Time for Trump to Get Tough With Mexico-About Tuna and Abusing the WTO Dispute System

posted by Rob Howse

Today, an arbitrator at the WTO awarded Mexico the right to impose trade retaliation against United States imports in the amount of 163,230,000 US. This result is the outcome of a process whereby Mexico violated its own obligations under NAFTA in suing the US at the WTO. The case concerns a labeling scheme that enables US consumers to make animal welfare-motivated consumption decisions about tuna. Despite Mexico's egregious abuse of WTO proceedings, and flaunting of the NAFTA, administration officials played nice: originally, a panel ruling that went against the US was upheld on narrow grounds by the WTO Appellate Body, and the US conscientiously responded to that ruling, conforming its regulations to the Appellate Body's instructions: thus the US introduced an approach that was even-handed in the way it monitored tuna-fishers' compliance with the dolphin-friendly designation on the label, applying appropriate monitoring not just in seas where Mexicans fished, but others as well.

Not to be deterred from abusing WTO processes, Mexico-even after the US had changed its regulations-restarted another WTO proceeding to try and get more than the Appellate Body gave it before. In one of the worst decisions in the history of WTO dispute settlement the Appellate Body upheld an incoherent panel report that rewarded Mexico for trying a second kick at the can, reworking a theory rejected in the earlier proceeding.

Now, again taking an aggressive posture, Mexico insists it will proceed with retaliation immediately, although the United States has further actions pending in the WTO to attempt to correct the disastrous and incoherent earlier rulings.

Why should the Trump Administration tolerate US exporters to Mexico suffering $163 million plus retaliation per annum as a consequence of Mexico's abusive bad faith conduct of this dispute?

First of all, the text of the NAFTA is crystal clear that a responding NAFTA party has the legal right to insist that any dispute concerning environment and animal life and health be brought in NAFTA alone, to the exclusion of the WTO:

3. In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

(a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and

(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,

Previously, the US was unable to block Mexico from pursuing a dispute at the WTO in violation of these provisions of NAFTA because there is no explicit basis in the relevant WTO treaty law for a WTO panel declining jurisdiction on the grounds that the complaining State has an obligation under a different treaty to bring the case exclusively to the forum stipulated in the non-WTO treaty. While in previous litigation related to this issue at the WTO, estoppel-type arguments were raised to address this gap in the treaty law, none succeeded on the facts of those particular earlier disputes. Still, one may question why, although the US did object to the Dispute Settlement Body striking a panel in these circumstances (and obviously failed), US trade officials did not try and emphatically to make the case for abuse of process before the panel itself.

But what the Trump Administration has to do now is to pursue vigorously a case against Mexico under NAFTA Chapter 20 dispute procedures for violation of its choice of forum obligations. The clear remedy would be the immediate cessation of the retaliation that Mexico won from bringing suits before the WTO in violation of those obligations. If Mexico doesn't stop retaliating, then under NAFTA 2019 the US could suspend benefits of equal commercial effect.

Of course, such a dispute could take several years; in the mean time the US suffers the injury of trade restrictions being imposed by Mexico that originate in the internationally wrongful act of bringing a case to the WTO in violation of its NAFTA obligations. NAFTA Ch. 20 does not allow for interim or provisional measures in this kind of situation, and NAFTA 2004 seems to require that the US go through the NAFTA dispute settlement procedure as means of redress for a NAFTA violation-so without that ruling, Trump could probably not legally impose countermeasures on Mexico for its violation of NAFTA. However, to the extent that US *investors or investments* in Mexico suffer economic harm from Mexico's retaliation against the US

they may have a claim for damages under Chapter 19 of NAFTA, through investor-state arbitration for a violation of fair and equitable treatment or MFN, for example. Given the integrated supply chains across the US-Mexico border, Mexico would have to be very careful in trying to avoid forms of retaliation that have a negative economic impact on "investments" or "investors", broadly defined categories in NAFTA.