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U.S. Trade Laws And The Sovereignty Canard

Dan Ikenson

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John Bolton took to the pages of the *Wall Street Journal* yesterday to assert America's interest in abandoning international institutions that threaten U.S. sovereignty. In identifying the World Trade Organization's Dispute Settlement Body as such an institution, Bolton was reinforcing a central theme of the Trump administration's recently-minted 2017 Trade Policy Agenda. That document is short on specifics, but makes one thing clear: Under threat of going rogue, the United States will leverage its indispensability to compel changes at the WTO that accommodate a more expansive, less surgical application of domestic trade laws.

"Defending our national sovereignty over trade policy" and "strictly enforcing U.S. trade laws" are, explicitly, the top two priorities on the agenda. Taken together, those priorities suggest the Trump administration will aggressively execute U.S. trade laws with little regard for whether that execution violates internationally-agreed rules established to prevent and discourage abuse of such laws. Agreeing that "all animals are equal," then adding the famous caveat "but some are more equal than others" is what is meant by "defending our national sovereignty."

Given the prominence of domestic steel industry representation in the Trump administration, these priorities aren't surprising. High on the list of talking points of the Washington-swamp-savvy U.S. steel lobby is the assertion that the WTO's DSB, by finding U.S. antidumping and countervailing duty practices in violation of WTO obligations on numerous occasions over the years, usurps U.S. sovereignty over its own laws. This is a complaint frequently made by Robert Lighthizer, Trump's USTR-designate, who for decades has represented domestic steel interests in AD/CVD cases before U.S. agencies.

To the chagrin of Lighthizer's clients, U.S. government actions in some of those cases were challenged by foreign governments at the WTO, where the DSB ultimately found Commerce Department or U.S. International Trade Commission execution of the U.S. trade laws to be inconsistent with U.S. obligations under various WTO agreements. In fact, on 38 occasions since 1995, the WTO has found aspects of U.S. trade remedy law administration to be "out of conformity" with U.S. WTO obligations.

The Alliance for American Manufacturing (AAM) claims the WTO is "threatening America's ability to defend U.S. workers & manufacturers from unfair trade" and that it is "overstepping its mandate and **disproportionately targeting U.S. trade remedy laws"** (My emphasis). Just last

month, AAM published a paper by two domestic steel industry trade lawyers, Terrence Stewart and Elizabeth Drake, titled "How the WTO Undermines U.S. Trade Remedy Enforcement." They write:

"For more than two decades, WTO decisions have put sustained pressure on U.S. trade remedy law. Despite the long-standing international recognition of the need for effective AD and CVD laws to remedy unfair trade, and despite the safeguards members attempted to build into the WTO dispute settlement system, the WTO has dealt numerous setbacks to U.S. trade remedy enforcement. **The U.S. has been the subject of far more adverse trade remedy decisions than any other WTO member, and it has suffered losses in 90% of WTO decisions** to date (My emphasis)."

Under WTO rules (which were established by consensus reached under U.S. leadership), governments are permitted to have and to use antidumping and countervailing duty (anti-subsidy) laws, but those laws and their execution must comport with certain standards, including those governing procedural fairness, transparency, and comparison and calculation methodologies.

The WTO's Antidumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM) articulate fairly broad parameters that grant to member governments plenty of latitude in how they design and administer their trade remedy laws, provided that they redress "unfair" trade in manners that are remedial, but not so excessive as to be protectionist. Without such parameters, without the rule of law, what would prevent governments from using trade remedies in a purely protectionist, capricious, arbitrary, political manner (by which I mean in a MORE protectionist, capricious, arbitrary political manner than they do now)?

AAM claims the WTO disproportionately targets U.S. trade remedy laws. Citing a 90% loss rate, Stewart and Drake imply that U.S. trade remedies have been singled out by the WTO. U.S. sovereignty to administer its own trade remedy laws has been surrendered to a body of bureaucrats in Geneva, is how John Bolton sees it.

The United States has indeed run afoul of the ADA more often than any other WTO member. But the explanation isn't that the United States has been targeted. The WTO doesn't target any member's policies, laws, regulations, or actions. The "WTO" doesn't file complaints at the WTO. WTO members do. And they do so when they are aggrieved and when they are as close as possible to 100% certain that they will prevail if the matter goes all the way through dispute settlement. As a result, complainants prevail almost all of the time -- on 90% of adjudicated issues. When the United States has been a complainant (as it has in 114 of 522 WTO disputes over 22 years -- more than any other WTO member) it has prevailed on 91% of adjudicated issues. When the United States is a respondent (as it has been in 129 cases -- more than any other WTO member), it has lost on 89% of adjudicated issues.

There is no anti-American bias in the WTO DSB. There is no anti-trade remedies bias. If anything, there is a pro-complainant bias by virtue of the fact that complaints are brought on a self-selected basis. That WTO members have brought so many complaints against U.S. trade remedy actions speaks to the fact that the United States has been a very aggressive user of trade

remedies and has resorted to methods that plainly violate the agreed rules. Posturing and claims of victimization notwithstanding, the U.S. government has not always toed the line with respect to its obligations under the ADA and ASCM. In fact, it has frequently encroached well beyond the bounds of acceptable trade remedies administration.

Under the WTO agreements, governments are authorized to impose antidumping duties when a domestic industry demonstrates that it is "materially injured" or threatened with material injury by reason of imports that have been sold in the domestic market at prices that are lower than those charged by the same producer in his home market. Governments are authorized to impose countervailing duties when material injury is found to be caused or threatened by imports that have been subsidized by foreign governments.

Under U.S. law, after a petition is filed by or on behalf of a domestic industry and a case is initiated, the U.S. Department of Commerce (DOC) estimates whether and to what extent dumping or subsidization has occurred, and the U.S. International Trade Commission (ITC) determines whether the domestic industry is injured or threatened with injury by reason of the dumped or subsidized imports. That is how it works in broad stroke. But the devil's in the details -- especially in the details of the convoluted process used to determine the existence and magnitude of dumping, which serves as the basis for duty assessments going forward under U.S. law.

Some Cato Institute colleagues and I have spent a lot of time over the years documenting and describing just how aggressively U.S. trade remedy laws are enforced, including some of the methodological tricks designed to inflate margins of dumping. (See, for example, Antidumping 101: The Devilish Details of "Unfair Trade" Law; Abuse of Discretion: Time to Fix the Administration of the U.S. Antidumping Law; Zeroing In: Antidumping's Flawed Methodology under Fire; Nonmarket Nonsense: U.S. Antidumping Policy toward China; Poster Child for Reform: The Antidumping Case on Bedroom Furniture from China).

The AD/CVD laws are portrayed by the protectionism lobby as tools needed to help upstanding U.S. producers "level the playing field" with predatory foreign producers, who exploit unfair practices to establish dominance in the U.S. market. In reality, the laws have become commercial weapons used primarily by American companies and their workers to secure advantages over other American companies and their workers. The rhetoric says "U.S. vs. China," but the reality is "U.S. vs. U.S.," with the duties imposed wreaking havoc on downstream U.S. companies and reducing national economic welfare. Rare is any evidence of the AD/CVD laws helping to restore jobs or domestic production. Abundant is the evidence that those laws cause contraction in downstream industries (for some evidence, see Economic Self-Flagellation: How U.S. Antidumping Policy Subverts the National Export Initiative).

Unfortunately, the collateral damage from aggressive use of trade remedies is even more extensive than that. When the United States imposes duties on foreign companies, U.S. exporters often pay a price. Increasingly, U.S. companies are the targets of foreign trade remedies, which are motivated by actions taken by the United States first (as described in Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.S. Exports).

So numerous are the methodological distortions in antidumping administration and so extensive is the collateral damage caused by those distortions that if there is anything the WTO should do it isn't to loosen the reins so that the U.S. government can "reclaim the sovereignty" to appease its steel industry with a virtual wall of protective tariffs at huge cost to the rest of the economy. Rather, the WTO should tighten the reins that have brought us to the present, where 376 U.S. trade remedy orders are in effect, restricting imports of inputs from 42 countries that are essential to the profitability of thousands of U.S. companies in dozens of industries for the exclusive benefit of a few connected industries. In fact, this is what the WTO should do about the ADA: Reforming the Antidumping Agreement: A Road Map for WTO Negotiations.

To this day, there remains broad, bipartitsan support for the trade remedy laws. The laws are ideally suited for the purposes of politicians because the benefits are seen (i.e., tariff protection requested by steel producers) and the costs go unseen (i.e., higher input costs for steel-using industries, the tariffs soon imposed on U.S. exporters, etc.), or are at least sufficiently, plausibly disconnected from the initial action.

But there is no economic rationale that reconciles the antidumping law with its administration (as this paper explains: The U.S. Antidumping Law: Rhetoric versus Reality). Instead, over the years, as politicians came to embrace the antidumping law as a useful political salve, justifying its purpose became less important, and the focus gradually shifted to giving the law broader scope and sharper teeth (as this paper describes: Protection Made to Order: Domestic Industry's Capture and Reconfiguration of U.S. Antidumping Policy).

The sovereignty issue is a canard created and perpetuated to appeal to nationalistic, "Us vs. Them" sensibilities, which have been piqued in recent times. The fact is that the WTO doesn't usurp U.S. sovereignty. The DSB never orders respondents to do anything. When DSB reports include a finding that a WTO member has breached an obligation, the language in the conclusion is only suggestive. The report would say something like "we find the U.S. practice of offsetting negative dumping margins to be in violation of Article 2.4.2 of the ADA and ***recommend*** that the United States bring its practice into conformity with the agreement..."

As a sovereign nation, the United States doesn't need to heed this recommendation. If it doesn't, the complainants can request permission to "withdraw concessions," which means essentially permission to retaliate by subjecting U.S. interests to treatment less favorable than the treatment accorded all other WTO members. That retaliation would normally be targeted at U.S. interests that aren't involved in the immediate dispute and otherwise have no stake in whether or how that dispute is resolved. For example, if the United States failed to bring it's nonconforming practices on behalf of its steel industry into conformity, the complainant's retaliation might include raising tariffs on imports of citrus products or textiles or motorcycles so that commercial interests in Florida, California, South Carolina, and Wisconsin have a stake in the dispute. The process of widening the fray encourages a domestic dialogue among U.S. policymakers who suddenly have interests in seeing the United States comply with the DSB ruling.

The process ensures that U.S. sovereignty is not usurped, but also that exercise of that sovereignty in manners that breach commitments made come at a price. As John Bolton admits in the *WSJ*: "In reality, ignoring DSU outcomes has always been an option for those prepared to face the consequences." It turns out that the United States has been prepared to face the

consequences more than any other WTO member. No other member is out of compliance (i.e., has not brought its offending actions, laws, policies or procedures into conformity with its WTO commitments) on more matters or has been so for a longer duration than the United States.

The prominence of the claim that U.S. sovereignty is threatened reflects the over-representation of steel interests in the Trump administration. It is intended to add credibility to the implied threat that the United States will ignore DSB rulings with which it disagrees unless and until there are changes made to the WTO texts that render compliant the United States' non-compliant actions on trade remedies. But it is irresponsible to risk blowing up the system, especially on behalf of an industry that accounts for less than 0.3% of the U.S. economy.

The bottom line is that the WTO dispute settlement system, though not perfect, offers a reasonable formula for balancing the simultaneous imperatives of preserving the rule of international trade law and national sovereignty.

Dan Ikenson is director of Cato's Herbert A. Stiefel Center for Trade Policy Studies, where he coordinates and conducts research on all manner of international trade and investment policy. Since joining Cato in 2000, Ikenson has authored dozens of papers on various aspects of trade policy, focusing his research on U.S.-China trade relations; bilateral and multilateral trade agreements and institutions; globalization; U.S. manufacturing issues; trade politics; and trade remedies, such as the antidumping regime.