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The USMCA/CUSMA/T-MEC's Entry into Force: Investment Arbitration in the Financial Services Chapter: What Changed and What Remains?

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As North America embarks into a post-NAFTA era with the USMCA, it is crucial to analyze the new agreement's disciplines. The USMCA Investment Chapter, for instance, has been the subject of many articles that have reviewed relevant differences with respect to NAFTA, particularly on investment arbitration. This post will explore the arbitration rules applicable to investment disputes under the USMCA Financial Services Chapter.

From NAFTA to the USMCA: Structure and Framework for Financial Services Disputes

The disciplines on investment in NAFTA (including those applicable to arbitration) are mainly encompassed in Chapter 11 (Investment). However, in NAFTA Chapter 14 (Financial Services), Canada, Mexico, and the United States designed a separate chapter that applied to measures of a Party relating to financial institutions of another Party, cross-border trade in financial services, and an investor of another Party, and investments of that investor, in a financial institution in the Party's territory.

NAFTA Chapter 14 provided, among others, the standards of protection to investors and investments in financial institutions, as well as the rules on investment arbitration. Some of those provisions were incorporated by reference to the NAFTA Investment Chapter, according to Article 1401(2):

> Articles 1109 [(Transfers), 1110 (expropriation),] 1111 [(Special Formalities and information requirements)], 1113 [(Denial of Benefits)], 1114 [(Environmental Measures)] … are hereby incorporated into and made a part of this Chapter. Articles 1115 through 1138 are hereby incorporated into and made a part of this Chapter solely for breaches by a Party of Articles 1109 through 1111, 1113 and 1114, as incorporated into this Chapter.

Thus, measures adopted or maintained by a Party that applied to investments in the financial sector were regulated outside Chapter 11 (Investment). NAFTA Article 1101.3 drew that line providing

that “Chapter [11] does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).” Therefore, a claim against a measure within the scope of Chapter 14 could only be arbitrated according to that chapter.

The USMCA preserves the same structure designed in NAFTA by providing a separate framework for investments in the financial sector, and related investment claims, in Chapter 17 (Financial Services). The arbitration rules for investment claims under Chapter 17 are contained in Annex 17-C (Mexico-United States Investment Disputes in Financial Services), which will be reviewed in the next section.

The USMCA: Substantive Modifications for Investment Arbitration in the Financial Services Sector

Similar to NAFTA, the USMCA builds an exclusive arbitration regime applicable to the financial services sector by incorporating the investment arbitration framework set out in Annex 14-D and introducing some modifications. Annex 17-C provides that the investment arbitration provisions set out in the Investment Chapter (Annex 14-D) will apply to investment disputes under the Financial Services Chapter, as modified by that annex. This section reviews the main modifications.

ISDS for investments in the financial sector does not include Canada. Unlike NAFTA, in the USMCA, Canada does not consent to arbitrate investment claims under the scope of the Financial Services Chapter, which only involves Mexico and the United States. Therefore, just like in the general ISDS regime contained in Annex 14-D of the USMCA Investment Chapter (discussed in Wednesday’s post), US and Mexican investors will no longer be able to have recourse to investment arbitration in the financial sector against Canada (and vice-versa concerning Canadian investors). However, alternatives remain. Mexican and Canadian investors continue to have the ability to arbitrate disputes against Canada and Mexico, respectively, under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Chapter 11 (Financial Services), Article 11.22. For any disputes involving US and Canadian claims against Canada or the United States, respectively, the only option to settle a dispute under the Financial Services chapter would be the State to State dispute settlement mechanism, as provided in USMCA’s Article 17.21 (Dispute Settlement).

Limited consent to arbitration. The USMCA Financial Services Chapter incorporates the following obligations from the Investment Chapter: Article 14.6 (Minimum Standard of Treatment), Article 14.7 (Treatment in Case of Armed Conflict or Civil Strife), Article 14.8 (Expropriation and Compensation), Article 14.9 (Transfers), Article 14.13 (Special Formalities and Information Requirements), Article 14.14 (Denial of Benefits), Article 14.16 (Investment and Environmental, Health, Safety, and other Regulatory Objectives).

However, similar to the investment claims allowed under Annex 14-D of the USMCA Investment Chapter examined in other posts, the United States and Mexico limited their consent to arbitrate disputes under the Financial Services Chapter. An investor can only submit to arbitration claims for alleged breaches to the National Treatment (Article 17.3(1) and (2)), and Most-Favored-Nation Treatment (Article 17.4.1(a) to (c)) obligations set out in the Financial Services Chapter (except for the establishment or acquisition of an investment), and Expropriation (Article 14.8), except for

indirect expropriation.

In comparison, under CPTPP, Canada and Mexico limited their consent to arbitrate disputes in the financial sector to the following obligations of the Investment Chapter:

Minimum Standard of Treatment (Article 9.6) (Mexico did not consent to the submission to arbitration for a breach of this provision before the seventh anniversary of the date of entry into force of CPTPP); Treatment in the Case of Armed Conflict or Civil Strife (Article 9.7); Expropriation and Compensation (Article 9.8); Transfers (Article 9.9); Special Formalities and Information Requirements (Article 9.14), and Denial of Benefits (Article 9.15).

Under NAFTA, the three States granted the same consent to arbitration to investors of all three States, but not anymore under the USMCA because Canada is not a Party to Annex 17-C. Furthermore, when CPTPP is brought to the analysis, the contrast between the different access to investment arbitration for investors of the three States is more evident.

Litigation in domestic courts. Under the general regime for investment arbitration set out in Annex 14-D, the USMCA imposes the obligation on US and Mexican investors (or the enterprise, when a claim is brought on behalf of it) to pursue domestic litigation before the courts of the host State, before submitting a claim to arbitration (Article 14.D.5.a.). It also requires that the investor or the enterprise obtain a final decision from the court of last resort in the host state, or that 30 months have elapsed from the initiation of the domestic litigation. Under Annex 17-C, the same restrictions apply, except that the 30-month requirement to pursue such domestic remedies is reduced to 18 months (Annex 17-C.4). This requirement did not exist in NAFTA.

Exceptions. In NAFTA, when an investor submitted a claim to arbitration under the Financial Services Chapter, the respondent could invoke as a defense an exception under Article 1410 (prudential exception or monetary and exchange rate policies exception). Upon request of the respondent, the tribunal was required to refer the matter to the NAFTA Financial Services Committee (comprised by the Parties' financial authorities) for a decision as to whether the invoked exception was a valid defense. This effectively interrupted the arbitration while the matter was being resolved. If the Committee failed to decide the matter within 60 days, an arbitral panel established under the State-to-State dispute resolution mechanism could decide the matter and issue a report. Both the decision and the report were binding for the tribunal. In case no request to establish a panel was made, the tribunal had to decide the matter.

This mechanism in NAFTA was not used. In Fireman's Fund, the only arbitration under NAFTA's Financial Services Chapter, Mexico invoked an exception under Article 1410 for measures adopted for prudential reasons, as a defense against an expropriation claim. Mexico, however, did not request the matter to be referred to the Committee for a decision. The tribunal did not assess the validity of the defense in the end, because it found that the challenged measures did not constitute expropriation under the NAFTA.

The USMCA retains the possibility for a respondent to invoke Article 17.11 (Exceptions) as a defense, allowing a careful consideration of the matter while the arbitral procedure is suspended. However, USMCA eliminates the phase of the State-to-State dispute resolution mechanism but includes a more detailed procedure in Annex 17-C.5. Some of the new features are reviewed below.

Once the respondent invokes an exception under Article 17.11, it *must* submit to the financial

authorities of the Party of the claimant, a request for a joint determination by the authorities of both Parties, as to whether and to what extend the exception invoked is a valid defense. The request must include the text proposed for a joint determination. As mentioned above, under NAFTA, the tribunal had to refer the matter to the Committee *only* upon request of the respondent. Also, NAFTA did not require to propose the text for a joint determination.

Under USMCA, the authorities must seek to agree on a joint determination within 120 days, and in extraordinary circumstances, they can extend the date 60 days. Under NAFTA, the Committee had 60 days to decide the matter.

The following aspects described were also not present in NAFTA and are new features added to the arbitration proceeding under the USMCA. Within 120 or 180 days if an extension is agreed, the authorities of the Party of the claimant must notify the authorities of the respondent whether they agree with the proposed joint determination, offer an alternative resolution, or do not accept a joint determination.

In case no notification is made, it shall be presumed that the authorities of the Party of the claimant, take a position consistent with that of the authorities of the respondent. In that case, a joint determination shall be deemed to be agreed as set out in the proposed joint determination. A joint determination shall be binding on the tribunal.

The arbitration may continue (i) 10 days after the disputing parties and, if constituted, the tribunal, receive the join determination, or (ii) 10 days after the expiration of the 120 days or the extended time agreed. However, if the authorities have not resolved within the 120 days, or the extended time agreed, the tribunal must decide the issue left unresolved by the authorities on the request of the respondent. In that case, the tribunal must decide the issue before the merits of the claim.

Specialized Arbitrators. The USMCA Financial Services Chapter requires that presiding arbitrators of the tribunal "ha[ve] expertise or experience in financial services law or practice such as the regulation of financial institutions." The same rule applies to the other arbitrators "to the extent practicable" (Annex 17-C.3.a.). This requirement did not exist in NAFTA for investment tribunals, although it existed as a requirement for panelists under the State-to-State dispute settlement mechanism. This approach in NAFTA shows the preference of the three States to decide financial matters by experts in the field of financial services law, either by the Financial Services Committee or State-to-State panels. Although under the USMCA Financial Services Chapter, State-to-State panels will no longer intervene in deciding exceptions invoked by the respondent in investment arbitration, Mexico and the United States favored the NAFTA approach of appointing arbitrators specialized in financial services law in Annex 17-C.

Conclusion

In the USMCA, the three States decided to continue the approach agreed in NAFTA and devoted a specific regime to investments in the financial sector. However, only Mexico and the United States consented to arbitrate investment disputes, with limited scope as described above. Despite those limitations, Mexico and the United States designed a more detailed set of rules for investment arbitration in the financial sector, particularly when the respondent invokes an exception under Article 17.11.

In *Fireman's Fund*, the investor alleged (unsuccessfully) that the measures challenged were not within the Financial Services Chapter's scope as an attempt to have access to a broader set of claims under the Investment Chapter (e.g., Minimum Standard of Treatment). Under the USMCA, that situation is unlikely to occur because in both chapters 14 (Annex 14-D) and 17 (Annex 17-C) Mexico and the United States have granted a similar and limited consent to arbitrate investment disputes.

This post was prepared by the author in his personal capacity. The opinions expressed in this post are only the author's own.

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