Message

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From Inside U.S. Trade.

# Deputy USTR nominee says U.S. could bring USMCA enforcement cases by fall

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The U.S. could take enforcement actions under the U.S.-Mexico-Canada Agreement as soon as this fall, according to Michael Nemelka, the president's nominee for deputy U.S. Trade Representative for investment, services, labor, environment, Africa, China and the Western Hemisphere.

Nemelka, who's confirmation hearing was held before the Senate Finance Committee on Tuesday, has been serving as a USTR adviser working on trade talks with Kenya. President Trump nominated him in March to replace C.J. Mahoney as a deputy USTR. Mahoney has been tapped to serve as the legal adviser for the State Department.

In response to a question from Senate Finance Committee ranking member Ron Wyden (D-OR), Nemelka said the administration has "hit the ground running" when it comes to setting up the necessary enforcement structures under USMCA.

"We are working with stakeholders and others to identify the best cases," he said. It was important "not only to do it quickly but also to pick the right cases and work and consult with you and this committee to identify the best cases and to win them," Nemelka said.

USTR Robert Lighthizer has said the administration will soon launch USMCA consultations with Mexico over its biotechnology regulatory approval process. Senate Finance Chairman Chuck Grassley (R-IA) has also cited Mexico's ban on glyphosate as a potential violation that could be addressed under the deal's state-to-state dispute settlement mechanism. Senate minority leader Charles Schumer (D-NY) last month claimed Canada was attempting to circumvent its USMCA obligations on dairy and urged Lighthizer to ensure that Canada upholds its commitments in that area.

"In terms of a target date, I know that [Lighthizer] has said we have this month to review the process and then consult with you and then, quickly thereafter, bring the best cases. Of course, before we bring the case we need to consult with Canada and Mexico and try to resolve the case before actually litigating. But if those consultations fail, I agree with you that we need to be fully prepared to use the tools that you have given us."

A party may request the establishment of a state-to-state dispute settlement panel if the consulting parties fail to resolve the issue 30 days after a party has requested consultations; 75 days after a party has delivered a request for consultations; or "another period as the consulting Parties may decide," according to a protocol of amendment agreed to by the parties last December.

Wyden asked about the chances of "enforcement action" taken, including via the rapid-response mechanism, "in the next several months," to which Nemelka said the fall was most likely.

"We all understand first impressions are key and I think knowing enforcement actions are going to be coming up is an extraordinarily important message," Wyden asserted.

The Interagency Labor Committee last month outlined procedures to address potential challenges brought under the USMCA labor chapter as well as the so-called rapid-response tool. All petitions will be submitted to the trade arm of the Labor Department's Bureau of International Affairs. Analysts have predicted that a handful of complaints will be submitted to the administration early on.

The facility-specific rapid-response mechanism allows for a USMCA party to resolve a labor complaint domestically before specialized panels are formed. For example, if the U.S. brings a case against Mexico, the U.S. must first request that Mexico conduct its own review of the alleged violation. Mexico is then required to report within 45 days whether it has found that a so-called denial of rights exists.

If Mexico finds a denial of rights, the parties must attempt to agree on a course of remediation via consultations over a 10-day period, the protocol states.

"If the consultation processes fail, I could see [the U.S. taking action] sometime this fall," Nemelka told senators. "There are time periods where we need to consult with Canada and Mexico. We are limited by that time period … but if I am confirmed I could see actually doing something this fall," he asserted.

If the parties agree on a course of remediation, no additional duties can be imposed during that period. However, if Mexico chooses not to conduct a review; determines there was no denial or rights and the U.S. disagrees; or determines there was a denial of rights but the countries cannot agree on the remediation -- a party can request the formation of a panel.

A panel can be requested during the 10-day consultation period, the protocol continues, but the panel may not issue a request for verification until the expiration of that period.

**Nemelka also faced questions on the U.S.-China phase-one deal as well as trade negotiations recently** launched with Kenya. Prior to his nomination, Nemelka said he would be "leading" the negotiations with Kenya.

On China, Grassley asked Nemelka how he planned to ensure that China lives up to purchase commitments inked in the phase-one deal.

"I know that at USTR we work every day to make sure that China lives up to its commitments," he said. If confirmed, Nemelka said he "will put all of my energies behind that as well."

"Specifically, on the agricultural purchases -- we have [Chief Agricultural Negotiator Gregg Doud] who is on the phone almost every day with the Chinese ensuring that they fulfill their commitments," he continued. "And in the fall, in particular with these seasonal products and soybeans in particular that are currently in the ground -- we expect to see those purchases rapidly increase."

Grassley also asked the nominee about a potential investment chapter in a U.S.-Kenya deal, contending the language should go beyond what was included in the USMCA. Grassley, along with several other GOP lawmakers and business groups, have balked at the investor-state dispute settlement provisions in USMCA, saying they had been "scaled back." He asked Nemelka to commit to seeking "comprehensive protection" for investors and a more robust approach than the one taken in USMCA.

"We have a goal of making it a high-standard, comprehensive chapter. With respect to ISDS, I know that that is still under consideration and you have my commitment to work with [Lighthizer] to carefully consider that issue and to consult with you on it," Nemelka added.

Sen. Bill Cassidy (R-LA) also raised investment issues with Nemelka, saying he was "concerned about the absence of ISDS" in USMCA but "understood philosophically that for some it served as a subsidy."

Sen. Ben Cardin (D-MD) asked the nominee how he planned to ensure that a Kenya deal sufficiently addresses good governance and anticorruption issues.

"Kenya has a reputation that is less than stellar on fighting corruption," Cardin contended. "It would be a country that would present challenges under any scenario on governance issues."

Nemelka said the administration fully intends to secure comprehensive language on the issue.

"The intention is to negotiate a high-standard comprehensive agreement with Kenya that can serve as a model," he said. "If we don't have strong good governance and anticorruption provisions, it won't be as useful of a model."

USTR's negotiating objectives for a deal with Kenya say the agency plans to "promote good governance and the rule of law." The document also includes novel language on anti-corruption. -- *Isabelle Icso* (iicso@iwpnews.com)