MANUFACTURING POLICY INITIATIVE AT O'NEILL
INSIGHT INTO MANUFACTURING POLICY

Will Trade Enforcement Trends Continue?

Gilbert B. Kaplan

When I started my career as a trade practitioner, I asked a seasoned colleague how trade policy is determined. By "determined," I meant two things—how are decisions about trade policy made, and how do you know what the trade policy of the United States is? These are fair questions. Unlike in other policy areas, such as foreign policy or national defense, there is no one leader on trade policy and no clear policy manifesto. (The US Trade Representative—the chief negotiator on trade—is not given sole powers on trade policy.)

My friend gave a succinct answer, which I have come to believe is true: "Trade cases *are* trade policy." It is evident that trade cases are specific, they lead to clear resolutions, they are public, and they result in action. Many other activities in trade, such as large trade agreements or consultations among senior officials, are often precatory, vague, confidential, and lacking in real results or compliance.

Table 1 shows indicators of trade activity, including trade cases, in the first three years of recent presidential administrations. Most of the chosen indicators are trade case initiations, which are based on certain criteria and standards. The table demonstrates a continual belief in and reliance upon trade cases, which almost always concern manufactured products.

During President Clinton's first term, the United States signed onto the World Trade Organization (WTO). It was not predicted that the number of trade cases would grow. To the contrary, many believed that the WTO would answer the big trade questions, members would comply with it, and case filings would decline or disappear. This did not turn out to be the case, and in the first three years of the George W. Bush administration, the number of trade cases increased significantly. That period also coincided with the entry of China into the WTO on December 11, 2001, and 25 of the dumping cases in President Bush's first three years were from China alone.

Table 1. Trade Activity in First Three Calendar Years of a Presidential Administration.

Activity	*Clinton*	*Bush 43*	*Obama*	*Trump*
Antidumping cases initiated	101	148	48	123
Countervailing duty cases initiated	11	27	26	65
Section 201 investigations initiated	0	1	0	2
Section 301 investigations initiated	10	1	2	3
Section 232 investigations initiated	2	1	0	5
Section 337 investigations completed	41	57	154	171*
WTO cases filed	6	8	7	12

**Completed investigations for 2019 cases are estimated.*

Sources: US Trade Representative (USTR), US Department of Commerce International Trade Administration, U.S Department of Commerce Bureau of Industry and Security, US International Trade Commission, World Trade Organization, and the Office of the Federal Register.

Looking further at Table 1, other trends become evident. The first, and somewhat surprising, finding is that Section 337 cases have become the most commonly used trade remedy. Section 337 (19 USC Section 1337), was at one time considered an obscure, relatively rarely used trade statute meant to cover intellectual property (IP)-infringing products imported into the United States, where the company exporting the product to the United States did not have a US presence and was therefore not subject to US jurisdiction.

The only way to deal with such infringement was to have the US Customs Bureau stop the product at the border. Customs itself was not able to determine whether there was infringement in the broad range of practices covered by Section 337: patent, copyright, trademark, and trade secrets. So the International Trade Commission (ITC) was given jurisdiction to determine whether infringement was occurring and, if it was, the ITC issued an order to Customs to exclude entry of the product.

Why has this become the most commonly used trade remedy, surpassing both antidumping and countervailing duty cases? This is part of a larger overall trend: competition for technology supremacy. Intellectual property theft (or at least infringement) is an off-shoot of this competition. Another major, and very high profile, example of IP theft is the Section 301 case on *China's Policies Related to Technology Transfer,* brought in 2017 by the Trump Administration, and leading to tariffs on hundreds of billions of dollars of Chinese imports into the United States.

What other trends are apparent? Countervailing duty (CVD) cases—involving unfair subsidization—have expanded significantly. Before 2007, the US Commerce Department took the position that a government controls all aspects of a non-market economy and thus there was no way to isolate and measure a particular subsidy. But in 2007, as a result of trade cases filed by the author, Commerce changed its position and said, in effect, that because traditional non-market economies such as China and Vietnam were becoming more of a hybrid of market and non-market elements, specific subsidies could be identified. This major change in trade policy significantly affected utilization of the CVD law. Since then, 56% of CVD cases involve imports from China.

The number of CVD cases is likely to continue to grow. Many of the industrial development strategies described in such programs as *Made in China 2025* rely heavily on subsidies, not only at the national level, but also at the provincial and municipal level. And this architecture for industrial development is not limited to China. The Chinese model of intense government direction and support for building up manufacturing sectors is being copied across the world. As such, there are significant numbers of CVD cases against other countries, such as Brazil, Taiwan, and South Korea. It is not likely the numbers will go down.

The other major area of growth is antidumping (AD) cases. Dumping is very generally defined as sales in the United States at below cost, or below the home market price, of the exporting country. Though these cases (and CVD cases) can be self-initiated by the US government, this is rarely done. Since 1985, there have been only four self-initiated cases. There are a number of reasons, but the most important is that the ITC must determine whether or not the domestic industry is being harmed by unfair imports. This is largely dependent on analysis of company financial data which only the industry, and not the government, has in its possession. As such, it is difficult for the government to build up a case on its own.

This leaves the decision as to whether or not to begin a case in the hands of private petitioners, who under the law must be producers of the product covered by the AD (or CVD) case, or workers in that industry. A number of factors will come into play in deciding whether to file a case, including, obviously, whether there is good evidence of dumping (or subsidies), and whether there is evidence of injury. Other subordinate questions important to initiating a case are (1) have covered imports been increasing so as to reach a significant US market share, (2) have profits and employment in the US

industry declined at the same time as imports have increased, and (3) are there any major US companies that oppose the case, perhaps because they have production facilities in the target country, or because they fear retaliation of some sort if a case is filed against a named country.

Despite the numerous hurdles, the number of antidumping cases is also on an upward trend, and this is likely to continue. As major economies build up large or even excess capacity in the world-wide fight for market dominance and for jobs, dumping is a natural and unfortunate byproduct. Despite the difficult issues that come up in any decision to file an AD case (including the costs of pursuing a case), many US companies feel compelled to do so in order to survive.

Two other trends are worth noting. The first is the increase in the use of Section 232 cases, which concern whether imports are harming national security. The Trump Administration has brought 232 cases on steel, aluminum, and autos, and the first two have led to tariff orders on imported products. Finally, the use of Section 201 safeguard cases has increased (e.g., clothes washers and solar panels) to address imports that circumvent an AD or CVD order by being manufactured in or transshipped through a third country. Safeguard relief is not limited in scope to a named country but, if granted, can cover the whole world. The Trump Administration has started using Section 201 and 232 and their use is likely to expand.

In sum, the increasing use of trade cases by manufacturers is a trend that is likely to continue in the years ahead, unless and until there is a fundamental change in the industrial development strategies of US competitor nations.

Gilbert B. Kaplan is MPI Senior Fellow and former Under Secretary for International Trade at the US Department of Commerce

Peer reviewers: John R. Magnus, President, TradeWins LLC and Ed Brzytwa, Director for International Trade, American Chemistry Council