

簡介《美國－墨西哥－加拿大協定》下 投資人對地主國爭端解決機制之變革

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摘要

今 (2018) 年 9 月 30 日，美國、墨西哥與加拿大宣布完成《北美自由貿易協定》之重啟談判，並釋出初步命名為《美國－墨西哥－加拿大協定》之替代條約草案。在過去數輪的談判中，三方就許多談判事項存在分歧，投資人對地主國爭端解決機制之存廢即為一例。在最終集結三方共識的草案文本中，可發現談判方就此機制做出明顯變革：《美國－墨西哥－加拿大協定》下的投資人對地主國爭端解決機制對投資人較為嚴格，且加拿大決定退出此機制，而考量投資人需要適應新舊規範間之差異，《美國－墨西哥－加拿大協定》亦設立「舊有投資」條款，使《北美自由貿易協定》時代即存在之投資可在三年期限內，利用舊有框架進行爭端解決。上述變革將如何影響三國間投資人的權益及國際投資治理框架，值得持續觀察。

(本篇取材自：Julissa Reynoso, Ricardo E. Ugarte, Marcelo M. Blackburn, Michael A Fernández & Rodolfo J. Herrera-Moro Saft, *NAFTA's Closing Window: Investment Dispute Settlement under the New United States-Mexico-Canada Agreement*, WINSTON & STRAWN LLP (Oct. 3, 2018), <https://www.winston.com/print/content/1015667/naftas-closing-window-investment-dispute-settlement-under-the-new-united-states-mexico-canada-agreement.pdf>.)

今 (2018) 年 9 月 30 日，美國、墨西哥與加拿大宣布完成《北美自由貿易協定》(North American Free Trade Agreement, NAFTA) 之重啟談判，並釋出初步命名為《美國－墨西哥－加拿大協定》(United States-Mexico-Canada Agreement, USMCA) 之替代條約草案¹。最大變革之一是在「投資人對地主國投資爭端解決 (Investor-To-State Dispute Settlement, ISDS)」機制的改變：不僅加拿大選擇退出該機制，現行 NAFTA 下可用救濟之範圍亦遭到限縮。為使讀者瞭解本次變革

¹ Government of Canada, Trade Negotiations and Agreements: *United States-Mexico-Canada Agreement (USMCA)*, GOVERNMENT OF CANADA, <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/index.aspx?lang=eng> (last modified Nov. 15, 2018).

之遠因，以下將先簡介自去 (2017) 年 8 月 16 日 NAFTA 重啟談判後²，美國、墨西哥與加拿大三方對 ISDS 機制所抱持之立場，再歸納並整理 USMCA 針對 ISDS 機制所行改革之特點，最後作一結論。

壹、NAFTA 2.0 版談判中各方對 ISDS 機制之立場

將 ISDS 機制引入 NAFTA 的原始目的，係為在北美地區創設可預測的投資環境³。有鑑於墨西哥司法並不夠獨立，NAFTA 第 11 章專為加拿大及美國投資人所設，以確保他們在墨西哥的投資不會失去正當程序保障⁴。為吸引來自加拿大及美國的投資，墨西哥當年也認為接受 ISDS 條款符合國家利益⁵。不過，近年來 ISDS 機制變得較具爭議性，在 NAFTA 2.0 版談判中，三方政府在此議題之立場有所分歧。

隨著退出《跨太平洋夥伴協定》(Trans-Pacific Partnership)，美國政府對 ISDS 機制抱持反對立場⁶。美國政府認為 ISDS 機制不僅侵犯主權，且公司將業務外包至墨西哥時，若受到墨方之不公平待遇，此機制保障公司有申訴的場域⁷，等於提供了業務外包之誘因⁸。是以，美國貿易代表署 (Office of the United States Trade Representative) 曾提案讓各方自由選擇加入或退出 ISDS 機制，同時表明川普政府將選擇退出⁹。

² USTR, Press Release: *USTR Announces First Round of NAFTA Negotiations*, USTR, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-announces-first-round-nafta#> (last visited Nov. 15, 2018).

³ Phuong Tran, *A Review of NAFTA Investor-State Dispute Settlement Claims from 2007 to 2017*, 22(4) LAW & BUS. REV. AM. 435, 436 (2016).

⁴ North American Free Trade Agreement, art. 1115, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA], (providing that: “Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.”); *Id.*

⁵ Phuong Tran, *supra* note 3.

⁶ Clint Peinhardt, *Should NAFTA 2.0 Keep ISDS?*, GEORGE W. BUSH PRESIDENTIAL CENTER (Apr. 4, 2018), <https://www.bushcenter.org/publications/articles/2018/04/isds-nafta.html>.

⁷ NAFTA, art. 1116.1, (providing that: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.”).

⁸ Mike Blanchfield & Alexander Panetta, *Canada, Mexico Tell U.S. on NAFTA Investor-State Protection: Get in, or Get out*, NAT'L POST, <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/canada-mexico-tell-u-s-on-nafta-investor-state-protection-get-in-or-get-out> (last updated Jan. 28, 2018).

⁹ Jenny Leonard, *Hatch, Brady Warn Lighthizer That His ISDS Approach in NAFTA Will Risk Congressional Passage*, CONGRESSMAN SANDY LEVIN (Mar. 14, 2018), <https://levin.house.gov/hatch-brady-warn-lighthizer-his-isds-approach-nafta-will-risk-congressional-passage>.

至於加拿大，儘管其聯邦政府官網之解讀是 ISDS 機制保障加拿大海外投資，同時顯示了加拿大歡迎外國投資¹⁰。不過，截至 2015 年 1 月止，加拿大是在 NAFTA 下被控訴最多次的地主國¹¹；在全球而言，加拿大亦較其他的已開發國家涉及更多的 ISDS 案件¹²。相對地，加拿大籍公司在 ISDS 案件中卻相當不成功¹³。職是之故，加拿大外交部長方慧蘭 (Chrystia Freeland) 在演講中闡述加拿大政府有關 NAFTA 2.0 版之談判目標時，即明白表達希望透過改革 ISDS 之程序，以確保加國政府之公共利益管制權不受攻擊¹⁴。

事實上，在今年 2 月的會議期間，即有消息指出加拿大欲提案刪除 ISDS 條款，而美國亦擬同意¹⁵。雖然墨西哥因為能源部門中的外國投資，而成為 NAFTA 國家中最想保留 ISDS 者，但為獲得其他部門之減讓利益，其不反對加拿大的提案¹⁶。

貳、USMCA 中的 ISDS 機制特點

USMCA¹⁷第 14 章投資專章雖未完全刪除 ISDS 機制，但卻有不少變革。USMCA 允許投資者透過國際投資仲裁提起基於條約的主張，不過相較於 NAFTA，USMCA 的 ISDS 機制對投資者較為不利。對大多數投資者而言，在 USMCA 下僅有國民待遇、最惠國待遇及直接徵收義務之違反，可訴諸投資條約仲裁¹⁸。這剝奪了投資者在 NAFTA 下所享有之許多保障，舉例來說，大部分投

¹⁰ Government of Canada, *Privacy Notice Statement: FIPA Consultations*, GOVERNMENT OF CANADA, <http://www.international.gc.ca/trade-commerce/consultations/fipa-apie/privacy-confidentialite.aspx?lang=eng> (last updated July 27, 2018).

¹¹ 截至 2015 年 1 月，在 NAFTA 的 ISDS 機制下，加拿大政府被起訴了 35 次、墨西哥政府被起訴了 22 次、美國政府被起訴了 20 次。美國政府從未敗訴或支付任何損害賠償予加拿大或墨西哥籍企業；相對地，加拿大共支付 1 億 3700 萬美元之損害賠償，墨西哥政府則共支付 2 億 400 萬美元之損害賠償。ERIC MILLER, *REMAKING NAFTA: ITS ORIGIN, IMPACT AND FUTURE* 7 (2017),

https://d3n8a8pro7vnm.cloudfront.net/cdfai/pages/2817/attachments/original/1502385204/Remaking_NAFTA_Its_Origin_Impact_and_Future.pdf?1502385204.

¹² Kyla Tienhaara, *Canada Has an ISDS Clause with the US. It Has Faced 35 Challenges. Is This Australia's Future?*, THE CONVERSATION (Oct. 9, 2015), <https://theconversation.com/canada-has-an-isds-clause-with-the-us-it-has-faced-35-challenges-is-this-australias-future-48757>.

¹³ *Id.*; HADRIAN MERTINS-KIRKWOOD, *A LOSING PROPOSITION: THE FAILURE OF CANADIAN ISDS POLICY AT HOME AND ABROAD* 28 (2015), https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/08/Losing_Proposition.pdf.

¹⁴ Chrystia Freeland, Minister of Foreign Affairs of Canada, *Address by Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement (NAFTA)* (Aug. 14, 2017).

¹⁵ Jenny Leonard, *Sources: Canada to Propose Eliminating ISDS in NAFTA; USTR to Agree*, INSIDE U.S. TRADE, Vol. 36, No. 8, Feb. 23, 2018.

¹⁶ *Id.*

¹⁷ *United States-Mexico-Canada Agreement Text*, USTR, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico> (last visited Nov. 25, 2018) [hereinafter USMCA].

¹⁸ *Id.*, Annex 14-D, art. 3.1

資者將無法再對其投資的間接徵收行為，即「逐步徵收 (creeping expropriation)」¹⁹，向仲裁庭提起救濟²⁰。

根據投資專章附件 14-B，是否構成間接徵收，須視個案情況而定，並需「基於事實的調查 (fact-based inquiry)」，該調查所參酌的事由包括²¹：(一) 政府行為所造成的經濟影響，縱使該負面影響並未確立間接徵收之發生²²；(二) 政府行為干擾「基於投資之顯著、合理期待 (distinct, reasonable investment-backed expectations)」之程度²³；以及(三) 政府行為的特性²⁴。附件 14-B 進一步規定²⁵：「締約方為保護諸如健康、安全及環境等正當公共福利目標，而制定及適用的非歧視性管制，除極少數情況外，並不構成間接徵收。」不過特定產業的投資者則屬例外²⁶，即企業與政府所締結之投資契約若是關於(石)油／(天然)氣²⁷、發電²⁸、電信²⁹、運輸服務³⁰及基礎設施之所有權或管理權者³¹，則可豁免於上述限制³²。

除了得訴諸仲裁之事由有所限縮外，在程序方面，USMCA 導入數項對投資者較不友善的特色。其中最值得注意的是，投資者必須先在地主國法院進行至少 30 個月的訴訟程序，始得提起仲裁³³。

在 NAFTA 2.0 版談判中，即便 ISDS 機制已限縮不少，加拿大仍舊決定退出，故在美國／墨西哥的加拿大投資者及在加拿大的美國／墨西哥投資者，將無

¹⁹ 逐步徵收 (creeping expropriation) 可被定義為漸進式侵佔一項或多項外國投資者之所有權之行為，該行為最終將破壞 (或幾乎破壞) 投資價值，或剝奪投資者之控制權。UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at 11, U.N. Doc. UNCTAD/DIAE/IA/2011/7, U.N. Sales No. E.12.II.D.7 (2012).

²⁰ USMCA, Annex 14-D, arts. 3.1(a)(i)(B), 3.1(b)(i)(B).

²¹ *Id.* Annex 14-B, ¶ 3(a), (providing that: “The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors...”).

²² *Id.* Annex 14-B, ¶ 3(a)(i).

²³ *Id.* Annex 14-B, ¶ 3(a)(ii).

²⁴ *Id.* Annex 14-B, ¶ 3(a)(iii).

²⁵ *Id.* Annex 14-B, ¶ 3(b).

²⁶ *Id.* Annex 14-E, ¶ 1, (providing that: “Annex 14-D (Mexico-United States Investment Disputes) shall apply as modified by this Annex to the settlement of a qualifying investment dispute under this Chapter in the circumstances set out in paragraph 2.”).

²⁷ *Id.* Annex 14-E, ¶ 6(b)(i).

²⁸ *Id.* Annex 14-E, ¶ 6(b)(ii).

²⁹ *Id.* Annex 14-E, ¶ 6(b)(iii).

³⁰ *Id.* Annex 14-E, ¶ 6(b)(iv).

³¹ *Id.* Annex 14-E, ¶ 6(b)(v).

³² *Id.* Annex 14-E, ¶¶ 1, 2, 6.

³³ *Id.* Annex 14-D, art. 5.1(b), (providing that: “No claim shall be submitted to arbitration under this Annex unless: ... (b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated.”).

法再向仲裁庭控訴地主國之違反條約作為³⁴。換言之，對於 USMCA 所保障之國民待遇³⁵、最惠國待遇³⁶、最低標準待遇 (minimum standard of treatment)³⁷義務，以及對徵收之限制³⁸，上述投資者必須向地主國法院訴請救濟，或說服母國政府透過 USMCA 第 31 章下的國與國爭端解決機制 (State-to-State dispute resolution mechanism)³⁹尋求救濟。

預期投資者有適應新法律架構之需要，USMCA 為「舊有投資 (legacy investments)」⁴⁰保留利用 NAFTA 爭端解決機制的機會⁴¹，該機會自 USMCA 生效起維持三年⁴²。鑑於 USMCA 與 NAFTA 之間的差異，可能提起控訴的企業將會加緊腳步，善用 NAFTA 下更有利之規定。

參、結論

儘管目前尚難預測 USMCA 之未來效果，但一般而言，減少對投資者的保護並增加其在外國法院訟爭的可能性，通常會抑制投資者對外國市場的興趣⁴³。

³⁴ *Id.* art. 14.2.4, (providing that: “For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).”).

³⁵ *Id.* art. 14.4.

³⁶ *Id.* art. 14.5.

³⁷ 最低標準待遇 (minimum standard of treatment) 係指締約方應根據國際習慣法，給予投資者相當之待遇，包括「公平與公正待遇 (fair and equitable treatment)」及「完整保障與安全 (full protection and security)」兩大原則。USMCA 下的「公平與公正待遇」原則包含依照全球主要法律體系所體現的正當程序原則，不拒絕在刑事、民事及行政裁決程序中落實正義之義務；「完整保障與安全」原則則要求各締約方依照國際習慣法之標準，提供警察保護。*Id.* arts. 14.6.1, 14.6.2.

³⁸ *Id.* art. 14.8.1, (providing that: “No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and (d) in accordance with due process of law.”).

³⁹ *Id.* art. 31.3.1, (providing that: “If a dispute regarding a matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.”).

⁴⁰ 舊有投資 (legacy investments) 係指一締約方之投資者，於 1994 年 1 月 1 日與 NAFTA 終止日之間，在另一締約方境內所設立或取得之投資，該投資並應於 USMCA 生效時存在。*Id.* Annex 14-C, ¶ 6(a).

⁴¹ *Id.* Annex 14-C, ¶ 1, (providing that: “Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with the provisions in Section B of Chapter 11 of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 of NAFTA 1994; (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A of Chapter 11 of NAFTA 1994.”).

⁴² *Id.* Annex 14-C, ¶ 3, (providing that: “A Party’s consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.”).

⁴³ Sarah E. Reynolds, Soledad G. O'Donnell, Timothy J. Keeler & James T. Coleman, *The “New NAFTA” and Its Revised Dispute Resolution Mechanisms*, MAYER BROWN (Oct. 8, 2018), <https://www.mayerbrown.com/the-new-nafta-and-its-revised-dispute-resolution-mechanisms-10-08-2018/>.

NAFTA 曾在 1990 年代後期引爆大量的 ISDS 案件，而本次 NAFTA 2.0 談判對 ISDS 機制做出的戲劇性變革是十分顯著的⁴⁴。或許其將再次推動嶄新的國際投資治理方法，不過這次 ISDS 將不再是常規，或至少受到嚴格限制⁴⁵。



⁴⁴ Nathalie Bernasconi-Osterwalder, *USMCA Curbs How Much Investors Can Sue Countries—Sort of*, INT'L INST. FOR SUSTAINABLE DEV., <https://www.iisd.org/library/usmca-investors> (last visited Nov. 25, 2018).

⁴⁵ *Id.*