The Meaning of “Unfair” in U.S. Import Policy

J. Michael Finger

Protection for U.S. production beset by import competition is what the antidumping and countervailing duty laws are all about. All the emphasis on doing things the right way distracts the United States from seeing that it is doing the wrong thing. The focus of trade regulation should be the following question: Who in the domestic economy will benefit from the proposed restriction and who in the domestic economy will lose, and by how much?
Protection for U.S. production beset by import competition is what the antidumping and countervailing duty laws are all about, contends Finger. Only in rhetoric are the unfair trade procedures about what foreign sellers are doing and about whether what they are doing is fair or unfair. The legal definitions of what is unfair 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 any briefcase full of information from a U.S. industry will be sufficient to win an affirmative determination, Finger argues. But a domestic interest stopped by a detail of the law need only wait (or pay) for preparation of a new petition, or revision of the administrative regulation, or amendment of the law — as did the Louisiana sulfur company whose problem was fixed by adding constructed value to the law.

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 profits to buy off their sovereign right to retaliate are the major limits on how much protection the system will provide. Domestic politics imposes only the necessity of explaining that foreigners are unfair, while the trade laws themselves provide the podium from which to do so.

Almost all the procedural changes (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 a right to review the evidence and to comment on its interpretation as well as its accuracy. Transparency, openness, and objectivity are important parts of the American ideal of rule of law. Yet these procedural refinements seem to contribute more to the problem than to a solution. All the emphasis on doing things the right way distracts us from seeing that we are doing the wrong thing. The unfair trade laws (with their broad definitions of what is unfair) provide traditional American justice: we give every horse thief a fair trial, and then we hang him, writes Finger.

The focus of trade regulation should be the following question: Who in the domestic economy will benefit from the proposed restriction and who in the domestic economy will lose, and by how much? Then, get the economics right. The domestic economic costs of a trade-restricting action are as substantive as the gains. These costs have never been given legal substance because the legal profession has never been charged to do so, not because it cannot be done.

A domestic loss and a domestic loser from an impediment to imports should have the same standing in law and in administrative procedures as a gain or a gainer — including the administrative mechanisms to petition for removal of an impediment to imports when that impediment compromises his or her economic interests. This is hardly a new notion. The idea that there are gains from trade, usually greater than the costs, has been around since Adam Smith, Finger concludes. It is just that they have never been made legal in the United States.
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J.M. Finger

Unfair trade cases are where the action is. According to two of Washington's top trade lawyers (Horlick and Oliver 1989) they "have become the usual first choice for industries seeking protection from imports into the United States" (p. 5). There are indeed a lot of cases. From 1975 to 1979, the U.S. government processed 245 antidumping and countervailing duty (antisubsidy) cases or some 50 cases a year. In the 1980s, the case load rose even higher, to 774 cases between 1980 and 1988, or 86 cases a year.¹ By comparison, there have been only four escape-clause cases a year, cases in which an industry sought protection from import competition without accusing the foreign seller of employing or benefiting from unfair practices.

The United States is not alone, as the other chapters on enforcement practices well demonstrate. Many countries review their imports for instances of unfairness. 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 or countervailing duty cases, but only seventeen safeguard cases.

Several features stand out from the pattern of U.S. antidumping and countervailing duty cases from 1980 through 1988 (see tables 14.1 and 14.2):

- For developed and developing countries as a group, the proportion of cases is about the same as the proportion of U.S. imports that originate in each group. There are large differences within groups, however. Japan and the EC each supply about 20 percent of U.S. imports, but the EC has been the object of 40 percent of U.S. antidumping and countervailing duty cases, Japan of only 6 percent. Among developing countries, imports from Brazil generate a disproportionately high number of cases, and imports from Taiwan, Hong Kong, and Singapore disproportionately low numbers.

- Almost half the cases (348 of 774) have been superseded by negotiated export restraints.
Cases against developing countries more often come to restrictive outcomes than cases against developed countries—three-fourths versus two-thirds. ("Restrictive" outcomes include cases that reached an affirmative final determination or that were superseded by a restrictive agreement with the exporter.) But negotiated export restraints were much more often used against developed countries—the outcome in 36 percent of cases compared with 15 percent for developing countries. A country that possesses the countervailing power to retaliate is accorded the courtesy of a negotiated settlement. Others are restricted in the normal course of administrative procedures.

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 percent of dumping and subsidy determinations result in negative determinations.2

When no action is taken against the foreign exporter, more than six times in seven it is because no competing U.S. producer has been hurt.

This chapter examines the patterns of unfair trade cases in the United States and then looks at how these patterns fit into or are shaped by the politics of U.S. trade policy. My thesis is 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. But injury to domestic producers is what drives U.S. trade politics, and how high a mark an instance of import competition receives on the political barometer of injury is what 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 shaped and filled elsewhere. It is not a matter of putting in the bottle only what a studied proscription demands. "Unfair foreign competition" is the label put on a bottle that was filled from the spring of domestic politics.
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 large. 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, and that improvement will not depend on whether the government's diagnosis was correct. Whether your competitors are pricing fairly or unfairly (in some legal or philosophical sense), forcing them to set higher prices will improve your business. Period. Your interests thus lie in a broad and encompassing definition of what will cause the government to act in your favor, not in whether that definition is in accord with some abstract concept that has at best an indirect bearing on the economic and financial health of your business.

I do not deny that a sense of moral obligation might restrain many people from certain actions that would be profitable. But only amateurs think that the unfair trade laws deal with matters of morality. The view of professionals, of people with money at stake, is the following: "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" (Horlick and Oliver 1989; emphasis added). The same can be said for antidumping.

If the issue is when to restrict imports, it follows that any business beset by import competition will attempt to explain its circumstances as those that the law is supposed to remedy and, when the occasion presents itself, will attempt to change the law so that it covers those circumstances. If import remedies were based solely on the petitioners' motive, then remedies would be applied to all instances in which import competition displaces or
threatens to displace domestic production. It is the role of the law, however, to sort from the universe of potential requests for import restrictions those requests that will be honored. This role suggests a public motive different in some cases from the private motive; only when the two are in accord will public means (the power of the state) be used to satisfy the private motive.

The public motive that built U.S. trade policy after World War II existed in a different dimension from the profits and jobs that motivate private requests for import restrictions. To the people who served in the U.S. government and shaped public opinion, trade policy was less economics than international diplomacy. A dominant idea, widely shared, was that freedom of commerce could be an important instrument for building international stability and maintaining world peace. 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 (quoted by Cooper 1987, 299, from Hull's Memoirs.)" The Cold War with the Soviet Union 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.

And within this strategy, in I.M. Destler's informative phrase, trade remedies provided "protection for Congress" against the wrath of special interests that would press a member of Congress who was sympathetic to the general thrust of U.S. trade policy. The ideology of interdependence to preserve global stability was part of the U.S. trade strategy, but it was not all of it. Economics also mattered, but not in the way an economist would explain the gains from trade. How it mattered had more to do with the way trade remedies were viewed. In this regard, an old metaphor about prosperity is informative: a rising tide lifts all boats. The 1950s and 1960s were generally prosperous times in which the United States enjoyed substantial trade surpluses. Directing a protection-seeking industry into a maze of administrative procedures bought time, and before the industry emerged from
the end of the maze to find that there was no prize, it realized that business was better and pressed the 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.

The dominant concerns were strategic and diplomatic, and advancing these concerns required that the U.S. market be kept open to imports. The trade negotiations, not the trade remedies, expressed the thrust of U.S. trade policy. But on the trade remedies issue, the internationalists wanted foreigners to have more access to the U.S. market while import-competing interests wanted them to have less. Nobody really cared about "fair" or "unfair." 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 correctly defined in some moral, economic, or otherwise objective sense.

The concerns of those who might have insisted that foreigners were fair existed in one dimension, while the concerns of those who might have insisted that they were unfair existed in a different dimension. The adversary process reduced the issue to the lowest common dimension, more versus fewer trade restrictions, and those who favored fewer restrictions carried the day. They won by emphasizing strategic and diplomatic concerns, by pushing the "fair versus unfair" issue aside, not by demonstrating that everything exporters did was fair. In sum, the politics of the day allowed the trade remedies procedures to be calibrated to produce trade restrictions at a much slower pace than the trade negotiations were removing them.

In the 1980s, the issue was still more versus fewer trade restrictions. Fairness was the rhetoric of the matter but not the substance. But before looking at what happened in the 1980s, I want to take a brief detour into the
workings of the GATT, to examine whether it imposes effective limits on the
use of unfair trade actions to restrict imports.

The GATT is no limit

A long-standing concern of the contracting parties to the GATT is
expressed by noted GATT scholar, John H. Jackson (1969): "The mere initiation
of a dumping procedure ... is often so costly to the importer that, on the
threat of such procedure, it inhibits imports even if the procedure ultimately
establishes that no dumping occurred" (p. 407). Jackson quotes a 1959 GATT
Working Group on the intent of the GATT: "it was essential that countries
should avoid immoderate use of antidumping and countervailing duties, since
this would reduce the value of the efforts that had been made since the war to
remove barriers to trade" (p. 409). Does Article VI of the GATT then express a
right of contracting parties to levy antidumping and countervailing duties or
an obligation to limit their use? Jackson argues that "this article in effect
imposes positive obligations on GATT contracting parties" (p. 411) to limit
their use.

The GATT, however, has proven to be a minimal limit to the expanding use
of unfair trade laws. There has been only one GATT dispute-settlement
complaint against the U.S. countervailing duty law, a panel requested by the
EC under the subsidies code on provisions of the U.S. Wine Equity Act. There
has been only one GATT case against a U.S. antidumping action, that one filed
by Sweden in 1989 and, as of this writing (April 1991), still pending. One
might suspect that U.S. antidumping actions are not challenged at the GATT
because they are against smaller countries that are intimidated by the
economic and political power of the United States. But, as table 14.1
documents, a disproportionate number of U.S. antidumping cases are against the
EC and its member states. And on other matters, the EC and its members have
filed many GATT cases against the United States.
On the other side of the ledger, the United States is second only to Japan in the number of times it has been the object of other countries' antidumping actions (Finger 1987). And although the United States has filed more GATT law suits than any other country, it has never filed against another country's antidumping actions or procedures. Jackson (1969) reports that antidumping actions have fostered "considerable displeasure ... about other countries' practices" but only one formal complaint of GATT violation--by Italy against Sweden, in 1954 (p. 407). It is hard then to escape the conclusion that the expanded use of antidumping and countervailing duty regulations by the United States and other countries is within the bounds of what the GATT allows.

While the intent of the GATT is to control the imposition of trade restrictions, its letter has proven to be quite permissive. Even where there are limits in the GATT, these limits do not necessarily limit the U.S. government from acting against imports under U.S. law. Robert Hudec (1986), another noted legal expert, 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. Perhaps more important, Congress has frequently committed administration of important trade laws to more-or-less objective investigatory and decision-making bodies outside the Executive Branch ... and the courts.... These examples [the 1979 Act's antidumping and countervailing duty law and escape-clause law], and a few others, could well be considered models for effective legal implementation of GATT obligations.... (p. 238)

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...

(p. 239)

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. (p. 248)

There is more. Even where there are limits in U.S. unfair trade law, they do not necessarily prevent the government from acting against imports politically perceived to be 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 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.6

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

Are U.S. unfair trade laws supposed to keep the U.S. market open or to protect U.S. producers from import competition?

The legal objective of the unfair trade laws is to police the fairness of trade practices. The laws pursue this objective by restricting imports from unfair exporters only. The unfair trade laws are thus policy instruments with the power to restrict imports, and they will attract those with an interest in having imports restricted. Firms and industries beset by unfair competition will be attracted, but they will not be alone. A firm or industry unfavorably situated vis-à-vis its foreign competitors will attempt to make its situation fit the law's scope or, alternatively, will try to make the law's scope fit its situation.

Only the details of the unfair trade laws attempt to contain the pressures that the laws themselves enfranchise. Some, but perhaps not all, instances of import competition will fit within the definition of dumping or subsidization and will also cause material injury to a domestic industry. Domestic interests that would benefit from protection need not change the thrust of the rules to push the balance in their favor. Expanding the details is enough.

Expansion of circumstances when the law allows imports to be restricted

While trade bills are usually celebrated for the authority they give the president to negotiate tariff reductions, expansions of the circumstances
under which imports can be restricted have been a quiet part of every trade
bill since the Reciprocal Trade Agreements program began in the 1930s. Baldwin
(1985) has explained the sequence of changes through which Congress has
reduced the president’s discretionary authority not to impose import
restrictions when the International Trade Commission has made an affirmative
decision in an escape-clause case. Hufbauer (1989) explains that various
drafts of the 1988 trade law contained provisions in seemingly generic
language entitling the titanium, ammonia, cement, and aircraft industries to
antidumping or countervailing duty protection. Not every such proposal earns
legal enactment, but many of them do, so that over time the circumstances that
entitle domestic industry to protection have been considerably expanded.

Constructed value. Nivola (1988) identifies two recent changes in the
antidumping law that have significantly expanded its scope: the use of
constructed costs and cumulation of imports. The 1974 trade bill amended the
antidumping law to require that investigators screen their observations on the
exporter’s home market price against sales at less than “constructed cost”
(defined as fully allocated long-run production costs, including a minimum of
10 percent for general selling expenses and a minimum 8 percent profit).

Even if export and home market prices were identical, the exporter would
violate the dumping law if the value the U.S. investigators constructed for
the product exceeded the price charged. As a general rule, when “below cost”
sales are less than 90 percent of the value of all home market transactions,
the Commerce Department will base its dumping calculations on the remaining
“above cost” sales — which might be no more than 10 percent of all home
market sales. Where 90 percent or more of home market sales are “below cost,”
all home market sales are ignored and the constructed value is used instead of
the home market price (Applebaum and Grace 1988, 514). The antidumping law
also specifies that “below cost” sales must be made “over an extended period
of time.” Thus enforcement of the law suggests that a foreign firm, 90 percent
of whose home market sales over an extended period of time are below cost and

whose export price is likewise below cost, will have sufficient vigor to do material injury to its U.S. competitors.

Nivola explains that the amendment was sponsored by Senator Russell B. Long of Louisiana to rescue a sulfur producer in that state whose antidumping petition under existing law had been turned down. According to experts on antidumping enforcement, this provision, which allows the U.S. government to ignore up to 90 percent of an exporters home market sales, has been applied in 60 percent of investigations in the 1980s (Horlick 1989, 136). Thus foreigners 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 price that way are not in violation of U.S. antitrust laws.

Cumulation. If a domestic industry is beset by competition from fifty different countries, it may be hard 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 International Trade Commission had discretion to consider cumulated imports. The 1984 Act, at the behest of domestic textile and steel companies, made cumulation mandatory (Horlick and Oliver 1989, 35). The Cut Flowers case of 1987 (see chapter 7) illustrates the power of this change. The case covered imports from ten countries. Colombia supplied over 85 percent of U.S. imports; Canada, Kenya, and Chile each supplied 0.5 percent or less, yet the cumulation rule prevented the International Trade Commission from dropping them from the case (Horlick and Oliver 1989). This was a troublesome result, not only politically, but administratively. The Commerce Department has to conduct a full dumping investigation for each country included in a case, so the administrative resource requirements implicit in the cumulation rule are enormous.

The 1988 trade bill restored to the International Trade Commission the authority to eliminate minimal suppliers at the preliminary stage. However, the legislative history of the bill makes clear that Congress expects the
International Trade Commission "to apply the exception narrowly." Congress "does not intend for this narrow, limited exception to subvert the purpose and general application of the cumulation requirement" (Horlick and Oliver 1989, 37).

Free trade, not protection, depends on loopholes

From an American preconception that associates rules with doing it right and an economist's perception that associates import restrictions with doing it wrong, it is easy to conclude that the "other side" -- those seeking import restrictions -- must be winning by deceit and trickery, by cynically exploiting loopholes in the law, and by pressuring vulnerable members of Congress to insert new ones.

Not true. The thrust of legislative modifications and of court review has been to push the meanings of "subsidy," "dumping," and "injury" toward their meanings in common usage and to close some of those loopholes. Take cumulation of injury, for example. Would it be reasonable to grant relief to an industry that was losing its U.S. market to a vigorous Korean industry, yet to deny relief to an industry that was being nibbled to death by fifty competitors? Or consider downstream dumping. If the Canadian government subsidizes the production of logs or sells them to Canadian mills at one-tenth of their market value, it is hardly reasonable to argue that the lumber itself is not being subsidized or dumped, and so to refuse to protect U.S. lumber mills from competition from Canadian lumber. If the basic concept of the law is implemented "reasonably," the result is protection.

The basic test of trade remedy law, the injury test, means essentially that if the petitioner could make more money if foreigners were kept out, then foreigners should be kept out. "Injury," when translated from the language of law to the language of economics, is the inverse of comparative advantage. Thus the basic economic precept on which trade remedy law is built -- to offset domestic injury from import competition -- is protectionist.
Gradations that distinguish an affirmative injury determination from a negative one -- say the difference between "serious injury" and "material injury," -- are matters of arbitrary detail. The Antidumping Authority Act of 1988 required the Australian Antidumping Authority to investigate how "material injury" could be defined in practice. 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 (Antidumping Authority 1989, 1). 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" (Antidumping Authority 1989, 16; emphasis added).

In sum, the function of loopholes in and elliptical interpretations of trade remedy law is to keep markets open, not to shut foreigners out. If the basic concepts of the law are interpreted "reasonably," the result is protection.

But when the U.S. government's dominant trade policy motive was to keep the U.S. market open, the government had to enforce the law's basic concept in an "unreasonable" way. To prevent the law's basic protectionist thrust from being applied, the executive branch had to find convenient details and loopholes in the trade remedies laws, and the Congress had to be willing not to close those loopholes too quickly.

The loopholes were not subtle. Before 1974, there was no time limit for completing a countervailing duty investigation. Sometimes the Treasury Department (then the administering agency) used this loophole -- it chose not to complete an investigation. Since 1974, deadlines have been imposed on countervailing duty cases. In 1980 the International Trade Commission found "no injury" on an escape-clause petition filed by the automobile industry. Commissioners who voted against injury did so not on grounds that the industry had not lost money and jobs to import competition, but on grounds that they had lost even more money and more jobs because of a recession and a shift of
consumer tastes away from larger cars. This loophole was closed by the 1988 trade bill.

In the law, fair trade itself is a matter neither of economics nor of morality. It is a loophole that can keep petitions for import restrictions from becoming import restrictions, and the loophole is made larger or smaller as it suits the politics of trade.

The intent of Congress is that the law protect

Intent is important. Congress, in drafting the laws, cannot anticipate the details of every potential case and so must provide instructions that are, to some degree, generalized. But no matter how many words Congress inserts into the antidumping and countervailing duty laws, the actions the laws will pin down and those they will let go depend to a large extent on administrative practice. And what administrators do depends on what they understand to be the objective of the law they administer.

The intent of Congress seems best revealed by its actions. When it winked at the loopholes that allowed the executive branch to maintain the openness of the U.S. economy, that was probably its intent. But Congress has since moved vigorously to close those loopholes, and the intent it is now signaling is that the antidumping and countervailing duty procedures should not overlook any import competition that injures a U.S. interest. Congress wants the benefit of the doubt to rest with the domestic petitioner, not with the presumption that the U.S. market should be open to international competition. Legal interpretations of the standard of proof required for an affirmative preliminary injury determination confirm this view.

The injury test. U.S. law provides that interested parties (the petitioning U.S. importer or the foreign exporter) to a countervailing or antidumping duty case may appeal any dumping, subsidy, or injury determination to the Court of International Trade and then to the Court of Appeals for the Federal Circuit. The review process is designed to ensure that the administering authorities do what the law intends that they do. The government
agency that conducts the subsidy, dumping, or injury investigation must assure the courts that its determination is consistent with the law, based on reliable evidence and on reasonable conclusions drawn from the evidence of record.

The way the courts have interpreted the standards for preliminary injury determination shows clearly that the law's dominant concern is to prevent injury to domestic producers. The International Trade Commission is expected to return an affirmative preliminary injury determination if it finds "a reasonable indication of injury." In *Republic Steel Corporation v. United States* (591F, Supp. 640) the Court of International Trade held in 1984 that the objective of a preliminary investigation is simply to determine whether there are any facts that raise the possibility of injury. At this stage the issue is not whether there is material injury but whether a full investigation should be conducted. A "reasonable indication of injury" will exist if the evidence of record includes some facts indicating injury, and the International Trade Commission should, on that basis, continue the investigation. There should be no netting out at this stage of offsetting facts against those indicating injury.

To dismiss a case at the preliminary stage, the International Trade Commission must meet a much more strenuous evidentiary standard. In *American Lamb Company v. United States* (785F, 2d 994) the Court of Appeals ruled in 1986 that the International Trade Commission can determine that there is no "reasonable indication" of material injury or threat when there is clear and convincing evidence of the absence of such reasonable indication, and the record shows that it would be extremely unlikely for evidence of a "reasonable indication" to be developed in a final investigation.

These court interpretations mean that the benefit of the doubt belongs to the domestic petitioner for an import restriction. The investigations are to be the petitioner’s day in court, not the day in court of a president or a trade negotiator who made a commitment to keep the U.S. market open. What this means for the contract the United States has struck with its trading partners
through the GATT -- the U.S. "obligation" to keep its market open to import competition -- is that more and more that obligation is being outweighed by the exercise of the "rights" the U.S. government has reserved to impose import restrictions.

Cumulation (again). The cumulation requirement is another indicator that avoiding injury to a U.S. producer is the dominant concern of U.S. unfair trade law. For example, cumulation of injury tests over imports of steel sheets from various sources seems reasonable if the objective is to protect only the interests of U.S. producers of steel sheets. Import competition arising from many sources is not predatory and so will not leave U.S. users of steel sheets exposed to exploitation by foreign monopoly sellers. 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 call for 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. More and more, the focus of the unfair trade laws is on protecting any U.S. production that might be displaced by import competition, even if other U.S. production benefits from this import competition and the proposed remedy would have a net negative effect on U.S. production. This point is sometimes difficult for economists to accept, but it seems to be generally accepted by the legal community. Horlick and Oliver (1988), for example, write that "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 effect on the country imposing the duty." (p. 23, emphasis added).

Circumvention. Provisions for policing the circumvention of an antidumping or countervailing duty order provide another example of the
dominance of the principle of injury to the complainant firm or industry. If an antidumping order against imports of radios leads to increased imports of radio parts for assembly or finishing in the United States, circumvention provisions often allow the initial antidumping order to be extended to the parts. Yet an antidumping case brought by U.S. producers of radio parts would be unlikely to treat radios as part of the relevant domestic industry or to take into account the interests of radio manufacturers or assemblers during the injury investigation. This asymmetry in the way the input-output relationship is treated when anticircumvention is the issue compared to when injury is the issue means that the unfair trade laws protect against the gross impact of trade on any U.S. production rather than the net impact on all U.S. production.

Drawbacks. The change in drawback regulations shows a similar disregard of issues of broader economywide concern. Until the 1988 trade act, U.S. exporters could be reimbursed for any antidumping or countervailing duties that had been paid on a product that they reexported or incorporated into a product that was exported. In the 1988 trade act, Congress excluded antidumping and countervailing duties from eligibility for drawback. Any U.S. exporter’s interest in access to lower-priced inputs was made secondary to the U.S. input producer’s interest in protection from import competition.

The intent of Congress is not to politicize

The same instinct that classifies rules and free trade as "good" tends to associate "bad" results with politics -- if trade policy is going bad, it must be because politics has been allowed to creep in. Again, preconceptions can be misleading. While Congress is clearly moving trade law toward protection of U.S. production, Congress is clearly not moving to politicize the trade laws, to open up the criteria for import relief so that any day’s decisions could 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. The thrust of judicial review is toward (a) predictable outcomes based on (b) systematic interpretation of (c) objective measures of (d) criteria specified in the law.

Shortly after administrative authority had been shifted from the Treasury Department to the Commerce Department, there were accusations around Washington that the Commerce Department had, in a matter of months, overthrown sixty years of honest enforcement of the antidumping and countervailing duty laws. The accusations were probably valid, and the changes in enforcement practice were probably what Congress intended. Treasury's tradition of enforcement had evolved at a time when international considerations and the general-interest orientation of the Treasury Department were supposed to be taken into account. But times and concerns change. By 1980, Congress wanted the old mold to be broken. The truth, however, is not necessarily the whole truth. Throwing out sixty years of honest enforcement does not necessarily mean replacing it with dishonest enforcement. The objective was a different mold, not having no mold at all.

The thrust of the enforcement tradition in the United States and of judicial review is toward standard practice, toward finding common elements and always treating these elements the same way. This does not mean that each person will interpret the law in the same way. Michael Moore (1988), in a study of injury determinations in antidumping cases between 1980 and 1986, found that the percentage of affirmative votes for each of the twelve people serving on the International Trade Commission ranged from 100 percent to 21 percent. Yet, when Moore analyzed the factors on which decisions were based, he found that each commissioner's decisions were systematically based on the factors that the law identifies with injury and that factors not specified in the law had minimal influence. He found that different individuals assigned different weights to the various factors, but that each systematically applied these weights to the cases reviewed.
This tendency to systematize the interpretation of the law and to make it objective is not, however, a limit on the frequency of restrictive actions. Every discovery of a new dimension of "unfairness" allows the administrators of the law to develop an interpretation of that dimension that warrants an import restriction and that allows Congress eventually to add to the law the more restrictive interpretation of the dimension. "For every unfair practice attacked by the trade laws, several new ones always seem to arrive on the agenda, summoning amendments, as the definition of 'unfairness' expands" (Nivola 1988, 54).

The presidential politics of unfair trade

In U.S. politics, bald-faced protectionism is still a loser. Walter Mondale, John Connally, and Richard Gephardt are evidence of that. But the regulation of unfair foreign trade practices is surely a political winner. The first draft of President Reagan's fall 1987 trade speech was a free trade speech; the draft he delivered was a fair trade speech. In a remarkable story in the Wall Street Journal of September 24, 1987, Robert W. Berry 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." Mr. Regan [White House chief of staff] met with a group of outside advisers, including long time Reagan strategists Stuart Spencer and Lynn Nofziger, who echoed that view (p. 7).

The rhetoric of unfair trade provides the president the same opportunity it provides the Congress -- to have one's cake and eat it too.15 The president can collect his political rewards and honor his political commitments by enforcing the law and by negotiating voluntary export restraints. In response to a growing number of congressional initiatives on trade policy, President Reagan took a giant step toward reestablishing the executive's leadership by announcing a two-pronged policy plan on September 23, 1987: to work with the leadership of other countries to lower the value of
the dollar and to aggressively attack foreign unfair trade practices. While President Reagan's fair trade speech of September 23, 1987, marked a significant shift in his rhetoric on the matter, it did not mark his administration's discovery of unfair trade politics. For example, two weeks before, in defending the administration's international economic policy, Treasury Secretary James A. Baker III (1987) 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 (p. 4). Half a century covers every president since Herbert Hoover, the president who signed the Smoot-Hawley tariff.

Conclusions

It hardly seems necessary to argue that the unfair trade laws do not approximate any moral, economic, or philosophical definition of "unfair." What reason is there to expect that they would? None of the political pressures and economic interests that have propelled the laws' passage or molded their enforcement would judge if the laws serve them well or ill by how accurately the laws approximate such a standard.

Protection for U.S. production beset by import competition is what the antidumping and countervailing duty laws are about. Only in rhetoric are the unfair trade procedures about what foreign sellers are doing and about whether what they are doing is fair or unfair. The legal definitions of what is unfair 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 any briefcase full of information from a U.S. industry will be sufficient to win an affirmative determination. But a domestic interest stopped by a detail of the law need only wait (or pay) for preparation of a new petition, or 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.

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 profits to buy off their sovereign right to retaliate are the major limits on how much protection the system will provide. Domestic politics imposes only the necessity of explaining that foreigners are unfair, while the trade laws themselves provide the podium from which to do so.

Almost all the procedural changes (not the substantive changes) that have been made are commendable. Standards are stated with increased precision, objective application is guarded by court review, interested parties have a right to review the evidence and to comment on its interpretation as well as its accuracy. Transparency, openness, and objectivity are important parts of the American ideal of rule of law. Yet these procedural refinements seem to contribute more to the problem than to a solution. All the emphasis on doing things the right way distracts us from seeing that we are doing the wrong thing. The unfair trade laws (with their broad definitions of what is unfair) provide traditional 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. But its strictures have proven to be too general to provide effective limits on trade restrictions. And the point made by Robert Hudec is important: Trade restrictions are fungible. The limits on authority provided in one section of the law can be evaded by using the discretion provided in another section.

Even though the U.S. fair trade laws are in accordance with the GATT, in domestic politics "fair trade" has come to mean a right to protection. In both substance and form, fair trade laws seem to conform to our beliefs about what rights ought to be about: we have a remedy to being treated unfairly by
foreigners (the substance) that is precisely codified and carefully administered (the form) and not subject to the whim of some capricious or venal government official.

On the matter of a right to import relief, I want to borrow from the conclusions of an earlier analyst:

In the language of politics, private needs are never far removed from private rights, and no one can read the record of the hearings without observing the startling degree to which this tendency is shown in the discussions. (p. 88)

The concept of the "right" to protection has as a corollary the proposition that it is immoral to oppose the just claims of any industry to protection. (p. 136)

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. (p. 85)

The analyst I am quoting is E.E. Schattschneider (1935), and the passage came 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" (p. 283). 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:

Talk 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. (p. 84)
The 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. (p. 284.)

There is thus an evident parallel between 1930’s cost-equalization policy -- with the tariff as the instrument -- and 1980’s fairness-equalization policy -- with antidumping and countervailing duty orders as the instrument. I do not point out this parallel to predict that unfair trade regulations will go the way of the Smoot-Hawley tariff. I point it out to predict that when a new fashion in import regulation has pushed unfair trade rules aside, these rules will be as obviously silly to the policy community then as the cost-equalization formula is to us today.

How do we get to Cincinnati?

This is my policy advice: What we are doing now is worse than doing nothing at all, so we should not do it.

But how do we get there? 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 from here?"

The farmer responded, "Well, you go down the road, take the second fork to the left. Eventually you’ll come to a crossroads 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."
You have probably heard the story. The farmer replies, "Maybe so, but I'm not lost."

But in my story 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. Or, as the U.S. government in the 1980s -- president and Congress -- 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 to everybody how nice it is in Cincinnati as well as how nice it is here. As now, anyone should be able to petition for an import restriction. But the focus of trade regulation should be the following question: Who in the domestic economy will benefit from the proposed restriction and who in the domestic economy will lose, and by how much? Then, get the economics right. The domestic economic costs of a trade-restricting action are as substantive as the gains. These costs have never been given legal substance because the legal profession has never been charged to do so, not because it cannot be done. A domestic loss and a domestic loser from an impediment to imports should have the same standing in law and in administrative procedures as a gain or a gainer -- including the administrative mechanics to petition for removal of an impediment to imports when that impediment compromises his or her economic interests.\textsuperscript{16} This is hardly a new notion. The idea that there are gains from trade, usually greater than the costs, has been around since Adam Smith. It is just that they have never been made legal in the United States.
25
Notes

The author wishes to thank Gary N. Horlick and Robert E. Hudec for thoughtful comments on an earlier version, and Ms. Nellie T. Artis for administrative and editorial help that has been invaluable. But only the author is responsible for opinions and interpretations expressed here, and for remaining errors.

1. In addition, there have been 259 other unfair trade practices cases. Most of these are under section 337 of the U.S. Trade Act and involve trademark or copyright infringement, false advertising, false designation of origin, and trade secret misappropriation. These cases follow procedures that are quite different from antidumping and countervailing duty procedures, and they are not analyzed here.

2. Two different treatments of withdrawn or terminated cases produce the same 11 percent figure. First, I left them out -- I counted only cases that came to formal determinations. Of these, 11.0 percent were negative and 89.0 percent were affirmative determinations. In my alternative calculation, I added cases that had been withdrawn or terminated by the Commerce Department to the cases with formal "negative" determinations and added the cases that had ended with negotiation of a restrictive agreement to the cases with formal "affirmative" determinations. The split then was 11.5 percent, 88.5 percent.

3. It is, of course, neither illegal nor immoral for someone to act from such motives. The Congress decides what the law will be, and every person has a right to attempt to influence what Congress ultimately decides. The administering agencies, instructed by the law and overseen by the courts, decide which petitions do in fact meet the conditions set by the law. Every person has a right to attempt to show that his or her circumstances fit the criteria for remedy that the law provides, and all analyses of the laws' administration indicate that they are honestly enforced. Of course, honest enforcement of a policy does not make it good policy.

4. I do not suggest that the public motive is "higher" on some moral scale than a private motive. I specifically chose to talk about requests that will be honored, not about requests that should be honored.

5. Cooper provides similar quotes from Presidents Franklin D. Roosevelt and Harry S. Truman.

6. This paragraph was included in the 1984 draft of Professor Hudec's study (pp. 98ff) but omitted from the published draft. I quote it here with the permission of the author.

7. The Court of International Trade later ruled that the 1984 act requires cumulation across antidumping and countervailing duty cases.


9. That the law must be generic does not mean that its administration will be influenced by factors that the law does specify. This matter is taken up later in the chapter.

10. I want here to bring to the reader's mind a familiar idea, not an unfamiliar one. Communicating the objective is an important part of instructing anyone on how to do a job. For example, a telephone receptionist might be instructed to take great care not to refer a caller to the wrong
person in the company. Or, he might be instructed to take great care to leave no caller on hold. How he does his work will depend on which objective is emphasized.

11. Proof of predatory effects or intent is not required in an unfair-trade case. As to intent, Harvey M. Applebaum ('98), an attorney who practices antitrust as well as trade law and contributes frequently to legal reviews, makes the point emphatically. "We next 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" (p. 412). As to predation actually being practiced, Palmeter (1988) concluded as follows: "No less a body than the United States Supreme Court has observed that 'predatory pricing schemes are rarely tried and [are] even more rarely successful' [Matsushita Electric Industry Company v. Zenith Radio Corporation, 475 U.S. 574, 589 1986]. 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" (1988, 6).

12. 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 stringent limits on what foreign sellers can do in the U.S. market than the U.S. antitrust laws impose on domestic sellers. For additional examples see Horlick (1989, especially section 3) and Palmeter (1989).

13. People with Treasury Department experience were a receptive audience.

14. A similar analysis of dumping and subsidy determination (Finger, Hall, and Nelson 1982) likewise found that influences not given expression in the law did not affect the determinations.

15. I owe this point entirely to Neville (1988). The major theme of his excellent paper is that the rhetoric of unfair trade provides an effective means for blame avoidance, for the executive as well as for the Congress.


Table 1 U.S. antidumping and countervailing duty cases and U.S. merchandise import shares, by country or trading bloc, 1980-88

<table>
<thead>
<tr>
<th>Country or group</th>
<th>Number of casesa</th>
<th>Cases as a percentage of total cases</th>
<th>Percentage of 1987 U.S. merchandise imports</th>
<th>Percentage of cases with restrictive outcomesb</th>
</tr>
</thead>
<tbody>
<tr>
<td>All countries</td>
<td>774</td>
<td>100</td>
<td>100</td>
<td>70</td>
</tr>
<tr>
<td>Developed countries</td>
<td>450</td>
<td>58</td>
<td>63</td>
<td>65</td>
</tr>
<tr>
<td>Developing countries</td>
<td>286</td>
<td>37</td>
<td>36</td>
<td>75</td>
</tr>
<tr>
<td>Eastern European countries</td>
<td>38</td>
<td>5</td>
<td>0.5</td>
<td>87</td>
</tr>
<tr>
<td>European Community</td>
<td>304</td>
<td>40</td>
<td>20</td>
<td>64</td>
</tr>
<tr>
<td>Brazil</td>
<td>56</td>
<td>7</td>
<td>2</td>
<td>79</td>
</tr>
<tr>
<td>South Africa</td>
<td>20</td>
<td>2.6</td>
<td>0.3</td>
<td>100</td>
</tr>
<tr>
<td>Korea</td>
<td>36</td>
<td>4.7</td>
<td>4.2</td>
<td>86</td>
</tr>
<tr>
<td>Mexico</td>
<td>35</td>
<td>4.5</td>
<td>4.9</td>
<td>91</td>
</tr>
<tr>
<td>Taiwan, China</td>
<td>29</td>
<td>3.7</td>
<td>6.1</td>
<td>62</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>1</td>
<td>0.1</td>
<td>2.4</td>
<td>100</td>
</tr>
<tr>
<td>Singapore</td>
<td>6</td>
<td>0.8</td>
<td>1.5</td>
<td>67</td>
</tr>
<tr>
<td>Canada</td>
<td>35</td>
<td>5</td>
<td>18</td>
<td>54</td>
</tr>
<tr>
<td>Japan</td>
<td>49</td>
<td>6</td>
<td>21</td>
<td>69</td>
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</tbody>
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a. Antidumping and countervailing duty cases completed during 1980-88.
b. Negotiated export restraints are counted as restrictive outcomes.

Source: Finger and Murray 1990.

Table 2 Countervailing duty and antidumping outcomes compared, 1980-89

<table>
<thead>
<tr>
<th>Country or group</th>
<th>Antidumping as a percentage of total number</th>
<th>Restrictive outcomes as a percentage of total cases</th>
<th>Negotiated export restraints as a percentage of restrictive outcomes</th>
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<tbody>
<tr>
<td></td>
<td>Antidumping</td>
<td>Counter-</td>
<td>Both</td>
</tr>
<tr>
<td>All countries</td>
<td>50</td>
<td>72</td>
<td>67</td>
</tr>
<tr>
<td>Developed countries</td>
<td>49</td>
<td>69</td>
<td>61</td>
</tr>
<tr>
<td>Developing countries</td>
<td>48</td>
<td>73</td>
<td>77</td>
</tr>
<tr>
<td>Eastern European countries</td>
<td>87</td>
<td>91</td>
<td>60</td>
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Source: Finger and Murray 1990
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