U.S. Trade Remedy Laws and the WTO

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"Improving America's Trade Performance"

John R. Magnus
Dewey Ballantine LLP

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I. Introduction

The Labor/Industry Coalition for International Trade (LICIT), founded over 20 years ago, brings companies and unions together on key issues of U.S. trade policy. The coalition seeks to make sure that needs of manufacturing sector are taken into account in all aspects of the U.S. government's trade policy output. Industry coverage includes electronics, forest products, steel, machine tools, etc. The coalition is pleased to co-sponsor today's event. Congressional staff are encouraged to use LICIT as a resource.

"Improving America's Trade Performance" is obviously a huge topic. The exchange rate and other big-picture issues discussed by today's other panelists are important elements. My presentation focuses on another important element: trade remedy laws.

Effective antidumping and anti-subsidy rules are a cornerstone of the United States' open-market policy and form the last line of defense for our manufacturers and farmers against unfair foreign trade practices. These rules have been a pillar of the GATT/WTO system since its inception more than 50 years ago, and rigorous enforcement of the U.S. fair trade laws is part of the basic government-industry compact that undergirds our participation in the trading system. These laws matter in every U.S. state and district.

II. Troubling WTO Developments

Two categories of worrisome activity: (1) Dispute Settlement cases, (2) Preparations for a new round of WTO negotiations.

Dispute Settlement Cases present the most immediate problem: an attempt, already partly successful, to achieve through cases what could not be achieved at negotiating table. Panels, potentially conflicted and/or inept and definitely subject to overweening influence of WTO secretariat, are fabricating obligations, refusing to apply standard of review, etc. Regrettably, what you have been hearing about WTO dispute settlement is mostly true. The number of challenges to U.S. trade laws is now approaching 30. No safeguard measure ever has been sustained by the WTO. In addition, there is the problem of cases to which the United States is not even a party, but that have implication on U.S. trade laws.

Negotiations -- The number one goal of many trading partners is to reopen the Uruguay Round package and revisit divisive (and already over-negotiated) issues like antidumping. The explicit goal is to force the United States to weaken its laws. In my view, there is no way a Round in which antidumping is on the table could result in a net plus for the U.S. manufacturing industry.

III. What We Should Do -- Positive Agenda

1. Rigorous enforcement/strengthening of our fair trade laws. The agencies charged with administering those laws should in every case be taking every possible action

consistent with existing law and WTO rules to find, and to act against, unfair trade. Regrettably, that is not now happening. The laws also need to be strengthened. Congressmen English, Cardin, Houghton and Levin with H.R. 1988 have introduced a package of WTO-consistent changes that will improve the functioning of the laws and that may begin to bridge the credibility gap that now affects all facets of trade policy.

2. Improve the WTO dispute settlement system. Reforms to the dispute settlement system are badly overdue. Priority reforms should include: (i) greater transparency -- open meetings and public briefs; (ii) limits on the WTO Secretariat's role in dispute settlement proceedings; and (iii) clarifications regarding deference to the findings of administering authorities.

3. Improve the U.S. Government's *use* of the dispute settlement system. This includes:

- ***Deter/respond to cases:*** It has become a routine matter for foreign governments to challenge U.S. trade law determinations at the WTO. For other WTO Members, standard operating procedure is to *respond* to WTO cases by *filing* WTO cases. In these circumstances, a passive U.S. approach is unsupportable. The U.S. Government should impose a cost when foreign governments invoke WTO dispute settlement against U.S. measures.

- ***Reinforce U.S. litigation capability in Geneva:*** The Commerce Department today has a minimal role in managing the dispute settlement process in Geneva. Stationing full-time personnel in the Geneva Mission would give Commerce experts a greater role in panelist selection, vetting candidates for the WTO Appellate Body, participating in WTO conferences, etc.

- ***Expand U.S. dispute settlement delegations:*** It is essential that *all* of the best resources, both public and private, be available to help defend the U.S. trade laws when they come under attack in Geneva. While other governments regularly block U.S. requests to open panel meetings to "observers," the obvious solution -- including knowledgeable private representatives in the U.S. delegation -- has remained untried. Showing a willingness to deputize will quickly convince other WTO Members that there is no point opposing observers.

- ***Create WTO Dispute Settlement Review Commission:*** In seeking Congressional approval for the WTO agreements, President Clinton agreed to the creation of an independent body to review panel decisions, advising Congress as to whether those decisions wrongly expand U.S. legal obligations; deviate from the applicable standard of review, etc. It is time to keep this promise.

- ***Limit modifications of agency practice to conform to panel decisions:*** Trade law opponents often argue that the Department of Commerce and the International Trade Commission must bend to adopted WTO panel decisions -- even decisions issued in cases to which the United States was not a party, even if it means dropping methodologies that are permissible under U.S. law. Where administrative agencies have discretion, should they be guided in the exercise of

that discretion by dispute settlement outcomes? This is a very dangerous proposition. To avoid granting WTO Panel decisions a role in trade law administration which they were never intended to have, administrative practice should ***not*** be changed as a result of WTO decisions without formal notification to the Congress, and a period during which Congressional consideration can occur. Enacting limits in this area is an immediate priority.

IV. What We Should *Not* Do -- Negative Agenda

Most importantly, keep trade laws out of the current and pending negotiations. The parameters established for Trade Promotion Authority (TPA) represent the best means of doing this. This is of course just one of many issues that has to be resolved concerning TPA, but it is a crucial one. Clear majorities of both Houses of Congress are on record as opposing any further weakening changes to, or even negotiations over, trade remedy laws. Fast track procedures should not be misused once again to weaken our trade remedy laws.

To those who worry that drawing a line now on trade remedy laws will impede the prospects for a new WTO Round, I would say that just the opposite is true. Another divisive battle over antidumping would make a new Round impossible to conclude and block progress on the other issues facing WTO Members -- issues that, by any objective standard, are vastly more important. Antidumping measures affect a tiny fraction of world trade and well under 2% of the imports of the United States (generally considered a heavy user). Where applied, they simply ensure a modicum of fairness, but even if that were not the case, it would hardly be plausible to argue that use of antidumping is a major problem in international trade.

Furthermore, the new WTO antidumping rules have hardly been tested, and there are many new users of antidumping, often developing countries, trying to come into compliance with Uruguay Round rules. What is needed is a period of repose and certainty, not continued shifting of the WTO rules which could spur confusion and negatively affect all countries' exports.

Senate Finance Committee staff have identified three options for dealing with trade laws in TPA legislation:

(1) An outright exclusion, making fast track procedures unavailable for any bill containing amendments to Title VII of the Tariff Act of 1930 or Title II of the Trade Act of 1974. Such an exclusion appears in the three fast track bills Chairman Baucus recently introduced for Free Trade Agreements with Australia, New Zealand and South Korea. This approach would not prevent the Administration from discussing trade remedy rules, or even negotiating changes and presenting them to Congress. It would simply ensure that such changes be processed back here in Washington under normal Congressional procedures.

(2) Separating the main procedural elements of fast track -- non-amendability and time limits. An implementing bill changing U.S. trade remedy laws, while non-amendable, would be subject to Committee consideration without any time limits

and/or normal debate rules on the Senate and House floor. This approach is less useful than an outright exclusion but still helpful.

(3) Instructions to negotiators to avoid any agreements that require weakening changes to the trade remedy laws. Such instructions have long been part of fast track, but are not enforceable and have not proved a sufficient bulwark to prevent highly damaging changes. Language of this type is necessary but not sufficient.