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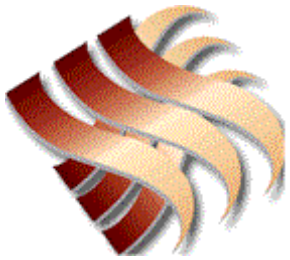

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U.S. ANTIDUMPING POLICY AS IT AFFECTS NEGOTIATIONS RE ALCA/FTAA, NAFTA, AND AN EVENTUAL WTO ROUND

W O R K I N G P A P E R

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INTRODUCTION

U.S. antidumping (AD) law is one of the core issues in all major international trade negotiations involving the United States over the next few years. Numerous Latin American and Caribbean countries have determined that trade liberalization negotiated with the United States has often been nullified by U.S. AD actions against key industries (e.g., salmon and raspberries from Chile, wire rod from Trinidad and Tobago, fresh flowers from Columbia and Ecuador, oil from Mexico and Venezuela, and a long list from Brazil and Argentina).

It is, therefore, appropriate to examine the U.S. position regarding its antidumping regime, investigating principally what the domestic and international constraints and pressures are that affect the U.S. position on international trade negotiations in the AD arena. Such an examination will include how far the U.S. might be prepared to go to change its regime and under what conditions. We will also consider how U.S. trading partners might lead the U.S. into new thinking in the AD area.

U.S. trade negotiators, like their counterparts, have a worldwide approach to trade negotiations. In other words, negotiators consider the effects of negotiating changes in one forum on potential changes in other fora. They know that what they agree to in a bilateral

agreement, for example, will have an effect on later multilateral agreements. Thus, one must look at the possibility of AD changes in all venues to understand fully the U.S. position in each.

As will be seen, the United States currently has more reasons to avoid substantive discussions on AD than reasons to favor changes. Nonetheless, the U.S. would change its position if U.S. private sector interests told the Administration that they are willing to support changes to the U.S. AD law (for example, as the quid pro quo for changes in other negotiating areas).

U.S. CONSIDERATIONS AGAINST AD CHANGES

Both domestic and international constraints on the current Bush Administration lead it to oppose substantive changes to the U.S. AD law. **Domestic constraints** on the Bush Administration negotiators include Congress, the 2004 presidential election and the private sector.

The Administration is ever mindful that the U.S. Congress must implement into U.S. law any agreement negotiated by the executive branch. With the current divided Congress (the Senate majority Democrat (by one vote), the House majority Republican (by 10 seats out of 435)), implementing any legislation is even more difficult than usual. Generally, Republicans (considered friendlier toward business) support increased commerce in all forms, including international trade. Lately, Democrats (strongly supported by labor unions in the U.S.) have resisted trade agreements and are the party pushing to include labor and environmental provisions in international trade agreements.

The President's ongoing efforts to regain Trade Promotion Authority (TPA, formerly known as fast track authority)[1] to give him added credibility in international trade negotiations have illustrated the divisions within the Congress and between the Congress and the White House. Similar divisions and factions will appear when Congress considers free trade agreements, whether bilateral or multilateral.

Within the Congress, Members must always consider their party's platform and their constituents' position, balancing those against what kind of support the Member can gain for his/her own legislative initiatives if he supports other Members and the President on their priorities. A well-known U.S. politician[2] once said "all politics is local," implying that, no matter what the national or international stakes in an issue, a politician must consider how his constituents and financial supporters will regard his vote, if he wants to be reelected. This has led even a few Republicans to break party lines and vote against TPA and other international trade issues.

To ensure as many Republicans as possible vote for TPA, the President must make clear that TPA is one of his top priorities and that Republicans wanting Presidential support for their own legislative agenda must support him in TPA now. The President and members of his cabinet and staff have been assiduously courting lawmakers with this message over the last few months.[3]

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[1] Such legislation provides that Congress may not amend trade legislation to implement international trade agreements signed by the President. Congress must either vote for the legislation, thus acceding to all parts of the agreement, or vote down the legislation, thus disapproving the agreement. TPA is designed to provide U.S. negotiating partners security that Congress will not second guess the negotiators and try to change the agreement after the compromises have been carefully worked out. Other countries tend to consider the passage of TPA proof of the U.S.'s interest in negotiations, although TPA is not really necessary under U.S. law and is often held hostage to unrelated items that the President would not otherwise support. Thus, it is not always accurate to consider that TPA represents U.S. willingness to negotiate seriously.

[2] Thomas E. ("Tip") O'Neill, former Democrat from Massachusetts and one time Speaker of the House of Representatives.

[3] This is the context of the current section 201 safeguards investigation on steel products self-initiated by the Administration in June 2001. Although some regard this investigation as an unfriendly signal to U.S. trading partners, in our view the case is a political quid pro quo for TPA support. The U.S. steel industry is in financial trouble and wants relief from competing imports. Although protection is not the preferred Republican method, the

The U.S. Congress and Administration are also greatly influenced by the private sector. Of crucial importance is U.S. lobbying intensity, even more than numbers---on numerous public policy issues, a smaller interest group has been able to prevail because politicians perceive the smaller group as feeling more intensely about an issue (and, thus, more likely to vote on the basis of the decision about that issue).

Currently, retaining the U.S. AD law in its protectionist form is the number one priority of the U.S. steel industry. Antidumping, either pro or con, is only priority number four or five, at best, for most companies based in the U.S. that support free trade. But companies focus their efforts in Congress only on their top two or three priorities, meaning that AD issues do not come up as a top priority at the meetings of free trade interests with Members of Congress. As long as the steel industry[4] leads the way in favor of protectionist AD laws, it receives support from other industries that would be unwilling to lead this charge, absent the voice of steel. The fact remains that, generally, the only private sector voice heard on AD issues is that of the steel industry and its supporters. In such circumstances, Members of Congress will vote to maintain the current AD law, or worse (e.g., the Byrd Amendment, which currently turns AD duties collected by the U.S. Government over to the petitioning U.S. industry).

One must also keep in mind that, in the United States, the AD law is always promoted as the failsafe measure for trade liberalization. The Administration and Congress both, for years,

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Bush Administration is conducting this investigation for solid political reasons. In the short term, President Bush and his advisors hope more Senators and Representatives will support TPA in exchange for his support for the steel industry. In the long run, President Bush is looking to the 2004 U.S. Presidential elections. West Virginia, Ohio, and Pennsylvania are all states in which the steel industry is concentrated. Bush won West Virginia, surprising for a Republican (and would not have won the electoral count without it). Relief for the steel industry will play well in those states and will increase his changes of winning these states in the next election.

Furthermore, an independent agency, the International Trade Commission, has jurisdiction over this investigation. Generally, although the Commissioners tend to favor U.S. industries, the ITC conducts a thorough, relatively impartial investigation before determining what relief it might suggest that the President implement, and the President has full discretion as to what measures (if any) to apply to imports found by the ITC to cause injury. Thus, it is not entirely clear yet how much relief the U.S. steel industry will receive (and how restrained imports will be) as a result of this investigation.

[4] The U.S. steel industry represents less than 0.2 percent of U.S. GDP. Companies opposing protectionist action, such as Caterpillar or Cargill, are far larger than any U.S. steel company.

have told private industries fearful of trade liberalization and its negative impact on those companies that the AD law remains to counter "unfair" trade practices. Without this backup tool, it would be more difficult to sell U.S. industries on the benefits of international trade liberalization in general. One need only look at the unwillingness of U.S. negotiators to consider substantive changes to AD calculations in past FTAs (even the ground-breaking NAFTA) to understand how entrenched this mindset is - - even without any calculation of how much protection is being traded for how much liberalization.

For Members of Congress to consider going against this powerful pro-AD lobby, other industries in the private sector will need to convince Members that they are willing to support such changes. We see three principal reasons why U.S. industries would support this position: 1) other features in international trade agreements are more important to U.S. industry in general and the U.S. will obtain them only if it agrees to revise the U.S. AD law;[5] 2) U.S. industries find their exports so constricted by foreign AD cases that they want the U.S. and other governments to restrict the use of these laws; and/or 3) the U.S. companies are so internationally-integrated that AD laws hurt more than help them.

To date, there is little perception in the United States that foreign AD laws restrict U.S. exports in other than spotty fashion. Furthermore, few U.S. companies in category 3 above have come forward publicly to complain about the impact of foreign (or US) AD laws (apart from U.S. related party importers involved in U.S. AD cases). Moreover, as noted above, challenging the current bias in favor of keeping U.S. AD laws would require that this issue become one of the top two or three issues U.S. companies want to discuss when lobbying their Members of Congress—a high threshold.

[5]In the ALCA/FTAA, such issues might include other countries agreeing to "WTO-plus" TRIPS, or investment liberalization for foreign companies in Brazil, or other issues of great interest to U.S. businesses. (One of the Uruguay Round Agreements, for the first time, concerned and imposed some disciplines on TRIPs, the trade-related

The size of the U.S. domestic market also affects how the U.S. private sector views international trade. In the past, many U.S. firms have relied on the U.S. market for the majority of their sales and profits. The international marketplace has been an added benefit, but not their primary focus. Thus, U.S. companies whose principal market is the United States are more concerned about maintaining strict access to that market than about market-opening measures abroad. The corollary, of course, is that U.S. companies and industries whose principal markets are overseas might support AD changes in the U.S. in exchange for increased access abroad, as discussed below.

In addition to these domestic constraints leading U.S. negotiators to contest changes to the current U.S. AD regime, there are **international considerations** that support this position within the United States. Such considerations include U.S. concerns about global trade negotiations, U.S. plurilateral trade agreements (i.e., NAFTA and ALCA/FTAA), and whether bilateral trade agreements offer adequate inducements to offset the U.S. pro-AD lobby.

The foremost reason for U.S. intransigence in the ALCA/FTAA or other regional agreements is that U.S. negotiators believe they need to save their potential negotiating trade-offs for the next round of global trade negotiations under the aegis of the World Trade Organization. U.S. negotiators presume that any changes they accept in bilateral or regional trade negotiations will be considered by other countries as the starting point in the WTO negotiations. Thus, every change to the U.S. AD legal and regulatory framework negotiated in a sub-global negotiation will be a change for which the U.S. will get no real concession in the WTO new round. Given that negotiators want to maximize the worth of their concessions, and avoid granting any unnecessary ones, the U.S. Administration has little incentive to grant AD concessions in a less than global trade negotiation (i.e., any change in AD will only occur if it is required in return for

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aspects of intellectual property rights, such as patents, copyrights, and trademarks. Members of the U.S. private sector have long desired to see additional discipline in the TRIPs area, commonly referred to as WTO-plus TRIPs.)

some concession the U.S. wants). Furthermore, as noted above, the constant response of U.S. negotiators and Members of Congress to those fearing increased trade integration is that the U.S. AD/CVD laws will remain to combat "unfair" trade. Loosening the rules will only happen when U.S. officials can point to greater gains for U.S. companies elsewhere in an agreement. This explains the current U.S. willingness to discuss only procedural changes to AD law.

This analysis runs somewhat contrary to popular negotiating theory for bilateral/regional trade agreements. Those favoring regional agreements often posit that countries should be able to achieve a freer (or at least more preferential) multilateral trading regime among a smaller number of participants, thus going beyond what is achievable in a global context. Certainly this is one reason proponents argue in favor of the ALCA/FTAA. If the world had just completed an international trade negotiation, rather than discussing commencing negotiations, this theory might work better in the AD area. Given, however, that the world seems poised to begin a contentious set of global negotiations in which the U.S. wants gains in numerous areas, U.S. negotiators have clearly decided to try to save substantive AD changes for the global round.[6]

In addition, U.S. negotiators have in mind that the U.S. wants a number of changes made to the global rules governing international trade in areas outside those of great relevance in ongoing regional negotiations. The U.S.-EU disagreement over agricultural subsidies or the U.S. desire for additional discipline in intellectual property rights and investment come to mind in this context.

The above helps explain why the United States was unwilling to negotiate further AD liberalization or innovation in NAFTA. In the original negotiations, Mexican officials wanted to discuss AD issues, but U.S. officials refused. The only substantive change to the U.S. AD/CVD laws as a result of NAFTA is Chapter 19, which governs disputes involving AD/CVD cases.

[6] Of course, to date U.S. negotiators, hampered by the pro-AD lobby in the U.S., continue to resist substantive AD discussions even in the global trade context.

Chapter 19, however, was originally negotiated in the U.S.-Canada FTA, used as the model for NAFTA. Thus, even Chapter 19 was not new to NAFTA and Mexican negotiators were unable to force U.S. negotiators to discuss substantive AD changes in U.S. law, however important the overall negotiations were to the United States.

Currently, the U.S. sees no point in liberalizing unless there is some change it wants to see in NAFTA. To date, there is no change it wants that is worth waking the pro-AD dragon in the U.S. Changes to NAFTA's Chapter 11 are under discussion, but the United States is not the sole demandeur in such discussions and so would not consider changes to its AD rules for such changes. Add to this the fact that Canada vigorously uses its AD law and industries in Mexico increasingly use the Mexican AD law (if you can't beat them, join them) and we see that changes in the AD area in NAFTA will not come soon, if ever.

Given the above analysis, it seems that the U.S. Administration would not envision any bilateral or regional agreement currently under discussion to provide sufficient reasons to change current negotiating strategy in the AD area, unless it becomes convinced that its unwillingness to enter into substantive discussions on AD imperils U.S. negotiating goals, or even achieving an agreement as a whole. Indeed, U.S. negotiators involved in the ongoing bilateral FTA negotiations have consistently refused to discuss substantive changes to U.S. AD laws. The only concession the Administration has made has been a willingness to discuss (not necessarily change) procedural issues.

REASONS THE U.S. MIGHT FAVOR AD CHANGES

As stated above, the U.S. private sector is the key to changing U.S. AD policy. Absent strong private sector pressure on Congress and the Administration for AD reform, no politician will support such changes against the intense pro-AD steel lobby.

U.S. private sector advisory groups and large multinational corporations want changes in a number of areas in other countries. Primary among these are liberalization in financial services, investment policy, telecommunications, and intellectual property rights and, of course, tariffs. A problem for the United States is its generally low tariff rates (except in a few protected areas, notably citrus, textiles and apparel). If tariffs are already low, what can the U.S. offer in exchange for the liberalization it wants in other areas?

It is at this point that other countries would need to refuse to negotiate substantive changes on U.S. demands if the U.S refuses to contemplate changes to its AD rules (unless there are other changes to U.S. law that other countries prefer to see). At the same time, U.S. industries need to see important market access opportunities abroad so that trade issues become a more important priority in their lobbying efforts with Congress and the Administration. Absent a combined effort by the U.S. private sector and foreign negotiators pushing changes, negotiations could founder. Although President George W. Bush has made a hemispheric free trade agreement one of his top priorities, if pushed too hard, we expect he would back off from the agreement rather than give much on AD, unless there is countervailing pressure in the United States to support AD reform.

The U.S. industries interested in seeing increased liberalization in areas such as investment, financial services, and telecommunications and increased discipline over intellectual property rights far outweigh U.S. industries interested in maintaining the U.S. AD regime. This is especially true were it combined with other countries' refusal to negotiate in these areas absent a substantive negotiation in the AD area. They could overrun U.S. AD defenders, much as U.S.

intellectual property and services industries triumphed over the U.S. textile industry in the Uruguay Round – but will do so only if that effort is needed to achieve their own negotiating goals.

MEASURES ALCA/FTAA NATIONS CAN TAKE TO NEGOTIATE THE UNITED STATES

Absent taking concrete steps to attempt to force a new vision on the United States, U.S. negotiating partners can presume the U.S. will take no steps to change U.S. AD policy/laws/etc. In the absence of an action-forcing event, such as a negotiation, groups that support the current U.S. AD regime (notably steel) are very intense about maintaining it unchanged, while other interest groups do not focus much on U.S. AD law. This can change when there is something the other groups want in a negotiation, as we have stated earlier. Absent negotiations, however, the United States will remain protectionist in this area. It will continue to enforce U.S. law, however much others believe it contravenes the WTO Antidumping Agreement and its international obligations, daring other countries to challenge U.S. actions. When, after the U.S. has dragged out a dispute as long as possible, the U.S. is found in violation of the WTO in a particular AD case, it complies reluctantly, and only in that case, rather than regularly using WTO decisions to help it remodel U.S. AD law to more closely mirror the WTO AD Agreement.

There are, however, interim measures ALCA/FTAA countries can take to change this mindset and help induce the U.S. private sector and the U.S. government to favor substantive negotiations in the AD arena. One relatively simple measure is to apply to U.S. exports the same AD rules the U.S. applies, and to be transparent about it. This would result in U.S. lobbying that obtains changes to AD laws in general.

Secondly, other countries should take a more thought-out approach to filing challenges in the WTO against specific AD practices in AD cases investigated by the United States. Countries need to think strategically, determining among themselves which U.S. AD practices are most egregious, harm their industries the most, and that other countries would most like to see eliminated. Collectively, then, countries need to cooperate, find the best specific cases to challenge in the WTO, ensure those disputes are handled expeditiously, and retaliate against the United States if the U.S. does not fully and promptly comply with panel decisions.

One imponderable factor worth noting: the senior trade people throughout the new Administration privately think that AD laws are unsound economics used as a mask for protectionism. By contrast, key officials in the Clinton White House and the Commerce Department liked AD laws. Thus there is some reason to hope that the outcome now will parallel that in the earlier Bush Administration, in which senior officials in the White House and USTR (but not Commerce) disliked AD laws and were able to allow significant limits on U.S. AD law (as is apparent in recent WTO cases) to be put into the Uruguay Round as part of a package which included elements sought by non-AD-centric U.S. private interests. But it is worth noting that the earlier Bush Administration allowed nothing about U.S. AD law into NAFTA, and Mexico did not withhold anything in order to force the U.S. to include it.

CONCLUSION

The current position of U.S. negotiators is unlikely to change in the near future, i.e., until U.S. negotiators are convinced (as they are not yet convinced) that they will not achieve their goals without substantive AD changes. Over the longer term, and especially in the context of the global WTO trade negotiations (where greater trade-offs are possible), the U.S. will have to

agree to substantive discussions. The most likely result, however, is that changes will come only when more industries in the U.S. private sector want them than oppose them, so that there is political cover for the Administration and Members of Congress to support change.

As far as the ALCA/FTAA is concerned, the current Bush Administration has invested much political capital promoting this agreement and would be politically weakened in the U.S. if the negotiations founder. Thus, if other countries involved in these negotiations absolutely refuse to negotiate any substantive changes in other areas of interest to the United States unless the U.S. is willing to negotiate AD changes, the United States might agree to review some changes to AD in order to obtain an agreement. So far, it does not appear that other ALCA/FTAA countries are willing to go that far. Evidently, the negotiating partners each believe they can negotiate a hemispheric trading system that improves the current regime, even if not all problems (e.g., AD laws) are resolved.

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