

INTERNATIONAL ECONOMIC PROBLEMS AND THEIR MANAGEMENT IN THE 21ST CENTURY

*John H. Jackson**

I. INTRODUCTION

"In the long run we will all be dead," say some economists, and to try to peer 40 years into the future is in many ways the "long run." It is longer than the period since World War II and longer than the period between World War I and World War II. What dramatic contingencies could occur in that period of time we can only guess. Yet occasionally, to stretch one's imagination to a "farther horizon," although hazardous as prediction, can have the useful result of shedding light and perspective on the problems of the "shorter run." In this short essay I purpose to focus on one aspect of international affairs, namely, the problems of economic relations.

At a time of growing economic interdependence and profound stresses upon traditional economic relations, (oil price increases, developing country poverty problems, fluctuating exchange rates) the institutions established at the end of World War II for managing international economic problems are undergoing fundamental changes. They are increasingly failing to cope with current perplexities. A major round of trade negotiations has just been completed, and if implemented as contemplated, the results of this negotiation will substantially increase the responsibilities of the international trade "system," while hardly improving its institutional structure, indeed possibly reducing the effectiveness of that system. Although not likely, it is certainly possible that the hard work of the "Tokyo Round" trade negotiators could be at least partly defeated by the defects in the international legal and constitutional structures for implementing those results.

Thus there is plenty of reason at this juncture to pause and reconsider some of the international institutions and techniques for resolving international economic problems. Indeed, the next decade may be crucial to what occurs for the three decades thereafter, just as the 1944-1950 period established the overall

*Professor of Law, University of Michigan Law School.

"Bretton Woods" monetary-trade system that is now, after 30 years of remarkable success, crumbling. Before turning our sights to the horizon, however, it is necessary to briefly examine the situation today. What is it about the "structure" of the international economic system that appears deficient? What are the current and foreseeable new problems which challenge that structure?¹

II. CONSTRAINTS ON REFORM VERSUS THE NEED FOR REFORM

More than most people realize, the legal-institutional structure of international relations influences the development of policy and constrains the choices or options available to policy makers. Often these legal-institutional constraints are overlooked by observers and scholars, although they may be uppermost in the mind of the governmental officials responsible for developing or implementing a proposal.

When I use the terms "legal-institutional structure" or the "legal system" of international economic affairs, I do not confine that concept to *international* institutions or structures. The various *national* governmental and constitutional structures, at least those of the major participants, have an important impact on the capability of the international "structure" to cope with problems. The total "system" involves a complex interaction of national and international law. For example, in the United States the tension between the Executive and the Congress is an important feature of the Constitution. Congress has explicit and special constitutional competence over "commerce," both interstate and foreign. The authority of the President and the executive branch is often circumscribed by the limitations of congressionally delegated authorities (such as in the Trade Act of 1974), and the limitations effectively eliminate certain policy options from consideration.

This interplay between national and international structures can be further illustrated by several examples. The General Agreement on Tariffs and Trade (GATT) as the central interna-

¹ See generally the following works of the same author: *WORLD TRADE AND THE LAW OF GATT* (1969); *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (1977); *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93 (1978); *The Jurisprudence of International Trade: The DISC Case in GATT*, J. 72 AM. J. INT'L L. 747 (1978); *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1 (1979).

tional institution for regulating international trade, drafted in 1947, has been greatly influenced by the United States Constitution. United States executive branch negotiators at the 1947 Geneva conference contemplated that the President would accept the GATT for the United States without submitting it to Congress or the Senate, arguing that his Presidential and delegated authority in the then existing trade act, authorized this procedure. By contrast it was recognized that the International Trade Organization (ITO) then being drafted at the same time, would require United States Congressional or Senate approval (which never occurred). Many members of Congress at that time even challenged the President's authority to accept GATT, and these challenges influenced the negotiators to structure the GATT as merely a "reciprocal trade agreement" which did *not* have the appearance of an international organization, to keep the GATT within the borderlines of Presidential authority. Such were the origins of a longlasting congressional hostility to GATT, and to an early reluctance on the part of the United States to see GATT develop into a more complete organization and secretariat.

Another example can be seen today in the constitutional developments of the European Economic Communities. The struggle for power between the "Commission" and the "Council," as well as the diligence of some European Community member state governments to prevent any further reduction of "national sovereignty" through exercise of community institutional power, created an acute "conservatism" as to what the European Community was willing to accept concerning institutional reform in the Tokyo Round negotiations.

Despite these constraints against change, many anomalies and weaknesses in the international economic system exist. For example, it is odd but true that the GATT itself has never entered into force. It is only applied "provisionally" by the 1947 Protocol of Provisional Application. This protocol exempts from certain GATT rules "existing legislation" of member nations, thus creating the so-called "grandfather rights" which have been the source of some tension and acrimony between nations.

Even though the GATT was not intended to be an international organization, the failure of the ITO to come into being forced the GATT to evolve into the central organization for trade which it is today. Yet in the GATT agreements there is manifested little attention to important institutional questions, such as secretariat services, sub-bodies, and voting. The GATT has been a thirty year

exercise in improvisation, most of it surprisingly successful, but in the fast changing interdependent world of today, many institutional defects are becoming obvious. The GATT began as a relatively homogeneous group of twenty-two nations, but it now has well over eighty members (more are joining as this is written), with wide disparities in economic status (the rich and the poor), stage of economy (manufacturing or primary good producing), type of economic structure (free enterprise to socialist), type of government (parliamentary democracy to military autocracy). The ability of any organization to withstand the cataclysmic changes of the last thirty years would be doubtful in any case, but with detailed rules of conduct that have become out of date, and a procedure for amendment that has become virtually unuseable, the GATT is now proving particularly deficient. Improvisation continues, and devices (such as separate "codes" or agreements on special topics) are found to avoid the GATT defects without formally amending GATT. In some cases the improvisation can only be characterized as simple non-compliance with the rules, a direction that always has its own costs.

The techniques of dispute resolution in the GATT also leave much to be desired. Drafted in an ambiguous manner, the original GATT provisions regarding dispute settlement depended on a certain underlying consensus regarding the assumptions of international trade policy—a consensus that does not now exist. Improvisation has developed a more elaborate system of dispute procedures, with the use of supposedly neutral third-party "panels," yet the whole procedure has been increasingly criticized as being "politically tainted," too slow, with confused objectives (adjudication or conciliation?).

III. CONSIDERATIONS FOR REFORM

What then are the possibilities for future reform of this legal system or structure for international economic affairs? Changes will need to take account of certain realities of international life, some of them leading in seemingly contradictory directions. One such reality is the growing economic interdependence and the consequent decline of "meaningful national sovereignty." National decisions on even the most essential domestic governmental issues, such as fiscal or monetary policy (tax and interest rates) can impinge on or be limited by the economic activities of other nations.

Another reality is the current lack of consensus on how international trade and other economic affairs should be structured. Should the stress be upon "private enterprise decisions" with the international system designed to limit governmental interference with these (a conception which underlay the GATT), or should the international system be viewed more as a way for governments to effectively regulate or guide international economic affairs (e.g. to minimize unemployment, or to aid less developed countries)? Nations are not agreed on the fundamental policy goals for an international economic system and consequently it is likely that any reforms in the foreseeable future must be based on "neutrality" as to these issues. The system must be designed to allow short term reversible experimentation, to promote the necessary compromises between the widely divergent policy preferences, and to assist in the process of identifying the emerging problems and the policy options realistically available to deal with them.

Yet another reality appears to be that traditional diplomatic techniques for handling divergent international policy preferences in connection with economic affairs are not very effective. If traditional diplomatic techniques are viewed as including secrecy, behind-the-scenes corridor bargaining between officials who have the authority to make a "deal" and deliver on it, "papering over" differences or deliberately using ambiguity to achieve apparent consensus when real consensus can not be easily achieved, operation of the system by elites relatively unencumbered by messy democratic processes, then these processes may be particularly inappropriate for economic affairs, especially on behalf of a democratic nation which emphasizes private enterprise economic decision making. That is not to say that these techniques may not be effective and necessary for other subject matters such as military alliances, arms control, and certain major political initiatives. As to economic affairs, however, the international decisions will often touch more quickly and directly the lives of ordinary private citizens. These citizens appropriately make their views known to their parliamentary representatives who have some obligation to try to persuade their government to take account of these constituent views. Increased trade may bring great aggregate benefits to a society but may cause real family hardship for a few citizens in that society, and fairness suggests that the few should not be sacrificed for the diffuse benefit of the many without some compensating benefits for those who suffer. In addition, where private economic decision making is emphasized, the decision maker

wants to know and to be able to rely on governmental decisions. Secrecy of government action is harder to maintain because individuals will be affected and come to learn about the government action, and because private decision makers need to know about the actions and therefore are willing to spend the time and effort necessary to do so. In the United States, executive officials and diplomats often cannot implement an international bargain without congressional approval or involvement. This means that "power bargaining" becomes difficult or inappropriate, and non-secret.

In considering reform or change of the international economic system, two basic groups of institutional issues must be considered: 1) the process of making new rules (and keeping old rules up to date); and 2) the process of applying the rules (usually in the context of a procedure for the resolution of disputes about the rules). Under the existing international system, particularly that of GATT, rule making is difficult. One can roughly divide rule making techniques into those which are based on voting or quasi-parliamentary procedure, and those which are based on negotiation or consensus building procedures. A well balanced and neutral procedural system, presumably would involve both types of procedures.

With respect to voting, there is an enormous attachment to the principle of one-nation-one-vote. Yet there is increasing realization on the part of thoughtful observers that one-nation-one-vote procedure can encourage irresponsible actions, and actions which have little likelihood of real effect. Without going into details about the arguments on these procedures, it appears very unlikely that those countries which have real power in the world will ever be willing to delegate any of their real power to an international body, if such body relies too heavily upon a one-nation-one-vote system. Consequently, the negotiation or consensus techniques for the development of rules will likely continue to be preeminent. This has certainly been true in the GATT, where new rules are generally formulated in the context of major negotiating rounds. The irony of these realities, is that often a negotiating technique gives countries with significant power even greater leverage in the negotiation than would be available with some sort of voting procedure which at least tried to balance the impact of real power with the needs of less powerful populations in the world.

With respect to rule application, and particularly focusing upon the problem of procedures for the resolution of disputes, it seems plausible to divide dispute resolution techniques roughly into two types: settlement by negotiation with reference (explicitly or implicitly) to relative power status of the party; or settlement by negotiation with reference to rules to which both parties have previously agreed. For example, two countries, A and B, which have a dispute may negotiate about the resolution of that dispute. The key question, however is what the negotiators feel are their "bargaining chips." In the absence of a fair third party adjudicatory type procedure, the tendency is for the parties to bargain for settlement with reference to the relative power position of the countries. Foreign aid, military maneuvers, import restrictions on key goods, potential export subsidies, would all figure in the negotiation. A small country would hesitate to challenge a large one on whom its trade or defense depends. Implicit or explicit threats could be part of the negotiating techniques. Domestic political influences would probably play a greater weight on the approach of the respective negotiators in this system particularly on the negotiator for the more powerful party.

On the other hand, a second technique suggested—negotiation with reference to agreed rules—would see the negotiators arguing about the application of a rule (was the party in fact obligated under treaty rules, and did its activity breach those rules?). Again negotiation would be the primary method of settling most disputes, but under a rule orientated system, the negotiators would presumably realize that if their negotiations broke down, their dispute would be submitted to an impartial third party arbitrator or adjudicatory body whose decision would be binding or at least very influential. In such a system the negotiators would be bargaining under the influence of their respective predictions as to what the third party decision might be. This would tend to promote compliance with the rules, and therefore reinforce the predictability and stability of the rules in the system.

In a country like the United States, when one considers changes in the international structure for economic affairs, attention must also be given to the national structure and how it relates to the international system. There has been some worry that in the current international trade system, the United States political apparatus, with its democratic procedures, its built-in checks and balances tension between the Congress and the Executive, its

legalization of many government affairs (public hearings, judicial review, etc.) coupled with its heavy reliance on private enterprise decision making, may render the United States government at a disadvantage when it comes to protecting the essential national economic interests of the United States in that international system.

In Europe (and even in Japan) one can perceive the development of trends that may lead in directions similar to those which have occurred within the United States. For example, within the European Community there is considerable intra-community maneuvering and struggling for power, between the Commission and the Council, and between the member states and the Community institutions. The European Court of Justice stands in a central position in this struggle, and in many ways the opinions of the Court of Justice look remarkably similar to some of the historic opinions of the United States Supreme Court as it grappled with issues of power struggles between parts of the United States governmental system. Furthermore, by placing the Court central to these processes, there is developing in Europe a tendency for decisions to be more heavily influenced by predictions as to what the Court of Justice will decide and thus a tendency to establish rules, directives, and regulations in a highly legalistic manner. Even more striking is the fact that these European Community tendencies seem to deviate substantially from traditional practices followed within many of the national member governments.

The basic point to be made is that in considering the reform and change of the international system for resolving international economic problems, careful consideration must be given to national governmental structures which relate to this international system.

IV. THE FUTURE

Can anything more be said about the future directions of the international system for economic affairs? The answer to that question, as is so often the case when one tries to deal with broad and long range trends, is possibly yes, and possibly no. Any attempt to predict with any degree of detail what a structure for international economic affairs might be forty years from now, obviously has considerable risks.

Apart from trying to develop detailed plans and proposals, however, it does appear there are some general ideas which could

be suggested. These ideas are not necessarily new, since they draw on thoughts and discussions which have gone on for a number of years.

It seems to this writer that an international structure for economic affairs which is "rule orientated" dovetails best with democratic national governmental structures which have parliaments with real power, and is more compatible with those economic systems which depend on private enterprise decision making, while at the same time not being necessarily inconsistent with governmental structures that are otherwise organized.

Important attention must be given to rule making and to rule application. As to rule making, it seems likely that the nation participants will want to preserve a high degree of control over the development of new rules, and that no nation will want to submit itself to a substantive rule on international economic affairs without its consent. This means that "majority rule" techniques are unlikely candidates for a successful system of developing most new rules, at least those that seem to be a significant departure from previous practice. Consequently the international structure will likely continue to be primarily based on rules developed through negotiation and consensus. Nevertheless, the international structure should be designed so that an institution can develop proposals, suggest alternatives, identify the essential policy differences among nations, and perhaps design experiments to which nations could adhere for limited periods of time, or compromise positions which would balance the interests of various parts of the world.

A structure for rule making should, however, establish a more realistic voting procedure for limited use, designed to recognize real power to the extent necessary to promote rules which have a greater chance of becoming effective, while protecting the important interests of the less powerful. It should also be designed to encourage the confidence of powerful nations so that gradual delegation of important issues to this procedure can occur over time.

An international system should be more specific with respect to dispute resolution. There are various proposals which could go a long way towards enhancing the "rule orientation" of the international legal system, thus achieving many of the benefits implied in the discussion above.²

² See Jackson *Governmental Disputes in International Trade Relations—A Proposal in the Context of GATT*, J. WORLD TRADE L. (submitted and accepted for publication).

The essential underlying question of all this speculation on a future international economic structure, however, is what might be termed the "federalism" question. This is the question as to what level of government should make certain decisions. There is a continuum of governmental institutions, from the very local, through the city, then state, then nation, and finally international. In designing governmental structures, this continuum must be considered. How can decision making be as "local" as possible, where it is more closely in touch with the people who are affected, and can be influenced by them? Some decisions must be made at the highest level i.e., international, because divergencies between sub-units defeat the whole purpose of the decision making. Up to now we have been basing most governmental affairs on the nation state principle, but some nation states have great experience with "federalism" and have had to grapple with the ideas reflected above. As greater economic interdependence forces greater international coordination of policy and the development of more international rules, this "federalism question" will loom larger. There is a spectre of a remote international elite bureaucracy making detailed rules as to what a government can subsidize or regulate with respect to product characteristics affecting consumer health, air pollution and the like, is a spectre which inhibits the development of necessary international coordination. An international system must be designed which will least restrict the lower level governmental opportunities to pursue reasonable policy choices of its constituents, while at the same time offering an opportunity for international coordination and compromise on those issues where the absence of compromise can lead at best to a serious deterioration of welfare in the world, and at worst to conflagration like those which have plagued the world twice this century.