

BY GREG RUSHFORD

## Ah, Washington,

the town where politics trumps all. Law? Certainly. Economics? Busywork for bean counters. Even common sense, when it gets in the way of the folks who instruct the folks who interpret the rules. Consider the United States International Trade Commission, a small quasi-judicial federal agency charged with administering key portions of America's trade laws.

The six commissioners – presidential appointees subject to Senate confirmation – are nominally independent. But Washington being Washington, such independence does not extend to the domestic steel lobby and other special pleaders. In a series of politically charged trade cases, the ITC has failed to do the solid economic analysis that would meet America's legal obligations as a member of the World Trade Organization. And when WTO dispute-resolution panels have slapped down the ITC's shoddy work, the commission has ignored them.

Nor, for that matter, have commissioners paid much attention to instructions from U.S. judges. The extraordinary lengths to which the ITC has gone in some cases to dodge its obligations might provide comic relief to those who appreciate the more outrageous workings of politically compliant bureaucracies. Unfortunately, in the process of pleasing the Stand Up for Steel lobbying group, the ITC has created a serious rule-of-law problem. There should be little humor in that – at

least not for anyone who cares about America's credibility with its economic allies.

### WHAT'S GOING ON HERE?

When companies or whole domestic industries file antidumping cases that accuse foreign producers of offering American consumers too good a deal, the U.S. Department of Commerce first must determine whether the petitioner has been the victim of unfair foreign competition. This is roughly defined as foreigners selling goods below cost. The Commerce bureaucracy – which is even more inclined to see it the American producers' way than the ITC – is almost always shocked to find that dumping is going on. Like the police inspector in *Casablanca*, who was shocked to discover gambling in Rick's Cafe.

Once Commerce charges the nefarious foreigners with unfair trade practices, the case goes to the ITC. Before the dumpers can be taxed, the ITC must determine that dumping – not other factors – injured the petitioner. If it has not, the case must be circular-filed.

Now, from economists' perspective, the very notion of dumping is far-fetched. Within our own borders, American businesses routinely do the equivalent – selling below fully

GREG RUSHFORD publishes *The Rushford Report*, a monthly newsletter on international trade and development policy.

## TRENDS

allocated costs in distressed markets if they can cover the incremental cost of production. Such behavior is a healthy response to hard times: it is better, after all, to sell at deep discounts than to idle plants and lay off workers. But when foreigners engage in similar practices – when they offer their widgets in U.S. markets at cheap prices for the same reason – economists don't have the last word.

The ITC is also charged with investigating alleged injury in cases involving the federal safeguards statute. That statute, Section 201 of the Trade Act of 1974, is not concerned with whether foreign competition is unfair, however the term is defined. Under it, domestic industries can seek relief from foreign competition simply because they have been hit hard by a surge in imports and could use a breather – perhaps years of temporary quotas and tariffs – to get back to profitability. In these Section 201 cases, the ITC is supposed to determine the extent to which the import surge has really caused injury.

This sounds straightforward – and might be, were it not for the pressures buffeting its deliberations. When ITC votes against Big Steel – sometimes it does happen – threats of retribution follow as surely as general elections follow primaries. Everyone in Washington's trade bar knows the drill: threats from The Hill to cut the budget for the ITC's Economics Office, even personal attacks on commissioners. Two years ago, President Bush bowed to the domestic steel lobby and refused to renominate ITC Commissioner Thelma Askey. Askey's problem: she lacked the stomach to ignore the facts. Over the years, commissioners have learned that honesty and political survival don't mix.

### SLAPPED DOWN AT THE WTO

Since 1995, World Trade Organization dis-

pute panels have considered four challenges to ITC Section 201 safeguard decisions. The four: pipe from Korea, lamb from New Zealand and Australia, and wheat gluten and steel wire rod from the European Union. Each case raised different issues. But in each, the WTO panels decided that the ITC did not perform sufficiently rigorous injury analysis to comply with Article 4 of the WTO's own rules, which gives countries some leeway to buffer industries from import surges.

Moreover, in proceedings involving challenges to United States antidumping actions, the WTO's appellate body has found that the methodology the ITC has been using to find injury does not stand up to scrutiny. Thus, when Japan challenged a U.S. antidumping action targeting hot-rolled steel, the ITC barely went through the motions before giving the Japanese a cold shoulder.

Although the legal issues are not understood well by Congress, you don't have to be a \$500-an-hour trade lawyer to see what's happening. In both safeguards and antidumping cases, the ITC must find a causal link between injury to the domestic industry and the imports, or dismiss the case.

By the same token, Article 3.5 of the WTO's antidumping code specifies that when a national authority like the ITC examines injury claims, it must consider other factors contributing to the injury – for example, the “volume and prices of imports not sold at dumping prices.” Most people are not puzzled by the language: if the fairly traded imports rather than the dumped imports are driving down prices, the injury to the domestic petitioner can hardly be blamed on dumping.

Article 4 of the WTO safeguards agreement follows the same reasoning. It obligates the ITC to “evaluate all relevant factors,” like the “rate and amount of the increase in imports” before finding a “causal link” be-



tween increased imports and the serious injury. One line in Article 4(b) says it all: “when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.”

All the WTO jurists ask is that the ITC undertake an economic analysis capable of passing a laugh test, and then document the reasoning. No big deal, you say? You’re not an ITC commissioner. In recent decades, the commission has gotten used to finding injury without rigorous economic analysis. With advice from Congress, the commissioners have decided that dumping only has to be somewhere in the mix of contributing factors. The commission has even argued that the dumping does not have to be a significant factor in the injury.

Last year, in the case brought by South Korea against United States’ safeguards on pipe, the WTO’s appellate body criticized the ITC for its shoddy analysis of other economic factors contributing to the injury, like the sharp declines in demand for pipe by the oil and natural gas industries. By the same token,

when Japan appealed the ITC’s aforementioned antidumping decision on hot-rolled steel, the legal literalists at the WTO wondered why the ITC did not consider the impact of increased production capacity at domestic steel minimills or the adverse effects of a strike at General Motors.

#### **SLAPPED DOWN BY U.S. LAW**

The ITC has had its problems with domestic courts, too. In December 1997, the U.S. Court of Appeals in Washington ruled on an antidumping case involving magnesium imports from Russia, Ukraine and China. The decision in *Gerald Metals v. United States* tracks the same reasoning as the WTO’s Article 4 safeguards agreement and Article 3.5 of the antidumping code. Basically, the court said that if the domestic magnesium producer – Utah-based Magnesium Corporation of America – was being injured by fair competition in the global market, and not by dumping, the ITC’s injury analysis must reflect that.

While ordinary people would immediately grasp the court’s logic, the ITC bureaucracy was in no mood to be confused by reason.

## TRENDS

First, the ITC's general counsel, Lyn Schlitt, along with the seven Washington law firms that represent Stand Up for Steel tried unsuccessfully to have the opinion reversed. Since then, *Gerald Metals* has become the legal elephant in the hearing room – the ITC's lawyers and commissioners simply pretend not to know it is there. As best as I can determine, in the five years since the decision, the ITC has acknowledged that *Gerald Metals* was the law of the land in just one case.

### BUREAUCRATIC IMPERATIVES

It is fascinating to see just how far the commissioners have been willing to go to please the politically connected. Consider the petitioner in the string of continuing magnesium cases that began in 1992 and resulted in the *Gerald Metals* ruling.

The Magnesium Corporation of America has for many years been in deep doo-doo with the Environmental Protection Agency – seems the EPA does not appreciate the company's inclination to release chlorine into the air.

MagCorp is a subsidiary of Renco Metals, which is owned by Ira Rennert, a man whose lifestyle would have made Louis XIV jealous. He owns a house on 63 acres fronting the beach in the Hamptons, with two bowling alleys, two libraries, an art gallery, and servants' quarters for a dozen. *Time* has dubbed Rennert "the man with 41 bathrooms," although *The New York Times* reported only 39.

More relevant here, Rennert writes big checks to both parties. Recent recipients of Rennert's generosity range from the National Republican Senatorial Committee to Joseph Lieberman. And cynics may wonder whether his open checkbook has something to do with the ITC's propensity to give Rennert the benefit of the doubt.

In July 2000, the ITC refused to revoke a 1992 order involving government subsidies given to Norsk Hydro, a Quebec magnesium producer. The offending subsidy was a one-time grant from the government of Quebec that underwrote Norsk Hydro's installation of pollution-control equipment. The ITC said that lifting the order would likely lead to a recurrence of injury to the Magnesium Corporation of America "within a reasonably foreseeable time." Or to put it another way, in the American political system domestic polluters trump green foreigners.

The ITC proved to be even more concerned about Magnola Metallurgy, another magnesium producer in Quebec. Magnola was just starting up in 2000, having spent some \$700 million to position itself to sell magnesium in U.S. markets. But Magnola had never produced any ingots. Prices in the U.S. magnesium market were effectively set by third-country exporters like Russia and China, not by dumped Canadian metal.

But even though Magnola had never been found to have dumped anything, the ITC voted to hit it with a preemptive 21 percent antidumping tariff, along with countervailing duties of about 7 percent.

In July 2002, a U.S.-Canadian panel convened to resolve disputes under the North American Free Trade Agreement sent the case back to the ITC with instructions to take another look – this time applying the *Gerald Metals* precedent properly. In October, the ITC flat-out refused, issuing a 22-page ruling signed by all five current commissioners that dripped with bureaucratic scorn.

We're right, you're wrong, the commissioners told Nafta, "We incorporate in full our prior findings, analysis and conclusions." Quebec has gone back to the Nafta panel, asking that it order the ITC to terminate the case in accordance with U.S. law.

### STANDING UP FOR THE STEEL LOBBY

Need more convincing of the ITC's intransigence? Consider the decision in *Nippon Steel v. United States*. Here, Weirton Steel alleged that it was being injured by dumped imports of tin- and chromium-coated steel from Japan. The ITC sided with Weirton. But a federal judge subsequently tied a legal tin can to

mainly in the eastern United States, while the Japanese steel sold in the west. "The only pricing documents submitted by Weirton apparently showed that its pricing range was determined without regard to foreign prices," Restani observed. Furthermore, Weirton's customers cited quality and service problems with the long-troubled mill. As Restani put it,

**For those attuned to black humor, it is fascinating to see just how far the commissioners have been willing to go to please the politically connected.**

Weirton's case, documenting a certain desperation in the ITC's enthusiasm for the arguments offered by lawyers for the politically connected domestic mill. In December 2001, Judge Jane Restani of the U.S. Court of International Trade sent the proceedings back to the ITC. Citing *Gerald Metals*, Restani instructed the commission to take another crack at analyzing other possible factors that may have "made a material contribution to [Weirton's] injury."

The ITC refused to reconsider, so lawyers for the Japanese manufacturer went back to court. And in August 2002, Judge Restani issued a blistering opinion that ordered the ITC to terminate the case. The judge decided that "uncontested evidence leads inexorably to the conclusion that lower-priced subject imports did not have a material effect on domestic prices." She found that for two of the three years the ITC had examined, the Japanese had generally sold their steel in the U.S. market at a higher price than Weirton did. Moreover, imports from third countries had enjoyed a greater market share in the United States.

Judge Restani also found that Weirton sold

the evidence "showed domestic producers' on-time performance was poor" during the period involved. "The Commission's apparent tunnel vision is misleading and violates the court's directive to analyze and present data in a manner that facilitates review," Restani concluded.

As this article goes to press, the ITC has come under more fire from the WTO for its approach to an even more important steel issue. When commissioners gave the go-ahead for the Section 201 safeguards plan that led President Bush to slap tariffs as high as 30 percent on foreign steel, they once again failed to perform a proper injury analysis. The commissioners found injury to the petitioning domestic mills even though most categories of steel imports were actually falling. Remember, Article 4 of the WTO's safeguards agreement requires evidence of rising imports. To find such evidence, the ITC counted imports of semi-finished steel slabs. Since these slabs were brought into the United States by the domestic mills themselves, how could the ITC claim these slab imports harmed the same mills? By this point, you can make an educated guess. **M**