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# The Meaning of “Unfair” in United States Import Policy

J. Michael Finger\*

Unfair trade cases are where the action is. According to two of Washington’s top trade lawyers, these cases “have become the usual first choice for industries seeking protection from imports into the U.S.”<sup>1</sup> There are indeed a lot of cases. From 1975 to 1979, the U.S. government processed 245 antidumping and countervailing duty (antisubsidy) cases, or around fifty cases a year.<sup>2</sup> In the 1980s, the caseload rose even higher, to eighty-six cases a year.<sup>3</sup> By comparison, there have been only four escape clause cases a year;<sup>4</sup> cases in which an industry sought protection from import competition without accusing the foreign seller of employing or benefiting from unfair practices.<sup>5</sup>

Several features stand out from the pattern of U.S. antidumping and countervailing duty cases from 1980 through 1988 (see Tables 1 and 2):<sup>6</sup>

■ The number of antidumping and countervailing duty cases

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\* J. Michael Finger is Lead Economist, Trade Policy, at the World Bank. University of Texas, B.A.; University of North Carolina, Ph.D. The author wishes to thank Gary N. Horlick and Robert E. Hudec for their thoughtful comments on an earlier version, and Ms. Nellie T. Artis for administrative and editorial assistance that has been invaluable. But the author alone is responsible for opinions and interpretations expressed here, and for remaining errors.

1. Gary N. Horlick & Geoffrey D. Oliver, *Antidumping and Countervailing Duty Law Provisions for the Omnibus Trade and Competitiveness Act of 1988*, 23 J. WORLD TRADE 5, 5 (1989).

2. J.M. Finger et al., *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 452, 463 (1982) (Table 4).

3. Table 1.

4. N. David Palmeter, *The Antidumping Emperor*, 22 J. WORLD TRADE 5, 5 (1988).

5. The United States is not alone. Since 1980, the three other major users of GATT-based import screens — Australia, Canada, and the European Community (EC) — have processed over a thousand antidumping and countervailing duty cases, but only seventeen escape clause cases. J. MICHAEL FINGER, *ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT*, Table 1.1 (forthcoming Oct. 1992 from U. Michigan Press).

6. The data for Tables 1 and 2 are from J. Michael Finger & Tracy Murray, *Policing Unfair Imports: The United States Example*, 24 J. WORLD TRADE 39, 43, 45 (1990).

directed at developed and developing countries is roughly proportional to their exports to the United States.<sup>7</sup> Within these groups, however, there are large differences.

TABLE 1

U.S. antidumping and countervailing duty cases and U.S. merchandise import shares, by country or trading bloc, 1980-88.

Country or Group	Number of cases <sup>a</sup>	Cases as a percentage of total cases	Percentage 1987 U.S. merchandise imports	Percentage cases with restrictive outcomes <sup>b</sup>
All countries	774	100	100	70
Developed countries	450	58	63	65
Developing countries	286	37	36	75
Eastern European countries	38	5	0.5	87
European Community	304	40	20	64
Brazil	56	7	2	79
South Africa	20	2.6	0.3	100
Korea	36	4.7	4.2	86
Mexico	35	4.5	4.9	91
Taiwan, China	29	3.7	6.1	62
Hong Kong	1	0.1	2.4	100
Singapore	6	0.8	1.5	67
Canada	35	5	18	54
Japan	49	6	21	69

<sup>a</sup> Antidumping and countervailing duty cases completed during 1980-88.

<sup>b</sup> Negotiated export restraints are counted as restrictive outcomes.

Japan and the EC each supply about 20% of U.S. imports, but the EC has been the object of 40% of U.S. antidumping and countervailing duty cases, while Japan has been the object of only 6%.<sup>8</sup> Among developing countries, imports from Brazil generate a disproportionately high number of cases, and imports from Taiwan, Hong Kong, and Singapore, a disproportionately low number.<sup>9</sup>

■ Negotiated export restraints have superseded almost half the cases (348 of 774).<sup>10</sup>

■ Three-fourths of the cases against developing countries resulted in restrictive outcomes while only two-thirds of cases against developed countries produced restrictive outcomes.<sup>11</sup>

7. Table 1.

8. *Id.*

9. *Id.*

10. Table 2.

11. *Id.* Cases categorized as having restrictive outcomes include those that reached an affirmative final determination and those that were superseded by a restrictive agreement with the exporter.

Negotiated export restraints, however, were much more often used against *developed* countries — the outcome in 36% of cases compared with 15% for developing countries.<sup>12</sup> A country that possesses the countervailing power to retaliate is accorded the courtesy of a negotiated settlement. Others are restricted to the normal course of administrative procedures.

TABLE 2

Antidumping and countervailing duty case outcomes compared, 1980-88.

Country or Group	Antidumping as a percentage of total number	Restrictive outcomes as a percentage of total cases			Negotiated export restraints as a percentage of restrictive outcomes		
		Anti-dumping	Counter-vailing	Both	Anti-dumping	Counter-vailing	Both
All countries	50	72	67	70	63	66	64
Developed countries	49	69	61	65	65	82	74
Developing countries	46	73	77	75	55	46	49
Eastern European countries	87	91	60	87	77	100	78

■ The U.S. government almost always finds that the foreign exporter is unfair or is benefiting from the unfair actions of its government. Only 11% of dumping and subsidy determinations result in negative determinations.<sup>13</sup>

■ Finally, when the United States does not take action against the accused exporter, more than six times in seven it is because no competing U.S. producer has been harmed. Based on percentages of affirmative and negative determinations at each stage (preliminary injury, preliminary dumping or subsidy, final dumping or subsidy, and final injury) over the 1980-88 period, a "typical" one hundred cases that go through the process to a formal ending will produce the following outcomes: forty-four affirmative determinations (affirmative final determinations on

12. *Id.*

13. Finger & Murray, *supra* note 6, at 46 (Table 5). This figure can be derived in two ways. If withdrawn cases or terminated proceedings are not considered, but instead only those cases that resulted in formal determinations are considered, there were 11.0% negative and 89.0% affirmative determinations. If, on the other hand, cases withdrawn or terminated by the Commerce Department are added to the cases having formal "negative" determinations and cases that resulted in successful negotiation of a restrictive agreement are added to the cases having formal "affirmative" determinations, the split is then 11.5% , 88.5%. *Id.*

injury and on dumping-subsidy), and fifty-six negative determinations. Of the fifty-six cases that end with a negative determination, eight will end with a negative dumping or subsidy determination, forty-eight with a negative injury determination.<sup>14</sup>

This Article examines the patterns of unfair trade cases in the United States and how these patterns fit into or are shaped by the politics of U.S. trade policy. It argues that an objective definition of "unfair" neither is nor ever has been the basis for determining when the U.S. government will act against imports. The unfair trade laws provide the political rhetoric for restricting imports, and the unfair trade procedures provide the podium from which an import-competing U.S. firm or industry can take its case to the public. However, injury to domestic producers drives U.S. trade politics, and the mark an instance of import competition receives on the *political* barometer of injury determines when the power of the state will be used against imports. Current U.S. import policy is a matter of pasting the label "unfair" on a bottle that was filled from the spring of domestic politics. It is not a matter of putting into the bottle only what a studied prescription demands.

### I. DID ANYBODY EVER CARE IF FOREIGNERS ARE FAIR?

Suppose a car mechanic examines your car and concludes that it will not run because the spark plug gaps are too wide. He adjusts the spark plug gaps to the proper setting. Will your car run now? It will if his diagnosis was correct; it will not if his diagnosis was wrong.

Suppose the government examines your business and concludes that you are losing money because your competitors are pricing unfairly. The government orders them to set higher prices. Will your business now improve? It very likely will, but that improvement will not depend on whether the government's diagnosis was correct. Regardless of whether your competitors are pricing fairly or unfairly in some legal or philosophical sense, simply forcing them to set higher prices will improve your business. Thus, your interests lie in creating a broad and encompassing definition of what will cause the government to act in your favor, not a definition in accord with an abstract concept

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14. *Id.* at 47.

that *may* have an indirect bearing on the economic and financial health of your business.

Any business beset by import competition will attempt to explain its circumstances as those that the law can remedy and, when the occasion presents itself, will attempt to change the law so that it offers a remedy for its particular circumstances.<sup>15</sup> The role of the law is to extract legitimate claims from this universe of requests for import restrictions. This role suggests a *public* goal different in some cases from the private goal;<sup>16</sup> only when the two are in accord would public means be used to satisfy the private motive.

The public motive that built U.S. trade policy after World War II was not fueled by the economic factors that motivate private requests for import restrictions. The U.S. leadership considered freedom of commerce an important instrument for building international stability and maintaining world peace.<sup>17</sup> To Cordell Hull, Secretary of State for President Franklin D. Roosevelt, the link was straightforward: "unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war."<sup>18</sup> The Cold War allowed a vulgar version of this idea to generate wide public support for the government's trade policy — if the United States did not provide markets for these countries, they would be taken over by the communist bloc.

Within this strategy, trade remedies provided protection for Congress against the wrath of special interests that pressured members of Congress sympathetic to the general thrust of U.S. trade policy.<sup>19</sup> The 1950s and 1960s were generally prosperous times during which the United States enjoyed substantial trade surpluses. Directing a protection-seeking industry into a maze

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15. It is, of course, neither illegal nor immoral to act from such motives. Congress decides what the law will be, and every person has a right to attempt to influence Congress' decision. The administering agencies, instructed by the law and overseen by the courts, decide which petitions do in fact meet the criteria established by the law. Any person may attempt to show that his or her circumstances fit the prerequisites for the remedy that the law provides. Honest enforcement of a policy, however, does not guarantee it will be a good policy.

16. I do not suggest that the public motive is "higher" on some moral scale than private motives. This Article addresses requests that *will* be honored, not those that *should* be honored.

17. R.N. Cooper, *Trade Policy as Foreign Policy*, in U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY 291, 300 (Robert M. Stern ed., 1987).

18. CORDELL HULL, THE MEMOIRS OF CORDELL HULL 81 (1948).

19. I.M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 12-13 (1986).

of administrative procedures bought time. By the time the industry eventually emerged from the end of the maze without a prize, business had improved and it pressed its case no further. Besides, the system satisfied the American sense of fairness. It provided a place to complain where officials listened, investigated, and held hearings. One had one's day in court. To complain further would be un-American, and maybe even pro-communist if the closing of the U.S. market tipped a country over to the Soviet side in the Cold War.

On trade issues, two objectives came into play. One, which I characterize as "internationalist," was to restore global stability and to preserve world peace. The other, which I characterize as "protectionist," was to preserve American profits and jobs in import competing industries. And, as the above quote from Cordell Hull dramatizes,<sup>20</sup> on trade issues the two objectives were in direct conflict. While internationalists wanted lower U.S. trade barriers,<sup>21</sup> protectionists sought to bolster them. But neither side — not the "profits and jobs and save our communities" calculus of import competing industries nor the "restore global stability and preserve world peace" calculus of the internationalists — had a direct interest in seeing that the term "fair" was defined in some moral, economic, or otherwise objective sense. For each, such a standard would limit rather than complement its primary objective.

As for trade policy, the conflict between the two objectives was more versus fewer trade restrictions, and those who favored fewer carried the day. They won by emphasizing export politics<sup>22</sup> and playing on the citizenry's sympathy for their strategic and diplomatic concerns. They left the "fair versus unfair" issue aside by making the trade negotiations the major thrust of U.S. trade policy, not by demonstrating that everything exporters did was fair. The politics of the day allowed the government to calibrate trade remedy law to produce trade restrictions at a slower pace than the trade agreements removed them.

In the 1980s, the issue was still more versus fewer trade restrictions. Fairness continued to be the *rhetoric* of the matter, but not the substance. Instead, injury has been the focus of U.S. trade remedy law. However, determining gradations that distin-

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20. See text accompanying note 18.

21. Stephen D. Krasner, *U.S. Commercial and Monetary Policy: Unraveling the Paradox of External Strength and Internal Weakness*, 31 INT'L ORG. 635 (1977).

22. DESTLER, *supra* note 19, provides the best discussion of export politics.

guish an affirmative injury determination from a negative one, such as the difference between "serious injury" and "material injury," have been so difficult to define that the results tend to be arbitrary.<sup>23</sup>

## II. FREE TRADE, NOT PROTECTION, DEPENDS ON LOOPHOLES

The American obsession with regulation through formalized rules combined with economists' abhorrence of import restrictions fuel the belief that those seeking import restrictions must be winning by deceit and trickery, cynically exploiting loopholes in the law and pressing vulnerable members of Congress to insert new ones. But two related arguments suggest that this is not true:

■ In the past, the executive branch depended on loopholes and convenient details to control trade remedies, and

■ Congress has expanded the trade power and the scope of trade remedies primarily by eliminating the details on which the executive branch used to depend.

The loopholes on which the executive branch depended to keep trade remedies under control were not subtle. Before 1974, there was no time limit for completing a countervailing duty investigation. The Treasury Department<sup>24</sup> often used this loophole, defeating complaints against alleged foreign subsidies by choosing not to complete an investigation. This loophole has not been available since 1974 because Congress imposed deadlines on countervailing duty cases.<sup>25</sup> Also, in 1980 the ITC determined there to be "no injury" in an escape-clause petition filed by the

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23. For example, the Antidumping Authority Act of 1988 required the Australian Antidumping Authority to investigate how "material injury" could be defined in practice. ANTIDUMPING AUTHORITY, ADA PUB. NO. 4, INQUIRY INTO MATERIAL INJURY, PROFIT IN NORMAL VALUES AND EXTENDED PERIOD OF TIME 27 (Australian Gov't Pub. Serv., Mar. 1989). Some submissions to the Authority argued that even the slightest injury should be taken to be material, others said that material injury should mean that the Australian industry was at the point of extinction. *Id.* The Authority, however, could find no operational guidelines to separate one degree of injury from another, and in the end recommended that "material injury" be taken to mean injury which is "*not immaterial, insubstantial or insignificant.*" *Id.* (emphasis added).

24. At that time, the Treasury Department was the administering agency. Gary N. Horlick, THE UNITED STATES ANTIDUMPING SYSTEM, in ANTIDUMPING LAW AND PRACTICE 99, 105 (John H. Jackson & Edwin A. Vermulst eds., 1989).

25. Robert E. Baldwin & Michael O. Moore, *Political Aspects of the Administration of the Trade Remedy Laws*, in DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 253, 256-57 (Richard Boltuck & Robert E. Litan eds., 1991).



automobile industry.<sup>26</sup> Commissioners who voted against injury did so not because the industry had not lost *any* money and jobs to import competition, but because a recession and a shift of consumer tastes away from larger cars had caused a *greater* loss of money and jobs.<sup>27</sup> This loophole was closed by the 1988 trade bill. As the law was revised, the International Trade Commission (ITC) "may not aggregate the causes of declining demand associated with a recession or economic downturn in the United States economy into a single cause of serious injury. . . ."<sup>28</sup>

The same argument applies for "cumulation."<sup>29</sup> If a domestic industry is beset by competition from fifty different countries, it may be difficult to show that the domestic industry is seriously injured by imports from any one of them. Yet combined imports from the fifty might have a significant effect. Prior to the trade bill of 1984, the ITC had discretion to consider cumulated imports, but sometimes did not. The 1984 Act, at the behest of domestic textile and steel companies, made cumulation mandatory.<sup>30</sup> The 1988 trade bill restored to the ITC the authority to eliminate minimal suppliers at the preliminary stage. However, the legislative history of the bill makes clear that Congress expects the ITC to "apply the exception narrowly and [not use it] to subvert the purpose and general application of the [cumulation] requirement."<sup>31</sup>

By closing loopholes that allowed negative determinations, legislative modification and court review have pushed the meanings of "subsidy," "dumping," and "injury" toward their meanings in common usage. Cumulation of injury illustrates the point. Would it be reasonable to grant relief to an industry that was losing its U.S. market to a vigorous Korean industry, yet deny it to an industry that was being nibbled to death by fifty competitors? Consider downstream dumping. If the Canadian

26. Certain Motor Vehicles and Certain Chassis and Bodies Thereof, Determination of No Serious Injury Thereof, 45 Fed. Reg. 85,194 (1980) (U.S. Int'l Trade Comm.).

27. See Gordon I. Endow, Recent Development, *Car Wars: Auto Imports and the Escape Clause*, 13 LAW & POL'Y INT'L BUS. 591, 603 (1981).

28. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1401(a), 102 Stat. 1107, 1228 (codified at 19 U.S.C. § 2252(c)(2)(A) (1988)).

29. For a discussion of how cumulation serves protectionist interests, see *infra* notes 66-67 and accompanying text.

30. Horlick & Oliver, *supra* note 1, at 35. The Court of International Trade later ruled that the 1984 act requires cumulation across antidumping and countervailing duty cases. Bingham & Taylor Div., Virginia Indus., Inc. v. United States, 627 F. Supp. 793 (Ct. Int'l Trade 1986), *aff'd*, 815 F.2d 1482 (Fed. Cir. 1987).

31. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 621 (1988).

government subsidizes the production of logs or sells them to Canadian mills at one-tenth of their market value, it also subsidizes or dumps the lumber. Therefore, protecting U.S. lumber mills from Canadian competition seems reasonable. If the basic concept of the law is implemented "reasonably," the result is increased protection.

### III. POWER POLITICS

Not all of the expansion of unfair trade law has been a matter of filling in loopholes. Some of it has been straightforward power politics.<sup>32</sup> For example, Senator Russell B. Long of Louisiana<sup>33</sup> successfully sponsored an amendment to the 1974 trade bill to rescue a local sulfur producer in that state whose antidumping petition had been turned down under existing law.<sup>34</sup> Long's amendment required investigators to screen their observations of the exporter's home market price against their estimate of the exporter's fully-allocated production costs.<sup>35</sup>

Under this provision, even if export and home market prices are identical, the exporter violates U.S. dumping law if the cost estimated for the product by the Commerce Department exceeds the price charged. Generally, when the Commerce Department finds that "below cost" sales are more than 10% of home market transactions (by volume), it will base its dumping calculations on the remaining "above cost" sales. When more than 90% of home market transactions are at "below cost" prices, *all* information on home market prices is discarded. Foreign market value is then based on the Commerce Department's estimate of the exporter's costs.<sup>36</sup>

In short, this provision requires the U.S. government to sys-

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32. See generally Pietro S. Nivola, *Trade Policy: Refereeing the Playing Field*, in A QUESTION OF BALANCE: THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY 201-53 (Thomas E. Mann, ed. 1990) (providing examples of how constituent pressures have expanded U.S. unfair trade laws).

33. Senator Long, as chairman of the Senate Finance Committee, probably had more power over trade legislation than any other member of Congress.

34. Nivola, *supra* note 32, at 229-30.

35. 19 U.S.C. § 1677 (1988) (amended version of the Tariff Act of 1930 § 773(b)).

36. See Harvey M. Applebaum & David R. Grace, *U.S. Antitrust Law and Antidumping Actions Under Title VII of the Trade Agreements Act of 1979*, 56 ANTITRUST L.J. 497 (1987). Along these lines another commentator adds that a 50% benchmark is sometimes used in cases involving fresh agricultural products. N. David Palmetier, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS, 64, 74 n.26, 85 (Richard Boltuck & Robert E. Litan eds., 1991).

tematically throw out the price information that is most favorable to the exporter's case.<sup>37</sup> Thus, foreigners (exporters) whose prices in the U.S. market are below fully-allocated costs are dumping and will be restrained, even though such pricing is common practice in competitive markets and domestic firms that follow the same pricing strategy are not in violation of U.S. antitrust laws.

#### IV. CONGRESS INTENDS THE LAW TO PROTECT

Intent is important. Because Congress cannot anticipate the details of every potential case, antidumping and countervailing duty laws must provide administrative agencies with somewhat general instructions.<sup>38</sup> Therefore, legal remedies primarily depend on administrators' understanding of the laws' objectives.

Congress probably revealed implicit support for fewer trade restrictions when it winked at the loopholes that allowed the executive branch to maintain the openness of the U.S. economy. However, Congress has since vigorously moved to close those loopholes, signaling that the antidumping and countervailing duty procedures should not overlook any import competition that injures a U.S. interest. The low standard of proof required for an affirmative preliminary injury determination confirms that Congress favors the domestic petitioner. Congress does not presume that the U.S. market should be open to international competition.

While trade bills are celebrated for the authority they give the president to negotiate tariff reductions, expansion of the circumstances under which imports can be restricted has been a quiet part of many of them. Through a sequence of changes Congress has reduced the president's discretionary authority to refuse to impose import restrictions when the International Trade Commission makes affirmative decisions in escape clause cases.<sup>39</sup> Various drafts of the 1988 trade law contained provisions in seemingly generic language which entitled the titanium, ammonia, cement, and aircraft industries to antidumping and countervailing duty protection.<sup>40</sup> Not every such proposal earns

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37. Horlick, *supra* note 24, at 137. Horlick reports that this provision has been applied in sixty percent of investigations performed in the 1980s. *Id.* at 136.

38. "General" laws may nonetheless dictate the factors which will influence their administration. This matter is taken up later in this Article.

39. See generally ROBERT E. BALDWIN, *THE POLITICAL ECONOMY OF U.S. IMPORT POLICY 33-78* (1985).

40. Gary C. Hufbauer, *Comments on 'Protectionist Rules and Internation-*

legal enactment, but many of them do. Thus, protection of domestic industry has expanded gradually, but considerably.

## V. CONGRESS DOES NOT INTEND TO POLITICIZE

Those who consider rules and free trade "good" tend to associate "bad" results with politics: if trade policy is deteriorating, it must be because politics has been allowed to creep in. Again, preconceptions can be misleading. While Congress is clearly moving to expand the availability of import relief, Congress is *not* moving to loosen the criteria for import relief so that administrators' determinations can bend with the political breezes blowing that day. The text of the law has grown longer and more detailed, and the administrative regulations have become thicker. Perhaps the strongest indication that Congress does not want to politicize the administration of trade law is that it has made that administration subject to judicial review.<sup>41</sup> Judicial review helps to provide predictable outcomes based on systematic interpretations of the legal criteria.

Shortly after administrative authority shifted from the Treasury Department to the Commerce Department, critics in Washington argued that the Commerce Department had, in a matter of months, overthrown sixty years of consistent enforcement of the antidumping and countervailing duty laws. These accusations were probably valid: Congress probably intended changes in enforcement practice. The Treasury Department's tradition of enforcement had evolved during a period of time when international considerations and the public interest were supposed to be taken into account. By 1980, however, Congress wanted to break away from this mold. A total break with the past, however, was not intended: throwing out sixty years of consistent enforcement does not necessarily mean replacing it with haphazard enforcement. Congress wanted a different mold, not no mold at all.

The thrust of the enforcement and judicial traditions in the United States is toward a consistent and systematic practice. This does not mean that each individual will interpret the law in the same way. In a study of injury determinations in antidumping cases adjudicated between 1980 and 1986, Michael Moore found that the percentage of affirmative votes for each of the

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*alist Discretion in the Making of National Trade Policy*, in NEW INSTITUTIONAL ARRANGEMENTS FOR THE WORLD ECONOMY (Hans-Jurgen Vosgerau ed., 1989).

41. 19 U.S.C. § 1516(e)-(f) (1988).

twelve people serving on the International Trade Commission ranged from 21% to 100%.<sup>42</sup> Yet, when Moore analyzed the factors on which the decisions were based, he found that each commissioner systematically based his or her decision on the factors that the law identifies with injury and that factors not specified in the law had minimal influence.<sup>43</sup> He found that each individual assigned different weights to the various factors, but that each systematically applied these weighted factors to the reviewed cases.

However, this tendency to systematize the interpretation of the law and to make it objective is not a limit on the frequency of restrictive actions. Every new dimension of unfairness allows interest groups to argue for a new import restriction and allows Congress eventually to add to the law a new, more restrictive interpretation of that dimension. "For every unfair practice that is attacked, several new ones pop up, summoning amendments as the definition of unfairness expands."<sup>44</sup>

## VI. THE PRESIDENTIAL POLITICS OF UNFAIR TRADE

The failure of the "protectionist" message in the presidential campaigns of Walter Mondale, John Connolly, and Richard Gephardt is evidence that blatant protectionism is still a loser in U.S. politics. The regulation of unfair foreign trade practices, however, is surely a political winner. The rhetoric of unfair trade provides the president the same opportunity it provides the Congress — to have one's cake and eat it too.<sup>45</sup> The president can collect his political rewards and honor his political commitments by enforcing the law and by negotiating voluntary export restraints.

For example, in response to a growing number of congressional initiatives on trade policy, President Reagan took a giant step toward re-establishing the Executive's leadership by announcing a two-pronged policy plan in a speech given on September 23, 1987: to work with the leadership of other countries to lower the value of the dollar and to aggressively attack for-

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42. See generally Michael E. Moore, *Rules or Politics? An Empirical Analysis of International Trade Commission Antidumping Decisions*, 30 *ECON. INQUIRY* (forthcoming, 1992).

43. *Id.* A similar analysis in dumping and subsidy determinations likewise found that influences not expressed in the law did not effect the determinations. Finger et al., *supra* note 2, at 452.

44. Nivola, *supra* note 32, at 247.

45. *Id.* at 223-24 (arguing that the rhetoric of unfair trade provides an effective means to avoid blame for the executive branch and for Congress).

eign unfair trade practices. The first draft of the trade speech was a free trade speech; the draft he delivered was a fair trade speech. Officials in the White House did not make the change for any principled legal or economic reason, but rather because the officials considered fair trade rhetoric more politically salient than free trade rhetoric.<sup>46</sup>

While this fair trade speech marked a significant shift in President Reagan's rhetoric on the matter, it did not mark his administration's discovery of unfair trade politics. Two weeks before, in defending the administration's international economic policy, Treasury Secretary James A. Baker III pointed out, "We have not neglected our responsibilities to fair trade . . . President Reagan, in fact, has granted more import relief to U.S. industry than any of his predecessors in more than half a century."<sup>47</sup> Half a century covers every president since Herbert Hoover, the president who signed the Smoot-Hawley tariff.

## VII. THE GATT DOES NOT RESTRICT TRADE ACTIONS

John H. Jackson expressed a long-standing concern of the Contracting Parties to the GATT as follows: "[T]he mere initiation of a dumping procedure . . . is often so costly to the importer that [the initiation], on the threat of such procedure, inhibits imports even if the procedure ultimately establishes that no dumping occurred . . ."<sup>48</sup> Jackson quotes a 1959 GATT Working Group on the intent of the GATT: "[I]t was essential that countries should avoid immoderate use of anti-dumping and countervailing duties, since this would reduce the value of the efforts that had been made since the war to remove barriers to trade."<sup>49</sup>

The GATT, however, has proven to be a minimal limit to the expanding use of unfair trade laws. Firstly, because the GATT's language on what is permissible is very broad, the explosion of cases in the 1980s has triggered only a handful of ap-

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46. A perceptive *Wall Street Journal* story documents the transformation that took place from first draft to last: "One business lobbyist called to say 'free-trade rhetoric is a loser politically; fair-trade rhetoric is a winner.'" Robert W. Merry, *Reagan's Aides Split over His Trade Speech and Altered It Sharply*, WALL ST. J., Sept. 24, 1985, at A12. White House Chief of Staff Don Regan met with a group of outside advisers, including long time Reagan strategists Stuart Spencer and Lyn Nofziger, who echoed that view. *Id.*

47. James A. Baker III, Remarks before a Conference Sponsored by the Institute for International Economics (Sept. 14, 1987), in *TREASURY NEWS*, 1988, at 4.

48. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 407 (1969).

49. *Id.* at 409.

peals to the GATT. Moreover, countries against which GATT panels have ruled continue to rely on their own interpretations of GATT provisions.

The United States is the only country that makes extensive use of countervailing duties to control imports.<sup>50</sup> Though such U.S. actions often raise the ire of exporting countries, that ire has usually been political rather than legal.<sup>51</sup> India, in 1980, was the first country to ask for a GATT panel on a U.S. countervailing duty action. After the United States and India reached a satisfactory bilateral resolution, India requested that the panel be terminated.<sup>52</sup> Five other countervailing actions by the United States have been taken to GATT panels. Three of the actions are very recent and panel investigations are still under way. The panel report from one of the other two cases has not (yet) been adopted.<sup>53</sup>

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50. Of some 370 countervailing duty investigations by industrial countries in the 1980s, 316 were initiated by the United States. Finger, *supra* note 5, at Table 1.1.

51. J. Michael Finger & Julio Nogues, *International Control of Subsidies and Countervailing Duties*, 1 WORLD BANK ECON. REV. 707-25 (1987).

52. *United States — Imposition of Countervailing Duty without Injury Criterion*, BISD 28th Supp. 113 at ¶ 5 (1982) (GATT panel report adopted Nov. 3, 1981). Horlick and Oliver describe the outcome as a "soft deal," in which the United States agreed to include India among the countries for which the U.S. countervailing duty procedure would include an injury test, in exchange for soft discipline on Indian export subsidies. Horlick & Oliver, *supra* note 1, at 12.

53. Panels appointed by the Committee on Subsidies and Countervailing Measures are presently investigating the following matters: Countervailing measures on salmon from Norway (GATT Doc. SCM/M/57), Measures affecting the export of pure and alloy magnesium from Canada (GATT Docs. SCM/130 and SCM/M/57), and Measures affecting the export of softwood lumber from Canada (GATT Docs. SCM/133 and SCM/M/57). The U.S.-Canada dispute over softwood lumber was reopened when Canada terminated a bilateral memorandum of understanding that had ended an earlier dispute, the earlier dispute having also gone to a GATT panel. *United States — Initiation of a CVD Investigation into Softwood Lumber Products from Canada*, BISD 34th Supp. 194 (1988) (Subsidies Code panel report adopted June 3, 1987, providing terms of the memorandum of understanding). In 1988, Brazil requested a panel (under the Subsidies Code) to investigate U.S. failure to automatically backdate the revocation of a countervailing duty order on Brazilian exports of non-rubber footwear. When this panel did not find in Brazil's favor, *United States — Countervailing Duties on Non-Rubber Footwear from Brazil*, GATT Doc. SCM/94 (Oct. 4, 1989) (Subsidies Code panel report), Brazil brought the matter to the GATT Council, and a panel appointed by the Council found in Brazil's favor. *United States — Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil*, GATT Doc. DS/18/R (Jan. 10, 1992) (GATT panel report). As of June 1992, neither panel report on non-rubber footwear had been adopted. The other U.S. countervailing action taken to a GATT panel (under the Subsidies Code) involved an EC complaint concerning wine and grape products. A panel report delivered in 1986 was finally adopted on April 28, 1992. *United States — Defini-*

The first GATT case against a U.S. antidumping action was filed by Sweden in 1988. In August 1990, the GATT panel that investigated the case returned a finding in favor of Sweden,<sup>54</sup> but as of this writing (October 1992) the United States has not allowed the panel's report to be adopted.<sup>55</sup> A few months earlier, a GATT panel that looked into a Japanese complaint about an EC antidumping action found against the European Community,<sup>56</sup> and the panel's report was adopted by the GATT Council. The European Community has announced, however, that it will neither lift the action that was contested nor change its antidumping policy, pending the outcome of the Uruguay Round negotiations.<sup>57</sup>

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*tion of Industry Concerning Wine and Grape Products*, GATT Doc. SCM/71 (Mar. 24, 1986) (Subsidies Code panel report).

54. *United States — Imposition of Antidumping Duties on Imports of Stainless Seamless Steel Hollow Products from Sweden*, GATT Doc. ADP/47 (Aug. 20, 1990) (Antidumping Code panel report).

55. The panel chose not to consider the substance of the Swedish complaint, instead basing its finding on a procedural technicality — that in the U.S. antidumping proceeding, the U.S. International Trade Commission (ITC) did not determine *at the appropriate stage of its proceedings* that the petitioner was representative of the U.S. industry. *Id.*, ¶ 5.18-19. If the ITC chose to treat this finding as it would a remand from the U.S. Court of International Trade, it could go through its proceedings in the sequence the panel considers proper and shortly return the same affirmative injury finding.

The ITC, in the original case, had determined that Swedish welded stainless steel tubes caused *no injury* to the U.S. welded stainless tubes industry, but that Swedish seamless stainless steel tubes did cause injury. Reg. 45,265 (1987). The action Sweden brought to GATT concerned the antidumping measure imposed on seamless tubes as a result of the "seamless half" of the ITC case. *USA — Anti-dumping Duty in the United States on Stainless Seamless Pipes and Tubes from Sweden*, ADP/40, (Jan. 4, 1989) (communication from Sweden). Meanwhile, the petitioner appealed the welded tubes determination to the U.S. Court of International Trade. That court remanded the case to the ITC for reconsideration. *Trent Tube Div., Crucible Materials Corp. v. United States*, 741 F. Supp. 227 (Ct. Int'l Trade 1990), *modified*, 741 F. Supp. 921 (1990). On remand, the ITC determined that the petitioner was in fact injured by the Swedish welded tubes. *Trent Tube Div., Crucible Materials Corp. v. United States*, 752 F. Supp. 468. Thus, while Sweden has attempted — so far unsuccessfully — to enlist the GATT's help to remove the U.S. antidumping order on seamless tubes, the U.S. government reversed itself on the other half of the case and imposed antidumping duties on welded tubes. 55 Fed. Reg. 51,745 (1990). See J. Michael Finger, *Bad Law Begets Embarrassing Diplomacy: An Example of How U.S. Trade Law Really Works*, *ECONOMISK DEBATT* (forthcoming) (providing a detailed analysis of this case).

56. *European Economic Community — Regulation on Imports of Parts and Components*, BISD 37th Supp. 132 (1991) (GATT panel report adopted May 16, 1990), *reprinted* in 30 INT'L LEGAL MATERIALS 1081 (1991).

57. *EEC Comments on the Panel Report on EEC — Regulation on Imports of Parts and Components*, GATT Doc. L/6676 (May 16, 1990).



More than 170 pages of proposals have been submitted at the Uruguay Round to modify the antidumping code. The proposals are almost evenly split between expanding and limiting the circumstances which allow an antidumping action.<sup>58</sup> Meanwhile, the permissive U.S. and EC interpretations of GATT have been used as ammunition *against* reform in Australia and Canada.<sup>59</sup> As the Uruguay Round moves toward final agreement, GATT's broad language will not significantly inhibit the increasing use of antidumping and countervailing duty regulations.

Even where there are clear limits in GATT, they do not necessarily restrict the U.S. government from acting against imports. Sometimes GATT's restrictions do not carry over into U.S. law. Robert Hudec sums up the relation between GATT and U.S. trade law in these words:

The general structure of U.S. foreign trade law exhibits a reasonable degree of consistency with the main policy lines set down in GATT. . . . In a number of these laws, the Congress has provided as much or more substantive detail as the GATT itself contains. . . . At the other extreme, the number of laws openly violating GATT remain reasonably few. *The main body of U.S. trade law occupies a middle position between these extremes of compliance and direct violation, a middle position in which the Executive has discretionary power which allows him to comply with GATT or not, according to policy decisions that are largely unreviewable. . . .* Wherever U.S. foreign trade law takes this discretionary middle position, there is in fact no meaningful legal requirement that GATT rules be observed. There may, of course, be a reasonable level of GATT compliance in fact, but if so, it is a matter of day-to-day Executive policy, and not law.<sup>60</sup>

Even when there are limits in U.S. unfair trade law, these limits do not prevent the government from restricting imports politically perceived as unfair. I turn again to Hudec:

Trade barriers are fungible, and they overlap. Legal controls on one type of trade barrier, like an escape clause, will not be fully effective if those seeking protection can achieve the escape clause result by other means that are not controlled. . . . A classic example occurred in late 1983 when certain U.S. textile producers, seeking additional barriers to restrict textile imports, brought a countervailing duty action alleging

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58. See J. Michael Finger & S. Dhar, *Do Rules Control Power? GATT Articles and Agreements in the Uruguay Round*, in *THE GLOBAL TRADING SYSTEM: ANALYTICAL AND NEGOTIATING ISSUES* (Allan W. Deardorff & Robert M. Stern eds., forthcoming from U. Michigan Press).

59. See M. Dutz, *Enforcement of Canadian 'Unfair' Trade Laws*, PRE Working Paper, WPS 776 World Bank (1991) (discussing Canada); G. Banks, *Australia's Antidumping Experience*, PRE Working Paper, WPS 551 World Bank (1990) (discussing Australia).

60. Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in *THE EUROPEAN COMMUNITY AND GATT* 187, 238-39, 248 (Meinhard Hilf et al. eds., 1986) (emphasis added).

that the Chinese government was subsidizing the export of such products. The legal theory of the complaint was novel and unlikely to be approved by the courts; it was in fact disapproved by the Commerce Department in a similar case several months later. In this case, however, the expected legal response was not allowed to be controlling because the Executive Branch agreed to use its discretionary powers under the textile agreements law to achieve an equivalent degree of trade restriction by other means, by changing a "rules of origin" requirement.<sup>61</sup>

Rules of origin are only one of several possible ways to restrict imports. GATT itself lists eight categories of forbidden protectionist measures, and eleven categories of measures permitted in specified circumstances. Such options provide a complete menu for a country seeking alternative means to restrict imports.<sup>62</sup>

In sum, this section has advanced two points. First, GATT provisions for antidumping and countervailing duties have proven to be broad enough to allow an explosion of such actions in the 1980s. Second, the limits in GATT do not prevent U.S. government actions. When the politics of an unfair trade case are compelling, but an affirmative legal determination is not possible, the United States often can find an alternative legal basis for restricting trade. Making U.S. antidumping and countervailing duty laws consistent with GATT introduces procedural complications, but it does not severely limit trade-restricting actions by the U.S. government.

### VIII. ECONOMIC NONSENSE

Increasingly, the focus of the unfair trade laws is on protecting *any* U.S. production that might be displaced by import competition, even if the proposed remedy would have a negative effect on U.S. production on the whole. This point is sometimes difficult for economists to accept, but it seems generally accepted by the legal community. "Under the GATT, under current U.S. law and under other countries' antidumping statutes, dumping is not considered to be criminal or immoral, but rather a business practice; the remedy, which is only necessary if injury is caused to a domestic industry, is to force the companies engaged in dumping to raise their prices, *usually a net negative*

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61. This paragraph was included in the 1984 draft of Professor Hudec's study, but omitted from the published 1986 draft, *id.* I quote it here with the permission of the author.

62. John H. Jackson, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 40-43 (1989).

*effect on the country imposing the duty.*"<sup>63</sup>

The change in drawback regulations further illustrates trade remedy law's disregard of issues of broader economy-wide concern. Prior to 1988, U.S. exporters could draw back, i.e. be reimbursed for, any antidumping or countervailing duties they paid on a product that they re-exported or incorporated into a product that was exported.<sup>64</sup> In the 1988 trade act, Congress excluded antidumping and countervailing duties from eligibility for drawback.<sup>65</sup> Any U.S. exporter's interest in access to lower-priced inputs was thus made secondary to the U.S. input producer's interest in protection from import competition.

Many of the above reviewed changes in U.S. unfair trade law demonstrate that its dominant concern is avoiding injury to U.S. producers, rather than preserving competition in the U.S. market. For example, cumulation of injury tests over imports of steel sheets from various sources seems reasonable *if* the objective is only to protect the interests of U.S. *producers* of steel sheets. Because import competition arising from many sources is not predatory, it will not leave U.S. users of products such as steel sheets exposed to exploitation by foreign monopoly sellers.<sup>66</sup> Cumulation, in effect, extends the scope of regulation from what the antitrust laws attempt to isolate as bad competition to what economic theory would describe as normal competition. If applied to domestic commerce, cumulation would require intervention to protect any firm that could not keep up with its competitors. To believe in the cumulation principle is to believe that competition normally does not serve society's interests.<sup>67</sup>

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63. Horlick & Oliver, *supra* note 1, at 23 (emphasis added).

64. *Id.* at 42.

65. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1334(a), 102 Stat. 1107, 1209 (1988).

66. Proof of predatory effects or intent is not required in an unfair trade case. "We . . . should put to rest the media concept that predatory dumping exists. It may exist, but none of the trade laws require any showing of predatory intent whatsoever." Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTITRUST L.J. 409, 412 (1987). "[N]o less a body than the United States Supreme Court has observed that 'predatory pricing schemes are rarely tried and [are] even more rarely successful.' It probably is safe to predict that in none of the 767 affirmative antidumping determinations reached by Australia, Canada, the EC and the US between 1980 and 1986 was predatory pricing remotely present." Palmeter, *The Antidumping Emperor*, *supra* note 4, at 6 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986)).

67. The fully-allocated-costs pricing standard and cumulation of injury are only two of many ways in which the unfair trade laws impose much more strin-

## CONCLUSION

It seems clear that the unfair trade laws do not embody any moral, economic, or philosophical definition of "unfair." Why should they? None of the political pressures and economic interests that have propelled the laws' passage or molded their enforcement would measure their effectiveness by how accurately these laws approximate such standards.

Antidumping and countervailing duty laws aim to protect U.S. production threatened by import competition. Unfair trade procedures neither focus on what foreign sellers do, nor ask whether what they do is fair or unfair. The legal definitions of unfairness offer so many possibilities that any U.S. producer who would be better off if imports were restricted can find a way to qualify — if not now, then after the next trade bill.

This does not mean that just *any* briefcase full of information from a U.S. industry will be sufficient to win an affirmative determination. However, a domestic interest stopped by a mere detail of the law need only prepare a new petition, or wait for a revision of the administrative regulations or amendment of the law — as did the Louisiana sulfur company whose problem was fixed by adding "constructed value" to the law.<sup>68</sup>

In the long run, a winning portfolio *can* be pulled together by any industry that experiences substantive competition from imports. The cost of putting that portfolio together and the tedium of negotiating a voluntary export restraint that will give the exporters enough extra profit to buy off their sovereign right to retaliate are the major limits on the protection the system provides. Domestic politics impose only the necessity of explaining that foreigners are unfair, while the trade laws provide the podium from which to do so.

Almost all of the procedural changes (but not the substantive changes) that have been made are commendable. Standards are stated with increased precision, objective application is guarded by court review, and interested parties have the right to review the evidence and to comment on its accuracy and interpretation. Transparency, openness, and objectivity are important parts of the American 'rule of law' ideal. Yet these procedural refinements seem to contribute more to the problem than to a solution. The emphasis on doing things the right way

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gent limits on what foreign sellers can do in the U.S. market than the U.S. antitrust laws impose on domestic sellers. *See supra* text accompanying note 37; Palmeter, *The Antidumping Emperor*, *supra* note 4, at 6-7.

68. *See supra* notes 32-34 and accompanying text.

distracts us from seeing that we are doing the wrong thing. The unfair trade laws, with their broad definitions of what is unfair, recall a cynical characterization of American justice: we give every horse thief a fair trial, then we hang him.

The GATT expresses the best intentions and highest aspirations of international leadership since the end of World War II. However, its provisions have been proven too general to provide effective limits on trade restrictions. Robert Hudec's point that trade restrictions are fungible is important. The limits on authority provided in one section of the law can be evaded by using the discretion provided in another section.

The unfair trade laws — as Congress has expanded them and as the president has enforced them — provide protection for every American industry that faces import competition. An earlier analysis of the expansion of the protective system explains:

One of the great defects of the protective system is that it provides no clear basis for discrimination, and that, since discrimination is politically difficult, Congress destroys the essential character of the policy in order to make it politically strong.<sup>69</sup>

The analyst I am quoting is E.E. Schattschneider (1935), and the passage comes from his celebrated analysis of the politics of the Smoot-Hawley tariff. "The history of the American tariff," argues Schattschneider, "is the story of a dubious economic policy turned into a great political success."<sup>70</sup>

There is further parallel between 1930's politics of the tariff and today's politics of unfair trade. The "principle" behind the Smoot-Hawley tariff was that it should offset the difference between the cost of an article outside and inside the United States. But, as Schattschneider saw things:

[T]alk of tariffs written on the costs formula is no more than an elaborate sham and a bluff . . . . The [congressional] committees did not generally determine rates according to the formula advertised and they did not do so for the conclusive reason that they could not.<sup>71</sup>

[T]he difference of costs formula is to be classified more properly as a slogan belonging to the politics of gaining acceptance of the legislation than as a method of determining rates. It is an argument rather than a formula.<sup>72</sup>

U.S. commercial policy has gone full circle. The fairness-equalization policy of the 1980s enforced through antidumping and countervailing duty orders is the same as the cost-equaliza-

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69. E.E. Schattschneider, *POLITICS, PRESSURES AND THE TARIFF* 85 (Archon Books 1963) (1935).

70. *Id.* at 283.

71. *Id.* at 84.

72. *Id.* at 284.

tion policy of 1930 enforced through the tariff. I do not point out this parallel to predict that unfair trade regulations will go the way of the Smoot-Hawley tariff, but to predict that when a new wind in trade policy thought blows aside the unfair trade rules, future policy makers will regard the current unfair trade rules to be as absurd as we now consider the Smoot-Hawley cost-equalization formula.

### HOW DO WE GET TO CINCINNATI? SOME POLICY ADVICE

What we are doing now is worse than doing nothing at all: therefore, we should not do it. But how do we change course?

A city slicker, driving through the countryside on his way to Cincinnati, realized that he had lost his way. He stopped and asked a farmer, "How do I get to Cincinnati?"

The farmer responded, "Well, you go down the road, take the second fork to the left. Eventually you'll come to a cross-roads where you'll see a sign directing you to Wilson's Store. Go toward Wilson's Store, but before you get there . . . now wait a minute. It might be better if you go *up* this road, then after you cross a bridge . . . No, I don't believe that will get you there either. You know, mister, I don't think you can get to Cincinnati from here."

To this the city slicker responded, "What? You've lived here all your life and you don't know the way to Cincinnati? You must be pretty stupid."

The farmer replies, "Maybe so, but I'm not lost."

This old story usually ends here, but in my version the city slicker has the last word: "That's only because you don't want to go to Cincinnati. If you knew how much nicer it is in Cincinnati than it is here, then you'd be lost, too."

Perhaps the United States has never been to Cincinnati, but it has been closer than it is now. Indeed, the U.S. administration and Congress of the 1980s might paraphrase Pogo: "We have met Smoot, Hawley, and Hoover, and they are us."

How do we get to Cincinnati? Perhaps we start by changing the law so that it explains how nice it is in Cincinnati as well as how nice it is here. Anyone should be able to petition for an import restriction, as is now the case. However, trade regulation should focus on both those who would benefit and those who would suffer from a proposed trade restriction, and should consider how much will be gained or lost. Because the domestic economic costs of a trade-restricting action can be as substantial

as its gain, a domestic entity which is hurt economically by an impediment to imports should have the same standing in law and in administrative procedures as someone who profits from the impediment. This should include the administrative mechanics to petition for removal of an impediment to imports when that impediment compromises an entity's economic interests.<sup>73</sup> This is hardly a new notion. The idea that the gains from free trade are usually greater than the costs has been around since Adam Smith; it just has never been recognized in U.S. law.

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73. J. Michael Finger, *Incorporating the Gains from Trade into Policy*, 5 THE WORLD ECONOMY 367-77 (1982).