# What is the ISDS Landscape under the “New NAFTA”?

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On Friday December 7th, a distinguished panel of government negotiators, experienced investment arbitrators and senior legal advisors gathered in Paris at the law faculty of the University Paris II Panthéon-Assas (Paris II) to discuss the US-Mexico-Canada Trade Agreement (USMCA) also called the “New NAFTA” signed on November 30th.

The panel was held as part of a seminar series on Topical Issues in international investment law and investor-state dispute settlement organized by the CERSA, Research Centre of the French National Centre for Scientific Research (CNRS) and the University Paris II Panthéon-Assas. The seminar was moderated by Catharine Titi (CNRS-CERSA, University Paris II Panthéon-Assas) and brought together as panelists

Héctor Anaya Mondragón (Creel, García-Cuellar, Aiza y Enriquez), José Manuel García Represa (Dechert LLP), David Gaukrodger (OECD, in a personal capacity), Barton Legum (Dentons), Rodney Neufeld (Government of Canada, in a personal capacity) and Noah Rubins (Freshfields Bruckhaus Deringer). Over the course of three hours, the panelists discussed the new investment law landscape following the signature of the USMCA.

Main Differences Between the Old and the New NAFTA

USMCA developments have been previously discussed in the blog in relation to Latin America, the EU, in relation to fork in the road provisions and more generally in here.

To kick-off the discussion, the moderator asked the panel to describe the key differences in the ISDS provisions between the USMCA and NAFTA. The first panel described the most striking change as the phasing out of ISDS for investors between the US and Canada and the significant restriction of ISDS between the US and Mexico. Nevertheless, panelists pointed out that even after the USMCA is ratified, the old NAFTA ISDS mechanism will still live on for another three years for what has been termed "legacy investments" made during the NAFTA period from January 1st 1994 to the date of NAFTA's termination. As noted by the panel, "legacy investments" claims initiated during the three year period will be decided under the old NAFTA Chapter 11 rules and the tribunal proceedings will continue until finished and any arbitral awards will be fully enforceable, even beyond the three-year phase-out period. As such, the panel noted that there will likely be a flurry of new claims by investors before their arbitration rights expire.

Legacy Investments

The panel then spent a lengthy time debating various questions raised by the legacy investments provisions without producing straightforward answers. These questions included: Is it intentional that pre-1994 investments are not included and if so why? Do the legacy investments provisions still kick-in if one of the parties does not ratify the USMCA? What does "termination" of NAFTA actually mean? Will arbitrators be allowed to interpret new claims filed under the legacy provisions in light of modifications made in the "New NAFTA"?

USMCA Innovations

The speakers also noted more specific innovations to the old NAFTA contained in the USMCA including, the expansion on the definition of expropriation in Annex 14-B, the use of specific examples given for interpretation of the minimum standards of treatment provided in the new Article 14.6 (previously article 1105) 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".

Negotiation Process and Government Concerns

The conversation then turned to the negotiation process. The 15-month long negotiations of the USMCA were described as “very strange” and unlike any other high level treaty negotiations previously experienced by those involved, including some very “big surprises” along the way. By way of explanation, the panelists highlighted the political shift that has taken place since the old NAFTA agreement was put into place.

In particular, panelists observed that more recently, high-level government representatives have made sharp public criticisms of investment treaties which could explain some of the new approaches in the treaty. For example, David Gaukrodger noted that, in testimony before the US Congress, US Trade Representative Robert Lighthizer expressed concerns about preferential treatment of foreign investors over US investors due to access to ISDS, ISDS incentivizing companies to outsource jobs, and the dissuasive impact of investment treaties on regulation in the public interest (popularly coined as “regulatory chill”) as governments fear that they expose themselves to liability.  It was noted that, unlike recent EU rejection of the operation of investor-state arbitration, this criticism was broader and goes to the overall effects of investment treaties.

Death of ISDS?

Interestingly, Noah Rubinson and Barton Legum noted how twenty years ago, these statements used to be reserved to the NGOs and the left and right “fringes” but have now moved to the mainstream. This in turn sparked an exchange around the oft-debated question is this “The Death of ISDS”?

At first speakers debated philosophically if it would matter if it really were the end of ISDS and whether the underlying issue was really more an emotional attachment than a crisis in the world order. Ultimately, the panelists seemed to agree that the USMCA marks a decline although perhaps not the fatal end of ISDS. Moreover, José Manuel García Represa remarked that he previously represented a couple of the first Latin American countries to renounce the ICSID Convention and that now this exodus seems to be spreading to capital-exporting countries while, ironically, countries like Ecuador are reversing course and returning to ISDS.

State to State Disputes

Catharine Titi concluded the panel discussion by questioning the likelihood that under the New NAFTA, there will be a return to State to State disputes and asked the panelists to indicate how well they think that the US, Mexico and Canada are prepared for this. Barton Legum noted that the US is well situated to handle such claims because the State Department office dealing with large claims before the US-Iran Claims Tribunal contains a large staff with a great amount of expertise that will become available when the current hearings in that tribunal conclude. Rodney Neufeld pointed to Canada's extensive WTO practice as providing good preparation for such claims. On the other hand, Héctor Anaya Mondragón expressed some concern as to Mexico's preparedness in light of the newly-elected government's purge of experienced staff and the push to cut the budget and therefore avoid the use of external counsel.

Unanswered by the panel was the deeper question posed by the moderator, Does this return to State to State disputes mean a return to diplomatic protection and the Calvo Doctrine?