Dispute Settlement in the United States-Mexico-Canada Agreement

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This is the latest instalment in BLG's series of detailed assessments covering key provisions in the United States-Mexico-Canada Agreement (USMCA).

The USMCA contains the same three types of dispute settlement found in the NAFTA: investor-state dispute settlement (ISDS), binational panels to adjudicate challenges to antidumping and countervailing duty determinations, and state-to-state dispute settlement. The latter two largely mirror what existed under the NAFTA. However, the ISDS mechanism set out in USMCA Chapter 14 is a significant departure from ISDS under NAFTA Chapter 11 and notably, will not apply to claims by U.S. and Canadian investors against each other's governments.

Binational Panel Review of Trade Remedy Determinations (Chapter 10)

A fundamental objective for Canada in the negotiations was to maintain the equivalent of NAFTA's Chapter 19 dispute settlement mechanism, which allows for binational panel review of a party's anti-dumping or countervailing duty determinations as a substitute for domestic judicial review and with the same force of law. The United States had adamantly opposed including the equivalent of Chapter 19 in a renegotiated NAFTA but relented in late September, helping to pave the way for the tripartite deal. As a result, the Chapter 19 mechanism has been reproduced, in near identical terms, as part of the USMCA's Chapter 10 (Trade Remedies).

The negotiations failed to address problems with Chapter 19, including the panel selection process and the procedure allowing for "extraordinary challenges" to binational panel determinations, which is subject to abuse. Nevertheless, for companies and governments affected by trade remedy actions of any of the USMCA parties, the binational panel review process offers an important alternative where domestic courts are seen as excessively deferential to the determinations of investigating authorities.

State-to-State Dispute Settlement (Chapter 31)

Chapter 31 of the USMCA preserves the dispute settlement system established by NAFTA Chapter 20, which enables a state party to bring a challenge against another party for an alleged breach of the Agreement. The U.S. had effectively sought to eliminate binding state-to-state dispute settlement but ultimately agreed to maintain the Chapter 20 mechanism essentially intact but, notably, has expanded it to cover compliance with obligations in the Labour, Environment and Anti-corruption chapters of the USMCA. The negotiations did not address a major flaw in the panel selection process under Chapter 20 of the NAFTA, which had enabled a party to thwart the composition of a panel where the parties' rosters of potential panelists had expired. This was a principal reason why Chapter 20 dispute settlement had languished for many years. However, U.S. interest in ensuring that obligations in the Labour and Environment chapters are enforceable through Chapter 31 dispute settlement should incentivize the parties to maintain up-to-date rosters under the USMCA.

ISDS (Chapter 14)

The USMCA does not provide for ISDS as between U.S. investors and Canada, and will sunset NAFTA ISDS. U.S. investors in Canada and Canadian investors in the United States will have at most 3 more years of access to ISDS for claims against their host state. Arbitration claims initiated by U.S. investors against Canada or Canadian investors against the United States before the NAFTA is terminated will be permitted to continue, but the only new claims that will be recognized in either case will be claims in respect of so-called "legacy investments" (defined as investments established or acquired between January 1, 1994 and the date of termination of the NAFTA, and in existence when the USMCA enters into force) made within three years of the NAFTA's termination. Otherwise, as between Canada and the United States only state-to-state dispute settlement will be available under the USMCA for alleged breaches of its investment obligations. Substantively, those obligations are similar to the investment obligations in the NAFTA but reflect the sort of clarifications with respect to obligations such as indirect expropriation and minimum standard of treatment as are found in other post-NAFTA US and Canadian investment treaties.

Canadian investors in Mexico and Mexican investors in Canada will have recourse to ISDS under the provisions in the Trans-Pacific Partnership Agreement (CPTPP) upon its entry into force on December 30, 2018.

The USMCA does provide for ISDS claims by U.S. investors against Mexico and vice versa, but with considerable restrictions relative to the NAFTA, particularly if the claim does not arise out of an investment contract with the host state to either provide public services in certain covered sectors (power generation, telecommunications, transportation and infrastructure) or to engage in activities controlled by the host state in the oil and gas sector.

Where investor-state dispute settlement is curtailed or no longer available under the USMCA, investors will have two other possibilities to preserve their access to international arbitration in respect of their investments in the other USMCA countries. Where the host government is directly involved in a project or exercises significant regulatory oversight, investors should consider insisting on contractual commitments from the host government that are subject to binding international arbitration. Investors should also bear in mind that Canada and the United States are each party to numerous other investment treaties and free-trade agreements that provide for ISDS and should

consider whether it may be practical to structure their investments to gain the benefits of those treaties.

This article is one in a series of analyses and commentaries by BLG's experts on specific aspects of the USMCA text. Our International Trade and Investment lawyers are well-placed to provide you with practical strategic and operational advice on how the USMCA may affect your business. For more information, please contact the authors.

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