In 2013, Mexico amended its constitution to allow foreign companies to enter into agreements to explore for and extract hydrocarbons in Mexico. Since then, U.S. oil and gas companies have invested billions of dollars in Mexico with uncertain protection under NAFTA. The United States-Mexico-Canada Agreement (USMCA) ushers in protections for current and future investors in Mexico’s upstream hydrocarbon sector. Once Canada ratifies this treaty, U.S. companies’ direct and indirect investments in Mexico’s hydrocarbon sector will be safeguarded by traditional investment treaty protections.

I. The USMCA’s Broad Protections

Under the USMCA, contracts to explore for and extract hydrocarbons are protected investments. This includes contracts entered into before the USMCA takes effect. Three of the USMCA’s important protections are summarized below.

a. Prohibits Expropriation Without Fair Compensation

The USMCA prevents Mexico from expropriating, directly or indirectly, these investments except when it is (1) for a public purpose, (2) non-discriminatory, (3) for fair compensation, and (4) in accordance with due process. Consequently, Mexico cannot nationalize a U.S. company’s hydrocarbon investment nor can it take measures that interfere with a U.S. company’s reasonable investment-backed expectations without consequence.

b. Requires “Fair and Equitable Treatment”

The USMCA requires Mexico to provide “fair and equitable treatment” for U.S. companies’ investments in Mexico’s upstream sector. This means that Mexico cannot take actions that are inconsistent with an investor’s reasonable expectations based on Mexico’s pre-investment representations. This includes, for example, denying a U.S. company due process with respect to any civil or administrative proceedings related to its upstream investments.

c. Requires a “Minimum Standard of Treatment”

The USMCA requires Mexico to afford U.S. oil and gas companies “treatment no less favorable than it accords, in like circumstances,” to Mexican companies. In other words, Mexico cannot treat its own oil and gas companies more favorably than U.S. companies. This protection may be particularly important given PEMEX’s role in Mexico’s hydrocarbon sector.
II. **Access to International Arbitration Under the USMCA**

To enforce these protections, U.S. oil and gas companies will have access to international arbitration. Under the USMCA, U.S. oil and gas companies can bypass Mexico’s court system and proceed directly to arbitration. Hydrocarbons are one of five industries allowed to bring USMCA claims directly in arbitration; companies in other industries have to bring their disputes before Mexican courts and can only initiate arbitration if the litigation is not resolved within 30 months.¹

III. **Arbitrating Under the USMCA**

The arbitration procedures under the USMCA are patterned after those found in more modern investment treaties. However, the USMCA contains some interesting nuances, described below.

- **Limitations**
  - Claims are subject to a three-year limitations period.

- **Timing**
  - A claimant must wait six months after the “events giving rise to the claim” to commence arbitration.
  - A claimant must serve a formal notice of dispute three months before commencing arbitration.

- **Administration**
  - A claimant may commence arbitration under any of the following alternatives: (1) the ICSID Convention; (2) the ICSID Additional Facility Rules; (3) the UNCITRAL Arbitration Rules; or (4) if the parties agree, any other arbitral institution or any other arbitration rules.

- **Arbitral Tribunal**
  - Unless otherwise agreed, the tribunal will be comprised of three arbitrators, with each party appointing one and the third appointed by agreement of the parties. The IBA Guidelines govern arbitrator conflicts of interest.
  - The UNCITRAL Arbitration Rules govern arbitrator challenges.

- **Arbitration Conduct**
  - Mexico can object that the claim is “manifestly without legal merit” at the outset of the arbitration.
  - The arbitration should be conducted in an expeditious and cost-effective manner.

- **Transparency**

¹ This-cave out also applies to companies with government contracts in the following industries: power generation; telecommunication; public transportation; and roads, railways, bridges, and canals.
The USMCA (NAFTA 2.0) Protects U.S. Oil and Gas Investment in Mexico

- Barring a protective order, the arbitration process is public.

- **Award**
  - Parties have 60 days to comment on a proposed decision.
  - A final decision is to be rendered within 45 days thereafter.
  - The tribunal can award attorneys’ fees and costs.

**IV. Role of Mexican Law?**

Disputes under the USMCA are to be governed by the USMCA itself and the “applicable rules of international law.” As such, parties should anticipate attempts to introduce Mexican law into the dispute. For example, a disputing party may try to use Mexican law when addressing a claim for “indirect expropriation.” This requires analyzing the character, context, and intent of Mexico’s act and whether it is consistent with due process. Thus, it is foreseeable that Mexican law may play some role, even if not binding, in resolving a claim under the USMCA.

**V. Conclusion**

The USMCA offers U.S. oil and gas companies broad protections for their investments in Mexico. If Mexico engages in conduct prohibited by the USMCA, U.S. oil and gas companies will soon have the ability to bypass Mexico’s court system and assert their rights in international arbitration. These new rules provide U.S. oil and gas companies with leverage and authority to protect both current and future oil and gas investments.

For more information on protecting your investments in Mexico, please contact one of the attorneys listed below.

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