Vanderbilt Journal of Transnational Law

Volume 18
Issue 3 *Summer 1985*

Article 2

1985

A Critical Evaluation of U.S. Fair Trade Policy

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I. INTRODUCTION

As the United States trade deficit has spiralled to record heights, a great deal of attention has focused on the desirability of employing import sanctions to eliminate this trade imbalance. In recent years, United States policy-makers largely have welcomed periodic modification of free trade principles through "fair trade" restrictions. Now many lawyers, legislators, and economists appear prepared to jettison the entire free trade foundation of United States policy and resort to government allocation of market share through quotas, import surcharges, and related mechanisms.

Opponents of free trade consider it a dangerous relic of the laissez faire era, unsuited for today's neo-mercantilist world of indus-

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trial policy and widespread government economic intervention. They regard retaliation against subsidized foreign competition and dumped imports as a fair, and not protectionist, response. Most of the voting public appear to agree.

However, this "fairness" approach to international trade oversimplifies and distorts several complex issues and concerns. As an inherently subjective and partisan concept, "fairness" provides an inadequate basis for designing trade policy. Often superficially "fair" solutions to particular trade problems actually result in unfair and economically unjustifiable discrimination against foreign exporters and their customers.

This article utilizes economic analysis to critique fair trade rhetoric and expose the inconsistencies and protectionist consequences of United States antidumping and antisubsidy laws. Proposed reforms deemphasize the ambiguous concept of fair trade, and focus instead on balancing the conflicting economic interests at issue in most trade disputes. Between the elusive, impractical ideal of unfettered free trade and the protectionist objective of strict "fair trade" sanctions, lies a principled middle ground toward which trade policy-makers should be urged to gravitate.

II. Defining Fair Trade

Passage of the Trade Agreements Act of 1979[1] marked the culmination of a trend away from discretionary decision-making and toward adjudicatory resolution of trade disputes. The Act promulgated strict timetables for dumping and subsidy investigations by the Commerce Department and the International Trade Commission (ITC), and increased both the scope and accessability of fair trade remedies.[2] A proliferation of fair trade investigations has resulted, significantly influencing the pattern of imports into the United States.

The Commerce Department is responsible for determining particular instances of dumping, defined as less than fair value sales,[3] or subsidization, the bestowal of direct or indirect grants for the

1. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 U.S.C. (1982)) [hereinafter cited as Trade Agreements Act of 1979].

2. *See generally Symposium: A Practitioner's Guide to International Trade Law*, 6 N.C.J. Int'l L. & Com. Reg. 307 (1981) (an extended analysis of United States antisubsidy and antidumping law).

3. 19 U.S.C. § 1673 (1982).

production or exportation of goods.[4] If the ITC concurrently finds that the alleged dumping or subsidization has caused material injury to a domestic industry, the Commerce Department will direct Customs to impose offsetting antidumping or countervailing duties.[5] Interested parties can appeal unfavorable Commerce Department and ITC decisions to the United States Court of International Trade.[6]

The adjudicatory process entails a series of complex determinations concerning the various constituent elements of fair trade complaints. Protectionist initiatives aimed at increasing the scope and availability of fair trade remedies threaten further to complicate this process. Prior to refining the questionable techniques utilized in trade deliberations, policymakers should first reexamine the flawed motivating rationale that underlies the entire adjudicatory structure.

The fairness arguments forwarded by domestic industries in pursuit of import relief appear compelling at first glance. They justify the levy of countervailing duties as necessary to eliminate the unfair or artificial price advantage that subsidies confer on foreign exporters. With equal vigor, they advocate the levy of antidumping duties to eliminate the unfair price discrimination that occurs when foreign monopolists utilize exorbitant home market profits to undercut United States competitors.

The theory of fair trade underlying these arguments for retaliatory duties can be summarized as follows: any competitive edge is unfair if it would not exist absent foreign market distortions or foreign government policies favoring particular industries. Advocates of fair trade claim to favor open competition but only after the marketplace is reduced to a level playing field, purged of distortions created by unfair advantages. However, both the attainability and desirability of "fair" market conditions appear questionable.

III. Evaluating the Fairness of Subsidies

The Trade Agreements Act provided the Commerce Department with a detailed but not exclusive list of foreign government programs subject to countervailing duties.[7] The list incorporates

4. *Id.* § 1303(a).
5. *Id.* §§ 1671e(a), 1673e(a).
6. *Id.* § 1516a.
7. *Id.* § 1677(5).

all export subsidies described in the GATT Subsidies Code,[8] as well as certain domestic subsidies, such as government provision of goods, services or capital at preferential rates, or government grants to cover operating losses.

In determining which government actions constitute countervailable subsidization, Commerce has drawn a fundamental distinction between generally available and more narrowly focused benefit programs. Commerce will countervail any foreign government program which preferentially benefits specific industries or regions.[9] For example, Commerce countervailed a Belgian program that reimbursed firms for worker training costs in distressed industrial areas because of the program's regional nature.[10] Other government actions regarded as subsidies include equity infusions inconsistent with commercial considerations,[11] targeted research and development funding,[12] exemptions from property taxes,[13] and exemptions from customs duties on imported equipment.[14]

Commerce not only countervails a wide variety of foreign government programs, it also refuses to consider certain offsetting costs when calculating net subsidies. While Commerce does subtract application fees and offsetting export taxes from the value of a gross subsidy, it makes no allowance for the indirect or associated costs which exporters must incur before obtaining particular subsidies.[15]

This brief overview of the United States countervailing duty

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8. General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, XVI and XXIII, *done* April 12, 1979, 31 U.S.T. 513, 530, T.I.A.S. No. 9619, at 13, U.N.T.S. Registration No. 814 LXXXVI (registered July 1, 1980) [hereinafter cited as the Subsidies Code]. Although too lengthy to reprint, the illustrative list of export subsidies provided in Annex A of the Subsidies Code includes government programs such as (1) currency retention schemes conferring a bonus on exporters, (2) the provision of government services to exporters at discount rates, (3) the exemption or deferral of direct taxes on exports, (4) the allowance of special tax deductions for exporters, and (5) the provision of discount export credits.

9. *See* Certain Steel Products from Belgium, 47 Fed. Reg. 39,304 (1982).

10. *Id.* at 39,305.

11. *Id.* at 39,304.

12. *Id.*

13. *Id.*

14. *See* Certain Carbon Steel Products from Brazil, 49 Fed. Reg. 17,988 (1984).

15. 19 U.S.C. § 1677(6) (1982).

law suffices to illustrate its underlying premise—that a particular foreign government program can be viewed in isolation as bestowing an unfair competitive advantage. But this premise is erroneous. An individual government program does not operate in a vacuum. Failing to distinguish between individual subsidies and net rates of subsidization can grossly exaggerate the ultimate impact of a particular government program on import price. For example, a Brazilian steel manufacturer that receives a subsidy for relocating to the Amazon region also will incur higher transportation and labor training costs. But Commerce assesses countervailing duties without regard to governmental measures or natural conditions which might offset the financial advantage conferred by a subsidy. Thus, trade "fairness" is achieved by ignoring the actual, or net, competitive advantage that foreign government subsidies provide importers.

Governments often use subsidies to correct, rather than create, economic distortions. Subsidies can promote allocative efficiency if they either offset the effects of counter-productive government regulations or compensate for externalities. Many of America's trading partners impose a relatively heavy regulatory burden on their economies. Particularly in lesser developed countries (LDCs), misguided government regulations can significantly diminish an industry's natural competitive advantages.[16] When government action alters the incentive structure generated by the private marketplace, pernicious economic distortions often result.

Mexican minimum wage laws, for example, disadvantage labor-intensive industries by artificially inflating the cost of their primary input above the market rate. Usually such wage-boosting measures have the unintended consequence of increasing unemployment and decreasing output in the affected industries.[17] The most efficient means of correcting the ensuing misallocation of resources would be to eliminate the minimum wage. Governments, however, often view policies such as minimum wages, interest rate ceilings and price controls as politically sacrosanct because of

16. *See* P. BAUER, REALITY AND RHETORIC, 33-35 (1984). In this and prior works, Professor Bauer has sought to demonstrate the destructive impact widespread government intervention has had in the economies of many developing nations.

17. For a discussion of the distortive influence minimum wage legislation can have on labor markets, see Balassa, *Prices, Incentives and Economic Growth,* 120 REV. WORLD ECON. 611 (1984).

their perceived impact on inequitable socio-economic conditions. In order to offset the disincentives created by a minimum wage law, the Mexican government, therefore, might decide to pursue a second-best solution, such as subsidization of labor or output in the most severely affected industries.[18] Subsidizing selected manufacturers would encourage them to increase output and employment, stimulating a more efficient use of resources previously idled by labor market distortions.[19]

Instead of subsidizing domestic production in general, developing countries often conserve their limited financial resources by subsidizing only exports, while imposing concomitant import taxes.[20] This combination of measures can provide the same incentives to domestic industry as a more expensive production subsidy, although import taxes may artificially inflate consumer prices.[21] Thus, governments can sometimes justify the use of export subsidies as well as domestic subsidies, as a means of correcting distortions and compensating for externalities.

An industry generates a positive externality when its expansion confers unremunerated benefits on other sectors of the economy. For example, a Brazilian steel mill operating in the Amazon might provide an external stimulus to neighboring businesses through its labor training and infrastructure development programs. Although these byproduct benefits aid the local economy, they do not generate income for the mill, and hence, will not influence its scale of operations. Because the mill's operation generates a net societal gain in excess of its private profit, the mill's output will be less than the socially optimal level. Government production subsidies can provide the necessary incentive for the mill to expand output to the socially optimal level,[22] thereby pro-

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18. Much economic research has been performed analyzing the use of second-best solutions to remove economic distortions. A standard treatise in the field is W. CORDEN, TRADE POLICY AND ECONOMIC WELFARE (1974). Corden argues that subsidization is often the optimal means of correcting entrenched labor market distortions because it imposes the fewest byproduct distortions on the economy.

19. *Id.* at 144-49.

20. *See* B. BALASSA & M. SHARPSTON, EXPORT SUBSIDIES BY DEVELOPING COUNTRIES 34-36 (1977).

21. *Id.*

22. *Id.* Balassa and Sharpston argue that manufacturing industries in LDCs provide social benefits by producing skilled labor and technical change, and warrant subsidization as a result. The concept of externalities is more fully ex-

moting a more efficient allocation of resources.

Proponents of almost any government subsidy can concoct an externalities argument to justify their position.[23] Economic expansion in a particular sector usually results in increases in both employment and the demand for inputs, as well as an expansion of the local tax base. Businesses never can internalize the entire beneficial impact of increased investment in planning output levels. At this trivial level, externalities represent a generalized economic phenomenon unworthy of special government attention. But in many cases, particularly in underdeveloped nations or regions, the diffuse and positive external consequences of introducing or expanding certain industries provide appropriate grounds for subsidization. Governments do not always, or even predominantly, employ subsidies as second-best measures to improve efficiency or to compensate for significant externalities; but they do so often enough to discredit the fair traders' blanket condemnation of subsidization as an affront to free trade and comparative advantage.

Subsidies designed to correct government imposed economic dislocations or to compensate for externalities do not unfairly advantage foreign exporters. Instead, such subsidies stimulate economic efficiency abroad and reinforce natural comparative advantages. However, whether a government employs a subsidy to promote economic efficiency or to achieve equally legitimate noneconomic objectives is of no consequence under the United States "fair trade" laws. Thus, in the name of fair competition, we condemn all subsidies, including those intended to neutralize distortive policies and correct conditions that handicap foreign producers.

Even economically unjustifiable subsidies often may provide lit-

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plained in A. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 89-105 (1980).

23. Of course, protectionism can be justified as an attempt to forestall the negative externalities generated by diminished output in import-competing industries. For example, erecting tariff and quota barriers might enable beleagured Pennsylvania steel mills to retain market share, preventing the loss of jobs that unimpeded market forces might otherwise dictate. But protectionism is usually an inefficient means of offsetting a negative externality such as decreased employment in Johnstown, because of the heavy aggregate costs it imposes on consumers in general. Governments should intercede to offset externalities only when the aggregate impact of such measures would be to stimulate a more efficient allocation of resources nationally.

tle net advantage to foreign exporters beset by a panapoly of government-imposed disadvantages. For example, the same European governments which distribute relatively generous politically motivated subsidies also exact relatively high income and payroll taxes from their industrial sectors.[24] United States trade law treats subsidies as unfair deviations from an otherwise common, acceptable, or inconsequential level of government economic intervention. Governments, however, pursue widely varying degrees of intervention. Countervailing an isolated subsidy cannot level a competitive plane which has been permanently disfigured by a myriad of government tax, benefit and regulatory policies.

Thus, the fair trader's vision of a level playing field is an economic mirage. Its attainment presupposes the ability to determine each subsidizing nation's underlying comparative advantage in particular industries, to be calculated by factoring out the consequences of all government-imposed economic distortions. Even the most quixotic economist would blanch at such a task. Consider the impact of one individual government policy benefiting or penalizing a particular product, such as a cigarette tax. The increase in cigarette prices would influence the price of all other products to some degree, due to its general equilibrium effect on the demand for and supply of complementary and substitute products.[25] Every government program has a similar general equilibrium impact that reverberates throughout the economy. Consequently, economists cannot accurately distill from the resulting mishmash of distortionary effects the net impact of aggregate government policy on the price of a particular product. Rather

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24. *See* J. MUTTI, TAXES, SUBSIDIES, AND COMPETITIVENESS INTERNATIONALLY 5 (1982).

25. The term "general equilibrium effect" refers to the impact that an individual tax has on the entire economy over time. By increasing cigarette prices, a cigarette tax would have an immediate impact on demand for competing substitute goods, such as chewing gum, which would become relatively less expensive. Similarly, demand for complementary goods, such as lighters, would fall with demand for cigarettes. The forces of supply and demand will first influence the prices of these substitute and complementary goods, and next the prices of goods considered substitutes and complements for chewing gum, lighters and the like. Like a wave of falling dominoes, changes in supply and demand for one good will eventually effect the supply and demand for all goods, until the economy digests the entire system-wide impact. Given that at any one time a myriad of government policies are working at cross-purposes, the net impact of the sum total of distortive government policies on the price of a particular good can never be accurately isolated.

than continue the economic charade of trying to determine precisely as well as countervail the impact of foreign interventionism, United States policymakers should reconsider the relevance of the concept of a level playing field in the modern world.

Subsidies affect industrial incentives only from within a broader current of government intervention. Thus, trade can confidently be condemned as unfair only in those relatively few cases where the magnitude of subsidization is immense or the exporter's objective blatantly predatory. Countervailing isolated subsidies, without regard to offsetting considerations, serve only protectionist interests, and not the illusory objective of fair trade.

IV. Evaluating the Fairness of Dumping

The Commerce Department is authorized to assess antidumping duties against imports with a foreign market value in excess of their United States price.[26] Although Commerce normally determines foreign market value on the basis of an import's home market sales price, if home market distribution is too limited, Commerce will look to third-country sales or rely on a constructed value.[27] During its investigations, Commerce resorts to a series of complex and often questionable economic calculations in order to develop a level basis for comparison of foreign market value and United States price. Although acclaimed as vital to the preservation of fair competition conditions in United States markets, this elaborate adjudicatory mechanism usually promotes only protectionist ends.[28]

The following premise appears to underlie the antidumping code: importers whose home market prices or costs of production exceed their United States prices must be abusing their foreign market power to eliminate or cripple unfairly United States competitors. Dumping, however, is ordinarily a perfectly legitimate response to the varying economic conditions present in different national markets.[29] Foreign price discrimination is neither ineffi-

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26. 19 C.F.R. § 353.48 (1985).

27. 19 U.S.C. § 1677b (1982).

28. A convincing demonstration of the questionable nature of the techniques and formulas utilized by the Commerce Department in its antidumping investigations is provided in Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930,* 13 Law & Pol'y Int'l Bus. 681 (1981) [hereinafter cited as Caine].

29. *See* Ordover, Sykes and Willig, *Unfair International Trade Practices,* 15

cient nor contrary to consumer interests unless an importer harbors monopolistic intentions. Commerce, however, casts far too wide a net in conducting its investigations—few of the importers challenged as dumpers actually threaten the competitive integrity of the United States marketplace.

Fair traders allege that predatory importers employ dumping to drive out their American competition and create opportunities for price gouging in the vacated markets. Yet, these same fair traders provide little or no evidence that such foreign machinations have ever succeeded. Professors Ordover and Willig have demonstrated convincingly that only markets characterized by all three of the following deficiencies will prove susceptible to predatory abuse: (1) a sufficient degree of horizontal concentration, (2) high and irreversible costs limiting market entry and (3) barriers to reentry once competitors abandon the market.[30] Although high entry costs and reentry barriers exist in many markets, few threatened by subsidized imports are sufficiently concentrated to make predation a plausible objective. Absent the simultaneous presence of the three enumerated competitive restraints, predatory importers will be either unable to drive out their competitors or unable to later raise prices for fear of attracting renewed competition. Indeed, a major barrier to prospective predatory importers in most markets appears to be other foreign competitors, who are often free to adjust their volume of imports with relative ease. Given these obstacles, dumpers only rarely should be regarded as predatory threats.

A foreign producer who charges what each of its markets will bear, but always above marginal cost, is behaving logically, not unfairly. Nonpredatory importers would be foolish to waste income gained from home market power by pricing below cost in the United States, unless coerced by fierce competitive conditions. In most cases, dumping is the innocent, and hardly unfair, byproduct of an import strategy simply designed to maximize profits, or minimize losses, in each of the diverse markets in which an importer competes.

N.Y.U. J. INT'L L. & POL. 323, 328 (1983) [hereinafter cited as Ordover]. These three economists provide a detailed analysis of the benign impact of nonpredatory dumping. *See also* L. YEAGER AND D. TUERCK, FOREIGN TRADE AND U.S. POLICY 128-29 (1976).

30. Ordover and Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8 (1981).

V. The Appropriateness of the Fairness Standard

United States trade policy now revolves around the nebulous but politically potent concept of fairness. We have established an enormous adjudicatory network to evaluate the behavior of foreign governments and producers in their home markets. The Trade Agreement Act eliminated most of the discretionary authority once afforded the Executive Branch when processing dumping and subsidy complaints. This emphasis on adjudication enables the President to assuage competing protectionist and foreign interests with the claim that fair trade disputes are now resolved through legal channels beyond his control.

However, the concept of fair trade enshrined in United States law is economically incoherent and is enforced in a manner that often appears unfair and arbitrary. Moreover, only minimal proof of injury is required before countervailing and antidumping duties can be imposed.[31] By penalizing importers on the basis of a contradictory rationale and an unpredictable methodology, without requiring proof of substantial domestic injury, we simply have engaged in a covert form of protectionism.

The United States now maintains a large and expensive bureaucracy to enforce its quasi-protectionist "fair trade" laws. Ironically, import-competing interests have increasingly disregarded existing bureaucratic channels and directly petitioned the President with their "fair trade" grievances. They thereby hope to obtain broader relief than mere countervailing or antidumping duties. Such duties, intended only to offset the alleged price advantage resulting from dumping or subsidization,[32] often are not sufficiently punitive to affect significantly the volume of imports entering threatened markets. In frequently bypassing or belittling the adjudicatory process, protectionist forces have signalled that their real concern is not the ethics of foreign behavior abroad, but rather market conditions in the United States.

The same trade laws that supposedly promote the cause of "fairness" fail to quench the protectionist's underlying thirst for comprehensive remedial action. However, even after abandoning adjudication, protectionists still enjoy employing fair trade rheto-

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31. *See* Caine, *supra* note 28, at 703. The ITC need only be satisfied of the existence or threat of material injury, defined by statute as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982).

32. 19 U.S.C. §§ 1671e(a), 1673e(a) (1982).

ric to bolster support for their ultimate objective—de facto limits on import penetration of United States markets. In pursuit of this objective, import-competing interests now utilize a bold array of tactics. Flooding Congress with more imaginative protectionist initiatives, they continue to make aggressive use of adjudicatory channels and constantly pressure the Executive Branch to impose discretionary trade sanctions. In order to forestall further fragmentation in United States trade policy, a new unifying approach must replace this confused scramble for trade fairness.

The most efficient way to tackle trade disputes is head on: concentrating ab initio on market share, instead of becoming mired in misleading and arduous fair trade adjudication which often addresses only the peripheral concerns of interested parties. The Trade Act of 1974[33] already offers a suitable discretionary mechanism for directly balancing competing trade interests. Section 201,[34] known as the Escape Clause, authorizes the President to grant import relief when the ITC determines that increased imports of a product are a substantial cause of serious injury to domestic competitors.[35] Once a complainant satisfies this injury test, the President has the option of either raising tariffs, imposing quotas or negotiating orderly marketing agreements.[36] The President may deny relief if it is unlikely to lead to restored domestic competitiveness or if the cost to consumers is excessive.[37]

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33. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in scattered sections of 5, 19, 26, 31 U.S.C. (1982)).

34. 19 U.S.C. § 2251 (1982).

35. The ITC must take into account all relevant economic factors in making its injury determinations, including levels of profitability, employment, sales, capacity utilization and production. *Id.* § 2251(b)(2). Imports will be regarded as a substantial cause of serious injury if they are more significant than any other cause. *Id.* § 2251(b)(4).

36. *Id.* § 2253(a). If the ITC makes an affirmative injury determination, it is authorized to recommend the provision of adjustment assistance, as opposed to import relief. *Id.* § 2251(d)(1). If the ITC recommends import relief, the President must determine within 60 days what method and amount of relief he will provide, or determine that relief is not in the national economic interest. *Id.* § 2252(b).

37. *Id.* § 2252(c). This section also authorizes the President to deny relief if advisable in light of such considerations as United States international economic interests, the availability of adjustment assistance, or the impact that offsetting concessions would have on other United States economic sectors. Section 248 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, amending 19 U.S.C. § 2253(c)(1) (1982) enables Congress by joint resolution to overturn presidential decisions which resolve Escape Clause actions in a manner contrary

Trade policy decisions should be predicated on principled evaluations of economic and equitable considerations, rather than on fairness rhetoric. Proper application of the Escape Clause would result in protection only for producers whose combined injuries and prospects for recovery outweigh the benefits consumers derive from free trade. Eliminating existing fair trade remedies and relying solely on the Escape Clause would replace disguised protectionism with a more appropriate standard for weighing the issues of greatest importance in trade disputes.[38]

A. Debating the Merits of the Status Quo

Economists Gary Hufbauer and Joanna Erb support the fairness approach to trade, arguing that a liberal trade order is no longer feasible in this era of divergent national economic policies.[39] Our trading partners have become increasingly mercantilistic; therefore, we must protect our domestic industries from subsidized competition, or risk losing the evolving intergovernmental struggle for the economic high ground.

Hufbauer and Erb advocate further refinements in the legalistic guidelines defining the differences between acceptable (generally available) and unacceptable (industry-specific) foreign government incentive programs.[40] They overlook the economic anomalies resulting from this demarcation process because they fear that if the world trend towards subsidization continues to intensify, it will culminate in outright trade warfare.

A subsidized trade war would drain government coffers and generate a crippling protectionist backlash. Facing this chilling prospect of mutually assured economic destruction, we can anticipate that our trading partners will exercise a reasonable degree of restraint in their use of subsidies. Besides, replacement of existing antisubsidy laws with a discretionary approach would not leave United States industries entirely defenseless when con-

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to ITC recommendations. The duration of Escape Clause relief is ordinarily limited to five years in order to encourage adjustment by the injured United States industries. 19 U.S.C. § 2253(h).

38. Prior commentators have similarly argued at length in favor of replacing adjudication with a modified Escape Clause approach. *See* Barcelo, *Subsidies, Countervailing Duties and Antidumping after the Tokyo Round,* 13 CORNELL INT'L L.J. 257 (1980); Caine, *supra* note 28.

39. *See* G. HUFBAUER AND J. ERB, SUBSIDIES IN INTERNATIONAL TRADE (1984).

40. *Id.* at 127.

fronting subsidized competition. Judicious use of the modified Escape Clause remedy presumably would deter foreign nations from engaging in any subsidization which threatens to severely injure United States interests.

Although Hufbauer and Erbs' fear of a beggar-thy-neighbor trade war appears exaggerated, any shift in domestic emphasis away from countervailing action should be accompanied by renewed multilateral initiatives to condemn unbridled subsidization. Historical precedent indicates that, absent repeated encouragement, nations can easily lose sight of the fact that trade warfare directly contravenes their enlightened self-interest.[41]

Moreover, continued international use of export-oriented subsidies at current levels is in itself objectionable. When governments resort to widespread subsidization, they propagate a worldwide misallocation of resources, since the majority of subsidies are not justifiable on efficiency grounds.

With few exceptions, however, unilateral action by the United States has done little to dissuade subsidizing governments and,hence, merely deprives United States consumers of windfall gains. Countervailing action only compounds an already inefficient situation when it is not accompanied by reduced subsidization abroad. Multilateral negotiations offer the best hope for effectively coming to grips with the problem.

Some economists argue that the United States should vigorously enforce its fair trade laws to prevent foreign nations from using subsidies that create otherwise non-existent comparative advantages in the so-called "industries of the future."[42] Not all such foreign subsidization programs, however, will succeed. Economic characteristics such as labor scarcity or capital abundance can stimulate certain industries and disadvantage others. Similarly, government intervention may hinder as many exporters as it helps. The innovative and entrepreneurial qualities of privately funded United States competitors will continue to provide a winning edge in many markets.

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41. During the late 1920s and early 1930s, the United States and its trade partners engaged in a spree of self-destructive protectionist one-upmanship which crippled trade relations and further aggravated the worldwide slide into depression. *See* P. ELLSWORTH AND J. LEITH, THE INTERNATIONAL ECONOMY 433-45 (4th ed. 1975) [hereinafter cited as P. ELLSWORTH AND J. LEITH].

42. *See* A Report to the President From the President's Export Council, Coping with the Dynamics of World Trade in the 1980s, Vol. II, 171 (1984).

The United States need not emulate its interventionist rivals to compete internationally. United States policymakers obviously do not regard industrial policy as an infallible means of generating competitive advantages in the major growth industries; otherwise, they would trumpet its virtues themselves. Our government can best promote the growth of dynamic private enterprises by concentrating on the removal of impediments to their further expansion. Priority should be given to negotiations aimed at increasing the access of United States exports to world markets. Stricter enforcement of United States fair trade laws might only stiffen foreign resolve to maintain import barriers, just as United States recourse to industrial policy might only dilute the competitive spirit fueling our economic expansion.

B. Aspects of Major Trade Reform

Proponents of countervailing duties contend that reliance solely on the Escape Clause would lead to the increasingly abusive use of export subsidies abroad. However, the Escape Clause could be modified to make the existence of egregiously anticompetitive subsidies an important factor in determining appropriate relief once complainants satisfy the "substantial cause of serious injury" test. The General Agreement on Tariffs and Trade (GATT)[43] presently obligates the United States to (1) impose Escape Clause penalties evenly on all importers of an offending product, and (2) make offsetting concessions available to the countries involved. When foreign subsidies cause injury, however, the United States could depart from GATT strictures by selectively penalizing only subsidized importers and without providing offsetting compensation.

The pertinent provision of GATT, Article XIX, does not expressly forbid signatories from introducing such modifications.[44] Indeed, United States trade law currently permits selective application of Escape Clause remedies when necessary.[45] To the extent a modified Escape Clause proposal contravened GATT guidelines,

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43. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. XIX, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. For a detailed explanation of express and implied United States obligations under Article XIX of GATT, see J. JACKSON, WORLD TRADE AND THE LAW OF GATT 564-66 (1969).

44. GATT, *supra* note 43, art. XIX.

45. 19 U.S.C. § 2253(k)(1) (1982).

it would do so only to the extent required to achieve those broader objectives fully endorsed by GATT. Our trading partners, therefore, would be unlikely to raise strong objections to such a proposal.

The domestic industry could utilize the Escape Clause forum whenever import competition directly and significantly threatened their economic well-being. In addition, a supplemental avenue of relief should be maintained to deter importers who otherwise might resort to predatory dumping intended to cartelize or monopolize United States markets. Recall that dumped or subsidized imports could only effectively achieve the monopolization of a limited number of competitively restricted United States markets. Instead of relying on the overly broad and often arbitrary fair trade laws to address this problem, Congress could delegate responsibility to the federal courts under the antitrust laws.[46]

Presumably, the courts could efficiently enforce straightforward analytic tests to determine if predatory threats exist in particular cases.[47] Critics would argue that antitrust judgments often are as unpredictable and arbitrary as administrative dumping determinations. However, such judgments would at least require some ev-

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46. The Antidumping Act of 1916, 15 U.S.C. § 72 (1982), made predatory dumping of imports a criminal offense and provided for treble damages in private antitrust actions against dumpers. However, the Act required proof of both predatory intent and systematic United States sales at substantially below actual market value or wholesale prices abroad. *Id.* The severity of these provisions have relegated the Act to total obscurity. *See* Note, *The Antidumping Act of 1916: Antitrust and Product Comparability Criteria in Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 20 COLUM. J. TRANSNAT'L L. 133 (1981). Moreover, the Robinson-Patman Act, prohibiting domestic price discrimination, does not apply to the dumping of imports. *Id.* at 142. However, import-competing interests can bring suit against dumpers under the antimonopoly provisions of section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). For a more complete analysis, see Caine, *supra* note 28, at 713-14.

47. *See* Ordover, *supra* note 29. The authors explain that judicial analysis of the threat of foreign predation should entail an evaluation of (1) a market's susceptibility to successful predation, based on the existence of horizontal concentration, entry hurdles, and reentry barriers, and (2) the presence of predatory profit sacrifice, manifested by action which depends for its profitability upon attainment of a monopoly position based on the irreversible exit of rivals. The authors propose a comparison of specified cost floors to facilitate the analysis required under step two. *See id.* at 324-26. For similar propositions on judicial means of evaluating the existence of predatory dumping, see Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

idence of predatory intent, whereas antidumping duties often are assessed on the basis of exogenous forces such as exchange rate fluctuations and relative inflation rates.[48] Although judicial determinations might take longer than administrative antidumping investigations, the prospect of treble damages should ease plaintiffs' objections about delays.

Replacing fair trade remedies with a modified Escape Clause would shift the focus of trade sanctions from implicit protectionism to the promotion of adjustment. Escape Clause relief, when warranted, should be both comprehensive and temporary, primarily directed to restoring an afflicted industry's competitive posture and to easing the dislocation costs that such a process might engender.

C. Trade Policy and Economic Efficiency

According to classical comparative advantage theory, nations should specialize in the production of goods which they can make either most efficiently or with the least inefficiency relative to other nations. Allocation of resources in accordance with comparative advantage both maximizes world output and minimizes the prices charged consumers.[49] Economists have traditionally ascribed the source of nations' comparative advantages to their relative endowments of factors of production such as labor and capital; consequently, India should be competitive in labor-intensive industries and Australia in land-intensive industries.[50]

The economic logic underpinning comparative advantage and its byproduct, free trade, has not evaporated merely because of the increased role of government in the economies of our trading partners. Instead of fearing foreign government efforts to generate "artificial" comparative advantages, we can regard government itself as an element of comparative advantage. Hence, interventionist France or Holland could be said to have a comparative advantage in aging heavy industries where government subsidization plays as vital a role as labor or capital market conditions. Conversely, those same nations might also have a comparative disadvantage in more dynamic economic sectors where statism deters innovation and entrepreneurship.

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48. *See* Caine, *supra* note 28, at 695.

49. *See, e.g.*, P. ELLSWORTH AND J. LEITH, *supra* note 41, at 44-93; Samuelson, *The Gains from International Trade Once Again*, 72 ECON. J. 820 (1962).

50. *See* P. ELLSWORTH AND J. LEITH, *supra* note 41, at 94-106.

Governments which continually subsidize noncompetitive industries can inflict severe long-run damage on their economies by propagating an inefficient allocation of domestic resources. But if a foreign government regards subsidization as politically imperative despite the costs, that nation indeed will be able to sell subsidized commodities at competitive rates. A foreign steel mill operating with a blank check from the state treasury, for example, has as great an advantage as one with access to cheap labor or nearby iron ore deposits.

The essence of comparative advantage theory is the efficiency of allocating world production according to relative competitiveness. To the extent government subsidization channels resources into inefficient activities, it violates the spirit of comparative advantage. However, to the extent foreign governments are absolutely determined to accept and even foster such inefficient results, the United States simply compounds the inefficiency by imposing countervailing duties. Generally, the effect of countervailing action is not to induce foreign governments to abandon subsidization, but only to deny the United States economy a ready source of low-cost suppliers. Internal political pressures are the root cause of foreign subsidization, and unilateral United States action rarely will influence any misallocation of foreign resources that may result. Futile attempts to restore world efficiency penalize United States consumers who would otherwise benefit from lower prices.

The most efficient solution to this debacle would require world agreement on the optimality of nondistortive government policies. Absent such a utopian achievement, the most efficient United States response would permit consumers to take advantage of subsidized foreign competition and concentrate on realigning production resources. Of course, the many well-paid American workers facing unemployment and dislocation as a result of subsidized import competition would denounce such a reformulation of comparative advantage theory. Their unions often argue that unchecked foreign subsidization eventually could lead to the deindustrialization of America. Yet the more market oriented United States economy has far outpaced its subsidy-prone European rivals during the recent recovery.[51] The relative absence of government interventionism in the United States actually may

51. *See* THE ECONOMIST, Apr. 6, 1985, at 97-98.

provide a competitive advantage to our flourishing high-tech and service industries. By concentrating our resources in these areas, we can maximize domestic allocative efficiency.

D. The Burden of Adjustment

Achieving allocative efficiency in the United States would necessitate a good deal of difficult adjustment by those employed in the aging heavy industries that are hit hardest by subsidized foreign competition. Their resulting distress might seem particularly unfair because it would not have been induced by free market forces alone.

Entrepreneurship fuels economic development through a "gale of creative destruction."[52] Technical progress and internal competitive forces will continue to render obsolete once-potent industries. In these instances we acknowledge that such dislocations are the inevitable byproduct of dynamic economic growth. Yet we resist making adjustments in the name of efficiency when subsidized imports provide the stimulus for change.

The political appeal of our quasi-protectionist fair trade laws can be ascribed to several causes. First, the protected industries are typically quite large, highly unionized and concentrated in well identified regions. Such characteristics enable them to marshall impressive political resources.[53] Secondly, these industries are being injured, not by relatively benign forces such as technical progress, but by subsidized foreign rivals that are propped up by mercantilist governments. Hence, proponents of countervailing duties are able to paint the resulting trade-off between equity and efficiency in particularly stark terms, rendering politically unpalatable any attempt to challenge fair trade rhetoric and remedies.

Those favoring major trade reform need to stress that more ef-

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52. J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (2d ed. 1947).

53. Economist George Stigler theorizes that legislators act not in response to the public interest, but in order to maximize their political popularity by pandering to special interests. Concentrated and unionized industries can efficiently reward legislators favoring their particular interests by dispensing block votes, marshalling political resources, and maximizing financial contributions by preventing free-riding among the ranks. Only when a regulation's burden on society exceeds the information costs of uncovering the situation, will the general public take action to influence legislators. *See* G. STIGLER, THE CITIZEN AND THE STATE (1975). Fair trade rhetoric provides an effective layer of obfuscation hindering consumers from organizing in defense of their interests.

ficient trade policies need not entail the complete subjugation of equitable considerations. When injury to import-competing industries is sufficiently threatening, the proper response to subsidized foreign competition surely may include countervailing action. However, rather than ignore the issue of efficiency and rely entirely on misdirected fair trade adjudication, we can achieve more comprehensive and balanced results by utilizing a discretionary Escape Clause approach.

Such an approach would enable a farsighted Administration to shift its emphasis away from protectionism and toward efficient adjustment, without ignoring compelling equitable considerations. For, when politicians deem it necessary to offset the distributional consequences of subsidized competition, the efficient solution will relieve some of the pain involved in adjustment, rather than stifle such adjustment entirely by imposing trade barriers.

However, past adjustment assistance efforts have often been maligned as ineffective and misdirected.[54] Understandably, employees facing the permanent loss of lucrative union-scale positions have scorned adjustment in favor of protectionism. Consumers, swayed both by fairness rhetoric and the apparition of American deindustrialization in the face of subsidized competition, have yet to demonstrate dissatisfaction with countervailing measures even though they bear the brunt of the efficiency costs such measures impose. Thus, in order to generate political support for a modified Escape Clause proposal, more efficient and attractive adjustment assistance programs will also have to be developed and promoted.[55]

E. Political Considerations Inhibiting Trade Reform

Formidable political hurdles certainly would block the path of any effort to replace the quasi-protectionist "fair trade" system

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54. *See* R. LAWRENCE, CAN AMERICA COMPETE 131-33 (1984) [hereinafter cited as R. LAWRENCE]. Lawrence argues that by compensating only workers who fail to adjust, United States trade adjustment assistance programs have not created appropriate incentives for worker training and relocation.

55. Senators Roth, Chafee and Symms have introduced during the current session of Congress the Trade Expansion Act of 1985, S. 234, 99th Cong., 1st Sess., 131 CONG. REC. S473 (daily ed. Jan. 22, 1985). Title II of the bill proposes just the type of adjustment assistance reform that might provide a political counterweight to protectionist initiatives. It would scrap the existing program and provide eligible individuals with job training vouchers redeemable for training in a variety of private sector programs.

with a modified Escape Clause approach. One carrot which might attract support from import-competing interests is the broadened scope of relief available under the Escape Clause. The President would not be limited to offsetting the value of subsidies or dumping margins in fashioning relief.[56] Domestic interests, however, already can take advantage of the existing Escape Clause provisions, in addition to fair trade remedies.

Despite its protectionist bent, current United States trade law does have certain merits. One advantage of fair trade adjudication is that domestic interests which fail to establish violations, subsequently find it more difficult to plead their tarnished cases when seeking discretionary relief from the President. Protectionist interests could well amend a modified Escape Clause proposal to deflate its injury standard and limit the President's discretion to deny relief. Enacting a one-sided Escape Clause while eliminating the check provided by negative fair trade determinations would put importers "squarely behind the eight ball."

An optimal Escape Clause approach would retain the "substantial cause of serious injury" test, and allow both the ITC and the President to consider consumer as well as producer interests before deciding on remedial action. Any legislatively mandated deviation from this optimal approach that is designed to favor protectionist interests might make even the existing fair trade morass appear superior in comparison.

The adjudicatory fair trade approach, despite its many anomalies, offers some degree of refuge to foreign exporters who fear abject protectionist abuse. Currently, assessable duties are limited to the value of alleged subsidy and dumping margins,[57] and judicial recourse is available to prevent procedural abuse.[58] The Administration often points to the existence of the fair trade bureaucracy in order to counter protectionist pressure for more comprehensive relief from import competition.[59]

As the United States trade deficit rises, so do protectionist sentiments in Congress. A "highfalutin'" Escape Clause proposal would never survive legislative scrutiny in pristine condition. Thus, trade reform advocates need weigh carefully the theoretical

56. *See supra* note 32 and accompanying text.

57. *Id.*

58. *See supra* note 6 and accompanying text.

59. *See, e.g.*, 130 CONG. REC. S11488 (daily ed. Sept. 19, 1984) (letter from Ambassador Brock).

appeal of a modified Escape Clause against the practical likelihood of extensive protectionist modifications. Congress cannot be trusted to deliver an impartial discretionary mechanism until consumers have developed sufficient political awareness and organizational strength to counteract special interest meddling.[60]

At present the seriously flawed but relatively tolerable adjudicatory approach appears less harmful than its most likely replacements. Nonetheless, chastened reformers should not mistakenly regard the existing fair trade framework as offering a safe haven from more comprehensive protectionist initiatives. When necessary, import-competing interests frequently have succeeded in circumventing adjudicatory channels and obtaining direct relief through such devices as "voluntary" quotas.[61] Those who scoff at the possibility of passing a modified Escape Clause proposal free of crippling protectionist amendments, should equally acknowledge that the adjudicatory process also can be overwhelmed easily by concerted protectionist political pressure.

In retrospect, less ambitious trade reforms ultimately may provide the most effective means of tempering the protectionist bent of current United States trade policy. Given the dislocations subsidized imports have caused in vocal sectors of the economy, the odds are slim that Congress would scrap politically appealing fair trade rhetoric and remedies in favor of academically sound but rhetorically bland Escape Clause modifications.

F. Summarizing the Escape Clause Argument

The Trade Agreements Act altered the antisubsidy and antidumping laws in order to reduce executive discretion and legalize the dispute resolution process. However, the inefficiency and impracticality of addressing major trade disputes in accordance with a simplistic and nebulous concept such as fair trade has become increasingly obvious. A modified Escape Clause approach would be superior because it would enable either the ITC or the President to directly address the crucial issues involved in most

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60. *See supra* note 53 and accompanying text.

61. *See* R. LAWRENCE, *supra* note 54, at 128. Lawrence cites the following four recent cases in which protectionists successfully circumvented existing adjudicatory channels: (1) the voluntary export restraints on Japanese automobiles, (2) the bilateral export quotas negotiated with foreign steelmakers, (3) the reintroduction of sugar quotas, and (4) the tightening of the multifiber agreement governing textile imports.

import disputes: whether the loss to producers outweighs the gains for consumers; if so, whether relief would stimulate renewed competition or merely resuscitate an industrial dinosaur.

Critics claim that reintroducing executive discretion and eliminating judicial oversight would leave trade disputes exposed to the vagaries of the political arena, creating grave potential for protectionist abuse. Major subsidy and dumping actions, however, inevitably generate parallel political struggles for discretionary relief anyway, and eliminating the fair trade smokescreen might force protectionists to defend their political agenda on a cost-benefit basis. Questionable trade actions argued on the merits before Escape Clause panels are defeated more easily as protectionist than similar actions that are cloaked in fair trade rhetoric and decided on the basis of legal hair-splitting.

Trade disputes are inherently political and best resolved in a forum which squarely addresses the political issues at stake. Aside from a total absence of Presidential backbone, the only real threat of protectionist abuse that would materialize under a modified Escape Clause would entail legislative tinkering with its injury test or its mandated balancing of consumer and producer interests. Such tinkering would appear inevitable, however, given the broad impact such legislation would have on a large number of well-financed import-competing interests.

The very qualities that make a modified Escape Clause approach appealing from a free trade vantage point would rouse overwhelming protectionist opposition in Congress. However, advocacy of such a meritorious, albeit unpopular, proposal at least may ease the path for more modest trade reform measures.

VI. Alternative Reform Measures

The fair trade bureaucracy conceivably is so entrenched that a major overhaul of the law is nearly impossible. Even if Congress declines to dismantle the Trade Agreements Act framework in favor of a modified Escape Clause, less ambitious steps still can be taken to remove some of the most blatantly protectionist excesses of our "fair trade" regulations. Although more equitable "fair trade" laws still would focus on inappropriate issues, they would do so in a less arbitrary and less unpredictable fashion.

The fairness objective of the antisubsidy law is so elusive because no amount of adjudicatory hair-splitting can ensure that we penalize only economically and politically unjustifiable subsidies. Nonetheless, a simple reform could effect a more equitable pro-

cess without requiring the quixotic reconstruction of level competitive playing fields. Congress could instruct Commerce to focus only on that class of subsidies which most often lacks political or economic merit—export subsidies. Countervailing only export-oriented subsidies rather than domestic subsidies would streamline administrative procedures and eliminate much of the current statute's protectionist bias. If such a blanket exception proves politically untenable, greater account should be taken, at least, of offsetting costs and consequences before the countervailing of particular domestic subsidies.

Because the "bogeyman" of foreign government intervention is absent in dumping controversies, a more politically persuasive case can be made for paring down the Commerce Department's jurisdiction in this area. Ideally, the courts should be empowered to challenge predatory abuses by dumpers under the antitrust laws, leaving importers otherwise free to charge the going rate in each of their diverse markets.[62] Absent this reform, any measures granting importers wider latitude to set prices according to prevailing market conditions would be welcomed.

In dumping cases particularly, foreign exchange rate fluctuations and other variable factors tend to influence unduly Commerce Department calculations and to intensify the unpredictability of fair trade decisions.[63] Commerce should promulgate standards which enhance the predictability and consistency of its determinations.

The most economically indefensible aspect of the entire fair trade canon is the method used to calculate foreign market value when home market sales are de minimis in dumping cases.[64] One means of correcting for the arbitrariness of such dumping calculations would require Congress to offer private rulings to importers who seek advance knowledge of the possible sanctions they face for fair trade violations.[65]

In reforming the fair trade laws, Congress should emphasize simplification. The adjudicatory process is already extremely

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62. *See supra* note 47 and accompanying text.

63. *See* Caine, *supra* note 28, at 695.

64. *Id.* at 687.

65. For a good discussion of the desirability of these and other limited reforms of United States antisubsidy and antidumping law, see *First Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit, As It Should Be: What's Wrong with the Law,* 100 F.R.D. 576, 593 (1984).

complex and each session of Congress seemingly results in an expansion of the scope and detail of the fair trade calculus. For example, the Trade and Tariff Act of 1984 requires Commerce to investigate the effect of "upstream subsidies" which might indirectly reduce an exporter's raw material costs.[66] As the definition of countervailable subsidization expands, so does the protectionist potential of United States trade policy. Any simplifying reforms which would limit the reach of the fair trade laws or curb the number of countervailable foreign actions would result in a major improvement on the present state of affairs.

VII. Conclusion

United States fair trade adjudication has grown increasingly more complex, encouraging ever greater numbers of lawyers to vie for a piece of the action. Yet, the end result appears more protectionist than fair, because nearly any instance of foreign government subsidization or price discrimination now can be condemned regardless of offsetting economic or political justifications.

Moreover, the arduous, expensive, misleading and often arbitrary process of fair trade adjudication simply fails to address the central concern of most parties involved in major trade disputes—market share. Shifting to a modified Escape Clause approach would enable policymakers to directly and even-handedly balance competing producer and consumer interests, unencumbered by a fair trade smokescreen. Of course, the injurious consequences of blatantly abusive foreign export subsidies would not be ignored in the course of Escape Clause deliberations.

Protectionist forces likely have sufficient influence to subvert any principled proposal to re-emphasize discretionary relief in trade policymaking. Although it might be politically imprudent to attempt a complete dismantling of the fair trade framework, efforts should at least be made to correct some of the grosser inequities of the existing adjudicatory approach.

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66. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 613(a), 98 Stat. 2948, 3035.