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Barbarians Inside the Gate: Public Choice Theory and International Economic Law

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The use of public choice theory to analyze legal issues raises hackles. To be sure, all applications of economics to law disturb some legal theorists, but this branch of the dismal science seems especially upsetting. Perhaps lawyers, trained in the arts of reasoned deliberation, resent a theory that purports to elucidate crass self-interest at the heart of the lawmaking process and, so it seems, celebrates the presence of the barbarians that have breached the walls of civilization. Many in the academy can live with materialistic theories as long as they remain broad and impersonal, driven by class and the like, but an analytic construct that assumes that lawmakers either sell themselves to the highest bidder or depart politics may be too much to bear.

Nevertheless, public choice theory can serve as a useful tool for exploring a variety of legal issues, including those raised by international economic law. It purports to be a positive theory, attempting to give a rigorous and predictive account of the world but not assigning any normative weight to its insights. If it succeeds in this task, we cannot blame the theory because the world it describes does not always conform to our preferences.

To support my claim about the usefulness of this style of analysis, I will first give a brief account of its assumptions, structure, and insights. Next, I confront what might be called meta-arguments about public choice theory: Even if it appears to correctly explain certain aspects of legal decisionmaking, should we still disregard the theory? Finally, I apply the theory to four problems that arise in international economic law. These applications illustrate both the strengths and the limitations of public choice analysis.
I. PUBLIC CHOICE THEORY

Public choice theory seeks to apply certain insights derived from the study of private economic behavior to collective action problems, including that form of concerted activity that constitutes government. The fundamental assumptions should be familiar to anyone who has encountered the application of economics to law: individuals seek to maximize their well-being; for a wide range of persons across a great variety of times and places, well-being can be understood as primarily the accumulation of material benefits rather than spiritual grace; and a process of natural selection discourages arrangements that over time fail to serve the purpose of maximizing well-being. These assumptions are far from uncontroversial, much less self-evident, but for present purposes I will concede their validity.

Much of the vocabulary, as well as the analytic constructs, of public choice theory stems from the classical economic analysis of monopolistic behavior. A brief review of this account should suffice to demonstrate the link. Classical theory teaches that where scarce goods are rationed through markets, the equilibrium price is determined by the extent of consumer demand for the good, which declines as prices rise (a downward sloping demand curve), and the supply of the good, which increases in response to higher prices (an upward sloping supply curve). Producers are assumed to be unable to discriminate among customers in terms of price, which means that all goods will be sold at the same market price even if some producers value the good more highly than that price reflects, and some producers less. For consumers that would have paid more, the difference between their reservation price and the market price is called consumer surplus. Similarly, the difference between a producer's reservation price and the market price is called producer surplus.

If many producers are free to bring goods to market, supply will increase until the cost of making the last good produced (marginal cost) equals the return from the sale of that good (marginal return). But if only one producer supplies the good, the same calculus produces a different result. A monopolist must evaluate any increase in production in light of revenue lost due to lower prices received for its goods (lost producer surplus). The single producer maximizes its profit at the point where no further goods could be sold without its marginal cost (a combination of production cost plus lost producer surplus) exceeding the price paid for that good. By definition, then, a monopolist will choose to supply fewer goods and will enjoy higher prices than would competing producers. The increase in a producer's return over what it would receive in a competitive market (where no restrictions on supply exist) is called a monopoly rent. The metaphor suggests that the power to restrict supply can be seen as a kind of property interest from which a return can be derived.

Although this analysis involves only a single producer, it suggests generally that many producers could derive a benefit from withholding goods from the market to prop up the price. If producers could act cooperatively rather than competitively, they would restrict production to maximize producer surplus and generate monopoly rents that they could distribute among themselves. Formation of a cartel is the most obvious form of producer cooperation: the cartel typically sets production quotas for each member and monitors their behavior to ensure that no one chisels.

Thus far, we have considered only a positive analysis. The conventional normative response to this account of monopolies is to determine that society is worse off if monopolies and cartels are permitted, because the benefits to producers from high prices, the monopoly rents, are less than the cost to consumers caused by those producers (lost consumer surplus, in the technical jargon). Positive analysis concludes that government efforts to restrict monopolies and cartels, to the extent they increase market competition, will benefit consumers more than they will harm producers. Normative analysis, particularly the branch of theory known as welfare economics, claims that it is desirable for government to take that step, because a world in which consumers derive benefits at the expense of producers is a better place as long as the benefits to the consumers are greater than the harm to the producers.

Public choice theory takes from classical theory the concept of rent-seeking through restrictions on production, and uses it to account for governmental behavior. If, under certain conditions, private actors may
band together in cartels to restrain competition, then they may also induce government to aid them in this endeavor. Government can impose licensing requirements and costly standards on the production process, ban outright activity that might compete with producers, or limit access to inputs needed for production. If it responds to producer interests, it may take these action not to increase public welfare, but to benefit producers to the detriment of consumers. In other words, government has the potential to serve as the instrument of rent-seeking, not only as its scourge.

In a democratic society where lawmakers must face the electorate at periodic intervals, why would politicians enact rules that serve the few to the detriment of the many? Obfuscation and misinformation might prevent the general public from detecting immediately how it was being disserved, but economic theory has as a key postulate that, over time, suboptimal arrangements lose out to competition from superior ones. The distinctive contribution of public choice theory is to provide a rejoinder. It offers an account as to how, within the confines of a representative democracy, lawmakers may enact rent-seeking rules.

At its heart, public choice theory proposes an inversion of the famous Carolene Products concern for "discrete and insular" minorities. Discrete and insular interest groups, it claims, can act collectively more effectively than can the general public. Such a group can generate and disseminate information among its members more efficiently, and generally can organize itself at a lower cost than can a similarly sized group of persons with diverse interests. Unburdened by the difficulties of compromise and tradeoff, a single interest group can more easily form and govern itself, and make its voice heard. Due to this organizational advantage, it can outcompete bigger but less efficient groups in the market for political loyalty.

This grossly simplified account of what really is a quite elegant theory is sufficient to identify several of the underlying assumptions that are necessary to make it work. First, politics must consist primarily of the effecting of tradeoffs and compromises among competing interests, rather than a solidaristic pursuit of an overarching common goal to the exclusion of opposing claims. In other words, lawmaking reflects the sum of private interests, not some general religious or moral claim that supersedes private welfare maximization. Second, there must be a political marketplace, in the sense that lawmakers have influence on the lawmaking process to the extent that they remain lawmakers, (i.e., are reelect-

ed), and that reelection requires responsiveness to constituencies. Third, information must matter and be relatively costly to produce: in an electoral system where all votes have equal weight, a minority can outcompete a majority only if voters have incomplete information on which to base their votes, and if the minority can disseminate information conducive to its preferences more effectively than can the majority. The next section analyzes each of these controversial assumptions.

To appreciate both the strength and the ambivalence of public choice theory, one must take into account a complementary economic explanation of government action. Were minorities unable to outcompete majorities in the market for laws, then public choices, economic theory holds, would tend over time to favor actions that improve the net welfare of society (again, this is a predictive outcome of positive theory, not to be confused with the normative claim that law should pursue this end). In this scenario, government regulation would survive in the political marketplace only to the extent that it enhanced net welfare, i.e., if it addressed a problem of market failure. There is at least one instance, previously mentioned, where this condition may be satisfied, namely where lawmakers enact rules that suppress monopolistic behavior. Another would be where government provides for public goods.

Public goods are commodities or services that: 1) are nonexclusive, in the sense that consumption of such a good by one person does not preclude another from enjoying the same good, and 2) are free, in the sense that the cost of denying someone access to the good is greater than the value of the good. Economists cite national security, a deliberative political and legal culture, and clean air and highways as examples of nonexclusive and free goods. These characteristics explain why pri-


I do not mean to suggest that the suppression of monopolies and the production of public goods are the only justifications for government regulation that economic theory entertains. Regulation is also beneficial (i.e., conducive to net welfare enhancement) if it corrects information asymmetries or the overproduction of goods that generate negative externalities, i.e., costs to society for which the producer does not have to account. The occasions on which economists believe that private markets fail to generate the economically efficient level of goods are described as market failures, and regulation has the best chance of improving social welfare in those cases where market failure exists.

vate producers will supply less of such goods than the members of society would like to buy. Public goods cannot easily be converted into property interests, which means that their producers will get no return for some substantial portion of the benefit produced. But government, if it responds to general net welfare, will produce the “right” (i.e., economically efficient) amount of public goods.

The importance of the public goods story is that it often provides a competing hypothesis for government actions that public choice theory would characterize as rent-seeking. Many instances of government-imposed regulation might be justified as an effort to provide a public good, although they also may have as an effect a reduction in competition among producers of other private goods. There are no a priori grounds for determining which explanation best fits any given regulation; characterization usually involves constructing a contestable narrative as to what happened and what mattered. The dualism of public goods and public choice accounts means, on the one hand, that proponents of public choice theory (which purports to describe and predict government actions without passing judgment on them) must confront the public goods explanation and provide convincing reasons why that alternative analysis does not adequately account for the measures taken, and, on the other hand, critics of public choice theory must be prepared to justify the anticompetitive effects of particular regulatory measures associated with the provision of public goods.

II. METATHEORETICAL CONCERNS

The conventional progression in proposing a positive theory of social interaction is first to describe the hypothesis and then to test it with applications. But the use of public choice theory as an explanation for lawmaking, and especially as an account of the construction of international law, is sufficiently controversial to merit another layer of argument. A critic of public choice theory may conceive of a number of objections that precede the theory, principally by refusing to grant the assumptions about human behavior on which it rests. This section attempts to anticipate and respond to several such objections.

First and most fundamental is the nagging problem of rationality. I will not reproduce here the extensive debate over the possibility of human interaction being based on rational choices. At its most abstract level, that debate is perplexing and unsatisfying. On the one hand, there are good reasons to handle the concept of rationality with caution: at least since Goëdel proposed his eponymous theorem, there has been good reason to believe that mathematics, supposedly the purest ex-
pression of human reason, rests at bottom on begged questions rather than on logical proof. On the other hand, theories of social life that rule out the possibility of learned cooperative behavior and that see human interaction as grounded only in violence or the threat of violence, perhaps supplemented by certain "hard-wired" behaviors and exogenous environmental influences, seem seriously incomplete: complex social structures do evolve and sustain the increasingly differentiated and interdependent behaviors of an ever-growing number of people. Because it is important to postulate some kind of medium through which individuals perceive and respond to social conditions, there is no harm in calling that medium "rationality" as long as one exercises caution when attempting to specify its content.

The more pressing problem for internationalists is to come up with a concept of rationality that accommodates interchanges between persons from different cultures. It is all good and well to assert that individuals seek to maximize their welfare, but what behaviors achieve that end, and therefore receive positive reinforcement, will vary among cultures. Persons with different backgrounds—linguistic, historical, class, gender, erotic, or other cultural determinants—will carry with them different intuitions and understandings of what makes sense. When these people interact, they either will be doomed to misunderstanding, or they will learn new conceptions of rationality that take into account the other's different characteristics. If an internationalist is to use the concept, then special care must be taken to avoid culture-bound conceptions of rationality.

On reflection, however, the problem of shared rationality does not seem insoluble. First, a great deal of international interaction involves persons from fundamentally similar cultures, especially those of Western

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5. K. Goedel, On Formality Undecidable Propositions in Principle Mathematic and Related Systems 37, 57-63 (B. Meltzer trans., 1962). At least that is one interpretation of the theorem's implications. The theorem itself deals only with the possibility of establishing the logical foundations of the real number system.

6. At an existential level, it seems especially difficult for academics who spend their professional lives teaching and writing to assert that learned cooperation cannot take place. Perhaps this is why older academics, such as myself, who have invested a larger portion of their lives in these behaviors, find it especially easy to resist the notion that they are pointless.

7. Whether the solution is normatively desirable is another matter. Some rationalities may be objectionable because they exclude the point of view of minorities or otherwise reflect bad characteristics. I am not attempting to provide a normative defense of rationality, but only to defend the proposition that the concept may be used in the construction of a positive theory.
Europe and Anglophone North America and Oceania. Although it would be foolish to assume any superiority derived from participation in a Eurocentric culture, it would be just as silly to deny the volume and significance of international interaction within this sphere. Second, in many cases, learning between different cultures takes place relatively quickly, even if in an unbalanced fashion. It may be significantly easier for persons in one culture to fathom and attempt to internalize the other's conception of rationality, rather than to convert the other to its conception or to construct a polyglot rationality. Interactions between multitudinous and small cultures probably follow this pattern: as a normative matter one might deplore this decrease in the world's diversity, but as a positive matter, such transformations of small cultures surely take place. Accordingly, there is reason to doubt whether unbridgeable chasms between cultures, and therefore breakdowns in shared rationality, are frequent and prolonged.

Another fundamental objection to public choice theory stems from its focus on material well-being. Although, as economic analysis posits, the welfare that individuals seek to maximize need not be material, a positive theory with claims to predictive power must relate to some kind of objective behavior. Perhaps more out of the need to justify its existence than anything else, economic science assumes that the desire to accumulate tangible goods and services drives social interactions. Yet, there is every reason to believe that ideas matter, both in general and especially in the political realm. Public choice theory seems seriously incomplete to the extent that it denies the impact of ideas on politics.

Here, it seems appropriate not to deny the validity of the objection but to limit its effect. Public choice theory does not purport to provide a comprehensive explanation of all political arrangements. Rather, it identifies some factors that may have an impact on lawmaking. To the extent observed behavior conforms to its predictions, the theory has its uses; where the data refuses to behave, we can determine its limits. Unless a critic is willing to claim that only ideas matter and that material conditions have no impact on human behavior, he must concede that the issue

8. Nor should an internationalist be concerned exclusively with universal principles. For example, the Kantian notion of international law as something largely confined to interactions among democratic countries has enjoyed something of a revival in recent years, in spite of its explicit marginalization of relations among nondemocratic states. See Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 COLUM. L. REV. 1907 (1992).
is one of relative importance and not irrelevance. Observations can test the extent of the impact of material conditions.

There is also a subtle sociological point lurking behind this objection. For the same reason that academics prefer to assume that rationality exists, they resist explanations of human behavior that deny the importance of ideas. The capacity to form and communicate ideas seems far more differentiated across the general population than does the capacity for physical appetites, and academics like to believe (and are selected on the basis of the belief) that their intellectual capacity is superior to that of the masses. There is something disturbingly egalitarian about a theory that marginalizes this capacity. My point is not that an argument is false simply because it serves the self-interest of the person making it; I accept rationality even though it is self-interested for me to do so. Rather, the presence of self-interest invites skepticism and suggests that the proponent of a self-interested argument should submit the proposition to whatever objective tests might be contrived.

A third objection to public choice theory draws on normative rather than positive arguments. Even if one can demonstrate that legislators respond to interest groups in ways that are consistent with public choice theory, should we advertise that fact? Accounts of rent-seeking could have at least two pernicious effects: they might educate rent-seekers as to how to manipulate the lawmaking process more effectively, and by presenting this phenomenon as a rational response to certain institutional conditions, they may implicitly legitimize it. Lurking behind the latter concern is the important and deeply controversial issue of whether it is possible to talk of a truly positive theory within a value-free social science, or if instead all propositions in social science either legitimate or subvert the status quo. If the latter, one must ask if it is then necessary to defend the normative implications of every positive claim.

These are deep waters and I will not dwell in them for too long. As I have stated, one can reduce these questions to a single issue of transparency, which in turn rests on one's conception of rationality. Transparency, and the liberal political theory on which it draws, requires a conviction that knowledge can set us free. If a given social convention or behavior is good, we should study it so that we can propagate whatever it is about that phenomenon that makes it good. If a social institu-

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tion is bad, we must study it so that we can learn how to dispose of it. Such faith in the uninhibited pursuit of critical inquiry can be challenged on many fronts, but it serves as a common ground for much that constitutes contemporary legal scholarship, whatever its political orientation.

What this means in practice is that public choice theory can be put to a range of political uses. On one level, it subverts the conventional faith in democratic decisionmaking and the present institutional arrangements that rest on law (including private ownership of the means of production) by suggesting why freely elected representative governments may disserve their electorates. On another, it serves the status quo by providing a critique of law-based efforts to interfere with existing contractual and property arrangements. Dressed up as a fully developed social science, it may promote the interests of technocrats at the expense of politicians, for example, by smoothing the road for an ideology of liberal trade that frustrates the efforts of local elites to pursue diverse cultural and social goals. A skillful user of the theory can reverse each of these tendencies.

III. APPLICATIONS

That public choice theory can enrich our understanding of international economic law should come as no surprise. The field developed in part to provide an explanation for various international phenomena, including the distribution of costs within the NATO alliance and the resilience of protectionism in international trade. I have chosen four problems that have not received as exhaustive treatment from users of the analysis, but that nonetheless reveal new facets and hues when subjected to the public choice treatment. In each case, public choice theory does not compel any particular conclusion about the optimal outcome, but rather expands the range of inquiry one may undertake when exploring difficult issues of international economic law.

A. EXECUTIVE POWER

To what extent may the President of the United States act on his own initiative in the field of international economic relations, and to what extent must his action meet with the approval of Congress? The unusual structure of the United States government, which liberates the Executive from the kind of accountability characteristic of parliamentary systems and which permits voters to elect persons from different parties to head the Executive and Congress, makes these questions almost uniquely
important. The problem is fundamental and involves both constitutional interpretation and strategies for statutory interpretation.

As a general matter one might take any of four approaches:¹¹

(1) **Presidential Exclusivity.** This position maintains that in the field of international relations, the executive power is exclusive and not subject to legislative interference, excepting only those explicit constitutional commitments (the authority of the Senate to consent to treaties, the protection of individual liberties through the Bill of Rights, etc.) that generally circumscribe the President’s powers. This position would require a court to interpret statutes in a manner that would avoid conflicts with presidential actions, and to invalidate a statute where such a conflict is unavoidable. The rhetoric, although not the holdings, of a number of famous Supreme Court decisions from the 1930s and 1940s is consistent with this position.¹²

(2) **Preference for Executive Power.** This approach posits that a strong presumption exists in favor of executive power but disfavors complete autonomy. Accordingly, it would permit the President to exercise this power without statutory authority but require deference to Congress where it chooses to act. Consistent with this approach, a court also would interpret statutes so as not to interfere with the power of the President to conduct international economic relations, but would honor the indisputable commands of Congress. Several important Supreme Court decisions from the last decade or so express this position.¹³

(3) **Preference for Legislative Power.** To the contrary, this approach argues that to respect properly the power of Congress to enact laws, courts should insist that every act of the Executive, to have legal effect, rest on some sort of legislative authorization. This position rejects all notions of inherent executive power and does not sanction presidential acts that depended only on the passive acquiescence of Congress for their authority. Taking this approach, courts would always search for some legislative basis for a presidential action, although they might tolerate generous interpretations of ambiguous statutes to uphold particular exercises of executive power. A number of Supreme Court decisions are consistent with this approach, in the sense that they engage in far-reach-

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ing, sometimes heroic quests for statutory authority before upholding executive action.\textsuperscript{14}

(4) \textit{Legislative Exclusivity}. The strongest position in support of legislative prerogatives would require courts to refuse to enforce any action of the Executive that does not rest on precise, direct, and explicit statutory authority. That an action might involve international affairs and the ability of the Executive to bargain effectively with other governments would not matter to proponents of this approach. These persons would regard the paramount obligation of courts to be the protection of the exclusive power of Congress to make law, no matter what the context or the impact on the international obligations of the United States.

Among the body of judicial decisions dealing with questions of international economic law, the opinion of the Fourth Circuit in \textit{United States v. Guy W. Capps, Inc.},\textsuperscript{15} probably best reflects the last strategy. The trade measure at issue in that case, limiting the import of certain kinds of Canadian potatoes, stemmed from an executive agreement between the United States and Canadian governments. A statute—the Agricultural Act of 1948\textsuperscript{16}—specified the procedure that the Executive had to follow before it could introduce rules affecting the import of agricultural products, and the provisions at issue in \textit{Guy W. Capps} had not been subjected to that process. That statute failed to declare that the specified procedure, involving proceedings before the Tariff Commission, was the exclusive means for promulgating rules for agricultural imports, but neither did it expressly authorize any alternatives. The Fourth Circuit ruled that the failure to comply with the Agricultural Adjustment Act procedure was fatal, even though the Trade Agreements Act of 1934,\textsuperscript{17} another less specific statute, seemed to give the Executive authority to negotiate and implement trade agreements such as the one on which the potato agreement was based.

What does public choice theory have to say about these approaches? First, one might maintain that international lawmaking reflects contractu-


\textsuperscript{15} 204 F.2d 655 (4th Cir. 1953), \textit{aff'd on other grounds}, 348 U.S. 296 (1955).


\textsuperscript{17} Trade Agreements Act of 1934, Act of Jun. 12, 1934, ch. 474, §1, 48 Stat. 943 (1934).
al rather than legislative processes, and that this aspect makes international law less prone to interest group capture. A legislative majority can enact rules that bind the entire polity, but (ignoring the possibility of *jus cogens*) imposition of an international obligation requires the consent of each subject to whom the obligation applies. Although one or a few governments might fall prey to the influence of a single interest group, it is less likely that the same group can prevail across a broad coalition of countries.\(^9\) As a first proposition, then, public choice theory might support a claim that the procedural obstacles to promulgating international law might be more relaxed than those governing the enactment of domestic legislation.

But this proposition does not resolve the matter, because the public choice literature—or more precisely, those scholars who draw normative conclusions from the theory and seek to design rules that may frustrate interest-group legislation—supports the erection of various procedural requirements for lawmaking with the intended effect of reducing the supply of public regulation. A good example is the nondelegation doctrine, which these scholars defend because it supposedly deters Congress from empowering administrative agencies in a manner conducive to interest group capture.\(^9\) Yet an interpretive approach that frees the Executive from strict adherence to statutory restraints constitutes a delegation of lawmaking power that carries with it no guarantee that executive action will not pander to special interests to the detriment of the general welfare.

One might try to resolve this dilemma by distinguishing between executive actions based on international agreements and other exercises of executive power in the field of international economic relations. The trade measure at issue in *Guy W. Capps* and the claims settlement procedure upheld in *Dames & Moore* fall into the first category, the oil import fee involved in *Algonquin SNG* into the latter. One could argue

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\(^9\) This argument ignores the possibility that proponents of international lawmaking, in particular technical experts the influential value of whose skills will grow in the face of international lawmaking, constitute an interest group.

that where another government has agreed to reciprocal obligations, the possibility that the executive action reflects interest group rent-seeking is diminished. But where a measure constitutes the unilateral exercise of executive power, the barriers to rent-seeking are too low.

On reflection, however, this distinction is both unworkable and inapposite. It is unworkable because distinguishing between agreement-based and unilateral actions seems too difficult in the face of the many vague and broadly worded agreements that affect the international economy. Consider, for example, the oil import fee at issue in Algonquin SNG. The United States levy was not the product of an international condominium to bolster the value of the dollar or break the OPEC cartel, but it was structured (or so the United States maintained) so as to be consistent with United States obligations under the General Agreement on Tariffs and Trade (GATT). One therefore could argue that this unilateral excise on oil imports was based on the GATT, an international agreement. After all, the GATT Contracting Parties could not have made the various concessions embodied in that agreement without also reserving the right to impose trade controls necessary to further essential objectives such as coping with balance-of-payments imbalances and protecting national security. Yet this use of the “based upon” concept ends up swallowing almost every possible exercise of authority affecting international economic relations, because most actions not directly in violation of the nation’s international obligations can fit within one or more rights reserved under various international agreements.

The distinction is also inapposite because it presupposes that international cooperation takes place only within the framework of explicit agreements. Yet the concept of patterned cooperation, epitomized by the tit-for-tat game, has become commonplace in international relations literature. In many instances, formal agreements may be too costly to conclude, in particular because domestic special interests may have enough power to block their ratification. But countries can achieve similar results by taking unilateral actions that produce benefits only if other countries behave cooperatively. The tit-for-tat strategy requires that the first mover expose itself to the risks of defection, and then continue to act cooperatively as long as its implicit partners do not defect. The strategy also dictates that defection be met with a single act of retaliation, but not with complete abandonment of a pattern of cooperation. In retrospect, many aspects of the United States-Soviet rivalry seem broadly

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consistent with the tit-for-tat game, and other examples from the realm of economic relations can be cited. There exists no obvious reason why cooperation of this sort would more likely reflect interest group rent-seeking than cooperation based on express agreements. If anything, the opposite seems more plausible.

Yet another postulate of public choice theory further muddies the waters. It holds that, *ceterus paribus*, welfare-enhancing collective action becomes more difficult to achieve as the number of consents required to adopt the action increase. This conclusion is based on the likelihood of an interest group's recruiting any one decisionmaker to vote against a proposal that increases general welfare at the expense of that group goes up with the number of decisionmakers involved in a choice. It follows almost automatically that congressional approval of a benign action could be more difficult to obtain approval than would executive branch support, given the relatively unified command structure in the latter. Any rule that requires the express approval of Congress before an executive action can take effect, then, will frustrate a substantial number of desirable steps.

Where does all this leave us? Public choice theory does not dictate the adoption of any particular rule governing presidential-legislative relations, but it does allow persons who have particular normative preferences to pick more intelligently among the possible rules. Suppose, for example, one preferred international rules, either because of a belief that treaties and other forms of international cooperation should be encouraged or due to skepticism about individual national interests. Public choice theory suggests that someone with this preference should support rules (1) or (2) over rules (3) or (4), because the latter give greater sway to interest-group vetoes. If one focused exclusively on welfare maximization and the suppression of rent-seeking, then one should prefer (2) or (3) to (1) or (4), because vesting exclusive rulemaking authority in either branch of government lowers the cost of rent-seeking (one branch is easier to capture than are two). If one believed that promiscuous approaches to statutory interpretation by the judiciary encourages undesirable interest group influence by increasing the importance of statutory histories and other subtexts that such groups may shape, then one would avoid rule (3) in comparison to the other choices. That the Supreme Court, more often than not, seems to favor rule (2)—accepting some assertions of executive power in the international field that lack statutory authorization, but preserving the power of Congress expressly to block such actions—implies that the Court may share some or all of these preferences.
B. CURRENCY CONTROLS

In spite of the movement toward the lifting of exchange controls over the last fifteen years, many national currencies remain subject to a wide range of government restrictions on their use either as a means of current payment or as a medium for investment. The type of control varies significantly, but the underlying purpose of controls is to discourage holders of the local currency from either buying foreign goods and services (except for those approved by the government) or investing in foreign projects. Although one might associate such controls with efforts to manage a negative balance of payments, some countries with strongly positive balances (the Soviet Union in the 1970s, the People's Republic of China in the 1990s) have imposed pervasive controls while others with negative balances (e.g., the United States in the 1980s and 1990s) have had no significant limits on the use of their currency.

Why do governments restrict the power of residents to dispose of local currency? In many cases, exchange controls bolster government programs to manage the economy, especially those promoting import substitution. Generally, they reflect partnerships between the government and particular sectors of the private economy. Such partnerships invite abuse: many studies have documented instances of "government failure" in which the bureaucracies that administer the programs and the businesses that participate in them collaborate in rent-seeking. These studies do not justify a sweeping condemnation of all currency controls as the product of special interest success in the lawmaking process, but they do suggest that the presence of controls raises a presumption of rent-seeking, subject to further evidence.


22. I am ignoring the function of exchange controls in command economies that have little or no private sectors. In such states, which for the most part dispense with effective institutions of representative democracy, exchange controls have served to strengthen the power of the governing élite by enabling it to ration strictly who would have access to foreign goods and services. For a more extensive discussion of exchange controls in these economies, see STEPHAN, ET AL., supra note 11, at 224-27.

23. See generally Anne O. Krueger, Government Failures in Development, 4 J. ECON. PERSP. 9 (1990) (summarizing the literature that evidences public and private abuses in developing nations' economies).
This issue has legal significance because Article VIII(2)(b) of the treaty establishing the International Monetary Fund, which most of the countries of the world have ratified, obligates the parties not to enforce exchange contracts that violate national exchange regulations that satisfy IMF rules. A substantial body of case law and scholarly commentary has wrestled with the meaning of this obligation. Perhaps the most divisive issue is what constitutes an "exchange contract." Some courts, especially the state and federal courts of New York, interpret the term narrowly so as to avoid enforcing the Article VIII(2)(b) obligation; many scholars and a few courts in other jurisdictions disagree. So, for example, several New York courts have refused to treat letter of credit transactions as exchange contracts, even though the letters provided for payment in a foreign currency. Other cases similarly have refused to treat foreign currency loans as coming within the Article VIII(2)(b) obligation.

As in the case of maintaining the boundaries between executive and congressional power, public choice theory does not dictate any particular resolution of this interpretive issue, but it does suggest the results that might flow from particular normative preferences. For someone who objects to legal rules that derive from rent-seeking, most currency controls will seem suspect if not obnoxious. Such a person will seek an interpretation of Article VIII(2)(b) that will discourage governments from imposing such controls. If that person further believes that a broad interpretation of this Article will not induce more countries to submit to other forms of currency discipline—a plausible inference, given the importance of other benefits from IMF membership such as access to credit—then he would prefer to make the comity given foreign currency controls as weak an obligation as possible. That person would welcome the strategies adopted by the New York courts, which generally reduce the scope of Article VIII(2)(b).

None of this is ineluctable. One might believe that rent-seeking is an acceptable price to pay for active involvement of citizens in the lawmaking process. One could doubt whether many currency controls reflect

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rent-seeking, and assert that in most instances these controls respond to market failures. One even could claim that the comity promised by Article VIII(2)(b) has independent value and deserves strengthening, because national governments ought to get into the habit of respecting those choices that international law permits other governments to make. What public choice theory contributes is a shift in the burden of argument by raising concerns that the holders of these beliefs must address.

C. TRADE AND THE ENVIRONMENT

The last few years have witnessed an upsurge in the popularity of the claim that environmental goals conflict with the expansion of free trade. The debate in the United States over the implementation of the North American Free Trade Agreement (NAFTA) gave special urgency to this argument, but the issue also has arisen within the context of the present GATT structure and the forthcoming Uruguay Round commitments. In particular, a GATT dispute resolution panel decision that condemned the United States Marine Mammal Protection Act (MMPA), has served as a lightning rod for those who believe that trade liberalization means the sacrifice of environmental quality.

The MMPA prohibits the import into the United States of tuna from countries that do not satisfy United States standards for protecting dolphins in the course of fishing. Mexico contended that this statute constituted an impermissible quantitative restriction under GATT Article XI; the United States justified its ban as a measure to protect natural resources permitted by GATT Article XX(b) and (g). A GATT panel rejected the United States claim, contending that GATT parties may limit imports only to protect natural resources within their own borders. As of this writing, the GATT Contracting Parties have not adopted this gloss as an acceptable interpretation of Article XX, and other aspects of the panel report suggest that more narrow grounds exist for condemning the MMPA. But whatever the legal standing of the panel report, it

29. See David Parmeter, Environment and Trade: Much Ado About Little? 27 J. WORLD TRADE 55 (June 1993). The MMPA allows imports from countries whose tuna fishing fleets do not kill a higher proportion of dolphins than does the United States fleet during the same year. As the panel observed, this exception is completely arbitrary, inasmuch as a country will not know until the end of the year what per-
has framed an issue about which commentators have generated much controversy: Does the GATT, and more generally the principles of free trade upon which a liberal international economic order supposedly rests, permit countries to impose trade sanctions in response to environmentally harmful conduct, if that conduct does not directly injure the country imposing the sanctions?30

This is a large topic and I wish to address only a small piece of it. Some commentators would claim that stating the question as I just have is misleading, because most environmental harms produce direct injuries to all persons on the planet, even if the damage is intrinsic rather than material.31 It seems possible, however, to analyze the problem in terms of three categories of environmental injury: harms that have direct effects in the country of importation (spillover pollution), harms to the so-called global commons, and harms that affect only persons in the country of production.32 The first and third categories seem less interesting, the first because the case for retaliation seems self-evident, and the third because it represents a variation on the traditional problem of comparative advantage. But asking whether one country may employ trade measures to address another's exploitation of a global commons seems well worthwhile.

The conventional analysis of commons problems notes that the absence of property rights leads to inefficient overconsumption and ultimately the exhaustion of the resource; the typical instrumental response is to recommend the creation of property rights.33 Some international


31. See, e.g., Chang, supra note 30, at 39-43.

32. STEPHAN, ET AL., supra note 11, at 770-71.

33. See Abbott, supra note 20, at 396-98 (discussing the allocation of property in
regimes have done this, notably the Montreal Protocol for the protection of the ozone layer,\textsuperscript{34} but such structures take time to create and remain subject to holdout problems. In the interim, either the commons must suffer or individual nations must resort to unilateral measures to induce cooperative protection of the resource.

Are trade sanctions, directed either against the offending product or the country that tolerates overconsumption, justified when used for this end? Public choice theory identifies several possible lines of analysis, the validity of which turns on the empirical basis for their underlying assumptions. Some economists have portrayed pollution (including overconsumption of a commons) as a problem of negative externalities: polluting producers capture the benefits embodied in the goods they make but do not have to pay for the damage caused by their dirty production processes. If this scenario is correct, then polluters, at least within certain industries, may constitute a discrete and insular group that can outcompete the general public. They would use their organizational superiority to deter lawmakers from enacting rules that would improve overall welfare but increase their production costs. Seen in this light, antipollution measures, including trade sanctions directed against foreign polluters, might be seen as welfare enhancing. If one otherwise believed that increasing the common wealth at the expense of a few polluters would be normatively desirable, then one would embrace measures that attack despoilers of a global commons.

Other economists, however, make a different set of empirical assumptions and reach a contrary conclusion. These persons argue that producers do not necessarily see environmental regulation as costly. Environmentally motivated rules may require new investment and otherwise raise the cost of production, but under some conditions, established producers might find these costs less onerous than would new entrants into the industry. If designed with this end in mind, environmental regulation can serve as a barrier to competition, and the resulting monopoly rents may outweigh the costs of compliance. At least some producers, then, may have an incentive to seek environmental rules that would harm the general welfare because the lost consumer surplus associated with the producers’ monopoly rents would outweigh the environmental benefits. One possible source of allies for such producers would be a society’s economic and intellectual élites, who tend to prefer a cleaner

\textsuperscript{34} Montreal Protocol on the Substances that Deplete the Ozone Layer, 23 I.L.M. 874 (1993).
environment over economic expansion to a greater extent than does the general public. Public choice theory would predict that producers seeking monopoly rents and better educated and more powerful élites could obtain regulatory regimes that harmed overall welfare.

Which of these stories might explain trade sanctions? One important area of empirical inquiry is the impact of sanctions on producer behavior. A ban on dirty imports, for example, denies the producer access to one market but leaves it free to sell the product to other, less fastidious customers. If the alternative international markets are sufficiently thick, the producer’s cost from lost sales in the regulated market may be minimal and the dirty production would continue pretty much as it had before the trade sanction. Meanwhile, domestic producers would enjoy the benefits of a protected market, which might outweigh the costs of complying with the environmental regulation.

Reconsidering the environmental regime embodied in the MMPA, it seems plausible to believe that the United States fleet might find it less expensive to purchase the new technologies necessary to produce a dolphin-safe catch than would some of their developing country competitors. The producers of these new technologies might be located in the United States, creating yet another obvious interest group favoring rules mandating the technologies’ use. By contrast, those consumers of tuna who might prefer lower prices to reassurance about the safety of dolphins are undoubtedly a diffuse and unorganized group, unable to discipline effectively lawmakers who might act against their preferences. Were these assumptions correct, public choice theory would predict that United States lawmakers might impose requirements on the tuna industry that would result in a net welfare loss to society. Someone normatively opposed to such a loss then might embrace an interpretation of the GATT that made such rules more difficult to implement.

As with the other applications, public choice theory does not militate for or against any particular policy. Rather, it sets a research agenda by identifying the empirical issues that a critic might want to address before approving or condemning environmentally motivated trade restrictions. As such, it can be a useful tool, even though it cannot be an exclusive one.

D. PROTECTION OF CULTURE

Culture is one of those things that define and enliven a society, even if we have a hard time establishing exactly what it is. Across time and place, many peoples have sought to assert and nourish their culture, acting in the belief that every member of the society benefits from such
investments. Language, art, and the other elements of culture, whether high or low, appear to have the attributes of public goods, inasmuch as one person's participation in a particular culture does not preclude another's, and charging a fee for such participation seems impracticable. Were government seeking to promote the general welfare, we would expect to find many instances in which it pursued cultural goals.

At the same time, some persons benefit more from government actions regarding culture than do others. Foremost are the purveyors of culture, whether educators, writers, or artists. We should expect these persons, articulate and well connected as they tend to be, to constitute a powerful lobby for government support of their activities. Thus, public choice theory suggests that we also may encounter instances where governments take steps to promote culture that might diminish overall welfare.

Support for culture need not only take the form of subsidies and commissions. One way in which a society might protect its cultural heritage is through discouraging influences that threaten it. The state might prohibit the sale of national cultural treasures or, as the French government recently attempted, outlaw the assimilation of foreign phrases into the national language. International economic law comes into play when a government seeks to ban imports that in some way harm the national culture. Some of these rules seem silly and inconsequential (the United States restrictions on the importation of propaganda comes to mind), but others have significant economic consequences. Prominent among the latter is the effort of the European Union to impose a quota on the number of hours during which its television stations may broadcast non-European (principally United States) programs.35

Are such restrictions necessary components of a government effort to protect a common culture from erosion, or do they frustrate consumer preferences for foreign-originated entertainment to the narrow benefit of domestic producers? Once again, public choice theory proposes a line of

inquiry, not a resolution to the above problem. At the outset, one needs to address fundamental issues about the definition of culture, and in particular the question of whether hierarchical norms, as opposed to popular usage, contribute to the building of a culture. One would also need to know something about the strength and extent of government support of domestic cultural industries. Someone who favored popular usage over hierarchical norms and who detected an established and government-supported domestic industry might conclude that measures such as the European Union's television programming rules constitute welfare-reducing protectionism; those inclined toward a more authoritarian approach to culture might approve of these actions regardless of the incidental benefits to domestic producers.

CONCLUSION

When all is said and done, public choice theory poses difficult problems for teachers and practitioners of international economic law. It tends to undermine the logical appeal to implicit norms that often makes up the heart of legal analysis, and it poses questions that require empirical responses. It suggests that appetites more than ideals might dominate the lawmaking process, a conclusion that is at least dreary if not disillusioning. It also suggests that not all international norms are alike, and that some may deserve to be distinguished away rather than enthusiastically applied.

Yet I have trouble seeing how a scholar could hope to understand international economic law without coming to grips with this theory. So much of what it suggests about lawmaking seems apposite, and so many problems in the field seem to become clearer and more interesting when subjected to its analytics, that I cannot imagine in a world in which no one raised the questions that public choice theory asks. Nor do I regard the theory as committing its student to any particular set of normative preferences or political ideologies. What I do see the theory achieving is empowerment: its users can understand better what the instrumental effects of their preferences may be and shape their arguments accordingly. This is no small feat.