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RESEARCH SEMINAR IN INTERNATIONAL ECONOMICS

**Department of Economics
The University of Michigan
Ann Arbor, Michigan 48109-1220**

SEMINAR DISCUSSION PAPER NO. 222

**INTERDEPENDENCE AND WORLD TRADE RULES:
LAW AND POLICY OF MANAGING THE INTERFACE**

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Excerpts from Chapters 1 and 14**

by

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May 31, 1988

To be published by the MIT Press, 1989.

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MANAGING THE INTERFACE

[Tentative Title]

Draft Manuscript
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To be published by The MIT Press 1988
Cambridge, Massachusetts

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Ann Arbor, Michigan
Date: May 31, 1988

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by John H. Jackson

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Tentative Contents of Book to be published by MIT Press 1988

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**CHAPTER 1: THE POLICIES & REALITIES OF INTERNATIONAL ECONOMIC
REGULATION**

- Section 1.1 Law, Politics and the Dismal Science
- Section 1.2 The Policy Assumptions of the International
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- Section 1.3 Competing Policy Goals and Non-Economic Objectives
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Section 1.1: Law, Politics and the Dismal Science

- a. **Puzzles or Why Do Officials Choose the Fourth Best
Option?**

Puzzle: Suppose you are the minister for trade of a small Asian country that is rapidly developing. Several of your small electronic components manufacturers export their products to various countries of the world, and you are informed that one of those importing countries has just decided to stop imports from your country. What steps can you take? As a small country, are you completely at the mercy of a larger economic power? In

planning investment policies for your country designed partly to export and obtain foreign exchange to pay off a staggering external debt, what world market environment can you rely upon?

Puzzle: Suppose you are advising a large multinational corporation based in the United States, and this company is exploring the feasibility of a substantial investment in a plant in a small underdeveloped country in Africa. Inexpensive labor could give products of this plant a substantial advantage on the world market, but in order to be economically viable this plant must ship over 80 percent of its output outside the small country which has only a tiny market for the product. A smaller plant would not be able to achieve the economies of scale necessary to make the enterprise flourish. Currently there are few government barriers to imports of the projected product into either the United States or Europe. Can you advise your client that it can depend on those circumstances continuing long enough into the future to be able to realize a satisfactory return on the proposed investment?

Puzzle: Economists, government policy makers, and many others tend to agree that barriers to international trade reduce world welfare and often the welfare of the countries which impose the barriers. If barriers must be imposed, such experts generally agree that a tariff (or price effect measure) is superior to quantitative restrictions. Yet quantitative measures

to reduce trade have proliferated around the world -- particularly in recent years the so-called "voluntary export restraint" device, whereby the exporting country, at the request of the importing country, restrains the amount of exports of a product which will be shipped to the importing country. This device seems favored even by the importing country although it is often thought to have an even less favorable effect on the economy of the importing country than the alternative whereby the importing country imposes the quantitative measures itself. Why is it then that governments tend to opt for the fourth best measure?

These are only a few of a large number of puzzles embedded in the subject of international trade today. These puzzles cannot be solved by reference only to one academic discipline, be it economics, or law, or political science. Indeed, these puzzles may not be solvable at all. But the only potential for discovering reasonable explanations or solutions for these and many other similar puzzles is a pragmatic and empirical analysis of the motivating factors and circumstances of real transactions and government actions. Many different disciplines, certainly all of those mentioned above, are required to assist in that process.

b. The Meaning of Interdependence

In a world where trade across borders constitutes over

50 percent of the Gross National Product of some countries, and 14 percent even for as large an internal market as the United States,¹ it is no wonder that government leaders, businessmen, and almost anyone else feels an "air of anxiety" about those mysterious foreign influences which can affect daily lives so dramatically.²

Even these statistics don't tell the whole story. It is generally recognized that the influence of international trade³ on national economies has been growing for decades and can be much more profound than the percentages stated might indicate, both because the trade itself is often a much higher percentage of the goods-producing sectors of economies and because a multiplier or ripple effect amplifies the consequences of such sectors expanding or contracting.

In sum, as frequently stated, the world has become increasingly interdependent. With that interdependence has come great wealth -- goods are produced where their costs are lowest; the consumer has more choices; the institutions of production are disciplined through competition; producers can realize the advantages of economies of scale. But with that interdependence has come a vulnerability. National economies do not stand alone -- economic forces move rapidly across borders to influence other societies. Government deficits in the United States can have an impact on its interest rate which can push heavily indebted

developing countries to the verge of "bankruptcy" (if such a thing exists for sovereigns). An embargo or price rise implemented by major oil-producing nations can cause deep and frustrating unemployment, farm bankruptcies, and dramatic rises in the cost of living in the United States. A recession in one part of the world is rapidly felt in other parts.⁴

These observations were underscored in an article by Martin Feldstein in *Foreign Affairs* for Summer 1985⁵ in which the former Chairman of the U.S. Council of Economic Advisors said:

"The experience of the past few years has underlined the interdependence of the world economy. Sharp changes in international trade, in capital flows and in exchange rates have affected all major economies. The rise in real interest rates everywhere reflects the close links among capital markets."

Economic interdependence creates great difficulties for national governments. National political leaders find it harder to deliver programs to respond to needs of constituents. Businesses fail or flail in the face of greater uncertainties. Some laboring citizens cannot understand why it is harder to achieve the standard of living to which they aspired.

How did this interdependence, at least within the non-Communist world, come about?

Perhaps the technological innovations of the post-World War II era would have alone created these conditions, at least in the absence of

major military fighting. The time and cost of transport has fallen rapidly, so that this barrier to greater trade flows and service exchanges has also dropped. Communications have become spectacularly instantaneous -- we watch local wars in our living rooms on the T.V. news by satellite, and it is possible now to order goods or shift huge sums of money across oceans, literally in seconds. Information systems are changing the character of markets, and also affecting business techniques such as the control of inventories, the use of borrowed money, the response to changing interest rates, and the adoption of new developments of technology. But these scientific advances would have had little influence if they had been resisted by governments, as can be observed in the case of those governments that do resist them.⁶

We must recognize that the international institutions erected or reinstated by governments after World War II have made their contribution. If some world organizations have failed to perform in the manner contemplated by their founders, they have nevertheless contributed symbiotically to the general trend of the world environment made possible by the scientific innovations. This is particularly the case with the economic institutions.

The 1944 Bretton Woods Conference launched the World Bank and the International Monetary Fund. A few years later came a failed attempt to add a complementary organization for trade, the ill-fated ITO of the Havana Charter, but into the vacuum grew the GATT -- the General Agreement on Tariffs and Trade. These institutions were later joined by

others, including the OECD, UNCTAD, and some important regional systems. By the late 1960's, therefore, the liberalization of trade and financial flows promoted by this post war system -- sometimes broadly called the Bretton Woods System -- had progressed far enough to foster an unprecedented surge of trade and to demonstrate the economic benefits that flow from such liberalization. But at the same time, new problems were emerging. The receding waters of tariff and other overt protection inevitably uncover the rocks and shoals of non-tariff barriers and other problems. As the European Economic Community has in recent decades experienced, creating free trade requires attention to a group of interrelated activities⁷ such as the flow of capital, the flow of labor, and the flow of technology and services. These in turn have revolutionized government methods traditionally used to control fiscal and monetary policy, taxation structure, environment regulation, product standards, and liability for product defects. The propensity for government summit meetings, both within the European region and on a broader world-wide basis, is obviously not unrelated to these world economic trends of interdependence. Likewise the attempts by governments to combine their efforts through international organizations is a similar result. The question is not whether a government will play on the international scene, the questions are: Where will it play and with whom, i.e. what forum will it work in, and which other governments is it willing to let into its 'club'?

The problem of international economics today, then, is largely a problem of "managing" interdependence.⁸ The success of the Bretton Woods

Systems has created a host of new problems. When economic transactions so easily cross national borders, tensions occur merely because of the differences between economic institutions as well as cultures. In addition, the freedom of border "transit" sometimes allows unscrupulous entrepreneurs to evade national government regulation. Even morally sensitive entrepreneurs find their effective power enhanced when they can move activity quickly from one nation to another. Governments, in contrast, find themselves increasingly frustrated by effective evasion of their regulatory powers. Furthermore, governments find that actions of other governments cause them great difficulties.

Governments respond to these problems in a variety of ways. One set of responses governments pursue is to join other governments in an attempt to create an international regulatory system to help ameliorate the "free-for-all" aspects of international trade such as beggar-thy-neighbor policies, or to provide a unified posture to confront the less public-spirited entrepreneurs. Another common response is to develop internal policies designed to enable their nations to better cope with the challenges of the world economy. Thus, governments adopt "industrial policies"; measures to enhance "competitiveness"; measures (usually at the border) to offset foreign government or private actions deemed potentially damaging; or reciprocal responses of various kinds.

In considering any of these responses, however, governments participating in the "Bretton Woods System" (as described in the next chapter) confront international as well as national sets of rules,

procedures and principles that may narrowly constrain their options. One of the purposes of this book is to describe one part of that system -- the rules of international trade as developed principally in the context of GATT, but related closely to national laws which regulate trade.

c. Do The Rules Work?

Let's explore one example: In recent decades the so-called "injury test" has been one pillar of trade policy. When this test applies, an importing country will presumably only impose restraints on imports of a particular product if it can be established that such imports are "injuring" its domestic industry which produces like or similar products. An "injurious" import is defined as one which in competing with the domestic product causes a decline in the domestic industry.

Under international treaties as well as the domestic law of major trading countries, the "injury" test is elaborately defined. In some cases an independent agency is charged with ascertaining whether the detailed legal criteria for "injury" have been met, and in other cases appeal to the courts may be permitted.

Thus it was surprising and revealing to this author when some years ago he was having a detailed conversation about trade policy with a highly ranked trade official of a European country, and this official blandly stated, "Oh, we can always find 'injury' whenever we need to for political purposes."

This comment about the ease with which detailed legal criteria can be overcome for political purposes typifies a larger dilemma of implementing international trade policy in major market oriented countries today: the tension that is created when legal rules, designed to bring the subject a measure of predictability and stability are juxtaposed with the intense human needs of government to make "exceptions" to solve short term or ad hoc problems. This tension poses difficult problems for the practitioner and the chronicler. (Of course trade policy is surely not qualitatively different in this respect, from say tax policy, or unfair competition law, although it may be different in degree.)

d. **Contours of this Study**

This book is about trade policy. But it is about trade policy in the context of the legal, constitutional, and political realities that constrain it. These constraints mold policy so much that the resulting form scarcely if at all resembles the pure logic of the economic theorist. Yet the economic theory is clearly part of the "reality." Without the theory, the policy would often be directionless, lurching from one inconsistent approach to another.

Thus the purpose of this book is to examine the theory and real implementation of the policies of international trade in our contemporary world in a way that attempts to explain how the theories have been effectively constrained by the processes of real human institutions,

especially legal institutions. The perspective of this book is that of a legal scholar, of course. (This author's "comparative advantage" would not realistically support any other perspective.) Yet the goal - not too ambitious he hopes - of this author is to explore the multi-disciplinary context of trade policy rules. Charts, graphs, and formal mathematical proofs will be eschewed here, because this author can fortunately rely on the extensive literature and expertise of generous economist friends for those. Nevertheless, the basic economic propositions of international trade policy will be stated, and they will be seen to lie at the center of this exposition. However, many other policies -- sometimes called "non-economic" -- will also be examined. Indeed, in many cases we will see a direct clash of inconsistent policies. In precisely those cases lurks the greatest challenge to government action and the law. The basic purpose of this book is to provide policy makers, practitioners, students, and scholars of many different disciplines with an integrated knowledge of the way in which the international trade "system" really operates in today's complex and interdependent world economic-legal-political environment.

Clearly the larger problem of international economics includes many subjects in addition to trade in goods. Monetary issues, investment flows, trade in services (such as transport, insurance, or banking) come easily to mind. But the observable fact is that the "legal system" for trade in goods, including both national and international rules, is the most intricate and elaborate of rule systems which exist in the context of international economic relations.⁹ This book is devoted to that

system of rules regarding trade in goods, partly because to take on the broader field would make it impossible or at least much more difficult to formulate any meaningful generalizations or hypotheses. Also motivating this focus of attention is the surmise (which the reader will have to evaluate for himself) that many of the principles, difficulties, and advantages of the "trading system" are likely to be influential in the evolving process of developing "legal systems" for other subjects. Indeed, there are currently moves towards a "GATT for services" and "a GATT for investment."¹⁰

In order to explore the trading system in any depth, however, it is necessary to observe some inter-disciplinary linkages. Although this book is written principally from the perspective of a legal scholar, it would be an artificially narrow view of the subject to use only that perspective. The driving principles are generally those of economics, and the many constraints to policy besides legal norms are the sphere of the political scientist. The subject of international trade policy is a kaleidoscope pattern produced by the interplay of legal norms, political science, and economics.

Throughout this work there will occur references to certain basic themes. One of those has already been stated in the previous sub-section: the tension between the necessity for legal rules for stability and predictability, and the human need for solutions to short term and ad hoc problems. In another sense this dilemma is largely the well-recognized problem of political philosophy of the tug-of-war between

rules and official discretion. Other themes will be stated elsewhere in this chapter, and in the final chapter.

This chapter, Chapter 1, continues in its next sections with some further introductory reflections. In section 1.2 we turn to the basic policy assumptions which underlie most of the law and policy described in this book, starting with the doctrine of "comparative advantage." Next we look at some of the policies, often termed "non-economic" which compete with the doctrine of comparative advantage. Certain basic concepts of international law related to international economic affairs will be introduced in section 1.4. Finally we will reconsider some of the underlying "themes" of this book's exploration of trade policy.

Chapters 2, 3, and 4 outline the basic "constitutional structure" of the contemporary world trading system. Chapter 2 will examine the international structure, while Chapter 3 will focus on domestic governmental structures, particularly those of the United States. In chapter 4 we then explore the much discussed dispute resolution and compliance problems.

Chapters 5 through 11 then take up specific "regulatory" subjects of international trade. These are the "substantive issues" of trade policy which are the core of the "system" today. Not all substantive trade policy issues can be taken up in this book, of course, but these eight chapters will cover the most significant as well as those

most frequently encountered.

Chapters 12 and 13 then introduce problems which relate to specific types of national economic structures. Chapter 12 examines trade policy and the operation of the current trading "system" with respect to developing countries. We here explore whether the system and its rules work for developing countries, or whether they introduce some biased constraints on those countries. Chapter 13 looks at a different set of national economic structures, namely those often termed "non-market". Of course the sets of nations focused on in these two chapters are not exclusive -- they overlap extensively. Nevertheless the implications for policy modification can differ substantially in these two types of economies.

Finally, in Chapter 14 we will survey the scene we have painted with such detail in the previous chapters, and ask ourselves some very large questions. Some hypotheses will be offered as answers to some of these questions, but clearly some of the questions are (at least at present) unanswerable.

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1.5 The Tangled Web: Is There a Warp and Woof? (Themes)

Legal scholars sometimes refer to the "seamless web" of the law.¹ The phrase connotes the notion that each legal concept is in some way related to virtually every other legal concept. It also connotes a certain skepticism of theory and of simplifying concepts -- a skepticism which in many ways is characteristic of the legal profession, which often views itself as uniquely, among the learned professions, coming face to face with the complexity and coarseness of reality with the aim of solving real problems. It is sometimes said that the economist tells us what should be done, while the lawyer is left to figure out how to do it. This brings to mind the anecdote of the person on a desert island who finds a can of vegetables and asks the theorist how to open it. "Use a can opener," the theorist replies. "But where do I find one?" asks the other castaway. "Don't bother me with details!" responds the theorist.

The converse problem can also be dangerous -- there is always the risk of losing sight of the forest because one's gaze focuses on particular trees. Watch a lawyer and a social scientist argue. The lawyer often cites specific cases -- the "anecdotal evidence" -- to make his point. The social scientist, on the other hand, will often use statistics to make his point. There are dangers with each approach. In order to formulate statistics it is often necessary to develop categories for counting which are over-simplified. The specific case

history can be a useful way to avoid this kind of oversimplification. On the other hand the use of anecdotes can often seriously mislead policy makers. "Once does not make always"; the anecdotes may be atypical.

Thus we see the dilemma of a book like this. How can some meaningful generalizations be stated in the short space allotted for exposition of an extra-ordinarily complex subject? There is always the danger of an apparently "unifying hypothesis" seriously oversimplifying the subject and thereby misleading the policy maker and problem solver. Yet without some generalization it is difficult, if not impossible, to understand the subject. Perhaps one way out of this difficulty is to state issues or questions raised by the material, without in all cases trying to formulate answers. In this book we try to do a little of both.

Some important themes or problems of the "world trade policy system" have already been introduced. The dilemma of rule versus discretion is one such theme,² to which we return particularly in chapter 4. Closely associated with that theme is the question of "effectiveness" of the trade rules: How effective are they? How effective should they be? How can they be made more effective (if that is desirable)?

The puzzle of an apparent tendency to choose second, third, or even fourth best policy options has also been

previously noted.³ In these cases there are often non-economic policy goals operating, sometimes without it being obvious. Some of the conflicting policy goals have to do with the legal and constitutional structure of the "system." A certain constitutional political structure can impose severe constraints on decision makers, as we shall see particularly in the next two chapters. For example, a constitutional requirement of parliamentary approval can often lead officials to seek non-legislative ways to resolve problems, even if such ways appear to be less optimal (in economic theory) than the option selected. Yet, there are important policy reasons for the existence of constitutional structure, e.g. preventing a monopoly of power or preserving a representative form of government. Sometimes the "obstructiveness" of lawyers ("you can't do that, it's unconstitutional!") is merely the exercise of a constitutional cautionary function ("Think about the really long-term consequences of what you want to do").

One persistent theme that becomes apparent in the study of trade policy and law is the close interaction of national and international institutions. Each has a strong influence on the other, and it is impossible to understand this subject fully (and many others in today's interdependent world!) without noticing and analyzing how these influences operate. The U.S. Constitution had a direct influence on the shaping of the GATT (as the next chapter will show). Vice versa, much of current

U.S. trade legislation can only be understood in the context of the GATT rules.⁴ The tendency for academic subject matters to separate international from national or domestic issues becomes an important source of misunderstanding.

A frequently discussed and debated topic of current trade policy is the question of what is "unfair" government or private activity. Politicians and others commonly declare, "Of course I am for liberal trade, but it must be fair trade. We must take action against all those unfair trade activities of other nations, even if that means restraining imports from them." But how do we tell what is "fair?" In Chapters 10, 11 and 12 we struggle with this theme. Closely related to it is another theme, which this author has termed the "interface" problem. This refers to the difficulty, in the current interdependent world, of trade among different types of economies. Some of the "unfairness" problems are in reality "differentness" problems. We come across this type of issue in a number of later chapters, but most especially in chapters 10, 11 and 12 again.

Thus we have expressed a sort of "consumer warning." Don't expect too much of this book. Problems which appeared intractable before you read it will in many cases still appear intractable afterward. But it is hoped that this monograph will contribute at least modestly to an understanding of why those problems appear to be intractable.

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CHAPTER 14: CONCLUSIONS AND PERSPECTIVES

Section 14.1: The "Trade Constitution"

Section 14.2: How the System Works

Section 14.3: Weaknesses of the Trade Constitution

Section 14.4: Some Fundamental Policy Questions

Section 14.5: Prospects and Worries

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Section 14.1: The "Trade Constitution"

What we have explored in the preceding chapters can be characterized overall as the "Constitution" for international trade relations in the world today. It is a very complex mix of economic and governmental policies, political constraints, and above all (from this author's perspective) an intricate set of constraints imposed by a variety of "rules" or legal norms. It is these legal norms which provide the skeleton for the whole system. Attached to that skeleton are the softer tissues of policy and administrative discretion. Even the skeleton is not rigid or always successful in sustaining the weight placed upon it. Some of the "bones" bend and crack from time to time. And some of the tissues are unhealthy.

This "constitution" imposes different levels of constraint on the policy options available to public or private leaders. Some of the "rules" are virtually immutable. Others can be changed more easily. Part of the complexity of the whole system is this variety of constraints which limit the

realistically available options for solving problems. In addition there are different contexts or levels for these constraining rules. Some of these constraints come from national or sovereign state governmental systems (e.g. the constitution of the United States, or statutes of a GATT member country). Other rules come from the international system and its treaty mosaic, centering for our purposes on the GATT system, but also reached by other elements of the Bretton Woods system and indeed the entire structure of international law (weak as it may be.)

Some of these "constitutional" constraints are sources of great annoyance both to decision makers and to economists. The rules, they will sometimes say, too often "get in the way." Indeed, with respect to the "trade constitution", they are probably right. As we will discuss below there is considerable reason to be discontent with that "constitution" as it exists today, and to worry about its weaknesses and defects in the context of the type of interdependent world with which we are faced.

However, some of the constraints are the result of important and necessary principles, resulting from competing policy goals of the total system (not just that for international trade.) For example, there is no question but what the U.S. constitutional "separation of powers" principles are the source of great annoyance for decision makers, who must struggle with

the constant tensions of the Executive-Congress power struggles. Yet the great genius of the draftsmen of this Constitution was their understanding of the need to disperse power so as to avoid its abuse. Thus in a broader context, the separation of powers principle can be seen to have greater importance than the needs for shorter term solutions to disagreeable international economic and trade problems.

Likewise, a rule oriented structure of the portion of the skeleton devoted to international treaties for trade (GATT) is often a source of annoyance and aggravation. Yet that rule structure itself, as outlined in Chapter 4, has potential values for creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions. In some instances it is more important that international disputes be settled quietly and peacefully, than it is that they conform to all correct economic policy goals.

Like almost all government activity, the international trading system and its constitution contain conflicting and competing policy goals. Thus, like most government institutions, the methods for resolving or "compromising" these competing goals is crucial for the potential longer range success of the system. For example, the worthy objectives of liberal trade (based on economic principles such as comparative advantage) will often conflict with goals (at least short run) of protecting poorer or

weaker parts of a society's citizenry. Thus, as we saw in the chapter on safeguards, the "purenness" of liberal trade policies is relaxed somewhat to accommodate some competing goals of helping the poorer to adjust. (Of course, the constitutional structure of the system sometimes perversely also assists the more privileged of the world's producers to perpetrate that privilege at the expense of others -- merely illustrating one of the many imperfections in the system.) The "conservative social welfare function," so ably described by Max Corden, realistically explains the approach of many national governments in today's world. Even if Corden and his admirers (including this author) do not always feel such function is wisely administered, yet it can be defended in some circumstances as an appropriate governmental goal which also competes with purer versions of liberal trade policy.

With these observations we can now see some approaches to solutions for the puzzles posed in chapter 1. How vulnerable is a small country to blocking by other nations of the small country's exports? As we have seen, at the moment almost the only recourse or inhibition on such action by importing nations is the GATT system. Defective as it is, it nevertheless plays a crucial role in constraining some of the more rampant national governmental actions which would otherwise restrict trade and defeat important expectations of small (and large) exporting countries.

Likewise one puzzle was that faced by the investor who needed some longer term dependability of export markets for his new plant to be a viable investment. Again the GATT system is crucial (and not necessarily too comforting!) Without this system, the degree of predictability would be even considerably less.

Why do governments choose fourth best economic policy options? It should now be clearer. The intricate interplay of the international rules and the national constitutions and norms gives us the necessary clues. National executives prefer to avoid going to Congress or parliaments in order to obtain the necessary authority for certain approaches, and this may rule out some options. The international rules provide in some circumstances the onus of "compensation" or re-balancing of negotiated benefits, which impose constraints. Thus governments may pursue "informal" measures or other approaches which are less advantageous in economic terms, in order to avoid some of the national or international rule imposed "costs" of particular actions. The use of export restraint arrangements particularly comes to mind.

In this final chapter, we will look briefly at a summary of some of the main principles governing how the trading system works. We then turn to a review of some of the many defects or

weakness of that system. Next we will briefly mention some of the longer term key policy questions which lurk within this system, and in a final section, we will draw an end to our discussions in this book.

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Section 14.2: How the System Works

We can now summarize, or at least characterize, how the world's "trade constitution" works, such as it is. As noted in the previous section, this system is a complex interplay of both national and international norms, institutions and policies. It cannot be understood if only the international part is studied, nor can it be understood if only the sovereign national states are studied. The linkages are extremely significant: the GATT is what it is, at least partly because of the United States constitutional structure, and more recently, the structure of the European Economic Community. U.S. law is what it is at least partly because of the GATT. To explore how to achieve certain policy options, one must know not only the procedures for rule formulation or treaty change in the GATT, but also the similar procedures in at least some of the key nation-state GATT members.

Within major GATT trading nations, a cardinal principle of the administering (executive) authorities is often to avoid seeking legislation from the legislature. Thus the constitutional allocation of powers, embellished by the authorities which are contained in existing legislation, often become significant constraints on policy selection.

A core part of the system is the vast body of GATT tariff bindings, made significant and relatively enforceable

because of the GATT and its institutional make up. An additional part of the system (perhaps less effective) is the "code of conduct" established by the many other GATT rules and extended for at least some nations by the various "side codes" of the GATT described in various chapters above.

Important additions to the system come from national government laws and institutions, most particularly those relating to "unfair trade practices." In many cases national procedures provide for initiation of complaints by private entrepreneurs, and various nations have rules which differ in the extent to which government officials are "mandated" to carry out certain actions, or have discretion to choose among various possibilities. We have seen that the U.S. Congress has strongly pushed the U.S. law in the direction, at least for dumping and subsidy countermeasures, of mandatory import restraints, and this is posing certain threats to the liberal trade policies of the system. Part of the congressional impetus for this approach is the distrust by the Congress of Executive branch handling of trade policy in the past, but also some of the impetus stems from the natural proclivity of members of Congress to please particular constituents.

All in all, however, the system does work; or perhaps it would be better to say that the GATT system operates better than anyone had a right to expect, given the uncertain beginnings and

the various gaps in this "trade constitution."

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Section 14.3: Weaknesses of the Trade Constitution

Although it works (sort of), there is plenty of reason for much of the concern expressed about this system, as we have now seen. What are these concerns?

Most fundamental (and perhaps most difficult to remedy) is the basic constitutional infirmity of the GATT as a treaty and an organization. It was never intended to be what it has become, and as we have seen the GATT has become what it is largely through an evolutionary and pragmatic adaptation to the role thrust upon it when the ITO failed to come into being. This has meant:

- changes in the trade rules are hard to achieve; amending the GATT is almost impossible, and so the trading nations have turned to other measures such as "side codes" (which have some troublesome side effects) to establish changes in the trading rules

- the GATT membership is changing and expanding; different types of societies are entering the GATT fold, and some are still left out

- loopholes or lacunae in the GATT rules have been

troublesome, partly because of the difficulty of changing GATT rules

- the GATT has not yet manifested its ability to house amicably under its single roof vastly different economic systems, including those termed "non-market"

- problems of agriculture trade have so far been intractable

- some urge the GATT approach to be extended to areas of international economic endeavor not heretofore covered by the GATT system, such as trade in services

- rule implementation has sometimes been troublesome in GATT, as a number of nations avoid GATT rules by subterfuge, exploiting lacunae in the rules, or merely by exercising their power

- the procedures for dispute settlement have been heavily criticized and need attention

- subsidy rules in particular have been a source of great confusion, disagreement, and dissatisfaction

- the GATT as an organization has probably not developed sufficiently to accomplish all the responsibilities heaped upon

it; in particular the secretariat may be inadequate

Not only the GATT can be criticized, however. The laws and procedures of national governments leave much to be desired. For example, in the United States there is much ambiguity and potential for troublesome delay in situations when a GATT dispute settlement panel and procedure rules that the U.S. is obligated to change its law because of GATT rules. The Congress or the administration does not always efficiently implement such international rulings, a situation which tends to induce other countries also to resist such rulings and to generally reduce the respect for and predictability of the rules of the trading system.

In the United States there is some concern about the inefficiency of the U.S. national laws and procedures relating to "unfair trade practices", particularly those involving dumping or subsidies. This includes the worry that the procedures are cumbersome, slow, and very costly, in some cases becoming themselves barriers to liberal trade among nations.

In addition there is general concern about the functioning of the U.S. Congress. Its vulnerability to narrow local constitutional interests and to certain powerful lobbies, especially in the absence of strong Presidential leadership, is a worry expressed by many about the U.S. Constitution. The

performance of the Congress in trying to shape a trade bill during 1985, 1986, 1987 and 1988 must be seen as evidence of failure of the Congressional processes, confirming those worries.

Concerns can also be expressed about the trade laws of other governments. The European Economic Community is in the process of an agonizing constitutional evolution which sometimes renders its relations to the GATT system less than satisfactory from the point of view of other nations.

Likewise the influence on international trade policy and negotiations, of approaching national elections (and when is there none?), especially in Europe, can often be observed raising worries similar to those about the U.S. Congress.

More could obviously be said, but we need to turn to some key policy questions.

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Section 14.4: Some Fundamental Policy Questions

Clearly the implications of the preceding section are that considerable attention is warranted for the basic constitutional structure of GATT. New mechanisms for rule making and rule evolution would be welcome, and this may imply some sort of "steering group" or other institution. Perhaps sometime governments will even be bold enough to consider a new "OTC" type charter, i.e. a brief treaty of only institutional measures (not covering substantive obligations), such as that tried unsuccessfully in the mid 1950's.¹

The dispute settlement procedures are also under close scrutiny as we have elsewhere discussed.² The critical question whether such procedures should be tilted towards a "rule orientation" or "power orientation", (or what should be the appropriate intermediate mixture) is still unresolved. To what extent are governments today willing to submit to "rules", and to rule implementing procedures which effectively reduce the discretion of national officials? How far will governments trust dispute settlement panels with "big issues" of trade policy? Can a rule system at least partly serve to replace the "hegemonic" system which many commentators suggest has been lost, as U.S. relative economic power has declined?³

A particularly fundamental question, not often

discussed, is the issue of what techniques are appropriate to "manage interdependence." Several alternative approaches can be suggested including:⁴

- Harmonization, i.e. a system which gradually induces nations towards uniform approaches to a variety of economic regulations and structures. An example would be standardization of certain product specifications. Another example would be uniformity of procedures for applying countervailing duties or escape clause measures.

- Reciprocity, i.e. a system of continuous "trades" or "swaps" of measures to liberalize (or the contrary) trade. GATT tariff negotiations are in this mold.

- Interface, which recognizes that different economic systems will always exist in the world and tries to create the institutional means to ameliorate international tensions caused by those differences, perhaps through buffering or escape clause mechanisms.

Obviously a mixture of all these techniques is the most likely to be acceptable, but that still leaves open the question of what is the appropriate mixture. For example, how much should the "trade constitution" pressure nations to conform to some uniform "harmonized" approaches, or is it better to simply establish

buffering mechanisms which allow nations to preserve diversity but try to avoid situations where one nation imposes burdens (economic or political) on other nations?

Closely connected to this previous point, is an issue which may be loosely characterized as that similar to "federalism." This is the issue about the appropriate allocation of decision making authority at different levels of government. Each federal nation faces this issue, i.e. what is the appropriate allocation of power between the national government, or subordinate state or municipal governments? The international system broadly and the international trade system in particular, also face this question. As interdependence drives nations to more concerted action, there also arises the question whether a gradual drift of decision making authority upward to international institutions is always best for the world. How much power do we want to delegate to such international institutions? In what instances do we wish to preserve local or subordinate government control on the grounds that such government is closer to the affected constituents? To what degree does a "harmonization" approach to managing interdependence unduly interfere with these "federalism" principles of maintaining decision making closer to affected individuals and firms?

One very perplexing issue is that of the appropriate

linkage of international economic policies and measures to "non-economic" policies such as human rights, or geopolitical considerations. Many enterprises and their leaders (at least in the U.S.) have been arguing against any such linkage. They argue that measures such as trade boycotts, or removing MFN privileges, often tend to be self-defeating and only allow competing nations and firms to move in with trade to fill the gap. Yet national leaders of powerful states cannot easily eschew the use of economic measures, particularly since the use of more "active" or military approaches have become less and less feasible. Economic measures are often the sole usable instruments of diplomacy. Noone denies that if a nuclear war can be avoided by the use of an economic trade measure, such is appropriate. But that type of causal connection is never presented. But if the "trade constitution" provided for a more effective channel of concerted economic actions to encourage better human rights treatments in some states, or to discourage risky national military moves or terrorism, to what degree should such economic actions be allowed or encouraged? Clearly there are some causal connections between economic measures and other policy goals, even though in many instances it appears that the economic measures do not work too well.⁵ Enlarging the EC to include Greece, Spain and Portugal had a large component of non-economic policy in it. Other examples can be readily cited. It has been argued that economic interchange and discourse can play an important role in promoting understanding among nations and their citizens, and that it can

also build constituencies for identity of interests which cross national boundaries and thus discourage resorts to force.

There is an important policy issue in connection with the "trade constitution's" principles of non-discrimination, particularly the MFN principle discussed in Chapter 6. It must be recognized that MFN policies have some costs as well as benefits. Thus the question arises in connection with many trade measures, whether MFN principles should be observed or not. Closely related but not identical is the question of "multilateralism" versus "bilateralism." Which of these approaches best promotes the longer run interests of the system?

Within national governments there are also a number of fundamental policy issues closely linked to the international "trade constitution." One of these is the degree to which a "legalistic" or "adversary" system of administering trade laws, (such as the U.S. anti-dumping and countervailing duty systems), is best. A more legalistic or litigious approach has its costs, including attorney and consultant fees, time delay, and government costs. On the other hand it may in some situations provide better information to decision makers, allow interested parties to make their case and give them the feeling that they have had their "day in court", and avoid corruption through transparency.⁶

Also within national governments is the question of the appropriate distribution of power as between courts and administrative officials. What is the appropriate role of courts in reviewing trade measures undertaken by administration officials? Should the courts exercise great deference to the administrators on the grounds of the relative lack of expertise and of information gathering techniques of the courts? Or will such deference result in increasing abdication of judicial responsibilities to maintain fairness and completeness of decisions, as interdependence extends to more human endeavors?

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Section 14.5: Prospects and Worries

More than forty years after the current world "trade constitution" was launched as part of the immediate post World War II Bretton Woods system, we still find that the central institution of this constitution is an organization which was not intended to be an organization, a treaty that is yet only "provisionally" in force, and an incredibly complex tangled web of international agreements and provisions modifying, explaining, or escaping those agreements. That it works at all is truly surprising. Yet this GATT system does work, and as we have said, considerably better than anyone had a right to expect at the end of the 1940's.

But clearly it is defective. As the world becomes increasingly interdependent, and increasingly vulnerable to rapidly changing and rapidly transmitted economic forces, it is impossible not to worry about the question whether the "trade constitution" can stand up the stresses it is likely to face in the next few decades. One of the negotiating topics listed on the agenda for the Uruguay round of trade negotiations is "future of the GATT system", or "FOGS" for short. Whether this or other endeavors can succeed in time to bring into effect sufficient improvement in the trade constitution so as to avoid a worldwide economic disaster, no one can say for certain. Yet the

reasonable but surprising success of the past few decades, based largely on pragmatic and evolutionary problem solving techniques, do give us some reason to be optimistic. Let us hope therefore, that the world's economic diplomats will be able to continue to "pull it off". Let us also hope, however, that they can begin to develop changes which will move the trade constitution, even if slowly, towards a system which is not so vulnerable to short term ad hoc "fixes", but instead can establish the framework for mutual international cooperation in a manner creating both the predictability and stability needed for solid economic progress, but also for the flexibility necessary to avoid floundering on the shoals of parochial special national interests.

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