

Michigan Law Review

Volume 83 | Issue 4

1985

International Trade and the "Rule of Law"

Phillip R. Trimble

University of California, Los Angeles

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [International Trade Law Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/34>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INTERNATIONAL TRADE AND THE "RULE OF LAW"[†]

Phillip R. Trimble*

IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES. By *John H. Jackson, Jean-Victor Louis* and *Mitsuo Matsushita*. Ann Arbor: The University of Michigan Press. 1984. Pp. 223. \$18.

For at least a quarter of a century, lawyers, diplomats and politicians have debated the extent to which the "rule of law" should govern American foreign policy and international relations.¹ During that period proponents of the "rule of law" have scored a number of important victories, particularly in the economic sphere. For example, foreign governments may now be sued with respect to "commercial activities" (expansively defined), and claims of foreign sovereign immunity are subject to judicial, rather than executive, determination.² Foreign governments may also be held judicially accountable in damages for violations of international human rights law.³ In addition, foreign confiscatory expropriations may be challenged in American courts, where they will be judged under American views of international law.⁴ Finally, American foreign and economic policy actions

† The comments of William Alford, Nancy Bekavac and Arthur Rosett on an earlier draft of this review were especially appreciated.

* Acting Professor of Law, University of California, Los Angeles. B.A. 1958, Ohio University; M.A. 1959, The Fletcher School of Law and Diplomacy; LL.B. 1963, Harvard University. The author served as Assistant Legal Adviser for Economic and Business Affairs of the Department of State from 1974-1977, and as American Ambassador to the Kingdom of Nepal from 1980-1981. — Ed.

1. Compare G. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 95-101 (1951), with D. MOYNIHAN, *LOYALTIES* 61-96 (1984); and compare T. NARDIN, *LAW, MORALITY AND THE RELATIONS OF STATES* (1983), with Hoffman, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW* 21 (K. Deutsch & S. Hoffman eds. 1968), and L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 259-66 (1972), and compare Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 22 *BUS. LAW.* 3 (1966), with A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-33, 183-98 (1962), and T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* 155-62 (1979), and Trimble, *Foreign Policy Frustrated* — Dames & Moore, *Claims Court Jurisdiction and a New Raid on the Treasury*, 84 *COLUM. L. REV.* 317, 364-66, 373-77 (1984).

2. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892, codified at 28 U.S.C. §§ 1602-1611 (1982).

3. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984); *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980); see also *Argentine Torture Victim Wins Redress in U.S. Court*, L.A. Times, Oct. 20, 1984, at 1, col. 1 (referring to *Siderman v. Argentina*, No. CV 82-1772-RMT (MCx), slip op. (C.D. Cal. Sept. 28, 1984) (Takasugi, J.)).

4. See 28 U.S.C. § 1605(a)(3) (1982); 22 U.S.C. § 2370(e)(2) (1982) (effectively overruling *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)); *Banco Nacional de Cuba v. Farr*,

are increasingly subject to judicial scrutiny under the "takings" clause of the Constitution.⁵

Although appeals to the "rule of law" may seem difficult to resist, some commentators (including this one) harbor reservations concerning these developments.⁶ At least it seems appropriate to examine more carefully what "law" is going to rule, and whose interests are going to be served. International trade is a particularly appropriate field of study in this regard because it is especially laden with rules. In fact, a subset of the general debate has focused on the General Agreement on Tariffs and Trade (the GATT), and specifically on how best to understand the GATT's contribution to the "rule of law."

For most of the GATT's history the cognoscenti have debated why it works and how (if at all) it should be changed. One group — the pragmatists — attributes the GATT's success to the "nonlegalistic," "impressionistic" approach it takes to the application of rules.⁷ In this view, the principal value of the GATT is that it provides a process through which trade problems are negotiated and compromised within a general framework of rules. The compromises may not always be technically in accordance with the "law" as a court would apply it, but most problems have in fact been defused, and the overall system has held together with great success.

Another group — the legalists — believes that "[t]here is a danger . . . in making a virtue out of necessity."⁸ The GATT may have succeeded *despite* the pragmatic approach, not because of it. Moreover, just because the GATT has operated that way in the past does not mean that it should continue to do so in the future. For the legalists, a central objective of the system is to enable private entrepreneurs to plan economic decisions and thereby maximize efficiency. To this end they need stability and predictability. The rules must be clear, and the best way to assure clarity is through a system of impartial adjudication

Whitlock & Co., 383 F.2d 166 (2d Cir. 1967); RESTATEMENT OF FOREIGN RELATIONS LAW (Revised) § 713 reporter's note 6 (Tent. Draft No. 3, 1982).

5. See *Dames & Moore v. Regan*, 453 U.S. 654, 688-90 (1981); *De Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc); *In re Aircrash in Bali, Indonesia* on Apr. 22, 1974, 684 F.2d 1301 (9th Cir. 1982); *Langenegger v. United States*, 5 Cl. Ct. 229 (1984); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983).

6. See T. FRANCK & E. WEISBAND, *supra* note 1; Trimble, *supra* note 1; *Multilateral Trade Negotiations: Dispute Settlement*, 74 AM. SOC. INT. L. PROC. 129, 134-36, 138-39 (1980) (comments of Graham & deKieffer) [hereinafter cited as *MTN Panel*].

7. See, e.g., K. DAM, *THE GATT — LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); DEKIEFFER, *GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law*, 2 Nw. J. Intl. L. & Bus. 317 (1980).

8. J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 756 (1969). See generally *id.* at 756-68; Herzstein, *The Role of Law and Lawyers Under the New Multilateral Trade Agreements*, 9 GA. J. INTL. & COMP. L. 177 (1979); Jackson, *International Economic Problems and Their Management in the 21st Century*, 9 GA. J. INTL. & COMP. L. 497 (1979); *MTN Panel*, *supra* note 6, at 137 (comments of Jackson).

that is routinely used by governments to develop a common law of trade.

In the legalists' view, the "pragmatic" approach fails to achieve the necessary predictability because it reserves too great a role for *negotiation* of disputes, with the prospect of diplomatic intervention and "political" compromise. Diplomats are thus seen as a major obstacle on the road to free trade. Against this background, *Implementing the Tokyo Round: National Constitutions and International Economic Rules* finds yet another obstacle: national parliaments and domestic political structures. To reach David Ricardo's Promised Land, we apparently must do more than restrain misguided diplomacy; we must curtail representative government as well.

The authors seek to call attention to the "the little-studied interrelationship of the national legal systems to th[e] international [economic] system" (p. 210). They point out that domestic procedures for negotiating, accepting and implementing treaties are critical to understanding the inevitable (if unfortunate) *limitations* on the role of international law. They cite two major types of limitation. First, there are constraints on the kinds of agreements that can be negotiated. In a federal system some subjects may not be within the competence of the national government. Thus, Australia and Canada may not be constitutionally authorized to accept international rules governing provincial government procurement, thereby preventing the extension of free trade to that arena.

Second, there are disparities among countries in the domestic implementation of agreements. Some legislatures may not pass specific legislation implementing new international obligations, perhaps relying instead on the constitutional supremacy of treaties. In some nations judicial review to enforce a treaty may not be available. Different parties to an agreement may therefore carry out an accepted obligation with widely differing degrees of effectiveness. Those disparities, in turn, may cast doubt on the basic fairness of the system.

To eliminate those disparities and the problems thus caused by domestic political systems, the authors propose an international judicial procedure in which private parties could directly challenge treaty violations by governments:

[G]overnments and business firms do desire greater predictability of national government economic actions in an increasingly interdependent world, and do desire greater balance and equality in actual implementation of negotiated international rules on economic matters. Those factors could lead governments to be willing to accept some sort of a mechanism by which individual citizens or firms could appeal directly to an international body like the GATT to determine whether a government obligated under the GATT or one of its codes has taken an action that is inconsistent with its international obligations. [P. 208.]

The authors add that the proposed procedure is unlikely to include

"truly effective sanctions," but they say that the institution could nevertheless make "reliable third-party determination on [sic] the facts and the application of the law" (p. 208).

In this regard they escalate the legalists' demand for GATT reform (under which existing GATT tribunals would be made more effective⁹) to an appeal for the creation of an entirely new international court (or "supercourt" as I shall call it), apparently "above" even the GATT itself. Although the authors do not call the proposed institution a "court," I take it they are talking about an institution that makes final and binding decisions; otherwise the reformed system would have the same problems of uneven implementation, the criticism of which is a central theme of this book. Accordingly, it is not unfair to characterize the proposed institution as a court, and one of very broad jurisdiction indeed. Through the authors' supercourt, the "rule of law," too long suppressed in GATT practice, is to be revived with a vengeance.

Implementing the Tokyo Round makes a valuable contribution to the debate over the GATT and the role of law in foreign affairs generally. It buttresses the legalists' case by demonstrating the potential unfairness of the GATT system that results from different national approaches toward implementing international agreements.

Although most of the book is taken up with summary descriptions of constitutional structure, it provides a good outline of the trade law environment in three important jurisdictions: Japan, the European Economic Community (EEC) and the United States. It also takes tentative steps toward integrating analyses of bureaucratic behavior and the political environment with a more conventional rule-oriented approach. The book accordingly introduces the reader to "political" concerns that are sometimes assumed to be extraneous to truly "legal" analysis, an assumption that occasionally surfaces in the book under review. Nevertheless, those political factors surely are important to any meaningful understanding of the role of international law — or any law — in the real world.

Perhaps this study will, as the authors hope, provoke further interdisciplinary exploration of comparable legal and constitutional constraints that exist in other legal cultures. The "multinational" approach embodied in this book, drawing on the insights of authors from each of the jurisdictions analyzed, is certainly worth following.

The book's concluding chapter applies its principal themes to po-

9. In the Tokyo Round, the legalists and the pragmatists clashed over reform of the GATT dispute settlement machinery. *MTN Panel*, *supra* note 6, at 131 (comments of Hudec). The pragmatists seem to have won. See *id.* at 131-33; Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INTL. L.J. 145 (1980); Jackson, *Multilateral Trade Negotiations*, 73 AM. SOC. INT. L. PROC. 56 (1979); Note, *Dispute Settlement Pursuant to the Agreement of Technical Barriers to Trade: The United States-Japan Metal Bar Dispute*, 7 FORDHAM INTL. L.J. 137 (1984).

tential negotiations on trade in services,¹⁰ investment and capital flows, and notes the limitations that may affect those negotiations. It also briefly analyzes the structure of the existing international economic system and prescribes the supercourt remedy.

Although the authors concede that their recommendation regarding the supercourt "will probably not be readily accepted" by governments (p. 208), I am not persuaded that it should be. As I will explain in Part II, the book does not follow through with the implications of its basic thesis in two important respects. First, the authors do not come to terms with the barriers to acceptance of the supercourt that are imposed by the very domestic political processes they have described. They also do not examine the potential incompatibility of their proposed institution with deeply embedded ideas of representative government. It seems to me that the requirements of political accountability enshrined in the democracies examined may well preclude locating such significant authority essentially outside the domestic political process.

Second, the authors call attention to "limitations" imposed by domestic law on the use and effectiveness of international agreements. In doing so they overlook a major advantage of those limitations, even from the point of view of strengthening international law. The same domestic political process that inhibits the effective expansion of international law also confers a measure of legitimacy upon those norms that successfully emerge from that process. In my view the limitations seen by the authors should instead be seen as benefits. The future of effective international rule making lies in more extensive involvement of domestic political institutions, not in the impartial dispensations of an international court.

I

The book begins with a brief overview of the international economic system, including a sketch of the trade negotiations culminating in the establishment of the GATT in 1947. Successive GATT negotiations, or "rounds," led to steadily diminishing levels of tariffs that contributed significantly to the economic growth of the last three decades.¹¹ The most recent negotiation, the Tokyo Round, which lasted from 1973 to 1979, was an ambitious new attempt to extend international regulation to more subtle and politically sensitive nontariff barriers to trade. The agenda included government procurement practices, national administration of product standards, customs

10. The Reagan administration has advocated a new GATT "round" to negotiate a code on trade in services, as well as bilateral agreements serving the same end. *New Era in Service Exports*, N.Y. Times, Oct. 24, 1984, at D1, col. 3.

11. See Lipson, *The transformation of trade: the sources and effects of regime change*, 36 INTL. ORG. 417, 424-28 (1982).

valuation procedures and the especially sensitive rules designed to protect against the "unfair" trade practices of subsidies and dumping. All these practices can effectively discriminate against, or protect domestic producers from, imports of foreign products. During the Tokyo Round, nine codes (the Multilateral Trade Negotiation, or MTN, agreements) dealing with nontariff barriers were negotiated.¹²

The main part of the book shows how those codes were implemented by the EEC, Japan and the United States, each of which is treated by the author from that particular jurisdiction. The book is unified through a common set of questions, focusing on the domestic authority to negotiate and accept the MTN agreements and on the process of implementing the obligations assumed. The authors also specifically examine the role of the judiciary and private rights of action.

A. *Japan*

Professor Matsushita offers a lucid account of the Japanese constitutional system and, more importantly, a description of the policy-making process and extralegal factors that are critical to understanding that system.

Because Japan has a unitary parliamentary government, a traditional legal analysis might have been deceptively simple. An international agreement affecting private rights must be submitted to the National Diet. Treaties approved by the Diet then take precedence over domestic law, and a full measure of judicial review is available. In fact, most of the MTN agreements were submitted to the Diet and were approved by it. The Diet also passed the necessary changes in domestic law, and the ministries changed regulations as required. Since the Japanese delegation that negotiated the MTN agreements represented ministers drawn from the parliament (and from the dominant political party), on the surface the process was quite straightforward.

Matsushita enriches his basic outline with descriptions of important related phenomena, such as conflicts among ministries fighting on behalf of particular constituencies and the extraparliamentary relationships (notably those between the bureaucracy and the ruling Liberal Democratic Party) that are critical to the development of legislation. He also includes a comprehensive summary of the basic laws regulating international trade, and he emphasizes the importance of the administrative process in their application. Regular features of this process include wide discretion on the part of administrators, fre-

12. For an extensive discussion of the Tokyo Round negotiation and the substance and immediate implementation of each of the MTN agreements, see L. GLICK, *MULTILATERAL TRADE NEGOTIATIONS — WORLD TRADE AFTER THE TOKYO ROUND* (1984).

quent resort to informal guidance, and government-directed private agreements as policy-implementing devices.

The author also summarizes a number of complaints of protectionism leveled against Japanese practice in government procurement and in administering technical product standards (such as inspection procedures and health requirements). He outlines the measures adopted to meet those complaints, and underscores the role of unofficial organizations in resolving trade problems. Finally, he explains the system of judicial review that is theoretically available to challenge government action that is allegedly contrary to the MTN agreements, but states that Japanese companies are "less inclined [than foreign firms] to use legal actions to cope with troubles with the government" (p. 131).

Three distinctive features of the Japanese system emerge as critical for understanding its operation: the historically rooted symbiotic relationship of government and business, the critical importance of administrative power wielded by the bureaucracy, and the frequent reliance on informal methods of operation and control. While these features seem consistent with my nonspecialist's view of Japan, they also seem fundamentally inconsistent with the idea of elevating the role of adjudication to the extent proposed by the authors in their conclusion. Nevertheless, Matsushita's brief account provides a satisfying outline of the Japanese legal landscape.

B. *The European Economic Community*

The chapter on the EEC is less felicitous. Poorly edited, somewhat dense and frequently confusing, it may simply reflect the uncertainty surrounding some of the issues raised.

In this study, the EEC itself is viewed as a federal system. Because its member-states have quite recently been fully independent, and because at least some of them have been deeply ambivalent about transferring sovereignty to a central government, the obvious first question concerns the EEC's competence to negotiate the MTN agreements. The 1957 Treaty of Rome, however, transferred authority over "common commercial policy" to the EEC. Thus, issues of federalism apparently did not loom large in the Tokyo Round negotiations, at least until the end, although some matters may have been excluded from the negotiations because of doubts as to EEC authority.

The governmental structure established by the Treaty of Rome did have subtle effects on the development of international economic norms. The fourteen-member Commission is the "executive" body of the Community. It is said to adopt a Community-wide perspective and to represent "only the global interest" (p. 22) of the Community.¹³

13. As a nonspecialist, I wonder about the extent to which the Commission may, in fact,

The Commission operates under directives from a Council of Ministers, which may be seen as a "legislative" organ, consisting of the ten member-states each acting in its individual national interest.¹⁴ Although this structure suggests a potential for legislative-executive conflicts, like those in the United States, problems of that nature apparently did not arise in the Tokyo Round negotiations because member-states kept tight control of the Commission through other means. In the negotiations the Commission was constrained by an unusually important role assumed by the special "Committee of Article 113" (named after the article of the Treaty of Rome that authorizes its establishment), made up of representatives of the ten member-states acting in national capacities, and an ad hoc body of national experts whose power was enhanced by the technical nature of the negotiations (pp. 27-28).

The most interesting aspect of the EEC constitutional structure revealed by Professor Louis is the general shift of power in the area of commercial policy from national parliaments to executive authorities. The European parliament has not yet been able to assert a significant role in this area. Accordingly, the principal source of restraint on the supranational Commission is the Council of Ministers, which is itself composed of executive officials. Legislative supervision and control over commercial policy, whether by the federal or national parliaments, has therefore been lost by the creation of the Common Market. This development would seem to be of major importance to the viability of Community law-making ventures, although Professor Louis does not elaborate on its implications.¹⁵

Finally, the availability of judicial review to enforce EEC obligations under the MTN agreements is unclear. Given the improbability that courts will be used much in Japan, the United States may turn out to be the only jurisdiction in which the judiciary will play an important role in the implementation of the MTN agreements. This is the kind of disparity in the effectiveness of international obligations that is of great concern to the authors. Nevertheless, the lack of a clear commitment to judicial review in Japan and the EEC suggests further skepticism about the authors' concluding proposal for a supercourt.¹⁶

continue to reflect more parochial national interests, a point on which I would have preferred more discussion by Professor Louis.

14. The official names of these institutions are "The Commission of the European Communities" and "The Council of the European Communities." I have used the technically inaccurate term "Council of Ministers" as a shorthand expression for the latter because it more accurately describes the composition of the body. For a general outline of the Commission-Council structure, see E. STEIN, P. HAY & M. WELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 30-42 (1976).

15. This is not to say that affected interests do not exert influence on the Commission. The Economic and Social Committee serves as a forum for this purpose. P. 46.

16. One also wonders what France and Great Britain, given their ambivalence about transfers of "sovereignty," would think about the supercourt.

C. *The United States*

Professor Jackson's chapter provides a good review of the United States' constitutional landscape affecting international economic agreements. He particularly notes the congressional constraints on the negotiation, acceptance and implementation of agreements. He also sketches the history of U.S. involvement with the GATT and the events leading up to U.S. participation in the Tokyo Round.

In addition to providing a conventional exposition of legal doctrine, Jackson's account is useful for its description of the political context in which the Trade Act of 1974 was enacted, the bureaucratic structure that heavily influences U.S. trade policy, and the sources of Congress' dissatisfaction with the performance of the State and Treasury departments. Distrust of the executive led Congress, in the 1974 act, to delegate authority sparingly, and to assume particularly close control over the nontariff barrier agreements that formed the core of the Tokyo Round. Thus, Congress required that industry and legislative branch representatives be involved in the formulation of the U.S. negotiating position as well as in the negotiation itself. The agreements were implemented under a special procedure requiring a specific act of Congress.

Jackson's description of the role of Congress at the conclusion of the negotiation is especially interesting. Because the nontariff barrier agreements of the MTN could not be implemented without congressional approval, the precise terms of the implementing legislation were of critical importance to the effectiveness of the MTN agreements under U.S. law. Consequently foreign governments, notably the EEC, had a considerable interest in the "internal" negotiation of the terms of that legislation by the executive branch and Congress. The result was a multi-cornered negotiation of the final details of some of the codes among the EEC, the Congress and the executive branch, a process that confounded conventional notions of separation of powers and international law. This experience, more than any other described in the book, illustrates its thesis that domestic law shapes the real effectiveness of trade agreements. It also shows that the traditional view maintained in international law theory of a government as a single entity (embodied in its executive ministry of foreign affairs) can be quite misleading.

After explaining the steps taken by the United States to implement the MTN agreements, Jackson explains the system of private remedies available to enforce the obligations. Under U.S. law a private firm may file a petition with the U.S. Trade Representative (USTR) alleging an "unfair" trade practice (including a violation of a trade agreement) by a foreign government. Thereupon the USTR must either open an investigation and raise the matter officially with the foreign government, or state publicly why it is not going to do so. In view of

the political difficulties of the latter alternative, this system practically forces the government to take diplomatic action against a foreign state upon demand by a private interest. This, then, is another manifestation of Congress' distrust of the executive branch's willingness to "stand up for the rights of American business." The result is a "high degree of legalization" (p. 177) of the MTN agreements in American law, which Jackson and his coauthors applaud as the desired course for future development. The supercourt naturally follows.

II

I am skeptical about the supercourt proposal, in part for the reasons suggested by the central argument of the book. The authors demonstrate the critical importance of domestic law in determining the scope and effectiveness of international obligations. I would argue that behind their thesis lies a more fundamental lesson about the necessity of a solid connection between law and political community.

The material in the book shows the importance, even the necessity, of invoking normal (and generally accepted) law-making processes in order to carry out international obligations. The book also shows that it is equally critical to involve domestic political constituencies in international decisions affecting their important interests. These lessons simply underscore the fact that the governments studied, and most governments important to international trade, are in one way or another representative governments. Their legitimacy and ability to maintain their authority depends on a measure of voluntary acceptance of their actions by their people. In turn, they gain acceptance by being responsive to the immediate interests of important constituencies. This process of representation provides an essential connection between international law and domestic political community.

The proposal for an international supercourt, on the other hand, seems to contemplate the imposition of rules from "above" the national systems. It is difficult for me to imagine a supercourt that could be adequately rooted in the various political communities that would have to accept the scheme.¹⁷ Theoretically, I concede, my objection would disappear if accession to the supercourt were itself effected through regular national political processes. Thus, for the United States, the President could negotiate such an agreement and the Congress could approve it, thereby subjecting the new procedure to the scrutiny of the domestic political process, with all the attendant advantages of publicity, consensus building and acceptance resulting

17. One must be similarly skeptical of self-executing treaties, see Trimble, *Legal Scholarship and the ILO*, 6 *COMP. LAB. L.* 212, 216-21 (1984), and customary international law (the subject of a forthcoming article by the author) in the American system. One may also wonder about the solidity of agreements approved by the EEC without participation of national parliaments because such agreements lack the stamp of political effectiveness and approval.

from that process. To this argument I offer five objections. I shall limit my counterarguments to the United States context, although I suspect that comparable arguments could be developed with respect to other systems as well.

A. *Objections to the Supercourt*

1. *Impracticability*

It seems inconceivable that a President (Republican or Democrat) or the Congress would go along with the proposal. In the United States a distrust of international supervision is deeply embedded in our political tradition and has been repeatedly demonstrated in this century.¹⁸ The Senate frustrated a variety of attempts to conclude arbitration treaties by Presidents Cleveland, McKinley, Roosevelt and Taft. It then repudiated the League of Nations, and for twelve years stalled consideration of U.S. participation in the World Court before finally rejecting it in 1935. When the Senate eventually consented to the jurisdiction of the International Court of Justice in 1945, it did so only with a reservation that essentially negated the effect of ratification. More recently, the prospect of international supervision has led the Senate to refuse to consider the Human Rights Conventions.¹⁹ President Carter did not even submit to the Senate the Optional Protocol to the International Covenant on Civil and Political Rights, which would have subjected the United States to international supervision.

These are not isolated acts. They reflect a deep and enduring American attitude toward law-making authority removed from representative control. The authors clearly share my skepticism on this score, citing "the typical government reluctance to relinquish any power or to constrain its field of discretion" (p. 209). I think, however, that the causes of this reluctance are deeper than the egos of bureaucrats and politicians. They are expressed in basic national political philosophy. Even the active involvement of the United States in world affairs, and the dramatically increased national interdependence of the international economy, will alter this attitude only slowly, if at all. In the next section, I will explain why I think that this attitude should not be changed.

2. *Political Philosophy*

My objection is more than a prediction that Congress will reject the scheme. In reaching the conclusion that a supercourt should not be accepted, I start with the assumption that any exercise of authority

18. See e.g., R. ANAND, *STUDIES IN INTERNATIONAL ADJUDICATION* 1-35 (1969).

19. See Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 422 (1979) ("A deep isolationism continues to motivate many Americans, even some who are eager to judge others and to intercede on behalf of human rights in other countries."); Rusk, *A Personal Reflection on the International Covenants on Human Rights*, 9 HOFSTRA L. REV. 515, 517-21 (1981).

by a government should be explained by a coherent theory of power that is acceptable to the relevant political community. Accordingly, I look to American political philosophy and tradition in order to test the novel supranational authority proposed by the authors. In this regard the proposal does not pass muster.

The kind of international law making envisioned by the authors cannot easily be reconciled with American political tradition.²⁰ For over 200 years the theory and rhetoric used to justify law making in the United States has exalted limited and representative government resting on the "consent of the governed." Authority is said to be delegated to a federal government of limited powers, with law making concentrated in politically accountable branches of government that are responsive to the interests of their constituencies. It is true that we entrust wide law-making power to unelected judges, but they are products of the domestic political system and in fact are responsive to political changes in society. Judges read the newspapers and follow the election returns.

Supercourt judges, on the other hand, would not be similarly responsive. Given the number of different cultures and countries represented, they probably could not be. Indeed, judges of the supercourt would presumably be selected in a manner designed to assure their independence of national perspectives. Even so, it is doubtful that they would regard themselves (or be regarded by others) as products of an international polity, or that they would be adequately divested of national parochialism.²¹

There are, of course, several contemporary examples of international tribunals rendering decisions that affect the United States. It may be asked how their authority can be explained under the test I have proposed. The existing GATT Panels, for example, consist of representatives of neutral parties acting in "individual" capacities. Their recommendations, however, are made to the GATT Council, a political body, and implementation depends on the engagement of regular national political processes.²²

The authors' proposed scheme more closely resembles the traditional form of arbitration or adjudication of intergovernmental disputes. In those cases, decisions are typically binding without further

20. In this Part I have drawn on, *inter alia*, B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); D. BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* (1953); H. COMMAGER, *THE AMERICAN MIND* 310-35 (1950); L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* (2d ed. 1973); Masters, *The Lockean Tradition in American Foreign Policy*, in *THEORY AND REALITY IN INTERNATIONAL RELATIONS* (J. Farrell & A. Smith eds. 1967).

21. For discussions of similar problems in the context of the ICJ, see T. FRANCK, *THE STRUCTURE OF IMPARTIALITY — EXAMINING THE RIDDLE OF ONE LAW IN A FRAGMENTED WORLD* 250-71 (1968); L. PROTT, *THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE* (1979).

22. See generally R. HUDEC, *supra* note 7.

political action by the losing party. Those cases are few,²³ however, and normally are limited to a particular dispute, like the U.S.-Canada maritime boundary case,²⁴ or to a narrow subject matter, like the Iran-U.S. Claims Tribunal.²⁵ They thus involve situations in which the stakes are not as high, and the risks not as open-ended, as would be the case where a court had general authority over "international trade."

It could be argued that my preoccupation with American tradition is misplaced. Perhaps we need to change our political philosophy to accommodate explanations of authority that are more adequate to the modern world of economic interdependence, environmental degradation and nuclear terror.²⁶ I would not be opposed to such an effort, but no satisfactory alternative has been offered. I am deeply skeptical of notions of international community and world values, not only because I see little basis in reality for maintaining their existence, but also because I am not convinced that the "world government" conclusions frequently implied by those notions are desirable. Among other disadvantages, the values of personal autonomy and community control that many of us prize most highly could be lost. I suspect that people in other cultures would harbor the same fears, although for different reasons.

3. *The Undesirable Effects of Emphasizing Economic over Political Values*

There is a third general objection to the authors' recommendation. The proposal may be seen as another attempt to enhance the "rule of law" in international relations. The "law" involved here, as in many other proposals to apply law to foreign policy, would protect commercial interests against government intervention. In this scheme private economic planning is more important than government regulation. In the contest between economic and political values, the latter would yield.

The authors of course recognize that free trade values are not the only concern of government. Professor Jackson has elsewhere acknowledged that perhaps "big" cases (like automobiles and steel)

23. J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM — CASES AND MATERIALS* 67-74 (2d ed. 1981).

24. *See World Court Settles Dispute on U.S.-Canada Boundary*, N.Y. Times, Oct. 13, 1984, at A3, col. 4.

25. *See Carter, The Iran-United States Claims Tribunal: Observations on the First Year*, 29 UCLA L. REV. 1076 (1982).

26. Professor Falk is a leading advocate of the approach discussed in this section. *See R. FALK, THE END OF WORLD ORDER* (1983); R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* (1970); Falk, *The Adequacy of Contemporary Theories of International Law — Gaps in Legal Thinking*, 50 VA. L. REV. 231 (1964).

could not be handled within an adjudicatory system.²⁷ In those cases "political" pressures would require departure from the solutions demanded by economists' rules. The legalists regard political pressures as causing unfortunate, if sometimes necessary, deviations from the pure pursuit of objective adjudication.

On the other hand, I see political pressure as a natural, and even laudable, feature of our political system. I do not see a basis for distinguishing "big" cases from "small" ones. If political pressure works for the strong, it should be permitted to work for the less strong as well. If the conflict between free trade and community interests over steel is to be resolved in the politically accountable Congress and executive branch, the same conflict over mushrooms should be resolved the same way. Special interests may command special attention in the process, but that is characteristic of the general political system.

There also is no reason why free trade or economic factors should be automatically or even normally entitled to priority over political factors, even foreign policy concerns. The law of comparative advantage may dictate that the United States should sell computers to the Soviet Union and that steel should be made in Korea, but even the legalists agree that there must be limits to the pursuit of profit and free trade theory.

In the specific context of the GATT, the question comes down to who will be primarily in charge of trade policy — elected officials and political branch bureaucrats, who are responsive to the constituencies of their districts and agencies, or private litigants and international judges, who are responsive to a body of rules. In favoring the former I simply doubt that rules can be drafted with sufficient prescience, or that they can be changed quickly enough, to respond to the legitimate needs of domestic constituencies. Free trade is an important goal, but it is not the only one, and I doubt our capacity to create institutions that will respond the way we expect representative government to respond. Some observers may think that the executive branch has not been sufficiently responsive to domestic interests, and others may believe that special interests have too much influence. I trust the political process to reach a fair balance.²⁸ In my view the value of representative government outweighs the value of free trade.

As I noted at the outset, however, the legalists have scored some victories in their quest for the "rule of law." Fortunately their momentum has been blunted. While the "commercial activity" doctrine permits lawsuits against foreign governments, the courts have appar-

27. See Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INTL. L. 747, 779-80 (1978).

28. For theoretical accounts reflecting my approach, see R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

ently reacted by expanding the act of state doctrine.²⁹ And although the political question doctrine may be in general retreat domestically, it still seems vibrant in the foreign affairs field.³⁰ American judges have been conspicuously cautious in applying rules to unfamiliar areas involving foreign relations. Their example suggests further caution before accepting the legalist line.

4. *The Undesirability of a Strict "Rule of Law" in International Trade*

My fourth point focuses specifically on the debate over how best to understand the GATT's contribution to the "rule of law." I agree with the authors that governments will be reluctant to accept their proposal. One reason is that many GATT obligations are intentionally general or vague, concealing important differences of opinion. The Subsidies Code is a good example.³¹ Judicial interpretation would disrupt the appearance of agreement by applying the language of a convention in unambiguous concrete ways. It could also inhibit the successful negotiation of future agreements. Although one may object that such agreements are undesirable anyway, I would respond that vague agreements are frequently important politically. Indeed, vague agreements may be the only agreements possible. Even if an agreement does not reflect a "genuine meeting of the minds," it may temporarily defuse conflicts, make other agreements possible, or help hold the jerry-rigged system together for another few years during which the conditions for real agreement may improve.

Judicial clarification is inconsistent with this approach. Here too I side with the pragmatists and see a major value of the GATT in its ambiguous, flexible and "nonlegal" approach. In view of the GATT's success, the proponents of radical change bear a heavy burden of persuasion to justify abandonment of the GATT's self-conscious accommodation to political reality.

5. *Adverse Effects on Free Trade*

Finally, it is not clear that international litigation to enforce rules

29. See, e.g., *International Assn. of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Allied Bank Intl. v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440 (S.D.N.Y. 1983) *revd.*, 757 F.2d 516 (2d Cir. 1985) (declining to apply act of state doctrine outside national territory); see also Leigh, *Judicial Decisions — Allied Bank Intl. v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440 (S.D.N.Y. 1983), 78 AM. J. INTL. L. 441, 443 (1984).

30. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring); *de Arellano v. Weinberger*, 745 F.2d 1500, 1545-50, 1550-66 (D.C. Cir. 1984) (en banc) (Tamm, J., and Scalia, J., dissenting); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979).

31. For a description of the disagreements involved in the negotiation of this Code, see Rivers & Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 LAW & POL. IN INTL. BUS. 1447 (1979).

will even serve to promote an open trading system. In theory it may sound desirable. U.S. exporters could strike down Japanese quotas maintained in violation of article XI of the GATT. A German exporter of specialty steel could sue to force U.S. revocation of escape clause relief recently granted to the specialty steel industry.³² There is no problem for free trade as long as the suit is brought against an inefficient producer hiding behind an illegal practice.

On the other hand, suits by competitors to enforce rules against "unfair" actions (like subsidies) are just as likely. Thus, the threatened U.S. steel industry could sue to halt illegal Brazilian subsidies.³³ Such litigation may simply lead the defendant government to do whatever is necessary to stop the lawsuit, and not necessarily to change its practices to conform to the rules. Even if one believes the classic argument that subsidization (or dumping) is unfair, and therefore ought to be eliminated, the range of opinion among nations about subsidies and dumping is so wide, and the practices subject to attack so entrenched, that it seems extremely doubtful that litigation to resolve the differences of opinion would be tolerated. The result of domestic litigation by the steel industry has been the effective cartelization of world steel trade through "voluntary" restraint agreements. The likely result of establishing a supercourt would simply be more "voluntary" agreements, serving protectionist rather than free trade objectives. The "high degree of legalization" of the U.S. system applauded by the book under review has itself been seen by some observers as a nontariff barrier.

B. *The Benefits of "Limitations"*

There is another respect in which the book does not follow through the implications of its basic thesis. The authors focus on the *constraints* imposed by domestic law — limitations on negotiating authority and burdensome legislative requirements for implementation. I would equally stress the *strengths* derived from those constraints. An international norm that has been approved after scrutiny in a country's regular law-making processes is more likely to be effective law.

Thus, it may be difficult for the American executive branch to negotiate an agreement establishing a relatively open international regime regulating trade in steel because the Congress would have to approve such an agreement. But if Congress did approve it, the obligations would be all the stronger by virtue of the congressional action. Not only would the result be more likely to be accepted by the affected interests within the American political community, but because of the

32. See *President Grants U.S. Specialty Steel Industry Four Years of Quotas, Tariffs*, 8 U.S. IMPORT WEEKLY (BNA) 519 (July 6, 1983).

33. See, e.g., *ITC Issues Final Affirmative Rulings on Brazilian Stainless Steel Products*, 8 U.S. IMPORT WEEKLY (BNA) 459 (June 22, 1983).

congressional action the result would be protected by the judiciary in a way that a presidential agreement without congressional support would normally not be.³⁴

The cumbersome political and legislative processes may therefore be necessary to transform international law from diplomatic theory to practical reality. Indeed, the key to effective international law making lies in the domestic political process so well described in the main part of this book, not in the chimerical international court advocated in its conclusion.

34. See *Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).