned, there is no investment arbitration with Canada. Secondly, USMCA establishes a smaller investment protection scheme than NAFTA, only applicable between the U.S. and Mexico. It is a complex system of investment protection, establishing two different types of covered protected investment based in the industry of the investment activity (which will be discussed in detail in part 2 of this section).

USMCA fully eliminates investment arbitration claims for U.S. investors with future investments in Canada (and vice-versa), and for Mexican investors with future investments in Canada (and vice-versa).[50] In other words, after the third year of USMCA's entry into force (that is, on July 3rd 2023) U.S. investors initiating new investments in Canada, and Canadian investors initiating new investments in the U.S. will be forced to resort to local courts to resolve their disputes, or resource to State-to-State arbitration.[51]

This measure would not affect claims related to legacy investments brought within three (3) years after NAFTA's termination (that is until July 1st, 2020), or arbitrations already initiated

[50] A. ALI et al., "The USMCA nears entry into force with significant consequences for cross-border North American investors," ***Lexology*** <https://www.lexology.com/library/detail.aspx?g=9e156d11-3da8-4fc4-ad89-9ae09050e412> (01/05/2020).
[51] See USMCA Chapter 34 on the State-to-State dispute settlement regime.

under NAFTA on the date of its termination (the paper fully discuss in more detail the legacy claims in part 5 of this section).[52]

For Canadian investors in Mexico and Mexican investors in Canada, it will be possible to rely on the ISDS provisions of another treaty, the Comprehensive Progressive Trans-Pacific Partnership (CPTPP), which took effect at the end of December 2018.[53]

We can only speculate on the reasons why Canada opted out of the ISDS mechanism in USMCA. The fact that Canada as a host State has lost eight investment-arbitration cases (resulting as of 2017 in more than $219 million only in damages and settlements, plus another $95 million in legal costs defending itself) while the U.S. has not lost any, may provide an initial clue on the matter.[54]

In any case, a more in depth research of the available legislative history of the new treaty would be required to fully comprehend this decision. In the meantime, based on empirical information available, we can assert that one of the most important characteristics of investment arbitration is the availability of neutral fora for the resolution of investment disputes, which is rooted in the perceived inadequacy or prejudice of national courts against foreign investors.

Former representatives of the Office of The United States Trade Representative (USTR) expressed that "Neither U.S. nor Canadian investors can seriously argue that the other's courts are not capable of fairly resolving their disputes with the U.S. and Canadian governments, particularly given similarities in the countries' common law-based justice systems."[55] In the end, "Canada got an arguably stronger trade remedies and dispute resolution provision than exists in NAFTA, and perhaps, given the remedies available for its investors in U.S. courts, that was worth more to it than investment arbitration."[56]

Chapter 14 of USMCA applies only to disputes against either the U.S. or Mexico, providing for two distinct dispute resolution frameworks based on the type of investor. One is the ***general investment*** regime reflected in Chapter 14 Article 1101 and subsequent; the other one is the one related to the ***covered government contracts*** regime reflected in Annex 14-E.

The ***covered government contracts regime*** refers to investments from highly regulated activities such as oil, gas, power generation, telecommunications, transportation, and infrastructure. The ***covered government contract investments*** are provided with certain benefits

[52] See USMCA Annex 14-C on legacy and pending claims.
[53] D. GONZALES et al., "The USMCA enters into force: a glimpse into its investment chapter", ***Lexology*** (07/03/2020) <https://www.jdsupra.com/legalnews/the-usmca-enters-into-force-a-glimpse-37543/> (02/13/2022); ***see also*** USMCA Section 14-C; ***See also*** CTPPP Chapter 9; ***see also*** Government of Canada, ***Official Site for CTPPP*** <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng> (02/13/2022).
[54] S. SINCLAIR, "Canada's Track Record under NAFTA Chapter 11", ***Canadian Centre for policy alternative CCPA*** ***1***(2018) <https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf> (02/13/2022).
[55] M. HODGSON, N. 42 (2020).
[56] M. HODGSON, N. 42 (2020).

that other types of investments do not have, and have more grounds under which they can bring arbitration claims.[57]

Generally, USMCA only allows claims for direct expropriation, and breach of the national treatment and most favored nation principles. *Covered investors* can bring claims on additional grounds, including indirect expropriation and fair and equitable treatment (among others), which usually includes a prohibition for states to act in an arbitrary or discriminatory fashion.

A possible reason for the U.S. to consider maintaining ISDS protections with Mexico (but with a twist) could be related to the significant amount of U.S. investment in Mexico, particularly within the oil, gas, and power generation sectors. As of today, private U.S. players have invested $933 million in Mexico's energy and power sector.[58]Additionally, with only a week into its term, the administration of Mexican President Andres Manuel Lopez Obrador (AMLO) engaged in a series of actions to reestablish the prominence of the state-owned oil company Petróleos Mexicanos (PEMEX), and the state utility Comisión Federal de Electricidad (CFE).[59]

For example, it ordered the revision of the legality of 107 government awarded contracts between 2015-2018 to private companies such as Murphy Oil, Chevron, Fieldwood Energy, ExxonMobil and Talos Energy (all U.S. companies);[60]changed the Electric Industry Law; delayed, revoked, and denied operations permits to U.S. companies; and granted extensions on regulatory compliance only to PEMEX.[61] These and other actions to reinstate government control over Mexico's free energy markets, plus the proposal (and later approval by the Mexican Congress) of regulation affecting U.S. investor's rights may have been the catalyzer for a change of heart in the U.S. negotiators to switch from "no ISDS" to "Skinny ISDS" between Mexico and the U.S.[62]

USMCA Chapter 14 is accompanied by annexes that further explain in detail which investors can bring what claims and when, with two (2) tiers of protection: the first one is the legacy claims for remaining claims from NAFTA; the second one is a new regime for claims arising only between Mexico and the U.S.

The next part discusses in detail the most important changes in the standard of protections between NAFTA and USMCA, and the scope of the available investment protections under the new treaty for claims arising between Mexico and the U.S.

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[57] See USMCA Chapter 14 Annex 14-E on the Mexico-U.S. investment disputes related to covered government contracts.

[58] C. RIEGO, "Private investment in Mexico's sector wanes amid 2021 changes", ***bnamericas*** (2021).

[59] L. BELTRAN, "Mexico: When Trade and Energy Policy Collide", ***Americas Quarterly*** (08/18/2022) <https://www.americasquarterly.org/article/mexico-when-trade-and-energy-policy-collide/> (09/20/2022).

[60] M. O'GRADY, "Mexico Moves to Seize American Assets", ***Wall Street Journal*** (10/17/2021) <https://www.wsj.com/articles/mexico-american-assets-obrador-amlo-energy-11634496785> (02/13/2022); ***see also*** I. VILLA, "Inició la revisión de los contratos otorgados en las rondas petroleras", ***El Financiero*** (09/16/2018) <https://www.elfinanciero.com.mx/nacional/nahle-afirma-que-si-hubo-corrupcion-en-rondas-petroleras/> (02/13/2022).

[61] L. BELTRAN, N. 58 (2022).

[62] L. KASSAI, "Oil Trader Bests AMLO with Mexico Injunction to Import Fuels", ***Bloomberg*** <https://www.bloomberg.com/news/articles/2021-08-10/oil-trader-defies-amlo-with-mexico-injunction-to-import-fuels> (02/13/2022).

2. Legacy and Pending Claims

The first tier of protection in USMCA are the *Legacy and Pending Claims*,[63] which protect investors from Canada, Mexico, and the U.S. equally. These investors can bring claims under NAFTA Chapter 11 for three (3) years after the termination of NAFTA.[64]

Legacy Investments are defined in USMCA Chapter 14 Annex 14-C as "an investment of an investor of another Party in the territory of the **Party established or acquired** between January 1st of 1994, and the date of termination of NAFTA 1994,[65] **and in existence** on the date of entry into force of this Agreement", that is, on July 1st, 2020.[66] In other words, under USMCA the applicable law to a legacy claim is NAFTA Chapter 11.[67]

Canada's consent for legacy claims expires three (3) years after the termination of NAFTA, that is in July 2023. After that date, Canada will be completely out of the ISDS system established by USMCA, and all potential investment claims covered under NAFTA will cease to exist.[68]

Legacy investment claims are particularly relevant for Canadian investors since Canada is not part of the USMCA ISDS mechanism. Legacy claims are also relevant for U.S. investments that do not comply with all the requirements set out in USMCA to have access to the full range of investment protections, since only investments with a written government contract agreement from a covered sector will have access to all the protections granted in the new treaty.

To this date there are seven (7) legacy claims reported to be "grandfathered" by NAFTA: *First Majestic Silver v. Mexico*,[69] *Finley and others v. Mexico*,[70]*Koch Industries v. Canada*,[71] *TC Energy and Transcanada v. USA*,[72] *Doups Holding LLC v. Mexico*,[73] *Alberta Petroleum Marketing Commission v. USA*,[74] *Access Business Group LLC v. Mexico.*[75]

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[63] Something that did not exist in NAFTA.
[64] See USMCA Chapter 14 Annex 14-C, 14.1 – 14.4.
[65] That is, July 1, 2020.
[66] That is, July 1, 2020.
[67] See USMCA Chapter 14- Annex 14-C, 6.a.
[68] See USMCA Annex 14-C; See also USMCA Chapter 14.1 – 14.4.
[69] D. CHARLOTIN, "Canadian Miner Serves Mexico with NAFTA Notice of Intent", *IA Reporter* <https://www.iareporter.com/articles/canadian-miner-serves-mexico-with-nafta-notice-of-intent/> (02/13/2022).
[70] REUTERS, "U.S. oil service group seeks $100 million from Mexico in arbitration claim", <https://www.reuters.com/article/mexico-oil-arbitration-idAFL2N2N414K> (02/13/2022).
[71] L. BOHMER, "Koch Conglomerate Launches NAFTA Legacy Claim Against Canada Over Cancellation of Emissions Trading Program", *IA Reporter* <https://www.iareporter.com/articles/us-conglomerate-launches-nafta-legacy-claim-against-canada-over-cancellation-of-emissions-trading-program/> (02/13/2022).
[72] REUTERS, "TC Energy seeks NAFTA damages over canceled Keystone XL project", <https://www.reuters.com/legal/litigation/tc-energy-seeks-nafta-damages-over-canceled-keystone-xl-project-2021-11-23/> (02/13/2022).
[73] CIAR GLOBAL, "El Arbitraje de Doups Holdings Contra México es una Realidad en CIADI", <https://ciarglobal.com/el-arbitraje-de-doups-holdings-contra-mexico-es-una-realidad-en-ciadi/bal> (09/20/2022).
[74] Alberta Petroleum Marketing Commission v. United States of America, Notice of Intent to Submit a Claim to Arbitration, Feb. 9, 2022, <https://jusmundi.com/en/document/pdf/other/en-alberta-petroleum-marketing-commission-v-united-states-of-america-notice-of-intent-to-submit-a-claim-to-arbitration-wednesday-9th-february-2022> (09/20/2022).
[75] Access Business Group LLC v. United Mexican States, Notice of Intent to Submit a Claim to Arbitration, Oct. 11, 2022, <https://files.lbr.cloud/public/2022-11/Access%20Business%20Group%20LLC%20Notice%20of%20Intent%20to%20Submit%20Claim%20to%20Arbitration.PDF?VersionId=83wE6qLDTeJxPUXontyaKFyvlRlc2MKx> (09/20/2022).

Pending claims under NAFTA will continue as they are until its concussion, that is, with NAFTA as the applicable law in accordance with USMCA Annex 14-C.5.

3. Scope of Available Investment Protections

The second tier of protection refers to claims arising out of investments between Mexico and the U.S., for investments made after the USMCA went into effect, namely, for disputes arising out of investments established after July 1st 2020.

On this, it is important to note that NAFTA Chapter 11 not only provided for investment arbitration for investors from all State members of the treaty. But also, it provided for the same scope of protection for all types of investment and breach.

That changes completely under the new treaty into a new sub-division of the type of investment for disputes between the U.S. and Mexico. In other words, the new scope of the available protections will differ depending on the type of investor. Investors in USMCA are divided into two distinctive groups: *general investors* and *government contract covered investors,* and the applicable legal regime or investment protection granted in USMCA will differ based on this distinction.

3.1 General Investments

USMCA Chapter 14 Annex 14-D protects all types of foreign investments regardless of its sector. It affords the protections of National Treatment (NT), Most Favorite Nation (MFN) for post-established investments only,[76] and Direct Expropriation. Indirect Expropriation, a war trophy of NAFTA Article 10, is not included in USMCA for this type of investments.[77]

Additionally, the Minimum Standard of Treatment (MST) in accordance with international law of NAFTA Article 1105 is reformulated in USMCA Annex 14-A in a timid attend to clarify the concept, in a way that does not really add much to it.[78]

Furthermore, USMCA Annex 14-D reduces the scope of the MFN protection by establishing that "(1) the 'treatment' referred to in Article 14.5 (Most-Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; and (2) the 'treatment' referred to in Article 14.5 only encompasses measures adopted or maintained by the other Annex Party, which for greater clarity may include measures adopted in connection with the implementation of substantive obligations in other international trade or investment agreements."[79]

[76] Unlike NAFTA's Article 1102 on National Treatment, USMCA does not protect pre-established investment activities; *see* USMCA Article 14.2.3 and Annex 14.D.3.1.a.
[77] See USMCA Chapter 14 Annex-14. D.3.
[78] See USMCA Chapter 14 Annex 14-A stating "The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens."
[79] See footnote 22 in USMCA Article 14.D.3.a.

The NT, MFN, and MST clauses in USMCA all reflect innovative language additions that are more recent than NAFTA.[80] For example, the NT and MFN establish that the "In like circumstances" limitation to provide such treatment requires a "totality of the circumstances" analysis, allowing for the possibility of a different treatment of an investor for the reasons of "public welfare objectives."[81]

Other innovative features of USMCA Annex 14-D that strengthen the Respondent's position in investment arbitration include: (1) a requirement of exhaustion of local remedies for at least thirty (30) months, subject to a loose futility exception;[82] (2) a requirement for investors to submit with the notice of arbitration waivers of the right to initiate or continue litigation;[83] (3) an exclusion of investment arbitration for public debt disputes; (4) a prohibition for investors to submit claims based on the USMCA if the claim has already been submitted to the Mexican courts;[84] (5) a requirement that in order to collect damages "satisfactory evidence that is not speculative" must be established by the Claimant;[85] (6) a prohibition for tribunals not to "order the Respondent to take or not to take other actions, including the amendment, repeal, adoption, or implementation of a law or regulation."[86]

3.2 Covered Government Contract Investments

USMCA Annex 14-E grants ***enhanced*** ISDS protections for investment within the oil, gas, telecommunications, transportation, infrastructure, and power generation sectors.

For investors within these industries holding a written government contract, USMCA establishes all of the previously mentioned protections (that is, those protections for general investment) ***plus*** Fair and Equitable Treatment (FET), Full Protection and Security (FPS), and Indirect Expropriation (IE).[87]

Another example of an innovative provision of USMCA in favor of the Respondent that is reflected in this regime is, the requirement that the Claimant that was previously a party to the covered contract must continue to be a party to the covered contract for the duration of the contract.[88]

Finally, on procedural aspects, disputes under government contracts do not mandate a waiting period of thirty (30) months prior to the commencement of arbitration.[89] Instead, this special regime establishes a specific period in which claims can be brought under this regime. More specifically, it establishes that no claim shall be submitted if: *(*a) less than six months have elapsed from the events giving rise to the claim; and (b) more than three years have elapsed

[80] See USMCA Articles 14.4 – 14.6.
[81] See USMCA Article 14.4.4.
[82] See Articles 14. D.5.1.an and b; ***see also*** footnote 25 stating "The provisions in subparagraphs (a) and (b) do not apply to the extent recourse to domestic remedies was obviously futile."
[83] See USMCA Article 14.D.5.1.e.
[84] See USMCA Article Annex 14-D Appendix 3.
[85] See USMCA Article 14. D.13.1.2.
[86] See USMCA Article 14.D.13.2 and footnote 27.
[87] See USMCA Annex 14-E.
[88] See USMCA Annex 14-D Article 14.D.3 excluding indirect expropriation as a reason for submission of a claim to arbitration under the general investments disputes regime between Mexico and the United States.
[89] See USMCA Annex 14-E, footnote 32.

from the date on which the Claimant first acquired or should have first acquired knowledge of the breach alleged.[90]

4. Available Investment Protections

Having addressed in detail the scope of the available protections, the following part is a more descriptive analysis on each of the most important substantive protection granted in NAFTA, and the way it evolved under USMCA:

4.1 Definition of Investment

USMCA defines investment as an asset that an investor owns or controls that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gaining profit, or the assumption of risk.[91] This definition is more descriptive and of a wider scope than the one provided in NAFTA Article 1139.

4.2 National Treatment

NAFTA Article 1102 states that "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

On this, USMCA Article 14.4 at first appears to maintain the same standard provided by NAFTA Article 1102. However, at the end of it adds on a more restringing language in favor of the Respondent by stating "Whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives".[92] This was not contemplated previously in NAFTA and represents another reason of why the USMCA is called "Skinny NAFTA" with "lighter" investment protections than its predecessor treaty.

4.3 Expropriation and Compensation

NAFTA Article 110 granted investment protections for direct and indirect expropriation. USMCA limits substantially the scope in which indirect expropriation claims can be submitted under USMCA Annex 14-D.3 (unless the investment qualifies as a ***covered government contract investment***, in which case, it will be regulated instead by USMCA Annex 14-E).[93]

Another innovation of the USMCA is that it seeks to prevent differences of interpretation of provisions by tribunals, based on the idea that the definition of expropriation and compensation in NAFTA Article 1110 over time led to differences in interpretation due to its wide language.[94] On this, USMCA establishes a number of specific criteria that need to be considered in determining whether a series of actions qualify as indirect expropriation, such as: (a) the

[90] See USMCA Annex 14-E.4.
[91] See USMCA Article 14.1.
[92] See USMCA Article 14.4.4.
[93] See USMCA Annex 14-D.2. a.i.A.
[94] For example, while in ***Pope & Talbot v. Canada*** the tribunal observed that the test for indirect expropriation was weather the interference was sufficiently restrictive to support a conclusion that the property has been taken from the owner, in ***Metaclad v. Mexico*** the tribunal held that the finding of indirect expropriation depended on a serious of event altogether such as party's reliance on federal governmental representations, the nature of the measures taken by the local government, and the economically harmful effects of those measures.

economic impact of the government action; (b) the extent to which such action or series of actions truly interferes with the investment-backed expectations; and (c) the character, object, context and intent of the government action or actions.[95]

USMCA also states that non-discriminatory regulatory taking aimed at protecting public welfare objectives, ***shall not*** be considered indirect expropriation within the scope of the agreement, subject to certain exceptions (definitely another victory of treaty drafting in favor of the Respondent State).[96]

Finally, USMCA excludes general investors from bringing treaty claims in binding international arbitration against the host State for indirect expropriation.[97]

4.4 Most Favored Nation

For avoidance of doubt, a Most Favored Nation (MFN) clause establishes the possibility for investors protected under a given treaty, to import more favorable provisions from a third-party treaty made by their host State.[98]

NAFTA granted the MFN treatment to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[99] On this, USMCA expressly excludes the application of the MFN clause to "the establishment or acquisition of an investment for general investments."[100]

The MFN clause in USMCA Chapter 14 is again another "lighter" investment protection from the one from NAFTA Article 1103, similar, but with one carve out: in deciding on whether treatment is accorded in "like circumstances," consideration must be given to whether the treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.[101]

Moreover, USMCA Annexes 14-D and 14-E provide that the MFN clause cannot be used to import substantive arbitration protections from other treaties, which is an unprecedented restricting change in treaty law.

4.5 Minimum Standard of Treatment, Fair and Equitable Treatment, Full Protection and Security, and None-Discrimination

On the Minimum Standard of Treatment (MST) NAFTA Article 1105 states that "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security…" and that "each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains

[95] See USMCA Annex 14-D.3.
[96] See USMCA Annex 14-B.3.b.
[97] See USMCA Article 14.D.2.1.a.B.
[98] OECD, "Most-Favored-Nation Treatment in International Investment Law", ***OECD Working Papers on International Investment*** <https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf> (02/13/2022).
[99] See NAFTA Article 1103.
[100] See USMCA Article 14.D.3.b.i.A.
[101] See USMCA Article, 14.5 and 14.4.4.

relating to losses suffered by investments in its territory owing to armed conflict or civil strife." As we can see, a wide and highly protective language in favor of the investor.

The MST in USMCA Article 14.6 is a more detailed and precise iteration of NAFTA Article 1105, cemented in the same customary international law standard as NAFTA, but with the following carve-outs:

First, it clearly states that ***Fair and Equitable Treatment (FET)*** and ***Full Protection and Security (FPS)*** do not require treatment in addition to or beyond the minimum standard of treatment under customary international law. This is in harmony with the binding interpretation of the NAFTA Free Trade Commission in July 2001.[102]

Secondly, it clearly states that an action from the host State would not breach the MST just because it did not meet the investor's expectation, another war trophy from previous past experience of the signatory parties acting as responding States. Therefore, the issue of legitimate expectations of the investors is settled here in favor of the Respondent State thanks to treaty drafting.[103]

5. Procedural Matters

In addition to the substantial legal changes detailed above, on one side, USMCA includes new language additions that appear to be focused on enhancing transparency, and overall making more efficient the arbitral proceedings. The efficiency of these changes is yet to be seen. On the other side, the new procedural requirements in USMCA create additional burdens for investors to enforce their right to assert claims in binding international arbitration.

The following list is a summary of the most critical changes from NAFTA to USMCA in terms of procedural changes:

5.1 Consent to Arbitrate

With regards to NAFTA within the context of the legacy investment claims previously discussed, USMCA makes clear that an investor cannot wait to file its NAFTA claims ad infinitum. Instead, the State parties' consent to arbitrate is expressed in accordance with Section B of Chapter 11 of NAFTA, which expires three years after the termination of NAFTA 1994.[104]

In addition and as previously mentioned, USMCA Annex 14-C clarifies that the new treaty creates no jurisdictional impediment to the completion of already-filed NAFTA claims under NAFTA rules.[105]

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[102] NAFTA Notes of Interpretation, No. 11 (2001) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf> (02/13/2022).
[103] See USMCA Article 14.6.4.; in the past, the NAFTA tribunals of ***Metaclad v. Mexico, S.D. Meyers v. Canada, and Pope and Talbot v. Mexico*** decided on the basis that a breach of the standard can be found for acts that would not be found to have breach the minimum standard of treatment at customary international law.
[104] See USMCA Annex 14-C.3.
[105] See USMCA Annex 14-C.4.

5.2 Fork-in-the-road Provision

The Fork-in-the-road Provision is not technically part of USMCA Investment Chapter 14. Instead, it is included in USMCA Chapter 31 Annex III, which contains the rules of procedure for dispute settlement. However, it not only is part of the procedural aspects of investment arbitration (whether it is a question of jurisdiction or admissibility). But also, it is intertwined with the concept of consent to arbitrate on behalf of the host State, and therefore, deserves a thorough discussion.

NAFTA allowed foreign investors to bring claims without prior exhaustion of local remedies and, in specific circumstances permitted parallel proceedings between domestic and international fora. This model is called the "no-U-turn" model, and it is a departure from the famous "fork-in-the-road" model proposed by the United States in the early negotiations of the treaty.[106]

NAFTA Article 1121 allows foreign investors to seek damages, injunctions, or declaratory relief in a domestic court, or to pursue other dispute settlement procedures prior to bringing a NAFTA arbitration claim. However, at any point within the three-year limitation period set by Articles 1116(2) and 1117(2), the investor may choose to: (1) waive its right to initiate or continue dispute settlement procedures before domestic administrative tribunals or courts with respect to the measure in dispute "except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages"; and (2) bring a NAFTA Chapter 11 international arbitration claim instead. The waiver is irrevocable for the investor.[107]

Unlike NAFTA that is based in the "No-U-turn model," USMCA is based on the "fork-in-the-road" model, which requires the investor to make the irrevocable choice of seeking relief through either domestic courts or international arbitration.[108] These clauses are typically inserted to avoid duplication of proceedings and conflicting decisions over the same matter.[109]

The fork-in-the-road clause in USMCA is ***asymmetric*** because it applies only to U.S. investors in Mexico.[110] It states that U.S. investors "may not submit to arbitration a claim that Mexico has breached an obligation under this [treaty] . . . if the investor or the enterprise, respectively, has alleged that breach of an obligation under this [treaty] in proceedings before a court or administrative tribunal of Mexico." There is no parallel provision in USMCA concerning Mexican investors looking to submit to arbitration claims against the U.S., which makes this asymmetrical fork-in-the-road provision the first of its kind.[111] In other words, it only protects

[106] M. KINNEAR et al., N. 6 (2006).
[107] NAFTA Chapter 11 Art. 1121.
[108] C. SCHREUER et al., ***Principles of International Investment Law***, Oxford University Press, 2nd ed., p. 267 (2012).
[109] ***Supervision v. Costa Rica***, ICSID, Award, 18 January 2017, para. 294 "In order to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions, Investment Treaties use two methods for limiting the selection of a dispute resolution mechanism by the investor. The first method consists of obligating the investor to select a dispute resolution mechanism ab initio through an irrevocable option clause, usually called "fork in the road", which implies that once one of the routes is selected, the possibility of choosing the other is excluded...."; ***See also*** G. KAUFMANN-KOHLER et al., "Investor-State Dispute Settlement and National Courts", ***European Yearbook of International Economic Law*** <https://link.springer.com/chapter/10.1007/978-3-030-44164-7_3> (02/13/2022).
[110] D. GARCIA-BARRAGAN et al., "The New NAFTA: Scaled-Back Arbitration in the USMCA", ***Journal of International Arbitration*** (2019); See also USMCA Chapter 14 Appendix 3.
[111] A. BEDROSYAN, "The Asymetrical Fork-on-the-road clause in USMCA: Helpful and Unique", ***Kluwer Arbitration Blog*** <http://arbitrationblog.kluwerarbitration.com/2018/10/29/usmca/> (02/13/2022).

Mexico against U.S. investors, and technically leaves the U.S. unprotected against Mexican investors. On reason for this may be that since the U.S. law "prevents a Mexican investor from alleging a breach of the USMCA before U.S. courts, the drafters felt no need to include a similar provision addressing Mexican investors in the U.S."[112]

General investors from the U.S. must first obtain a final decision from the local courts of final appeal or defend their claims in local Mexican courts for thirty (30) months before initiating international arbitration, unless such action would be "obviously futile."[113] This period of time runs concurrently with a four-year statute of limitations for asserting any claim through investment arbitration.[114] Claims arising from *covered government contract investments*, however, are exempted from this limitation and can be brought directly before an international arbitration tribunal.[115]

5.3 Rules on the Seat

In contrast with the NAFTA requirement that the seat (that is, the legal place of arbitration) be located in a NAFTA State,[116] USMCA allows the tribunal to choose the place of the arbitration in any State that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (a.k.a. "the New York Convention"), if the disputing parties fail to reach an agreement on the seat.[117] This opens the door for more choices for the parties for the selection of the seat, which went from three (3) choices in NAFTA to a hundred and sixty nine (169) choices (as of December 2021) in USMCA.[118]

5.4 Rules on Transparency

USMCA includes new provisions intended to increase the transparency of arbitral proceedings by explicitly providing that the public have access to relevant arbitration documents and the hearings,[119] whereas NAFTA contained provisions referencing only the publication of the award, notice, and request for arbitration.[120]

USMCA includes a guidance as to the transparency frameworks applicable to ISDS proceedings. Although USMCA does not adopt the UNCITRAL Transparency Rules by reference, it nonetheless signals a willingness to go beyond the provisions on transparency contained in them. For example, it imposes obligations upon Respondent States to make available to the public and the non-disputing USMCA State various documents associated with the proceeding (subject to certain safeguards), including the notice of intent, notice of

[112] M. HODGSON, N. 43 (2020).
[113] K. GORE, No. 47 (2019); *see also* USMCA Chapter 14 Appendix 3; *see also* USMCA Chapter 14 Appendix 3.
[114] M. BURFISHER et al., "NAFTA to USMCA: What Is Gained?", *International Monetary Fund* (2019); *see also* USMCA Chapter 14 Appendix 3.
[115] R. LABONTÉ et al., "USMCA (NAFTA 2.0): Tightening the Constraints on the Right to Regulate for Public Health", *Globalization and Health* (2019); USMCA Chapter 14 Appendix 3.
[116] See NAFTA Chapter 11 Article 1130.
[117] See USMCA Chapter 14 Annex 14-D.7.1.
[118] New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), List of Contracting States <https://www.newyorkconvention.org/countries> (02/13/2022).
[119] See USMCA Chapter 14 Annex 14-D. 8.
[120] See NAFTA Chapter 11, Section C, Articles 1126 and 1137.4.

arbitration, pleadings, memorials and briefs, minutes, transcripts of tribunal hearings and orders, awards, and decisions of the tribunal.[121]

However, even though USMCA provides for significant elements of procedural transparency for ISDS, it does miss others. For example, it lacks more specific elements of transparency such as more guidelines on third party funding; or more guidelines with respect to other avant-garde topics such as investor's obligations.

5.5 Ethics, Conflict of Interest, and the Changing of Hats Discussion

During the UNCITRAL 35th session, States expressed in the Report of the Working Group III concerns regarding the conflict of interest created by some arbitrators engaging in "double hatting."[122] USMCA Annex 14-D Article 6 provides that arbitrators need to comply with the IBA Guidelines on Conflict of Interest, "or any supplemental guidelines or rules adopted by the Annex of the Parties."[123]

Accordingly, USMCA arbitrators shall refrain from "changing hats," that is, arbitrators cannot act as counsel, appointed expert, or witness in a pending arbitration.[124] In other words, future USMCA Chapter 14 arbitrators once appointed are prohibited from acting as counsel or in any other capacity in another pending USMCA Chapter 14 arbitration while the arbitrations in which they sit as arbitrators remain pending.

Some suggest that banning "double-hatting" may decrease diversity among the pool of prospective arbitrators in investment arbitration proceedings, claiming that a "ban effectively limits opportunities available to younger emerging arbitrators who are 'transitional' in their practice and working to move to full-time arbitrator practices, while still acting as counsel or expert."[125]

Nonetheless, USMCA does add new rules for the selection of arbitrators that are most helpful. For example, arbitrators are not required to have any specific experience or training (for instance, in public international law and/or in international investment and trade law). This creates other avenues of entry for diverse and emerging arbitrators with complimentary expertise. For example, expertise in international commercial law, or relevant experience on specific industries.

5.6 Exhaustion of Local Remedies and Statute of Limitation

As previously addressed, NAFTA provided a simple statute of limitation for the submission of claims of three (3) years after the date of knowledge of the alleged breach, and had no

[121] See USMCA Chapter 14 Annex 14-D.8.
[122] UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the works of its thirty-fifth session (May 14, 3018) <https://daccess-ods.un.org/tmp/5769776.70192719.html> (02/13/2022); for avoidance of doubt, "double hatting" refers to when arbitrators also serve at the same time in other conflicting roles in different proceedings, such as party counsel or expert.
[123] See USMCA Annex 14-D.6.
[124] D. GONZALES, No. 52 (2020).
[125] E. SHIRLOW et al., "The USMCA/CUSMA/T-MEC's Entry into Force: Evolution, Innovation, and Reform", ***Kluwer Arbitration Blog*** <http://arbitrationblog.kluwerarbitration.com/2020/06/28/the-usmca-cusma-t-mecs-entry-into-force-evolution-innovation-and-reform/> (02/13/2022).

requirement of exhaustion of local remedies for pursuing an investment claim in binding international arbitration.[126]

In sharp contrast to NAFTA, the new treaty provides more restrictive terms for investors to bring claims than before. USMCA Chapter 14 expressly requires Claimants to exhaust local remedies prior to initiating arbitration, except for when "recourse to domestic remedies was obviously futile or manifestly ineffective."[127] USMCA Chapter 14 also requires Claimants to obtain a final decision from the Respondent's court of last resort, or that thirty (30) months have elapsed from the date Claimant initiated local proceedings.[128]

Additionally, each tier of protection in USMCA grants different time limits for the submission of disputes to international arbitration. In relation to general investments, Claimants should submit disputes to arbitration no more than four (4) years from the date on which Claimant learned of the breach. With respect to covered government contracts investments, no claims shall be submitted to arbitration if less than six (6) months have elapsed from the events giving rise to the claim and more than three (3) years have elapsed from the date on which the Claimant learned of the breach.[129]

5.7 Comments on Draft Awards before the Official Issuance

One of the most innovative features of USMCA is that it grants the disputing parties the right to review and comment on the tribunal's award prior to its issuance.[130] The new treaty imposes on the tribunal the obligation to transmit the draft decision to the disputing parties upon request. It remains to be seen how this innovation plays out in practice, or if it may lead to a never-ending circle of writs between the post-hearing brief and the brand new "pre-award brief."

5.8 Expedited Hearing Procedure

USMCA also provides an expedited hearing procedure for certain proceedings like jurisdictional objections, or objections that a claim is manifestly without legal merit.[131] Again, whether these changes will lead to more time efficient or cost efficient proceedings remains to be seen. Much will depend on the arbitrators' willingness to duly and diligently reject claims at the jurisdictional stage.

5.9 Clarification of Damage Criteria

NAFTA offered the tribunal different choices on how to issue the award, whether it was (a) monetary damages plus applicable interest; (b) restitution the property; (c) and costs when applicable.

[126] See NAFTA Articles 1116(2) and 1117(2).
[127] See USMCA Chapter 14 Appendix 3.
[128] See USMCA Chapter 14, Appendix 3.
[129] See USMCA Chapter 14 Annex 14-E, 4(a).
[130] See USMCA Annex 14-D.7.12
[131] See USMCA Annex 14-D, 7.4. and 7.5.

This remains similar in USMCA, but with a twist. The new treaty adds new clarifying language establishing the burden of proof under which a tribunal may order a Respondent State to pay damages to an investor given "satisfactory evidence…that is not inherently speculative."[132]

5.10 Sunset Clause

The sunset clause is not technically part of the Investment Chapter in NAFTA or USMCA, but it is important to discuss it for the purpose of comparing investment protection between both treaties.

NAFTA did not have a sunset clause, most likely because at the time of its creation adding one was contrary to the purpose and objectives of the agreement, which was to eliminate all tariffs and non-tariff barriers of trade and investment between the United States, Canada and Mexico, and in doing so, to encourage economic activity in the region.[133] Therefore, the drafters established that the only way to terminate the treaty was by express withdrawal of the parties, in which case, the Agreement would remain in force for the remaining parties.[134]

Contrary to NAFTA, USMCA includes a sunset clause with an expiring term of sixteen (16) years. Additionally, every six (6) years the member States will conduct a joint review and decide whether to extend the term of the agreement for another 16-year period.[135]

Figure 1: Comparative Chart of Most Relevant Changes in Investment Protections from NAFTA to USMCA

Topic	**NAFTA Chapter 11**	**USMCA Chapter 14**
Investment Arbitration Availability	Investment arbitration available to all three parties	No investment arbitration USA-CAN No investment arbitration MEX-CAN Reduced investment arbitration USA-MEX
Standard of Protection	Same standard of protection available for all types of investments	Two distinct standards of protections General Investments – some NAFTA protections available Covered Contract Investments (oil, gas, telecommunications, and transportation, infrastructure, and power generation) – all NAFTA protections available with additional limitations
Available Investment Protections	National Treatment Most Favorite Nation Minimum Standard of Treatment Fair and Equitable Treatment	General Investments National Treatment Most Favored Nation

[132] See USMCA Annex 14-D.13.2.
[133] J. SCHOTT et al., "La Implementación del T-Mec: Una Prueba para América del Norte", *Senado de la República y Secretaría de Economía de Mexico (2021)* <https://centrogilbertobosques.senado.gob.mx/docs/La_implementacion_del_T-MEC_una_prueba_para_America_Norte.pdf> (02/13/2022).
[134] See NAFTA Article 2205.
[135] See USMCA Chapter 34, Article 7.

Topic	NAFTA Chapter 11	USMCA Chapter 14
	Full Protection and Security Non-Discrimination Direct and Indirect Expropriation	Direct Expropriation only Covered Government Contract Investments All of the above plus Minimum Standard of Treatment Fair and Equitable Treatment Full Protection and Security Non-Discrimination Indirect Expropriation
Pre-investment Phase	National Treatment and Most Favorite Nation available	General Investments National Treatment unavailable Most Favorite Nation unavailable Covered Government Contract Investments National Treatment available Most Favorite Nation available
Exhaustion of Local Remedies	Arbitration available after 6 months since the dispute arose	Arbitration available only after exhausting local remedies of the host State for 30 months
Procedural Matters	Seat in NAFTA country Transparency Rules – publish only the request for arbitration, notification, and award No rules on double-hatting Award text available only after emission without the opportunity to comment on it in advanced	Seat in any NY Convention country New Rules on Transparency – publication of additional documents and public hearings New rules on double-hatting and conflicts of interests Award draft available prior to emission with the opportunity to comment on it before releasing final award
Sunset Clause	No sunset clause	Treaty expires after 16 years

III. Conclusions and Recommendations

1. Conclusions

Trade between and among nations is in no doubt the cornerstone of modern-day society. Nations that are considered to be economic powerhouses have in the past developed their economies by doing business with other like-minded partners. For nations to trade with one another, specific modalities have to be put in place in the initial stages to streamline pertinent issues like dispute resolution, or rules for doing business in host nations, among others.

Setting up efficient dispute resolution mechanisms is especially important in bilateral investment treaties (BITs) as well as in foreign trade agreements (FTAs) or international investment agreements (IIAs), especially since legal disputes are quite common in international trade. NAFTA and USMCA are perfect examples of this.

Unlike its predecessor the *State-to-State arbitration system*, which required the cooperation of the home State of the foreign investor before an investment claim could be brought against a host State, the modern Investor-State Dispute Settlement mechanism (ISDS) does not require such intervention. Most modern BITs, FTAs, and IIAs contain ISDS provisions that allow investors the right to commence arbitration directly against the host State.

From its humble beginning when the first BIT was signed between Germany and Pakistan in 1959, to the present day with the existence of more than 3,300 known IIAs according to UNCTAD, international investment arbitration has come a long way and NAFTA contributed to that immensely.

Overall, looking back at NAFTA Chapter 11 it is clear that the negotiations resembled the economic and political contexts of the early 1990's. NAFTA sought to break down all national barriers that barred inter-country investment, eliminate political element associated with regional trade, and most importantly, instill investor confidence among citizens of the three (3) nations by providing a neutral and specialized fora for the resolution of their complex disputes.

In the almost three (3) decades that NAFTA has been operational, it encouraged trade and foreign investments within the three signatory nations.

NAFTA's Investor-State Dispute Settlement (ISDS) protocol established in the 1990's was not only a pioneer, but also an efficient foundation that other investment treaties have been based on. This demonstrates just how historic and efficient NAFTA's dispute resolution framework was.

However, no matter how avant-garde its dispute resolution mechanism was, NAFTA became outdated in many other parts of its text. Additionally, political events in the U.S. and Mexico produced the call for change that paved the way for a new treaty, the USMCA.

After reaching a decision to rethink NAFTA, USMCA was developed, and NAFTA Chapter 11 on dispute resolution was eventually replaced by USMCA Chapter 14.

USMCA Chapter 14 was designed in a way based on litigation experience, negotiated by the same parties being previously sued in binding international arbitration. As such, the new treaty strengthens the Respondent's (host State) position in matters of dispute resolution against foreign investors.

Unlike NAFTA Chapter 11 that applied to all three member States and protected investor of all sectors with the same standard, USMCA Chapter 14 on investment arbitration only applies to Mexico and the United States.

The new treaty USMCA has two very distinct standards of protection, one for general investment and the other for covered government contract investments. On this, USMCA seems to favor investors who operate in the telecommunications, power generation, infrastructure, gas, oil, and transportation sectors over other types of investors by granting them

additional protections not available to general investors. Also, no investment arbitration with Canada.

With regards to the available investment protections, for general investments USMCA has a reduced and more complex menu in comparison to NAFTA, including only the protections of national treatment, most favored nation, and direct expropriation. For covered government contract investment there is a more robust menu that includes all of the previous protections plus indirect expropriation (a NAFTA work product) and the minimum standard of treatment (which encompass fair and equitable treatment, full protection and security and non-discrimination).

There are also a wide range of procedural changes that are of the utmost importance, varying from the new requirement of exhaustion of local remedies, to new rules on the seat, transparency, double-hatting, and the opportunity to comment on the award before its emission. Whether these changes add efficiency to the proceedings remains to be seen.

NAFTA was a pioneer in treaty law, as it has been appropriated by other bilateral and multilateral investment agreements. Although there are substantial investment provisions in the new treaty, USMCA contains less investment protections than its predecessor NAFTA. However, even though investment protections are considerably reduced in the new treaty, USMCA still offers substantial foreign investment protections to investors from Mexico and the United States.

In the end, it is only logical for treaties to either evolve or be abandoned. The end of NAFTA and the rise of USMCA is a combination of forces between foreign policy and natural treaty evolution. With that in mind, investors need to be aware of the most important changes from one treaty to another, to be able react to these changes in the most proactive and efficient manner, to continue to secure investment protections of their businesses abroad.

2. Recommendations

Outside the political and ideological factors that undoubtedly paved the way for the rise of USMCA, in terms of treaty law, USMCA is the product of decades of a consistent practice of NAFTA litigation. Based on their own experience, State parties negotiated a new treaty that corrected many of the un-anticipated “errors” generated by NAFTA’s jurisprudence. This exercise automatically benefits the position of the host State against foreign investors in adversarial international litigation.

It will be interesting to see the outcomes of these changes throughout the development of the new USMCA jurisprudence and interpretative notes.

State parties will have the opportunity to revisit the terms of this new treaty every six (6) years and decide whether to extend the term of the agreement for another sixteen-year period.

State parties should take advantage of these opportunities when available and use it wisely, not only to advance on their current best interest as Respondent parties in foreign litigation. But also, to advocate for what is best for the encouragement, promotion, and attraction of foreign investments, trade, and development.

Given that USMCA is a treaty that strengthens the Respondent's position from its baseline, the following are some recommendations for investors or potential investors from any of the signatory countries.

With Canada out and investment protections substantially reduced under USMCA, time is of the essence for those investors considering legacy claims under NAFTA Chapter 11. Investors will want to submit any legacy NAFTA claim as soon as possible and no later than July 1st, 2023. NAFTA contains a minimum ninety (90) day notice provision, so investors will want to submit their notice of intent in good time, that is, on April 1st, 2023 at the latest. However, expropriation claims related to taxation measures must be notified six (6) months before July 1st, 2023, on January 1st, 2023 at the latest.[136] Three critical things to consider will be: (a) whether an investment was established; (b) when did the dispute arise; (c) when and how the claim will expire. Determining these will be critical in understanding the proper cause of action for the investor moving forward in order to raise such claims.

Investors need to be aware that, in comparison to NAFTA, access to investment arbitration in USMCA is subject to rules that are more restrictive, new requirements, and prior steps that did not exist before. However, these new requirements can still be avoided for claims submitted in accordance with USMCA Annex 14-C as a legacy claim in the investment claims chapter.

For an investment to be considered a legacy investment, it must have been made between January 1st, 1994 and July 20th, 2020.

Investors will need to balance their options cautiously, depending on the date of their investment, as well as the specific nature of their industry.

For legacy claims, investors first have to ensure that all jurisdictional requirements under the applicable treaty are met. That is, the elements of: (a) *ratione personae* or ensuring that the nationality of the investor is protected by the treaty; (b) *ratione materiae* or ensuring that the investment falls within the definition of investment in the treaty; and (c) and *ratione temporis* or ensuring that the treaty is applicable when the violation occurred. Furthermore, for treaties like NAFTA or USMCA that provide for arbitration at the International Centre for Settlement of Investment Disputes (ICSID) as the dispute resolution mechanism, investors must also satisfy the requirements of the ICSID Convention.

Also, prior to investing in a foreign country, investors must make sure that their investments receive the best protections available. Hence, foreign investors may want to consider engaging in investment treaty planning, which involves a thorough and detailed effort to structure the investment to optimize its protections available in international investment treaties.

Additionally, jurisdictionally re-structuring existing investments to maximize protections under the global network of investment protections may be a meaningful way forward, in order to maximize treaty protections for those existing investments.

For example, the U.S. has in force forty one (41) BITs and fifty (50) treaties with investment chapters.[137] Mexico has in force thirty three (33) BITs and sixteen (16) treaties with investment

[136] See NAFTA Article 2103.6.

[137] S. AKHTAR et al., *"US International Investment Agreements: Issues for Congress"*, Congressional Research Service Washington, DC (2013).

chapters.[138] It would not take long to find an agreement that provides greater back-end economic relationship protection (e.g., the Netherlands-Mexico BIT). Care must be taken in switching treaty nationalities before a dispute arises, and not after.

Moreover, U.S. investors in Mexico and Mexican investors in the U.S. may also want to consider entering into qualifying government contracts with access to arbitration of the full range of USMCA investment protections.

Finally, for investors that attempt to establish or acquire investments after the entry into force of USMCA, special consideration should be given to address how to avoid or resolve potential conflicts when drafting agreements with government entities. Investors will want to include clear and unambiguous language concerning their dispute resolution rights, including the right to international arbitration.

[138] J. SALACUSE et al., "Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", Harvard International Law Journal (2005).