
Infrastructure Series: NAFTA Renegotiation: Energy Infrastructure and Investor-State Disputes

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This is the final issue of WilmerHale's 10-in-10 Infrastructure Series. In this series, our attorneys share insights on current and emerging issues affecting infrastructure project developers in the United States. Attorneys from across various practice groups at the firm will offer their take on issues ranging from permitting reform to financing to litigation and share their insights from working with clients in a variety of infrastructure sectors, from water infrastructure, to energy development, to infrastructure development on tribal lands. This client alert was also published by [Law360](#).

Negotiations to reshape the North American Free Trade Agreement (NAFTA) among the United States, Canada and Mexico have recently intensified as various factors—upcoming elections in Mexico in July and in the United States in November; the prospects of a trade showdown between the United States and China—have the three nations pushing to reach an agreement in principle in the coming weeks (although talks are presently on hold until May 7). One remaining sticking point is the future of NAFTA's Investor-State Dispute Settlement (ISDS) provision. ISDS provisions, in NAFTA as well as in other trade agreements, allow companies with foreign investments to bring before an arbitration panel claims that a state actor has violated the treaty by, for example, expropriating their assets, discriminating against them, or denying them fair and equitable treatment. The United States negotiators have indicated that they wish to eliminate this provision from NAFTA. Mexico and Canada appear aligned in their desire to preserve ISDS (with some suggestion that they would bilaterally agree to ISDS if it falls out of NAFTA). The US domestic energy industry has voiced strong support for retaining NAFTA's ISDS regime. Examples in both the oil and gas and renewables sectors illustrate the value that the energy industry places on ISDS and explain the vocal push to retain it in any NAFTA renegotiation.

Oil and Gas Projects

The Keystone XL pipeline provides a high-profile example of the use of ISDS in the oil and gas infrastructure context. In 2015, then-President Obama, acting through the US State Department, denied Canadian energy company TransCanada Corporation's application for a needed Presidential Permit to authorize construction of Keystone XL in the United States. TransCanada responded by filing a request for arbitration pursuant to NAFTA. TransCanada claimed that the

denial violated, among others, NAFTA's requirements that states treat investors of other states as they would domestic investors and extend to all investors fair and equitable treatment.¹

TransCanada argued that the denial was arbitrary and designed to signal the Obama Administration's climate change bona fides, as opposed to being grounded in the merits of Keystone XL itself. TransCanada made some persuasive arguments to advance its position, though the Trump Administration's decision to reverse the denial and authorize Keystone XL ultimately mooted the challenge.

Regulation of upstream oil and gas projects has been the subject of ISDS claims as well. For example, after Canada and Newfoundland and Labrador imposed requirements on offshore oil and gas producers to contribute a portion of their revenue to research, development, education and training in the Canadian province, affected US-based companies submitted claims alleging that such action violated NAFTA. An arbitration panel agreed with the US companies, finding that the obligation to contribute to provincial interests violated NAFTA Article 1106's prohibition on requirements "to purchase, use or accord a preference to goods produced or services provided in its territory."²

Wind Projects

Wind farm developers have invoked NAFTA's ISDS provision as well. Windstream Energy LLC, an American wind energy developer, won an award against Canada in 2016. Windstream had secured a contract pursuant to Ontario's feed-in-tariff program for renewable energy to sell energy into the province's grid from an offshore wind facility Windstream planned to build in Lake Ontario. Before Windstream could construct that facility, however, Ontario placed a moratorium on offshore wind development. An arbitration panel found that although the moratorium did not violate NAFTA *per se*, Canada had denied Windstream fair and equitable treatment in violation of NAFTA as a result of its actions following imposition of the moratorium. Specifically, the tribunal took issue with Canada's failure subsequently to provide adequate justification for the moratorium and its failure "to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium."³

Industry Supports ISDS in NAFTA Renegotiation

As these examples illustrate, NAFTA's ISDS provision has served as a useful tool for the energy industry in protecting foreign investments. In the absence of ISDS, those foreign investors would likely be forced into the home country's courts to resolve any disputes.⁴ The energy industry has thus been supportive of maintaining ISDS in NAFTA.

The upcoming elections in Mexico may sharpen the energy industry's concern. The leading presidential candidate, Andrés Manuel López Obrador, has suggested he could reverse the recent privatization of the oil and gas industry in Mexico, including by walking back contracts between private investors and Mexico's state-owned oil company Petróleos Mexicanos (Pemex). Without ISDS, foreign private investors may have no effective recourse to secure their rights under the NAFTA and to recover compensation for any violations by Mexico.

Throughout the many rounds of NAFTA negotiations, energy industry groups have voiced support for

ISDS. Most recently, the American Petroleum Institute (API) released a statement in February ahead of the seventh round of negotiations. In that statement, API argued that NAFTA should provide “strong protections,” including by continuing to provide ISDS to protect American investment, in particular, in Mexico’s emerging oil and natural gas market.⁵ API continued, “[W]eakening or eliminating NAFTA’s Investor-State Dispute Settlement (ISDS) ... would undermine US energy security, investment protections and our global energy leadership.”⁶ API had previously joined its equivalents in Mexico (Asociación Mexicana de Empresas de Hidrocarburos) and Canada (Canadian Association of Petroleum Producers) to mount a similar defense of ISDS. In a joint position paper, the united industry groups say that they “support preservation of NAFTA’s provisions for strong investment protections and Investor-State Dispute Settlement (ISDS), including rules that restrict expropriation of investments and that provide for prompt, adequate and effective compensation if expropriation does occur.”⁷

The position of these energy trade groups is consistent with the broader position of US industry. Writing in *The Hill*, Peter Robinson, CEO of the United States Council for International Business, recently mounted a defense of ISDS. Mr. Robinson argued, “Without substantive provisions protecting investment, including investor-state dispute settlement (ISDS), it’s very unlikely that the United States would gain the very tangible benefits it gets from open investment among the three NAFTA partners.”⁸ Mr. Robinson noted that eliminating ISDS threatens to undermine the very goal of NAFTA to encourage trade among the three signatories: “U.S. investors, including the many smaller and medium-sized companies that have expanded sales and operations north and south of the border under NAFTA, would be far less willing to do business in Canada or Mexico if those governments couldn’t be held responsible for poor treatment or abuse of power.”⁹

Conclusion

Reports indicate that NAFTA renegotiations could be culminating in a new deal soon, and that the future of ISDS is very much on the table. If ISDS is eliminated, as the Trump Administration has signaled it wants, the energy industry will have lost a tool that it has used in the past to protect cross-border investments in North America. Energy firms must remain aware of the nuanced dynamics of the trade provisions at play in the NAFTA renegotiation. There is limited time remaining to lobby for retaining ISDS, given the expected final push by negotiators this month. They should also be giving thought to how a post-ISDS world would affect their existing and future investments.

¹ Specifically, TransCanada alleged violations of NAFTA Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation).

² *Mobil Investments Canada, Inc. v. Canada*, ICSID No. ARB(AF)/07/4, at ¶ 27 (2015).

³ *Windstream Energy LLC v. Canada*, Slip Op. at 109 (Perm. Ct. Arb. 2016).

The tribunal meanwhile rejected a claim that Ontario's actions amounted to an indirect expropriation. *Id.* at 76-78.

⁴ Note, however, that TransCanada brought a challenge under the US Constitution in US federal court to the Obama Administration's denial of the Presidential Permit for Keystone XL.

⁵ American Petroleum Institute, *API Supports NAFTA Modernization That Retains Strong Protections for U.S. Investors* (Feb. 20, 2018).

⁶ *Id.*

⁷ American Petroleum Institute, Asociación Mexicana de Empresas de Hidrocarburos, and Canadian Association of Petroleum Producers, *North American Oil & Natural Gas Industry Positions on NAFTA*.

⁸ Peter M. Robinson, Op-Ed, "Trump Aiming to Make NAFTA Like a Football Game Without Referees," *The Hill* (Apr. 26, 2018).

⁹ *Id.*

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