ISDS in NAFTA – and ISDS alternatives

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Debates about the propriety of investor-state dispute settlement (ISDS) were revived by a recent letter by U.S. academics, which urged the abandonment of ISDS in the renegotiated North American Free Trade Agreement (NAFTA). This letter repeated arguments that are familiar from prior ISDS debates, such as that ISDS "grants foreign corporations and investors rights to skirt domestic courts" and that ISDS permits suits against sovereign governments which will be decided by "tribunals of three private-sector lawyers." Such anti-ISDS sentiments do not enjoy unanimous support in the United States, however, as both pro- and anti-ISDS statements were submitted in response to the U.S. government's June 2017 request for comments on the NAFTA renegotiation. Moreover, particularly in light of the support that ISDS enjoys, it is clear that curtailing or eliminating ISDS in NAFTA will not actually end disputes between investors and host states, but rather simply channel those disputes through alternative mechanisms.

Previous comments on ISDS in NAFTA renegotiation

Calls for the abandonment or curtailment of ISDS, similar to those made in the recent letter, were made by a number of groups in June 2017, in response to the Administration's request for comments on the NAFTA renegotiation. For example, a June 2017 comment from the Center for Tobacco Control Research and Education at the University of California, San Francisco called for the elimination of ISDS, citing the negative effects of NAFTA claims against the United States, as well as

non-NAFTA claims related to tobacco plain-packaging laws. In a joint statement, several members of congress also called for the elimination of ISDS in NAFTA, and opined that "NAFTA's Chapter 11 makes it less risky and cheaper for U.S. firms to relocate offshore by guaranteeing privileged treatment for firms in Mexico and Canada and by providing for the enforcement of these new rights through the Investor-State Dispute Settlement (ISDS) mechanism." Finally, a number of individuals also submitted comments critical of ISDS in connection with the Administration's request for comments on the NAFTA renegotiation. For example, Phila Back of Kutztown, Pennsylvania described ISDS as "elevating foreign corporations to the status of sovereign nations" and stated that ISDS provides "a huge incentive for corporations to off-shore production or the corporation itself by means of inversion."

A number of others submitting comments regarding the renegotiation of NAFTA have favored ISDS, however. In its June 2017 submission, the National Association of Manufacturers (NAM), for example, emphasized the importance of ensuring that ISDS is broadly available to "all industries" and for "all core violations and contract rights." Comments by the Securities Industry and Financial Markets Association (SIFMA) similarly called for "[e]nhancing the investor protections in the investor-state dispute settlement mechanism" of NAFTA, and in particular "ensur[ing] that the financial sector has the same broad coverage of investor protections, and ISDS as the enforcement mechanism, as afforded to other sectors." The American Petroleum Institute also wrote favorably about ISDS, and suggested incorporating into the modernized NAFTA provisions of the 2012 U.S. Model BIT. In an August 2018 letter to U.S. NAFTA negotiators, leaders of various U.S. business associations similarly emphasized the "critical importance" of ISDS in NAFTA and stated that ISDS "upholds the same fundamental due process and private property guarantees protected by [the U.S.] Constitution, and it obligates other countries to uphold these precepts as well."

As these comments make clear, a number of U.S. stakeholders continue to support ISDS, even as others criticize the mechanism in a manner similar to the letter recently prepared by law professors. Updated NAFTA negotiating objectives released by the U.S. government in November 2017 do not provide clear guidance as to the position of the U.S. negotiators on the issue, however, and state the the U.S. supports "meaningful procedures for resolving investment disputes," which will "ensur[e] the protection of U.S. sovereignty and the maintenance of strong

U.S. domestic industries."

ISDS Alternatives

Even if anti-ISDS views were to prevail, and ISDS was eliminated or curtailed in the renegotiated NAFTA, disputes would continue between investors and the foreign states that host their investments. For U.S. investors, a number of alternative mechanisms exist under U.S. law that, in certain circumstances, could be applied to permit government retaliation for acts that harmed U.S. investors and their investments. Such ISDS alternatives include, among other avenues, Section 301 of the U.S. Trade Act of 1974 and Section 337 of the Tariff Act of 1930.

Under Section 301 of the Trade Act of 1974 the U.S. government may investigate whether a foreign country has denied rights under a U.S. trade agreement or violated a trade agreement, or whether a foreign country has engaged in conduct that is unreasonable or discriminatory, as well as burdensome or restrictive to U.S. commerce. Section 301 investigations may be initiated either by third-party petitions or by the U.S. government itself, and the statutory timeline for the completion of an investigation is typically 12 months. If a violation of Section 301 is found, U.S. law permits unilateral retaliation in response to the offending conduct. Although Section 301 has been used infrequently in recent years, the current U.S. Administration has already initiated a Section 301 investigation into China's policies related to technology transfer, intellectual property, and innovation. In a recent interview, the U.S. Trade Representative described Section 301 as a very effective tool that the Administration was willing to use.

Another alternative avenue that American investors could use to air their grievances, if ISDS were eliminated or curtailed, is Section 337 of the Tariff Act of 1930. Section 337 declares unlawful "unfair methods of competition and unfair acts" in importation which have the threat or effect of destroying or substantially injuring an industry in the United States, preventing the establishment of a U.S. industry, or restraining or monopolizing U.S. trade and commerce. Section 337 investigations most often involve allegations of patent infringement, but can also concern claims of false designation of origin; copyright, trademark, or trade dress infringement; or other unfair acts. Section 337 investigations may be initiated by private parties and include discovery and trial proceedings before an administrative law judge and review by the U.S. International Trade Commission (ITC). If a Section 337 claim is successful, the remedies imposed may include

exclusion orders that stop offending imports from entering the United States, and cease and desist orders against named importers and others engaged in unfair acts that violate Section 337.

Although these alternatives for airing investment disputes are not the same as ISDS—and notably would not permit claims against the U.S. government—these mechanisms could serve as alternative bases to resolve disputes between U.S. investors and other governments and impose retaliatory actions, should ISDS eliminated from NAFTA or other U.S. agreements. Moreover, the existence and use of such tools under U.S. law could spark the enactment or pursuit of similar policies by other governments, leading to further expansion of ISDS alternatives for resolving disputes.

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In brief, criticism of ISDS in NAFTA is neither new nor unanimous, and comments of U.S. stakeholders have been both pro- and anti-ISDS. Moreover, even if ISDS were eliminated or curtailed in the renegotiated NAFTA, numerous alternative avenues exist for the airing of disputes that might otherwise go to ISDS. Accordingly, the elimination of ISDS in NAFTA would merely shift the framing of such disputes, rather than eliminating their existence particularly as numerous organizations have emphasized the value of such dispute settlement mechanisms.