

From: Jon Johnson

To: Canadians Concerned about Investor-State Dispute Settlement Procedures

Date: October 16, 2020

Re: **CUSMA – END OF INVESTOR-STATE DISPUTE SETTLEMENT FOR CANADA**

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The Canada-United States-Mexico Agreement (CUSMA) terminates investor-state dispute settlement (ISDS) procedures between Canada, the US and Mexico (although the Trans-Pacific agreement provisions apply between Canada and Mexico).

Canada only reluctantly agreed to ISDS procedures in NAFTA and has defended more NAFTA ISDS claims than either the US or Mexico. While achieving substantial (though by no means complete) success on defence, no Canadian investor has ever succeeded in a claim against the US and no claims were made against Mexico.

Despite Canada's mostly negative experience with ISDS under NAFTA, it was the US that sought to eliminate or curtail ISDS under CUSMA, on the theory that ISDS is a form of investment insurance encouraging US investors to invest elsewhere than in the US.

So when and how does this termination of ISDS procedures take place?

CUSMA is brought into effect by a [protocol](#) that replaces NAFTA with CUSMA. It provides that when CUSMA entered into force on July 1, CUSMA superseded NAFTA, but without prejudice to CUSMA provisions referring to NAFTA provisions.

CUSMA Annex 14-C provides that each CUSMA party consents with respect to a "legacy investment" to the submission of a claim to arbitration in accordance with the NAFTA ISDS provisions and alleging a breach of an obligation under Section A of NAFTA Chapter 11. These include Article 1102 (National Treatment), Article 1103 (Most-Favoured Nation Treatment), Article 1105 (Fair and Equitable Treatment) and Article 1110 (Expropriation and Compensation). This consent expires on June 30, 2023.

A "legacy investment" is an investment within a CUSMA nation established or acquired between January 1, 1994 and July 1, 2020 and existing on July 1, 2020.

CUSMA preserves the right to bring an ISDS claim by or on behalf of a legacy investment until June 30, 2023. However, when does the breach upon which the claim is based have to have occurred? Prior to CUSMA superseding NAFTA on July 1, 2020? Or any time up to June 30, 2023?

While CUSMA Annex 14-C is not explicit on this point, context provided elsewhere in CUSMA suggests that the cut-off date is July 1, 2020, the date that CUSMA superseded NAFTA, and not June 30, 2023, the date that the consent referred to above expires.

First, the relevant NAFTA provisions (e.g., NAFTA Articles 1102, 1103, 1105 and 1110) would have to survive CUSMA superseding NAFTA as the protocol provides. While these NAFTA provisions have differently worded counterparts in CUSMA, there is nothing that states that these NAFTA provisions survive.

Second, context (a key consideration in treaty interpretation) is provided by CUSMA Annex 14-D that covers Mexico-United States Investment Disputes. Annex 14-D applies only between the US and Mexico and, subject to significant limitations, provides for ISDS procedures only respecting breaches of CUSMA Article 14.4 (National Treatment), Article 14.5 (Most-Favoured Nation Treatment) and CUSMA Article 14.8 (Expropriation and Compensation).

On the other hand, Annex 14-C applies to all three countries and preserves the right to bring ISDS claims under NAFTA. If Annex 14-C permits ISDS claims respecting breaches of NAFTA provisions occurring after July 1, 2020, then the US and Mexico are subject to two parallel regimes, one under Annex 14-C that applies to breaches of NAFTA provisions occurring up until June 30, 2023 and another more restrictive regime under Annex 14-D applying to breaches of similar but differently worded CUSMA provisions.

While the context just described suggests that ISDS only applies to breaches of NAFTA provisions occurring prior to July 1, CUSMA is by no means clear on this point. It may take an actual case to sort this out.

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