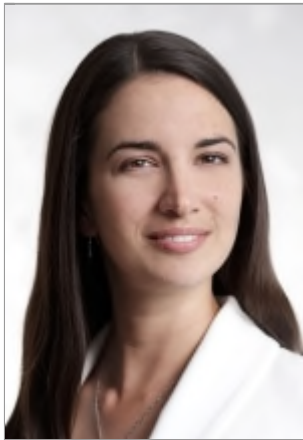


Environment

NAFTA talks provide no certainty for Canada's environment wish list

By **Barbora Grochalova**



Barbora Grochalova

(September 20, 2017, 10:23 AM EDT) -- Canada, the United States and Mexico have concluded the second round of talks on the future of the North American Free Trade Agreement (NAFTA). Among many priorities, the environment appeared on the negotiating agenda for two days of the Mexico City round of talks.

It is too early to tell what shape a future environment chapter might take, but while the parties may be aligned on some broad issues, it is no secret that climate change may be a sore spot. As well, changes to Chapter 11 may also have an impact on environmental and climate-change objectives.

The United States trade representative's stated objectives for a renegotiated NAFTA include several relatively palatable points: bringing environmental provisions out of a side agreement and into the core NAFTA text, establishing rules against countries'

waiver or derogation of domestic environmental laws, and even the promotion of sustainable fisheries and marine species conservation.

As always, the proof will be in the details, scope and enforceability of any provisions of a potential environment chapter.

Although Canada has not released a similar list of objectives, Environment Minister Catherine McKenna struck a NAFTA Advisory Council on the Environment, signalling that environmental provisions are one of the priorities. Canada also appears to be pursuing a more ambitious goal: Government representatives stated they want to see action on climate change specifically included in NAFTA. So far, the U.S. seems keen on avoiding that phrase, and few details of Canada's position are available.

To be fair, it can be unclear what action on climate change looks like in the context of an international trade agreement. And yet, for the past few weeks, the news of NAFTA negotiations has been eclipsed only by reports of climate change-exacerbated destruction. Harvey. Irma. A third of the area of Bangladesh under water. Hundreds of people killed due to mudslides and flooding in Sierra Leone.

Whatever form climate policy takes, it must be fast, it must be fair and it must be effective.

One of the ways climate change can be included in NAFTA is by adding the Paris Agreement to a clause that would require member countries to implement certain multilateral environmental agreements. Such a clause, in general terms, is already on the

list of the U.S. objectives. However, incorporating the Paris Agreement specifically is not likely what its trade negotiators had in mind, given the intention of the U.S. administration to withdraw from the climate agreement.

More importantly, it is unclear how such a provision would be enforced, and whether it would create additional environmental benefits. Similar questions should be asked regarding any proposed environment provisions: Is the language clear enough to be understood, is it meaningfully enforceable and does it achieve the purpose?

But looking beyond the musings on the hypothetical environment chapter, the future of the investor-state dispute settlement (ISDS) mechanism in Chapter 11 of NAFTA may also play a role in Canada's climate policy.

Canada is currently the most sued country under Chapter 11, which allows foreign investors to challenge domestic policies that are shown to affect their anticipated revenues. Analysts describe a potential regulatory chill, stemming from a fear that governments will have to pay millions of dollars in damages under Chapter 11 claims, in addition to having to repeal the "offending" environmental provisions. Overstated or not, the threat has materialized in the past.

Another example of a Chapter 11 dispute saw an American company challenge the decision of a joint federal and provincial environmental assessment review panel, which rejected its proposed expansion of a quarry in Nova Scotia. In a ruling that many have critiqued for its inaccurate appreciation of Canadian environmental assessment law, the tribunal established under Chapter 11 found Canada liable and awarded considerable damages. Canada has now applied to the Federal Court to set aside the ruling.

The purpose of these examples is not to comment on issues of international trade, but to suggest the impact ISDS may have on future environment and climate policies.

Canada, which is hosting the third round of talks in Ottawa from Sept. 23-27, will soon have to determine what steps it will take once it becomes clear that nation-wide carbon pricing alone will not help us meet our obligations under the Paris Agreement.

Effectively addressing climate change is a complex task with few obvious answers. What Canada needs is the freedom to develop and implement innovative climate policies, and certainty in its regulatory regime. Future claims under ISDS provisions, existing or updated, may pose hurdles we may not be able to afford.

As the ink dries on the first draft of NAFTA later this fall, the future of Chapter 11 will be just as interesting in the impact it has on environmental law, as will the proposed environment chapter.

Barbora Grochalova is an associate in the environmental, municipal, expropriation and regulatory group in the Toronto office of Borden Ladner Gervais LLP.

Photo credit / Coldimages ISTOCKPHOTO.COM

© 2017, The Lawyer's Daily. All rights reserved.