

## Trade Disputes Mechanism To Dominate Canada's NAFTA Talks

By **Caroline Simson**

*Law360 (August 29, 2018, 9:29 PM EDT)* -- As Canada scrambles to be included in trade talks for the updated North American Free Trade Agreement before a Friday deadline, efforts to save a controversial provision the country considers "essential" to fairly resolving trade disputes have already outweighed any concern over a more limited investor-state arbitration mechanism, experts say.

The Trump administration and Mexican trade officials announced Monday that they had reached a preliminary agreement to update the 24-year-old trade pact, and that the deal would likely be sent to Congress on Friday, putting pressure on Canada to sign it or be left behind as the U.S. and Mexico look to finalize the updated agreement by the end of November.

The proposed deal includes a narrowed investor-state dispute settlement, or ISDS, mechanism that limits the range of claims that U.S. investors can bring against Mexico and vice versa, except in certain sectors when a government contract is involved. Experts say Canada is unlikely to warm to this revised ISDS mechanism, which lacks any of the more progressive attributes it has pushed for in NAFTA, such as a provision protecting a government's right to regulate in the public interest.

But such considerations will almost certainly be cast aside as the Canadians look to revive what they consider to be a far more important mechanism for trade disputes known as Chapter 19, which Mexico has agreed to scrap under pressure from the Trump administration.

Reports emerged Wednesday that Canadian trade officials were ready to make concessions allowing the U.S. more access to its dairy market in a bid to save Chapter 19, which provides for a binational arbitration process for resolving disputes over anti-dumping and countervailing duties.

"That's a deal-breaker," said Ian Laird, co-chair of the international dispute resolution group at Crowell & Moring LLP. With regard to the ISDS provision in NAFTA, "I think Canada would like to get its way, but I suspect it's something they would trade if they could get concessions in other areas. It's clearly not a top priority for Canada."

The revised ISDS provision in the proposed U.S.-Mexico deal will allow U.S. investors in Mexico to pursue claims that they have been discriminated against compared to Mexican nationals or the nationals of other countries and will give Mexican investors in the U.S. the same rights. The investors will be able to assert claims for direct expropriation, meaning if the government takes control of their assets through some official action, such as by passing a decree.

Claims for indirect expropriation — such as if the government unfairly denies a necessary permit for a project — will not be permitted.

U.S. Trade Representative Robert Lighthizer told reporters on Monday that investors who hold government contracts in the sectors of oil and gas, infrastructure, energy generation and telecommunications, will get "the old-fashioned ISDS," although the exact details of these and the other ISDS provisions in the new trade pact have not yet been released.

The proposal is an about-face for Lighthizer, who previously floated the idea of an "opt-in" mechanism for investor state arbitration that would allow the U.S. to opt out while giving the other NAFTA partners the opportunity to adopt the provision for themselves. The ambassador has criticized ISDS for encouraging U.S. companies to invest abroad rather than domestically and for undermining U.S. sovereignty, among other things.

Lighthizer's change of heart is almost certainly a political decision meant to expedite the proposed deal's passage, according to Todd Weiler, a Canadian lawyer who specializes in the field of investment treaty arbitration.

"What it really says to me is that the USTR is looking for some way to appease the many senators and congressmen ... who told him in committee hearings that he could expect a very hard ride for any new NAFTA deal that didn't include investor-state dispute settlement," he said.

The opt-in idea was widely panned for effectively making the provision toothless, and it was not popular with Canada, whose investors are among the most likely in the world to bring an ISDS claim against a foreign government. A spokesperson for Canadian Foreign Affairs Minister Chrystia Freeland told Law360 in February that Canada had proposed that the renegotiated NAFTA contain a "comprehensive investment chapter with a progressive approach to ISDS" that builds off the framework established in the trade deal Canada had recently signed with the European Union, the Comprehensive Economic and Trade Agreement.

CETA includes an investor court that is meant to address many of the criticisms against the traditional ad hoc ISDS system — like the one in the previous version of NAFTA — by incorporating a standing panel of judges and an appellate mechanism, among other things. With regard to the NAFTA reboot, the Canadian government had embraced new language that would underscore governments' "unassailable" right to regulate in the public interest.

In that vein, it had spoken specifically of inserting language that would ensure investors couldn't assert claims based on environmental protection standards.

But with no progress for the Canadians on this front, it stands to reason that this goal has not been a top priority in the NAFTA talks, according to Dickinson Wright PLLC of counsel Daniel D. Ujcz, an international trade and customs lawyer who chairs the firm's cross-border (Canada-U.S.) practice group.

"I believe that the Canadian position has been agnostic at best on ISDS/Chapter 11," he said, referring to the chapter in NAFTA containing the ISDS provisions.

Moreover, the lack of a robust ISDS mechanism with Mexico in the new NAFTA won't be a concern for the Canadians since those two countries have already agreed to a "modern" investment protection treaty in the newly adopted Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

But Chapter 19 and its arbitration process for disputes over anti-dumping and countervailing duties is a different story.

The provision, originally included in a NAFTA precursor, the U.S.-Canada Free Trade Agreement, was a hard-fought victory for the Canadian government, according to Weiler. It required a personal appeal from Canada's prime minister at the time, Brian Mulroney, to then-President Ronald Reagan, with the prime minister "keying in on the latter's deep ideological commitment to free trade," he said.

But the measure has long been a punching bag for U.S. producers, who complain that it undoes tariffs they petitioned for. And the Trump administration has already gained points for nixing the provision from the U.S.-Mexico trade deal from interest groups like the Committee to Support U.S. Trade Laws, an organization of companies, trade associations, labor unions, law firms and individuals committed to preserving and enhancing U.S. trade laws and supporting trade policies that benefit the U.S.-based productive economy.

But comments from Canadian Prime Minister Justin Trudeau last summer, after the Trump administration included a desire to remove Chapter 19 in its NAFTA renegotiating wish list, suggest that Canada will be digging in its heels on the provision.

"A fair dispute resolution system is essential for any trade deal that Canada signs onto, and we expect that that will continue to be the case in any renegotiated NAFTA," Trudeau said.

--Editing by Jill Coffey and Alanna Weissman.