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U.S. Trade-Remedy Laws: Do They Facilitate or Hinder Free Trade?

"Our fair trade laws are the bedrock on which free trade stands."
— Malcolm Baldrige

AN INCREASINGLY contentious issue in international trade pertains to so-called "trade-remedy laws." These laws are intended to remedy hardships for U.S. firms resulting from the actions and policies of foreign firms and governments. Allegedly, these laws produce a "fair" and "free" trading environment. The possibility exists, however, that the concept of fair trade is simply a pretext used by interest groups to pursue their own interests at the expense of the national interest. This can result in a protectionist trading environment, which lowers economic well-being in the United States, rather than a fair and free one.

This paper provides an introduction to U.S. trade-remedy laws. As background to understanding the justification and effects of these laws, the concepts of fair trade, free trade and protectionism are described. Next, an overview of the primary laws is provided. This is followed by evidence on the increasing use of trade-remedy laws. Finally, evidence on the administration and effects of these laws is examined to assess competing claims that these laws facilitate or hinder free trade.

FAIR TRADE, FREE TRADE AND PROTECTIONISM

To understand the controversy involving trade-remedy laws, one must become familiar with the basic concepts underlying the dispute. The most elusive concept is that of fair trade. On the surface, it is hard to argue against fair trade; however, there are different interpretations of this term and, thus, its application in concrete situations varies across individuals.

Two interpretations of fair trade are related directly to differing impressions of reciprocity, which is a concept of fairness used in international trade negotiations.[1] Before negotiations to reduce trade barriers, two countries will generally have different levels and types of trade bar-

[1]See Bhagwati and Irwin (1987) for a discussion of fair trade and its relation to U.S. trade policy.

riers. "First-difference" reciprocity means that a fair outcome is characterized by reductions in trade barriers such that the value received by each country stemming from the other country's reduction in trade barriers is equal. Consequently, after the completion of negotiations, the two countries may still retain different patterns of trade barriers.

On the other hand, "full" reciprocity requires that two countries allow identical access to their respective markets, which implies identical trade restrictions. Full reciprocity means that reciprocity of access must be met for individual sectors. This is known as a level playing field.

Negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT) use first-difference reciprocity as a procedural device. Nonetheless, the implicit goal of GATT is to generate a free trade environment, which implies full reciprocity of market access. In such an environment, certain actions, such as government attempts to directly influence the pattern of trade, are viewed as inappropriate and, thus, can be counteracted.[2]

Even though actions taken to open foreign markets and counteract inappropriate behavior by foreign firms and governments can be justified in the name of fair and free trade, these actions might not achieve their stated purpose. If they do not, then the result is higher levels of barriers with adverse consequences.

Trade restrictions tend to reduce the competition faced by domestic producers; this protection is at the expense of domestic consumers. Empirical evidence shows clearly that the losses suffered by consumers exceed the gains reaped by domestic producers and government.[3] Not only are there inefficiencies associated with excessive domestic production and restricted consumption, but there are costs associated with both the enforcement of protectionist legislation and attempts to influence trade policy. Empirical research also shows that the adverse effects of protectionist policies persist because such policies generate relatively lower growth rates than free trade policies.

THE BASICS OF TRADE-REMEDY LAWS

The United States employs various trade-remedy laws to provide relief from imports for U.S. industries. These laws are frequently characterized as "contingent protection" because the import relief is provided only under certain conditions.[4] Table 1 lists the principal trade-remedy laws and summarizes their key features.

The Escape Clause

The escape clause, contained in Section 201 of the Trade Act of 1974, allows temporary import barriers when rising imports can be shown to injure a domestic industry seriously.[5] The legislation requires that the increase in imports constitutes "a substantial cause" of serious injury. While a substantial cause is not defined precisely, a working definition is that the cause is important and no less important than any other cause of serious injury.

Two primary justifications exist for escape clauses. The first justification relies on the importance of an "economic adjustment" goal. Rapidly increasing imports can harm selected groups, especially import-competing domestic firms and their workers. Such firms must adjust to rising imports by enhancing productivity or by laying-off employees. Proponents of the escape clause argue that the costs of this adjustment can be reduced if the firm is provided temporary relief from imports.

This argument, however, has some problems. Foremost is that there are numerous circumstances in which firms are forced to make adjustments. Changes in consumer demand, energy price shocks and governmental changes in spending, taxation and regulation necessitate adjustments. If rising imports justify governmental intervention, then it can be argued that these

[2]Bhagwati (1988) characterizes GATT as a "contractarian" institution that regulates inappropriate actions. Political pressures make it difficult to maintain a free trade stance unilaterally, so GATT attempts to prevent those actions that induce others to move away from free trade.

[3]See Coughlin et al. (1988) and Richardson (1989) for recent surveys.

[4]Administered protection and procedural protectionism are two other terms for contingent protection.

[5]Prior to 1974, escape clause legislation required that the rising imports be due to a prior reduction of a trade barrier. The elimination of this necessary relationship by the Trade Act of 1974 appears to make U.S. law inconsistent with GATT. See Jackson (1990) for a comparison of the legal nuances of U.S. law with Article XIX of GATT.

Table 1
Principal U.S. Trade Law Provisions[1]

Statute	Focus	Criteria for action	Response	Responsibility
Section 201: Fair Trade (escape clause)	Increasing imports	Increasing imports are substantial cause of injury	Duties, quotas, tariff-rate quotas, orderly marketing arrangements, adjustment assistance	President (ITC recommendation)
Section 301: Unfair Trade	Foreign practices violating a trade agreement or injurious to U.S. trade	Unjustifiable, unreasonable, or discriminatory practices, burdensome to U.S. commerce	All appropriate and feasible action	U.S. trade representative subject to direction by the president
Section 701: Subsidized Imports	Manufacturing, production or export subsidies	Material injury or threat of material injury[2]	Duties	ITC-Injury determination ITA-Subsidy determination
Section 731: Dumped Imports	Imports sold below cost of production or below foreign market price	Material injury or threat of material injury	Duties	ITC-Injury determination ITA-Dumping determination

[1]Origin of current provisions: Tariff Act of 1930 (Smoot-Hawley), as amended; Trade Act of 1974, as amended; Trade Agreements Act of 1979, as amended; Trade and Tariff Act of 1984; Omnibus Trade and Competitiveness Act of 1988.

[2]The material injury test is extended only to countries that fulfill certain conditions.

SOURCE: Council of Economic Advisers (1988, p. 152), modified by author.

other causes of adjustment costs should be mitigated as well. While there are cases other than rising imports that do lead to governmental intervention, where should the line be drawn?

Another facet of the adjustment argument focuses on the fact that rising imports provide benefits to many consumers and impose costs on relatively few firms and workers. An equity argument can therefore be made for shifting some of the burden of adjustment from the few who are harmed to the many who benefit through the tax on consumers imposed by import restrictions.

The second primary justification for escape clauses relates to this argument. A relatively small yet potentially well-organized group harmed by rising imports could be a formidable force for import restrictions. From a national perspective, it is much better to provide temporary and limited protection for such a group not only to mitigate the burdens of adjustment, but also to reduce the political pressures for more permanent import restrictions. Unfortunately, these temporary measures often become long-lived.[6]

Petitions for relief can be filed by any one of the following groups—individual firms, labor unions, trade associations or selected government bodies (such as the United States Trade Representative, the House Ways and Means Committee and the Senate Finance Committee). The International Trade Commission (ITC) is a six member, appointed body that assesses injury

[6]Lande and VanGrasstek (1986) note that the escape clause allows member countries to impose trade restrictions to mitigate the perceived adverse effects of rising imports, while remaining cognizant of their obligations to fellow GATT members. This flexibility allows temporary departures from trade obligations without full-fledged repudiations.

after the filing of petitions. Significant declines in sales, production, profits, wages or employment are evidence of serious injury.

Negative ITC decisions require a majority of the commissioners to reject the petition and terminate the process. Affirmative ITC decisions require either a tie or the majority of the commissioners to accept the petition; they are forwarded to the president. A recommendation as to the appropriate trade restriction and/or adjustment assistance to prevent or ameliorate the injury is included. The president, however, is not bound by the ITC's injury finding or its suggested relief. Nevertheless, the Trade Act of 1974 instructs the president to provide relief (which can take the various forms identified in table 1), unless such relief is deemed not to be in the national interest.

Unfair Trade Legislation

The escape clause allows a nation to restrain imports regardless of whether the imports have been assisted by "unfair" practices. Examined below are the three most prominent pieces of U.S. legislation that address the issue of offsetting the effects of unfair actions: 1) Section 701, which deals with governments subsidizing exports; 2) Section 731, which deals with dumping, that is, with foreign firms selling their goods at lower prices in the United States than in their home markets; and 3) Section 301, which deals with violations of trade commitments and a wide range of other actions.

Section 701: Countervailing Duty Legislation

The legal purpose of countervailing duty legislation is to offset government-provided benefits that assist the exports of foreign firms. These benefits include export subsidies, such as direct government payments, tax relief and subsidized loans to a nation's exporters and low-interest loans to foreign buyers. By inducing additional foreign export activity as U.S. consumers substitute these goods for similar domestically produced goods, these subsidies can injure import-competing U.S. industries. Assuming certain provisions are met, U.S. trade law allows subsidized exports to be counteracted with tariffs termed countervailing duties.

Even if one acknowledges that export subsidies harm a domestic industry, it is possible to question the wisdom of countervailing duties. Many economists argue that if a foreign government subsidizes exports, the importing country should accept the gift of cheaper goods. Resources no longer needed by the import-competing U.S. industries can be employed productively in other sectors of the economy. Countervailing duty legislation, however, focuses on the harm to these import-competing industries and ignores the benefits reaped by consumers and other producers.

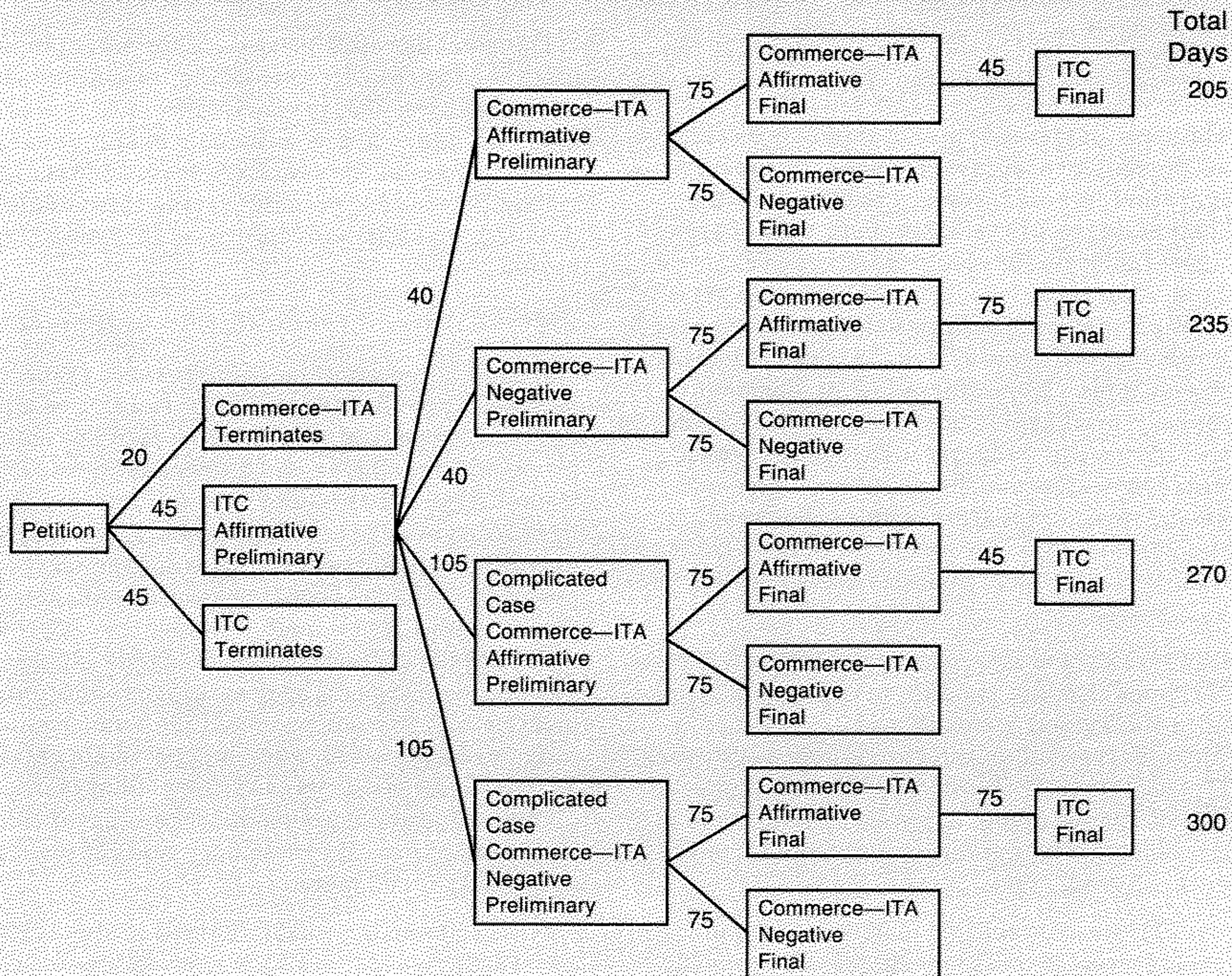
Bhagwati (1988), while acknowledging the economic validity of the preceding argument, argues that a free trade regime might depend on unfair trade legislation. Countries pursuing a free trade policy find it difficult to resist the demands for protection when the decline of an industry is due to the market-determined advantages of foreign producers. If the decline is due to the use of export subsidies, demands for protection are heightened because issues of fairness are stressed. A free trade regime that does not counteract artificial advantages might find itself unable to defend and perpetuate its free trade stance.

The administration of countervailing duty laws is the joint responsibility of the ITC and the International Trade Administration (ITA) of the Department of Commerce. The ITA determines the existence and magnitude of any subsidy, negotiates agreements to offset any subsidy, imposes duties, reviews the effectiveness of the remedy and determines when the remedy is terminated. Concurrently, the ITC applies an injury test to determine whether subsidized exports have caused or will threaten material injury to a domestic industry or have retarded the establishment of a domestic industry.[7]

Material injury, as defined by the Tariff Act of 1930, is "harm which is not inconsequential, immaterial, or unimportant." While this definition is far from clear, the law does require that the ITC incorporate volume, price and impact considerations in its determination of harm. In examining the volume of imports, the ITC is charged with determining whether an increase in that volume, either absolute or relative to either U.S. consumption or production, is signif-

[7]Lande and VanGrasstek (1986) point out that an injury test is used in countervailing duty cases only when the foreign country meets certain conditions. When an injury test is not required, the ITA has complete control.

Figure 1
Statutory Timetable for Countervailing Duty Investigations (in days)



SOURCE: United States International Trade Commission (1987).

icant. With respect to the effect of imports on prices, the ITC looks for significant price undercutting by the imports relative to domestically produced goods and attempts to assess the resulting price consequences. Finally, the impact on the domestic industry is assessed by examining changes in production, employment, market share, profits and wages.

Countervailing duty cases begin when a petition is filed with the ITA and the ITC by either an interested party or the ITA itself. (A complete timetable for countervailing duty investigations is provided in figure 1.) If the ITA concludes that an investigation is warranted, then the ITC must reach a preliminary determination as to whether a "reasonable indication" of material injury exists. A negative ITC determination terminates the proceedings, while a positive determination leads to additional investigation.

A preliminary affirmative ITA decision leads to the announcement of a preliminary estimate of the export subsidy and an order that importers make a cash deposit or post a bond equal to the estimate of the subsidy for each entry. If the preliminary ITA decision is negative, no deposit or bond is posted; however, the ITA investigation continues until it reaches a final decision. If the final ITA decision is negative, then the case is terminated; otherwise, the ITA must determine the final subsidy margin.

An affirmative final determination by the ITA leads to an ITC hearing in which all interested

parties participate. If the ITC finds no material injury, then the case ends. On the other hand, a finding of material injury by the ITC leads to an ITA order of countervailing duties against the imported merchandise. Such an order continues until revoked.

Section 731: Anti-dumping Legislation

The legal purpose of anti-dumping legislation is to prevent two unfair practices: 1) price discrimination in which foreign firms sell in the United States at prices lower than they charge in their home markets, and 2) export sales in the United States at prices below the average total cost of production.[8] Both practices tend to lower the price of the good in the U.S. market causing U.S. consumers to purchase less of similar domestically produced goods. This decrease in demand harms the domestic industry by reducing profitability, sales, employment and other measures relative to a market without dumping. Although domestic consumers do benefit from the lower price, their interests are ignored by this legislation.

Focusing on the first practice, if the ITA determines that the product in question is being sold in the United States at a price less than its foreign market value, the case is referred to the ITC. The ITC then investigates whether, as a result of the dumping, a domestic industry is injured, likely to be injured or prevented from being established.

The ITC's assessment of material injury in dumping cases is the same as in countervailing duty cases. The ITA's determination of the dumping margin, however, differs from the determination of the subsidy margin. The dumping margin is simply the difference between the home market sales price and the export sales price. While the concept of a dumping margin is simple, applying the concept to the real world is complicated.[9] Details on calculating the dumping margin, which can affect the consequences of this legislation, are highlighted later.

The administrative procedure for anti-dumping cases is virtually identical to that of countervailing duty cases. The primary difference is that while an injury test is automatic in anti-dumping cases, it may not be required in certain countervailing duty cases. In addition, the timetable for dumping investigations (provided in figure 2) is longer.

Section 301 and the Authority to Retaliate

Section 301 grants the United States Trade Representative (USTR) authority (subject to any directions from the president) to take all "appropriate and feasible action" to remove foreign trade barriers that hinder U.S. exports and to fight foreign subsidies that hinder U.S. exports to third-country markets.[10] This legislation is primarily a Congressional response to dissatisfaction with GATT's ineffectiveness in resolving trade disputes.[11] Formally, Section 301 allows the USTR to respond against any act, policy or practice of a foreign country that is determined to be: 1) inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement; or 2) unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce.

Unreasonable is broadly defined in the Trade and Tariff Act of 1984 so that offending foreign restrictions are not limited to violations of trade agreements. The term includes, and goes beyond, any act, policy or practice that denies fair and equitable opportunities to begin and operate a business. Unjustifiable, as well as discrim-

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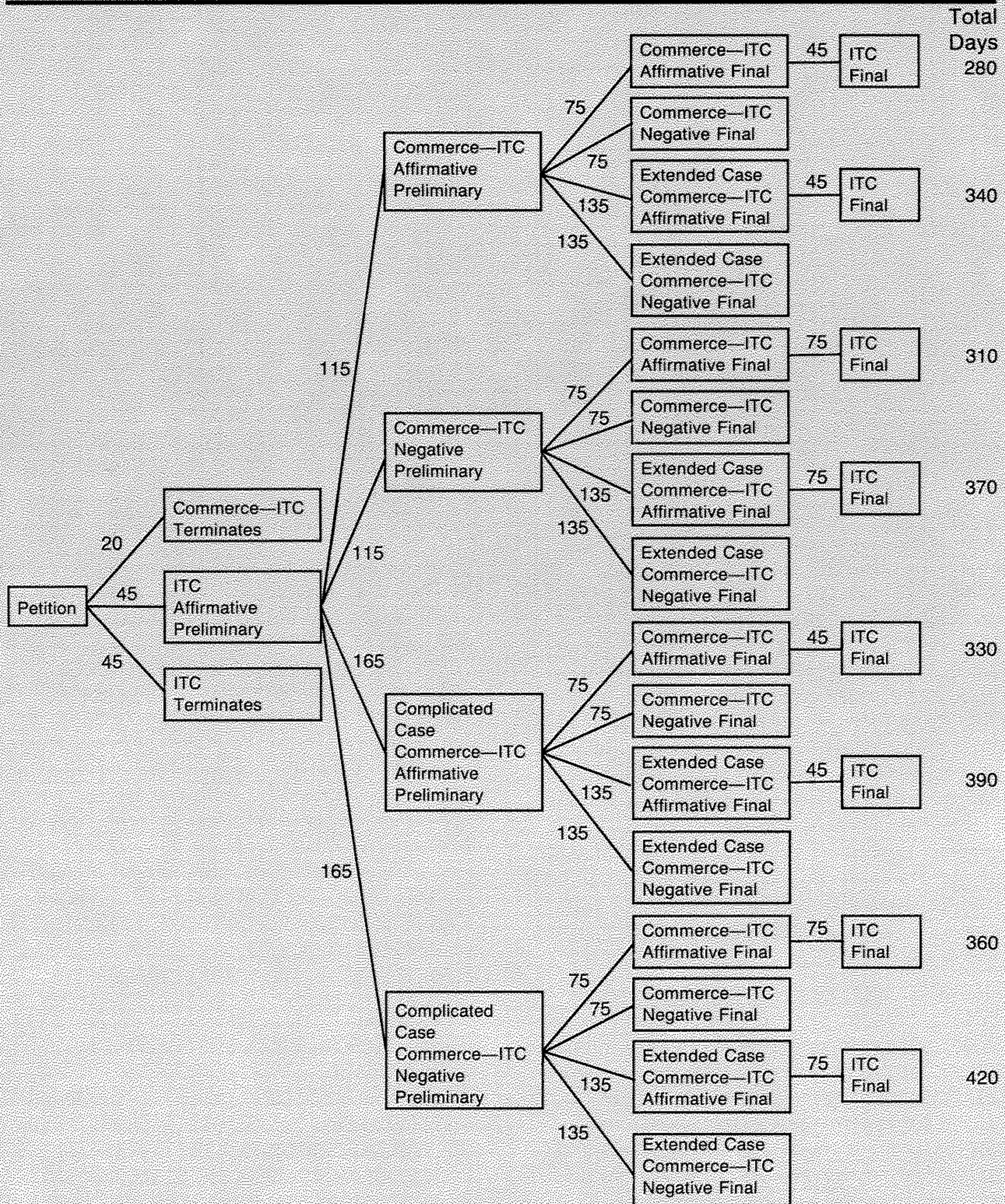
[8]Boltuck (1991) identifies international price discrimination, promotional pricing, predatory pricing and hidden export subsidies as instances of price dumping. Note that for price dumping to be profitable, barriers must exist that prevent the imported good from being resold in the exporter's market at the higher home market price. International price discrimination is profitable when an exporter possesses more market power at home than in the United States (that is, demand in the firm's home market is less elastic than in the United States) and charges a higher price in its home market than in the United States. Promotional pricing arises when an exporter induces consumers in a foreign market to try a product by introducing it at a low price. Predatory pricing is a rarely used strategy in which an exporter attempts to eliminate competitors by reducing the export price below its rival's costs and below its own production costs. Once the competitors have exited the market, the exporter raises the price. Finally, hidden export subsidies are classified as dumping either because there is no direct subsidization or the ITA is unable to demonstrate the existence of a subsidy.

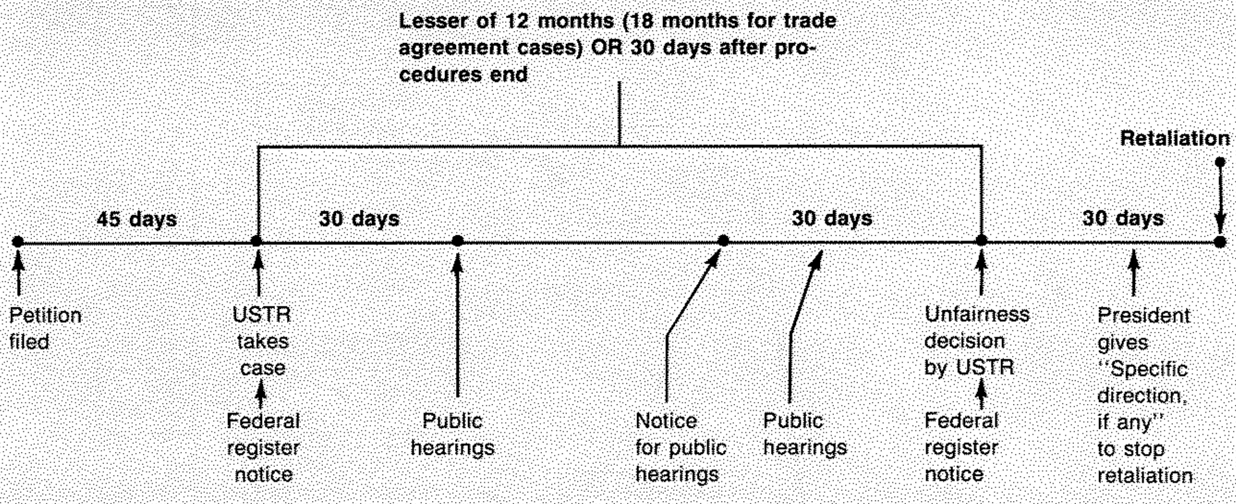
[9]See Jackson (1990) for details on this complexity.

[10]The President (rather than the USTR) had this authority prior to the Omnibus Trade and Competitiveness Act of 1988.

[11]Although GATT is frequently involved in dispute-settlement proceedings, it has no authority to impose sanctions or enforce its decisions. A GATT ruling favorable to the United States simply justifies unilateral U.S. action when the other party does not abide by the decision. In addition, Section 301 allows for the settlement of trade disputes with countries not belonging to GATT or when the issue is not covered by GATT.



SOURCE: United States International Trade Commission (1987).



SOURCE: Grinols (1989).

inatory, includes any act, policy or practice that denies *either* national or most-favored-nation treatment. In the context of the United States and a specific foreign country, national treatment focuses on whether U.S. firms operating in that country are treated as favorably as the firms of the foreign country are treated in the United States. Most-favored-nation treatment refers to the best treatment accorded to firms from any other country operating in a specific foreign country. Even though all foreign firms (including U.S. firms) may be treated identically in a specific country, Section 301 could still be invoked if the treatment given were not as favorable as the treatment given the foreign firms in the United States.

Similar to other trade remedy proceedings, U.S. firms may formally petition to initiate Section 301 proceedings or the USTR may initiate the case. A typical case in which the petition is filed with the USTR is illustrated in figure 3. The USTR's role in Section 301 cases varies from the roles of the ITA and ITC in other trade-remedy cases. The USTR acts as both judge and advocate, while, relatively speaking, the ITA and ITC primarily judge on the basis of the objective merits as defined by the relevant statutes. The USTR's task is much more subjective because it must also devise and pursue a negotiated settlement with a foreign government.

If a negotiated settlement is not reached, the USTR may: 1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign party involved; and 2) impose duties or other import restrictions on the products of, and fees or restrictions on the services of, such foreign party. This retaliation can be applied to all countries or to selected countries. Furthermore, the retaliation can be applied to goods and services other than those identified in the petition.

In addition to dissatisfaction with the GATT dispute-settlement process, Congress has been unhappy with the operation of Section 301. Changes included in the Omnibus Trade and Competitiveness Act of 1988 generally reduce the president's input into the process and encourage more frequent use of Section 301.[12] A particular provision of the legislation known as Super 301 reflected Congress' desire to "get tough" with our foreign rivals and pry open

[12]See Grinols (1989).

Table 2
U.S. Trade-Remedy Petitions: Number and Percentage of Total

	Escape clause		Anti-dumping		Countervailing duty		Section 301		Total petitions
1979	4	6.5%	16	25.8%	37	59.7%	5	8.1%	62
1980	2	5.4	24	64.9	11	29.7	0	0	37
1981	6	11.3	15	28.3	22	41.5	10	18.9	53
1982	1	0.5	63	29.2	145	67.1	7	3.2	216
1983	5	6.2	47	58.0	22	27.2	7	8.6	81
1984	6	4.5	73	54.9	52	39.1	2	1.5	133
1985	3	2.7	65	58.6	38	34.2	5	4.5	111
1986	3	2.9	70	66.7	26	24.8	6	5.7	105
1987	2	7.7	14	53.8	5	19.2	5	19.2	26
1988	2	3.2	40	64.5	13	21.0	7	11.3	62
1989	0	0	23	56.1	9	22.0	9	22.0	41
1990	1	1.8	43	76.8	8	14.3	4	7.1	56

SOURCE: Escape clause, anti-dumping and countervailing duty data for 1979-1988 are from Messerlin (1990). The remaining years of data are from the Office of the United States Trade Representative (1991). The data for Section 301, which includes petitions as well as cases instigated by the President of the United States and the USTR, is based on a listing from the Office of the United States Trade Representative.

their markets.[13] Super 301 required the USTR to name (by May 30 of each year) those nations with the most restrictive barriers to U.S. exports and to identify the specific practices that most hinder U.S. exports. The listed countries faced retaliatory measures if no agreement on removing the trade barriers was reached within 12 to 18 months.

THE FREQUENCY OF TRADE-REMEDY PETITIONS

During the 1980s, import-competing firms throughout the world increasingly used anti-dumping actions rather than countervailing duty and escape clause actions.[14] As shown in table 2, this change has occurred in the United States as well; however, this change is not as pronounced in the United States as it is elsewhere. From 1983 onward, anti-dumping actions in the United States have exceeded 50 percent of the total number of trade-remedy petitions. In fact, the use of the escape clause mechanism has become negligible. Since 1984, escape clause cases have generally totaled less than 5 percent of the petitions.

The total number of actions show a substantial decline since 1987. However, to argue that this decline indicates a sharp reduction in the demand for protection would be erroneous. Between 1982 and 1986, the total number of actions exceeded 100 cases in every year but one; however, approximately 200 cases involving steel products were initiated prior to the voluntary steel agreement of October 1984.[15] In addition, the duties imposed under anti-dumping and countervailing duty actions can persist for some time.[16] Similarly, other non-tariff barriers that were negotiated and imposed as a result of the pressure represented by anti-dumping and countervailing duty actions also persist for some time. Thus, many industries had their concerns resolved (at least temporarily) which resulted in a reduced number of new cases in the late 1980s.

[13]See Bhagwati and Patrick (1990), especially Chapter 1, for an overview of the reasons for and the issues generated by Super 301.

[14]See Messerlin (1990) for details.

[15]See Ahearn et al. (1990).

[16]According to the Office of the United States Trade Representative (1991), 71 countervailing duty orders were in effect at year-end 1990. These 71 orders exceed the total number of countervailing duty petitions (61) between 1986 and 1990.

The trend since 1987 of declining actions, however, is not exhibited by Section 301 petitions. On the other hand, there is no clear upward trend either. Recent legislative changes in the Omnibus Trade and Competitiveness Act of 1988 suggest that this mechanism will assume increasing importance in the future.

TRADE-REMEDY LAWS: THEIR EFFECTS AND THE ROLE OF ADMINISTRATIVE BIASES

To assess the consequences of trade-remedy legislation, information on the frequency of these petitions is supplemented with details of their administration and outcome. The evidence presented below highlights biases in the administration of these laws and the proliferation of trade barriers resulting from these cases. As a result, it is highly unlikely that the legislation is facilitating free and fair trade.

The Negligible Effects of Escape Clause Legislation

The small number of escape clause petitions in recent years suggests that this trade-remedy legislation is having virtually no effect on the pattern of trade. The underlying criteria for a successful petition, plus the possibility of foreign retaliation unless other U.S. trade barriers are reduced, have deterred the use of escape clause petitions and induced industries to seek protection using other trade-remedy avenues.[17] Despite the "requirement" that anti-dumping and countervailing duty actions can be invoked only to counteract the specific unfair trade practices of dumping and export subsidies, industries have increasingly resorted to these trade-remedy laws rather than use the escape clause route. This apparent anomaly is explained when the administrative details of these less-than-fair value procedures are scrutinized.

Effects of Countervailing Duty and Anti-dumping Legislation and Administrative Biases

Countervailing duty and anti-dumping actions are associated with rising trade barriers. For example, of 774 countervailing duty and anti-dumping cases completed in the United States between 1980 and 1988, 70 percent were resolved to restrict trade in some way.[18] Whether the resulting duties, as well as the other negotiated restrictions on trade, should be viewed as protectionist, however, requires additional information.

Countervailing and anti-dumping duties can be viewed as responses to actions taken by foreign governments and firms. For example, if an investigation determines that dumping is occurring, then the U.S. response to impose a duty (a dumping bond) equal to the dumping margin is automatic. In this case, the effect of the duty is to offset the injury to the domestic industry. If each instance of dumping is counteracted, then the net effect on trade would be zero in the sense that the level of trade would return to the same level prior to dumping. Many, however, do not feel that the actual workings of the legislation are quite so benign.

Administrative Biases

Bias has been found to enter the administration of less-than-fair value statutes through their interpretation by administrative agencies.[19] The administering agencies have discretion that is sufficiently broad to allow for bias. For example, Boltuck et al. (1991) conclude that the procedures used by the ITA in measuring subsidy rates and dumping margins are biased toward finding dumping and export subsidies.[20]

A foreign firm is found to be dumping when the price of their good in the U.S. market is

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[17]Article XIX of GATT allows trading partners affected adversely by an escape clause action to retaliate by withdrawing "substantially equivalent concessions" affecting the goods of the country invoking the escape clause. An alternative is to provide compensation to these GATT members by lowering trade barriers on their exports. See Hamilton and Whalley (1990) and Lande and VanGrasstek (1986) for additional details.

[18]See Finger and Murray (1990).

[19]Recent research has suggested another way that the administration of this legislation could be biased. Moore (1990) found that ITC anti-dumping decisions were biased toward affirmative decisions when the complaining industry was located in the state of a senator on the Senate Finance Committee.

[20]See Kaplan (1991) for a demonstration of the protectionist bias in injury and causation determinations before the ITC.

below: 1) the price of the good in its home market; 2) the price of the good in a third market if no home market exists; or 3) its production cost. Such comparisons appear to be simple, but the description below suggests otherwise. Similarly, the measurement of subsidy rates appears straightforward with the focus on devising accounting rules to allocate government subsidies across the volume of exports. Closer inspection, however, indicates much complexity as well as the potential for bias in these calculations.

The calculation of price dumping margins is subject to error at four different stages: 1) in identifying the home (domestic) market; 2) in adjustments to make domestic and export products comparable; 3) in adjustments to calculate the *ex factory* price (that is, the price as it leaves the factory) of domestic and export products; and 4) in comparing the *ex factory* prices of domestic and export products. Errors at the first and last of these stages are illustrated.

The identification of the foreign firm's home market tends to produce the highest possible fair value of the foreign good and, thus, the largest possible dumping margin. To illustrate, assume a firm occasionally charges a price below its production cost in its home market. Such sales are made in the "normal course of business" for any firm in a competitive industry that faces a demand for its product that varies randomly.[21] Below-cost sales, that occur when demand falls below its average level, are balanced by above-cost sales, that occur when demand is above its average level, allowing the firm to earn a competitive rate of return. The ITA, however, excludes all below-cost sales from its calculation which raises the fair value of the product and creates an upward bias in the dumping margin.

The comparison between the *ex factory* price of individual sales in the foreign firm's export market (that is, the United States) to the average *ex factory* price in its domestic market can produce bias as well. For example, if prices were declining and exports increased relative to home sales during the period used to assess the existence of dumping by the foreign firm, then a positive dumping margin would be found. The low-priced export sales at the end of the period and the high-priced home market sales at the beginning of the period would generate a positive margin. Note that dumping would be found in this case even if home and export prices were identical for every sale made on the same day.[22]

In theory, the preceding bias should also operate in the other direction to generate negative margins. In practice, however, this does not occur because the ITC excludes the possibility of negative dumping, not only on average, but on each individual price comparison. Thus, all export sales below fair market value carry a positive dumping margin, while all export sales above fair market value carry a margin of zero.[23] Consequently, a positive dumping margin will be found even when all sales are made at the same price on the same day and the weights on each sale are identical.[24] Thus, this procedure punishes foreign firms for not price discriminating because the only way to avoid dumping duties is to charge substantially more in the United States than in other markets.

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[21]Fred Smith of the Competitive Enterprise Institute, as quoted by Bovard (1987), notes, "If the same antidumping laws applied to U.S. companies, every after-Christmas sale in the country would be banned."

[22]To illustrate this particular bias, assume the foreign firm's sales occur at the same *ex factory* price in both the United States and its home market. Let the price be $10 in the first half of the investigation period and $5 in the second half. The firm sells five units both in the United States and at home in the first half of the period and 15 units in the United States and 10 at home in the second half. The average home price is $6.67 because one-third of the home sales occurred at $10 and two-thirds at $5. This average price is compared to the individual sales prices in the United States. Thus, each U.S. sale in the first half of the period would show a negative dumping margin (that is, dumping in the foreign firm's home market rather than in the United States) of $3.33 because the sales price of $10 exceeds the average home price of $6.67; each sale in the second half of the period would show a positive dumping margin of $1.67 because the sales price of $5 is less than $6.67. One-fourth of the U.S. sales would have a negative dumping margin of $3.33, while three-fourths of the sales would have a positive dumping margin of $1.67. If this were the only bias in the ITA's calculations, a positive dumping margin of $.42 would be calculated even though no actual dumping occurred. Additional biases, however, exacerbate the error further.

[23]In the numerical example in the preceding footnote, the one-fourth of the U.S. sales with the negative dumping margin of $3.33 would be treated as having a zero dumping margin. This increases the calculated dumping margin to $1.25 even though no actual dumping occurred.

[24]Boltuck et al. (1991) show that the bias in the margin equals approximately one standard deviation of the prices from the mean. Thus, if a company charges an identical price in the United States and other markets and its prices generally vary within 10 percent of the average price charged, the ITA will calculate a dumping margin of 10 percent. In other words, if the firm's average price is $6.00, the bias in the dumping margin is about $.60.

Similar bias exists in the ITA's calculation of subsidies in countervailing duty cases, especially when the subsidy is not in the form of a direct per unit export subsidy. Biased accounting methods provide one route for finding inequity. For example, assume a foreign firm produces more than one product and that one of the products is allegedly subsidized. If the firm is found to be subsidized, the ITA allocates the entire subsidy to the specific product that is the focus of the investigation irrespective of the degree, if any, to which the product is subsidized.[25]

Because of these sources of bias, virtually every investigation that proceeds to a formal determination finds in favor of positive dumping margins and export subsidies.[26] Thus, less-than-fair-value cases, similar to escape clause cases, hinge on injury tests. Since the criteria for the injury test are less stringent for less-than-fair-value than they are for escape clause cases, the infrequent usage of the escape clause is not surprising.[27]

Duties and Uncertainty

The reasons for the protectionist consequences of less-than-fair-value legislation are not limited to biased administration. By law, any dumping margin or export subsidy greater than 0.5 percent justifies an affirmative determination. While a small duty is unlikely to have a large effect on competitiveness, the existence of any anti-dumping and countervailing duties creates costs of uncertainty that may have large effects for the exporter. This possibility is related to the fact that the importer (not the exporter) assumes the risk of incurring higher duties than those originally paid.

The bond initially posted on imports which are subject to these duties is only an estimate of the final duty. At the end of each year, the ITA allows interested parties the right to request a review of outstanding anti-dumping and countervailing duty orders. Such a review will typically require three to four years before the final duty rate is set. If there is no request for a review, then the estimated deposit rate is equal to the final duty rate.

The uncertainty over deposit rates means that by importing under anti-dumping and countervailing duty orders, importers are creating open-ended contingent liabilities for themselves. Findings of underpayment require additional payments including interest to the government for the imports. To assess the risk of underpayment, an importer must have substantial information. For example, importers of goods subject to countervailing duties must be knowledgeable about the various industrial programs in the exporting country and be able to assess the bias that exists in the calculation of duties.[28]

Harassment

Another line of argument suggesting the protectionist consequences of less-than-fair-value legislation is known as the harassment thesis. Gregory (1979) noted a barrage of administrative complaints or court suits (35) filed by U.S. electronic appliance and component manufacturers against Japanese competitors. He concluded that even when these actions are not directly successful, they impose lengthy and costly delays on Japanese firms that indirectly produce a protectionist result.

This harassment is not confined to Japanese firms nor are the consequences limited to increasing the cost of penetrating the U.S. market. Firms from virtually all developed countries as well as many developing countries have been subjected to less-than-fair-value petitions.[29] While these petitions directly increase the cost of penetrating the U.S. market, the threat of a petition also increases the risk of exporting to the United States for actual and potential exporters. The ultimate result is that foreign firms will reduce their efforts to export to the United States.

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[25]See Boltuck et al. (1991) for additional examples.

[26]See Finger and Murray (1990).

[27]The fact that the president cannot set aside affirmative less-than-fair-value decisions but can set aside affirmative escape clause decisions, and that less-than-fair-value cases can be targeted against firms from specific countries while escape clause cases cannot, also explains the relative use of less-than-fair-value cases.

[28]This problem is not so pronounced in the case of dumping. An exporter that continued to dump would be sharing revenue with the U.S. Treasury that it could have retained. Nonetheless, an exporter more concerned with short-term profits from price discrimination than with a long-term relationship with the importer might still find it profitable to price discriminate.

[29]Finger and Murray (1990) note that before a firm files a less-than-fair-value petition, it frequently makes inquiries with law firms and holds informal discussions with the ITA, neither of which are kept secret. In effect, the period of harassment can begin before an official complaint is lodged.

Non-tariff Barriers

As suggested by arguments discussing uncertainty as well as harassment, less-than-fair-value legislation can have protectionist consequences apart from the actual duties resulting from specific cases. Another route to protectionism is that this legislation can result in the more frequent use of non-tariff barriers. Finger (1981) pointed out that less-than-fair-value mechanisms can be used by a domestic industry to generate public support for protection. Until all the standard means of seeking protection have been exhausted, it is unlikely that there will be strong political support for protection. Mechanisms such as less-than-fair-value cases must be utilized prior to gaining access to more political forms of protection. Many non-tariff barriers originated as less-than-fair-value cases. For example, Finger and Murray (1990) found that nearly half of the less-than-fair-value cases in the 1980s were superseded by some form of negotiated export restraint.

The Use of Less-Than-Fair-Value Legislation in Other Countries

A final line of argument suggesting that less-than-fair-value cases lead to protectionism is that these cases induce other less-than-fair-value cases. As indicated by Messerlin (1990), this avenue of protection was not used by developing countries through 1985. The increased frequency of these cases by developed countries could have spurred their increased use by developing countries in the late 1980s. In 1988 more than 20 percent of anti-dumping actions originated in developing countries. Some have argued that use of this mechanism by developing countries is even more capricious than use by developed countries because importers may be subject to anti-dumping duties without either due process or even formal notification.[30] Thus, the use of less-than-fair-value legislation in the United States could backfire by generating additional inequities for U.S. producers—in this case, exporters—and in subjecting international trade to more barriers.[31]

Section 301 and Super 301: Controversial Consequences

Although Super 301 has generated much controversy since its passage, it has produced only a small number of offenders and practices. In 1989, for example, Brazil was cited for quantitative restrictions involving her balance of payments; Japan was cited both for technical barriers to trade hindering forest products and government procurement practices involving supercomputers and satellites; and India was cited for barriers limiting trade in foreign insurance services and for trade-related investment measures that imposed export performance requirements on foreign investors. It is noteworthy that these priority practices were not necessarily those with the greatest export potential and that they were similar to those generally handled under Section 301. Nonetheless, these Super 301 actions generated protests from our major trading partners.[32]

Barfield (1990) criticizes the Super 301 process because it is ultimately controlled by the same political judgments the United States criticizes other countries for using in their trade policy decisions. For example, the naming of India and Brazil was in retaliation for their role as leaders of a group of developing countries that opposed U.S. goals in the Uruguay Round.

The politicization charge can be levied against the Section 301 process in general. Powell (1990) argues that voluntary export restraints on steel in the 1980s were highly politicized. In the course of the 1984 presidential campaign, Republican political leaders bowed to steel industry pressure for protection. Finding no other avenue available, the USTR threatened to file Section 301 cases unless numerous countries agreed to limit steel exports.

Other ways also exist to manipulate Section 301 cases. For example, in November 1987, the USTR invited public comment to identify potential Brazilian imports as targets for retaliatory tariffs in a computer piracy case. Representatives from various industries producing goods

[30]This point is made by Powell (1990) based on an interview with Robert McNeill, the executive vice chairman of the Emergency Committee for American Trade.

[31]A related point is that the filing of anti-dumping petitions in the United States is not limited to domestically owned firms. As reported by Bradsher (1991), the American manufacturing subsidiary of a Japanese company recently asked the ITC to impose duties on the imports of a competitor that is 48 percent British-owned. This new type of trade complaint will likely cause some supporters of this legislation to reconsider their positions as it becomes clear that foreign-owned firms can benefit at the expense of U.S. consumers.

[32]See Bhagwati and Patrick (1990), especially Part 3, for the reactions to Section 301 by various U.S. trading partners.

unrelated to computers, such as leather shoes and dinner dishes, made appeals for retaliatory tariffs of 100 percent to the USTR.

Barfield (1990) also criticizes Super 301 because it violates the fundamental premises of GATT. GATT relies on negotiated reciprocal reductions of trade barriers on a multilateral basis across many industries. Actions in which countries unilaterally define unfair practices and force bilateral negotiations under a retaliation threat are antithetical to GATT. Since GATT is the foundation for an orderly world trading system, it is quite difficult to accept any argument suggesting that use of this legislation by the United States can facilitate free trade. It is more likely that other countries will develop their own versions of 301 legislation and that they will be used to counteract the United States. In such an environment, trade barriers will probably rise rather than decline.

A more fundamental criticism of Section 301 (in general) and Super 301 (specifically) is that trade retaliation and retaliatory threats are ineffective in opening foreign markets. After studying a large number of cases, Powell (1990) concluded that this "crowbar" approach generally fails and that markets are opened because of domestic conditions rather than external ones. From 1975 through March 1990, only 13 of 79 Section 301 cases that were filed led to market openings.[33] In many cases, countries have responded to retaliation by further closing their markets.

Numerous reasons are offered to explain the ineffectiveness and shortcomings of this approach to open foreign markets. First, nationalism in the target country is inspired by retaliation; a coercive attempt by a foreign government tends to unite the target country against the threat. Second, the target country reorients its economy toward alternative suppliers and markets. Firms and consumers in targeted countries can replace their transactions with the United States by selling to and purchasing from other countries. Third, the government's role in the target country generally expands. This intervention to manage the changes induced by the retaliation involves trade-distorting policies, many of which are difficult to eliminate once they have been instituted. Fourth, the tougher the sanctions, the larger the costs incurred by the retaliating country in terms of higher consumer and input prices.[34]

The preceding assessment, however, is not shared by everyone. Ahearn et al. (1990) note a congressional perception in recent years that Section 301 and Super 301 are working. The 1989 Super 301 complaints against Japan and Brazil were resolved in 1990. In addition, South Korea and Taiwan, both frequently mentioned as potential targets of Super 301, made advance concessions to avoid being named as priority countries.[35] Nonetheless, even in situations where this legislation is generating results, it is far from clear that barriers to trade are actually being reduced. For example, recent U.S.-Japan discussions (known as the Structural Impediments Initiative) were largely a Section 301 negotiation. It can be questioned whether the U.S.-Japan agreement to reduce structural impediments to trade, such as Japanese "concessions" to review tax policies that favor agriculture over new construction and American "concessions" to reduce its budget deficit, will promote a freer trading environment or even reduce the U.S. bilateral trade deficit with Japan.[36]

CONCLUSION

The alleged purpose of nearly all trade-remedy laws is to ensure that international competition is fair. Certain commercial practices, such as dumping and export subsidies, are viewed as unfair and, thus, should be counteracted. The elimination of these unfair practices will produce an economic environment in which the

[33]Powell (1990) found that some openings for U.S. exports to South Korea have led to new restrictions on imports from other countries, especially those from Japan. Thus, the South Korean market in not more open overall. While the actions by South Korea have served the interests of certain U.S. exporters, the actions reflect the fact that political clout rather than economic efficiency is determining the pattern of trade.

[34]Numerous examples are available to suggest the harm. In 1988, President Reagan imposed 100 percent tariffs on Brazilian paper products, pharmaceuticals and consumer electronics as a result of a Section 301 petition alleging inadequate Brazilian protection of pharmaceutical patents. In 1982, President Reagan ordered higher steel tariffs and more restrictive import quotas as a result of a petition charging European steel subsidies. While U.S. steel producers undoubtedly benefited, American manufacturers that required competitively-priced steel as an input were harmed.

[35]The 1989 Super 301 complaints involving two practices in India remain to be resolved. A review is to be conducted after the conclusion of the Uruguay Round.

[36]See Butler (1991) for details on these negotiations as well as for a general overview of U.S.-Japan trade.

success of firms and resource suppliers depend on their own performance in a competitive market rather than on their access to government subsidies or the use of questionable practices.

Reality, however, bears little resemblance to the alleged purpose. Less-than-fair-value trade laws, especially anti-dumping laws, are the most frequently used trade-remedy laws and provide potential relief from all imports, whether they are traded fairly or unfairly. In fact, the operations of these laws are biased toward findings of dumping and export subsidies. Therefore, they have become standard devices to protect specific domestic producer interests at the expense of domestic consumer and other producer interests. In addition, U.S. less-than-fair-value trade laws explicitly instruct administrators to protect specific domestic producers, while ignoring the interests of domestic consumers and other domestic producers.

The costs imposed by the increasing use of less-than-fair-value trade laws are not restricted to the consequences of the actual import duties. The threat of such cases leads to "voluntary" agreements to limit trade, agreements that harm potential importers. Furthermore, the uncertainty associated with the actual duties collected functions as a type of non-tariff barrier. Finally, there is evidence that the use of trade-remedy laws tends to encourage protectionism in other countries.

Despite some instances where Section 301 and Super 301 cases might have had positive effects in liberalizing foreign markets, there is substantial evidence suggesting that the crowbar approach generally fails. Domestic conditions rather than external pressures provide the primary motivation for the liberalization of markets. Nonetheless, there is a high probability that this trade-remedy approach will be used more frequently in the future. If so, then other countries are likely to develop and use their own versions of 301 legislation to counteract the United States' actions. Similar to the world's experience with less-than-fair-value laws, protectionism is a likely consequence.

Overall, the evidence is that trade-remedy laws hinder rather than facilitate free trade. U.S. fair trade laws can be more accurately characterized as the bedrock for protectionism rather than the bedrock for free trade. As such, trade-remedy laws need to be remedied by eliminating the bias toward protection of domestic producers.

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