# 6

# Changing the Rules: The Rise of Administrative Trade Remedies

Administrative remedy procedures—"the rules"—were a key component in the 1934 system of US trade policymaking. In the years after 1970, they became central to the policy debate. Congress made them more accessible to trade-impacted producers, resulting in an upsurge of cases and greater import relief.

There were four major statutes. The "escape clause" offered recourse to firms and workers injured by import competition in general. The countervailing duty (CVD) law provided relief from imports subsidized by foreign governments, which the statute labeled an "unfair trade practice." The law that protected US producers from "dumping" (sales at "less than fair value") by foreign firms also used the same label to describe dumping. Finally, those hurt by trade could apply for "adjustment assistance," mainly stipends and worker retraining.

Up through the early 1970s, however, US firms found it difficult to win relief under these statutes. Eligibility criteria for the escape clause and adjustment assistance were tightly drawn, and enforcement of the CVD and antidumping laws was at best a sometime thing. So import-competing interests lobbied successfully for changes in the rules that would broaden eligibility and tighten enforcement. Their success was reflected in the many more petitions for administrative import relief that they submitted in the 1980s, and the fact that, increasingly, they were winning those cases.

Champions of these quasi-judicial procedures defended them as a way to "depoliticize" trade issues, to "run trade on economic law."[1] They were seen as a way to keep trade decisions "out of politics," and petitioners off of legislators' backs, by establishing objective import relief rules that governed the strong and the weak alike. For large cases, however, this was often not the actual result. As steel producers, in particular, moved to take advantage of these statutes, the effect—and often their clear intent—was not to lower the political temperature but to raise it. "The rules" changed from a means of diverting political pressure to a means of asserting it. Typically, the policy result was not the remedy specified in law but new "special case" protection for the claimants.

Two other trends were evident. One was the decline in use of the escape clause, with the antidumping law the primary recourse for protection. The second was the tilting of the rules for calculating foreign and domestic prices in antidumping cases, such that findings of dumping became nearly automatic.

The escape clause was originally intended to provide exceptional relief from the impact of negotiated reductions in US tariffs. In a manner consistent with Article XIX of the General Agreement on Tariffs and Trade (GATT), if producers met the statutory criteria of injury from imports as determined by the Tariff Commission,[2] it would recommend and the president could order temporary relief, including tariffs, quotas, or other import restraints.

In addition to such insurance, the rules also provided offsets to "unfair" advantages of foreign competitors, with the sanction of GATT Article VI. In accordance with a statute dating from 1897, if another government gave a "bounty or grant" to a particular industry or firm, the US government, on the petition of the American interests affected, was supposed to impose a CVD equivalent to the size of the foreign subsidy. It could impose a similar penalty on imports found to be "dumped," or sold in the US market at "less than fair value," or below the prices at which the good was sold in its home market.

Finally, there was a program to facilitate adjustment. Under the Trade Expansion Act of 1962, if firms were injured or workers lost jobs as a result of import competition, they were eligible for "trade adjustment assistance" (TAA), consisting of financial aid and retraining above and beyond normal unemployment benefits, designed to help them move into new, competitive lines of work.

1. Chairman Charles Vanik (D-OH), US Congress, House Ways and Means Committee, Subcommittee on Trade, *Trade with Japan*, 96th Congress, 2nd session (18 September 1980), 140.

2. The Tariff Commission was restructured and renamed the United States International Trade Commission (USITC) in 1975.

The trade policy justification for the various quasi-judicial procedures was that they provided options for those damaged by the operation of the open system. The political rationale was that they offered an escape valve, a place for congressmen and executive branch leaders to refer complaints, thus easing the pressure to take immediate trade-restrictive action themselves. There was also the promise of equity. Like other government regulatory procedures, the trade "rules" were supposed to take certain tariff and quota decisions out of the political arena, where benefits went to those with the greatest clout, and entrust them to institutions that would act "objectively," relating the rules to the facts of particular cases.

But there was one problem. In concept, such procedures appeared to give advantages to import-injured petitioners.[3] In practice, however, in the early postwar decades, those who played by these rules tended to come out losers.

## Through the Early 1970s: Little Relief

Under the escape clause, the Tariff Commission investigated 113 claims between 1948 and 1962 and recommended relief in 41 cases, but the president provided it in only 15.[4] Things grew worse for affected industries after the Trade Expansion Act of 1962 tightened relief requirements. The Tariff Commission considered 30 cases in the 12 years ended in 1974. It found injury justifying import relief in only four.[5]

Petitioners did not find the countervailing duty law much more helpful. The law triggered 191 investigations between 1934 and 1968, but only 30 resulted in the imposition of CVDs. In 1968, just 13 CVD orders were in effect, with only four of them having been imposed in the 1960s.[6] There were three more affirmative findings in 1969, and just eight more between 1971 and 1974.[7]

Trade relief was similarly elusive on antidumping cases. Out of 371 processed from 1955 through 1968, only 12 resulted in findings of dumping,

3. J. Michael Finger et al. note that the "technical track" favors petitioners because it excludes from the review process those economic interests "who want access to foreign sources of supply." But they concluded that, through the 1970s, "this bias" toward protectionism was "not large": in 1975–79, "only 2.2 percent of US manufactured imports [were] granted relief under the [countervailing duty and antidumping] statutes, and only 3.8 percent under the escape clause." J. M. Finger, H. Keith Hall, and Douglas R. Nelson, "The Political Economy of Administered Protection," *American Economic Review* 72, no. 3 (June 1982): 454, 466.

4. Herbert G. Grubel, *International Economics* (Homewood, IL: Richard D. Irwin, 1981), 174.

5. Tariff Commission, *Annual Report*, Washington, DC, various years.

6. US Department of the Treasury, "Report of the Secretary of the Treasury," *Annual Report of the Department of the Treasury, 1968*, Washington, DC, 416.

7. Ibid., Statistical Appendices.

although 89 more were concluded by revision in the price or termination of sales.[8]

Finally, not a single petition for trade adjustment assistance for workers won favorable action in that program's first seven years. The volume of petitions went up sharply in the early 1970s, but out of 110,640 workers seeking benefits by the end of 1974, only 48,314 received them.[9]

So in the first 30 postwar years, import-affected industries that played the trade policy game by the legal rules generally lost out.

The immediate effect was to make US markets more open than they otherwise would have been, since less trade was being restricted. More important was the longer-term impact. Predominantly negative outcomes for petitioners discredited the trade remedy procedures, discouraging their use and encouraging affected interests to seek direct help from Congress or the administration. This was, of course, exactly what "the rules" were intended to avoid.

As the Kennedy Round drew to a conclusion in 1967, executive branch trade leaders recognized that to restore the credibility of these statutes, their procedures needed to be made less forbidding. Legislators were even more committed to this goal. If the 1934 system was to continue to provide "protection for Congress," other channels had to offer real relief alternatives. Otherwise, pressure on Congress to provide direct, product-specific trade protection could only increase. Indeed, such pressure built up rapidly in the late 1960s and early 1970s, as evidenced by the House vote in favor of general import quota legislation in 1970 and the introduction of the more restrictive, labor-endorsed Burke-Hartke quota bill the following year.

Twice during the 1970s, Congress responded to this pressure as one would have predicted: it changed the rules to make administrative trade relief easier for import-affected industries to obtain. It did so in 1974, as part of the Trade Act, authorizing US participation in the Tokyo Round trade negotiations. It did so again in 1979, in the Trade Agreements Act, which approved the round's results.

## The Trade Act of 1974

The simplest and most straightforward action in 1974 was that governing the escape clause. The Trade Expansion Act of 1962 had required that an industry prove that it had suffered serious injury, the "major cause" of

8. Ibid., 416.

9. US Department of Labor, "Labor Issues of American International Trade and Investment" (prepared for the National Manpower Administration Policy Task Force), *Policy Studies in Employment and Welfare*, no. 24 (Washington, DC, 1976): 52.

which was imports due to US tariff concessions ("major cause" meant greater than all other factors combined). Section 201 of the Trade Act of 1974 lowered that threshold, requiring that imports be only a "substantial cause of serious injury, or the threat thereof" (this was defined as "not less than any other cause"). Section 201 also removed a proviso that such injury had to result from specific US tariff concessions.

Congress also sought to encourage favorable findings by increasing the independence of the Tariff Commission, which ruled on industry petitions. Members' terms were lengthened from six to nine years, and it was renamed the US International Trade Commission (USITC) "because tariffs are no longer the major impediments to trade."[10] Moreover, in cases where the USITC recommended relief, the president was required to act on that recommendation within 60 days. If he did not grant the relief, Congress could override him and enforce the USITC recommendation by majority vote of both houses.[11]

On adjustment assistance, Congress insisted that the program be expanded and made easier to qualify for, notwithstanding organized labor's disillusionment with it and the Nixon administration's skepticism about the appropriateness of a special program for workers displaced by trade. One reason few workers had previously been eligible was that the criterion was essentially the same as those for tariffs or quotas: Imports had to be the "major cause" of unemployment or underemployment. House Ways and Means Committee members thought trade adjustment assistance should be the easiest form of relief to obtain. So the law was changed to open it to workers for whom "increases of imports . . . contributed importantly to loss of jobs." The magnitude and duration of benefits were also increased.

But the primary focus of efforts to "change the rules" in the early 1970s was the alleged foreign abuses covered by the CVD and antidumping statutes, addressed in a rather lengthy Trade Act title labeled "Relief from *Unfair* Trade Practices" (emphasis added).

This was a natural, even inevitable, emphasis, for the Kennedy Round's success in reducing industrial tariff levels had focused attention on nontariff barriers (NTBs) and other trade-distorting governmental practices. Among those thought to require regulation or discipline, subsidies were

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10. US Congress, Senate Committee on Finance, *Trade Reform Act of 1974*, 93rd Congress, 2nd session (26 November 1974), Staff Report 93-1208, 25.

11. In *Immigration and Naturalization Service v. Chadha*, the US Supreme Court declared a similar legislative veto provision unconstitutional, on grounds that it did not provide for "presentment to the President," as in the normal legislative process. Congress responded, in the Trade and Tariff Act of 1984, by providing for a joint resolution congressional veto for presidential decisions under Section 201. Such a resolution is presented to the chief executive for his signature; should the president veto it, a two-thirds majority of both houses would be required to override.

at the top of the list for American trade specialists. To some, in Gary Clyde Hufbauer's metaphor, subsidies were a "rising reef," increasingly granted in order to buttress favored industries and influence trade flows. Others concluded, more modestly, that it was the "falling water level" of reduced tariffs that had made the NTB reef more important, and certainly more visible.[12]

Joined with increased complaints about foreign subsidies was the sense that the United States was not doing much to combat them. The Senate Finance Committee expressed unhappiness "that the Treasury Department has used the absence of time limits to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law."[13] This charge was not ungrounded, for at Treasury there was a fairly widespread view that the law was archaic, with its old-fashioned language ("bounty or grant") and 19th century origins.

The increased attention to nontariff trade distortions, and above all to subsidies, reinforced the widespread Washington perception that other countries were taking advantage of the United States—that it was, in the words of Nixon White House aide Peter M. Flanigan, "more sinned against than sinning."[14] There was evidence to support this view.[15] Moreover, the opaqueness of governments' nontariff policies affecting trade—the difficulty in seeing and measuring them and determining their extent—made it hard to resist those who argued that such foreign practices were endemic and that the United States needed to respond forcefully.[16] The record on CVDs and dumping suggested that it had not been doing so.

One way Congress addressed this problem was by making clear that subsidies should be given priority in the upcoming Tokyo Round, in which nontariff trade distortions were to be the central focus. The other way was to tighten the remedy procedures. On countervailing duties, the

12. Gary Clyde Hufbauer and Joanna Shelton Erb, *Subsidies in International Trade* (Washington, DC: Institute for International Economics, 1984), 2.

13. US Congress, Senate Committee on Finance, *Trade Reform Act of 1974*, 93rd Congress, 2nd session (26 November 1974), 183.

14. Quoted in *National Journal*, 13 January 1973, 45.

15. One study of overall Organization for Economic Cooperation and Development (OECD) data concludes that, among the seven major advanced industrial countries, "the United States has persistently exhibited the lowest ratio of subsidies to GDP and, unlike [that of] other countries, the US ratio has declined since the late 1960s." Hufbauer and Shelton Erb, *Subsidies in International Trade*, 2.

16. For a perceptive discussion of how the opaqueness of nontax trade policy nourishes perceptions of foreign "unfairness," see J. David Richardson, *Currents and Cross-Currents in the Flow of U.S. Trade Policy*, NBER Conference Report (Cambridge, MA: National Bureau of Economic Research, 1984), 2–3.

1974 act added a requirement that final action be taken within a year of receipt of a petition and made provision for judicial review of decisions that denied relief. Such review was also provided for negative antidumping decisions. One technical provision required the Treasury Department to disregard certain low-cost home-market sales in determining the price against which export sales were compared to ascertain whether dumping existed. This had the effect of favoring petitioners and could even lead to findings of dumping in cases in which the average home and export prices were the same!

## The Result: Slightly More Relief

The immediate result of the changing of the rules in 1974 was that firms filed many more cases and the government moved more expeditiously in handling them. Petitions for escape clause relief, for example, rose from two in 1973 (and none in 1974) to 13 in 1975. The number of CVD investigations initiated shot up from one in 1973 (and five in 1974) to 38 in 1975, both because new claims were being submitted and because the Treasury was moving faster on old ones under the new timetable.[17]

But in terms of actual relief granted, industry petitioners were again to be disappointed.

The new escape clause criteria established by Section 201 were affecting the US International Trade Commission, which was now finding regularly in petitioners' favor. Between 1975 and 1990, the commission conducted 62 investigations, which resulted in 30 affirmative determinations. This 48 percent success rate at the USITC for those who sought relief contrasted sharply with the 13 percent rate (4 of 30) under the previous law. And the escape clause cases included important import-affected industries: carbon and specialty steel, shoes, color television sets, and, grandest of all, automobiles.

In the 1974 act, however, Congress had reluctantly retained the president's discretion to modify or reject a USITC relief recommendation, provided he determined that "provision of such relief is not in the national economic interest of the United States." This was a broader criterion than the industry-specific rules that governed the decisions of the commission. Applying this more comprehensive standard, presidents repeatedly rejected or modified the commission's escape clause recommendations.

In the 30 cases in which the USITC recommended import relief between 1975 and 1990, the president ordered tariffs or quotas in only 10 and denied all relief in 12. In five cases, he provided only adjustment assistance, and in the remaining three he initiated negotiations leading to orderly

17. *International Economic Report of the President* (Washington, DC: Government Printing Office, March 1976), 45.

marketing agreements (OMAs) with the exporting nations to limit their sales. Congress complained that the law was not being implemented, but it never actually voted to override the president.

As it did prior to the 1974 Trade Act, this situation again yielded present gains for the liberal trade order.[18] But it piled up future costs, for the effect was to discredit the process, perhaps more than previously. Before, almost nobody got relief, but at least the rules were being followed. Now, industries were playing by the rules and winning in the USITC, only to have those decisions reversed by the president, who asserted his prerogative in an opaque White House decision-making process in which they had no established role. The footwear case of 1976 was a good example. The Ford administration's trade representative had promised favorable consideration of such a case when the Trade Act was before the Senate.[19] But it reached the president for decision one month after he had granted relief to the specialty steel industry, and Ford was worried about the international repercussions of restricting trade twice in a row. So he rejected import relief, granting only adjustment assistance.[20]

The shoe case was in fact reconsidered, and the Carter administration negotiated export restraint agreements with Korea and Taiwan a year later. Nor was this unique. The producers of "bolts, nuts, and large screws," to cite another example from the latter 1970s, were denied relief by President Carter in 1978, only to be granted it the next year after strong congressional pressure led to reconsideration of their case.

By easing the criteria but retaining presidential discretion, Congress had turned the political process on its head. The aim had been to take trade "out of politics." But once the USITC began regularly finding in petitioners' favor, product cases were thrown squarely into the political arena and resolved in a process governed by different "rules" entirely. The president had to weigh the demands of an injured industry, of trade politics, and sometimes of electoral support against the interests of the larger economy, the need to combat inflation, the demands of international economic leadership, etc. Industries had reason to fear that their legitimate cases would get lost in this larger shuffle.

The escape clause received a further blow in the automobile case of 1980, the most important and visible import issue ever addressed under the procedure. The American auto industry and its workers were suffering a severe drop in their production and sales, which was clearly exacer-

18. For a detailed analysis welcoming this result, see Walter Adams and Joel B. Dirlam, "Import Competition and the Trade Act of 1974: A Case Study of Section 201 and its Interpretation by the International Trade Commission," *Indiana Law Journal* 52, no. 3 (Spring 1977): 535–99.

19. STR William D. Eberle to Senator Thomas J. McIntyre, *Congressional Record*, 13 December 1974, 39813.

20. See Roger Porter, *Presidential Decision Making: The Economic Policy Board* (Cambridge, MA: Cambridge University Press, 1980), chapter 6.

bated by record Japanese imports. Yet a three-to-two majority of USITC members found that the industry failed to meet the "substantial cause" criterion: factors other than imports were more important causes of the industry's plight—above all, the shift in market demand toward smaller cars brought about by the oil price increase of 1979. Thus, the USITC was unable to recommend relief.

The decision was defensible in terms of the law. Nonetheless, the result was to further discredit Section 201. The US political system found the negative outcome impossible to live with. House Trade Subcommittee Chairman Charles A. Vanik (D-OH) had argued repeatedly for running trade according to the rules, "depoliticizing" it. Yet when the "economic law" produced a negative outcome on autos, he was quick to call hearings to explore the need for alternative trade action.

In response to congressional pressure, and to a Reagan campaign commitment, the new administration ended up pressing—successfully—for Japanese voluntary restraint on auto exports. As a result, the escape clause procedure was further discredited. In the three years after 1980, the USITC received only four escape clause petitions.

On countervailing duties—unlike the escape clause—there is no general presidential authority to override the procedure in the name of broader American interests. The basic law is mandatory: If a subsidy is found, a duty "shall be imposed." However, a special waiver authority was added for the Tokyo Round multilateral trade negotiations (MTN) of the 1970s, in which a primary US negotiating goal was to discipline trade-distorting subsidies.

The US government had something to give on this issue. Contrary to GATT rules, as Europeans had long complained, US law did not require that injury be found from imports before a CVD was imposed. Europeans were not about to negotiate if the United States simultaneously began enforcing a tough antisubsidy statute. So Congress reluctantly granted the secretary of the Treasury the authority to waive imposition of CVDs for four years if the foreign government was taking steps to reduce a subsidy's effect, and if the secretary found that imposition of a duty would "seriously jeopardize" completion of the MTN, including the desired subsidies code.

In practice, this waiver authority took away from affected industries much of the gain that the 1974 act provided. From 1976 through 1978, for example, the Treasury made a total of 35 affirmative CVD decisions, a marked increase from previous years. But the secretary then exercised the waiver in 19 of the cases. More than half of the time, then, "successful" petitioners were denied the full remedy that the law, in principle, provided.[21]

21. US Department of the Treasury, *Annual Report*, Washington, DC, various issues; US Congress, House Committee on Ways and Means, *Temporary Extension of Countervailing Duty Waiver Authority*, 96th Congress, 1st session (22 February 1979), HR 96-15. The latter describes the 19 waivers and their status as of the report date.

In contrast, the number of antidumping cases during this period remained at about the level of previous years. However, the filing of a large number of such cases by the steel industry in 1977 led the Carter administration to establish a price floor on imports with the trigger-price mechanism, which was enforced under the antidumping law.[22]

In summary, in the years after 1974, industries were getting only slightly more relief from administrative procedures than they had before—Trade Act changes notwithstanding. So unhappiness built up again about the remedy procedures. The House Ways and Means Committee reflected this in 1979, declaring that "both the countervailing duty and antidumping duty laws have been inadequately enforced in the past, including the lack of resources devoted to this important area of law."[23]

## The Trade Agreements Act of 1979

The required approval of the Tokyo Round/MTN in 1979 gave Congress a new opportunity to act. The minimum need was legislation to implement the nontariff barrier codes completed early that year. Since the principal countries were unable to resolve their differences on escape clause issues, the intended safeguards code was not completed. So Section 201, the US law governing escape clause relief, was left unchanged.

The codes on subsidies and countervailing measures and on antidumping, however, were the MTN's centerpieces. The negotiation of the former had been fueled by a widely shared conviction, in the words of one leading authority, that "the current rules on subsidies and countervailing duties" were "woefully inadequate to cope with the pressures put upon importing economies by a myriad of subtle (and sometimes not so subtle) governmental aids to exports."[24] Now that the code was completed, legislation was necessary to make US law conform. The United States had to incorporate in its statutes the requirement that "material injury" be proven before countervailing duties were imposed on imports from coun-

22. See Hideo Sato and Michael W. Hodin, "The U.S.-Japanese Steel Issue of 1977," in I. M. Destler and Hideo Sato, eds., *Coping With U.S.-Japanese Trade Conflicts* (Lexington, MA: Lexington Books, 1982), 27–72.

23. US Congress, House Committee on Ways and Means, *Trade Agreements Act of 1979*, 96th Congress, 1st session (3 July 1979), HR 96-317.

24. John H. Jackson, "The Crumbling Institutions of the Liberal Trade System," *Journal of World Trade Law* 12, no. 2 (March–April 1978): 95.

tries adhering to the code. But nothing barred more extensive statutory changes as long as they were consistent with the codes and other US international obligations. So revision of these statutes became part of the bargaining process for MTN ratification.

In the 1974 act, Congress had committed itself to an expeditious, up-or-down vote on whatever implementing legislation the president submitted. To maximize congressional support, Special Trade Representative Robert S. Strauss, who led the Carter administration's negotiating enterprise at home as well as abroad, accepted the proposal of the Senate Finance Committee to have the bill designed and drafted on Capitol Hill, as a collaborative effort of the two branches (see chapter 4). Key industries like steel, and concerned senators like John Heinz (R-PA), made it clear that their priority was the trade remedy laws. They wanted to ensure, this time, that they would provide petitioners effective and timely relief. And Strauss saw this as a tolerable price for their support.

The most visible change—a "material injury" test for all CVDs on products of countries adhering to the new code—had the formal effect of tightening the criteria relief-seeking firms had to meet. Here, the administration and the House Ways and Means Committee prevailed over a Senate Finance Committee proposal to soften the requirement to the single word "injury." Lobbyists for the European Community actively supported the tougher standard. Still, "material injury" was defined as "harm which is not inconsequential, immaterial or unimportant"; this is significantly less demanding than the escape clause test that imports be "a substantial cause of serious injury." More important, perhaps, by bringing US law into conformity with GATT and international practice, the injury standard legitimized use of CVDs in future cases.

If the new injury test affected the criteria for obtaining relief, the Trade Agreements Act of 1979 employed a different means to aid petitioners—reforming the law's procedures and administration. Tighter time limits were mandated not just for CVD cases taken as a whole but for their specific stages; for example, an investigation had to be initiated within 20 days, and only "clearly frivolous" petitions, or those lacking key information reasonably available to petitioners, were to be dismissed without any formal investigation. The overall timetable from initiation to final determination was compressed, in normal cases, from a year to seven months. This tended to favor petitioners, since foreign governments and firms had less time to develop the complicated countercases that were needed to rebut the data of those seeking relief. Moreover, if there was a preliminary finding of subsidy (and injury), importers would now have to post a deposit just three months (instead of a year) after a petition was submitted. Thus effective trade restraint could be obtained much

sooner.[25] Parallel steps were taken on antidumping procedures to shorten time limits, advance the time when exporting firms had to pay or advance penalty duties, and promote openness and judicial review.

But the most important single change was organizational, the shift of administrative responsibility for the unfair-trade remedies laws. This, although not an explicit provision of the Trade Agreements Act of 1979, was a not-so-subtle condition of its approval, as the Senate Finance Committee declined to bring that act to the floor until the president had submitted a comprehensive trade reorganization plan. In this plan, the power to enforce the rewritten CVD and antidumping laws was delegated not to the secretary of the Treasury—the responsible official since 1897—but to the secretary of Commerce. Members of both key congressional committees were convinced that his department would take the job more seriously and be more sympathetic to industry concerns. And they were right.

## The Declining Use of the Escape Clause

How did the administrative trade remedies—"the rules" as amended—play out in practice after 1979? The most dramatic development was the contrast between the declining use of Section 201 and adjustment assistance and the upsurge in new petitions alleging unfair foreign trade practices. (See table 6.1.)

The escape clause was used above all during the Reagan reelection campaign. The USITC ruled on just one case in 1981, one case in 1982, and two cases in 1983. In January 1984, however, the carbon steel, shoe, copper, and table flatware industries all submitted petitions in order to pressure the Reagan White House for sympathetic action at a time of maximum political vulnerability.[26] By March, the USITC suddenly found itself investigating no fewer than five escape clause cases. Section 201 had been transformed from a means of diverting political pressure into a device for exerting it. In two prominent cases—steel and copper—the USITC recommended protection, forcing presidential decisions in September, within two months of the general election. The president denied relief to the copper industry but ordered negotiation of export restraint agreements for steel, as spelled out later in this chapter.

25. There were also a number of changes aimed at greater procedural openness. Administrative protective orders gave petitioners' counsel access to confidential business information supplied to the government by foreign exporters. Limits were imposed on private ex parte meetings between government officials and one party to a case; the substance of these meetings now had to be made public. Rights to public hearings and judicial review were also expanded. For example, labor unions and trade associations that had not initiated a case could now appeal.

26. In 1980, the United Auto Workers—in what was widely seen as a political blunder—did not submit its auto escape clause petition until June; as a result, the USITC did not reach its finding until after the November election.

**Table 6.1 Antidumping, countervailing duty, and Section 201 investigations initiated from 1979 to 1994**

| Year | Antidumping cases | Countervailing duty cases | Section 201 cases |
|---|---|---|---|
| 1979 | 26 | 40 | 4 |
| 1980 | 21 | 14 | 2 |
| 1981 | 15 | 22 | 1 |
| 1982 | 65 | 140 | 3 |
| 1983 | 46 | 22 | 0 |
| 1984 | 74 | 51 | 7 |
| 1985 | 66 | 43 | 4 |
| 1986 | 71 | 27 | 1 |
| 1987 | 15 | 8 | 0 |
| 1988 | 42 | 11 | 1 |
| 1989 | 23 | 7 | 0 |
| 1990 | 43 | 7 | 1 |
| 1991 | 51 | 8 | 0 |
| 1992 | 99 | 43 | 1 |
| 1993 | 42 | 5 | 0 |
| 1994 | 43 | 7 | 0 |
| **Total** | **742** | **455** | **25** |

*Sources:* Author's calculations, based on tallies from US International Trade Commission; ALLAD-Casis and ALLCVD-Casis databases, and the *Federal Register*, various issues.

The footwear industry was not so fortunate. In July 1984, the USITC made a unanimous negative finding on injury, because manufacturers' profits were high. At the initiative of Senator John C. Danforth (R-MO), Congress then changed the law so that profits could not be, by themselves, the decisive USITC criterion. The industry then resubmitted its case in December. Responding to the statutory change and a worsening of the industry's plight, the USITC now recommended stringent quotas. But now President Reagan said no, denying all import relief to the footwear industry in August 1985.

The rest of the decade saw only one more successful escape clause case—the petition of the wood shingles and shakes producers claiming injury from Canadian competition. Concerned about generating support for US-Canada free trade negotiations, President Reagan imposed in May 1986 a declining tariff with a peak of 35 percent. Only two escape clause petitions were submitted in 1987–90, neither of them successful.

## The Decline of Trade Adjustment Assistance

Also in decline over this period was that pressure-diverting program that had once seemed most promising and constructive: trade adjustment assistance for workers.

When such a program was originally proposed, the most sophisticated postwar study of trade policymaking lauded it as an approach that "could destroy the political basis of protectionism by giving the injured an alternative way out."[27] But because the injury threshold was originally set so high, it yielded little trade relief in the decade after its enactment in 1962. In the late 1970s, however, following the 1974 act's expansion of benefits and easing of eligibility criteria, this program began at last to be seriously tested. The explosion of TAA claims (mainly from laid-off auto workers), combined with the very generous financial benefits provided, drove the cost to $1.6 billion in fiscal year 1980, six times the previous peak.[28]

Jimmy Carter pointed to this expansion as a humane response to the workers' plight and a constructive alternative to protection. But Ronald Reagan came to power looking for programs to cut and predisposed against the economic interventionism that TAA exemplified. Since analytic studies indicated that TAA was not in practice fulfilling the goal of adjustment—helping workers move to other, more competitive industries—it was a vulnerable target for Reagan's new budget director, David A. Stockman, who was opposed to entitlement programs available only to certain groups of workers. Nor did the Reagan administration make this program a chosen instrument when it shifted to trade activism in the fall of 1985.[29]

So beginning with the Omnibus Budget Reconciliation Act of 1981, the level and duration of benefits were cut and total program funds were slashed. Stipends were limited to the level of regular unemployment insurance, whereas previously they had supplemented such benefits. Moreover, they were now available only after a worker's eligibility for unemployment benefits had been exhausted, and they were generally limited—by a 1988 amendment—to workers undergoing retraining. Congressional champions managed, through persistent effort, to keep TAA alive in statute. And a modest additional trade adjustment program was inaugurated in 1994 for workers displaced by NAFTA. But as of 1994, the overall TAA budget (including NAFTA) totaled only about $200 million annually, with just 65,000 workers eligible for benefits.

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27. Raymond A. Bauer, Ithiel de Sola Pool, and Lewis Anthony Dexter, *American Business and Public Policy: The Politics of Foreign Trade* (Chicago: Aldine-Atherton, 2d ed., 1972), 43.

28. C. Michael Aho and Thomas O. Bayard, "Costs and Benefits of Trade Adjustment Assistance," in Robert E. Baldwin and Anne O. Krueger, eds., *The Structure and Evolution of Recent US Trade Policy* (Chicago: University of Chicago Press, 1984), 184. For a comprehensive assessment of trade adjustment programs in the 1970s and 1980s, see Gary Clyde Hufbauer and Howard F. Rosen, *Trade Policy for Troubled Industries*, Policy Analyses in International Economics 15 (Washington, DC: Institute for International Economics, 1986).

29. Howard Rosen, "US Assistance for Trade-Related Workers: A Need for Better Coordination and Reform," statement before US Congress, House Committee on Ways and Means, Subcommittee on Trade (1 August 1991), processed, 8–12.

## The Upsurge in "Unfair Trade" Cases

But if use of the escape clause had waned, and if TAA barely survived, there was a sharp increase in petitions under the unfair-trade practices statutes. Many more cases were submitted, covering a much greater volume of trade. And many more were decided in petitioners' favor. For the first time, the process was a serious one, with the responsible bureaucracy (the Commerce Department) making a strong effort to administer it according to its intended purposes.[30]

In response to industry petitions, Commerce initiated 249 CVD investigations over 1980–84, and 96 more in 1985–89. (This compares with one investigation initiated in 1973 and five in 1974.) Parallel antidumping investigation numbers were 221 for 1980–84 and 217 for 1985–89.[31] Gary Horlick and Geoffrey Oliver observed in 1989 that "AD [antidumping]/CVD laws have become the usual first choice for industries seeking protection from imports into the U.S."[32]

Moreover, when petitioners sought relief under these statutes, they more often than not obtained it. Of 258 CVD petitions in 1980–89 carried through the full statutory process, 135, or 52 percent, won either imposition of duties or suspension of the offending foreign practice. The remaining 87 were withdrawn by petitioners, almost always because the source nation had promised to limit exports. On antidumping, the numbers over the same period were similar—out of 327 petitions carried to term, 173 (53 percent) resulted in duties or suspension agreements, and 111 more petitions were withdrawn, largely after agreement on voluntary export restraints.

Unlike relief under the escape clause—which is limited to a specified term—CVD and antidumping relief continue indefinitely, unless and until

30. See Shannon Stock Shuman and Charles Owen Verrill, Jr., *Recent Developments in Countervailing Duty Law and Practice*, NBER Conference Report (Cambridge, MA: National Bureau of Economic Research, 1984). See also the candid testimony of former Deputy Assistant Secretary of Commerce Gary Horlick in US Congress, House Committee on Ways and Means, *Options to Improve the Trade Remedy Laws*, 98th Congress, 1st session (16 March 1983), part 2, 535–87.

31. The numbers that follow are a compilation based on analysis and cross-checking of data from a range of documents, including Commerce Department reports submitted semiannually to the GATT; USTR Trade Action Monitoring System reports; USITC annual reports; congressional hearings; other Commerce, USTR, and USITC reports; and the *Federal Register*. These have been supplemented by direct communication with responsible officials to fill gaps and resolve contradictions. I am grateful to Diane T. Berliner for her persistent and painstaking work in putting these numbers together for the original edition, and to Paul W. Baker, Steven Schoeny, Tomoyuki Sho, and Andrew Mosley for their equally thorough and professional efforts in reviewing and updating these data. The underlying case information is posted at www.iie.com.

32. Gary N. Horlick and Geoffrey D. Oliver, "Antidumping and Countervailing Duty Law Provisions of the Omnibus Trade and Competitiveness Act of 1988," *Journal of World Trade* 23, no. 3 (June 1989): 5.

a Commerce Department review determined that circumstances no longer justify it. Thus, at the end of 1990 there were 72 countervailing duties still in effect, and 202 antidumping duties. This compares with 56 and 137, respectively, in effect in mid-1983.

The "unfair trade" statutes were now a real alternative to statutory trade restrictions. So if the original political logic remained valid, both the petitioning industries and the supporters of liberal trade should have been more or less satisfied: the former because their cases were at last being taken seriously, the latter because they were being handled by apolitical, quasi-judicial procedures that considered each case in isolation, protecting Congress and minimizing the risk of protectionist contagion.

In the real world, alas, discontent remained. Affected industries continued to protest the laws' inadequacy and seek their further elaboration and complication to cover imports that still escaped their reach. But the same lack of executive branch discretion that kept executive officials from denying or diluting relief also prevented them from tailoring it to an industry's needs, whether the goal be protection or adjustment.

Foreign interests were dismayed because the trade remedy procedures seemed arbitrary and unfair (and expensive) to them. They were also unhappy because the US legal tradition clashes with their more discretionary ways of handling such issues. US laws are, for the most part, GATT-consistent, proper under the international trade rules that Americans have done so much to create. Indeed, elaborating these rules was one of the prime accomplishments of the Tokyo Round. But other peoples—Europeans, Japanese, Koreans, and Brazilians—see "due process" for American domestic interests as a threat to their interests. They (the Europeans above all) are typically anxious about the real trade effects of US legal decisions: their overall magnitude and how the pain will be distributed among foreign suppliers. They are unwilling to let their fates be determined by procedures that might seem objective and fair and nonpolitical to Americans, but which to foreign eyes appear both unpredictable and skewed in favor of the import-affected petitioner. And these cases inevitably involve "a host of arbitrary determinations":[33] calculating fair value, the full cost of production, the effect of different government programs on export prices, etc.

So it is not surprising that foreign firms and governments are receptive to alternatives. If US processes are going to end up restricting their trade, they want to have a voice in how the pain is allocated.

Actually, the 1979 law did create one new procedure for negotiating an end to a trade remedy case. In a major departure from previous trade laws, it authorized "suspension of investigations" through agreements

33. Robert W. Crandall, "The EEC-US Steel Trade Crisis," paper prepared for Symposium on Euro-American Relations and Global Economic Interdependence, College of Europe (Bruges, Belgium, 13 September 1984). Quoted with permission.

with foreign governments, or with "exporters representing substantially all of the imports of the merchandise"[34] covered by a case. But Congress sought to ensure that the purposes of the laws would not be subverted by conditioning such suspension on one of two forms of remedial action: elimination of subsidies or dumping (directly, or through imposition of an offset like an export tax), or elimination of their injurious effect. In other words, the point was to remove the subsidy, or at least its trade impact, not to bargain about market share.[35]

Typically, foreign firms and governments want more leeway than this. They may not agree with US legal determination of subsidy or "less-than-fair-value" (dumped) sales, and even if they do, they may have their own political or legal problems in complying. US firms have recognized and exploited this foreign vulnerability. Beginning with the steel antidumping petitions of 1977, they submitted cases aimed less at achieving the specific relief provided by statute than at creating an intolerable situation for foreign competitors, forcing them to come to the bargaining table and cut deals. Once a satisfactory arrangement was reached, the constraints of the law on suspension of investigations were circumvented by a simple device: the complaining industry withdrew its petition, and Commerce then terminated the investigation, as the law explicitly allows.

## Forcing Political Solutions

A dramatic illustration came in the steel cases of 1982. There was little doubt that some foreigners were subsidizing steel that was being shipped to the US market; within Europe, the French and British were especially guilty.[36] So when on 11 January 1982, seven US steelmakers jointly delivered 494 boxes

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34. House Committee on Ways and Means, *Trade Agreements Act of 1979*, 54.

35. For a description and defense of Commerce Department administration of this provision through mid-1984, see Alan F. Holmer and Judith H. Bello, "U.S. Import Law and Policy Series: Suspension and Settlement Agreements in Unfair Trade Cases," *International Lawyer* 18, no. 3 (Summer 1984): 683–97.

36. For one comprehensive effort to catalog such subsidies, see Bethlehem Steel Corporation and United States Steel Corporation, "Government Aid to the Steel Industry of the European Communities: Market Distortion in Europe and Its Impact on the U.S. Steel Industry," report prepared by Verner, Liipfert, Bernhard, McPherson, and Hand (Washington, DC, 1984).

It does not follow, however, that foreign subsidies are the primary cause of US industry woes, or that their removal would bring substantial market relief. Robert W. Crandall argues, in fact, that while in an entirely private (nonsubsidized) European steel industry the worth of plants might be very much lower, "no one has presented any convincing evidence that capacity and output would be much lower under such a regime." And even if European output and exports did fall, "Brazil, Taiwan, Korea, and even Canada and Japan have the ability to expand their output and even their capacity substantially in response to any upward movement in export prices." See Crandall, "The EEC-US Steel Trade Crisis," 26.

containing 3 million pages of documentation for 132 countervailing and antidumping petitions against foreign (mainly European Community) suppliers, this flood of litigation had real-world justification. And the remedy sought was the proper one provided under American law. Further petitions followed, bringing the total for 1982 to about 150.[37]

But there was little doubt also that pursuing these cases to their legal conclusion would be highly disruptive to the steel industries of individual European Community countries and to the network of political understandings among them. Inevitably, the Europeans sought to bargain. And US Secretary of Commerce Malcolm Baldrige was pushed into the position of brokering between foreign governments and domestic steel makers for a trade-restricting arrangement entirely outside established procedures. Under this arrangement the EC "voluntarily" restricted carbon steel exports to the United States to 5.44 percent of the US market. And while this overall limit corresponded roughly to what the outcome of enforcing US law would have been, the Europeans distributed the pain among themselves so that the efficient Germans ended up worse off than they would have been, and the inefficient British and French better off.[38]

In the fall of 1983 came another example, involving China and textiles. Unhappy with the terms of a bilateral quota agreement concluded in August, the US textile industry retaliated with an innovative suit, alleging that China's dual exchange rate system constituted a subsidy under the CVD law.

This put US authorities in another bind. They had just reached a deal with China, but its substance was being threatened by a procedure over which they had little control in the short run. They feared that, to Beijing, the administration would appear either two-faced or impotent at a time when the president was preparing for a major state visit the following spring. And the Chinese government, choosing to treat the matter as an internal US problem, resisted supplying information to contest the suit.

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37. US International Trade Commission, Annual Report, 1982, Washington, DC, x; Office of the United States Trade Representative, *Twenty-sixth Annual Report of the President of the United States on the Trade Agreements Program, 1981–82*, Washington, DC, November 1982, 114; Timothy B. Clark, "When Demand Is Down, Competition Up, That Spells Trouble for American Steel," *National Journal*, 7 January 1984, 9.

38. It was primarily the Europeans who administered the restraint. However, to be on the safe side, the Commerce Department—with the aid of Senator Heinz and over the procedural protests of House Trade Subcommittee leaders—slipped through Congress an amendment to the Tariff Act of 1930 providing that "steel mill products" under arrangements entered into "prior to January 1, 1983" would be denied entry into the United States if they lacked proper foreign government documentation. (*Congressional Record*, 29 September 1982, S12474–75; *Congressional Record*, 1 October 1982, H8368–71, H8388–89.) With these "arrangements" completed, the industry petitioners withdrew their suits.

The administration might have ridden the storm out internationally and domestically.[39] But senators from key textile states—Strom Thurmond (R-SC) and Jesse Helms (R-NC)—were up for reelection in 1984. They pressed the White House to do something for the industry. President Reagan, also up for reelection, saw personal political advantage in responding; moreover, in the 1980 campaign, he had made a general commitment to moderate the growth of textile imports. So in December 1983, against the overwhelming advice of his cabinet, he ordered a deal that gave the US textile industry tighter enforcement of existing quota arrangements, not particularly vis-à-vis mainland China but on East Asian imports generally. The industry then withdrew its suit at the last possible moment. Reagan had appeased the textile people without alienating Beijing, but at the cost of further compromise of both trade process and trade policy.

As 1984 began, the steel industry inaugurated a new round with the same old tactics. With European sales fixed at about 5 percent of US consumption and the Japanese informally limiting themselves to about the same amount, the remaining threat was the newly industrialized countries: Brazil, Mexico, and Korea in particular. Again, there was a blizzard of paper, with multiple submissions of CVD and antidumping cases. This time no one tried very hard to conceal the political rationale. As David M. Roderick of United States Steel told a press breakfast in early February, US firms planned to file "a tremendous number" of unfair trade complaints, aiming to make the total impact so "burdensome" that the administration, and "all players of substance in the import game . . . would be very pleased to enter into quotas in a negotiated manner."[40]

The steel industry had been the prime force behind the legislative changes of 1979 and the prime user of the rules on unfair trade practices since then. Now its explicit goal was "temporary" steel import quotas, however they might be achieved or implemented. The results would demonstrate that for trade as well, in Justice Holmes's words, "great cases make bad law."[41]

## Steel Wins Comprehensive Protection

What ended up forcing a decision was an action by United States Steel's principal rival, Bethlehem Steel, and their union, the United Steelworkers. Citing an increase in the market share taken by imports from 15 percent

39. In May 1984, in fact, the Commerce Department would rule that the CVD law did not apply to imports from nonmarket-economy countries, and this position was later upheld in the Federal Circuit Court of Appeals. (Without a competitive market as a reference point, the word "subsidy" loses its meaning.)

40. *Washington Post*, 9 February 1984.

41. Oliver Wendell Holmes, Jr., *Northern Securities Company v. United States*, 193 US 197, 400 (1904).

in 1979 to 25 percent in early 1984, at a time of decline in domestic production and a 200,000-person drop in steel employment, they submitted an escape clause petition in January 1984, seeking protection so that domestic firms could generate the cash flow to remain in business and finance modernization.

The following July, the USITC found by a three-to-two vote that imports had been a substantial cause of serious injury in five of the nine major steel import categories. For relief it recommended a mixture of tariffs, quotas, and tariff-rate quotas for five years on products in those five categories. This recommendation came in late July, and under the law the president had just 60 days to implement, modify, or reject it.

Ronald Reagan's response, in the midst of the general election campaign, was, in the words of one administration insider, "a masterpiece of blue smoke and mirrors."[42] He had his trade representative, William E. Brock, announce that the president was rejecting the USITC recommendation: "The President has clearly determined that protectionism is not in the national interest. It costs jobs, raises prices and undermines our ability to compete here and abroad."[43] But having hoisted the banner of free trade in the first paragraph, Brock's announcement then "noted," in the second paragraph, that American steel firms and workers faced an "unprecedented and unacceptable" surge of imported steel due both to "massive unfair trade practices" and "diversion of steel imports into the US markets due to quotas and import restraints in other nations."[44] Brock would therefore "consult with those nations responsible . . . with a view toward the elimination of such practices." Meanwhile, the government was "to vigorously enforce US fair trade laws."

So far, so good, perhaps. But after further bows to the need "to liberalize world trade" and not "put at risk the exports of our farmers and other workers in export industries," the statement reached the crux of the matter on its third page:

> The president's decision assumes the continuation of the US/European Community's arrangement on steel as well as voluntary agreements announced earlier by Mexico and South Africa. . . . In some instances the US Trade Representative could be instructed to negotiate voluntary restraint agreements with other

42. The announcement had both protectionists and antiprotectionists cheering—for a day! Then the latter figured out its real content. The insider was William A. Niskanen, then a member of Reagan's Council of Economic Advisers. See Niskanen, *Reaganomics: An Insider's Account of the Policies and the People* (New York: Oxford University Press, 1988), 143.

43. Office of the United States Trade Representative, press release, 18 September 1984, 1.

44. Such quotas and import restraints were indeed rife abroad, but the case linking them to diversion of steel here was weak. Were that the case, prices in the US market would have been below those in, say, Japan. In fact, they were higher. The prime cause of increased imports was, rather, the growing competitive disadvantage of US firms in many product lines, which was exacerbated by the strong dollar.

> countries. . . . Such restraint could cover products on which there was no injury determination. . . .

The statement concluded with an expression of "hope" that "this combination of actions, taken without protectionist intention or effect," would cause the market to "return to a more normal level of steel imports, or approximately 18 percent, excluding semi-finished steel."[45]

Brock insisted initially that this market share figure was a target, not a binding commitment, but steel officials who had just met with the president clearly felt otherwise, and they expressed their gratification with the decision. And little wonder: the events of the remainder of 1984 made it clear that the president's "national policy for the steel industry," as it came to be labeled, was a lot more protectionist than the USITC program he rejected. Asked to provide backup enforcement authority for foreign export restraints, Congress did this and more. It put into statute a target for fair import share: 17 percent to 20.2 percent of the US market, declaring further that in the absence of "satisfactory results within a reasonable period of time, the Congress will consider taking further legislative action."[46]

In the months that followed, agreements were negotiated or reaffirmed with every major foreign seller, whether or not the seller in question subsidized sales, and whether or not the USITC had found injury from imports of the seller's products. What all this amounted to was systematic circumvention of the rules for enforcing fair trade, for creating a level playing field, to which the administration, and Congress, claimed to give highest priority!

Ronald Reagan's successor, George H. W. Bush, initially followed a similar course. The Reagan VERs lasted five years, through 30 September 1989. Having committed himself to extending them during the 1988 election campaign, Bush now needed to decide how. The circumstances clearly favored some relaxation of the system: over the original quota period, the dollar had plummeted and the US steel industry had undergone major restructuring. As a result, according to the USITC, "nearly all of the VRA countries exported less steel to the United States in 1988 than they were allowed."[47] After an intense debate among competing interests,

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45. This translated into an import share figure of 20.2 percent when semifinished products were added.

46. Quotations taken from the Trade and Tariff Act of 1984, section 803, and US Congress, House, "Joint Explanatory Statement of the Committee of Conference," *Trade and Tariff Act of 1984*, 98th Congress, 2nd session (5 October 1984), HR 98-1156, 197–98.

47. US International Trade Commission, *The Effects of the Steel Voluntary Restraint Agreements on U.S. Steel-Consuming Industries*, Report to the Subcommittee on Trade of the House Committee on Ways and Means on Investigation No. 332-270 Under Section 332 of the Tariff Act of 1930, USITC Publication 2182, Washington, DC, May 1989.

Bush announced on 23 July a "Steel Trade Liberalization Program," with the declared objective "to phase out in a responsible and orderly manner the voluntary restraint arrangements . . . and to negotiate an international consensus to remove unfair trade practices."[48] In the short run, Bush basically kept the quotas in place, though country ceiling levels were raised slightly. But he rather bravely set the phaseout period for two and a half years, so quotas would come off early in the election year of 1992, and he delivered on his pledge and ended them then. The industry responded with 36 new CVD and 48 new antidumping cases.

In the United States, this tendency to exploit unfair-trade laws to gain favorable trade-restricting deals left liberal traders and procedural purists isolated and vulnerable. It also put executive officials in a bind. It was hard for them to resist cutting a deal when producing interests on both sides of the border wanted one—foreign exporters seeking market stability (and quota rents) and home firms pressing for import constraint.

## New Legislative Initiatives

Even as steel and other industries were exploiting existing laws to force negotiated protection, other parties were seeking further amendment of these laws. Foremost among these were industries pointing to alleged abuses the laws did not cover, but also seeking change were persons who opposed political fixes and wanted to make it harder for industries to use the laws to this end. An early leader in this movement was a man with a foot in both camps, Chairman of the House Ways and Means Subcommittee on Trade Sam M. Gibbons.

The Florida Democrat opposed quotas and trade restrictions generally, but supported those designed to counter unfair foreign trade practices. Gibbons did not think it proper, however, that the trade remedy laws be circumvented through negotiation of quota arrangements.

Gibbons also had problems that were specific to his personal situation in the House. As a labeled free trader, he was vulnerable to the charge that he no longer reflected the prevailing view of House Democrats. This charge threatened the leverage of his subcommittee, and of Ways and Means as a whole, at a time of fierce jurisdictional conflict with Energy and Commerce under the aggressive leadership of John D. Dingell (D-MI) (see chapter 4). Gibbons therefore needed to show that he too could be tough about trade, but in a way consistent with the liberal system.

So he held comprehensive hearings on the trade remedy laws in the spring of 1983, and his subcommittee proposed a "Trade Remedies Reform

48. Letter from USTR Carla A. Hills to Anne Brunsdale, chairman, USITC, in *Steel Industry Annual Report*, Report to the President on Investigation No. 332-289 Under Section 332 of the Tariff Act of 1930, USITC Publication 2316, Washington, DC, September 1990, A-2.

Act" in early 1984 that would have extended the CVD law to two previously uncovered foreign practices. One of these was *export targeting*, defined broadly as "any government plan or scheme . . . the effect of which is to assist the beneficiary to become more competitive in the export of any class or kind of merchandise."[49] The second of these practices was *natural resource subsidies*: A government such as Mexico would keep the domestic price of, say, oil or natural gas below international market levels, conveying a cost advantage to producers of an energy-intensive product like fertilizer. So US ammonia producers sought relief.[50]

The bill balanced these potentially trade-restrictive steps with an effort to protect the integrity of the rules. It required that the president, not the secretary of Commerce, make all decisions to suspend or terminate CVD or antidumping investigations, and it provided that any resulting export restraint agreement could not "have an effect on US consumers more adverse" than the imposition of penalty duties through normal operation of the law.[51]

These proposals met serious resistance as the proposal reached the full committee and the House floor, and none of them were included in the 1984 Trade and Tariff Act. But trade remedy reform became a central issue in the omnibus trade legislation that began in the House in 1986 and became law in 1988. In HR 4800, the omnibus measure approved by

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49. US Congress, House Committee on Ways and Means, *Trade Remedies Reform Act of 1984*, 98th Congress, 2nd session (1 May 1984), HR 98-725, 26. The object of concern was Japan. The semiconductor case had brought to prominence the claim that "industrial targeting," or the singling out of specific industrial sectors for government favor to enhance their future export prospects, had been a prime cause of Japanese economic success. See Semiconductor Industry Association, *The Effect of Government Targeting on World Semiconductor Competition: A Case History of Japanese Industrial Strategy and Its Costs for America*, report prepared by Verner, Liipfert, Bernhard, and McPherson under the direction of Alan Wm. Wolff (Washington, DC, 1983). More idiosyncratic was the Houdaille machine-tool case. An enterprising Washington attorney, Richard Copaken, developed an ingenious argument for a once-obscure Florida machine-tool firm, alleging that Japanese subsidies of its competing industry derived (in part) from proceeds of community bicycle races. This case was, in the end, rejected by the Reagan White House in the spring of 1983, but in the meantime Copaken made the "Houdaille case" a household word among trade cognoscenti and a preoccupation within the executive branch for the better part of a year.

50. Such subsidies had not been countervailable under US and international practice because they did not meet the specificity test: they were not provided selectively to particular firms or industries, but were available on an economywide basis. For detailed treatment of these issues by two lawyers who addressed them in the Department of Commerce, see Alan F. Holmer and Judith Hippler Bello, "The Trade and Tariff Act of 1984: The Road to Enactment," *International Lawyer* 19, no. 1 (Winter 1985): 287–320; and Bello and Holmer, "Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test," *George Washington Journal of International Law and Economics* 18, no. 2 (1984): 297–329.

51. US Congress, House Committee on Ways and Means, Subcommittee on Trade, "Description of HR 4784, the Trade Remedies Reform Act, as Ordered Reported" (29 February 1984), processed, 2.

a 295 to 115 House vote in May 1986, "resource input subsidies" were made actionable under the CVD law and "export targeting" was listed as an "unreasonable or unjustifiable" foreign practice under Section 301. The escape clause was amended to allow emergency relief for producers of perishable products, and to transfer final decision-making authority from the president to the US trade representative.[52]

The 1986 bill died in the Senate, as chronicled in chapter 4. But such provisions were dusted off and included in the legislation of 1987 and 1988. The House bill contained "several amendments sought by coalitions of import-competing U.S. industry seeking more restrictive AD/CVD laws." These were "greatly changed in the Senate, following sustained lobbying by the Administration and by export-oriented large U.S. businesses," but that body added several additional antidumping/CVD amendments, "none of which were in the House bill."[53] Most prominent, once again, was the natural resources provision. Others featured such lawyerish labels as "diversionary input dumping," or addressed thorny technical problems like "non-market-economy dumping."

These problem provisions were split between the two bills, and the administration (and some export-oriented businesses) fought hard against them. With leaders in both houses wanting a bill the president would sign, the conference negotiations "led to the rejection or dilution of nearly all the 'restrictive' antidumping/CVD amendments."[54]

The experience of the 1980s underscored the impossibility of managing volatile trade issues primarily through the elaboration of quasi-judicial procedures. One could not make the laws reach potential, borderline subsidies without extending them into uncertain and controversial new areas supported by neither domestic nor international consensus. It was hard to avoid seeing the trade remedy reform movement as a new pursuit of an old illusion—that the really "hot" major trade cases could somehow be diverted from the political arena, and that the United States could, in the words of Gibbons's predecessor, "run trade on economic law." There was to be one more rewriting of the laws in the 1971–94 period, however, and this time the initiative came from those who would limit their reach.

52. See US Congress, House Committee on Ways and Means, *Comprehensive Trade Policy Reform Act of 1986*, 99th Congress, 2nd session (6 May 1986), HR 99-581, part 1.

53. Horlick and Oliver, "Antidumping and CVD Law Provisions," 6.

54. Ibid. There was a modest clarification of the "specificity test" for subsidies—Commerce was to consider not just whether a subsidy was de jure available to all producers within a country, but whether it was de facto widely used. If it was not widely used, then it would meet the specificity test and be countervailable under US law. In fact, Commerce had been applying the test in this way for several years, but the statutory language cleared up the confusion created by several Court of International Trade decisions.

## The Uruguay Round Antidumping Agreement

Antidumping law was among the major agenda items in the Uruguay Round. One might have thought that US officials, at a disadvantage in fighting the protectionist tilt domestically, would have seized on international negotiations as an antiprotectionist counterweight, just as their counterparts did with the tariff beginning in the 1930s. But neither the Bush nor the Clinton administration was so inclined. Using international agreement to constrain protectionist use of this mechanism does seem to have been in the mind of GATT Secretary General Arthur Dunkel, however, whose text—put forward in December 1991 to break a stalemate in the overall negotiations—contained provisions for antidumping law reform. In the climactic weeks of November–December 1993, US negotiators gave top priority to watering down these provisions, with some success, but substantial changes nonetheless remained in the final text—changes aimed at curbing practices that had tilted the process in favor of domestic protection seekers. Among the new requirements were the following:

- **Sunset**. An antidumping duty "shall be terminated on a date not later than five years from its imposition," unless a review establishes its continued justification. (US law had provided for antidumping duties to continue indefinitely unless a party requested and was granted a review.)
- **Start-up**. Production costs were to be adjusted for nonrecurring items that occur in the start-up period. (US law had not deducted for start-up.)
- **Price averaging**. "The existence of margins of dumping shall normally be established" by comparing a weighted average of export prices with a weighted average of the exporter's home-country prices. (US practice had been to compare average home-country prices with individual export sales, increasing the chances that substantial dumping will be found.)
- **Standing**. Producers submitting a case must account for at least 25 percent of the domestic output of the product. (US law did not have such a minimum requirement.)
- **De minimis**. An investigation must be terminated if the dumping margin is less than 2 percent or (in most cases) if dumped imports from the exporting country represent less than 3 percent of total imports. (US law included a 0.5 percent de minimis requirement for the dumping margin.)

None of these changes were as substantial as antidumping reformers had sought. But in the view of US experts on both sides of the issue, they would—if implemented in a straightforward manner—have made it

significantly more difficult for domestic petitioners to obtain protection under the antidumping statute.

Industries prone to employ the antidumping law fought back, steel in particular. They sought language in the US implementing legislation that would limit the impact of the Uruguay Round changes. In this effort they had the sympathy and cooperation of the Clinton administration. USTR Mickey Kantor made no bones about where he stood: he was convinced that the administration's (and his own) reputation for toughness, and hence its credibility in pushing trade expansion, depended on defense of the antidumping laws. Commerce, which administered the law, agreed.

Representatives Sander Levin (D-MI) and Amo Houghton (R-NY) were active on the petitioners' side. Also unchanged from earlier periods was the relative weakness of internationalist firms and import users. Each of them had interests in changing the laws to bring treatment of import pricing closer to treatment of pricing of domestically produced goods. But in the main, CEOs of internationalist firms were preoccupied with other issues. So ambiguities in the Geneva agreement were resolved in favor of the petitioning industry in drafting the implementing bill and the related "statement of administrative action." Users of the law also won certain changes in their favor on matters not covered by the Geneva agreement at all,[55] including the following:

- **Sunset**. The legislation pushed the time for reviews as far back as possible within the five-year period. And capitalizing on ambiguities in the agreement, it specified that mandated reforms on price averaging would be applied only to new cases, not to reviews.
- **Start-up**. The administration's statement of administrative action explicitly limited the adjustment to fixed costs, excluding such things as advertising and other sales expenses.
- **Price averaging**. The bill mandated the agreed-upon "average-to-average" comparison rule for new cases (but not for reviews, which the agreement did not explicitly require). It also, however, established "a new fair comparison methodology that deducts an amount for the importer's profit from the US price,"[56] which has the effect of increasing the amount of dumping that is found.

55. For details on this process, see Robert E. Cumby and Theodore H. Moran, "Testing Models of the Trade Policy Process: Antidumping and the 'New Issues,'" chapter 6 in *The Effects of U.S. Trade Promotion and Protection Policies* (cf. p. 209, footnote 33) (Chicago: University of Chicago Press for the National Bureau of Economic Research, 1997), Robert C. Feenstra, ed.

56. *Uruguay Round Agreements Act*, Joint Report (No. 103-412) of the Committee on Finance, Committee on Agriculture, Nutrition, and Forestry, and Committee on Governmental Affairs of the United States Senate, to accompany S 2467, 22 November 1994, 7.

- **Standing** and **de minimis**. The bill included straightforward language implementing these provisions but limited the latter to new investigations.

The bill also included changes, beyond the Uruguay Round agreement, that benefited users of the law. These included toughened language on anticircumvention and a provision to exclude "captive production" (inputs manufactured by a firm for its own use) from the total US market for a product on which injury determinations are based. Critics of the antidumping laws, moreover, failed in their effort to win agreement on a provision to limit imposition of duties in "short supply" situations. Though a firm conclusion is difficult to reach, supporters of antidumping laws appear to have won back in Washington most, but probably not all, of the ground they lost in Geneva. If so, this was not—as some have alleged—a protectionist takeover of US policy via the antidumping laws. It was a lost opportunity to make them significantly less restrictive.[57]

In the end, the movement to change trade remedy legislation had only modest net impact in the 1980s and early 1990s. What did have effect, however, were the changes enacted in the 1970s. In addition to facilitating the political fixes treated at some length above, they led to many more specific impositions of countervailing and antidumping duties. And the threat of their imposition had an additional trade-deterring effect.

## Administrative Remedies: A Balance Sheet on 1980–94

In the 1980–94 period, there were 424 countervailing duty and 718 antidumping investigations initiated in response to specific petitions. Table 6.1 (p. 149) shows their distribution by year. And it shows clearly contrasting patterns.

Countervailing duty cases surged in the early years, peaking in 1982 and 1984 and dropping precipitously after 1986. This reflects the fact that a very large share were steel cases, intended to force political settlements. These fell to a fraction of their former level once this goal had been achieved (and spiked temporarily in 1992, when the quotas were phased out). Outside of steel, government subsidies were harder to prove—and their use probably declined through this period as more and more countries adopted market-oriented economic strategies.

57. My effort to sort through the complexity of these issues was aided immensely by my research assistant, Steven Schoeny; by the summation in Jeffrey J. Schott (assisted by Johanna W. Buurman), *The Uruguay Round: An Assessment* (Washington, DC: Institute for International Economics, 1994); by the Senate Report, *Uruguay Round Agreements Act*; and by several conversations with experts on these issues. This does not mean that any of them will be satisfied with the balance struck here.

In contrast, antidumping cases persisted. They peaked in 1984 and 1986, to be sure, and fell thereafter with the decline of the dollar, which cut into the growth of imports and made it harder for firms to prove injury. Nonetheless, they averaged 45 per year in 1987–94 (compared with 12.5 per year for CVD cases).

There was one piece of "good news" for liberal traders and procedural purists: resolution through negotiated VERs dropped sharply. As shown in table 6.2, 1980–85 featured many occasions when plaintiffs withdrew their petitions, predominantly because they had forced political solutions. The number fell off sharply in the years thereafter.

The other side of the coin, however, was a rising success rate of petitioners in winning relief under the antidumping statute itself. In 1980–84, 38 percent (53 of 138) of petitions carried to completion led to either antidumping duties or suspension agreements. In 1985–94, 55 percent (246 of 444) were successful.

When petitioners were unsuccessful, moreover, it was rarely because they were unable to meet the statutory criterion for dumping. Only 35 of 582 petitions (6 percent) failed for this reason, and only 19 of 444 (4 percent) in 1985–94. In contrast, 43 percent (248 of 582) failed because the USITC did not find "material injury" to the producer from the imports alleged to be dumped.[58]

Clearly, by the late 1980s petitioners were finding relief. Indeed, the numbers suggest that unfair trade must have been rampant, since the Department of Commerce had been finding dumping on the overwhelming majority of petitions submitted. There is substantial evidence, however, that the enforcement of the unfair-trade laws had become sharply skewed in favor of petitioners and against their foreign competitors. The basic premise of the law is consistent with GATT Article VI: that US producers should not be undercut by foreign competitors who sell at lower prices in the US market than in theirs.[59] However, the way US law was written and implemented tilted the playing field in favor of the petitioner—and thus against the foreign producer *and* the US users of its products, through

58. For a comprehensive account of 1980–88 cases that reaches similar conclusions, see J. Michael Finger and Tracy Murray, *Policing Unfair Imports: The U.S. Example*, Working Paper 401 (Washington, DC: World Bank, Country Economics Department, March 1990). Finger and Murray also offer interesting information on which countries are most likely to be targeted with unfair-trade petitions. For a broader analysis treating specific cases in detail, see Finger and Nellie T. Artis, *How Antidumping Works and Who Gets Hurt* (Ann Arbor: University of Michigan Press, 1993).

59. Even this principle does not go uncontested. Carried to extremes, "dumping" amounts to the predatory pricing for which remedy is available against competing *domestic* firms. But as typically carried out, it is similar to market discrimination, setting different prices for different customers or in different economic circumstances, which is common and indeed necessary business practice *within* national boundaries.

**Table 6.2 Antidumping cases and results, 1980–94**

| | | | | Cases affirmed | | No dumping | | No injury | |
|---|---|---|---|---|---|---|---|---|---|
| Year | Total | Cases withdrawn | Cases completed | Number | Percent | Number | Percent | Number | Percent |
| 1980 | 21 | 9 | 12 | 4 | 33.3 | 1 | 8.3 | 7 | 58.3 |
| 1981 | 15 | 4 | 11 | 7 | 63.6 | 1 | 9.1 | 3 | 27.3 |
| 1982 | 65 | 24 | 41 | 14 | 34.1 | 3 | 7.3 | 24 | 58.5 |
| 1983 | 46 | 5 | 41 | 19 | 46.3 | 5 | 12.2 | 17 | 41.5 |
| 1984 | 74 | 41 | 33 | 9 | 27.3 | 6 | 18.2 | 18 | 54.5 |
| 1985 | 66 | 16 | 50 | 29 | 58.0 | 2 | 4.0 | 19 | 38.0 |
| 1986 | 71 | 7 | 64 | 44 | 68.8 | 3 | 4.7 | 17 | 26.6 |
| 1987 | 15 | 1 | 14 | 9 | 64.3 | 0 | 0.0 | 5 | 35.7 |
| 1988 | 42 | 0 | 42 | 22 | 52.4 | 3 | 7.1 | 17 | 40.5 |
| 1989 | 23 | 3 | 20 | 14 | 70.0 | 0 | 0.0 | 6 | 30.0 |
| 1990 | 43 | 2 | 41 | 19 | 46.3 | 5 | 12.2 | 17 | 41.5 |
| 1991 | 53 | 4 | 49 | 24 | 49.0 | 2 | 4.1 | 23 | 46.9 |
| 1992 | 99 | 11 | 88 | 45 | 51.1 | 1 | 1.1 | 42 | 47.7 |
| 1993 | 42 | 6 | 36 | 19 | 52.8 | 2 | 5.6 | 15 | 41.7 |
| 1994 | 43 | 3 | 40 | 21 | 52.5 | 1 | 2.5 | 18 | 45.0 |
| **Total** | **718** | **136** | **582** | **299** | **51.3** | **35** | **6.4** | **248** | **42.2** |

*Sources:* US International Trade Commission, annual *The Year in Review* reports; Bruce Blonigen, *US Antidumping Case-Specific Data*, 1980–95; and the *Federal Register*.

"practices and procedures which tend to systematically favor higher rather than lower dumping and CVD margins."[60]

Specifically, the law encouraged the Commerce Department to exclude from the calculation of the "foreign market value" of a product (the foreign producer's home-market average price) any sales that were below his average costs and to ignore in the calculation of the average price at which he sold in the United States any sales that were above the foreign market value. And when data on the accused producer's production costs were judged insufficient, Commerce substituted a "constructed value" based on estimated average cost of production plus overhead plus profit. Since it is standard business practice to sell below average total cost of production on a variety of occasions—and by definition profitable, at the margin, to sell at any price above marginal costs—this meant that the only way a producer could avoid being found guilty of dumping was to sell in the US market at prices well above those at home![61]

It is no wonder that escape clause cases had virtually disappeared by the late 1980s, for if a finding of dumping was quasi-automatic, the antidumping procedure had the advantage of a lower injury threshold, no

60. Richard Boltuck and Robert E. Litan, *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington, DC: Brookings Institution, 1991), 13. The remainder of this section draws upon their analysis.

61. For a thoroughgoing critique, see Brink Lindsey and Dan Ikenson, *Antidumping 101: The Devilish Details of "Unfair Trade" Law* (Cato Institute, Center for Trade Policy Studies, Trade Policy Analysis 20, November 21, 2002).

presidential power to overturn an affirmative decision, and (until the Uruguay Round changes) indefinite duration for any import relief imposed—unless the foreign producer won revocation of the duty by raising prices, which has the same net benefit for the US producer.

## The Limits of Administrative Remedies

"The rules" had come full circle. For decades they had been a sideshow on an obscure bureaucratic stage; now they were prominently affecting—and impeding—trade flows. For years they were properly denounced as ineffective; by the 1990s they were, with equal accuracy, attacked as tilted in favor of US producers. And the debate continues.

To ignore the trade sins these laws were designed to counter would be inconsistent with GATT rules and politically counterproductive. To be obsessed with them, however, exaggerates their marginal contribution to overall American trade woes, fueling the growing, rather self-indulgent conviction among businesspeople and politicians that the international trade game is systematically rigged against the United States. And the moral cast of this ongoing debate not only favors domestic plaintiffs over foreign producer interests, but it also disadvantages the domestic users of the products subject to trade sanctions. Their interests have no special standing in the litigation over unfair-trade laws, but they suffer if prices of steel, for example, are increased as a result of the outcomes of unfair-trade cases.[62]

Still, the unfair-trade laws affect only a rather modest slice of American trade (over the years, steel producers accounted for close to 50 percent of total cases). Even when one adds the deterrent effect of such laws on some export sales, it has been hard for critics to show that their trade costs are large in relation to overall US international transactions. Thus some ex-

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62. For evidence that this moral disadvantage dampens political reaction by those interests hurt by import restrictions imposed under the "unfair trade" statutes, see I. M. Destler and John S. Odell with Kimberly Ann Elliott, *Anti-Protection: Changing Forces in United States Trade Politics* (Washington, DC: Institute for International Economics, Policy Analyses in International Economics 21, September 1987), especially 73–74.

Occasionally, import users have mobilized in response. When the price understandings in the US-Japan semiconductor agreement of 1986, reached pursuant to antidumping petitions, led to a doubling of the price of chips in the US market, IBM and other computer makers protested and forced a modification of the antidumping provisions in the follow-on agreement reached in 1991. A similar reaction followed antidumping duties imposed on ball bearings, an important input to many manufacturers, in 1989. And in the summer of 1991, users rose up in arms when a small American producer of flat-panel display screens for laptop computers succeeded in winning huge antidumping duties against the Japanese imports that dominate the US market. Such a determination, Apple and Compaq and IBM declared, would render it uneconomic to produce their next-generation laptops in the United States and would force a transfer of production to overseas plants.

perts of liberal trade persuasion argue that it is better to live with the quasi-judicial trade remedy system. One of America's foremost trade law authorities, John H. Jackson, reviewed the trade cases of several decades through the early 1980s and concluded with a cautious affirmative: The system is better than likely alternatives "if we can believe . . . that the US legalistic system—cumbersome, rigid, and costly as it is—in fact provides for an economy more open to imports than virtually any other major industrial economy in the world."[63] This argument remains credible, notwithstanding the substantial broadening of antidumping protection since its publication.

The unfair-trade statutes do impose substantial costs on particular US producers: for example, foreign governments are increasingly invoking similar dumping laws against US exporters. And this book will argue for amending them in its concluding chapter. But changing them is an uphill political struggle, ever vulnerable to the charge of "weakening the unfair-trade laws" or aligning with foreign adversaries. For unfair-trade laws remain politically popular, and they have become—at long last—economically successful for their users. They have become, to repeat a phrase quoted earlier, "the usual first choice for industries seeking protection from imports into the U.S."[64] And for members of Congress pressed by trade-affected constituents, predisposed to see unfairness in foreign competition, and reluctant to take action directly, they seem to offer the best of all worlds: a chance to occupy the moral high ground of backing "free but fair trade."

63. John H. Jackson, "Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States," *Michigan Law Review* 82, no. 6 (April–May 1984): 1579–80, 1582. Jackson recognizes, however, that as discussed in earlier pages, for "very big cases . . . the system breaks down and in fact returns, by one subterfuge or another, to a 'non-rule system' of extensive executive discretion and 'back-room bargaining.' " Ibid., 1580–81.

64. Horlick and Oliver, "Antidumping and CVD Law Provisions," 5.