

INTERNATIONAL TRADE

Governments have been using the WTO to sidestep domestic appellate courts

By Lawrence L. Herman

One of the most important, but least commented on, developments in the last decade has been transformation of the World Trade Organization into a virtual court of appeal.

By this I mean the use of the WTO panel system by governments to "appeal" adverse decisions of foreign domestic tribunals, sidestepping domestic appellate courts in the process.

The best example is Canada's use of WTO panels in the *Softwood Lumber* case, with the Canadian side going directly to the WTO to challenge decisions by the U.S. International Trade Commission. The WTO panels have, in this sense, replaced domestic appellate courts in the international trade law system.

Nothing in the *WTO Agreement* provides for panels to step into the shoes of appellate courts. But for a variety of reasons — not least of which is the political value of success before WTO panels — member states are increasingly using recourse to WTO panels to challenge decisions of local tribunals.

This is a notable shift from the days of the *General Agreement on Tariffs and Trade* or "GATT", which operated from 1947 until the entry into force of the WTO

Agreement in 1995. While many GATT panel decisions were respectable, they were non-binding on governments and subject to a variety of diplomatic and political factors.

The advent of the WTO in 1995 greatly enhanced the merits of the international dispute settlement process, providing the stimulus for a more aggressive approach to international litigation, as states sought to overturn domestic trade

in domestic legal systems, at least in the U.S., Canada and other jurisdictions with a common law heritage, judicial review is a specialized proceeding, restricted to the issue of whether the agency concerned committed egregious legal or factual errors and subject to the over-arching doctrine of judicial deference.

Not so in the WTO. Panels are not subject to the doctrine of deference under the DSU provisions.

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agency decision made against the interests of their nationals.

The WTO system is grounded in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* or DSU. Article 11 is the central DSU provision, empowering WTO panels to make "an objective assessment of the facts" to determine "the conformity [of the measure at issue] with the relevant covered agreements".

Experience so far is that the authority of Article 11 is being broadly applied to extend panel jurisdiction well beyond that of earlier GATT panels, into matters that were previously regarded as the province of domestic courts.

This gives them a much more open-ended mandate than domestic courts in making an independent "objective assessment of the facts" and to render appropriate recommendations to the DSB.

A more restrictive "judicial deference" view has been argued on several occasions at the WTO. However, the Appellate Body has regularly sided with the panels and said they have the right to delve deeply into the merits of the dispute and, if not free to completely substitute their own view for that of the local tribunal, at least they can deeply probe the factual and legal basis of the decision.

In an early WTO case called *Korea-Dairy*, the Appellate Body stated that, "We consider that for the Panel to adopt a policy of total deference to the findings of national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU". Later Appellate Body decisions have supported this view.

In *U.S.-Softwood Lumber*, the interminable Canada-U.S. dispute that has been raging literally for decades, the U.S. has argued that panels stray beyond the bounds of Article 11 of the DSU by "reviewing" injury determinations by the U.S. International Trade Commission.

The U.S. sought to rein in the WTO panels by application of the concept of judicial deference, especially in regard to domestic agencies with specialized functions in the realm of trade law. Rejecting this, the Appellate Body said that, to the contrary, Article 11 imposes "a comprehensive obligation" to make an objective assessment of the matter, "an obligation which embraces all aspects of a panel's examination of the 'matter', both factual and legal".

In effect, the treaty requirement in Article 11 of the DSU to make an "objective assessment", supported by Appellate Body jurisprudence, has clothed panels with the right to delve into the impugned decision and the record of the agency concerned and to arrive at independent conclusions as to whether or not the agency complied with the obligations set out in the various WTO agreements.



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While this has riled some, the thrust of WTO jurisprudence is that these panels have a wide degree of authority to look into the decisions of domestic agencies without need to pay homage to notions of deference. This makes the panels much less constrained than domestic courts in Canada and the United States and other common law countries.

This, in turn, has produced a greater tendency of WTO governments to seek direct panel recourse from adverse tribunal decisions. It has transformed the old GATT system from its focus on the validity of domestic laws and regulations into an international court of appeal. That is of profound significance in the annals of international law.

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