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DIVERGENT FAIR AND EQUITABLE TREATMENT STANDARDS UNDER NAFTA AND THE USMCA

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I. INTRODUCTION

The United States-Mexico-Canada Agreement ("USMCA") entered into force on July 1, 2020,[1] and replaced the North American Free Trade Agreement ("NAFTA").[2] The USMCA's investment protection provisions for foreign investors diverge from NAFTA in certain respects. Notably, investors are subject to some restrictions in bringing investor-state dispute settlement ("ISDS") claims under the USMCA because Canada has not consented to the ISDS mechanism. Further, before initiating arbitration, investors under the USMCA are obligated to pursue legal action against the host state's measures before the local courts and obtain a final judgment or demonstrate that they could not after 30 months of local proceedings.[3]

Notwithstanding these changes to ISDS, the USMCA has a legacy claims provision to protect investors who acquired rights before NAFTA expired.[4] The legacy claims provision has a three-year sunset clause, which expires July 1, 2023.[5] However, a foreign investor wishing to take advantage of the legacy claims provision must send a notice of intent to arbitrate at least 90 days before the claim is submitted.[6] Thus, the date for filing legacy disputes has expired on April 1, 2023.

There are also numerous issues concerning the availability of certain standards of protection and their scope under the USMCA. While the USMCA provides consent to ISDS for the direct expropriation based on the breach of the minimum standards of

[1] Agreement between the United States of America, the United Mexican States, and Canada, Nov. 18, 2018, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Invest ment.pdf (entered into force July 1, 2020) [hereinafter USMCA].

[2] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

[3] USMCA, *supra* note 1, Annex 14-D, art. 14.D.5.

[4] *Id.* Annex 14-C.

[5] *Id.* Annex 14-C(3).

[6] *See id.* Annex 14-C(2)-(3); NAFTA, *supra* note 2, art. 1119.

treatment, investors cannot initiate an arbitration for the indirect expropriation relying on this protection. Further, the agreement does not provide the fair and equitable treatment standard explicitly, which is one of the most important protections in investment treaties. On the other hand, foreign investors who have entered into a covered government contract with the host state have the right to initiate arbitration proceedings for violations of all the substantive protections available under the USMCA.[7]

In this respect, this article will explain FET briefly and address certain influential cases to explore the importance of this clause for investment disputes. It will also distinguish between how FET is treated under investment treaties compared to broader international law. Thereafter, it will assess the differences between NAFTA and the USMCA, evaluated in light of the ISDS mechanism.

II. FET STANDARD

FET for foreign investors is commonly required in bilateral, regional, and multilateral treaties, and its breach is the most invoked protection in investor-state arbitration.[8] This standard provides a widespread coverage of investment protection without having to rely on any other standard of protection. For instance, the FET standard can provide a basis for redress where there is insufficient basis to find that an expropriation has occurred.[9] As FET does not have a precise definition, which is often drafted in vague terms,[10] it is critical to interpret the specific language of the FET provision at issue. The Vienna Convention on the Law of Treaties ("VCLT")[11] is an essential tool of interpretation. VCLT Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[12] In

[7] USMCA Annex 14-D, art. 14.D.3.

[8] Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 10 (2014).

[9] PSEG Global Inc. v. Turkey, ICSID Case No. ARB/02/5, Award, ¶ 238-39 (Jan. 19, 2007).

[10] *See*, *e.g.*, German Model BIT art. 2(1), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download.

[11] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[12] *Id.* art. 31(1).

addition, FET's meaning is often determined by state practice, decisions of international tribunals, and, more importantly, the circumstances of the case.[13]

While FET may stand alone in an agreement, this protection can also be incorporated by application of other standards of treatment, such as MFN and national treatment. Although arbitration awards do not establish binding precedent, investment case law guides the standards of protection under FET, which may include legitimate expectations, non-discrimination, fair procedure, transparency, proportionality, and sustainable development.[14]

Tribunals often consider certain "concrete principles" when evaluating whether states have breached their FET obligations: (i) "the State must act transparently"; (ii) "the State is obliged to act in good faith"; (iii) "the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking in due process"; and (iv) "the State must respect procedural propriety and due process."[15]

A. *Legitimate Expectations*

A significant element of the FET standard is the protection of the investor's legitimate expectations, which requires a certain level of stability and consistency in the legal framework of the host state. To determine the investor's legitimate expectations, tribunals consider three factors cumulatively: (i) whether there was a specific representation by the state, (ii) whether the investor relied on the representation, and (iii) whether the investor's reliance was reasonable.[16]

While some tribunals determine the legitimate expectations using these three factors, others may consider only whether there is a reasonable basis for the investor's expectations. Under this approach, tribunals focus on the stability of the state's legal and business framework while analyzing the breach of FET claims.[17] The investor's concern is the protection provided by the fundamental legal stability of the

[13] *See* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 77, 120, 155 (2008).

[14] Rumeli Telekom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 583 (July 29, 2008).

[15] *Id.* ¶ 609.

[16] Allard v. Barbados, PCA Case No. 2012-06, Award, ¶ 194 (July 27, 2016).

[17] CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005).

host state when the investor wants to make long-term investments in the host state. For instance, in *Eiser Infrastructure Ltd. v. Spain*,[18] the tribunal was concerned about changes in the State's legislative framework for renewable energy. The tribunal held that there was a breach of the FET standard contained in Article 10(1) of the Energy Charter Treaty[19] and explained:

> Fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. [T]he legitimate expectations of any investor [. . .] [have] to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law.[20]

The tribunal also considered whether drastic changes to the host state's legislative regime frustrated the legitimate expectations of investors.[21] In addition, another tribunal held that a change to the regulatory framework is not in itself a violation. "What is prohibited however is for a State to act unfairly, unreasonably, or inequitably in the exercise of its legislative power."[22]

On the other hand, legitimate expectations should also be considered together with the investor's due diligence undertaken prior to making an investment. An investor will have a right of protection of its legitimate expectations provided that it exercised due diligence, and its legitimate expectations were reasonable in light of the circumstances.[23] In other words, investors are expected to conduct proper due diligence before investing in a host state. This includes undertaking reasonable efforts to collect information about the rules and regulations governing their proposed investments.

[18] Eiser Infrastructure Ltd. v. Spain, ICSID Case No. ARB/13/36, Award (May 4, 2017).

[19] Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 100, 34 I.L.M. 360.

[20] *Eiser* ¶ 382 (internal quotations omitted and edits in original).

[21] *Id.* ¶ 348.

[22] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sep. 11, 2007).

[23] *Id.* ¶ 333.

B. *Non-Discrimination*

FET also includes protection against discrimination based on the nationality of the foreign investor. This protection is a well-established element in arbitral proceedings. Tribunals may also consider allegations of discrimination based on harassment, coercion, or arbitrariness against the foreign investor.[24] For example, in *Saluka Investments BV v. Czech Republic*,[25] the tribunal evaluated non-discrimination under the FET standard by considering the reasonableness of a public policy. In that case, the claimant asserted a violation of FET, claiming that the government granted massive financial assistance to its competitors.[26] The tribunal held that because state-owned banks benefited from governmental assistance, whereas the privatized bank was exempted, such conduct manifestly violated the requirements of consistency, transparency, even-handedness, and non-discrimination.[27] The tribunal explained,

> [i]n particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[28]

C. *Fair Procedure*

Due process is a fundamental requirement for the rule of law and referred in main international and constitutional instruments. The Fifth and Fourteenth Amendments of the U.S. Constitution require procedural propriety and due process. European Court of Justice jurisprudence indicates that this principle applies to, *inter alia*, the duration of the process.[29] In one case, an arbitral tribunal held that an extraordinarily long trial constituted a denial of justice and, thus, a breach of FET.[30] Accordingly, the

[24] *See* Tudor, *supra* note 13, at 155, 180-81.

[25] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006).

[26] *Id.*

[27] *Id.* ¶ 307.

[28] *Id.*

[29] König v. Germany, App. No. 6232/73, ¶ 105 (Eur. Ct. H.R. June 28, 1978).

[30] Casado v. Chile, ICSID Case No. ARB/98/2, Award, ¶ 653 (Apr. 22, 2008).

FET standard requires states to afford foreign investors procedural propriety and due process, just as they would their nationals.

D. *Transparency*

Foreign investors also may allege a breach of the FET standard by relying on the transparency of the host state's action. The host state's legal procedures should be apparent, unambiguous, and readily accessible to the investor. For example, in *Maffezini v. Spain*,[31] funds from the investor's loan had been transferred by a government institution without the investor's consent. The tribunal held that the lack of transparency with respect to this loan transaction was incompatible with Spain's commitment to ensure the investor FET under the BIT.[32]

E. *Proportionality*

Proportionality and reasonableness are other crucial factors in determining a violation of FET. Proportionality is evaluated by comparing the effects and the goal of the state measure.[33] An ICSID tribunal evaluated the proportionality of a state's acts according to the following factors:[34]

> Where the administration wishes to impose a severe penalty, then it appears to the Tribunal that the State must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious.

Ultimately, there should be rationale and a balance between the state's regulatory authority and investors' rights. Besides, states must act in good faith and reasonably while using their autonomy to provide FET to foreign investors.

III. FET AS A MINIMUM STANDARD OF TREATMENT UNDER NAFTA

In general, customary international law imposes a minimum standard of treatment for foreign investors in the host state's territory. A breach of the

[31] Maffezini v. Spain, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000).

[32] *Id.* ¶ 83.

[33] Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003).

[34] Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 416 (Oct. 5, 2012).

international minimum standard of treatment may not only occur by bad faith but also by unfair and inequitable conduct. With respect to distinguishing the FET standard, the main issue is whether the concept of fair and equitable treatment under FET might be limited to the international minimum standard of customary international law or whether it might be constructed independently as a self-contained treaty standard. FET might be regarded as equivalent to the minimum standard of treatment by including customary international law provisions in the agreement.

Regarding the scope of the FET standard, tribunals often take a broader approach than under the international minimum standard.[35] Tribunals have highlighted the importance of having specific rather than abstract expectations with specific evidentiary support for the alleged expectation.[36]

In light of customary international law, some agreements, such as NAFTA, include the FET provision as a minimum standard without adding any additional requirements. For example, Article 1105(1) of NAFTA ("Minimum Standard of Treatment") requires that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[37] Thereby, Article 1105 of NAFTA links the FET standard to international law and requires the host state to treat covered investments no less favorably than that required by (customary) international law.

Article 1131(2) of NAFTA states that the NAFTA Free Trade Commission ("FTC") may issue interpretations of NAFTA, which are binding on arbitral tribunals. Due to the potential of different interpretations of this provision by arbitral tribunals, the FTC issued an interpretation stating that Article 1105(1) prescribes the customary

[35] *See*, *e.g.*, Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award (July 14, 2006); Genin v. Estonia, ICSID Case No. ARB/99/2, Award (Jan. 1, 2006); Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[36] *See*, *e.g.*, Minnotte v. Poland, ICSID Case No. ARB (AF)/10/1, Award, ¶¶ 194-96 (May 16, 2014).

[37] NAFTA, *supra* note 2, art. 1105.

international law minimum standard of treatment as the minimum standard of treatment required to be afforded to investments of foreign investors.[38]

The FTC's interpretation of the FET standard has been adopted by tribunals as a principle limited to Article 1105(1). In *Resolute Forest Products Inc. v. Canada*,[39] the tribunal applied the FTC's interpretation and held that the FET standard is restricted to the minimum standard of treatment under Article 1105 as required by customary international law.[40] On the other hand, the *Metalclad Corp. v. Mexico*[41] tribunal did not restrict itself to the FTC's interpretation and incorporated the obligation of transparency into the concept of FET and other sources of international law.[42]

IV. THE USMCA

The USMCA tends to track the structure of NAFTA by having a separate chapter devoted to investment protections. Chapter 14 of the USMCA also includes two interpretational annexes: the first on the meaning of "customary international law" (Annex 14-A) and the second on "expropriation" (Annex 14-B). However, there are notable differences between the USMCA and NAFTA. Unlike in NAFTA, Canada is not a party to the USMCA's ISDS section (Annex-14D). As such, investor-state arbitration under the USMCA is limited to potential claims against the United States and Mexico.

Moreover, Article 14.6(1) of the USMCA ("Minimum Standard of Treatment") states that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[43] Accordingly, FET is regarded as an international minimum standard under the USMCA.

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[38] Organization for Economic Cooperation and Development, *Fair and Equitable Treatment Standard in International Investment Law* at 10-11 (2004), *available at* http://dx.doi.org/10.1787/675702255435; NAFTA FTC, North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), *available at* http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.

[39] Resolute Forest Products Inc. v. Canada, PCA Case No. 2016-13, Award (July 25, 2022).

[40] *Id.* ¶ 736.

[41] Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[42] *Id.* ¶ 70.

[43] USMCA, *supra* note 1, art. 14.6(1).

The USMCA's investment protection provisions can be categorized as follows: legacy investments, standard protections for non-privileged investors, dispute resolution procedures, and investment disputes protections related to covered government contracts.

A. *Legacy Investments*

The rights and claims derived while NAFTA was in force can be raised as "Legacy Investments"[44] under Annex 14-C of the USMCA. Annex 14-C provides that legacy investment claims and pending claims can be brought in accordance with Chapter 11, Section B of NAFTA.[45] By way of the legacy claim protection, investors from Mexico, the United States, and Canada may commence arbitration proceedings under NAFTA.

NAFTA's investor-state dispute resolution mechanism remains in place for legacy investments for three years following NAFTA's termination. The USMCA provides this three-year sunset period for investors with legacy investments made between January 1, 1994, and June 30, 2020. Investors have until July 1, 2023, to assert these claims under NAFTA, assuming they have complied with the six-month waiting period and the 90-day notice of intent period on or before July 1, 2023.[46] In other words, in accordance with NAFTA Chapter 11, legacy investment claims still must be brought after the six-month cooling-off period and 90-day notice of intent to arbitrate before commencing arbitration.

B. *Standard Protection for Non-Privileged Investors*

The requirements for bringing a claim against Mexico or the United States are addressed under Annex 14-D. Like with NAFTA, the USMCA requires affording investors the minimum standard of treatment, including FET and FPS.[47] Comparing

[44] *Id.* Annex 14-C(6)(a) ("'legacy investment' means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement").

[45] *Id.* Annex 14-C(1).

[46] *Id.* Annex 14-C(3) ("A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.").

[47] *Id.* art. 14.6 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond

the wording of both agreements, the USMCA refers to the term "customary international law" instead of just "international law," as was used in NAFTA.

However, Article 14.D.3 states that a non-privileged investor may only submit a claim to arbitration on the basis of (i) Article 14.4 (National Treatment) or Article 14.5 (Most-Favored Nation Treatment), except with respect to the establishment or acquisition of an investment; or (ii) Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation. In other words, the most common ground for investment claims, FET, is not granted to non-privileged investors under USMCA Article 14-D.

As stated above, the NAFTA FTC interpreted the FET standard as narrowly as possible by limiting the standard to the minimum standard of treatment under customary international law. Nevertheless, even if NAFTA Article 1131(2) references the binding nature of FTC interpretations,[48] a few tribunals have questioned whether the FTC note was a legitimate amendment or interpretation. For example, the *Pope & Talbot Inc. v. Canada*[49] tribunal discussed this issue under four factors: (1) whether the interpretation put forward by the FTC was a valid exercise of the FTC's power of interpretation and so binding on the Tribunal; (2) if so, what effect did the interpretation have in relation to awards already made by a tribunal (the retroactivity issue); (3) the construction and application of the interpretation; and (4) the nature and content of customary international law in the context of Article 1105 and its application to the facts of the case at issue.[50] The tribunal broadly concluded that the FTC's interpretation was not binding and was invalid. As previously noted, prior arbitral awards are not binding precedent but may be taken into account by tribunals

that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.").

[48] NAFTA, *supra* note 2, art. 1131(2) ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.").

[49] Pope & Talbot Inc. v. Canada, UNCITRAL, Award in Respect of Damages (May 31, 2002).

[50] *Id.* ¶ 16.

in subsequent cases.[51] Such a potential broad review might be grounds for negotiators to expressly clarify and limit the standard of treatment to the so-called international minimum standard in the agreement.

The USMCA clarifies in Annex 14-A that "[t]he Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment)."[52] Article 14.6 explicitly states that FET is part of customary international law. Therefore, all subprinciples of the FET standard, namely the protection of legitimate expectations, non-discrimination, due process, transparency, and proportionality, are within the principles of international law. For example, a tribunal interpreted minimum fair and equitable treatment under the U.S.-Ecuador BIT, which provides in Article II (3) (a): "investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security, and shall in no case be accorded less favorable than that required by international law."[53]

It is important to discuss whether FET is a binding legal obligation under customary international law. The USMCA, like NAFTA, accepts FET as a part of customary international law under Chapter 14. Annex 14-A incorporates the obligations of customary international law into the USMCA without any need of a specific provision, thereby requiring the host states to comply with customary law in its treatment of covered investments. In *S.D. Myers, Inc. v. Canada*,[54] an UNCITRAL tribunal highlighted that NAFTA's heading of "Minimum Standard of Treatment" imports the requirements of international law.[55]

In *Técnicas Medioambientales Tecmed, S.A. v. Mexico*,[56] the scope of fair and

[51] RosInvestCo UK Ltd. v. Russia, SCC Case No. V079/2005, Decision on Jurisdiction, ¶ 49 (Oct. 1, 2007); *see generally* Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Frederico Ortino, & Christoph Schreuer eds., 2008).

[52] USMCA, *supra* note 1, Annex 14-A.

[53] *See*, *e.g.*, Occidental Exploration & Production Co. v. Ecuador, LCIA Case No. UN 3467, Final Award, ¶ 180 (July 1, 2004).

[54] S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000).

[55] *Id.* ¶¶ 259-63.

[56] Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award (May 29,

equitable treatment was also taken "from international law and the good faith principle."[57] In a London Court of International Arbitration case, the tribunal interpreted FET under the treaty at issue and concluded that investments shall at all times be accorded FET according to the treaty, which stated that investments "shall in no case be accorded treatment less favorable than that required by international law."[58] The critical question that arises is whether a violation of an obligation under a treaty could be within a tribunal's jurisdiction, even though the obligation is not specified as a ground for a claim under the treaty.

Customary international law is an evolving standard. In *ADF Group Inc. v. United States*,[59] the tribunal held that both customary international law and the minimum standard of treatment are constantly in the process of development.[60] Some commentators, such as Ioana Tudor, argue that FET should be viewed as a "standard."[61] Others treat it as an embodiment of the rule of law.[62] Another question that may arise is whether all sub-principles of the FET standard, namely the protection of legitimate expectations, non-discrimination, due process, transparency, and proportionality, might be considered within the principles of international law.

In *Rumeli Telekom S.A. v. Kazakhstan*,[63] the BIT at issue did not impose a FET obligation on the host state; nevertheless, the tribunal concluded that Kazakhstan violated the FET standard.[64] The tribunal indirectly applied another provision of the

2003).

[57] *Id.* ¶ 155.

[58] *Occidental* ¶¶ 180-92.

[59] ADF Grp. Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003).

[60] *Id.* ¶ 179.

[61] Tudor, *supra* note 13, at 155.

[62] Stephen Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, Institute for International Law and Justice Working Paper 2006/6, *available at* https://iilj.org/wp-content/uploads/2016/08/Schill-Fair-and-Equitable-Treatment-under-Investment-Treaties-as-an-Embodiment-of-the-Rule-of-Law-2006-2.pdf.

[63] Rumeli Telekom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award (July 29, 2008).

[64] *Id.* ¶ 618.

1995 U.K.-Kazakhstan BIT by means of the most-favored-nation clause, which referred to the FET obligation.[65]

C. *Dispute Resolution Procedure under Annex 14-D of the USMCA*

The USMCA provides for a dispute resolution procedure where the parties should initially seek to resolve the dispute through consultation and negotiation.[66] The parties may refer the dispute to a non-binding, third-party dispute settlement procedure, such as good offices, conciliation, or mediation.[67] The claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration (notice of intent) at least 90 days before submitting any claim to arbitration as a cooling-off period.[68]

In addition, Article 5 of Annex 14-D requires claimants to initiate and maintain domestic litigation proceedings for thirty months (or to a final decision) before initiating arbitration, with a limited exception if domestic recourse would be obviously futile.[69]

Appendix 3 to Annex 14-D further provides for the submission of a claim to arbitration by establishing a "fork in the road" provision and states that a U.S. investor may not submit an arbitration claim against Mexico if such claim for a breach of USMCA obligations has been submitted before a court or administrative tribunal of Mexico.[70]

D. *Investment Disputes Related to Covered Government Contracts*

Annex 14-E of the USMCA provides protection for investors covered by government contracts. According to Annex 14-E, Mexico and the United States agreed to continue investment arbitration with respect to certain disputes. The

[65] *Id.* ¶ 575; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 153 (Aug. 27, 2009).

[66] USMCA, *supra* note 1, Annex 14-D.2.

[67] *Id.*

[68] *Id.* Annex 14-D.3(2).

[69] Daniel Garcia-Barragan et al., *The New NAFTA: Scaled-Back Arbitration in the* USMCA, 36 J. INT'L ARB. 739, 743 (2019).

[70] *Id.*

claimant must be a party to a government contract 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."[71]

Moreover, Annex 14-E provides protections for investors that are covered by a government contract or engaged in activities in the same covered sector in the territory as an enterprise of the respondent that the claimant owns or controls directly or indirectly, which is a party to a covered government contract. The USMCA defines a "covered sector" as:

> (i) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale,
> (ii) the supply of power generation services to the public on behalf of an Annex Party,
> (iii) the supply of telecommunications services to the public on behalf of an Annex Party,
> (iv) the supply of transportation services to the public on behalf of an Annex Party, or
> (v) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party.[72]

Under this Annex, a claimant can bring a dispute related to a government contract when a respondent breaches any obligation under Chapter 14 and that claimant has incurred loss or damage by reason of or arising out of that breach. In addition, no claim shall be submitted to arbitration under this provision if less than six months have elapsed from the events giving rise to the claim; and more than three years have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the breach alleged under this provision and knowledge that the claimant has incurred loss or damage.[73]

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[71] USMCA, *supra* note 1, Annex 14-E(6)(a). In addition to investors with covered government contracts, this Annex also provides protections for investors "engaged in activities in the same covered sector in the territory as an enterprise of the respondent that the claimant owns or controls directly or indirectly, which is a party to a covered government contract." *Id.* Annex 14-E(2)(a)(i)(A)(2).

[72] *Id.* Annex 14-E(6)(b).

[73] *Id.* Annex 14-E(4).

For investment disputes between Mexico and the United States related to a covered government contract, investors can bring claims regarding violation of the minimum standard of treatment. However, Article 14.6(4) states that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[74] The Article does not involve fair and equitable treatment on its face.

On the other hand, those investors with covered government contracts are not subject to limitations like the other investors under the USMCA. For example, investors with covered government contracts do not need to exhaust domestic remedies to commence an arbitration proceeding; but these investors are still subject to notice requirements and a cooling-off period. They can also bring claims regarding indirect expropriation and violation of the minimum standard of treatment.

V. CONCLUSION

International investment treaties play a critical role in international relations and the global economy. The USMCA is a substantial instrument in North America in this regard after replacing NAFTA. However, it might be possible to witness a legacy claim that arose under NAFTA before the sunset clause expires, if a notice of intent to arbitrate under NAFTA has been sent by April 1, 2023, namely three years after its termination for United States, Mexican, and Canadian investors. This is important given the critical differences between the USMC and NAFTA. With respect to ISDS, notably, Canada has not consented to the ISDS mechanism under the USMCA and there are several limitations on investors from Mexico and the United States to use arbitration or to initially submit disputes to local courts.

Further, any claim asserting FET will likely not be smooth under the USMCA. The tribunal would likely consider whether the contract is a covered government contract and whether the investment sectors are related to oil, natural gas, or some public services. On the other hand, customary international law is an evolving standard, and some tribunals may still allow the discussion of whether FET is a binding legal

[74] *Id.* art. 14.6(4).

obligation under customary international law and whether it can be the basis for a claim even if it is not expressly provided for. The USMCA and its limitations regarding ISDS might be a model form for other international agreements in the near future, like the previous United States-involved agreements.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
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