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Author's Response

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1. Introduction

It is a privilege for me to have received the attention to my latest book[1] of such a trio of expertise and scholarly balanced policy perspectives from three different disciplines: economics, law, and diplomacy. It is also a privilege and honor for me to receive from each of these three sometimes divergent disciplines a general overall recognition of what I sought to accomplish in this book. I congratulate the reviewers. The book has an intricate logical structure but struggles with huge amounts of empirical information, in a purposefully short work.[2] All three authors have recognized these features, and seem to respect them for better or worse, but not always without qualms and appropriate reservations. It is also a privilege and honor for me to count each of these reviewers as a long-term friend and subject matter colleague.

Annoying as I knew it would be to some readers, I decided to write this book to reflect the way I generally have approached my subject, with 'queries not theories' to appreciate the enormous complexity and fluidity of most if not all human activity, and maybe especially this subject. Perhaps I was reacting to some of my reservations about overly simplified and overly broad unsubstantiated generalizations of some works (although those can be appropriate and stimulating to further thought).

But having escaped some of the problems indicated above does not mean this author has escaped all others. There is plenty more to be accomplished on the subject of this book, some of which is evident from the gaps; indeed, this author feels attracted to struggle with a number of issues tackled only briefly, as time and resources permit. The three reviewers who are the subject of this essay all realize

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1 Jackson, John H. (2006), *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge: Cambridge University Press.

2 As indicated in the reviews, this book derives from the annual series of Lauterpacht lectures delivered in the fall of 2002 at the Lauterpacht Center at Cambridge England. The book is actually five times as long (in words) as the lectures, and became a jump off point for the author to express some of his views, including those sought by the invitation for the lecture series to examine the interrelationship of international economic law and general international law.

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that. Patrick Low speaks of the 'thorniest issue' of the fundamental question of the source of the law, and also speaks of the 'possibly forlorn search for the holy grail of an authoritative, convincing and widely shared framework of reference for understanding what drives international cooperation'. Andy Soler stipulates that the book is 'thought provoking', and Laurence Boisson de Chazournes speaks of it as a 'thrilling overview' of some parts of the subject. Thrilling must surely speak somewhat to the risks and difficulties of clambering over some of the messes described in the work.

Several of the concepts and principles of this book, well recognized by the reviewers, can be briefly inventoried, so as not to be too repetitive in the essay when discussing each of the reviews separately. For example, propositions put forward in the book suggest:

1. The real world of today, and particularly certain relatively recent technological developments such as speed and low cost of transport and communication, clearly challenge certain fundamental concepts of international law and relations, and particularly international economic relations and legal norms.
2. An important trait in attempting to gain an understanding of these and other 'globalizing' developments is an appreciation of empirical evidence and real-life experience, and these often tilt towards a relatively pragmatic approach to generalizations. But they also resonate with the old adage, 'the devil is in the detail'. Failure to pursue at least an elemental understanding of the detail, is often fallacy-creating in literature and political discourse (particularly the latter!!).
3. Sovereignty as an important generative concept has major ambiguities and built-in fallacies (descriptive propositions which do not actually accord with reality) such that it is important to use the term 'sovereignty' very carefully, and generally to recognize that it is not a single all-embracing concept, but more a disaggregated series of specific concepts, referred to in the book as 'slices of sovereignty.'
4. Interdependence (driven heavily but not only by transport and communication changes) requires an approach to world relations (and thus to international legal norms) which differ from many traditional views of such norms, and require new international institutions and norms. The major puzzle is how to create and implement those new institutions and norms without harming the older norms and institutions that still have great value. (This certainly requires a reasonably thorough understanding of those older norms and institutions.)
5. Some features of the global reality of today that challenge older approaches and views include the growing power and proliferation of non-government actors on the world scene, a recognition that 'state consent' cannot always be the sole basis of new norm creation, and that 'mantras' like the view that all nations are equal (and thus have an equal vote in world norm creation) do not carry the weight that they used to.
6. Juridical institutions are becoming more significant (indeed vital) to the development of norms and institutions, and are extraordinarily important to treaty-based institutions that have gaps as well as rigidities. There is a very great growth

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in the number, and importance, therefore, of juridical institutions. The WTO dispute settlement system is already a remarkable example of such an institution, seen as very valuable to world policy goals such as stability and predictability, perhaps especially in relation to economic affairs.

7. It is increasingly important in the light of these many circumstances of the current legal and real world to begin thinking about international institutions in 'constitutional' terms, recognizing that the word constitution has many definitions and is often frightening to many persons, even thoughtful policy professionals. Use of the term should also recognize the importance of 'constitutional' attributes at the international level, often taken for granted within nation-state levels, such as transparency, participation, checks and balances, and independent juridical institutions.

2. Appreciating the three reviews

Patrick Low

Patrick Low demonstrates an economist's appreciation for the devilish detail and the need for empirical understanding of the great complexity of world affairs, economic or otherwise. Clearly, his position at the WTO secretariat, in the middle of the constant interplay of international diplomacy, gives him a powerful perspective on matters related to the book. He readily grasps virtually all of the reality implied by the book, and demonstrates (dare I say it) even a 'lawyer's grasp' of the material. He takes note of the 'radical weakness in the conceptual structure of international law', and goes beyond that to score a valid point against my own views when he notes the danger of embracing too much the existing reality because that can lead dangerously to addiction to the status quo. Good point: I am forewarned in my future work.

Patrick's reaction to the conceptual problems of sovereignty well demonstrate his experience in the midst of what the book discusses as a major constant tension concerning allocation of power or authority between the nation-states and the international cooperative institutions. This is daily grist in his life, and the life of virtually everyone who is professionally engaged in international affairs, perhaps particularly international economic affairs. (It could be that this tension is particularly acute in economic affairs, because there are so many layers of power and authority in those contexts, including private enterprise, special interests, questions of governance at various layers, and layers of government and non-government entities at federal, sub-federal, international regional, bilateral and multilateral international situations.) Wearing his 'lawyer thinking' hat, Patrick notes the challenges to a basic fundamental of international law, namely 'state consent.' He notes correctly that I could have used some of those circumstances as further examples of 'organized hypocrisy'.

Finally, for this essay, Patrick perceptively comments on one of the most important features of the WTO, its dispute settlement system. While appreciating its

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significance, he appropriately notes the problem of balancing law and politics, and the need for non-litigious interaction including use of concepts of 'soft law.' This clearly is another direction which I would like to pursue, hopefully with the assistance of Patrick and his colleagues, and other professionals similarly situated.

Laurence Boisson de Chazournes

Laurence, with her scholarly lawyer mix of admirable competences, bores right into the core of the problems explored in this book, namely sovereignty. She argues that states still retain a pre-eminent role, but matters are changing and they are losing their monopoly of interest articulation and action on the international scene. Here again we face the tension of allocation of competence and authority between the international cooperative mechanisms and those operating at national or other levels. She correctly appraises my work as directed by the 'prism' of international economic law, which I believe offers now a growing jurisprudence with more depth of analysis and more detailed experience, than almost any other field of international relations. Some of the WTO cases approach, if not embrace, the activity of 'balancing' policy goals (trade cf. non-trade, international cf. subsidiarity, etc.) in the reports.

These approaches have been criticized by some observers and participants in the WTO processes, as being inappropriate because such persons argue that balancing should only be done at the nation-state level. There is, of course, some rationale for that belief, since many nation-states can claim more 'democratic legitimate' procedures for such decisions, and in some cases are large enough and diverse enough to bring various constituencies to bear on a problem, where balancing must occur. But the issue is still open, and will become even more festering, as to how much 'balancing' must gravitate to the international level in the type of world ('global') that seems to be inevitably developing. Laurence has masterfully put her finger on a key pulse of the international system.

Laurence adds two important thoughts that relate to the limitations of this book. One raises the subject of human rights, and other the very important question of whether the WTO as an international institution is 'appropriately equipped' to manage the various complex dilemmas of power allocation and policy conflicts, some of which require elements of 'balancing' concepts which are sometimes argued to be appropriately done only within the framework of national societies and constitutions.

As to human rights, or other broad concepts which may require departure from 'consent of sovereign' notions of international law, Laurence notes ideas such as 'responsibility to protect' are only slightly developed. She ingeniously suggests that more exploration is worthwhile to consider applying such departures as cases of 'grave economic disturbances', which might cause grave breaches of human rights (e.g. the rogue state problem). I have had the privilege of participating in a research project several years ago (resulting in two books of selected

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essays[3]) about the interface of international economic law and human rights, and I realize that this is a major field of study which needs much more work. I hope I may be able to at least participate in some of that work during forthcoming years. The work of the project mentioned only scratched the surface of a number of perplexing issues. For example, suppose a WTO member uses trade or other economic 'sanctions' against the products of another member which has egregiously violated human rights. At what point must the WTO dispute settlement system recognize an excuse for such 'sanctions' from the normal WTO obligations. (WTO provisions recognize possibilities when there is a United Nations legal mandate for such sanctions, but that leaves a lot open.) Laurence has put this on the table very neatly.

The other point she makes, the capacity of the WTO to 'manage' the complex institutional and other developments in a broad menu of international economic relations, is acutely recognized by many, and mentioned in several portions of this book. She is dead right to call attention to this subject, and indeed there is a fair amount of study, comment, and literature on it (including the Sutherland Report).[4] This question of institutional capacity, of course, arises in almost every part of the landscape of international cooperation and relations today, and becomes increasingly acute.

Andrew L. Stoler

Andy completes this trio of commentaries on the book, appropriately stressing his role and extensive experience as a negotiator and diplomat. Like the others, he well appreciates the major pragmatic and empirical thrust (and 'queries') of the book, while noting that he is not a lawyer and thus is 'not comfortable' addressing some of the book's discussion regarding sovereignty and international law. For this reason, he focuses his comments on chapters 4 and 5 which are devoted to the WTO (and comprise half of the book's pages.) My view is that Andy is probably too modest in his self-constraint.

My many conversations with him make me very aware that with his experience he has had to struggle with these 'legal concepts' as part of the landscape of his negotiating roles. Andy demonstrates this dimension of his thinking when he notes the discussion in the book about some of the dispute case reports and their significance. Here he flags attention to the remarkable *Shrimp–Turtle* case, and

3 Jackson, John H. (2006), 'Reflections on the Possible Research Agenda for Exploring the Relationship between Human Rights Norms and International Trade Rules', *International Trade and Human Rights: Foundations and Conceptual Issues, The World Trade Forum*, Frederick M. Abbott, Christine Breining-Kaufmann, and Thomas Cottier (eds.), 19–28. Volume 5, Ann Arbor, MI: The University of Michigan Press; Jackson, John H. (2005), 'General Editor's Foreword', *Human Rights and International Trade*, Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds.), v–ix. Oxford: Oxford University Press.

4 Peter Sutherland *et al.* (2003), *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, available at: www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf, last visited April 19, 2007.

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other cases, discussed in the book. As a US diplomat and subsequently a very high official of the GATT (Deputy Director General) with important responsibilities that embraced at least some legal matters, his memory is well stocked with information relevant to the work of lawyers, perhaps especially regarding the meaning of some of the text negotiated.

Consequently I recognize some of his comments in this review, and respect his views expressed. In addition, he takes up three matters which he states are minor and not central to the book's themes. I could probably defer to him without commenting, but I think readers may expect me to comment briefly on these. Although he defers on 'law', I tend to defer to him on some of the matters he raises, and certainly cannot comment as definitively as he can on parts.

Andy raises the issue of 'single undertaking' and differs a bit from my view which he suggests is either inaccurate or a misperception. Obviously, I prefer the latter word. Andy suggests that the real bite of the 'single undertaking' to require all members of the new WTO organization to accept virtually all the treaty commitments, was only developed near the end of the UR negotiation, through 'massaging by the Quad group' (US, EC, Japan, and Canada). There are at least some clues that some thinking at the launch of the UR was already primed for that suggestion, and indeed the full language of the Punta del Este declaration states, 'The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.'[5] Some writing about the negotiation notes this language and suggests a 'formal' exception for services,[6] so maybe the single package was originally designed mostly for the GATT parts of the negotiation. My other sources, including some discussions with persons who negotiated the Punta declaration suggests there may have been some ambiguity about this phrase, or at least the phrase could be shaped by 'massaging' into a requirement near the end of the UR that almost all of the final text must be accepted as a condition of WTO membership. Certainly, any negotiator is all too aware of various ambiguities in a treaty, especially one with so many participating negotiating entities.

Discussions with some who participated in the negotiation of that text suggest that some participants were reacting to the problems of the prior major negotiating round (the Tokyo round of 1974 to 1979), which resulted in a deeply fragmented set of obligations, leaving much choice to nations which 'side texts' they would accept, so later the situation was termed 'GATT a la carte'. There seemed to be some sense that this situation should be avoided. But I do accept that my language in the book was not very precise on some of these subtleties, with which Andy and his colleagues at that time had to cope. So I am happy to credit Andy's view. The agreed fact, however, is that at the end of the negotiation it was established

5 See *Ministerial Declaration*, GATT B.I.S.D. (33rd Supp.) (1987).

6 Croome, John (1995), *Reshaping the World Trading System: A History of the Uruguay Round*, Geneva: World Trade Organization.

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'after massaging' that almost all of the treaty had to be accepted by any nation which wished to be a member of the newly formed WTO.

A second point Andy flags, is the book's 'implication' that WTO Ministerial Conferences might better be held not 'on the road', but in Geneva. Andy feels that ministerials in Geneva demonstrated that 'Geneva is too small and ill-equipped.' That is a logistical judgment that I am not too well equipped to judge, although I find it curious. Seattle and other 'road away' venues did not turn out so well, and the costs of transporting huge quantities of documents, and transporting and housing masses of persons (who in Geneva would live at home during conferences there) seem quite formidable. Also, there is the view of some, including the Sutherland Report[7] which suggests that ministerials should be annual, and should be substantially downsized. So my guess is more thought and detail needs to be considered on this admittedly small point.

A third point Andy calls a 'quibble' is the book's manner of listing what Andy terms the 'goals of the WTO dispute settlement system'. He feels that some policy goals listed are not appropriate to the WTO, and indeed I also agree that is so. In fact, this section of the book was not setting forth the goals of the WTO DS system, but instead was illustrating a partial inventory of the large number of different goals which could relate to one or another of the many international dispute settlement systems. The point of this section was precisely that some of these goals were not applicable to some juridical systems, and also some goals conflicted even with each other, and that this itself contributes to the complexity of any international DS (or tribunal) system, certainly including the WTO. Indeed, some of the goals expressed in the WTO UR text (especially the Dispute Settlement Understanding)[8] can be seen to potentially conflict, even though they are part of the same treaty text mandate. (Thus balancing between the goals must inevitably occur.)

3. Conclusions

I enjoyed very much having the opportunity to read, admire, and reply to a set of extraordinarily perceptive and experienced authors from diverse backgrounds. Clearly the range of issues and institutional as well as substantive circumstances relating to international economic law is enormous. But I have both enjoyed and been stimulated by applying some thinking processes to a portion of that range of issues, without pretensions of solving very much.

Institutionally I probably would emphasize most a point I made in the list beginning this essay, namely that the importance of juridical institutions cannot be

7 See Sutherland, *supra* note 6.

8 Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3, General Agreement on Trade and Tariffs (GATT) Secretariat, *The Results of the Uruguay Round Multilateral Trade Negotiations, the Legal Texts* (Geneva, 1994).

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overstressed. Perhaps that is a lawyer's particular tilt, but my sense is that it is a multi-disciplinary tilt. The excellent book reviews designed to trigger my response, at least partly confirm my thinking on this subject. I express my gratitude to those review authors, and to the editor of this journal, Douglas Irwin, who initiated and engineered this exercise.

My main hope for this exercise is that I will continue to have much contact with all persons mentioned above, and indeed many others who relish the challenges of the subject of international economic law.

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