

What NAFTA Renegotiating Objectives Mean For Arbitration

By **Caroline Simson**

Law360, New York (November 22, 2017, 1:27 PM EST) -- Updated renegotiation objectives for the North American Free Trade Agreement that the Trump administration released in recent days have provided more insight into its stance on investment arbitration. Here, Law360 lays out what you need to know.

The release updates negotiating objectives put forward by the Office of the U.S. Trade Representative this summer, which had left many unanswered questions as to how President Donald Trump and his trade czar, Robert Lighthizer, would approach NAFTA's section on investor-state arbitration, Chapter 11.

Notably, there's no call in the document, released Nov. 17, to completely jettison Chapter 11. That's a prospect some observers had feared given comments Lighthizer made last month suggesting that investor-state arbitration is essentially a government-supported means of encouraging domestic companies to invest abroad, and given reports of an opt-in proposal being floated by his office that would give each NAFTA country the chance to opt in or out of the trade deal's investment arbitration chapter. This opt-in proposal is not mentioned at all in the updated objectives.

Instead, the objectives focus on improving arbitration under Chapter 11, according to Squire Patton Boggs LLP's Stephen Anway and Mark Stadnyk. Anway co-heads the investment arbitration division of the firm's international dispute resolution practice group, and Stadnyk is a lawyer in the firm's New York office.

"In many respects these are tweaks to existing NAFTA Chapter 11 procedures, rather than wholly new ideas," Anway and Stadnyk told Law360.

Still, there are subtle differences in the Trump administration's approach to Chapter 11 and investor-state dispute settlement in general that could have ramifications for business investing abroad.

How It's Similar

The updated NAFTA renegotiating goals include provisions that will be familiar to observers of U.S. policy in this area, such as ensuring that arbitrators are impartial and independent and that frivolous claims can be dismissed early in the proceeding.

Other familiar provisions include ensuring that hearings are open to the public and that documents from

the proceeding are promptly made public, and that third parties like businesses, unions and nongovernmental organizations be allowed to make amicus curiae submissions.

In that sense, the Trump administration's approach to Chapter 11 reflects that taken by previous administrations, which have viewed investor-state dispute settlement, or ISDS, as a positive remedy for U.S. investors with interests abroad, assuming certain safeguards — such as the ones in the updated objectives — are in place.

"Those are essentially the very same goals that the U.S. has had for bilateral investment treaties and for investment chapters in trade agreements since 2004," said Todd Weiler, a Canadian lawyer who specializes in the field of investment treaty arbitration.

That there's no mention of ditching Chapter 11 is significant given that the administration specifically states in the negotiating objectives that it intends to target a separate arbitration mechanism for trade disputes known as Chapter 19 for elimination, Anway and Stadnyk said.

How It's Different

In terms of the procedural aspects of a NAFTA dispute, there is one departure from existing Chapter 11 orthodoxy, Anway and Stadnyk said.

That's a provision to ensure that the parties "retain control of disputes and can address situations when a panel has clearly erred in its assessment of the facts or the obligations that apply."

Exactly what that would mean in practice is unclear, but it could lead to more substantial review or oversight by NAFTA countries. The current practice allows them to make submissions about interpreting certain NAFTA provisions to a tribunal overseeing a particular dispute. There's additional oversight through the post-award review currently undertaken by national courts and annulment panels on request, the Squire Patton lawyers said.

As for more substantive differences in the negotiating objectives, one must read between the lines. Previously, Congress made clear that a principal negotiating objective of the U.S. regarding foreign investments was to provide "meaningful procedures for resolving investment disputes."

Now, the updated objectives include that provision, but add to it a caveat that investment rules must "ensur[e] the protection of U.S. sovereignty and the maintenance of strong U.S. domestic industries," a reference that could mean businesses investing abroad will be on their own if trouble arises.

"The reference in the ISDS negotiating objectives to 'U.S. sovereignty' and 'the maintenance of strong U.S. domestic industries' appears to be a euphemism for telling U.S. companies that if they wish to expand their businesses overseas, they shouldn't expect the full support of the U.S. government," said Marney Cheek, co-chair of Covington & Burling LLP's international arbitration practice, who was formerly associate general counsel at the USTR.

This new stance appears to reflect the comments Lighthizer made last month regarding American companies that have criticized the opt-in proposal, according to Armand de Mestral, a professor emeritus at McGill University and a senior fellow at the Canadian think tank Centre for International Governance Innovation.

"Like several other statements of principle of the USTR, this seems bland, but apparently behind it is a demand that investor-state arbitration possibly not be binding and that investment protection is seen by [Lighthizer] as an encouragement to Americans to invest abroad," he said.

The comments referenced by de Mestral were made by Lighthizer during a press briefing in October. The trade representative had harsh words for domestic businesses that argue the USTR shouldn't be looking to substantively change Chapter 11 because then they wouldn't be able to invest in the other NAFTA countries.

"I've had people come in and say, literally, to me, you can't do this, you can't change ISDS ... you can't do that because we wouldn't have made the investment otherwise," Lighthizer said. "I'm thinking, then why is it a good policy for the United States government to encourage investment in Mexico?"

Meanwhile, there have also been reports that the U.S. has proposed eliminating the ability of investors to assert ISDS claims for indirect expropriation — meaning when a government imposes restrictions or takes administrative actions targeting an investment, significantly reducing its value to the investor — and for violations of fair and equitable treatment, a core standard of protection in international law.

Taken together, these elements could have troubling impacts for multinational companies, Cheek said.

"The new negotiating objectives underscore that this administration has not shown a commitment to meaningful, neutral dispute settlement to resolve the full range of serious mistreatment U.S. companies may face abroad," she said. "That is a dramatic departure from past U.S. practice."

And What Happened to the Opt-In Proposal?

Many of the experts consulted for this story thought it strange that the Trump administration in the updated negotiating objectives did not include the opt-in proposal, reports of which have thus far relied on unnamed sources in the USTR.

It remains unclear how such a mechanism would work, but reports in the journal *Inside U.S. Trade* suggest that the proposal gives the three countries "specific instructions for how to opt-in" and use the dispute settlement system. Other reports have suggested that while Canada and Mexico would opt in — meaning other NAFTA country investors could bring claims against them — the U.S. hasn't stated publicly what it would do if the mechanism were put in place.

The opt-in proposal has been extremely unpopular with the American business community, and its absence from the updated negotiating goals may prompt some to think the proposal has been taken off the table. That may or may not necessarily be the case, but it may not matter given that the proposal is likely to be trumped by other objectives, such as reducing the perceived trade deficit, according to Anway and Stadnyk.

"Given the opposition from U.S. companies to eliminating or even scaling back ISDS, [we] expect the 'opt in' proposal will be even lower on the priority list for U.S. negotiators," they said.

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