Intelligence MEMOS

As NAFTA renegotiations proceed through the summer and fall, the C.D. Howe Institute Intelligence Memos will be looking at what to expect and provide analysis on the latest developments at the table. This post is part of that series.

From: Jon Johnson

To: The Honourable Ministers of International Trade, and Foreign Affairs

Date: August 10, 2017

Re: **NAFTA Chapter 19 Reality Check**

Recent news reports suggest that Canada will walk away from impending NAFTA renegotiations if the US insists on doing away with Chapter 19 dispute settlement mechanism. This mechanism allows one NAFTA country to request a review, by an independent binational panel, of another NAFTA country's final determination in a dumping or subsidy case. Panels can pronounce on whether the agencies have followed their own domestic laws in arriving at the determination, and if they haven't, panels can require that the determination be reviewed and modified.

The mechanism is binding. In the case of a US determination, the US must appoint members to a Chapter 19 binational panel. Once the panel makes a final decision, the US Department of Commerce ("Commerce"), the US International Trade Commission ("USITC") and the US Customs service must comply. If a US party launches a constitutional challenge, the US government must defend the Chapter 19 mechanism.

This has helped Canadian exporters to get a fair hearing against overzealous application of US antidumping and countervailing duty laws – and vice-versa. However, to function effectively Chapter 19 requires co-operation on the part of the US administration. The current US administration clearly has no interest in Chapter 19 functioning at all, let alone effectively.

Softwood IV, the process that concluded in 2006 and bought peace for a decade, demonstrates how foot-dragging can work. The US Government appointed panellists and filed a creditable statement of defence when the US Lumber Coalition launched a constitutional challenge. However, both Commerce and the USITC resisted complying with panel decisions. As just one example, it took five panel decisions and four remands before Commerce finally issued a *de minimis* subsidy determination as directed by the panel.

Besides those types of delaying tactics, the administration could refuse to properly defend a constitutional challenge, which might significantly increase the chances of US courts finding Chapter 19 unconstitutional. Of course, that would breach NAFTA, as well as egregiously violating the US obligation to abide by treaties in good faith.

In light of this hostility, Canada should take a hard look at Chapter 19. How many Canadian industries besides softwood lumber risk being victimized by overly aggressive application of US trade remedy actions? Also, how effective are the existing judicial review remedies available under US law in curbing overreaching by US agencies as compared with the perception 30 years ago when Chapter 19 was first negotiated?

Canadian softwood lumber producers have been major users of Chapter 19 to challenge US trade actions. Softwood IV produced some satisfying wins, but the US delaying tactics forced the Canadian producers to settle. And Chapter 19 is no more promising for Softwood V. Canadian softwood lumber producers would be better off if Ottawa successfully negotiated a workable and binding subsidies code enshrined in US law applicable to the Canadian provincial stumpage systems. The establishment of such a code could be a possible *quid pro quo* for Canada agreeing to give up Chapter 19. Any such trade-off must be substantial.

Perhaps with the greater integration of the Canadian and US economies and fewer US trade actions directed at Canada, there is no need for Chapter 19 for most industries. NAFTA negotiators could usefully focus on fixing problems in those industries where aggressive trade actions continue to be a concern.

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

To send a comment or leave feedback, email us at blog@cdhowe.org.