

Fordham International Law Journal

Volume 10, Issue 1

1986

Article 5

McGovern, International Trade Regulation

William J. Davey*

*

Copyright ©1986 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

McGovern, International Trade Regulation

William J. Davey

Abstract

International Trade Regulation is a work with many strengths and few weaknesses. One could nitpick about certain aspects of its organization, but basically the organization is sufficiently logical overall that the book could be read cover to cover and be a coherent introduction to the subject of international trade regulation for a novice in the field. At the same time, within each section, the exposition of the basic international rules, followed by a discussion of the related United States and EEC rules, works well.

BOOK REVIEWS

INTERNATIONAL TRADE REGULATION. BY EDMOND MCGOVERN. Exeter: Globefield Press, 2d ed. 1986. xliv + 534 pp., appendices, index. \$60.00. ISBN 0-9508463-4-1.

*Reviewed by William J. Davey**

The next few years may be a watershed in the history of international economic relations. The period since World War II has been characterized by a rapidly increasing volume of international trade and a general decline, especially among the more industrialized countries, of barriers to trade. But today, more than at any other time in the recent past, it appears that these trends could be reversed. For a number of years now, the major industrialized nations have relied on informal arrangements with exporting nations to restrict trade, and it appears that the use of such devices is increasing. Moreover, largely in response to the mammoth United States balance-of-trade deficit, it is possible that the United States Congress may give in to intense political pressures to impose draconian limits on imports to the United States. So far, such measures have been opposed by the Reagan Administration, but over time it seems to have gradually accepted more and more trade restrictions in an effort to placate Congress. These trends mainly concern manufactured products. At the same time, massive farm surpluses in Europe and the United States have led to pressures for the use of increased export subsidies to dispose of the excesses and help fund the skyrocketing costs of the farm price support programs. The competitive use of such subsidies is also placing immense strains on the world trading system.

Whether the next few years lead to a growth in national protectionism or whether the general post-World War II trend toward liberalization of trade barriers continues may well be determined by the success of the new round of trade negotiations recently begun under the auspices of the General Agreement on Tariffs and Trade (GATT). These negotiations were

* Associate Professor of Law, University of Illinois at Urbana-Champaign. B.A., 1971; J.D., 1974; University of Michigan. Member of the Bar in New York and Michigan.

officially launched in September of 1986 at Punta del Este, Uruguay. As this is written, the prospects for the negotiations are still uncertain.

Against this background, the second edition of *International Trade Regulation* by Edmond McGovern is an extremely timely and valuable addition to the available literature on international trade law. The broad scope of the work makes it unique,¹ and since its appearance coincides with the commencement of the new round of international trade negotiations, it serves as a useful catalog of where trade law stands on the eve of these negotiations. The new edition is about one-third longer than the first edition published four years ago, an expansion in part due to more readable and less compressed typesetting. As to be expected, McGovern updates those areas where significant developments have occurred, especially with respect to the operation of GATT and of its various committees, and he also significantly expands the prior edition's coverage of a number of subjects, including United States antidumping and countervailing duty law. The GATT is now included as an appendix, obviating the need to quote long passages from it in the text, as was done in the first edition. The most amazing feature of the book is the incredible wealth of information that is packed into it. On virtually every international trade topic, McGovern lays out the basic rules and lists rather extensive bibliographic references. And while the book is generally more descriptive than analytical, McGovern often offers useful insights and analysis concerning the rules.

The second edition of *International Trade Regulation* follows the organization of the first edition. For those not familiar with that edition, the organization can be summarized as follows. The first section of the book essentially gives an overview of the institutions and operations of the most important players in the international trade regulation arena: the GATT,

1. Other important treatises in the general area tend to focus on more narrowly defined topics without the comparative coverage of McGovern's work. See, e.g., J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); H. KAYE, P. PLAIA & M. HERTZBERG, *INTERNATIONAL TRADE PRACTICE* (1986) (U.S. law). Many, but not all, of the subjects covered by McGovern are examined in J. JACKSON & W. DAVEY, *LEGAL PROBLEMS IN INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986), but the format is that of an American law school casebook, albeit with considerable text, not that of a treatise.

the United States and the European Economic Community (EEC). In the case of GATT, McGovern outlines the agreement and summarizes the powers of the GATT Contracting Parties. He also includes a very useful and extended analysis of GATT's dispute settlement mechanisms and some of their problems. From the viewpoint of the United States, these problems—particularly the tendency of the EEC to rely on the GATT tradition of consensus decision-making to block dispute settlement decisions adverse to EEC interests—are one of the principal subjects to be treated in the new negotiations.

As to the United States and the EEC, the book describes the division of the power to regulate international trade between their various institutions, i.e., between the Congress and the President in the United States, between the EEC institutions and its member states in the EEC.² The basic organization of this introductory section (and much of the rest of the book) is similar to a casebook of which this reviewer is a co-author, so I have little to complain of in that regard, except that the book might be even more useful if the introductory section also presented a brief summary of the economic thinking that provides the theoretical underpinnings of the GATT system and contained a discussion of Japan and Japanese institutions comparable to its discussion of the United States and the EEC. An understanding of many of the more important trade disputes occurring today is difficult to comprehend without an appreciation of the way in which the Japanese government operates and negotiates agreements in international trade matters.

The heart of the book is the second part, where McGovern analyzes the general rules applicable to international trade. Although McGovern does not do so, this part of the book can

2. The one part of the book where some of the material does not seem to be completely accurate is its description of United States institutions. For example, the President cannot introduce bills in Congress (p. 64) and the U.S. Trade Representative, as part of the Executive Office of the President, cannot be viewed as an "agent" of Congress (p. 80). Similarly, there are a few examples in this section where the description, while perhaps technically accurate, may be a bit misleading. For example, the statutory presumption that U.S. authorities—such as those charged with administering the antidumping and countervailing duty laws—have made the correct decision, when challenged in court (pp. 81-82), is formalistic; courts are quite willing to reverse the authorities if they believe a decision is incorrect. See J. JACKSON & W. DAVEY, *supra* note 1, at 168 (examples).

be usefully subdivided into four subparts dealing with: 1) the operation of customs laws and tariffs, 2) the operation of nontariff barriers to imports, 3) the basic GATT rules on trade and 4) the situations where GATT permits imposition of trade restrictions, such as tariffs and quotas, to offset the effect of injurious trade practices.

The second part starts with a description of customs law issues under GATT, United States and EEC rules, including a general description of how customs systems work and an analysis of the basic issues arising in respect to assigning duties on imported goods: their classification, their valuation and their origin. The book then describes how tariffs and quotas are regulated under GATT (GATT bans quotas in theory and encourages reductions in tariffs) and briefly describes United States and EEC practices. Customs law by its very nature is extremely detailed and complex—to begin with every conceivable object must be categorized. As an inevitable consequence, the book cannot be thought of as a customs law handbook, but as an introduction to the subject it is comprehensive and amazingly comprehensible.

In examining nontariff barriers, the author concentrates on three such barriers: state-trading enterprises, government procurement and product standards. Each of these mechanisms may be used to limit trade: a state-trading enterprise, e.g., a government-created import monopoly, can determine trade flows by discriminating in favor of some exporters, government procurement rules and practices that favor domestic suppliers can obviously impede trade flows, while national product standards that are radically different from those usually applied in most countries may effectively insulate a domestic market from foreign competitors. GATT does not generally prohibit the use of these devices, but it does attempt some degree of regulation, which McGovern describes in fair detail.

The book next treats the basic GATT obligations—the most-favored-nation clause and the national treatment clause—and the two most troublesome exceptions to those obligations: 1) the exception for customs unions, which essentially developed without much attempt at control by GATT and which allows the establishment of preferential trading arrangements between groups of countries in derogation of the most-favored-nation obligation, and 2) the acceptance of pref-

erences for developing countries, which has, in the minds of some, largely relieved those countries from complying with GATT rules.

Finally, the second part concludes with a discussion of the various exceptions to GATT. The first is that of Article XIX, which permits a country to impose import restraints to protect a domestic industry that is being seriously injured by increasing imports. McGovern discusses the relevant GATT, United States and EEC rules in this area, although he spends little time on some of the difficult questions of how to interpret the rules, especially under U.S. law—where issues of causation and what constitutes “serious” injury have been hotly contested. The book also largely ignores the significant efforts now being made to reform the operation of the GATT rules, inspired largely by developing country complaints that the rules are too easily invoked. Realistically, however, significant progress toward such reforms will probably not occur in the near future, so the next edition may be an appropriate time to consider such issues.

The most extensive section of the book (encompassing almost 100 pages) is its treatment of the international rules on dumping and subsidies and the way in which the United States and the EEC apply those rules under their antidumping and countervailing duty laws. As noted at the outset, McGovern has substantially expanded his treatment of United States law in the area, and has a rather extensive analysis of the manner in which the U.S. authorities and courts have applied the rules. The section on EEC law is less detailed, in part out of necessity: there are almost no court cases involving the substance of EEC law in these areas and the EEC authorities generally publish less detailed reports of cases and issues than is the practice in the United States. Indeed, the EEC relies heavily on negotiated settlements in resolving antidumping and countervailing duty cases and McGovern can be faulted for not stressing more the existence of that practice. Part II concludes with a chapter on the general and national security exceptions to GATT and the way the United States and the EEC have taken advantage of such exceptions, e.g., Section 337 of the Tariff Act of 1930, which, *inter alia*, provides a means for United States patent holders to obtain orders excluding infringing products from

the United States, and the extensive export controls that the United States maintains on exports to the Soviet Union.

The third part of the book then briefly describes special international regimes applicable to trade in agriculture, commodities and certain manufactured products, in particular textiles and steel.

* * * * *

International Trade Regulation is a work with many strengths and few weaknesses. One could nitpick about certain aspects of its organization, but basically the organization is sufficiently logical overall that the book could be read cover to cover and be a coherent introduction to the subject of international trade regulation for a novice in the field. At the same time, within each section, the exposition of the basic international rules, followed by a discussion of the related United States and EEC rules, works well. As noted above, the principal criticism would be that the book does not consider Japan and its trading rules, but then such information is not easily obtainable.

On the subjects that it treats, the book is concise, yet comprehensive. In some areas, e.g., the international rules applicable to educational, scientific and cultural materials, the book draws together information this reviewer has seldom seen even referred to in other works. On the more mainstream issues of international trade, such as subsidies and dumping, McGovern generally does much more than simply describe the applicable statutes and regulations. He analyzes, and occasionally critiques, those rules and the cases that interpret them. Moreover, particularly in the case of GATT, he often lends valuable insights into the actual operation of that institution, e.g., by giving statistics on the actual use of various GATT procedures. This alone would make this a notable work, as these insights are current as of 1986, while it has been over a decade and a half since the other major works on GATT law have been published.³ Another instance of its "insider" information is the book's discussion of a number of GATT dispute settlement panel reports that have not yet been adopted in GATT and therefore are not generally available.

3. See, e.g., K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); J. JACKSON, *supra* note 1.

The book, as all books, does have some weaknesses. Two are worth mentioning, both of which may be unavoidable. The first is an inevitable by-product of the broad scope of the book and the need to be concise: sometimes a subject is given only superficial treatment. Indeed, the principal complaint that can be made about the book is that McGovern too often does not give us the benefit of his analysis of a particular topic. This, of course, does not detract from the great usefulness of the book. It simply highlights that there is no work that is at all comparable to it in scope. In any event, so long as the reader is aware that the treatment of some subjects is not comprehensive, there is no problem, especially since the book has extensive bibliographic references on most subjects.

Second, and a related criticism, the scope of the book invites intersection comparisons. Since not all sections are equally strong, one wishes that certain sections had received the same depth of treatment as others.

Finally, there is one other criticism that may be made, although this reviewer does not subscribe to it. One could argue that by attempting to lay out in detail the international (as opposed to national) rules affecting world trade, McGovern implicitly suggests the rules he describes are actually applied. Some might argue that his effort is misguided; that the international rules are not rules at all because they are followed or applied only when the affected nations find it convenient to do so. There are certainly examples of where this is true—witness the EEC's blockage of the adoption of several GATT dispute settlement reports because the results question certain of its practices. Nonetheless, many disputes over the rules have been brought to GATT, and the vast majority have been resolved. Over time, the degree of GATT compliance of at least the industrialized nations seems to have increased noticeably. For example, there is now little reliance on the so-called Grandfather Clause, by which laws existing at GATT's inception, which were inconsistent with GATT, were exempted from its provisions. In the case of the United States in particular, that was not true only ten years ago. Even if the GATT rules are not scrupulously followed at all times, they are generally accepted and followed often enough and have a sufficient impact on international behavior to be worth cataloging, as McGovern has done so well.

These minor criticisms detailed above take nothing away from the value and timeliness of the book. *International Trade Regulation* would be a valuable addition to any library dealing with contemporary world economic affairs. For the specialist or practitioner in the area, it is an indispensable addition.

ECONOMIC INTEGRATION AMONG DEVELOPING NATIONS: LAW AND POLICY. BY BEVERLY MAY CARL. New York, N.Y.: Praeger, 1986. xx + 285 pp. \$42.95. ISBN 0-03-005973-9.

*Reviewed by Richard A. Givens**

The early success of the European Economic Community (EEC) boldly demonstrated the benefits of economic integration. Between 1959 and 1971, trade between the original six Member Countries increased nearly sixfold,¹ and by 1979 the expanded EEC accounted for 20 percent of total world trade.² It is this integration — the reduction in trade barriers between countries — that is explored in Beverly May Carl's *Economic Integration Among Developing Nations: Law and Policy*. Professor Carl focuses on regional common market associations of developing nations, their benefits as well as their difficulties, and their utility as a means of reducing trade barriers and dependence on imports by member nations from industrialized nations. Integration thus can be a tool for development, as the Commerce Clause of the Federal Constitution was for the nascent United States of America and still is today.³

Professor Carl's work also contains much practical information and useful appendices that can be of assistance to those doing business in many areas of the Third World that have regional economic arrangements.

One deficiency of the book is its treatment of the Soviet-bloc Council for Mutual Economic Assistance (COMECON) as if it were actually composed of entirely independent sovereign states: "[s]ince COMECON operates on the theory of sovereign equality of its states, no measure may be adopted against

* Member, Botein Hays & Sklar, New York City; LL.B., Columbia University 1959; M.S. in Economics, University of Wisconsin, 1954; Assistant U.S. Attorney, New York, 1961-1971; Regional Director, Federal Trade Commission, New York, 1971-1977.

1. B. BALASSA, TYPES OF ECONOMIC INTEGRATION 18 (World Bank Reprint Series No. 69, 1976).

2. U.S. DEPARTMENT OF STATE, THE EUROPEAN COMMUNITY GIST 3 (August 1979).

3. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); Task Force on Simplification, *Report on the Commerce Clause of the Federal Constitution and Complex Regulation Imposing a Burden on Interstate Commerce*, 58 N.Y. ST. B.J. 52 (1986).

the will of any member concerned.”⁴

The book fails to discuss the implications of the coercion of the “will” of a “member” by the intervention of Soviet armed forces or threat of such intervention, as in the cases of Hungary in 1956, Czechoslovakia in 1968 and Poland in 1981.⁵ The primacy of self-promotion of political power by a ruling party⁶ over ordinary economic objectives creates further differences extending beyond those brought about by the non-market aspects of state management of economic enterprises.⁷

The deeper question raised by Professor Carl is the extent to which the benefits of reducing trade barriers between developing nations can overcome economic and political difficulties attributed to disparities in the rate of development.

To the degree that integration of the kind Professor Carl describes can overcome these difficulties, Third World nations with large populations or geographic extent already have an appreciable portion of that advantage. Perhaps Japan represents the most spectacular instance of a formerly lesser-developed nation moving into the forefront of industrialized nations.⁸ Yet few others have been able to emulate the Japanese example. And Japan, of course, was already a strongly industrialized nation by the end of the 1930’s, as the United States discovered in 1941 and 1942.

Japan today faces many of the problems of other industrialized nations — such as difficulty in making affirmative efforts to protect its own environment⁹ and in creating outlets for its

4. B. CARL, *ECONOMIC INTEGRATION AMONG DEVELOPING NATIONS: LAW AND POLICY* 91 (1986).

5. Where force or threat of force cannot be brought to bear, a differing course of political and hence economic development occurs. Yugoslavia and China, which separated themselves from the Soviet bloc, have had a different history from Poland and Afghanistan.

6. For early recognition of some relevant aspects, see M. DILAS, *THE NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM* (1957); G. ORWELL, *HOMAGE TO CATALONIA* (1969 ed.); S. PÉTREMENT, *SIMONE WEIL: A LIFE* (1976) (describing Simone Weil’s perceptions in the 1930’s).

7. See Keren, *The Ministry, Plan Changes and the Ratchet in Planning*, 6 *J. COMP. ECON.* 327 (1982); cf. N. LEITES, *SOVIET STYLE IN WAR* (1982).

8. See F. GIBNEY, *MIRACLE BY DESIGN: THE REAL REASONS BEHIND JAPAN’S ECONOMIC SUCCESS* (1982).

9. On possibilities of “positive” technology assessment for such purposes, see *BUSINESS ROUNDTABLE, STRATEGY FOR A VITAL U.S. ECONOMY* 31 (1984); Thomas, *How Should Humans Pay Their Way?*, *N.Y. Times*, Aug. 24, 1981, at A15, col. 3;

products. Likewise, Japan has been unable to avoid the tendency to exhaust scarce resources, such as species of whales, which has caused international hostility.¹⁰

Perhaps even more seriously, Japan's economy is heavily dependent upon exports, which tend to trigger import restrictions generated by loss of jobs among its trading partners. These restrictions can set off trade wars — with obvious harm to all parties, including consumers.¹¹ Such events can also harm political relations among the countries drawn into an economic free-for-all.¹² Trade wars cause all concerned to forfeit the very benefits of a "common market" described by Professor Carl.¹³

Professor Carl acknowledges that mercantilist tendencies represent a weed almost impossible to extirpate, i.e., witness the fact that large aggregations which themselves benefit from their internal "common markets" are riven by internal disputes over differential export advantages sought by member nations.¹⁴ Efforts to deal with such disputes by offering transitional aid to victims of reductions of trade barriers have partial success at times, but run into problems because of the difficulty of distinguishing injury due to imports or reductions in barriers from that due to general economic circumstances.¹⁵ Further, the cost of compensation may tend to become prohibitive. Similarly, economic blocs often become even more avid to obtain export advantages over outsiders. An example is

Worsinger, *New Technologies and Antitrust*, 47 N.Y. St. B.J. 651 (1975), reprinted in 81 CASE & COMM. 33 (1976); BUS. WK., July 6, 1963, at 62;

10. Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860 (1986). See generally Douglas & Torman, *Understanding Nonrenewable Resource Supply Behavior*, 219 SCI. 927 (1983).

11. See Weil, 'Anti-targeting' as Bad for Trade as Smoot-Hawley Tariffs in 1930's, N.Y. Times, Feb. 18, 1984, at A23, col. 2.

12. See generally R. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* (1956).

13. See also E. ELLSWORTH, *THE INTERNATIONAL ECONOMY* (1951); P. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* (9th ed. 1973). See generally M. WASSERMAN, *MODERN INTERNATIONAL ECONOMICS* (1971).

14. B. CARL, *supra* note 4, at 13.

15. See 19 U.S.C. §§ 2271-2394 (1982); Givens, *The Search for an Alternative to Protection*, 30 FORDHAM L. REV. 17 (1961); Wilcox, *Relief for Victims of Tariff Cuts*, 40 AM. ECON. REV. 884 (1950).

found in the trade disputes between the politically friendly EEC and the United States.

Such tendencies may be reduced, although not eliminated, when demand surges for labor, goods and services and everyone in a nation's labor market is needed. Competition under these conditions takes different forms, as during the Second World War.¹⁶

After that war, President Harry S. Truman proposed his Point Four program, designed to provide technical assistance to developing nations.¹⁷ This view that technology transfer at the "rice roots" would permit a leap forward by developing economies also formed the foundation of the Peace Corps.¹⁸

It was unforeseen, however, that much of the assistance granted would instead merely fill balance-of-payments deficits swollen by uneconomical governmental expenditures by Third World governments and even hurt local industry competing with imports subsidized by the aid.¹⁹ Nor was it foreseen that imported concepts might work entirely differently in a different environment²⁰ or that technological advance might focus chiefly on industries whose primary function was to sell goods back to the industrialized nations at lower prices due, in large part, to lower wage rates paid, thus depriving workers of jobs in nations such as the United States.

Proposals to require higher wages to be paid in such industries as a condition to allowing imports ignore the difficulty of enforcement of such rules,²¹ as well as the impossible situation created, at least theoretically, by far different wage scales

16. See G. THOMSON, *VOTE OF CENSURE* (1968) (concerning Britain); see also L. SULLIVAN, *BUILD BROTHER BUILD* (1969) (Apollo program in the United States in the 1960's). Compare B. KLEIN, *GERMANY'S ECONOMIC PREPARATIONS FOR WAR* (1959) with A. SPEER, *INSIDE THE THIRD REICH* (1970) (concerning Germany).

17. See 3 *STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1970* (1966).

18. See J. KENNEDY, *THE BURDEN AND THE GLORY* 15 nn. 25 & 32, 21 n. 72 (1964).

19. See *Foreign Assistance Act of 1969: Hearings Before the House Comm. on Foreign Affairs*, 91st Cong., 1st Sess., reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2611. *Improper Practices, Commodity Import Program, U.S. Foreign Aid: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Government Operations*, 90th Cong., 1st and 2nd Sess. (1968).

20. See M. YOUNG, *SHAREHOLDER RIGHTS AND SHAREHOLDERS' MEETINGS IN JAPAN: A CASE STUDY IN INSTITUTIONAL DISTORTION*, Working Paper No. 5, Center for Law & Economic Studies, Columbia Law School, July 1983.

21. Cf. the situation described in C. VIDICH, *THE NEW YORK CAB DRIVER AND HIS FARE* (1976).

for export and domestic industries existing side by side in the same local environment. Moreover, the United States and similar advanced nations themselves must export, and cannot do so if their domestic industries are protected at higher cost levels. Therefore these nations cannot compete with, e.g., Hong Kong, Taiwan or Korea, in selling many manufactured products in, e.g., Italian, German or Pakistani markets.

Technological advance is, of course, the engine that has made much of the world, including major parts of the Third World, wealthier economically than ever before.²² In order to increase the benefit of an advance that can be captured by an inventor or investor, removal of unnecessary artificial barriers, including but far from limited to international barriers reduced by the common markets discussed by Professor Carl, is important.²³ Much benefit may also flow to the nation's economy as a whole, a phenomenon described by economists as an "externality,"²⁴ which is the reason that basic research has long been subsidized by nations that can afford to do so.²⁵

But in order to be useful rather than counterproductive, a technology must fit its environment and thus cannot be imported as if it fell out of the sky — as were huge coffee bean storage elevators placed in Ghana under Nkrumah when there were no adequate roads to carry the crop to the elevators. "Appropriate" techniques that take advantage of local resources such as labor, or manure to make cooking gas, may be especially important in this respect.²⁶

In order to prevent injury arising from competition by developing nations, which focus on external markets for manufactured goods in developed nations rather than on their own

22. See generally V. CHILDE, *WHAT HAPPENED IN HISTORY* (rev. ed. 1964).

23. See Richardson, *Cutting Regulatory Tape*, N.Y. Times, Dec. 13, 1984, at A31, col. 2.

24. See generally N. TERLECKYJ, *EFFECTS OF R&D ON THE PRODUCTIVITY GROWTH OF INDUSTRIES* (1974); Mansfield, *Basic Research and Productivity Increase in Manufacturing*, 70 *AMER. ECON. REV.* 863 (1980); Starr & Rudman, *Parameters of Technological Growth*, 182 *SCI.* 358 (1973).

25. See 1 *STATE OF THE UNION MESSAGES OF THE PRESIDENTS* 3 (1966) (George Washington in 1790); *id.* at 88 (Thomas Jefferson); *id.* at 249 (John Quincy Adams); Bronk, *The National Science Foundation: Origins, Hopes, and Aspirations*, 188 *SCI.* 409 (1975).

26. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *Technological Innovation: Key to Progress in Less-Industrialized Countries*, 126 *OECD OBSERVER* 7 (1964).

internal markets, the developed nations would have to see to it that they remain ahead. This may require deliberate attention to technologies that will keep them several jumps ahead of what can workably be copied.²⁷

It must be recognized that, on balance, technical advance creates rather than destroys jobs²⁸ because ultimately what people want to do seems to expand to meet their ability to do it.²⁹ In any event, to retain jobs, advanced countries *must* maintain their technological advantage, for if country *A* does not do so it will lose jobs to country *B* that does.

Politically, as well as economically, the form of society, open or closed, that shows itself superior in moving forward technologically is likely to have an expanded role in determining the future.³⁰ Areas of sharing³¹ between nations at different stages of development may provide a common basis from which each can benefit from both the knowledge and mistakes of the other. It is here that Professor Carl's book may have its greatest application.

Cooperation between *independent* nations, of course, is the very opposite of the kind of control exercised within COMECON and ignored by Professor Carl in Chapter Six of her otherwise excellent volume. The ability to develop mutually beneficial political and economic relationships with Third World countries that are based on mutual respect rather than extortion or predation is an important part of this larger competition between systems.

Just as a bicycle remains stable if it moves ahead, technological advance within the open societies of the industrialized world may provide energy and spinoffs that can promote if not automatically provide stability and benefit all.³² In such a con-

27. See Levin, *Interindustry Differences in R&D Appropriability and Technological Opportunity*, Table 2 (Preliminary Report 1984).

28. See C. FREEMAN, *UNEMPLOYMENT AND TECHNICAL INNOVATION* (1982), discussed in Dickson, *Technology and Cycles of Boom and Bust*, 219 *SCI.* 33 (1983).

29. See G. ALLPORT, *BECOMING: BASIC CONSIDERATIONS FOR A PSYCHOLOGY OF PERSONALITY* (1955); K. LORENZ, *ON AGGRESSION* (1966).

30. See 3 *STATE OF THE UNION MESSAGES OF THE PRESIDENTS 3008-09* (1966).

31. Compare Norris, *Halting the Flow of High-Tech Bargains*, *N.Y. Times*, Feb. 26, 1986, at F3, with Dickson, *New Push for European Science Cooperation*, 220 *SCI.* 1134 (1983).

32. See T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

text, open societies with a marketplace for both ideas³³ and for goods and services³⁴ may have a tremendous advantage.³⁵

Of course, there are many other obvious challenges, among them: How can the disruption of economic activity by political events be overcome? How can the ceaseless pressure of totalitarian expansion be defeated where it takes advantage of weakness? How can the tendency to become enmeshed with unpopular or corrupt regimes that are doomed over a period of time be avoided?

In addition to the challenges enumerated above, how can aid be supervised so as to be used for intended, rather than corrupt, purposes and simultaneously critical independence of the developing nations be fostered? Even with sophisticated and dedicated personnel, these difficulties seem often insuperable.³⁶

Ultimately, one returns to the obvious: the fate of the Third World rests primarily and necessarily in the hands of its own people. Heroic figures from Ghandi to Anwar Sadat to the new democratic leaders of Argentina and Brazil show that innovation grows in their soil as much as in that of more highly industrialized nations. Part of the message of Professor Carl's work is that the Third World must determine its own destiny, and that regional common groupings of the kind Simon Bolivar envisioned for Latin America, must be part of the means to this end.

Eduardo Frei Montalva, the last great democratic (and by party designation Christian Democratic) president of Chile, who preceded both Augusto Pinochet's coup in 1973 and Salvador Allende Gossens' minority-candidate victory in 1970,³⁷

33. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Compare A. SAKHAROV, *PROGRESS, COEXISTENCE AND INTELLECTUAL FREEDOM* (1968) with G. ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

34. Axinn, *Response*, 52 A.B.A. ANTITRUST L.J. 643, 652 (1983), quoting Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1055 (1979).

35. See *LEGAL STRATEGIES FOR INDUSTRIAL INNOVATION* (R. Givens ed. 1982).

36. Compare H. SUMMERS, *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* (1982) with B. TUCHMAN, *STILWELL AND THE AMERICAN EXPERIENCE IN CHINA, 1911-1945* (1970).

37. Allende won by a plurality of 36.3% in a field of five candidates and was elected by Congress based on rhetoric that Congress had to confirm the candidate with the most popular votes, contrary to the very purpose of the constitutional provision which enabled Congress to prevent a minority candidate from changing the nature of the society.

proposed a convergence of democratic nations on a larger scale than hitherto seen.³⁸ The economic summits of non-totalitarian industrialized powers may be a foreshadowing of future economic relations among these nations — perhaps common markets and common enterprises on a grander scale.

These undertakings could embrace technological consortia involving new industries not yet entwined in protectionist brambles and relevant to Third World needs, such as cost-effective sea water desalinization.³⁹ However, such common ventures are not likely to succeed if obstructionist, totalitarian, or non-contributing countries are given an “equal” voice. In order for economies of scale to be gained,⁴⁰ treating unequal contributors equally would hardly be workable — or true — equality. One-nation-one-vote or one-nation-one-veto is hardly a way to run a technological effort. Admission of all to a technological enterprise may mean maximum results for none.⁴¹

Disparities often lead to corrective measures that overbalance in other areas. For example, purchase of raw materials from developing nations by industrialized trading partners on terms unfavorable to the developing nations was temporarily counterbalanced in the case of oil during the heyday of the OPEC cartel. The wealth transferred, however, did not necessarily benefit the bulk of the population in the developing nations that controlled the oil. And the precipitous rise and fall of oil prices may have left such nations worse off than before the rise.

Coalitions of developing nations such as those discussed by Professor Carl may tend to promote OPEC-type behavior by their members expressing pooled self-interest.⁴² This may

38. Similar goals were put forward by Montalva and Lester Pearson of Canada in *Crying for a Vision*, and by other distinguished contributors, in *ATLANTIC COMMUNITY QUARTERLY* (Fall 1966).

39. See Hamilton, *What Will We Do When the Well Runs Dry*, *HARV. BUS. REV.*, Nov.-Dec. 1984, at 28; Johnson, *If We Could Take the Salt Out of Water*, *N.Y. Times*, Oct. 30, 1960 (Magazine), at 17.

40. See Dickson, *supra* note 31.

41. See also H.R. REP. NO. 1659, 90th Cong., 2d Sess. (1968). Compare Franck, *Going Outside the U.N.*, *N.Y. Times*, June 4, 1985, at A29, col. 1 with Winston Churchill in the House of Commons, Jan. 27, 1942, *quoted in NEVER GIVE IN!* 22 (1967) (consulting everyone on everything is the best way to lose).

42. See *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981).

be impossible to prevent. However, development of substitutes for items subject to import disruption — which may themselves become even more valuable for new purposes — is one defense against industrialized nations' vulnerability to this kind of blackmail by developing nations.⁴³

Another troublesome disparity relates to credit. There is as yet no international equivalent to Chapter 11 of the United States Bankruptcy Code, which allows an entity that wishes to reorganize to stay all litigation throughout the United States merely by filing a petition in Bankruptcy Court. Perhaps the closest thing to a formal international system is that of the International Monetary Fund (IMF) and various auxiliary institutions.⁴⁴

And, ironically, accounting rules permitting banks to keep questionable loans on their books support favorable balance sheets in some instances, even though the money is not collected. This suggests that the actual collection of the funds may be less important than the accounting treatment of the assets.⁴⁵ Once a developing nation becomes an industrial competitor, such as Hong Kong or Korea, perhaps the old loans might serve as a set-off to balances due to the former debtor if they had been kept alive. Some form of longer-term deferral of loans may in fact be developing informally through the device of rolling them over despite the lack of realistic hope of payment within a foreseeable period. Obviously the impact of debt depends on the purposes for which the credit is used, e.g., whether it is income-producing or for meeting current expenses, or in the case of foreign loans, for making international payments or supporting governmental budget deficits.⁴⁶

43. See Cohen, Heine & Phillips, *The Quantum Mechanics of Materials*, 246 SCI. AM. 82 (1982); Goeller & Zucker, *Infinite Resources: The Ultimate Strategy*, 223 SCI. 456 (1984).

44. For background, see GARDNER, *supra* note 12; SAMUELSON, *supra* note 13 at 642, 703-14.

45. Cf. AMERICAN BANKERS ASS'N AND ERNST & WHINNEY, *OFF-BALANCE SHEET FINANCING ARRANGEMENTS IN BANKS AND BANK HOLDING COMPANIES* (1986).

46. See generally V. CHILDE, *supra* note 22; C. FREEMAN, *UNEMPLOYMENT AND TECHNOLOGICAL INNOVATION* (1982); J. ROBINSON, *THE ACCUMULATION OF CAPITAL* (2d ed. 1965); J. SCHUMPETER, *BUSINESS CYCLES* (1964); J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (3rd ed. 1962); Clinger, *Capital Budgeting*, N.Y. Times, Feb. 2, 1982, at A25, col. 3.

In these and many other respects, attempts at collaboration that seek to ignore difficulties run into almost automatic misunderstanding between partners of grossly unequal bargaining power.⁴⁷ Such difficulties can best be overcome where there is an overarching common goal that makes the differences largely irrelevant⁴⁸ or where the disparities are not particularly pertinent to the area of joint endeavor.⁴⁹

The path of closer technological, and hence economic, collaboration with those willing and able to share, in a manner that is a true two-way street, may lead to benefits on a broader scale, so that one may be able to say in the future as did a famous statesman:

[p]rodigious hammer strokes have been needed to bring us together . . . he must indeed have a blind soul who cannot see that some great purpose and design is being worked out here below, of which we have the honor to be the faithful servants.⁵⁰

47. Cf. E.M. FORSTER, *A PASSAGE TO INDIA* (1981 ed.).

48. Cf. E. COOKRIDGE, *THEY CAME FROM THE SKY* (1965) (divergent experiences involving the French Resistance during World War II).

49. E.g., the view of Abraham Lincoln that the Declaration of Independence "gave promise that in due time the weight would be lifted from the shoulders of all men," quoted in HARNBERGER, *THE LINCOLN TREASURY* 67-68 (1950). Much earlier, Thomas Jefferson had said, "(m)ay it be to the world, what I believe it will be (to some parts sooner, to others later, but finally to all), the signal of arousing men to burst their chains." White, *The American Idea*, N.Y. Times, July 6, 1986, § 6 (Magazine), at 13; 3 STATE OF THE UNION MESSAGES OF THE PRESIDENTS 2860, 2868, 3008-09 (1966); see also 2 A. DAVIES, *AMERICAN DESTINY* (1942); 2 R. HOFSTADTER, *GREAT ISSUES IN AMERICAN HISTORY: A DOCUMENTARY RECORD* 398-99, 444-45 (1958).

50. Winston Churchill, address to the Congress of the United States (Dec. 26, 1941), quoted in *THE UNRELENTING STRUGGLE: WAR SPEECHES OF THE RT. HON. SIR WINSTON CHURCHILL* 339 (1942).