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6 Testing Models of the Trade Policy Process: Antidumping and the "New Issues"

Robert E. Cumby and Theodore H. Moran

6.1 Introduction: The Expansion of Trade Protection in the Midst of Trade Expansion

The trade policy process in the United States is producing dramatically opposite outcomes simultaneously. On the one hand, the United States has ratified both the North American Free Trade Agreement (NAFTA) and the Uruguay Round, which together include sweeping trade liberalization measures. On the other hand, from the perspective of many of those involved in the struggles over NAFTA and the Uruguay Round, those opposing trade liberalization or seeking new trade protection have battled with extraordinary intensity and, in significant areas, with some success. How is the trade policy process likely to evolve in the post-Uruguay Round era? Will models of policy formation that have been useful in the past continue to be relevant in the future?

This paper examines one of the most vigorously contested areas in the Uruguay Round, the case of establishing a framework for antidumping actions in the World Trade Organization (WTO). Here, efforts at trade liberalization were not successful. In fact, there was an extension and codification of a new protectionist regulatory regime worldwide, leavened only by some modest reforms

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of existing procedures. How did this campaign on behalf of antidumping protectionism succeed in the midst of a major tide flowing in the direction of liberalization, what does it say about how the process works, and what does it portend for the trade battles to come?

6.2 Models of the U.S. Trade Policy Process

The basic model of trade policy formation predicts protectionist outcomes. Policy making toward trade is an archetypical example of the collective-goods problem (Olson 1965; Schattschneider 1935; Cohen 1988; Baldwin 1985). Intense damage to concentrated groups will prevail over small individual benefits to diffuse populations in generating a policy response. Trade policy will be dominated by interests seeking relief through protection in general or possibly specifically through antidumping. There are three alternative models of the policy-formation process, however, that contradict the collective-goods logic to predict more liberal policies.

1. *Defying protectionism I: An institutional structure for the executive to save Congress from itself.* Popularly elected representatives find themselves faced by protectionist pressures of the collective-goods kind but want to do their duty in the larger national interest. Congress therefore delegates authority to undertake trade-liberalizing negotiations to the executive, with a fast-track institutional structure that allows the executive to save Congress from itself on behalf of the greater good. This explains liberal outcomes and would predict a split between the executive and Congress on antidumping, with the former winning out on behalf of a more liberal approach. (See Pastor 1980; Destler 1995.)

2. *Defying protectionism II: MNC and big exporter clout to expand market access abroad.* Helping explain liberal outcomes, special interest protectionism is offset by "special interest" market expansionism on the part of the big U.S. exporter and MNC (multinational corporation) trade-and-investment community. U.S. exporters and MNCs add their pressure from lobbying and PAC contributions to the weaker pressures from consumers. This would predict strong inside-the-beltway as well as corporate grassroots forces rising to confront those pressing an agenda of more restrictive antidumping laws. (See Destler, Odell, and Elliott 1987; Hufbauer 1989; McKeown 1984; Milner 1988.)

A "strategic-trade" qualification to this argument, advanced by Milner and Yoffie (1989), suggests that U.S. exporters and MNCs may support liberalization, not unconditionally, but only conditionally since they need the economies of scale that come from access to foreign markets to compete globally and fear the competitive boost that access to the U.S. market might give non-U.S. firms. Hence, U.S. MNCs withhold their support for liberalism at home unless it is strictly matched by reciprocity and balance in market-opening measures else-

where. In the case of antidumping regulations, this "qualification" would predict particularly strong U.S. MNC effort to expand market access abroad without interference by antidumping forces in other nations, in return for which American multinationals help stifle domestic U.S. antidumping pressure groups.

3. *Defying protectionism III: The broader political and economic interests of the American hegemon (even a declining hegemon).* Charles Kindleberger and others postulate that an open international trading system requires a hegemonic power willing to bear a disproportionate share of the costs, risks, and burdens to keep the tendency toward shortsighted national self-interest under control.[1] The preponderant power, formerly the United Kingdom and now the United States, has a unique time frame and discount rate ("the long shadow of the future") as well as set of national political interests that predispose it to assume system maintenance duties for the benefit of all. This would predict strong efforts on the part of the foreign policy/national defense community to circumscribe antidumping protectionism at home and push for strong multilateral disciplines on its spread abroad.[2]

A qualification may be needed as American preeminence wanes, according to Walz (1979) and Mastanduno (1991). With the decline of American hegemony, national policy makers may place the search for relative gains above the search for mutual gains. They will support the latter only if the outcome is weighted to improve the relative position of the United States. In the case of antidumping, this qualification suggests that uppermost in the minds of U.S. policy makers will be the question of whether the outcome will leave the United States in a stronger or weaker position vis-à-vis America's major industrial rivals.

6.3 Background on Antidumping

U.S. antidumping law was originally intended to supplement domestic antitrust law and address international predatory pricing by foreign firms in the U.S. market. Predatory intent to injure was central in the determination of dumping. The first significant change to this original treatment of dumping came as early as 1921, when a new law omitted any reference to predation and provided for a remedy in the form of antidumping duties whenever foreign firms were found to be selling in the United States at less than fair value (below the price in the foreign markets or, in the absence of such a price, below the cost of production). Importantly, the 1921 law transformed dumping cases into

1. Kindleberger (1973, 1986) and Goldstein (1986, 1988); Coates and Ludema (1994) provide a formal, game-theoretic model of liberalization led by a dominant power.

2. Prestowitz (1988) presents a more "bureaucratic politics" version of this argument, that the foreign policy/national defense community weighs in to give away access to the U.S. market to foreigners so as to maintain cordial political relations with them.

administrative determinations rather than judicial proceedings, thereby softening the rules of evidence and standards of proof.

Over time, a number of changes have been made in U.S. antidumping laws that have made them increasingly more restrictive. Two changes stand out in importance: the increasing reliance on a comparison of the U.S. price of imports to "constructed value" (an estimate of average cost plus profit and selling expenses) and the change in the administering authority from the Treasury Department to the Commerce Department in order to provide for more sympathetic treatment of petitioners.[3] Moreover, the details of the laws and of Commerce's implementation of the laws have become biased toward finding larger margins and therefore more frequent positive dumping determinations.[4] Three examples illustrate these biases in the law and its implementation prior to the Uruguay Round. First, as the law permitted, Commerce compared a six-month average of foreign prices to individual U.S. (import) prices and ignored any U.S. prices that take place above the average foreign price when computing dumping margins. Thus, an exporter would be found to be dumping unless its price on every transaction in the United States is above the average price in the exporter's home market. Second, when Commerce used estimates of constructed value instead of foreign prices, the law mandated that overhead of 10 percent and a profit margin of 8 percent be added to fully allocated production costs. In contrast, recognizing that competitive firms may set price below average total cost for a number of reasons, U.S. courts require that price be below marginal cost or average variable cost and that it be possible to recoup short-term losses through subsequently higher monopoly prices before a firm's pricing practices run afoul of the antitrust laws. Because the antidumping laws compare U.S. prices to average total cost, and because U.S. firms' margins are often smaller than 18.8 percent, a double standard evolved under which a foreign firm would be found to be dumping in the U.S. market even if it had the same costs and charged the same price as a U.S. competitor who faced no legal problems. Third, when the exporter failed to provide the information requested by Commerce in the format desired, Commerce would use the "best information available" (generally obtained from the petitioner) to compute dumping margins.

In addition to the faulty microeconomics that underlies the U.S. approach, the biases in Commerce's procedures have become so severe that it reached negative determinations in only 3 percent of its final determinations between

3. The Trade Act of 1974 requires that sales in the exporter's home market that take place below (an estimate of) cost should be excluded from calculations. Not only does this raise the average and therefore the resulting dumping margin when price comparisons are used, but it also often reduces the number of foreign prices available for comparison by enough to justify ignoring the exporter's home market prices and comparing prices in the U.S. market to constructed value. The change in administering authority took place as part of congressional approval of the Trade Agreements Act of 1979.

4. The biases in Commerce's methods are described and thoroughly analyzed in several contributions in Boltuck and Litan (1991).

1988 and 1992 (Arnold 1994). The view that Commerce's procedures are biased in favor of petitioners is shared by a number of U.S. trading partners and led them to push for greater discipline on antidumping actions as part of the Uruguay Round negotiations.

The central issue for antidumping in the Uruguay Round was therefore a choice between attempting to circumscribe antidumping protectionism at home and abroad and legitimizing the U.S. approach in the new Uruguay Round agreements as the standard that would then become commonplace in foreign markets. From the beginning of the Uruguay Round negotiations, the Reagan and Bush administrations' negotiators consistently pressed for the latter. During the Bush administration, the U.S. negotiators, along with those from the European Community (EC), resisted including antidumping in the negotiations at all. U.S. negotiators finally acquiesced but consistently defended U.S. antidumping practices and, at the end of 1989, formed what Horlick and Shea call a "non-aggressive pact" to resist changes to either of their antidumping practices (Horlick and Shea 1995, 12). The U.S. negotiators never attempted to use the multilateral negotiations as an "antiprotectionist counterweight" (Destler 1995).

The negotiations dragged on well past the initial deadline of December 1990 owing to disputes on a number of matters. In December 1991, GATT director general Dunkel produced a draft agreement to serve as the basis for further negotiations. Given the history of U.S. pressure, the Dunkel text did not embrace a sweeping reform of antidumping practices but did include a number of restrictions that were aimed at reducing the extent of bias against imports that had developed in the United States and elsewhere. For example, the draft required that, when conducting antidumping investigations, the authorities compare average prices in the home and foreign markets or compare individual transaction prices in the two markets (rather than average prices in one market to transactions prices in the other market); required that actual data on profitability (but only on above-cost sales) be used when calculating constructed cost; and placed restrictions on the use of the best information available.

6.4 Determining the Outcome on Antidumping Policy

6.4.1 Internal Debate in the New Administration

In principle, the new administration could have reopened the entire spectrum of debate on antidumping, including the constructed-cost/price discrimination standard, as might be expected from an administration devoted to expanding the export potential of the country's industries. Such an effort did take place informally in the summer of 1993, via circulation of discussion papers across agencies on a personal basis (a U.S. government equivalent of the *samizdat* process). But the authors of such documents were quickly tracked down by those who had responsibility for enunciating "official" policy positions,

reminded of the requirement for agency clearance of all such papers, threatened with exclusion from the deliberative process if they did not play by the rules, and warned about the loss of credibility in interagency debate if they ventured too far out in front.[5]

In practice, then, there was no "bottom-up review" of antidumping in the new administration. The initial policy battle began from where the previous administration had left off, with the more circumscribed but nonetheless significant question of whether to try to shape the new international regime at the margin in ways that would favor consumers and exporters (and economic efficiency) or to reinforce the protection afforded domestic producers not only in the United States but around the world.

Beginning in late September, the terms of debate (as defined by the office of the U.S. trade representative [USTR] with the backing of the National Economic Council [NEC]) centered on whether to insist on five major changes to the Draft Final Act ("Dunkel text"): standard of review for dispute settlement panels; circumvention; sunset; standing for unions; and cumulation.

1. *Standard of review.* The issue was whether WTO panels should act in a de novo or appellate role when considering dumping cases, that is, whether the Dunkel text should be reopened to explicitly circumscribe the ability of WTO panels to reweigh factual evidence and offer their own interpretation of whether national decisions were consistent with a given country's GATT obligations. On the one hand was the argument that WTO panels constitute an important brake on protectionist actions by national authorities. On the other hand was the argument that WTO panels might "dismantle our trade laws."

2. *Sunset.* Under then-existing law, a dumping order was terminated only when Commerce found no dumping in three successive annual reviews. In practice, this meant that most antidumping actions dragged on in perpetuity. In the Dunkel text, antidumping duties would end after five years unless the domestic industry could show that it would be injured by resumed dumping. The question was whether the burden of proof should be placed on the party found to be dumping in the first place or on the party seeking continued trade protection.

3. *Cumulation.* Most countries add together imports from different sources when they make an injury determination. The Dunkel text had no explicit provision on cumulation. The issue was whether to reopen the text to make this explicit.

4. *Circumvention.* The anticircumvention provision in the Dunkel text was designed to deter the shifting of sources by a multinational firm from one country

5. It is ironic that Commerce and the U.S. trade representative (USTR) were reportedly discussing noncleared drafts with congressional staff at the same time.

to another after an antidumping measure was imposed by not requiring a new investigation for each country. The question was whether to strengthen the language.

5. *Standing for unions.* The concern was whether unions can file antidumping petitions. While the Dunkel text did not address the issue of standing for labor unions, it expressly allowed governments to permit anyone to be an interested party. As in the case of cumulation, the debate centered on whether to reopen the text to clarify the right of unions to bring an antidumping case.

In preparation for small, deputies-level (generally undersecretaries or their designees) discussions of these issues, the USTR announced that its representatives had consulted with the Department of Commerce, the International Trade Commission, the staff of the House Ways and Means and Senate Finance Committees, and "the trade bar" in order to arrive at positions that could successfully be "sold" to the trade bar and to Congress.[6]

Among the materials prepared by the USTR for the launching of the U.S. strategy toward antidumping in the Uruguay Round on 28 September, there was no attempt to evaluate the substantive effect of the approach being considered on the U.S. economy or any discussion of the tactical option of energizing exporter and MNC groups to weigh in with their own points of view. When discussion papers attempting such an evaluation and suggesting such a tactic had been circulated informally in the preceding months, they had been personally squashed by the NEC's senior trade practitioner for fear they would be leaked; the rationale was that mobilizing forces to counter the antidumping lobby would merely inflame the latter.

The survey that was undertaken of the parties enumerated above indicated that standard of review was "the number one issue on everyone's list." The USTR reported that there was serious concern that panels would reweigh factual evidence and impose their own interpretation of the agreements, rather than deferring to the original determination by investigating authorities. Arguing on behalf of protecting the integrity of U.S. trade law, a position with a sturdy prosovereignty ring, the USTR urged that circumscribing this standard of review, either in the antidumping text or in the Integrated Dispute Settlement text, should become the first on the short list of "must haves" in negotiating a brokered text.

The USTR recommended that the United States seek changes in the Dunkel text in the other four areas as well, recognizing, however, that the United States was "isolated" on these issues among most of the rest of the GATT members and at the end of the day might have to settle for less. The Commerce Department and the new National Economic Council (ostensibly established as an

6. From the earliest interagency meetings, *the trade bar* was used exclusively to refer to the petitioners' bar, i.e., those representing industries seeking protection through the antidumping laws.

honest broker for all points of view) firmly sided with the USTR's recommendations.

Other parts of the administration were consistently antiprotectionist. The Council of Economic Advisers (CEA), for example, adopted its traditional position supporting liberalized trade. The Treasury Department and the State Department, however, abandoned their historical roles on this issue. Their behavior defied the conventional bureaucratic policies dictum, "Where you sit is where you stand." The Treasury Department, traditionally stalwart in favor of freer trade, did not play an active role on Uruguay Round issues, except for financial services. The State Department, also traditionally on the side of freer trade, was split: the undersecretary of state for economic affairs, however, consistently decided in favor of those in her department who supported a "strong defense of our trade laws." The Office of Management and Budget (OMB) and Justice generally supported the CEA position, but the NEC frequently excluded the OMB from key meetings (the OMB would be excluded from one, not invited in response to staff-level requests to the next, reinvited to the next only when a senior OMB official intervened, and excluded from the next, necessitating a chip-expending process for OMB subofficials vis-à-vis their bosses, which they had to conserve for deployment on multiple important issues). And Justice was shut out completely despite considerable expertise on trade laws.

As for outside pressures, the USTR reported that "the industries supporting strong U.S. trade laws remain highly agitated." Those representing exporting interests, on the other hand, remain "virtually silent." The only nonprotectionist group whose views are documented at all in the discussions was ECAT (the Emergency Committee for American Trade, a group of approximately fifty of the most international U.S. corporations), repeatedly cited as the exception to what is referred to as the "consensus."

The NEC/USTR-led strategy included an explicit plan to share U.S. government intentions with those who use the antidumping laws for protection, for example, "quietly advising the trade bar" on how the administration intended to handle what the USTR called "margin-protecting" issues (provisions that otherwise might reduce dumping margins when compared with current U.S. practice) and attempting to "sell draft language" on standard of review to the trade bar.

6.4.2 The Geneva Endgame

During the early debates on the administration's antidumping strategy in September and October, the undersecretary of commerce for international trade, the political appointee with organizational responsibility within the executive branch for carrying out the antidumping laws, had not yet been confirmed; by mid-November, as the Uruguay Round endgame in Geneva approached, he was. His first action as part of the Uruguay Round negotiating team in Washington was to make a special request for an "urgent meeting" of

the deputies at which the U.S. position on the five issues already identified as critical would be toughened—in particular, standard of review, so that GATT panels cannot "dismantle our trade laws bit-by-bit"; sunset, so that the burden of terminating an order restraining imports be borne by the parties who created the problem, the exporters (in the case in mind, of course, non-U.S. exporters); and cumulation, so that de minimis thresholds be based on share of imports, not share of total consumption. Only in this way could the "broad attack" on U.S. law represented by the Dunkel text be countered. In addition, he proposed a list of other changes in rules governing start-up costs, constructed value, and average prices.

The senior officials in the U.S. delegation in Geneva were from the USTR and the Commerce Department. Other agencies were represented by much lower ranks. In private "confessionals" with Director General Sutherland as well as public statements, the changes in the Dunkel draft on antidumping were listed as the "number one priority," once the dispute over the Blair House agreement on agriculture was settled. The priority placed on changing the antidumping text might be expected to have reduced U.S. bargaining power on other issues, such as enhanced market access, better intellectual property rights protection, and/or liberalization of trade in financial services. U.S. negotiators claim, however, that there was no opportunity cost for other trade issues from placing such high priority on the antidumping changes.[7]

This high priority on the part of the U.S. delegation, in the face of strong international opposition, did not lead the U.S. antidumping interest groups to relax their pressures. On the contrary, they managed to mobilize senior congressional representatives, including the chair of the Senate Finance Committee and the House majority leader, to fly over to join the lobbying effort in Geneva.

The group most directly advocating the position of exporters and MNCs, ECAT, went to Geneva with only junior members of Congress supporting their position. Not only was this side outnumbered and outranked, but it became the target of personal attack. After pushing for a sunset clause that made it easy to terminate an antidumping order after five years, a senior lawyer on the ECAT team was accused by colleagues from the Washington trade law community of working to undermine what would be (absent sunset) a stream of ongoing cases.[8]

The outcome in Geneva included eight of the eleven changes demanded by the United States. These included circumscribing the powers of WTO panels via limits on the standard of review and making explicit the standing of labor

7. Horlick and Shea (1995, n. 59) note that a contrary view is expressed by others, including Japan's chief negotiator.

8. Since antidumping cases generate more respondents than petitioners, there is no reason a priori to believe that the trade law community is biased toward protection. On the other hand, there may be reason to believe that there is a vested interest among trade lawyers in keeping the antidumping process itself continuing.

unions to bring antidumping cases. In addition, procedural rules were altered in a way that would change the results of previous cases, such as the change in negligibility. This change was made because the steel industry would have been more successful at the International Trade Commission (ITC) in the spring 1993 steel cases under the new criterion than under the old one. The principal victory for the more liberal side was the sunset provision under which antidumping orders are terminated after five years unless there is a finding that renewed injury would result.

6.4.3 The Struggle over Implementing Legislation

Once the Geneva agreement was reached, the process of turning that agreement into legislative language to be approved by the Congress began. Problems were expected primarily in four areas, involving sovereignty and the World Trade Organization (in particular, its dispute settlement procedures), provision for renewed fast-track authority, parts of the subsidies agreement, and antidumping. Within antidumping, the debate centered on seven main issues (along with hundreds of "little" ones): "compensation," awarding any antidumping collected to successful petitioners; "duty as a cost," adding antidumping duties to the estimate of the exporter's cost (thereby doubling any antidumping duties levied); "captive production," excluding domestic production used internally for further processing when computing import penetration and examining industry financial performance for injury determination;[9] "averaging in reviews," comparing average foreign market prices to individual domestic prices;[10] "exporter's sales price," adjusting the exporter's price when sales occur through a U.S. affiliate of the foreign exporter;[11] "short supply," suspending antidumping duties if the domestic industry was unable to supply domestic users with sufficient quantity and quality;[12] and "start-up," adjusting production and sales costs of a new product during its start-up period.[13]

The implementing legislation was subject to "fast-track" legislative rules

9. This proposal was spurred by the assessment that several of the ITC's findings of "no injury" in the steel cases (especially those involving hot-rolled steel) decided in 1993 would have gone the other way had "captive production" been excluded.

10. This reflects standard Commerce Department practice prior to the Uruguay Round legislation and imparts an upward bias to calculated dumping margins unless all prices are identical. The Uruguay Round antidumping code prohibits this practice in investigations. U.S. negotiators argued that the code is silent on the procedure to be used in subsequent reviews.

11. This proposal would expand dumping margins on goods sold to U.S. affiliates of foreign MNCs by mandating that the affiliate's profits and selling costs be deducted from the price at which the good was first sold to an unrelated party. No similar adjustment would be made to the prices in the exporting country.

12. Computer manufacturers (Apple, Compaq, Digital, Hewlett-Packard, and IBM) in particular supported this provision, in part in response to the flat panel display case of 1991. They were joined by the Precision Metalforming Association (a group of steel users), Caterpillar, and Michelin. The Energy Industry Group supported the provision because of concerns of shortages of large-diameter steel pipe.

13. The Uruguay Round antidumping code requires that these costs be adjusted to reflect the costs at the end of the start-up period. Two aspects of this requirement were the subject of contro-

that prohibit amendments once the legislation is formally submitted and require that the entire package be voted up or down. But it is misleading to think of "fast track" as a process that prevents congressional changes to the legislation proposed by the administration. Instead, any changes need to be made before the legislation is *formally* submitted. The administration's draft legislation (itself the product of negotiations with the representatives of key committees and their staffs) is first informally submitted to the relevant committees.[14] The committees then hold "mock markup" sessions and reconcile the House and Senate versions in a "mock conference" to produce a congressional version of the package. Only then does the executive formally submit the legislation under fast-track rules.

Although fast-track procedures do not prevent the Congress from influencing the legislative package, they do, of course, affect the relative power of those involved in the implementing legislation. Amendments from the floor of Congress are prohibited, thus concentrating congressional power entirely in the relevant committees. And the administration, which submits the final legislation, can decide which of the changes proposed by the Congress to accept and which to reject subject to the constraint that the package (and possibly other parts of their legislative agenda) be successful.

A second set of legislative rules—the "pay-as-you-go" budget rules adopted as part of the Budget Enforcement Act of 1990—created a potential obstacle to achieving congressional approval of the implementing legislation. The tariff reductions would lead to revenue losses estimated by the Congressional Budget Office at $12 billion over five years and $28 billion over ten years. Under House rules, the five-year revenue losses needed to be offset by other revenues or by spending cuts. Under Senate rules, the legislation would need to offset the ten-year losses unless a sixty-vote waiver was obtained. Since the administration was prepared only to propose offsets for the projected revenue losses during the first five years, the legislation required a sixty-vote majority in the Senate. This budget offset requirement added to potential opposition to the legislation, and the requirement of a supermajority provided added leverage to those seeking to extract concessions in return for supporting the legislation.

As soon as the agreement was reached in Geneva, domestic users of the antidumping laws began to attack the agreement as weakening or dismantling U.S. trade laws. This attack was led by representatives of the integrated steel producers and the semiconductor industry, two groups that had found the antidumping laws helpful in the past and that had lobbied for changes in the Dun-

versy. On one side, petitioners, led by the Semiconductor Industry Association, were pushing for as early an end for the start-up period as possible and for the adjustment to be limited to fixed production costs. On the other side, a group of multinationals led by the computer manufacturers was pushing for setting the end of start-up at six months after normal production levels were achieved and for all start-up costs (production and marketing) to be included in the adjustment.

14. These were the House Ways and Means Committee and the Senate Finance Committee for antidumping and for most of the remaining legislation. A total of eight committees in the House alone claimed jurisdiction over some piece of the legislation.

kel text. In January 1994, Representative Ralph Regula (R-OH), vice chair of the congressional steel caucus, proposed fifty changes to U.S. antidumping and countervailing duty laws. Senator Ernest Hollings (D-SC) renewed proposals to change the calculation of the exporter's sales price (ESP) when imports are made through a related party. Hollings had been unsuccessful in adding these proposals to the 1988 trade bill but pressed the administration to include them and other margin-increasing changes in the implementing legislation.

The administration's efforts on the implementing legislation were again coordinated by an NEC-led group. Negotiations with the Congress were the responsibility of the trade representative's office, joined by the Department of Commerce on antidumping and countervailing duty issues. The focus of the NEC-led group was on getting the agreement through Congress. Because the task was to determine "what package can be sold to Congress," the USTR, which was charged with congressional relations, was in a position of providing judgments as to what could be sold. Consequently, as both the judge of what could be sold and the agent coordinating the negotiation with Congress, the USTR effectively controlled the process.

The administration outlined its approach in a series of memos to the House Ways and Means Committee beginning in March. In particular, they chose not to embrace several of the proposals being pushed by petitioners, including provisions for compensation, tighter anticircumvention rules, and instructions that the International Trade Commission ignore "captive production" in its injury determinations. They also chose not to include a "short-supply" provision that was sought by a group of multinationals and energy firms. The administration's outline for the implementing legislation left some ambiguity about "duty as a cost" and the treatment of ESP. It proposed that Commerce continue with its practice of comparing U.S. prices of specific transactions to averages of foreign prices in computing dumping margins during reviews.

A "lawyers group" consisting of staff from the trade representative's office and the Department of Commerce was formed to draft legislative language.[15] The staff-level group charged with drafting the legislation had enormous power to make small but important changes to the antidumping laws. Even those aspects characterized as containing broader, policy-level issues were composed of highly technical pieces in what is a byzantine set of laws, regulations, and practices. Evaluating those policy-level issues required expertise in U.S. trade laws that made it difficult for those in the NEC-led deputies group who were not trade lawyers to influence the process. More generally, exercising effective control over the legislative language from the deputies' level was largely impossible because of the mind-numbing level of detail, the extraordinary number of provisions, and the fact that the language was withheld from

15. Adopting the Geneva agreement verbatim was not possible. The agreement is ambiguous in a number of places, is silent in others, and permits but does not require some practices. This group conducted drafting sessions in close cooperation with the majority staff of the Ways and Means Committee.

staff outside of Commerce and the USTR until the summer.[16] Thus, the staff-level group drafting the legislation had the ability to tilt the language in the direction sought by petitioners, and it did so in several important ways.

In the first half of April, Representatives Norman Mineta (D-CA) and Ralph Regula (R-OH), the chairs of the House Democratic and Republican task forces on the GATT, introduced a bill containing implementing legislation for antidumping and countervailing duties. Although slightly pared down from Regula's earlier efforts, the bill still reflected the changes sought by petitioners. Regula characterized the bill as an attempt to influence the administration's proposals for the implementing legislation, pointing to "some differences within the Administration on how restrictive" the antidumping parts of the implementing legislation would be (Regula was quoted in *Inside U.S. Trade*, 15 April 1994, 6).

The first complete compilation of the administration's proposals for the implementing legislation was presented to the Ways and Means Committee for the 16 June executive session and the 20 June public session of the trade subcommittee. The administration's proposal did not contain several of the most visible provisions sought by petitioners (duty as a cost, circumvention, captive production, or compensation). Nor did it contain the short-supply provision sought by several large multinationals and computer manufacturers.

The treatment of costs during a "start-up" phase of production became an increasingly visible issue during the spring. The administration's initial proposal was fairly close to the petitioners' position. The end of the start-up period was set as no later than the beginning of normal production levels, and only fixed production costs were to be adjusted. Changing this proposal then became one of the key goals of those lobbying for less restrictive provisions in the implementing legislation.

Almost immediately after the administration set out its proposals for the Ways and Means trade subcommittee, a bipartisan group of ten members of the Ways and Means Committee (six Democrats and four Republicans) led by Sander Levin (D-MI) and Amo Houghton (R-NY) charged that the administration's proposals would fail to preserve U.S. trade laws and listed twelve changes that they would seek. The list included the familiar issues of duty as a cost, compensation, captive production, and anticircumvention as well as an early end to the start-up period and a weaker injury standard.[17]

The Ways and Means Committee marked up the antidumping legislation on

16. The sheer number of small or subtle ways in which the draft legislation tilted in the direction of petitioners presented problems for oversight at a higher level outside Commerce. It is difficult to justify deputy-level focus on minutiae, and choosing a few of the most important ones is problematic. As one experienced trade lawyer explained, it is impossible for an outsider to know from a simple reading of the text which cases or how many cases will turn on a particular choice of words.

17. The group also pressed for a change in the countervailing duty (CVD) laws that would reverse a 7 June 1994 Court of International Trade decision concerning privatized industries. In two steel cases, the court overturned the Commerce Department's practice of allowing past subsidies to "travel" to the new owners of a privatized firm. The court ruled that no countervailable

20 July, passing an en bloc amendment that included several concessions to the Levin-Houghton group, and rejecting the computer MNC's short-supply amendment.[18] The Levin-Houghton group won partial victories on captive production, duty absorption, anticircumvention, and countervailing duties (CVDs) on privatized firms. On captive production, this markup directed the ITC to "focus primarily on the merchant market for the upstream product" to determine market share and financial performance. Although a duty as a cost provision was not adopted, the ITC was instructed to consider duty absorption when conducting sunset reviews and required that, within two years of an antidumping order being issued, Commerce assess the extent of duty absorption.[19]

Not all the en bloc amendments favored petitioners. The end of the start-up period was set "at" (rather than "no later than") the beginning of commercial production levels, and the resulting adjustment had to include "all production costs" (as opposed to "fixed costs" only). Also, the averaging of prices in administrative reviews was limited to one month.

The antidumping issue that proved to be the most controversial in the Senate, the calculation of the ESP between related parties, was contained in the "chairman's mark" that was presented to the committee for the markup. Senate Finance Committee Chairman Moynihan included language that provided for profits as well as selling costs to be deducted from the price from the first sale to an unrelated party. This provision, which had been championed by Ernest Hollings (D-SC), would inflate dumping margins by an estimated 7 percentage points or more (Lawrence 1994). The administration's proposal (which was approved by the House) provided for a more neutral procedure that would take the sales price from the first sale to an unrelated party and then make adjustments in order to compare that price to the price in the exporter's home market at a comparable level of trade.

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subsidy survived an "arm's-length" transaction when either an entire enterprise or a division of a subsidized enterprise is privatized. The Levin-Houghton group expressed its desire to "clarify" the law by codifying Commerce's overturned practice. The administration opposed the Levin-Houghton amendments but expressed willingness to "work with the trade subcommittee staff to discuss the concerns of the integrated steel producers" on captive production and said that they would "continue to consider" the issue of CVDs and privatized firms. (The quote is from a memo from the USTR general counsel to acting trade subcommittee chairman Matsui.)

18. The short-supply amendment was rejected by a vote of twenty-three to fifteen, surprising the large computer company and MNC supporters who, earlier in the week, had expected it to pass. The assistant secretary of commerce for import administration voiced strong opposition to the amendment. Chairmen Gibbons and Matsui also opposed the amendment.

19. The assistant secretary of commerce for import administration reportedly told the committee that, if duty absorption were taking place, it would "lead us to find an ever higher duty" (quoted in *Inside U.S. Trade,* 22 July 1994, 21). The en bloc amendment also states that a change in ownership of a firm or a division of the firm "does not, by itself require the administering authority to find that past countervailable subsidies received by the firm no longer continue to be countervailable." Although this amendment was pushed primarily by the integrated steel producers, it was reportedly also supported by Representative Jim McDermott (D-WA) because of Boeing's concerns about the treatment of subsidies to Aerospatiale, one of the partner companies in Airbus, should it be privatized (*Inside U.S. Trade,* 22 July 1994, 22).

On 28 July, the Finance Committee adopted a set of twenty-six en bloc amendments, including the Hollings ESP proposal that was in the chairman's mark and three amendments similar to those adopted by the House. Price averaging in administrative reviews was restricted to one month, and language on captive production, pushed by Senators Rockefeller (D-WV) and Hatch (R-UT), and on the effect of privatization on countervailing duties similar, but not identical, to the House language was adopted. In addition, an amendment pushed by Senators Rockefeller and Danforth to restrict "diversionary dumping" was included in the en bloc amendments.[20]

The House and Senate versions of the implementing legislation then proceeded to conference, where the conferees needed to deal simultaneously with several contentious issues and with the calendar as well. The House and Senate conferees reached agreement on 20 September, although a few controversial issues were left to the administration.[21] A House compromise on fast-track authority did not survive the conference, and fast-track renewal had to await separate legislation. The conference reached a compromise on the treatment of ESP that provided for the deduction of profits in computing the exporter's sales price (thereby inflating dumping margins), as advocated by Hollings and others, but also included language that may result in more frequent "level of trade" adjustments by Commerce. The conference adopted the start-up language in the House version of the legislation, with the result that the start-up period was to end when commercial production levels were achieved and both fixed and variable production costs were to be adjusted. The Senate language on "diversionary dumping" was also adopted.[22]

20. According to its proponents, the amendment was aimed at preventing hot-rolled steel that was under a dumping order from being shipped to another country, where it would be transformed to cold-rolled steel and then shipped to the United States not subject to a dumping order.

21. A change in a rule of origin for textiles and apparel—the country of origin was changed to the country where the object was assembled rather than the country where the fabric was cut—was included in both the House and the Senate versions of the legislation, but the Senate version delayed implementation for five years. A delay of eighteen months (until 1 July 1996) was included in the legislation the administration submitted.

22. The concessions on ESP and textile rules of origin notwithstanding, on 28 September Hollings announced that the Commerce Committee would use the full forty-five days to consider the legislation that fast-track rules allow. The president then asked the Senate to stay in session until a vote could be taken, and a vote was scheduled for 1 December. Once the legislation was formally submitted, the remaining question was whether the required sixty votes would be achieved in the Senate. Minority Leader Dole (R-KS) threw up a number of obstacles during the fall. He implied that he was conditioning his support on, among other things, a capital gains tax cut, assurances that farm programs would not be "singled out" in future budget cuts, and the creation of a commission to examine the decisions of the dispute settlement mechanisms of the WTO. He also requested specific commitments for wheat and oilseed producers. An agreement between the administration and Senator Dole providing for the creation of the Dispute Settlement Review Commission to scrutinize decisions that go against the United States was announced on 23 November. That agreement cleared the way for Senate approval of the legislation. The House approved the legislation by a bipartisan majority of 288-146 on 29 November. On 1 December, the Senate voted sixty-eight to thirty-two to waive the budget rule and then voted seventy-six to twenty-four to approve the legislation. Senator Hollings was not among those voting in favor of the legislation.

6.4.4 The Dynamics of Trade Policy Formation on Antidumping

The preceding sections suggest five conclusions about the dynamics of trade policy formation on antidumping.

First, the policy decision-making structure was largely dominated by members of the trade bar practitioner community, owing in part to the structure of senior-level appointments and in part to the detailed and specialized nature of the subject. This community stretched across the executive and Congress and, whether being solicitous of the demands of petitioners or attempting to constrain the latter's demands at the margin, conducted itself so as deliberately to exclude more liberal outsiders (in the executive or Congress) as much as possible. The few key players who did not come from the trade bar community, such as the undersecretary of commerce for international trade, emerged from the Senate confirmation process thoroughly imbued with an appreciation of the need to cater to the antidumping petitioners' lobby.

Second, reinforcing the strength derived from the technical and specialized nature of the debate, the trade law practitioner community enjoyed the considerable advantage that comes from having captured the rhetorical high ground in characterizing debate on the antidumping issue. *Strengthening our trade laws* became the standard code for awarding protection via antidumping; *weakening our trade laws* became the standard characterization for policy efforts designed to help consumers and exporters. Indeed, *the trade bar* came to be synonymous with the petitioners' lobby. This victory in the Orwellian struggle over use of language reinforced the ability of the trade bar practitioner community to maintain control over the process by handicapping the ability of more liberal participants to enlist the support of senior policy makers elsewhere in the administration.

Third, the policy determination process did not start from an assessment or a debate about what was in the broadest national interest and then proceed to bend policy toward reality from there (initial efforts to proceed in this way were effectively squashed). In fact, except as maverick actions on the part of the more liberal policy players, working from the fringes, there was no attempt on the part of the principal negotiators (the USTR and Commerce) to "round up" countervailing forces or seek out allies to provide some balance against the special interest demands of petitioners. The tactical strategy was to mollify and appease the more protectionist forces, with the hope of thereby keeping their opposition and criticism within some reasonable bounds. In the process, the idea that more restrictive antidumping legislation was the "price" that needed to be paid to obtain congressional approval of the full Uruguay Round package went from received wisdom to a self-fulfilling prophecy.

Fourth, in this contest, the protectionist interests organized their own forces vigorously and well, with an offensive that set the agenda of debate. From the earliest days of determining appointments in the new administration, through

lopsided representation on the ground in Geneva, to the final construction of implementing legislation, they mobilized strong supporters from both sides of the aisle, while the administration, at best, played at damage control.

Fifth, those production-oriented interest groups wanting a more liberal outcome (like exporters and MNCs) were never represented on as high a level or with the same expenditure of resources and energy as their counterparts from the ranks of petitioners. Individuals or organizations representing consumers or the economy at large were virtually nonexistent. Companies that stood to benefit from a more liberal approach or to be hurt by the more protectionist options tended to concentrate their efforts on a few relatively narrow issues of particular concern (like short supply or start-up costs).

To provide a fuller perspective on the policy-making process, however, there is an additional dimension that emerges from examining an initiative to revise the antidumping treatment of exports from economies in transition.

6.4.5 The Economies-in-Transition Initiative: High Politics versus Low Politics

During the debate over implementing legislation, there was a major mini-struggle over the antidumping treatment of the economies in transition (EITs) that sheds important light on the relation between "high politics" (national security, central political relations) and "low politics" (economic policy outcomes, especially domestic economic outcomes).

Since early in the Clinton administration, the National Security Council (NSC), State Department, Defense Department, and Council of Economic Advisers had been urging that trade (backed by foreign investment) would have to replace aid in fueling market-led growth and reform in Eastern Europe and the former Soviet Union. This prospect was essentially stymied by the biased treatment accorded EITs on antidumping. What was needed, therefore, was a new method of treating exports from EITs that would be more foreign investor/export friendly.

To remedy this, the administration's senior strategist for Russia and the former Soviet Union set up an NSC-NEC interagency group with instructions to devise options for remedying the situation. At his direction, the group was to be chaired by the undersecretary of commerce for international trade, with the rationale that no solution could be found that was not supported by the Department of Commerce. (In one subsequent interagency meeting, an assistant secretary of state previously from the ranks of "the trade bar" broadened this rationale by asserting that the debate on antidumping policy should be limited to those who had actual experience in the preparation of antidumping cases, in response to which a non–"trade bar" official muttered that it was fortunate that the assistant secretary of state for human rights, who investigates torture cases, did not interrupt interagency proceedings with a comparable demand.)

The first conclusion, unanimously supported, was that administrative reform

was not a realistic option since a long record of precedents would allow petitioners to challenge administration of existing laws that were less favorable to their claims successfully in court.

Turning to legislative reforms, the initial option to receive wide support was the so-called Heinz amendment, which would shift antidumping cases from a cost to a price test.[23] EIT exporters would not be found to be dumping as long as they sold at the price of major free market producers. This was vetoed by the assistant secretary of commerce with the argument that the shift to a price test not only undermined the viability of using it but was likely to arouse widespread alarm in the trade bar because of the precedent it might set for broader antidumping reform.

A second option was to shift to reform of 406(D), the safeguard provisions concerning imports from nonmarket economies. This would replace antidumping coverage with a new Section 406 treatment for EITs. The initiative contained a series of hard-fought-out compromises. The injury test that was devised ("a cause of serious injury") lay between the easy-to-meet antidumping standard and the harder-to-meet current 406 standard. Injury would be restricted to imports into the United States, instead of a Commerce proposal that Russian exports anywhere in the world could be used as evidence to protect U.S. industries. A remedy would be mandatory, but the president would have discretion about what type of remedy. The scope of remedy would be to "address" the injury, not to "remedy" the injury (i.e., would not have to compensate 100 percent).

The downside to this "406 reform" route was that the domestic industry seeking protection simply would have only to go once to the ITC to find injury and get relief: thus, 406 reform would become one-stop shopping for protection. The prevailing antidumping practice requires one stop at the ITC for a "preliminary" finding, one stop at the ITC for "final" finding, and one stop at Commerce—or three stops plus international effort to accumulate surrogate data. The cost would drop by two-thirds, from $400,000–$500,000 in an antidumping case to approximately $150,000–$200,000 for a 406(D) case. In sum, the (small) uncertainty of protection would be eliminated and the cost of acquiring it cut by two-thirds, providing much easier access to a much broader array of petitioners.

Worse, under both 406 "reform" and current antidumping law, the outcome in the vast majority of cases would be a VRA (voluntary restraint agreement) negotiated government to government, thus putting the Russian government (and others) right back in the center of developing an industrial policy for the new EIT export sector via case-by-case managed trade.

Even this modest reform, the administration's congressional strategists calculated, would require high-level effort to convince Senate Finance and House

23. For background on options on exports from nonmarket economies and economies in transition, see Horlick and Shuman (1984).

Ways and Means committee members to accept on geopolitical grounds. Instead, however, the principal coordinator of policy toward Russia and other Commonwealth of Independent State (CIS) countries within the administration delegated the task of selling the proposal to the assistant secretary of state for economic and business affairs (who told his colleagues that he did not intend to spend any chips on it); the NSC delegated it to the NEC, the USTR, and Commerce; and the Department of Defense (DOD) remained preoccupied with other matters.

As a result, the EIT proposal was introduced very late and, according to staff members on both committees, not vigorously pushed or convincingly explained by those assigned the task at the deputies level (cf. *Inside U.S. Trade,* 22 July 1994, 11–12); according to one of the participants, their behavior constituted a modern-day version of "the treason of the clerks." The cycle was extremely difficult to break: when those in favor of the EIT initiative managed to have calls to the Senate Finance Committee and the House Ways and Means Committee put on the calendar of the deputy secretary of state, for example, he delegated the task to the assistant secretary, who in reality was one of the "clerks," because the latter was more familiar with the details and better known to committee staff.

The only principal from the administration to weigh in, at the last minute, to try to salvage the initiative was the vice president. With an urgent personal phone call, he managed to get it included in Chairman Moynihan's "mark," but the proposal was rejected by the Senate Finance Committee when Senator Hatch moved to strike it from the legislation.

6.5 Testing the Models of the U.S. Trade Policy Process

Evidence from the antidumping parts of the Uruguay Round has its limitations. Clearly, one case study cannot be used to evaluate models of trade policy formation under all circumstances.

Perhaps the outcome on antidumping was, for example, simply the price the country had to pay to get the Uruguay Round completed. Destler reports that USTR Strauss viewed the more protectionist antidumping procedures embodied in the 1979 Trade Agreements Act as a "tolerable price to pay" for the support of the integrated steel producers and their supporters in Congress and characterizes USTR Kantor as viewing defense of U.S. antidumping laws as essential to his and the administration's "reputation for toughness and hence its credibility for pushing trade expansion" in the Congress (Destler 1995, 149, 241).

But surely this begs the question. Opposition to the U.S. position on antidumping was extremely strong and widespread, especially among the Asian trading partners, who themselves were holding out on financial services, industrial market access (e.g., glass and zero-for-zeros in copper, wood products, and chemicals), and agriculture. So the issue was what kind of a grand bargain could be struck—a liberalizing grand bargain, in which the United States put

antidumping on the table to elicit more generous offers from others, or a restrictive grand bargain, in which the United States "toughed it out" on antidumping and others reciprocated in areas of special interest to them.

Perhaps the outcome was, alternatively, merely the result of a tactical error of oversolicitousness on the part of the core group of negotiators. Perhaps the outcome may eventually appear to reflect, in part, the familiar revolving-door phenomenon in Washington.[24]

There is, however, a general trend of which this antidumping case is a major part, namely, the greater ease with which import-competing firms have been able to obtain administered protection, over the past two decades, a trend that runs counter to the thrust of overall trade liberalization. It may be particularly useful, therefore, to assess the fit between the most common models of trade policy formation and the Uruguay Round antidumping case, with an eye toward future trade negotiations on issues whose structural characteristics resemble those examined here.

6.5.1 An Institutional Structure for the Executive to Save Congress from Itself

The principal explanation for trade liberalization since the Great Depression, an institutional split between the legislative and the executive branches of government, with the former looking to the latter for ways to save itself from its own worse instincts (or simply to get narrow constituencies off its back), finds no support in the case of antidumping. Congressional proponents of more restrictive antidumping laws were decidedly activist. They lobbied the USTR and Commerce repeatedly on antidumping and exacted pledges in the confirmation hearings of political appointees. Prominent congressional supporters of more restrictive antidumping laws traveled to Geneva to watch over the Uruguay Round endgame. House and Senate trade committees both played energetic roles in turning the implementing legislation in a more protectionist direction. The intensity of the struggle over antidumping policy was not an isolated episode; it was reminiscent of the NAFTA battle, which passed with a narrow majority and created an acrimonious split in the Democratic Party. The administration did not want to risk a bruising intraparty battle with the Uruguay Round legislation, especially with the administration's health care legislation making its way through the Senate Finance and House Ways and Means Committees at the same time and with midterm elections looming.[25]

24. It will be impossible to give an impartial assessment of the revolving-door process for some time. Once U.S. trade negotiators have left office, they are barred from representing foreign exporters; they are not barred from working for domestic firms, to help orchestrate their trade strategy in Washington and Geneva, so long as they do not directly lobby their former agencies for a period of one year. (Also, many of the key players who have taken part in determining policy on antidumping policy do not technically qualify as "trade negotiators.")

25. Congressional activism in antidumping policy is not new. Baldwin and Moore (1991), e.g., characterize it as the best example of congressional efforts over the past thirty years to assert a dominant role in trade policy. They point to efforts not only to change the antidumping law but also

Members of Congress were not just active in a general sense during the process but engaged in constituent service. They sought changes in the rules that can be readily traced to the interests of particular constituents—frequently in an effort to reverse previous decisions that had gone against a constituent.[26] Although Congress did not engage in line-by-line tariff setting, there was little doubt about the consequences of the rule changes that were sought (higher dumping margins and more frequent injury determinations) and who would benefit from the changes.[27]

Congressional advocates of more restrictive antidumping laws also exerted influence over the executive branch through staff-level appointments. For example, congressional staff members moved to key posts in the new administration with the backing of their former employers. Together with the pressures exerted through the confirmation process on more senior appointees, members of Congress were able to help shape the legislation.

Was the success of congressional backers of restrictive antidumping laws due to a lack of strong administration pressure that would have served as a counterweight? Once back from Geneva, the administration initially did set out to present implementing legislation that was generally faithful to the Geneva agreement. Even here, however, the interests of import-competing industries were accommodated to some extent by provisions allowed under the

to influence regulations and procedures and to influence the "nature of the personnel appointed to political positions" in Commerce. Destler (1995) acknowledges a history of congressional activism in antidumping that contrasts with Congress's usual practice of delegating line-by-line tariff setting to the Executive.

26. For example, the change in the negligibility threshold or the captive production clause would have changed the ITC's ruling of no injury in several of the 1993 steel cases.

27. Douglas Nelson (1989) offers an ingenious method to explain the split between congressional protectionism and executive liberalism while supporting the thesis of what he calls "executive dominance of trade policy." He argues that administered protection (antidumping, countervailing duty, and escape clause) alters the role of the legislative branch from engaging in a distributional struggle in which Congress awards individual industries special favors to pursuing what Theodore Lowi calls a "regulatory issue," defining the rules under which all firms/industries have access to protectionism on the same terms. This transformation undermines the logrolling dynamics of protectionist coalitions and allows the congressional dynamic to remain fundamentally protectionist without derailing the executive's push for liberalization (which Nelson ascribes to the determination of key decision makers, especially in the State Department, to use international trade policy as an instrument of national security policy). "In exchange for guarantees that no significant sectors of the population would suffer sustained injury, the executive branch was given the power to pursue a sustained policy of trade liberalization."

The antidumping case examined here, however, shows congressional representatives intervening on behalf of individual industries (steel and semiconductors, e.g.) to put in place both a broad antidumping regime and particular rules of implementation that will benefit their constituents quite specifically, to the detriment of other major sectors of the economy (e.g., exporters and domestic users of imported steel and semiconductors). Nelson's (1989) idea that antidumping regulations act as a kind of safety net for the economy as a whole (the functional equivalent of an escape clause or an adjustment assistance program), whose presence confers permission to the executive to liberalize goods and services across the board, does not fit the facts as well as the simpler notion of a particularly well-organized and tenacious special interest group maneuvering to get its way at the expense of other sectors and holding their benefits hostage until its interests could be satisfied (or its power negated).

agreement (e.g., by continuing to compare average prices to individual prices in reviews). Moreover, there was ongoing ambiguity about how firmly the administration intended to hold the line against protectionist modifications. USTR Kantor made statements that suggested that the administration might be flexible on ESP and on captive production. In addition, there were leaks to the press to the effect that the administration was "split" or "not firm" in its announced antidumping positions. These reports were no doubt accurate to some extent. Historically, the executive has not been unified on antidumping. Indeed, Congress pressured the executive to transfer antidumping responsibility from the Treasury Department to the Commerce Department because of the contrasting perspectives embedded in the two institutions. But public disclosure of these splits had the effect of strengthening the hand of import-competing interests and weakening the position of those in the administration seeking to resist congressional pressures.

Overall, to fit the policy-formation process on antidumping, this save-Congress-from-itself model would have to be turned not only on its head but also inside out: former practitioners from the ranks of the petitioners' trade bar and from congressional staffs entered the administration to act as custodians against more liberal tendencies operating there. Their interaction with the Congress inflated the value of antidumping as an issue and turned the argument that it was a deal breaker into a self-fulfilling prophecy.

Looking toward the "new trade agenda" on trade and the environment, trade and labor standards, and trade and competition policy, how realistic will it be to expect that one will find a Congress that wants the executive to brush aside its supposed demands and take the higher road toward trade liberalization that the members themselves in their secret heart of hearts really do favor as the preferred outcome?

6.5.2 MNC and Exporter Clout to Expand Market Access Abroad

There is a major mystery why the big U.S. exporters and MNCs did not use their influence to offset the antidumping protectionists (but, rather, in some prominent cases, most notably the semiconductor industry, actually supported them). Indeed, their behavior did not even meet the Yoffie/Milner "strategic trade model" test of making access to the U.S. market contingent on greater reciprocal access abroad. Instead, they permitted a worldwide regime to be codified that would restrict exports among major production centers and restrain global sourcing networks. Why were they the dog that did not bark?

Although they generally have an interest in liberalized antidumping laws, most large exporters and MNCs have a number of other trade policy objectives. The intensity of their interest in antidumping does not match that of frequent antidumping law users for whom administered protection is the central objective in trade policy. And relative intensity of interest is important in Congress. The high priority of antidumping to petitioners (like the integrated steel producers) is mirrored in the high priority of antidumping to those in Congress

who push their agenda. When putting together a sizable piece of legislation, even leaders who generally support more liberal trade want to make problems go away. Neutralizing the effect of those who feel strongly about an issue requires effort and political capital that have an opportunity cost, contributing to the idea that doing the right thing on antidumping is a political loser.

In general, large U.S. exporters and MNCs did not match the intensity of interest of the petitioners because they were saving their chips for even more important items for themselves in the Uruguay Round negotiations than antidumping. The representations of prominent international companies for whom antidumping policy was a potential concern directed the bulk of their lobbying efforts toward areas of greater salience for their corporations, such as zero-for-zero tariff cuts in their industries, IPR (intellectual property rights) protection, or government procurement. When they did weigh in, they tended to focus on provisions within the antidumping legislation that would affect their interests as importers of intermediate goods. The Computer and Business Equipment Manufacturers Association (CBEMA), for example, concentrated its antidumping lobbying on narrow subissues like short supply (to facilitate imports of flat panel displays) or start-up costs.

At the same time, they had to conserve their political influence for deployment in other directions altogether; in particular, they had to expend resources to support renewal of most-favored nation (MFN) status for China that could otherwise have gone into lobbying on the implementing legislation. They simply could not match the single-issue intensity on antidumping of, for example, the integrated steel producers. The lack of CEO-level pressure on members of Congress from exporters and MNCs was mentioned repeatedly on Capitol Hill during the late spring as a reason for the lesser exporter/MNC effect on the antidumping legislation.

Contributing to less intense interest in more liberal antidumping laws is the possibility that the interests of some U.S. exporters and MNCs may be ambiguous when it comes to antidumping laws. The U.S. market remains a large one for U.S. exporters and for the MNC community. For some firms, the prospect of using the antidumping laws to attain greater protection in the U.S. market may be attractive even if it might mean that they will be the subject of antidumping actions in foreign markets. And, even if they are the subject of antidumping actions abroad, antidumping laws can act as anticompetitive devices that set price floors and enforce collusive behavior and might raise their profits in some export markets.[28]

In future trade negotiations, how likely might it be that the exporter and MNC community can be more greatly energized to offset the twin clout of

28. Staiger and Wolak (1991) present a model in which antidumping laws facilitate collusive behavior during periods of slack demand when enforcement is especially difficult. Staiger and Wolak (1994a, 1994b) present evidence consistent with the use of antidumping petitions as a device to enforce collusive behavior. Messerlin (1990) argues that this is important in the European Union chemicals industry.

domestic protectionists and single-interest groups concerned about the environment, labor, and "inside the border" sovereignty issues?

6.5.3 The Broader Political and Economic Interests of the American Hegemon (Even a Declining Hegemon)

The antidumping case points the trend line in a direction opposite to what these models of system maintenance and realpolitik predict. The United States did not play the role of hegemonic leader, or "benevolent despot" in Kindleberger's characterization, guiding and forcing the international economic system in the direction of liberalization of the antidumping regime. Quite the opposite, it guided and forced the international economic system to accept a more restrictive global antidumping regime.

Nor did the United States play the role of the declining hegemon, calibrating its strategy to produce an outcome that would give greatest relative gains to the United States. Because the United States has been the most frequent target of antidumping cases worldwide, the antidumping outcome will hurt U.S. exporters more than it will foreign exporters.[29] Instead of producing greater relative gains for the United States (per the realpolitik school of Walz and Mastanduno) or greater reciprocity of market access for U.S.-based multinationals (the Yoffie/Milner strategic trade qualification), the reverse will be true.

What is noteworthy is the ease with which the "high politics" community was marginalized, not just on the broad issue of antidumping, but even on the specific issue of treatment of products from economies in transition, the success of whose reforms was characterized as the highest foreign policy priority of the administration during this period of policy struggle. (This case therefore offers a dramatic reversal of Prestowitz's [1988] assertion that trade issues find themselves subordinated to the diplomatic needs of the national security community.)

To be sure, the antidumping debate had arcane elements that could be exploited by the protectionist side in the government. Senior players on foreign policy issues declined to weigh in on the struggle over trade reform for economies in transition because they were uncomfortable debating the intricacies of injury standards or constructed costs, even though the most ardent defender of antidumping (the Commerce Department) admitted in writing that the current system was hopelessly biased against EIT exports and could not be repaired by anything short of new legislation.[30]

29. Between 1989 and 1993, U.S. exporters were targeted by more antidumping cases than were exporters from any other country. Moreover, the use of antidumping laws is growing. As recently as 1990, about two dozen countries had antidumping laws. More than forty do now, and several others are likely to adopt such laws in the near future.

30. The director of the policy planning staff at the State Department (a lawyer) ultimately abandoned the trench warfare over the tests for injury and causation with the assistant secretary for economics (a trade lawyer), even while instructing the staff to continue to highlight U.S. support for market access for Eastern Europe and Russia as a priority in the speeches of the secretary of state.

Other senior players did weigh in, and then faded away, preoccupied with other issues. Early in the EIT debate, the undersecretary of defense (later deputy secretary of defense) stormed into an NEC deputies meeting to which the DOD had not been invited, was immediately given the floor, and declared how strategically important it was for the United States to change its treatment of exports from the former Soviet Union. The NEC deputies nodded in agreement, invited the DOD principal deputy assistant secretary (who was professionally very knowledgeable about antidumping issues) to the next few meetings, and then dropped him from the list when he consistently failed to show up while working on the administration's flat panel display initiative.

In coming years, is there greater plausibility that the "high politics" community of security officials in the U.S. government will be *more* able, or *less* able, to hold the "low politics" agenda of domestic interests and enthusiasms in check?

6.6 Implications for Future Trade Policy Making: A "Paradigm Shift" in the Making?

How does the antidumping case study look from the perspective of the comparative literature on policy making in the United States? As one looks to the "new trade agenda" of the future, might there be a need for a paradigm shift in how the trade policy-formation process can best be conceptualized?

Trade policy cannot be explained by economic models of a government seeking to maximize the welfare of its residents. It is difficult to explain either the extent of protection or its structure with models of a benevolent, welfare-maximizing government. While the trade policy process deflects pressures toward general closure, it nevertheless still repeatedly produces suboptimal and nonmajoritarian outcomes. Attempts to model the politics of trade policy with individuals voting their rational self-interest have given way to models that focus on the role of rent-seeking interest groups with disproportional influence via campaign finance when collective goods conditions constrain effective action on the part of the beneficiaries of trade liberalization.[31] More recent work derives an electoral equilibrium in which each political party acts as if it were maximizing a weighted sum of the aggregate welfares of (informed) voters and members of interest groups, trading off extra campaign contributions obtained by catering to the interest groups' demands against the votes that the resulting actions might cost them (Grossman and Helpman 1994).

The comparative literature on public policy making adds a further dimension by focusing less on electoral politics per se and more on the conditions surrounding agenda setting, decision making, and policy implementation. The antidumping case illustrates how important this policy-formation dimension

31. Baldwin (1985) and Krueger (1993) survey the development in the economics literature of the political economy of commercial policy. Krueger (1995) examines the political economy of commercial policy in a number of industries.

can be for understanding protectionist outcomes. This dimension is likely to be all the more prominent in the struggle over the "new agenda" trade issues.

This comparative literature on public policy formation yields three rather somber insights.

First, collective-goods problems are prominent in understanding not only who does not take an active part in policy struggles but also who does take an active part. In the face of relative passivity on the part of many who are widely dispersed and only mildly affected by a particular policy outcome, there is a propensity to find the terms of the debate, the posing of alternatives, the tactics of maneuver, and the selection of policy makers to be dominated by "volunteers," who differ from the general public in their zeal and commitment to single issues and in their unwillingness to compromise easily for a more generally accepted definition of the common good.

The literature that analyzes this phenomenon tries to explain perverse outcomes in electoral campaigns (why do the primaries produce candidates and candidate positions at variance with what is desired by the majority of the electorate?), in budget debates (why is a particular category like social security sacrosanct?), and in controversial issue debates (why was the majority-supported Equal Rights Amendment defeated? why is the minority-supported pro life position so often a litmus test?) (cf. Mansbridge 1986).

In the antidumping case, owing to the domination of the Orwellian debate by the protectionists, there was a certain element of "true believer" zealotry about the need to defend the integrity and sovereignty of U.S. policy against the "unfair" practices of outsiders. In the "new agenda," the proponents of the protectionist side of the debate are likely to find it easy to capture the rhetorical high ground and motivate dedicated efforts on the part of those who feel strongly about the environment, labor standards, or sovereign control over domestic issues like competition policy.[32] In contrast to antidumping, the environmental and labor agendas on trade have genuine substantive reasons to appeal to supporters as well as serving as cover for protectionists.

In short, the collective goods problem is likely to show up on the "new agenda" trade issues with doubly perverse consequences, generating single-interest true believers from within the hard-to-mobilize general public plus concentrated special interests from within the easy-to-mobilize sectors threatened by trade liberalization, both on the side of greater protection.

Second, the comparative literature points out a tendency to form "networks" of like-minded supporters across agency boundaries, carefully vetted in the confirmation process, who combine expertise and determination in pursuing their objectives and excluding outsiders, in a policy-making milieu that has become more decentralized and fragmented over the past several decades.

32. The rhetorical high ground is surprisingly important. Destler and Odell (1987, 73) found that activity in opposition to trade restrictions was "significantly lighter or absent" in cases "where charges of unfairness were . . . prominent."

In the past, the most prominent power structure that perpetuated outcomes favorable to specific interests was the mechanism christened the "iron triangle" consisting of congressional committee chairs, well-financed lobbies, and well-placed bureaucrats. This has fit well with the conventional conception of rent-seeking behavior. Now that two decades of congressional "reform" have cut back the power of committee chairs while proliferating the numbers of committees and subcommittees themselves and political appointees have replaced career civil servants more widely in policy-making positions within the executive, the newer methodology in the political science literature is to show how special interests have narrowed their demands and created "networks" of committed supporters throughout a much more complex governmental environment than existed in the earlier era (Heclo 1978; Browne and Paik 1993).[33]

The study of U.S. agricultural policy, for example, once relied heavily on the use of the "iron triangle" metaphor. As agricultural issues have been apportioned in a Congress and an executive that is more decentralized, with overlapping jurisdictions for aspects of farming that pertain to the environment, conservation, energy, consumer protection, and international competition as well as agricultural production, the tracing of painstakingly placed networks of supporters and sympathizers has become more prominent in explaining outcomes (Browne and Paik 1993).

In the antidumping case, presided over by the watchful eye of the congressional confirmation process, the deployment of a set of decidedly nonneutral policy players across agency lines made the prospects for participating in interagency debate on antidumping issues, let alone wresting control of the outcome from the "network," exceedingly difficult and unlikely. In the "new agenda," the networks arrayed against trade liberalization (to extend the previous argument) will be *double strength,* combining single-issue "true believers" with opportunistic protectionists. The new trade issues community of environmentalists and labor representatives cum threatened industry interests will be ready and eager to field a team of spirited and determined veteran practitioners in the policy-formation process; the freer trade community is less likely to be similarly prepared or energized. As a consequence, the appointments process is likely to constitute a microcosm of this collective-goods problem: high-level political appointments matter, and true believers will ally with concentrated vested interests to get sympathetic and reliable individuals in place for the battles to come. One might predict, therefore, that the appointments process

33. The literature on "iron triangles" and "networks" has important implications for the analysis of rent-seeking behavior. Models of the latter tend to assume that protectionists have to mobilize and expend enough resources to affect aggregate electoral outcomes. But, clearly, this is too high a hurdle. Instead, special interests seeking protection have to dispense just enough rents to nurture an iron triangle of congressional committees, related agencies, and affected industries or, perhaps even less, to maintain a network of committed activists just strong enough to logroll or back scratch successfully on behalf of their sponsors. In short, a little bit of rents may be able to go a long way.

itself will be vulnerable to "capture" in the way that the antidumping case illustrates.

Third, far from finding Congress deliberately ceding control over policy outcomes to the executive in the interest of protecting the broader "national interest," the comparative literature on policy formation shows determined efforts by Congress to create structures and processes that are deliberately designed to insulate policy outcomes from the broader "national interest" test.

Three cases highlighted in the comparative literature, for example, are the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Consumer Product Safety Commission (CPSC) (Moe 1989). Their formal structures vary greatly: OSHA is carefully buried within a presumably friendly agency, the Labor Department; the CPSC is an autonomous regulatory commission, a form strongly desired by consumer advocates despite (or perhaps because of) their observation over the years of the vulnerability of commissions to capture; the EPA is an independent agency with a mandate theoretically covering the entire economy and society. But, in each case, their supporters created them precisely to give them insulation from and superiority over efforts to make their actions mesh with broader conceptions of the public good (Chubb and Peterson 1989). Their supporters have established them to serve particular interests, undeterred by future congresses or presidents with a different agenda.

The antidumping case clearly falls into this subgroup of structures and processes that is difficult to harness and control on behalf of the greatest good for the greatest number, with the ITC an independent agency and the Commerce bureaucracy forming a quasi-independent apparatus, bolstered by administrative procedures and judicial rulings. Even a president must expend large amounts of capital to bring about change. The same is likely to be true on "new agenda" issues.

Moreover, on any issue that is at all technical, where there are contrasting opinions that are not the most blatant traditional protectionism (i.e., not so blatant and simple as to set off 1930s-analogy alarm bells), the high politics community, inattentive and busy with other serious national security issues, is quite vulnerable to being marginalized, at least until faits accomplis are accomplis.

As a consequence, therefore, in contrast to a stylized division between the executive and the Congress, with the former staunchly upholding trade liberalization with the tacit approval of the latter, there will likely be intimate links created with executive-congressional appointees advocating protectionist measures and turning market-opening possibilities into deal breakers whenever they are pursued. Analytically, the notion of a congressional-executive split, with the executive pursuing the broader common interest and offsetting the protectionist impulses of the Congress, is likely to vanish as a useful model for much of the trade policy-formation process.

This might well suggest considerable pessimism about making much trade-

expanding progress on the "new agenda," unless proliberalization forces, including the MNC and big exporter community, can be mobilized and energized as an effective counterweight to more market-closing pressure groups in the formation of trade policy.

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