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INVESTMENTS PROTECTED UNDER USMCA PROVISIONS

Under the newly enacted United States-Mexico-Canada Agreement (USMCA), Canadian, Mexican and United States citizens or permanent residents are eligible to benefit from the treaty between the U.S., Canada, and Mexico investment rules. The U.S., Canada, and Mexico are referred to as the “Parties” or “Party” under the USMCA. In addition, most private and public, profit and nonprofit businesses constituted or organized under Canadian, Mexican or United States law also qualify. The treaty specifically includes enterprises operating as corporations, trust, partnerships, sole proprietorships, joint ventures and business associations.

INDIVIDUALS AND COMPANIES PROTECTED UNDER AGREEMENTS

Under the USMCA, an “investor of a Party” means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party. A national means a “natural person who has the nationality of a Party” or permanent resident of a Party.

USMCA’s denial of benefits article, among other things, permits a Party to deny the investment chapter’s benefits to an “investor of another Party that is an enterprise of the other Party and to investments of that investor if the enterprise: (a) is owned or controlled by a person of a non-Party or of the denying party; and (b) has no substantial business activities in the territory of any Party other than the denying party.” An “investor of a non-party” means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an “investor of a Party.”

TYPES OF INVESTMENTS PROTECTED

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.” An investment may include an enterprise; shares, stock and other forms of equity participation in an enterprise; intellectual property rights; other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases. Under chapter 1, an enterprise is defined as “an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally- owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization.

TREATMENT OF INVESTOR AND INVESTMENTS

The USMCA establishes 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." The "fair and equitable treatment" under the USMCA includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceeding in accordance with the principle of due process embodied in the principal legal systems of the world; and "full protection and security" requires each Party to provide the level of police protection required under customary international law.

RIGHT OF INVESTORS

Under the USMCA, 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. Investors also are entitled to receive the most-favored treatment from state or provincial government as they grant their own investors and investments.

PROTECTION FROM EXPROPRIATION

USMCA prohibits a party from directly or indirectly expropriating an 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.

Direct expropriation is referred to as an investment that is nationalized or otherwise directly expropriated through a formal transfer of title or outright seizure. Indirect expropriation is an action or series of actions by a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

DISPUTE RESOLUTION

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 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.

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

Under the USMCA, a claim to arbitration must be submitted 90 days in advance to the respondent. 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. It is also 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

USMCA provides 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. The USMCA will go into effect on July 1, 2020.

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