Antidumping, Countervailing Duties and Trade Remedies: Let's Make a Deal??

Presentation Summary and Comments

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Gary Horlick: Horlick began by critiquing conventional arguments in favor of antidumping (AD) and countervailing duty (CVD) laws (collectively "unfair trade laws"). These arguments suggest the unfair trade laws are needed as a "safety valve" from import competition. He noted that World Trade Organization (WTO) rules already include a separate safety valve—the safeguard rules. The AD and CVD laws are not meant to serve as safety valves.

In terms of the negotiations on the unfair trade laws during the Doha Round of WTO negotiations Horlick argued that the issue should be viewed from a negotiating lens and not as a matter of principle. In Horlick's view, the position of some groups that the United States must not agree to alter any of the current AD/CVD rules in the Doha Round is not compatible with the nature of negotiation. The answer to the question—should the United States be prepared to discuss changes to the AD/CVD rules in the Doha Round—is that it depends on what the United States is offered. If, for example, the European Union (EU) were to agree to reform the Common Agricultural Policy (CAP) or Japan was willing to cut its tariff on beef by 50 percent in exchange for reforms in the AD/CVD area, Horlick argued that the United States would find it difficult to refuse to negotiate.

Horlick added that limits imposed on U.S. exports due to AD/CVD duties justify renegotiation of the AD/CVD rules in any case. The United States is currently the number three target of AD duties in the world. Therefore, the prospect of AD/CVD rules being used as export restraints on U.S. goods is not a risk but a reality.

He stated that unless the U.S. Trade Representative (USTR) can guarantee that foreign countries will be more lenient than the United States is with its AD laws, U.S. producers

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will be at a disadvantage. He observed that this is ultimately unlikely, since the United States and Canada are the only countries that have independent bodies acting as AD authorities. In the rest of the world, AD/CVD agencies report to a politically appointed minister. Therefore, whereas foreign producers know they will get an independent decision on the merits in an AD case in the United States, U.S. producers are far less likely to be treated fairly.

Horlick argued that this is a key reason why the United States should oppose a special standard of review in antidumping rules, requiring WTO dispute settlement panels to defer to national authorities. Foreign courts are far more deferential to the AD/CVD administering agencies than are courts in the United States. Thus, it is unwise for USTR to continue to advocate greater deference by WTO dispute settlement panels to national AD/CVD authorities. Whereas a foreign exporter involved in a trade case in the United States will get a searching decision on the merits at the national level of its antidumping and countervailing duty claims, U.S. exporters can only rely on WTO review for a fair resolution of antidumping and countervailing duty their claims. Notwithstanding this fact, USTR refuses to bring cases at the WTO against foreign countries for improper application of their trade laws.

Terence Stewart: Stewart first addressed the question of whether antidumping and countervailing duty laws should be negotiated in the current round. He acknowledged that negotiations on the subject are a reality, but stressed the importance of adhering to the parameters set out in the language of paragraph twenty-eight of the WTO Doha Ministerial Declaration, which stresses the importance of retaining the effectiveness of the current agreements. Provided that negotiations comport with this language, he argued, they are a rational thing for the United States to engage in.

Stewart added that, from the perspective of U.S. petitioners, the United States has an incentive to negotiate because WTO dispute settlement panels have changed the interpretation and application of the WTO's agreements dealing with AD and CVD laws. Regardless of whether recent WTO decisions are good or bad from a policy perspective, he argued, the decisions do not comport with how the United States understood its obligations under the WTO agreements. Therefore, additional negotiations may be necessary to ensure that future WTO dispute settlement panels adhere more closely to the language and spirit of the agreements as understood by the parties involved.

Stewart noted that while some domestic petitioners fought to prevent AD and CVD laws from being discussed at all, a negotiation could be favorable to the United States if the parameters set in the Doha Ministerial Declaration and in the Trade Promotion Authority (TPA) legislation are followed. Stewart expressed concern, however, that U.S. trading partners will not respect the limits identified in the Doha Ministerial Declaration. He noted, however, the value of a more detailed agreement that better reflects what U.S. law is and thereby limits the creativity of Dispute Settlement Body (DSB) Panels.

With regard to whether the agreements should be restructured to better protect U.S. exporters facing trade cases abroad, Stewart disagreed with Horlick. He noted that a U.S. exporter being subject to trade cases in foreign countries is not a new phenomenon. While the United States may rank third as a target of AD and CVD cases, he noted that, as a percentage of trade, U.S. exports subject to antidumping orders are smaller than those for any other country. He further noted that the United States only ranks third in the number of cases it is defending against if one does not aggregate the EU countries. In sum, with just fourteen cases lodged against the United States per year, the claim that the rules do not work in the United States' favor is not persuasive.

Stewart argued that during the Doha negotiations the United States should focus on promoting greater transparency and due process and on addressing the underlying causes of antidumping and countervailing duty cases, which include sheltered home markets and subsidies. He noted that addressing the fundamental problems in the industries that bring the vast majority of trade cases, such as by addressing the overcapacity problem in the steel industry, would be a useful step forward.

Greg Mastel: Mastel focused his remarks on the political importance of U.S. trade laws, making three observations. First, Mastel stated that trade laws play an indispensable part in trade liberalization. Their influence is particularly the case now that Congress is so ambivalent toward trade, as evidenced by the very close battle over Trade Promotion Authority (TPA). Mastel noted that voting records in Congress suggest that sentiment in favor of trade laws, which has always been strong, is rising. The so-called Dayton-Craig amendment to the TPA bill, which effectively would have prevented discussion of unfair trade laws in the current Doha Round, garnered over sixty-five votes in the Senate. He observed that Congress by and large is not interested in the WTO or NAFTA in the abstract; rather, congressional members care about sectoral issues that affect their constituencies. He stressed that the problems in these sectors require solutions and, in the short run, often the only solution is bringing a case under the unfair trade laws.

Second, Mastel noted that conflict between domestic trade laws and the WTO is rising. He argued that in a few decisions where panels went well beyond their mandate (such as cases involving U.S. antidumping duties on hot-rolled steel from Japan and countervailing duties on lumber from Canada), they ended up undermining their own legitimacy. The WTO is a negotiated agreement; therefore, it is very dangerous politically for panels to exceed the scope of the agreement. This danger, he argued, is why the U.S. government has stressed the need for WTO panels to respect the special standard of review applicable to reviews involving duties against unfair trade.

The WTO's authority is further threatened because several cases adverse to U.S. trade remedy laws, such as the case involving the so-called Byrd Amendment and the case arising from the hot-rolled steel antidumping investigation require congressional action for implementation. Because congressional members do not believe that, for example, the Byrd Amendment violates WTO rules, they may not act on the WTO decision, thus giving rise to further conflict between Congress and the WTO.

Third, Mastel argued that the increasing conflict between the WTO agreements and domestic trade remedy laws will ultimately be resolved in favor of strong antidumping laws. The Senate strongly supports U.S. trade laws. In any conflict between these laws and small trade agreements, as well as major agreements such as the WTO, supporters of free trade are no longer protected from a more fundamental debate on the value of the WTO agreements. This debate is a relatively new phenomenon and raises the question of whether the WTO agreement itself is a good thing. While further negotiations in the WTO could lead to many improvements that are positive, Mastel did not see this as their likely outcome. He stressed that major changes in the AD laws made in 1994 will take many years to digest. While trade remedy laws in other countries create some problems for U.S. exporters, Mastel indicated that he found no case where the current WTO rules were inadequate to address them.

Angela Ellard: Ellard observed that while one year ago the hottest issues in the TPA debate would have been labor and environment, the toughest issue in conference turned out to be on trade remedies—the so-called Dayton-Craig amendment. This, she stated,

shows how important these laws are to congressional members. She suggested, however, that this statement comes with some caveats.

First, it is important to realize that the apparently strong support for the Dayton-Craig amendment was really abstract support for the trade remedy laws. The TPA debate did not involve consideration of specific changes to the trade laws; implementing legislation has in the past included specific changes.

Second, TPA was very much an effort at balancing, both within the area of trade remedies (between petitioner and downstream user interests) and across sectors (between strong trade remedy laws and concessions in agriculture or services). Trade remedies were viewed as one part of the puzzle that needed to be balanced with other parts. Ellard observed that whether negotiators ended up in Doha or congressional members supported TPA and trade remedies was an issue that the U.S. House of Representatives considered and voted on right before the Doha Ministerial. A resolution introduced in the House by Representative Phil English emphasized the importance of preserving the United States' ability to continue to enforce its trade remedy laws and avoid agreements that undermine these laws. At the same time, in that resolution, members of Congress also voted to ensure that U.S. exports were not subject to the abusive use of trade laws by other countries. Ellard argued that this resolution shows that members of Congress realize there is a need for balance in how the trade remedy laws are applied.

Third, Ellard noted that the reason supporters of the Dayton-Craig amendment got so many votes in the Senate was that Congress was sending a message to negotiators to take this issue seriously. When it was clear that this message was understood, the amendment was ultimately dropped in conference.

With regard to certain adverse WTO decisions on trade remedies, such as the Byrd Amendment, Ellard agreed with Mastel that Congress may ultimately not change the law to comply. Trying to convince congressional members to change the law for the sake of change itself is difficult. Instead, Congress must be convinced that change is absolutely necessary as part of U.S. obligations under the WTO. Or, as in the U.S. Foreign Sales Corporation case (where extreme reluctance to comply exists), four billion dollars in retaliatory measures will lead many in Congress to feel pressure to change the underlying law. In sum, Ellard argued, in each case Congress will look to the pros and cons of making changes to U.S. law in order to be in compliance with WTO rulings. In some cases they will conclude that it is worth doing, while in other instances they will not.

Questions and Answers: The panel was asked what sort of commitments or concessions the United States would need in order to consider the elimination of antidumping altogether or the weakening of U.S. trade remedies. Horlick noted that in the U.S.-Canada free trade agreement the issue of how to address trade remedies arose, and the United States ultimately did agree to accept a special dispute resolution process in exchange for improved investment rules from Canada. He noted that if, for example, the EU offered to drop the Common Agricultural Policy (CAP), the United States would give the EU almost anything. Congress is a practical institution: it wants antidumping and countervailing duties and safeguards but also desires no barriers to exporters. USTR must resolve the contradiction between these interests and will likely not be interested in the language in paragraph twenty-eight of the Doha resolution when it comes time to making deals.

Mastel agreed with Horlick that Congress has many conflicted thoughts on these issues, but argued that some goals in the trade bill are more difficult to trade away than others. Trade remedy laws, he argued, will be very difficult to trade away. The Dayton-Craig

amendment would have required a special vote to do so, and while that amendment did not ultimately become law, Mastel argued that the vote did not fully reflect the number of congressional members who supported the amendment in their hearts.

The panel was asked whether the claim that antidumping and countervailing duty laws were important to ensure public support for more trade liberalization was mere rhetoric. Stewart stated that in some of his research he found that government officials in India, China, and Mexico all stressed the opportunity to use trade remedy laws when discussing trade liberalization with constituents. Stewart also noted that the use of antidumping laws by Mexico, for example, allowed it to make commitments that it would not otherwise have been able to make. This concept, he argued, is not just rhetoric; rather, it is particularly potent when countries are facing dramatic changes in their domestic economies due to trade liberalization. If these rules are taken away, opposition to trade negotiations will increase.