Fordham International Law Journal

Volume 21, *Issue* 4 1997 *Article* 10

Assessing the Modern Era of International Trade

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Abstract

This Book Review surveys The Post-Cold War Trading System by Sylvia Ostry. Part I explains the features of international trade law and policy the book highlights, and the perspectives offered by the book about those features. Part II of this review critically analyzes the book. It identifies the issues not addressed, and the arguments not made. Part II thereby imparts to the prospective reader a sense of what must be learned from other sources on international trade law and policy. Part III offers a brief concluding observation about the future direction of international trade scholarship.

BOOK REVIEWS

ASSESSING THE MODERN ERA OF INTERNATIONAL TRADE

*Raj Bhala**

INTRODUCTION

It is not easy to assess the modern era of international trade law and policy in one slender volume. An author must explain the geopolitical and economic context in which the General Agreements on Tariffs and Trade ("GATT") was born in 1947, develop a view as to the nature, evolution, and purpose of the GATT system, and provide a road map of the legal intricacies associated with prominent features of the system-like antidumping law and seemingly arcane features like textile quotas. Sylvia Ostry, the Director of the Center for International Studies at the University of Toronto and the former Canadian Ambassador to the Uruguay Round trade negotiations, does an admirable job of discussing the modern era in *The Post-Cold War Trading System*.[1]

In 239 pages plus a sixteen-page appendix, Professor Ostry brings us from the ashes of World War II and the destroyed European and Japanese economies to the December 1996 World Trade Organization ("WTO") Ministerial Meeting in Singapore. The seven chapters of *The Post-Cold War Trading System* cover post-War European and Japanese economic development, the birth and growth of GATT, the East Asian miracle, the multilateral commitments made in the Uruguay Round, and the steps needed to strengthen international trade law and policy. To embark on, much less succeed, in a project of such grand scope but confine the final product to less than three hundred pages is venerable. Thus, *The Post-Cold War Trading System* is excellent

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1. SYLVIA OSTRY, THE POST-COLD WAR TRADING SYSTEM (University of Chicago Press 1997).

reading for the current or budding international trade lawyer seeking an overview of "where we were," "how we got to be where we are," and "where we might be going."

At the same time, the book suffers from a small number of noteworthy shortcomings, which perhaps is inevitable given the disconnect between its scope and size, that some readers may find frustrating. These shortcomings may be characterized broadly by saying that some readers may find the book has a bit of a desultory quality. However, this point ought not to detract from the ambitious nature and successes of Ostry's project. Every day, international trade touches the lives of virtually every American in ways most Americans take for granted. We wake up to watch the morning news on a Sony television set made in East or Southeast Asia and to go jogging in shoes made by a Nike factory located in the Guangdong. While watching our TV, or upon our return from our jog, we drink coffee from beans harvested in Indonesia, Vietnam, Brazil, Colombia, Ethiopia, or Kenya. When we dress for work, we put on apparel made in China, South or Southeast Asia, and we splash on French or Italian cologne or perfume. We go to work in a car quite possibly made by Honda or Toyota — or better yet, Mercedes or BMW — and almost certainly running on Middle Eastern oil. At work, we use telecommunications and computer equipment made by a multinational corporation at an overseas production facility. On a good day, after work, we enjoy an ethnic restaurant meal with French, Italian, or German wine. Only in our entertainment after work — be it through television programming, movies, music, books, or magazines — are we likely to insist on American products. (Of course, the rest of the world has the same voracious appetite for American cultural industry products as we do.) In brief, trade is inevitable and ubiquitous, hence the importance of Ostry's efforts to discuss the globalization process.

To give the prospective reader a sense of what she will encounter, Part I of this review surveys *The Post-Cold War Trading System*. It explains the features of international trade law and policy the book highlights, and the perspectives offered by the book about those features. Part II of this review critically analyzes the book. It identifies the issues not addressed, and the arguments not made. Part II thereby imparts to the prospective reader a sense of what must be learned from other sources on international trade law and policy. Part III offers a brief con-

cluding observation about the future direction of international trade scholarship.

I. *THE MAJESTIC SCOPE OF The Post-Cold War Trading System*

A. *Unintended Results*

The Post-Cold War Trading System observes that for Americans, the development of the trading system since World War II has had two unintended and unwelcome results. First, The United States's early post-War economic policy, particularly the willingness to transfer manufacturing technology, allowed the European and Japanese economies ravaged by the War to recover and, by the 1970s, boast a standard of living comparable to that in the United States. The catalyst for this policy was the U.S. Cold War containment strategy. Accordingly, the Truman Administration enthusiastically sponsored the Marshall Plan to help re-build Europe, and both the Roosevelt and Truman Administrations strongly encouraged the development of the Bretton Woods institutions for the benefit of the world economy. Through foreign direct investment ("FDI") in Europe, technology was transferred that enabled European companies to develop their manufacturing prowess.[2] While the Japanese market was not too open to FDI, and U.S. firms lacked interest in this market, these firms eagerly signed technology transfer license agreements with Japanese companies, thereby enabling the locals to gain manufacturing expertise.[3] The unintended, unwelcome result of American generosity was the convergence of the European and Japanese economies with the U.S. economy by the 1970s.[4] Indeed, by the Tokyo Round, multilateral trade negotiations no longer were dominated by the United States alone, but rather by the three great economic powers. (To be sure, *The Post-Cold War Trading System* may convey too much surprise at this convergence. Given the over-riding need to contain Soviet and Chinese communism, and given that "dispossessed" countries with no vested interest in the international political economy might be more likely to adopt radical development strategies and means to achieve them, it may be asked with hindsight why

2. *See id.* at 6-13, 22-35 (1997).
3. *See id.* at 44-50.
4. *See id.* at xv-xvi, 55-56.

the United States did not try to develop even more countries into robust trading partners.)

The second developmental result neither intended nor welcomed by Americans was the emergence of forms of market economies in Europe and Japan that differed from the U.S. model. The European model was marked by greater state planning and ownership of productive resources, and copious welfare benefits.[5] The Japanese model featured a public-private partnership, high concentration (*e.g.*, the notorious *keiretsu*), and lifetime job security for workers in major and mid-level firms.[6] In other words, neither European nor Japanese capitalism tracked the U.S. model in which (1) state intervention had to be justified by market failure, (2) companies behaved in the neoclassical economic manner as short-term profit maximizers rather than long-term market-share maximizers, and (3) a social safety net existed only for the truly dispossessed, not the able-bodied.

B. *System Friction*

This diversity in economic systems would, by the 1970s, force an expansion in the trade negotiating agenda. The United States insisted that greater state intervention and industrial con-

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5. *See id.* at 19-22, 83. To be sure, presently this model is not accepted throughout Europe, as the contrasting policies of England's Prime Minister Tony Blair and France's Prime Minister Lionel Jospin evince. *See, e.g.*, Dominique Moisi, *Right Man on Wrong Path*, FIN. TIMES, Jan. 9, 1998, at 18 (observing that "[t]he idea that central government, as opposed to market forces, can be held directly responsible for the creation of jobs" is, while outdated elsewhere, "probably in tune with the feelings of most French people, who want to be protected by the state from long working hours as well as from foreign immigrants"); Warren Hoge, *First Test for Britain's Camelot: Welfare Reform*, N.Y. TIMES, Jan. 4, 1998, at 1 (discussing legislation enacted by Blair's New Labor government to cut support for jobless single mothers, submit benefits of sick and disabled persons to means test, and require young unemployed people to report to government job centers and seek employment or job training, or face elimination of their benefits).

6. *See* OSTRY, *supra* note 2, at 35-44. One particularly interesting insight is that immediately following World War II, the Truman Administration intended for Japan only to be a peaceful, democratic, liberal *Third World* country, and not develop a standard of living higher than that of neighboring Asian countries. The Administration felt Japan was to blame for its destruction and, therefore, the Allied powers should not take on the burden of repairing the war damage. Correspondingly, the giant industrial combines (*zaibatsu*), a centerpiece of Imperial Japan's war machine, were to be broken up. However, as the Cold War began, industrial de-concentration was seen as socialistic, and revenge against Japan came to be viewed as contrary to U.S. political and business interests in the light of the need to contain communism. *See id.* at 35-40.

centration reduced market-access opportunities for U.S. exporters and investors. The result, to borrow the catchy term from *The Post-Cold War Trading System*, was greater "system friction,"[7] because U.S. trade negotiators demanded reforms in areas previously viewed as the sovereign province of domestic governmental policy. After all, the United States thought it was creating a bulwark against communism that was a replica of itself. When it found out differently, Americans exclaimed "unfair!"[8] To the chagrin of the United States, however, the Tokyo Round failed to produce meaningful reductions in non-tariff barriers regarding agricultural subsidies (*e.g.*, the European Union ("EU") made few changes in its Common Agricultural Policy) or safeguards (*e.g.*, the EU insisted on the right to apply safeguard measures selectively).[9] Moreover, the numerous codes agreed to during that Round were plurilateral, not multilateral, agreements that side-stepped the traditional one-country, one-vote consensus operation and rules-based nature of the GATT system, causing a fragmentation or "balkanization" of the system.[10] These codes raised a concern about free riders who might get the benefit, but not incur the obligations, set forth in the codes. To deal with this concern, conditional most-favored nation ("MFN") treatment was introduced into the GATT system for the first time: MFN treatment was accorded only to code signatories.[11] The solution, of course, undermined the hallowed unconditional MFN principle. Finally, no progress was made on trade-impeding barriers entrenched in the Japanese economy, and the U.S. trade deficit and investment asymmetries with Japan ballooned during the 1970s and 1980s.[12]

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7. *See, e.g.*, OSTRY, *supra* note 2, at xvii, 72, 98, 110-11, 124-26, 131-32, 172-74, 205-10, 233-38.

8. *See id.* at 56, 102-05.

9. *See id.* at 86-88.

10. *See id.* at 91.

11. *See id.* at 89.

12. *See id.* at 112-18, 141-55. Interestingly, table 4.2 on page 115 of *The Post-Cold War Trading System* reveals that Japan's share of the total U.S. trade deficit did not much rise much during the 1980s (starting at 33.7% in 1980, peaking at 45.6% in 1981, declining to 29.8% in 1984, and finishing decade at 35.9%), *i.e.*, it grew only in absolute terms, not relative to the shares of Germany, France, Italy, or the United Kingdom. Thus, perhaps some of the increased system friction attributable to the bilateral trade deficit was unfounded.

Indeed, as the book also reveals, an important reason for the persistent U.S. trade deficit with the Far East is the behavior of American multinational corporations

Thus, the United States insisted — over the strong opposition of the European Union and developing countries, principally India and Brazil — that the Uruguay Round agenda deal directly with non-tariff barriers, as well as topics that mattered to U.S. business, namely, services and intellectual property protection.[13] Eventually, the United States prevailed, and the successful results of the Uruguay Round — particularly in the Agreements on Subsidies and Countervailing Measures, Safeguards, Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), and the General Agreement on Trade in Services ("GATS") — are widely known.[14]

In addition, as *The Post-Cold War Trading System* points out, during the Reagan, Bush, and Clinton Administrations, the United States developed five different initiatives to pry open the Japanese market through changes in the way Japan, Inc. did business.[15] First, the 1985-87 Market Opening Sector Specific ("MOSS") talks were aimed at increasing transparency in Japanese government procurement and product standard setting and testing (particularly with respect to high-technology products like medical, pharmaceutical, and telecommunications equipment). Second, voluntary export restraints ("VERs") were used to respond to growing imports of Japanese cars into the United States during the early and mid 1980s and, indirectly, to

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("MNCs"). They tend to regard the Far East as a low-wage platform for manufacturing low-value added products and exporting the finished items to the United States. This behavior, along with the operation of Asian companies exporting to the United States, and the tendency of Asian companies to import capital goods from Japan rather than the United States, exacerbates the trade deficit. *See id.* at 144-45, 161-67, 172-74.

Unfortunately, *The Post-Cold War Trading System* does not critically address the concept of a bilateral trade deficit in an era of MNCs and global production. The concept may have some meaning in the world of Smith and Ricardo where all exporters are firms located and producing in an exporting country. But, where the exporters are MNCs for which political boundaries are largely unimportant, does a bilateral deficit matter? Indeed, if many of the MNCs are headquartered in the United States, and have large numbers of U.S. shareholders who benefit from stock appreciation and higher dividends when their companies' export revenues increase, then might a deficit be a positive phenomenon?

13. *See id.* at 105-08, 175-77.

14. For in-depth treatments of these results, see RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW (1998); RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS (1996) [hereinafter INTERNATIONAL TRADE LAW]. *The Post-Cold War Trading System* provides a brief overview of the Safeguards, Trade-Related Investment Measures ("TRIMs"), TRIPs, and GATS Agreements, as well as the antidumping rules and the creation of the WTO. *See* OSTRY, *supra* note 2, at 178-200.

15. *See* OSTRY, *supra* note 2, at 122-32.

the competitive threat posed by the production *keiretsu* (*i.e.*, the long-term reciprocal contractual relations between suppliers and assemblers). Third, the 1986 Semiconductor Agreement introduced specific market share targets for foreign semiconductor chip producers in an effort to combat the vertically integrated structure and oligopolistic nature of the Japanese electronics industry, and also aimed to eliminate dumping of chips by Japanese firms. The Agreement was reincarnated in 1991,[16] and again in 1996 without any promises about foreign market share.[17] Fourth, the 1989-90 Structural Impediments Initiative ("SII"), which was renewed briefly in 1992, sought to reduce a broad array of undefined "structural" impediments in Japan to imports, exemplified by a vertical distribution *keiretsu* (*i.e.*, long-term exclusive buying and dealing arrangements), lax antitrust enforcement, discriminatory pricing policies, and restrictive land-use practices. Finally, the U.S.-Japan Framework for a New Economic Partnership, launched in July 1993 was a combination of the MOSS, SII, and results-oriented benchmarks for measuring import penetration in Japan, particularly with respect to autos, auto parts, high-technology products, and insurance and other financial services. By the end of 1995, the Framework talks led to twenty bilateral agreements that included objective criteria to monitor (but not guarantee) foreign market shares in Japan.

C. *The End of the Cold War Bargain*

Why was the United States so generous after World War II? Why did it ignore the possibility it was creating not simply robust trade partners, but also major trade rivals? Why did it not foresee the increase in system friction? Perhaps Americans were naive. More likely, suggests *The Post-Cold War Trading System*, it was Cold War *realpolitik*. As long as the Europeans and Japanese supported, by means of military alliances and political machinations, our doctrine of containing the spread of Soviet and Chinese communism, presidents and their State Departments did

16. *See* INTERNATIONAL TRADE LAW, *supra* note 14, at 1141-44.

17. *See* Helene Cooper, *U.S. and Japan Reach a Vague Accord on Chips that is Largely Unenforceable*, WALL ST. J., Aug. 5, 1996, at A2; Nancy Dunne & Michiyo Nakamoto, *Microchip Pact Agreed by Tokyo and Washington*, FIN. TIMES, Aug. 3-4, 1996, at 1.

not care much about "low" foreign policy agenda items like trade.

The fall of the Berlin Wall, coupled with the convergence of the U.S., European, and Japanese economic performance and the new protectionism that had developed during the 1970s, spelled the end of this Cold War bargain between the United States and its trading partner-rivals.[18] The United States developed a multi-track trade policy, and expanded the scope of trade negotiations. It simultaneously pursued multilateral, regional, and unilateral methods to achieve trade liberalization. It signaled an abandonment of a whole-hearted commitment to the multilateral spirit of the GATT-WTO system of which the United States was the architect, and in particular, of the vision of President Franklin Roosevelt's Secretary of State, Cordell Hull, that multilateral trade liberalization based on reciprocal concessions would lead to economic prosperity, which in turn would reinforce world peace.[19]

In other words, the United State's methods became less predictable. Our trading partner-rivals no longer could be quite sure how the United States might go about the business of trade liberalization. Moreover, as suggested above,[20] the United States began applying these methods to an agenda that went far beyond tariff and non-tariff barriers, embracing intellectual property, services, foreign direct investment ("FDI"), competition policy, and labor and environmental standards. Negotiations on such items is inherently complex because defining what constitutes "reciprocal" concessions is fraught with difficulty. It is one thing to agree upon a ten percent cut in tariffs or an expansion by 100,000 units of a quota; it is quite another matter to discern whether barriers to entry against foreign retail stores, or public procurement, in the U.S. market are on par with barriers in Japan.[21] In sum, with the end of the Cold War, both the means

18. *See* OSTRY, *supra* note 2, at 70-71, 76-86, 237-38.

19. *See id.* at 58, 67-72, 85-86, 91-95, 97-98.

20. *See supra* note 7 and accompanying text.

21. Each of these examples has been on the U.S. negotiating agenda with Japan. Recently, Prime Minister Hashimoto's ruling Liberal Democratic Party announced it would repeal Japan's Large-Scale Retail Store Law, pursuant to which the Ministry of International Trade and Industry ("MITI") strictly regulated the entry of large stores into municipalities by, *inter alia*, setting rules on floor space and closing times. The repeal of the Law is expected to ease foreign store entry, because municipalities seek to encourage big stores, including foreign chains, into their areas. With the repeal, mu-

and ends of trade negotiations became highly contentious and convoluted.

The successes of the Uruguay Round do not alter this central fact. Indeed, *The Post-Cold War Trading System* indicates that the experience of the Uruguay Round is a harbinger of still more system friction to come. The unfinished agenda includes better protections for FDI that are found in the Agreement on Trade Related Investment Measures, labor issues (the United States was not able to persuade the WTO to place trade and labor issues on the agenda at the December 1996 Ministerial meeting in Singapore), and possibly environmental matters.[22] Likewise, the United States's five trade initiatives with Japan are harbingers of future system friction. Bilateral trade deficits with Japan persist; indeed, given the strong dollar in the wake of the 1997-98 Asian currency crisis, these deficits are certain to increase. U.S. businesses in key sectors, including autos, still complain of market access difficulties. Most importantly, as *The Post-Cold War Trading System* ably presents, the "domain of trade policy has extended inside the border,"[23] which means the perceived threat to sovereignty among the enemies of trade liberalization is greater than ever before.

The book's solution, to use the Uruguay Round *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("*DSU*"),[24] along with the nullification and impairment clause of GATT Article XXIII:1(b)[25] as a way of bringing about incremental adaptation and change, is a constructive one.[26] However,

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nicipalities will be free (subject to environmental guidelines issued by MITI) to approve or reject entry of stores with floor space exceeding 1,000 square meters. *See* Toshio Aritake, *Japan Planning Retail Guidelines Along with Revised Retail Store Law*, 15 INT'L TRADE REP. (BNA) 5 (Jan. 7, 1998). Regarding public procurement, the Japanese Ministry of Construction is considering measures to improve the transparency of public works projects. For example, the Ministry may disclose publicly projected contract prices, after the tendering period. (Disclosure before the bidding process could lead to bid-rigging.) It also may empower contract-awarding entities to examine bidders to ensure under-qualified construction firms do not participate in tenders. *See Japan Construction Panel Plans to Propose Improved Transparency in Public Works Bids*, 15 INT'L TRADE REP. (BNA) 6 (Jan. 7, 1998).

22. *See* OSTRY, *supra* note 2, at 183-92, 216-31.

23. *See id.* at 205.

24. The *DSU* is reprinted in a variety of sources, including RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS – DOCUMENTS SUPPLEMENT 397-425 (1996).

25. The GATT is reprinted in a variety of sources, including DOCUMENTS SUPPLEMENT, *supra* note 24, at 1-67. Article XXIII appears at page 46.

26. *See* OSTRY, *supra* note 2, at 207-10. Indeed, this reviewer has advocated the

such change is by definition slow. More seriously, it implies a theoretical view of the GATT-WTO system as a dynamic, growing organism, not a static set of rules, and presumes a willingness among WTO Members to allow WTO panels and the Appellate Body to be judicial activists. Such activism creates deep philosophical and political schisms in a domestic legal context. Given the sovereignty howls of protectionists, and even of some more enlightened observers, surely it would be no less controversial in the international context. Possible controversy, however, is not a reason to be dissuaded from trying the book's useful proposal.

II. *IS The Post-Cold War Trading System DESULTORY?*

A. *The Need for a Thesis*

The Post-Cold War Trading System seems to lack a definite plan or purpose other than to describe. There is no central thesis advanced that neatly and cogently ties together the many topics covered. From time to time, there are glimpses of a unifying argument, such as (1) the rise and fall of Hull's vision of a link between free trade, economic prosperity, and global peace, (2) the essential compromise embedded in the 1947 GATT document, namely, the reciprocal reduction of trade barriers in exchange for escapes from negotiated trade-liberalizing commitments in order to meet domestic policy objectives, and (3) the subservience of U.S. trade policy to national security policy during the Cold War.[27] Even some of these glimpses are a bit fuzzy. For example, the claim that the essential compromise of GATT reflected not Hull's vision, but rather "masked significant differences" among the United States, Europe, and Japan on the role of government, *viz*, "the *nature and extent of government intervention to achieve domestic objectives*,"[28] is made with hindsight oblivious to the relevant chronology. If these differences were not striking until at least the 1950s, and possibly well thereafter, how could they have been the basis for a document hammered out in 1946 and 1947?

Thus, *The Post-Cold War Trading System* is largely expositional, reading more like a history of the modern era of interna-

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same solution. *See* Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. issue 2 (1998) [hereinafter *Hegelian Reflections*].

27. *See* OSTRY, *supra* note 2, at 58-72.

28. *Id.* at 72 (emphasis original).

tional trade law and policy than a unique, provocative perspective on this history. However, expositions deserve an important place in, and add value to, international trade scholarship, particularly when they ably synthesize as much material and present it as clearly as does *The Post-Cold War Trading System.* The point is that the book is sure to inform the reader, but not necessarily fundamentally change the way the reader thinks about issues in international trade law and policy. To be fair, of course, how many scholars (including this reviewer) can justifiably claim to have authored the great paradigm-shifting piece? In this regard, the assertion in the Preface that "[i]t is not difficult to outline a grand vision of the global trading system of the twenty-first century" is naive.[29] At least three theses could have been developed in *The Post-Cold War Trading System* that would have flowed naturally from the existing exposition and suggested a grand vision.

1. There is No Such Thing As Free Trade At Law

First, an important possible thesis *The Post-Cold War Trading System* might have developed concerns the essential compromise of GATT, or more generally the practical irrelevance of free trade theory. As a matter of law, it can be argued that there is no such thing as free trade. Free trade exists only in the minds and on the graphs of neoclassical economists. If the economic law of comparative advantage were translated fully and faithfully by trade negotiators into "real" law, then surely trade-liberalizing deals like the Uruguay Round agreements or the North American Free Trade Agreement ("NAFTA") need only be one page. Article I of the deal would state that "all tariff and non-tariff barriers are hereby abolished." Article II would define broadly, with no exceptions, the terms "tariff barrier" and "non-tariff barrier." Thereafter would follow the signatures of the parties. It is the myriad exceptions to trade-liberalizing provisions, and the concern with "fair" trade and remedies to "unfair" trade practices, that help explain why so-called free trade agreements are so long and complex. Put slightly differently, it can be argued that as a matter of law, all trade is managed trade, because a careful read of any trade agreement reveals more than mere remnants of trade barriers. It reveals, *inter alia,* express carve-outs for certain preferred sectors, intricate and protective rules of origin,

29. *Id.* at xviii.

lengthy phase-in periods for trade-liberalizing obligations, and lengthy phase-out periods for trade barriers. The discussion in *The Post-Cold War Trading System* of the five Reagan-Bush-Clinton Administration initiatives regarding Japan, particularly those initiatives establishing foreign market share goals or seeking at least to monitor foreign market share, illustrate this argument. Yet, the book does not make this point, much less highlight the free trade-managed trade distinction implicit in these initiatives.

2. Developing Countries

A second thesis *The Post-Cold War Trading System* might have advanced concerns developing countries. Except for a chapter on the growth of East Asia,[30] less developed countries ("LDCs") are not given extensive treatment. Yet, it could be argued that the most significant fissure in the world trading system is between LDCs and developed countries ("DCs"). If Hamish McRae's prognostication in *The World in 2020* is accepted, then by 2020 there will be three dominant economic regions: North America, western Europe, and the Far East.[31] Few countries in Latin America, central and eastern Europe, South Asia, and Africa will have achieved sustained economic growth rates by 2020 so as to propel themselves into the ranks of DCs.

Consequently, they may demand wealth redistribution from the DCs, and their demands may in some instances be backed by terrorism. The world in 2020, then, may be a more dangerous place than it is now. *The Post-Cold War Trading System* might have identified the special and differential treatment accorded by the Uruguay Round agreements to LDCs, which principally takes the form of longer phase-in periods during which to meet certain obligations, and relief from other obligations. The book might have characterized this treatment — rightly — as paltry, and thereby concluded that the Uruguay Round was a watershed in DC-LDC relations. History may record that in this Round, the radical demands made by some LDCs since the 1960s for a "new international economic order" in which the world trading system would be restructured to allow for wealth redistribution from DCs to LDCs were finally defeated. Put crudely (and perhaps too simply), all the LDCs got was a little more time to live up to

30. *See id.* at ch. 5.

31. *See* HAMISH MCRAE, THE WORLD IN 2020 pts. I, III (1994).

the agreements, and they were forced to make agreements on matters of greatest importance to DCs, namely, services and intellectual property.

Had *The Post-Cold War Trading System* made this observation, the book could have then proceeded along one of two lines of argument. A conservative argument could have been fashioned based on the economic development views of Lord Bauer, namely, that LDCs have largely themselves to blame for much of their plight (*e.g.*, for reasons of corruption and mismanagement),[32] and that most mainstream economic thought about development problems is erroneous.[33] There is, for example, no such thing as a vicious cycle of poverty (*i.e.*, the notion that an LDC cannot escape poverty because incomes are too low to accumulate savings, which in turn are needed for investment in productive assets that raise incomes). After all, Bauer observes, "[t]o have money is the result of economic achievement, not its precondition."[34] Millions of poor Third World farmers have made sizeable investments in agriculture and moved from subsistence to cash crop farming. Thereafter, low-value added manufacturing sectors have evolved. This happy growth process also occurred in what is now the developed world. Most importantly, the process does not, and need not, involve external donations, such as radical wealth redistribution through a restructuring of the trading system. Thus, *The Post-Cold War Trading System* could have argued that the Uruguay Round watershed is to be celebrated, because it represents the triumph of Bauer-type thinking about development problems over radical left demands.

A second and ideologically antipodal argument that the book might have advanced is that the Uruguay Round watershed is to be bemoaned, because it signals the widening and deepening gap between DCs and LDCs. The lack of meaningful special and differential treatment shows LDCs are powerless in multilateral trade negotiations, and underscores that the WTO is not a development agency. To the contrary, it is a system of rules writ-

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32. *See* PETER T. BAUER, EQUALITY, THE THIRD WORLD AND ECONOMIC DELUSION 66-85 (1981).

33. *See* PETER T. BAUER, DISSENT ON DEVELOPMENT chs. 2-3, 8 (1976) [hereinafter DISSENT ON DEVELOPMENT].

34. PETER T. BAUER, SUBSISTENCE, TRADE, AND EXCHANGE: UNDERSTANDING DEVELOPING ECONOMIES 7 (Cato Institute Distinguished Lecture Series, Oct. 14, 1992). *See also* DISSENT ON DEVELOPMENT, *supra* note 33, at 31-38.

ten to ensure market access for products from DCs.[35] This second argument could insist the system become more responsive to LDC needs, and suggest a commitment to a particular conception of justice as a vehicle for greater responsiveness. One possible applicable theory of justice could be distributive justice theory.[36] In very general and no doubt overly-simplistic terms, distributive justice theory begins by positing that "[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."[37] If the polity is reconceived not as individuals in a society, but as countries in a global economy, then it might be re-posited that each country possesses an inviolability that cannot be compromised even for a broader utilitarian good. That inviolability, it could be argued, consists of the right to compete on an equal basis in the global market, and the right to receive assistance designed to ensure equality of competitive opportunity in a broad sense. The assistance ought to include better special and differential treatment than now exists in the Uruguay Round agreements. This non-utilitarian, distributive justice-based logic could be reinforced by a utilitarian point. As long as LDCs cannot compete effectively and are not integrated into the world trading system, global peace and security is at risk. Poor countries with little stake in the system are, after all, susceptible to leaders and movements seeking to disrupt the system.[38] In sum, *The Post-Cold War Trading System* might have bemoaned the shabby treatment of LDCs in the Uruguay Round, and argued from distributive justice theory, utilitarian theory, or both for a new trade order.

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35. A somewhat less pessimistic or cynical variant of this argument is that the special and differential treatment accorded in the Uruguay Round is the best compromise LDCs could expect between their demands for a new order and resistance by DCs to those demands. If LDCs take advantage of the favors they did get, then perhaps they can better integrate into the world trading system and develop into meaningful trading partners with diversified economies.

36. *See, e.g.*, JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE (1996); CHANDRAN KUKATHAS & PHILIP PETTIT, RAWLS — A THEORY OF JUSTICE AND ITS CRITICS (1990); NORMAN DANIELS, ED., READING RAWLS — CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE; THOMAS W. POGGE, REALIZING RAWLS (1989); JOHN RAWLS, A THEORY OF JUSTICE (1971). For an excellent and clear overview of distributive justice theory, see ALAN BROWN, MODERN POLITICAL PHILOSOPHY ch. 3 (1986).

37. RAWLS, *supra* note 36, at 3.

38. As Lester Thurow writes, "[t]he losers, those who are left out and cannot make the system work, retreat into religious fundamentalism, where a world of certainty replaces a world of uncertainty." LESTER C. THUROW, THE FUTURE OF CAPITALISM 18 (1996).

3. Persistent Doubts About Free Trade

Why are free trade theory and empirical evidence on the benefits of trade liberalization not universally persuasive? This issue is not addressed directly in *The Post-Cold War Trading System*, but it is a paradox in international trade law and policy, and it is a third possible basis for the development of a thesis in the book. The compelling nature of Adam Smith's and David Ricardo's static demonstration of comparative advantage, as well as more recent dynamic models of international trade, cannot be doubted. Doubters like India and Argentina that pursued protectionist, import-substitution policies for most of the post-World War II period are reversing course. The resolution to the paradox may lie in the treatment of losers from trade liberalization. As Ravi Batra argues forcefully in *The Myth of Free Trade*, there are workers in certain sectors of the United States whose real wages or jobs are threatened (though as Lester Thurow counters in *The Future of Capitalism*, the threat may come from an inability to develop prized skills and adapt to new technologies).[39] These workers are certain to oppose trade liberalization, and if the sectors they represent are politically dominant in their countries, official policy may be geared against market-opening ventures with other countries. Thus, until international trade law and policy treats the losers better, the paradox is sure to persist.

In terms of economic theory, the way to express this point is that U.S. trade policy has yet to deal with the consequences of the Stopler-Samuelson theorem. This theorem states that "[f]ree international trade benefits the abundant factor and harms the scarce factor."[40] The intuitive argument behind this theorem requires reference to two closely related theorems, the factor price equalization and Heckscher-Ohlin theorems.[41] Assume (as is true) that relative to China, the United States is a capital-abundant and labor-scarce country. Before trade occurs between the two countries, each country produces the capital- and labor-intensive product and consumes each product itself. When trade begins between the two countries, the Stopler-Samu-

39. *See* RAVI BATRA, THE MYTH OF FREE TRADE 35-53 (1993); THUROW, *supra* note 38, at 166-84 (1996).

40. STEVEN HUSTED & MICHAEL MELVIN, INTERNATIONAL ECONOMICS 111 (1998).

41. The discussion of the Stopler-Samuelson, factor price equalization, and Heckscher-Ohlin theorems is drawn from HUSTED & MELVIN, *supra* note 40, at 100-02, 108-15.

elson theorem predicts returns to capital in the United States (rents) will rise, and the returns to labor (wages) will fall. The converse phenomenon will occur in China. These two outcomes, taken together, represent factor price equalization. The factor price equalization theorem holds that international trade will lead to the international equalization of individual factor prices, assuming there are no trade barriers and factors have equal access to identical technology. Accordingly, capital rents rise in the United States and fall in China to a rough parity, and wage rates fall in the United States and rise in China to a rough parity.

Capital rents rise, and wage rates fall, in the United States because, according to the Heckscher-Ohlin theorem, with international trade the United States specializes in the production of the factor with which it is relatively well endowed, namely capital. That is, the United States exports a capital-intensive product to China, and China exports a labor-intensive product to the United States. Consequently, production of the labor-intensive good in the United States diminishes, and labor is idled, as the Chinese labor-intensive product enters the U.S. market. (Again, the converse phenomenon occurs in China.) American workers no longer can exploit their relative scarcity and command high wage rates. In contrast, production of the capital-intensive good in the United States rises to meet export demand. Correspondingly the demand for capital increases, and thus so too does the return to capital. Yet, the demand for capital cannot be met entirely by the transfer of capital from the contracting labor-intensive industry. Precisely because the contracting industry is labor-intensive, its capital stock is not sufficiently large to meet the demand. Thus, the Stopler-Samuelson theorem: the abundant factor in the United States, capital, benefits from trade liberalization (*i.e.*, rents rise), while the scarce factor, labor, loses (*i.e.*, wages fall).

The *Post-Cold War Trading System* provides a glimpse, in an almost off-handed way, of why many American workers, particularly those in unions, are opposed to trade liberalization. Relying on a distinction made by Alfred O. Hirschman in *Exit, Voice and Loyalty* between "Exit" and "Voice,"[42] the book suggests cor-

42. *See* OSTRY, *supra* note 2, at 83, 235; ALFRED O. HIRSCHMANN, EXIT, VOICE AND LOYALTY (1971). For an application of this distinction, see Alexis Jacquemin & David

rectly that the United States pursues a strategy of "Exit" with respect to displaced workers, whereas the European Union follows a course of "Voice" with respect to such workers. In an Exit paradigm, losers are expected to disappear without receiving much, if any, compensation for their loss. This paradigm rewards the most efficient, and relies on decentralized, anonymous market mechanisms to allocate the adjustment costs associated with freer trade. Specifically, workers' fortunes rise and fall based on the interaction of their human capital endowments and improvements thereto with local, regional, national, and global trends in their industries. Workers cannot rely on government help when their fortunes decline. The U.S. trade adjustment assistance programs have been ravaged by budget cuts in an era of budget-balancing efforts,[43] and relief under the escape clause (Section 201 of the Trade Act of 1974, as amended[44]) is unlikely owing to difficulties of proving increased imports are the "substantial cause" of "serious" injury. Likewise, workers in some developing countries reliant on one or a small number of commodity exports for earnings fear stiff import competition resulting from trade liberalization because such competition would make the birth of new industries, and the growth of infant industries, difficult.

In contrast, a Voice paradigm is less fluid and dynamic than an Exit paradigm. Workers are not viewed as substitutable or disposable. The government plays an active role in managing the social costs of adjustment imposed on certain groups of workers. There is a rigid framework in which negotiations between the public and private sectors take place. The result is less emphasis on economic efficiency, but more emphasis on sociopolitical cohesion, than in a Voice paradigm. Many European governments — most notably the French — play precisely this expanded, activistic role. Workers in a Voice paradigm may oppose trade liberalization if they fear it will lead to a loss of Voice, for example, a cut in adjustment assistance.

The Exit-Voice distinction suggests potentially displaced workers in developed countries, and many developing countries,

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Wright, *Corporate Strategies and European Challenges Post-1992*, 31 J. COMMON MKT. STUD. 535, 536 (1993).

43. *See* HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 106-15 (Comm. Print 1997).

44. *See* 19 U.S.C. §§ 2251-2254.

will not accept the otherwise forceful logic of Smith and Ricardo unless and until they are given a reasonably loud and lasting Voice. Movements to restrict imports from countries that do not enforce internationally recognized workers rights also can be viewed according to this distinction. Developed country labor advocates of such restrictions surely are motivated in part by fear of wage erosion or job loss, as well as *bona fide* humanitarian sentiments. Developing country labor activists advocating stronger enforcement mechanisms are motivated by concerns about exploitation. Both groups seek a greater Voice in international trade law and policy.

What Voice might persuade potentially displaced workers? Put in economic terms, how might the United States deal with the Stopler-Samuelson theorem? *The Post-Cold War Trading System* might have oriented its discussion of the Uruguay Round reforms of safeguard remedies to this issue. One answer is to consider whether use of the GATT Article XIX escape clause pursuant to the Uruguay Round Agreement on Safeguards likely to benefit the losers?[45] On the one hand, the Agreement bars voluntary restraint agreements ("VRAs") as a solution to import surges, largely because VRAs are not transparent.[46] Governments seeking to invoke Article XIX must, therefore, adopt a "real" remedy like a tariff or quota. Furthermore, retaliation against such a remedy must be deferred for the first three years in which a remedy is in effect.[47] On the other hand, the remedy is limited in duration to four years,[48] with a maximum extension of four more years,[49] though the periods for developing and least developed countries are more generous.[50] Another feature of the Voice might be a more generous system of preferential trading arrangements (*e.g.*, the Generalized System of Prefer-

45. This Article and Agreement are reprinted in a variety of sources, including DOCUMENTS SUPPLEMENT, *supra* note 24, at 42-43, 314-24, respectively.

46. *See* Uruguay Round Agreement on Safeguards, Art. 11:1(b), 2, *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 24, at 320-21.

47. *See* Uruguay Round Agreement on Safeguards, Art. 8:2-3, *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 24, at 319.

48. *See* Uruguay Round Agreement on Safeguards, Art. 7:1, *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 24, at 318.

49. *See* Uruguay Round Agreement on Safeguards, Art. 7:2-3, *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 24, at 318.

50. *See* Uruguay Round Agreement on Safeguards, Art. 9:2, *reprinted in* DOCUMENTS SUPPLEMENT, *supra* note 24, at 320.

ences and the Lome Convention), with fewer political criteria that must be met to benefit from these arrangements, to help spawn and nurture industries in developing countries. Still another possibility would be the establishment, under the auspices of the WTO (perhaps in coordination with the World Bank) of a global fund for trade adjustment assistance that would sponsor worker retraining and relocation programs through grants and loans. In sum, *The Post-Cold War Trading System* might have argued that until the consequences of trade liberalization for the losers are dealt with in one (or more) of the aforementioned, or some alternative, method the winners will face vocal and aggressive opposition to freer trade.

B. *American Trade History*

In addition to the need for an overarching thesis, *The Post-Cold War Trading System* requires more careful treatment of the history of American international trade law and policy. The book's contention that the United States had a "single, overriding commitment to multilateralism," which it "abandoned" in 1986 when the Uruguay Round was launched, is dubious.[51] Indeed, the analysis in *The Post-Cold War Trading System* of the failure of the Havana Charter in 1950, and the United States's growing resentment in the 1970s of unfair trading practices, contradicts the contention of a whole-hearted commitment to multilateralism.[52] The United States never had such a commitment, and perhaps never will. Rather, it has shifted its relative emphases among multilateralism, regionalism, and unilateralism at different times in its history depending on political and economic forces.[53]

More generally, trade policy is a subset, even an instrument, of foreign policy. Ever since President George Washington declared in his Farewell Address that "[t]he great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little *political* connection as

51. *See* OSTRY, *supra* note 2, at 97.

52. *See id.* at 63, 70.

53. *See generally* STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY (1996) (discussing three critical features of U.S. foreign trade policy formulation and implementation, namely, economics, politics, and law); ALFRED ECKES, OPENING AMERICA'S MARKET (1995) (discussing history of U.S. international trade law and policy since 1776).

possible,"[54] isolationism has been an impulse in U.S. foreign policy.[55] Thus, it should come as no surprise that the unilateralist bravado of presidential hopefuls like Patrick Buchanan and Richard Gephardt appeals to roughly one-quarter, and sometimes in some states one-third, of voters in presidential primaries.[56] Likewise, ever since the declaration of the Monroe Doctrine,[57] regionalism, in the form of a particular focus on North and South America, has been an element of foreign policy. In sum, *The Post-Cold War Trading System* mistakenly bemoans a past that never was. It would have done better to suggest ways the United States's emphasis on multilateralism could be strengthened in the new millennium.

C. *U.S. Multi-Track Trade Policy*

Related to the need for a more careful treatment of U.S. history is the failure of *The Post-Cold War Trading System* to make a convincing case against a multi-track trade policy. Only a half-hearted argument is made against regionalism,[58] though many can be made (*e.g.*, it undermines the GATT-WTO system by dividing the world into trading blocs, and in practice customs unions and free trade agreements cause trade diversion and are not stepping stones to broader liberalization). To the contrary, it is acknowledged that regionalism (in contrast to unilateralism) "is compatible with" a rules-based global trading system,[59] and some of the advantages of realism are highlighted. For example, deeper integration may be easier to achieve in a regional rather than multilateral forum because the latter is larger and, there-

54. *Quoted in* ROBERT W. TUCKER & DAVID C. HENDRICKSON, EMPIRE OF LIBERTY 239-240 (1990) (emphasis original).

55. *See, e.g.*, WILLIAM APPLEMAN WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY 108-61 (1972) (discussing isolationism and Open Door Policy during 1920s); II ALEXANDER DECONDE, A HISTORY OF AMERICAN FOREIGN POLICY 128-49 (3rd ed. 1978) (discussing economic nationalism and isolationism between World War I and World War II).

56. *See generally* THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY (1994) (discussing use of Section 301 of Trade Act of 1974, as amended).

57. *See, e.g.*, DANIEL COIT GILMAN, JAMES MONROE 159-79 (Arthur M. Schlesinger, Jr. ed., Chelsea House Publishers 1983 ed.) (1898) (discussing Monroe Doctrine and United States's long-standing interest in Latin America); I ALEXANDER DECONDE, A HISTORY OF AMERICAN FOREIGN POLICY 109-33 (3rd ed. 1978) (discussing Monroe Doctrine).

58. *See* OSTRY, *supra* note 2, at 203-04.

59. *See id.* at 237.

fore, unwieldy.[60] While procedural checks against the tyranny of the majority exist in the Uruguay Round agreements, such as the consensus rule in the *DSU* concerning the creation of panels, adoption of panel and Appellate Body reports, and authorization of retaliation,[61] the economically dominant powers like the United States, European Union, and Japan may be vulnerable in other respects (*e.g.*, placing items on a negotiating agenda). However, the book's proposal that all regional arrangements apply the MFN principle, perhaps with some delay, to non-arrangement members as a way of ensuring a convergence of regionalism and multilateralism is interesting and worthy of more discussion.[62]

The book makes two arguments against unilateralism. First, as mentioned above, unilateralism may lead to less predictability in U.S. trade policy.[63] But, why is that bad from a U.S. viewpoint? Ambiguity and uncertainty may have a tactical, even strategic value. Candidly, putting actual or potential rivals slightly off balance about U.S. actions and responses may keep them in check if they assume the highest probability U.S. action or response would be the one most seriously adverse to their interests. One of President Nixon's ten commandments of statecraft is "never let your adversary underestimate what you would do in response to a challenge," and correspondingly "never tell him what you would not do."[64] (President Nixon relied on this strategy, arguably with some success, during the Vietnam War to persuade the then-North Vietnamese government to participate in the Paris peace talks.[65] In a more recent context, strategic ambiguity is probably one factor keeping the People's Liberation Army from forcibly repatriating Taiwan.) Of course, the adversaries might also miscalculate and commit a costly blunder. (Obvi-

60. *See id.* at 195.

61. *See id.* at 196; DSU, Arts. 2:4 n.1 (definition of "consensus" as no formal objection from any WTO Member), 6:1 (establishment of panel unless consensus not to establish panel), 16:4 (adoption of panel report unless consensus not to adopt report), 17:14 (adoption of Appellate Body report unless consensus not to adopt the report), and 22:6 (authorization to approve request to take retaliatory action unless consensus to reject request), *reprinted in Documents Supplement, supra* note 24, at 397-420.

62. *See* OSTRY, *supra* note 2, at 204. The book's other proposal, that all regional arrangements be tabled in the WTO for monitoring, does not sound all that different from the requirements of Article XXIV of GATT.

63. *See id.* at 123.

64. JAMES C. HUMES, NIXON'S TEN COMMANDMENTS OF STATECRAFT 105 (1997).

65. *See id.* at 106-13.

ously, there are game theory implications of strategic ambiguity to be explored.)

Second, *The Post-Cold War Trading System* urges that unilateral trade actions are "the wrong thing for the right reasons."[66] The argument is tricky, but it seems to be that the United States violates the GATT-WTO rules in order to defend them, which in turn suggests that the United States has a higher degree, even unique endowment of, sovereign power in that system. This argument seems to misread the procedural requirements of Section 301 of the Trade Act of 1974, as amended.[67] If a dispute "involves" an international trade agreement and a mutually agreeable solution is not reached through direct consultations within a prescribed period, then the United States is obligated by statute to follow any dispute settlement mechanisms set forth in that agreement.[68] To be sure, there is a degree of unilateralism in initial decision as to whether a dispute involves an international trade agreement. But, at least in matters unequivocally not covered by an agreement, where is the GATT-WTO violation in invoking Section 301? The answer may be that a Section 301 remedy may involve denial of MFN or national treatment, or the imposition of quantitative restrictions, hence it is the remedial action that is offensive. However, is not a rebuttal to this answer that if the initial dispute is not covered by the GATT-WTO rules, then neither ought any remedy to be covered?

III. *FUTURE DIRECTIONS IN INTERNATIONAL TRADE SCHOLARSHIP: A CALL FOR MORE THEORY*

The comments about *The Post-Cold War Trading System* made in Part II suggest a need for the application of greater theory to practical problems in international trade scholarship.[69] After all, a thesis about international trade law ought to be advanced on the basis of some theory, which may be a distinction between

66. *See* OSTRY, *supra* note 2, at 122.

67. *See* 19 U.S.C. §§ 2411 *et seq.*

68. *See* 19 U.S.C. § 2413(a)(2).

69. In this respect, there are some promising explorations being made. *See, e.g.*, DOUGLAS A. IRWIN, AGAINST THE TIDE (1996); RICHARD F. TEICHGRAEBER, III, "FREE TRADE" AND MORAL PHILOSOPHY (1986); Jeffrey L. Dunoff, "Trade and": Recent Developments in Trade Policy and Scholarship – And Their Surprising Political Implications, 17 NW. J. INT'L L. & BUS. 759 (1996-97). For an example of this reviewer's efforts, see *Hegelian Reflections*, *supra* note 26.

free and managed trade, or a vision of justice in the global economy. *The Post-Cold War Trading System* not only is majestic in its coverage of the modern era of international trade law, but also is a catalyst for thought about what theories might be developed or invoked to address pressing issues. It is, in these respects, a highly recommended piece of scholarship.

GIULIANO AMATO, ANTITRUST AND THE BOUNDS OF POWER

*Reviewed by Barry E. Hawk**

It is a difficult challenge to write a refreshing and insightful book on antitrust policy after more than a century of U.S. debate and almost half a century of European debate. Professor Giuliano Amato successfully has met that challenge in his highly enlightening opus on *Antitrust and the Bounds of Power*.[1] Professor Amato writes from the Olympian heights as the former head of the well respected Italian Antitrust Authority, a former Prime Minister of Italy, and the present professor at the European University Institute in Florence. As might be expected from an author with such broad public experience, *Antitrust and the Bounds of Power* places antitrust law in the broader context of political theory and history. Although the author modestly states that the book is written for young people embarking on an immersion in antitrust law, seasoned antitrust veterans will greatly benefit from Professor Amato's measured wisdom.

Professor Amato begins with the judgment that the desirable introduction of increasingly sophisticated economic analysis into antitrust law has obscured some of the problems and policy goals that antitrust law was born to deal with. He persuasively places the genesis of antitrust both in the United States and in Europe in politics, notably the political values underlying liberal democracy. According to Professor Amato, liberal democracy faces the following dilemma: the fundamental freedom of individuals to trade can lead to the opposite phenomenon of private power that is capable of infringing not just the economic freedom of other individuals but also the balance of public decisions. In a democratic society two boundaries should never be crossed: one beyond which the unlegitimated power of individuals arises, the other beyond which legitimate public power becomes illegitimate. Antitrust law is relevant to understanding both sides of the divide and to deciding where the boundaries should be set. Professor's Amato's book is devoted to this gen-

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1. GIULIANO AMATO, ANTITRUST AND THE BOUNDS OF POWER (1997).

eral theme and his explication of antitrust law is set against the background of this political dilemma in a liberal democracy.

Chapter One sets forth a brief but perceptive analysis of the early history of the Sherman Act case law. Several interesting observations are made. For example, Professor Amato reads the early decisions as points on a continuous line seeking to define a new boundary on market power, marked no longer by the alternative of freedom and coercion, but by respect for, or distortion of, the economic rules laid down for the market itself by the competitive system. He then draws the more general political observation that the defenders of the old common law boundary could see that the boundary had been shifted forward to allow intrusions on freedom of contract that they perceived as opposed to the very foundations of liberal society.

Chapter Two deals with the more recent period in United States antitrust enforcement, notably the influence of the so-called Chicago School. Here, again, Professor's Amato's observations are nuanced and balanced. On the one hand, he expresses doubts whether "consumer welfare" can be restricted to a concept of lower prices and better product quality to the detriment of diversity of consumer choice of more suppliers and products.[2] On the other hand, he praises the Chicago School for having focused antitrust enforcement on market power and efficiency.[3]

Chapter Three explores the history of European antitrust or competition law. Its modern history begins with the German antitrust laws in the 1950s which had their inspiration in the so-called Freiburg School or "Freiburger Ordoliberalen." The Freiburg School was concerned about non-legitimate private power and the necessity to provide a solid institutional framework for the competitive economy to prevent both formation of private power and the creation with it, by linking up with public power, of conglomerates that could engender tragedies such as occurred during the Nazi period.[4] The Freiburg School's mistrust of economic power because it can lead to political power is echoed in the historical roots of U.S. antitrust law. The history

2. *Id.* at 23.

3. *Id.* at 24.

4. *Id.* at 40-41; *see also* David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Comparative Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994).

of EC competition law is strikingly different, however, in its emphasis on market integration as a goal even to the subordination of competition. This heavy emphasis on market integration and the formalism adopted by many antitrust officials and practitioners has resulted in, on the one hand, formalisms and rigidities and, on the other hand, permissive flexibilities that are peculiarly European in origin. As Professor Amato demonstrates, the EC's position towards vertical restraints is perhaps the best example. Indeed, Professor Amato refers to the EC law on vertical restraints as "European duplicity."

As Professor Amato points out, the market integration goal is not the sole explanation for the differences in results between U.S. antitrust law and European competition law. More fundamentally, there is a difference in "antitrust culture," *i.e.* the persistence of a rooted European culture of regulating and controlling the economy. Amato writes convincingly that EC competition policy rests on two ideas that are in tension: 1) the old idea of supremacy of state power which is above the powers of private individuals and is the most suitable instrument to confront private power; and 2) the new idea of competition in the sense that private power is simply a degeneration of freedom against which the freedom of all must be guaranteed. In other words, in Europe there is still the tendency to prefer that government set the boundary between economic power and freedom of enterprises and not the constitutionally recognized solidity of specific freedoms of each and all.[5] In contrast, the United States is more accepting of private power, continuing to see it as a natural manifestation or expression of private freedoms and thus preferred to the interventions of public power.[6]

This European itch to regulate, or at least reluctance to let markets self-correct, explains many differences between EC and U.S. antitrust law and policy — for example, the EC resort to block exemptions and the inclusion of non-competition policy objectives in antitrust law, such as "industrial policy," or social and regional policies.[7] Another important example concerns abusive or monopolistic behavior by dominant firms where the European itch to regulate also can be seen in the EC's broader

5. *See* AMATO, *supra* note 1, at 54.
6. *Id.* at 76-77.
7. *Id.* at 63-64.

and stricter application of its antitrust laws to dominant firm behavior under Article 86 as compared with Section 2 of the Sherman Act.[8]

The difference in scope between Article 86 and Section 2 rests on the European concern with protecting trading partners that are "dependent" on dominant firms, even where this concern conflicts with consumer welfare considerations. In other words, there is a strong tendency under Article 86 (as well as under the EEC Merger Regulation[9]) to protect competitors and not simply competition.

This tendency to protect competitors, or at least to be unduly sensitive toward effect on competitors as opposed to effect on consumers and consumer welfare, can also be seen in the Commission's occasionally perverse treatment of efficiencies under the EEC Merger Regulation. As Professor Amato points out, the Commission in some cases appears to take the extreme that greater efficiency is not a positive factor in reviewing mergers but a negative one and thus has protected consumers not because of market foreclosure and the associated restriction of output but out of a concern for maintaining pluralism and defending the right to sell to small producers currently on the market.[10]

The recent evolution of EC competition law suggests, however, that there is a greater emphasis on protecting competition and perhaps even the liberation of antitrust law from the multiple purposes it has served in the past.[11] Professor Amato strongly approves of this change and notes that it may result in the weakening of the old regulatory propensity. This would mean rooting antitrust more in the encounter between freedoms and economic rights at stake and less in the tradition of balancing varying public interests; it also would mean making economics the primary yardstick of antitrust analysis.[12] While Professor Amato applauds this narrowing of antitrust policy, he does not advocate an exclusive Chicago School-like reliance on economic efficiency as the sole goal of antitrust. He reasons that

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8. *Id.* at 68-69.

9. Council Regulation No. 4064/89 on the Control of Concentrations Between Undertakings, O.J. L 257/14 (1990).

10. *See* AMATO, *supra* note 1, at 87.

11. *Id.* at 116.

12. *Id.* at 116-17.

although much of European antitrust law has gone too far in looking to industrial, social, and regional considerations in the implementation of antitrust law, the other extreme would be a Chicago School narrowing of antitrust solely to consumer welfare defined as economic efficiency. Professor Amato rejects both extremes and opts for the nuanced but more complex middle ground where antitrust law takes into account not only economic efficiency but also concerns about economic power for political reasons.

After reviewing and comparing the history and present state of U.S. and European antitrust law and policy, Professor Amato returns to the broader political themes. He is particularly instructive in discussing how political history helps explain other differences between U.S. and European law and policy. For example, the Jeffersonian notion of a society of small citizen-farmers that inspired the Sherman Act did not generate liberal democracy in Europe but rather the idea of a communist utopia. This dramatically different outcome is explained by the American mistrust of the state compared with the traditional European belief in the state. This difference in political attitudes toward government is reflected in the fact that the word "state" is not a common term in the U.S. political vocabulary, whereas the concept of "l'etat" plays a strong role not only in European political theory but also in popular European political debate. On the other hand, the early European supporters of antitrust, like Jefferson, also greatly mistrusted economic power but not only because it generated political power. They also mistrusted economic power out of a concern that it reduced social solidarity. Thus European antitrust law, both at the EC and the Member State level, takes a stricter and more interventionist view toward certain business practices and gives less weight to freedom of contract and to freedom of firms to do business. In a sense, the Europeans prefer "soft" competition to "hard" competition, as those terms were used by Judge Learned Hand in his *United States v. Corn Products* decision.[13] It is perhaps inevitable that a preference for soft over hard competition leads to an interventionist antitrust policy which, in the European case, is reinforced by traditional statist preferences.

In sum, *Antitrust And The Bounds of Power* contributes to the

13. *See* United States v. Corn Prod. Ref. Co., 234 F. 964 (S.D.N.Y. 1916).

ongoing debate about antitrust policy goals by providing a refreshingly broad and eminently wise political perspective. Novices, as well as the cognoscenti, will greatly benefit from a close reading.