With Passage of NAFTA 2.0, Congress Boosts Fossil Fuel Polluters in Mexico

Aerial picture showing a Pemex oil complex in Tula, Hidalgo State, Mexico, taken on February 4, 2019.PEDRO PARDO / AFP via Getty Images

By Manuel Perez-Rocha, Inequality.org Published January 18, 2020

NAFTA 2.0 cleared another hurdle on January 16 as the U.S. Senate approved the trade deal with bipartisan support.

Officially called the United States-Mexico-Canada Agreement (USMCA), the pact has some improvements but remains a handout to large corporations.

This is particularly evident in the USMCA rules related to investor rights. One of the most controversial aspects of the original NAFTA was that it allowed private corporations to sue governments in international tribunals, demanding compensation for alleged violations of a wide range of investor "rights." Corporations have used these rules repeatedly to demand compensation for environmental protections and other public interest laws and regulations that reduce the value of their investments.

The new trade deal curtails this "investor-state" dispute settlement (ISDS) somewhat. But it falls far short of the progressive demands for an alternative system that prioritizes human rights and the rights of nature over corporate rights, as we laid out in the report "Beyond NAFTA 2.0."

The Sierra Club, one of the most vocal opponents of the USMCA, had demanded complete elimination of the ISDS system, which it describes as an

"illegitimate, shadow legal system for notorious corporate polluters like Chevron and ExxonMobil."

Sierra Club and other large U.S. environmental organizations issued a joint statement against the USMCA, complaining that it "failed to eliminate this clear-cut handout to oil and gas corporations. As such, the revised deal would allow corporate polluters to sue Mexico in private tribunals if new environmental policies undercut their government contracts for offshore drilling, fracking, oil and gas pipelines, refineries, or other polluting activities."

Three Distinct Investment Protection Regimes in North America

If the USCMA is ratified in Canada, the North American region will have not one but three distinct investment protection regimes.

1. a system for the United States and Canada, in which ISDS no longer exists. Many substantive investment protections will remain, but they will need to be handled national or local courts or through state-to-state mechanisms rather than through international arbitration tribunals;
2. a system for Mexico and the United States, in which ISDS persists, notably for certain government contracts, which remain subject to the full protections of NAFTA Chapter 11; and
3. another system between Canada and Mexico, under the Trans-Pacific Partnership (TPP), which is largely based on NAFTA's pre-existing Chapter 11 model.

Annex 14-D of the USCMA (applicable only to Mexico and the United States) puts new limitations on investor claims. For example, claims cannot be made for indirect expropriation, which is used by companies to get "compensated" for profits it expected to have. It also requires investors to first exhaust domestic remedies before bringing a claim to an international tribunal.

However, Annex 14-E preserves NAFTA investor protections for disputes related to government contracts connected to the oil and gas, power generation, telecommunications, transportation, and infrastructure sectors. Also, Annex 14-E does not include the requirement to exhaust domestic remedies.

While the elimination of ISDS between the United States and Canada is clearly positive for those countries, the USMCA's fragmented investment provisions otherwise represent a step backwards, toward the originally asymmetrical, post-colonial investor protection system, in which ISDS was established primarily to allow corporations based in high-income countries to sue governments in the Global South.

Indeed, developed countries are increasingly withdrawing from or rejecting ISDS in agreements amongst themselves. For example, the European Union and Australia and New Zealand have reportedly dropped ISDS from their mandate for negotiations of a Free Trade Agreement, while there have been strong indications that a new Transatlantic Trade Treaty (TTIP) would not require ISDS given the "highly evolved" rule of law, legal systems, and robust courts on both sides of the Atlantic. Meanwhile, the European Union countries have begun phasing out Bilateral Investment Treaties among themselves.

Rich countries (mainly the United States and the European Union) clearly intend to preserve mechanisms for the protection of their investments in the Global South, continuing a tradition of predictably discriminatory practical effects. To give but one example, no Mexican company has ever won a case versus the United States or a European country, but it has lost many cases and many more are pending. Also it is expected that in the renegotiation of the trade agreement between the European Union and Mexico, ISDS is going to be introduced via the EU's Investment Court System.

Extraction Casino: Mining Companies Gambling with Latin American Lives and Sovereignty Through International Arbitration

All in all, with the USCMA and the TPP, Mexico stands to remain the target of investor-state lawsuits from both the United States and Canada. As demonstrated in our report "Extraction Casino," during the last couple of decades — and particularly during the last ten years — mining companies have filed dozens of claims against Latin American countries before international arbitration panels, demanding compensation for court decisions, public

policies, and other government measures that they claim reduce the value of their investments.

In a majority of these cases, the communities most affected by the mining projects have been actively organizing to defend their territories and natural commons. For local residents, these projects are a threat to their land, health, environment, self-determination and ways of life. These suits represent a further assault. For the global mining companies, international arbitration is merely another opportunity to strike it rich through reckless, casino-style gambling, given how the recourse they have to bring expensive lawsuits to international tribunals takes place within a system in which the deck is heavily stacked in their favor.

Two Mining Companies Sued Mexico in 2019

Since NAFTA came into effect in 1994, Mexico has already had to pay $242.94 million to companies under ISDS cases. The government is currently facing investor-state suits in which companies are demanding a staggering total of $5.97 billion. Two of these were brought by mining companies over environmental protections.

Shortly before the renegotiated text of NAFTA 2.0 was made public, the U.S. company Legacy Vulcan LLC and its Mexican subsidiary, Calizas Industriales del Carmen (Calica), filed a notice of intent to sue Mexico under NAFTA over an environmental dispute concerning limestone quarrying in the state of Quintana Roo. The company is in conflict with the municipality of Solidaridad (where the resort town Playa del Carmen is located), whose ecological land use planning has prevented the company from mining on two properties. The company followed through on its threat, registering its suit on January 3, 2019 for $500 million.

Also in early 2019, the Odyssey Mineral mining company filed another suit against Mexico under NAFTA for not having approved environmental permits for its seabed phosphate project off the coast of Baja California Sur, claiming a whopping $3.54 billion dollars. Fishing cooperatives, citizens groups and environmental organizations have been opposed to this project for years given the threat to their livelihoods and the ecosystems they depend on.

NAFTA 2.0. Will Undercut Efforts to Confront the Climate Crisis

Quoting again the U.S. environmental organizations united against the USMCA, combined with existing and forthcoming trade agreements such as the TPP, "The environmental consequences of the USMCA are very real. The deal would contribute to the climate crisis by helping corporate polluters dodge our climate policies via outsourcing, leaving the controversial Investor-State Dispute Settlement system intact for the most polluting sectors in Mexico."

Indeed, U.S. and Canadian (as well as EU) oil and gas companies have a key interest in the Mexican oil market. The strengthening of investment protections under the new agreements will lock in the reforms made by the Mexican government in 2013 allowing for the privatization of the energy sector. The present and future Mexican governments will find it hard to reverse these policies without the risk of being sued at international investment tribunals. The risk of lawsuits by oil, gas and mining companies is very real since a significant proportion of the international investment arbitration cases stems from the extractives sector.

The passage of NAFTA 2.0 is very concerning for all the efforts to confront the climate crisis and save the planet.