RedNHE | Red Nacional de Investigadores en Economía

Unlawful Tariffs: Incidence, Damages, and Remedies

Roger D. Blair (University of Florida)

Javier D. Donna (University of Miami/Rimini Center for Economic Analysis)

Gunnar Heins (University of Florida)

DOCUMENTO DE TRABAJO N° 412

Noviembre de 2026

Los documentos de trabajo de la RedNIE se difunden con el propósito de generar comentarios y debate, no habiendo estado sujetos a revisión de pares. Las opiniones expresadas en este trabajo son de los autores y no necesariamente representan las opiniones de la RedNIE o su Comisión Directiva.

The RedNIE working papers are disseminated for the purpose of generating comments and debate, and have not been subjected to peer review. The opinions expressed in this paper are exclusively those of the authors and do not necessarily represent the opinions of the RedNIE or its Board of Directors.

Citar como:
Blair, Roger D., Javier D. Donna y Gunner Heins (2026). Unlawful Tariffs: Incidence, Damages, and Remedies. Documento de trabajo RedNIE N°412.

UNLAWFUL TARIFFS: INCIDENCE, DAMAGES, AND REMEDIES

Roger D. Blair[*] **Javier D. Donna**[**] **Gunnar Heins**[***]

ABSTRACT

In *Learning Resources, Inc. v. Trump*, the Supreme Court held that the tariffs imposed by executive order pursuant to the International Emergency Economic Powers Act exceeded presidential authority. The decision has generated over two thousand lawsuits and potential refund exposure in the range of $130–175 billion. This Article provides a law and economics analysis of the recovery problem. Drawing on the *Bigelow* measure of antitrust damages and standard tax incidence theory, the Article argues that both importers and foreign exporters have suffered cognizable injury. The damage suffered by each class depends on the incidence of the tariff, which is determined by the elasticities of domestic import demand and foreign export supply. The Article examines the complications introduced by market power, supply-chain pass-on under *Illinois Brick*, the problem of windfalls, and the econometric challenges of estimating the but-for price. Methodological approaches—including before-and-after comparisons, yardstick methods, and structural demand estimation—are evaluated. The Article also addresses the social welfare loss not captured by private damage claims and the procedural constraint imposed by the 180-day customs protest period.

Keywords: Unlawful tariffs, IEEPA, tariff incidence, antitrust damages, but-for price, *Illinois Brick*, pass-on defense, customs refund, trade policy.

JEL codes: K21, F13, K33, H22, K41.

---

[*] Professor, Department of Economics, University of Florida, and Affiliate Faculty, Levin College of Law, University of Florida. Email: rdblair@ufl.edu.

[**] Associate Professor of Economics, Jeffrey L. Bewkes Family Endowed Chair, Miami Herbert Business School, University of Miami; The Rimini Centre for Economic Analysis, Rimini, Italy. Email: jdonna@miami.edu.

[***] Assistant Professor, Department of Economics, University of Florida. Email: gheins@ufl.edu.

The authors thank Sara Benzley, Professor of Legal Research, University of Florida Levin College of Law, for invaluable research assistance. Our colleagues, David Denslow, Elias Dinopoulos, Richard Romano, and David Sappington provided many constructive suggestions. They cannot be blamed for what follows.

I. INTRODUCTION

In *Learning Resources, Inc. v. Trump*,[1] the Supreme Court, by a vote of six to three, held that the tariffs imposed by executive order pursuant to the International Emergency Economic Powers Act (IEEPA)[2] exceeded the scope of presidential authority. Chief Justice Roberts, writing for the Court, concluded that IEEPA does not authorize the President to impose tariffs of this character and breadth, reasoning that the statute's enumeration of regulatory powers does not extend to the imposition of general import taxes.[3]

The tariffs affected imports from nearly ninety countries and generated an estimated $130–166 billion in unlawful revenue from more than 330,000 domestic businesses.[4,5] The decision did not resolve whether, or by what mechanism, the collected tariffs must be refunded. The Supreme Court invalidated the legal basis for the tariffs but left the refund issues to lower courts and the customs authorities. Within weeks, private parties filed suit. As of the date of this writing, more than two thousand suits have been filed in the United States Court of International Trade (CIT), with many more anticipated.[6,7]

Representative among the early filers is *V.O.S. Selections, Inc. v. United States*,[8] which seeks injunctive relief and an order requiring the government to refund all tariffs paid with interest. A partial judicial response was provided by the CIT in *Atmus Filtration, Inc. v. United States*,[9] but

[1]Learning Resources, Inc. v. Trump, No. 24-1287, slip op. (U.S. Feb. 20, 2026). The opinion is available at https://www.supremecourt.gov/opinions/25pdf/24-1287_4gcj.pdf.

[2]International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1708 (2018).

[3]Learning Resources, No. 24-1287, slip op. at 6–7 (Chief Justice Roberts writing for the Court, joined by five Justices). Three Justices dissented.

[4]J.P. Morgan Global Research, U.S. Tariffs: Economic Impact and Refund Litigation (Feb. 24, 2026); see also Wikipedia, Tariffs in the Second Trump Administration, https://en.wikipedia.org/wiki/Tariffs_in_the_second_Trump_administration.

[5]J.P. Morgan Global Research, supra note 4 (placing aggregate refund exposure in the range of $130–175 billion).

[6]The Daily Record, Supreme Rules: U.S. Court Tariff Refund Lawsuits Surge (Mar. 3, 2026), https://thedailyrecord.com/2026/03/03/supreme-rules-us-court-tariff-refund-lawsuits-surge/.

[7]Reuters, Global Companies That Have Sued the U.S. Government for Tariff Refunds (Feb. 19, 2026), https://www.reuters.com/business/autos-transportation/global-companies-that-have-sued-the-us-government-tariff-refunds-2026-02-19/. Named plaintiffs include Costco Wholesale, FedEx, and L'Oréal, as well as roughly 2,000 smaller companies.

[8]V.O.S. Selections, Inc. v. United States, No. 1:25-00066 (Ct. Int'l Trade 2025). The complaint seeks injunctive relief and an order requiring the government to "promptly refund all tariffs paid, with interest, under IEEPA."

[9]Atmus Filtration, Inc. v. United States, No. 1:2026cv01259 (Ct. Int'l Trade Mar. 4, 2026) (Eaton, J.).

that ruling addressed only unliquidated and non-final liquidated entries and was promptly stayed pending development of a refund mechanism by U.S. Customs and Border Protection (CBP).[10,11,12]

The legal disputes arising from the unlawful tariffs pose perplexing questions of law and economics. Who suffered harm? What is the measure of damages? Are both importers and foreign exporters entitled to recover? How should the but-for price (the price that would have prevailed absent the unlawful tariff) be estimated? Does *Illinois Brick* bar pass-on claims by downstream purchasers? Does the 180-day customs protest period bar recovery for tariffs paid at the outset of the program? These questions require a synthesis of antitrust damages law, tax incidence theory, and econometric methodology. This Article provides that synthesis.

Part II describes the statutory background and the Supreme Court's holding in *Learning Resources*. Part III analyzes the CIT's ruling in *Atmus Filtration* and the procedural constraints on recovery. Part IV applies standard incidence analysis to identify the distribution of harm between importers and exporters. Part V presents the normative policy proposal: it distinguishes the existing customs refund mechanism from the *Bigelow* damages framework, addresses the standing gap for foreign exporters and three mechanisms for closing it, and identifies the principled boundary between upstream exporter claims and the downstream bar imposed by *Illinois Brick*. Part VI addresses the calculation of claims and the econometric methodology for estimating the but-for price. Part VII examines complicating factors, including market power, product heterogeneity, and supply-chain pass-on. Part VIII concludes.

II. BACKGROUND

A. The IEEPA and Presidential Tariff Authority

The International Emergency Economic Powers Act grants the President broad authority to regulate international commerce in response to a declared national emergency. The Act authorizes the President to "investigate, regulate, or prohibit" transactions in foreign exchange and to "prevent or prohibit" dealings in property in which a foreign national has an interest.[13]

Prior to *Learning Resources*, the executive branch maintained that the authority to "regulate" commerce encompassed the power to impose tariffs as an emergency measure. This position rested on the breadth of IEEPA's enumerated powers and the absence of an express

---

[10]See H.K. Law, Court of International Trade Orders Nationwide Tariff Refunds (Mar. 2026), https://www.hklaw.com/en/insights/publications/2026/03/court-of-international-trade-orders-nationwide-tariff-refunds; Squire Patton Boggs, Preserve Your Rights to Tariff Refunds (2026), https://www.squirepattonboggs.com/insights/publications/preserve-your-rights-to-tariff-refunds-now-in-light-of-the-ongoing-supreme-court-tariff-litigation/.

[11]Bradley, Court of International Trade Orders Reliquidation of IEEPA Tariff Duties: What Importers Should Do (Mar. 2026), https://www.bradley.com/insights/publications/2026/03/court-of-international-trade-orders-reliquidation-of-ieepa-tariff-duties-what-importers-should-do.

[12]Atmus Filtration, No. 1:2026cv01259, Order of Mar. 6, 2026 (staying the March 4 refund order while CBP prepares a proposed refund mechanism; commentators estimated a forty-five-day window for CBP to finalize its proposal).

[13]IEEPA, 50 U.S.C. § 1702(a)(1)(B) (enumerating the President's authority to "regulate" transactions in foreign exchange and to "prevent or prohibit" specified dealings in property subject to U.S. jurisdiction in which a foreign national has an interest).

prohibition on tariffs in the statute's text. The Trump administration was the first to use the statute as the basis for a sweeping, country-specific tariff program on goods imports from nearly every trading partner.[14]

The "Liberation Day" tariff program imposed, as a baseline, a ten-percent ad valorem (i.e., percentage of value) tariff on imports from all countries, with additional "reciprocal" rates for approximately ninety nations. The tariffs operated as charges on the customs value of imported goods and were collected by CBP at the border. The total of unlawful IEEPA tariff receipts is estimated at $130–166 billion, a figure that excludes pre-existing Section 232 and Section 301 duties not challenged in *Learning Resources*.[15]

The announcement of the Liberation Day tariffs on April 2, 2025 triggered one of the largest single-day declines in U.S. equity markets since the pandemic, reflecting market participants' assessment that the economic burden would fall substantially on domestic firms and consumers.[16]

B. The Supreme Court's Ruling

In *Learning Resources, Inc. v. Trump*, decided February 20, 2026, the Supreme Court struck down the IEEPA-based tariffs in a six-to-three decision authored by Chief Justice Roberts. The Court applied the major questions doctrine, under which a claim of executive authority to resolve questions of vast economic and political significance must rest on clear congressional authorization. The Court concluded that neither the text nor the structure of IEEPA provided the clear statutory authorization required to sustain a tariff program generating over one hundred billion dollars per year in revenue and affecting imports from nearly every country in the world. The power to impose such taxes, the Court held, remains with Congress.[17]

The Court's opinion explicitly declined to address the question of refunds. The decision invalidated the legal basis for the tariffs going forward and declared the executive orders unlawful, but it did not establish a mechanism for the return of tariffs already collected, leaving that issue to the lower courts and the customs authorities.

III. THE COURT OF INTERNATIONAL TRADE RULING

---

[14]J.P. Morgan Global Research, supra note 4; see also CNN, Supreme Court Rules on Tariffs (Feb. 20, 2026), https://www.cnn.com/2026/02/20/politics/supreme-court-tariffs.

[15]Tariff rates varied by country and by product. Chinese manufactured goods already subject to Section 301 tariffs faced an additional IEEPA levy. Canadian and Mexican steel and aluminum products faced Section 232 duties of twenty-five percent and ten percent respectively, on top of which the IEEPA surcharge applied to non-USMCA-qualifying goods. J.P. Morgan Global Research, supra note 4.

[16] See, e.g., the S&P 500's decline of approximately 4.8 percent on April 3, 2025, the first trading day following the Liberation Day announcement. Financial market event studies document that industries with high import-input intensity experienced sharper equity declines, consistent with the incidence analysis in Part IV. *See* Fajgelbaum and Goldberg (2020) documenting market reactions to tariff announcements. P. Fajgelbaum and P. Goldberg , P. Kennedy & A. Khandelwal, The Return to Protectionism, 135 Quarterly Journal of Economics 1 (2020).

[17]Learning Resources, No. 24-1287, slip op. at 8–12 (applying the major questions doctrine). See also Wired, The Supreme Court's Trump Tariffs Ruling (2026), https://www.wired.com/story/supreme-court-trump-tariffs-ruling/; Wall Street Journal, Trump Tariffs Supreme Court Decision (2026), https://www.wsj.com/us-news/law/trump-tariffs-supreme-court-decision-29c26fa2.

A. The Atmus Filtration Order

Following the Supreme Court's decision, the CIT, in *Atmus Filtration, Inc. v. United States*,[18] issued an order on March 4, 2026, directing CBP to cease collecting IEEPA duties and to unwind (i.e., reverse) duties already assessed. Judge Eaton's order directed CBP to: (1) liquidate unliquidated entries without IEEPA tariffs; and (2) reliquidate liquidated but still non-final entries without IEEPA tariffs. In customs law, "liquidation" is the final determination of duties owed on an import entry; an "unliquidated" entry is one whose final duty has not yet been computed, while a "liquidated" entry is one that has been finalized. "Reliquidation" is a correction of a prior liquidation.[19]

The order was understood by commentators and practitioners as contemplating refunds to all importers of record, not only those who had filed suit. The court directed that covered entries be processed "as if the IEEPA tariffs had never applied." In practice, reliquidation without IEEPA duties means that the difference between the tariff paid and the lawful duty is returned to the importer of record.[20]

However, the order does not compel refunds for entries that are fully final (i.e., entries whose liquidation has become legally definitive and cannot be revised under any administrative process) and no longer subject to reliquidation. Such entries remain in legal limbo pending further judicial, administrative, or congressional action. The scope of the order is therefore partial: it reaches a substantial volume of entries but does not resolve the refund claim of every importer.

B. The Stay and Procedural Posture

On March 6, 2026, the CIT suspended implementation of the March 4 refund order while CBP developed a proposed refund process, with an estimated forty-five-day period for CBP to finalize the proposal.[21] The stay left the mechanics and scope of the eventual process unsettled. An appeal by the government is widely anticipated by analysts who warn that higher courts may narrow the order's universal application.[22]

C. The 180-Day Protest Period

A constraint that has received insufficient attention in press coverage of the litigation is the 180-day customs protest period.[23] Under 19 U.S.C. § 1514, an importer who disputes a liquidation

---

[18]Atmus Filtration, supra note 9.

[19]Bradley, supra note 11; H.K. Law, supra note 10.

[20]Forvismaz, supra note 14; see also Jdsupra, IEEPA Tariff Refunds: Current Status (Mar. 2026), https://www.jdsupra.com/legalnews/ieepa-tariff-refunds-current-status-and-8168062/.

[21]Atmus Filtration, supra note 12 (stay order of Mar. 6, 2026).

[22]See Forvismaz, Atmus Filtration, Inc. v. United States—Closer to Tariff Refund Clarity (Mar. 2026), https://www.forvismazars.us/forsights/2026/03/atmus-filtration-inc-v-united-states-closer-to-tariff-refund-clarity; Buchalter, CIT Orders CBP to Remove IEEPA Tariffs from Unliquidated Entries (Mar. 2026), https://www.buchalter.com/insights/cit-orders-cbp-to-remove-ieepa-tariffs-from-unliquidated-entries-pressure-builds-on-cbp-to-roll-out-a-refund-procedure/.

[23]19 U.S.C. § 1514 (2018) (establishing the finality of customs liquidations and the 180-day protest period).

decision must file a protest within 180 days of the liquidation date. Failure to protest within that period renders the liquidation final and may bar a subsequent refund claim.

Yet the CIT's reliquidation-based order operates with respect to entries that are not yet final. For entries that were liquidated more than 180 days before the importer filed a protest or suit, the time-bar may operate independently of the *Atmus* order, potentially leaving a class of early-paying importers without a remedy regardless of the merits of their claim.[24]

The legal resolution of this issue turns on whether *Learning Resources* constitutes a basis for extraordinary relief from the finality rules of 19 U.S.C. § 1514, and whether courts treat the initial tariff orders as void *ab initio* in a manner that displaces the standard protest deadline. These questions are unresolved.

IV. THE INCIDENCE OF UNLAWFUL TARIFFS

A. Standard Incidence Analysis

Suppose that a firm (the importer) purchases a good, for example an input, from another firm (the exporter), which is located in a foreign country. An ad valorem tariff at rate τ creates a price wedge between the domestic price paid by the importer, P_1, and the price received by the foreign exporter, P_2. To illustrate, Figures 1 and 2 plot the demand curve for imports D as well as the export supply curve prior to and after the tariff, S_1 and S_2, respectively. Since the tariff effectively inflates the marginal cost of exporters, S_2 will generally lie above S_1.[25]

In the absence of the tariff, the equilibrium price is P_3. We refer to this price as the free-trade or but-for price---the price that would have prevailed for both the importer and the exporter had the tariff never been imposed---which lies between P_2 and P_1.[26] Specifically, if τ denotes the ad valorem tariff rate, then $P_1 = P_2(1 + \tau)$, so the per-unit tariff is $P_1 - P_2 = \tau P_2$. The tariff revenue per unit is $P_1 - P_2$, and the total tariff revenue is $(P_1 - P_2) \cdot Q_1$, where Q_1 is the quantity traded under the tariff. The but-for price lies between P_1 and P_2 because the tariff drives them apart: P_1 rises above what the competitive price would have been, and P_2 falls below it. Comparing actual prices to the but-for price P_3 is the key to measuring each party's harm.[27]

---

[24]There is a 180-day protest period that runs from the date of *liquidation*, not from the date of payment. See 19 U.S.C. § 1514(c)(3). Because liquidation often occurs months or years after the duty is paid, an importer who paid a tariff early in the IEEPA program may still have a timely protest if the entry had not yet been liquidated within the 180-day window before suit was filed. Conversely, an importer whose entry was liquidated more than 180 days before the filing of a protest or suit, and who did not file a timely protest, may be time-barred regardless of when the underlying payment was made.

[25] Note that we adopt the common assumption that firms engage in perfect competition throughout this section.

[26] Note that the arguments of this section do not depend qualitatively on whether or not the initial tariff is 0 or positive. This is important since the IEEPA tariffs were imposed in addition to prior waves of tariffs, such as those under Section 301. However, when tariffs are already initially different from 0, D and S_1 should be interpreted as demand and supply prior to IEEPA and P_3 as the corresponding price.

[27]The ad valorem tariff τ generates a domestic price $P_1 = P_2(1 + \tau)$ under competitive conditions, where P_2 denotes the exporter's net-of-tariff receipt. The price wedge $P_1 - P_2 = \tau P_2$ is the tariff per unit.

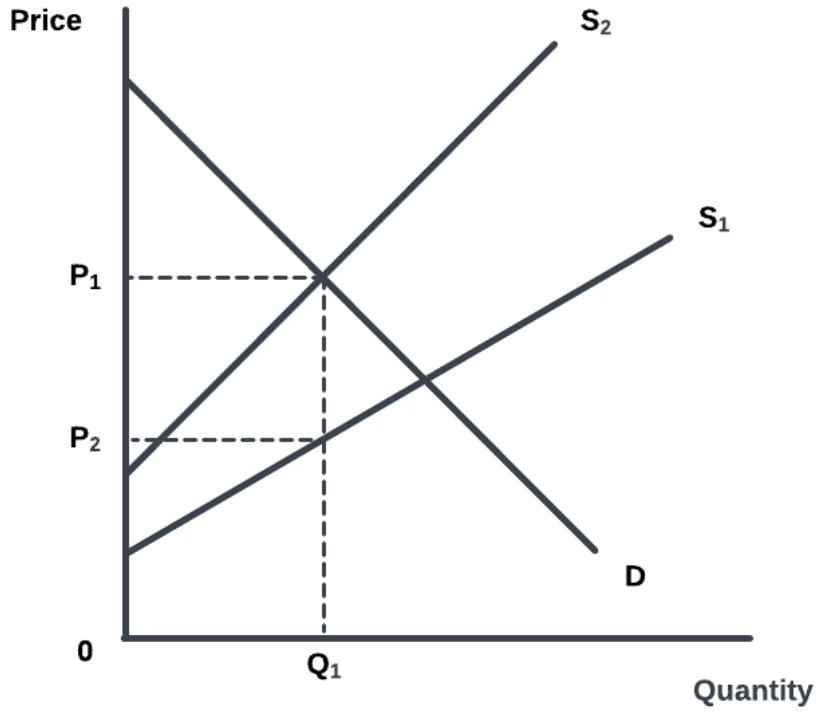


Figure 1: Price and Quantity with a Tariff

The burden of the tariff is shared between importers and exporters according to the relative elasticities of domestic import demand and foreign export supply. Let ε denote the absolute value of the price elasticity of domestic import demand, and let η denote the price elasticity of foreign export supply.[28] Standard incidence analysis establishes:[29]

$$P_1 - P_3 = [\eta / (\varepsilon + \eta)] \cdot (P_1 - P_2)$$

$$P_3 - P_2 = [\varepsilon / (\varepsilon + \eta)] \cdot (P_1 - P_2)$$

The first expression states that the importer's per-unit burden—measured as the increase in the domestic price relative to the but-for price—is a fraction $\eta/(\varepsilon + \eta)$ of the total tariff. The second states that the exporter's burden—the reduction in the export price relative to the but-for price—is a fraction $\varepsilon/(\varepsilon + \eta)$ of the total tariff. Two polar cases are instructive. If domestic demand is perfectly inelastic ($\varepsilon \to 0$), the entire tariff falls on the importer and the exporter's price is

[28] Specifically, these elasticities describe by which percentage demand and supply change in response to a 1-percent increase in prices.

[29] The derivation follows standard partial-equilibrium trade theory. See Paul R. Krugman, Maurice Obstfeld & Marc J. Melitz, International Economics: Theory and Policy 213–40 (11th ed. 2018). See also Amiti, M., Redding, S., & Weinstein, D., The Impact of the 2018 Tariffs on Prices and Welfare, 33 Journal of Economic Perspectives 187 (2019).

undisturbed. If foreign export supply is perfectly elastic ($\eta \to \infty$), the domestic price rises by the full tariff and the exporter bears nothing. In intermediate cases, both parties bear a positive share. The analysis focuses on these two direct parties to the import transaction. The burden that is ultimately passed on to domestic consumers through higher retail prices is addressed separately: as developed in Part V, the legal framework under *Illinois Brick* assigns the full damage claim to the importer of record and bars downstream consumer claims.[30]

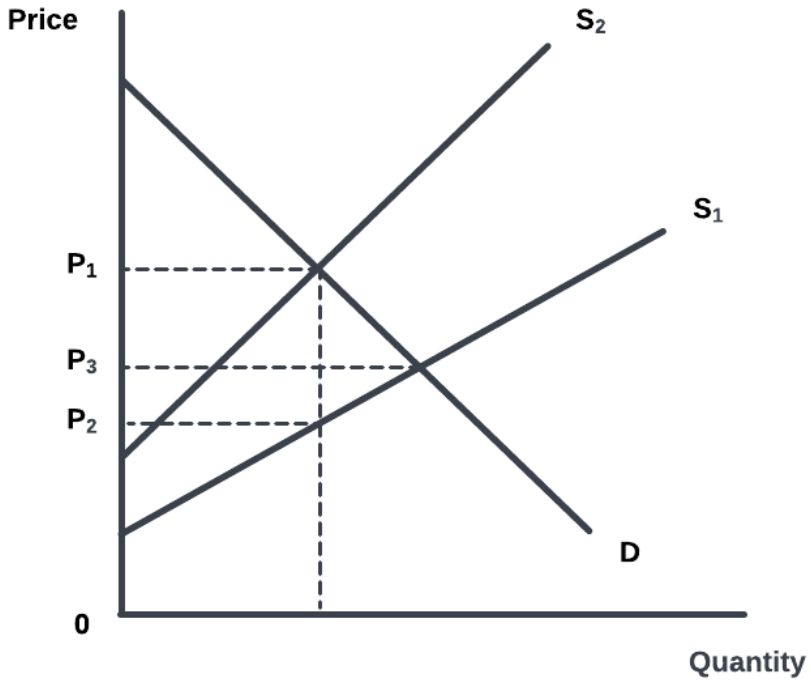


Figure 2: Incidence of Unlawful Tariffs

B. Quantity Effects and the Deadweight Loss

The tariff reduces the quantity traded: the higher domestic price P_1 reduces the quantity that domestic buyers are willing to purchase, and the lower export price P_2 reduces the quantity that foreign producers are willing to supply. Let Q_3 denote the quantity that would have been traded

[30] The foregoing analysis treats the supply curve as the foreign export supply of the imported good, abstracting from domestic production. Domestic producers of import-competing goods are not parties to the import transaction; under the tariff, they benefit from the higher domestic price P_1 rather than suffering injury. The damage analysis in Part V is therefore properly confined to importers and foreign exporters (the two parties to the taxed transaction) and does not extend to domestic producers, whose tariff-era producer surplus gains would partly offset the social cost of the program.

at the but-for price P_3. The equilibrium quantity under the tariff, Q_1, is less than Q_3. The quantity reduction generates a deadweight loss:[31]

$$DWL = (1/2) \cdot (P_1 - P_2) \cdot (Q_3 - Q_1)$$

This deadweight loss represents the value of the additional trade that would have occurred had the tariff not been imposed—transactions that would have benefited both parties but were prevented by the tariff-induced price wedge. It is not included in tariff revenues and cannot be recovered through any private damage claim. It is the social cost of the unlawful tariff.

V. A POLICY PROPOSAL: STANDING AND THE MEASURE OF DAMAGES

Before setting out the proposed damages framework, it is useful to distinguish what existing positive law provides from what this Article proposes as a normative regime. Under *Track 1*—the *lex lata*—the *Atmus Filtration* reliquidation mechanism returns the full tariff—$(P_1 - P_2) \cdot Q_1$—to the importer of record, without requiring any estimation of a but-for price and without providing any remedy to foreign exporters. This mechanism is grounded in existing customs law and operates through CBP's reliquidation authority. Its limits are those described in Part III: it covers only non-final entries, it is stayed pending a CBP refund process, and the 180-day protest period may bar recovery for early-paying importers.

This Article argues, under *Track 2—de lege ferenda*—that the existing mechanism is economically incomplete in two respects. First, it gives importers a windfall: the importer recovers $(P_1 - P_2) \cdot Q_1$ even though, under standard incidence analysis, it bore only the domestic share $(P_1 - P_3) \cdot Q_1$. Second, it leaves the exporter's injury—$(P_3 - P_2) \cdot Q_1$—uncompensated. The *Bigelow* framework, adapted from antitrust law, provides a principled basis for a more complete recovery regime. It requires either legislative action, an expanded reading of the Court of International Trade's equitable jurisdiction, or a new administrative channel. The following subsections develop this framework and address the standing, boundary, and remedial questions it raises.

A. The Bigelow Measure

In *Bigelow v. RKO Radio Pictures*,[32] the Supreme Court articulated the standard measure of antitrust damages: "comparison of profits, prices and values as affected by the [unlawful conduct], with what they would have been in its absence under freely competitive conditions."[33] This benchmark—the but-for world—provides the foundation for the damage analysis presented

[31]The deadweight loss formula $(1/2)(P_1 - P_2)(Q_3 - Q_1)$ gives the value of trades prevented by the tariff assuming linear demand and supply functions, and perfect competition. This loss is not captured by either the importer's or exporter's damage formula and is not recoverable through private litigation. The incidence formulas in the text are derived under constant demand and supply elasticities and hold exactly for infinitesimal tariff changes; the linear demand and supply curves in Figures 1 and 2 are used for expositional clarity and are consistent with the DWL approximation, though they imply variable elasticities that differ from the constant-elasticity assumption underlying the incidence decomposition. For the moderate tariff rates at issue, the quantitative difference between the two approaches is small.

[32]Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

[33]327 U.S. at 264 ("[T]he jury could, with sufficient certainty, fix the amount of [plaintiff's] damages by comparing profits, prices and values as affected by the [antitrust violation], with what they would have been in its absence under freely competitive conditions.").

in this Article. The phrase "freely competitive conditions" is Bigelow's formulation; as discussed in Part VII.A, the but-for price P_3 in markets with pre-existing market power must account for that structure rather than assuming a purely competitive baseline. Adapting the *Bigelow* prescription to unlawful tariffs, the importer's compensable loss is:

$$\Delta_M = (P_1 - P_3) \cdot Q_1$$

This amount captures the overcharge borne by the importer: it paid P_1 but, absent the tariff, would have paid only P_3. The quantity Q_1 is the quantity actually imported at the inflated price. This measure does not include lost trade volume ($Q_3 - Q_1$), which represents transactions foreclosed by the tariff but not directly attributable to the importer as a market participant. The lost volume is a social welfare cost captured in the deadweight loss of Part IV.B; it cannot be attributed to any individual plaintiff because these are trades that simply did not occur, and no party paid or received anything in connection with them.[34]

B. Standing for Foreign Exporters

The incidence analysis of Part IV establishes that a portion of the tariff burden falls on foreign exporters in the form of a price reduction from the but-for level P_3 to the realized export price P_2. The exporter's compensable loss is:

$$\Delta_X = (P_3 - P_2) \cdot Q_1$$

Note that:

$$\Delta_M + \Delta_X = (P_1 - P_2) \cdot Q_1 = \text{Total IEEPA Tariff Revenue on } Q_1$$

That is, the sum of importer and exporter damages equals the total tariff collected on the quantity actually traded. If courts award full recovery to both parties, the government refunds the entirety of tariff revenue raised on the margin but does not compensate for the deadweight loss—trades that were prevented by the tariff.

Under current positive law, foreign exporters almost certainly lack standing to sue in the Court of International Trade. The CIT's jurisdiction under 28 U.S.C. § 1581 is invoked by importers contesting customs determinations—parties who received a duty demand from CBP and paid duties at the border. Foreign exporters received no such demand and paid nothing to CBP. They have no obvious legal basis for a claim under the existing customs statutory scheme.

The consequence of this standing gap is a government windfall. If importers recover only *their* share of the tariff burden—$(P_1 - P_3) \cdot Q_1$—and exporters have no legal vehicle, the government permanently retains $(P_3 - P_2) \cdot Q_1$. This is revenue collected pursuant to executive orders that the Supreme Court has declared unconstitutional. Permitting the government to retain it is independently objectionable on grounds that go beyond the economics of incidence: a government that collects taxes under a law declared void *ab initio* should not profit from the

[34]The quantity actually traded at the tariff-inclusive price, Q_1, is observable from CBP import records. The importer's damage formula does not include the lost volume of trade ($Q_3 - Q_1$), which represents potential gains from foregone transactions.

illegality through a standing gap that its own enforcement structure created. This consequence is the normative justification for proposing a new legal channel for exporter claims.

Three mechanisms, in ascending order of legal difficulty, could resolve the exporter-side gap. *First*, a bilateral administrative channel. The U.S. government could negotiate with affected trading partners to distribute the aggregate exporter-side share—the sum of $(P_3 - P_2) \cdot Q_1$ across all affected products—to each exporting country as a lump sum, leaving distribution among individual firms to the exporting country's domestic law. This mechanism avoids individual standing problems entirely, is consistent with the bilateral structure of trade relations, and has the advantage of administrative efficiency. Its principal weakness is that it requires political agreement and may be resisted by an executive branch that is also disputing the underlying refund obligation.

Second, the Tucker Act and the Court of Federal Claims. The Tucker Act, 28 U.S.C. § 1491, grants the Court of Federal Claims jurisdiction over claims against the United States founded on the Constitution, federal statute, or regulation. A foreign exporter might argue that the tariff constituted an unlawful taking of property—specifically, the depressed export price P_2 in place of the lawful price P_3—or an unjust enrichment claim under general federal equity principles. This path is speculative: Tucker Act jurisdiction has not been extended to foreign entities claiming injury from trade policy, and the Court of Federal Claims has not recognized an unjust enrichment cause of action arising from unlawful tariffs. Nevertheless, this mechanism is potentially available as a matter of law and warrants consideration in any comprehensive legislative or judicial response to the standing gap.

Third, and most straightforwardly, congressional legislation. Congress could enact a statute conferring a right of action in the CIT on foreign exporters of record who demonstrate, under the *Bigelow* framework, that they bore a quantifiable portion of the unlawful tariff burden. The statute would define standing, specify the damage formula as $\Delta_X = (P_3 - P_2) \cdot Q_1$, and authorize the CIT to determine the but-for price P_3 using the econometric methodologies described in Part VI. This is the cleanest solution analytically; it eliminates the standing gap, aligns legal entitlement with economic incidence, and ensures that total recovery equals total unlawful tariff revenue on the quantity traded—no more and no less. The political obstacles are substantial, but the economic logic is compelling and the constitutional argument (that the government should not retain revenues from a law declared void) provides a principled foundation for legislative action.

Fourth, a combined plaintiff structure. Where the importer and the exporter are related parties—for example, a U.S. subsidiary importing from its foreign parent, or a multinational firm importing from its own overseas manufacturing operation—the two may combine as co-plaintiffs and sue jointly for the full tariff: $(P_1 - P_2) \cdot Q_1$. This amount is directly observable from CBP entry records and requires no estimation of P_3. The division of the recovery between importer and exporter would be determined by private agreement between the co-plaintiffs—ideally resolved before litigation commences—with each party receiving its incidence-adjusted share consistent with the *Bigelow* framework. This mechanism simultaneously resolves both the standing problem and the need for product-level econometric identification for that subset of claims. Its applicability is limited to cases where the importer and exporter have a sufficiently close relationship to permit

coordinated litigation; arm's-length transactions between unaffiliated parties require one of the other three mechanisms. Where a class of co-plaintiffs is contemplated, court approval may be required to protect unnamed class members, a procedural question that warrants further research.

C. The Principled Boundary of the Antitrust Analogy

The *Bigelow* framework, as applied in this Article, traces the tariff burden both downstream—where it is cut off by *Illinois Brick*—and upstream, where the exporter's claim is recognized. A reader might reasonably ask what principle permits upstream tracing to exporters while prohibiting downstream tracing to consumers. The answer is that the two directions represent structurally distinct relationships to the tariff-generating transaction, and the antitrust analogy illuminates rather than obscures that distinction.

The tariff is levied on the import transaction: the crossing of a specific good from a foreign seller to a domestic buyer at the border. Both the importer and the exporter are direct parties to that transaction. The tariff drives a price wedge between what the importer paid (P_1) and what the exporter received (P_2). The importer's loss—$(P_1 - P_3) \cdot Q_1$—and the exporter's loss—$(P_3 - P_2) \cdot Q_1$—are each direct, first-order consequences of the same unlawful act (i.e., they arise immediately from the tariff itself, not through any intervening party's decision), arising from the same transaction. Neither loss is derived from the other party's pricing decision.

The domestic consumer's loss is structurally different. The consumer was not a party to the import transaction. The consumer paid more because the importer, having absorbed a tariff-inflated cost, passed some or all of that cost on to domestic consumers through its domestic pricing decision. The consumer's injury is therefore *derived*: it exists only because the importer made a separate pricing decision after the tariff-generating transaction was complete. This is precisely the structure that *Illinois Brick* was designed to address—and bar. The Court's concern in *Illinois Brick* was precisely with claims that require tracing an overcharge through an intervening pricing decision. The exporter's claim requires no such tracing: it requires only comparing the price the exporter actually received (P_2) against the price it would have received but for the tariff (P_3).

In sum: *Bigelow* defines the universe of primary claimants by reference to direct participation in the tariff-generating transaction. *Illinois Brick* then allocates, within the domestic side of that universe, the importer's full damage claim to the direct purchaser rather than tracing it to downstream buyers. These two rules operate at different levels: *Bigelow* identifies *who* the primary injured parties are; *Illinois Brick* determines *how* the domestic share of that injury is allocated within the supply chain. The two rules are complementary rather than in conflict, and together they produce a coherent and administrable framework.

D. Illinois Brick and the Pass-On Problem

Most importers do not consume the goods they import; they resell them to domestic wholesalers, retailers, or end consumers. The Supreme Court's holding in *Illinois Brick Co. v. Illinois*[35] bars downstream purchasers from recovering the portion of an overcharge passed on to

[35]Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The Court held that only direct purchasers—not indirect purchasers—may recover overcharge damages, and that the pass-on defense is unavailable to defendants.

them.[36] The rule assigns the full damage claim to the direct purchaser—in the tariff context, the importer of record—regardless of how much of the tariff was actually borne by the importer versus passed on to downstream parties.[37]

The *Illinois Brick* rule produces a windfall for importers who passed on the tariff to customers: they recover the full overcharge Δ_M even though their net-of-passthrough loss is less than that amount.[38] This windfall is the accepted cost of the rule's administrative simplicity: requiring courts to trace how much of the overcharge each party actually absorbed would demand extensive supply-chain accounting and would render the damage remedy unworkable in practice. In the tariff refund context, the same logic applies: the government may not reduce the importer's damage claim by proving that the importer passed the tariff to customers. Allowing the pass-on defense would require tracing price effects through supply chains of uncertain depth—an inquiry that would dwarf the litigation costs of the underlying claims.

This analysis implies that the importer of record is the appropriate plaintiff for the domestic portion of tariff damages. Downstream purchasers—including processors, retailers, and final consumers—have no recovery under *Illinois Brick*, even though they collectively bear a portion of the economic burden of the tariff.[39]

E. Summary of the Policy Proposal

The policy proposal has five components. First, the Track 1 customs refund mechanism—reliquidation under *Atmus Filtration*—should be implemented promptly for all non-final entries, with resolution of the 180-day protest issue for early-paying importers. Second, for a complete Track 2 regime, importers of record should receive damages equal to $\Delta_M = (P_1 - P_3) \cdot Q_1$, estimated using the *Bigelow* methodology set out in Part VI. Third, the exporter-side gap should be closed through one of the three mechanisms identified in Part V.B—bilateral channel, Tucker Act, or legislation—with congressional action being the most analytically tractable. Fourth, *Illinois Brick* should preclude recovery by downstream domestic purchasers, and the government should be barred from invoking the pass-on defense. Fifth, pre-judgment interest should be awarded to reflect the time value of unlawfully collected revenues.

VI. CALCULATION OF CLAIMS

A. Observable Quantities and Prices

The calculation of Δ_M and Δ_X requires three inputs: the actual prices paid (P_1) and received (P_2), the actual quantity imported (Q_1), and the but-for price (P_3). The first two are directly observable from ordinary business records and CBP import data. The *Bigelow* Court recognized

[36] In its earlier decision in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968) the Supreme Court barred defendants from invoking the pass-on as a defense to reduce the direct purchaser's recovery.
[37] See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968) (rejecting the pass-on defense).
[38] Illinois Brick, 431 U.S. at 745–46.
[39] The social welfare costs of the tariff beyond the importer windfall—including the portion of the tariff burden borne by consumers through higher retail prices—are discussed in Part VII.

that actual prices and quantities will be found in business records and that uncertainty as to the amount does not bar recovery once the fact of injury is established.[40]

Total tariff revenue on a specific shipment is equal to $(P_1 - P_2) \cdot Q_1$ and is available from CBP's records. These government records provide a floor for total refund liability: if all $130–166 billion in IEEPA tariff receipts are ultimately refundable,[41] the combined importer and exporter damage claims total that amount. The division of that sum between importers and exporters is determined by incidence and requires estimation of P_3.

B. Estimating the But-For Price

The central econometric challenge is the estimation of P_3, the price that would have prevailed absent the tariff. The *Bigelow* Court acknowledged that the but-for price must be estimated and that this estimation may involve a significant econometric problem.[42] Three methodologies are available. They are not equally appropriate across all product-country pairs; they should be understood as a priority hierarchy rather than interchangeable alternatives. Before-and-after with difference-in-differences is the default and should be applied whenever a sufficient pre-tariff price series exists. The yardstick method is the fallback when a pre-tariff series is unavailable but a valid comparator market exists. Structural demand estimation is the method of last resort for high-value, heterogeneous markets and is the only method that produces separate importer and exporter incidence shares directly, without requiring a separate incidence calculation step (for the reason explained in Part VI.B.3 below). The following subsections describe the triggering conditions and identification requirements for each method.

1. Before-and-After Method

The most straightforward approach compares prices in the pre-tariff period to prices during the tariff period, controlling for other factors that affect prices. The before-and-after estimator identifies P_3 as the pre-tariff price adjusted for secular price trends. A difference-in-differences specification strengthens this approach: it compares the price change of tariff-affected goods (the "treated" group) to the price change of similar goods not subject to the IEEPA tariffs (the "control" group). The difference between the two price changes isolates the tariff effect by controlling for price trends common to both groups.[43,44] This method is the appropriate default because CBP and commercial trade databases maintain entry-level price and quantity records going back well

[40]Bigelow, 327 U.S. at 264 ("[A]ctual numbers will be found in ordinary business records").

[41]J.P. Morgan Global Research, supra note 4. Government estimates cited in Atmus Filtration proceedings indicate $166 billion was collected from more than 330,000 businesses. Bradley, supra note 11.

[42]Bigelow, 328 U.S. at 264–65 (acknowledging that the but-for price "must be estimated" and that this estimation "may involve a significant econometric problem").

[43]On difference-in-differences as a tool for policy evaluation, see David Card & Alan B. Krueger, Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania, 84 Am. Econ. Rev. 772 (1994). For application to trade policy, see Javier D. Donna & Germán Gutiérrez, Finding Nessie: Amazon's Algorithmic Pricing in the Wild (Jan. 16, 2026) (unpublished manuscript), which employs a difference-in-differences design to identify the price effects of a policy with discrete activation and deactivation episodes.

[44]Guido W. Imbens & Jeffrey M. Wooldridge, Recent Developments in the Econometrics of Program Evaluation, 47 J. Econ. Literature 5 (2009).

beyond the tariff period, making the requisite pre-tariff series routinely available at the HS-8 level (the 8-digit Harmonized System commodity classification code, which identifies products at a high degree of specificity).

Three conditions must be satisfied to implement this method reliably. First, a pre-tariff price series of at least twelve months must exist for the product at the relevant HS level. Second, a plausible control group must be identified: either domestically produced substitutes or imports from countries facing materially different tariff rates. Third, a parallel pre-trends test must be satisfied, confirming that treated and control prices moved together before the tariff took effect. When all three conditions are met, the method should be accepted by courts and CBP as the primary identification strategy.

The primary weakness of the before-and-after method is that it attributes all price changes during the tariff period to the tariff. If other shocks—macroeconomic conditions, supply disruptions, or demand shifts—occurred simultaneously, the estimate of P_3 may be biased. Careful specification of the control group mitigates this concern. The parallel pre-trends test checks whether treated and control goods had statistically similar price trajectories before the tariff took effect; if they did not, the control group is an unreliable counterfactual and the method should not be used without further adjustment.

In modern practice, this method is implemented as a reduced-form regression of log import prices on a tariff indicator (or the ad valorem tariff rate itself), with product-country fixed effects to absorb time-invariant characteristics of each product-origin pair and time fixed effects to control for common macroeconomic shocks. This specification directly addresses the concern that price changes during the tariff period may reflect factors other than the tariff: the fixed effects purge the estimate of unobserved heterogeneity, while the control group provides the counterfactual trend. The approach is standard in the empirical trade literature on tariff incidence, including the work of Fajgelbaum et al. and Amiti et al. cited in Part VI.C, and is readily adaptable to the HS-code and country-level structure of CBP entry data.

2. Yardstick Method

The yardstick method estimates P_3 by reference to prices in comparable markets not subject to the tariff. Because the IEEPA tariffs applied to nearly ninety countries, many natural comparators are unavailable.[45] This method is appropriate when the before-and-after conditions cannot be satisfied—for example, for goods with no reliable pre-tariff price series—but a geographically or product-adjacent comparator is available. Two categories of comparator survive the breadth problem. First, goods from countries subject only to MFN rates, not the IEEPA surcharge, can serve as yardsticks where the HS-level product is sufficiently homogeneous—meaning the treated and yardstick goods are close enough in quality and characteristics that price differences between them can be attributed to the tariff rather than to product differences, verified in practice by comparing pre-tariff price levels and co-movement between the two groups—so that

[45] J.P. Morgan Global Research, supra note 4 (noting that the IEEPA tariff applied to approximately ninety countries, making many natural comparators unavailable).

price differences during the tariff period reflect tariff incidence rather than quality differentials. Second, the post-*Learning Resources* period itself functions as a natural yardstick: once the tariff was struck down, prices reverted toward P_3, providing a direct post-treatment observation of the but-for price for products remaining in the market. The identification requirement for the yardstick method is a pre-tariff price co-movement test: the proposed comparator and the treated product must exhibit parallel price behavior in the period before the tariff took effect.

3. Structural Demand Estimation

A more theoretically rigorous approach employs structural demand estimation to recover the but-for price from estimates of demand and supply elasticities. Given estimates of ε and η, the but-for price is, as derived from the incidence formulas of Part IV:

$$P_3 = P_2 + [\varepsilon / (\varepsilon + \eta)] \cdot (P_1 - P_2)$$

This formula states that the but-for price equals the exporter's realized price P_2 plus the domestic incidence share of the total tariff: the fraction $\varepsilon/(\varepsilon + \eta)$ of $(P_1 - P_2)$. Intuitively, the domestic share is larger when domestic demand is more price-sensitive relative to foreign export supply, because elastic demand limits how far the domestic price can rise. Standard frameworks—including the Almost Ideal Demand System and the Berry and Berry-Levinsohn-Pakes approach[46,47]—can be applied to import data at the HS code level to estimate ε for each affected product category. The export supply elasticity η is typically estimated from cross-country trade data and variation over time, for example in tariffs. The international trade literature has a long history of producing estimates of ε and η for a wide range of traded goods via the so-called Feenstra-Method and several other approaches.[48,49] Given these estimates, P_3 can be computed and the damage shares Δ_M and Δ_X calculated for each product-country pair.

The structural method is the appropriate choice for high-value, differentiated markets (i.e., markets in which products differ in quality, features, or brand, such that consumers do not treat them as perfect substitutes and firms exercise some pricing power) where neither a reliable pre-tariff series nor a valid yardstick exists. It is also uniquely valuable when separate Δ_M and Δ_X estimates are required to allocate recovery between importers and exporters without a separate incidence step. (The before-and-after and yardstick methods estimate P_3 directly but do not decompose the tariff burden between importer and exporter; that allocation requires a separate step

[46]See A. Deaton & J. Muellbauer, Economics and Consumer Behavior 20–56 (1980); Hal R. Varian, Intermediate Microeconomics: A Modern Approach 440–80 (9th ed. 2014).

[47]Steven T. Berry, Estimating Discrete-Choice Models of Product Differentiation, 25 RAND J. Econ. 242 (1994); Steven T. Berry, James Levinsohn & Ariel Pakes, Automobile Prices in Market Equilibrium, 63 Econometrica 841 (1995).

[48] See R. Feenstra, New Product Varieties and the Measurement of International Prices, 84 American Economic Review 157 (1994); C. Broda & D. Weinstein, Globalization and the Gains From Variety, 121 Quarterly Journal of Economics 541 (2006); A. Soderbery, Estimating import supply and demand elasticities: Analysis and implications, 96 Journal of International Economics 1 (2015).

[49] See P. Fajgelbaum , P. Goldberg , P. Kennedy & A. Khandelwal, The Return to Protectionism, 135 Quarterly Journal of Economics 1 (2020).

using the incidence formulas of Part IV. Structural estimation avoids this by estimating ε and η directly, from which both P_3 and the incidence shares follow immediately.) The identification requirements are: price and quantity data at the HS-6 level or finer (aggregate data at broader HS levels—such as HS-4 or HS-2—would mask substantial within-category variation in demand elasticities and introduce bias); a valid instrument for price—an instrument is a variable that shifts the supply or demand curve but does not otherwise affect the price, enabling the researcher to isolate the causal effect of demand on price; cost-side instruments such as foreign input cost indices or bilateral exchange rate movements serve this purpose in the trade literature—and an adequate market definition for the demand system (a definition that includes all products consumers regard as reasonably close substitutes, so that the estimated elasticity ε reflects the full range of alternatives available to buyers). The structural method requires stronger assumptions about functional form than the reduced-form alternatives and should be reserved for cases where those assumptions are defensible.

C. Illustrative Estimates of Incidence

Based on recent insights from the 2018–19 U.S.–China Tariff War and the tariffs imposed in 2025, we provide illustrative estimates of the but-for price and the tariff burden on importers and exporters. In the context of the 2018-19 U.S.-China Tariff War, existing research has found nearly complete pass-through to importer prices and export supply that is nearly perfectly elastic. Consequently, if we, in line with previous estimates regarding the median elasticities across sectors, set $\varepsilon = 2.53$ and η very large (consistent with a nearly horizontal foreign supply curve), the exporter's burden $P_3 - P_2$ is close to 0 and the importer price increases nearly one-for-one with the tariff.[50]

More recent evidence suggests that the pass-through from tariffs to importer prices in 2025 was lower, but still ranged between 86% and 94%.[51] The lower pass-through relative to the 2018–19 episode likely reflects the broader product and country coverage of the 2025 tariffs, which affected more diverse supply chains with less-than-perfectly-elastic export supply. Hence, the but-for price will be on average between 6 and 14% higher than the observed duty-exclusive prices. Given recent estimates that over $175 billion in U.S. revenue may be subject to refunds, this suggests that a quantitatively meaningful tariff burden of up to $24.5 billion may in fact have been borne by foreign exporters.[52] At the time the IEEPA tariffs were imposed, the administration maintained that foreign exporters would reduce their prices to absorb the duties, leaving import prices paid by

[50] See P. Fajgelbaum , P. Goldberg , P. Kennedy & A. Khandelwal, The Return to Protectionism, 135 Quarterly Journal of Economics 1 (2020).

[51] M. Amiti, C. Flanagan, S. Heise & D. Weinstein, Who Is Paying for the 2025 U.S. Tariffs?, Federal Reserve Bank of New York Liberty Street Economics, February 12, 2026. Pablo Fajgelbaum & Amit Khandelwal, *Tariffs in 2025: Short-Run Impacts on the U.S. Economy*, Brookings Papers on Economic Activity (Spring 2026 conference draft), estimating a baseline pass-through rate of approximately 90%, with foreign exporters absorbing roughly 10% of the tariff cost.

[52] See https://www.reuters.com/world/us-tariff-revenue-risk-supreme-court-ruling-tops-175-billion-penn-wharton-2026-02-20/.

domestic buyers unchanged and thereby sparing U.S. consumers.[53] The empirical evidence is inconsistent with this account. Research by economists at the Federal Reserve Bank of New York found that approximately 86 to 94 percent of the tariff burden in 2025 was borne by U.S. importers and consumers, with foreign exporters absorbing only a small residual share.[54] The tariffs thus functioned as a domestic sales tax paid by U.S. importers and, through pass-on, their downstream customers — the very parties the administration claimed would be insulated. The Supreme Court itself noted the extraordinary fiscal scale of the administration's tariff program, citing government projections that the tariffs would reduce the national deficit by $4 trillion.[55]
In addition, prior work has found that the impact of tariffs tends to become stronger in the long-run, which may lead to an even larger exporter burden in the future.[56]

D. Identification Standards and Evidentiary Thresholds

Courts and CBP require a principled standard for evaluating P_3 estimates. The Supreme Court established the governing principle in *Story Parchment Co. v. Paterson Parchment Paper Co.*:[57] once the fact of injury is established, uncertainty as to the amount of damages does not bar recovery, and the wrongdoer bears the risk of imprecision that its own unlawful conduct created. *Bigelow v. RKO Radio Pictures* applies the same principle specifically to the but-for price estimation context that our damages formula requires, making it the more directly relevant precedent for the identification standards proposed here. Together, the two cases establish that the standard of reasonable approximation governs P_3 estimation: neither speculative guesswork nor mathematical precision is required. This Article proposes three identification tiers corresponding to different evidentiary conditions, each with a distinct procedural consequence.

Sufficient identification exists when the chosen method meets all triggering conditions: a parallel pre-trends test passes for before-and-after, a pre-tariff price co-movement test passes for the yardstick, or a valid instrument is established for structural estimation. In this tier, the P_3 estimate should be accepted by the adjudicator as the basis for computing Δ_M and Δ_X, subject to

---

[53] Donald J. Trump, *Tariffs Have Brought America Back*, Wall St. J., Jan. 30, 2026 (op-ed) ("The data shows that the burden, or 'incidence,' of the tariffs has fallen overwhelmingly on foreign producers and middlemen, including large corporations that are not from the U.S."); *see also* M. Amiti, C. Flanagan, S. Heise & D. Weinstein, *Who Is Paying for the 2025 U.S. Tariffs?*, Fed. Reserve Bank of N.Y. Liberty Street Econ. (Feb. 12, 2026) (finding that U.S. firms and consumers bore approximately 90 percent of the tariff burden throughout 2025, with foreign exporters absorbing the remainder).
[54] M. Amiti, C. Flanagan, S. Heise & D. Weinstein, *Who Is Paying for the 2025 U.S. Tariffs?*, Fed. Reserve Bank of N.Y. Liberty Street Econ. (Feb. 12, 2026). For the eight-month period January through August 2025, U.S. importers bore 94% of tariff costs; by November 2025, the figure was 86%. *See also* Kiel Institute for the World Economy, *Who Pays Trump's Tariffs?* (Jan. 2026) (finding foreign exporters absorbed approximately 4% of the tariff burden, with 96% falling on U.S. buyers).
[55] *Learning Resources, Inc. v. Trump*, 607 U.S. ___, slip op. at ___ (2026) ("The Government points to projections that the tariffs will reduce the national deficit by $4 trillion, and that international agreements reached in reliance on the tariffs could be worth $15 trillion." (citing Brief for Federal Parties 3, 11)). The Court cited these figures to underscore the breadth of the executive authority claimed — authority the Court held IEEPA does not confer.
[56] C. Boehm, A. Levchenko & N. Pandalai-Nayar, The Long and Short (Run) of Trade Elasticities, 113 American Economic Review 861 (2023).
[57] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

normal adversarial challenge. The claimant bears the burden of demonstrating that the triggering conditions are satisfied; the government bears the burden of showing a specific methodological defect if it contests the estimate.

Partial identification exists when the method is feasible but the identifying assumptions are contestable—for example, a difference-in-differences with an imperfect pre-trends test, or a yardstick with moderately differentiated products. In this tier, *Bigelow*'s reasonable approximation standard applies: recovery is not precluded, but the adjudicator should accept a range rather than a point estimate of P_3. The claimant must show that the true but-for price falls within the stated range with reasonable probability; the adjudicator selects a point within that range, applying the principle that uncertainty in quantification attributable to the defendant's unlawful act should not be resolved against the injured party.

Identification failure occurs when no method is available with adequate data—for example, for goods with no pre-tariff price history, no valid comparator, and insufficient volume for structural estimation. This creates a difficult policy problem that has normative implications. There are two alternatives.

Alternative A: Full-tariff default. When no but-for price estimate is feasible, the importer should receive a default recovery equal to the full tariff collected per unit: $(P_1 - P_2) \cdot Q_1$. The doctrinal foundation is *Bigelow*: the fact of injury is established by the unlawful tariff itself, and the full tariff amount is the most conservative available approximation of damages when the but-for price cannot be estimated. This approach has administrative simplicity: it collapses Track 2 to Track 1 recovery for identification-failure cases, using the government's own records without additional econometric input. Its principal drawback is that it awards the importer the exporter's incidence share as well—$(P_3 - P_2) \cdot Q_1$—producing a windfall inconsistent with the incidence-based allocation the framework otherwise prescribes.

Alternative B: Rebuttable presumption with a default incidence ratio. When identification fails, the court applies a default incidence split rather than awarding the full tariff. The default ratio is derived from the average $\varepsilon/(\varepsilon + \eta)$ and $\eta/(\varepsilon + \eta)$ estimated across all HS-6 product categories where sufficient identification was achievable, weighted by import value. This ratio allocates the full tariff between Δ_M (to the importer) and Δ_X (to the exporter) without requiring a product-specific P_3 estimate. This approach is more consistent with the incidence framework and avoids the importer windfall of Alternative A. For example, if identified products show an import-value-weighted average domestic incidence share of 0.90, the default rule would award the importer $\Delta_M = 0.90 \times (P_1 - P_2) \times Q_1$ and designate the remaining 10% as Δ_X. Its drawback is that it requires the court or CBP to first estimate average elasticities across identified products before applying the default—adding one layer of aggregate empirical work—and it presupposes that the average incidence ratio is a reasonable proxy for the unidentified product, which may not hold where identification failure correlates with distinctive market structure. For instance, if identification fails precisely because a product is highly differentiated or traded under a bilateral monopoly arrangement, the unidentified products may systematically have more extreme incidence ratios than the average, making the default unreliable for exactly those cases.

Under either alternative, the claimant must affirmatively demonstrate that identification failure exists—that is, that the triggering conditions for all three methods cannot be met. The government may rebut by showing that a feasible method was overlooked. The default rule, whichever is adopted, functions as an incentive for claimants to develop adequate evidence where it exists rather than invoking the default strategically.

E. Institutional Division of Labor and Mass Adjudication

The volume of affected parties makes individual judicial adjudication of every claim impractical. More than 330,000 businesses paid unlawful tariffs, and over 2,000 suits have already been filed. A workable recovery regime must match claimant class and entry status to the forum best equipped to handle each category. This subsection maps the entry-status taxonomy of Part III onto the institutional architecture that follows from the framework developed in Parts V and VI.

CBP administrative reliquidation (Track 1). Unliquidated entries and liquidated non-final entries are handled by CBP under the *Atmus* reliquidation order. No but-for price estimation is required; recovery equals the full tariff per entry, $(P_1 - P_2) \cdot Q_1$, derived from CBP's own entry records. The evidentiary burden is minimal: the importer must produce the entry summary and proof of duty payment. This forum covers the large majority of affected businesses by number and should be the primary vehicle for resolving the mass of claims without litigation.

Administrative claims process before a specialist panel (Track 2, standard cases). Claimants who seek *Bigelow*-framework damages—because their entries are final or because they dispute the Track 1 amount as insufficient relative to their actual incidence-adjusted loss—should proceed before an administrative panel applying the identification standards of Part VI.C. Before-and-after and yardstick estimation cases belong here. The panel reviews the method selection, identification conditions, and the P_3 estimate, applies the sufficient/partial/failure classification, and awards damages accordingly. Judicial review in the CIT is reserved for contested determinations of method adequacy or the incidence ratio.

CIT litigation (Track 2, complex cases). Structural demand estimation cases, high-value product-country pairs with disputed market structure (monopsony, oligopsony, bilateral monopoly), and cases where the government contests the identification standard at the panel level belong in the CIT. This is the forum for full adversarial expert testimony on elasticity estimation and market definition. The BLP and difference-in-differences methodologies are already used in administrative antitrust proceedings—FTC merger analysis and DOJ cartel damages proceedings—and are well suited to CIT adjudication. These econometric approaches are familiar to courts and agency economists from extensive use in antitrust expert testimony and are subject to a well-developed body of methodological standards.

Equitable or congressional action (protest-barred claimants). Entries that are fully final under the 180-day protest rule of 19 U.S.C. § 1514 present the hardest case. No currently available administrative or judicial forum compels recovery for these claimants. The strongest argument for relief is that the protest deadline was designed for lawfully imposed but disputed duties, and that a tariff declared void *ab initio* should not be shielded by a finality rule premised on the duty's lawfulness. Courts must resolve whether *Learning Resources* constitutes a basis for extraordinary

relief from § 1514 finality. Absent such relief, congressional legislation is the appropriate vehicle—either extending the protest period retroactively or creating a separate cause of action for tariffs paid on final entries during the IEEPA program.

Congressional action or bilateral channel (foreign exporter claims). As developed in Part V.B, no current forum provides foreign exporters with a right of action. This gap requires one of the three mechanisms identified there—bilateral administrative channel, Tucker Act proceedings, or legislation—with congressional action being the most analytically tractable. Until one of those mechanisms is established, the exporter-side share $(P_3 - P_2) \cdot Q_1$ remains a government windfall from unconstitutional taxation.

VII. COMPLICATING FACTORS

A. Market Power

The analysis in Parts IV through VI assumes competitive markets. Several departures from this benchmark warrant attention. First, the United States may exercise monopsony power in some import markets: as a large purchaser, the U.S. can affect world prices by varying import volumes. In this case, the tariff interacts with pre-existing market power, and the competitive but-for price P_3 may differ from the outcome that would obtain if the U.S. were a price taker.

Second, foreign export supply may be oligopolistic. If a small number of foreign firms supply the U.S. market, the export price in the absence of the tariff would reflect an oligopolistic markup rather than marginal cost. The appropriate P_3 must account for the pre-existing market structure.[58]

Third, in certain markets a bilateral monopoly model is appropriate—particularly in bilateral trade with a single foreign supplier or group.[59] In bilateral monopoly, prices are set through negotiation, and the equilibrium price is indeterminate within a range. The tariff shifts the price range but does not determine P_3 uniquely. More precisely, the unlawful tariff reduces the surplus-maximizing quantity and narrows the range within which the parties bargain over price. The total tariff receipts can be calculated as $(P_1 - P_2) \cdot Q_1$, but the division of that amount between the importer and the exporter depends on the parties' relative bargaining power rather than on the competitive incidence formula of Part IV. The Blair-Kaserman formula price contract provides a framework under which the parties can negotiate the allocation of recovery consistent with the surplus-maximizing outcome, and may be adapted here to determine the exporter's share of the damage claim.[60]

---

[58] See Jean Tirole, The Theory of Industrial Organization 1–82 (1988) (bilateral monopoly and bargaining).

[59] A bilateral monopoly market structure exists when a monopoly seller confronts a monopsony buyer. For the seminal work, see A. Bowley, Bilateral Monopoly, 38 Econ. J. 651 (1928). For a more accessible treatment, see Roger D. Blair, David L. Kaserman, and Richard E. Romano, A Pedagogical Treatment of Bilateral Monopoly, 55 South. Econ. J. 831 (1989). A policy-oriented approach is provided by Richard D. Friedman, Antitrust Analysis and Bilateral Monopoly, 1986 Wis. L. Rev. 873 (1986).

[60] Roger D. Blair & David L. Kaserman, A Note on Bilateral Monopoly and Formula Price Contracts, 77 Am. Econ. Rev. 460 (1987).

B. Heterogeneity Across Products and Countries

The unlawful tariffs applied to approximately ninety countries and to a large assortment of products at varying rates.[61] Demand and supply elasticities vary substantially across products and countries, as do market structures. A uniform incidence assumption would produce estimates of Δ_M and Δ_X with unknown bias. The correct approach is to estimate P_3 at the product-country level using HS code data, a computationally demanding exercise given the breadth of the tariff program. The identification standards of Part VI.C apply at this level: a product-country pair that fails all three triggering conditions must be handled under the default rule adopted for identification failure, rather than through aggregated estimates that obscure the cross-product variation in incidence.

A related form of heterogeneity concerns product quality. Because the unlawful tariffs reduced the net price received by foreign exporters, some exporters may have responded by shipping lower-quality goods to the U.S. market — a form of margin preservation through quality adjustment rather than explicit price reduction. If quality declined, the observed import price P_1 overstates the true value received by the importer relative to the pre-tariff benchmark, and the but-for price P_3 estimated from pre-tariff data reflects a higher-quality good than the one actually imported during the tariff period. In this case, the damage formula $\Delta_M = (P_1 - P_3) \cdot Q_1$ overstates the importer's true loss, since part of the price gap reflects a quality difference rather than a tariff-induced overcharge. Correcting for this requires either quality-adjusted price indices (available from the Bureau of Labor Statistics for some product categories) or hedonic regression methods that control for observable quality characteristics at the HS-code level. Where quality adjustment is not feasible, the implication is that the damage estimate should be understood as an upper bound on the importer's compensable injury.

This incentive is specific to ad valorem tariffs such as the IEEPA levies: because the duty is a percentage of the invoice price, an exporter can reduce its effective tariff liability by shipping lower-quality goods at a lower declared price, a strategy that is unavailable under specific tariffs where the duty per unit is independent of invoice value.

C. Supply-Chain Pass-On and the Scope of the Plaintiff Class

Most importers are intermediaries who purchase goods from foreign exporters and resell to domestic parties. The supply chain extends from the foreign producer through the importer to wholesalers, retailers, and final consumers. At each stage, some portion of the tariff-induced price increase may be passed forward or backward.

Under *Illinois Brick*, the importer of record is the direct purchaser for purposes of the tariff, and the pass-on defense is unavailable to the government.[62] If, however, every injured party in the supply chain had standing to sue, the risk of duplicative recovery would arise. Consider coffee imported from Brazil: the tariff-inflated price is paid by the importer, who sells to roasters, who sell to wholesalers, who sell to retailers, who sell to consumers. Under *Hanover Shoe*, the importer recovers the full gross overcharge $(P_1 - P_3) \cdot Q_1$ regardless of how much it passed on. If downstream

[61] J.P. Morgan Global Research, supra note 4; Bradley, supra note 11.

[62] Illinois Brick, supra note 35, at 745–46.

parties also had standing to claim their respective gross overcharges—that is, the portion of the tariff-inflated price increase they each absorbed and passed forward—the aggregate of all claims would exceed the total domestic incidence of the tariff, because the same tariff dollars would be counted once at each link of the chain. The sum of true net losses across the supply chain equals Δ_M exactly, but a legal framework that awards gross overcharges at each level rather than apportioning net losses would generate overlapping claims summing to a multiple of Δ_M.[63]

The *Illinois Brick* framework resolves this problem by concentrating recovery in the direct purchaser. The importer's claim for the full overcharge—even if partially passed on—does not generate duplicative recovery because downstream parties are barred from suit. The framework accepts the importer's windfall as the price of administrative manageability.

D. Pre-Judgment Interest

The tariffs were collected over a period beginning in 2025 and extending, in some cases, through early 2026. The time value of money means that a refund paid in 2026 or 2027 of amounts paid in 2025 does not fully compensate the payor without interest. Whether pre-judgment interest is available on tariff refunds is a matter of statutory and equitable law that this Article does not resolve.

As a matter of economics, however, the damage formula should include interest. The importer's economic loss is not merely $(P_1 - P_3) \cdot Q_1$; it is the present value of that amount computed at the importer's opportunity cost of funds (the rate of return it could have earned on those funds in its next-best alternative investment) over the period from payment to refund. The failure to include pre-judgment interest understates the economic harm and produces a windfall for the government equal to interest earnings on unlawfully collected revenue.

E. Retaliatory Tariffs

Several U.S. trading partners responded to the IEEPA tariffs by imposing retaliatory duties on imports from the United States. These measures reduced export volumes and depressed prices received by U.S. exporters, imposing losses on domestic producers that are analytically distinct from the importer and exporter injuries analyzed in Parts IV and V. The retaliatory tariffs were not imposed by the U.S. government (and were not declared unlawful by the Supreme Court's ruling in *Learning Resources)*; they represent a market consequence of the IEEPA program rather than a direct legal injury traceable to the unlawful executive orders. The framework developed in this Article — grounded in the *Bigelow* measure of damages from unlawful government conduct — does not extend to losses suffered by U.S. exporters from foreign retaliation. That question, including whether and under what theory U.S. exporters might seek relief, is left for future work.

[63]The aggregate of all claims across the supply chain would exceed the tariff revenue collected if each downstream party had standing to recover its pass-through loss. This risk of overdeterrence is the principal rationale for the direct-purchaser rule of Illinois Brick. See 431 U.S. at 741–44.

F. General Equilibrium Considerations

The partial equilibrium framework of Parts IV through VI abstracts from general equilibrium effects that were likely substantial given the program's scale. Two channels are particularly relevant to the damage analysis. First, the IEEPA tariffs contributed to an appreciation of the U.S. dollar relative to the currencies of major trading partners (a standard predicted effect of large import tariffs, consistent with observed exchange rate movements in 2025). Dollar appreciation reduces the dollar-denominated price of imports from a given trading partner independently of any tariff-related adjustment by the exporter, which complicates before-and-after estimation of P_3: part of the observed price movement during the tariff period reflects the exchange rate channel rather than the tariff itself. Identification strategies that instrument for exchange rate movements, or that use bilateral exchange rate variation as a control, are needed to isolate the tariff effect. Second, the tariff program affected domestic interest rates and equity markets through uncertainty and fiscal effects, altering the cost of capital for both importers and exporters in ways unrelated to the direct tariff burden. A complete welfare analysis would require a computable general equilibrium model accounting for these economy-wide effects, which lies beyond the scope of the present article.

VIII. CONCLUSION

The Supreme Court's decision in *Learning Resources, Inc. v. Trump* has created a recovery problem of potentially historic scale. The unlawful IEEPA tariffs raised between $130 and $166 billion from more than 330,000 domestic businesses. Over two thousand suits have been filed, and many more are expected. The legal and economic questions raised by these suits deserve systematic analysis: who has been harmed, by how much, and how claims should be calculated and adjudicated.

This Article has argued for an approach grounded in the *Bigelow* measure of damages and standard tax incidence theory. Both importers and foreign exporters bear cognizable harm. The importer's damage is the overcharge on the quantity actually imported: $\Delta_M = (P_1 - P_3) \cdot Q_1$. The exporter's damage is the revenue forgone on the depressed export price: $\Delta_X = (P_3 - P_2) \cdot Q_1$. Together, these two measures sum to the total tariff revenue collected on the quantity traded. The division depends on the incidence of the tariff, determined by the elasticities of domestic import demand and foreign export supply.

The *Illinois Brick* rule bars pass-on claims by downstream domestic purchasers and prevents the government from using the pass-on defense to reduce the importer's recovery. The 180-day customs protest period may bar recovery for importers who paid tariffs early in the program without filing timely protests—a procedural constraint whose scope courts must resolve.

Estimation of the but-for price requires an econometric analysis matched to the complexity of the affected markets. Before-and-after comparisons, yardstick methods, and structural demand estimation each have a role. In markets with significant heterogeneity across products and countries, product-level analysis at the HS code level is essential. In markets with market power—

monopsony, oligopsony, or bilateral monopoly—the competitive benchmark must be specified with care.

A comprehensive recovery regime requires a working division of labor across five forums, matched to claimant class and entry status. CBP administrative reliquidation handles unliquidated and non-final liquidated entries under Track 1, returning the full tariff per entry without econometric input. An administrative specialist panel handles Track 2 standard cases—before-and-after and yardstick estimation—applying the identification standards of Part VI.C. The CIT handles complex Track 2 cases requiring structural estimation or disputed market structure. Equitable or congressional relief is required for protest-barred claimants on final entries. A new legal channel—bilateral administrative, Tucker Act, or congressional—is required for foreign exporter claims. One normative question remains open for decision: whether identification failure in Track 2 should trigger a full-tariff default under *Bigelow* (Alternative A) or a default incidence ratio derived from identified products (Alternative B), as set out in Part VI.C. The economic framework presented in this Article provides the analytical foundation for each element of that regime, and the institutional map of Part VI.E connects that framework to the forums and evidentiary standards needed to make it operational. It bears noting that Track 2 proceedings involving econometric estimation of P_3 will require expert testimony whose costs may consume a significant portion of recovery for smaller claimants. This asymmetry is an additional argument for the administrative panel structure of Part VI.E, which can develop standardized estimates applicable across claimant classes.