



NAFTA 2.0 to Bring Major Changes to Investor-State Dispute Settlement

New U.S.-Mexico-Canada Agreement significantly curtails investment arbitration.

The North American Free Trade Agreement ("NAFTA") enables Canadian, Mexican, and U.S. investors to bring arbitrations against the Canadian, Mexican, and U.S. governments for violations of the treaty, including its guarantees of national treatment, most-favored-nation treatment ("MFN"), the minimum standard of treatment, and protection against unlawful expropriation.

The new United States-Mexico-Canada Agreement ("USMCA") sharply curtails that procedure.

Annex 14-C provides that with respect to investments made before NAFTA's termination, investors may initiate arbitrations under NAFTA, but only for three years after termination. Apart from this sunset clause, there is no provision for arbitration by Mexican or U.S. investors against Canada or for Canadian investors against Mexico or the United States.

Although Annex 14-D allows U.S. investors to initiate arbitrations against Mexico and Mexican investors to initiate arbitrations against the United States, investors may claim only breach of national treatment and MFN (and not in the establishment of an investment) or direct expropriation. They may do so only after they have initiated a proceeding regarding the measure(s) in question in the other country's courts and obtained final judgment from a court of last resort or waited 30 months. (Appendix 3 adds that if a U.S. investor alleges a breach of the USMCA in a Mexican court, the investor may not later arbitrate that claim.)

For a limited subset of "covered government contracts," Annex 14-E allows arbitration of a broader set of claims, without the local-litigation requirement. The contracts covered are those with a "national authority" of a state in the oil and gas, power generation, telecommunications, transportation, or infrastructure sectors.

One upshot is that, if and when NAFTA is terminated, investors with claims under NAFTA should bring those claims quickly, to benefit from the sunset clause. Another takeaway is that, if and when the USMCA enters into force, investors with claims under Annex 14-D also should act quickly, in order to begin the 30-month local-court process before the relevant four-year statute of limitations expires.

Ultimately, it is important to emphasize that the USMCA has not yet entered into force. Each country's leader must sign the agreement, and then it must be ratified in accordance with internal domestic procedures, including by the U.S. Congress.



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