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One of the many strands of the trade-and-environment debate is a complaint that exports from countries with weak environmental regulations are "unfair." It is argued that producers in such countries obtain an unfair cost advantage because they are excused from complying with proper environmental practices. For example, if paper producers are not required to clean up the water they discharge from their production facilities, their costs will be lower than those of producers in countries requiring clean discharges. The claim that such cost advantages are unfair rests on a general normative proposition known as the "level-playing-field" complaint: competition is unfair whenever foreign producers enjoy any advantage created by their government that is not equally available to the complaining domestic producers.

A government could satisfy the demand for a level playing field by removing the perceived cost disadvantage in one of three ways. First, the government could lower its own environmental standards. Second, the government could give domestic producers a cash subsidy to cover their environmental compliance costs. Finally, the government could tax away the foreign producers' cost advantage by imposing customs duties ("eco-duties") on imports from countries with low environmental standards.

The first two options are problematic. Environmentalists quite naturally oppose relaxing domestic environmental standards. Budget problems usually limit the extent to which subsidies can be granted. Consequently, commercial and environmental interests tend to support eco-duties. From the environmental point of view, eco-duties improve both domestic and foreign environmental policies. They mollify the competitive

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concerns of domestic producers and offer economic incentives to improve environmental standards abroad. Domestic producers prefer eco-duties because they elicit the least opposition from environmentalists and taxpayers.

Needless to say, governments of countries with low environmental standards do not concede that their lack of environmental regulations creates an unfair advantage. In most cases, they are developing countries who assert the right to formulate whatever environmental policies are best suited to their level of economic development. They therefore object to any trade measures levied on the basis of lower environmental compliance costs.

This article evaluates the claim that imports from countries with low environmental standards are unfair.[1] Part I surveys recent U.S. legislative proposals that have addressed the level-playing-field complaint. Part II examines environmental policy arguments that usually accompany unfairness claims and describes their relationship to unfairness issues. Part III explores the root concepts of fairness underlying the level-playing-field

1. For an earlier and somewhat differently oriented version of the analysis in this section, see Robert E. Hudec, *"Mirror, Mirror, on the Wall": The Concept of Fairness in U.S. Foreign Trade Policy*, *in* PROCEEDINGS OF THE 1990 CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 88, 88-110 (1990).

For other recent works exploring the possible meanings of the fairness concept, *see* Ronald A. Cass and Richard D. Boltuck, *Antidumping and Countervailing Duty Law: The Mirage of Equitable International Competition*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish Bhagwati and Robert E. Hudec eds., forthcoming 1996); Kenneth W. Abbott, *Defensive Unfairness: The Normative Structure of Section 301*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish Bhagwati and Robert E. Hudec eds., forthcoming 1996); Robert T. Kudrle, *Fairness, Efficiency, and Opportunism in U.S. Trade and Investment Policy*, *in* 8 NATIONAL COMPETIVENESS IN A GLOBAL ECONOMY, 153 (1995); Robert Howse & Michael J. Trebilcock, The Fair Trade - Free Trade Debate: Trade, Labour and the Environment, (WPS - 32, University of Toronto Law and Economics Working Paper Series, 1994) (on file with author); J. Michael Finger, *The Meaning of 'Unfair' in United States Import Policy*, 1 MINN. J. GLOBAL TRADE 35 (1992); John J. Barcelo III, *An Analytical History of GATT Unfair Trade Remedy Law*, 14 WORLD ECON. 311 (1991); Susan Hutton & Michael Trebilcock, *An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for a Normative Rationale*, 24 J. WORLD TRADE 123 (1990); Patricia I. Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122 (1987).

On the influence of the fairness concept in U.S. policy, see Jagdish Bhagwati, PROTECTIONISM chs. 3, 6 (1988); AGGRESSIVE UNILATERALISM: AMERICA'S 301 POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati and Hugh Patrick, eds., 1990); JAGDISH BHAGWATI, THE WORLD TRADING SYSTEM AT RISK (Harry Johnson Memorial Lecture, 1990).

complaint as it appears in current U.S. trade policy debate. Part IV examines the extent to which the concepts of "subsidy" and "dumping" in both GATT law and current U.S. trade law can be applied to imports produced under low environmental standards. Part V looks beyond the level-playing-field norm and considers other, possibly more discriminating norms that might justify national differences in environmental standards. A brief conclusion examines the likely course of future developments.

I. RECENT LEGISLATIVE PROPOSALS

The legislative solution most frequently proposed to offset the price advantage of weak environmental regulations is a tax on imports from the low-standards country. The Copper Bill introduced by Senator DeConcini in 1985 provides an early example of such a "level playing field" proposal.[2] The bill, which did not pass, imposed duties on copper produced in countries that "do not employ environmental measures substantially equivalent to those imposed on [U.S.] copper producers."[3] The bill fixed the amount of the duty by comparing the import's actual cost of production to the cost if the foreign producer were required to observe U.S. environmental standards.[4]

A 1991 proposal by Senator Baucus targeted countries that refused to negotiate international environmental standards.[5] Under this proposal, if a country rejected international negotiations and its environmental standards did not meet those of the United States, the United States would be allowed to impose countervailing duties on imports from that country.[6] The United States would have imposed such duties only if three criteria were met: (1) the applicable U.S. environmental standards must have been scientifically based; (2) the same standards must have been applied to all competitive domestic production; and (3) the imported products must have been causing economic injury to competitive domestic production.[7] The duty would have set an amount to "offset any economic advantage gained by

2. S. 353, 99th Cong., 1st Sess. §§ 1-2 (1985).

3. *Id.* at § 2.

4. *Id.*

5. Richard Lawrence, *GATT Urged to Address Environment,* J. COM., Oct. 28, 1991, at 5A.

6. *Id.*

7. 137 Cong. Rec. S13,169 (daily ed. Sept. 17, 1991) (recommendation of Senator Baucus). *See also Baucus Calls for Environmental Code in GATT Modeled After Subsidies Code,* 8 Int'l Trade Rep. (BNA) 1568-69 (Oct. 30, 1991).

producing the product under less stringent environmental protection regulations."[8]

The International Pollution Deterrence Act of 1991, proposed by Senator Boren, would have allowed the United States to apply countervailing duties to imports produced without "effective pollution controls."[9] The duty based on the cost of complying with U.S. environmental standards. Half of the countervailing duties collected would have been placed into a "Pollution Control Export Fund" to help developing countries purchase U.S. pollution control equipment.[10] The Boren bill was not enacted or reintroduced.

A more general Congressional resolution introduced in 1993 called for creating a "fair" world economic system by ensuring that "[U.S.] laws designed to protect the environment from polluting and environmentally destructive industrial and agricultural practices not place the United States at a competitive disadvantage compared with other countries."[11] This resolution also failed.

Representative Gephardt has advanced the most recent level-playing-field measure entitled "Blue and Green 301."[12] Not yet introduced as a bill, Gephardt's proposal treats any failure to adopt effective environmental safeguards as an unfair trading practice if it yields a competitive advantage to the polluter.[13] The proposal also allows the United States to impose unilateral trade sanctions against countries failing to enforce their own environmental and labor laws.[14]

One academic commentator has suggested an antidumping approach to the problem. She recommends imposing a dumping duty equal to the cost "saved" by the exporter in a low-standards country.[15] The amount of the duty would be based on the difference between the cost of complying with the importing country's

8. 137 Cong. Rec. at S13,169.

9. S. 984, 102d Cong., 1st Sess. § 3 (1991). *See also Trade Incentives and Environmental Reform: The Search for a Suitable Incentive,* 4 GEO. INT'L ENVTL. L. REV. 421, 427 (1992).

10. S. 984, 102d Cong., 1st Sess. § 4 (1991).

11. H.R. Con. Res. 86 (1993).

12. The colors represent the interests protected by the bill — labor (blue collar) and the environment (green).

13. *Gephardt Bill to Allow Sanctions For Not Enforcing Environmental Laws,* 11 Int'l Trade Rep. (BNA) 500 (Mar. 30, 1994).

14. *Id.*

15. Ursula Kettlewell, *GATT — Will Liberalized Trade Aid Global Environmental Protection?* 21 DENV. J. INT'L L. & POL'Y 55, 74-76 (1992).

environmental regulations and the cost of complying with the exporting country's regulations.[16]

Another proposed solution to the perceived competitive problem would remove otherwise available preferential tariff treatment for products from countries that fail to meet some acceptable standard of environmental regulation. For example, the Baucus proposal contained a provision making adequate environmental regulation a condition for extending U.S. duty-free benefits to developing countries.[17] Similarly, the Global Environmental Protection and Trade Equity Act, introduced by Senators Lautenberg, Kasten and Dixon, would have required that countries institute and enforce "effective" pollution control programs in order to be eligible for trade preferences under the U.S. Generalized System of Preferences (GSP) and the Caribbean Basin Initiative (CBI).[18] Representative Brown introduced the GSP Renewal and Reform Act of 1993 that would have required countries to comply with internationally recognized environmental protection standards in order to qualify for GSP status.[19] Congress has yet to enact any of these GSP proposals.[20]

II. THE ENVIRONMENTAL CASE FOR A LEVEL PLAYING FIELD

Although the main focus of the level-playing-field complaint is commercial, environmental concerns add a new policy dimension. Some environmental writers argue that satisfying the unfairness claims of domestic producers promotes better environmental policies. If such producers are protected from foreign competition they may be less likely to oppose higher domestic environmental standards. Environmental advocates also assert that the threat of eco-duties creates pressure for higher environmental standards in other countries.

Environmental writers have developed a vocabulary connecting these level-playing-field concerns to other environmen-

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16. *Id.* at 75.

17. 137 Cong. Rec. S13,170 (daily ed. Sept. 17, 1991). *See also* Lawrence, *supra* note 5, at 5A.

18. S. 2887, 101st Cong., 2d Sess. (1990).

19. H.R. 3625, 103d Cong., 1st Sess. (1993).

20. Section 601 of the Uruguay Round Agreements Act, 108 Stat. 4809, 4990 (1994), extended the existing GSP law, 19 U.S.C. §§ 2461-65 (1994) through July 31, 1995 to give Congress additional time to consider the long-term fate of the GSP program. The proposed renewal legislation, H.R. 1654, 104th Cong., 1st Sess. (1995), contained no environmental conditions. This renewal legislation had not been enacted as of October, 1995.

tal issues. Environmentalists once drew attention to the pollution "spillover" that weak environmental policies caused in neighboring countries. They argued that pollution that crossed national frontiers should be treated like any other tortious harm and that affected countries had a right to take action against the polluting countries. The term "spillover" acquired so much normative resonance in this context that environmental writers began to use it to describe many other kinds of environmental concerns. For example, the term "psychological spillover" is used to support a claim that mistreatment of animals has an emotional impact on citizens of other countries, an impact that harms them as much as pollution spillover and thus justifies similar retaliatory action.[21] This same "spillover" vocabulary is now used to describe the adverse political effects caused by imports from countries with low environmental standards. Such imports cause "political spillover" when they induce local producers to oppose stronger environmental policies at home.

It is true that domestic producers often cite competitive disadvantage as one reason to object to higher environmental standards at home. Moreover, if domestic producers can feasibly relocate to a "polluter haven" country, they will usually threaten to do so. One can never know, however, the extent to which lower environmental standards abroad actually do contribute to the substance or intensity of such political positions. Common sense tells us that there are usually many other factors involved in perceptions of competitive disadvantage *vis-à-vis* imports. Recent studies indicate that the cost of complying with environmental regulations to date has not been very large.[22] Some skepticism is warranted.

Assuming that discrepancies in environmental policies cause at least some cost differences and that manufacturers will call attention to them, the ultimate question is whether these cost differences deserve to be treated as more important than the dozens of other cost advantages a foreign producer may

21. *See, e.g.*, Richard Blackhurst & Arvind Sabramanian, *Promoting Multilateral Cooperation on the Environment, in* THE GREENING OF WORLD TRADE ISSUES 247 (Kym Anderson & Richard Blackhurst eds., 1992).

22. *See* Arik Levinson, *Environmental Regulations and Industry Location: International and Domestic Evidence, in* 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES TO FREE TRADE? (Jagdish Bhagwati & Robert E. Hudec eds., forthcoming 1996).

Daniel Esty, while acknowledging the generally low level of current environmental compliance costs, reports a number of estimates showing that average compliance costs will rise significantly. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 160-61 (1994).

have. International trade is based on differences of cost factors. Local producers will complain about any of them if given a chance. Unless something is thought to be wrong with a particular cost factor, however, governments do not usually feel obliged to address such complaints, nor, indeed, do such complaints tend to be pressed very far in the first place.

In sum, "political spillover" arguments are significant only to the extent they are supported by some kind of normative complaint. It is the level-playing-field complaint that gives them what vigor they have today. While environmental writers do not necessarily endorse the level-playing-field complaint on its merits (although to be fair most don't exactly oppose it, either), the strength of their political spillover arguments depends on it. It would be difficult to complain about the political spillover of low environmental standards if such standards were generally perceived to be a normal and legitimate variation between national domestic policies.

III. THE CONCEPT OF FAIRNESS IN INTERNATIONAL TRADE

The concept of fairness in international trade policy is almost entirely a U.S. contribution. No government uses unfair trade laws as vigorously as does the United States, and the U.S. Congress bows to no one in its attachment to concepts of fair and unfair trade. To understand these distinctive U.S. ideas, we must start by looking into their origins in U.S. economic life.

A. FAIR COMPETITION IN U.S. ECONOMIC POLICY

In the United States, the core substantive content of unfairness claims derives from a concept known as "fair competition." The normative assertion behind the idea of fair competition is that merit should determine business outcomes. In other words, businesses should succeed or fail according to their merit as competitors. Competition will be "fair" if none of the competitors has any advantages that are not based on merit. Competition will be fair if the playing field is level.

The concept of fair competition originated in U.S. internal economic policy. Throughout most of its history, the United States has maintained a commitment to an open internal economy. U.S. businesses are expected to compete with each other. The policy is reflected in the U.S. Constitution's Commerce

Clause,[23] and in the many components of the U.S. antitrust laws. The primary justification for this policy, of course, is its beneficial effect on national economic welfare. Over the years, however, public debate has added the concept of fair competition as a normative justification for this policy.

The idea of merit-based outcomes has broad popular appeal, at least in United States politics. The business community itself has come to welcome the idea, because a fair competition policy requires that government not intrude in business. The role of government is merely to make certain that the playing field is level, by ensuring both that local governments do not tilt the playing surface and that private parties do not impede competition through cartels or other anti-competitive behavior.

To be sure, the rhetorical image of a level playing field is somewhat fanciful to the extent that it portrays competitors grappling for commercial success in some pristine environment free from external influences. The modern world has never known such a government-free state of nature. Government is everywhere. Government presence in the market begins by providing certain very important basic conditions such as law and order, infrastructure, stable financial markets, and so forth. The modern state goes much further with economic program upon economic program, each of which influences the direction and content of business activity. The concept of fair competition, therefore, simply cannot exclude government assistance from the picture. It can make sense, however, in terms of a policy which excludes all forms of one-sided government assistance. If everyone receives essentially the same kind and amount of government assistance, as well as the same measure of government-imposed handicaps, no competitor will be advantaged by government in the end, and so competitive skills will continue to be the determining factor of commercial success.

"Fair competition" can be achieved in a general way in the internal U.S. market. Business conditions between domestic competitors are, for the most part, the same. All businesses are subject to the same federal government, providing them with the same type of government benefits and burdens. State governments do differ to some extent, and sometimes differences between states generate business complaints, as in the case of taxes or labor policy. But the disadvantages of such inter-state

23. The U.S. Constitution states that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3.

differences tend to be muted by an underlying acceptance of business mobility as a relevant option — if you don't like it you can move. Another leveling element is the fact that businesses really can compete anywhere within the internal market. No one has an officially protected market, and antitrust laws limit the competitive barriers that can be erected privately.

In the rough-and-tumble of business competition, losers will always want to complain about the unfairness of the process and there will always be some difference in business conditions to complain about. Governments cannot run a sensible economic policy unless they are capable of considerable skepticism toward such complaints. The internal U.S. market comes equipped with a considerable supply of such skepticism. Almost all the players in the competitive contest are represented in the relevant governments, so that every claim of unfair advantage will be tested by opposing interests. Domestic economic policy is not in fact swamped with unfairness claims.

On the whole, then, the concept of fair competition works well enough in the internal U.S. market that most U.S. business and political leaders make a public commitment to these values. This is a central part of the normative education they bring to international trade affairs.

B. "FAIR COMPETITION" APPLIED TO FOREIGN TRADE

The concept of fair competition found an important role in United States foreign trade policy after World War II. During the U.S. economic domination of the 1950s and early 1960s, the U.S. government and the U.S. business sector utilized the rhetoric of fair competition when demanding entry into protected foreign markets. "Open your doors," they said, "and let the better competitor win." When the pressure of foreign competition started to rise in the late 1960s and early 1970s, U.S. business interests began to speak more softly, but the U.S. government kept up the rhetoric in an effort to justify an increasingly liberal trade policy.

The invocation of "fair competition" values justified two important elements of U.S. foreign trade policy. First, and most obviously, it avoided trade protection. A commitment to fair competition policy found its way into the U.S. "escape clause" legislation.[24] The escape clause law declares that, while local

24. The current version of the escape clause, which was substantially rewritten in the Omnibus Trade and Competitiveness Act of 1988, is found at 19 U.S.C. § 2251-53 (1994).

business may deserve some breathing space when import competition becomes very intense, trade remedies must be temporary. If domestic industry cannot compete in the long run without extra protection, it should get out of the business.

A second policy consequence of the commitment to fair competition was the practice of not compensating the losers in foreign trade competition. The economic theory of international trade demonstrates that trade creates welfare gains for society as a whole, but admits that there will be dislocation costs for losers. The standard academic answer to the problem of dislocation costs is to use the gains from trade to compensate the losers. The fair competition approach says "no" to the idea of compensation. It posits that losers deserved to lose because they were just not good enough competitors. Losers must accept their losses and move on. That has generally been the U.S. policy.

In order to make "fair competition" a politically credible justification for liberal trade policy, the U.S. government had to acknowledge the existence of "unfair competition" as well and promise to protect U.S. producers against it. During the early 1970s, the U.S. government almost welcomed increased attention to claims of "unfair" foreign competition because it signaled acceptance in the business community of the basic policy of openness toward "fair" foreign competition. By the time of the Trade Agreements Act of 1979, it could be said that government and business had struck a deal: business would accept the policy of unprotected and uncompensated adjustment to "fair" foreign competition in exchange for effective protection against "unfair" competition.[25]

Unfortunately, the ideas of fair and unfair competition that make sense to competition within a domestic market do not make the same kind of sense when applied to international competition. The question of whether international competition is fair or unfair depends on the net advantage produced by the differing conditions in each country. There is, however, no reliable way of ascertaining and comparing the net advantage from one country to another. Foreign and domestic competitors do not share the same governmental regulatory structures. The burdens and benefits of each government's policy are never identical

25. Trade Agreements Act, Pub. L. No. 96-39, 93 Stat. 144 (1979). This act, which ratified the results of the GATT Tokyo Round negotiations, contained a complete rewriting of the antidumping and countervailing duty (AD/CVD) laws, making them tighter in a number of respects. The AD/CVD laws continue to have a large industry support group, which periodically calls upon Congress to keep its 1979 pledge to make the AD/CVD laws effective.

to those in other countries. Moreover, government policies are so complex that one could never compile a complete list of the relevant policy measures influencing competitive outcomes in any one country, much less measure them. Nor can the effects of these differences be equalized by the mobility of producer investments or by access into the competitor's market, for neither of these alternatives can be taken for granted in the markets of other countries.

In short, there is no way to know whether the playing field is level to begin with. That being so, there is no way to know whether any particular government measure produces an unfair advantage. A single advantage, like a subsidy, is unfair only if one assumes that all other factors are equal. Eliminating a subsidy will produce a level playing field only when the playing field is otherwise level.

Critics of unfair trade laws welcome this demonstration of the normative incoherence of such laws, but advocates for liberal trade policy take no comfort in its unpleasant corollary — the impossibility of proving that any instance of foreign competition is fair. Our inability to measure and compare competitive conditions between nations means that the possibility that a foreign competitor has received greater assistance than the assistance given by one's own government can never be excluded. This is a most disturbing truth, for it means that foreign trade can never be proved to be in compliance with the seemingly all-powerful normative standard that governs U.S. business and political attitudes toward trade.

A logical response at this point may be for trade policy experts to educate the U.S. business and political community that (1) the concepts of "fair" and "unfair" cannot be applied to foreign trade, and (2) foreign trade is nonetheless clearly beneficial to the national welfare even though it is based on different business conditions. But that response has thus far not been made.

Instead, the U.S. trade laws continue to treat foreign trade as though fairness and unfairness were administrable concepts. In all probability, the decision to do so was largely unconscious. Ideas of fairness and unfairness were part of everyone's attitudes toward competition, and the simple momentum of traditional thinking could account for the importation of those ideas into the relatively unfamiliar domain of international competition. The fact that traditional ideas of fair competition were quite useful in securing broad political acceptance of trade liberalization no doubt also encouraged this tendency.

Oddly enough, U.S. trade laws have been reasonably successful in creating the illusion that the law can distinguish between fair and unfair foreign trade. The trade laws simply identify certain acts such as subsidies and dumping as unfair and further provide a tariff remedy that "cures" the unfair effects of these practices. By claiming the ability to police unfair trade, the law implicitly assures the business public that the rest of foreign trade is fair — something like the way a hanging assures the public that the streets are safe.

Business attitudes aid this illusion of legal efficacy, because most business participants are genuinely convinced of the unfairness of certain advantages enjoyed by foreign business. Fairness is very much a matter of perception, and perceptions vary considerably according to the eye of the beholder. For the average business leader, "unfair is what your government does for you that mine does not do for me." As for the nice things one's own government does, well, those are just the well-deserved fruits of having a competent government. These intuitive, perhaps even subconscious, sorting operations produce what feels like genuine convictions of unfairness. Most domestic producers become genuinely livid about the unfairness of a foreign government subsidy, their minds intuitively closed to the possibility, for example, that the subsidy does no more than correct for an overvalued exchange rate. It helps, of course, that the foreign producers to whom these attitudes are directed are not represented in the political process.

Before rejecting this entire legal edifice as make-believe, we must give make-believe its due. The U.S. laws on fair and unfair trade attempt to develop a politically acceptable rationale for a liberal trade policy. Politics is the art of working with the values and perceptions that people have, to the extent one cannot change them. If public discourse reveals a fairness-unfairness line along which the business community will accept a healthy degree of free trade, governments can be forgiven for trying to use, and even enhance, those business perceptions as a way of promoting sound policy.

The results have been quite satisfying on the whole. The world is currently experiencing the greatest degree of trade liberalization it has known since the rise of the nation state. We will never know what would have happened if a more intellectually honest approach had been taken because the success of the present policy has all but carved these wrong ideas in stone. For the foreseeable future, U.S. trade policy is condemned to follow a public religion based on the worship of fairness and unfairness. Trade policy officials will have to make the best policy they can within the confines of that theology.

C. LIMITING THE REACH OF FAIRNESS CONCEPTS

The greatest danger posed by the current attachment to fairness concepts in international trade policy is the possibility that those concepts will be used to attack almost all foreign trade. There are many differences between business conditions from one country to another. We know that there is no way to measure the net balance of advantage produced by such differences. U.S. trade law tries to circumvent this problem by focusing on one particular advantage at a time, such as a subsidy, and treating that advantage in isolation. If every advantageous difference in business conditions between countries were similarly treated in isolation, most if not all foreign trade could be branded as unfair.

The question is whether a line can be drawn between the sort of competitive advantage created by things like subsidies, which have already been declared to be unfair, and the competitive advantage created by other differences in regulatory policy such as differences in environmental standards. Logically, the fairness concept underlying these characterizations does not offer a plausible distinction between one source of advantage and another. Anything that affects competition is potentially unfair. Happily, however, logic has not been the controlling variable so far. Governments seem to recognize a practical need to limit the fairness concept at some point.

The pragmatic concern is simply that a limitless concept of fairness will destroy a country's exports as well as its imports. Most countries have a substantial investment in international trade and are not prepared to suffer the major economic dislocation that would occur if all that trade were cut off. The U.S. government's commitment to preventing unfair trade was never intended to threaten this larger interest. To the contrary, the attention to unfairness emerged primarily as a quid pro quo support for liberal trade policy. Indeed, if the unfairness concept is viewed from its political origins, it must be seen as necessarily assuming that the bulk of foreign trade as we know it is fair.

Thus far, it would appear that governments have applied the unfairness concept with the sort of restraint just suggested. As will be discussed in the following section, broader ideas of subsidy and dumping are rejected whenever they threaten to produce too many trade restrictions.

To be sure, there is always the possibility that, in the long run, the idea of unfairness will overpower its creators. Normative concepts like this one do have a capacity to generate their own growth. It would not be the first time a legal fiction had grown out of control and destroyed the values it was created to implement.[26] The main safeguard against this outcome is simply the size of the world's investment in international trade. It is probably a safe bet that these large money interests will prevail, but it is difficult to be complacent about a political issue involving anything as potentially volatile as perceptions of unfairness.

IV. FAIRNESS CONCEPTS IN ACTION: CAN LOW ENVIRONMENTAL STANDARDS BE TREATED AS "SUBSIDIES" OR "DUMPING"?

The primary legal concepts employed to root out unfair trade are those of subsidy and dumping. This section considers how present laws dealing with subsidies and dumping address low environmental standards. The analysis considers both GATT and U.S. law.

A. LOW ENVIRONMENTAL STANDARDS AS SUBSIDIES

The most common legal framework for level-playing-field claims against low environmental standards is the assertion that such low standards should be treated as a form of subsidy to producers. The subsidy is the cost saved due to the low environmental standard — the difference between the producer's actual costs and the higher costs it would have incurred if required to comply with more rigorous environmental standards. GATT law permits governments to impose "countervailing duties" (CVDs) on subsidized imports that cause material injury to a domestic industry. The amount of the countervailing duty is equal to the amount of the subsidy.

Current countervailing duty laws do not seem to provide a remedy against goods produced in countries with low environ-

26. The editors have asked for an example. One that comes to mind is the concept of "benefit" in the law of restitution, originally stretched out of shape to do justice in cases where the law of contracts failed to do so, and now routinely employed to give plaintiffs an unjustly excessive measure of damages.

mental standards. Such a legal claim would fail on several counts. First, the current definition of "subsidy" does not appear to include the cost advantage obtained from lower environmental standards. Second, in most cases the benefits of such a subsidy do not meet the requirement that they be "specific" to certain industries. Finally, it is very difficult to demonstrate, much less measure, the financial benefit conferred by low environmental standards. Most proposals calling for CVDs against environmental subsidies concede that new legislation would be required to impose such a remedy.

New legislation, of course, could remove all these legal shortcomings in a single stroke. Such legislation could declare the cost advantage of low environmental standards to be a subsidy, it could waive the specificity requirement, and establish an arbitrary formula for calculating the size of the subsidy. Such a law would probably run afoul of GATT obligations, but that has not always prevented such laws from being enacted.

The core concept of "subsidy" is extremely pliable. The term normally means the transfer by the government of something of value to a producer which increases the producer's profitability. The most common kinds of subsidies involve transfers of money, goods or services, either for free or at below market prices. But from an economic viewpoint anything the government does which alters the producer's costs or revenues in a favorable direction could just as easily be called a subsidy. The political perception is primarily a matter of visibility. Once the helping hand of government becomes conspicuous, it tends to elicit "subsidy" objections no matter what form the help takes.

Until recently, the concept of subsidy was not defined either in national law or in GATT. The lack of definition caused no major problems before the 1970's. The countervailing duty law was little used, and complaints tended to focus on the ordinary export subsidies involving financial transfers from government to business.

Pressure to expand the concept began in the 1970's when the United States decided to apply CVD law to domestic subsidies. In response, domestic producers complained about more and more kinds of government assistance. U.S. countervailing duty law resisted this pressure to expand and began to impose some limits on the subsidy concept.

The first major limitation on the subsidy concept was the so-called "specificity" requirement.[27] Countervailing duty law was held inapplicable to any governmental benefits "generally available" to all or most producers. This limitation effectively excluded most government contributions to infrastructure, as well as most economy-wide social or economic programs. The GATT subsequently adopted the specificity requirement when it issued the first formal definition of "subsidy" in the 1994 Uruguay Round revision of the GATT Subsidies Code.[28]

A second major definitional exercise is still in motion. Until about 1992, the U.S. administrative authorities limited the definition of "subsidy" in U.S. CVD law to transfers of things of value by the government. The concept included the grant of less tangible benefits like loan guarantees, but stopped short of recognizing indirect financial benefits that sometimes result from regulatory measures, such as lower input prices that certain producers obtain from an export restriction on the raw materials they use. In 1992, the U.S. Department of Commerce explicitly rejected its previous definition of subsidy in the *Softwood Lumber III* case.[29] The Department determined that a Canadian export restriction on raw logs, which effectively reduced the price of raw logs to Canadian lumber mills, was an actionable subsidy to those mills.[30] Although the Commerce ruling was ultimately reversed on other grounds, a U.S.-Canada binational panel upheld the expansion of the subsidy definition.[31]

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27. For an account of the origins of the U.S. doctrine, see James D. Southwick, *The Lingering Problem with the Specificity Test in United States Countervailing Duty Law*, 72 MINN. L. REV. 1159 (1988).

28. Agreement on Subsidies and Countervailing Measures, *opened for signature* Apr. 15, 1994, art. 2, *in* GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 264, GATT Sales No. 1994-4 (1994) [hereinafter 1994 Subsidies Code].

29. Certain Softwood Lumber Products from Canada, 14 I.T.R.D. (BNA) 2166, 2224-2237 (May 28, 1992) (the third CVD action involving a long-standing complaint about imports of softwood lumber from Canada).

30. The change had been adumbrated in a somewhat earlier decision by the Commerce Department, Leather from Argentina, 13 I.T.R.D. (BNA) 1095, 1096 (Oct. 2, 1990).

31. Certain Softwood Lumber Products from Canada, 16 I.T.R.D. 1168 (BNA) (May 6, 1993). The decision of the Commerce Department was appealed to a binational panel constituted under Chapter 19 of the U.S.-Canada Free Trade Agreement. *Id.* The binational panel accepted the "subsidy" classification of the export ban by a 3-2 decision, but remanded asking for further elaboration on the issues of "specificity" and "direct and discernable effect." *Id.* The Commerce Department elaborated on and affirmed its original findings. 1993 FTAPD LEXIS 10 (Sept. 17, 1993). On a second appeal, the binational panel found the elaborated "specificity" finding still insufficient and remanded with

Shortly after it was announced, the broad new subsidy concept articulated in *Softwood Lumber III* appeared to have been rejected by the new GATT definition of "subsidy" in the Uruguay Round Subsidies Code.[32] The new GATT definition limited the subsidy concept to measures involving a "financial contribution by a government."[33] Indeed, even the Commerce Department opinion in *Softwood Lumber III* seemed to concede that the broader definition of subsidy it adopted in that case was in conflict with the new GATT definition, then in draft.[34]

In ratifying the Uruguay Round Subsidy Code, however, the U.S. Congress made clear that it wanted the new GATT definition of "subsidy" to be interpreted as including and affirming the broader concept of regulatory subsidy employed in *Softwood Lumber III*. The consistency of Congress's position with the new GATT definition cannot be determined authoritatively without a comprehensive review of the negotiating history of the new definition, the documentation for which is still restricted,[35] but the U.S. law itself is now quite clear.

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orders to dismiss the proceeding. 1993 FTAPD LEXIS 15 (Dec. 17, 1993). That remand order was affirmed by an Extraordinary Challenge Committee, Panel No. ECC-94-1904-01 USA, 1994 FTAPD LEXIS 11 (Aug. 3, 1994), and the Commerce Department's countervailing duty order was dismissed, 59 Fed. Reg. 42,029 (Aug. 16, 1994).

32. 1994 Subsidies Code, *supra* note 28, at art. 1.

33. *Id.*

34. The Commerce decision took note of the unadopted text of the new GATT definition, conceded that it was in conflict with the new definition of subsidy being adopted in that case, and actually sought to use the changes made by the draft GATT text as proof that the definition of "subsidy" in the older version of the Subsidies Code then in force (the Tokyo Round version) must not have been similarly limited. Certain Softwood Lumber Products from Canada, *supra* note 29, at 2235.

35. The full text of the new GATT definition reads as follows:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested

Is this evolving U.S. definition of "subsidy" broad enough to include the cost advantage created by low environmental standards? Probably not. The current definition in U.S. law includes financial benefits businesses receive from private sources, but only those benefits arising from government action that "entrusts or directs a private entity to make a financial contribu-

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in the government and the practice, in no real sense, differs from practices normally followed by governments; or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and

(b) a benefit is thereby conferred.

1994 Subsidies Code, *supra* note 28, at art. 1.1 (footnote omitted).

Congress enacted a considerably modified version of the GATT definition into U.S. countervailing duty law. The text of Article 1.1 (a)(1)(iv) of the 1994 Subsidies Code came out as:

> [an authority] makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments.

Uruguay Round Agreements Act, Pub. L. No. 103-465, § 251, 108 Stat. 4809, 4902 (1994) (codified at 19 U.S.C. § 1677(5)(B)(iii)).

According to the House conference report for the Act, Congress interpreted subsection 5(B)(iii) to cover any situation where "government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation." H.R. REP. No. 826, 103d Cong., 2d Sess., pt. 1, 108-09 (1994). According to the Senate Finance Committee report, "the Committee intends that the term entrusts or directs shall be interpreted broadly to prevent the 'indirect' provision of a subsidy from becoming a harmful loophole to effective enforcement of the countervailing duty law." S. REP. No. 412, 103d Cong., 2d Sess., 91 (1994). Both reports explicitly affirm the definition of "subsidy" in *Softwood Lumber III*. *Id.*; H.R. Rep. No. 826, *supra*, at 108-09.

The GATT text itself appears to limit "private" subsidies to cases where private bodies are dispensing benefits in the same manner as would a government agency. To be sure, governments have often given subsidies by selling raw material inputs below fair market value. An export restriction will usually force private sellers to reduce their price below what it would otherwise be. Whether the resulting reduced-price sale "in no real sense differs from practices normally followed by governments" is debatable. Interestingly, the U.S. implementing legislation struck "in no real sense differs" and substituted "does not differ in substance."

As well as can be determined from available negotiating records, the negotiators appear to have agreed to disagree about the meaning of the term "financial contribution," adopting that text without resolving their differences. Several months after the term "financial contribution" had been established in a July 1990 chairman's draft, the EEC and others were insisting the term should require an actual charge on the public account, while the United States was still holding to an earlier position that the definition had to include "any government action or combination of government actions which confers a benefit on the recipient firm(s)." 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 861, 873, 898-899, 967 (Terrence P. Stewart ed., 1993).

tion."[36] Additionally, according to the House conference report, private subsidies require "a formal, enforceable [government] measure which directly [leads] to a discernable benefit."[37] An export restriction fits within this definition because it is a concrete government measure usually intended to lower the domestic market price of the product being exported. Weak environmental laws, however, involve no government action as such. The financial benefit to producers, if any, arises from government inaction rather than action. Moreover, the financial benefit has no identifiable transferor, public or private. In sum, a definition that treated the *absence* of regulation as a subsidy — a benefit measured by the cost of what some other government decides the regulation should have been — would carry the concept of "subsidy" to a new and different level.

Nonetheless, the recent action of the U.S. Congress indicates that the legal definition of subsidy is still unsettled. Both in GATT and in U.S. law, the present legal definition of subsidy consists of arbitrary lines drawn around a rather loose concept of a government-generated benefit. The underlying concept of subsidy can always be extended to cover any additional unfair benefits that political leaders want to countervail. Only a widespread awareness that broader definitions will at some point become self-destructive holds the more limited definitions in place.

B. Low Environmental Standards as Dumping

Current antidumping laws define dumping to include sustained sales at prices below the average cost of production. When dumped imports materially injure a domestic industry, governments may levy an antidumping duty equal to the "margin of dumping" — the amount by which the import price falls below the true cost of production plus profit. If goods produced under low environmental standards can be viewed as goods being sold for less than their true cost of production, antidumping laws may provide a mechanism to impose eco-duties.

Environmental policy literature endorses the idea that goods produced under inadequate environmental standards should be viewed as goods manufactured at prices below the true costs of production.[38] The cost of the environmental resources appropriated by the pollution-causing production pro-

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36. 19 U.S.C. 1677 (5)(B)(iii) (1994).
37. H.R. Rep. No. 826, *supra* note 35, at 108-09.
38. Michael Jacobs, The Green Economy: Environment, Sustainable Development and the Politics of the Future xv-xvii (1991); David W.

cess is not reflected in the price of such goods. Indeed, one of the most widely advocated reforms in this area is the proposal to create a legal framework requiring that such goods reflect their true cost.[39]

To the author's knowledge, no national antidumping law currently allows an action for environmental dumping. For the most part, current laws determine costs of production based on the producer's own data. "Cost" has meant the actual costs of the kind that businesses and tax collectors record.

As is true of the subsidy concept, however, the history of legal definition in this area suggests possibilities for growth. Some precedent exists for imposing fictitious costs where legislators believe they ought to be recognized. Until recently, U.S. antidumping law imposed an eight percent profit charge and a ten percent overheads charge when calculating the cost of imports, regardless of whether the producer actually incurred these costs.[40] Moreover, the antidumping law of most countries allows administrators to calculate hypothetical costs and prices for imports from non-market economies.[41] It would hardly be unprecedented, therefore, if a country amended its antidumping law to include a statutory environmental compliance cost, calculated from the same sort of arbitrary general average data as the eight percent profits and ten percent overhead items.

At the moment, however, the policy trend appears to be moving against imposing such fictitious costs. The 1994 Uruguay Round revision of the GATT Antidumping Code seeks to preclude governments from using the sort of arbitrary profit and overhead figures just described. The 1994 Antidumping Code provides that "costs shall normally be calculated on the basis of records kept by producers," and that cost and overhead expenses "shall be based on actual data pertaining to production and sales . . . by the exporter or producer under investigation."[42] In re-

PEARCE AND R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 3-28 (1990).

39. Jacobs, *supra* note 38, at 62-70; PEARCE AND TURNER, *supra* note 38, at 120-90.

40. In the pre-1994 version of U.S. antidumping law, these provisions were found at 19 U.S.C. 1677b (e)(1)(B)(i)-(ii) (1980).

41. For the current U.S. provision governing products from nonmarket economies *see* 19 U.S.C. 1677b(c) (1994). *See also* William P. Alford, *When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and other "Nonmarket Economy" Nations*, 61 S. CAL. L. REV. 79 (1987).

42. Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade, *opened for signature* April 15, 1994, arts. 2.2.1.1, 2.2.2,

sponse, the United States removed the statutory rates for profit and overhead from its antidumping law.[43]

At the present time, therefore, both national antidumping laws and the law of GATT seem to preclude using antidumping laws to remedy the level-playing-field complaint against low environmental standards. The idea of treating environmental degradation as a cost of production has by no means lost its appeal, however. As in the case of anti-subsidies law, the final answer to these questions has yet to be written.

V. FAIRNESS REVISITED: CAN DIFFERENCES IN ENVIRONMENTAL STANDARDS BE JUSTIFIED ON OTHER NORMATIVE GROUNDS?

The level playing field metaphor reflects a rather simple-minded concept of fairness. As usually applied, its standard is the equality of competitive conditions: competition is only fair when all conditions are equal.

In most discourse about international trade, however, experts agree that some differences in competitive conditions between countries are both natural and proper, and that trade outcomes determined by these differences are consequently "legitimate." Those who accept the legitimacy of such differences in competitive conditions include free trade economists at one end of the spectrum and dedicated disciples of unfair trade laws at the other. The willingness to accept differences suggests that there are more sophisticated concepts of fairness that may eventually displace simple level-playing-field norms — concepts that may produce a normative framework for trade that allows for at least some national differences in environmental regulatory standards.

A. Legitimate Differences in General

Both in free trade economic theory and in the "fairness" rhetoric of modern U.S. trade law, competitive advantages arising from certain physical differences between countries are universally considered as a fair and proper basis of international trade. Economists call them factor endowments. Natural ad-

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reprinted in United States Trade Representative, Final Texts of the GATT Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization 168 (1994).

43. Uruguay Round Agreements Act, § 224 (e)(2)(B)(iii), Pub. L. No. 103-465, 108 Stat. 4809, 4884 (1994).

vantages such as the fertility of soil, climate, rainfall, available raw materials, and transportation facilities such as deep harbors and navigable rivers fall into this category. Economists assert that nations increase their economic welfare when they trade according to the comparative advantages stemming from such differences. The priests of fairness doctrine also bless the competitive results of these natural differences — a position not entirely consistent with their usual emphasis on awarding victory to the better competitor, but one seemingly hammered into them by 150 years of indoctrination by David Ricardo.

At the next level, both free trade economists and fair trade advocates bless the competitive advantages arising from certain societal differences between nations, such as work habits, savings rate, education, and efficient government. For economists, these qualities also determine a nation's comparative advantages, and therefore basing trade upon these qualities increases welfare. Fair traders also seem to accept the competitive advantages created by these social differences because they are part of the package of virtues that distinguish good competitors from poor competitors.

This attitude toward natural advantages seems to legitimize at least one kind of difference in national environmental policies. If a country's natural physical advantages allow it to achieve the same level of environmental quality with less rigorous regulation, the cost advantage from less rigorous standards is fair. For example, a country with fast-running, self-cleaning rivers that retains good quality water despite less stringent controls deserves the resultant cost advantage. Similarly, economists and fair traders would likely endorse cost savings gained from less rigorous air pollution standards in a country with fewer smokestacks and more trees. Additionally, lower environmental standards made possible by superior social behavior, such as recycling, auto speed limits, or turning down thermostats, would probably be accepted as well.

The national differences that cause the greatest disagreement are lower environmental standards that produce lower levels of environmental quality. At this point, the normative claims of free trade economists and fair-traders diverge. Each, however, offers an analytical framework in which some difference in environmental regulatory standards can be viewed as legitimate.

B. A Fair-Trader's Approach to Legitimate Differences

Fair trade advocates appear willing to accept lower levels of environmental regulation to the extent they can somehow be characterized as "natural" (like the self-cleaning river example) rather than "artificial" (like cash subsidies from the government). Consider the following policy statement by the Clinton Administration on trade-and-environment:

> The Administration is not seeking guidelines on the level of minimum wages, nor health and safety standards that are not appropriate to a country's level of development . . . . But at the same time, no country should seek to gain or maintain a comparative advantage or otherwise distort competitive conditions by maintaining artificially low labor or environmental standards.[44]

The distinction between "low" and "artificially low" is not immediately clear. The idea that lower environmental standards are legitimate because they are "appropriate to a country's level of development" is equally elusive. The word "artificial" suggests that environmental standards are acceptable if they result from pure-minded choices based only on environmental factors, as opposed to standards chosen for impure competitive business reasons. The reference to "development" suggests a similar distinction; low standards due to a lack of development are legitimate, whereas low standards based on competitive aggression are invalid.[45]

The thought that poor countries in particular can adopt environmental policies absent any competitive motivation seems particularly fanciful. To be sure, some kinds of pollution result from a lack of public funds for things like sanitation, but this is

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44. *Proposed SAA Language on Labor, Environment and Fast Track*, INSIDE U.S. TRADE, Aug. 12, 1994, at S-7.

45. Few writers escape unscathed after wrestling with this concept of legitimacy. For example:

> Where differences in environmental policy choices reflect variations in climate, weather patterns, existing pollution levels, population density, economic needs, and risk preferences *and where* any environmental impacts are confined to local harm, the divergent standards may be considered legitimate — and therefore an inappropriate target for unilateral ecoduties or other efforts to adjust for policy differences.
>
> Where, however, the *strategic* environmental behavior results in pollution that spills over onto others, the difference in standards should be considered illegitimate, thereby making resort to ecoduties potentially appropriate.

ESTY, *supra* note 22, at 157 (emphasis added).

The distinction between local and transborder harm is clear enough, but those are distinctions of environmental policy. The intriguing distinction is the one between the first category of "legitimate" variations and the second category of "strategic environmental behavior."

not the type of low environmental standard that countries like the United States complain about. The primary complaint against developing countries involves lower environmental standards that reduce manufacturing costs. When a manufacturer is spared the cost of higher environmental standards *because* of its country's stage of development or level of poverty, the reason is a commercial one; it is simply that the lower costs created by lower standards will preserve the manufacturer's competitive position, thus preserving and expanding that manufacturer's useful economic activity. Development reasons *are* commercial reasons.

On reflection, this rather ill-defined acceptance of differences in developing-country environmental standards appears to be nothing more than an effort to accord some margin of tolerance to poor countries. This is the same normative presumption that underlies government economic assistance to poor countries. Existing assistance programs, such as those that offer tax benefits for investors, often create competitive advantages for producers in beneficiary countries. A willingness to overlook less rigorous pollution controls suggests the same normative response to poverty.

As such, the fair trader's tolerance for weaker environmental regulation in developing countries is probably not based on any principled distinction between "legitimate" and "illegitimate" differences in environmental policy. Rather, this tolerance works like most forms of charity where donors try to balance between recognizing a moral obligation to help and limiting the donation to the amount they can afford. The balance in this case will probably depend primarily on two factors.

The first factor involves the amount of commercial injury resulting from the environmental policy difference. Given that costs of environmental compliance are usually rather small, the amount of commercial injury will rarely be significant. The second factor is the amount of environmental damage caused by the lower standards in question. The more the harm exceeds what the observer thinks is reasonable, the greater the tendency to ascribe unworthy commercial motives to the underlying environmental policy.

Unclear though it may be, this fair-trader's view of legitimate differences is potentially very important. The idea has some staying power in the rough and ready debate of everyday politics in much the same way as the rather crude idea of "fairness" itself. If this idea of legitimacy can arm politicians in battle, it deserves further attention.

C. AN ECONOMIST'S APPROACH TO LEGITIMATE DIFFERENCES

Economic analysis contributes a number of distinctive ideas to the normative debate over differences in national environmental policy. First, it underlines the fact that environmental amenities do have opportunity costs. The economist stresses that local environmental amenities are purchased at the cost of other government expenditures, increased production costs, or foregone economic opportunities. By stressing cost, the economic perspective reinforces the intuitive judgment that poor nations are not able to afford the same level of environmental amenities. The economist's emphasis on opportunity cost does not rebut the fairness complaint that the commercial advantage created by weak environmental policies is somehow "artificial." Rather, like the fair trader's poverty defense, it suggests the competing value of the need to give poor countries greater leeway in using such cost advantages.[46]

Economic analysis sometimes suggests another set of normative justifications for differences in national environmental policies, based on certain perceptions of legitimacy that attach to market outcomes. One part of this legitimacy claim might be called the relativity of market outcomes. The "right" outcome for every market is the mix of products and prices that yields the greatest satisfaction to the market participants. Since it is given that the wants and needs of individual participants always differ, it follows that the optimal outcome for any market varies according to the wants and needs of its individual participants. "Right" is merely the sum of what the market participants want.

A related legitimacy claim attached to market outcomes rests on the perception that market outcomes are determined without overall human guidance. Individuals express their preferences, but the overall result of those preferences is defined through the invisible hand of the price mechanism. In this sense, the market functions "naturally." Market outcomes are not "artificial" in the sense of having been created by government policy.

46. The idea that a developing country cannot "afford" certain environmental standards is a nice way of describing the choice in a way that makes it seem like there is no choice at all. It is a way of approving the choice by denying the freedom not to make it.

Both the relativity of consumer preferences and the perceived neutrality of market processes are used to justify painful economic outcomes in international trade. Assume, for example, that consumers in Canada develop an insane attachment to skim milk. This surge of demand causes an increase in Canadian skim milk production and, with it, a sharp decline in the price of all the excess Canadian butter manufactured as a by-product of skim milk production. The low-priced Canadian butter finds its way to export markets where it displaces local U.S. production. Is this unfair trade? Economists generally decline to express an opinion about fairness, but few would hesitate to point out that the result, painful as it may be for U.S. producers, was merely the product of neutral market forces — just innocent consumer preferences acting in an unguided manner.

Economists looking at national differences in environmental policy sometimes suggest that such policy differences are another kind of market outcome. The individuals in each country have preferences regarding the choice between environmental amenities and the other things that must be given up for them. The sum of these preferences constitutes the nation's environmental policy. The analogy to market processes seeks to legitimize resulting policy differences as a result of innocent personal preferences, collated by a neutral, invisible hand. No government is trying to steal jobs from anyone.

Even if one overcomes the many other objections to viewing environmental policy differences as the product of neutral market forces,[47] the market analogy cannot answer the unfairness complaint. Assuming for the sake of argument that a nation's environmental policy is the sum of the unguided preferences of its individual citizens, the individual preferences in question are still essentially commercial in character. If people in poor countries choose fewer environmental amenities because the cost is too high, they are doing so because they want to maintain the competitive conditions that will preserve their jobs. Individuals in developing countries quite naturally prefer economic benefits

47. The traditional demonstration of optimal market outcomes assumes a market for private goods in which the participants directly bear the full cost or receive the full benefit of the goods in question. In the case of a public good like pollution control, these assumptions cannot be made. The consumer cannot restrict the benefit of the good to him or herself, nor can others who benefit from it be made to pay for it. As a consequence, environmental economists argue that the free market alone usually does not call for the correct amount of public goods, either under-producing because of free riders or over-producing when externalities are shifted to nonconsumers.

over environmental benefits, but that does not answer the question of whether they won those economic benefits fairly.

In the end, the economist's attention to cost and market choice undoubtedly sharpens the perception that the economic cost of environmental policies is relatively higher for poor countries. The ultimate normative thrust of this analysis comes down to an assertion of the same value that supports the other claims for legitimacy in this area — the notion that poor countries are to some degree entitled to spend less on environmental amenities.

D. WHITHER LEGITIMACY?

The fairness debate goes on. As long as trade policy continues to worship at the shrine of fairness, trade policy advocates will find it necessary to try to satisfy the relentless demands for proof that trade is fair. The fact that fairness concepts make no sense in international trade matters will not excuse the need to employ them.

In this second-best sort of policy debate, it is somewhat comforting to know that there are a few standards of legitimacy that can go beyond the ruthless equality of the level playing field. There seems to be some mileage in the distinction between "natural" and "artificial" differences in competitive conditions. Although the distinction does not provide a wholly convincing justification for different environmental standards, the ideas are fluid enough to provide a normative cover to other competing values. Things that are perceived as fair also tend to be perceived as natural. The perception that poor countries are entitled to employ lower standards slides easily into the idea that lower standards are natural, normal, unguided, and unaggressive. Both fair traders and economists are able to wrap their altruistic values in such normative dress. The fact that such claims do not withstand analysis may be less interesting than the fact that they seem to work anyway.

A story is told that during the early days of World War II, German camouflage experts tried to lure British bombers away from German airfields by constructing fake airfields, using wood-and-canvass mock-ups of aircraft and buildings. One day the Royal Air Force discovered the deception. The next day RAF bombers flew over and dropped wooden bombs on the canvass airplanes.

VI. CONCLUSION

If politics were completely rational, there would be little reason to be concerned about level-playing-field claims against imports from countries with weak environmental standards. The size of the commercial advantage in such cases is usually too small to generate serious business concerns. Because of the importance attached to fairness complaints in today's trade policy environment, however, there is always temptation for industries to throw in level-playing-field complaints when they seek protection from imports or oppose new environmental standards. And while legislators themselves may be skeptical about these complaints, no one ever lost an election by coming down on the side of fairness. As a result, level-playing-field complaints about weak environmental policies remain on the trade agenda.

Policy debate cannot completely answer these fairness complaints because the normative concepts that underlie the notions of fairness in this debate are simply not coherent when applied to international trade relations. No one knows whether any playing field is truly level, nor does anyone know how to make it level. Instead, the present system of unfair trade laws seems to be held in check by nothing more than a rather vague sense of restraint. We have suggested an implicit policy settlement here — a settlement under which we remedy certain highly visible fairness claims in exchange for accepting a generally liberal trade policy, with the reservation that fairness claims will not threaten the main contours of that liberal policy. The sense of restraint sometimes bends before important political needs, but it remains effective and is likely to endure so long as countries have major investments in open world markets.

The debate over level-playing-field claims is likely to continue as long as fairness claims exert some political leverage. As long as they do, those who defend trade with developing countries will have to reply. In the current debate, there does seem to be an effort in many quarters to find a normative justification for at least some differences in national environmental policies. Granted that the underlying normative concepts in this area are not wholly coherent, it still seems worthwhile to encourage further investment in analysis — or perhaps, better, artistry — to bring these different strands together into some kind of politically effective policy response.