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Four Dichotomies

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Overview: Four Dichotomies in American Trade Policy

PROFESSOR HAROLD HONGJU KOH: Let me begin by thanking the entire staff of the *Yale Law & Policy Review* for everything it has done to make this conference possible. It bears repeating that this conference has been entirely conceived, planned, organized, and now executed by Yale law students, with only minimal assistance from the faculty and administration.

If you have been watching the Bork confirmation hearings and counting the number of present and former Yale law professors who have been testifying for and against Judge Bork (including Judge Bork himself), you are well aware that the New Haven-to-Washington axis remains alive and well. At a minimum, the *Yale Law & Policy Review* must be congratulated today for having single-handedly equalized the traffic flow in the opposite direction. The *Review's* efforts—and particularly the hard work of Editor-in-Chief Rhonda Brown and the Trade Symposium team—have cast off “positive externalities” (as we like to say around here) on many in our community. (I understand, for example, that Business Express’ 3:30 flight to Washington, D.C. this afternoon will be filled entirely with conference participants, and that Pepe’s Apizza was nearly overwhelmed last night by hungry panelists.) But most of all, the *Review's* efforts have redounded to the benefit of all of us here in the Law School, University, and New Haven communities who are interested in the present and future of American trade policy.

The *Review's* editors have asked me to provide a brief overview of today’s conference and how today’s four panels relate to one another. Whether your perspective is principally academic, or that of an insider integrally involved in the trade policymaking process (as so many of our panelists are), or that of an interested lay person trying to understand recent trade developments, most of you probably need no convincing that this conference arrives at a moment of extraordinary ferment in American trade policy.

Any skeptics among you need look no further than the “Gephardt for President” commercials that have been appearing on the evening news—or further even than the Toshiba television sets on which you may have been watching those commercials—to recognize that trade questions have recently moved from the back-burner

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to the very forefront of our national political debate. In just the last few months, we have watched as the U.S. monthly merchandise trade deficit hit a record \$16.5 billion in July 1987 (with imports measured on a cost-insurance-freight basis). We have watched the dollar fall below 140 yen and the Group of Seven countries pour some \$70 billion into the international currency markets to support the dollar at its current levels.¹ We have followed the dramatic heightening of trade tensions between the United States and Japan that followed America's imposition upon Japan of semiconductor tariffs this summer. These tensions have grown so severe that they have now begun to manifest themselves in curious ways, for example, by the ceremonial bashing of a Toshiba radio on the Capitol lawn and by Eastman Kodak's request this fall that the University of Rochester's Business School rescind its acceptance of a Japanese employee of Fuji Film.

Moreover, we have watched as 199 congressmen from nearly 20 standing House and Senate Committees have started to confer on a new omnibus trade bill, a bill that some observers now fear will become the Smoot-Hawley Act of *nontariff* barriers.² If you have not yet seen it, that legislative package is so thick that it is currently being held together with rubber bands rather than staples. At the same time, we have witnessed labor unrest in South Korea, one of our most controversial trading partners, the passage by the House of Representatives of a textile bill that may become the subject of a presidential veto, and the appointment of a new Secretary of Commerce, Mr. C. William Verity, Jr.

This past week, we watched as Canadian negotiators walked out of historic talks to conclude a United States-Canada Free Trade Agreement, a pact designed to liberalize some 7% of the world's trade, in the face of an October 4th deadline that Congress had set for submission of a final draft.³ We have witnessed the formal launching last fall of the eighth round of multilateral trade negotiations under

1. By year's end, the dollar had fallen even further, to 123.7 yen. See Nash, *Plunge in Dollar Brings Call by U.S. for Stabilization*, N.Y. Times, Dec. 28, 1987, at A1, col. 6.

2. The Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, which set the most protectionist tariff levels in United States history, is widely viewed as having substantially contributed to the Great Depression. See R. Pastor, *Congress and the Politics of U.S. Foreign Economic Policy* 78-79 (1980).

3. After considerable suspense, the two nations finally signed the Free Trade Agreement on January 2, 1988. At this writing, both the accord and its implementing legislation are awaiting congressional approval. For a discussion of the U.S., Canadian, and international legal issues raised by the free-trade negotiations, see Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 Yale J. Int'l L. 193 (1987).

the auspices of the General Agreements of Tariffs and Trade (GATT),⁴ the so-called Uruguay Round.⁵ If that round is not the last GATT round ever, it will almost certainly be the last one in this century, and by even the most conservative estimates, will extend well into the next Presidency.

Last, but by no means least, we have watched as American trade policy has become a central issue in the upcoming 1988 presidential and congressional elections. "Competitiveness" has become the rallying cry for declared and undeclared candidates on every side of the political aisle. And with the political demise of Gary Hart⁶ and Joseph Biden, we have watched Congressman Richard Gephardt of Missouri take the lead in the Democratic polls in Iowa, running almost entirely on an international trade platform. That platform consists in large measure of Congressman Gephardt's controversial proposed amendment to the omnibus trade bill. The Gephardt Amendment⁷ would require the President of the United States to retaliate against countries such as Japan, Taiwan, and Korea, which are running "excessive and unwarranted" trade surpluses with the United States, with the goal of forcing those countries to reduce their surpluses by 10% annually. Thus, the Gephardt Amendment is nothing more or less than an international trade variant of the Gramm-Rudman-Hollings⁸ budget-balancing bill, which likewise takes an automatic, phased, numerical approach to deficit reduction.

Each of our panelists today have been deeply involved in some or all of these recent events. The *Review* has, therefore, designed our four panels so that the panelists can apply their unique perspectives to help us unravel these extraordinarily important and complex events. To add an academic perspective to the more pragmatic ones that our panelists will offer, let me suggest four dichotomies—or if you prefer, four sets of tensions—that run through all four panels. These four dichotomies, which permeate the entire field of Ameri-

4. See Glossary at 129.

5. See Glossary at 130.

6. Subsequently, of course, Senator Hart re-entered, then again withdrew, from the presidential race.

7. Trade and International Economic Policy Reform Act of 1987, H.R. 3, 100th Cong., 1st Sess. § 126, 133 Cong. Rec. 2,755-57 (1987). Subsequently, Congressman Gephardt also withdrew from the presidential race, and his amendment will likely be dropped in conference. Yet, it seems paradoxical that Congressman Gephardt should have been so anxious to *reduce* the President's discretion over international trade at the same time that he was personally so anxious to become President; if he had been truly serious about the Gephardt Amendment, then he probably was not really serious about being President, and vice versa.

8. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 1985 U.S. Code Cong. & Admin. News (99 Stat.) 1038.

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can trade law and policy, I will call the interplay between: law and policy, substance and process, institutions and ideology, and illusion and reality. Let me briefly explain what I mean by each.

I. Law and Policy

Given the name of our institutional sponsor, it seems only proper that this conference should first explore the dichotomy between law and policy in the trade area. To be sure, this conference is entitled “American Trade *Policy*: Actors, Issues and Options.” But the central focus of each of today’s panels will be on *law*—the role that law and lawyers can play and are playing in facilitating or hindering the development of a sensible American trade policy.

The *Yale Law & Policy Review* takes as its motto the statement made by Professors Harold Lasswell and Myres McDougal more than 40 years ago that the study of law should be the study of “public policy in the public interest.”⁹ The principal question we address today is whether United States trade law—as it exists and is developing at this critical moment in our trade relations—in fact furthers or hinders the development of public policy in the public interest. As our first panel, “Administrative Agencies, Private Parties, and the Courts” will discuss, to a degree unmatched by other nations, the United States has adopted a legalistic, judicialized approach to regulating imports. That approach allows private American industries to allege before administrative agencies and courts that foreign industries have violated certain formulae that have been detailed in statutes, and that consequently, executive branch officials are required to impose retaliatory measures on foreign imports.

The proponents of this legalistic, rule-based system argue that our “litigious” approach to trade law gives private parties their day in court, allows all interested parties to receive the maximum amount of information, and ensures predictable and neutral decisionmaking in accordance with legislatively prescribed rules.¹⁰ The approach’s critics have responded that this system gives self-interested private parties inordinate access to the decisionmaking process, unnecessarily restrains the discretion of executive officials in sensitive foreign policy matters, and lends itself to abuse by power-

9. See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *Yale L. J.* 203 (1943).

10. See, e.g., Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 *Mich. L. Rev.* 1570 (1984).

ful special interests who can win waivers of the rules in big cases or who, through lobbying, can influence how Congress writes the statutory criteria. Moreover, these critics suggest, this approach embeds in United States law statutory formulae that make no sense from a long-range economic and policy perspective. The result, some trade practitioners have argued, is that in the United States, "trade law is not merely an important aspect of . . . trade policy, [trade law] actually *is* trade policy."¹¹

Under this legalistic approach, trade policymaking officials spend inordinate amounts of time appeasing those industries that have invoked the statutory process successfully—even relatively unimportant industries like the cut flower, golf cart, or shingles and shakes industries¹²—with the result that our trade policy is conducted inefficiently, incoherently, and without any clear sense of what our national trade priorities are. For example, the President may veto a textile bill on one day, and then be forced to give the textile industries quotas to end a countervailing duty case on the next.

Thus, the first key question to be asked at this conference is whether there is too much or too little law in United States trade policy. Should trade policy at both the domestic and international level be made with greater or lesser reference to legal rules? In seeking answers to these questions, I am delighted that our conference participants include scholars, judges, and public and private sector practitioners, and that we have representatives here from the legislative and executive branches, as well as from the administrative agencies. The fact that so many of these participants have worn not one, but several, of these hats during their careers only enhances their ability to provide thoughtful and balanced consideration of this first relationship, between trade law and trade policy.

II. *Substance and Process*

The second dichotomy that dominates this conference is the relationship and tension between substance and process. Two of our panels, the first and the third, concern the *process* of creating and

11. See Howell & Wolff, *The Role of Trade Law in the Making of Trade Policy*, in J. Jackson, R. Cunningham & C. Fonthelm, *International Trade Policy: The Lawyer's Perspective* 3-1, 3-21 (1985) (emphasis in original).

12. In May 1986, for example, a petition filed by the United States shingles and shakes industry forced President Reagan to impose tariffs on certain Canadian products, thereby jeopardizing the United States-Canada Free Trade Agreement talks. Yet cedar shingles and shakes currently comprise less than one-seventh of one percent of the total volume of United States-Canada trade. See Koh, *supra* note 3, at 215-16 n.79.

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implementing trade policy: Who decides what our trade policy should be? The second and fourth panels concern the *substance* of United States trade policy: What exactly should that policy be?

Obviously, a close interplay exists between process and substance in the trade field. On the one hand, the question of who decides our trade policy necessarily determines that policy's substance; on the other, the various actors' substantive policy biases inevitably drive them to structure the decisionmaking process in a way that gives some institutions and not others final decisionmaking authority.

I have already suggested some of the questions that face our first "process" panel, "Administrative Agencies, Private Parties, and the Courts." Let me point out that our third panel, on the roles of the President and Congress, will remind us that these procedural questions have not just statutory, but also constitutional, stature. In this bicentennial year of our Constitution, the Iran-*Contra* affair, the Persian Gulf controversy, the debate over the reinterpretation of the Anti-Ballistic Missile Treaty, and the Supreme Court's decisions striking down the legislative veto¹³ and provisions of the Gramm-Rudman-Hollings Act¹⁴ have all reawakened our national consciousness regarding how separation-of-powers principles function in the foreign affairs realm. The confirmation hearings of Judge Robert Bork and the debate over his views about the scope of executive power have invited us to reconsider what role the courts should play in mediating this ongoing tug-of-war between the two political branches.

But all of the legal and policy issues that arise out of these recent events—regarding the appropriate degree of congressional oversight and participation in foreign affairs, the acceptable restraints on presidential discretion to deal with international problems, the search for constitutional substitutes for the legislative veto, and the constitutionally permissible role of the independent administrative agencies—have been the subject of debate for years in the trade area. So I would both hope and expect the members of our third panel—all of whom are experts on current separation-of-powers issues in the trade area—to instruct us on what is happening in that field. I also hope they will suggest some broader lessons about appropriate degrees of presidential discretion and congressional oversight that we can carry and apply to other realms of foreign policy,

13. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

14. *Bowsher v. Synar*, 106 U.S. 3181 (1986).

for example, covert operations, foreign intelligence, and war-making.

Our second and fourth panels concern the *substance* of U.S. trade policy. Obviously, reducing a record trade deficit calls for two types of action: reducing imports and boosting exports. Achieving the first task—controlling and reducing imports—is the announced goal of the new omnibus trade bill and other legislative efforts on Capitol Hill. The second task, boosting exports, calls for two solutions: a demand-side solution—opening closed foreign markets so that United States exporters may gain greater access to foreign consumers—and a supply-side solution—improving the competitiveness of United States industries. Our second panel, “Controlling Imports and Opening Foreign Markets,” will address both the import problem and the demand-side aspect of the export problem. Its primary focus will be on the wisdom or foolishness of various provisions in the proposed omnibus trade legislation. Our fourth and last panel, “Competitiveness of U.S. Industries,” will address the supply-side aspect of the export problem, by considering the structural dimensions of our international competitiveness problem.

Our two substantive panels will offer predictions regarding both the kind of omnibus trade act that is possible and the specific provisions that will likely emerge from the House and Senate conference. But I hope that our panelists will not shy away from the broader question of what kinds of legislative solutions will actually work. Do the various legislative remedies being proposed really target the underlying *structural* causes of our trade deficit? Do our various import solutions comport with or undercut our export strategy? And just what is the fine line between legislative innovation and legislative gimmick, and on what side of that line do measures like the Gephardt Amendment fall?

III. Institutions and Ideology

A third and even more general dichotomy around which this conference will revolve is what I call the tension between institutions and ideology. To me, the most striking development in the international trade system during the Reagan era has been the growing cynicism, at both the domestic and international level, about the post-World War II vision of multilateral trade management. By multilateral trade management, I mean the once widely accepted view that the most sensible way for nations to avoid international economic warfare is through the administration of international

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trade by neutral, nonpolitical institutions applying mutually agreed-upon legal rules to trade problems. At the international level, the postwar system rested on the notion that multilateral trade management was best accomplished through the GATT, with that institution applying universally accepted norms about nondiscrimination. At the domestic level, the postwar trade system *within* the United States similarly rested on an assumption that the United States could most effectively lead this international system with prudent presidential leadership designed to promote a substantive norm of free trade, guided only by limited congressional oversight and some expert advice from neutral agencies, such as the International Trade Commission (ITC).¹⁵

We can debate whether or not these ideal visions ever reached fruition, even in the immediate postwar era. But what does seem clear is that, at least in theory, these postwar domestic and international decisionmaking structures fit together neatly. Under presidential leadership designed to promote a norm of free trade, the United States could lead a multilateral international system founded on substantive principles of nondiscrimination, thereby rendering the entire international trade system internally coherent.

Today, however, this institutional model is under attack at both levels by an ideological model of power politics. At the international level, we find growing skepticism about the efficacy of multilateralism as the *procedural* solution to international problems—with suspicion directed not just at the GATT, but also at tottering political institutions, such as the United Nations, UNESCO, and the International Court of Justice. Moreover, we encounter growing doubt among our trading partners about the wisdom of basing a world trading regime upon *substantive* principles of nondiscrimination and unconditional most-favored-nation status. And so we see new procedural innovations: the proliferation of bilateral free trade agreements, side deals outside the GATT framework, plurilateral monetary management by the Group of 7 nations, and unilateral retaliatory trade actions of the type that the United States has recently authorized against many of its trading partners, including not just the newly industrialized nations, Korea, Taiwan, and Singapore, but also its major political allies, Japan and the European Community. At the domestic level, Congress' protectionist bias has made it reluctant even to pay lip service to substantive notions of free trade. Moreover, the Iran-*Contra* affair and President Reagan's lame-duck

15. See Glossary at 129.

status have resulted in unprecedented congressional domination of the trade process. Consequently, we are seeing domestic and international trade policies that are less guided by institutions and rules than they are driven by ideological concerns and power politics. Even more troubling, we are witnessing a growing disjunction between our evolving domestic and international decisionmaking structures. At a time when arguably we need greater bipartisan consensus on new national policies to deal with new international trade arrangements, we are witnessing greater political conflict and confrontation between the President and Congress over who should control the way in which we deal with these problems. I hope that today's discussions will not overlook this third tension—between the decline of institutions and the rise of ideology in the management of international trade—and the impact that those trends will have on the future of our trade policy.

IV. Illusion and Reality

Fourth and perhaps most crucially, I hope this conference will address the relationship between illusion and reality in the trade area. One cannot long study the statements and actions of *all* actors in the trade field—the Executive, the Congress, the courts, the agencies, and private industry—without starting to suspect that much of what we see and read about American trade policy is one gigantic illusion, orchestrated with blue smoke and mirrors.

And in the trade process, no one seems wholly free from blame. Recently, for example, the President announced his firm commitment to the GATT and multilateralism at the same time as he launched a whole new wave of unilateral trade retaliations. The Democratic presidential candidates announce that the competitiveness problem lies within our boundaries, but some of them have nevertheless gone on to campaign in Iowa and New Hampshire against the Japanese and the Europeans. Some of the same congressmen who bash Toshiba radios, the *New York Times* tells us, drive home at night in Toyotas and Mercedes.¹⁶ We argue that other nations' trade surpluses result from "unfair" trade practices simply because those practices differ from our own, but then we engage in many of those same practices ourselves. We recognize that world welfare will be improved by trade expansion, but then we debate and pass trade-restricting legislation. We recognize as a nation that

16. See Dowd, *Speaking of Imports, What's That Sitting in Your Parking Spot?*, N.Y. Times, May 1, 1986, at A16, col. 1.

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the trade deficit calls for a fundamental reallocation of private and public resources into such areas as worker education, trade adjustment assistance, and industrial policies, but then we pursue only those legislative options that avoid reallocating those resources.

In many senses, this final tension between illusion and reality is the one that most dominates our national debate over trade policy. But none of our panelists today have gotten to where they are by being shy. More than a few of them have made names for themselves by pointing out when an emperor has no clothes. As the day progresses, I hope that none of them will hesitate to shout out if they should spot a naked emperor walking by. So without further ado, let me call up our first group of panelists, so that we may begin to explore these four dichotomies in American trade policy.