Does Administrative Protection Protect?

A Reexamination of the U.S. Title VII and Escape Clause Statutes

Wendy L. Hansen and Thomas J. Prusa

Faced with the rising pressure of increasing foreign competition, many U.S. industries turned to Washington during the 1980s with demands for import relief. Often they argued that they needed protection to offset unfair trade practices or simply to gain time to adjust to the new international trading environment. Industries demanded that Congress do something about the supposed negative impact of imports on U.S. industries and the economy as a whole. But obligations stemming from the General Agreement on Tariffs and Trade (GATT) significantly limited Congress's ability to legislate targeted, sector-specific protection in the form of tariffs or quotas. Consequently, U.S. industries turned to the so-called administrative protection of the trade remedy laws and filed an unprecedented number of trade complaints.

There are two general classes of trade laws under which U.S. industries can apply for import relief: "unfair trade" laws, with antidumping and countervailing duty laws being the primary examples, and "escape clause" or "safeguard" protection under section 201 of the Tariff Act of 1930. While both types of laws provide relief to injured U.S. industries, in recent years industries have resorted almost exclusively to the unfair trade laws. From 1980 to 1988 U.S. industries seeking protection from foreign competition filed over 700 petitions under the antidumping and countervailing duty laws but only nineteen escape clause petitions. By way of comparison, from 1963 to 1979, domestic industries filed 532 unfair trade petitions and 75 escape clause petitions.

Why is protection sought much more frequently under the unfair trade laws, and why has the escape clause declined in importance? Part of the explanation may lie in the fact that the laws have different purposes. "Unfair" trade laws are designed to correct for the injurious effects of foreign dumping and government subsidization of exports. The escape clause, on the other hand, is designed to allow industries to seek trade relief merely on the basis of injury from foreign competition. One might thus conclude that U.S. industries battled more foreign dumping and government subsidization in the 1980s than in previous years. That is not the entire story, however.

The preference for invoking unfair trade laws is also the result of how Congress has amended the trade laws over the past fifteen years. Each

Wendy L. Hansen is an assistant professor of political science at the State University of New York at Stony Brook, where Thomas J. Prusa is an assistant professor of economics.

revision contained in the past three major trade bills has increasingly facilitated U.S. industries' use of the unfair trade laws. In fact, the rules governing antidumping and countervailing duty procedures are now so biased in favor of U.S. industries that it is often questionable whether any "unfair" trade act was actually committed—a fact that has led many observers to believe it is more accurate to refer to antidumping and countervailing duty laws as "Title VII" laws (for the section in which they appear in the trade statutes) rather than "unfair" trade laws. From our perspective, the changing filing patterns is due in large part to the fact that Title VII actions are substituting for safeguard actions. Because Title VII actions are now so much more likely to result in protection, an industry will choose to file a Title VII petition although the facts of the case may make it more appropriate (according to GATT standards) to file an escape clause petition.

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The dramatic rise of administrative protection over the past decade and explosion of unfair trade cases call out for some evaluation of the effects of such import relief. What are the costs of administrative protection? How much have domestic industries really benefitted from that protection? Since trade protection comes at a high cost to U.S. consumers, it is well worth examining what that protection buys in terms of saved jobs and revived industries. We shall show that administrative protection does not protect very effectively: industries continue to perform very poorly even after receiving protection. Accordingly, it is difficult to justify the significant burdens that such protection imposes on the rest of society.

An Overview of the Trade Laws

In many nations, including the United States, domestic industries injured by import competition have a number of legal and political channels through which they can seek relief. We can broadly classify those channels into two policy mechanisms: safeguard policies and policies used to correct "unfair" trade distortions. Safeguard policies are any government actions taken in response to import levels that are deemed to "harm" or injure the importing country's economy or domestic competing industries. Of interest to our study is the particular policy tool known as the escape clause, which is built into both U.S. law and international rules of the GATT. It is important to note that import-restraining actions regarded as safeguard actions are justified for economic adjustment and political reasons and do not require that trade be unfair in any way. GATT founders felt a safeguard provision was valuable since nations would be more likely to agree to trade concessions if there were a way to temporarily "escape" from their obligations, regardless of whether the injuring imports were fairly or unfairly traded. "Nondiscrimination" is a crucial characteristic of trade relief under the escape clause; since escape clause actions are aimed at providing "temporary" relief from injury resulting from trade, rather than relief from any particular unfair behavior, escape clause protection is applied to imports from all countries.

Whereas the escape clause is concerned primarily with injury to domestic competing industries regardless of the cause of that injury, the second type of GATT-sanctioned policy tool is designed to offset the effects of unfair trade distortions that foreign firms or governments create in their attempt to promote exports. Antidumping and countervailing duty laws are two specific examples of that type of policy tool; they are used to counter the practices of dumping and government subsidization, respectively. In contrast to the escape clause, antidumping and countervailing duty protection is generally discriminatory in the sense that the duty is applied specifically against imports coming from particular countries singled out as unfair traders. Because the procedures and provisions of antidumping and countervailing duty laws are quite similar, we shall refer to actions filed under either law as "Title VII" actions.

A key feature shared by Title VII and escape clause actions is that the import-competing domestic industry usually initiates the petition for trade relief. Industries thus have a more direct role in their quest for protection than was possible under traditional methods of protection such as

Table 1: Most Frequent Petitioners*

Industry	Total Number of Petitions
Blast Furnaces and Steel Mills	323
Misc. Fabricated Wire Products	23
Ornamental Nursery Products	21
Ball and Roller Bearings	18
Fabricated Metal Products	17
Valves and Pipe Fittings	16
Industrial Inorganic Chemicals	14
Copper Rolling and Drawing	13
Moter Vehicle Parts and Accessories	13
Hydraulic Cement	12
Potash, Soda, and Borate Minerals	10
House Furnishings	10
Wet Corn Milling	9
Fabricated Textile Products	9
Medicinals and Botanicals	9

*By four-digit S.I.C. classification.

Table 2: Key Features of Trade Laws

Feature	Comment
Injury Criterion	Escape clause's "serious injury" standard more difficult to satisfy than the "material injury" standard required under Title VII.
Presidential Discretion	Reduces desirability of escape clause. During 1980s the president rejected 30 percent of the cases that the ITC recommended for protection.
Scope of Protection	Nondiscriminatory escape clause offers stronger protection. Discriminatory Title VII leads to the filing of multiple petitions.
Length of Protection	Favors Title VII actions.
"Unfair Practices" Test	Should favor escape clause but in practice a nonfactor due to biased Commerce Department procedures.

tariffs and quotas. Not surprisingly, some industries have been much more aggressive than others in that endeavor. Table 1 lists the industries most frequently using the trade laws from 1980 to 1988. The iron- and steel-related industries have been the preeminent users of both Title VII and escape clause laws, followed by producers of agricultural products, chemicals, and machinery.

In contrast to the nondiscriminatory scope of escape clause cases, Title VII cases target a specific country's firms or government as unfair traders. From 1980 to 1988 U.S. industries filed fifty-one dumping cases against Japan, twenty-six against West Germany, twenty-five against Taiwan, and twenty-three against Brazil. With regard to the practice of government subsidies, Brazil was the most widely cited country with thirty complaints, followed by Mexico (twenty-seven), Spain (twenty-four), and France (nineteen).

Although well over 100 different manufacturing industries have used the laws, the top fifteen petitioning industries listed in Table 1 account for almost 70 percent of the cases filed. Interestingly, those top industries share certain characteristics that may account for their using the laws. First, they are large industries as measured by value of output and number of employees: the average petitioning industry has almost four times the sales and three times the employees as the average manufacturing industry. As has been widely recognized, an industry's size may be related to its ability to lobby effectively for trade protection: larger industries have greater resources and can exert greater political pressure on the relevant administrative agencies. Second, industries filing petitions face much greater import competition than the average industry: foreign producers' share of the domestic U.S. market is about 30 percent, as compared with the national average of about 13 percent.

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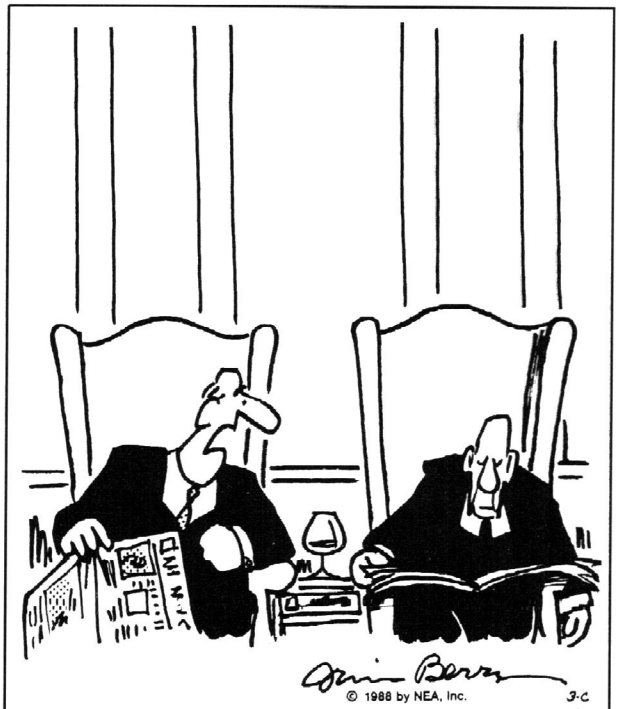
Why Are the Unfair Trade Laws So Popular?

To a large extent, differences in procedures for seeking and being granted protection under the escape clause and Title VII laws can explain the disparities in their usage. In Table 2 we list some of the key features that distinguish the laws. As the table makes clear, the differences between the laws make Title VII actions more desirable to industries seeking protection. For instance, the criteria used by the International Trade Commission (ITC) for determining injury, as specified by



"WAKE UP! Japan has targeted our club!!!"

both GATT and U.S. law, differ significantly for safeguard versus unfair trade actions. Under section 201, the law requires that imports cause or threaten to cause "serious injury" and that they be a "substantial cause" (meaning a cause that is "important and not less important than any other cause") of that injury. In contrast, under the unfair trade laws, once dumping or subsidization has been established, the ITC need only find "material injury" (defined by Congress as "harm which is not inconsequential, immaterial, or unimportant") or the threat thereof to provide relief to the domestic industry.

The fact that the president has the power to disapprove or alter the ITC's suggested remedy makes escape clause petitions more uncertain and thus discourages industries from filing those petitions. The president may consider the "national economic interest" in his decision whether to grant relief.

The unfair trade laws are also popular because the president has no formal role in their application. In escape clause cases the ITC investigates and decides the merits of the petitions, but the president has final decisionmaking authority over whether to grant protection under that law. In contrast, the president has no formal role under Title VII; for those petitions the ITC determines whether there is injury to the industry, and the Department of Commerce determines whether there are unfair practices occurring in trade. Both agencies must rule in favor of the petitioner for protection to be granted.

The fact that the president has the power to disapprove or alter the ITC's suggested remedy makes escape clause petitions more uncertain and thus discourages industries from filing those petitions. Under section 201, the president may consider the "national economic interest" in his decision whether to grant relief; accordingly, he has very broad discretionary authority over the outcome of escape clause petitions. Furthermore, GATT rules allow affected countries to retaliate against protective relief imposed under a safeguard action. That is, affected countries can levy a tariff or quota on an equal dollar value of U.S. exports. This built-in allowance for retaliation further complicates the president's decision.

Moreover, escape clause cases are less desirable than Title VII cases because escape clause protection is meant to provide only temporary relief from injury resulting from trade. Thus, until recently protection was limited to five years (the 1988 Trade Act extended escape clause protection to eight years). Protection under Title VII, by contrast, is reviewed annually and may continue indefinitely if the unfair practices are determined to continue to exist. As a practical matter, duty orders imposed under Title VII are often difficult to revoke; it is not uncommon for them to remain in place for a decade or more. The limited nature of escape clause protection may further deter industries from seeking relief under that law.

There is, however, one key feature that would seem to deter industries from frivolously filing Title VII actions: the Commerce Department must determine that foreign firms or governments have engaged in an unfair trade practice before dumping or subsidy duties can be levied. In theory at least, such a requirement should increase the probability that the petition will be rejected and thus make pursuing a Title VII remedy less attractive. As has been widely recognized, however, the

rules governing how Commerce determines "unfair trade" are slanted in favor of domestic industries, making the determination quite easy to satisfy. For instance, from 1980 to 1988 Commerce rejected only 6 percent of antidumping cases, while the ITC's rejection rate was 31 percent.

There are numerous examples of Commerce Department procedures that are biased against foreign industries. For example, duty margins are often calculated by using the "best information available," which usually means relying on information provided by the domestic complainant. In antidumping cases, the Commerce Department's method of comparing average home market prices to individual transactions in the U.S. market leads to positive dumping margins even when the prices are the same in both markets. It is noteworthy that Congress transferred jurisdiction over unfair trade determinations from the Treasury Department to Commerce in 1980 largely because Congress disapproved of Treasury's handling of cases and wanted the job done by a body that would work as an advocate for domestic industries.

Industry Performance before Filing for Trade Relief

To evaluate the economic performance of the industries that seek administrative protection, we have examined trends in employment, output, market share, and new capital spending during the three years before the industries filed a petition for protection. Consider, for example, the state of the cellular telephone equipment industry in 1984. Employment fell by over 22 percent from 1981 to 1984. Although shipments increased by almost 12 percent during that time, the domestic industry still lost ground to foreign producers; imports' share of the U.S. market increased by over 17 percent. Domestic producers filed an antidumping case against Japanese producers of mobile telephones and claimed that those recent trends were evidence of material injury.

Rather than focus on trends on a case-by-case basis, we show in Figure 1 the trends for the four economic criteria for all industries that filed Title VII and escape clause petitions from 1980 to 1988. To establish a benchmark and to account for overall trends in the economy, we also show those trends for all U.S. manufacturing industries. To better view the trends in the data we measure each criterion relative to its value in the year the petition was filed. (Therefore, all the data will have a value of 100 in the year the petition was filed.)

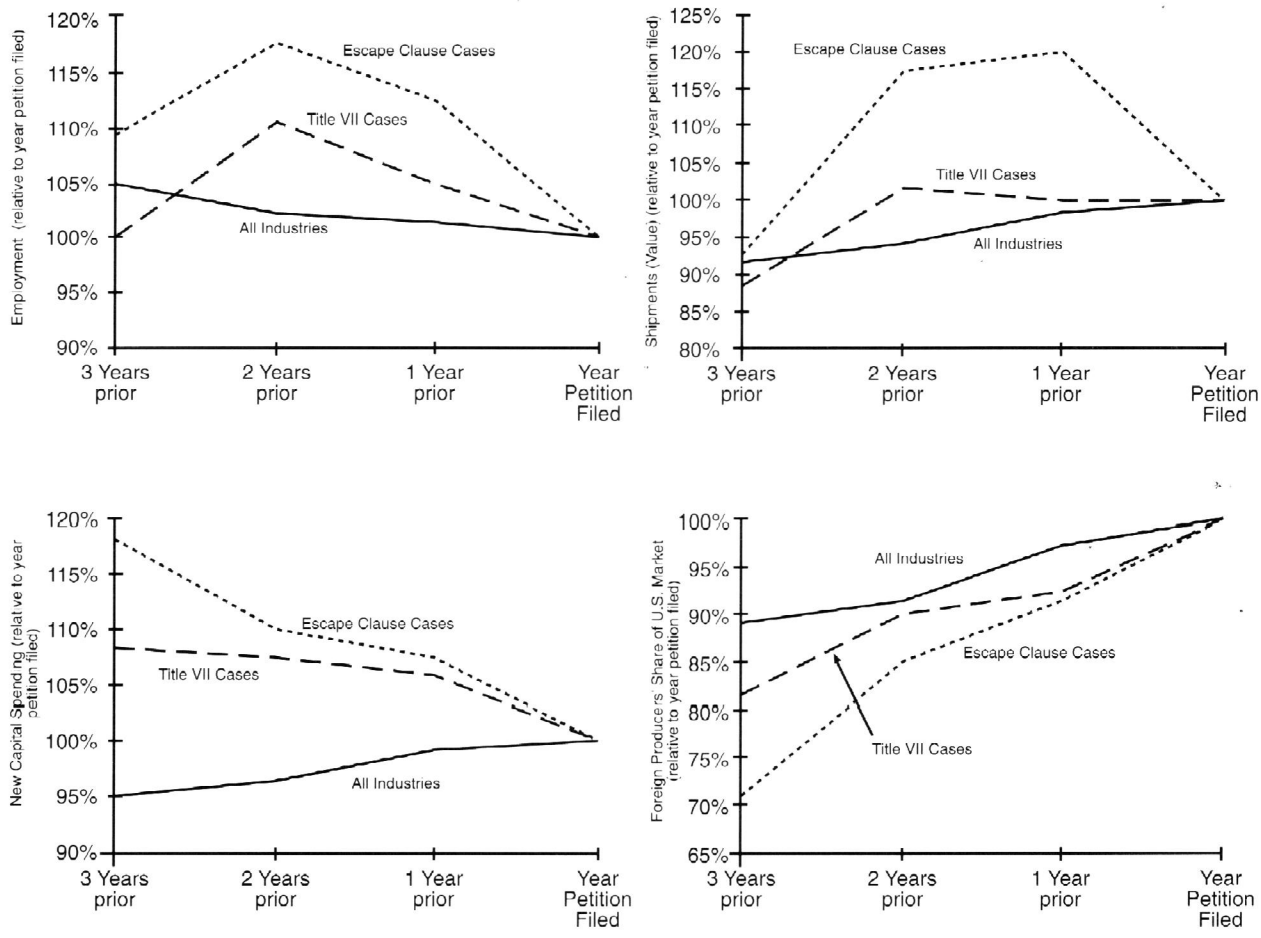
The trends for all the economic criteria are consistent with the notion that the industries suffered poor economic performance during the years immediately before filing the petition. There are a number of trends worth noting. For example, looking at the top panel, we see that on average employment in escape clause cases fell by about 10 percent over the three years before the filing of a petition. Moreover, the rate of decline in employment reached about 18 percent during the final two years. For Title VII cases the petitioning industries' employment also falls dramatically during the final two years before filing for relief. Comparing those trends with the trends for all manufacturing industries in the same years, we find that industries filing for trade relief experienced a much more drastic employment decline than the typical manufacturing industry—a trend the petitioning industries surely used as evidence of injury.

Trends in employment, output, market share, and new capital spending are consistent with the notion that the industries filing Title VII and escape clause petitions from 1980 to 1988 suffered poor economic performance during the years immediately before filing the petition.

The next panel in the figure displays trends in the value of shipments (output). While on average all industries experienced moderate *increases* in shipments during the period, industries using the trade laws experienced an initial rise followed by a rather sharp decline immediately before filing the petition. Once again, the pattern is consistent with the industries' claims of injury.

The other panels display trends that are consistent with the above findings. In particular, foreign producers' share of the U.S. domestic market grew much more rapidly in those industries that file trade complaints. For example, industries that file escape clause petitions experienced almost a 30 percent increase in the market share held by imports. In contrast, on average all manufacturing industries experienced only a 10 percent increase

Figure 1: Industry Trends before Filing for Trade Relief



during the same time period. Also striking is the rapid decline in new capital spending by petitioning industries, especially relative to the increasing trend displayed by all manufacturing industries.

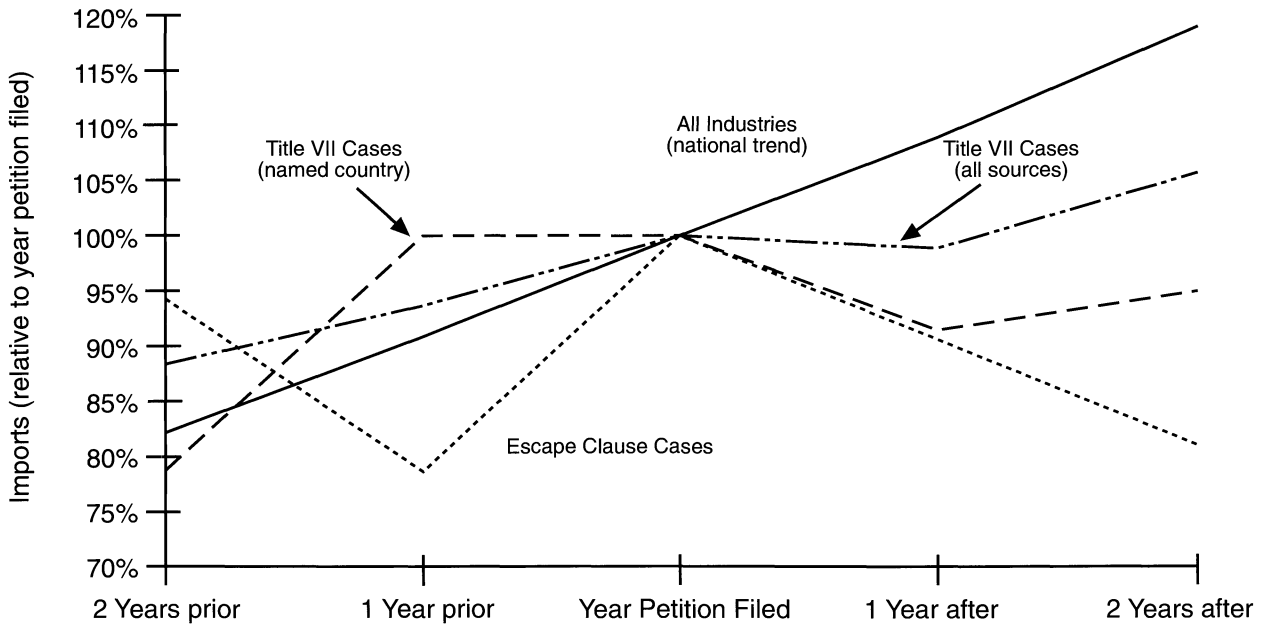
While those trends demonstrate that industries filing either Title VII or escape clause petitions are performing worse than the average industry (trends consistent with the notion of injury), it is also clear that industries filing escape clause petitions demonstrate an even greater decline. That is consistent with the more stringent injury standard required under the escape clause. It is also consistent with our belief that many industries file Title VII actions because they know they will be unable to prove "serious injury."

The Effect of Protection on Import Trade

Once an industry has decided to file a petition, the ITC must decide whether the injury standard has been satisfied. If injury is shown (and, for Title VII cases, Commerce confirms the existence of an "unfair" act), the U.S. Customs Service is instructed to levy a duty or quota against foreign imports. That trade restraint imposes a cost on U.S. businesses and consumers: it raises the price and reduces the supply of imported merchandise.

In Figure 2 we show the import trends for industries receiving Title VII and escape clause protection—the five escape clause cases that received presidential approval and the 467 Title VII cases that were settled or had duties levied. Once again, we measure each criterion relative to its value in the year the petition was filed. We see that imports grew at a steady rate for all industries. Using that as the benchmark, we can evaluate the effect of protection. Both escape clause and Title VII protection significantly decrease imports relative to the national trend: import growth in import categories receiving protection is 20 to 30 percent less than the national average during the two years following the imposition of protection.

Figure 2: Import Trends



More specifically, the trend under escape clause protection shows that imports in industries receiving escape clause protection fall sharply after protection is granted: they are about 10 percent lower after the first year and about 20 percent lower after the second year. Further, we find that those percentage decreases are not based on a small import trade volume. Import trade averaged well over $1 billion in industries receiving escape clause protection. Clearly, that protection significantly affects U.S. consumers.

Import trade is also reduced in industries receiving Title VII protection, but here we need to be a bit more careful about how we evaluate the import effect. As discussed above, Title VII protection only affects imports from specific named countries (for example, color televisions from Japan, Korea, and Taiwan). Thus, Title VII protection is discriminatory. Once protection is granted, trade is often diverted from "unfair trader" countries to other countries not subject to the duty order. (For example, imports of color televisions from Japan, Korea, and Taiwan have fallen while imports from Mexico have risen.) Therefore, it is useful to measure the effect of Title VII protection on imports from duty-subject countries as well as overall import volumes.

As Figure 2 shows, import trade from named countries grew very rapidly before protection; afterwards, however, import trade fell significantly. Imports from all sources are likewise reduced, but by far less than those from named countries. By either measure, though, Title VII protection imposes substantial costs on affected U.S. businesses and consumers.

How Effective Is Protection?

The significant negative impact on imports caused by administrative protection is generally not matched by a corresponding beneficial impact on the protected U.S. industries. In other words, administrative protection does not protect very well. Accordingly, it exacts large costs for very little benefit.

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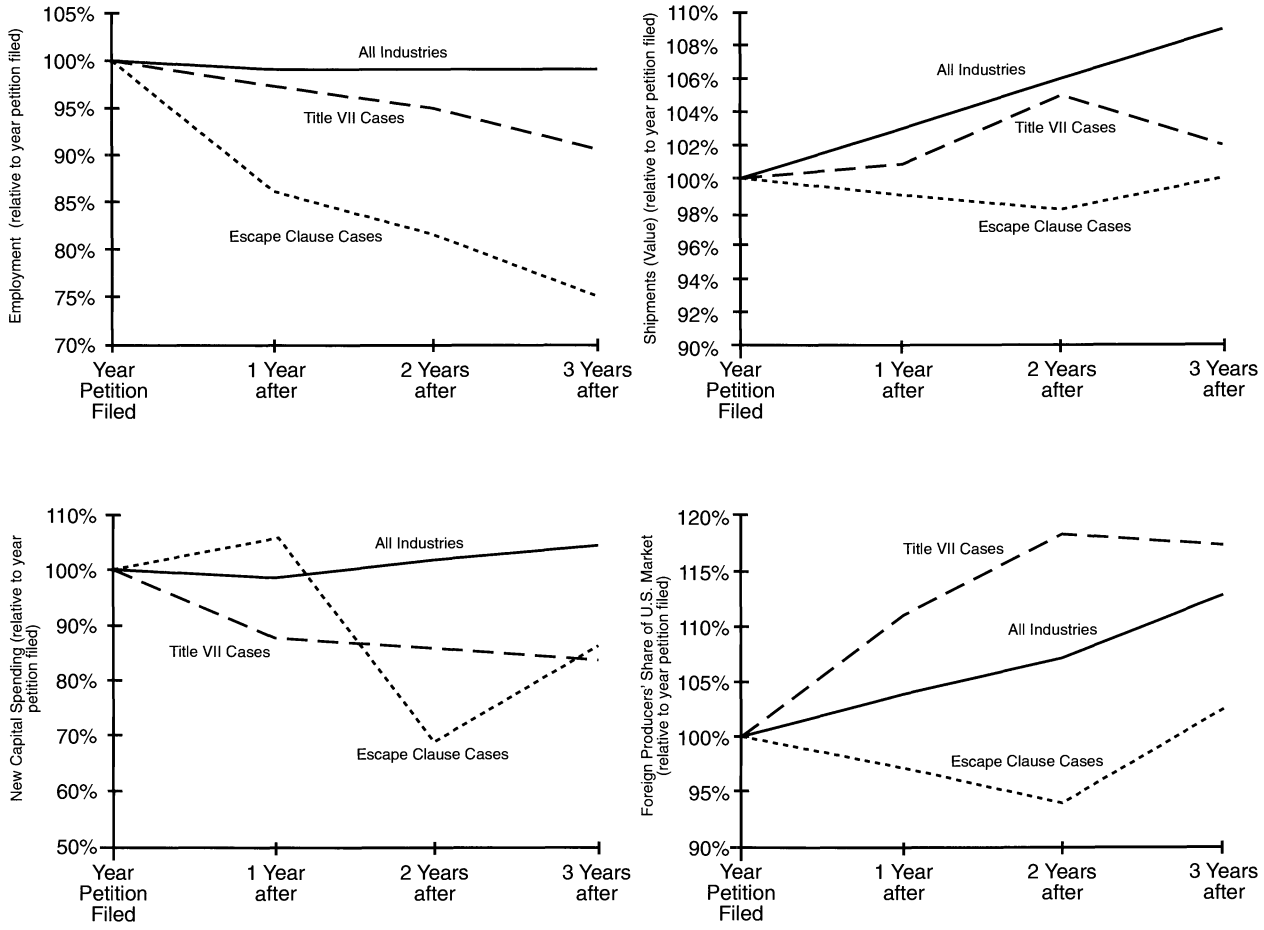
Consider once again the 1984 antidumping case against Japanese producers of cellular telephones. The ITC ruled in favor of the domestic industry and levied a weighted average dumping margin of 57 percent. Despite that high rate of protection,

Figure 3: Industry Trends after Receiving Trade Relief



the U.S. industry continued to flounder. For example, the share of U.S. sales accounted for by all foreign producers increased by more than 25 percent from 1984 to 1987. Also, employment and output fell by almost one-third during that period. Moreover, capital expenditures in the industry fell dramatically. Thus, it seems doubtful that the costs imposed on U.S. consumers were worthwhile.

In Figure 3 we consider the same four economic criteria, but once again we restrict ourselves to only those industries that received protection. The figure depicts the industries' performance during the three years *following* trade protection. As seen in the figure, protection is not a panacea for the industries' ills. By almost every measure, the industries granted protection continued to perform poorly.

With respect to employment, we see that industries receiving trade protection experienced a much sharper decline than the national average, especially for escape clause cases, which experienced a 25 percent decline in employment. The protection did not preserve jobs in the industry.

The picture is not much rosier when we look at the value of shipments. While on average manufacturing industries experienced a 10 percent growth during the period, industries receiving protection showed little, if any, improvement. The porous nature of protection partially explains that result for industries receiving Title VII protection. Recall that Title VII protection applies only to imports from specified countries. Thus, a successful Title VII case often results in other foreign producers' increasing their share of the U.S. market (as in the cellular telephone case). As the figure shows, foreign producers' share of the domestic market increases faster than average for those industries receiving Title VII protection.

Note, however, that this does not help to explain the decline in output of industries that received

escape clause protection since all foreign producers faced sanctions in those cases. In fact, for escape clause cases, foreign producers' share of the domestic market actually fell after protection was granted. Thus, industries receiving escape clause protection still declined despite the powerful nondiscriminatory nature of their protection.

Industries often claim that protection will enable them to retool their factories. While that argument sounds plausible, the evidence is to the contrary. Three years after receiving protection, capital spending by affected industries was 15 percent lower than it was during the year that the petition was filed. In contrast, the average manufacturing industry increased capital spending by about 5 percent during the same period. Thus, industries receiving protection do not appear to achieve the recovery policymakers anticipated.

Concluding Thoughts

The 1980s witnessed an explosion in the popularity of administrative protection as a means to address troublesome foreign competition. The drop in escape clause actions was more than compensated for by a dramatic expansion of Title VII protection. Yet when we consider what the granting of that protection has accomplished for U.S. industries, the picture is bleak.

Why do the laws perform so dismally? Defenders of the unfair trade laws have argued that they are not enforced vigorously enough, that the discriminatory protection they provide is too easily "circumvented" by import-shifting. Our analysis of escape clause actions counters that argument. In those cases, even where the protection granted is comprehensive, U.S. industry performance continues to deteriorate.

Surely a major factor in explaining the limited benefits of administrative protection is the type of industries choosing to file petitions. Independent of any problems associated with foreign trade, industries using the laws are declining industries, and restraining foreign trade does not reverse their decline. Declining industries are the ones most likely to file complaints, not only because they are desperate to fend off competition, but also because they have the best chance of proving injury and thus prevailing. Unfortunately, those industries may be performing so poorly that mere trade restraints most often cannot reverse their downward course. It may also be the case that easing competitive pressures through imposition of protection dulls the incentives for protected domestic industries to take the steps needed to revive their fortunes.

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