Policy Analysis

Cato Institute Policy Analysis No. 91: Our Trade Laws Are a National Disgrace

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Executive Summary

The U.S. Department of Commerce is almost as ingenious at discovering "economic crimes" as was Stalin's Soviet Union. In the kangaroo court system of trade investigations held in the United States, foreign businesses are almost certain to be convicted of some offense. U.S. laws on fair trade are far more arbitrary and far more punitive than the fair-trade laws of most of our trading partners. They inevitably result in less competition, higher prices, and increased government interference in the marketplace.

Since 1983, the United States has brought more unfair-trade cases than any other country in the world. [1] Since 1980, the Commerce Department has found only 6 percent of the imports it has investigated not guilty of unfair trade practices.[2] And Commerce will investigate almost any import if so requested by a domestic industry. As one of the State Department's top trade experts has observed, "I think the Commerce Department can prove illegal dumping against any import it chooses."[3]

Unfair trade is one of the biggest growth industries in the country. In the past decade, Congress has repeatedly expanded the definition of unfair practices. Increasingly, what was deemed fair last year is illegal this year, and it demands retaliation. As former International Trade Commission (ITC) chairman William Leonard has observed, "Every time Congress takes another whack at the law, it gets more biased and easier for domestic industry to win a decision."[4]

Yet even though the current trade laws are simply a lynch law for foreign businesses, Congress seems resolved to make them even worse--to create a perfect Star Wars trade law capable of shooting down all incoming imports before American consumers can buy them.

Protectionism has become far less honest in recent years. Instead of openly advocating the sacrificing of U.S. consumers to U.S. corporations and unions, politicians concoct an endless list of purportedly unfair practices used by foreign firms. Instead of proposing to give up economic efficiency and productivity, members of Congress preach the necessity of retaliating against an endless list of domestic policies of foreign governments. Instead of openly proposing to close U.S. ports and borders, members of Congress proclaim the need for a "level playing field"--which translates into allowing the U.S. government to punish whomever it chooses, for whatever reason.

Our trade laws could properly be described as the Foreign Business Excess Profits Program--since the tendency is to require foreign companies to sell their products to Americans at higher prices than they otherwise would and thus to inflate foreign profits (often while reducing foreign sales volume). In the past 10 years, foreign companies have made billions of dollars in extra profits in the United States thanks to U.S. trade restrictions. (Of course, many foreign

companies have been denied the chance to make any profit at all and have been forced to sell less than they otherwise would.) Yet if a foreign company allegedly loses 1 percent on its U.S. sales, then the members of Congress become incensed, claiming that the foreign company is trying to destroy its American competitors.

According to the late secretary of commerce Malcolm Baldrige, "Literally, our fair trade laws are the bedrock on which free trade stands."[5] However, rather than a bedrock, our trade laws are in reality a rigged trap, certain to snare foreigners while leaving domestic companies untouched. For the Commerce Department, the only fair price seems to be a price higher than that charged by American competitors.

Before we allow Congress to crucify American consumers on a cross of "fairness," we should understand the convoluted, contradictory, and perverse idea of fairness that Congress is championing.

U.S. Trade Laws

Our trade laws are based on the unwritten premise that any foreign company that takes business from a U.S. firm is guilty of damaging the United States. Congress, in writing trade laws, often shows a general hostility to imports by failing to make a distinction between fair and unfair foreign practices. As the Federal Trade Commission, in a discussion of the 1979 trade act, observed, "The drafters of the bill, in explaining its operation, frequently used the phrase 'injury . . . by reason of imports' as a synonym for the phrase 'injury through the effects of dumping.'"[6]

The Tariff Act of 1930, as amended, requires that first, the Commerce Department determine whether a foreign product is being sold here at "less than fair value" or if the foreign company receives a government subsidy. After that, the ITC must determine whether imports cause domestic companies any "harm which is not inconsequential, immaterial, or unimportant."[7]

However, this measure is usually meaningless. As ITC chairman Susan Liebeler has noted, "Any time a foreign producer exports products to the U.S., it harms the domestic industry that competes in that market. . . . Any time a foreign producer exports to the U.S., the increase in supply must result in a lower price of the product than would otherwise prevail." If imports only prevent U.S. prices from rising, they can be condemned for having a "price suppressing" effect.[8] Our trade laws have never been accused of having a proconsumer bias.

U.S. trade laws have far broader definitions of unfair trade than do those of other countries. Under these laws there are two major types of trade crime. One is dumping, wherein a foreign product is sold in the United States for less than it sells for in its home market or for less than the Commerce Department's "constructed fair value." The other trade crime is for a foreign firm selling in the United States to be subsidized by its own government; in such cases, the Commerce Department imposes a countervailing duty equal to the alleged amount of the government subsidy.

Although these trade laws may sound reasonable, in practice they rapidly become a bureaucratic nightmare of arbitrariness and uncertainty. In fact, these trade laws have become a lawyer's paradise and a businessman's nightmare.

As World Bank economists J. Michael Finger and Julio Nogues have observed, "The subsidies-countervailing duties issue is not a multilateral issue but a bilateral issue with the United States on one side and its trading partners on the other."[9] As economist Patrick Messerlin has noted, "To the United States, the [GATT] Code is an instrument to control subsidies. To the rest of the world, it is an instrument to control U.S. countervailing duties."[10]

What is "less than fair value"? Technically, it means selling a good for less than the price in the foreign home market or for less than its alleged cost of production. The Commerce Department's creative definitions have probably made many medieval scholastics smile in heaven.

Commerce Department analyses of foreigners' costs of production are arbitrary and often senseless. U.S. trade laws require that Commerce always assume in its cost-of-production construction that a foreign company makes an 8 percent profit. As Deputy Assistant Secretary of Commerce Gilbert Kaplan, trying to convince Congress that the current laws are effective, told a Senate subcommittee, "What company, unfamiliar with the antidumping law, could imagine that the United States requires that at least eight percent profit must be included when calculating a constructed value?"[11]

All trade cases that prove that foreign companies are selling below cost of production also assume that the companies are making an 8 percent profit. Nobody at Commerce can explain this reasoning. If a foreign company has an actual profit of 7 percent, then the company, by U.S. law, is guilty of selling at a loss of 1 percent. Such laws are intended to convict foreign businesses without rhyme or reason.

We have radically different definitions of fair trade for Americans and foreigners. As Fred Smith of the Competitive Enterprise Institute said, "If our antidumping laws applied to U.S. companies, every after-Christmas sale in the country would be banned."[12]

Fairness in Action

In 1986, Commerce cited China for a dumping margin of 66.65 percent on its porcelain-on-steel cookware--meaning that China was allegedly spending $1.67 to secure $1 in sales in the United States. How did Commerce divine 66.65 percent? Since China does not have a market price system, Commerce looked elsewhere to deduce the cost of Chinese cookware production. Commerce decided that Thailand was "at a level of economic development comparable" to China's. (This would be a surprise to Bangkok, in that Thailand's per capita income is roughly three times as high as China's.) But Thai cookware makers refused to open their files to Commerce--justifiably, since foreign companies that have voluntarily helped Commerce in the past have subsequently been hit with dumping charges themselves.

Commerce then decided to judge China by comparing its cookware prices with those of Dutch, French, and West German cookware. Not surprisingly, Chinese prices were much lower. (Chinese quality was also lower, but Commerce did not adjust for that.) Commerce thus purportedly proved that China was unfairly dumping its pots and pans on America. After Commerce's verdict, the Customs Service imposed a 66.65 percent surtax on all incoming Chinese porcelainon-steel cookware.[13]

In 1986, Commerce also cited China for a dumping margin of 135.73 percent on its candle exports. Commerce concocted 135.73 percent by comparing Chinese export prices with Malaysian export prices--again, even though Malaysia may have been exporting higher- quality candles.[14]

Using an analysis based on constructed fair value, Commerce proved that Romania was selling tapered roller bearings for 8.70 percent less than their fair value. Commerce proved that because Romania was at roughly the same economic level as Portugal and Portugal could not make tapered roller bearings that cheaply, Romania must be selling at a loss.[15] Commerce also used this Portugal-based proof to show that Hungary was selling the same product at a 7.42 percent loss.[16]

Commerce used all its wizardry in calculating the fair price of tapered roller bearings from China.[17] In the Portugal examples, at least one Portuguese firm had helped Commerce out. But no such luck with the Chinese analysis. So Commerce decided that India was a surrogate economy--and then calculated what it would have cost to make this product in India. Raw material prices were pulled from the Steel Authority of India (even though Indian prices differ from Chinese prices), the cost of labor was pulled from International Labor Organization reports (again, even though Chinese and Indian labor costs are different), and 31 percent was added for employee fringe benefits (again, not a common Chinese practice). Commerce then assumed a 10 percent overhead rate and an automatic 8 percent profit for the imaginary Indian producer, made currency conversions from Indian rupees to U.S. dollars, and compared that total to the U.S. price of the Chinese imports.

The final result: Commerce proved that the Chinese were exporting tapered roller bearings for 0.97 percent less than their fair value.[18] This is like an authoritarian regime spending weeks torturing a suspect--who finally admits at the end that he once jaywalked.

In July 1986, Commerce determined that Iran was paying a 317 percent dumping margin (that is, spending $4.17 to get $1 in U.S. sales) on its pistachio nut exports. The proof? Iranian nut exporters can exchange their dollars at the business exchange rate, which is much higher than the artificial official exchange rate. Since Iran, like most dictatorships, has a totally unrealistic official exchange rate, that was enough proof for Commerce to act as though Iran was trying to take over the American nut market.[19]

Some of our trade law prosecutions prove only that the U.S. government has no shame. In April 1986, Commerce hit Thai rice exporters with a 0.82 percent penalty because of alleged government-subsidized dumping. Commerce, after an in-depth examination, determined that subsidized loans provided a subsidy equal to 0.0004 percent of the value of Thai rice exports to the United States, that cooperative assistance provided a 0.09 percent subsidy, that a mortgage program provided a 0.02 percent subsidy, that discounts to rice millers provided a 0.01 percent subsidy, and so forth.[20]

Yet at the same time the Commerce Department was nickel-and- diming Thai rice growers, the U.S. Department of Agriculture was bankrupting them, spending a billion dollars to dump surplus U.S. rice and driving down the world rice price by 50 percent.

The vast majority of trade cases are simply instances of U.S. bureaucrats quibbling about such matters as which expenses of a foreign company to allow, how to calculate foreign costs of production, what adjustments to make for exchange-rate fluctuations, and how to compare prices for arbitrary adjustments for differences in quality, sales volumes, and wholesale versus retail sales figures. In 1984, Italy was convicted of a less-than-fair-value margin of 1.16 percent on its pads for woodwind instruments--even though Commerce admitted that it did not compare sales of identical products in Italy and the United States.[21]

In 1986, the Commerce Department cited a West German firm for dumping stainless steel strip in the United States. Commerce assessed "dumping duties equal to the calculated differences between U.S. price and foreign market value after deducting from the U.S. price ocean freight, marine insurance, brokerage/handling charges and U.S. customs duties."[22] Commerce, in its analysis of the West German price, "disallowed technical and laboratory service expenses, sales expenses, and warranty costs because they were not proven to be directly related to sales."[23] What is more, the West German company was cited in October 1986 based on sales data from 1982 and 1983.

The alleged dumping margin on West German steel strip was 2 percent, but the customs duty alone was over 5 percent. If Commerce had not subtracted from the U.S. sales price the amount of the customs duty, then the West German steel exporter would not have been condemned for dumping.

In many dumping cases, the alleged dumping margin is less than the deductions Commerce makes for foreign brokerage, foreign inland freight, ocean freight, U.S. customs duty, U.S. brokerage, and freight and marine insurance. In other words, the foreign company is not selling its products for less in the United States than in its home market. Rather, the U.S. sales price for the foreign product is not enough higher than the home-market price to please the Commerce Department.

Early in 1987, in a case involving dry-cleaning machinery, Commerce cited a West German company for a 0.48 percent dumping margin based on sales data from 1983 and 1984. As Commerce noted in its Federal Register announcement, "We compared sales to distributors in the U.S. with direct sales to end-users in the home market. We made no adjustment for claimed level-of-trade differences because the claims were inadequately quantified."[24] In other words, Commerce compared retail prices in West Germany with wholesale prices in the United States--and because the West German company could not meet all of Commerce's demands for information, Commerce refused to make any adjustment.

The Great Flower Facade, or, Like Products Are Not Alike

The recent dispute over imported flowers nicely illustrates the absurdities of our trade cases and how the U.S. government's efforts are blatantly anticonsumer.

In recent years, foreign flowers have poured into the United States, and retail flower prices have tumbled as vendors set up their baskets on the street to sell carnations and roses for a third of what professional florists charged. The result has been a vast increase in flower sales, more jobs, and no perceptible decrease in public happiness.

While imports have soared, domestic sales also have boomed. Per capita flower consumption has doubled during the past decade. In the last few years, the domestic industry has experienced considerable growth: shipments by domestic growers have increased by 12.7 percent, acreage devoted to flower production has expanded, the number of workers in flower production has risen, and research and development expenditures more than doubled between 1983 and 1985.[25]

Most American florists admit that the Dutch grow prettier flowers than American growers. According to some florist wholesalers, the attitude of some American flower growers is like Henry Ford's attitude toward car buyers: they could have Model T cars in any color they chose, as long as they wanted black. In the words of Bill Maas, president of Florists' Transworld Delivery (FTD), "The growers in this country, with some notable exceptions, have never demonstrated more than a casual interest in selling the flowers they grow."[26]

Yet in spring 1987, the ITC concluded that flower imports were hurting domestic growers. The evidence? Largely that domestic growers' profits would have been higher if the government had banned flower imports.

This case, like many cases, rested almost entirely on the definition of "like product," the product to whose price the price of the imported good should be compared.[27] As ITC vice chairman Anne E. Brunsdale noted, "From the standpoint of producers and consumers, all fresh cut flowers are very close substitutes and thus should be treated as one like product."[28] In its preliminary determination, the ITC concluded that the "like product" was all domestically produced fresh cut flowers.[29]

However, the ITC then reversed itself and subsequently spent months splitting hairs on the different economic impacts of issues such as full-size versus miniature carnations.

Annual Kenyan flower exports to the United States are barely $250,000, or less than one-twentieth of 1 percent of total U.S. flower consumption. Nevertheless, the ITC concluded that Kenyan full-size carnations were hurting U.S. flower growers but conceded that Kenyan miniature carnations were not hurting U.S. growers. (ITC chairman Liebeler and vice chairman Brunsdale dissented but were outvoted.)[30]

Commerce condemned Kenyan flower exporters for a less-than- fair-value U.S. sales price of 1.58 percent.[31] But in reality it is almost impossible to compare sales prices in the United States and Kenya, in that sales conditions are entirely different, quality is different, and the number of flowers per bunch sold is different. Besides, Kenya's U.S. sales prices are established by West German middlemen, who buy the flowers in Nairobi and then ship them to Miami or New York.

Once again, the problem was not that Kenyan flowers were cheaper in the United States than in Kenya; rather, after Commerce made deductions to the U.S. price for air freight, shipping charges, packing costs, and so forth, the Kenyan price appeared to be higher.[32]

Commerce also proved that Canadian flowers were subsidized by 1.52 percent because of energy subsidies to growers from the Ontario Greenhouse Energy Efficiency Corporation. The Ontario program, Commerce declared, contributes to "the capital cost of retrofitting existing greenhouses in Ontario with certain energy- saving equipment and materials."[33] Commerce would have us believe that the only reason that the Canadian government paid for retrofitting a few greenhouses was to drive California flower growers to their knees.

Several floral wholesalers were threatened with having their domestic flower supplies cut off just before Valentine's Day if they testified in Washington against imposing penalties on flower imports. Since this was the biggest sale period of the year, it could have bankrupted flower dealers who opposed import barriers.[34]

The flower case was typical of the government's sloppiness in determining injury to domestic producers. Only one-fifth of the domestic growers responded to the ITC price survey. And there was little or no agreement on how to compare foreign and domestic prices, since flowers were often packaged differently and were of widely varying quality.

The ITC's concept of "harm" to domestic companies is extremely vague, and it seems to cover almost everything a business lobbyist can think of. In a case on El Salvadoran window cranks, U.S. producers were asked to furnish the ITC with customer names, quantities, and dates relating to any sales or revenues that had been lost to Salvadoran competition. But no such allegations of lost sales were submitted.[35] The only evidence was claims by two unidentified companies that they had twice had to lower their final prices in order to outbid Salvadoran competition.

Even though window-crank prices had sharply increased in the United States during the 1984-86 period and the number of Americans working at producing window cranks had increased,[36] the ITC still found that El Salvador had injured U.S. producers. The alleged subsidy on Salvadoran window cranks was only 0.70 percent, based on an income-tax exemption for export earnings.[37] Yet even this tiny subsidy supposedly damaged the U.S. industry.

In any trade case determining injury from foreign competition, there is a blatant double standard at work. As former ITC chairman Leonard has noted, "The ITC more or less takes on faith the price and profitability information supplied by domestic industries. But the price information is usually meaningless because it does not show the quantities being sold."[38] Of course, U.S. producers have an incentive to overstate their prices to make it easier to prove that foreigners are unfairly underselling them. No American company has ever been penalized for lying about its prices in an ITC investigation.

In an ITC price survey, if a company does not feel that it is being hurt, then it has no incentive to reply. Thus, because the entire system is based only on information from companies claiming to be hurt, it is rigged to produce biased results.

As Peter Suchman, a lawyer for the American Association of Exporters and Importers, told a Senate hearing in 1986,

It is notorious among practitioners that the so- called surveys conducted by the Commission are totally unverified and are an open field for domestic companies to say whatever they want to about their prices. And in fact, they have the added incentive in a method such as that which has been proposed of trying to knock their overseas competitors out of the market by rigging that comparison.[39]

Chips Madness

The recent semiconductor case in which the Commerce Department claimed that the Japanese were selling at less than fair value was typical of Commerce's wizardry in proving unfair trade. One key to the case was showing that Japan now dominated the U.S. semiconductor industry. However, in its analysis of U.S. versus Japanese chip production, Commerce excluded all chips made by IBM and AT&T because they were utilized in-house. This is like counting the number of hamburgers served in America and excluding those served by McDonald's and Burger King. If the IBM and AT&T chips had been included, it would have been obvious that the United States still has the world's largest semiconductor industry.[40]

Japanese semiconductor chips were selling for a higher price in the United States than they sold for in Japan. Thus, it appeared obvious that they were not being dumped. Nevertheless, in 1986 Commerce managed to produce a conviction by using a model that "proved" that Japanese companies were selling below cost of production.

Commerce assumed a static cost-of-production model that had little or nothing in common with real business decisions. There were disputes on how to allocate plant overhead, research and development expenses, start-up costs, pension costs, depreciation schedules, and so forth.[41] And, of course, Commerce assumed that the Japanese were making an 8 percent profit on their money-losing sales.

Commerce's analysis of Japanese business practices was sometimes amazingly sloppy. At one point, Hitachi's lawyers complained by letter to the secretary of commerce that "certain expenses in connection with an Hitachi charitable foundation in the U.S. ought not to be considered as part of constructed value. Obviously, this is not an operating expense which is appropriately charged to cost of production."[42] Commerce backed down on this point.

As a Federal Trade Commission (FTC) brief on the semiconductor case noted,

Even if all of the difficult issues that arise in attempting to properly define a constructed value measure could be correctly resolved, the resulting cost would only reflect the average total cost of DRAM [Dynamic Random Access Memory chip] production. However, economists expect that in a competitive industry it is normal for firms to sometimes sell at prices that are below average total cost. Only over the entire trade cycle is it expected that firms cover all their economic costs.[43]

The FTC concluded that Commerce "should not include fixed costs (which will be incurred regardless of the level of production in any particular period of time) in the accounting measure used for comparison purposes."[44] As Citizens for a Sound Economy analyst Michael Becker noted, "Original capital 'start up costs' and 'research and development' are irrelevant in determining whether the price is adequate to justify additional production."[45]

The real question was not what the total costs were but what the variable costs were--the costs of producing one additional unit

after all initial outlays were made. According to Motorola, in its brief filed with the Commerce Department, the variable costs amounted to only about 25 percent of the total costs of producing chips. In other words, once a company had already done the research and built the factory, each additional chip cost only 25 percent of the original start-up costs.[46]

Commerce's analysis completely ignored the issue of business cycles because the department assumes that every foreign company must make a profit on every sale or else it has an evil intent. One Japanese company argued that it was inappropriate to use only a six-month period to judge full cost recovery.[47] Yet Commerce insisted that six months was a sufficient period for judging the profitability of an operation. This would be news to such enterprises as Federal Express and USA Today, which took years to become profitable.

Fairness, Fairness Everywhere

Fairness is the last thing that our trade czars are interested in.

U.S. trade laws are masterpieces of arbitrariness and uncertainty. As Deputy Assistant Secretary of Commerce Kaplan told the Subcommittee on International Trade of the Senate Finance Committee,

A foreign producer may not even know whether he is dumping. He doesn't know offhand what benchmark we are going to look at when we start a dumping case. He doesn't know what effect currency fluctuations might have between the time he signs a contract and actually sells and the time the investigation starts. He doesn't know what such or similar merchandise we are going to be basing our comparisons on. . . .[48]

Another reason why a company might not be able to predict whether it is dumping concerns currency fluctuations. If the home market price is 200 yen and the U.S. price is $1.00 and the exchange rate is 200 yen equal $1.00, there is no dumping. If the yen appreciated against the dollar, however, so that only 150 yen equalled $1.00, unless there was a corresponding change in prices, suddenly the company is dumping by 33 percent, because 200 yen is now worth $1.33. . . .[49]

The minute a case is filed, an importer or a customer faces an undetermined liability, an undetermined price basically, for items, for an indeterminate period of time, into the future. If you are a purchaser . . . you have to think very long and hard before buying from an exporter given that undetermined liability that you are going to face for quite a number of years.[50]

The Commerce Department feels that the best trade law is that which makes it easiest to convict foreigners of unfair trade practices. Kaplan stated that in judging the fairness of imports from socialist countries, "the lowest import price [of products from other countries] is the appropriate model to use in trying to derive a solution. . . . However, the outcome of the case can vary as much as 100 percent depending on which of the producers we choose as the surrogate."[51]

Kaplan favored judging the fairness of imports from nonmarket countries by comparing their prices to the lowest other import price because this method is the easiest to administer. Paula Stern, then-chairman of the ITC, advocated instead judging the fairness of such imports by simply looking at the average market price in the United States.[52] The mentality of our so-called fair-trade judges is reminiscent of southern judges a hundred years ago who reasoned that the easiest way to solve a crime was to find the nearest black person and hang him.

The whole point of our trade laws is to prevent foreigners from dumping their products, bankrupting U.S. companies, and then taking over the market and victimizing American consumers. However, these dire consequences never happened, not even before the existing trade laws were enacted. As Judge Robert Bork has observed, "Predation by such [pricing] techniques is very improbable."[53] The Supreme Court recently stated, "There is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."[54]

The more intense the international competition has become, the less chance any one company or country has had of cornering the world market. As World Bank economist Finger observed, "The customer's best defense against predatory pricing is the availability of an alternative supplier."[55] If Japan tries to ratchet up car prices, the South Koreans will soon make mincemeat of Japan Incorporated. If West German breweries try to put the squeeze on American beer drinkers, Belgian, Canadian, and Mexican beer companies will come to the rescue.

The Commerce Department's "trade medicine" is almost guaranteed to be far more harmful than any illness it purports to treat. Our trade laws routinely inflate domestic prices to protect consumers against the one-in-a-million possibility that a foreign company could corner the market and raise prices.

And with world capital markets being so open and responsive, it is extremely doubtful that a country that did temporarily corner

a market could hold on to its monopoly for very long. The most successful cartel of modern times--OPEC--could not have lasted as long as it did without U.S. government laws that discouraged domestic oil production and encouraged excessive domestic oil consumption.

It is far more likely that Commerce errs in its analyses of foreign costs and sales efforts than that foreigners are deliberately losing money so they can bankrupt American business. Most violations of our trade laws are crimes without a motive. If foreign companies don't intend to take over the U.S. market, what earthly incentive do they have to sell at a loss? How likely is it that Kenya, Turkey, or Zimbabwe will successfully bankrupt all their American competition? Most of our trade laws are good only for harassing foreigners and enriching American lawyers.

Commerce's alleged margins for dumping and subsidies are usually much less than the exchange-rate fluctuations. Thus, exchange rates have far more influence on trade than subsidies or dumping. Between 1980 and 1985, over 90 percent of the counter- vailing-duty convictions on South Korean exports had margins of unfair trade of less than 1 percent.[56] Proclaiming 1 or 2 percent dumping margins in a world where the value of the dollar can easily change by 30 percent in one year is absurd.

When huge dumping margins are announced, it is often because the foreign company refused to reveal all its in-house financial secrets to a Commerce Department inquisition. Just as Coca-Cola refuses to reveal its secret formula to prying foreign governments, many foreign governments prefer not to bare their souls to the U.S. government.

Commerce, in its judgment on the Japanese semiconductor case, observed, "When a company is requested to respond and refuses, the most conservative approach is for the U.S. to assume that the potential respondent has seen the petition and determined that its actual margins of dumping are even higher than those alleged."[57] That is, the United States can demand an infinite amount of information, and any refusal to comply is taken as a confession of guilt.

The whole idea of dumping--the idea that it is a crime for companies to sell the same product for two different prices in two different markets 15,000 miles apart--is absurd. There are many reasons that a company would sell a product for different prices in different parts of the world. If a businessman charges higher prices in New York than in Kansas, does that prove he is trying to bankrupt every business in Kansas, to achieve a monopoly, and to take advantage of consumers? If the states regulated interstate trade the way the Commerce Department regulates international trade, our economy would grind to a halt and we would soon be about as prosperous as, say, Yugoslavia.

The premise of U.S. trade laws is that every time a foreign company takes a loss selling goods in the United States, it has an evil intent. Our trade laws are based on a conspiracy theory that is always painting commercial demons where none exist. If we assumed the same about U.S. companies--that every time a business sold a product at a loss, the board of directors was up to no good and should be banned from doing further business--we would have few companies left in business.

Congress is the biggest lobby in the world for excessive profits for foreign manufacturers. Almost every trade restriction indirectly forces foreign companies to raise their prices and thereby hurt American consumers. The voluntary restraint agreements that cover foreign autos and steel have added over $5 billion to the prices and profits of foreign manufacturers. Yet Congress is unconcerned about huge foreign profits as long as no Japanese company loses 50 cents on a sale and thereby tries to destroy America. It is okay to burden American consumers with artificially high prices, but it is unforgivable to compete with American businesses through artificially low prices.

Of course, trade penalties also reduce the amount of merchandise a foreign company can sell in the United States, thus depriving American consumers of greater quantities of high-quality goods.

Under Secretary of Commerce Bruce Smart recently wrote in a letter to the Wall Street Journal that "selling below cost by American producers in the American market is a common--and legal--practice. But selling to Americans by American firms competing with one another does not threaten to transfer wealth and unemployment across international boundaries."[58] This mercantilist view was thoroughly refuted by Adam Smith 211 years ago. If foreigners are selling below cost, that means that they are transferring wealth to Americans; they are giving us a handout. Should the U.S. government be so paranoid about foreigners bearing gifts? How can a foreign company give Americans money and at the same time destroy American jobs?

The issue is not whether a foreign company, intentionally or inadvertently, gives a slight subsidy to American consumers. The issue is whether a foreign company is likely to be able to take over the U.S. market, bankrupt U.S. competitors, and then drive up prices. So-called fair-trade advocates cannot produce any examples of this happening.

The Crimes of the Trade Bill, 1987

The only thing more absurd than the current laws is the proposed revisions Congress is preparing to enact. Under various provisions in the House and Senate trade bills, unfair trade would be expanded to include

-- penalties against countries that do not have a minimum wage, child labor laws, or collective bargaining,

-- an affirmative action program for exports that would require foreign governments to pressure companies to purchase a set amount of U.S. parts and components for use in their manufacturing,

-- new schemes for "exchange rate equalization tariffs" that would tax imports if a foreign currency does not exchange with the dollar at the rate of the week preferred by U.S. bureaucrats, and

-- penalties against countries whose trade programs allegedly cost U.S. exporters sales in third-market countries.

There is even a provision in the House bill to establish a new branch in the U.S. trade representative's office that would alert small businesses to opportunities to sue foreign exporters--and have their legal fees subsidized.

The idea underlying almost all these provisions is that the United States is justified in retaliating against anything that foreign governments do for their own businesses. It is the doctrine that the United States should have effective sovereignty over every economic policy in the world and should have the right to dictate social reforms to other countries so that they may have the honor of selling lower-priced, higher-quality goods to American citizens. This doctrine is typical of the economic illiteracy that often attends congressional trade debate.

It makes no sense for the United States to require foreign countries to have minimum-wage laws and restrictions on an individual's right to work beyond a certain number of hours a week. The United States itself did not have such laws until 1938, and most economists agree that the minimum wage has raised unemployment among unskilled workers. Such laws are costly to low-skilled workers in an advanced economy; they are absolutely unaffordable in Third World countries, which just don't have the wealth to legislate U.S. work standards. Perhaps Congress could add a provision that if a country suffers a crop failure and faces widespread starvation, then it is temporarily exempted from a requirement to prohibit people from working more than 40 hours a week.

Amusingly, those Democrats most in favor of a U.S. industrial policy--pervasive government intervention in the economy--are most adamant that any type of industrial policy made by foreign governments is sufficient to bar their exports. This is not surprising, since most advocates of government control of the economy have an instinctive hostility to foreign trade.

Conclusion

Our trade laws are explicitly designed to sacrifice domestic consumers to domestic industries. Trade barriers routinely cost American consumers 8 to 10 times as much as they benefit American producers.[59] Yet despite this huge waste, the protectionist juggernaut rolls on.

Our trade laws are predicated on the mercantilist notion that "commerce is exporting, not importing" and "the excess of exports over imports is the rate of profit," as an 1821 congressional report on manufacturing observed.[60] That myopic sentiment explains why imports are presumed guilty until proven innocent and why proving trade innocence is almost as easy as squaring the circle.

The more trade barriers we have, the less competitive American companies can be internationally. Every trade barrier increases the cost of production and decreases the efficiency of the U.S. economy. As George Gilder noted of the semiconductor trade barriers, "The Commerce Department declared war on the U.S. computer industry, effectively excepting IBM. . . . To attack the U.S. computer industry in order to save the U.S. semiconductor industry is simply crazy."[61]

The classical measure of the benefits of foreign trade is, "If you can buy it for less than you can build it, you are better off to buy it."[62] Today, though, to the U.S. government, foreign trade benefits the country only if it meets a vague, constantly changing criterion of fairness. And if imports can meet this nebulous test, then the United States is supposedly better off sacrificing consumers and some domestic companies to other domestic companies.

As World Bank economist Finger argued, domestic companies and consumers that suffer from higher costs of imports should have the same "standing in law and in administrative procedures" as companies that profit from protection.[63] Currently, domestic companies that suffer from foreign competition have legal rights superior to those of domestic companies that are penalized by higher prices due to protectionism. This is like judging a trial by hearing only the prosecution--and then summarily convicting the defendant without ever giving him a chance to speak.

Yet in the trade bill in Congress this year, there is no effort to rectify this inequity; all effort is instead going into making the law even more biased and even more certain to result in a guilty verdict.

The worst thing about our trade laws and their pending revision is not that they represent absurd, idiotic, or suicidal economics but that they are dishonest. As protectionism has become less politically fashionable, Congress has found new names to use to achieve old evils.

For over a hundred years, the cry of "fair trade" has been a red herring used to close the borders and sacrifice some Americans to other Americans. Many domestic companies and business organizations would oppose free trade even if every foreign government followed the policies of the U.S. government exactly. The goal is not fair trade but less competition and higher profits for domestic manufacturers.

If Congress wishes to close our borders and blockade our ports against cheaper, higher-quality foreign goods, it should do so openly. If Congress wants to hold up consumers, it should not hide behind a smoke screen of fairness. If Congress wants a trade war, it should admit that it is launching a first strike on our trading partners--and it should not excuse itself by pointing to some minor border incident to justify a massive retaliation to save the national honor.

FOOTNOTES

[1] For a number of countervailing-duty cases, see J. Michael Finger, "Antidumping and Countervailing Duties," chap. 18 in a forthcoming World Bank study of trade laws, p. 9. For dumping cases, see W. B. Carmichael, Review of the Customs Tariff (Anti- Dumping) Act (Industries Assistance Commission, Australia, February 1986), p.18.

[2] Testimony of Gilbert Kaplan, deputy assistant secretary of commerce for import administration, in Subcommittee on International Trade, Senate Finance Committee, Hearings on the Unfair Foreign Competition Act of 1985, July 18, 1986, p. 37.

[3] Personal interview with a State Department official, who asked not to be identified, June 24, 1987.

[4] Personal interview, May 21, 1987.

[5] James Bovard, "U.S. Trade Laws Are Anything but Fair," Wall Street Journal, June 2, 1987, p. 18.

[6] Federal Trade Commission, "64K Dynamic Random Access Memory Components from Japan, no. 731-TA-270 (final), and Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, no. 731-TA-300 (final)," prehearing brief before the International Trade Commission (Washington, April 25, 1986), p. 12.

[7] 19 U.S.C. 1977(7)(A)(1980).

[8] International Trade Commission, In-Shell Pistachio Nuts from Iran, ITC publication no. 1875 (Washington, July 1986), p. 10.

[9] J. Michael Finger and Julio Nogues, "International Control of Subsidies and Countervailing Duties," World Bank unpublished study, May 1987, p. 3.

[10] Quoted in ibid., p. 10.

[11] Kaplan, p. 39.

[12] Personal interview, May 22, 1987.

[13] Federal Register 51 (October 10, 1986): 36420.

[14] Ibid. (February 19, 1986): 6017.

[15] Ibid. 52 (May 8, 1987): 17433.

[16] Ibid., p. 17428.

[17] Ibid. (May 27, 1987): 19748.

[18] Ibid., p. 19751.

[19] Ibid. 51 (October 7, 1986): 35679.

[20] Ibid. (April 9, 1986): 12356.

[21] Bovard.

[22] Federal Register 51 (October 9, 1986): 36258.

[23] Ibid.

[24] Ibid. 52 (January 20, 1987): 2124.

[25] International Trade Commission, Certain Fresh Flowers from Peru, Kenya and Mexico, ITC publication no. 1968 (Washington, April 1987), pp. 35-38.

[26] Testimony of Bill Maas, presented to the International Trade Commission, February 2, 1987.

[27] Like product is a key issue in trade cases. From ITC, Certain Fresh Flowers: "Under section 771(4)(A) of the Tariff Act of 1930, as amended, industry is defined as 'the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.' [19 U.S.C. 1677(4)(A)(1982)] And like product is defined as 'a product which is like, or in the absence of like, most similar in characteristics and uses with, the [imported] article subject to investigation.'" Vice Chairman Anne E. Brunsdale, ibid., p. 29: "From the standpoint of consumers, two products are like each other if they are close substitutes and if consumers can select from among them as close alternatives."

[28] Ibid., p. 30.

[29] Ibid.

[30] Ibid.

[31] "Commerce Negative CVD, Affirmative Dumping Ruling on Kenya Flowers," International Trade Reporter, April 1, 1987, p. 444.

[32] ITC, Certain Fresh Flowers, p. A-8.

[33] Federal Register 51 (October 27, 1986): 37926.

[34] James Bovard, "Flower Power," New York Times, February 2, 1987, p. A16.

[35] International Trade Commission, Operators for Jalousie and Awning Windows from El Salvador, ITC publication no. 1843 (Washington, April 1986), p. A-25.

[36] Ibid., p. A-21.

[37] Federal Register 51 (June 18, 1986): 22099.

[38] Bovard, "U.S. Trade Laws Are Anything but Fair."

[39] Testimony of Peter Suchman before the Senate Finance Committee, Subcommittee on International Trade, hearing on nonmarket economy dumping, May 15, 1986, p. 101.

[40] Robert Samuelson, "Chip Industry's Plea," Washington Post, June 24, 1987, p. C1.

[41] Federal Register 51 (October 30, 1986): 39680.

[42] Letter prepared by Rick McDermott of the law firm of Metzger, Shadyal and Schwarz, September 16, 1986.

[43] FTC, p. 19.

[44] Ibid., p. 22.

[45] Michael Becker, Semiconductor Protectionism: Goodbye Mr. Chips (Washington: Citizens for a Sound Economy, August 27, 1986), p. 8.

[46] Prehearing brief presented by Motorola, April 25, 1986, quoted in FTC, p. 23.

[47] Federal Register 51 (October 30, 1986): 39686.

[48] Kaplan, p. 35.

[49] Ibid., p. 39.

[50] Ibid., p. 35.

[51] Testimony of Gilbert Kaplan before the Senate Finance Committee, Subcommittee on International Trade, hearing on nonmarket economy dumping, May 15, 1986, p. 36.

[52] Ibid., p. 86.

[53] Robert H. Bork, The Antitrust Paradox (New York: Basic Books, 1978), p. 154, quoted in FTC.

[54] Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 54 U.S. L.W. 4319, 4323 (March 26, 1986), quoted in FTC.

[55] Finger, "Antidumping and Countervailing Duties," p. 14.

[56] Finger and Nogues, p. 32. [57] Federal Register 51 (October 30, 1986): 36689.

[58] Bruce Smart, "Trade Is Everything but Unfair" (letter to the editor), Wall Street Journal, June 22, 1987, p. 19.

[59] Dave Larsons, The Cost of Import Protection in the U.S. (Washington: Treasury Department, 1979), cited in J. Michael Finger, H. Keith Hall, and Douglas R. Nelson, "The Political Economy of Administrative Protectionism," American Economic Review 72, no. 3 (June 1982): 453.

[60] Quoted in John Taylor, Tyranny Unmasked (Washington: David and Force, Franklin's Head, 1822), p. 13. Taylor went on to offer one of the best answers ever to protectionists: "Let us compare the evils resulting from foreign and domestic restrictions, bounties, and monopolies, to discern which are the worst, for both are undoubtedly bad. By foreign bounties, consumers are enabled for a period, often a long one, to buy cheaper; by domestick they are compelled to buy dearer. Foreign monopoly, the design of foreign bounties, is certainly diminished or defeated by the competition of independent nations; by our power of transferring our commerce from a nation attempting it, to those nations which do not; and by the progress of our internal mechanical skill. Domestick monopoly, the design also of domestick bounties, cannot be defeated by the competition of all manufacturing foreign nations, because this competition is expelled by protecting-duties; nor by a power of transferring our dealings from the monopoly to free exchanges, wherever to be found, because this power is taken from us by law; nor by our internal mechanical skill, because that skill is to be monopolized by the capitalists, who will very easily effect it, by the help of a general excise. Our mechanical skill, if not monopolized, would itself be a full match for foreign competitions, when aided by freights, revenue duties, and the cheapness of materials; and to force it into undertakings where these advantages will not suffice, can only produce a loss or a fraud. . . . Foreign regulations of commerce cannot be uniform among all nations, and however restrictive, their dissimilarity will always afford us a better market than can possibly be afforded by a single capitalist combination at home."

[61] George Gilder, "Chip Sense and Nonsense," Wall Street Journal, April 2, 1987, p. 18.

[62] Finger, "Antidumping and Countervailing Duties," p. 18.

[63] Ibid., p. 19.