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Abstract

In his earlier work, Nivola displayed his ability to urge acceptance of controversial viewpoints. In his most recent work, *Regulating Unfair Trade*, Mr. Nivola has outdone himself. Even those who disagree with some of his analyses and conclusions will acknowledge that his views are informed and balanced. Furthermore, his presentation is thorough and his style is easy to follow. Mr. Nivola divides the discussion into seven chapters. In the first chapter, "Gulliver's Travail," he describes the objective for his enterprise. In the second chapter, he maps out the terrain. In chapter three, he sets the general tone for the discussion. In chapter four, he examines specific grievances referred to as "war stories." In chapter five and six, he compares the legislative and executive approaches to the problem of regulation. In chapter seven, he recommends solutions to the problem.

BOOK REVIEW

REGULATING UNFAIR TRADE. By Pietro S. Nivola, Washington, D.C., the Brookings Institution, 1993. xviii & 190 pp. ISBN 0-8157-6090-6. Cloth, \$31.95.

*Reviewed by Victor Essien**

In *The Politics of Energy Conservation*,¹ Pietro S. Nivola examined U.S. energy development and conservation against the backdrop of internal and global politics. In this earlier work, Nivola displayed his ability to urge acceptance of controversial viewpoints. In his most recent work, *Regulating Unfair Trade*,² Mr. Nivola has outdone himself. Even those who disagree with some of his analyses and conclusions will acknowledge that his views are informed and balanced. Furthermore, his presentation is thorough and his style is easy to follow.

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In the first chapter, Nivola asserts that the book addresses an "ambitious regulatory program," namely, "America's effort to combat objectionable trading practices of other countries."³ He recalls the immediate post-war period when the United States dominated the world economy and for economic and political reasons turned a blind eye to the trade foibles of other nations.⁴ Nivola identifies certain changes that seemed to threaten the U.S. hegemony over the world economy, and con-

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1. PIETRO S. NIVOLA, *THE POLITICS OF ENERGY CONSERVATION* (1986).

2. PIETRO S. NIVOLA, *REGULATING UNFAIR TRADE* (1993).

3. *Id.* at 1.

4. *Id.* at 2.

sequently affected its attitude towards regulation.⁵ Trade became a significant share of the Gross National Product at a time when imports far outstripped exports. Although the country was more dependent on export-led growth, seven rounds of unilateral regulations under the General Agreement on Tariffs and Trade ("GATT") left the U.S. market more exposed than those of other countries.⁶

Nivola, however, notes the existence of public indifference and dissension in governmental policy over the need for regulation.⁷ Added to this was what he terms "a regulatory paradox."⁸ Regulation of foreign trade expanded during a period when the U.S. government was curtailing its role in important sectors of the domestic economy like transportation, energy, and telecommunication.⁹ The U.S. expansion in trade regulation took the form of hundreds of anti-dumping suits, countervailing duties and hints of other retaliatory sanctions. Nivola concludes that all of these yielded mixed results and distracted national attention from other primary tasks, such as healing the budget deficit, resuscitating the national rate of saving, and rehabilitating the nation's human capital.¹⁰

In chapter two, Nivola, like Jonathan Swift's Gulliver, introduces the land of "Lilliput, Brobdingnag, Laputa, Balnibarbe, Luggnagg, Glubbudrib, Houyhnhnms and Japan."¹¹ Similar to Jonathan Swift, Nivola in this chapter, lays claim to literary license. He attempts to persuade the reader that more regulation cannot assure a level playing field. So intent is he in this advocacy that he sometimes makes unproven statements. For instance, in the face of several dislocations in the iron and steel industries, he points to unfavorable exchange rates and the failings of the local industry as the culprits and not foreign trade.¹²

5. *Id.*

6. *Id.*

7. *Id.* at 3.

8. *Id.* at 3-6.

9. *Id.* at 15.

10. *Id.* at 18.

11. JONATHAN SWIFT, *GULLIVER'S TRAVELS* (P. Dixon & J. Chalker eds. 1967). In this work, Gulliver travels to several nations of the world. Nivola obviously sees his excursion into trade regulation as akin to Jonathan Swift's *Gulliver's Travels* with part of its satirical overtones. *Id.*

12. Nivola, *supra* note 2, at 21.

Secondly, he insinuates that because of the impossibility of measuring the extent and severity of unwarranted foreign trade distortion there can be no basis for believing that there is a malicious environment for merchandise trade.¹³ He also attempts to prove that non-tariff protection has not slowed down global trade and that "the growth of non-tariff barriers in the 1980s was almost certainly being offset by unilateral tariff reductions."¹⁴ Furthermore, confronted with the high incidence of dumping and predatory pricing of the Japanese, he explains that this "reflected redefinitions of 'unfair' pricing rather than a highest incidence of production and price-gouging."¹⁵

Finally, he contends that, in spite of recent U.S. trade policy, the United States has enjoyed remarkable growth during the past decade.¹⁶ He claims that the "overall effect of sectional market opening actions was small in comparison with the effect of currency realignments, improvements in U.S. manufacturing productivity and other macroeconomic forces."¹⁷

In chapter three, Nivola discusses the Politics of Remediation. To prove the dangers and irrelevance of trade regulation, Nivola links the electoral defeats of Walter Mondale, Richard Gephardt, Robert Dole, Pat Robertson, Tom Harkin, and Robert Kerrey to their positions on the trade issue.¹⁸ Such an assertion is undoubtedly controversial and hard to substantiate.

These biases aside, Nivola has written a very instructive book. He is particularly skilled at demonstrating the close relationship between law, politics and economics in the international trade arena. In the chapter entitled "War Stories,"¹⁹ Nivola describes the hopelessness of the institutional arrangements aimed at insulating the policy process against the pressures of politics. Nivola describes how after the debacle of the 1930 Tariff Act, the legislative and executive branches agreed on the need to "hold renewed protectionist reflexes in

13. *Id.* at 26.

14. *Id.* at 26-28.

15. *Id.* at 48.

16. *Id.* at 49.

17. *Id.*

18. *Id.* at 57.

19. *Id.* at 69.

check.”²⁰ The legislature surrendered some of its authority to the courts and various regulatory agencies including the International Trade Commission (ITC), the International Trade Administration of the Commerce Department (ITA), the Office of the U.S. Trade Representative (USTR) and the Court of International Trade (CIT).²¹ These adjudicatory bodies would buy off the anger of aggrieved industries by offering token protection in legitimate instances that would not interfere with the general flow of commerce.²²

Nivola, however, provides three interesting cases where this carefully crafted script has not been followed and where political issues came into play. The first of these cases is what he calls the “textile tangle” involving a coalition of U.S. textile and apparel companies and their petition to the Department of Commerce to act against subsidized textile products from mainland China in September 1983.²³ The coalition claimed that the illegal subsidy stemmed from China’s dual exchange rate. The petition was in effect a reaction to the August 1983 U.S.-China Trade Accord restricting annual growth of Chinese textile exports to the U.S. from 2.5% to 3.5%.²⁴ The coalition referred to this deal as “a disaster.”

In addition, Nivola explains that for political reasons the Reagan administration avoided an ITA ruling on the petition by promising to and actually signing another accord in December 1983 with Hong Kong, South Korea, Taiwan and China aimed at systematically monitoring and controlling textile imports from these countries.²⁵ This accord, however, did not end the textile controversy.²⁶ Since 1961 the domestic textile and apparel manufacturers had been protected by an increasing number of trade restrictions.²⁷ By 1990 more than 1,000 quotas existed with thirty-eight nations, covering three-quarters of all imports.²⁸ Nivola contends that with an average duty of 20% on these products, this situation costs American

20. *Id.*

21. *Id.*

22. *Id.* at 71.

23. *Id.* at 73.

24. *Id.* at 74.

25. *Id.* at 75.

26. *Id.* at 76.

27. *Id.*

28. *Id.*

consumers \$20 billion a year for the clothes they buy.²⁹

Nivola relates two additional "war stories," involving the Canadian lumber industry and the Japanese construction industry.³⁰ Unlike the controversy surrounding the textile industry, these events did not yield excessive dollar losses to U.S. consumers. However, in both the Canadian and Japanese episodes, "[w]hat began, seemingly, as a technical administrative exercise involving a few low-level participants and limited stakes, gradually drew in the rest of the government, raising tempers, altering expectations, and sometimes extending the conflicts."³¹

In chapter five, Nivola considers the politics of trade legislation. He characterizes legislative activity to be of two kinds: theatrical gestures and substantive enactments.³² Furthermore, Nivola traces how both forms of legislative activity have impelled various trade legislation including the Trade Act of 1974, the Trade Agreements Act of 1979, the Trade and Tariff Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988.³³ Nivola is more concerned with how the legislation came into being than with how the legislation functions. Concluding that the cumulative effect of the legislative activity has become significant, Nivola asserts that "an extensive patchwork of regulations was being pieced together, with new layers repeatedly stitched to older ones."³⁴

In chapter six, Nivola turns his attention to the functions of the executive. Examining the historical context of the executive's function, Nivola recognizes that the executive who "could check and balance the pressures for measures regulating foreign trade . . . also contributed to them."³⁵ In addition, Nivola characterizes the executive-legislative interactions in trade matters variously as a "marriage of convenience," a "complex partnership," and a "good cop, bad cop" routine.³⁶ All characterizations are correct. Nivola further suggests that

29. *Id.*

30. *Id.* at 73.

31. *Id.*

32. *Id.* at 91.

33. *See id.* at 91-107 (discussing details of various trade legislation).

34. *Id.* at 108.

35. *Id.* at 110.

36. *Id.* at 122.

unlike Congress, the executive tends to subordinate trade conflicts to more fundamental domestic concerns, especially those concerning war and peace.³⁷ Yet, he accurately states that the “conventional model of interbranch politics, in which the legislature is forever pushing interventionist projects that the executive indefatigably resists, is an oversimplification.”³⁸ Although the partnership between the executive and lawmakers is advantageous to both, Nivola questions whether their complex relationship offers them the “political slack they need to start solving economic problems more fundamental than foreign trading practices.”³⁹

Nivola’s final chapter is devoted to providing some solutions for the trade policy dilemma. He first sums up the present situation as follows:

Although the international trading system was generating fierce competitive pressures, for the most part the pressures and the system were not less ‘fair’ than in the past. Despite speculation about rising foreign protectionism and a moribund GATT, world trade and welfare grew throughout the 1980s, and by the end of the decade, our robust export sectors were leading the parade. To be sure, adversarial economic practices continued to interfere. Industrial targeting and predatory pricing could endanger strategic U.S. export industries.⁴⁰

Furthermore, Nivola explains that:

[M]ost of the complaints about harmful subsidizing and dumping did not involve them. Moreover, many complaints reflected changes in conceptions of fairness rather than increases in pernicious subsidies or pricing strategies.⁴¹

Against this background, Nivola notes that commentators usually make one of the following three recommendations. One group urges suspension of the regulatory campaign against unfair trade. In contrast, the second proposes that government manage trading relations on a larger scale. The third group suggests that the government should train its interventionist’s arsenal on structural sources of competitive

37. *Id.* at 113.

38. *Id.* at 127.

39. *Id.* at 128.

40. *Id.* at 131.

41. *Id.*

erosion in the domestic economy.⁴²

Nivola contends that “[s]omewhere along the continuum of theoretical policy options lies common sense,” which he translates as pressing for equitable rules of foreign trade while carrying out the economic changes needed to make government a better partner of industry at home.⁴³ Nivola recommends that the “[h]ighest priority should go to fostering a robust rate of productivity growth by raising the level of public and private savings, curbing the costs of health care, creating a less adversarial regulatory environment and equipping the labor force for the work it will have to do.”⁴⁴

While these basic changes are gradually being implemented, Nivola offers some mid-range suggestions in order to make trade decisions that “complement, rather than subordinate, the primary agenda.”⁴⁵ Nivola advises that the safeguard mechanism under GATT, which is section 201 of the 1974 Trade Act, should be pressed into service more often to provide emergency relief to U.S. industries that are seriously impaired by trade. He cautions, however, that the injury threshold and the norms for causality addressed in section 201 needs to be revised if the legislation is to become more attractive.⁴⁶ In addition, Nivola maintains that the anti-dumping legislation needs re-tooling. In particular, he contends that the injury test should relate not only to the industry but to the country’s national welfare and security. Presumably, if the pricing in question favors competition and will bring a net benefit to the U.S. economy then the petitioner should lose out.⁴⁷ Nivola’s other mid-range suggestions relate to strengthening the unilateral GATT process to challenge trade barriers, picking trade disputes well and clarifying the institutional responsibilities of both the executive and legislature to trade policy.

Nivola’s suggestions and recommendations warrant the at-

42. *Id.* at 137.

43. *Id.* at 142.

44. *Id.*

45. *Id.* at 144.

46. *Id.* Nivola does not spend much time discussing how the General Agreements on Tariffs and Trade (GATT) fits into the present regime. *Id.*

47. *Id.* at 145. Nivola’s criticisms echo the highly critical views of other commentators regarding the enforcement of U.S. unfair trading legislature. *DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS* (R. Boltuck and R.E. Litan eds., 1991).

tention of both those who make and those who are affected by trade policy. His remarks that trade policy should not mask the need for more basic economic changes are even more significant. Since Nivola's book is concise and not too technical,⁴⁸ it should garner a wide readership.

48. See, e.g., Murray, *The Administration of the Antidumping Duty Law by the Department of Commerce in DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS* 23 (R. Boltuck and R.E. Litan eds., 1991) (discussing technical aspects of administration of unfair trade laws); see generally, *ALI-ABA INTERNATIONAL TRADE FOR THE NON-SPECIALIST* (P.H. Vishny ed., 1992).