

1988

Book Reviews

Recommended Citation

Book Reviews, 22 INT'L L. 233 (1988)

<https://scholar.smu.edu/til/vol22/iss1/17>

This Book Review is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

BOOK REVIEW

American Trade Politics: System Under Stress

By I. M. Destler, Washington, D.C., and New York, N.Y.: Institute for International Economics and Twentieth Century Fund, 1986, pp. 366, \$18.00.

American Trade Politics, by I. M. Destler, is an outstanding chronicle of domestic politics concerning the formulation of American trade policy from the 1930s to the present. At best, the book details the changes in congressional-executive relations governing trade agreements and developments in statutory trade rules. While the proposals for future action are less innovative, what it tells the lawyer, lobbyist, scholar, and policy formulator about the current issues and institutions is indispensable. What the reader learns about Congress's abdication of constitutional responsibility in trade is shocking.

The author's theme is the need to correct an erosion in our trade policy-making institutions. At the crux, Destler asserts that a 1935 doctoral dissertation claiming special interests in Congress caused the adoption of the disastrous Smoot-Hawley tariff bill. The author claims that the trend since then has been towards the development of antiprotectionist counterweights for diverting trade-restrictive pressures. In light of global changes, however, the system has undergone substantial challenge, and much needs to be done to further ensure congressional protection from special interests.

One of the means developed in the post-war era to divert pressure from the Congress and the President was the expansion of quasi-judicial regulatory procedures centered around the International Trade Commission and the International Trade Administration (of the Department of Commerce). This system, in combination with "special deals," free-trade Presidents, and strong congressional committees (Senate Finance and House Ways and Means) made the trade system work. The President would tend to his trade-expanding work while special interests pursued their trade remedies.

As part of the system, Congress delegated authority to the President to negotiate trade agreements (executive agreements). When tariffs be-

came less important and nontariff barriers (NTBs) became more important, the Congress needed to pass legislation at both ends of the process to authorize the negotiations and to implement them. Congress did this through innovative "fast-track" procedures in the 1970s concerning the Tokyo Round and the 1979 Multilateral Trade Negotiations (MTN) Codes and recently concerning the United States-Canadian Free Trade Agreement. With the rise in importance of NTBs, other congressional committees become players in the field. This tended to make congressional policy-making even less predictable. The Reagan Administration just barely contained protectionist pressures in the 1984 Trade and Tariff Act and faces an uphill battle in the 100th Congress.

Trade rules, such as section 201 ("escape clause relief"), section 301 ("retaliation") of the Trade Act of 1974, and antidumping/countervailing duties have consistently been strengthened by Congress in the 1960s and 1970s. Conceptually, this strengthening allows both the President and Congress to deflect special interest demands for product-specific legislation and protection and to use such procedures as an escape valve. Actually, the procedures have been used as a means to increase pressure on foreign governments, rather than merely to divert pressure. Destler believes the rules play "a significant role in concept, and a modest role in practice" (p. 111).

The unique part of this book is the author's compilation and analysis of administrative case data from administration summaries to substantiate his arguments. The author argues that the illfated 1986 Omnibus Trade bill contained so many changes to administrative actions that a form of "process protectionism" could emerge and has to be guarded against in the 100th Congress. The author suggests giving more discretion to the President in applying all trade remedies.

What has happened in the 1970s and 1980s? According to the author, trade politics have become more partisan. Destler argues that an historical reversal of roles has taken place. The Democrats are now protectionist, and the Republicans free traders. Intellectual challenges to open-market policies have grown. (Witness the debate over industrial policy, competitiveness and the need for "fair trade.") In addition to the trends noted by Destler, newer and more vocal industry and business coalitions have developed. These coalitions are lining up both for and against trade proposals.

Most of all, Destler argues, the old system of diverting and managing trade pressures has been seriously injured by massive macroeconomic developments. The author asserts fleetingly and only paradoxically so, unfortunately, that Congress has not yet reclaimed its constitutional primacy over foreign trade. Destler views the actions of the 1980s (such as voluntary export restraints on Japanese automobiles and steel restraints

with the European Communities) as amounting to an unwarranted extension of "managed trade."

The author believes that the United States may be on the verge of new special deals for special cases, "process protectionism," and a new ideological debate on trade. He proposes several remedies based on an assumption of "free trade."

Destler next asserts that trade measures are generally ineffective in addressing trade problems. He identifies major macroeconomic problems as the culprits, the most important being the high value of the dollar attributed to international capital flows caused by high U.S. interest rates stemming from the large federal budget deficit. The author states that by "[u]sing corrective macroeconomic policy measures, as well as reforms in structure and process . . . government can attack those large imbalances that so burden trade policymakers. For these economy wide 'trade' problems have, by their nature, no trade policy solutions." (p. 191)

Destler supports greater productivity as a means of alleviating the trade problem. He then suggests changes in "structure and process." He would convert the Office of the United States Trade Representative into a smaller, elite unit in the Executive Office of the White House, create a new United States Trade Administration, abolish the Department of Commerce, and give greater discretion to the President in imposing statutory trade remedies.

Destler also suggests changes in congressional committee organization such as strengthening the House Ways and Means Committee by designating its chairman as head of a House Trade Steering Committee, which would act as the floor leader on general trade legislation. As the author points out, these proposals draw on ideas that arose during the Carter administration's trade reorganization deliberations.

To me, these suggestions seem old hat. Proposals to do away with the Commerce Department and fiddle around with executive and congressional organization are only minor contributions at best. Some I do not agree with. Changes in trade laws are necessary and more judicial review can only further depoliticize trade problems. These proposals are similar to the developments that led to the congressional ordering of judicial determination of sovereign immunity in the mid-1970s and the removal of the Department of State from the process even though the Department of State was the prime mover of the 1976 legislation.

While giving the President greater latitude in imposing statutory trade remedies would recognize the merger of trade policy with larger issues of foreign policy, it would have a lightning rod effect for both domestic and international pressures. If a grant of such authority is matched by a greater degree of judicial review, however, it ought to be acceptable. Presidents are elected to decide tough national interests.

The strength of this book is the author's detailing of the parameters of trade developments over the last fifty years and more particularly over the last decade. Especially interesting is Destler's thoughtful description of the development and transformation of the nature of congressional delegation of authority concerning executive trade agreements and development of particular statutory trade remedies and their impact. Whether or not it is bad that procedures have been "distorted" away from avoidance of pressure to asserting pressure, I am not yet convinced. I believe regularizing demands for change in a judicial or quasi-judicial process is preferable to back-slapping and back room deal-making on either the domestic or international levels.

The author's decision to limit his review to imports only, excluding exports in international trade, while somewhat understandable, leaves out the very significant and main area of contention and action of the last few years. Export controls and the new 1985 export legislation are of crucial importance. Export promotion and export controls of commodities and high technology are at the very center of the American problem. There is a need to strike a balance between regulating imports into the United States and fostering viable policies concerning the competitive role of U.S. firms in the world market place and the U.S. export environment generally. The problem may be as much with U.S. firms as with foreign practices.

Some discussion of the trade implication of the recent farreaching tax reform would have been helpful. Needless to say, any discussion of that issue may just be too speculative at this point. In addition, a discussion of national security issues and trade sanctions should have emerged from any discussion of export controls, although such issues are also involved and should have been raised with any discussion of imports (such as restricting imports from South Africa, Iran, and Nicaragua). A discussion of intra-multinational corporate transactions and trade by American subsidiaries abroad would have given a greater perspective on the very real strengths of American management.

What is more disturbing about this book is that the author contends that the system that developed during the 1930s was beneficial. That system depended on the abdication of Congress in exercising its plenary authority under the Constitution in regulating international trade. This refusal to act was clearly contrary to the intent of the drafters of the Constitution where plenary authority for such regulation was placed with Congress.

Now, congressional abdication is no longer feasible. Congress must own up to its constitutional responsibility to control the budget and to regulate international trade. Hiding behind a false facade of legal-administrative

protectionism created by Congress itself, it has escaped its plenary responsibility out of self-interest. Congress did not really want to get involved in a meaningful way in tough issues. To a great extent, neither did the President.

Congress simply did not act in the post-war era. The failure of American trade policy has been principally the failure of the Congress to formulate pro-competitive policies and to curb dysfunctional legislative and regulatory actions both in trade issues and macroeconomic matters. The Constitution gave the plenary authority to Congress to regulate international trade. It cannot blame the President or administrative agencies. The time has arrived for the Congress to do what is required.

International regulation may or may not require government action. But those are decisions of the Congress. The less government intervention, the better. Unlike the domestic economy, however, the international economy is populated by foreign government actors. Some government action appears necessary on the fluctuation of currency rates. The author's contention concerning the need for trade action seems minimal. Surely, greater legal and administrative relief, if properly fashioned, is itself a minimal response.

We are plying unknown international political and economic waters. We need less doctrinaire and partisan responses and more thoughtful analysis and empirical observation. The author's diagnosis, if not his prognosis, seems to have added greatly to such an undertaking.

Stuart S. Malawer, J.D., Ph.D.
(Int'l Relations), *Diploma*
(Hague Academy, Research Centre).

Professor of Law
George Mason University Law School

