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The Asymmetrical Fork-in-the-Road Clause in the USMCA: Helpful and Unique

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Introduction: The Pro-State Orientation of the USMCA

Chapter 14 of the United States-Mexico-Canada Agreement (USMCA) presents a model of investor-state dispute settlement (ISDS) that fundamentally realigns the balance between investors and states in favor of the latter.

This realignment consists in the USMCA's structure and specific provisions. Structurally, the USMCA eliminates ISDS between Canadian investors and the United States and vice versa. It provides for ISDS between American investors and Mexico and vice versa for only certain types of claims (except for investors in five "covered sectors," who retain ISDS for all claims.).[1)]

Specific provisions, meanwhile, explicitly codify pro-state interpretations of debated questions in investment arbitration. Some of these provisions are familiar. For example, Article 14.1 requires an investment to satisfy the *Salini* criteria in order to be protected, [2)] while Article 14.6(2) limits the content of the "fair and equitable treatment" and "full protection and security" obligations to the customary international law minimum standard of treatment of aliens.

Other such provisions are unprecedented. Footnotes 22 and 29, in Annexes 14-D and 14-E, respectively, provide that the "most favored nation" (MFN) clause cannot be used to import substantive or arbitration provisions from other treaties. No other investment treaty explicitly restricts MFN clauses in this way.

It is therefore unsurprising that Roberto Landicho and Andrea Cohen describe the USMCA as effecting a "veritable sea change" compared to ISDS in the predecessor North American Free Trade Agreement (NAFTA), while Nikos Lavranos characterizes the USMCA as providing only a "light and restricted" version of ISDS.

The Asymmetrical Fork-in-the-Road Provision in the USMCA

One exceptional provision adopts a pro-investor position on a debated question in investment arbitration: the fork-in-the-road provision, found in Appendix 3. It provides:

> An investor of the United States may not submit to arbitration a claim that Mexico has breached an obligation under this Chapter . . . if the investor or the enterprise, respectively, has alleged that breach of an obligation under this Chapter in proceedings before a court or administrative tribunal of Mexico.

The USMCA does not contain a parallel provision concerning Mexican investors looking to submit to arbitration claims against the United States. Appendix 3 is therefore an "asymmetrical" fork-in-the-road provision – the first of its kind.

This asymmetry reflects the drafters' recognition of the different status that international treaties have in the domestic legal systems of Mexico and the United States.

Like many countries with a civil law tradition, Mexico is a "monist" legal system. Its international treaties are automatically part of its domestic law (*i.e.*, without the need for implementing legislation) and directly enforceable in its courts. [3] As a result, an American investor could bring a claim for violation of the USMCA directly before Mexican courts.

The United States, by contrast, like many common-law countries, is much closer to a "dualist" legal system. A treaty does not automatically become part of American domestic law unless it conveys an intention to be "self-executing." [4] Even then, the American constitutional separation of powers presumes that the treaty must be enforced by the executive branch through diplomacy, rather than by the judicial branch. A self-executing treaty is therefore not enforceable in American courts unless it clearly confers a private right of action – a rare proposition. For example, in *McKesson v. Islamic Republic of Iran*, the Court of Appeals for the D.C. Circuit found that the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, although it was self-executing and conferred property rights to individuals, did not allow individuals to enforce these rights through domestic litigation. 539 F.3d 485, 488-91 (D.C. Cir. 2008). Therefore, it is highly unlikely that a Mexican investor could bring a claim for breach of the USMCA in American courts.

The Asymmetrical Fork-in-the-Road Provision and the debate surrounding Fork-in-the-Road Provisions

The USCMA parties drafted the asymmetrical fork-in-the-road provision in the context of a debate among investment arbitration practitioners on how broadly fork-in-the-road provisions in investment treaties should be interpreted. This debate has two camps.

One camp argues that a fork-in-the-road clause prohibits an investor from bringing claims arising out of the same facts in both international arbitration and a host state's domestic courts only if the claims share the same cause of action. Under this view, a party could claim before the host state's domestic courts that a given measure by the host state breached domestic law, and claim in international arbitration that the same measure breached the investment treaty, because each claim would have a different cause of action. [5]

The second camp, by contrast, argues that a fork-in-the-road clause prevents an investor from bringing claims arising out of the same facts in both international arbitration and a host state's

domestic courts, regardless of the cause of action underlying each claim. Under this view, it is irrelevant that the claim in the domestic court is brought under domestic law and the claim in international arbitration under international law. [6)]

The asymmetrical fork-in-the-road provision in the USMCA suggests that its drafters side with the first camp. The provision applies only to claims brought by an American investor in Mexican courts for breach of the USMCA. It prohibits an American investor who has brought a claim for breach of the USMCA in Mexican courts from bringing a claim for the same breach of the USMCA in international arbitration. Because American law prevents a Mexican investor from alleging a breach of the USMCA before United States courts, the drafters felt no need to include a similar provision addressing Mexican investors. In other words, they agreed that a fork-in-the-road provision is meant to prohibit only parallel claims arising both out of the same facts and under the same cause of action (in this case, under the treaty itself).

Conclusion

The asymmetrical fork-in-the-road provision of the USMCA is unique, both in isolation and in context of the USMCA as a whole. It is the only known fork-in-the-road provision that applies to claims brought by investors of only one party to an investment treaty, and it reflects a rare occasion where the USMCA adopts a pro-investor view of a debated question in investment arbitration.

More important, the provision serves as a reminder for drafters of investment treaties to take into account the role that international law plays in the domestic legal systems of the parties to the treaty, particularly where the parties come from both common-law and civil-law traditions. If the fork-in-the-road clause in the USMCA were symmetrical, a question would arise as to whether Mexican investors who challenged measures by the United States in American courts as breaching domestic law would retain their rights to challenge the same measures in international arbitration as breaching the treaty. Instead, the drafters of the USCMA appropriately took into account the different role that international treaties play in the Mexican and American legal systems, in order to draft a uniquely asymmetrical fork-in-the-road clause that communicates clearly that the clause has a narrow application.

If more investment treaties follow the innovative lead of the USMCA on similar issues, it would bring welcome clarity for investors, states, and ISDS arbitrators alike.

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References

?1 This paragraph implies no criticism of the quality of protection foreign investors can expect to receive in the courts of the USMCA parties.

?2 The investment must have "such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

?3 Adrián Cisneros Aguilar, *The Position of International Treaties in PRC and Mexican Law: Using the Chinese "Dialectical Model" to Implement and Enforce a Hypothetical Mexico-China FTA, as Related to Foreign Investment*, 13 Arrelano L. & Pol'y Rev. 29, 35-36 (2015).

?4 *See Medellin v. Texas*, 552 U.S. 491, 504-05 (2008).

?5 *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction, ¶ 80 (17 July 2003); *Ronald S. Lauder v. Czech Republic*, Final Award, ¶¶ 159-66 (3 Sept. 2001); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, ¶¶ 47-59 (1 July 2004); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction, ¶¶ 89-92 (8 Dec. 2003); *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶¶ 211-12 (11 Sept. 2009); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No ARB/99/2, Award, ¶ 332 (25 June 2001).

?6 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, ¶¶ 61-68 (30 July 2009); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶¶ 55, 113 (3 July 2002); *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Award, ¶¶ 359-70 (6 May 2014); *Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶¶ 4.72-4.77 (27 Feb. 2012).

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