Intelligence MEMOS

From: Jon Johnson

To: US Trade Representative Robert Lighthizer

Date: August 31, 2020

Re: **An American Dispute Resolution Proposal Arrives with a Softwood Ruling**

On August 24, a WTO panel released its decision in *United States – Countervailing Measures on Softwood Lumber from Canada,* rejecting US Department of Commerce arguments that benchmark prices for softwood lumber from Alberta, Ontario, Quebec, and New Brunswick be based on Nova Scotia stumpage prices and that benchmark prices for softwood lumber from British Columbia be based on Washington State prices. The panel was critical of much of the Commerce analysis.

Inside US Trade reported that you stated that the report was "flawed" and that the panel's findings "would prevent the United States from taking legitimate action in response to Canada's pervasive subsidies for its softwood lumber industry." However, your position that the panel report is "flawed" cannot be tested because the WTO Appellate Body no longer functions, thanks to your government's refusal to consent to the appointment of new members. You can appeal the panel's decision to the now non-functioning Appellate Body and put the entire matter into limbo.

Curiously, your latest proposal for resolving the Appellate Body conundrum appeared in your Wall Street Journal op-ed, *How to Set World Trade Straight*, just days before the decision. You advocate replacing the current system (i.e., panel decision with right of appeal to the Appellate Body) with a process akin to commercial arbitration with ad hoc tribunals resolving disputes expeditiously. Rather than allowing an automatic appeal to the Appellate Body, you advocate creating a mechanism allowing the WTO membership to set aside erroneous opinions in exceptional cases.

You have a precedent for this type of mechanism in NAFTA Chapter 19, which has been carried forward into CUSMA Chapter 10. Canada, the US and Mexico all have the right to request binational panel review of certain final determinations made by another party in antidumping or countervailing duty cases. The binational panel reviews whether the determination has been made in accordance with the applicable law of the party making the determination, and can "remand" the determination back for correction.

There is no appeal from the decision of a binational panel. Instead, the losing party can initiate an extraordinary challenge only under very strict conditions (e.g., panel member guilty of gross misconduct, panel seriously departed from a fundamental rule of procedure, or panel manifestly exceeded its powers, authority or jurisdiction). Under NAFTA there were few extraordinary challenges and none succeeded.

While the details of your mechanism for setting "aside erroneous panel opinions in exceptional cases" may differ from the NAFTA/CUSMA extraordinary challenge procedure, the fact that it would apply only "in exceptional cases" means that its scope would be very limited.

How can such a mechanism possibly advance US interests? The mechanism you propose to overrule a panel must find the panel's decision "erroneous" in some way that is "exceptional." A functioning Appellate Body is under no such constraint and can take issue with any matter of law in a panel's decision.

Rather than advocating for the abolition of the Appellate Body and its replacement with some sort of amorphous challenge procedure for "exceptional cases," you would further US interests, and those of all WTO members, by making constructive suggestions as to how the Appellate Body should be reformed. Or perhaps "limbo" is the preferred position of the Trump administration for WTO panel decisions that the administration doesn't like.

Jon Johnson is a former advisor to the Canadian government during NAFTA negotiations and is a Senior Fellow at the C.D. Howe Institute.
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