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Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States

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PERSPECTIVES ON THE JURISPRUDENCE OF INTERNATIONAL TRADE: COSTS AND BENEFITS OF LEGAL PROCEDURES IN THE UNITED STATES†

*John H. Jackson**

The question of how to implement worthy governmental policies is always important — and often neglected. Much attention goes toward the study and formulation of policies, but frequently the question of implementing the policy is relatively ignored or left to "technicians." Yet in connection with many subjects, certainly including international trade, major difficulties and perplexities are encountered in carrying out a policy. An important dimension of international economic policy consists of the legal processes, both international and national, that are connected with implementing those policies.[1]

Both in the United States and abroad the U.S. legal system has been strongly criticized for its handling of international trade regulation.[2] Some of this criticism parallels general statements made about the United States as a litigious society, with too many lawyers and too much attention to "legalism." Despite their serious data faults and some serious misconceptions about comparing the role of a lawyer in the United States to false counterparts in other countries, I feel that it is worthwhile to examine these criticisms more systematically.

It is said, for example, that the U.S. legalistic system of regulating trade is costly, is itself a "non-tariff barrier" to trade, and lends itself to manipulative use by special domestic interests. Some of this may be true, but a systematic appraisal must examine at least three questions: (1) What are the real costs of the system? (2) What are the benefits of the system? and (3) What alternatives to the system exist or are feasible, and what are their costs and benefits?

In this brief article I will confine myself to an analysis of the U.S. legal system pertaining to regulation of imports, deferring to other works an ex-

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† A preliminary and summary version of this article was presented by invitation at a panel chaired by Professor Robert Baldwin of the University of Wisconsin, at the annual meeting of the American Economic Association in San Francisco, December 27, 1983.

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1. *See generally* J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) [hereinafter cited as J. JACKSON, WORLD TRADE]; J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1977) [hereinafter cited as J. JACKSON, LEGAL PROBLEMS].

2. *See* Green, *The New Protectionism,* 3 NW. J. INTL. L. BUS. 1 (1981); ADVISORY COUNCIL ON JAPAN-U.S. ECONOMIC RELATIONS, JAPAN-U.S. BUSINESSMEN'S CONFERENCE, AGENDA FOR ACTION 35-39 (July 1983).

ploration of similar questions relating to regulation of exports or other international economic activities. First, however, I wish to touch on policies related to the legal structure of international rules for trade. This will help put the subject of this article in broader perspective, and although I will focus on U.S. domestic law measures, it will readily be seen that the international system depends greatly on national legal systems for its efficacy, and that to a lesser extent the national legal system likewise depends on the international system. Most policies of each category of system can apply almost equally in the other category. That is, many of the reasons for a "rule-oriented" approach in the international legal system also apply to a national system, and vice versa. The following sections discuss separately the three questions mentioned above, along with some policy and historical matters, in the context of U.S. import regulation.

I. Rule Orientation Versus Power Orientation for the Procedures of International Economic Relations

I have written elsewhere about the distinction between "power-oriented" and "rule-oriented" diplomacy.[3] Roughly categorizing diplomatic techniques into these two groups is an oversimplification, of course, but it is a useful one in describing a certain difference in technique and spirit that is involved in international discourse. Particularly when it comes to international affairs, these distinctions can have considerable importance.

Power-oriented techniques suggest a diplomat asserting, subtly or otherwise, the power of the nation he or she represents. Often diplomats of the more powerful nations prefer negotiation as a method of settling matters because they can bring to bear that power to win advantage in the particular negotiation. The "bargaining chips" involved could be promised aid, trade concessions, movement of an aircraft carrier, influence on exchange rates, and the like.

A rule-oriented approach, by way of contrast, would be designed to help institutions which would insure the highest possible degree of adherence and conformity to a set of rules. The rules themselves would be formulated in advance and would presumably make broad policy sense for the benefit of the world and the parties concerned. Of course, the process of formulating the rules will involve, to a certain extent, power-oriented techniques.

In negotiations for the settlement of disputes between countries, both techniques will be used in varying degrees. If a power orientation prevails, however, the dispute is likely to be settled more from the point of view of which party has the greater power. By contrast, if a rule-oriented approach prevails, the negotiation would resolve the dispute by reference to what the participants expect an international body would conclude about the application of preexisting international obligations.

Although to a large extent all government activity involves a mixture of these two techniques, and indeed to a large degree the history of civilization may be described as a gradual evolution from a power-oriented approach towards a rule-oriented approach, nevertheless the present state of interna-

3. *See, e.g.*, Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J.W.T.L. 93, 98 (1978).

tional affairs tips the scales heavily in favor of the power orientation. Yet a strong argument can be made that the same evolution must occur in international affairs and that, as to international economic affairs particularly, there are strong arguments for pursuing evenhandedly, and with a fixed direction, progress in international procedures towards a rule-oriented approach. Several advantages accrue generally to international affairs through a rule-oriented approach, such as: (1) less reliance on raw power and the temptation to exercise it; (2) fairer treatment of the smaller countries, or at least a perception of greater fairness; and (3) the development of agreed procedures to achieve the necessary compromises. In economic affairs there are additional reasons for a rule-oriented approach.

Economic affairs tend (at least in peace time) to affect more citizens directly than do political and military affairs. As the world becomes more economically interdependent, private citizens increasingly find their jobs, their businesses, and their quality of life affected, if not controlled, by forces from outside their country's boundaries. Thus, they are more affected by the international economic negotiations pursued by their own country on their behalf. A rule-oriented approach allows citizens a greater opportunity to give their "input" into the processes, and also allows decentralized decision makers (such as entrepreneurs in market-oriented economies) a greater opportunity to plan and to base action on more predictable and stable governmental policies.

II. Historical Overview of the U.S. System of Regulating Imports

Most Americans are familiar with the history and essential structure of the U.S. Constitution.[4] The founders were suspicious of power, and framed the Constitution with a series of "checks and balances" to attempt to prevent concentration of power. In foreign affairs at least, as well as in other subjects, this arrangement has resulted in constant tension between the President (including his "Executive Branch" officials and agencies) and the Congress.

Although the U.S. Constitution in the foreign affairs area is often ambiguous with respect to the division of powers between the President and the Congress, the Constitution is much more explicit with regard to international economic affairs. Article 1, section 8, explicitly delegates to the Congress the power "to regulate commerce with foreign nations," and "to lay and collect . . . duties . . . ." The Congress jealously guards this power and likes to remind the President of this constitutional clause. Thus, matters such as import duties and other regulations of imports can be claimed by the Congress to be exclusively within its power. That is, the President has no "inherent" or other authority over the subject unless Congress has delegated such authority to him by statute.

With respect to import duties, the Congress exercised this authority itself through the infamous Smoot-Hawley Tariff Act of 1930.[5] The results

4. For an overview of the U.S. Constitution and U.S. regulation of international economic affairs, see generally J. Jackson, Legal Problems, *supra* note 1, at 275-78.

5. Tariff Act of 1930, 19 U.S.C. §§ 1202-1677 (1982).

of that exercise, however, left many observers with the realization that the Congress was not able to act on imports for the benefit of the general public interest. Thus, early in the Roosevelt presidency, the Congress was persuaded by Secretary of State Cordell Hull to enact the Reciprocal Trade Agreements Act of 1934,[6] under which the Congress delegated to the President the authority to enter into international tariff-reducing and trade-regulating agreements, and to implement those agreements in U.S. law without further reference to Congress. This act originally expired after three years, but it has been renewed from time to time and continues to be an essential element of the U.S. government's system for regulating imports. One of the renewals was in 1945, for a three-year period, during which the GATT — General Agreement on Tariffs and Trade — was negotiated under its authority. Other subsequent renewals include the 1962 Trade Expansion Act,[7] and the 1974 Trade Act.[8] The authority of the 1974 Trade Act expired in January of 1980, however, and since that time there has been no renewal of any *general* delegation of tariff-cutting authority to the President, although much other detailed delegation remains.

During the post-World War II period, there have been two parallel but clear trends in the system of U.S. regulation of imports. The first trend has been the dramatic overall reduction in the level of tariffs since 1947, after the negotiation of the GATT, and the holding of seven tariff and trade negotiating rounds (through 1979) under the auspices of GATT.[9]

The second trend has been a gradually accelerating recourse to nontariff measures for restraining imports, including measures entitled "antidumping duties" and "countervailing duties." This trend has accelerated particularly since 1962, and it is instructive to examine the major trade acts of 1962, 1974, and 1979 (the last being the Trade Agreements Act of 1979, which implemented the results of the Tokyo Round Multilateral Trade Negotiations[10]). The clear trend manifested in those statutes is toward a greater "legalization" or "judicialization" of the system. The 1974 act greatly reduced administrative discretion in the application of certain regulatory principles, particularly countervailing duties. It did this by imposing time limits on administrative action and, in some cases, by embellishing the requirements for public hearings and other procedures to allow citizen access to the process. The 1979 act went even further in this regard, and also took

6. Trade Agreement Act §§ 1-4, 19 U.S.C. §§ 1351-54 (1982).

7. Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1982).

8. Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (Supp. V 1975) (expired 1980) (current version at 19 U.S.C. §§ 2101-2487 (1982) (amended 1983)).

9. W. CLINE, N. KAWANABE, T. KRONSJO, & T. WILLIAMS, TRADE NEGOTIATIONS IN THE TOKYO ROUND: A QUANTITATIVE ASSESSMENT 9 (1978); K. KOCK, INTERNATIONAL TRADE POLICY AND THE GATT 1947-1967, 276-77 (1969); *See* Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal,* 12 LAW & POLY. INTL. BUS. 21, 24 (1980).

10. Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 101-07 (Countervailing and Antidumping Duties) and §§ 1001-02 (Judicial Review in Countervailing Duty and Antidumping Duty Proceedings), 93 Stat. 144, 150-93, 300-07 (1979) (codified at 19 U.S.C. §§ 1671-77g and in other scattered sections of 19 U.S.C. and 28 U.S.C. (1982) (amended 1983)); Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1975) (expired 1980) (current version at 19 U.S.C. §§ 2101-2487 (1982) (amended 1983)); Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1982).

some major steps in expanding the scope of judicial review of administrative actions.

Consequently, as of mid-1984, the United States has a remarkably elaborate governmental system for the regulation of imports, including approximately a dozen different types of procedures or processes, most of which include a number of explicit statutory procedural requirements calling for: (1) citizen complaint initiation; (2) public hearings; (3) published official determinations with reasoned opinions; (4) judicial review; and/or (5) much reduced discretion for Executive Branch officials handling these matters. Appendix A to this article enumerates many of these different procedures, with a short paragraph describing each. This may assist those who are not familiar with the U.S. import regulation system to perceive its overall scope.

III. The Policy Goals of the U.S. Government Institutions and Procedures for Regulating Imports

The details of substantive policy goals for U.S. import policy are beyond the scope of this paper, which will instead focus on procedures. However, the first obvious policy goal of any system is to arrive in specific cases at the "right decision." What is the right decision in cases of import regulation is almost never easy to ascertain. Perhaps it is to permit the greatest liberality for imports coming into the United States that can be accomplished without causing undue harm to the U.S. economy, without being too unjust to particular segments of the U.S. economy, and without upsetting important international relations of the United States with foreign countries. As so stated, this is virtually a shibboleth. However, specific cases are very complex and they often pose dilemmas between contradictory goals, such as between the goals of permitting maximum imports yet preventing unfair hardship on particular small segments of the U.S. economy. It is difficult to know and to decide what is right in each case, but that is the essence of government.

Having given due obeisance to substantive policy, most of the remaining policies that I will mention could be categorized as "procedural." These are the policies that underlie the way that institutions and procedures have been shaped within the United States. Unfortunately, many of these policies are overlooked by important critics of the system. Perhaps it will be easiest for the reader if I enumerate them briefly:

(1) The procedure should maximize the opportunity of government officials to receive all relevant information, arguments, and perspectives. Thus, a procedure that allows all interested parties to present evidence and arguments would enhance the realization of this goal.

(2) The procedure should prevent corruption and ethical *mala fides,* even when the latter fall short of corruption and illegal activity. Another way to express this is that an important policy goal of the procedure is to prevent "back room political deals" that favor special or particular interests while defeating broader policy objectives of the U.S. government.

(3) The procedure should enhance the perception of all parties who will be affected by a decision that they have had their chance to present information and arguments, i.e., that they have had their "day in court." This is

an important policy objective, particularly for democratic societies; affected parties must have some confidence in the decision-making process, even when the decision goes against them.

(4) The procedure should be perceived by the citizens at large as fair and tending to maximize the chances for a correct decision. A sense of fairness will include a desire that even weaker interests in a society be treated fairly, i.e., that the ability to get a favorable decision will not depend only on money, political power, status, or other elements deemed unfair.

(5) The procedure should be reasonably efficient, that is, it should allow reasonably quick government decisions and minimize the cost both to government and to private parties of arriving at those decisions. It is this policy goal that is most questioned by the criticisms of the American "legalistic" procedures.

(6) The procedure should tend to maximize the likelihood that a decision will be made on a general national basis (or international basis), not catering particularly to special interests. In other words, the procedure should be designed so that government officials can realistically be assisted in "fending off" special interests that conflict with the general good of the nation.

(7) The procedure must fit into the overall constitutional system of the society concerned and be consistent with policy goals underpinning that constitutional system. For the United States, as stated above, an important policy underpinning the Constitution is the prevention of power monopolies within our society. The system of checks and balances thus creates a constant tension between various branches of the government, which may often appear messy, costly, and inefficient, but which is based on fundamental constitutional principles.

(8) Predictability and stability of decisions are important values. Predictability of decisions, whether based on precedent, statutory formulas, or something else, enables private parties and their counselors (lawyers, economists, and politicians) to calculate generally the potential or lack of potential for a favorable decision under each of a variety of different regulatory schemes. The greater the predictability, the more likely that cases will be brought only if they have a good chance to succeed. The private lawyer often experiences the situation wherein he counsels clients in the privacy of his office in such a way that the client will use her best judgment to decide not to bring a case.

I make no claim that the list of policy objectives enumerated above is exhaustive; I am certain that others can be considered. Likewise, as stated earlier, the policy goals mentioned tend to be related to national procedures rather than to international procedures. However, many of these goals also apply, sometimes with modified weight, to international institutions and procedures.

IV. Costs of the U.S. System — Quantifiable and Non-quantifiable

I want to turn now to an attempt to appraise the costs to U.S. society of the U.S. government system of regulating imports. Again, I am only looking at the import side (export regulations could be taken up separately).

Furthermore, I am attempting to evaluate the costs of the "legalistic system." There are certain costs that would be incurred no matter what type of import regulation system a government operated, whether it was a system of broad government discretion or a more legalistic system with hearings, statutory criteria, and judicial review.

The costs can be roughly divided into two types: those that are quantifiable, and those that are difficult, if not impossible, to quantify. I will take up each of these types in turn.

I should also note that the concept of "legalistic" is relative. Even in the U.S. import regulation system, often deemed the most "legalistic" in the world, there are many possibilities for flexibility, executive discretion, and (less fortunately) "deal making."

A. *Quantifiable Costs of the U.S. Import Regulation System*

As a rather simplistic exercise, I have tried to evaluate the quantifiable costs in dollars of the U.S. method of regulating imports. A careful evaluation would involve a rather elaborate survey research study, and I have not so far had the resources to undertake that. Furthermore, I am not certain that such a study would be likely to produce results that are meaningfully better than my "rough and dirty" techniques.[11]

The quantifiable costs can be divided into three categories: (1) the budgetary costs of the U.S. government agencies concerned; (2) the costs of private attorneys and external consultants who handle such cases; and (3) the in-house costs of the firms that are engaged in such cases. There may be a few other costs that do not easily fall into these three categories, but they are likely to be very small. In evaluating these quantifiable costs I have attempted to exclude, to the extent feasible, the governmental and other costs that would be incurred regardless of the type of regulatory system involved. Thus, I exclude the governmental costs of the Customs Bureau, on the ground that the operation of a general tariff and customs system for imports is virtually universal among governments and does not depend on the type of import regulation. One can, of course, challenge this assumption since there are clearly some minor aspects of the Customs Bureau operations that relate to the "legalistic" regulation of imports. Nevertheless, this seems to be a plausible rough dividing line for the purposes of this article.

1. *Governmental Costs*

Governmental costs are probably the easiest to identify. One simply takes the annual budgetary costs for the agencies involved in the regulation of imports and adds them together. Needless to say, some of the agencies

11. The available data for this simplistic exercise are limited, although a much more extensive project could probably refine them somewhat. In general I have tried to overstate rather than understate the costs. However, even when data is available, there are dozens of different ways to "array" or present the data, and I am sure many disputes can be generated by these techniques. My goal here is not to develop precise quantities, but to make "order of magnitude" guesses, to help point in the direction of policy conclusions. If nothing else, this exercise may suggest that the important considerations are not quantifiable. Nevertheless, I hope this article might stimulate some other scholar to undertake a more careful appraisal of the costs examined here.

are involved in both exports and imports, as well as some other international economic activities, and to be precise one should disaggregate the activities within an agency. I have found this too difficult, so I have simply included the total budget amount for the several agencies or agency parts that are most concerned with imports, recognizing that my figure in the end will likely be an overstatement of costs.[12] The agencies or parts thereof included were the Office of the U.S. Trade Representative, the import regulation portion of the International Trade Administration (Commerce Department), the State Department Bureau of Economic and Business Affairs, and the International Trade Commission. The total costs estimated for these agencies is approximately $44 million per year.

It is possible on the one hand to try to identify a few positions in a number of other agencies, such as Treasury, Labor, Defense, Agriculture, and a few congressional staff positions, which are concerned with the import processes of the United States, but on the other hand the inclusion of the entire agencies discussed in the preceding paragraph would certainly include people who are engaged in activities other than imports. The latter more than offset the costs in other parts of government, and if anything the total above will overstate the total U.S. regulatory costs for imports.

2. *Identifiable Attorney and Consultant Costs*

It is much more difficult to identify and evaluate the nongovernmental costs of the system. Indeed, the figures in this subsection and the next subsection are little more than guesses, although they are educated guesses. For attorneys' fees, I have had the benefit of confidential information from attorney friends who deal in these subjects daily, which has given me some sort of idea of the costs of the various different kinds of trade procedures. When these costs are multiplied by the number of such procedures that are brought in any given year and modified by the number of cases that go on to later procedural steps including judicial review, one can begin to develop a sense of the order of magnitude of the figures that are involved. The types of regulatory processes are numerous,[13] but essentially only five of these (as outlined in Appendix A) have a significant number of annual proceedings and also can be described as part of the "legalistic" trade system.

Using this technique, I have been able to establish that a reasonable (somewhat overstated) estimate of costs for all attorneys' fees for normal trade import actions during 1983 is likely to be about $97 million. There is one important caveat to this: certain major cases tend to have considerably higher costs. For example, the 1982 countervailing duty cases concerning carbon steel imports probably involved attorneys' fees approaching the total attorneys' fees estimated for all countervailing duty cases in one normal year.[14] In other words, there is a bulge in the statistics. Likewise, the Canadian lumber countervailing duty case involved significant attorneys' fees that would be above the average because of the enormous amount of trade

12. *See* Appendix B.

13. *See* Appendix A.

14. The final determination in the carbon steel countervailing duty cases is published in 47 Fed. Reg. 39,304 (1982).

covered ($2 billion) and the complexity of the case.[15] However, even with these payments in mind, it still seems fair to evaluate the rough average annual current costs for attorneys and private consultants engaged in various import trade actions of the United States at about the amount stated. This includes the representation for both importers and domestic industry, and would include, where relevant, the costs of representation when they are incurred by foreign governments.

3. *Costs Internal to the Firms Involved in the Proceedings*

I have no sound basis for estimating this figure. It has been suggested to me, however, and I have accepted for present purposes, that the internal firm costs (executives' time, in-house lawyers, clerical time in marshalling evidence and data, etc.) are roughly the same as the external firm and consultant costs.

4. *Combining the Various Figures*

One can easily see that the figures under the three parts above would total approximately $238 million for 1983. To give due allowance to the imprecision of the estimates, we can expand that figure and say that the probability is very high that the total is less than $250 million.

With what can we compare this figure? One obvious comparison is the total value of imports during the year, which for 1983 is estimated to be $254 billion. The result is that the cost of the U.S. import regulation system is 0.0009, or approximately 1/10th of 1 percent of the total annual value of imports. One could conclude that this figure is reasonably insignificant, if it were considered as a sort of "transaction cost" for a regulatory system that had other benefits. It is perhaps not entirely fair, however, to measure or evaluate the cost of the system by dividing those quantifiable costs by the total value of imports. A better cost-benefit approach would be to look at the regulatory system's welfare benefit to society, and I return to that question in the next section of this article. It should also be recognized that this aggregate approach does not answer all relevant questions. For example, the distribution of costs can vary enormously, and may in fact be very unfair (imposing, for example, substantial burdens on certain sectors of the economy, and few burdens on other sectors). Finally, we must remember that there are a number of nonquantifiable costs that need to be weighed in the balance.

B. *Nonquantifiable Costs of the Import Regulatory System*

To focus only on the quantifiable dollar costs of the system would be a major mistake. Some of the most important costs may in fact be non-quantifiable. A few of these should be mentioned.

1. *Foreign Policy Rigidity*

A system that depends on statutory criteria and procedures, allows citizen access, and establishes predictability, will inherently diminish the dis-

15. The final determination of the Canadian lumber case is at 48 Fed. Reg. 24,159 (1983).

cretion and flexibility of government officials. Indeed, that is exactly what it is designed to do. However, certain types of foreign policy activities may be inhibited by such a system. Secret negotiations are much more difficult and quick decisions are sometimes almost impossible under a "legalistic" system. Indeed, as was demonstrated in the recent countervailing duty case concerning Chinese textiles, as well as in certain portions of the 1982 carbon steel countervailing duty cases, a "legalistic system" tends to give citizen complainants a considerable amount of control over their cases, which in turn risks giving those particular citizens undue advantage to the detriment of broader U.S. foreign policy considerations.[16]

2. *Manipulation or Harassment*

The legalistic type of system that exists in the United States also lends itself to some abuse by special interests that manipulate the system for their own advantage in ways not necessarily contemplated by the Congress when it enacted the relevant statutes. For example, a complainant may be tempted to initiate a proceeding knowing that the procedure will present considerable opportunity to create mischief and difficulty for U.S. foreign policy while the real motive for using the procedure is to negotiate with the government towards some solution that is not contemplated within the statutory or regulatory procedure set up by Congress. A complainant may really desire certain tax benefits or cartel-like quotas dividing up the U.S. market and ensuring domestic interests of a certain portion of that market. It may bring a trade proceeding that contemplates relief through imposition of a certain amount of tariff-like duties at the border solely to try to get the U.S. government to negotiate in a way that would achieve the complainant's true objective of quota-like restraints. In addition, it has been alleged in some commentary and by some foreign observers that the U.S. system tends to result in "multiple harassment," by which domestic industry complainants can bring one procedure after another even though they know that they probably will not succeed in such procedures. The running battle of domestic television interests against imported television sets is often cited as one instance of multiple harassment. The mere institution of such procedures creates considerable uncertainty in the market for the imports and creates costs for the importing firms concerned. Both factors tend to reduce the importation of such challenged goods initially and to increase importers' general costs of penetrating the U.S. market, with attendant effects upon their later price structure and competitiveness in the U.S. market. Although appraisal of the "multiple harassment" charge is not easy, there appear to be few instances in which it can actually be established that such action has occurred.[17] Even the threat of such activity, however, may itself

16. Lawrence, *Chinese Textile Case Rocks Global Trade Scene,* J. of Com., Dec. 22, 1983, at 4A; Pine, *U.S. Delays Decision on Penalty Duties on Chinese Textile Imports Until Dec. 16,* Wall St. J., Dec. 7, 1983, at 8.

17. Several colleagues and I recently examined trade cases in four or five different legal procedures of the United States going back several decades to search for instances in which a U.S. industry had complained under more than one of those laws against the same foreign producer or importer within a span of five years. We discovered approximately 20 such cases.

be somewhat inhibiting to foreign exporters who are eyeing the potential of the U.S. market.

3. *Wrong Law Rigidity*

One of the results of the U.S. "legalistic" system of regulating imports is that criteria tend to be embodied in statutes enacted by Congress and then become very hard to change. Because Congress distrusts executive discretion, it tends to establish rather elaborate detail in statutory criteria. But on some occasions the statutory formulas prove later to be inappropriate from a policy or economic point of view.[18] Or an international proceeding will find that the U.S. law violates U.S. international obligations.[19] In these cases it has proved very difficult to get the Congress to change the law, because a variety of special interests tend to be able to block such change. Consequently, the result is that the system has a certain amount of "wrong law rigidity" built into it.

4. *Special Interest Influence on the Formulation of the Statutory Criteria*

The processes by which the Congress writes the statutory criteria and formulates the law are reasonably well known. The system sometimes lends itself to manipulation by special economic interests in the United States that can foresee the results of certain statutory wordings on their potential cases in the future. Thus, an important economic sector can sometimes influence the Congress in developing criteria that will later prove to be very beneficial to it in particular cases, even though such criteria may not be in the overall best interests of the United States. In this respect, however, the process is no different from that of any domestic subject matter. It is perhaps a price one pays for an open democratic system.

5. *Big Cases Mishandled*

One of the allegations often made is that the United States' elaborately legalistic system of import regulation may operate with reasonable satisfaction only as to the little cases that are generally unimportant in themselves. But when it comes to very big cases that have a broad influence in major sectors of the economy (such as autos, textiles, agriculture, and steel),[20] it is

18. For example, some of the intricate criteria of finding foreign "subsidies" for purposes of the countervailing duty law can, with the advantage of hindsight, be considered inappropriate in terms of economic and other policies. Yet it is thought to be virtually impossible to get Congress to change the law.

19. The famous "DISC" case (Domestic International Sales Corporation), in which there is a GATT finding that the U.S. law contravenes U.S. international obligations, is one example. U.S. administrations have announced that they will try to get Congress to change the law, but the statute remains unchanged. For a discussion of the DISC case, see Jackson, *The Jurisprudence of International Trade: The DISC case in GATT,* 72 AM. J. INTL. L. 747 (1978).

20. The escape clause action against importation of automobiles resulted in a negative determination by the ITC. Nevertheless, political forces were such as to induce the United States to encourage the government of Japan voluntarily to restrain exports of automobiles to the United States. The carbon steel countervailing duty cases in 1982 resulted in a settlement agreement which, although heavily influenced by the legal procedures, nevertheless was not, at least explicitly, contemplated by those procedures. The autumn 1983 complaint against Chinese textile imports into the United States resulted in a withdrawal of the complaint at the last

said that the system breaks down and in fact returns, by one subterfuge or another, to a "non-rule system" of extensive executive discretion and "back-room bargaining."

6. *The Dilemma of a Legalistic System*

As one can begin to surmise from analyzing these various costs, both quantifiable and nonquantifiable, there is to a certain extent a dilemma involved in designing any institutional system for regulating imports. The dilemma is not unique to this subject and is involved in a number of other areas of governmental endeavor also. This dilemma is that the more one maximizes the goals of a legalistic system (predictability, transparency and elimination of corruption and political back-room deals), the more one sacrifices other desirable goals such as flexibility and the ability of government officials to make determinations in the broad national interest as opposed to catering to specific special interests.

V. The Benefits of the System

The benefits of the legalistic system may be considerable, but they are perhaps harder to appraise. I will discuss them under two categories.

A. *Procedural Benefits of the System*

Apart from costs and delays, the legalistic system responds well to many of the goals and objectives set out in section III above. Clearly, the more extensive and detailed are the statutory criteria, the public proceedings, the opportunity for judicial review and the like, the more likely that the system will be predictable, corruption-proof and devoid of back-room political deals. An exception to this might be the "big case" question: If the system becomes too rigid, the big cases — those involving considerable political power — will tend to make "end runs" around the system, and thus will not be channeled by the rules and will perhaps be even more vulnerable to flexible executive official discretion than would be the case if the formal procedures were less rigid and could better accommodate the big cases.

B. *Substantive Benefits*

One of the critical questions, and perhaps the most critical question, is whether this legalistic system, given its costs, in fact provides a substantial measure of benefits (benefits that exceed the costs) to the general welfare of the United States. Here it is necessary to indulge in some assumptions, and to recognize that conclusions are only tentative, in the form of hypotheses that need further testing.

The basic assumption that may be required to justify the legalistic system is that it in fact allows a higher degree of liberal trade access for imports into the U.S. economy. This assumption itself is premised on the assumption that such trade liberalization provides a benefit to the U.S.

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minute, after negotiations between the U.S. government and the textile industry during which the government agreed to certain of the industry's import limitation demands. *See* note 11 *supra*.

economy. Most economists believe that trade liberalization does provide such a benefit, and my colleagues at the University of Michigan Department of Economics, Alan Deardorff and Robert Stern, have used their very large international trade model to compute some of the welfare benefits of liberal trade.[21] For example, they conclude that a fifty percent reduction across the board in pre-Tokyo Round tariff levels (from an average of about eight percent to half that), would result in an additional welfare benefit to the U.S. economy of approximately one billion dollars. There is some indication by them and others that this welfare benefit amount is understated, but we can accept it provisionally, for purposes of comparison.

If we can believe (and although it is essentially a "judgment call" many people do believe it) that the U.S. legalistic system — cumbersome, rigid, and costly as it is — in fact provides for an economy more open to imports than virtually any other major industrial economy in the world, then we could count this as a benefit. But measuring that benefit is obviously very difficult. We are measuring it against an unknown — namely, what would be the degree of import restraint in the U.S. economy if the U.S. system were not so legalistic and were more "discretion prone." Morici and Megna of the National Planning Association have tried to evaluate the current costs of all the various nontariff barriers in the United States, and they arrived at an amount of less than one percent tariff equivalent.[22] The current import restraints, they report, are fairly modest in comparison with those of other economies, so one might well imagine that the tariff equivalent of import restraints unfettered by a legalistic system might be considerably more restrictive. Another way to say it is that overall import restraint tariff equivalents could increase by fifty percent over pre-Tokyo Round U.S. tariff levels (in the Deardorff-Stern model). Thus the Deardorff-Stern welfare benefit amount of about one billion dollars might be one "ballpark" measure of the more quantifiable of the economic benefits of the trade regulatory system. This compares quite favorably to the quantifiable costs mentioned above (and in Appendix B), although this comparison depends on much-hedged assumptions.

One must not forget, however, that there are also a number of nonquantifiable benefits to the system — greater confidence of the citizenry in the operation of its government in this subject matter, the business planning advantage of a higher degree of stability in governmental actions, reduction of corruption, etc.

VI. Some Concluding Remarks and Perspectives

What I have tried to do in this brief article is to approach the question of whether the U.S. legalistic and procedural system of regulating imports, despite its considerable costs, has advantages that outweigh those costs. This is, to my knowledge, a first attempt to be somewhat concrete and even

21. Deardorff & Stern, The Structure and Sample Results of the Michigan Computational Model of World Production and Trade (Dec. 5, 1983) (unpublished manuscript) (for presentation at the Symposium on General Equilibrium Trade Policy Modelling, Columbia University, April 5-6, 1984).

22. Morici & Megna, U.S. Economic Policies Affecting Industrial Trade — A Quantitative Assessment 47 (Natl. Planning Assn. Report No. 200, 1983).

quasi-quantifiable in answering this question. Nevertheless, it is very difficult to be too precise, even as to the quantifiable aspects. One could conceive of a more elaborate research study that might gain greater precision in this matter, but one can also doubt that the additional effort of such study would really tell us very much. Even indulging in an overestimation of quantifiable costs and a possible underestimation of quantifiable benefits, one can see that the benefits appear to be very substantial compared to the costs. However, the most important part of the subject may indeed be the nonquantifiable parts, and on those one is likely to receive many different opinions from a variety of knowledgeable observers. In short, the matter seems to be very much "judgmental." People will bring to that judgment their own personal experiences, often involving specific cases, which cases may not be generally representative of the system as a whole.

One thing is clear, however: Those who would criticize the existing system must bear the responsibility of weighing that system against viable alternative systems. It is not enough simply to describe in great detail all the horrors, or detriments, of the existing system. It is necessary to weigh in the balance the advantages of the system *and* to do that in comparison with viable alternative systems. Is there any viable alternative system that is likely to be more satisfactory than or even as satisfactory as the existing system? What are the possible alternative systems? The principal one that comes to mind is one that would involve a considerably higher degree of government officials' discretion. We can witness such systems in other major industrial countries with considerable imports. Such observation does not lead one to be confident about those alternatives to the U.S. system. The dangers of corruption are high; the dangers of political manipulation and back-room deals are also high; and often the weaker segments of the domestic economy (frequently including consumers) are the ones who must pay for the resulting decisions that are made for the benefit of the more powerful producing interests. The legalistic system permits well-intentioned governmental officials to fend off certain types of particularistic pressures (but, of course, no system will fend off all such pressures).

Sometimes governmental officials, past, present or future, express considerable impatience with the U.S. legalistic system and yearn for a simpler structure. Often they are simply expressing a bias that can frequently be perceived in government officials, that whatever system exists should leave to those government officials as much discretion and elbow room as possible to make the necessary decisions because those officials inherently feel that they will make the best decisions possible. Others of us may not have such a high degree of confidence in government officialdom.

APPENDIX A
MAJOR U.S. IMPORT REGULATIONS

TYPE	STAT	AGENCIES INVOLVED	TIME LIM.	CIT CMPL	PUB. HEAR	REAS DET.	JUD. REVIEW
(1) Escape Clause	TA § 201	ITC/Pres.	Y	Y	Y	Y	N
(2) Anti-Dumping	TAA § 101	ITA/ITC	Y	Y	Y	Y	Y
(3) Countervailing Duties	TAA § 101	ITA/ITC	Y	Y	Y	Y	Y
(4) Complaints vs. Foreign Govt. Actions	TA § 301	STR/Pres.	Y	Y	Y	Y	N
(5) Unfair Trade Practices	TA § 341 (T § 337)	ITC/Pres.	Y	Y	Y	Y	Y
(6) Non-market economy safeguards	TA § 406	ITC/Pres.	Y	Y	Y	Y	N
(7) Textile	AA § 22	Pres.	N	N	Y	Y	N
(8) National Security	TEA § 232	Cmc/Pres.	Y	Y	Y(ia)	Y	N
(9) Dairy Prod.	AAA § 22	Ag/ITC/Pres.	N	N	Y	Y	N
(10) Meat	MIA § 1	Pres.	N	N	Y(pc)	Y	N
(11) Tax. Meas. (Houdaille)	IRC § 103 (a)(7)(D)	Pres.	N	N	N	N	N
(12) GSP	TA Tit.V	Pres.	Y	N	N	Y	N
(13) Voluntary Restraint Agreements	TEA § 352 AA § 204	Pres. Pres.	Y Y	N N	N N	N N	N N
(14) Gen. Customs (tariffs)	T § 516	Treas.	Y	Y	Y	Y	Y

Abbreviations:

T = *Tariff Act of 1930 as amended*
TA = *Trade Act of 1974*
TAA = *Trade Agreements Act of 1979*
TEA = *Trade Expansion Act of 1962*
MIA = *Meat Import Act of 1979*
ITC = *International Trade Commission (of U.S.)*
ITA = *International Trade Admin. (Dept. of Commerce)*
IRC = *Internal Revenue Code*
AA = *Agricultural Act of 1956*
AAA = *Agricultural Adjustment Act of 1933*
Pres = *President*
pc = *public comment*
ia = *"if it is appropriate"*
Y = *Yes*
N = *No*
Ag = *Agriculture Department*
Cmc = *Commerce Department*
Str = *U.S. Trade Representative*

Column headings:

STAT	=	*statutory reference, as amended*
AGENCIES	=	*agencies that administer*
TIME LIM.	=	*statutory time limits*
CIT. CMPL.	=	*complaints citizens can initiate*
PUB. HEAR	=	*public hearings provided in statute or regulation*
REAS. DET.	=	*reasoned determination must be published*
JUD. REVIEW	=	*judicial review provided by statute*

The first five procedures have been analyzed for costs since they involve legalistic procedures and significant private party initiated proceedings each year. As explained in the text, normal customs procedures are omitted. Numbers 6 and 8 have averaged less than one case per year. The column headings refer to explicit statutory or regulatory procedures, but there are also implicit possibilities (such as constitutional challenges in court) that may occur in some cases.

(1) *The Escape Clause:* This law (Trade Act of 1974, § 201, 19 U.S.C. § 2251 (1982)) provides that when increasing imports are the substantial cause of serious injury to a competing U.S. industry, the President can proclaim certain limitations regarding those imports for a temporary period not to exceed five years.

(2) *Anti Dumping:* This law (Trade Agreements Act of 1979, § 101, 19 U.S.C. §§ 1673-1677 (1982)) provides that if imports into the United States are priced at a level that is below the price at which those goods are sold in the market of the producer, then the difference (after adjusting for a number of different circumstances) can be offset with an additional tariff duty at the border of the United States.

(3) *Countervailing Duties* (Trade Agreement Act of 1979, § 101, 19 U.S.C. §§ 1671-1672, 1675-1677 (1982)): These duties can be assessed at the border of the United States in addition to normal duties to offset any subsidies that the imported goods enjoy.

(4) *Complaints Against Foreign Government Actions:* Trade Act of 1974, § 301, as amended by the Trade Agreements Act of 1979, 19 U.S.C. §§ 2411-2416 (1982), sets forth a procedure by which American firms and citizens can complain to the U.S. government about foreign government practices affecting U.S. exports or other trading actions. The United States is obliged to study the complaint and, if it finds the complaint meritorious, to undertake negotiations and other actions to persuade the foreign government to change its practices. Ultimately it gives authority to the President to retaliate by various measures.

(5) *Unfair Trade Practices* (Tariff Act of 1930, § 337, as amended by the Trade Act of 1974, § 341, 19 U.S.C. § 1337 (1982)): This is a very generalized "unfair trade practices" provision, by which American companies can complain to the International Trade Commission that imports are involved in unfair trade practices such as patent or copyright infringement, monopolization, etc. If the ITC finds the complaint meritorious, it can order a ban on all imports of those goods, subject to a presidential override.

(6) *Non-Market Economy Safeguards Measure* (Trade Act of 1974, § 406, 19 U.S.C. § 2436 (1982)): This is an alternative escape clause procedure, with slightly softer criteria for the causal link between increased imports and serious injury, designed for imports from nonmarket economies. Cases average less than one per year.

(7) *Textile Import Barriers* (Agricultural Act of 1956, § 204, as amended by 7 U.S.C. § 1854): The United States, like many other textile importing countries, takes advantage of the International Multifiber Agreement in the context of GATT, Agreement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840, to negotiate a series of bilateral export restraint arrangements with textile supplying countries.

(8) *National Security:* A U.S. statute (The Trade Expansion Act of 1962, § 232, as amended by Trade Act of 1974, § 127, 19 U.S.C. §§ 1862-1863 (1982)) provides that complaints can be made to the U.S. government that imports are harming a U.S. industry to the extent that would endanger national security. This requires an investigation of the matter by the Commerce Department and a report to the President. The President is authorized to take import restraining measures if he finds them justified for national security purposes. Only petroleum products have actually benefitted from import restraint action, although a number of other complaints have been made and turned down. (Complaints average less than one per year.)

(9) *Dairy Product Import Restraints* (Agricultural Adjustment Act of 1933, § 22, 7 U.S.C. § 624 (1982): Originally § 22 of the Agricultural Adjustment Act of 1933 provided for quota-type restraints on a number of agricultural products. For the most part the quota restraints that remain are those involving dairy products such as cheese.

(10) *Meat Imports* (Meat Import Act of 1979, § 1, 19 U.S.C. § 1202 (1982)): These can be restrained under provisions of agricultural legislation that try to set limits on the imports of meat based on projections of domestic supply and demand.

(11) *Tax Measures (Houdaille* 47 Fed. Reg. 20411 (1982) (Discussion of complaint)): An unusual complaint was brought several years ago by domestic machine tool companies against imports from Japan, arguing that the imports have been favored with various unfair Japanese government practices, including subsidies, and that therefore under the Internal Revenue Act of 1971, § 103, 26 U.S.C. § 48 (a)(7)(D) (1982), certain tax advantages to U.S. companies for purchasing such imported machines should be denied. The complaint was turned down.

(12) *Generalized System of Preferences:* Under Title V of the Trade Act of 1974, 19 U.S.C. §§ 2461-2465 (1982), many goods from most developing countries can be imported tariff-free into the United States. The list of goods, as well as the list of countries that can benefit, can be changed from time to time by the President.

(13) *Voluntary Restraint Agreements: (e.g.,* Trade Expansion Act of 1962, § 352, 19 U.S.C. § 1982 (1982), Agricultural Act of 1956 § 204, 7 U.S.C. § 1854 and others): Occasionally governments that are exporting to the United States will be willing "voluntarily" to restrain the level of those exports. In general, U.S. law prevents the U.S. government from entering into agreements about this (the exceptions are textiles and agricultural goods), but sometimes foreign governments will restrain themselves without an explicit agreement with the U.S. government, although generally with a favorable nod from the U.S. government.

(14) *General Customs Tariffs* (Tariff Act of 1930, as amended, § 516, 19 U.S.C. subtitle I (1982)): The United States, like other countries, has a general customs tariff law that requires an entry form to be made for each import. The tariff charge varies from item to item, according to an elaborate tariff schedule. Most tariffs have been reduced significantly under the various negotiating rounds of GATT.

APPENDIX B

COST ESTIMATES OF U.S. IMPORT REGULATION

1. U.S. Government Costs - Estimates*	MILLIONS OF DOLLARS Budget		
Name of Agency	1982	1983	Annual Estimate
International Trade Commission	17.6	19.8	20
Intl. Trade Admin. (Commerce, Import reg.)	8.1	N/A	10
Office of U.S. Trade Representative	9.2	10.5	11
Bureau of Econ. & Bus. Affairs, Dept. State	N/A	2.23	2.5
Annual Total	34.9	32.53	43.5

2. Private Costs: Extra-Firm (Attys, etc.)**	Approx.***	
Type of Action	No. per Yr.	Total Cost (Mil.)
Escape Clause (201-203)	9	$4.125
Anti-dumping: New	50	$23.750
AD - annual reviews	109	$13.625
Countervailing Duty - New	40	$16.300
CV - annual reviews	81	$10.125
Section 337	40	$28.000
Section 301	6	$1.050
TOTAL	335	$96.975

3. Private Costs: Intra-Firm (Guess based on extra-firm costs)	$96.975

4. OVERALL TOTAL ANNUAL ESTIMATE OF COSTS	$237.450
TOTAL VALUE OF IMPORTS - 1983 ($ Billion)	254
COSTS AS A PERCENT OF IMPORTS	0.0935%
COSTS AS A FRACTION OF IMPORTS	0.000935

NOTES: * Amounts are overstated since little attempt has been made to disaggregate for various functions within a unit. On the other hand, as explained in the text, agencies with a very small amount of activities in this area are omitted.

** Estimates of total costs are not simply a multiple of cases times average cost per case, but involve estimates of the number of cases which are appealed, go on for further procedures (injury test), etc.

*** Based largely on 1983 filings, with averages of prior years used to estimate an annual number if 1983 figures seemed unrepresentative.