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Trump ignites another fire in trade

By Bruce Hirsh

Yet another five-alarm fire appears ready to ignite in trade policy, with little respite from recent efforts to contain those on the Trump administration's threatened withdrawals from the North American Free Trade Agreement. The administration appears intent on proposing that dispute settlement procedures under NAFTA be nonbinding, breaking from the consistent efforts of Congress and past U.S. administrations over decades to make such procedures in trade agreements binding and enforceable. While significant for NAFTA, it would be particularly incendiary if, as is likely, the administration were to push the same approach at the World Trade Organization, where binding dispute settlement is at the heart of the organization's effectiveness.

Given the administration's long-standing critique of WTO dispute settlement, it is clear this proposal isn't just about NAFTA. U.S. Trade Representative Robert Lighthizer recently foreshadowed such a move in an appearance at the Center for Strategic and International Studies, where he spoke positively about the dispute settlement system of the General Agreement on Tariffs and Trade, the predecessor of the WTO. In this, as in many other matters relating to trade policy, the Trump administration's views are contrary to conventional wisdom, which has long held that GATT dispute settlement was ineffectual because a losing party could block decisions from going into effect, rendering them advisory in nature.

But that may be exactly the attraction for a Trump administration seeking greater space for unilateralism and highly critical of perceived judicial overreach at the principal forum for dispute settlement, the WTO. Were the administration to roll back the binding nature of dispute settlement in trade agreements like NAFTA and the WTO, it would undermine the value of those agreements for every U.S. trader, and not only for those whose trade issues may be directly litigated.

Rather than weakening such systems in response to their perceived flaws, the Trump administration should seek to strengthen them through reform proposals to address those concerns and work with trading partners to reach agreement on those proposals. While much of the talk is related to a proposal in the NAFTA renegotiation, the administration's criticisms to date have been focused on WTO dispute procedures, and the administration has been active at the WTO in calling for changes to those procedures.

Supporters of the WTO dispute settlement system consider it not simply a pillar of the global trading system, but one of its greatest accomplishments. While the rules of the WTO have established a framework for behavior among nations in regulating trade, the dispute settlement system has provided the glue holding the framework together by establishing the rules as credible and enforceable.

This has been fundamental in achieving the secure and predictable trading environment that has more than tripled global trade in goods and services since the WTO was established in 1995. The system's success and credibility can in part be judged by its heavy use with over 500 cases brought in the last 12 years, more than were brought in the nearly five decades of the GATT. The U.S. has brought more cases than any other WTO member, benefitting a range of U.S. exporters from aircraft manufacturers to auto parts and beef producers. But numbers do not capture the full picture.

As a former U.S. trade negotiator and litigator, I have seen firsthand how the mere possibility of dispute settlement has motivated WTO countries to take seriously their agreement commitments. For every case taken to dispute settlement, several others have been averted. A case the U.S. successfully litigated against Japanese restrictions on apple imports was followed in short order by successful negotiations to remove similar restrictions on lettuce and tomato imports, without resort to dispute settlement. Other countries cited the mere possibility of dispute settlement as the reason for their careful scrutiny of commitments made in the WTO's new Trade Facilitation Agreement.

It would seem odd for an administration committed to more effective enforcement of trade agreements to flirt with the possibility of less effective trade agreement enforcement procedures. But President Trump and his team have long expressed their belief that unilateral pressure is a more effective means to solve trade problems. Such a unilateral approach would risk bumping up against trade agreement rules if President Trump were to raise U.S. duties on a trading partner's goods without first resorting to WTO dispute settlement procedures.

Rendering dispute settlement rulings "advisory" would at a minimum shield U.S. trade actions from WTO-authorized countermeasures. However, any such benefit is likely to be illusory, as our trading partners would almost certainly retaliate in any event. For example, the European Commission made clear they would respond "in days" without going to the WTO if the U.S. were to restrict imports of European steel products under the Trade Expansion Act. China would no doubt do the same.

This highlights a potential flaw in a strategy of returning to the unilateralism of the 1980s, namely that our trading partners are far stronger economically, and the international economy far more integrated. Without the legitimacy and leverage provided by agreed-upon, binding dispute settlement, the leverage used in the past of threatening to withhold U.S. market access is simply not what it once was, and comes at a potentially far greater cost to our exporters.

But the administration is looking for more than space to resort to retaliatory tariffs. It has argued for months that trade agreement dispute settlement could interfere with U.S. sovereignty, a point alluded to by President Trump in his appearance at the United Nations. In particular, the administration has strongly criticized WTO dispute settlement for judicial overreach, creating obligations WTO members have not bargained for.

While previous U.S. administrations leveled similar criticisms with respect to particular dispute settlement findings, none viewed this as negating the overwhelmingly positive benefits of the system, or suggested that these problems were the norm rather than the exception. None viewed U.S. sovereignty as under threat, as only Congress and the administration can change U.S. laws or administrative practice in response to adverse WTO dispute settlement decisions. Rather than pulling down one of the pillars of the international trade system, along with many of its benefits, the Trump administration would be better served by identifying reforms to the dispute settlement system that address its specific concerns.

The Trump administration can propose that WTO members provide additional guidance to dispute settlement adjudicatory bodies as to proper interpretive approaches, or that dispute settlement procedures be modified to provide better member oversight of dispute settlement rulings, for example, by enabling members to collectively negate particular elements of rulings or by providing disputing parties greater flexibility in how they settle disputes. Such proposals could be built into updated NAFTA procedures. These approaches would reinforce the strengths of these systems, address the potential for judicial overreach, and ensure that this critical enforcement tool continues to thrive.

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