Trade Policy Harmonization: Too Much of a Good Thing?

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In seeking to resolve political, economic, and social concerns, Americans aspire to achieve fairness. And they do so with an almost religious intensity that is unique to the American character. While Americans often disagree as to what fairness means in a particular context, as the debates over affirmative action illustrate, they still insist that fairness ought to be the touchstone of public policy.

It was thus inevitable that notions of fairness would permeate the debates over our nation's international trade policy. Fairness in this context is often colloquially expressed as the need for the United States to be on a level playing field with its trading partners. A less hackneyed variation of the same concept is expressed in terms of the need to harmonize nations' differing economic regimes. As a guide for putting these concepts into practice, most Americans would, however, confidently assert that others should simply be more like us.

That our trade policy focuses on this intuitive notion of fairness, rather than on economic efficiency, vexes American economists and others as well. Although they do not oppose fairness as such, they believe that most people in the United States, and certainly those in government, have not rigorously analyzed how this notion of fairness impinges on particular international trade policy issues.

It is in this broad, important context that all who are interested in U.S. trade policy should applaud the superb two-volume collection of essays, *Fair Trade and Harmonization: Prerequisites for Free Trade?*, edited by Jagdish N. Bhagwati and Robert E. Hudec. Bhagwati, a professor of economics and political science at Columbia University, and Hudec, a law professor at the University of Minnesota, both rank among the most distinguished trade policy analysts in the United States, and both are perceptive and forceful advocates of what in political arenas is
called the "free" trade side of the debate. To their great credit, however, the book they edited is not a polemic, but rather a scholarly and sympathetic assessment of the political, social and even cultural sensibilities that give rise to calls for harmonization of national regulatory and economic policy schemes. In other words, this assessment responds to these calls for others to be more like us.

Bhagwati and Hudec have collected and sometimes written a series of essays, each a separate chapter and all with comprehensive endnotes, which are published in two companion volumes, one on the economic issues and the other on the legal issues involved in the harmonization debate. The essays are uniformly clear and concise.

Essays in each volume often address the same harmonization issue, such as the competitive implications of nations' having different environmental regulatory regimes, from either the economic or legal perspective. The editors properly acknowledge the substantial overlap between these two perspectives, as well as the utility of reading the two volumes by topic rather than sequentially. The two volumes provide an extraordinary reference source for the scholar or the practitioner seeking sophisticated but concise analyses of the origins and consequences of various trade policy issues.

In essence, the two volumes cover four different major harmonization issues: environment, labor, unfair pricing, and market access. To gain a full appreciation of the extraordinary merit of the two volumes, it is worthwhile to examine how some of the authors assessed each of these four harmonization issues, particularly from the legal perspective. Such an examination also reveals how the fairness debate plays out in each setting, both in how to define an unfair trade practice and what to do when one is found to exist.

ENVIRONMENT

Some economists doubt the wisdom of imposing uniform standards of production by means of international environmental agreements. But because there continues to be strong public sentiment for many more such agreements, it is important first to consider their trade policy implications. According to Professor Hudec, the current trade-and-environment debate involves three distinct areas of potential conflict between trade and environmental policies. Each presents its own fairness issue.

The first area of conflict arises either when domestic environmental regulations overtly discriminate against imports or when they have a manifestly burdensome impact on imports. If the burdensome impact of
those environmental regulations cannot be justified by some credible regulatory purpose, they can be attacked as trade barriers that violate GATT/WTO obligations. For example, one country’s food safety regulations can be seen by others as blatant protectionism. In a case presenting this very issue, the United States recently obtained a favorable interim ruling from a WTO panel in its challenge to the EU’s prohibition of imports of hormone-enhanced beef. ¹ Over time, WTO review of various nations’ health and safety regulations will surely produce some desirable harmonization in this area.

The second area of conflict can arise if countries with more rigorous environmental policies seek to “level the playing field” by imposing some kind of offsetting trade restriction, such as a countervailing (anti-subsidy) duty, against goods from countries with less rigorous, and hence less costly, environmental policies. For example, U.S. producers often raise this prospect, so far without success, with respect to imports from Mexico and China, among other countries. To these U.S. producers, it is simply not fair that their foreign competitors incur far fewer environmental regulatory costs than they do.

To U.S. labor leaders, lax environmental regulatory enforcement in developing countries appears to be one more reason why United States-based multinationals are shifting production from the United States to such countries. But one of the essayists, the economist John Douglas Wilson, after examining several economic models and hypotheses, questions whether lax environmental regulation in and of itself acts as a magnet for foreign investment. ² Rather, Wilson maintains that direct subsidies and tax breaks are more frequently and efficiently employed to attract or retain investment. He concludes that developed countries need not dismantle their environmental regulations to preserve their manufacturing base.

In any event, there is nothing in the GATT/WTO Code on Subsidies and Countervailing Measures (SCM Code) that authorizes the imposition of penalty duties to offset the failure of an exporter to impose rigorous environmental regulations. The SCM Code does, however, specifically permit governments to subsidize a modest percentage of the

1. See Gary G. Yerkey, WTO Issues Ruling Backing U.S. Claim EU Ban on Beef Imports, 14 Int’l Trade Rep. (BNA), No. 20, at 873 (May 15, 1997). The panel’s ostensibly confidential interim ruling found that the EU’s import ban violated the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, among others. Essentially, restrictions imposed on imports for health and safety reasons must be based on “sound science” and “not on socio-economic factors.”

cost of compliance with environmental regulations. This allowance, as a political as well as a legal matter, probably neutralizes the efforts of those seeking to countervail against countries with lax environmental regulations.

The third area of conflict arises when one country imposes trade restrictions against imports from another country in order to induce producers there to correct behavior that is causing environmental harm, regardless of whether that behavior confers an economic advantage to those foreign producers. A recent example of such a trade restriction was the U.S. embargo on imports of tuna from countries that allow their tuna fleets to use nets that cause the death of large numbers of dolphins. The principal objection to such "retaliatory" trade restrictions, as recognized in an affirmative GATT panel finding in the Tuna-Dolphin Case, is that the government threatening trade retaliation is seeking to regulate external matters beyond the appropriate reach of its national power, for example, by violating bedrock limits on the extraterrestrial reach of national law.

This third area continues to generate the most interest among trade policy analysts, in and out of government, as well as relentless opposition from much of the business community. This area also remains of keen interest to environmental policy groups around the world. For these sound reasons, Hudec pursues this area in greater detail than the first two.

Because of the virtual certainty that there will be pressures for more international environmental agreements with trade sanctions, the WTO Committee on Trade and the Environment is considering whether and how to harmonize the use of trade restrictions as enforcement mechanisms in those agreements while maintaining the basic GATT/WTO commitment to markets open to all on equal terms. Three major environmental agreements currently authorize such trade restrictions, the CITES convention, the Montreal

3. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 8.2(e), LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 27 (1994) [hereinafter, Marrakesh Agreement].


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Protocol, and the Basel Convention. Hudec observes that since each of these three agreements has been ratified by all or most of the GATT's most powerful countries, the conditions for GATT-legal accommodation of these agreements are quite favorable. To Hudec, the crucial issue still to be decided is exactly what kinds of legal accommodation should be made: What kind of international environmental agreements should be included? What kind of trade restrictions, for what kind of purposes? What specific form of legal accommodation is required or appropriate? And what, if any, conditions should the GATT impose?

Even if those difficult questions are resolved, Hudec correctly notes that there would still be a need to reconcile the GATT-legal rights of nonsignatories with the policies being advanced by international environmental agreements. To Hudec, this is a problem that cannot be resolved by conventional legal analysis. To be sure, if the principles of certain environmental agreements achieved the status of generally recognized international law, they might override GATT. But Hudec asserts that no such status can be claimed for international environmental agreements as a class.

Instead Hudec asserts that absent a higher legal authority, the GATT/WTO itself is the only competent authority that can define the status of the GATT-legal rights of its member governments. The GATT agreement gave rise to those legal rights, and it provides no other means to accomplish their interpretation, amendment, waiver, or abrogation. As a result, international environmental agreements cannot in and of themselves authorize departures from GATT rules.

Hudec argues that the GATT requires a structure that permits it to articulate its own policy toward these environmental trade measures without ignoring the practical reality that GATT/WTO is unlikely to be able to reverse or even modify the trade provisions of a broadly based international environmental agreement, once ratified. Hudec suggests that one good structure for doing so would be a legal rule that would have two "lines." On the first line, governments acting through GATT would draft rules which would define the appropriate compromise between the contractual rights of GATT nonsignatories who opted out of the environmental agreement and the protection of the environment; the WTO would then review agreements for conformity with these rules in the hope that the signatory governments would change the text for the


agreements to meet concerns raised, even though they would have no GATT obligation to do so. On the second line, the rules would provide an alternative procedure under which international environmental agreements submitted by the signatory governments could receive ad hoc GATT approval.  

After reading Hudec’s splendidly reasoned analysis of the legal framework appropriate for harmonizing international environmental agreements with basic GATT/WTO precepts, it seems both inevitable and just that there be more such agreements. However, the first and fourth chapters in Volume 1, the economic section written by Bhagwati, cause the reader to rethink settled assumptions about the desirability of international agreements that establish environmental norms.

Who would oppose saving dolphins by imposing an embargo on tuna caught with nets that kill dolphins? Would it not be right for the Mexicans simply to adapt their practices to conform with American, or multilateral norms? Bhagwati reminds us that this choice does not come without cost, to the Mexicans or to the world. “[G]etting Mexico to forgo the use of purse seines to catch tuna could save dolphins but reduce productivity in the [Mexican] tuna industry and adversely affect Mexico’s growth and its capacity to generate resources to spend more on other environmental problems.”

It does not follow, however, that Mexico would in fact spend more on other, more important environmental problems. That uncertainty makes it a bit harder than Bhagwati will admit for the U.S. citizen or U.S. policymaker, or her multinational counterpart, to exercise short-term regulatory restraint in the hope of long-term environmental welfare gains. The same logic applies to child labor in developing countries, as the next section of this review illustrates.

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9. See Robert E. Hudec, GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices, in 2 FAIR TRADE AND HARMONIZATION 95, 125 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996). Hudec notes that “[a] model for this two-line type of rule can be found in GATT Article XX(h), which creates an exception for GATT-illegal trade measures imposed pursuant to obligations in international commodity agreements, overriding the GATT rights of nonsignatories as well as signatories. The first part of Article XX(h) sets out its own first-line criteria as to the substance, structure, and negotiating procedure that commodity agreements must meet in order to qualify for a XX(h) exception. The second part goes on to provide that the exception may also apply to any commodity agreement submitted to the GATT Contracting Parties and not disapproved by them.” Id.

Today's impassioned discussions about workers' rights and wages in the global economy might lead one to think that the linkage between trade and labor issues is new. But recognition of the relationship between the fair treatment of workers and international competitiveness, as Virginia Leary of SUNY Buffalo Law School vividly reminds us, dates from the concern about the conditions of workers during the Industrial Revolution in Europe in the early nineteenth century. Even then, harmonization of national labor laws, on child labor for example, was perceived as necessary in order to improve the condition of workers in developed economies.

The debate is not much different today, except that its focus is broader. The focus now is not only on preserving U.S. jobs at decent wage levels in the face of lower-wage competition in other countries, but also on whether workers' rights in other countries can be improved through the use of trade sanctions even if U.S. jobs are not at stake. An example of the latter concern is reflected in demands to ban imports of oriental rugs made by child labor, even though there is no directly competitive U.S. industry.

Leary notes that the founding of the International Labor Organization (ILO) in 1919 and the ensuing adoption of multiple international labor conventions by the ILO are seen by many as turning points in the history of the relation between workers' rights and trade. Certainly, the ILO has contributed to the enhancement of workers' rights (and wages) in developed countries. But Leary still questions whether the ILO has helped ameliorate the conditions of workers elsewhere. Of course, some development economists ask whether and to what extent developed countries should impose their high standards on the poorer but growing economies of the developing world.

In its broadest terms, the labor-trade debate has generated calls for the inclusion of a "social clause" in international trade agreements as a means to raise wages and improve working conditions to the levels of the advanced industrial nations. This clause would link workers' rights to trade concessions. Proponents of the social clause argue that the export of goods produced under exceptionally bad working conditions results in "unfair" competition which will negatively affect the working conditions in countries with high labor standards, resulting in a "race to the bottom" and a deterioration of working conditions in developed countries. Other
proponents of the social clause appear primarily concerned with the appalling working conditions in many developing countries, casting the issue in human rights terms.

Opponents of the linkage of workers' rights and international trade contend that imposition of labor "regulatory" costs will frustrate the increase of exports from developing countries. They assume, often correctly, that increasing exports is one of the best ways to improve the economies of developing countries, and that such improvement naturally raises labor standards. Many note the inadequacies of this laissez-faire observation. They believe it precludes the possibility that some external prodding, with respect to the recognition of labor unions, for example, would accelerate improvement of working conditions without major job losses among the poor. Instead they ask what norms the developed world should impose on developing economies. Leary's thorough and perceptive essay helps frame answers.

Leary acknowledges that there is much confusion in the literature concerning the meaning of such broad phrases as "internationally recognized workers' rights" and "minimal international labor standards." Similarly, there is confusion as to which labor standards are being referred to in the debates over linking them with trade.

Leary argues that ILO standards provide the best starting points for defining these broad phrases because they have been accepted in a multinational forum. The ILO has established a priority among its many standards by referring to conventions on freedom of association and collective bargaining, on forced labor, on equal remuneration, and on discrimination in employment as "basic human rights conventions" which should be accorded priority in ratification and implementation. Leary notes that these conventions are the most widely ratified of all ILO conventions and those to which the ILO devotes the most attention.

The ILO, however, is not the only appropriate source for defining these broad phrases. For example, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights also enshrine basic principles of workers' rights, but they do so more extensively than the ILO. They include such broad and controversial objectives as the right to protection against unemployment and the

right to equal pay for equal work. Most economic policymakers would consider these objectives to be laudable goals, but if they were enacted as binding law, they would inhibit economic growth and do more harm than good to the very people they were intended to assist.

Do broad phrases that seek to establish "acceptable conditions of work" require the elimination of child labor? Leary notes that, although conventions on child labor are not included among the ILO's basic human rights conventions, the ILO Committee of Experts has considered certain serious cases of the use of child labor as bonded or forced labor. Because the concept of "acceptable conditions of work" is such a broad term, Leary believes it is nearly meaningless. But how should that phrase be defined? For example, fourteen ILO conventions have been adopted since 1949 on various aspects of worker safety and health. Leary asks whether the concept of "adequate conditions of work with respect to . . . occupational safety and health" follow the detailed provisions of ILO conventions and recommendations on the subject. If not, what criteria should be used to determine adequate standards relating to safety and health? What are adequate "minimum wages"? To Leary and most others, the process of determining adequate minimum wages in any particular country or industry seems exceptionally complicated and controversial.

Leary makes the important additional point that U.S. legislation giving certain duty preferences to imports from the Caribbean, as well as the annual State Department Reports on Human Rights, also suggest that "internationally recognized worker rights," should be defined in relatively broad terms. Moreover, the Clinton Administration's proposed bill to provide Carribbean Basin Initiative (CBI) beneficiary countries with textile and apparel export parity with NAFTA countries, would require the CBI countries to guarantee internationally recognized workers' rights. These include "the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of coerced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." President Clinton's September 17, 1997 Fast-Track treaty negotiation proposal also would

13. See Leary, supra note 11, at 215.
14. The Caribbean Basin Initiative law provides that, in determining whether to grant duty-free treatment to the country concerned, the President may take into account the extent to which workers are afforded "reasonable workplace conditions and enjoy the right to organize and bargain collectively." 19 U.S.C. § 2702(c)(8)(1994).
require the United States to seek to establish a mechanism to report on
the extent to which ILO Member States have promoted "core labor
standards."16

Finally, Leary notes that the Netherlands undertook an effort to de-
fine "minimum international labor standards" in the mid-1980s. Upon
request, the Netherlands National Advisory Council for Development
Cooperation advised the Dutch Minister of Development Cooperation on
the feasibility of incorporating a provision concerning "minimum labor
standards" into international economic and trade agreements.

The Dutch Advisory Council’s report sets an absolutist tone. It de-
finishes minimum labor standards, as those which "all countries ought to
introduce and observe under all circumstances." However, it also indi-
cates that there are minimum standards "in a relative sense which
develop more or less in line with economic growth."17 The Advisory
Council reviewed various ILO standards to determine which should be
incorporated in the definition of "minimum internationally recognized
labor standards." The Council’s report concluded that the standards in
eight ILO conventions (two conventions on freedom of association; two
conventions on forced labor; and conventions on discrimination in
employment, equal remuneration, employment policy, and minimum age
for employment) provided the baseline regulation of international labor
practices to be incorporated in international agreements.

Leary believes this report’s thoroughness and the depth of its analy-
sis of the links between international trade and international standards
make it essential reading for those concerned with workers’ rights and
trade policy. She is right because, in spite of the protests of many
economists and many business leaders, public pressure will continue to
grow for international agreements that improve workers’ rights, some-
times with trade sanctions applied to governments that do not.

Workers’ rights issues are perhaps even more emotional than envi-
ronmental issues because of their close association with human rights
concerns. Policymakers and economists should not, therefore, underes-
timate the impact on U.S. and European public opinion of vivid
 television images of child labor cruelties and worker safety abuses. In
the years ahead the most compelling arguments for minimum labor
rights will not be based solely on fears that imported goods from low-

16. See Clinton Fast-Track Bill Limits Scope of Labor, Environment Rules, INSIDE U.S.
TRADE, Sept. 17, 1997, at S-3, S-4. It is likely that the Republican Congress will water down
this section of the Fast-Track proposal somewhat.

17. National Advisory Council for Development Cooperation, Recommendation on
Minimum International Labor Standards, (Ministry of Foreign Affairs, Plein 23, The Hague,
Netherlands, Nov. 1984), quoted in Leary, supra note 11, at 217.
wage countries will destroy manufacturing jobs in high wage countries. Rather, articulate and well-educated participants in the service sectors of the economy, whose jobs are not directly threatened by sweatshops, are likely to be in the vanguard of raising labor rights issues as human rights issues.

The challenge for policymakers will be to make sure that emotional responses to powerful images of suffering do not impose unintended economic harm. This is why consumer boycotts alone are often not a sufficient response to products made from sweatshop labor. Opinion makers in the developed world need to work with international development institutions as well as developing country industries and governments to ensure that mandates improving working conditions do in fact improve the prospects of the wretched of the earth. For example, raising the minimum age for child labor would be an empty gesture if there were no schooling available for the newly liberated children. This once again illustrates that achieving "fairness" often involves more than the upward harmonization of standards.

UNFAIR PRICING

The controversies over what does and does not constitute anti-competitive behavior in international trade presents, at least to the business and labor communities, one of the most impassioned manifestations of the "fairness" debates. The fundamental concern is that low-priced products from domestic or foreign sources have the potential to drive incumbent producers out of business. These pricing issues typically arise in two related settings: one, the antidumping and countervailing duty (anti-subsidy) laws; and the other, the antitrust laws. Each set of laws is concerned with unfairly low pricing, but in significantly different ways.

One of the most stimulating essays dealing with the debate in this pricing context is provocatively titled "Antidumping and Countervailing-Duty Law: The Mirage of Equitable International Competition." The authors, Ron Cass, a former chairman of the International Trade Commission and now a law school dean and Richard Boltuck, an international trade economist and business consultant, stress the divergence of the definitions of unfair pricing.18 The import relief laws reflect an international political judgment that sustained transnational price

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discrimination ought to be deterred notwithstanding the consumer benefits of low prices. In contrast, the infrequent application of antitrust law to deter aggressive, if not predatory, low prices reflects a classic economic judgment that consumer welfare is best served by low prices.

This divergence is revealed most visibly in the required determination of whether the low pricing at issue is injurious. The antidumping laws focus on the welfare of incumbent domestic producers. The antitrust laws seek to preserve the competitive process, whether the competitors are domestic or foreign. Further, the antidumping law essentially proscribes sales below the fully allocated cost of production, while antitrust law only proscribes sales below marginal or average variable cost.

The antitrust laws thus recognize that price discrimination is a commercially legitimate activity. Economists and counsel for respondents frequently criticize the antidumping laws for failing to recognize this fact. Cass and Boltuck argue that the "fairness" ascribed to the antidumping laws is really just a manifestation of special interest pleading by a few industries in the manufacturing sector, and that these special interests have hijacked the emotive phrase "fair trade" for their own unfair use. In fact, they are concerned as well that manufacturing interests will advocate global standards of fair environmental or labor practice simply to protect themselves from aggressive price competition from foreign goods.

Cass and Boltuck downplay, however, a practical distinction between geographic price discrimination in a wholly domestic context and that occurring across national borders. In many cases involving exports from


20. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (noting "[t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured").

21. In determining whether and to what extent there are dumping margins, the U.S. Commerce Department, when calculating "normal value" (usually the home market price), must disregard sales made in an extended record of time and in substantial quantities which "were not at prices which permit recovery of all costs within a reasonable period of time." 19 U.S.C. § 1677b(b)(1)(B).

22. See Brooke Group Ltd., 509 U.S. at 222 (1993) (holding that below-cost pricing is necessary to a showing of an antitrust violation). Although Brooke Group did not provide the measure of pricing to be used in antitrust cases, most courts have adopted the marginal or average variable cost measure. For exposition of how the circuit courts have measured below-cost pricing in antitrust cases, see 2 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 255-262 (4th ed. 1997). In any case, Brooke Group does state that pricing must be below cost for a proper antitrust case.
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relatively closed markets, such as Japan and Brazil in the 1980s, U.S. firms could not counter a foreign producer's extra-low prices in the U.S. market by pricing their own exports extra-low for the putative dumper's home market. Such tactics reduce that foreign producer's cross-subsidization of low-priced U.S. sales with high-priced home market sales. Within the bounds of a single country, in contrast, such commercial cross-retaliation is relatively simple, and usually effective.

In free trade agreements and customs unions, where tariffs and other trade barriers are reduced among participating countries, such as with NAFTA, there should be no reason to maintain the antidumping remedy as a way to deter international price discrimination because the ostensible victim of dumping can readily retaliate in the dumper's home market. In fact, a bedrock principle of the Rome Treaty precludes the filing of antidumping cases by producers in one EU Member State against imports from another Member State. The Australia-New Zealand and Chile-Canada trade agreements have similar provisions, but NAFTA does not.

In any event, Cass and Boltuck argue that the antidumping laws have always been an inappropriate response to low-priced products exported by firms operating in closed home markets. They contend that the antidumping laws, in part by virtue of their very complexity, overcompensate for whatever harm might be caused by the foreign producers' low export prices. Here again frequent users of the antidumping laws, such as the steel industry in the United States, have disproportionately influenced the administration of these laws in many nations. Surely, this is not a desirable form of harmonization.

Cass and Boltuck's criticism of the protectionist bias of the antidumping laws is legitimate. But they do not recommend specific reforms, perhaps because they recognize the political futility of such an effort, particularly since many of these protectionist abuses are enshrined in the text of the GATT/WTO Antidumping Code itself.

Nor do Cass and Boltuck discuss whether, much less how, the United States and the EU should deal with the political and economic dilemma of the pricing of imports from non-market economies (NMEs) such as Russia, Ukraine and China. In the United States there is an


especially complex and unavoidably arbitrary method for constructing an equivalent to the so-called “normal value” against which the U.S. price is compared to determine ostensible margins of dumping by the non-market economy producer. But in both the United States and the EU, many cases involving low-priced non-market economy imports, particularly those involving steel and mineral products, are settled by the use of quotas or a combination of quotas and price floors. This, of course, produces allegations of so-called “managed trade,” which the U.S. and EU governmental officials should ordinarily seek to avoid.

However, no one seems able to devise a simpler, more rational scheme for calculating margins of “unfairly” priced NME imports; the countervailing duty law, for example, does not apply to NME cases. Yet, most trade lawyers, government officials, and perhaps economists, are unwilling to permit Chinese and Russian exporters to have indiscriminate access to foreign markets.

Perhaps the answer to the NME import dilemma lies in the WTO Agreement on Safeguards. The Agreement provides for merely temporary relief from import competition, with an eight-year maximum duration, and allows for negotiated combinations of quotas and tariff rises as part of relief remedy. But industries seeking relief under the U.S. safeguards law, also known as the “escape clause” law or as a Sections 201 proceeding, accurately complain that this law has a higher injury threshold than the antidumping law, that its application is subject to presidential veto on extraneous grounds, and that when invoked the United States must pay “compensation” in the form of trade liberalization on other products equivalent to the amount of import trade curtailed. Because the application of the escape clause law is inherently much less predictable than the antidumping law, it appears for the foreseeable future not to be a politically satisfactory substitute for the antidumping law.

25. 19 U.S.C. § 1677b(c); 19 CFR § 351.408.
27. In theory an antidumping order can be revoked after five years, but only if the affected foreign producers can make the difficult evidentiary showing that the injurious dumping is not likely to continue or recur if the order is revoked. See 19 U.S.C. § 1675(d).
28. Agreement on Safeguards, Marrakesh Agreement, supra note 3.
In addition to their excellent analysis of the protectionist bias of the antidumping laws, Cass and Boltuck also review the scope and application of the countervailing duty law, imposed to offset government subsidies. Originally designed to counter export subsidies, this law is now more frequently used to respond to all manner of production subsidies, from regional development grants to bail-outs of failing state-owned enterprises. As with the calculation of antidumping margins, the authors believe that U.S. officials magnify the unit value of those subsidies when calculating their offsetting margins. The difficulty these U.S. officials encounter when establishing the economic value of the subsidy undercuts their argument that they impose these offsetting margins to achieve fairness. The current debate over how the U.S. Commerce Department should determine the residual value of government subsidies to a state-owned enterprise after it is privatized illustrates their point.

In large measure the WTO Antidumping Code and the WTO Code on Subsidies and Countervailing Measures already reflect a harmonization of laws dealing with the competition presented by low-priced foreign goods. Additionally, more and more developing countries administer their own antidumping laws in a manner that resembles the complex and often arbitrary U.S. process. This is hardly a commendable form of harmonization, yet it is hard to blame developing countries for wanting to give the United States and the EU a taste of their own medicine.

Since the successful conclusion of the Uruguay Round of multilateral trade negotiations, there have been increasing calls for nations to harmonize their antitrust and competition policy laws as well. The United States has refused to join this chorus, rightly fearing a “dumbing down” of its own laws, particularly as aggressively applied to prohibit price fixing and market division and to foster competition in previously regulated areas such as telecommunications. Interestingly, the February 15, 1997 WTO Telecoms Agreement for the first time incorporates basic antitrust, pro-competitive precepts into the GATT/WTO body of legal norms; this may portend greater concern at the international level over competition policy values that focus on consumer welfare. But there is no prospect that this also portends meaningful pro-consumer changes in either the Antidumping Code or the SCM Code.

MARKET ACCESS: THE CASE OF JAPAN

The antitrust debate arises in another important international trade context. For at least twenty-five years some of the most contentious trade policy debates in the United States have involved Japan, particularly the perception that Japanese governmental and business institutions work together to keep the Japanese market relatively closed to U.S. exports and investment. U.S. critics decry this manifest lack of reciprocity, and cite Japan's need to apply antitrust precepts as a means of making its internal markets more competitive, and hence more receptive to foreign goods and foreign investment. It is here that the United States loudly and clearly says that Japan should be more American, and with good reason.

The harsh U.S. reaction towards Japan's closed economy seems to be subsiding, however. This is because Japan is slowly opening. But it is also because the relative importance of Japan is declining owing to maturation of the Japanese economy and to greater U.S. preoccupation with China and the Asian tigers. In any event, current debates about Japan are also important today because they inform the comparable debates and strategies about access to China and other developing countries reluctant to open up their markets to U.S. trade and investment.

Gary Saxonhouse and John McMillen, both noted economists, have each written informative essays on Japan. Saxonhouse's essay reviews the long history of unfair trade allegations against Japan, and McMillen's essay explains why Japan resists foreign market-opening pressures. Both authors examine specific market opening issues, and both resist easy generalizations.

Saxonhouse reviews various U.S. perceptions of Japanese trade barriers and asserts that the Japanese market is not as closed as many U.S. policymakers think. Saxonhouse also asserts that Japan's closed market is neither the result of illegitimate government policies nor unusual economic institutions (a point somewhat inconsistent with his prior point that the market is open).33

While his conclusions remain debatable, Saxonhouse does offer many clarifying factual conclusions, such as the erosion of ostensibly permanent intercorporate relationships under the keiretsu system.34 McMillen likewise makes some interesting observations about this system of relationships. He also graciously condemns the United States’

33. See Gary R. Saxonhouse, A Short Summary of the Long History of Unfair Trade Allegations against Japan, in 1 FAIR TRADE AND HARMONIZATION, supra note 2, at 393.
34. See id. at 497.
blanket criticisms as hypocritical, in part because U.S. firms, notably in the auto industry are adopting the same types of relationships.\textsuperscript{35}

McMillen is optimistic about the future of U.S.-Japan trade relations, quoting with approval the Australian political scientist Amelia George:

\begin{quote}
US [sic] pressure has become a powerful catalyst for change in the Japanese economy, polity and society. . . . In many respects the United States is an actor in the Japanese policy process: as a surrogate opposition party presenting the only true set of alternative to the government's, as an interest group representing the voice of Japanese consumers, and as an alternative powerbase for Japanese prime minister seeking to overcome both shortfalls in their factional strength and domestic resistance to change.\textsuperscript{36}
\end{quote}

McMillen then comments on the importance of trade liberalization generally, and import competition in particular. Quoting Bhagwati, he observes that most free trade works as an effective antitrust device; allowing imports is an easy way to remove the market power of a domestic monopolist.\textsuperscript{37} And he could have added that this in turn prevents the domestic monopolist from subsidizing low or dumped export prices though supra-normal profits in the home market.

The discussions of market access are unfortunately somewhat out-of-date even though the two volumes were published only last year. These discussions focus on U.S. efforts to open foreign markets, particularly Japan, through the notorious unilateral Section 301 and Super 301 processes, and through numerous bilateral sectoral discussions.\textsuperscript{38} In the past, one reason for the United States taking these controversial unilateral approaches to market access issues was because there was no remedy in practice under the GATT system to attack governmental policies that protected home markets from foreign competition. Specifically, the dispute resolution process in the GATT did not work, because the losing country could block adoption of an adverse finding. This prevented the prevailing country from withdrawing trade benefits from the losing country, unless and until the losing country changed its practices to conform with the finding.

This all changed with the successful completion of the Uruguay Round in 1994. Now dispute resolution resembles adjudication rather than diplomacy. There are even mandatory decision deadlines. Losing

\begin{footnotes}
\textsuperscript{35} See John McMillen, Why Does Japan Resist Foreign Market-Opening Pressure, in 1 FAIR TRADE AND HARMONIZATION, supra note 2, at 531.
\textsuperscript{36} Id. at 519.
\textsuperscript{37} See id.
\textsuperscript{38} See id. at 485-502.
\end{footnotes}
countries must now change their practices or face legitimate limited retaliation. This retaliatory capacity should go a long way towards resolving market access issues arising from governmental acts or practices.

There is, however, now pending a WTO dispute resolution proceeding brought by the United States against Japan that will test whether the WTO dispute resolution process can be used to address the realities behind closed markets in Japan. The proceeding raises the fundamental question of whether Japan's failure to use its antitrust laws to break down restrictive distribution practices in the private sector nullifies or impairs market-liberalizing commitments, such as tariff cuts, that Japan has made in multilateral trade negotiations. This is a test case in two major respects. First, it seeks to harmonize Japanese antitrust enforcement with what occurs (or is said to occur) in the United States and the EU. Second, and even more importantly, it directly addresses the issue of when inaction by a government can nonetheless be actionable under basic WTO agreements, as it surely would be under the specific regulatory precepts of the WTO Telecoms Agreement.

If the WTO panel agrees that the United States has stated a claim that falls within the jurisdiction of the WTO dispute settlement process, this will be seen as a victory for the use of antitrust as a market-opening device, whether or not the United States prevails on the actual merits of the case. If the WTO panel refuses to hear the case, on the basis that only non-governmental activity is at issue, then we can expect frustration if not fury from United States lawmakers that the newly improved WTO dispute settlement process remains ineffective in dealing with closed national markets.

CONCLUSION

Economists observe that many policies and practices labeled as unfair are in fact mislabelled or that the proposed remedies create more problems than they solve. Thus, the economists make an essential contribution to public policy in reminding us that our hearts often outrun our heads, sometime with unforeseen consequences.


40. The case involves the U.S. government's claim that Japan's restrictive distribution practices has prevented Kodak from making inroads into Fuji's dominant position in the Japanese photographic film market. See Japan Continues to Support Barriers to Foreign Film, U.S. Says, 14 Int'l Trade Rep. (BNA), No. 23, at 983 (Jun. 4, 1997).
But many economists seem to discount or ignore the value of the debates over fairness, and even the threats to take action against it. Time and again, the world has seen examples of countries improving their internal laws and practices in response to public outcry sparked by outsiders, some with very parochial interests. In any event, debate over when and how to respond to perceived unfairness will surely continue, and probably increase. And that is no bad thing.