BOOK REVIEW

UNITED STATES FOREIGN TRADE LAW

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United States Foreign Trade Law, by Bruce E. Clubb. Boston, Massachusetts: Little, Brown & Co., 1991. $295.00 (hardcover).

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Bruce E. Clubb set for himself—and has largely accomplished—an extraordinary task. He has brought between two (or, more accurately, four) covers the entire history of U.S. government regulation of international trade. One would be hard-pressed to locate another work, even on the shelves of the Library of Congress, that excerpts both the South Carolina Nullification Ordinance[1] and the Omnibus Trade and Competitiveness Act of 1988[2].

Yet the ambition of Mr. Clubb's project bore the seeds of its own limitation. Two of the three constituencies the author hopes to address[3] will remain dissatisfied. Because of his scrupulous avoidance of anything that smacks of argument, private practitioners and in-house counsel may use Mr. Clubb's volumes as bibliographic aids, but they will not find answers to questions about how a brief should be written, how a case should be framed, or how an opponent is likely to behave.

To sum up: the achievement that this large work represents is testimony to the diligence and the thoughtfulness of its author. Yet the book is as likely to frustrate as it is to satisfy a reader, whatever her point of entry.

I.

United States Foreign Trade Law comprises two dense, somber tomes. The first is text: Clubb's narrative of the origins, evolution, and current content of the statutory law of the United States affecting foreign commerce. It is heavily (some would say ponderously) footnoted, more often than not with extensive verbatim

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1. 2 BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW 53 (1991).
2. *Id.* at 334-44.
3. 1 *Id.* at xi.

citations to documents excerpted in Volume II.[4]

The second volume is reference material upon which the author of Volume I relies, and to which the hyperdiligent reader will want access. Some of Volume II is statutes and caselaw that every U.S. law library (or computer database) already makes available. The rest is more obscure—and more interesting—documentation that acknowledges, even if it does not set out to demonstrate, that trade policy is an important part of broader political thinking.

Although more recent statutory texts are readily accessible outside these volumes, older ones are not; nor are the historical documents that Clubb compiles and to which he makes frequent reference. Clubb's compilation of these documents under one cover makes Volume II particularly helpful. Yet it is far from clear that the reader will use the volumes together. Volume I is to be read; Volume II is to be consulted.

Volume I begins with a painstaking synopsis of U.S. statutory law, from the time of independence to 1989. Clubb makes a perfunctory effort to organize this material along subject-matter lines, but in fact it is a simple and uncritical recitation of the chronological record.

Indeed, whenever Clubb strays from a straightforward presentation of his case, the book becomes hard to follow. Deviations from the historical record frequently lead to repetition. There are many cross-references to other portions of the book, which only add to the byzantine structure of the text.

The documents reproduced in Volume II are organized according to the parts and chapters of Volume I. Thus, for example, the chapter on antidumping law (Chapter 21) is documented by excerpts from statutes from 1916 through 1988, legislation proposed in 1919, the First International Antidumping Code, and the GATT agreement emerging from the Tokyo Round.

This means of organization makes the material in Volume II both useful and accessible. One can in moments trace the history of statutory language, as well as see how the contents of international compacts get reflected in U.S. law.

A final note on organization: Volume II contains the index for the entire work. A preferable arrangement would be to have

4. Yet, annoyingly, the footnotes in Volume I do not include page references to Volume II.

them separately indexed. It is very difficult to find discussions of particular topics in the first volume using only the chapter headings as a guide.

II.

The book suffers from two main flaws: it eschews analysis in favor of simple narrative, and it adopts an uncritical tone about U.S. law and policy when criticism seems invited, even compelled, by the subject matter. For example, there is no acknowledgement that aspects of U.S. foreign trade law might be GATT-illegal, or that our trading partners might be justified in their complaints that the U.S. does not always play fair.

Potential examples of both points abound. Nonetheless, the careful avoidance of argument entails a passive acceptance of what are really controversial propositions, without a squawk. Thus, we are told that the Constitution (at Article I, section 1(1)[5] "gives the President the power to conduct foreign affairs."[6] This is repeated in other guises: *e.g.*, "the President [has] constitutional authority to enter into treaties."[7]

Of course, the Constitution does *not* "give[] the President the power to conduct foreign affairs"—at least not explicitly—and the clause to which Mr. Clubb apparently refers actually grants to the President only "the executive power." Authors and courts have *inferred* from this grant a general authority to run the foreign policy of the United States (others find the same power in other constitutional provisions, such as the Presidential prerogative to appoint ambassadors in Article II, section 2(2)), but the point is that a reader of Mr. Clubb's book, especially a foreign reader, may not appreciate that there is a hotly contested issue here.[8]

Similarly as to treaties, the book contains a narrative account of the complex interplay between the executive and the legislature that has underlain the last forty years of GATT rounds. The President must have tariff-lowering authority granted by Congress because otherwise—and however silly and cumbersome it may seem today—Congress has the exclusive right to control and to set the tariff on every single item that enters this country. The Constitution mandates this at Article I, section 8(1). Likewise, no

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5. *Sic.* Mr. Clubb probably means CONST. art. II, § 1, cl. 1.
6. 1 CLUBB, *supra* note 1, § 1.6.
7. *Id.* § 3.7.1 n.6.
8. *See, e.g.*, Louis Henkin, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 17-68 (1990).

treaty can become the law of the land without the advice and consent of the Senate, nor can the President alter duty rates without congressional authority before the fact or ratification after. So it just will not do to say that express statutory grants to the executive of the power to reduce duties are superfluous or symbolic. Not only is this wrong as a matter of constitutional law, but it fails to acknowledge the vexed and complex nature of the disagreement between the branches, and among scholars, about this subject throughout the whole life of the Republic.

Some regular readers of textbooks on trade law apply a litmus test: they first consult the introduction to the section on dumping, and then review carefully the coherence of the author's presentation of why dumping is a bad thing. Here is Mr. Clubb's first discussion, in full:

> Dumping in its purest form is the practice of selling for export at a lower price than the price charged in the home market. It has been argued that this practice should be discouraged because it tends to disrupt the market in which the dumping takes place. Thus it is argued that a foreign producer, protected by high tariffs at home, sells for a high price in the home market and then sells for export to the United States at a much lower price. Once the U.S. competitors have been driven out of business, it is argued that the foreign producer would then raise the export price.[9]

This is not helpful, not only because it does not explain the point, but because it does not even suggest that the problem of dumping admits controversy or invites skepticism.[10] Is the hypothetical threat of dumping (to drive "U.S. competitors" out of business) empirically verifiable? Is it still dumping if the exporter's market is not shielded by high tariff walls? Is dumping simply an instance of predatory pricing, which can be engaged in only by market-dominating firms which can afford short-term losses as the price of devastating their competition?

The reader is not persuaded that dumping is unfair, anticompetitive, or destructive of free trade. He is simply invited, or expected, to assume these things. Yet without at least some discussion of the underpinnings of the law, it will be very hard for a novice, relying on Mr. Clubb's work, to write a brief urging that dumping penalties be (or, for that matter, that they not be) imposed upon a violator of the phantom proscription.

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9. 1 CLUBB, *supra* note 1, § 6.7 (citations omitted).

10. That three of the four sentences are in the passive without subjects does not make the message any more clear.

Perhaps complaints that the book is far too tolerant and accepting of U.S. law *de lege lata* are merely specific instances of the general proposition that it is too tolerant and not sufficiently critical overall. Given the checkered record of our country in international trade disputes, there is another opportunity missed here.

The extensive discussion of section 301 of the Trade Act of 1974 and its progeny[11] hints that the President is empowered to take action "which may itself violate the GATT," but it does not say that there is anything wrong with this, much less that U.S. unilateralism could threaten to undermine the entire multinational trading system. If anything, Mr. Clubb's citation to the legislative history of the 1974 Act, which describes the GATT as "an outmoded international agreement initiated by the Executive twenty-five years ago and never approved by the Congress,"[12] might be read as attempting to excuse any international illegality as somehow justified by municipal political concerns. This argument can, of course, be made coherently. But the point is that it is an argument, not a self-evident truth, and as an argument, it must be made and defended, or rebutted.

Section 301, and especially its offspring "Special 301" and "Super 301," reserve to the United States the roles of prosecutor, judge, and jury. Those provisions are the legitimate target of scrutiny and criticism. They can be and have been defended, but whatever else is true they do not merit the uncritical conclusion that "[w]here the United States cannot achieve agreement on standards of conduct in the GATT, however, it enforces the standard of conduct on a case-by-case basis under section 301."[13]

In its Report on United States Trade Barriers and Unfair Practices 1991,[14] the Commission of the European Communities lists over seventy provisions of U.S. law that are felt to be GATT-illegal or otherwise inconsistent with the rules of international trade. Granted that Mr. Clubb's book is meant to be an explanation and not an indictment of U.S. trade law, it is misleading nowhere to acknowledge at least that there is another side to the story.

It is just not the case that the history, or even the recent history, of U.S. trade law and policy demonstrates a concerted effort

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11. 1 CLUBB, *supra* note 1, §§ 11.15-.21; 2 *Id.* at 402-447.
12. 2 *Id.* § 11.15 n.6.
13. *Id.* § 11.23.
14. Published by the EC Commission in March 1991, the Report bears the telling subtitle "Problems of Doing Business with the U.S."

to "free up trade," as Mr.Clubb frequently asserts[15], again without argument. Yet the possibility that the United States bends or breaks the rules, or that it uses its considerable heft to obtain exceptions to them, is not discussed. Even clear cases—such as the refusal of the United States to give most-favored nation treatment (until recently) to Czechoslovakia—are not presented as antithetical to the multilateral trading system.

III.

Mr. Clubb's book is valuable and useful for its concentration of a vast array of materials in a single location. Its author is owed the gratitude of practitioners and students, both American and foreign, for having carried out this task that was long overdue. Yet one wishes that he had set out to do more. The book and its readers would have profited immensely from a larger dose of Mr. Clubb: his critique, his analysis, his commentary, and the reflection of his own experience, so intimately connected with the foreign trade laws of the United States. That, however, is a different book, and when that book is written, it will be a masterpiece.

15. 1 CLUBB, *supra* note 1, § 11 pt. B.