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INVESTMENTS PROTECTED UNDER NAFTA AND USMCA PROVISIONS

Under NAFTA and newly enacted USMCA, Canadian, Mexican and United States citizens or permanent residents, companies and other designated persons are eligible to benefit from the treaty between the U.S., Canada, and Mexico investment rules. In addition, most private and public, profit and nonprofit businesses "constituted or organized" under Canadian, Mexican or United States law also qualify. The treaties specifically include enterprises operating as corporations, trust, partnerships, sole proprietorships, joint ventures and business associations.

INDIVIDUALS AND COMPANIES PROTECTED UNDER AGREEMENTS

Under NAFTA, an "investor" can be any citizen, including an individual or business entity, of any of the three countries. This means that businesses owned by anyone which are "constituted or organized" inside NAFTA benefit from the agreement. Thus, Asians, Europeans, and Latin Americans (for example) can invest in North America and benefit from NAFTA.

Under USMCA, only an investor from the United States or Mexico will be able to file a claim for protection under the USMCA. It will exclude an investor that is owned or controlled by a person from a non USMCA country.

TYPES OF INVESTMENTS PROTECTED

The term "investments" encompasses a broader definition including most stocks, bonds, loans, income, profit or asset interest. Real estate, business property, construction contracts, concessions, and licensing and franchising contract are also generally included. However, each member state reserves certain economic activities to its state or domestic investors. Mexico has done so under its 1993 Foreign Investment Law.

Under the USMCA, investments is defined as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." It remains to be seen whether this potentially more expansive definition of investments will be interpreted in a materially different way than NAFTA.

TREATMENT OF INVESTOR AND INVESTMENTS

Both NAFTA and USMCA agreement establish a so called "minimum standard of treatment" for treaty investors and investments which is "treatment in accordance with international law," including "fair and equitable treatment and full protection and security." For example, if losses occur due to armed conflict or civil strife, treaty investors and investments must be accorded nondiscriminatory treatment in response.

However, under USMCA, an investor cannot bring a claim for breach of the minimum standard of treatment or for indirect expropriation.

RIGHT OF INVESTORS

In addition, investors and their investments are entitled to the better of national or most-favored-nation treatment from federal governments. Such treatment rights extend to establishing, acquiring, expanding, managing, operating, and selling or disposing of investments. From state or provincial governments, treaty investors and their investments are entitled to receive the most-favored treatment those governments grant their own investors and investments.

Under the USMCA, Investors can only bring claims for national treatment and most-favored-nation treatment. National treatment and most-favored-nation treatment claims related to the establishment or acquisition of an investment are also excluded; a claimant is therefore limited to claims alleging discrimination with respect to the "expansion, management, conduct, operation, and sale or other disposition of investments."

PROTECTION FROM EXPROPRIATION

NAFTA prohibits a party from directly or indirectly expropriating an investor's investment in the host country or taking a measure that is "tantamount to expropriation." Expropriation refers to the action by a state or an authority of taking property from its owners for public use or benefit. Any authorized expropriation must result in payment of compensation without delay. Compensation for expropriation must be equal to the fair market value of the investment immediately before the expropriation took place. In valuing the investment, going concern value, asset value (including declared tax values of tangible property) and other appropriate factors must be considered. The expropriation of an investor's investment is prohibited unless it is (1) done for a public purpose, (2) on a non-discriminatory basis, (3) in accordance with due process of law, and (4) on payment of prompt, adequate compensation.

Under the USMCA, an investor can only bring claims for direct expropriation.

DISPUTE RESOLUTION

Individual investors claiming that a government has breached treaty protections or state enterprise obligations, or that one of its monopolies has done so, may commence the dispute resolution process. All claims are filed against the federal government even when it is state, provincial or local government action that is being challenged.

The investor must allege that the breach of caused loss or damage. Such claims must be asserted no later than three years after the date when knowledge of the alleged breach and knowledge of the loss or

damage was first acquired or should have been first acquired. However, decision by the Canadian or Mexican foreign investment control commissions, national security actions, and Canadian cultural industry reservations cannot be the basis for such a claim.

Under the USMCA, Canada did not agree to be a part of the dispute resolution settlement. As a result, other than Legacy Claims, U.S. and Mexican investors cannot bring arbitration claims against Canada. Nor can Canadian investors bring such claims against the United States or Mexico.

REQUIRED NOTICE OF DISPUTES

A claim to arbitration must be submitted 90 days in advance to the host country. Such notice must include an explanation of the issues, their factual basis and remedies sought. Claimants must also consent in writing to arbitrate under the procedures established in the treaty agreement. They must waive in writing their rights to initiate or continue any other damages proceedings. Individual investors need not, however, waive their rights to injunctive, declaratory or other extraordinary relief (not involving damages). These remedies may not be awarded through treaty arbitration of investor state disputes. The treaty nations consented in advance to the submission of investor claims to arbitration under treaty procedures. Furthermore, they agreed not to assert insurance payments, or another investor indemnification rights as a defense, counter claim right of set off or otherwise.

Under the USMCA, it is required that a would-be claimant first litigate the challenged measure “before a competent court or administrative tribunal of the respondent.” The claimant must litigate until it receives a “final decision from a court of last resort” or 30 months have passed from the date the local court proceedings were initiated.

CONCLUSION

NAFTA and the new USMCA provide important protections for qualified investors that invest in the treaty countries. The purpose is to provide legal certainty and stability for their businesses and investments. While the current status of the treaties still requires ratification of the treaties by the U.S. Congress, it appears that such ratification will occur.

Please let us know if you have any questions on these matters and how you may structure your investments to get the protection and benefits provided by the trade agreements.

Sincerely,

Ruben Flores, Attorney and CPA