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United States Trade Protectionism: Institutions, Norms, and Practices Symposium: The Political Economy of International Trade Law and Policy

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United States Trade Protectionism: Institutions, Norms, and Practices

*Michael Borrus**
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I. INTRODUCTION

Are United States commercial institutions and free trade norms out of step with its current international economic position? Since the close of World War II the United States has been a staunch defender of free trade. Its open trade policy encourages the elimination of barriers to the free movement of goods across national boundaries, supports private rather than state-owned or state-operated enterprise, and promotes multilateralism. This policy deviates sharply from the country's pre-war defense of trade protectionism, and was preceded by a critical change in institutional authority. In 1934 Congress relinquished direct control over tariffs and granted to the executive branch and its more insulated administrative bureaucracy the preponderance of authority over trade matters.[1] In retrospect, though, it is clear that both executive autonomy and liberal trade norms rested on United States economic and military superiority. The United States could be committed to free trade for the same reason that Mohammed Ali in his prime only needed a fair fight: no one could touch them.

To be sure, United States support for the post-war liberal trade regime was based on more than economic self-interest. An allied trading bloc went hand-in-hand with the United States security strategy. Economic gains throughout the alliance were expected from open trade. Post-war domestic political stability in Europe and Japan was predicated on a consensus favoring economic growth, not class conflict and political dispute over scarce resources. That growth depended on commerce, which would both ensure an expanding "pie" and entice the requisite consumer spending.[2] Today, neither the security interests of the United States, nor the premise of economic gains from open trade, has changed radically. Yet, the country's commitment to liberalism is under scrutiny, and the reason is simple. In a range of critical economic sectors from agriculture to microelectronics, United States producers are now facing tough competition.

The debate surrounding recent trade legislation, the increasing number and diversity of petitions for relief being filed under United States trade laws since the late 1970s, and the highly visible trade problems of United States automobile, steel, textile, and semiconductor

[1] Reciprocal Trade Agreements Act of 1934, Pub. L. 73-316, ch. 474, Stat. 943 (codified as amended at 19 U.S.C. §§ 1001, 1201, 1351-54 (1982)). For a comprehensive survey of the current trade laws, see HOUSE COMM. ON WAYS AND MEANS, SUBCOMM. ON TRADE, OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAWS, H.R. DOC. NO. 40, 98th Cong. 2d Sess. (1984)[hereinafter CURRENT PROVISIONS].

[2] *See generally* Maier, *The Politics of Productivity: Foundations of American International Economic Policy After World War II*, 31 INT'L ORG. 607 (1977).

producers, all attest to the diminishing competitive advantage of United States industries.[3] These factors have convinced most trade analysts that the United States is on the road to protectionism.[4]

Hopes that pressures for protection would abate with the declining exchange rate of the dollar have been dimmed by the surprising persistence of massive trade deficits. After years of lackluster productivity growth, plunging net domestic investment rates, and mounting public and private consumption, United States dollars sent abroad to purchase imports during a consuming frenzy have flowed back in the form of massive indebtedness to foreign lenders, totalling almost $400 billion by the end of 1987.[5]

In the long run, debts must be paid off through export earnings. When debt payment occurs, presumably the United States fervent faith in free trade will be restored and the country's stroll toward protection will be halted. Critical questions then emerge. At what declining exchange value of the dollar will the country's accounts start generating a surplus? At what level of foregone consumption will the quality and competitiveness of the country's products be revived? At what apprecia-

[3] For testimony relating to this problem, see congressional hearings held during 1987 by the Senate Finance, House Ways and Means, and Joint Economic Committees: *Dual Pricing of Natural Resources: Hearings on S. 1292 and S. 1356 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance,* 99th Cong., 2d Sess. (1986); *Employment, Productivity and Int'l Trade: Hearing Before the Senate Comm. on Finance,* 99th Cong., 2d Sess. (1986); *Remedies Against Dumping of Imports: Hearings on S.1655 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance,* 99th Cong., 2d Sess. (1986); *Proposals to Reform the Escape Clause: Hearings Before the Senate Comm. on Finance,* 99th Cong., 2d Sess. (1986); *Possible New Round of Trade Negotiations: Hearing Before the Senate Comm. on Finance,* 99th Cong., 2d Sess. (1986); *State Trading Enterprises: Hearings on S. 2660 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance,* 99th Cong., 2d Sess. (1986); *Trade Reform Legislation: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means,* 99th Cong., 2d Sess. (1986). For the number and diversity of trade petitions filed, see the databases of the United States Trade Representative ("USTR") and the United States Department of Commerce, as well as the 28th Annual Report of the President of the United States on the Trade Agreements Program (1984-85).

[4] *See, e.g.,* M. KRAUSS, THE NEW PROTECTIONISM (1978). The numbers seem to support these conclusions. In 1975, import tariff protection above GATT-negotiated levels, orderly marketing and voluntary export restraints, and quotas affected about 8% of United States merchandise imports. N.Y. Times, Jan. 18, 1987, at E5 (data developed by the Institute for International Economics). By 1985, this figure had risen to about 22%. *Id.* However, this 1985 figure does not hold general tariff levels constant, nor account for the reduction in overall tariffs due to the Tokyo Round agreements. If considered, the computation for increases in the level of protection in 1985 would be considerably less.

[5] Productivity growth was 0.6% annually during the 1970s and only 0.4% during the 1980s; net private domestic investment averaged 6.9% of GNP during the 1970s, and only 4.7% from 1980 to 1986. *See* Peterson, *The Morning After,* THE ATLANTIC, Oct. 1987, at 43, 44; *see also* Ray, *Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers,* 8 NW. J. INT'L L. & BUS. 285, 293-95 (1987)(illustrating a link between declining economic statistics and rising levels of protectionism in the United States).

bly lowered standard of living will the country's foreign debt finally stop expanding? These remain unanswered questions. Unanswered too is to what extent and on what terms other economies will be able and willing to absorb the products the United States must export in order to generate the necessary earnings. One thing is certain: the domestic adjustments necessary to balance the trade deficit will strain, and perhaps even undermine, United States social, economic, and political harmony. How well the norms and institutions[6] of United States trade policy will comprehend, adapt to, and help dissipate the enormous strains of adjustment confronting the nation is the central question posed in this Article.

This Article argues that substantial changes in both international trade norms and institutions are necessary if successful and coherent adjustment is to be accomplished. These changes have not yet begun. Rather, the protectionist views of the liberal, free-trade consensus of the early post-war years, and the free trade-enabling adjustment programs of the Great Society all remain embedded norms in existing trade laws. These three periods of United States history left a legacy of institutions and ideas that frame all trade issues as a dichotomy of free trade versus protection from unfair competition. The problem with this legacy is that neither category is able to place in an appropriate context either the challenges confronting United States industry or the policy actions needed to deal effectively with those challenges today.

The recent problems faced by the United States semiconductor industry best illustrate the limitations of current institutions and ideas. As a high-tech growth industry nurtured by early United States defense and

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[6] Throughout this Article, a number of terms are used to clarify the process of trade legislation and policy. *Ideas* are beliefs of fact, causation, and rectitude which frame a community's debate of and response to a particular issue. *See* Goldstein, *Ideas, Institutions, and American Trade Policy*, 42 INT'L ORG. 177, 180 n.6 (1986)[hereinafter *Ideas*]; Krasner, *Structural Causes and Regime Consequences*, 36 INT'L ORG. 185, 186 (1982). Ideas about economic policy are combined with values or beliefs on correct courses to comprise *norms*, or ideas with a normative character. More precisely, norms may be defined as "standards of behavior defined in terms of rights and obligations." *Id.* This Article argues that norms are embedded in institutions in order to establish them as secure solutions to an issue, and shelter the solutions from political forces which differ with the norms' application to a future issue. An *institution* is a set of rules, compliance procedures, and moral and ethical behavioral norms designed to constrain the behavior of individuals. D. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 201-02 (1981). Thus, ideas about economic phenomena, imbued with value, affect the form, function, and scope of economic institutions.

Ideas and norms exist not only within the institutions, however, but in society as well. Indeed, the original norms embedded in institutions are derived from the society which originally established the institutions in question. At any given time, therefore, the norms of society may be inconsistent with the "earlier" norms embedded in existing institutions. *See infra* note 12 and accompanying text; *see also* J. Goldstein, Crisis Politics: The Effects of Ideas and "Fortuna" on Political Institutions (Sept. 1987)(paper presented at the 1987 Annual Meeting of the American Political Science Association)[hereinafter Crisis Politics].

space policy, and until recently dominated by domestic producers, the United States microchip industry should be a strong pillar supporting the United States position in the world economy. Instead, the semiconductor industry is an industry fighting for its life. This Article argues that United States trade policy has largely failed to understand and address the industry's competitive plight.

This Article first explores the origins and evolution of existing trade norms and institutions.[7] Then, as an example of the pressures on and potential responses open to United States industry, the Article turns to the recent experiences of the United States semiconductor industry.[8] The Article concludes with some thoughts on the future of trade policymaking institutions, including the insight that the failure in United States trade policy has been in part due to the lack of ideas on how the United States should respond to foreign competition in a burgeoning world economy.[9]

II. Legacies from the Past

Despite the United States international economic difficulties, in the short term the nation's general commitment to open trade is likely to prove at least as persistent as its trade deficit. The explanation for this apparent paradox lies in the organized political support for open trade, the short-run unresponsiveness of government to demands for change in existing norms and institutions, and the enduring ideological strength of the idea of free trade.[10]

First, although the overwhelming consensus among United States

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[7] *See infra* notes 10-113 and accompanying text.

[8] *See infra* notes 114-139 and accompanying text.

[9] *See infra* sec. V, at 363-64.

[10] This article takes one of two approaches which dominate the study of trade policy. The first, associated with the field of international politics, argues that a nation's trade policy reflects its relative power position. The "power" of a nation depends on the relative size of the state and the distribution of commercial power among trading partners. Variations in national endowments will influence a nation's trading "power." Such power translates into differing commercial strategies. *See* D. LAKE, POWER PROTECTION AND FREE TRADE: THE INTERNATIONAL SOURCES OF UNITED STATES COMMERCIAL STRATEGY, 1887-1939 (forthcoming 1988); Keohane, *The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967-1977*, in CHANGE IN THE INTERNATIONAL SYSTEM 131 (O. Holsti, R. Siverson & A. George eds. 1980); Krasner, *State Power and the Structure of International Trade*, 28 WORLD POL. 317 (1976). This approach personifies states as single rational actors with specific preferences, and is useful in defining the outer boundary of permissible state action in trade. It does not, however, explain why states subject to the same international constraints or having comparable amounts of power adopt vastly different trade policies.

The second approach—of which this Article is a subset—attempts to explain different reactions of similarly situated states, by focusing on the domestic component of trade policy. This approach

business during the early 1960s favoring open trade is no longer intact, there are still a substantial number of industries that perceive their futures in access to global markets.[11] These include: 1) most of the multinational insurance, banking, securities, and other financial services sectors; 2) the electronics, chemicals, pharmaceutical, and energy industries; 3) agriculture; 4) aerospace; 5) the emerging United States producers of new materials and biotechnology; 6) the automobile industry; and 7) almost all United States multinational companies. Together, these and other industrial players exert strong and vocal political pressure in favor of maintaining the United States commitment to open trade.

Second, even where well-organized opposition to open trade exists, the norms that have developed and the institutions which have been created to implement the United States trade policy do not necessarily respond to the opposition.[12] Demands for trade relief are processed through existing institutional channels and adjudicated according to es-

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adopts an interest group or economistic perspective, and centers on the ability of groups to enact state policies which favor their product over foreign competitors in home markets.

Two intellectual strains are intertwined in segments of this latter approach. The first, associated with Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), suggests that in the absence of transaction costs, rational individuals will enter into exchanges necessary to reach efficient results, regardless of the institutional context. State policy emerges as an equilibrium from the opposing efforts of those who want a protectionist policy and those who represent interests in free trade. For a review of the cost-of-protection literature, see Corden, *The Costs and Consequences of Protection: A Survey of Empirical Work*, in INTERNATIONAL TRADE AND FINANCE (P. Kenen ed. 1975); *see also* Brock & Magee, *Tariff Formation in a Democracy*, in CURRENT ISSUES IN COMMERCIAL POLICY AND DIPLOMACY 1 (J. Black & B. Hindley eds. 1980); Brock & Magee, *The Economics of Special Interest Politics: The Case of the Tariff*, 68 AM. ECON. REV. 246 (1978).

The second intellectual tradition arises from the work of Mancor Olson. M. OLSON, THE LOGIC OF COLLECTIVE GOODS (1965). Here, interests do not automatically translate into policy outcomes since groups vary in their ability to organize effectively. Analysts within this genre have focused on both the origins of demand and on the incorporation of social interests in public policy, either through Congress, *see* R. BALDWIN, THE POLITICAL ECONOMY OF U.S. IMPORT POLICY 33-77 (1985); R. BAUER, I. POOL & L. DEXTER, AMERICAN BUSINESS & PUBLIC POLICY (1972); E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF (1935), or through the control of bureaucratic agencies, *see* Baldwin, *Rent-Seeking and Trade Policy: An Industry Approach*, 120 WELTWIRTSCHAFTLICHES ARCHIV 662 (1984); Finger, Hall & Nelson, *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 452 (1982).

[11] On the early 1960s consensus which these authors identify, see generally R. BAUER, I. POOL & L. DEXTER, *supra* note 10.

[12] Within the institutional genre, scholars are far from uniform in their appraisal of the sources and longevity of institutional independence. Most argue that institutions may be independent in the short run, but that they must ultimately respond to a set of underlying forces. Where they are seen to be bound by international constraints, state institutions can be modelled as independent of domestic social constituencies. Institutional development is then understood to be part of either a sociological, macro-historical, or mystical process. *See Shepsle, Institutional Equilibrium and Equilibrium Institutions*, in POLITICAL SCIENCE: THE SCIENCE OF POLITICS 51, 66, 76 (H. Weisberg ed. 1986). State institutions will vary in their ability to extract necessary resources from society with which to compete in international politics, *see* Katzenstein, *Between Power and Plenty: Foreign Economic Poli-*

tablished norms. Both processes act to filter and contextualize interests. Thus, the responsiveness of policy to changing social needs is constrained, and interest group pressures to change established policy may be ignored.

Institutions arise from agreements among groups and individuals to overcome some collective action problem, efficiently meet a social need, or compromise among competing interests. Institutions are "sticky;" over the structure and agenda of any institution looms the "deal" that was originally struck to create it. Early agreements and compromises made between parties which established the institution influence the institution's later policies. Thus, trade institutions themselves legitimate certain claims for aid—their establishment laid down the "rules" under which groups would vie for the benefits of protection. To be sure, these rules reflect some societal values and interests, but they often do not reflect *contemporary* beliefs and interests.

One of the pillars of United States government, the separation of powers, makes it extremely difficult to effect rapid change in institutional structures.[13] This institutional lag is not necessarily counterproductive. If institutions are to be effective, those established to overcome some collective action problem or concern must lack responsiveness to the individual interests which suffer most from their creation. Institutions act as a mechanism to foreclose cheating. Translated into trade policy terms, Congress delegated power to the executive branch to set tariffs, partly to protect the economy from the ill effects of log-rolled tariffs.[14] The change in thinking by members of the legislature was striking.

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cies of Advanced Industrial States, 31 INT'L ORG. 587 (1977), but to survive, states ultimately must respond to external changes in the international system.

The institutional analysis of other scholars, including that of Professor Goldstein, focuses on the development of institutions in response to domestic constraints. Under this approach, institutions reflect what Riker refers to as "congealed tastes." Riker, *Implications from the Disequilbrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 455 (1980). Institutions are a constancy mechanism for social preferences that otherwise would not exist. The definitive work on social preferences is that of Arrow, *Statistics and Economic Policy*, 25 ECONOMETRICA 523 (1957). Institutions are mechanisms for inducing stability in unstable social systems. Institutions establish rules which influence their future behavior and make certain outcomes or social deals more viable than others. Social groups are then forced to act strategically based on the rules encased in these institutions.

[13] For example, an institution like the electoral college is able to continue though it enjoys little domestic support. For further discussion of institutional "lags," see Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, 37 INT'L. ORG. 497, 501 (1982).

[14] The abdication of tariff-making power by Congress in the Reciprocal Trade Agreements Act of 1934 was one of the more unusual events in congressional history. The fear that congressional intervention would lead again to high tariffs, and possibly another Depression, motivated Congress to transfer to the President its traditional prerogative. *See* E. SCHATTSCHNEIDER, *supra* note 10, at 25 n.14, 149, 153; J. Goldstein & W. Lowry, Aggrandizement or Abdication: Congressional Delega-

Third, "ideas" may survive far longer than the competing interests which gave rise to the ideas in the first place. The development of institutional structures coincides with the development of a legitimating ideology—a conception of causation or knowledge under which the institution was established. The acceptability of an institution's decisions depends on the legitimacy of its *ideology* and *values* to its constituents.[15] Analysis of institutions, then, requires a separate, but critical evaluation of the norms which accompany those structures. These underlying values and ideas, either alone or in conjunction with institutions, influence the direction and speed of policy change. For example, the value of government non-intervention in the area of trade comes from a generations-old consensus. However, there is a dawning recognition that in many international markets, active government promotion actually helps domestic industries to compete and can leave the domestic economy better off than if it were entrusted solely to the "invisible hand."[16] This glimmer of recognition has not brought about a normative change in the institutional approach. The value of government non-intervention remains embedded. An alternative trade paradigm does not yet exist for the United States, and unless an adequately defined replacement emerges, the ideological commitment to open trade will outlive the political support which sustained it in the past.[17]

Given the self-interested domestic political support for free trade, its institutional embodiment in law and bureaucracy, and the enduring power of the idea of free trade, it is not surprising that there is only one ideology available today. This ideology frames the trade debate in terms of free trade or unfair trade. Only if foreign practices fall into these categories do claims for protection become legitimate.

The unfortunate result of the dichotomy between free/fair trade and unfair trade is that the problems of United States industries today con-

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tions of Power (Sept. 1987)(paper presented at the 1987 Annual Meeting of the American Political Science Association).

[15] Just as people adhere to contracts because they are considered "just," institutional decisions and policies are accepted because they are seen as "fair." Without legitimacy of an institution's underlying ideology and values, enforcement costs undermine all but self-enforcing relationships between the institution and its constituents. *See* J. Goldstein, Crisis Politics, *supra* note 6.

[16] *See generally* Krugman, *Introduction: New Thinking About Trade Policy,* in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (P. Krugman ed. 1986).

[17] At least two forces are acting to keep free trade policy intact. First, in the United States the organization of government itself acts to slow policy change. Second, the separation of powers, overlapping mandates, and bureaucracy all make policy reform slow and incremental. The policy cannot change unless a viable alternative set of ideas and norms exists regarding how policy could and should be reorganized. Thus, even if analysts agree that trade policy is in crisis, the general slowness of institutional change and the lack of an alternative idea to liberalism precludes a radical shift in United States commercial policy.

front a stagnant set of legal and normative categories. These categories uphold the idea of free trade rather than allow a dynamic approach with the capacity to meet the actual needs of the industries. The institutional norms of the past, reflected in current trade law and bureaucracy, have an enduring impact on policy.[18] Thus, a contracting industry like steel, a recovering industry like autos, and a growth industry like semiconductors all must fit their quite different problems into the same legal categories.

III. THE GENEALOGY OF NORMS

Three intellectual traditions have influenced United States trade policy since the Civil War. The first period—the "mercantilist" era—begins around the late nineteenth century and the United States entrance into world commerce. In this period United States decisionmakers, answering to domestic interests, understood trade to be essentially a one way street, where the United States would benefit from increasing demands for domestic products but reciprocal penetration of the United States market was not a concern. This period gave birth to a set of trade statutes which attempted to combat unfair trade practices in other countries for the benefit of United States producers. Congress was the most active trade institution in this period, where constituent demands were answered through higher tariffs and other forms of aid.[19] During this time, imports were not viewed as a source of cheap foreign goods, a "carrot" for reciprocal lowering of other nations' trade barriers, or a financial mechanism to allow debtor countries to earn dollars. Protectionism and autarky were the dominant ideas of the day and were defended on grounds ranging from the defense of infant industry to a fear that trade would impoverish United States labor.

The second formative period for trade policy occurred in the 1930s when neo-classical or liberal economic notions of trade came to dominate ideas of protectionism. Association of the Smoot-Hawley tariffs[20] with the Great Depression led policymakers to conclude "that the U.S. could no longer use tariffs to help non-competitive industries; the economic and political ramifications of ignoring market forces were too great. Politically this meant that short-term political forces, in the form of powerful

[18] This point is made by many practitioners, among them former United States Deputy Trade Representative Alan Wolff. *See* Wolff, *International Competitiveness of American Industry: The Role of U.S. Trade Policy*, in U.S. COMPETITIVENESS IN THE WORLD ECONOMY (B. Scott and G. Lodge eds. 1985).

[19] *See id.* at 194-360; *see also* J. BARTON & B. FISHER, INTERNATIONAL TRADE AND INVESTMENT 94 n.9 (1986).

[20] Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (1930).

and articulate industrial interests, could not dominate in trade matters."[21] This conclusion permitted two crucial conditions for fundamental policy change to occur, even though it has been shown that high tariffs merely exacerbated existing structural problems in the world economy.[22] First, protectionism was discredited as the intellectual basis for trade policy.[23] Second, institutional responsibility for the setting of tariff levels was shifted from Congress to the executive branch[24] and the adjudication of petitions for import relief was vested in the International Trade Commission ("ITC").[25]

While the Great Depression in the United States had served to invalidate protectionism, a coherent alternative was not immediately available. The lessons were initially more modest. Protection from market forces would not automatically or politically be granted. Industries demanding aid would have to plead their cases through relatively more independent institutions and quasi-judicial procedures.[26] Congressional delegation of authority to dispense tariff protection assured a general commitment to trade liberalism, while guaranteeing to New Deal industries continued rapid growth and competitive strength unfettered by the complications of congressional, pork-barrel decisionmaking.[27]

Besides the mercantilist and liberal periods of United States trade policy, a third era arose in the 1960s. Congress legislated a set of redistributive "welfare" policies as a response to ailing United States industries which were suffering under the competitive pressures of international markets. These redistributive measures became a necessary part of the liberalization process, though intellectually they were not different from domestic programs associated with the New Deal and the Great Society. Those that suffered economic dislocation due to the loss

21 Goldstein, *The Political Economy of Trade: Institutions of Protection,* 80 AM. POL. SCI. REV. 161, 165 (1986)[hereinafter *Institutions*].

22 *See* C. KINDLEBERGER, THE WORLD IN DEPRESSION 1929-1939 305-06 (1973).

23 "Intellectual traditions take hold at moments when prevailing analysis is shown to be deficient. As the political community searches for a new and, it is to be hoped, more successful approach, alternative theoretical frameworks are seriously examined and can be used to explain and codify policy decisions." Goldstein, *Institutions, supra* note 21, at 164. After Smoot-Hawley, the time was ripe for the institutionalization of a liberal trade norm as an alternate to the discredited mercantile philosophy.

24 Reciprocal Trade Agreements Act of 1934, Pub. L. No. 98-57, ch. 474, 48 Stat. 943 (1934).

25 Tariff Act of 1930, Pub. L. No. 71-361, ch. 497, § 337 (codified as amended at 19 U.S.C. § 1337 (1982)).

26 This may have been the impetus for empowering the independent ITC to rule on the merits of industrial claims for protection and the more autonomous President to set tariffs in line with the national economic interest.

27 This mirrored congressional attempts to delegate in other areas, for instance in the regulatory power area at issue in Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

of comparative advantage could receive compensation from an ever-expanding economy. The idea was that liberalism brought prosperity to all and that those who suffered from adjustment problems deserved some of the wealth of the majority.

The welfare era of trade policy was immediately preceded by a number of powerful industries beginning to feel the strains of foreign trade. Elected leaders had to be responsive to their demands. Since protectionism fell outside the political agenda, the adjustment assistance response was created. Programs which refinanced industry and paid off laborers were inaugurated in the 1960s to keep liberalism alive.[28] Though the redistributive policies contained the seeds of a policy alternative to the free trade-unfair trade dichotomy, trade adjustment policies never fully developed as such.

In sum, today's policy landscape is composed of the norms and institutions from three distinct historical periods. The legislation developed in each of these periods will now be examined to show how differing notions of protectionism co-exist in United States law.

A. Free Trade: Escape Clause Legislation

First instituted by Executive Order in 1947 and incorporated into statute in 1951, the United States has always included "escape clauses" in trade treaties and legislation[29] in order to allow "the President to withdraw or modify trade concessions and impose duties or other restrictions on imports of any article which causes or threatens serious injury to the domestic industry producing a like or directly competitive article, following an investigation and determination by the International Trade Commission."[30] Initially, the escape clause was designed to accomplish what the old "peril point" had failed to do, that is, to keep imports at a level which precluded injury to domestic producers.[31] The concept of the escape clause was first used as a provision in a 1942 trade agreement with Mexico.[32] The idea reappeared in the ongoing debate over the Trade Agreements Act of 1945 as a compromise by the executive following congressional transference of increased tariff-making authority.[33] The result

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28 *See infra* notes 95-113 and accompanying text.

29 Trade Agreements Extension Act of 1951, Pub. L. No. 50-141, § 7(a), 65 Stat. 72 (1951); Exec. Order No. 10,004, 3 C.F.R. 819 (1943-1948).

30 CURRENT PROVISIONS, *supra* note 1, at 62.

31 *See generally* S. METZGER, TRADE AGREEMENTS AND THE KENNEDY ROUND 39-54 (1964)(discussing peril points and the escape clause as safeguards against injury).

32 Agreement Between the United States and Mexico Respecting Reciprocal Trade, Dec. 23, 1942, United States-Mexico, art. XI, 57 Stat. 845-46, E.A.S. No. 311 (terminated in 1950).

33 Trade Agreements Act of 1945, 59 Stat. 410 (1945). *See* Ris, *"Escape Clause" Relief Under*

was Executive Order 9832,[34] which established that all future trade agreements were to include escape clause provisions.[35]

To assure congressional assent, the United States backed inclusion of an escape clause provision similar to that in its domestic law, in the General Agreement on Tariffs and Trade ("GATT").[36] The provision, Article XIX, was reputedly condemned by President Truman as "an embarrassment to be avoided in the interest of maintaining an image of United States leadership and dependability in world and foreign affairs."[37] Once in place, however, the United States was the first to invoke the escape provision four years later in a case involving hatter's fur.[38] Prompted by the United States, the GATT Council held that the United States was "entitled to the benefit of the doubt" in its estimation of criteria of injury.[39] This somewhat loose interpretation of Article XIX led to the prediction that the liberal tenets of GATT would be defeated in an onslaught of cases using a nation's own definition of injury as grounds for protection. However, the use of Article XIX to escape liberalization by the United States or any of its trading partners has been limited. The magnitude of changes in trade patterns over the postwar period has not been reflected in use of the article. In effect, unilateral and bilateral tactics have substituted for the multilateral discipline of Article XIX.

Although the original intent of the escape clause procedure was frozen into GATT rules, its domestic United States counterpart has evolved over time.[40] Much of the original program remains.[41] A quick examina-

the Trade Act of 1974: New Standards, Same Results, 16 COLUM. J. TRANSNAT'L L. 297, 299 (1977); *see also* Goldstein, *Ideas*, *supra* note 6.

34 3 C.F.R. 126 (1974).

35 *See* Ris, *supra* note 33, at 299.

36 General Agreement on Tariffs and Trade, art. XIX, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. There have been seven major rounds of tariff and trade negotiations under the GATT. *See* Matsushita, *A Japanese View of United States Trade Law*, 8 NW. J. INT'L L. & BUS. 29, 30-31 (1987).

37 *See* Ris, *supra* note 33, at 300.

38 *See* Hatter's Fur Case, TC Pub. 82, Inv. No. 7-115, TEA-I-3 (March 1963).

39 *Id.* GATT, *supra* note 36, arts. XXII, XXIII. For a discussion of the international dispute settlement procedures under GATT, see J. BARTON & B. FISHER, *supra* note 19, at 453-54.

40 The current version of "§ 201" is found in the Trade Act of 1974, Pub. L. No. 93-618, § 201, 88 Stat. 1978 (1975)(codified as amended by the Trade and Tariff Act of 1984, 19 U.S.C. § 2251 (1982 & Supp. II 1985)). Escape clause procedures have been re-examined four times since the original version was set forth in the Trade Agreements Extension Act of 1951, ch. 141, §§ 6-7, 65 Stat. 72 (1951). *See infra* notes 42-47 and accompanying text. Each re-examination saw varying degrees of adjustment of the statute's procedures and criteria by Congress.

41 Under § 201, an escape clause investigation by the ITC (originally the United States Tariff Commission) will commence upon a request from the President, the Senate Committee on Finance, the House Ways and Means Committee, the USTR, or upon an ITC motion or an application from an interested party (industry, unions, or trade associations). 19 U.S.C. § 2251(a). In its escape clause investigation, the ITC seeks "to determine whether an article is being imported into the

tion of the changes in the remedy since 1951 demonstrates that, although Congress repeatedly adjusted the procedures and criteria necessary for relief, ultimate authority over tariff protection remained vested in the President, and due to that control, the provision's enforcement has never appreciably inhibited trade liberalization.

One major evolution of the escape clause provision was from a provision initially protecting against injuries from trade agreements and concessions into one protecting against any kind of import injury.[42] Another interesting change over the years was the adjustment by Congress of the degree to which increased imports actually contributed to the injury or threat of injury to a domestic industry.[43] A third example of adjustments by Congress since 1951 are the statutory factors the ITC considers when determining serious injury. In this case the adjustment was one of general focus, not a heightening or lessening of degree.[44]

United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2251(b)(1).

This statutory determination includes "all economic factors which [the ITC] considers relevant," including: 1) the extent to which productive facilities are idled; 2) the extent to which sales of the industry have declined; and 3) the extent to which an industry's market share has declined in the presence of increase imports. 19 U.S.C. § 2251(b)(2)(A-C). After a public hearing by the ITC, a decision on relief is rendered complete with recommended levels of relief. 19 U.S.C. § 2251(c-d). After the report is delivered to the President, the President decides whether to give tariff relief or deny relief because of harm to the national economic interest. 19 U.S.C. § 2252.

42 *Compare* Trade Agreement Extension Act of 1951, § 6 (aimed at increased imports due "as a whole or in part" to trade concessions granted another country by the United States) *with* Trade Act of 1974, 19 U.S.C. § 2251(b)(aimed at injury arising from any kind of increased imports). The transition from specific aim to general protection actually came after Congress first demanded, in the 1962 law, a stricter causal connection between the increased imports and a trade concession of the United States. *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301, 76 Stat. 872 (1962)(stipulating that increased imports must have resulted "in major part" from a concession not just "due in whole or in part," as under the 1951 law). *See supra* note 43. There was no need to show causal connection under the 1951 Act. *See* S. METZGER, *supra* note 31, at 44-45.

43 This criterion was also adjusted over time to provide United States industry greater protection. In 1962, injury due "as a whole or a part" to suspect imports—the 1951 criteria—was considered too permissive; instead, imports had to be "the main factor" in causing injury in order to justify aid. Under the Trade Act of 1974, the criteria again eased. Increased imports had only to be "a substantial cause" rather than "the major cause" of injury. Substantial cause was defined as one "which is important and not less than any other cause." See S. METZGER, *supra* note 31, at 48-49.

44 Under the 1951 law, the United States Tariff Commission's mandate was to consider, inter alia, "a downward trend of production, employment, prices, profits, or wages in the domestic industry concerned, or a decline in sales, an increase in imports, either actual or relative to domestic production, a higher or growing inventory, or a decline in the proportion of the domestic market supplied by domestic producers." Trade Agreements Extension Act of 1951, § 7(b). In 1962, this mandate to the Commission was modified to include "all economic factors which it considered relevant, including idling of productive facilities, inability to operate at a level of reasonable profit, and unemployment or underemployment." Trade Expansion Act, § 301(b)(2). These general factors were modified again in 1974 and 1984, so that the ITC must currently consider "a decline in sales, a

Despite congressional adjustment of the trade remedy's substantive criteria throughout its thirty-odd year history, the basic relationship between the executive and the legislature in administering trade relief has remained intact. Although sentiment has been expressed for a renewal of a congressional role in aiding industries injured by imports through simple relief after proven injury, the trend has been for Congress to grant more power to the executive branch.[45] Congress has never taken from the President its jurisdiction over final application of the escape clause.

In legislation aimed at affecting the decisionmaking criteria used by the executive branch, Congress has maintained guidelines established in the 1950s, a time when there was little interest and minimal pressure for protectionism. Although a President whose aid decision ignored the ITC's decision could have been overturned by Congress with increased ease after 1951 and until *INS v. Chadha*,[46] that power was never exercised. The role Congress plays is simply that of an adjustor of criteria for the ITC and other trade agencies in their adjudications and investigations. Once the hearings are complete and the law is codified, it is the executive branch and not Congress which dictates whether an industry receives effective aid.[47] In short, institutionalization of the President—with his or her national priorities—as the final enforcer of the escape clause trade remedy assured that free trade policy could triumph even where objective statutory criteria for protection were met.

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higher and growing inventory . . . and a downward trend in production, profits, wages, or employment . . . in the domestic industry concerned." Trade Act of 1974, as amended, 19 U.S.C. § 2251(b)(2)(B)(Supp. II 1984).

45 As early as the 1962 hearings, the position expressed on import aid was that "relief ought not to be denied for reasons that have nothing whatever to do with the merits of the case . . . . In particular . . . no United States industry which has suffered serious injury should be cut off from relief for foreign policy reasons." SENATE COMM. ON FINANCE, REPORT ON THE TRADE ACT OF 1974, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7263, 7268, *quoted in* Ris, *supra* note 33, at 307. Despite this rhetoric, the 1962 Act was the most anti-protectionist to come out of committee. During these hearings Congress expanded the executive branch's discretion with the inclusion of adjustment assistance as an alternative to the escape clause, but did not establish enforceable rules to dictate presidential choice. *See generally* Trade Expansion Act of 1962, § 302.

46 462 U.S. 919 (1983). After *Chadha*, the Trade Act of 1974 was amended to require a joint resolution of Congress, 19 U.S.C. § 2253(c), so that it is now much more difficult for Congress to override the President's actions.

47 Since Congress never restructured the escape clause legislation to make ITC decisions binding on the President, many of the statutory changes in the provision since the 1951 have been mitigated by the presidential prerogative to reject the ITC recommendations. Data compiled on ITC determinations and presidential action upon them illustrates that the legislation regulating escape clause procedures has not become more protectionist over time, as congressional revision of the law would suggest. *See* Goldstein, *Institutions*, *supra* note 21, at 170 (setting forth data compiled on § 201 petitions and relief from 1958 to 1981). Especially in the years in which the United States was engaged in the Tokyo Round of multilateral negotiations, the President consistently kept the United States market open by offering less aid than the ITC recommended. *See id.*

B. The Defense Against Unfair Trade: Antidumping Law, Countervailing Duties, and Section 301

The escape clause is only one mechanism open to industries needing import protection. Other forms of aid are based on differing notions of what constitutes a legitimate claim for protection. These laws, conceived before the Great Depression, are reflective of a period when the ideas of Frederick List and Alexander Hamilton dominated those of Adam Smith and David Ricardo.[48] It is in this period, from the end of the Civil War to Smoot-Hawley, in which ideas of autarky led policymakers to see gains from trade only in terms of export expansion.[49] This period gave rise to what are labeled here as "unfair" trade laws.[50]

The questions addressed by those debating the tariff in the mercantile period was whether a tariff's primary purpose should be to raise revenue or to protect national industry. In the liberal period the debate turned on the tariff as a foreign policy instrument, and the escape clause legislation was used to ease the transition into free trade. Since no single dominant position on determining an optimal tariff emerged, the type of tariff passed was a function of the capabilities of particular pressure groups within and outside Congress.[51] After 1934, agreement on one position on tariff policy (that is, liberalism), substantially transformed the interest group process.

What was somewhat unusual in the United States move to free trade is that liberalization occurred without the dismantling of pre-liberal

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48 List and Hamilton argued for a mercantile foreign economic policy, as opposed to Smith's, Ricardo's, and Mill's support for laissez-faire and the doctrine of comparative costs. Mercantilism is a body of thought identified with the economic practices of the 17th and 18th centuries. Mercantilists generally argued that the end of economic activity is increased wealth and increased political power for the state. One author identifies mercantilism with "the belief that the economic welfare of the state can only be secured by government regulation of a nationalist character." D. COLEMAN, REVISIONS IN MERCANTILISM 1 (1969). For List's perspective, see F. LIST, THE NATIONALE SYSTEM DER POLITISCHEN OEKONOMIE (rev. ed. 1977)(1841); Hamilton, *Report on the Subject of Manufacturers*, in 10 THE PAPERS OF ALEXANDER HAMILTON 230 (1987); *see also* Viner, *Power Versus Plenty as Objectives of Foreign Policy in the 17th and 18th Centuries*, 1 WORLD POL. 1 (1948). For one of the first systematic criticisms of mercantilism, see A. SMITH, 4 THE WEALTH OF NATIONS (London 1775).

49 Although by 1913 liberal ideas had gained acceptance among a subset of policymakers, it was only after 1934 that legal and institutional changes allowed these ideas to be translated into policy.

50 The genealogy of the modern forms of antidumping, countervailing duty, and the omnibus § 301 remedy, which go back to the mercantilist period of United States international economic philosophy, is curious considering that the current object of these laws is the promotion of fair trade among competitors. In fact, the layering of institutions and norms has simply transformed the originally protectionist institutions of the 1800s into the fair trade vehicles of today.

51 For an analysis of the pre-1934 tariffs, see D. LAKE, *supra* note 10; T. TERRILL, THE TARIFF, POLITICS, AND AMERICAN FOREIGN POLICY (1973); F. TAUSSIG, TARIFF HISTORY OF THE UNITED STATES (8th ed. 1931).

norms, values, and institutions. Laws written in the country's pre-liberal period reveal a far different set of state interests than would be the case after the Depression. In design, these "mercantile" statutes reflect earlier United States concerns with economic nationalism, not with later interest in the international gains free trade would afford. These laws changed little, even as the United States revamped its basic approach to trade policy. Thus, in the United States most liberal period (and continuing today) a mandate existed to exclude "unfair" imports through use of trade laws rooted in the mercantile period of United States tariff history.

When analyzed together, some legal and philosophical differences appear between cases considered under the free trade law (the escape clause) and the unfair trade laws. Primarily, there is a distinct concept of wrong present in violations of unfair trade laws which does not exist in the escape clause action. Belief in the long-term benefits of the free market leads United States decisionmakers to condemn foreign governments and industries that attempt to interfere with the market mechanism, especially if the goal of that manipulation is deemed "predatory."

In addition, there is a problem in the discovery and definition of a violation of the unfair trade laws. Aside from an apparent problem with data collection on the production of foreign goods, there is the more complex issue of which criteria should be used to assess policies of different economic and social systems. Although states vary greatly in their philosophical and historical relationships to domestic producers, the relationship assumed as the norm under the unfair trade laws is that found in the United States.[52] To use the United States as a benchmark in these laws, however, establishes criteria on the extreme end of a continuum.[53] Related to this problem is the determination of intent. Foreign producers may engage in what the United States views as unfair practices without predatory intent (that is, practices not aimed at gaining a market advantage unfairly), but still receive the same treatment under the unfair trade laws as purveyors of predatory policies. The result is often both an international chafing at the use of these trade remedies and a mischaracterization of United States trade policy.

1. Antidumping Legislation

Antidumping law is aimed at protecting home producers from im-

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[52] *See, e.g.*, Schmitter, *Still the Century of Corporatism?*, in THE NEW CORPORATISM (F. Pike & T. Stritch eds. 1974).

[53] The enforcement of United States values on state-industry relationships, interferes with the foreign policy goal of prosperity in non-communist states, translates into interference into other states' domestic policies, alienates allies, and violates principles of sovereignty.

ports sold at a value below that sold in their home market or below their cost of production. Antidumping legislation first appeared in its modern form in the United States in 1921,[54] although a parallel provision in the Revenue Act of 1916 contained a similar condemnation of unfair trade practices.[55] Today, if a good is found to be sold in the United States at less than its fair market value ("LTFV"), a duty equal to the difference between actual price and fair price is assessed.[56] The criteria for determining LTFV sales are more detailed than other trade remedies.[57] If a LTFV ruling is made by the Commerce Department, the case is sent to the ITC to determine whether there has been domestic "injury" as a result of the dumping activity.[58]

Until 1979 the ITC had a wide amount of discretion in its injury determination.[59] The discretionary nature of the injury determination

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54 Anti-Dumping Act of May 27, 1921, ch. 14, 42 Stat. 11 (codified as amended at 19 U.S.C. §§ 160-71 (1982)).

55 Revenue Act of September 8, 1916, ch. 463, 9 Stat. 756 (codified as amended at 15 U.S.C. §§ 71-77, 19 U.S.C. §§ 1333, 1335 (1982)).

56 *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. I § 101, 93 Stat. 144, 19 U.S.C. 1671 (1982).

57 Dumping is currently defined by 300 lines of statute and an additional 1000 lines of administrative regulation. *See* Finger, Hall & Nelson, *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 452, 453 (1982). By contrast, the only limit on the executive branch's escape clause decisions is "the national economic interest of the United States," which is imposed on the President's prerogative to refuse ITC relief recommendations. The criteria by which the ITC judges injury under § 201 take up only 35 lines. *Id.*

58 19 U.S.C. § 1671b(a)(1).

59 The character of the Tariff Commission (the predecessor of the ITC) proceedings was informal. Prior to 1974, no hearing was necessary, even if requested. Antidumping Act of 1921, ch. 14, § 201(a), 42 Stat. 11 (1921)(codified as amended at 19 U.S.C. § 160(a)), *repealed by* Trade Agreements Act of 1979, Pub. L. 96-39, § 106(a), 93 Stat. 144, 193, *replaced by* Trade Agreements Act § 101, 93 Stat. 144, 150, *adding* tit. VII to Tariff Act of 1930 (codified as amended at 19 U.S.C. §§ 1671-77g(1980)). *See also* U.S. Tariff Comm'n Rules on Practice & Procedure § 201.11, 27 Fed. Reg. 12,119 (1962)("Public hearings are to be held by the Commission when required by law, or if not required by law, when in the judgment of the Commission there is good and sufficient reason therefore.").

Formal hearing procedures came about with the enactment of the Trade Act of 1974. "Before making any determination under [§ 160(a)], the Secretary or the Commission . . . shall at the request of any foreign manufacturer or exporter, or any domestic importer, of the foreign merchandise in question, or of any domestic manufacturer, producer, or wholesaler of merchandise of the same class or kind, conduct a hearing . . . ." Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1978, 2044 (1975)(codified as amended at 19 U.S.C. § 160(d)).

The Commission was given broad discretion in the scope of its inquiry. 19 U.S.C. § 160(a)("after such investigation as [the Commission] deems necessary"). As a result, despite findings by Treasury of foreign merchandise being sold at less than fair value ("LTFV"), the Commission's wide-ranging investigation may actually conclude that no injury had resulted and thus duties were not required. *See, e.g.*, Vital Wheat Gluten from Canada, 29 Fed. Reg. 5921 (1964)(upon notification of sales in the United States at LTFV, a Canadian gluten producer reduced its price to competitive levels, resulting in a determination of no injury by the Commission).

The factors the Tariff Commission considered in making its final determination did not neces-

became a central concern to foreign producers by the time the Kennedy Round of GATT negotiations commenced in 1963. The GATT 1967 Antidumping Code resulting from the Kennedy Round attempted to establish uniform antidumping standards and procedures. In particular, the 1967 Code outlined in greater detail the concept of injury. The Code employed the "material injury" language of GATT Article VI, but added the consideration of restrictive trade practices, and the extent to which foreign prices undercut domestic prices in making an injury determination. The Code seemed to change the focus to predatory (rather than competitive) intent and effects of trade practices.[60] Congress never fully enacted the injury definition of the 1967 GATT Code, however, because it feared that the difference in degree of injury required between the Code and the 1921 Act would make domestic law less effective as a defense against predatory pricing by foreign producers.[61]

At the Tokyo Round of GATT negotiations, which opened in September 1973, the call for uniform definition of the injury concept was finally answered. The 1979 Antidumping Code adopted during the Tokyo Round was implemented by the Trade Agreements Act of 1979. The new act raised the injury requirement from the de minimis standard of the 1921 law to one of "material injury."[62]

Additional changes made to United States antidumping law in 1979 pointed directly to the weaknesses in the executive branch's administration of antidumping law. New time limits were set for the assessment of dumping duties. Before 1979, duties could be delayed for prolonged periods of time.[63] The 1979 law put a stop to these practices by setting a one

sarily have to apply to the injury determination alone. The Commission could thwart a petition for antidumping duties after a redetermination that the foreign producer was not, according to their judgment, dumping, and thus overturn the Treasury Department. *See* Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1442 (1966); Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 418 (1965).

60 Lorenzen, *Technical Analysis of the Antidumping Agreement and the Trade Agreements Act*, 11 L. & POL'Y INT'L BUS. 1405, 1411, 1413 (1979). *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, art. 3, 19 U.S.T. 4349, T.I.A.S. No. 6431.

61 *See* Lorenzen, *supra* note 60, at 1413.

62 This was the requirement adopted by the 1979 Code and reflects a major concession by the United States to its trading partners during the Tokyo Round. Lorenzen, *supra* note 60, at 1421. Congress enacted the standard "material injury" into the Trade Agreements Act of 1979, and defined it as "harm which is not inconsequential, immaterial or unimportant." 19 U.S.C. § 1677. While this standard is hardly clear, it appears to have raised the injury threshold from the de minimis injury which existed before 1979. Lorenzen, *supra* note 60, at 1422; *see also* Lowenfeld, *Fair or Unfair Trade*, 13 CORNELL INT'L L.J. 205, 208 (1980). Section 612 of the Trade and Tariff Act of 1984 established new criteria for determining "threat" of material injury. 19 U.S.C.A. § 1677(7)(F)(1985).

63 Marks, *Recent Changes in American Law on Regulatory Trade Measures*, 2 WORLD ECON.

year statutory time limit after the import transaction is completed for the collection of antidumping duties.[64]

Another example of Congress's growing institutional awareness was its shifting of the LTFV determination to the United States Department of Commerce in the 1979 law. This transfer was based on arguments that the Commerce Department, with its attachment to United States industries, would be more responsive than the Treasury Department to antidumping duty requests.[65] Although the administrative organization has changed, however, the legal mandate has not. Thus, the Commerce Department, another executive branch agency, may also choose to use the statutory latitude to maintain a liberal United States market.

2. *Countervailing Duty Legislation*

United States trade laws also provide aid to United States industry in situations where a foreign nation is directly or indirectly bestowing a subsidy to a domestic producer or exporter. This aid is in the form of a countervailing duty, which ideally is set equal to the net amount of the subsidy and is levied upon that product when it is imported into the United States.[66] The rationale behind countervailing duty law is that the duty will offset any unfair competitive advantage attained by a foreign manufacturer or producer due to a foreign government subsidy. In most other countries, subsidized exports are not distinguished from sales below cost.[67]

Current countervailing duty law requires that the Secretary of Commerce countervail when it is found after an investigation that a foreign nation has extended a "bounty or grant" to goods imported into the United States,[68] and injury to a United States industry has occurred.[69] In 1979, when the Tokyo Round Agreements resulted in the adoption of

427, 434 (1980)(delays of up to seven years were on record in collecting dumping duties, and uncollected duties owed to United States industry in amounts up to $400 million were claimed).

64 *Id.*

65 *See* I. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 99 (1986); *see also* R. BALDWIN, *supra* note 10, at 117-18 (stating that most members of Congress believed that the Commerce Department would follow the intent of Congress more closely than the Treasury Department historically had).

66 For imports from members of GATT, the countervailing duty provisions, as amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, are codified at 19 U.S.C. § 1671 (1982 & Supp. III 1985); for nonmembers, these provisions are codified at § 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, and the Trade and Tariff Act of 1984, 19 U.S.C. § 2411 (1982 & Supp. III 1985).

67 Davis, *supra* note 59, at 1445.

68 For a survey of judicial interpretations of the term "bounty or grant," see J. BARTON & B. FISHER, *supra* note 19, at 338-39.

69 *See* CURRENT PROVISIONS, *supra* note 1, at 47.

a new international code on subsidies and countervailing duties, the United States agreed to adopt a requirement of "material injury" and an elaborate definition of subsidy for application to those countries which were signatories to the Code. The old provisions remained in force for those countries that did not sign the Subsidies Code. Non-Code countries may thus still be subject to countervailing duties merely upon the demonstration that a subsidy is being provided, even if no injury to United States industry is shown.[70]

The 1979 law promoted increased openness in adjudication procedures, and the option of judicial review.[71] The countervailing duty procedures were streamlined, with the timetable for resolution of cases now seven months, where previously it was a year. A preliminary determination must be made within twenty days of the filing of a petition. Where a positive preliminary determination is made, the foreign producer must post a deposit within three months.

Until 1979, the Treasury Department (and subsequently the Commerce Department) had latitude to interpret the law, a flexibility which undercut the protectionist potential of these statutes. While recent changes were responsive to the interests of our trading partners in terms of injury standard and procedural guidelines, they may have come too late for United States industries. The reality of declining United States competitiveness in many industries may have been better served by a bureaucracy with greater latitude in the decision to countervail.

3. *Section 301*

Section 301 of the Trade Act of 1974 ("§ 301"), as amended, gave the President the authority to provide ailing United States businesses aid that may not have been available under the injury requirements of the antidumping or countervailing duty statutes. Section 301 authorizes the President to "take all appropriate and feasible" action to "enforce the rights of the United States under any trade agreement" or to respond to

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70 *See* J. BARTON & B. FISHER, *supra* note 19, at 336-37; *see also* Marks, *supra* note 63.

71 Section 776(a) of the 1979 Act provides for verification and publication of "all information relied upon in making a final determination in an investigation." Tariff Act of 1930, tit. VII, § 776(a), 93 Stat. 150, 186 (1979), *added by* Trade Agreements Act of 1979, § 101 (codified at 19 U.S.C. 1677e(a)(1980)). In addition, interested parties received access to information used in the determinations, subject only to confidentiality considerations, and authorities must also provide progress reports and records of ex parte meetings. 19 U.S.C. § 1677f. Hearing transcripts must also be provided. 19 U.S.C. § 1677c(b). Judicial review of the determinations was expanded by making review available to "any interested party who was a party to the proceeding" and including more types of decisions which could be challenged. Trade Agreements Act of 1979, § 1001 (codified as amended at 19 U.S.C. § 1516(a)(1980)). For a discussion of the expanded availability of judicial review under the Trade Agreements of 1979, see Marks, *supra* note 63, at 437-40.

any foreign practice that is "unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce."[72] The President's broad authority under § 301 enables him or her to attack unfair barriers to trade in services, foreign non-tariff barriers, and foreign industrial policies which have brought about a competitive advantage for foreign firms.[73]

Like the antidumping and countervailing duty laws, § 301 relief has evolved to assist United States industries searching for a standby mechanism to deal with specific trade problems.[74] Historically, the remedy was employed mostly to reach restrictive foreign practices affecting a broad range of manufactured and agricultural goods.[75] It was not until 1984 that the President's ability to take retaliatory action in the case of trade in services was clearly articulated by statute.[76]

Presidential actions which § 301 permits (whether investigatory, conciliatory, or retaliatory) may be taken either on the President's own initiative or in response to a petition filed by a private party with the USTR. Any § 301 petition must allege either substantive violations of the provisions of a trade agreement; deny benefits to the United States under a trade agreement;[77] or be unreasonable or discriminatory and a

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[72] 19 U.S.C. § 2411(a)(1982), as amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304, 98 Stat. 2948.

[73] The potential reach of § 301 is broader than the issues addressed here. For example, recent petitions under § 301 have attacked trade restricting practices that: 1) denied market access for United States exporters of footwear to Brazil, Japan, Korea, and Taiwan; 2) disrupted world rice markets through subsidization (by Taiwan); 3) denied foreign business to United States air courier service providers (by Argentina); 4) used domestic policies to subsidize exports and restrict imports of soybean oil and meal (by Brazil, Argentina, Spain, Portugal, Malaysia and Canada); 5) subsidized and diverted exports to the United States market of specialty steel (by Belgium, France, Italy, the U.K., Austria, and Sweden); and 6) limited through the denial of tax deductions the placement of advertising by Canadian businesses with United States border area broadcasters. *See* Bello & Holmer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 NW. J. INT'L L. & BUS. 633 (1986).

[74] Industries unable to qualify for aid under the escape clause have turned repeatedly to unfair trade statutes, even where their problems were not due to unfair trade practices. By filing petitions, industries hope to gain administrative attention, politicize their plight and garner the more substantial relief of a tariff or orderly marketing agreement. *See* Goldstein, *Ideas*, *supra* note 6.

[75] The antecedent statutes to § 301 were the Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252(c), 76 Stat. 872 (1962), and the Tariff Act of 1930, ch. 497, § 350(a)(5), 48 Stat. 943 (1934).

[76] *See* 19 U.S.C. § 2411(c)(1)(A)(Supp. III 1984).

[77] 19 U.S.C. § 2411(a)(1)(B)(i). While the USTR has generally interpreted "trade agreement" to mean the GATT or any of the GATT codes negotiated during the Tokyo Round of Multilateral Trade Negotiations, *see* Bello & Holmer, *supra* note 73, at 635, there are many international accords on which a § 301 petitioner might rely, such as Friendship, Commerce and Navigation Treaties, INTELSAT, and the OECD Guidelines on Investment Practices. *See generally* Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital*, 14 L. & POL'Y INT'L BUS. 569 (1982).

burden or restriction on United States commerce.[78] Section 301, then, provides parties with a cause of action under agreements constituting positive international law, and when properly wielded, has the ability to establish a common law of "fairness" in international markets.[79]

In those situations where no international agreement clearly applies to the trade problem, the "unjustifiable," "unreasonable," and "discriminatory" indicia come into play. "Unjustifiable" has been defined to include acts policies or practices which are "inconsistent" with—as opposed to "contrary to"—international agreements.[80] Arguably, this definition covers foreign government action which is technically legal but violates the spirit of an agreement, or which violates common understandings or practices that are not themselves the subject of international agreements. While this definition indisputably includes: 1) denial of national or "most favored nation" (MFN) treatment; 2) denial of the right to establish an enterprise in a foreign country; and 3) denial of protection for intellectual property rights;[81] it also seems to extend to almost any inequitable or bad faith practice.

"Unreasonable" has been similarly broadly defined to mean "any act, policy, or practice which, although not inconsistent with international legal rights of the United States is otherwise unfair or inequitable."[82] The definition includes both the denial of fair and equitable market opportunities and opportunities to establish enterprises.[83] Since unreasonable acts need not be inconsistent with any international agreement, this criterion allows for sweeping unilateral condemnations of foreign government practices.[84] "Discriminatory" includes acts that uniquely discriminate against United States business in favor of others. It covers acts, policies, or practices which deny national or MFN treatment to United States goods, services, or investment.[85]

Perhaps the most important feature of a § 301 action is the *lack* of a statutory material injury requirement. More significantly, § 301 petitions are required to move through fewer layers of bureaucracy than are petitions filed pursuant to other unfair trade statutes. They are submitted directly to the USTR and may subsequently be referred from there to the assistant secretary-level Trade Policy Review Group and even to the

78 19 U.S.C. § 2411(a)(1)(B)(i).
79 Fisher & Steinhardt, *supra* note 77, at 577.
80 19 U.S.C. § 2411(e)(4).
81 Bello & Holmer, *supra* note 73, at 640.
82 19 U.S.C. § 2411(e)(3).
83 *Id.*
84 *See* Bello & Holmer, *supra* note 73, at 642.
85 19 U.S.C. § 2411(e)(5).

cabinet-level Economic Policy Council, rather than first going to the ITC or the Department of Commerce.[86] The action that can be taken by the President after a positive § 301 determination includes, but is not limited to, suspension or withdrawal of concessions granted to the foreign country under trade agreements, or imposition of duties or other import restrictions on products from that country, for such period as deemed appropriate.[87]

Section 301's potential relief for United States industries facing the problem of closed foreign markets is significant. Japan and the newly industrializing countries ("NICs") (e.g., Korea and Taiwan) have successfully used closed domestic markets to build internationally competitive industries engaging in massive export drives. Import problems plaguing, for example, the United States automobile industry, would be significantly fewer had that industry managed to gain entry into Japan's closed markets.[88]

Another United States industry which has suffered the consequences of exclusion from the Japanese market is the microchip producing industry. These consequences are quite significant. First, exclusion means the loss of the profit opportunities that finance research and development necessary for the next generation of products. Exclusion also means fewer opportunities to realize the economies of scale that bring down costs and determine competitive position in world markets. Second, exclusion keeps United States producers away from the scene of permanent innovation and refinement in technology, particularly in the area of consumer products and manufacturing techniques. The only way for United States producers to stay abreast of technological change in Japan is to be in the market. The success of Japanese industries as diverse as autos, steel, and consumer electronics in world markets arose from the ability of Japanese manufacturers to move rapidly to volume production with limited risk in a domestic market insulated from foreign competition.[89]

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86 19 U.S.C. § 2412. *See also* Bello & Holmer, *supra* note 73, at 649-50. An interagency process occurs during the early conduct of a § 301 proceeding. Initially, potential § 301 petitioners often seek advice as to the merits of their arguments from the interagency § 301 Committee, a standing committee chaired by the USTR and normally composed of representatives of the Departments of State, Treasury, Commerce, Justice, Agriculture, and Labor, the Office of Management and Budget, and the Council of Economic Advisers. *Id.* at 646. If the § 301 Committee does not agree on an approach, the issue may then be taken to the Trade Policy Review Group. Failure to agree on an approach there may result in the issue's consideration by the Economic Policy Council. *Id.* at 650 n.93.

87 19 U.S.C. § 2411(b). *See also* Fisher & Steinhardt, *supra* note 77, at 635.

88 *See generally* L. Tyson & J. Zysman, Politics and Productivity: Developmental Strategy and Production Innovation in Japan (Berkeley Roundtable on the International Economy Working Paper No. 30, Nov. 1987).

89 *Id. See also* Wolff, *supra* note 18, at 323; Tyson & Zysman, *American Industry in Interna-*

As export sales or direct investment in Japan were denied to United States producers during the 1950s, 1960s, and 1970s, the industries licensed their technologies to Japanese companies. Flush with new technology, Japanese companies refined their products and developed highly efficient manufacturing systems, while simultaneously being protected from the then superior products and productivity of foreign companies. Assured financing in a protected home market led to the infamous overcapacity and export drives now characteristic of the East Asian NICs. United States pioneers of innovative technologies such as solid state television and numerically controlled machine tools thus found themselves out-produced in world markets. Their call for protection was the only response provided by the United States trade regime.

Section 301 provides the only trade law tool able to force negotiations on lowering foreign trade barriers against United States exports. In a growing number of cases, § 301 petitions have been used to accomplish exactly that.[90] Even when no remedial action has been authorized by the President, the threat of such action has sometimes served to secure competitive access for United States products in foreign markets.[91]

The use of § 301 has also been a critical remedy in cases where past practices by a foreign government have created a current "comparative advantage." Japan's recent and phenomenal success in international markets in exporting high-tech products such as semiconductors, numerically controlled machine tools, and telecommunications equipment, has resulted in renewed focus on Japanese industrial policies by United States businesses and government. In these more recent trade disputes, the scrutiny has been on a Japanese industrial policy, known as "targeting," which involves intensified promotion of a specific industrial sector. By targeting specific high technology sectors for development, the Japanese have been able to undermine the relative position of competing United States producers.[92]

tional Competition, in AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION: GOVERNMENT POLICIES AND CORPORATE STRATEGIES 27, 30-31, 34-38 (L. Tyson & J. Zysman eds. 1983)[hereinafter AMERICAN INDUSTRY].

[90] *See* Bello & Holmer, *supra* note 73, at 653-65 (illustrating the significance and variety of § 301's uses, particularly in those cases seeking improved access to foreign markets for United States exports of goods and services and for direct investment).

[91] See Fisher & Steinhardt, *supra* note 77, at 578 (describing how the astute use of a threat of filing a § 301 complaint, with the accompanying threat of retaliation, adverse publicity, and the souring of trade relations, can act as leverage to achieve a desired end—perhaps more effectively than actually filing a complaint and pursuing it through administrative channels).

[92] *See, e.g.,* SEMICONDUCTOR INDUSTRY ASSOCIATION & VERNER, LIIPFERT, BERNHARD & MCPHERSON, THE EFFECT OF GOVERNMENT TARGETING ON WORLD SEMICONDUCTOR COMPETITION (1983). For a general discussion of the practice of targeting, its legality under the GATT, and the adequacy of United States trade laws to offset or eliminate a foreign countrys targeting policy,

Targeting[93] is only one policy tool, however, which has helped create a comparative advantage for Japan in several technology sectors.[94] In fact, targeting should be viewed as part of a complex web of policy instruments geared towards achieving comparative advantage. This web includes industry rationalization, export cartels, tax incentives, user-directed subsidies, learning centers, leasing arrangements to encourage technology diffusion, and programs for lowering the costs of factor inputs to Japanese firms. Typically, these policies are directed at the competitive development of critical sectors with links to other industries which have the potential to affect the growth and development of the entire economy.

Critical sectors, such as semiconductors and machine tools, are seen as a type of industrial infrastructure (much as roads and bridges were viewed in an earlier era) needed to sustain economic growth. So viewed, the sector-by-sector development of such sectors is an appropriate goal of government policy in a capitalist economy. The Japanese aim is not to eliminate directly all competition from other nations' industrial sectors (although that may be its ultimate effect). Rather, the aim is to transform Japanese producers into low cost international competitors. In short, Japan's use of targeting is aimed at capturing the domestic benefits of comparative advantage by creating a domestic infrastructure which delivers lowest cost competitiveness in international markets.

Japan's ongoing effort to create comparative advantage in certain industries poses a formidable obstacle for any policy response attempted under existing United States trade law. Once a United States petitioner files a complaint, the United States trade bureaucracy must focus on the foreign behavior which is a *current* and product-specific violation of one or several of the United States trade statutes. However, the promotional programs which created the Japanese comparative advantage may have been terminated years before their effect was felt by United States industry. The United States trade laws simply do not have the capacity to defend against Japanese targeting measures whose success has already been achieved in a more competitive Japanese industry. The existence of

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see Note, *Foreign Industrial Targeting: Section 301 of the Trade Act of 1974 as a Remedy*, 25 VA. J. INT'L L. 483 (1985).

93 Targeting includes the establishment of industry-wide goals, producer subsidies, cooperative research and development, and tight control over access to the domestic market in the "targeted" sectors. *See* Note, *supra* note 92.

94 The argument on "created comparative advantage" is developed throughout AMERICAN INDUSTRY, *supra* note 89, and in Zysman & Cohen, *Double or Nothing: Open Trade and Competitive Industry*, 61 FOREIGN AFF. 1113 (1983). The basic argument is that government policies can gradually affect the cost, availability, and quality of factor inputs (human, capital, and resources), and thus—over time—alter a nation's comparative advantage by improving its economic base.

such a competitive advantage itself does not trigger a violation under United States trade laws. If Japan is not "caught in the act" of creating an advantage and successfully prosecuted under the appropriate trade law, its subsequent commercial success may not give rise to actionable claims in the United States.

Policies such as targeting are enigmas to United States trade law and industrial practice. Although not originally conceived to be a respite from deviations from a liberal trade regime's norms, § 301 has been used by United States business and the Congress to try to alleviate the effects of Japanese targeting. As in the case of semiconductors, however, even positive rulings on § 301 petitions and government attention to policies such as "targeting" may not alleviate the problems facing United States business.

Another alternative open to the United States government for aiding its domestic industries is direct assistance similar to that offered under Japanese industrial policy. To date, however, adjustment policies in the United States bear little resemblance to their Japanese counterpart. The history of the adjustment assistance programs show, among other things, that the normative constraints on United States policymakers foreclose promotional programs such as targeting, which have the potential to stop the drain on United States competitive advantage.

C. Trade Adjustment and the Move to More Coherent Policies

As with the other two tenets of United States commercial policy—free and unfair trade statutes—the origins of the country's adjustment policies trace to a cognitive model of the proper relationship between state and society. In this case the model focuses on the state's role in mitigating the social effects of economic fluctuations—simply stated, the welfare function of the state. After the 1930s, such active state participation gained increased legitimacy. Exigencies of the capitalist economy due to business cycles, technological advances, or capital migration (to name but a few) were accepted as costs associated with being a government in a capitalist economy. The role accepted by the government, however, was only that of adjustment. By the 1950s, the idea of direct state intervention into the economy, a position which had gained some acceptance in the 1930s, was rejected.

At their heart, trade adjustment policies reflect post-New Deal political norms. They are essentially compensatory. The state "pays off" industries and labor groups adversely affected by trade policy from a

hopefully ever-expanding "pie."[95] Trade adjustment assistance ("TAA") was buttressed by the notion that if trade policy was going to affect constituents adversely, they were entitled to state aid. To understand TAA only as a method of selling trade liberalization, however, is to fail to appreciate the welfare function the program has played. Though not so conceived in the early 1960s, adjustment assistance evolved into an important trade policy component of government reaction to a rising number of industry petitions for protection.

TAA was first proposed in 1954 in a minority opinion to the report of the Randall Commission.[96] That proposal saw adjustment assistance in the form of federal financial aid as a replacement for escape clause aid. A weak version of TAA appeared in the 1962 Trade Act,[97] was then used in the Automotive Products Trade Act of 1965,[98] and was ultimately expanded in the 1974 Trade Act and the Omnibus Budget Reconciliation Act of 1981.[99]

Under the 1962 Act, both individual workers and firms were eligible for aid.[100] Petitions were filed with the Tariff Commission for investiga-

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95 *See generally* Metzger, *supra* note 31, at 55-57.

96 COMMISSION ON FOREIGN ECONOMIC POLICY, REPORT TO THE PRESIDENT AND CONGRESS 54-58 (1954). *See* G. HUFBAUER & H. ROSEN, TRADE POLICY FOR TROUBLED INDUSTRIES 33-34 (1986). Although formal legislation of trade adjustment assistance appears relatively late in the liberalization period, the general notion of an adjustment wage was recommended much earlier. A report commissioned by President Roosevelt in 1933 and written by the Social Science Research Council suggests such compensation as part of the liberalization process. Their explanation was as follows:

> Since reductions [in tariffs] must, of necessity, be made . . . and since nearly all tariff reductions are bound to meet with great opposition, the question arises whether it would not be well both as a matter of justice and in the interest of practical politics to provide compensation in those cases in which serious losses to both workers and investors can be clearly demonstrated. Such cases might be looked upon as analogous to the condemnation of property. The government when it condemns real property for a public purpose . . . always pays fair compensation. Would not a similar procedure in the case of some downward revisions of tariffs be no less fair? With the possibility of compensation no industry would have a strong case if it was thought necessary in the public interest to liquidate that industry. . . . [Compensation to labor] is but a special form of unemployment wage; it is therefore consistent with present trends in social legislation.

SOCIAL SCIENCE RESEARCH COUNCIL, INTERNATIONAL ECONOMIC RELATIONS 70-71 (1933). For a general background on the history of the trade adjustment assistance ("TAA") program, see D. MITCHELL, LABOR ISSUES OF AMERICAN INTERNATIONAL TRADE AND INVESTMENT (1976); *see also* R. BAUER, I. POOL & L. DEXTER, *supra* note 10, at 43.

97 Trade Expansion Act of 1962, Pub. L. No. 87-794, tit. III, Pub. L. No. 87-794, 76 Stat. 872, 883 (1962).

98 Automotive Products Trade Act of 1965, §§ 301-04, tit. III, Pub. L. No. 89-183, tit. III, § 301, 79 Stat. 1016-18 (1965).

99 Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (codified as amended in scattered sections of Title 19, including 19 U.S.C. §§ 2251, 2272-395 (1982 & Supp. II 1984)). For a more complete discussion of the current statutory framework, see CURRENT PROVISIONS, *supra* note 1, at 67-68.

100 Trade Expansion Act of 1962, § 302(a)(2-3).

tion of whether the alleged injury: 1) was due in major part to trade concessions; 2) resulted in increased quantities of a like or directly competitive product; and 3) whether such increase was a major factor in causing or threatening to cause serious injury to the applicant firm, domestic industry, or group of workers.[101] Since the criteria used in certifying TAA cases to the President were identical under the 1962 law to those for escape clause relief,[102] a dilemma existed. The Tariff Commission "could not be liberal in approving adjustment assistance petitions without being liberal in approving escape clause petitions. Thus, adjustment assistance—which was supposed to foster freer trade—was included in the Trade Expansion Act in such a way as to make its actual use inconsistent with that objective."[103]

In response to this dilemma, TAA was revamped under the Trade Act of 1974.[104] Under the 1974 law, once certified to receive adjustment assistance, firms and communities received low cost loans and other financial assistance and relief. Qualifying workers received a weekly adjustment allowance of 70%[105] of their average weekly wage for a period

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101 *Id.* § 301. After the petition for certification was approved by the appropriate member of the executive branch (either the President, the Secretary of Commerce, or the Secretary of Labor, depending upon the petitioner), the President could choose which form of relief to provide—either escape clause tariffs or adjustment assistance. *Id.* § 302. After determining which type of aid was appropriate, additional requirements had to be met before relief was actually awarded. *See id.* §§ 313-30.

102 *Id.*

103 D. MITCHELL, *supra* note 96, at 43. *But see* S. METZGER, *supra* note 31, at 59-61 (arguing that the reason that adjustment assistance was included in the 1962 Act was to minimize tariff relief as the remedy for domestic industries adversely affected by increased imports caused by trade agreement concessions. Metzger argues that legislators were fully cognizant of the dichotomy between adjustment assistance and escape clause criteria, but intended that the TAA criteria be applied less stringently than those for escape clause relief.).

104 First, coverage was extended to communities as well as firms and workers. 19 U.S.C. § 2371 (1982). Second, the investigatory responsibilities and determination of injury were split between the Labor Department for worker cases, 19 U.S.C. § 2273, and the Commerce Department for cases involving firms and communities, 19 U.S.C. § 2251. Third, eligibility criteria changed from earlier, stricter requirements to the following criteria: 1) a significant number of workers must be affected; 2) there must be an absolute decrease in sales and production; and 3) imports of a like or directly competitive article must have contributed importantly to a decline in sales or production. 19 U.S.C. § 2272. "Contributed importantly" was interpreted as "a cause which is important but not necessarily more important than any other cause." *Id.*

This last criterion, whereby imports had to be of a like or directly competitive nature to a product made in the United States, served to disqualify a number of otherwise qualified applicants, especially in cases involving auto production. For example, a manufacturer of injection-molded plastic parts (largely bumper fillers) used in domestic automobiles claimed that foreign car imports in the late 1970s had hurt sales. Since similar parts were not being imported separately, but were included as part of the assembled automobiles, the domestic bumper manufacturers did not qualify for TAA. Holloway v. Donovan, 585 F. Supp. 1427 (Ct. Int'l Trade 1984).

105 19 U.S.C. § 2292(a)(1). In no case was aid to exceed the average weekly manufacturing wage, however.

of up to fifty-two weeks.[106] Workers in training, or workers over age sixty, could qualify for an additional twenty-six week extension.[107] Although employment services and relocation allowances were offered to facilitate reemployment, these measures constituted a small part of the program.

The 1974 adjustment assistance program was extended in 1981 for an additional two years and then modified by the Budget Reconciliation Act after the Reagan administration announced the replacement of the program.[108] After this modification and until the present, aid is given as an extension of unemployment insurance.[109]

In essence, TAA was a program of transfer payments or redistribution offsetting the cost of trade liberalism. In this way, TAA acted as both a welfare policy and a way to diffuse potential opposition to liberal trade policies.[110] While it was the latter which propelled its creation, the former was its engine for growth.[111] Regardless of which factor is now more important, adjustment assistance (or a functional equivalent) is a necessary ingredient in a liberal United States trade policy. Where an unregulated market leads to visible economic upheaval, the cognitive basis of liberalism will be questioned—the legitimacy of the free trade norm will be cast into doubt. Therefore, some agency must play the critical role of "buying off" potential opposition to state policy in order to protect the liberal norms of United States trade policy.

Although congressional efforts led to reauthorizations of TAA in 1983 and in 1986, reductions in the level and duration of benefits and a substantial decline in the total budget have been hallmarks of the Reagan presidency.[112] The idea of adjustment, however, emerged in early 1987 in a number of administrative reports. For fiscal year 1988, the Presi-

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106 19 U.S.C. § 2293(a).

107 19 U.S.C. § 2293(a). In no case was aid to exceed 65% (70% in the 1974 Act) of the average weekly manufacturing wage.

108 *See* Omnibus Budget Reconciliation Act of 1981, 19 U.S.C. §§ 2292, 2293.

109 19 U.S.C. §§ 2292(c), 2293(a)(1980 & Supp. II 1984).

110 *See generally* S. METZGER, *supra* note 31, at 55-58; G. HUFBAER & H. ROSEN, *supra* note 96, at 33-34.

111 The aggregate data for TAA shows large increases in aid requests since its creation. Requests increased from under 20 a year while the program was administered by the ITC to over 1000 a year under the 1974 Act and over 2000 a year between 1979 and 1982. TAA numbers dwarf the number of requests for the escape clause, although these two laws served the same constituency. The number of petitions resulting in aid is also much greater than with the escape clause. As opposed to other aid programs, a majority of those who applied for aid did receive aid. Goldstein, *Institutions, supra* note 21, at 170, 173-74.

112 The recent and propitious decline in worker aid receipts was not unexpected. The Reagan administration is committed to a reduced role for government and thus considers the premises of an adjustment program—economic redistribution of the benefits of liberal trade—illegitimate.

dent's budget recommendations included $980 million for job search, counseling, and training for dislocated workers.[113] Thus, for the moment, adjustment assistance appears secure as a redistributive trade policy which eases the pain of international competition, while failing to cure the competitive challenge.

IV. THE MICROELECTRONIC DILEMMA

United States firms are being beaten in international semiconductor competition.[114] Since the late 1970s, the dominant world market share enjoyed by the United States producers of semiconductor components was steadily eroded—and finally overtaken—by Japanese competition. The world market share of United States semiconductor firms fell from about 60% in 1978 to about 43% in late 1986.[115] During the same time frame, the share of the merchant world market held by Japanese producers has risen from about 24% to 46%.[116] Japanese gains have clearly come at the expense of the United States semiconductor industry. The country's merchant firms have been unable to reverse Japanese gains, despite an intensified focus on the traditional strengths and strategies that forged their leadership position—entrepreneurial strategies aimed at technological product innovation and market development strengths. By contrast, Japanese firms enjoy the security of the largest and most insulated national market for microelectronics. Japanese semiconductor producers are backed by state policy and massive structural resources,

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113 See EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE U.S. GOV'T, 5-99, 5-100 (Supp. 1987).

114 Adapted from M. BORRUS, COMPETING FOR CONTROL: AMERICA'S STAKE IN MICROELECTRONICS chs. 1 & 7 (forthcoming 1988).

115 Data drawn from the WORLD SEMICONDUCTOR TRADE STATISTICS PROGRAM (1987)[hereinafter STATISTICS PROGRAM].

116 *Id.* These figures are somewhat misleading because captive Japanese production—demand for chips by major Japanese producers of semiconductor producers, mostly major Japanese electronics companies—is included in the Japanese industry's "merchant" market share. M. BORRUS, *supra* note 114, at ch. 2, notes that some 20% to 25% of total Japanese production is consumed internally, a figure that has been relatively constant over the last decade.

Eliminating this Japanese captive production from overall figures would improve the merchant United States share, but market share trends would still remain unchanged. Similarly, if captive United States production (particularly that of IBM, AT&T, GM Delco, Digital Equipment, and Hewlett Packard) is included in world market share figures, the United States share improves, but there is no substantive change in overall market share trends.

The Defense Science Board estimates that, including United States captive production, the United States world market share has fallen over the last decade from 67% to 50%, and the Japanese share has risen from under 25% to 39%. U.S DEP'T OF DEFENSE, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON DEFENSE SEMICONDUCTOR DEPENDENCY (Office of the Under Secretary of Defense for Acquisition, Feb. 1987)(figures based on data from STATISTICS PROGRAM, *supra* note 115, and information from Dataquest and Integrated Circuit Engineering Corporation).

including investment capital loaned from government-affiliated banks at low cost. This infrastructure has allowed Japanese firms to seize the competitive initiative from their United States rivals.[117]

Japanese dominance in commodity memory, particularly in random access memory chips ("RAMs"),[118] places severe competitive pressure on United States merchant producers for two closely related reasons. First, commodity memory devices such as RAMs have historically generated operating margins which have allowed United States merchant firms to reinvest and to attract additional capital for research, development, and ultimately growth. Second, and equally important, successive generations of RAMs have been the simplest of increasingly complex integrated circuits. Experience gained in their production provides United States merchant firms with the fabrication process know-how necessary to become competitive in the manufacture of more complex devices.[119] Japanese leadership in commodity memory therefore poses a double dilemma for United States firms: their margins and capacity to innovate are squeezed at the same time that their ability to acquire critical process know-how for future developments is threatened. United States producers simultaneously face rapidly rising research and development costs and insufficient demand from which to generate the capacity necessary to remain at the industry's leading edge. By the mid-1980s, it appeared that losses in market position and technical leadership suffered by United States producers would result in the demise of United States competitiveness.

Recognizing that diversity and swift market responsiveness were insufficient to reverse Japanese gains, major United States merchant microchip producers turned to a political adjustment strategy. Perhaps, they thought, trade law and policy could accomplish what business strategies alone could not. In 1985 and 1986, major merchant United States chip producers called attention to their plight by initiating several major actions under various United States trade laws while attempting to garner congressional aid.[120] These actions were propitious in timing, because they coincided with mounting congressional and administration concern over the ever-larger United States trade deficit with Japan. Through clever lobbying and by "wrapping itself in the American flag,"

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[117] *See* Note, *supra* note 92, at 487-88.

[118] "RAMs" store digital information temporarily and can be changed by a user. A RAM constitutes one basic storage element in a computer. *See* Borrus, Millstein & Zysman, *Trade and Development in the Semiconductor Industry: Japanese Challenge and American Response*, in AMERICAN INDUSTRY, *supra* note 89, at 247.

[119] *See id.* at 222-23, 234-36.

[120] *See infra* notes 121-26 and accompanying text.

the semiconductor industry succeeded in identifying its troubles with the more widespread general discontent over Japanese trade tactics.

The industry's political-legal efforts actually began several years earlier when it released a series of reports demonstrating that the Japanese government had "targeted" the United States chip industry so as to gain a competitive advantage for the Japanese industry.[121] The United States industry argued that Japan was denying United States firms fair and open opportunities to compete in the domestic Japanese market, while Japanese firms were engaging in massive unfair trade practices in the United States market. Alleging that Japanese producers were dumping chips into the United States market, United States producers proclaimed that they were being driven out of business.[122]

By defining and documenting these two problems—market access and dumping—the Semiconductor Industry Association ("SIA") had crafted a base on which to build much needed political support. The problems were discussed during the ongoing United States-Japan negotiations of the High Tech Working Group, which was formed in 1984. Despite assurances from the Japanese government, the access and dumping problems remained unresolved. The United States government seemed disposed to do little, given the Reagan administration's rhetorical commitment to free trade and the still nascent political clout of the chip makers.

Then, with trade deficits mounting despite a falling dollar in 1985 and 1986, the chip makers launched an increasingly sophisticated campaign for trade relief. The SIA filed a trade petition under § 301 ,[123] asking the United States government to negotiate increased access to the Japanese market. The petition requested trade restrictions on Japanese imports in the event that market access was not forthcoming. A small United States memory producer, Micron Technologies, filed a claim under United States antidumping laws that Japanese producers were dumping 64 kilobyte dynamic random access memory chips ("64K DRAMs") in the United States at prices less than fair market value.[124]

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121 *See supra* notes 92-94 and accompanying text.

122 *See generally* Comment, *International Trade: Japanese Dumping of Semiconductors*, 27 HARV. INT'L L.J. 753 (1986).

123 Initiation of Investigation Under Section 301; Semiconductor Industry Association, 50 Fed. Reg. 28,866 (1985). *See* Bello & Holmer, *supra* note 73, at 656-57.

124 64K Dynamic Random Access Memory Components from Japan, 51 Fed. Reg. 21781 (1986). This petition was filed with the Department of Commerce and the ITC in June 1985. Both agencies made positive antidumping findings. One Japanese importer, who was subject to the Antidumping Duty Order issued by the Commerce Department, sued for and was granted a preliminary injunction against liquidation of certain entries of semiconductors which were subject to the order. Oki Electric Industry Co. v. United States, 669 F. Supp. 480 (Ct. Int'l Trade 1987).

The company also sued Japanese firms under United States antitrust law, alleging a conspiracy to monopolize the United States memory market.[125] In addition, another group of United States chip producers filed an antidumping complaint against Japanese producers of erasable programmable read only memory chips ("EPROMs"), asking for an embargo on Japanese imports.[126] Texas Instruments sued twenty-one East Asian semiconductor producers (nineteen of which had Hong Kong offices), alleging infringement of various Texas Instruments patents on semiconductor memory.[127]

Not wishing to appear unresponsive in the face of such concerted action, the Reagan administration initiated a dumping claim on behalf of United States firms threatened by aggressive Japanese pricing tactics in the 256K DRAM market.[128] Simultaneous sets of congressional hearings on the semiconductor trade issues and intensive lobbying completed the well-orchestrated campaign.

Like the textile, steel, consumer electronics, and automobile industries before it, the United States microchip industry used a political-legal campaign to provoke a trade policy response. Preliminary findings in the antidumping cases upheld the United States industry's claims that Japanese firms were dumping, while the § 301 petitions wound their way through the administrative procedures.[129] As increasingly negative evaluations of their chances to win on the merits filtered back to Japan, Japanese firms and the Japanese government were finally forced to the bargaining table in mid-1986.[130] The microchip producers' well-orchestrated relief campaign also began to constrain United States administrative decisionmaking, though the Reagan administration sought a solution to the semiconductor trade issues which would minimize damage to alli-

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125 *See* U.S. INT'L TRADE COMM'N, OPERATION OF THE TRADE AGREEMENT PROGRAM, 37TH REPORT 1985 at 169-70 (1986).

126 Eraseable [sic] Programmable Read Only Memories (EPROMs) from Japan: Initiation of Antidumping Duty Investigation, 50 Fed. Reg. 51,450 (1985).

127 Certain Portable Electronic Calculators; Investigation, 49 Fed. Reg. 29,162 (1984). For subsequent litigation, see Texas Instruments v. U.S. Int'l Trade Comm'n, 805 F.2d 1558 (Fed. Cir. 1986).

128 Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan; Initiation of Antidumping Duty Investigation, 50 Fed. Reg. 51,450 (1985); Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan; Antidumping Investigation, 50 Fed. Reg. 51,613-14 (1985).

129 Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, USITC Pub. No. 1803, Inv. No. 731-TA-300 (Preliminary)(1986); 64K Dynamic Random Access Memory Components from Japan, USITC Pub. No. 1735, Inv. No. 731-TA-270 (Preliminary) (1982); Erasable Programmable Read Only Memories from Japan, USITC Pub. No. 1778, Inv. No. 731-TA-288 (Preliminary)(1985).

130 *See* Matsushita, *supra* note 36, at 53.

ance relations.[131]

Following several false starts and the threat of a recommendation for strong trade sanctions from the § 301 petition, the United States-Japan Semiconductor Trade Agreement ("Agreement") was announced on July 31, 1986.[132] The Agreement, running through 1991, addressed both the dumping and market access issues.[133] On the dumping side, the Agreement established minimum reference prices based on Japanese production costs for RAMs, EPROMs, and several other categories of chips for which United States firms still retained substantial market positions. The minimum prices established were actually a moving price floor, and have been repeatedly adjusted downwards as Japanese production costs have fallen below prices at which dumping would be presumed.

An important term of the Agreement prohibits dumping not only in the United States market, but in the Japanese and third country markets for Japanese semiconductors as well.[134] This provision appears to be necessary (although virtually impossible to enforce) because most major microchip buyers have worldwide purchasing operations. The antidumping provisions would at least permit United States firms to stay in the process development game via a continuing presence in EPROMs and other "process driving" products, while stabilizing prices sufficiently to allow a future return to profitability. There was also hope that price stability would invite United States producers to re-enter the RAM production market, although that hope had not materialized as of late 1987. Unfortunately, the actual effect of the Agreement was to provide a profit windfall to Japanese producers by stabilizing the disastrous price erosion in RAMs after most United States firms had left the RAM market. Stabilized prices also invited competition from Korean RAM producers.

On the market access issue, the Agreement formally acknowledged that there was a problem which the Japanese government would try to solve. However, United States producers did not receive from Japan an explicit domestic market share target, though they understood the Agreement to call for an approximate doubling of the existing United

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[131] *See* D. Yoffee & J. Coleman, The Semiconductor Industry Association and the Trade Dispute with Japan (1987)(unpublished manuscript, Harvard Business School).

[132] Statement by the President, 22 WEEKLY COMP. PRES. DOC. 1021 (July 31, 1986).

[133] *See* Memorandum from the President for the United States Trade Representative on the Subject of the U.S.-Japan Semiconductor Trade Agreement 22 WEEKLY COMP. PRES. DOC. 1020-22 (Aug. 4, 1986); *see also* Bello & Holmer, *supra* note 73, at 656-57.

[134] Arrangement Between the Government of Japan and the Government of the United States of America Concerning Trade in Semiconductor Products, *reprinted in* 25 INT'L LEGAL MATERIALS 1409 (1986)[hereinafter Arrangement]; *see also* Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 27,811 (1986).

States market share by 1991.[135]

After these years of petitioning and deliberations, the semiconductor industry continued to face "unfair" competition abroad. The United States share of the Japanese market is now lower than the market share held at the time of SIA's June 1985 § 301 petition.[136] Furthermore, the Agreement did little to control Japanese dumping in third country markets.[137] In the spring of 1987 the United States government finally took retaliatory action against Japan for noncompliance with the Agreement. Tariffs were placed on about $300 million worth of Japanese imports.[138] However, the level of these tariffs was regarded by all parties, both foreign and domestic, as being far too low to be effective. Market access in Japan continues to be a problem.[139]

V. CONCLUSION

United States trade institutions are in a state of flux. Organized industrial and labor groups are demanding protection from both fair and unfair international competition. Neither Congress, the trade bureaucracy, or the President can ignore this growing outcry against foreign products and practices. Granting protection, however, portends an even greater risk. The United States economy is increasingly dependent upon foreign demand to spur its economic growth. Protectionism may lead to

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135 In private interviews with Mr. Borrus, the Japanese side vehemently denied that any such numerical target existed, though a secret codicil to the Agreement requiring the Japanese government to increase United States market share—reportedly setting a goal of 20% of the market for United States manufacturers within five years—is widely rumored to exist. *See, e.g.*, Comment, *Agreement Between the Government of Japan and the Government of the United States of America Concerning Trade in Semiconductor Products*, 28 HARV. INT'L L.J. 175, 178 n.16 (1987)(citations to several reports of the rumored codicil). Though the Agreement does not articulate the ways in which United States companies will increase their share in Japan, the Japanese government agreed to establish a promotional organization to facilitate long-term relationships. *See* Arrangement, *supra* note 134.

136 Market share was about 9.4% in 1985 (preceding the Agreement), declined to 8.5% in July 1986, and increased about .5% the following year. SEMICONDUCTOR INDUSTRY ASSOCIATION, ONE YEAR OF EXPERIENCE WITH THE U.S.-JAPANESE SEMICONDUCTOR AGREEMENT, FIRST ANNUAL REPORT TO THE PRESIDENT, Executive Summary at 2 (1987).

137 *Id.* at 2, 7.

138 *Id.*, The Settlement and the Suspension Agreements, at 1.

139 *See id.*, Executive Summary, at 3; *see also* Letter from Irwin Federman, Chairman, Semiconductor Industry Association, to President Ronald Reagan 2 (Nov. 3, 1987)(recommending that part of the sanctions imposed for noncompliance with the Agreement be suspended by an amount corresponding to the level of reduction in dumping of DRAMs and EPROMs found by of the Department of Commerce. SIA emphasized, however, that the sanctions relating to market access must remain in place because access to the Japanese market for imports from all sources showed no improvement. The SIA reluctantly concluded that imposition of additional sanctions may need to be considered, even though this would probably negate the "extraordinary efforts of both countries to reduce the level of hostility over trade issues.").

reciprocal closure, which would cause the United States economy to suffer far more in the future than it has in the past at the hands of foreign competition.

Although the United States is faced with increasing pressures at home and abroad, its response has been limited. Rather than attempting innovative solutions to the problems of international competition, United States trade institutions have been rigid in their response to import pressures. This is not to argue support for their causes. Rather, it is to say that government policy, even when responsive to industries (as in the semiconductor case) has had and can have only marginal impact on the behavior of foreign producers. Industries with sufficient clout are able to elicit a response from the United States government, since a well-financed and organized lobby cannot be ignored. Such response, however, is ad hoc, and less effective than it should be.

Government attention and support, however, do not assure a solution to the problems faced by United States industries. Decisionmakers are constrained by norms and institutions which limit the usefulness of their policies. Industries may gain market shares after the government responds to their requests for aid, but such gains are more often due to the exigencies of the international market than to United States policy itself.

Will these norms and institutions change? Perhaps, but if there is change in the next decade, there will be only incremental movement away from the liberal trade position currently advocated by the Reagan administration, since neither of the necessary factors for deep normative and institutional change exists.

First, change must be prefaced by the development of a theoretical alternative to liberal trade. Despite the criticism leveled against foreign nations that "cheat" and the disruptive impact of foreign trade on domestic labor, the only theoretical alternative to liberalism remains protectionism. But protectionism of the pre-Depression sort has almost no support among elected leaders. The fear of a "slippery slope," down which tariffs lead to reciprocal closure of markets, dwindling trade, and economic decline, is still a prevalent fear among policymakers.

With no politically viable alternative to liberalism, those disenchanted with the trade regime are forced to focus attention on principles of "fair" trade, an idea which has near-unanimous support among policymakers. While few policymakers today accept the idea that the trade regime should discriminate against United States producers, however, this idea underlies the trade regime established after World War II. Among a range of goods, including agricultural products, the United

States trading partners were allowed to favor their own products over United States goods. More general foreign policy concerns forced the United States to tolerate closer relationships between foreign producers and their governments than were sanctioned at home. In the 1950s and 1960s these "prejudicial" government-producer relationships did not endanger the United States economy, and formed, in fact, the infrastructure of the post-war alliance. By the 1970s, however, foreign penetration of the United States market was deep enough to provide an unfair advantage to European and Japanese producers. The underlying demand of fair trade proponents is the unraveling of these government support systems on which the post-war alliance was based. This demand is one which cannot be met.

If the first indicator of change in trade policy will be the development of an ideological alternative to free trade, the second will be a change in institutional structures. Today, the institutional arrangements that allowed the liberalization of trade to occur remain intact. Congress, though under pressure, has not re-asserted itself as the central agent of trade policy. Congress has reacted to a range of protectionist issues, and has enlarged the powers of executive agencies such as the ITC and the USTR, but has not directly enacted protectionist legislation. Thus, because the basic institutional structures created in the 1930s and 1940s to deal with outmoded ideas of pre-war protectionism are still standing, the institutional response to complaints for aid in the 1980s will come from institutions geared to react to the problems of prior decades. United States industry, therefore, should expect little institutional relief from trade pressures. And unlike its Japanese counterpart, United States industry does not have a champion in its government.