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Abstract

The book first sets forth the policies and practical considerations underlying the current international and national trading regimes, including a description of what Professor Jackson calls the "constitutional structure" of the national and world trading systems. In addition, the book describes the procedures and practices of dispute resolution. The international focus of the book is largely on the GATT, with the bulk of the book devoted to a discussion of a number of important substantive topics pertaining to the GATT. As the book points out, while a primary purpose of that international agreement was to lower tariffs, which has largely been achieved, high tariffs are not the only obstacle to trade between nations.5 The GATT also imposes a number of other obligations, the more important of which are discussed in the book, including the most favored nation principle, the obligation of nondiscriminatory or national treatment for imports, the permitting of actions against unfair trading (primarily dumping and subsidies), and the regulation of non-tariff barriers to trade. Also discussed are a number of policies that compete "with those of comparative advantage and liberal trade," including concerns with national security, protection of health and welfare, and protection of the environment. The final chapters are devoted, respectively, to special issues pertaining to developing countries and non-market economy countries. Professor Jackson ends his book by summarizing what conclusions a reader may draw from the book and proposes some corrective measures to ease problems in the international trade "constitution." In this regard, Professor Jackson understandably focuses on the U.S. perspective.

BOOK REVIEW

THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS. By J. Jackson. Cambridge, Massachusetts: MIT Press, 1989. xi + 417 pp. ISBN 0-262-10040-1. US$45.00.

Reviewed by Edwin J. Madaj *

Professor John Jackson has few rivals as a scholar in the field of international trade law, particularly with respect to the General Agreement on Tariffs and Trade (the "GATT"). As a distinguished professor of law, former General Counsel of what is now the Office of the U.S. Trade Representative, and a consultant to Congress on GATT issues, he brings decades of expertise in an arcane but important specialty of the law to his new book on international trade law and policy.[1] His exemplary record promises an excellence that his new book unfortunately does not consistently deliver.

The book is timely in light of the many important changes now occurring in the field of international trade: the signing and implementation of a Free Trade Agreement between the United States and Canada,[2] and the possibility of the negotiation of such an agreement between the United States and Mexico; the possibility of expanded trade with Eastern European countries due to the political liberalization occurring there; the efforts to integrate more closely the economies of the twelve countries of the European Community by 1992; and, not least, the negotiations being conducted as of this writing in the so-called "Uruguay Round" of multilateral trade talks in Geneva. While the book understandably cannot address the significance of recent developments on all these fronts, it does describe

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1. J. JACKSON, WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989) [hereinafter WORLD TRADING SYSTEM].

2. The United States-Canada Free Trade Agreement, *entered into force* Jan. 2, 1988, 27 I.L.M. 281 (1988). This agreement was implemented in the United States on September 28, 1988. Pub. L. No. 100-449, 102 Stat. 1851 (1988).

some of the history of the existing world trading system, as well as the law and policies that form its foundation.

The book first sets forth the policies and practical considerations underlying the current international and national trading regimes, including a description of what Professor Jackson calls the "constitutional structure" of the national and world trading systems.[3] In addition, the book describes the procedures and practices of dispute resolution.[4] The international focus of the book is largely on the GATT, with the bulk of the book devoted to a discussion of a number of important substantive topics pertaining to the GATT. As the book points out, while a primary purpose of that international agreement was to lower tariffs, which has largely been achieved, high tariffs are not the only obstacle to trade between nations.[5] The GATT also imposes a number of other obligations, the more important of which are discussed in the book, including the most favored nation principle, the obligation of nondiscriminatory or national treatment for imports, the permitting of actions against unfair trading (primarily dumping and subsidies), and the regulation of non-tariff barriers to trade. Also discussed are a number of policies that compete "with those of comparative advantage and liberal trade,"[6] including concerns with national security, protection of health and welfare, and protection of the environment. The final chapters are devoted, respectively, to special issues pertaining to developing countries and non-market economy countries. Professor Jackson ends his book by summarizing what conclusions a reader may draw from the book and proposes some corrective measures to ease problems in the international trade "constitution." In this regard, Professor Jackson understandably focuses on the U.S. perspective.

The book is at its best in describing the history of the world trading system and the GATT, and in articulating the substantive obligations imposed by the GATT. The book attempts to leaven this rather technical discussion with colorful examples, such as the one-time French requirement that im-

3. WORLD TRADING SYSTEM, *supra* note 1, at 7.

4. *Id.* at ch. 4.

5. *Id.* at 40-41, 115.

6. *Id.* at 203.

ported VCR's be imported through only one customs office located in an interior city with a limited staff.[7] One minor shortcoming of the book, however, is its cursory description of the various national institutions that are responsible for making trade policy. Most of the chapter on "National Institutions" is actually devoted to a description of U.S. constitutional law and a description of how trade agreements are negotiated and ratified in the United States. This is very useful. Only one paragraph, however, is devoted to national institutions in Japan, and only two paragraphs are devoted to a description of the various agencies in the United States having jurisdiction over international trade matters, including the U.S. Trade Representative, the U.S. Department of Commerce, the U.S. Department of the Treasury, and the International Trade Commission (the "ITC").[8] The limited discussion of U.S. trade institutions seems particularly anomalous given the long and ongoing controversy regarding the fragmentation of U.S. trade policy making among too many agencies.[9]

A more serious problem is posed by the book's philosophical orientation, which at times affects the book's textual discussion and analysis. Professor Jackson states that he intended the book to be an introductory text for "sophisticated readers that can form the basis of their further work, study, and reflection" on the complex subject of international trade law and policy.[10] Thus, rather than a work arguing for a particular (and identified) point of view in the trade policy debate, the reader is promised a neutral exposition of the subject, reflecting the perspective of a legal scholar,[11] for policy makers, practitioners, and scholars.[12] The book does not always live up to this

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7. *See id.* at 131, 158.

8. *Id.* at 76-77.

9. *See, e.g.*, H.R. REP. No. 40, 100th Cong., 1st Sess., pt. 1, at 169 (1987) (House Ways and Means Committee Report on what became the Omnibus Trade and Competitiveness Act of 1988) (noting lack of consensus among agencies responsible for trade policy); C. PRESTOWITZ, JR., TRADING PLACES 322-23 (1988) (calling for coordination among various committees in Congress and for administrative integration of trade functions in executive branch); J. JACKSON, J. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 172-73 (1984) (noting past congressional dissatisfaction with lack of effective organization on trade matters in executive branch).

10. WORLD TRADING SYSTEM, *supra* note 1, at ix.

11. *Id.* at 6.

12. *Id.* at ix. This expectation is not diminished by the book's proposal to share

advance billing of objective scholarship.[13] A more candid preface would have forewarned the reader that the work was intended to advocate a particular point of view in the trade policy debate, which would have been a perfectly legitimate approach for Professor Jackson to take and one more in keeping with the book he wrote. As it is, the Reviewer is compelled to note a number of instances where alternative points of view are slighted, a disappointment in a book that holds itself out to be a scholarly text on the subject of international trade law and policy.[14]

Professor Jackson does caution that the book could not detail all the intricate rules of international trade, although he notes that the intention of the book is to set forth the "broader purposes of international trade policy" and hopes that "the notes will suggest sources of more detailed information about many specific subjects that may be of interest."[15] Again, the premise is that the work will present a straightforward and objective exposition of the subject, and that the notes will guide the reader to authorities on the various points of view expressed. Indeed, the footnotes to the book contain an impressive array of references that reflect the depth of Professor Jackson's expertise. Unfortunately, the wealth of sources cited are somewhat one-sided, and also reflect the book's central shortcoming: a failure to set forth consistently in an objective manner the law and policies of the world trading system. Furthermore, sources or authorities that do in fact articulate alternative points of view are slighted, further contributing to the book's lack of balance.

Specifically, the book emphasizes classic or laissez-faire economic theory over competing economic theories or non-economic considerations to a degree inconsistent with the

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certain of Professor Jackson's "reflections and perceptions" that the reader may find "provocative." *Id.* at x. A neutral text may also make observations or proposals. The proposals, however, should not color the discussion of the textual material.

13. Indeed, part of the problem even for a sophisticated reader is being sufficiently on guard to distinguish the portions of the book, such as chapter 2 on the GATT, that tend to be scholarly and objective, from other more partisan portions, including several identified in this Book Review.

14. The Reviewer does not necessarily subscribe to these alternative perspectives; the point is merely that a book of this type is expected to delineate them adequately, and it does not.

15. WORLD TRADING SYSTEM, *supra* note 1, at ix.

book's intent to be an introductory text. This orientation extends, in some instances, to the stating of some controversial positions regarding U.S. trade laws without noting that they may be controversial and thus failing to note or analyze contrary authority. Together, for this Reviewer at least, these faults undermine the book's usefulness, notwithstanding its other merits. At least some of these objections could have been forestalled if Professor Jackson had written and separated the book into two parts: first, chapters objectively setting forth current law and policies of the world trading system, and second, chapters containing Professor Jackson's more controversial assessments and advocacy of laissez-faire free trade principles.

Also troubling is a problem that the book shares with many other works on the topic of international trade: namely, the propensity to use the word "protectionist"[16] as a descriptive term, and/or as a disparagement or an epithet for those who subscribe to a different trade ideology.[17] This is unfortunate, because the debate on international trade policy is becoming somewhat overheated,[18] and discussions of trade policy are not improved by name calling. This problem is exacerbated when a potentially pejorative term, such as "protectionist," is widely used but not well-defined, as is the case with the book's use of the term. The term can refer to policies foisted by special interest groups on governments designed to prop up lazy and inefficient industries that are unable to compete with foreign competitors.[19] More broadly, the

16. *See, e.g., id.* at 65-66 ("It is sometimes interesting to speculate whether the Congress or the president has been more 'protectionist' . . . . The 1988 Trade Act is considered by some to be rather protectionist . . . ."); *id.* at 203 (noting "desirability of . . . preventing the protectionist use of a variety of ingenious import restraints").

17. One "tongue-in-cheek" example of a countervailing epithet for zealous free traders that could be given is "GATT virgin." *See* Pluckhahn, *"GATT Virgins" in a Panic*, III THE INT'L ECON. 65 (Mar.-Apr. 1989) (defining GATT virgins as "those dour finger waggers who make their livings warning us that any departure from pure liberal trade principles will trigger the downfall of the world economy as we know it").

18. *See* Schlossstein, *The New McCarthyism: Inside Washington's 'Apologist v. Revisionist' Debate*, IV THE INT'L ECON. 32 (Apr.-May 1990) (calling for end to *ad hominem* attacks or name calling on part of both sides in United States-Japan trade debate).

19. *See, e.g.*, WORLD TRADING SYSTEM, *supra* note 1, at 203. This is also the tenor of Professor Jackson's statement, although he does not use the word protectionist, in describing "general concern" (though on whose part is unspecified) about the U.S.

term can refer to any governmental measure whatsoever that has an effect on importation, even to measures permitted under the international trade "constitution" to counteract unfair trading practices that are condemned by the international regime.[20] A better approach would have been to define the term. The best approach would be to avoid the use of potentially pejorative labels altogether.

I. *THE COMPETING POLICIES UNDERLYING THE INTERNATIONAL TRADING SYSTEM*

As noted above, the problem is that the book's partiality to liberal free-trade ideology goes beyond the occasional use of the term "protectionist" in a disparaging sense. The Reviewer does not object to Professor Jackson's stating his evident belief that classic economic theory should be the primary basis for international trade policy.[21] This would have been a legitimate position to take in the trade policy debate. However, the problem with the book is that it barely concedes the existence of a debate, let alone articulate the various positions. Although Professor Jackson occasionally notes what he considers to be non-economic policies, he fails to adequately flesh out these other bases for trade policy, or does so in a rather disapproving fashion, characterizing them as second, third, or fourth-best policy choices.[22] Similarly, the book skims over economic

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Congress' "vulnerability to narrow local constituency interests and certain powerful lobbies." *Id.* at 304.

20. *See id.* at 17 (critically noting powerful political appeal of level playing field rationale for antidumping and countervailing duties); *id.* at 255 (noting Canadian shock at "contingent protectionism" of application of U.S. countervailing duty laws to Canadian imports); *id.* at 257 (noting anger of domestic interests and Congress at ineffective or hesitant application of countervailing duty laws prior to 1980).

21. *See, e.g., id.* at 19 ("More subtle is the possibility that a national consensus could explicitly opt for a choice of policies that would not maximize wealth (in the traditionally measurable sense, at least), but would give preference to other non-economic goals."); *id.* at 203 (describing policies such as national defense, protection of health and environment as competing with comparative advantage and liberal trade policies).

22. *See, e.g., id.* at 7, 15. For example, even when describing the non-economic policy of national security, the book discounts its importance by noting that to some observers the overall economic well-being of a nation is more important than "traditional shorter-term goals of stockpiled war material or factories." *Id.* at 204. The book is also remiss in failing to note that even those who view "overall economic well-being" as part of the concept of national security may not subscribe to liberal-trade policies. *See* C. PRESTOWITZ, *supra* note 9, at 13, 239-40, 245-49.

or other criticisms of classic laissez-faire economic theory as it is applied to international trade.

The book, for example, devotes roughly one page to a very brief description of the challenges to the central assumptions of the theory of comparative advantage that underlie free trade ideology.[23] This scanty discussion is short shrift, given the importance that classic economy theory has for Professor Jackson's approach to the policy underpinnings of the international trading system, and the avowed purpose of the book to acquaint the reader with the broader policies underlying the international trading system.[24] This is especially disappointing given the extensive controversy that has surrounded what some have criticized as a simplistic use of the theory of comparative advantage and classic economic theory as it is applied to international trade.[25] Indeed, some works published after Professor Jackson's book could support an implication that the book's adherence to classic liberal free-trade ideology and the static theory of comparative advantage may be somewhat dated,[26] particularly given the book's reluctance to discuss ade-

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23. WORLD TRADING SYSTEM, *supra* note 1, at 14-15.

24. At one point, for example, Professor Jackson merely notes that skeptical politicians have attempted refutations of the theory of comparative advantage. *Id.* at 11 & n.22. He fails to articulate the refutations, or identify those making them, but merely notes that he has observed the attempts. *Id.* at 11 & n.22.

25. *See, e.g.*, C. PRESTOWITZ, *supra* note 9, at 230-37 (generally criticizing all economists for opposing any governmental response to foreign trade practices); H. SHUTT, THE MYTH OF FREE TRADE: PATTERNS OF PROTECTIONISM SINCE 1945, 5 (1985) (noting "fiction that world trade is governed by a system of rules which assures the open and non-discriminatory exchange of goods and services" under GATT); *id.* at 37 (noting "erroneous theoretical conclusions" resulting from reliance on "simplified two-country models typically used by economists in the field of international trade"); *id.* at 172-75; Strange, *Protectionism and World Politics*, INT'L ORG. 233, 235-45 (Spring 1985) (describing what she views as myths of liberal doctrine and stating view that protectionism has not had much effect on world trade); F. BRAUDEL, THE PERSPECTIVE OF THE WORLD 48-50 (Sean Reynolds trans. 1979).

26. *See* M. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 12 (1990). In his book, Mr. Porter notes that

> there is a growing awareness that the assumptions underlying factor comparative advantage theories of trade are unrealistic in many industries. The standard theory assumes that there are no economies of scale, that technologies everywhere are identical, that products are undifferentiated, and that the pool of national factors is fixed. The theory also assumes that factors, such as skilled labor and capital, do not move among nations. All these assumptions bear little relation, in most industries, to actual competition.

Id. (citations omitted); *see* Krugman, *Protectionism: Try it, You'll Like It*, IV THE INT'L ECON. 35-36 (June-July 1990). Mr. Krugman explained that

quately or even identify the criticisms made of these theories. A book with the ambition of being a textbook cannot largely ignore these criticisms.

The book also has a tendency to treat non-economic policies as implicitly inferior to the policies that would be chosen by adherence to classic economic theory, although considerably more space is devoted to describing at least some of these non-economic policies. An extreme, but telling, example of this treatment is the book's statement that a country's legal and constitutional structure can cause it to choose the second-, third-, or even "fourth-best policy options."[27] The reluctant observation that a constitutional system must be allowed to choose a fourth-best policy choice (*i.e.*, non-economic) in order to prevent "a monopoly of power or [to] preserv[e] a representative form of government"[28] is hardly a paean to democracy. In fact, it is almost an apology for the existence of democratic governments because such governments cannot be relied upon to choose the best policy choices (as judged by classic economic theory), because, as democracies, they must reflect the views of those who may not know what is best. Indeed, the book reflects a suspicion of the U.S. Congress, the President, and all politicians.[29] The book repeatedly expresses reservations about the wisdom of Congress' involvement in the making of international trade policy for the United States, largely because of the expressed view that it tends to cave in to "protectionist" pressures.[30]

> [t]he claim that protectionism caused the [Great] Depression [of 1929] is nonsense; the claim that future protectionism will lead to a repeat performance is equally nonsensical . . . . Among advanced countries . . . protectionism at current levels is not a first-class issue . . . . [D]efense of free trade loom[s] so large on the public agenda [because] free trade is an important touchstone for advocates of free-market economics.

Id. at 37. In addition he notes that "there are intellectually respectable arguments suggesting that protection may, in some cases, actually be beneficial." *Id.*

27. WORLD TRADING SYSTEM, *supra* note 1, at 25.

28. *Id.*

29. The book's advocacy of more aggressive direct application of "GATT law" by U.S. courts could be viewed as consistent with an apparent distrust of the Congress on international trade issues. *See, e.g., id.* at 67 (urging U.S. courts not to be as deferential to either President or Congress in trade matters); *id.* at 75 (stating "key parts of GATT are all domestic U.S. law because they have been proclaimed, and not because they are self-executing").

30. *See, e.g., id.* at 34 (noting failure of Congress to approve International Trade Organization charter); *id* at 65-66 ("It is sometimes interesting to speculate whether

Examples of the book's philosophical orientation are given by its treatment of two substantive issues that involve considerations of non-economic policies. While recognizing the non-economic policy of preventing degradation to the environment or of promoting public health, the book states that an importing country should not "use border restrictions or taxes to equalize the price of imported goods with domestic costs of health and safety regulation" when the exporting country does not impose such restrictions.[31] The basis for the statement is the "dangerous potential" of the international trading regime allowing such measures, which could result in the possible extension of this principle to other types of "unequal" governmental regulation, such as minimum wage or labor regulation.[32] These proposed measures, the book notes, "could be the basis of a rash of import restrictions, often defeating the basic goals of comparative advantage."[33] Instead, the book counsels "at least temporary 'benign neglect,' with the possibility that over time many of these problems will sort themselves out as the necessity of health and safety regulation becomes more apparent to more nations."[34] Thus, the best choice is, in the book's view, to avoid tinkering with the GATT system to allow governmental intervention because it might involve interference with comparative advantage.

Similarly, Professor Jackson concedes that one of the more

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the Congress or the president has been more 'protectionist' . . . . The fact is that the role of Congress in trade policy is extremely important, and to some, [whom Professor Jackson does not specify] very troublesome."); *id.* at 257 (noting "anger" of "domestic interests and the Congress" at ineffective or "hesitant" application of countervailing duty laws prior to 1980, and characterizing Congress's interest as searching for "ways to inhibit import competition"); *id.* at 302 ("U.S. Congress has strongly pushed the U.S. law in the direction of mandatory import restraints, and this is posing certain threats to the liberal trade policies of the system. Part of the Congressional impetus [is due to] the natural proclivity of members of Congress to please particular constituents."); *id.* at 304 ("[T]here is general concern about the functioning of the U.S. Congress. Its vulnerability to narrow local constituency interests and to certain powerful lobbies . . . is a worry expressed by many about the U.S. Constitution.").

31. *Id.* at 208-10. Note that in this case manufacturers in the importing country are placed at a disadvantage compared to the exporting firms because the exporters incur no (or fewer) costs inherent in environmental controls to the manufacturing process.

32. *Id.* at 210.

33. *Id.*

34. *Id.*

perplexing trade-policy problems is the border tax adjustment system under the GATT.[35] Under that regime, a country is allowed to rebate sales taxes or value added taxes upon exportation of a good. This is designed to prevent double taxation of goods, which might be subject to similar taxes in the importing country as well as in the originating country. However, rebates are not allowed upon exportation of a good for direct taxes that might have been imposed on the producing firm, such as an income or corporate tax. This means that a producer subject to such a direct tax is arguably at a cost disadvantage for export trade compared to a producer whose goods are subject to a rebatable tax. Conversely, it is argued that "goods from countries with substantial border tax rebates have not shouldered their share of the costs of government, and therefore are in essence subsidized," compared to those goods whose producers pay income or corporate taxes, which cannot be rebated on exportation.[36]

The book opposes amending the GATT to provide for a more equitable rule, arguing that "it is very unlikely that the GATT will be changed."[37] Moreover, Professor Jackson despairs of articulating a rule that would more accurately reflect the advantages or disadvantages of a particular system of taxation, and offers the view that, in theory, the exchange rate will adjust "to any border tax adjustment so that over a few years (at least), most distortion effects of the BTA are neutralized."[38] The only solution proposed is for nations to change their taxation policies to derive more income from rebatable indirect taxes, such as a national sales tax, than from direct taxes, such as an income tax. While the book concedes this can be viewed as the "tail wagging the dog," the book states that "if such a product tax system has other merit to commend it, it doesn't hurt that a by-product might be lessened concern about perceptions of unfairness of the international trade rules."[39] The

35. *Id.* at 194.

36. *Id.* at 196.

37. *Id.* It is unclear whether this is because it is hard to amend the GATT, or because such a measure would not obtain sufficient political support in the GATT community. If the former, the book fails to explore the possibility here of amending GATT through the adoption of side codes such as was done, for example, in the Antidumping and Subsidies Codes.

38. *Id.*

39. *Id.*

book, however, fails to discuss the competing concern about perceptions of unfairness of thereby changing national taxation systems to be based on what some characterize as more regressive direct taxes such as sales or excise taxes.

The book's treatment of the policies underlying U.S. laws also seems one-sided at times. For example, the book indicates that the United States has over-used the antidumping and countervailing duty laws because

> the Congress has made that law so mandatory, limiting the discretion involved in governmental implementation . . . reflect[ing] congressional suspicion of executive-branch implementation of these laws, as well as the pressures of domestic producers who are seeking to use the antidumping laws as a way to limit the importation of competing goods.[40]

This statement is a startling turn-around from Professor Jackson's praise of the "legalistic" nature of U.S. antidumping and countervailing duty laws in an earlier work.[41] He does not explain what has caused him to change his view.[42]

Moreover, the book makes no effort to analyze changes made in these laws over the years and show a correlation be-

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40. *Id.* at 242-43. It should be noted here, as well as elsewhere, that Professor Jackson implies that the ITC is not entirely independent of the executive branch. *Id.* at 77. The implication is incorrect. *See, e.g.*, H.R. REP. No. 576, 100th Cong., 2d Sess., 716-17 (1988) (explaining that ITC is "an independent regulatory agency"); Madaj, *Agency Investigation, Adjudication or Rulemaking?—The ITC's Material Injury Determinations Under the Antidumping or Countervailing Duty Laws*, 15 N.C. J. INT'L L. & COMM. REG. __ (Fall 1990).

41. *See* J. JACKSON, J. LOUIS & M. MATSUSHITA, *supra* note 9, at 177-78. In praising the U.S. antidumping and countervailing duty system, they state that

> [i]ts openness, and its comparative objectivity, comparative insulation from undue political influence, and comparative reliance on relatively detailed published criteria [which] give foreign parties interested in exporting to the U.S. a degree of predictable access to the market that may not be available in any other system. . . . If liberal trade is the desired goal of the system, such legalization *may more efficiently promote that goal than systems that rely more heavily on government discretion* or nonpublic decision making.

Id. (emphasis added).

42. In another place in the book, Professor Jackson also states (with some approval) that "the U.S. statutory test" is "more precise and controlled than that of" the international Antidumping Code, and expresses concern that the Codes contain such "extremely broad and permissive language" as to permit material injury to be found in virtually any case. WORLD TRADING SYSTEM, *supra* note 1, at 239. This statement is also in some conflict with the notion that the United States can be accused of a "tilt" against imports through the use of the antidumping or countervailing duty statutes.

tween such changes and any increase in use of the antidumping or countervailing duty statutes.[43] Indeed, just a few pages earlier the book notes that "practitioners who must appear on these issues before the ITC" have indicated that the ITC has retained such a degree of discretion that "it depends more on who the particular ITC commissioners are, at any given time, than on any statutory formula or committee attempt to define that formula."[44] The book's unsupported generalization that changes in these laws have decreased agency discretion and resulted in an increase in the use of antidumping and countervailing duty proceedings fails to discount the possibility that any such increase was due to an increase in exports that were either dumped or subsidized,[45] a factor that might have had a role in causing more antidumping and countervailing duty cases to be filed. The book also fails to note the dramatic decline in filings of antidumping and countervailing duty cases in

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43. The book states that "at least for dumping and subsidy countermeasures, the U.S. Congress has strongly pushed the U.S. law in the direction of mandatory import restraints . . . posing certain threats to the liberal trade policies of the system." *Id.* at 302. However, this statement is unexplained and is contradicted by some changes made by that very Congress, such as requiring in 1979 that a material injury test be satisfied before countervailing duties can be imposed, or by enacting the "negligible import" exception to the doctrine of cumulation included in the Omnibus Trade and Competitiveness Act of 1988. Moreover, at least one commentator has noted that the percentage of U.S. imports covered by antidumping or countervailing duty investigations is comparatively minimal and has decreased in recent years. *See* Stern, *Regulating U.S. Trade and Foreign Investment*, 21 INTER-AM. L. REV. 1, 5 & n.23 (1989).

44. WORLD TRADING SYSTEM, *supra* note 1, at 238. *See generally* S. REP. No. 249, 96th Cong., 1st Sess. at 58, 75 (1979); H.R. REP. No. 317, 96th Cong., 1st Sess. at 46-47 (1979); H.R. DOC. 153, 96th Cong., 1st Sess., pt. 2, at 435 (1979) (containing statements of administrative action). Several cases have dealt with the existence of the ITC's discretion under the statute. *See, e.g.*, Metallverken Nederland B.V. v. United States, 728 F. Supp. 730 (Ct. Int'l Trade 1989); Algoma Steel Corp. v. United States, 688 F. Supp. 639, 643 (Ct. Int'l Trade 1988) (noting that agency discretion as to causation of material injury was not generally restricted by 1979 enactment), *aff'd*, 865 F.2d 240 (Fed. Cir.), *cert. denied*, 109 S. Ct. 3244 (1989); Hercules, Inc. v. United States, 673 F. Supp. 454, 479-82 (Ct. Int'l Trade 1987); Hyundai Pipe Co. v. United States Int'l Trade Comm'n, 670 F. Supp. 357, 360 (Ct. Int'l Trade 1987); Maine Potato Council v. United States, 617 F. Supp. 1088, 1091 (Ct. Int'l Trade 1985).

45. The book also fails to explore whether the reason why the United States imposes antidumping or countervailing duties more frequently than some other countries may be due to the fact that the United States has one of the largest, relatively "open" economies in the world, with a correspondingly large volume of imports. *See* J. JACKSON, J. LOUIS & M. MATSUSHITA, *supra* note 9, at 102 (noting that Japan had not imposed antidumping or countervailing duties in part because Japanese import controls made such duties unnecessary).

the United States since the mid-1980s and to discuss this fact in light of the charge that the United States overuses antidumping and countervailing duty procedures. For example, the ITC instituted seventy-seven antidumping and countervailing duty investigations in fiscal year 1986, forty-one in fiscal year 1987, forty-eight in fiscal year 1988, thirty in fiscal year 1989, and twenty-five in fiscal year 1990.

II. *U.S. LAWS AND THE WORLD TRADING SYSTEM*

For those readers who may be less interested in the "policy" of the world trading system and more interested in the "law" of such a system, Professor Jackson, as usual, masterfully summarizes the basic principles of the GATT throughout the book. Some problems arise, however, in the treatment of U.S. law that pertains to international trade issues. First, the book fails fully to reflect developments in the mid-to-late 1980s[46] and erroneously states as unresolved matters that have already been decided by the courts.[47] The book specially highlights unfair trade issues in the context of the national and international rules on dumping and subsidies, a topic of some importance in the current Uruguay Round of trade negotiations.[48] Among the specific issues that the book discusses are the material injury test[49] and cumulation. Cumulation is the aggregate consideration of the volume and effect of dumped or subsidized imports from two or more countries in making a deter-

46. The book appears to be a somewhat haphazardly revised version of an earlier draft. In some places the book seems to have been updated through "mid-1988." WORLD TRADING SYSTEM, *supra* note 1, at 288. However, in other sections, even of the same chapter, the book indicates that it is reflecting events of "early 1989." *Id.* at 294. This imprecision makes it difficult for the reader to know the degree to which the book includes "late-breaking" developments in international trade, a matter highlighted by the preface to the book, which notes that "[d]uring the course of preparing this book, several important national statutes have been adopted on the subject (particularly in the United States), and a new (eighth) trade round of negotiations in the context of GATT has been launched." *Id.* at ix.

47. *See, e.g., id.* at 241-42; *infra* notes 54-65 and accompanying text (discussing erroneous statement of state of law).

48. To the extent that this Book Review focuses on the book's discussion of antidumping or countervailing duty laws, it reflects the "comparative advantage" of the Reviewer on this issue.

49. Under both the relevant international agreements and U.S. law, before corrective measures in the form of a special duty may be taken, imports must be found to be (1) dumped or subsidized and (2) such dumped or subsidized imports must be a cause of material injury to a domestic industry.

mination of whether dumped or subsidized imports are a cause of material injury.[50] The book is critical of the cumulation doctrine, particularly to the extent that it was made mandatory by the U.S. Trade and Tariff Act of 1984, but its discussion of the doctrine is wholly negative. Based on this discussion, some readers could get the impression that the doctrine has no rational policy basis, and is designed merely to engineer affirmative determinations.[51] Indeed, Professor Jackson fails to discuss or refer to the history of the cumulation doctrine and the reasons why the doctrine arose in the early 1960s.[52] A sentence or two of explanation would have provided the reader with a more balanced sense of the doctrine being criticized.[53]

More disturbing from a legal point of view is that the book states that "recently" an issue has been raised as to whether dumped imports should be cumulated with subsidized imports, and views this, as well as the entire doctrine of cumulation, as troublesome.[54] In fact, the issue not only had been raised, but had been resolved by a 1987 decision of the U.S. Court of Ap-

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50. *See, e.g.*, Madaj, *supra* note 40.

51. *See* WORLD TRADING SYSTEM, *supra* note 1, at 240 (stating that "it would be much easier for the ITC to make an affirmative injury determination" and that requirement imposed by 1984 Act that ITC cumulate in almost all cases "has in some ways been insidious").

52. *See, e.g.*, S. REP. No. 1298, 93d Cong., 2d Sess. 180 (1974) (Senate Finance Committee Report on the Trade Agreements Act of 1974) (citing City Lumber Co. v. United States, 64 Cust. Ct. 826, *aff'd*, 311 F. Supp. 340 (Cust. Ct. 1970), *aff'd*, 457 F.2d 991 (C.C.P.A. 1972)). *City Lumber* affirmed a Tariff Commission injury determination, based in part on the fact that certain importers had recently imported dumped cement from other countries. *City Lumber*, 311 F. Supp. at 349. The Commission considered the price effects of the dumped cement in the investigation on review in *City Lumber* in light of the fact that prices in the relevant marketing area had already been depressed by these previously dumped imports. *Id.* at 343-44. "[A]n investigation of imports from only one country, in disregard of the effect on the market area in question of sales at less than fair value from other countries, would result in a study and conclusions that would be myopic and unrealistic." *Id.* at 348; *see* Madaj, *supra* note 40.

53. Further, the book states that an example of the insidious nature of cumulation is that countries accounting for very small shipments of exports to the United States may nonetheless be "lumped together" with larger traders under mandatory cumulation. The book cites, in a footnote, the 1988 amendment to the statute that now permits the Commission to consider whether imports from a given country are "negligible," and if so, to exclude that country's exports from a cumulative analysis. *See* WORLD TRADING SYSTEM, *supra* note 1, at 387 n.85. However, the book fails to discuss or analyze this provision, or to assess whether this amendment obviates the criticism made of mandatory cumulation.

54. *See id.* at 241.

peals for the Federal Circuit.[55] While the preface to the book concedes that there is no way "that the latest details of the antidumping law can be presented effectively in a book of this type,"[56] this does not explain this type of omission.

A similar error occurs in the discussion of another technical issue arising under the antidumping and countervailing duty laws, the so-called margins analysis. This topic has been the source of considerable controversy at the ITC for nearly ten years. The purpose of margins analysis is to determine whether imports caused material injury by comparing the size of the dumping or subsidy margin to the average margin by which the imports undersold the domestic like product.[57] The book makes a sweeping generalization that "[p]rior to 1982, the ITC tried to show the causal connection between the extent of dumping or the extent of subsidization (the so-called margins), on the one hand, and the material injury on the other hand."[58] The book fails to note, however, that two court

55. *See* Bingham & Taylor Div., Va. Indus., Inc. v. United States, 815 F.2d 1482 (Fed. Cir. 1987). The Federal Circuit held that cumulation of dumped and subsidized imports (so-called "cross-cumulation") that otherwise met the statutory criteria for cumulation was mandated by the statute. *Id.* at 1486. The case is nowhere cited in the book. Instead, in a footnote the book notes that the Omnibus Trade and Competitiveness Act of 1988 amended the statute to provide for discretionary "cross-cumulation" in threat cases, as if that amendment left the question of cross-cumulation generally open. *See* WORLD TRADING SYSTEM, *supra* note 1, at 387 n.86. It does not. At the time of the enactment of the Omnibus Trade and Competitiveness Act of 1988, the U.S. Court of International Trade had only just decided that the pre-existing statute was deemed to permit, but not mandate, cumulation for the purpose of assessing threat of material injury. *See* Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1171-72 (Ct. Int'l Trade 1988), *later proceeding*, 704 F. Supp. 1068, 1070 (Ct. Int'l Trade 1988). In contrast, the *Bingham & Taylor* decision, issued about a year-and-a-half earlier, made clear that the pre-existing statute mandated cross-cumulation. *Bingham & Taylor*, 815 F.2d at 1486. Indeed, a provision of the House bill that would have explicitly made cross-cumulation mandatory in all cases was dropped by the Conference Committee. *See* H.R. REP. No. 576, 100th Cong., 2d Sess. 620 (1988) (Conference Report to the 1988 Trade Act); H.R. REP. No. 40, 100th Cong. 1st Sess., pt. 1, at 129, 410 (describing House bill).

56. WORLD TRADING SYSTEM, *supra* note 1, at ix.

57. *See, e.g.*, Hyundai Pipe Co. v. United States Int'l Trade Comm'n, 670 F. Supp. 357, 358 (Ct. Int'l Trade 1987). Since approximately the beginning of 1987, however, none of the commissioners that have considered the margin of dumping or subsidization in their analyses on the effects of imports have engaged in this type of "margins analysis" of comparing the margin of underselling to the dumping or subsidy margin.

58. WORLD TRADING SYSTEM, *supra* note 1, at 241. The stated date is faulty. The last determination in which a majority of the ITC commissioners engaged in margins

decisions have found no such consistent agency practice of engaging in margins analysis.[59] The book merely indicates that some unspecified persons have challenged whether the ITC engaged in a consistent practice.[60] The book also states (as if the issue had not yet been addressed by any legal authority) that "the United States government is obligated to use a 'margins analysis' in evaluating the material injury resulting from dumping or subsidization, and that at the very best the U.S. statute is ambiguous."[61]

The book fails to point out that six published court decisions, all issued prior to mid-1988, have addressed this very question.[62] Yet, only one of the decisions is cited by the book.[63] All six court decisions have rejected the position that margins analysis is mandated by the statute.[64] These decisions

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analysis was in 1980. Anhydrous Sodium Metasilicate from France, USITC Pub. 1118, Inv. No. 731-TA-25 (Final) (Dec. 1980); *see Hyundai Pipe*, 670 F. Supp. at 361.

59. *See Hyundai Pipe*, 670 F. Supp. at 361; Alberta Pork Producers' Mktg. Bd. v. United States, 669 F. Supp. 445, 466 (Ct. Int'l Trade 1987). The book also fails to note that individual commissioners, though not a majority of the ITC, have continued to consider the dumping or subsidy margins in their analyses, although they do not engage in "margins analysis" *per se*.

60. WORLD TRADING SYSTEM, *supra* note 1, at 241-42. In fact, margins analysis was used in perhaps fifty-three antidumping determinations under the Antidumping Act of 1921, and in some determinations after the 1979 amendments to the antidumping laws that became effective in 1980. *See Hyundai Pipe*, 670 F. Supp. at 361. There were nearly 220 antidumping determinations prior to 1980. Moreover, the "analysis" conducted by even the fifty-three determinations in some cases consisted of no more than a one sentence mention of the size of the dumping margin.

61. WORLD TRADING SYSTEM, *supra* note 1, at 242.

62. *See infra* note 64 (setting forth these decisions).

63. The lone case cited by the book is the *Hyundai Pipe* decision, cited as if it were an unpublished slip opinion, and it is not discussed. WORLD TRADING SYSTEM, *supra* note 1, at 241. Moreover, the book makes no reference to any of the Commission determinations that have discussed this issue.

64. *See* Algoma Steel Corp. v. United States, 688 F. Supp. 639, 645 (Ct. Int'l Trade 1988) ("Congress has not simply directed ITC to determine directly if dumping itself is causing injury."), *aff'd*, 865 F.2d 240 (Fed. Cir.), *cert. denied*, 109 S. Ct. 3244 (1989); Copperweld Corp. v. United States, 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988) ("consideration of the margins is neither required nor proscribed by the governing statute"); Alberta Pork Producers' Mktg. Bd. v. United States, 669 F. Supp. 445, 465 (Ct. Int'l Trade 1987) (statutes "do not require the Commission to find a causal connection between the foreign subsidies and the injury to the domestic industry"); Hyundai Pipe Co. v. United States Int'l Trade Comm'n, 670 F. Supp. 357 (Ct. Int'l Trade 1987); Maine Potato Council v. United States, 613 F. Supp. 1237 (Ct. Int'l Trade 1985); Republic Steel Corp. v. United States, 591 F. Supp. 640, 646 (Ct. Int'l Trade 1984) ("Our law does not go so far as to require that the *subsidy itself* be shown to be the cause of injury") (emphasis in original).

have also rejected the notion that either the Antidumping Code or the Subsidies Code unambiguously requires a type of "margins analysis," notwithstanding that the book finds this "argument" that "some" have made to be "improbable."[65] One would have expected that the existence of this adverse authority would be cited, so that the reader would have been aware of the contrary precedent on this point, even if Professor Jackson wished to argue that the cases were wrongly decided.

Similarly, the book is imprecise on the question of the domestic law effect of the GATT. The book states that "U.S. courts which have had to decide the issue of GATT direct applicability have all held that GATT was part of U.S. domestic law,"[66] when in fact this is not entirely correct, as one of Professor Jackson's own previous works indicates.[67] Moreover, the book fails to note that a large portion of the GATT, under U.S. law, is inferior to either pre-existing or subsequent federal legislation.[68] This is an important limitation on the potential

65. *Compare* WORLD TRADING SYSTEM, *supra* note 1, at 242 *with Algoma*, 688 F. Supp. at 645 *and Copperweld*, 682 F. Supp. at 563 *and Alberta Pork*, 669 F. Supp. at 466 *and Hyundai*, 670 F. Supp. at 360-61. *But see Republic Steel*, 591 F. Supp. at 646 n.9 (stating that Congress did not fully implement Subsidies Code and suggesting that Code, though not statute, might require considering level of subsidy in assessing causation of material injury).

66. WORLD TRADING SYSTEM, *supra* note 1, at 75.

67. *See* J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS IN CASES MATERIALS AND TEXT 308 (2d ed. 1986); *see also* Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 795 (E.D.N.Y. 1978) (stating, in suit to invalidate "escape clause" relief imposed under section 201 of Trade Agreements Act of 1974, that "[p]laintiffs' claim that the President's action violated the [GATT] . . . is likewise without merit [because] Congress has never ratified GATT"), *aff'd mem.*, 614 F.2d 1290 (2d Cir. 1979); United States v. Zenith Radio Corp., 562 F.2d 1209, 1220 n.21 (C.C.P.A. 1977) (rejecting as "irrelevant" issue of consistency with GATT), *aff'd*, 437 U.S. 443 (1978); United States v. Yoshida Int'l, Inc., 526 F.2d 560, 575 n.2 (C.C.P.A. 1975) (involving challenge to President Nixon's imposition of import surcharge).

68. Part II of the GATT, which encompasses the bulk of the substantive obligations of the agreement, including the national treatment obligation as well as the rules on safeguards and the imposition of antidumping and countervailing duties, "is expressly subject to pre-GATT federal legislation . . . [and] is inferior to subsequent federal legislation . . . . Thus, Part II of GATT is inferior to any inconsistent federal legislation." Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 312 (1967); *see* Cementos Anahuac del Golfo, S.A. v. United States, 689 F. Supp. 1191, 1200-05 (Ct. Int'l Trade 1988), *aff'd*, 879 F.2d 847 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1318 (1990); Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in THE EUROPEAN COMMUNITY AND GATT 187 (1986) (noting that no case has upheld claim that GATT obligation should be considered superior to U.S. federal law).

applicability of GATT as part of U.S. law.[69] It is particularly anomalous for the book to be silent about this limitation in light of its encouragement to U.S. courts to be more aggressive in reviewing U.S. government actions pertaining to international trade.[70]

Similarly, the question of the applicability in U.S. law of other international agreements, particularly the "side codes" such as the Antidumping and Subsidies Codes[71] negotiated in the Tokyo Round of trade negotiations ending in 1979, is also an important one. Unfortunately, the book fails to cite or discuss the court decisions that have ruled on how to construe U.S. antidumping or countervailing duty laws in light of the GATT Antidumping and Subsidies Codes.[72] It merely notes (correctly) that it is "virtually certain" that U.S. courts would find the Codes not to have a direct application on U.S. law.[73]

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69. The book does generally allude to grandfathering of U.S. statutes under the GATT. *See* WORLD TRADING SYSTEM, *supra* note 1, at 237, 257. However, many readers could be expected to miss the significance of this allusion, particularly as this fact is not highlighted in the section of the book that discusses the domestic law effect of the GATT.

70. *See id.* at 67.

71. As the book notes, these "side codes" constitute a way of amending or expounding upon GATT obligations in light of the difficulties involved in amending the GATT itself. *See id.* at 51-52, 55-57.

72. *See, e.g.*, Algoma Steel Corp. v. United States, 865 F.2d 240, 242 (Fed. Cir.) ("Should there be a conflict, the United States legislation must prevail."), *cert. denied*, 109 S. Ct. 3244 (1989); Fundicao Tupy S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int'l Trade), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988); Hercules, Inc. v. United States, 673 F. Supp. 454, 477 (Ct. Int'l Trade 1987); Timken Co. v. United States, 673 F. Supp. 495, 520-21 (Ct. Int'l Trade 1987); Republic Steel Corp. v. United States, 544 F. Supp. 901, 908 (Ct. Int'l Trade 1982) (stating that agency's first duty is to apply statute and not "to assume a larger responsibility by looking beyond the law to the codes or trade agreements it implements"). In addition, one case approved agency action when that agency looked to the Code to provide guidance when the legislative intent was otherwise ambiguous. United States Steel Corp. v. United States, 618 F. Supp. 496, 502 (Ct. Int'l Trade 1985).

73. *See* WORLD TRADING SYSTEM, *supra* note 1, at 75; *see also* Timken Co. v. United States, 673 F. Supp. 495 (Ct. Int'l Trade 1987) (discussing non-self-executing nature of Codes).

The book also argues for a direct application of the Codes as part of the legislative history of the statute. This is somewhat unusual because, in an earlier work, Professor Jackson more carefully noted only that the Codes could be used "at least [as] a secondary source of legislative history of the 1979 act *when other sources fail to resolve an issue.*" J. JACKSON, J. LOUIS & M. MATSUSHITA, *supra* note 9, at 167 (emphasis added). The *World Trading System* is much less hesitant about the status of the Codes as legislative history, and evidently views them to be at least on a par with any other source of legislative intent.

CONCLUSION

In sum, while the book is timely and represents a unique attempt to blend discussions of trade policies with analysis of national (primarily U.S.) and international rules of trade, it is an experiment that fails too often. The excellent substantive discussion of the international trading rules and history is marred by the book's uneven discussion of trade policies and U.S. trade laws, with the book moving from objectivity to advocacy in an unpredictable fashion. While any book of this sort will inevitably omit topics that a given reader might desire discussed, the topics that are chosen should be presented with a degree of impartiality and precision that this book unfortunately does not always provide. The need, however, for an "introductory text" on the world trading system is imperative in light of the many changes occurring around the world affecting world trade. The reader can only hope that Professor Jackson or some other author will try again to provide such a synthesis in another book in the near future.