

### NAFTA's sunset period is coming to an end, what are the foreign investor's options?

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After more than 25 years, the North American Free Trade Agreement ("NAFTA") was replaced by the United States of America, the United States of Mexico, and Canada Agreement ("USMCA") on July 1, 2020.

This new agreement, as well as the NAFTA, contains a mechanism to enforce the rights of the investors from violations caused by the contracting parties where they made their investment; this mechanism is known as *Investor State Dispute Settlement* (ISDS). Nevertheless, as provided in its Annex 14-C, investors who made their investments while NAFTA was in place may still be able to submit a claim under that treaty basis for a "Sunset Period" of three years since the USMCA entered into force, *i.e.*, July 1, 2023.

There are certain considerations investors should carefully consider to pursue their claims.

- **Who is entitled to initiate these claims?**

The USMCA establishes in its Annex 14-C (6)(a) that those investors who have a "legacy investment" are entitled to initiate these claims.

This means (i) there is an investment of a foreign investor from one party in the territory of another Party; (ii) such investment was established or acquired between January 1, 1994, and the date of termination of NAFTA, and (iii) it was in existence on the date of entry into force of this Agreement. This provision does not benefit U.S and Mexican investments which are under the scope of a covered government contract<sup>1</sup>.

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<sup>1</sup> According to Annex 14-E (6)(a) a covered government contract is defined as a written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector such as oil and natural gas, power generation, telecommunications, transportation, or infrastructure.

These claims may be relevant for Canadian investors - since Canada is not part of the USMCA ISDS mechanism- and therefore they will only be available to initiate an ISDS regarding Mexico violations -not the U.S- by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”). Also, it may be of interest to those U.S investors whose investments do not qualify as covered government contracts.

- **What steps should investors take before initiating an arbitration under this procedure?**

Even though the USMCA grants a *sunset period* regarding claims to be submitted under NAFTA basis, there are some previous steps that must be fulfilled.

According to Article 1119 of the NAFTA, the disputing investor shall deliver to the disputing party -any of the hosting States- a written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted.

This notice of intention is a prior step to the arbitration request, which aims to initiate a “cooling off” period between the investor and the State, where they should try to reach an amicable solution and avoid the arbitration proceeding.

Thus, the deadline to trigger the start of a NAFTA proceeding dispute is April 1, 2023<sup>2</sup>.

Investors should prepare a complete record of all the documents that evidence the violations caused by the contracting party and be ready to file its notice of intent by April 1, 2023, at the latest.

- **Main differences between USMCA and NAFTA**

Regarding the procedural aspect, unlike NAFTA, the USMCA requires investors to initiate local proceedings before a competent Court of the host state prior to the arbitration. Thus, investors need to either obtain a final judgment from the local courts or wait 30 months to show they were unable to obtain a final judgment by that time. Exceptionally, the Investor can skip this provision in the extent they prove that it was *obviously* futile to recourse to domestic remedies.

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<sup>2</sup> Note that investors with expropriations claims related to taxation measures must initiate their proceeding six months before the end of the sunset period, January 2, 2023.

The substantive protections in USMCA are more limited than in NAFTA. Investors still can bring claims for National Treatment, Most Favored Nation Clause -with a limited scope that relates to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments-, Direct Expropriation and Treatment in Case of Armed Conflict or Civil Strife. Therefore, the USMCA excludes the possibility of claiming for Indirect expropriation and the Minimum Standard of Treatment -which includes the Fair and Equitable Treatment standard-.

These provisions are not applicable to those investors with a covered government contract.

Galicia's Arbitration team has wide experience advising foreign investors with a comprehensive analysis of free trade agreements, defining strategies to protect and defend their investments as broadly as possible which ensures an efficient and successful case management.

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