The USMCA/CUSMA/T-MEC's Entry into Force: SAVE THE DATE: July 1, 2023 – Canada is Out. Legacy Investors, Get Your Investment Claims In!

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Devin Bray (De Brauw Blackstone Westbroek) and Jason Czerwiec

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Amid global economic uncertainty, the years-long project of the United States-Mexico-Canada Agreement ("USMCA") (also known as "the new-NAFTA" or "NAFTA 2.0") has finally reached fruition. On March 13, 2020, Canada became the final North American party to ratify the agreement and now the treaty will enter into force on July 1, 2020. Kluwer Arbitration Blog has featured analysis of several USMCA developments leading up to ratification. While the deal as a whole is regarded by each of the governments as a much needed upgrade to the economic integration between the countries, there is one standout development in the USMCA for Canada: its non-participation in the investor-State dispute settlement mechanism ("ISDS").

To be clear, Chapter 14 of the USMCA continues to provide ISDS for Mexican investors in the U.S. and U.S. investors in Mexico (albeit in a distilled manner, discussed in greater detail below). ISDS proceedings involving Canada – that is to

say either Canada acting as the host State respondent or Canadians as foreign investor claimants for disputes levied against the U.S. or Mexico – is eliminated. Aggrieved Canadian investors investing in Mexico and the U.S. are, however, not completely without recourse. The Comprehensive and Progressive Agreement for Trans Pacific Partnership ("CPTPP") provides for ISDS for Canadians and Mexican investing in Mexico and Canada respectively. There is no similar arrangement between Canada and the United States. For these stakeholders going forward, investment claims may only be raised through local courts, through the operation of a separate arbitration agreement between the parties (e.g., an arbitration clause of an investment contract with a State-owned entity), or as part of a state-to-state arbitration. The USMCA preserves "legacy claims", by which it permits ISDS claims between Mexico, Canada and the United States for existing investments to be raised under NAFTA for a period of three years after its termination, i.e., until July 1, 2023.

Canada's Perspective

On the one hand, Canada's non-participation may be regarded as an affront to the advancement of ISDS. Under NAFTA, Canada has faced 27 claims raised by U.S. investors and tribunals have ordered Canada to pay damages in eight of those cases. Critics of Canada's involvement with NAFTA highlight that the total known amount for settlements and damages now tops over $219 million, with legal costs in the range of $95 million. Compared to the pristine NAFTA record of the United States, which presently sits at 17-0 (16 of which were raised by Canadian investors), Canada's refusal to enter into any form of ISDS with the United States may be apparent from the countries' respective scorecards.

On the other hand, Canada's non-participation may make strategic sense. NAFTA Members have long flirted with supplanting the 1994 Agreement. However, after the parties were unable to close the Transnational Pacific Partnership ("TPP") – which was derailed when President Donald Trump announced his decision to withdraw in 2017 – there was less incentive for Mexico and Canada (as they joined the CPTPP, the TPP's successor) to renew what President Trump referred to as "the worst trade deal in history". Nonetheless, U.S. Trade Representative Robert Lighthizer was able to strong-arm Canada and Mexico back to the table. Pressed against tight politically-driven deadlines, Canada's non-participation in Chapter 14

of USMCA may have been the way forward to ensure an agreement was reached. It also leaves on the table a blue chip for future negotiations between the parties. Canada has a built-in reset button in the USMCA's sunset clause, which sets USMCA's termination date 16 years after its entry into force but permits Members to revisit their commitment to the treaty every six years. While it is unlikely these negotiations would center on the investment chapter of the treaty, Canada at least has the opportunity to reassert its stance on ISDS in the near future, potentially to counter-parties more amenable to its position.

The content of Chapter 14 of USMCA may have also been the cause for Canada's non-involvement. The USMCA departs significantly from the NAFTA by providing different degrees of protection for potential investor claimants. Annex 14-E of the agreement establishes a privileged regime for those with federal level government contracts in "covered sectors": (i) oil and gas, (ii) power generation, (iii) telecommunications; (iv) transportation, and (v) infrastructure. A less favourable regime, outlined in Annex 14-D, applies to all other ISDS claims, which includes a new 30-month resort to domestic court requirement and limits protection to claims involving direct expropriation, national treatment and most favoured nation treatment.

A deeper analysis also reveals that some provisions slightly favour the American position. For example, the U.S. rarely utilizes public contracts in the power generation and transportation sectors at a federal level, whereas Mexico does so. Further, recent liberalizations in the aforementioned sectors of the Mexican market are geared to incentivize American investors (despite a notable volte-face in Mexican energy policy). While a different annex could have been custom-made for U.S. and Canadian investment relations, the fact that it was not, given the privileged / non-privileged regimes proffered by the U.S.-Mexican template, is demonstrable of just how far apart the U.S. and Canada are when it comes to ISDS.

By all standards, where some countries have voiced strong opposition to ISDS by terminating investment agreements (European Union, Indonesia, India), denouncing institutions (Bolivia, Ecuador, Venezuela) and advancing other forms of dispute resolution (Brazil, South Africa), Canada has remained a steadfast champion of ISDS and associated reform efforts. Canada embraced the possibility of a multilateral court of arbitration when it signed the (Comprehensive Economic and Trade Agreement between the European Union and Canada ("CETA"). It has also kept open the traditional forms of ISDS in its contemporaneous BIT practice

(see e.g., Article 23, Canada-Moldova BIT, which was concluded nearly four years after the CETA negotiations had ended in August 2014). When six of the eleven Members of the CPTPP signed side letters that eschewed ISDS in favour of each jurisdiction's domestic courts, Canada declared its commitment to the "evolution of ISDS". Canadians also sit in influential positions advancing global reform efforts. Shane Spellisey, Director of Canada's Trade Law Bureau, is the elected Chairperson of the United Nations Commission on International trade Law (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform), mandated to address ISDS reform options. Meg Kinnear, Secretary General of the International Centre for Settlement of Investment Disputes ("ICSID") and Canadian, is leading the ICSID Rule Amendment Project. Canada's non-participation in Chapter 14 appears less an abandonment of ISDS than an educated and strategic move, especially given the state of global reform to ISDS, Canada's role in those developments, and the thinned protections offered by the USMCA along with the haste involved in its negotiation.

Investor Prospectus under the USMCA

With Canada out and investment protection set to significantly diminish under the USMCA as of July 1, 2023 (and a veritable coronavirus boom of investment arbitration cases on the horizon), NAFTA, Chapter 11 investment protection is looking mighty attractive. Timing is now a paramount consideration. Investors facing the expiration of NAFTA protections must determine when their investments were established, and if a dispute is imminent with a host State under NAFTA, they must determine concretely when that dispute can be said to have arisen. Above all else, they must know if, when and how their claims expire. These factors will be consequential in determining which procedural route applies to them and their investments going forward.

Will it result in a Black Friday rush of legacy claims before the USMCA's cut-off date of July 1, 2023? Maybe. When Venezuela denounced ICSID on January 24, 2012, nine cases were registered with ICSID within six months (as prescribed by Article 71 of the ICSID Convention). If investors wish to avoid their host State's local judiciary, which may be particularly untenable when raising certain claims (e.g., national treatment), or to avoid taking a backseat chance on a politicized state-to-state arbitration, then there may be a spike in NAFTA legacy claim cases over the

next three years.

Investors can and should also be proactive, by cultivating new forms of foreign investment relations (either under a government contract or investment contract that provides alternative routes to international arbitration). Established investors must take care with this step, especially if they are harbouring a potential claim. Under USMCA, Annex 14-C, an investor loses recourse as a "legacy investment" status holder if they qualify as an Annex 14-E "investor". This also means that those investors sitting on a claim who would already qualify under Annex 14-E may wish to raise such a NAFTA claim before it expires next week on July 1, 2020. Notably, the USMCA adopts more restrictive language to describe the substantive protections compared to similar ones found in NAFTA, Chapter 11 (Compare e.g., NAFTA, Article 1105(1) with USMCA, Article 14.6 and Annex 14-A).

Similarly, treaty planning – i.e., jurisdictionally re-structuring investments so as to maximize protection under the global network of investment protection – may be the way forward. The United States has in force 41 BITS and 50 treaties with investment chapters. Mexico has in force 33 BITs and 16 treaties with investment chapters. It would not take long to find an agreement that provides greater back-end economic relationship protection (e.g., Netherlands-Mexico BIT). Care must be taken as switching nationalities before a dispute has been resolved can negate the international claim, even despite egregious conduct by the host State.

What is clear is that the introduction of Chapter 14 of USMCA is a change that will spark reaction. Equally clear is that the collateral damage of this chapter will be small- and medium-sized firms involved with foreign investment opportunities. These stakeholders may not possess the clout or capability to secure government contracts in the protected sectors, negotiate separate arbitration clauses, or restructure internationally to ensure a greater degree of investment protection, but they will most likely be first in line to save the date: July 1, 2023.

For the full scope of our coverage of USMCA to date, click here.