Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures

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The program brochure states that "In the case of these Agreements …, the primary U.S. objective was defensive: to maintain effective remedies to address unfair trade practices." While this statement is certainly accurate as to the Antidumping Agreement, I submit that it is not an accurate or useful characterization of the Agreement on subsidies and Countervailing Measures.

On the issue of subsidies, the U.S. effort – a successful effort – was to transform a GATT discipline that was deficient both in substance and in enforcement mechanism into a WTO regime that would provide a meaningful remedy for U.S. companies that encounter subsidized competition in markets outside the United States. To obtain such a regime, the U.S. negotiators did not have to accept any significant weakening of the substance of U.S. countervailing duty law. They did accept – as a necessary consequence of obtaining the new binding system of dispute resolution needed to provide a true remedy against subsidies encountered in non-U.S. markets – the proposition that U.S. countervailing duty decisions could be challenged in that same binding dispute resolution process. On the whole, I submit that this bargain is working very well for the United States.

Keeping in mind this distinction between the two Agreements, let me offer some observations on the experience thus far under each Agreement.

I. The Antidumping Agreement

A. Department of Commerce Practice

During the debate over the Uruguay Round Agreements Act, much concern was expressed that substantive changes in U.S. law required by the new Antidumping Agreement would "raise the bar," making it more difficult for petitioners to obtain relief. Such concerns focused on, inter alia, the following:

- higher "de minimis" margin levels,
- comparison of weighted average U.S. price to weighted average home market price, instead of comparing the price of each U.S. sale to a single home market weighted average price, and

- changing from “purchase price” and “exporter’s sale price” to the new “export price” and “constructed export price.”

Today, after five years of experience under the new law, these petitioner-side concerns have largely disappeared. The difference in “de minimis” levels has not proved significant. Commerce has coped with the “averages to averages” methodology by making comparisons on the basis of narrowly-defined product groupings.[1] And the new definitions of “export price” and “constructed export price” have significantly favored petitioners, as many import sales that would have fallen into the more respondent-favorable “purchase price” category under the old law and now being put in the “constructed export price” category, with resultant higher dumping margins.

In addition, Commerce has adopted a number of interpretations under the new law that have tended to increase the dumping margin in most cases. Two examples:

Affiliated Parties. Under the new law, Commerce is much more likely to find a raw material or component supplier, or a company in the chain of distribution, to be “affiliated” to the exporter. The consequence of such a determination is usually a higher dumping margin and invariably a more arduous verification.

Concordance. In selecting the home market sales appropriate for comparison with each grouping of U.S. sales, the Department must eliminate below-cost home market sales, scrutinize home market sales to related parties to determine whether they are at arm’s length and determine which products sold to home market customers are most nearly identical to the product category sold in the United States. Commerce has changed the order in which those analyses are made, and has done so in a manner that, in most cases, tends to increase the dumping margin.

Finally, the Department has substantially raised the bar for revocation of orders in DOC changed circumstance reviews. Not too many years ago, an order would be revoked if a certain number of annual reviews found all sales to have been made at fair value, or if a greater number of reviews had found (as to a particular exporter) no imports at all. Progressively, Commerce has toughened those requirements. Today, a year with no imports does not count at all toward revocation. Three consecutive reviews in which imports were made entirely at fair value are now required. And even that may not be sufficient. Over the past two years, the Department has begun examining the volumes of the fair value imports in each review year and rejecting revocation where that volume is deemed too small.

In sum, it would be extremely difficult to make the case that the new WTO Antidumping Agreement has weakened antidumping law enforcement on the Commerce Department side.

[1] This, together with other DOC changes, has significantly exacerbated the nightmare complexity of the verification exercise.

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B. International Trade Commission Practice

Here there is little to say, since neither the new Antidumping Agreement on the URAA significantly changed the criteria applied in antidumping investigations at the International Trade Commission. Apart from the new standard for negligibility, under which a few countries with very small import volumes have been excluded from affirmative determinations in multi-country cases, decisional trends have turned on the make-up of the Commission and not significantly on any effect of the Uruguay Round.

C. Sunset Reviews

The inclusion of a five-year sunset review provision in the Agreements on Antidumping and on Subsidies and Countervailing Measures was seen as a major concession by the United States. The sunset review procedure caused particular concern in the petitioner bar when it became apparent that both the Agreements and the URAA provided that an order would be terminated unless both Commerce and ITC found a likelihood of future dumping, or if renewed or continued injury, if the order were to be revoked. While it is still early to draw firm conclusions about the effects of the sunset review provision, it is abundantly clear that prospects for revocation differ radically between the two agencies.

Commerce Department. The Department's approach to revocation under the sunset review provision reminds me of one of the classic Monty Python comedy sketches:

> In a small, windowless office sits an insurance agent (played by Eric Idle, dressed in a gangster suit, with sunglasses and a thin black moustache). In bursts a policyholder (played by John Cleese), who turns out to be a minister. He cannot understand why his claim has been rejected, when the damage to his car occurred when another car ran into it when it was parked in the minister's garage!
>
> The insurance agent finds a copy of the policy (a single sheet of crumpled paper) in his desk drawer, reads it and says, "Well, here's the problem, reverend. It says here very clearly that the company is under no obligation whatsoever to honor any claim [pause for dramatic effect] that you make.

This appears to be precisely the Commerce Department's position – mandated in large part by the URAA legislative history – as to sunset reviews. Where dumping was found in annual reviews after the original order, they will not revoke. Where there were no imports after the original order, they will not revoke. Where all imports after the order were found to have been at fair value, but the volume of those imports is lower than the pre-investigation volume, they will not revoke. Only where the exporter in question not only stopped dumping but increased its sales in the U. S. market will Commerce find future dumping is not likely and revoke. Not surprisingly, revocation at Commerce has depended on whether the petitioning U.S. industry contests the sunset review. If it does so, the respondent's hope of revocation lies with the ITC not with Commerce.

It is as yet a bit early to draw firm conclusions as to how the ITC will be handling their portion of the sunset review process. The early returns, however, suggest the following preliminary conclusions:

First, the sunset reviews are being analyzed similarly to the Commission's analysis in threat cases, except that the standard of "imminence' is somewhat more favorable to U.S. petitioners. In other words, the Commission will reach an affirmative determination based on a finding that material injury is likely at a somewhat more remote time than the "imminent" injury required in threat cases.

Second, the Commission is "playing it straight," meaning that there is no clear predilection apparent in the early decisions, neither in favor of nor against revocation.

Finally, at least two types of situations have emerged in which, given compelling facts, the Commission has demonstrated a willingness to find no likelihood of material injury if the order is revoked:

- Major U.S. consumers argue, and the Commission finds it to be the fact, that the subject merchandise is in short supply and thus additional imports are needed. Example: Titanium Sponge from the Russian Federation.

- The foreign exporter has established production in the United States (or for some other reason has greatly diminished reason to export to the United States) and the exporter has little or no available capacity to increase its U.S. exports. Example: Stainless Plate from Sweden.

Thus, while it continues to be evident that most contested ITC sunset reviews will result in the order remaining in effect, the new procedure is having its intended effect of weeding out those orders as to which U.S. producers have no further interest or as to which there is compelling evidence that future imports will be minimal or will be non-injurious.

D. WTO Panel Reviews of U.S. Antidumping Decisions

The loudest anguishing about the Uruguay Round Antidumping Agreement was directed, not against that Agreement itself, but against the subjecting of U.S. antidumping decisions to the new, non-blockable WTO dispute resolution mechanism. The hostility of most WTO member nations to U.S. antidumping practice, it was feared, would result in decision after decision overturning the results of U.S. cases. And, under the new procedures, the United States would no longer be able to block the adoption of adverse panel reports.

It hasn't turned out that way at all. In the Uruguay Round negotiations, the United States obtained agreement to a higher standard of review where panels considered the validity of a member nation's antidumping decision. In essence, the panel must give considerable deference to the agency's determination.

Only one U.S. antidumping measure – Korea DRAMS – has yet been ruled upon by the WTO, so there is as yet little evidence of a flood of challenges to U.S. determinations. And this decision does not demonstrate that WTO panels will delve into the intricacies of Commerce's dumping calculations. The Korea DRAMS decision does show that where a panel finds an overt and explicit conflict between U.S. law or practice and the language of the agreement, an adverse decision is likely. The panel found it inappropriate for the Department – in a revocation proceeding – to use as its criterion whether dumping is unlikely to occur if the order is revoked, as opposed to a finding that future dumping is likely if the order is revoked. The Department has revised the language of its regulation, with no discernible change in the outcome of revocation proceedings.

E. WTO Panel Reviews of Other Countries' Antidumping Decisions Against U.S. Exporters

The program brochure states that one of the goals of U.S. negotiators in the Uruguay Round was "to ensure that AD/CVD remedies were not misused against U.S. exporters." If that was the case, that goal was inconsistent with and greatly subordinated to the goal of limiting a WTO panel's ability to overturn a U.S. antidumping decision. Thus the higher standard of review that the United States insisted on for panel review of antidumping decisions means that panels will rule against antidumping orders imposed on U.S. exporters only in fairly extreme cases. For example, in the recent panel decision in Mexico High Fructose Corn Syrup the panel upheld the investigating authority's initiation of the case even though the investigating authority's notice of initiation failed to disclose that the investigating authority and the petitioner had contrary information on the make up of the domestic industry and the like product and failed to reconcile these differences on the record. Nevertheless, it is encouraging that the panel in Mexico High Fructose Corn Syrup found that the Mexican authority's determination of threat of material injury failed to address the factors set forth in Article 3.4, was based on an improper segmentation of the domestic market, and improperly concluded that there was a likelihood of substantially increased importation. The panel also found that the Mexican authority had acted improperly regarding its imposition and collection of provisional measures and the retroactive levying of duties.

II. The Agreement on Subsidies and Countervailing Measures

A. Disciplines on Subsidized Competition Encountered by U.S. Companies Outside the U.S. Market

On this issue – the primary goal of U.S. negotiators in the subsidy area – the news is very good indeed. Not only has the United Sates prevailed in the two panel proceedings it has thus far initiated under the Agreement on Subsidies and Countervailing Measures (the Indonesia Autos case and the Australia-Leather case), the precedents established in other cases are making clear that this Agreement will in fact become a tough discipline on trade-distorting subsidization.

Most notable is the panel decision in Canada Civil Aircraft. That case involved a Canadian program that provided so-called "repayable advances" to assist in the development of

new models of commuter aircraft. The advances were to be repaid exclusively out of income generated by the sales of the newly-developed aircraft models. If the sales of a model were insufficient to generate full repayment of the money advanced, the recipient Canadian company had no further obligation to make repayment.

The titular belligerents in this proceeding were Canada and Brazil. However, this case could be considered the Spanish Civil War of WTO subsidies law, because the issues at stake were fundamental to the antagonistic positions of the United States and the European Union on the meaning of the WTO disciplines on subsidies. On all the important points, the panel took the approach desired by the United States to create a truly meaningful discipline and rejected positions long espoused by the European Union, some of which would have largely vitiated the Agreement's effectiveness.

First, the panel confirmed that the test of whether the Canadian funding was a subsidy was whether it conferred a benefit on the recipient, in the sense that monies were provided to the Canadian manufacturer on terms more favorable than could have been obtained from commercial sources. The panel explicitly rejected the position long advanced by the European Union – namely, that a subsidy can be found only where there is a cost to the government in providing the funds.

Second, the panel confirmed that the existence of subsidization is to be determined by looking to the terms on which the funds are provided, i.e., by looking at Canada's projected rate of return. The panel did not find – as the EU has argued in other contexts – that one cannot determine the existence of this type of subsidy until the entire program (i.e., all sales of the aircraft model developed with the government funding) has run its course. Had the panel taken the European approach, there would be no meaningful way to apply the WTO discipline to this type of subsidy, since all benefits would have been received and all adverse effects would have occurred before it could be determined whether a subsidy existed.

Finally, the panel ruled that the Canadian scheme was an <u>export</u> subsidy and therefore was WTO-violative even without any showing of adverse effects on other WTO member nations. It based this conclusion on the fact that repayment of the advanced monies was to come from revenues predominantly derived from export sales as well as official statements demonstrating that export revenues were a significant factor in the decision to grant funds.

In sum, the United States' objective of achieving a tough, enforceable WTO discipline on foreign subsidies is being achieved. The puzzling question is why more U.S. companies and industries – only two so far – are not asking USTR to challenge foreign subsidies.

B. <u>WTO Panel Reviews of U.S. Countervailing Duty Decisions</u>

Unlike the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures does not contain a special standard of review that gives deference to Commerce Department or ITC decisionmaking in cases brought against U.S. countervailing duty determinations. Thus U.S. decisions are in some jeopardy if the U.S. agency adopts practices or methodologies at variance with international norms of subsidy analysis.

An example of such jeopardy is the recent WTO panel rejection of Commerce's analysis of the effect of a market value privatization on the countervailability of pre-privatization subsidies. For over a decade, Commerce has wrestled with the privatization issue. The issue is whether and to what extent the purchase of a company (or business unit) by new owners who pay full market value affects the continued countervailablity of "nonrecurring" subsidies provided to that company before the market value privatization. The analytical complexities arise because such nonrecurring subsidies (e.g., a grant or low-interest loan for capital investments) are not continuing money infusions as to which what is countervailed each year is the new funding provided in that year. Rather, these are provisions of funds in one year whose benefit to the company continues in future years. In other words, what is countervailed in later years is a portion of the earlier-year funding that is allocated or amortized to each of a given number of years after the actual fund infusion.

In two decisions in the 1980s, Commerce took the view that a sale of the subsidy-recipient company for its market value ended the countervailablity of past non-recurring subsidies, on the basis that such a market value transaction constituted payment in full by the new owners for all of the continuing benefits of any prior non-recurring subsidies. This approach was consistent with Commerce's view – expressed most recently in the preamble to its latest countervail regulations -–that a subsidy confers a benefit where, as a result of the infusion of funds by the government, it acquires some of its inputs at an artificially reduced cost. In such an analysis, it follows logically that the company no longer enjoys a subsidy benefit after its new owners have paid full market value for the entire company (and thus paid full value for any input whose cost had earlier been reduced by the non-recurring subsidy.)

In the early 1990s, however, Commerce radically changed its approach – beginning with decisions in the <u>Leaded Bar</u> and <u>Certain Steels</u> cases. It adopted the view that the continuing countervailability of the portion of a non-recurring subsidy allocated to future years was not dependent on whether the recipient company continued to benefit from that subsidy. Indeed, Commerce stated explicitly that "whether a subsidy confers a benefit, in the year of receipt or in any subsequent year, is irrelevant." Under this analysis, the payment of market value by the new owners of a privatized company did not end the countervailability of past non-recurring subsidies and Commerce took the position that it would countervail the privatized company whether or not its operations enjoyed any benefit from the past subsidies.

The WTO panel found this analysis inconsistent with the Agreement on Subsidies and Countervailing Measures. It ruled that countervailing duties cannot be imposed unless the current production of the imports on which duties are assessed benefits from the countervailed subsidies. Applying logic quite similar to that used by Commerce in its pre-1990 cases, the panel found that payment of market value eliminates the benefit previously conferred by the past subsidy and thus ends countervailability.

The United States has said it is considering an appeal of this decision to the WTO Appellate Body. The lesson of the case seems clear, however. Where U.S. countervailing duty law or practices diverges sharply from internationally accepted subsidy analysis – as in this case, where the United States professed itself ready to impose duties regardless of whether the production of the countervailed imports enjoyed any benefit from subsidies – such divergence is likely to be found WTO violative.