CHAPTER III

REGULATION OF INTERNATIONAL TRADE: THE INSTITUTIONS

The last chapter explored the international trade transaction from a private law viewpoint. This chapter turns to the public regulation of the same transaction and concentrates on the national and international institutions that may be involved; later chapters will consider the substantive principles that they employ.

International trade is regulated by a complex mixture of international agreements and domestic law; the latter may implement international accords or reflect purely domestic political processes. This chapter begins with a description of the overall structure, which will be observed in action in later chapters. The chapter then explores the constitutional issues that affect Congress's extensive delegations of power to the executive in the United States. The chapter next provides a parallel introduction to the central international institution, the World Trade Organization (WTO),[1] and its predecessor the General Agreement on Tariffs and Trade (GATT).[2] Finally, it explores two important regional developments with broad implications–-the European Union (EU), an entity that not only trades extensively with the United States, but also exemplifies the political, legal and constitutional difficulties of establishing and operating a common market or customs union,[3] and the North American Free Trade Agreement (NAFTA) the arrangement among the United States, Canada and Mexico that created a free trade area for the three states in goods, services and investment.

As you read this chapter, you should be asking questions about each institutional structure that is being described. What is the anatomy of each organization? What are the objectives of each institution? What are the processes established within each institution for achieving the objectives? How do differences in the systems described affect the making of international economic policy?

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[1]The WTO dispute resolution process is considered in Chapter IX.

[2] While the GATT was, strictly speaking, an executive agreement rather than an "organization," in practice the collective activity of the parties to the agreement functioned as, and was treated by the parties as, an international organization. *See infra* at [redacted] (discussing the status of the GATT).

[3] On the differences between a common market and a custom union, see *infra* at [redacted].

A. BACKGROUND AND INTRODUCTION

1. Development of the U.S. Trade Regulatory System[4]

The Tariff Act of 1789, signed into law by President Washington on July 4, 1789, was the first substantive legislation passed by the first Congress. This act, coupled with the Collection Act of 1789, operated as both a trade protectionist device and a revenue measure. Among other things, the act established the first schedule of import duties and created an additional duty of ten percent on imports carried on vessels "not of the United States."

While the specific provisions of the act are of little interest (by 1799 it had been superseded by more detailed legislation), the act remains significant for setting the basics of U.S. trade policy. In supporting its enactment, Alexander Hamilton argued that tariffs would encourage domestic industry. He also contended that other nations offered significant subsidies to their industries, and a tariff would protect U.S. industry from the effects of these subsidies.[5] Another argument in favor of the act is now easy to forget–before the income tax was authorized by the Sixteenth Amendment in 1913, the tariff was a key source of federal revenue. Thus, for over a century, import duties (along with domestic excise taxes) were the major source of federal government revenue, with sugar duties alone accounting for approximately 20 percent of all import duties.

The politics of tariffs soon became intertwined with sectional disputes. Northern manufacturers favored high tariffs; Southern planters, dependent on exports, favored free trade. One great effort at compromise was tariff-based. Henry Clay's proposed "American Plan," under which Northern manufacturers would be protected by high tariffs and become a large market for agricultural products of the West and the South, and revenue from tariffs would support construction of the transportation system needed to make internal trade feasible. However, the North wanted tariffs without public works expenditures; the South was opposed to any tariff supporting the price of manufactured goods. Clay's proposal failed, but a high tariff did pass Congress as the Tariff Act of 1828 (characterized by the Southern states as the "Tariff of Abominations") and nearly precipitated a constitutional crisis.

In December 1828, South Carolina endorsed the South Carolina Exposition, a document which asserted that the tariff was unconstitutional and thus could be nullified by individual states. By February 1829, five Southern state legislatures had protested the tariff as unfair. In 1832, a South Carolina state convention passed an ordinance purporting to nullify the act, and President Andrew Jackson responded with a proclamation that acts of nullification were themselves unconstitutional and treasonous. Congress enacted the Force Act, authorizing the president to use armed force to enforce the tariff, but also reduced tariff rates substantially. The crisis was finally defused when South Carolina accepted the lowered rates.

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[4] This section is derived in part from Fisher, The Multinationals and the Crisis in United States Trade and Investment Policy, 53 B.U.L. Rev. 308, 309-316 (1973). For other sources on the history of trade policy, *see* J. Condliffe, The Commerce of Nations (1950); S. Metzger, Trade Agreements and the Kennedy Round (1964); E. Stanwood, American Tariff Controversies in the Nineteenth Century (1903); I. Tarbell, the Tariff in Our Times (1911). Although less historical, the Report and Appendices of the Williams Commission are extremely useful: The Commission on International Trade and Investment Policy, United States Economic Policy in an Interdependent World, (Report to the President), Washington, D.C., July 1971.

[5] Concerns over "dumping"–imports sold at less than their fair value to gain unfair advantage over domestic goods–would also be addressed in the Tariff Act of 1816. For current rules with respect to dumping, see Chapter V, *infra*.

After the Civil War, domestic policies continued to favor a high-tariff policy--perhaps strengthened by the fact that industry was spreading through more of the nation and therefore broadening congressional support for high tariffs. By the 1890s, Congress was adding an important innovation to the legislation--a delegation of power to the executive to adjust tariffs in specific circumstances. An early example was what are now called "countervailing duties"–tariffs to be levied to correct for a foreign subsidy on a product exported to the United States.[6] The executive was directed to measure the foreign subsidy and was given authority to determine the countervailing duty without further congressional action. This became only one of a large number of such adjustment devices; other important ones include the antidumping duty, designed to respond to price discrimination between the United States and an exporter's home market, and the peril point or escape clause (*see* Chapter IV, *infra*), designed to protect an industry suffering serious injury from competition by imports. The supporting procedures frequently relied on the United States Tariff Commission, an administrative agency created in 1916, as well as on officials in the executive branch (the Tariff Commission was renamed the United States International Trade Commission (ITC) in 1974).

President Woodrow Wilson, an ardent free trader, sought to reform the tariff, arguing against a "tariff which cuts us off from our proper part in the commerce of the world, violates the just principles of taxation, and makes the government a facile instrument in the hands of private interests."[7] His efforts, which were only partially successful, were reversed by two bills: the Fordney-McCumber tariff of 1922 and the Smoot-Hawley tariff of 1930. The Fordney-McCumber tariff took the concept of delegation to an extreme through the "flexible clause," a provision empowering the president to alter tariff rates by up to 50% whenever he found, after investigation by the Tariff Commission, that the rates did not fairly equalize the costs of foreign production with those of domestic production. In essence, this was an effort to repeal the law of comparative advantage.[8] The Smoot-Hawley tariff increased duties on more than 1,000 articles; by the end of 1931, 26 foreign nations had raised their tariffs against the United States in retaliation. The resulting harm to international trade undoubtedly contributed to the severity of the Great Depression.

The misery of the 1930s also brought a free-trade oriented innovation in tariff law: the "reciprocal trade agreement" concept. This was an application of the idea that nations trading with each other might agree reciprocally to reduce their tariffs. Provided the employment created by each nation's increase in exports was greater than that lost to new imports, such an agreement might be politically beneficial--and would almost certainly be economically desirable. Because there was already a network of "Most-Favored Nation" (MFN) clauses in U.S. Friendship, Commerce, and Navigation treaties, a network deriving from the 18th century,[9] these reductions would also be effectively extended to most nations. It was Franklin D. Roosevelt's secretary of state from Tennessee, Cordell Hull, who succeeded in obtaining from Congress the delegation of authority needed to make this process easier. The Reciprocal Trade Agreements Act, passed in 1934, ultimately contributed to major reductions in tariffs through bilateral tariff-cutting negotiations, and by 1940 28 agreements had been concluded under the Trade Agreements Program.

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[6] For current rules on countervailing duties, see Chapter VI, *infra*.
[7] D. Muzzey, A History of Our Country 617 (1936).
[8] On the law of comparative advantage, see *supra* at [redacted].
[9] For the history of the MFN clause, see R. Snyder, The Most-Favored-Nation Clause (1948).

2. Creation and Operation of the GATT

These changes were roughly paralleled in other nations, and in the reconstruction period following World War II consideration was given to creating an International Trade Organization (ITO), in addition to monetary and development institutions. At Bretton Woods, New Hampshire, in 1944, the key negotiations took place to create the monetary and development organizations, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank).[10] The corresponding trade negotiations were slower and produced a charter at Havana in 1948, but it became apparent that the United States Congress would never approve the proposed trade organization. Then, as now, Congress was deeply suspicious of a supranational international organization that might infringe on U.S. sovereign powers in the regulation of international trade. Instead, the central principles of the ITO, as spelled out in an interim document, were presented and approved (by executive agreement in the United States) as the General Agreement on Tariffs and Trade (GATT), an agreement that more and more became an organization, and to which the Congress became increasingly receptive.[11] The text of the GATT appears in the Supplement.

The GATT provided a framework for tariff negotiations, included specific rules and norms for trade regulation, and created procedures for dispute settlement. The negotiations were an elaborated multipartite version of the reciprocal trade agreement pattern. These negotiations occurred in separate "rounds" of multilateral trade negotiations (MTNs), each of which lasted several years (and often effectively shaped by a specific congressional delegation of negotiating authority to the United States executive). Each MTN produced significant reductions in tariffs, and the later MTNs succeeded in obtaining some accords on nontariff barriers (NTBs)–devices such as quotas, import licensing, and restrictive technical standards that have much the same trade-restraining effects as tariffs. A table identifying the successive GATT negotiating rounds appears below in Figure 3-1.

The rounds tended increasingly to deal as well with rules. The rules in the GATT's initial text began with a reaffirmation of the MFN principle. This principle is in fact much more significant than might appear at first glance. It represents a commitment to nondiscrimination, globalism, and multilateralism, as opposed to discriminatory trade arrangements, regionalism, or bilateralism in trade relations.[12] Moreover, it greatly

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[10] For more detailed discussion of these negotiations and the "Bretton Woods System" that emerged as a result, see *infra* Chapter X at [redacted].

[11] *See* Remaking the System of World Trade: A Proposal for Institutional Reform, Am. Soc. Int'l Law Poly. No. 12 (1976). As the ASIL stated, "the centerpiece of the structure of international trade cooperation has been GATT, the General Agreement on Tariffs and Trade. It is in many ways an odd centerpiece. The GATT arose out of the tariff negotiations of the ITO conducted in the late 1940s among the members of the Preparatory Committee for the International Trade Organization (ITO) and was concluded before the formal negotiations of the ITO charter began. The general provisions, that were a traditional part of any tariff negotiations, modified as the result of the preliminary drafting of the ITO, became the GATT. They were limited to those projected ITO provisions that the U.S. president could accept under his Trade Agreements authority. When the U.S. failed to ratify the ITO, the General Agreement remained. Subsequently, the GATT provided the framework for a series of tariff negotiations, the dismantling of wartime trade controls, and the handling of many other trade issues. Its organizational structure, however, remained rudimentary, and technically it is not even an 'organization.' "

For histories and background of GATT, *see* G. Curzon, Multilateral Commercial Diplomacy (1965). K. Dam, The GATT (1970); J. Jackson, World Trade and the Law of GATT (1969). J. Jackson, The General Agreement on Tariffs and Trade in W. Surrey & D. Wallace (eds.) A Lawyer's Guide to International Business Transactions (1977).

[12] However, one should not ignore the growing trend towards a "neo-regionalism" built around such devices as the common market aspects of the EU or, more recently, the establishment of the NAFTA. *See infra* at [redacted]-[redacted] (discussing regional trading arrangements). *See also* Joseph L. Brand, *The New World Order of Regional Trading Blocks*, 8 AM. U. J. INT'L L. & POL'Y 163 (1992) (discussing recent trend).

reduces the opportunity to use trade arrangements as a way to extract diplomatic advantage from specific nations, and thus tends to eliminate frictions that might otherwise exist between trading partners. Supplementing the MFN principle are more specific rules covering, in particular, the circumstances in which tariff adjustments may be made. Later GATT negotiating rounds frequently further detailed and elaborated these principles. Thus, the work product of the Tokyo Round (1974-1979) was not just a large number of specific tariff reductions, but also a bookful of detailed codes covering such topics as the subsidies against which a party to the GATT might impose countervailing duties and the circumstances in which public agencies might favor their national suppliers over foreign bidders.

Popular Name	***Duration***	***Notable Results***
[Round 1]	1947	ITO Charter drafted; GATT drafted; MTNs conducted
[Round 2]	1949	GATT Contracting Parties accept members
[Round 3]	1950	GATT Contracting Parties accept members
[Round 4]	1954-1955	GATT amended; Japan admitted
Dillon Round	1960-1962	Significant tariff reductions
Kennedy Round	1962-1967	GATT Part IV added
Tokyo Round	1973-1979	Various codes adopted
Uruguay Round	1986-1994	WTO created
Doha Development Round	2001-*	**

*Negotiations are scheduled to conclude in 2007.
**Agenda includes agricultural trade, trade in services, improved access for trade in industrial products, intellectual property, improving the dispute settlement system.

Figure 3-1
GATT Negotiating Rounds

Finally, the GATT developed dispute-settlement mechanisms. These ranged from procedures by which a party might be exempted from GATT provisions that raised severe domestic economic and political problems, through consultations between GATT parties over trade disputes, to formal procedures leading to condemnation of a GATT violation. The formal procedures, however, had long been declining in importance. This was partly because the ultimate sanction available was the imposition of retaliatory duties against the offending party,[13] something not usually desirable economically. It also derived from the unwillingness of signatories to accept the domestic political implications of free trade or to cede significant sovereign decision-making power to an international trade forum. ()

The more recent trend under the GATT, therefore, was to bypass the formal procedures or to use them for symbolic purposes. Thus, Europe and the United States frequently used the GATT dispute settlement process more to condemn each other's protectionism than to negotiate it away. There also emerged an enormous number of side agreements, frequently on the edge of legality under the GATT, governing issues ranging from trade in textiles to Japanese exports of automobiles to the United States. By the beginning of the 1990s, both international and national law reflected the growth of protectionism in a depressed world economy.

3. Creation and Structure of the WTO

So matters stood at the initiation of the Uruguay Round in 1986.[14] By 1994, the negotiators had concluded a set of agreements that fundamentally transformed the GATT and its institutional structure. The GATT-as-agreement ("GATT 1947") remained the central document of international trade regulation, supplemented and updated by a new GATT agreement ("GATT 1994"). The GATT-as-institution was completely replaced, however, by a genuine international organization, the WTO, which was established by a WTO Charter and its accompanying annexes. The text of the Charter and its annexes appears in the Supplement.

While the creation of the WTO represents a fresh development in international trade regulation, it is grounded in historical continuity with the original GATT system, for two reasons. First, the Charter incorporates GATT 1947 into the new system, through the GATT 1994, which is Annex 1A of the Charter. Second, in many respects the new system is a response to, and an attempt to resolve, problems perceived in the former GATT system. Figure 3-2 below illustrates the WTO system in documentary terms.

The WTO Charter is the constitutive document of the WTO as a legal person, an international organization. It deals with such issues as the rules governing membership in the organization (Articles XI-XIII), functions, structure and status of the organization (Articles III-IV, VIII), powers and responsibilities of its various organs (Articles V-VII, IX), and technical issues affecting the Charter as a treaty (Articles X, XIV-XVI). The

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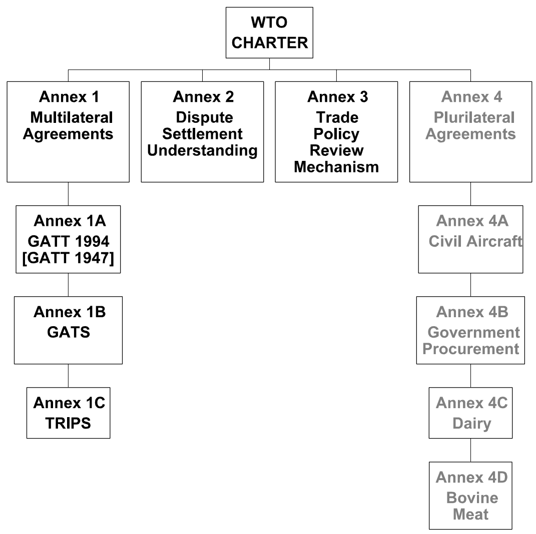
[13]However, under some of the NTB codes that we shall encounter later in this book, sanctions focus not on tariffs but instead on withdrawal of the privileges accorded to signatories who fail to live up to their obligations under the particular code.

[14]On the history of the Uruguay Round, see TERENCE P. STEWART, ed., THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1993); REINHARD RODE, ed., GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME (1990); Konrad von Moltke, *The Last Round: The General Agreement on Tariffs and Trade in Light of the Earth Summit*, 23 ENVIRON. L. 519 (1993); Michael B. Smith, *GATT, Trade, and the Environment*, 23 ENVIRON. L. 533 (1993).

organizational structure of the WTO is illustrated in Figure 3-3 below.



Annex – Mandatory agreement upon WTO accession
Annex – Voluntary agreement

Figure 3-2
WTO System: Basic Documents

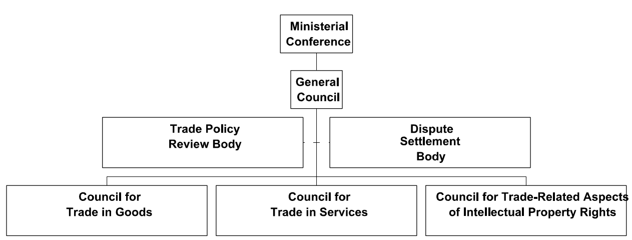


Figure 3-3
WTO: Organizational Structure

B. UNITED STATES TRADE INSTITUTIONS AND RELATED CONSTITUTIONAL ISSUES

It is now possible to describe briefly the institutional structure underlying U.S. trade law and to examine the relevant constitutional issues.

1. United States Trade Structure

The institutional structure administering the foreign trade laws of the United States involves all three branches of the federal government.

a. Congress

The starting point for analysis is that Congress, under Article I, § 8 of the U.S. Constitution, possesses the plenary authority over the regulation of foreign commerce unless and until it delegates that authority in a permissible manner.[15] While the Constitution does not grant any right to import or export,[16] Congress has, since 1789, frequently addressed both sides of international trade transactions,[17] and there has been a progressive legalization of certain rights on both fronts by statute. The following selection succinctly describes the role of Congress in U.S. trade policy.

S. COHEN, THE MAKING OF UNITED STATES INTERNATIONAL ECONOMIC POLICY

57-60 (1977)

THE CONGRESS

The principal source of the legislative branch's authority in the foreign commerce of the United States Article 1, Section 8 of the Constitution, which specifically empowers Congress to "lay and collect Taxes, Duties, Imports and Excises" and to "regulate commerce with foreign Nations." Congress's specific duties include approving the budgets of the makers and managers of international economic policy, passing supplementary legislation (dealing with changes in the par value of the dollar, U.S. membership in international organizations, international taxation, and so on), and approval in the Senate of international economic treaties and political appointees.

The depth of Congress's imprint on American international economic relations has

[15]U.S. Const. art. I, §8, cl.3 (empowering Congress "to regulate Commerce with foreign Nations"). *See Field v. Clark*, 143 U.S. 649 (1891) (upholding delegation to president of broad powers to restrict trade).

[16]*But see* U.S. Const. art I, §9, cl.5 (prohibiting Congress from levying duty on exports). *See also R. J. Reynolds Tobacco Co. v. Robertson*, 14 F. Supp 463 (M.D.N.C. 1935) (construing clause liberally and requiring that exportation not be obstructed by burden of taxation).

[17]The fact that the first substantive piece of legislation passed by the first Congress, the Tariff Act of 1789, dealt with the imposition of customs duties was an early indication of the high priority that trade policy has had with the U.S. Congress. Congressional preoccupation with U.S. trade policy has been due to many factors over time, including the need for revenue, the desire to protect against unfair foreign trade advantages, the desire for national independence, and the desire to protect U.S. infant (and eventually even established) industries. *See* D. MUZZEY, A HISTORY OF OUR COUNTRY (1936); Fisher, *The Multinationals and the Crisis in United States Trade and Investment Policy*, 53 B.U. L. Rev. 308, 309-311 (1973).

varied historically. Prior to 1934, it was very deep indeed; the executive branch was more administrator than policy formulator. But the growing volume of international trade and the growing burden of constituent pressures for tariff protection gave birth in 1934 to a transitory phase in which control over international economic policy began moving to the administration. By the early 1960s, Congress was doing the president's bidding. The complexity of the balance-of-payments problem and the paucity of grassroots interest channeled the average congressman's interest elsewhere. The politicization of international economics later in that decade marked the beginning of Congress's effort to redress the imbalance of influence. The overall post-Vietnam and post-Watergate reassertiveness marked the maturity of this effort. The Trade Act of 1974 is its first major offshoot.

No other national legislative body more extensively creates, revises, and offers critiques on a nation's international economic policy than does the Congress of the United States. To fulfill the duties of a separate and equal branch of government, it has an elaborate organizational structure to prepare legislation, challenge and reject administration proposals, evaluate existing policies, and suggest new ideas and approaches. The general reassertiveness of the Congress and specific statutory controls combine to assure that the legislative branch has become an active member of the policy-making process. That the executive branch must seriously consider congressional sentiment, the possibility of a congressional override of a trade action, means that an application of the bureaucratic politics model to international economic policy decision making may be specious if it concerns itself only with the clash of executive branch viewpoints and perspectives. Perhaps this is only a temporary situation. Nevertheless, at the present time, for specific policy decisions, the president may be forced to swallow hard–to the extent even of ignoring a State-Treasury Department consensus–and adapt U.S. policy to meet congressional demands.

At the heart of the congressional machinery are the committees. They are the vehicles for preparing legislation, confirming treaties, receiving briefings by executive branch policy makers, and exercising the oversight function. Relatively unknown outside of Washington, oversight hearings begin where the legislative function ends. . . . International economic legislation has begun to mandate tighter congressional scrutiny of policy. This fact, along with strengthened professional staff support for all committees, and increased scheduling of oversight hearings are the main manifestations of the new era of interest in international economics on Capitol Hill. Another symptom is the unofficial consultations that are becoming increasingly common on a personalized basis between international economic policy leaders in the two branches.

There are two striking features of the congressional committee structure in the international economic policy sphere: the large number of committees involved and the overlapping committee jurisdictions. The situation is, from an administrative point of view, strikingly similar to that which prevails in the executive branch. A major difference is the absence of any real attempts at coordination in Congress.

A reasonably complete, albeit nondefinitive, breakdown of committee responsibilities in international economic policy demonstrates that six legislative committees and one joint committee have jurisdictions involving the international economic relations of the United States.

Principal Congressional Committees with Trade Jurisdiction[a]

Committee	*Function*
Agriculture committees	Agricultural exports; international food stockpiles; food aid
Appropriations, Budget committees	Departmental, representational and program budgets
Senate Banking, House Financial Services committees	Bank regulatory policy; export policy and controls; financial aid to commerce and industry; international economic policy; monetary policy
Commerce committees	Export policy; foreign direct investment in the United States
Senate Foreign Relations, House International Relations committees	Economic sanctions; export controls; foreign affairs; foreign loans; international commodity agreements; international economic and monetary policy
Joint Economic Committee	Oversight of general international economic and monetary policy
House Ways and Means Committee; Senate Finance Committee	Trade agreements and customs legislation

On hot and complex issues, such as energy, international commodity agreements, and the multinational corporation, jurisdiction is fragmented ad nauseam. Aspects of the issues usually are parceled out in a narrow basis in response to initiatives and demands by several committees.

Most of the technical expertise is provided to members of Congress by the professional staffs retained by each committee. Since 1970, a rapid expansion of those staffs has taken place. Although the previously minuscule number of international economists working on Capitol Hill has increased geometrically, their numbers are still a small fraction of those employed in the executive branch. Additional expertise is provided on request by specialists in the Congressional Research Service, which is a part of the Library of Congress. The congressionally controlled General [Accountability] Office (GAO) undertakes investigations and evaluations of policies, practices, and programs maintained by the executive branch. The Congressional Budget Office, which provides analytic and research support for the budget committees who manage the Congress's . . . budget procedures, has the mandate, resources and influence to make it a further source of congressional ideas on international economic policy.

A final example of Congress's expanding involvement in this area has been the increased number of invitations by the executive branch to have congressional members serve as unofficial members of U.S. delegations to international economic conferences

[a]Updated as of January 2001 from congressional sources.

and negotiations.

b. The Executive Branch[1]

The executive branch implements U.S. international economic policy on a daily basis. Congress may, from time to time, set the agenda and the broad contours of policy, but it lacks the expertise, resources, and flexibility to react to the daily events that are the stuff of the fast-moving world of international commerce.

Within the executive branch at least 20 different agencies have been the recipients of congressional delegations of authority, including the Office of the United States Trade Representative (USTR), the International Trade Commission (ITC), and the Treasury, State, Homeland Security and Agriculture Departments.

The multiplicity of agencies having something to do with trade regulation sharply limits the ability of the executive branch to implement a coordinated U.S. trade policy. Why has the centralization of U.S. trade policy not taken place, despite the recommendations of numerous academics and government officials? We will be in a better position to answer that difficult question after we have considered the material in the next six chapters; for starters we can note the importance of interest group politics, the reluctance of bureaucracies to yield jurisdictional turf, personalities, historical accident, and the pluralism inherent in the making of trade policy in a democratic society.

The most important mission of the executive branch in the making of U.S. international economic policy is its role in the U.S. tariff establishment process. This is really a form of shorthand for the administered protection provided for the segments of the U.S. economy that are injured by trade as well as the pursuit of liberal trade policies leading to a more rational allocation of resources. In summary, the U.S. tariff establishment process is a complicated mechanism providing for possible long-term duty reductions and short-term duty increases under certain limited circumstances (*see* Figure 3-4, *infra*.).

The current effective tariff rates are derived from the 1930 Smoot-Hawley Column 2 duty rates in the Tariff Schedules of the United States by a series of international negotiations (which generally lower the rates) and by various domestic adjustment processes (which generally raise the rates, albeit on a temporary basis). Figure 3-5, *infra*, shows the average U.S. tariff rates since 1900.

Who are the key players in the executive branch in the making of U.S. international economic policy? This also is a difficult question to answer, as the influence of agencies shifts due to particular personalities or events. In general, one may describe two sets of actors–the "superpowers" (the White House, the Departments of Commerce, Treasury, and State) and the specialists (a long list of departments and agencies with some international policy concern, including the Departments of Agriculture, Transportation, Justice, Energy, Labor, and Interior, and specialized agencies such as the Export-Import (Exim) bank, the Agency for International Development, the Federal Communications Commission, etc.).[2]

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[1] This section is derived in part from U.S. GOVERNMENT MANUAL (2002-2003) and federal agency sources.

[2] The Department of Homeland Security, created by the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, Nov. 25, 2002, 116 Stat. 2135 (2002) (codified at scattered sections of 3, 5-8, 10, 14-15, 18-21, 26, 28, 31, 37-38, 40-42, 44, 49-50, 50 App. U.S.C.), is something of a hybrid that has taken over some functions of superpower agencies (*e.g.*, having taken over the Customs Service from the Treasury Department) and some functions of specialist agencies *e.g.*, having taken over the Office of Science and Technology from the Justice Department). It also has specialist features of its own, such as responsibility for "critical infrastructures." *See, e.g.*, HSA §§ 201-202, 211-215 (charging department with responsibility for critical

[INSERT FIGURE]

FIGURE 3-4
The Tariff Establishment Process

i. The White House

a. Negotiating Authority

As noted above, international negotiations covering the multilateral reduction of duties are conducted by the executive branch pursuant to authority delegated by Congress to the president. For example, delegation under the Trade Act of 1974 provided the negotiating authority for the Tokyo Round, while the Trade Agreements Act of 1979 implemented the results of that round. Likewise, the Trade and Tariff Act of 1984 authorized the president to undertake negotiations on a continuing basis to reduce or eliminate barriers to international trade in services, to reduce or eliminate the trade-distorting effects of investment-related measures, and to improve foreign market access for the export of high technology industries. These negotiations were completed, and the results were implemented in the Uruguay Round Agreements Act. (Pertinent excerpts from these acts, among others, appear in the Supplement.) Since the initiation of the WTO's Doha Development Round of multilateral trade negotiations in November 2001, Congress renewed the president's negotiating authority–formerly called "fast track" authority, now officially called "trade promotion" authority[3]–in section 2103 of

infrastructure information).

[3]*See* Trade Act of 2002, §§ 2101-2113, Pub. L. No. 107-210, 116 Stat. 933, 993-1023 (Aug. 6, 2002) (codified at 19 U.S.C. §§ 2191(b)(1), (c)(1), 2151(a)(1)-(2), (b)-(c), 2152, 2153(a), 2154(a), 2154(b), 2155(a)(1)(A), (e)(1)-(2) 2212(a),, 3801-3813) (using "trade promotion" terminology).

the Trade Act of 2002,[4] enacted in August 2002.

[INSERT FIGURE]

FIGURE 3-5
Average U.S. Tariff Rates Since 1900

b. Office of the United States Trade Representative

The United States Trade Representative (USTR), a Cabinet-level official with the rank of Ambassador reporting directly to the President, is responsible for directing all trade negotiations of and formulating trade policy for the United States. The Office of the United States Trade Representative was created as the Office of the Special Representative for Trade Negotiations by Executive Order 11075 in 1963. The Trade Act of 1974 (19 U.S.C. § 2171) established the Office as an agency of the Executive Office of the President charged with administering the trade agreements program. The Office is responsible for setting and administering overall trade policy. It also provides that the USTR is the chief representative of the United States for (*i*) all activities concerning the GATT; (*ii*) negotiations in the Organization for Economic Cooperation and Development, when they deal primarily with trade and commodity issues; (*iii*) negotiations in the U.N. Conference on Trade and Development and other multilateral institutions when such negotiations deal primarily with trade and commodity issues; (*iv*) other bilateral and multilateral negotiations when trade or commodities is the primary issue; (*v*) negotiations under sections 704 and 734 of the Tariff Act of 1930 (19 U.S.C. §§ 1671c, 1673c); and, (*vi*) negotiations concerning direct investment incentives and disincentives and bilateral investment issues concerning barriers to investment. The

[4] *Id.* § 2103 (codified at 19 U.S.C. § 3803).

Omnibus Trade and Competitiveness Act of 1988 codified these authorities and added additional authority, including the implementation of section 301 actions (regarding enforcement of U.S. rights under international trade agreements).

ii. Department of Commerce

a. In General

The Department of Commerce (DOC) was traditionally a weak participant in the formulation of trade policy. As part of the politics underlying the passage of the 1979 Act, however, the president transferred to the DOC from Treasury the authority to make the evaluations relating to price differences between U.S. and foreign markets (antidumping duty calculations) and foreign subsidies (countervailing duty calculations). The DOC is also responsible for encouraging and promoting U.S. international trade, economic growth, and technological advancement. Among other things, the DOC administers programs to prevent unfair foreign trade competition, provides social and economic statistics and analyses for business and government planners, provides research and support for scientific, engineering, and technological development, grants patents and registers trademarks.

b. International Trade Administration

The International Trade Administration (ITA),[5] established within the DOC in 1980, has responsibility for promoting world trade and strengthening the international trade and investment position of the United States. It is headed by the Under Secretary for International Trade, who oversees all issues concerning trade promotion, international commercial policy, market access, and trade law enforcement. The ITA is responsible for nonagricultural trade operations of the U.S. Government and supports the trade policy negotiation efforts of the U.S. Trade Representative.

The Office of the Assistant Secretary for Import Administration is responsible for administering the antidumping and countervailing duty laws of the United States. Among other things, the office also supervises the administration of foreign trade zones and advises the DOC Secretary on establishment of new zones.

The Office of the Assistant Secretary for Market Access and Compliance advises the DOC Secretary on the analysis, formulation, and implementation of U.S. international economic policies. The office administers programs to promote international trade, improve access by U.S. companies to overseas markets, and strengthen the international trade and investment position of the United States. It is also responsible for implementing, monitoring, and enforcing foreign compliance with bilateral and multilateral trade agreements.

The Office of the Assistant Secretary for Trade Development carries out programs to strengthen domestic export competitiveness and promotes U.S. industry participation in international markets.

c. Bureau of Industry and Security

Under the supervision of the Under Secretary for Export Administration, the Bureau of Industry and Security (BIS)–formerly called the Bureau of Export Administration (BXA)[6]–is responsible for supervising the export licensing requirements under the Export Administration Act and related legislation. Among other things, the BIS

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[5]Care should be taken not to confuse the ITA with the International Trade *Commission* (ITC), an independent agency with responsibility for trade investigations and studies, some of which are related to proceedings of the ITA. The ITC is discussed at [redacted], *infra*.

[6]*See* 67 Fed. Reg. 20,630 (2002) (codified at 15 C.F.R. §§ 710.1, 719.1(b), 766.2) (replacing references to BXA with references to BIS).

regulates exports of sensitive goods and technology and enforces export controls. The most significant aspect of this licensing system, however, is the broad array of export controls and prohibitions imposed for reasons of national security, foreign policy, and short supply.[7]

The Office of Export Administration within the BIS is responsible for export licenses and for compliance with treaties concerning export controls. The Office of Export Enforcement enforces dual-use export controls–national security measures with respect to goods and technology that have military as well as non-military uses–as well as nonproliferation, counterterrorism, foreign policy and short supply controls. Technical assistance is provided to nations lacking their own effective systems of export control by the Nonproliferation and Export Control Office. This assistance is intended to strengthen export and and transit control systems in nations identified as potential locations for export or transit of nuclear, chemical, biological or radiological weapons, missile delivery systems, and the commodities, technologies and equipment that could be used to design or build such weapons or their delivery systems. The Critical Infrastructure Assurance Office assists government agencies and the private sector in developing plans to reduce exposure to attacks on critical infrastructures within the United States, and if necessary to respond to any such future attacks.

iii. Department of the Treasury

a. In General

The Department of the Treasury is the third major executive branch actor with a role in the formulation of U.S. trade policy. Among other things, it is responsible for certain aspects of customs administration, international trade statistics, and Foreign Trade Zones. Treasury coordinates U.S. international financial policy by cooperating with the Federal Reserve System in intervening in the exchange market to counter disorderly conditions, authorizing positions to be taken by the United States in the IMF, and by participating in international debt rescheduling negotiations. United States companies will also deal with Treasury's international tax regulatory role through the department's international tax regulations and rulings and participation in international tax treaty negotiations. Finally, the Treasury Department participates in the enforcement of certain trade policies through the Office of Foreign Assets Control (OFAC), which is currently administering, among many other programs, the U.S. participation in the U.N. embargo against Iraq and sanctions against terrorists. In one area, however, the influence of Treasury over trade policy has waned since 1980, when its primary trade-related functions related to the administration of antidumping and countervailing duty laws were transferred to the DOC.

b. U.S. Customs Service

Most enforcement functions of the Customs Service have been transferred to the Department of Homeland Security.[8] However, revenue functions were retained by the Treasury Department. Thus, the Department continues to be responsible for such actions as assessing and collecting customs duties, excise taxes, fees, and penalties due on imported merchandise; processing persons, carriers, cargo, and mail into and out of the United States; detecting and apprehending persons engaged in fraudulent practices designed to circumvent customs and related laws, quotas, and marking requirements for imported merchandise; enforcing reciprocal trade agreement; and, collecting interna-

[7] The embargo aspects of these controls will be discussed in Chapter XIII, *infra* at [redacted]-[redacted].

[8] *See infra* at [redacted]-[redacted] (discussing transfer of functions).

tional trade statistics.

c. Office of Foreign Assets Control

At least in the area of economic sanctions, Treasury has overshadowed the DOC in its influence over sanctions-related trade policy. Beginning with the Iran hostage crisis of 1979-1981, and especially since the initiation of broad sanctions against Libya in 1986, primary responsibility for administering and enforcing trade embargo programs has usually been given to Treasury, with DOC export regulations often explicitly deferring to the implementing Treasury regulations issued and enforced by OFAC. These sanctions activities will be discussed in detail later in this book. [9]

iv. Department of State

It is obvious that the State Department has a much broader mandate than trade policy–it is interested in promoting U.S. diplomatic and foreign policy objectives, and it is thus a major player in the trade policy process, albeit frequently from the periphery. It occupies a strategic position in terms of location (overseas posts), communication (overseeing U.S. cable traffic), and personnel (a highly skilled Foreign Service). Yet the interest of the State Department in trade, viewed in terms of its zealousness in protecting U.S. commercial interests, was so low in the 1950s, that it was stripped of most of its formal trade authorities in 1962, when the Office of the United States Trade Representative–then called "Special Trade Representative"–was established to promote U.S. commercial trade interests.[10]

v. Department of Agriculture

a. Commodity Credit Corporation

The Commodity Credit Corporation (CCC) was organized in 1933, and was managed and operated in close affiliation with the Reconstruction Finance Corporation until 1939, when it was transferred to the Department of Agriculture. Among other things, the CCC carries out assigned foreign assistance activities, such as guaranteeing the credit sale of U.S. agricultural commodities abroad. Major emphasis is also directed toward meeting the needs of developing nations. Agricultural commodities are supplied and exported to combat hunger and malnutrition and to encourage economic development in developing countries. In addition, under the Food for Progress Program, the CCC supplies commodities to provide assistance to developing democracies.

b. Foreign Agricultural Service

The Foreign Agricultural Service (FAS) has primary responsibility for Agriculture's overseas market information, access, and development programs. It also administers Agriculture's export assistance and foreign food assistance programs. The FAS carries out its tasks through a network of agricultural counselors, attaches, and trade officers stationed overseas and its U.S.-based team of analysts, marketing specialists, negotiators, and other professionals.

The FAS maintains a worldwide agricultural intelligence and reporting system through its attache service with staff posted in more than 75 countries around the world. They represent Agriculture and provide information and data on foreign government

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[9] *See* Chapter XIII, *infra* at [redacted]-[redacted] (discussing OFAC programs).

[10] The relative deemphasis of trade was a reflection of the two-track system employed in formulating U.S. foreign policy until the mid-1970s. In this context, "high" foreign policy was traditionally understood almost entirely in terms of national security matters; "low" foreign policy was considered within the foreign policy establishment to encompass functional, economic-related issues, which were ascribed a lesser importance by the highest government officers. On the evolution of trade policy matters from "low" foreign policy in the post-war to "high" foreign policy in the 1970s, see Cooper, *Trade Policy is Foreign Policy*, 9 FOR. POL'Y 18, 18-21 (1972). *See also* C. BERGSTEN, TOWARD A NEW INTERNATIONAL ECONOMIC ORDER 3-10 (1975).

agricultural policies, analyses of supply and demand conditions, commercial trade relationships, and market opportunities. They report on more than 100 farm commodities, weather, economic factors, and related subjects that affect agriculture and agricultural trade.

To improve access for U.S. farm products abroad, FAS international trade policy specialists coordinate and direct Agriculture's responsibilities in international trade agreement programs and negotiations. They maintain an ongoing effort to reduce foreign trade barriers and practices that discourage the export of U.S. farm products.

The FAS has a continuing market development program to create, maintain and expand commercial export markets for U.S. agricultural products. It carries out programs with nonprofit commodity groups, trade associations, and State agriculture departments and their regional associations. It manages market opportunity referral services and organizes trade fairs and sales teams.

In addition, the Export Credit Guarantee Program and the Intermediate Export Credit Guarantee Program provide guarantees on private financing of U.S. exports to foreign buyers purchasing on credit terms. The Supplier Credit Guarantee Program guarantees a portion of a payment due for purchase of U.S. agricultural products for import, for which the exporter has directly extended short-term financing. The Facility Guarantee Program facilitates the financing of U.S. manufactured goods and services exported to emerging markets. The Emerging Markets Program promotes agricultural exports to emerging markets through sharing U.S. agricultural expertise by technical assistance. The Export Enhancement Program and the Dairy Export Incentive Program are export assistance programs designed to counter or offset the adverse effects from competitors' unfair trade practices on U.S. agriculture. The Market Access Program provides cost-share assistance to trade promotion organizations, cooperatives, and small businesses to help fund their market development activities overseas.

vi. Department of Defense

Within the Department of Defense (DOD), the Under Secretary of Defense for Policy is the principal adviser to the DOD Secretary for policy matters relating to, among other things, international trade and technology security. In that regard, the department has an important role to play in determining U.S. export policy with respect to goods and technology that may have a military application.

vii. Department of Transportation

Within the Department of Transportation, the Office of the Assistant Secretary for Aviation and International Affairs has principal responsibility for the development, review, and coordination of policy for international transportation, and for development, coordination, and implementation of policy relating to economic regulation of the airline industry. The Office licenses U.S. and foreign carriers to serve in international air transportation and conducts carrier fitness determinations. It develops policies in support of the department's role in aviation and maritime multilateral and bilateral negotiations with foreign governments and participates on the U.S. negotiating delegations. It also develops policies on a wide range of international transportation and trade matters. It processes and resolves complaints concerning unfair competitive practices in international fares and rates, and determines the disposition of requests for approval and immunization from the antitrust laws of international aviation agreements.

viii. Department of Homeland Security

a. In General

The Department of Homeland Security (DHS) was established in November 2002 by the Homeland Security Act of 2002 (HSA),[11] largely in response to the terrorist attacks on the United States that took place on September 11, 2001. The HSA represents a major reorganization of virtually all nonmilitary government functions related to the protection of the territory of the United States from possible future terrorist attacks, including not only functions related to physical security but also issues related to information security from cyber-terrorism and critical infrastructure information.

b. U.S. Customs Service

The U.S. Customs Service is one of the oldest U.S. Government agencies. The fifth act of the first Congress, passed on July 31, 1789 (1 Stat. 29), established customs districts and authorized customs officers to collect duties on goods, wares, and merchandise imposed by the *second* act of the first Congress, dated July 4, 1789 (1 Stat. 24). The Bureau of Customs was established as a separate agency under the Treasury Department in 1927 (19 U.S.C. § 2071) and was redesignated the U.S. Customs Service by a Department order in 1973. In November 2002, the HSA transferred the functions of the Service from Treasury to the DHS and reestablished the Service as a bureau of the DHS.[12]

Within the DHS, there is a Directorate of Border and Transportation Security headed by an Under Secretary.[13] The Under Secretary is responsible for: (*i*) preventing entry of terrorists and instruments of terrorism into the United States; (*ii*) securing U.S. borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems; (*iii*) carrying out the immigration enforcement functions transferred from the former Immigration and Naturalization Service); (*iv*) establishing and administering rules for granting of visas and other forms of permission to enter the United States to individuals who are not U.S. citizens or permanent residents; (*v*) establishing national immigration enforcement policies and priorities; (*vi*) administering U.S. customs laws; and, (*vii*) conducting inspection and related administrative functions transferred from the Department of Agriculture.[14] Of particular importance for purposes of this book, the HSA transferred to the DHS Secretary–with certain exceptions[15]–"the functions, personnel, assets, and liabilities of" the Customs Service from the Treasury Department,

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[11]*Supra* note 2.

[12]However, this transfer does not include authority related to Customs revenue functions (*e.g.*, the assessment and collection of import duties) that was vested in Treasury by law before the effective date of the HSA under specified provisions of law. HSA, § 412(a), 6 U.S.C. § 212(a). Thereafter, the Treasury Secretary may delegate the retained authority, but the Secretary must consult with the DHS Secretary regarding the exercise of any such retained authority. *Id*, § 412(a)(1), 6 U.S.C. § 212(a)(1). For these purposes, the term "customs revenue function" is defined to mean the following:

> (1) Assessing and collecting customs duties (including antidumping and countervailing duties and duties imposed under safeguard provisions), excise taxes, fees, and penalties due on imported merchandise, including classifying and valuing merchandise for purposes of such assessment.
>
> (2) Processing and denial of entry of persons, baggage, cargo, and mail, with respect to the assessment and collection of import duties.
>
> (3) Detecting and apprehending persons engaged in fraudulent practices designed to circumvent the customs laws of the United States.
>
> (4) Enforcing section 337 of the Tariff Act of 1930 and provisions relating to import quotas and the marking of imported merchandise, and providing Customs Recordations for copyrights, patents, and trademarks.
>
> (5) Collecting accurate import data for compilation of international trade statistics.
>
> (6) Enforcing reciprocal trade agreements.
>
> (7) Functions performed by . . . Import Specialists, Entry Specialists, Drawback Specialists, National Import Specialist, Fines and Penalties Specialists, attorneys of the Office of Regulations and Rulings, Customs Auditors, International Trade Specialists, Financial Systems Specialists.
>
> (8) Functions performed . . . with respect to any function described in any of paragraphs (1) through (7). . . .

Id. § 415(1)-(8), 6 U.S.C. § 215(1)-(8). With respect to the maintenance of these retained customs functions, see *id*. § 412(b), 6 USCA § 212(b).

[13]*Id*., § 401, 6 U.S.C. § 201.

[14]*Id*. § 402, 6 U.S.C. § 202(1)-(8).

[15]*See* note 11, *supra* (discussing customs authority retained by Treasury).

"including the functions of the Secretary of the Treasury relating thereto."[16]

c. Independent Agencies

In addition to the Executive Office of the President and the executive departments, there are many independent agencies that have more or less significant roles to play in international trade policy. In this subsection, we offer several examples. The first, the U.S. International Trade Commission (ITC), is arguably as significant as any of the executive departments. The other examples illustrate the highly specialized role that many of these agencies may play in international trade policy.

i. International Trade Commission

a. In General

The ITC is an independent agency created in 1916 (39 Stat. 795), originally named the U.S. Tariff Commission. The name was changed to the U.S. International Trade Commission by section 171 of the Trade Act of 1974 (19 U.S.C. § 2231). The ITC consists of six commissioners appointed by the President with the advice and consent of the Senate for nine-year terms. The Chairman and Vice Chairman are designated by the President for two-year terms, and succeeding Chairmen may not be of the same political party. Not more than three commissioners may be members of the same political party (19 U.S.C. § 1330).

The ITC furnishes studies, reports, and recommendations involving international trade and tariffs to the President, the USTR, and congressional committees. The ITC performs a number of functions pursuant to various federal statutes concerning international trade. Under the Tariff Act of 1930, the ITC is given broad powers of investigation relating to the customs laws of the United States and foreign countries; the volume of importation in comparison with domestic production and consumption; the conditions, causes, and effects relating to competition of foreign industries with those of the United States; and all other factors affecting competition between U.S. and imported articles. The ITC is required to make available to the President and to the House Ways and Means Committee and the Senate Finance Committee, whenever requested, any information at its command, and it is directed to make such investigations and reports as may be requested by the President or by either of those committees, or by either branch of Congress.

b. Imported Articles Subsidized or Sold at Less Than Fair Value

The ITC conducts preliminary-phase investigations to determine whether imports of foreign merchandise allegedly being subsidized or sold at less than fair value (*i.e.*, "dumped") may pose a threat to an industry in the United States. If its determination is affirmative, and the DOC Secretary determines there is reason to believe or suspect such unfair practices are occurring, then the ITC conducts final-phase investigations to determine the potential threat to an industry because of such imports.

If the DOC Secretary determines to suspend an investigation upon acceptance of an agreement to terminate such imports, the ITC may conduct an investigation to determine whether the agreement completely eliminates the threat. The ITC also conducts investigations to determine whether revocation or modification of existing agreements due to changed circumstances would pose new threat.

c. Unfair Practices in Import Trade

[16]*Id*. §§ 403(1), 411, 6 U.S.C. §§ 203(1), 211.

The ITC applies U.S. statutory and common law concerning unfair competition to the importation of products into the United States and their sale. If it determines that there is a violation of law, it may direct that the articles involved be excluded from entry into the United States, or it may issue cease-and-desist orders directing the person engaged in such violation to cease and desist from engaging in the unfair methods or acts.

d. Industry Adjustment to Import Competition (Global Safeguard Actions)

The ITC conducts investigations, upon petition, to determine whether an article is being imported in such increased quantities as to pose a threat to the domestic industry producing an article like or directly competitive with the imported article. If its finding is affirmative, it recommends to the President action that would address such a threat and be most effective in facilitating positive adjustment by the industry to import competition.

The ITC also reports on developments within an industry that has been granted import relief and advises the President of the probable economic effect of the reduction or elimination of the tariff increase that has been granted. The President may continue, modify, or terminate the import relief previously granted.

e. Imports From NAFTA Countries (Bilateral Safeguard Actions)

The ITC conducts investigations to determine whether, as a result of the reduction or elimination of a duty provided for under the North American Free Trade Agreement (NAFTA), a Canadian or Mexican article is being imported into the United States in such increased quantities and under such conditions so that imports of the article constitute a substantial cause of serious injury or (except in the case of a Canadian article) a threat of serious injury to the domestic industry producing an article that is like or directly competitive with the imported article. If its determination is in the affirmative, it recommends to the President the relief which is necessary to prevent or remedy serious injury.

f. Market Disruption From Communist Countries

The ITC also conducts investigations to determine whether increased imports of an article produced in a Communist country are causing market disruption in the United States. If its determination is in the affirmative, the President may take the same action as in the case of serious injury to an industry, except that the action would apply only to imports of the article from the Communist country.

g. Import Interference With Agricultural Programs

The ITC conducts investigations, at the direction of the President, to determine whether any articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective or to interfere materially with programs of the Department of Agriculture for agricultural commodities or products thereof, or to reduce substantially the amount of any product processed in the United States from such commodities or products, and makes findings and recommendations. The President may restrict the imports in question by imposition of either import fees or quotas. Such fees or quotas may be applied only against countries that are not members of the WTO.

h. Other Functions

Among its other functions, the ITC advises the President as to the probable economic effect on the domestic industry and consumers of modification of duties and other barriers to trade that may be considered for inclusion in any proposed trade agreement with foreign countries. It also advises the President, with respect to every article considered for preferential removal of the duty on imports from designated developing countries, as to the probable economic effect the preferential removal of duty will have on the domestic industry and on consumers.

In cooperation with the Treasury Secretary and the DOC Secretary, the ITC establishes and maintains for statistical purposes an enumeration of articles imported into the United States and exported from the United States, and seeks to establish comparability of such statistics with statistical programs for domestic production. The ITC also publishes and maintains the Harmonized Tariff Schedule of the United States (HTS), and considers questions concerning the arrangement of such schedules and the classification of articles within the HTS.

Finally, the ITC conducts studies, investigations, and research projects on a broad range of topics relating to international trade, pursuant to requests of the President, the House Ways and Means Committee, the Senate Finance Committee, either branch of the Congress, or on its own initiative. In most cases, public reports of these studies, investigations, and research projects are issued. It also prepares and publishes a series of summaries of trade and tariff information. These summaries contain descriptions (in terms of the HTS) of the thousands of products imported into the United States, methods of production, and the extent and relative importance of U.S. consumption, production, and trade, together with certain basic factors affecting the competitive position and economic health of domestic industries.

ii. Federal Maritime Commission

The Federal Maritime Commission was established in 1961 as an independent agency that regulates shipping under the Shipping Act of 1984 (46 U.S.C. app. §§ 1701-1720); the Merchant Marine Act, 1920 (46 U.S.C. app. § 861 *et seq*.); the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. § 1710a); the Merchant Marine Act, 1936 (46 U.S.C. app. §§ 1101 *et seq*.), among others. The Commission regulates the waterborne foreign commerce of the United States, ensures that U.S. international trade is open to all nations on fair and equitable terms, and protects against unauthorized, concerted activity in the waterborne commerce of the United States. It maintains surveillance over steamship conferences and common carriers by water; reviews agreements between persons subject to the Shipping Act of 1984; enforces prohibitions against discriminatory acts and other prohibited practices of shippers, carriers, and other persons subject to the shipping statutes; and ensures that adequate levels of financial responsibility are maintained for indemnification of passengers. The Commission conducts investigations of foreign governmental and foreign carrier practices that adversely affect the U.S. shipping trade and, in conjunction with the Department of State, conducts activities to effect the elimination of discriminatory practices on the part of foreign governments against U.S.-flag shipping and to achieve comity between the United States and its trading partners.

iii. Small Business Administration

The Administration's Office of International Trade provides export financing and export promotion services to small businesses. It administers an export working capital program, which provides short-term, transaction-specific financing for exporting, including pre-export financing of labor and materials, financing receivables generated from these sales, and standby letters of credit used as performance bonds or payment guarantees to foreign buyers.

The Office is a major participant in the U.S. Export Assistance Center initiative. The centers provide a single point of contact for all federal export promotion and finance programs in various cities throughout the United States. The Office also coordinates with other federal agencies, under the auspices of an interagency Trade Promotion

Coordinating Committee (TPCC), to ensure that trade promotion information and trade events are communicated to the small business community. The Office works with TPCC agencies in coordinating and facilitating trade between the U.S. small business community and businesses and governments of other countries.

d. Judicial Branch

While the Supreme Court of the United States has the paramount judicial authority within the United States, on a day-to-day basis the impact of the judicial branch on international trade policy is usually encountered in the proceedings and decisions of the lower federal courts. Nevertheless, as we shall see at various points throughout this book, on those rare occasions when the Supreme Court does address an issue relating to international trade policy, the effect can often be dramatic.

i. Courts of Appeals

The U.S. courts of appeals are intermediate appellate courts created in 1891 to relieve the Supreme Court of considering all appeals in cases originally decided by the federal trial courts. They are empowered to review all final decisions and certain interlocutory decisions (18 U.S.C. § 3731; 28 U.S.C. §§ 1291, 1292) of the federal district courts. They also are empowered to review and enforce orders of many federal administrative bodies. The decisions of the courts of appeals are final except as they are subject to review on appeal or on writ of certiorari by the Supreme Court.

The United States is divided geographically into twelve judicial circuits, including the District of Columbia. Each circuit has a court of appeals (28 U.S.C. §§ 41, 1294). Each of the 50 States is assigned to one of the circuits, and U.S. territories (*e.g.*, Guam and the Virgin Islands) or "commonwealths" (*e.g.*, Puerto Rico and the Northern Mariana Islands) are assigned variously to the first, third, and ninth circuits. There is also a Court of Appeals for the Federal Circuit, which has nationwide jurisdiction defined by subject matter. Each court of appeals normally hears cases in panels consisting of three judges but may sit *en banc* with all judges present.

The U.S. Court of Appeals for the Federal Circuit was established under Article III of the Constitution, pursuant to the Federal Courts Improvement Act of 1982 (28 U.S.C. §§ 41, 44, 48), as successor to the former U.S. Court of Customs and Patent Appeals and the United States Court of Claims. The court consists of twelve circuit judges. It sits in panels of three or more on each case and may also hear or rehear a case *en banc*. The court sits principally in Washington, D.C., and may hold court wherever any court of appeals sits (28 U.S.C. § 48). The jurisdiction of the court is nationwide (as provided by 28 U.S.C. § 1295) and includes, among other matters, appeals from final decisions of the U.S. Court of International Trade and the U.S. Court of Federal Claims. The jurisdiction of the court also includes the review of administrative rulings by the ITC and the DOC Secretary.

ii. District Courts

The U.S. district courts are the trial courts of general federal jurisdiction. Each state has at least one district court, while the larger states have as many as four. Altogether there are 89 district courts in the 50 states, plus the one in the District of Columbia. In addition, the Commonwealth of Puerto Rico has a district court with jurisdiction corresponding to that of district courts in the various states. Cases from the district courts may involve issues pertinent to international trade law and are reviewable on appeal by the applicable court of appeals.

iii. Court of International Trade

The U.S. Court of International Trade (CIT) was originally established as the Board of United States General Appraisers in 1890, with jurisdiction previously held by the district and circuit courts in actions arising under the tariff acts (19 U.S.C. ch. 4). The act of May 28, 1926 (19 U.S.C. § 405a), created the United States Customs Court to supersede the Board; by acts of August 7, 1939, and June 25, 1948 (28 U.S.C. §§ 1582, 1583), this court was integrated into the United States court structure, organization, and procedure. The act of July 14, 1956 (28 U.S.C. § 251), established the court as a court of record of the United States under Article III of the Constitution. The Customs Court Act of 1980 (28 U.S.C. § 251) reconstituted the court as the CIT.

The CIT has jurisdiction over any civil action against the United States arising from federal laws governing import transactions. This includes classification and valuation cases, as well as authority to review certain agency determinations under the Trade Agreements Act of 1979 (19 U.S.C. § 2501) involving antidumping and countervailing duty matters. In addition, it has exclusive jurisdiction of civil actions to review determinations as to the eligibility of workers, firms, and communities for adjustment assistance under the Trade Act of 1974 (19 U.S.C. § 2101). Civil actions commenced by the United States to recover customs duties, to recover on a customs bond, or for certain civil penalties alleging fraud or negligence are also within the exclusive jurisdiction of the court. Cases before the court may be tried before a jury. Appeals are taken to the U.S. Court of Appeals for the Federal Circuit, and ultimately review may be sought in appropriate cases in the Supreme Court. The CIT's principal offices are located in New York, N.Y., but the court is empowered to hear and determine cases arising at any port or place within the jurisdiction of the United States.

NOTES AND QUESTIONS

1. The WTO attempted to formulate an agenda for a new MTN at November 1999 meeting in Seattle, including such issues as world trade and development.[1] Unfortunately, the meeting collapsed under the pressure of widespread, and often violent, political protests and civil disobedience critical of the role of the WTO and its objectives. The “Battle in Seattle” was spearheaded by a diverse coalition opposed to globalization. This debacle placed in serious question the future agenda of WTO negotiating rounds.[2] For a succinct review of the Seattle disaster, see Sean D. Murphy, *Collapse of Efforts to Launch "Millennium" Round of Multilateral Trade Negotiations*, 94 AM. J. INT'L L. 375 (2000). A new round was finally initiated in Doha, Qatar, in November 2001.[3] The Doha Development Round involves a very ambitious agenda–including issues involving agricultural trade, trade in services, improved access for trade in industrial products, protection of intellectual property rights, and possible improvements to the WTO dispute settlement system. Consideration should be given to the debate between the forces in favor of globalization and the anti-globalists. How would you define “globalization”? How do you think it would apply to:

(a) trade in goods;

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[1]These issues will be explored in detail in Chapter X.

[2]*See* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257 (2000); David A. Gantz, *Failed Efforts to Initiate the "Millennium Round" in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349 (2000) (discussing implications of Seattle meeting for future WTO agenda).

[3]*See* Figure 3-1 and accompanying notes, *supra*.

(b) trade in services; or,
(c) trade in capital;
(d) cross-border movement of people (immigration);
(e) health matters; or,
(f) environmental issues?

How do you think politicians should respond to globalization?

2. As the preceding material suggests, the U.S. apparatus for trade policy formulation and execution is exceedingly complex. Why is this so? Of course, given the traditional constitutional doctrine of the separation of powers, it may be understandable that there would be some minimum, unavoidable level of complexity as a result of the division of powers among the legislative, executive and judicial branches. But within the executive branch itself, the complexity is almost numbing in its initial impact. Is this complexity related to the tensions between the legislative and executive branches that result from separation of powers? Are there other reasons that would explain the almost byzantine arrangement of responsibilities for trade policy within the executive branch? How else might these responsibilities be arranged?

3. An added level of complexity in U.S. trade policy results from the international regulatory regime represented by the WTO (and, as we shall see later, *infra* at [redacted]-[redacted], by the regional regime of the NAFTA, in which the United States participates). Does the existence of these international and regional regimes, based on U.S. treaty obligations, help to explain the complexities of the U.S. apparatus for trade policy?

4. Does the judicial structure applicable to the legal issues of U.S. trade policy and regulation seem complex? The basic arrangement–general trial courts, intermediate appellate courts, Supreme Court–probably seems unremarkable to anyone past the first year of law school. But what is the purpose of a separate CIT, and the Court of Appeals for the Federal Circuit to which CIT appeals are directed?

2. Delegation and other Constitutional Issues

Under the legislation described above, Congress has delegated significant tariff-setting and NTB negotiating authority to the executive. This raises policy problems, as the extent of actual discretion delegated to the executive may be enormous. The fact that international business has drastically grown extends the effect of this discretion to nearly every major firm or industry in the nation, and the discretion certainly could be misused. At the same time, it is almost certain that these delegations of power have created a much less protectionist international trading system than would have resulted had Congress retained the powers.[1]

Delegation may transfer so much power as to distort the Constitution's separation of powers and become unconstitutional. The usual test has been whether Congress has provided an adequate standard to guide and restrict the executive's discretion. The two leading cases are *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The first, decided shortly after New Deal domestic legislation had been struck down on delegation grounds, held that the executive had enough inherent authority in the foreign policy area

[1]For an excellent discussion of the delegation issues, see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1963).

that a weaker delegation test was appropriate. The authority delegated was that needed to impose an embargo on export of arms to areas of warfare. In *Youngstown,* in contrast, the president's assertion of authority to seize steel mills during a war-time strike was held unconstitutional. This was going too far, for the president was clearly acting against congressional intent.

As the following cases show, however, the courts have become more and more willing to uphold delegation against constitutional attack. And when foreign policy concerns are involved, the courts are particularly ready to give the executive implied powers; the most important recent case in the foreign policy area is *Dames & Moore v. Regan*, 453 U.S. 654 (1981), upholding the Iranian hostage financial settlement *(see also Haig v. Agee,* 453 U.S. 280 (1981)). Courts have also become more and more willing to read congressional action broadly and to give the executive the benefit of the doubt as to whether specific authority was actually delegated. *See, e.g., Florsheim Shoe Co. v. United States*, 4 I.T.R.D. 1571 (Ct. Int'l Trade 1983).

The trade act sequence discussed above is not the only major delegation of foreign economic policy power to the executive. There have been two other major lines, as illustrated in Figure 3-6, *infra*. The most far-reaching are enemy sanctions statutes, a line of legislation with a pedigree going back to authority given to Abraham Lincoln to deal with Confederate assets during the Civil War. As a result of congressional concern about executive emergency powers, use of the power outside a wartime context is now restated and made subject to congressional review under the International Emergency Economic Powers Act (IEEPA).[2] These statutes authorized the Iranian assets freeze, and currently support sanctions against North Korea, Cuba, and Libya. Many similar programs–such as the U.N.-mandated sanctions against Iraq and recent sanctions against terrorism–are supported by the United Nations Participation Act (UNPA)[3] as well as the IEEPA.

The other major line is the export control line, legislation empowering the president to prohibit the export of materials and information that might be helpful to enemy states, and to restrict exports of commodities in short supply within the United States. This was the basis for export restrictions with respect to the former Soviet Bloc during the Cold War. Other parts of the legislation authorize foreign policy embargos and related legislation attempts to restrict other forms of military exports that raise arms control concerns. During periods when Congress allows the Export Administration Act authority to lapse, the executive usually authorizes these regulations–without substantive changes–under the enemy sanctions line of statutes.[4]

The following lower court cases give the greatest available detail in this area. As you read through the cases you should be asking the following questions. What is the function that the legislative branch was trying to transfer to the president? What intelligible criteria are provided for executive action? Should the transfer of power in the international area be viewed differently than the domestic political arena? Finally, what are the alternatives to the delegation in each instance; is the power involved of a type that the legislature should not be allowed to transfer to the executive branch?

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[2]For extensive discussion and analysis of the extant Trading With the Enemy Act of 1917 and the IEEPA, see MICHAEL P. MALLOY, U.S. ECONOMIC SANCTIONS: THEORY AND PRACTICE 150-162, 171-186 (2001). *See also* Chapter XIII, *infra* at [redacted]-[redacted] (discussing application of sanctions statutes).

[3]For extensive discussion of the UNPA, see MALLOY, *supra* at 162-170.

[4]*See* 67 Fed. Reg. 53,721 (2002) (publishing presidential one-year continuation of emergency regarding export control regulations under IEEPA, despite expiration of Export Administration Act of 1979).

Trade Acts	***Enemy Sanctions Acts***	***Export Control Acts***
Reciprocal Trade Agreements Act of 1934	Trading With the Enemy Act of 1917 50 U.S.C. App. §§ 1 *et seq.* *replaced for non-war-time use only by*:	Export Control Act of 1949 *superseded by*:
Trade Agreements Act of 1954	International Emergency Economic Powers Act of 1977 50 U.S.C. §§ 1701-1706	Export Administration Act of 1962 *superseded by*:
Trade Expansion Act of 1962	United Nations Participation Act of 1945 22 U.S.C. §§ 287 *et seq.*	Export Administration Act of 1969 *superseded by*:
Trade Act of 1974	USA PATRIOT Act of 2001	Export Administration Act of 1979, as amended 50 U.S.C. App. §§ 2401 *et seq.* *expired but continued by:*
Trade Agreements Act of 1979		[*International Emergency Economic Powers Act of 1977*]
Trade and Tariff Act of 1984		
Omnibus Trade and Competitiveness Act of 1988		
Uruguay Round Agreements Act		
Trade Act of 2002		

Figure 3-6
Delegation Sequences

UNITED STATES v. YOSHIDA INTERNATIONAL, INC.

526 F.2d 560 (C.C.P.A. 1975)

MARKEY, CHIEF JUDGE

This is an appeal from a judgment of the Customs Court, 73 Cust. Ct. 1, C.D. 4550, 378 F. Supp. 1155 (1974), granting Yoshida's motion for summary judgment, and declaring an import duty surcharge invalid. Presidential Proclamation 4074, because it imposed the surcharge, was held to have been beyond the President's delegated powers. The court stated that a delegation of sufficient breadth to encompass the proclamation would have been unconstitutional. We reverse.

Facts

Yoshida's merchandise (zippers) was imported from Japan and entered the port of New York on August 17, 25, and 26, 1971. The government levied, in addition to the standard duty under TSUS item 745.72, an import duty surcharge of 10% in accordance with item 948.00, which was added to the TSUS [Tariff Schedules of the United States] by Presidential Proclamation 4074. Yoshida challenges only the validity of Proclamation 4074. . . .

President's Actions

During the summer of 1971, the United States was faced with an economic crisis. The nation suffered under an exceptionally severe and worsening balance of payments deficit. The gold reserve backing of the U.S. dollar had dropped from $17.8 billion in 1960 to less than $10.4 billion in June of 1971, reflecting a growing lack of confidence in the U.S. dollar abroad. Foreign exchange rates were being controlled by some of our major trading partners in such a way as to overvalue the U.S. dollar. That action, by stimulating U.S. imports and restraining U.S. exports, contributed substantially to the balance of payments deficit. As one step in a program designed to meet the economic crisis,[5] the President issued Proclamation 4074, which in relevant part stated:

> WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened, and, as a result, our continued ability to assure our security could be impaired;
>
> WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports; . . .
>
> A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.
>
> B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.
>
> (2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles . . . provided, however, that if the imposition of an additional duty of 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles . . . valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

To implement the above language, Proclamation 4074 established the following

[5]The Proclamation in suit was part of a "New Economic Policy," which involved suspension of the convertibility of foreign held dollars into gold, reductions in taxes, Federal spending and foreign aid, a 90-day wage-price freeze, and imposition of the surcharge "[a]s a temporary measure." Address to the Nation Outlining a New Economic Policy: "The Challenge of Peace," *Public Papers of the Presidents of the United States Richard Nixon 1971* 886 (1972), 65 *Dept. of State Bull.* 253 (1971), New York Times, Aug. 16, 1971, at 14, col. 1. The 90-day freeze, though challenged as based upon an unconstitutional delegation of legislative power, in violation of the separation of powers doctrine, was upheld in *Amalgamated Meat Cutters & Butcher Work v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

948.00 of subpart C, part 2, of the TSUS Appendix:

Item	*Article*	*Rates of duty* 1	2
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in trade agreements	10% ad val. (See headnote 3 of this subpart.)	No change.

The referenced headnote 3 reads as follows:

> 3. *Limitation on additional duties*–-The additional 10 percent rate of duty specified in rate of duty column numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

The President's authority for proclaiming the surcharge was stated in Proclamation 4074 to be:

> WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;
>
> WHEREAS, under the Tariff Act, the TEA and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority; . . .

Importers of products subject to the surcharge sought and obtained permission from the Cost of Living Council to pass the surcharge through to customers as a part of the price of the imported articles.

Within less than five months following the imposition of the surcharge, a multilateral agreement (The "Smithsonian Agreement" of December 18, 1971) among the major industrial nations was reached with, inter alia, gave promise of ending the overvaluation of the U.S. dollar in relation to other major currencies. On December 20, 1971, the import duty surcharge was terminated. (Presidential Proclamation 4098, 36 Fed. Reg. 24201 (1971).)

Customs Court

The main opinion below dealt extensively with the President's termination and emergency powers, finding that neither encompassed the tariff surcharge promulgated in Proclamation 4074.

The President's termination power, as expressed in the Tariff Act of 1930, as amended (Tariff Act) and the Trade Expansion Act of 1962 (TEA), was construed as follows:

> We conclude that the authority granted by statute to "terminate, in whole or in part, any proclamation" does not include the power to determine and fix unilaterally a rate of duty which has not been previously legally established. On the contrary, the "termination" authority, as statutorily granted, merely provides the President with a mechanical procedure of supplanting or replacing existing rates with rates which have been established by prior proclamations or by statutes. Relevant thereto is *United States v. American Bitumuls & Asphalt Co.*, 44 C.C.P.A. 199, C.A.D. 661, 246 F.2d 270 (1957), *cert. denied*, 355 U.S. 883 (1957).

The power to "terminate, in whole or in part," existing proclaimed rates was characterized as twofold: the President may "nullify and bring to an end an entire proclamation" (whereupon the duty rate would revert to one previously established but not terminated), or he may "specify the extent to which a prior proclamation is terminated, thereby permitting a portion thereof to remain in effect." Thus, said the court, exercise of the termination power affects duty rates

> . . . (1) to increase rates to the highest level, *i.e.*, the statutory rate, or (2) to raise or lower rates to conform to rates which have been established by a prior proclamation. In either of these instances, the rates, to which conformance may be sought, have been previously established either by the Congress (statutory rate) or by a bilateral negotiation embodied in a trade agreement pursuant to statutory authority. In short, the power to fix a new and independent rate requires a greater grant of power than that delegated to the President by the termination authority.

The Government's reliance on the phase "unless otherwise provided" in general headnote 4(d) of the tariff schedules[8] was met with these words:

> In our view that phrase is nothing more than an exception to the provision contained in headnote 4(d) fixing the order of rate reversion resulting from a termination proclamation. More specifically, the phrase "unless otherwise provided" gives the President discretionary authority when terminating a proclamation to specify a rate established in a specific previous proclamation other than the next intervening proclamation and thus avoid an automatic reversion to the next intervening proclaimed rate. In other words, the phrase "unless otherwise provided" contemplates only the exercise of Presidential discretion to preclude the order of reversion set forth in general headnote 4(d).

Issue

The sole issue before us is whether the Customs Court erred, as a matter of law, in holding that Proclamation 4074 was an ultra vires Presidential act. Resolution of the issue requires determination of whether the surcharge imposed by Presidential Proclamation 4074 was within the delegated authority to be found in either (1) the

[8]General headnote 4(d) provides:

> whenever a proclaimed rate is terminated or suspended, the rate shall revert, unless otherwise provided, to the next intervening proclaimed rate previously superseded but not terminated or, if none, to the statutory rate.

termination provisions §350 (a)(6) of the Tariff Act of 1930, as amended (Tariff Act) (19 U.S.C. §1351 (a)(6) of the Tariff Act of 1930, as amended (Tariff Act) (19 U.S.C. § 1351(a)(6)) and §255 (b) of the Trade Expansion Act of 1962 (TEA) (19 U.S.C. §1885(b)),[9] or (2) the emergency powers granted by §5(b) of the Trading With the Enemy Act (TWEA), as amended (50 U.S.C. App. §5(b)),[10] and if so, whether such a delegation of authority was constitutional.

Opinion

The people of the new United States, in adopting the Constitution, granted the power to "lay and collect duties" and to "regulate commerce" to the Congress, not to the Executive. U.S. Constitution, Art. I, Sec. 8, clauses 1 and 3. Nonetheless, as the Customs Court recognized in the opinion below, and as other courts and commentators have noted, Congress, beginning as early as 1794 and continuing into 1974, has delegated the exercise of much of the power to regulate foreign commerce to the Executive. As perhaps an inevitable result, "few areas of American constitutional law [are] more burdened with conflicting decisions and scholarly disagreement." *Recent Decisions*, 15 Va. J. Intl. L. 649 (1975).

As inferred in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the President has certain "inherent" powers in the conduct of foreign relations and foreign affairs. Some of the commentators referred to above have cited certain "concurrent" powers he shares with the Congress in those fields. The Supreme Court referred to "pooled" legislative and executive powers in foreign affairs, including delegations of power over foreign commerce, in *Chicago & S. Air Lines, Inc. v. Water Steamship Corp.*, 333 U.S. 103, 110 (1948). It is nonetheless clear that no undelegated power to regulate *commerce* or to set tariffs, inheres in the Presidency.

Termination Provisions

We are in basic agreement with the Customs Court's interpretation (quoted above) of the termination powers delegated by the Congress in the Tariff Act and in the TEA. *United States v. American Bitumuls & Asphalt Co.*, 246 F.2d 270, 44 CCPA 199, C.A.D. 661 (1957), *cert. denied*, 355 U.S. 883.

Having correctly found no delegation, in the acts or in their legislative histories, of the power to impose the surcharge here in question, the Customs Court nonetheless applied, and the parties have argued, the "separation of powers doctrine" and its

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[9]The Tariff Act and the TEA permit the President to enter foreign trade agreements and to implement them through modification of duties by proclamation. Each contains a termination provision:

> The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section. (§350(a)(6), Tariff Act of 1930, as amended);

> The President may at any time terminate, in whole or in part, any proclamation made under this subchapter. (§255 (b), Trade Expansion Act of 1962).

[10]TWEA §5(b), in pertinent part, follows:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise–
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by through, or to any banking institution, and the importing, exporting, hording, melting, or earmarking of gold or silver coin or bulletin, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition[,] holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in , or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; . . .

corollary, the "delegation doctrine," in relation to the termination provisions of the Tariff Act and the TEA. But whether the limitations on Congress' power to delegate, as gleaned by the Customs Court from *Schechter Poultry v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), are still viable, or whether they now rest on a rusted concept, are questions, raisable only after it is determined that a particular delegation had been attempted. It is unnecessary to discuss the constitutional ramifications that might obtain if Congress *had* made such a delegation in the Tariff Act or in the TEA.

Emergency Powers

We are presented, in this case, with the first reliance upon the TWEA as authority for a Presidential imposition of a temporary surcharge on imports. There being nothing in the TWEA or in its history which specifically either authorizes or prohibits the imposition of a surcharge, and no judicial precedent involving the same, we tread new ground.[16]

Power Delegated

It appears incontestable that §5(b) does in fact delegate to the President, for use during war or during national emergency only, the power to "regulate importation." The plain and unambiguous wording of the statute permits no other interpretation. As was said of a war power in *Lichter v. United States*, 334 U.S. 742, 782 (1948), the primary implication of an emergency power is that it should be effective to deal with a national emergency successfully. The delegation in §5(b) is broad and extensive; it could not have been otherwise if the President were to have, within constitutional boundaries, the flexibility required to meet problems surrounding a national emergency with the success desired by Congress.

A question remains, however, as to *how* the President may regulate importation in a national emergency, *i.e.*, what means of execution of the delegated power are permissible. As appears below, we agree with the Customs Court that the delegation could not constitutionally have been of "the full and all-inclusive power to regulate foreign commerce." We do not believe, however, as the Customs Court apparently did, that only in such a sweeping delegation could authority be found for Proclamation 4074. The choice is not draconian.

Means of Execution

The Customs Court, considering a broad delegation unconstitutional in the absence of standards restricting the President's actions thereunder, found such standards in an interpretation of the words "by means of instruction, licenses or otherwise" as words of restriction . . . .

The opinion below states:

[16]The TWEA has been considered by many different courts in hundreds of cases involving a variety of executive actions. Because it was hastily amended, the TWEA "has presented to the judiciary a collection of knotty problems which are probably not surpassed by those arising under any other statute of its size or weight." Bishop, Judicial Construction of the Trading With the Enemy Act, 62 Harv. L. Rev. 721 (1949). It has nonetheless survived every attack on its constitutionality: *See*, e.g., Veterans & Reserv. For Peace in Vietnam v. Regional Comr., 459 F.2d 676 (3d Cir.), *cert denied*, 409 U.S. 933 (1972) (literature detained under the Foreign Assets Control Regulations); Nielson v. Secretary of Treasury, 424 F.2d 833, 137 U.S. App. D.C. 345 (1970) (bank account blocked under the Cuban Assets Control Regulations); Teague v. Regional Commissioner of Customs, Region II, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969) (publications detained under the Foreign Assets Control Regulations); Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir.) *cert. denied*, 385 U.S. 898 (1966). . . ; Silesian-American Corp. v. Markham, 156 F.2d 793 (2d Cir. 1946), *aff'd sub nom*. Silesian-American Corp. v. Clark, 332 U.S. 469 (1947) (corporation stock vested in Alien Property Custodian); Draeger Shipping Co., v. Crowley, 55 F. Supp. 906 (S.D.N.Y. 1944) (corporation stock vested in Alien Property Custodian).

> The words "instructions, licenses, or otherwise" contained in section 5(b)(1) define the nature and mode of the regulatory authority intended to be delegated to the President. These words conform to the phraseology used through the history of the Act in the establishment of a system of *licenses and permits* for the control of property during a time of war and crisis and which have come to be recognized as the hallmark and distinguishing feature of the Act. [Emphasis added.]

We do not find, however, that the words "instructions, licenses, or otherwise," either "conform to the phraseology used throughout the history of the Act" or "have come to be recognized as the hallmark and distinguishing feature of the Act." . . .

Adhering to the analogy applied by the Customs Court, which found the roots of the TWEA in the Act of July 13, 1861 and the delegation in §5(b) a branch of the tree in which congressional power to regulate foreign commerce is lodged, we find, Mendel-like, a cross-breeding which produced an economic emergency branch. Only if the TWEA had remained limited to trading with the enemy in "time of war" would the "licensing" limitation and its historical background be controlling. . . .

We conclude, therefore, that Congress, in enacting §5(b) of the TWEA, authorized the President, during an emergency, to exercise the delegated substantive power, *i.e.*, to "regulate importation," by imposing an import duty surcharge or by other means appropriately and reasonably related, as discussed below, to the particular nature of the emergency declared. Whether a delegation of such breadth as to have authorized Proclamation 4074 would be constitutionally embraced, is determined, however, by the nature of the particular surcharge herein and its relationship to other statutes, as well as by its relationship to the particular emergency confronted.

Limited Nature of Proclamation 4074

In its proper concern for adherence to the Constitution, the Customs Court erred, we believe, in its expressed fear that, if Proclamation 4074 were upheld, the President, by "merely" declaring a national emergency, "could determine and fix rates of duty at will, without regard to statutory rates prescribed by Congress." . . .

Proclamation 4074, far from fixing rates in disregard of congressional will, specifically provided, as noted above, "that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply."

Further, the surcharge was limited to articles which had been the subject of prior tariff concessions and, thus, to less than all United States imports. It resulted in a range of effective surcharge rates and duties. The surcharge rate on automobiles, for example, became 6.5% ad valorem. S. Rep. No. 92-437, 92d Cong., 1st Sess. 14 (1971) U.S. Code Cong. & Admin. News 1971, p. 1825. With respect to some articles the surcharge could result in the precise statutory duty set by the Congress. If a prior concession had reduced the statutory rate by 10% ad valorem, the imposition of the 10% ad valorem surcharge would produce the statutory rate of column 1 in the Tariff Schedules. As Proclamation 4074 recognized, the duty rate after the surcharge might become that of column 2 for other articles. With respect to some other articles, the surcharge might result in a duty set by one of a series of earlier concessions following presidentially negotiated trade agreements. In the case of still other articles, the total duty under Proclamation 4074 might be less than that resulting from a rate set by Congress and different from that resulting from prior tariff concessions.

With respect to those articles on which no concession had been granted, the congressionally established rates remained untouched. And the limitation to "dutiable" articles meant that no duties were created on goods entitled to free entry under the statute. Far from attempting, therefore, to tear down or supplant the entire tariff scheme of Congress, the President imposed a limited surcharge, as a "temporary measure" (*see* footnote 4, *supra*) calculated to help meet a particular national emergency, which is quite different from "imposing whatever tariff rates he deems desirable."[26]

Relationship to Other Statutes

Reliance by the Customs Court on *Youngstown Sheet & Tube*, 343 U.S. 579 (1952) is misplaced. We do not have here, as was the case in *Youngstown*, what the Customs Court described as "legislative acts providing procedures prescribed by the Congress for the accomplishment of the very purpose sought to be obtained" by a Presidential Proclamation. The surcharge did not run counter to any explicit legislation. We know of no act, other than the TWEA, "providing procedures" for dealing with a national emergency involving a balance of payments problem such as that which existed in 1971. . . .

. . . We find it unreasonable to suppose that Congress passed the TWEA, delegating broad powers to the President for periodic use during national emergencies, while intending that the President, when faced with such an emergency, must follow limiting procedures in other acts designed for continuing use during normal times.

Relation to the Power Delegated and the Emergency Declared

A standard inherently applicable to the exercise of delegated emergency powers is the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action. The nature of the power determines *what* may be done and the nature of the emergency restricts the *how* of its doing, *i.e.*, the means of execution. Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the *actions* taken in response thereto or in reliance thereon. It is one thing for courts to review the judgment of a President that a national emergency exists. It is another for courts to review his acts arising from that judgment.

It is clear that the surcharge herein had, as its primary purpose, the curtailment, *i.e.*, the regulation, of imports. What was sought was an offset to actions of our foreign trading partners which had led to loss of our favorable balance of trade and to a serious negative balance, as the President's address, *supra* note 4, made plain. Pressure exerted by the surcharge contributed to achievement of a multilateral agreement of major nations, which included a realignment of currency exchange rates. As was indicated in *South Puerto Rico Sugar Co. Trad. Corp. v. United States*, 334 F.2d 622, 167 Ct. Cl 236 (1964), it is purpose, not form, which should govern judicial characterization of a charge on imports. *Cf. Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967). A principal function and necessary effect of the import surcharge in Proclamation 4074 was to regulate imports. Section 5(b) delegated power to "regulate importation." The relationship between the action taken and the power delegated was thus one of substantial identity.

The President's choice of means of execution must also bear a reasonable relation to the particular emergency confronted. In considering section 3 of the Tariff Act of 1890, which authorized the President, in non-emergency situations, to impose retaliatory

[26] A charge on imports will inherently produce revenue. As stated by the President, however, "The surcharge was not imposed to raise revenue but to provide the U.S. external position with some temporary protection." Economic Report of the President 70 (1972).

measures at his discretion "for such time as he shall deem just," the Supreme Court, after noting the fact finding limitation normally involved in peacetime delegations, said in *Field v. Clark*, 143 U.S. 649, 691 (1892):

> [I]n the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.

The "discriminating regulations . . .in the interests of their people" referred to in *Field* may be likened to the "unfair exchange rates," "unfair treatment" and "the unfair edge" which the President described in his address, *supra* note 4, as causing the United States "to compete with one hand tied behind her back" and as the "major reason why our trade balance has eroded."

That the surcharge herein had overtones of foreign relations and foreign policy seems self-evident. As the world has grown smaller and trade more complex, foreign exchange rates, international monetary reserves, balances of payments, and trade barriers have become increasingly intertwined, with trade barriers being used in furtherance of foreign policy. See the Congressional findings which appeared in §2 (50 U.S.C. App. §2401) of the Export Administration Act of 1969, 83 Stat. 841 (50 U.S.C. App. §2401-13). The Customs Court appreciated that the nature of the surcharge action converged with presidential representation of the United States in the "society of nations" and with the President's efforts to achieve "stability in the international trade position" of our country. The declared national emergency was premised on a prolonged decline in our country's international monetary reserves, the serious threat to our trade position, and our unfavorable balance of payments position. Unlike quotas and other forms of action, a surcharge can obviously be quickly imposed and removed, is not discriminatory among nations affected, and is administratively less complex. Through its impact on imports, the surcharge imposed by Proclamation 4074 had a direct effect on our nation’s balance of trade and, in turn, on its balance of payments deficit and its international monetary reserves. We conclude, therefore, that the President's action in imposing the surcharge bore an eminently reasonable relationship to the emergency confronted.

Constitutionality

It should be understood, in considering the constitutionality of the TWEA as here interpreted, that the President's imposition of the surcharge could not violate any individual's constitutional rights in foreign trade. No one has a vested right to trade with foreign nations. . . . And no one has a legal right to the maintenance of an existing rate or duty. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933). Nor are we faced here with denial or infringement, even indirectly, of any right arising from any of the Amendments to the Constitution, as were the courts, for example, in *Veterans & Reserv. For Peace In Vietnam v. Regional Comr.*, and *Teague v. Regional Commissioner of Customs*, *supra* note 16, wherein detention, under §5(b), of publications sent from North Vietnam was upheld against a claim of violation of First Amendment rights, or in *Sardino v. Federal Reserve Bank of New York, supra* note 16, wherein blocking of property, under §5(b), was found not to be a deprivation of property violative of the Fifth Amendment.

The Customs Court, as quoted above, perceived a constitutional flaw in §5(b) of the TWEA if it were interpreted as permitting the surcharge herein, viewing such interpretation as a denial of the people's right to a government of separated powers, *i.e.*, that Congress' delegation in §5(b), unless restricted to "licensing," would be a violation of the "delegation doctrine." Whatever may be the current viability of that doctrine . . ., we find no conflict therewith in the TWEA as applied to Proclamation 4074. The Supreme Court in *Hampton & Co. v. United States*, 276 U.S. 394 (1928), dealing with non-emergency conditions, found those delegations proper which laid down an "intelligible principle" under which the President was to act. We find that principle, as did the court in *Veterans & Reserv. For Peace* in the TWEA shall become operative only in "time of war" or "any other period of national emergency declared by the President" (*i.e.*, a congressional requirement that the President, before acting in peacetime, must find and declare the fact that a national emergency exists), and (2) that the power delegated therein shall be applied only to "property in which any foreign country or a national thereof has any interest."

It cannot be lightly dismissed that the TWEA is operative only during (war or) national emergencies, which inherently preclude prior prescription of specific, detailed guidelines. . . .

That §5(b) and Proclamation 4074 deal only with *foreign* goods also is of significance. The Supreme Court, though dealing with international relations and the sale of arms rather than with imports, and with normal rather than national emergency conditions, in *Curtiss-Wright Export Corp., supra*, recognized the distinction between delegations of power in foreign and domestic affairs in these words (299 U.S. at 320, 57 S.Ct. at 221):

> It is quite apparent that if, in the maintenance of our international relations, embarrassment–perhaps serious embarrassment–-is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

Congress, by delegating to the President in §5(b) the power to regulate imports within the national emergency powers standard, has not succeeded in abdicating its constitutional power to regulate foreign commerce. It remains the ultimate decision maker and the fundamental reservoir of power to regulate commerce. It may, of course, recall or limit the delegated emergency power at any time. Throughout the 114 year life of the TWEA and its progenitors, Congress has repeatedly exercised its untrammeled plenary power over foreign commerce. . . .

The mere incantation of "national emergency" cannot, of course, sound the death-knell of the Constitution. Nor can it repeal prior statutes or enlarge the delegation in §5(b). The declaration of a national emergency is not a talisman enabling the President to rewrite the tariff schedules, as it was not in this case. We agree, also, with the statement of the court in *Algonquin SNG, Inc. v. Federal Emergency Administration*, 518 F.2d 1051, 1062 (D.C. Cir. 1975), *cert. granted*, 423 U.S. 923 (1975) (No. 75-382), that: "Our laws were not established merely to be followed only when times are tranquil." The TWEA, which is among "our laws" and is designed specifically for non-tranquil times, was not before the court in *Algonquin*. As we have noted, if *every* law applicable to tranquil times were required to be followed in emergencies, there would be no point in delegating emergency powers and no adequate, prompt means for dealing with emergencies.

The Executive does not here seek, nor would it receive, judicial approval of a wholesale delegation of legislative power. Nor do we find in §5(b) the grant of the "unrestrained and unbridled" authority feared by the Customs Court. The courts continue to sit and remain prepared . . . to impede an unreasonable or ultra vires exercise of the power granted in §5(b). We do not here sanction the exercise of an unlimited power, which, we agree with the Customs Court, would be to strike a blow to our Constitution. On the contrary, we find ourselves in agreement with this statement of the Court of Claims in *South Puerto Rico Sugar Co. Trad. Corp.* (334 F.2d at 632):

> [W]hen Congress uses far-reaching words in delegating authority to the President in the area of foreign relations, courts must assume, unless there is a specific contrary showing elsewhere in the statute or in the legislative history, that the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act. In a statute dealing with foreign affairs, a grant to the President which is expansive to the reader's eye should not be hemmed in or "cabined, cribbed, confined" by anxious judicial blinders. [Footnote omitted.]

Conclusion

The broad and flexible construction given to §5(b) by the courts which have considered it is consistent with the intent of Congress and with the broad purposes of the Act. As was said by the Supreme Court in discussing the President's power to define "banking institution" under an earlier version of §5(b): "The power in peace and in war must be given generous scope to accomplish its purpose." *Propper v. Clark*, 337 U.S. 472, 481 (1949). Though such a broad grant may be considered unwise, or even dangerous, should it come into the hands of an unscrupulous, rampant President, willing to declare an emergency when none exists,[37] the wisdom of a congressional delegation is not for us to decide. As was said in *Norman v. B. & O. R. Co.*, 294 U.S. 240, 297 (1935), with respect to "gold clause" measures: "We are not concerned with their wisdom. The question before the Court is one of power, not of policy."

Congress, fully familiar with its own use of duties as a means of regulation, delegated to the President, in §5(b) of the TWEA, the power to regulate importation during declared national emergencies by means appropriate to the emergency involved. Interpreted as having authorized the President's imposition of the specific surcharge in Proclamation 4074, as a reasonable response to the particular national emergency declared therein, the delegation in §5(b) of the TWEA passes constitutional muster.

Accordingly, the President's action under review was within the power constitutionally delegated to him, and the judgment of the Customs Court that said action was ultra vires must be reversed.

STAR-KIST FOODS v. UNITED STATES

275 F.2d 472 (C.C.P.A. 1959)

[37]The growth of power in the Executive has been phenomenal over the last 40 years. The risks inherent in a concentration of power in the Executive remain those feared by the Framers. The Federalist, Nos. 48-49 (Madison). Recent events have brought the question into wider public discourse. Whether Congress should devote more effort to defining, limiting or regaining powers previously delegated is not a matter within the jurisdiction of the courts. Whether the pendulum of power should now begin to swing further in the direction of the Congress is a matter of policy, reserved to the people and their elected representatives in the Congress. Absent a violation of the Constitution, or action contrary to statute, it is not grist for the mill of this court.

MARTIN, JUDGE.

This appeal out of a protest filed by Star-Kist Foods, Inc., an American producer of canned tuna fish packed in oil and of tuna fish packed in distilled water (a "dietetic pack"). The protest was filed pursuant to section 516(b) of the Tariff Act of 1930, as amended, 19 U.S.C.A. § 1516(b), and attacked the assessment made by the Collector of Customs, Port of New York, of an import of tuna fish packed in brine at 12 ½ per centum ad valorem. The Collector assessed the imported merchandise in accordance with paragraph 718(b) of the Tariff Act of 1930, 19 U.S.C.A. §1001, par. 718 (b), as modified by a trade agreement with Iceland, T.D., 50956.[1] Star-Kist asserted that the goods were dutiable at the rates imposed by Congress in paragraph 718(b). . . .

Appellant asserts two reasons for objecting to the Secretary's action refusing to disturb the collector's assessment of the imported tuna fish at the reduced duties under the trade agreement with Iceland. Each ground, it is asserted, requires a holding that the trade agreement, by virtue of which the duty on brine packed tuna fish was reduced from 25% to 12 ½ % ad valorem, is null and void.

The first reason urged by appellant is that the Trade Agreements Act of 1934[2] by authority of which the trade agreement was negotiated, is null and void as being an unconstitutional delegation of legislative powers by the Congress to the President of the United States [enumerated in the U.S. Constitution as follows]. . . .

Article I, Sec. 1:

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[1]Paragraph 718(b) provides:

> "Fish, prepared or preserved in any manner, when packed in air-tight containers weighing with their contents not more than fifteen pounds each (except fish packed in oil or in oil and other substances): . . . . other fish, 25 per centum ad valorem."

The only change which T.D. 50956 has made, pertinent to this appeal, was the reduction of the dutiable rate to 12 ½ per centum ad valorem.

[2]Section 350(a) of the Tariff Act of 1930 as amended by the Act of June 12, 1934 entitled "An Act To amend the Tariff Act of 1930," 48 Stat. 943, 19 U.S.C. 1351 (1940 ed.) as further amended by the Joint Resolution of June 7, 1943, 57 Stat. 125, 19 U.S.C.A. § 1351, and as it read at the time of the importation of the merchandise at bar, provided:

> (a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency of restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with characteristics and the needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time–-
>
> (1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and
>
> (2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly; *Provided*, That the President may suspend the application to articles the growth, produce or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts (including the operation of international cartels) or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Sec. 7:

All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Article I, Sec. 8:

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

Second, appellant maintains that the trade agreement with Iceland, consummated under the provisions of the Trade Agreements Act of 1934, is a treaty and is therefore null and void because it was neither negotiated with the advice and consent of the Senate nor did two-thirds of the Senate concur in its execution as is required by Article II, Section 2, clause 2 of the Constitution, which reads as follows:

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . .

Appellant maintains further that the proclamation of the President pronounced in connection with this trade agreement is also null and void.

We shall treat these questions in the order in which we have outlined the contentions of appellant.

At the outset of this discussion it is well to bear in mind that this court has no authority to chart a new course in jurisprudence in a field in which precedents have been established by the Supreme Court. It behooves us, therefore, to endeavor to propound the principles governing the issues presented here as deduced from the pronouncements of that Court. . . .

Now we must endeavor to determine what principles of law can be adduced from the cases just reviewed. It is apparent that the development of the concepts of law in this field has been accomplished by a process of evolution.

First, the delegation of authority to the President to proclaim the happening of an event as a condition precedent to the invocation of an embargo on imports was sanctioned. *The Aurora v. United States*, *supra*. Next, legislation was upheld wherein Congress pronounced a policy, but the President, in order to act, was required to make a finding by proclamation, in which event certain imported articles would be suspended from the free list and specified duties would be imposed thereon. The President was given discretion, not only with reference to the finding, but also as to the duration of the suspension. *Field v. Clark*, *supra*. Later, legislation was approved which established a policy which empowered the President, after a required investigation by the Tariff Commission and findings by him, to proclaim increases or decreases in the duties on all imported articles within 50 percent of the established rates. The President was further authorized to modify and change the proclaimed rates of duty so long as he followed the same procedure. He was prohibited from transferring articles to and from the free list and from exceeding any maximum ad valorem rate of duty specified in Title I of the Tariff Act of 1922. *J.W. Hampton, Jr., & Co. v. United States*, *supra*. Again it should be noted that Congress can give the President much broader discretionary powers in legislation inherently bearing upon his conduct of foreign affairs, such as that here under consideration, than when purely domestic matters are involve. *United States v. Curtiss-Wright Export Corp.*, *supra*.

The Court's decisions in those cases have followed a discernible pattern and have set out certain principles which are the guideposts of Congress in enacting legislation which enlists the assistance of the President, and which are the fundamental guides in ascertaining whether Congress has adhered to the constitutional limitations.

A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President. In addition the act must specify when the powers conferred may be utilized by establishing a standard or "intelligible principle" which is sufficient to make it clear when action is proper. And because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner. This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action he takes will tend to promote rather than flout the legislative purpose. It is not necessary that the guides be precise or mathematical formulae to be satisfactory in a constitutional sense.

In the act before us the Congressional policy is pronounced very clearly. The stated objectives are to expand foreign markets for the products of the United States "by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States. . . ." These objectives are in their nature no different than those of the Tariff Act of 1890 wherein the stated policy was to secure reciprocally equal trade with countries producing certain enumerated articles, and the Tariff Act of 1922 which was designed to enable domestic producers to compete on an equal basis with foreign producers in the marketplaces of the United States.

Pursuant to the 1934 act the presidential power can be invoked "whenever he [the President] finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are *unduly burdening or restricting the foreign trade of the United States* and that the [purposes of the act] will be promoted. . . ." (Italics ours.) Under the 1890 act the President could invoke the statute when he was satisfied "that the Government of any country . . . imposes duties or other exactions upon . . . products of the United States . . . [which] he *may deem to be reciprocally unequal and unreasonable*. . . ." (Italics ours.) In this regard the 1922 act allowed the President to act if he found "*the duties prescribed in this Act do not equalize ... differences in costs of production in the United States and the principal competing country*. . ." (Italics ours.)

Now what could the President do under the several acts?

After making the requisite findings under the act of 1890, the President could suspend the free introduction of the articles specified for such time as he deemed "*just*," and pursuant to the act of 1922, he could increase or decrease rates up to 50 per centum of those specified, but could not exceed any maximum stipulated in the act nor transfer any article between the dutiable and free lists.

Under the provisions of the 1934 act the President by proclamation can modify existing duties and other import restrictions but not by more than 50 percent of the specified duties nor can he place articles upon or take them off the free list. Furthermore, he must accomplish the purposes of the act through the medium of foreign trade agreements with other countries. However, he can suspend the operation of such agreements if he discovers discriminatory treatment of American commerce, and he can terminate, in whole or in part, any proclamation at any time.

Of course the acts of 1890, 1922, and 1934 are different, but we comprehend only a difference in degree. In each one Congress has allowed the President broad discretion, not only with respect to when he can act, but also in the exercise of the conferred powers. Under the act of 1890, he could suspend articles from the free list "for such time as he shall deem just." And under the Flexible Tariff Act of 1922, the President was authorized to modify duties to equalize the competitive opportunities of American and foreign producers in the markets of the United States. Although he was to be assisted by the Tariff Commission, and was to consider as far as was "*practicable*" certain enumerated factors, as well as any other factors he himself deemed to be relevant, the final decision as respected equalization was his and *his alone*. While it is true that under that act the President was required to seek the advice of the Tariff Commission before he could act, the Court in the *Hampton* case recognized that an advisory commission is not necessary. Consequently, the absence of such a provision in the Tariff Agreements Act is inconsequential. Neither is the absence in the act of 1934 of a suggested list of factors to consider in applying the standard determinative of any of the issues. Under both the 1922 and the 1934 acts, the President was given the power to increase or decrease duties up to 50 per centum of the specified rates. The difference lies only in the procedure set out in the 1922 act to *assist* the Chief Executive in making *his* decision.

As has been earlier pointed out, appellant maintains that there is no limitation on the adjustment in duties which the Chief Executive is authorized to make. The argument leads to the conclusion, for example, that even if the President finds that duties should be increased 50 per centum to comply with the policy declaration of the act, he may arbitrarily decrease them 50 per centum instead. We do not so read the language which Congress has provided in the section we are considering.

After making the enabling finding, the President is authorized to act in a manner such "that the purpose above declared will be promoted by the means hereinafter specified." Those means are to enter into foreign trade agreements and to proclaim certain modifications in various import restrictions. It becomes immediately apparent, therefore, that the President is limited to action which will advance the policies of the act, and which will tend to secure the benefits considered desirable by the Congress. Not only must they advance the Congressional policy, but with respect to rate modifications, the problem with which the appellant is most concerned, they must be "required or appropriate" to carrying out the trade-agreement as well. This additional language doubly emphasizes the fact that Congress limited the Presidential authority to modify duties strictly in accordance with the purposes for which the act was promulgated.

In view of the Supreme Court's recognition of the necessity of flexibility in the laws affecting foreign relations, and the many significant and limiting similarities between the 1934 act on the one hand, and the 1890 and 1922 acts on the other, which latter acts the Supreme Court has approved, we are of the opinion that the 1934 act does not grant an unconstitutional delegation of authority to the President.

Appellant has relied greatly upon *Panama Refining Co. v. Ryan*, 293 U.S. 388, and

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, to support its contention that the Trade Agreements Act of 1934 is unconstitutional in that it confers an "unfettered discretion" upon the President. We have considered those cases, but since we find that the Supreme Court cited approvingly *Field* and *Hampton* in the *Panama* case and *Hampton* in the *Schechter* case, and since we believe the decisions in *Hampton* and *Field* to be controlling of the issues at bar, we find it unnecessary to discuss those cases further.

We now come to the other contention of appellants, that the trade agreement with Iceland executed by the President pursuant to the Trade Agreements Act is null and void because it is, in fact, a treaty and lacks the concurrence of the Senate, required by Article II, §2 of the Constitution and, further, that since the agreement is illegal the proclamation which effectuated the agreement is also without legal effect.

This procedure was established by Congress so that its policy and the basic philosophy which motivated the passage of the Trade Agreements Act could be realized. From reading the act, it is apparent that Congress concluded that the promotion of foreign trade required that the tariff barriers in this and other countries be modified on a negotiated basis. Since the President has the responsibility of conducting the foreign affairs of this country generally, it gave to him the added responsibility of negotiating the agreements in pursuance of the spirit of the act. Such a procedure is not without precedent nor judicial approval. The Supreme Court in *Altman & Co. v. United States*, 224 U.S. 583, 601, recognized that not all commercial compacts are treaties, saying:

> . . .While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, §3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representation of two sovereign nations, and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President.

In *United States v. Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at page 318, the Court observed that "the power to make such international agreements as do not constitute treaties in the constitutional sense,. . . [although not] expressly affirmed by the Constitution, nevertheless exist[s] as inherently inseparable from the conception of nationality."

In *United States v. Belmont*, 301 U.S. 324, which involved the assignment by the Soviet government to the petitioner of certain claims due to that government from American nationals, this question was again discussed. The assignment involved therein was effected by an exchange of diplomatic correspondence between the Soviet government and the United States coincident with the recognition of the Soviet government by the President of the United States. The purpose was to bring about a final settlement of the claims between those governments, it being agreed that the Soviet government would take no steps to enforce claims against American nationals and that all of such claims were released and assigned to the United States. The Supreme Court in upholding the transactions, stated:

> That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over external affairs is not distributed, but is vested exclusively in

> the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Article 2, §2), require the advice and consent of the Senate.
>
> A treaty signifies "a compact made between two or more independent nations, with a view to the public welfare." *Altman & Co. v. United States*, 224 U.S. 583, 600. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations. *See* 5 Moore, Int. Law Digest, 210-221. The distinction was pointed out by this court in the *Altman* case, *supra*, which arose under section 3 of the Tariff Act of 1897, (30 Stat. 151, 203), authorizing the President to conclude commercial agreements with foreign countries in certain specified matters. *Id.*, 301 U.S. at pages 330-331.

In *United States v. Pink*, 315 U.S. 203, that Court approved the opinion in the *Belmont* case, *supra*, and reaffirmed the proposition that there may be international agreements and compacts which are not treaties within the meaning of the Constitution. We see no significant difference between the executive power exercised and approved in those cases and that in issue here.

This court had occasion to discuss this question in the case of *Louis Wolf & Co. v. United States*, 107 F.2d 819, 27 CCPA 188, C.A.D. 84. In that case a trade agreement with Cuba consummated under the provisions of the Trade Agreements Act of 1934 was involved. In upholding the agreement this court said:

> We think that an agreement such as the one at bar relating to customs duties which may be levied upon articles of commerce between the two countries (when the agreement is authorized by Congress, although not ratified by the Senate) may be properly styled a commercial convention. We therefore hold that appellants' contentions with reference to the effect of the treaties with Austria and Norway are without merit. *See E. & J. Burke, Ltd. v. United States*, 26 CCPA, Customs, 374, 379, C.A.D. 44. *Id.*, 107 F.2d at page 827, 27 CCPA at page 200.

We, therefore, hold that the trade agreement with Iceland and the accompanying proclamation are valid. In view of the above analysis of the issues herein and our conclusions with respect thereto, we affirm the judgment of the Customs Court.

NOTES AND QUESTIONS

1. Are *Star-Kist* and *Yoshida* consistent?

2. Was the president’s action in *Star-Kist* one expected by Congress when it made the delegation? That in *Yoshida*?

3. In *Yoshida*, what was the intelligible principle by which the TWEA delegation was limited? Are you convinced?

4. Does the lower court seem correct in its position (accepted by the appellate court) that the Trade Act series gives the president power to restore tariffs only to specific pervious levels?

5. Are you troubled by the fact that the president stated that he was acting under the Trade Acts "and other provisions of law," while he was upheld under the TWEA? If you were president, do you think reference to the TWEA in the basic executive order

would have posed any problems for you?

6. Should the fact that Congress later granted the president clear authority to do what he did in *Yoshida* affect the outcome of the case? Do you think the president will ever use this authority again?

7. Was President Nixon's imposition of an import surcharge, discussed in *Yoshida*, successful in limiting the U.S. trade imbalance? In 1971, when the import surcharge was imposed, U.S. citizens, for the first time in this century, purchased more goods from abroad than they sold. By the mid-1980s the trade deficit was running in excess of $130 billion per annum. What was the policy significance of Nixon's simultaneous decision to shut the U.S. gold window? Could the latter decision have been taken without the former? *Yoshida* permitted the president, for better or worse (some have suggested that the move had more to do with preelection politics than international economics) to take charge of a troublesome situation, whereas President Truman was prevented from seizing the steel mills in a difficult domestic situation in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Can the distinction in the outcomes be adequately explained by the penumbra of the *Curtiss-Wright* decision granting a large measure of discretion to the president in the "vast external realm" of foreign affairs? *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304.

8. Does *Yoshida* adequately face the argument that delegated authority to impose a tariff, as opposed to other forms of regulation, amounts to taxation without representation? For other cases raising the issue, see *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

9. In what way does the international negotiation process of *Star-Kist* provide an intelligible standard for the delegated power? Is the standard stronger or weaker than that of *Yoshida*?

10. Would you hesitate to allow the President to impose a quota under one statute and a tariff under another on the same commodity? *See United States Cane Sugar Refiners' Assn. v. Block*, 544 F. Supp. 883 (Ct. Intl. Trade 1982).

11. Suppose the president attempted, without Japanese agreement or congressional action, to restrict Japanese auto imports to the United States. Could he do this under the IEEPA? Under § 232 of the Trade Expansion Act of 1962 permitting import restraints to be imposed on national security grounds? Under § 122 of the Trade Act of 1974? (*See* Supplement.) What does the section mean when it says that presidential actions should be "of broad and uniform application"? (Note that this request may derive from art. 1 §8, cl. of the Constitution.)

12. Much of the delegation legislation in the trade area, (including §201--the "escape clause," §406, dealing with trade with communist countries, as well as the provision in the Trade Act of 1974 concerning the granting of most-favored-nation status) included one or another form of congressional veto, *i.e.*, a procedure under which one or more houses of Congress, or even a committee, may strike down executive action to which it objects. What is the impact of *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), on the "legislative override" provisions in the trade area? In *Chadha*, the Supreme Court held that the congressional veto procedure in that case violated the "presentment" clause of the Constitution, which requires that legislation must be passed by both houses and presented to the president for his signature or veto. U.S. Const., art. I, §7. *See* Trade and Tariff Act of 1984, §248. How can you distinguish a joint resolution from a concurrent resolution of the Congress? What difference might a joint resolution make concerning the "presentment" clause of the Constitution?

In any event, do you think the congressional veto idea is wise or effective? On the legislative veto issue generally, *see* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

13. Presidential power in this area is largely a function of the permissible limits of delegated statutory authority. In one sense, of course, the permissible limits are those imposed by constitutional concepts of delegation theory. However, limits are also imposed by the *content* of the pertinent statutory authority underlying presidential action; in other words, assuming a constitutional delegation of authority has been made by Congress, limits on that delegation are imposed under the actual language of the statute. The TWEA, relied upon by the court in *Yoshida*, was amended in 1977 to be available prospectively only during time of war. For non-wartime periods of national emergency declared by the president, the pertinent statutory authority is now the IEEPA. Review the provisions of IEEPA, 50 U.S.C. §§ 1701-1706, which appear in the Supplement. Would Proclamation 4074 as written have been valid under the IEEPA? If not, how would you have redrafted it?

14. How exclusive are trade statutes as sources of presidential power in international trade regulation? Consider the following case in answering the question.

CONSUMERS UNION OF U.S. v. KISSINGER

506 F.2D 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975)

MCGOWAN, CIRCUIT JUDGE:

These consolidated cross-appeals are directed respectively to two declarations made by the District Court in a suit challenging efforts by the Executive Branch of the United States Government to bring about reductions in steel imports by means of self-imposed limitations on foreign producers. Arrayed against each other are a complaining consumers organization, on the one side, and, on the other, the State Department, and foreign and domestic steel producers, individually and in association. In the form eventually taken by the litigation in the District Court, we consider that the only question before us is whether the actions of the Executive were a regulation of foreign commerce foreclosed to it generally by Article I, Section 8, Clause 3 of the Constitution, and in particular by the Trade Expansion Act of 1962, 19 U.S.C. §1801 et seq. To the extent that the District Court declared no such conflict to exist, we affirm its decision.

I

Steel imports into the United States increased more than tenfold over the period 1958-68, with the great bulk of imports coming from Japan and the countries of the European Communities. The effect of this development on the domestic steel industry, which is deemed to be of great importance to the nation's security as well as to its peacetime economy, became a matter of widespread concern. In 1968 bills with substantial backing were introduced in Congress to impose mandatory import quotas on steel.

The Executive Branch regarded the problem created by steel imports as temporary in nature and thus amenable to a short-term solution. It concluded, moreover, that unilaterally imposed mandatory quotas would pose a danger of retaliation under the General Agreement on Trade and Tariffs, prove inflexible and difficult to terminate, and have a seriously adverse impact on the foreign relations of the United States. Import limiting agreements negotiated with other governments were likewise rejected on the State Department's advice that negotiated official restrictions, if achievable, would have political consequences for the foreign governments that would also affect our external affairs adversely. Accordingly, the Executive Branch concluded in 1968 that voluntary import restraint undertakings by foreign producers offered the best hope of alleviating the domestic industry's temporary problems at the least cost to United States foreign, economic and trade policies.

After an initial showing of interest by the foreign producer associations, State Department officials entered into discussions that lasted from June to December 1968, and resulted in letters being sent to the Secretary in which the Japanese and European producer associations stated their intentions to limit steel shipments to the United States to specified maximum tonnages for each of the years 1969, 1970, and 1971. During 1970, domestic industry and union representatives urged the State Department to seek renewal of the restraints beyond 1971 to provide greater time within which to achieve needed changes, and the House Ways and Means Committee issued a report to like effect. When various executive organs, such as the President's Council of Economic Advisors, had made the same recommendation, the President directed the Secretary to seek extensions of the limitations representations. Such extensions, covering 1972 through 1974, were forthcoming in letters dated early in May, 1972, and announced by the President on May 6.

The two 1972 letters are substantially alike. Each states the signatories' intention to limit exports of steel products to the United States both in aggregate tonnage and, within such limits, in terms of product mix. Each represents that the signatories "hold themselves ready to consult with representatives of the United States Government on any problem or question that may arise with respect to this voluntary restraint undertaking" and expect the United States Government so to hold itself ready.[6] In addition, each states that its undertaking is based on the assumptions that (1) the effect will not be to place the signatories at a disadvantage relative to each other, (2) the United States will take no unilateral actions to restrict exports by the signatories to the United States, and (3) the representations do not violate United States or international laws.

II

[The original complaint contained two separate and distinct claims. The first claimed that the 1972 letters of intent were continuing antitrust violations under section 1 of the Sherman Act, 15 U.S.C. §1. The second claimed that State Department officials had violated the law by "facilitating, bringing about and negotiating" the limitations set forth in the 1972 letters without compliance with Section 301 or Section 352 of the Trade Expansion Act of 1962. After answers had been filed by some of the defendants and a motion to dismiss or for summary judgment had been made by the State Department defendants, the parties stipulated that the first claim in the complaint be dismissed with prejudice. An amended complaint was filed, alleging that the State Department officials had acted to regulate foreign commerce within the meaning of Article 1, Section 8, Clause 3 of the Constitution, and in violation of sections 301 and 352 of the Trade Expansion Act of 1962. The foreign producer defendants were alleged to be violating the same laws, to the extent that they were effectuating the limitations sought by the defendant State Department officials acting in excess of their authority.]

. . . The [District Court] concluded its discussion of the issues by making two

[6] It is undisputed that "[i]n negotiating the arrangements and all of their specific terms, the State Department officers explained to the foreign producers that they were being asked to make the requested commitments by the Executive Branch of the United States Government on the ground that they were in the national interest of the United States." JA 155a.

declarations. The first was that "the Executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws and that such arrangements are not exempt." The second was that "the Executive is not preempted and may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as these undertakings do not violate legislation regulating foreign commerce, such as the Sherman Act, and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962."

The court then went on to say that, although the question of whether there was a violation of the Sherman Act was not before it by reason of the stipulated dismissal of the antitrust claim with prejudice, it was apparent to the court that "very serious questions can and should be raised as to the legality of the arrangements under the [Sherman] Act"; and the parties were "urged to reexamine their positions and premises in the light of this memorandum and the declarations made." The court characterized injunctive relief as inappropriate, and denied the respective motions for summary judgment to the extent that they were "inconsistent" with the declarations made by it. It concluded by saying that "no further proceedings are required," and "no costs will be awarded."

Appeals were filed by the State Department defendants and by the domestic and foreign producers. The plaintiff filed a cross appeal "insofar as any declaration, or ruling on the relief requested, has been decided adversely to the plaintiff."

III

A substantial portion of the briefs and argument before us has been devoted to the Sherman Act. The defendant-appellants are, not surprisingly, perturbed by some of the comments made by the District Court with respect to possible Sherman Act liability. Although the court stated in terms that, by reason of the stipulation of dismissal, "the question of whether or not a violation of the Sherman Act is present is not before the Court to decide," it did not leave the matter at that. One of its declarations is that the Executive has no authority to exempt from the antitrust laws the arrangements here involved, and "that such arrangements are not exempt."

Since there is nothing in the record that shows the Executive as purporting to grant such an exemption, this observation by the court does not have the status of a declaratory disposition of an actual controversy. The court's other comments in this connection are not couched in adjudicatory form, as indeed, so the court recognized, they could not be in the light of the abandonment by the plaintiff of its antitrust claim. With the declaration vacated, as we shall direct in our judgment, these expressions of the court's opinion are without judicial force or effect and are not appropriate for pursuit upon appeal.

We think that the Sherman Act issue, for all practical purposes, disappeared from this case when the plaintiff, for reasons best known to itself, stipulated its dismissal with prejudice. It is apparent from the face of the original complaint that the Sherman Act claim was originally conceived by the plaintiff as a vital aspect of its lawsuit. Its resolution would almost certainly have required the exploration by adversarial trial of a number of complex questions of fact and law, and the making of legal rulings in an area not distinguished for its simplicity. When the plaintiff, confronted by that formidable prospect, elected to abandon its antitrust claim, the Sherman Act could no longer play a significant part in this controversy, and we have no occasion to concern ourselves with the discussions by the parties of the precise reach of that statute.

IV

We turn, then, to the District Court's declaration that, in respect of the actions of the Executive culminating in the undertakings stated in the letters of intent, "the Executive is not preempted . . . and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962." That statute, as its name suggests, had as its principal purpose the stimulation of the economic growth of the United States and the maintenance and enlargement of foreign markets for its products.

This was to be achieved through trade agreements reached by the President with foreign countries. Title II of the Act provided that, for a period of five years (1962-67), the President was authorized to enter into such agreements whenever he determined that any existing tariff duties or other import restrictions of either the United States or any foreign country were unduly burdening and restricting the foreign trade of the United States. Upon reaching any such trade agreement, the President was delegated the unmistakably legislative power to modify or continue existing tariffs or other import restrictions, to continue existing duty-free or excise treatment, or to impose additional import restrictions, as he determined to be necessary or appropriate to the carrying out of the agreement. 19 U.S.C. §1821. In connection with the first two of these powers, the Tariff Commission was given an advisory function, which included public hearings; and public hearings were also directed to be held, by an agency designated by the President, in connection with any proposed trade agreement. 19 U.S.C. §§ 1841, 1843.

Title III of the Trade Expansion Act of 1962, recognizing that domestic interests of various kinds may be adversely affected by concessions granted under trade agreements, authorizes the making of compensating adjustments of various kinds. Section 301 (19 U.S.C. §1901) provides that the Tariff Commission shall undertake investigations of injuries allegedly being done to domestic businesses or workers by such things as increased imports flowing from a trade agreement. After holding public hearings, the Tariff Commission shall make a report to the President. If it affirmatively finds injury to domestic industry, the President may under Section 351 increase or impose tariff duties or other import restrictions, 19 U.S.C. § 1981, or alternatively he may under Section 352 negotiate agreements with foreign governments limiting the export from such countries to the United States of the article causing the injury. 19 U.S.C. § 1981. If this latter option is taken, the Act provides that the President is authorized to issue regulations governing the entry or withdrawal from warehouse of the article covered by the agreement.

The foregoing description of the Trade Expansion Act of 1962 covers, among others, Sections 301 and 352. They are the only provisions expressly identified in the amended complaint as constituting the allegedly preemptive exercise by Congress of its constitutional power to regulate foreign commerce that, so it is said, forecloses the actions of the Executive challenged in this case. The description extends also to Sections 302 and 351, which are referred to in plaintiff-appellant Consumers Union's brief, as is also Section 232, 19 U.S.C. §1862. This last is the so-called national security clause which provides that the President shall not decrease or eliminate tariffs or other import restrictions if to do so would impair the national security. The Director of the Office of Emergency Planning is directed to investigate any situation where imports threaten to impair the national security; and if he finds such threat, and the President concurs, action shall be taken "to adjust the imports" of the article in question, which means that the article may by regulation be excluded from entry or withdrawal from warehouse.

What is clear from the foregoing is a purpose on the part of Congress to delegate legislative power to the President for use by him in certain defined circumstances and in furtherance of certain stated purposes. Without such a delegation, the President could not increase or decrease tariffs, issue commands to the customs service to refuse or delay entry of goods into the country, or impose mandatory import quotas. To make use of such delegated power, the President would of course be required to proceed strictly in accordance with the procedures specified in the statutes conferring the delegation. Where, as here, he does not pretend to the possession of such power, no such conformity is required.

The steel import restraints do not purport to be enforceable, either as contracts or as governmental actions with the force of law; and the Executive has no sanctions to invoke in order to compel observance by the foreign producers of their self-denying representations. They are a statement of intent on the part of the foreign producer associations. The signatories' expectations, not unreasonably in light of the reception given their undertakings by the Executive, are that the Executive will consult with them over mutual concerns about the steel import situation, and that it will not have sudden recourse to the unilateral steps available to it under the Trade Expansion Act to impose legal restrictions on importation. The President is not bound in any way to refrain from taking such steps if he later deems them to be in the national interest, or if consultation proves unavailing to meet unforeseen difficulties; and certainly the Congress is not inhibited from enacting any legislation it desires to regulate by law the importation of steel.

The formality and specificity with which the undertakings are expressed does not alter their essentially precatory nature insofar as the Executive Branch is concerned. In effect the President has said that he will not initiate steps to limit steel imports by law if the volume of such imports remain within tolerable bounds. Communicating, through the Secretary of State, what levels he considers tolerable merely enables the foreign producers to conform their actions accordingly, and to avoid the risk of guessing at what is acceptable. Regardless of whether the producers run afoul of the antitrust laws in the undertakings or the process of consultation under them differentiates what the Executive has done here from what all Presidents, and to a lesser extent all high executive officers, do when they admonish an industry with the express or implicit warning that action, within either their existing powers or enlarged powers to be sought, will be taken if a desired course is not followed voluntarily.

The question of congressional preemption is simply not pertinent to executive action of this sort. Congress acts by making laws binding, if valid, on their objects and the President, whose duty it is faithfully to execute the laws. From the comprehensive pattern of its legislation regulating trade and governing the circumstances under and procedures by which the President is authorized to act to limit imports, it appears quite likely that Congress has by statute occupied the field of *enforceable* import restrictions, if it did not, indeed, have exclusive possession thereof by the terms of Article I of the Constitution. There is no potential for conflict, however, between exclusive congressional regulation of foreign commerce–regulation enforced ultimately by halting violative importations at the border–and assurances of voluntary restraint given to the Executive. Nor is there any warrant for creating such a conflict by straining to endow the voluntary undertakings with legally binding effect, contrary to the manifest understanding of all concerned and, indeed, to the manner in which departures from them have been treated.

In holding, as we do, that the District Court did not err in declining to characterize the conduct of Executive here under attack as in conflict with the Trade Expansion Act of 1962, we are not to be understood as intimating any views as to the relationship of the Sherman Act to the events in issue here. The Sherman Act is not, as noted above, one of the regulatory statutes charged as preempting the field, and the question of its possible substantive applicability vanished from this case with the original complaint.

The declaration in the District Court's order with respect to antitrust exemption is vacated, and the declaratory aspect of that order is confined to the proposition that the State Department defendants were not precluded from following the course they did by anything in the Constitution or Title 19 of the U.S. Code. As so confined, the order appealed from is affirmed.

LEVENTHAL, CIRCUIT JUDGE (dissenting):

With all respect, I must record my disagreement with the ruling of the majority that the President had the authority to negotiate detailed arrangements with foreign steel producers to limit their shipments of products to the United States. . . .

I am not persuaded by the majority's pronouncement that the statutes are not pertinent to the present case because the arrangements, incorporated in letters from foreign steel producers which describe themselves as "voluntary restraint undertakings," did not contemplate the mandate of judicial enforceability. These undertakings by the President and foreign steel producers were carefully structured in considerable detail, obviously after detailed consultations with American steel interests, without exposure to the kind of input by purchasers that would have been provided if the Congressional procedures had been followed. These undertakings are bilateral, and establish obligations. Their bite persists notwithstanding the majority's effort to coat them bland vanilla. The majority tolerates executive donors around the limits staked by Congress in the field it has occupied. Its concept that a different route is available for executive arrangements discerned as not intended for judicial enforcement is, in my view, unsound. . . .

The majority says that the steel import restraints are in harmony with the statutory program because they are not enforceable in courts of law; they are said to be mere precatory expressions which Congress never intended to circumscribe by the procedural requirements applicable to mandatory import controls.

This response presents an issue that focuses on the nature and effect of the undertakings before us. Turning first to effect, Presidents may engage in many activities that have a perceivable economic impact upon the volume of commodities imported. The effects vary in terms of their stability, their specificity, and their duration. At one pole would lie general Presidential exhortations–say, to consumers to "Buy American"–or general alarms, announcing that protective legislation will be sought if imports are not contained. Such appeals are valid even though they may have the effect of inhibiting some market behavior, and no one would view them as prohibited by even the strongest Congressional "free trade" legislation. At the other extreme is a Presidential proclamation that foreign-trade commodities will not be allowed to enter which plainly cannot be reconciled with the existing statutory structure, or legitimated by reference to some aura of "inherent" Presidential authority. In between is a continuum of restrictions. In my view, the comprehensive statutory program constrains some but not all of the activities in this continuum. Here, the undertakings have an economic effect that parallels that of import quotas proclaimed by the President.

Turning to its nature, the Presidential action here goes far beyond a speech or announcement–even one preceded by "feelers" to foreign governments to ascertain how much they will tolerate. Far from being mere expression of desire and intent, these are solemn negotiated bilateral understandings.

The arrangements are not unilateral announcements but the culmination of bilateral discussions that were not only participated in, but initiated by State Department officials.

Although the final letters that embody the specific limitations are astutely couched in a litany of a "voluntary restraint undertaking" on the part of the foreign steel producers, the circumstance are instinct with bilateral undertaking.

Obviously, foreign firms that have vigorously marketed their products in the United States do not voluntarily withhold production without some reciprocal aspect indicating that forbearance is to their advantage. Here, the undertakings of the foreign producers rest on Government assurances that disadvantages would be equalized among producers; that the United States Government–or at least the not uninfluential Executive Branch–would not take or start other measures to limit steel imports or increase duties; and that the transaction would not violate any law of the United States.

The specificity of the limitations imposed by the undertakings also indicates that they were the result of bilateral bargaining and agreement.

Significantly, by the terms of the arrangements, the parties contemplate continuing consultations. The foreign steel producers "hold themselves ready to consult" on any question that may arise on the interpretation of their "undertaking." Does one accompany a unilateral declaration of intent with an offer to "consult" about what he has declared? When the foreign producers go on to say that their undertakings are based on their expectation that the United States Government will consult with them on questions that arise, and the White House releases these letters, along with a detailed Fact Sheet, as a "welcome development" that is the product of Executive negotiation can it be meaningfully denied that there is a reciprocal undertaking by the United States Government to engage in consultations with the producers?

There is only local color, no legal significance, in the fact that in this case the Chairmen of key House and Senate Committees concerned with regulation of international trade voiced their approval on the occasion of White House announcement of the undertakings. The Government does not contend, and I do not see how it could rightfully contend, that such participation by particular Congressmen can invest the President with executive authority not otherwise possessed, or constitute a legally decisive definition of the demarcation between the zone that belongs to Congress as a whole and that which belongs solely to the President. . . .

NOTES AND QUESTIONS

1. How could Consumers Union have "standing" to bring an action like this? Could a consumer of footwear challenge an Orderly Marketing Agreement (OMA) negotiated by the president on footwear outside the context of Section 201 of the Trade Act of 1974 (*see* Supplement). *See Sneaker Circus v. Carter*, 566 F.2d 396 (2d. Cir. 1977). What about a competitor? What are the differences in the two situations?

2. How does the issue in this case differ from that in the preceding delegation cases? How should the court have come out if it held that the agreements were binding?

3. If the executive was acting in so informal a manner as not to gain the force of law, should its action have gained antitrust immunity?

4. Should the preceding argument really be defeated by the fact that plaintiff dropped its antitrust claim (probably to avoid costs and delays)?

5. Do you think that the plaintiff made a strategic error by dropping the antitrust claim? How would the antitrust claim come out today? *See* § 607 of the Trade Act of 1974.

6. If one accepts Judge Leventhal's view that the agreements had significant force, does it follow that they are unconstitutional?

7. Is there a "right to import"? Is there a property right of some sort in the uninhibited ability to import articles from other countries? *See Norwegian Nitrogen Products v. United States*, 288 U.S. 294 (1933). If there is no right to import, how can there be a right to be heard? How extensive are hearings rights under former §201(c) of the Trade Act of 1974 (currently 19 U.S.C. § 2252(b), (c))? Note that "military and foreign affairs functions" are exempted under the Administrative Procedure Act's rulemaking and adjudicating procedures. *See* 5 U.S.C. §§ 553(a)(1) and 554(a)(4). Is this an unfair deprivation for citizens of their right to be heard in trade-related controversies? If hearings rights are required as a matter of due process and fairness for welfare recipients (*see Goldberg v. Kelly*, 397 U.S. 254 (1970)) should U.S. citizens involved in trade have a lower degree of constitutional protection?

8. How do "voluntary" import restraints differ from OMAs? *See* § 203 of the Trade Act of 1974. What are the antitrust questions raise by voluntary restraints that would not be raised by an OMA negotiated (or imposed) pursuant to § 203 of the Trade Act of 1974? Do you see any foreign relations benefits to be obtained form going the "voluntary," as opposed to the OMA, or quota, route?

9. In congressional delegation of the power to modify tariffs through international agreement (the reciprocal trade negotiation power), where is the intelligible standard? Would you prefer to rest constitutionality on an argument that the negotiation process is an effective limit on discretion or on an argument that the agreement is a form of international settlement (as in *Dames & Moore*)?

10. In order to limit exportation of timber products from the United States to Japan, due to a perceived short supply of timber in the United States, the president, pursuant to the Export Administration Act, imposes a duty on logs exported from the United States. Redwood, Inc., a major U.S. exporter of timber, seeks an injunction against the U.S. government on the ground that such a duty is unconstitutional. What result? *See* U.S. Constitution, art. I, §9, cl.5. Would the result differ if the export tax were assessed by the State of California? What if the president sought to restrain exports by the imposition of quantitative restraints?

11. As we have seen, the typical constitutional issues involved in U.S. litigation over international trade regulation tend to be those related to separation of powers. You should note that challenges based on other constitutional constraints on federal governmental authority may arise. Particularly in an increasingly service-oriented economy--focusing on *activity* rather than objects--it becomes more likely that constitutional concerns about freedom of individual action may be implicated by international trade regulation. For example, is there a significant difference between exporting computer hardware and disseminating software designs and ideas? Consider the following case in answering the question.

BERNSTEIN v. U. S. DEPT. OF STATE

974 F. Supp. 1288 (N.D.Cal. 1997), *affirmed sub nom. Bernstein v. U.S. Dept. of Justice*, 176 F.3d 1132 (9th Cir. 1999), *rehearing granted and opinion withdrawn*, 192 F.3d 1308

PATEL, DISTRICT JUDGE.

[Bernstein, a mathematician, sought declaratory and injunctive relief against enforcement of the Arms Export Control Act (AECA), 22 U.S.C. § 2778 (1990), and the International Traffic in Arms Regulations (ITAR), 22 C.F.R. pts. 120-130 (1994), on the grounds that they were unconstitutional on their face and as applied to his cryptographic computer source code. On cross-motions for summary judgment, the district court, 945 F.Supp. 1279, had invalidated parts of the regulations. A new executive order transferred regulatory authority to the Department of Commerce, Ex. Order No. 13,026, 61 Fed. Reg. 58,767 (1996). Bernstein then challenged an interim Commerce rule regulating the export of certain encryption products, 61 Fed. Reg. 68,572 (1996). In a portion of the opinion excerpted in Chapter XIII, the district court held that there was no basis for a statutory, non-constitutional challenge to the executive order. In the portion of the opinion excerpted below, the court nevertheless went on to consider whether the encryption regulations issued by Commerce's Bureau of Export Administration (BXA) were subject to a facial prior restraint analysis under the First Amendment, even though the export of commercial cryptographic software programs was not undertaken for "expressive" reasons that we normally associate with that amendment.[a]]

At the time this action was filed, plaintiff was a PhD candidate in mathematics at University of California at Berkeley working in the field of cryptography, an area of applied mathematics that seeks to develop confidentiality in electronic communication. Plaintiff is currently a Research Assistant Professor in the Department of Mathematics, Statistics and Computer Science at the University of Illinois at Chicago.

I. Cryptography

[For the court's explanation of encryption, see Chapter XIII, *infra* at [redacted].[b] While a graduate student, Bernstein had developed an encryption algorithm called "Snuffle." He had disseminated his mathematical ideas about encryption in two ways--in an academic paper entitled "The Snuffle Encryption System," and in "source code" written in "C", a high-level computer programming language, detailing both encryption and decryption ("Snuffle.c" and "Unsnuffle.c," respectively). Once source code is converted into "object code," a binary system consisting of a series of 0's and 1's read by a computer, the computer would be capable of encrypting and decrypting data.] . . .

II. Prior Restraint

A. Analytical Framework

As the Supreme Court has stated, in determining the extent of the constitutional protection afforded by the guarantees of the First Amendment, "it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). It is for this reason that the Court has held: "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citations omitted).

While prior restraints have often come in the form of judicial injunctions on publication, *see e.g., C.B.S. v. Davis,* 510 U.S. 1315 (1994); *New York Times Co. v. United States*, 403 U.S. 713 (1971), they are also recognized in licensing schemes. *See e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990); *Lakewood v. Plain Dealer Publishing*

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[a] Some of the information in this summary is taken from the court's opinion and from its previous opinions in *Bernstein v. U.S. Dept. of State*, 922 F.Supp. 1426 (N.D.Cal.1996) (*Bernstein I*), and *Bernstein v. U.S. Dept. of State*, 945 F.Supp. 1279 (N.D.Cal.1996) (*Bernstein II*).

[b] For more detailed explanation of "asymmetric cryptography," see Jane K. Winn, *The Emperor's New Clothes: The Shocking Truth About Digital Signatures and Internet Commerce*, 37 IDAHO L. REV. 353, 384-388 (2001). *See also* JANE K. WINN & BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE § 1.04 (4th ed. 2001).

Co., 486 U.S. 750 (1988). Governments may impose valid time, place and manner restrictions when they are content neutral, narrowly tailored to serve a substantial governmental interest, and leave open alternative channels for communication. *See e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). However, "even if a government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion." *Lakewood*, 486 U.S. at 764.

> It is axiomatic that the First Amendment is more tolerant of subsequent criminal punishment of speech than it is of prior restraints on the same speech.
>
> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. . . .
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanction after publication "chills" speech, prior restraint "freezes" it at least for the time.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

While the Supreme Court has consistently rejected the idea that a prior restraint can never be employed, *id*. at 570, it nonetheless begins with a presumption of invalidity. The danger inherent in prior restraints is largely procedural, in that they bypass the judicial process and locate in a government official the delicate responsibility of passing on the permissibility of speech. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (holding that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system".) *Freedman* sets forth three procedural safeguards that have been used by the Supreme Court to examine licensing schemes: 1) any restraint prior to judicial review can only be imposed for a brief and specified period during which the status quo prevails; 2) expeditious judicial review must be available; and 3) the censor must bear the burden of going to court to suppress speech and once there bears the burden of proof. *FW/PBS*, 493 U.S. at 227 (citing Freedman, 380 U.S. at 58-60).

When the risks associated with unbridled licensing schemes are present to a significant degree, "courts must entertain an immediate facial attack on the law." *Lakewood*, 486 U.S. at 759, 108 S.Ct. at 2145.

B. Analysis

In *Bernstein II* this court held that the ITAR effected an unconstitutional prior restraint on speech due to inadequate procedural safeguards. Plaintiff contends that the new encryption regulations suffer from identical deficiencies. Defendants do not argue that the effect of the new regulations is notably different from that of the ITAR. They do, however, present arguments against some of the reasoning in *Bernstein II* and to the extent that these arguments are applicable to the current analysis, the court will address them.

1. Controls on Encryption Commodities and Software

First, defendants protest that a facial challenge is not applicable here because there is not a "close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of identified censorship risks."

Lakewood, 486 U.S. at 759. In *Lakewood*, a newspaper challenged a city ordinance which required annual permits for newsracks on public property and gave the mayor authority to grant or deny applications for those permits. The Court contrasted laws that are directed at expression, such as one governing the circulation of newspapers, with laws of general applicability not aimed at conduct commonly associated with expression, such as a law requiring building permits. *Id*. at 760-61. The former risks self- censorship on the part of those applying for permits and censorship on the part of the decisionmaker. The latter rarely do. *See also Freedman*, 380 U.S. 51 (licensing of films); *FW/PBS*, 493 U.S. 215 (licensing of sexually-oriented businesses). Defendants contend that while licensing schemes that vest unbridled discretion to regulate conduct commonly associated with expression are appropriate for facial attack under prior restraint doctrine, such is not the case here where the activity at issue is the programming of a computer to encrypt information.[20] Defendants also cite *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir.1996), to support their contention that only laws narrowly and specifically directed at expressive activities are subject to facial challenge. At issue in Roulette was an ordinance that prohibited people from sitting or lying on public sidewalks in certain areas and during certain times. The court, in a pithy opinion, held that "[t]he fact that sitting can possibly be expressive, however, isn't enough to sustain plaintiffs' facial challenge to the Seattle ordinance. . . . Consistent with this speech-protective purpose, the Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, 'by their terms,' sought to regulate" words or expressive conduct. *Id*. at 303 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973)).

The court does not disagree with defendants' statement of the law but with their application to the facts. The encryption regulations issued by the BXA are much more like the regulation of newspaper racks than lying or sitting. The new regulations are directed quite specifically and "by their terms" to an entire field of applied scientific research and discourse. Where one places a newspaper rack is not an activity associated with expression, but the availability of newspapers generally is. Similarly, while the export of a commercial cryptographic software program may not be undertaken for expressive reasons, that same activity–undisputably regulated under the EAR–is often undertaken by scientists for purely expressive reasons. By the very terms of the encryption regulations, the most common expressive activities of scholars–teaching a class, publishing their ideas, speaking at conferences, or writing to colleagues over the Internet–are subject to a prior restraint by the export controls when they involve cryptographic source code or computer programs. In the field of applied science ideas are not just expressed in abstract, theoretical terms, but in precise applications. Those applications are subject to licensing under the encryption regulations and are excluded from the exemptions for fundamental research and educational information. This is precisely the kind of law identified in Lakewood that risks self-censorship on the part of those that must apply for licenses and censorship on the part of the decisionmaker.

[20] Defendants again spend a great deal of energy arguing that encryption source code is not speech by citing to all the undisputed facts that show its functional capacity--its ability to actually secure communication. . . . Defendants argue that just because "a program may be understood by those trained in programming does not negate the functional nature of the program, nor render it a mere 'idea'. . . ." Again, the court does not disagree that encryption software is highly functional, but functionality does not remove it from the realm of speech. Just because an idea is functional does not "negate" its expressiveness. Indeed, it is functional speech. Programming is not, as defendants would have it, merely mechanical. It is both an art and a science. "[A] computer program is not just a way of getting a computer to perform operations but rather . . . is a novel formal medium for expressing ideas about methodology." . . .

As the American Association for the Advancement of Science ("AAAS") stated to the BXA in their comments regarding the new regulations, the "basic thrust" of the Interim Rule

> threatens to undermine essential features of scientific freedom and the open exchange of information that are generally acknowledged as critical to innovation in science and technology and are responsible in large part for the preeminence of America's research and development enterprise. AAAS opposes attempts by the government to restrict the communication or publication of unclassified research and technical information, efforts which we believe are inconsistent with scientific advancement.

The regulations merit the application of the prior restraint doctrine because they present "a danger of unduly suppressing protected expression." *Freedman*, 380 U.S. at 54.

The encryption regulations . . . [are] specifically directed at speech protected by the First Amendment. The Department of Commerce requires a license to export [these] items. . . . And as made explicit by the new regulations, export includes publication where publication is or could be made electronic and even where the information to be published is already publicly available. In fact, in spite of the disclaimers regarding functionality and the exception for printed materials, the encryption regulations issued by the BXA appear to be even less friendly to speech interests than the ITAR. Here encryption software is singled out and treated differently than other software regulated under the EAR. 61 Fed.Reg. 68580 (to be codified at 15 C.F.R. § 742.15); *see FW/PBS*, 493 U.S. at 225 ("Therefore, even assuming the correctness of the city's representation of its 'general' inspection scheme, the scheme involved here is more onerous with respect to sexually-oriented businesses than with respect to the vast majority of other businesses.").

And the exception for printed materials, while at first glance a concession to the speech interests involved, is so irrational and administratively unreliable that it may well serve to only exacerbate the potential for self-censorship. 61 Fed.Reg. 68578 (to be codified at 15 C.F.R. § 734.3). First, the exception is unreliable because the BXA has indicated that it reserves the right to control scannable source code in printed form. 61 Fed.Reg. 68575. Second, the exception seeks to codify a distinction between paper and electronic publication that makes little or no sense and is untenable. *See Bernstein II*, 945 F.Supp. at 1291 n. 10. As the AAAS commented,

> [w]hile it is acceptable under this provision to publish such material in a book and distribute it internationally without an export license, putting the same information on a disk and sending it abroad is subject to EAR approval. This distinction has serious ramifications for scholarly communication as many professional journals are now moving onto the Internet as electronic publications.

As an example, the AAAS noted that their journal SCIENCE is available in both print and electronic form. At oral argument defendants admitted that encryption code in print form could be converted into a functioning encryption product, but defended the distinction on the basis that converting the print version to working software required a good deal of skill. The court is somewhat confounded by this explanation. Defendants claim that encryption poses unique and serious threats to national security, yet the printed matter exception belies this rationale by making encryption freely available to only those foreigners who are technologically sophisticated. Defendants conceded at oral argument that the effect of this dichotomy would be to make it more difficult only for the more inept. This seems to defeat the very purpose of the regulation since those who likely pose a greater threat to national security are likely more willing to expend the time and resources in that effort and will not be prevented by the regulation. In effect, the exception undermines the stated purpose of the regulations. Again, the government conceded that in only a slightly greater length of time and with some greater technological skill, the regulation could be defeated.

Finally, the Supreme Court's recent decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), suggests that not only is the distinction between print and electronic media increasingly untenable, but that the Internet is subject to the same exacting level of First Amendment scrutiny as print media.

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, 'the content on the Interact is as diverse as human thought.' We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Id. at ----, 117 S.Ct. at 2344. Thus, the dramatically different treatment of the same materials depending on the medium by which they are conveyed is not only irrational, it may be impermissible under traditional First Amendment analysis.

As this court noted in *Bernstein II*, that BXA regulates encryption in the interest of national security does not alone justify a prior restraint. In *New York Times Co.*, 403 U.S. at 714, the Supreme Court invalidated a prior restraint on classified material that had been enjoined in the interests of national security. While that case inspired nine separate opinions on the propriety of enjoining publication of the Pentagon Papers in THE NEW YORK TIMES and THE WASHINGTON POST, a majority of Justices found national security, without more, too amorphous a rationale to abrogate the protections of the First Amendment. *See id*. at 719 (Black, J. and Douglas, J., concurring). Justice Brennan concluded that the First Amendment's ban on prior restraints could only be overridden in time of war, *id*. at 726 (Brennan, J. concurring) (citing *Schenck v. United States*, 249 U.S. 47 (1919)), and even then, according to Justice Stewart, only when disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id*. at 730 (Stewart, J. and White, J. concurring). Even without a consensus from the Supreme Court on how exacting the standard should be, it is clear from *New York Times* that national security alone is insufficient without more. Yet that is exactly what both the President and the BXA have offered here as the justification for the regulation: national security and foreign policy interests. Exec. Order No. 13026, 61 Fed.Reg. 58767; 61 Fed.Reg. 68573. Particularly now, when none of the encryption items subject to export controls under the EAR have military applications, a less amorphous rationale is required.

Nor is it necessary that an item be regulated for its content to make the regulations function as a prior restraint on speech. It is enough that they are directed at expressive activity. As the plurality opinion in *FW/PBS* suggests, even a licensing scheme with a content-neutral purpose must still contain adequate procedural safeguards in order to be constitutional.[22] Thus, without deciding whether the regulations are content-based, the court turns to the procedural safeguards afforded under the encryption regulations. As noted above, the Court in *FW/PBS* read *Freedman* to hold that for a licensing scheme to be constitutional, 1) the licensor must make the licensing decision within a specific and reasonable period of time; 2) there must be prompt judicial review; and 3) the censor must bear the burden of going to court to uphold a licensing denial and once there bears the burden of justifying the denial. *FW/PBS*, 493 U.S. at 227-28 (citing *Freedman*, 380 U.S. at 58-60). The new regulations, like the ITAR, are woefully inadequate.

The EAR provides that license applications will be resolved or referred to the President within 90 days.[23] 15 C.F.R. § 750.4(a). However, there is no time limit on an application that has been referred to the President. If a license is denied, the agency provides an internal appeals process, 15 C.F.R. Pt. 756, but the only time limit on the appeals decision is that the agency "shall decide an appeal within a reasonable time after receipt of the appeal." 15 C.F.R. § 756.2(c)(1). That decision is final and not subject to judicial review. 15 C.F.R. § 756.2(c)(2); 50 U.S.C.App. § 2412(e); *see also United States v. Bozarov*, 974 F.2d 1037, 1044-45 (9th Cir.1992) (EAA's preclusion of judicial review does not violate nondelegation doctrine), *cert. denied*, 507 U.S. 917 (1993).[24] And most important, and most lacking, are any standards for deciding an application. The EAR reviews applications for licenses "on a case-by-case basis" and appears to impose no limits on agency discretion. 61 Fed. Reg. 68581 (to be codified at 15 C.F.R. § 742.15(b)). Like the ordinance in *Lakewood*, where the mayor could deny a permit without any more justification than that it was not in the public interest, nothing in the regulations prevents the BXA from justifying a denial of an application by stating that it is contrary to national security and foreign policy interests.[25] As the Court noted in *Lakewood*, these are illusory constraints. 486 U.S. at 769; *see also Desert Outdoor Advertising Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir.1996) (finding billboard permit requirement unconstitutional because city officials had "discretion to deny a permit on the basis of ambiguous and subjective reasons"). This court has stated previously that while it is mindful of the problems inherent in judicial review of licensing decisions regarding cryptographic software, both with respect to the sophistication of the technology and the potentially classified nature of the licensing considerations, there must still be some review available if the export controls on cryptographic software are to survive the presumption against prior restraints on speech.

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[22] In *FW/PBS* Justice O'Connor, joined by Justices Stevens and Kennedy, stated:

> Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses.

FW/PBS, 493 U.S. at 223.

[23] Given the other more obvious deficiencies in the procedural aspects of the regulations, the court does not consider whether 90 days is fast enough given the demands in the field of cryptography.

[24] To the extent the EAR are authorized by the IEEPA, that statute does not appear to preclude judicial review. *Milena Ship Management Co. Ltd. v. Newcomb*, 804 F.Supp. 846, 850 n. 2 (E.D.La.1992) (nothing in IEEPA provides clear evidence of intent to preclude judicial review). However, if the EAR are authorized exclusively by Executive Order 13026, that order seems to preclude judicial review. Exec. Order No. 13026, 61 Fed.Reg. 58768.

[25] As the court discussed in *Bernstein II* with respect to the ITAR, some of the dangers of a standardless licensing scheme had already been realized. According to the NRC Report, the risk of discriminatory treatment associated with such schemes was reflected in the Report's comments that companies were reluctant to express their full dissatisfaction with the rules and implementation of export controls over cryptographic products for fear that "any explicit connection between critical comments and their company might result in unfavorable treatment of a future application for an export license for one of their products." NRC Report at 4-29.

In this case, for the reasons enumerated, the court concludes that the encryption regulations are an unconstitutional prior restraint in violation of the First Amendment.

NOTES AND QUESTIONS

1. A panel of the Ninth Circuit affirmed Judge Patel's decision, *Bernstein v. United States Dep't of Justice*, 176 F.3d 1132 (9th Cir.1999), but the Ninth Circuit withdrew the panel decision and ordered the case heard en banc. *Bernstein v. United States Dep't of Justice*, 192 F.3d 1308 (9th Cir.1999). Before the rehearing could take place, the defendants announced plans to make additional changes to the EARs. In January 2000, defendants added 15 C.F.R. § 740.13(e), which allows Commerce to exempt "publicly available" encryption source code from license requirements. Bernstein amended his complaint in January 2002, alleging that the amended regulations still amounted to a prior restraint under the First Amendment. The defendants moved for summary judgment on the amended complaint, on the grounds that Bernstein now lacked standing to challenge the Commerce regulations. On July 28, 2003, Judge Patel granted the motion. *Bernstein v. Dep't of Commerce*, No. 95-0582 (N.D.Cal. July 28, 2003).

2. In the preceding materials of this section, we have been focusing on constitutional limitations applicable to the federal government. However, individual states may also seek to regulate activities related to international trade, for a variety of reasons. These reasons may be protectionist in relation to the state's economic interests and actors, or they may involve other state policy objectives. The following notes and questions explore two examples of such individual state regulation.

3. In order to improve the economic position of its own producers, the State of Texas imposes a tariff on rice imported form other U.S. states as well as foreign countries. Husk, Inc., a Louisiana rice exporter, seeks to restrain this duty on the ground that such a duty against a U.S. "import" is unconstitutional. What result? *See* U.S. Constitution, art. I, §10, cl.2. What if the products involved were beer, wine, or distilled spirits? How might your answer differ? *See* U.S. Constitution, amend. XXI, §2, and Note, *State Control of Alcoholic Beverages in Interstate Commerce*, 27 N.Y. U. L. Rev. 127 (1952).

4. Assume that the state of West Dakota considers it contrary to its own public policy with respect to the protection of individual civil rights to deal with the repressive regime of Nusquam, a newly industrialized developing country that prohibits its citizens from organizing collective bargaining units or joining trade unions. To vindicate its public policy, the West Dakota legislature enacts the Nusquam Products Procurement Act (NPPA), which prohibits any private contractor dealing with the state government from "purchasing from or selling to, providing loans or other extensions of credit to, or investing in, any Nusquami citizen or any person located in, or organized under the laws of, Nusquam." The federal government itself imposes strict controls on exports to Nusquam (because of a border dispute between Nusquam and Freedonia, a close ally of the United States), but otherwise has imposed no restrictions on trade with Nusquam. Representatives of the federal government are actively pursuing diplomatic negotiations to assist Nusquam and Freedonia in resolving their border dispute. The West Dakota Widget Manufacturers Association, an industry trade group, is considering bringing suit in the federal district court for the Eastern District of West Dakota, challenging the constitutionality of the NPPA. The Association has asked for your advice concerning the likelihood of success if it brings this suit. How would you advise the Association? Consider the following case in answering this question.

CROSBY v. NATIONAL FOREIGN TRADE COUNCIL

530 U.S. 363 (2000)

JUSTICE SOUTER DELIVERED THE OPINION OF THE COURT.

The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business with Burma, is invalid under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is.

I

In June 1996, Massachusetts adopted "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)," 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Laws §§ 7:22G-7:22M, 40 F. 1/2 (1997)). The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a "restricted purchase list" of those doing business with Burma. §§ 7:22H(a), 7:22J. Although the statute has no general provision for waiver or termination of its ban, it does exempt from boycott any entities present in Burma solely to report the news, § 7:22H(e), or to provide international telecommunication goods or services, ibid., or medical supplies, § 7:22I.

"'Doing business with Burma'" is defined broadly to cover any person

> "(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;
>
> "(b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;
>
> "(c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);
>
> "(d) providing any goods or services to the government of Burma (Myanmar)." § 7:22G.

There are three exceptions to the ban: (1) if the procurement is essential, and without the restricted bid, there would be no bids or insufficient competition, § 7:22H(b); (2) if the procurement is of medical supplies, § 7:22I; and (3) if the procurement efforts elicit no "comparable low bid or offer" by a person not doing business with Burma, § 7:22H(d), meaning an offer that is no more than 10 percent greater than the restricted bid, § 7:22G. To enforce the ban, the Act requires petitioner Secretary of Administration and Finance to maintain a "restricted purchase list" of all firms "doing business with Burma,"[2] § 7:22J.

In September 1996, three months after the Massachusetts law was enacted, Congress

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[2] According to the District Court, companies may challenge their inclusion on the list by submitting an affidavit stating that they do no business with Burma. *National Foreign Trade Council v. Baker*, 26 F.Supp.2d 287, 289 (D.Mass.1998). The Massachusetts Executive Office's Operational Services Division makes a final determination. *Ibid*.

passed a statute imposing a set of mandatory and conditional sanctions on Burma. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009-121 to 3009-172). The federal Act has five basic parts, three substantive and two procedural.

First, it imposes three sanctions directly on Burma. It bans all aid to the Burmese Government except for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. § 570(a)(1). The statute instructs United States representatives to international financial institutions to vote against loans or other assistance to or for Burma, § 570(a)(2), and it provides that no entry visa shall be issued to any Burmese government official unless required by treaty or to staff the Burmese mission to the United Nations, § 570(a)(3). These restrictions are to remain in effect "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government." § 570(a).

Second, the federal Act authorizes the President to impose further sanctions subject to certain conditions. He may prohibit "United States persons" from "new investment" in Burma, and shall do so if he determines and certifies to Congress that the Burmese Government has physically harmed, rearrested, or exiled Daw Aung San Suu Kyi (the opposition leader selected to receive the Nobel Peace Prize), or has committed "large-scale repression of or violence against the Democratic opposition." § 570(b). "New investment" is defined as entry into a contract that would favor the "economical development of resources located in Burma," or would provide ownership interests in or benefits from such development, § 570(f)(2), but the term specifically excludes (and thus excludes from any Presidential prohibition) "entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology," *ibid*.

Third, the statute directs the President to work to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c). He is instructed to cooperate with members of the Association of Southeast Asian Nations (ASEAN) and with other countries having major trade and investment interests in Burma to devise such an approach, and to pursue the additional objective of fostering dialogue between the ruling State Law and Order Restoration Council (SLORC) and democratic opposition groups. *Ibid*.

As for the procedural provisions of the federal statute, the fourth section requires the President to report periodically to certain congressional committee chairmen on the progress toward democratization and better living conditions in Burma as well as on the development of the required strategy. § 570(d). And the fifth part of the federal Act authorizes the President "to waive, temporarily or permanently, any sanction [under the federal Act] ... if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." § 570(e).

On May 20, 1997, the President issued the Burma Executive Order, Exec. Order No. 13047, 3 CFR 202 (1997 Comp.). He certified for purposes of § 570(b) that the Government of Burma had "committed large-scale repression of the democratic opposition in Burma" and found that the Burmese Government's actions and policies constituted "an unusual and extraordinary threat to the national security and foreign policy of the United States," a threat characterized as a national emergency. The President then prohibited new investment in Burma "by United States persons," Exec. Order No. 13047, § 1, any approval or facilitation by a United States person of such new investment by foreign persons, § 2(a), and any transaction meant to evade or avoid the ban, § 2(b). The order generally incorporated the exceptions and exemptions addressed in the statute. §§ 3, 4. Finally, the President delegated to the Secretary of State the tasks of working with ASEAN and other countries to develop a strategy for democracy, human rights, and the quality of life in Burma, and of making the required congressional reports.[3] § 5.

II

Respondent National Foreign Trade Council (Council) is a nonprofit corporation representing companies engaged in foreign commerce; 34 of its members were on the Massachusetts restricted purchase list in 1998. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 48 (C.A.1 1999). Three withdrew from Burma after the passage of the state Act, and one member had its bid for a procurement contract increased by 10 percent under the provision of the state law allowing acceptance of a low bid from a listed bidder only if the next-to-lowest bid is more than 10 percent higher. *Ibid*.

In April 1998, the Council filed suit in the United States District Court for the District of Massachusetts, seeking declaratory and injunctive relief against the petitioner state officials charged with administering and enforcing the state Act (whom we will refer to simply as the State). The Council argued that the state law unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by the federal Act. [T]he District Court permanently enjoined enforcement of the state Act, holding that it "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs." *National Foreign Trade Council v. Baker*, 26 F.Supp.2d 287, 291 (D.Mass. 1998).

The United States Court of Appeals for the First Circuit affirmed on three independent grounds. 181 F.3d, at 45. It found the state Act unconstitutionally interfered with the foreign affairs power of the National Government under *Zschernig v. Miller*, 389 U.S. 429 (1968), *see* 181 F.3d, at 52-55; violated the dormant Foreign Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, *see* 181 F.3d, at 61-71; and was preempted by the congressional Burma Act, *see id*., at 71-77.

The State's petition for certiorari challenged the decision on all three grounds and asserted interests said to be shared by other state and local governments with similar measures.[5] . . .

III

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Art. VI, cl. 2; *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *California v. ARC America Corp*., 490 U.S. 93, 101 (1989). Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. *Id*., at 100; *cf. United States v. Locke*, 529 U.S. 89, ----, 120 S.Ct. 1135, 1151 (2000) (citing *Charleston & Western Carolina R. Co. v. Varnville Furniture Co*., 237 U.S. 597, 604 (1915)). And even if Congress has not occupied the field, state law

[3] The President also delegated authority to implement the policy to the Secretary of the Treasury, in consultation with the Secretary of State. § 6. On May 21, 1998, the Secretary of the Treasury issued federal regulations implementing the President's Executive Order. *See* 31 CFR pt. 537 (Burmese Sanctions Regulations).

[5] "At least nineteen municipal governments have enacted analogous laws restricting purchases from companies that do business in Burma." 181 F.3d, at 47; Pet. for Cert. 13 (citing N.Y.C. Admin. Code § 6-115 (1999); Los Angeles Admin. Code, Art. 12, §§ 10.38 et seq. (1999); Philadelphia Code § 17-104(b) (1999); Vermont H.J. Res. 157 (1998); 1999 Vt. Laws No. 13).

is naturally preempted to the extent of any conflict with a federal statute.[6] *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941); *ARC America Corp., supra*, at 100-101; *Locke, supra*, at ----, 120 S.Ct. at 1148. We will find preemption where it is impossible for a private party to comply with both state and federal law, *see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines, supra*, at 67. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:

> "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished--if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect--the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage, supra*, at 533, quoted in *Hines, supra*, at 67, n. 20.

Applying this standard, we see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act.[7] We find that the state law undermines the intended purpose and "natural effect" of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.[8]

A

. . . Congress clearly intended the federal act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions (prohibiting bilateral aid, § 570(a)(1),

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[6] We recognize, of course, that the categories of preemption are not "rigidly distinct." *English v. General Elec. Co*., 496 U.S. 72, 79, n. 5 (1990). Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, "field pre-emption may be understood as a species of conflict pre-emption." *id*., at 79-80, n. 5; *see also Gade v. National Solid Wastes Management Assn*., 505 U.S. 88, 104, n. 2 (1992) (quoting *English, supra*); 505 U.S., at 115-116 (Souter, J., dissenting) (noting similarity between "purpose-conflict pre-emption" and pre-emption of a field, and citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 486 (2d ed.1988)); 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1177 (3d ed.2000) (noting that "field" preemption may fall into any of the categories of express, implied, or conflict preemption).

[7] The State concedes, as it must, that in addressing the subject of the federal Act, Congress has the power to preempt the state statute. . . .

We add that we have already rejected the argument that a State's "statutory scheme ... escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Wisconsin Dept. of Industry v. Gould, Inc*., 475 U.S. 282, 287 (1986). In *Gould*, we found that a Wisconsin statute debarring repeat violators of the National Labor Relations Act, 29 U.S.C. § 151 *et seq*., from contracting with the State was preempted because the state statute's additional enforcement mechanism conflicted with the federal Act. *Gould*, 475 U.S., at 288-289. The fact that the State "ha[d] chosen to use its spending power rather than its police power" did not reduce the potential for conflict with the federal statute. *Ibid*.

[8] We leave for another day a consideration in this context of a presumption against preemption. *See United States v. Locke*, 529 U.S. 89, ----, 120 S.Ct. 1135, 1147 (2000). Assuming, arguendo, that some presumption against preemption is appropriate, we conclude, based on our analysis below, that the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue, see n. 6, supra, or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause. *See Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (concurring opinion).

support for international financial assistance, § 570(a)(2), and entry by Burmese officials into the United States, § 570(a)(3)), it authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma. § 570(a). It invested the President with the further power to ban new investment by United States persons, dependent only on specific Presidential findings of repression in Burma. § 570(b). And, most significantly, Congress empowered the President "to waive, temporarily or permanently, any sanction [under the federal act] ... if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." § 570(e).

This express investiture of the President with statutory authority to act for the United States in imposing sanctions with respect to the government of Burma, augmented by the flexibility[9] to respond to change by suspending sanctions in the interest of national security, recalls Justice Jackson's observation in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952): "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *See also id*., at 635-636 (noting that the President's power in the area of foreign relations is least restricted by Congress and citing *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304 (1936)). Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption here. The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.[10]

And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. As will be seen, the state statute penalizes some private action that the federal Act (as administered

[9] Statements by the sponsors of the federal Act underscore the statute's clarity in providing the President with flexibility in implementing its Burma sanctions policy. *See* 142 Cong. Rec. 19212 (1996) (emphasizing importance of providing "the administration flexibility in reacting to changes, both positive and negative, with respect to the behavior of the [Burmese regime]") (statement of principal sponsor Sen. Cohen); *id*., at 19213; *id*., at 19221 (describing the federal act as "giv[ing] the President, who, whether Democrat or Republican, is charged with conducting our Nation's foreign policy, some flexibility") (statement of cosponsor Sen. McCain); *id*., at 19220 ("We need to be able to have the flexibility to remove sanctions and provide support for Burma if it reaches a transition stage that is moving toward the restoration of democracy, which all of us support") (statement of cosponsor Sen. Feinstein). These sponsors chose a pliant policy with the explicit support of the Executive. *See, e.g., id*., at 19219 (letter from Barbara Larkin, Assistant Secretary, Legislative Affairs, U.S. Department of State to Sen. Cohen) (admitted by unanimous consent) ("We believe the current and conditional sanctions which your language proposes are consistent with Administration policy. As we have stated on several occasions in the past, we need to maintain our flexibility to respond to events in Burma and to consult with Congress on appropriate responses to ongoing and future development there").

[10] The State makes arguments that could be read to suggest that Congress's objective of Presidential flexibility was limited to discretion solely over the sanctions in the federal Act, and that Congress implicitly left control over state sanctions to the State. . . . We reject this cramped view of Congress's intent as against the weight of the evidence. Congress made no explicit statement of such limited objectives. More importantly, the federal Act itself strongly indicates the opposite. For example, under the federal Act, Congress explicitly identified protecting "national security interests" as a ground on which the President could suspend federal sanctions. § 570(e), 110 Stat. 3009-167. We find it unlikely that Congress intended both to enable the President to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the President's judgment of what national security requires.

by the President) may allow, and pulls levers of influence that the federal Act does not reach. But the point here is that the state sanctions are immediate,[11] *see* 1996 Mass. Acts 239, ch. 130, § 3 (restricting all contracts after law's effective date); Mass. Gen Laws § 7:22K (1997) (authorizing regulations for timely and effective implementation), and perpetual, there being no termination provision, *see, e.g.*, § 7:22J (restricted companies list to be updated at least every three months). This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), we used the metaphor of the bargaining chip to describe the President's control of funds valuable to a hostile country, *id*., at 673; here, the state Act reduces the value of the chips created by the federal statute.[12] It thus "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S., at 67.

B

Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. The federal Act confines its reach to United States persons, § 570(b), imposes limited immediate sanctions, § 570(a), places only a conditional ban on a carefully defined area of "new investment," § 570(f)(2), and pointedly exempts contracts to sell or purchase goods, services, or technology, § 570(f)(2). These detailed provisions show that Congress's calibrated Burma policy is a deliberate effort "to steer a middle path," *Hines*, *supra*, at 73.[13]

The State has set a different course, and its statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions. While the state Act differs from the federal in relying entirely on indirect economic leverage through third parties with Burmese connections, it otherwise stands in clear contrast to the congressional scheme in the scope of subject matter addressed. . . .

As with the subject of business meant to be affected, so with the class of companies doing it: the state Act's generality stands at odds with the federal discreteness. . . . The

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[11] These provisions strongly resemble the immediate sanctions on investment that appeared in the proposed section of H.R. 3540 that Congress rejected in favor of the federal act. *See* H.R. 3540, 104th Cong., 2d Sess., § 569(1) (1996).

[12] The sponsors of the federal Act obviously anticipated this analysis. *See, e.g.*, 142 Cong. Rec. at 19220 (1996) (statement of Sen. Feinstein) ("We may be able to have the effect of nudging the SLORC toward an increased dialog with the democratic opposition. That is why we also allow the President to lift sanctions").

[13] The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view. Most importantly, the federal Act, as passed, replaced the original proposed section of H.R. 3540, which barred "any investment in Burma" by a United States national without exception or limitation. *See* H.R. 3540, 104th Cong., 2d Sess., § 569(1) (1996). Congress also rejected a competing amendment, S. 1511, 104th Cong., 1st Sess. (Dec. 29, 1995), which similarly provided that "United States nationals shall not make any investment in Burma," § 4(b)(1), and would have permitted the President to impose conditional sanctions on the importation of "articles which are produced, manufactured, grown, or extracted in Burma," § 4(c)(1), and would have barred all travel by United States nationals to Burma, § 4(c)(2). Congress had rejected an earlier amendment that would have prohibited all United States investment in Burma, subject to the President's power to lift sanctions. S. 1092, 104th Cong., 1st Sess. (July 28, 1995).

Statements of the sponsors of the federal act also lend weight to the conclusions that the limits were deliberate. *See, e.g.*, 142 Cong. Rec. 19279 (1996) (statement of Sen. Breaux) (characterizing the federal Act as "strik[ing] a balance between unilateral sanctions against Burma and unfettered United States investment in that country"). The scope of the exemptions was discussed, *see ibid*. (statements of Sens. Nickles and Cohen), and broader sanctions were rejected, *see id*., at 19212 (statement of Sen. Cohen); *id*., at 19280 (statement of Sen. Murkowski) ("Instead of the current draconian sanctions proposed in the legislation before us, we should adopt an approach that effectively secures our national interests").

state Act . . . penalizes companies with pre-existing affiliates or investments, all of which lie beyond the reach of the federal act's restrictions on "new investment" in Burmese economic development. §§ 570(b), 570(f)(2). The state Act, moreover, imposes restrictions on foreign companies as well as domestic, whereas the federal Act limits its reach to United States persons.

The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions. . . . The fact of a common end hardly neutralizes conflicting means,[14] *see Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 103 (1992), and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ. *See Hines*, 312 U.S., at 61 ("The basic subject of the state and federal laws is identical"); *id*., at 67 (finding conflict preemption). "'[C]onflict is imminent'" when "'two separate remedies are brought to bear on the same activity,'" *Wisconsin Dept. of Industry v. Gould, Inc*., 475 U.S. 282, 286 (1986) (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-499 (1953)). Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.

C

Finally, the state Act is at odds with the President's intended authority to speak for the United States among the world's nations in developing a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c). Congress called for Presidential cooperation with members of ASEAN and other countries in developing such a strategy, *ibid*., directed the President to encourage a dialogue between the government of Burma and the democratic opposition, *ibid*.,[15] and required him to report to the Congress on the progress of his diplomatic efforts, § 570(d). As with Congress's explicit delegation to the President of power over economic sanctions, Congress's express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government, *cf. Youngstown Sheet & Tube Co*., 343 U.S., at 635, in harmony with the President's own constitutional powers, U.S. Const., Art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls"); § 3 ("[The President] shall receive Ambassadors and other public Ministers"). This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action. . . .

IV

The State's remaining argument is unavailing. It contends that the failure of Congress

[14] The State's reliance on *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 82-83 (1987), for the proposition that "[w]here the state law furthers the purpose of the federal law, the Court should not find conflict" is misplaced. . . . In *CTS Corp*., we found that an Indiana state securities law "further[ed] the federal policy of investor protection," 481 U.S., at 83, but we also examined whether the state law conflicted with federal law "[i]n implementing its goal," *ibid*. Identity of ends does not end our analysis of preemption. *See Gould*, 475 U.S., at 286.

[15] The record supports the conclusion that Congress considered the development of a multilateral sanctions strategy to be a central objective of the federal act. *See, e.g.*, 142 Cong. Rec. 19212 (1996) (remarks of Sen. Cohen) ("[T]o be effective, American policy in Burma has to be coordinated with our Asian friends and allies"); *id*., at 19219 (remarks of Sen. Feinstein) ("Only a multilateral approach is likely to be successful").

to preempt the state Act demonstrates implicit permission. The State points out that Congress has repeatedly declined to enact express preemption provisions aimed at state and local sanctions, and it calls our attention to the large number of such measures passed against South Africa in the 1980s, which various authorities cited have thought were not preempted.[25] The State stresses that Congress was aware of the state Act in 1996, but did not preempt it explicitly when it adopted its own Burma statute.[26] The State would have us conclude that Congress's continuing failure to enact express preemption implies approval, particularly in light of occasional instances of express preemption of state sanctions in the past.[27]

The argument is unconvincing on more than one level. A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict, *Hines*, 312 U.S., at 67. The State's inference of congressional intent is unwarranted here, therefore, simply because the silence of Congress is ambiguous. Since we never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter. . . .

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

[The full version of the Court's opinion was replete with references to the legislative history of the federal provisions with respect to Burma, and to other extraneous sources. Since it was "perfectly obvious on the face of this statute" that Congress intended to provide the president with flexibility in implementing Burma sanctions policy, that Congress expected the President to use his discretionary authority over sanctions to move the Burmese regime in a democratic direction, that the congressional policy with respect to Burma was a "calibrated" or limited one, and that Congress intended the President to develop a "multilateral strategy," and, since it was "perfectly obvious from the record," that the state Act's inflexibility in fact caused difficulties with U.S. allies and impeded a "multilateral strategy," Justice Scalia objected strongly to the Court's repeated use of legislative history in reaching its conclusions. He went on to argue that this use of legislative history had other, harmful effects.]

In any case, the portion of the Court's opinion that I consider irrelevant is quite

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[25] *See, e.g., Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 79-98, 562 A.2d 720, 744-749 (1989) (holding local divestment ordinance not preempted by Comprehensive Anti-Apartheid Act of 1986 (CAAA)), *cert. denied subnom. Lubman v. Mayor and City Council of Baltimore*, 493 U.S. 1093 (1990); *Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 Op. Off. Legal Counsel 49, 64-66, 1986 WL 213238 (state and local divestment and selective purchasing laws not preempted by pre-CAAA federal law); H.R. Res. Nos. 99-548, 99-549 (1986) (denying preemptive intent of CAAA); 132 Cong. Rec. 23119-23129 (1986) (House debate on resolutions); *id.*, at 23292 (Sen. Kennedy, quoting testimony of Laurence H. Tribe). Amicus Members of Congress in support of the State also note that when Congress revoked its federal sanctions in response to the democratic transition in that country, it refused to preempt the state and local measures, merely "urg[ing]" both state and local governments and private boycott participants to rescind their sanctions. . . . Brief for Senator Boxer *et al.* as Amici Curiae 9, citing South African Democratic Transition Support Act of 1993, § 4(c)(1), 107 Stat. 1503.

[26] The State also finds significant the fact that Congress did not preempt state and local sanctions in a recent sanctions reform bill, even though its sponsor seemed to be aware of such measures. *See* H.R.Rep. No. 105-2708 (1997); 143 Cong. Rec. E2080 (Oct. 23, 1997) (Rep. Hamilton).

[27] *See* Export Administration Act of 1979, 50 U.S.C.App. § 2407(c) (1988 ed.) (Anti-Arab boycott of Israel provisions expressly "preempt any law, rule, or regulation").

extensive, comprising, in total, about one-tenth of the opinion's size and (since it is in footnote type) even more of the opinion's content. I consider that to be not just wasteful . . . but harmful, since it tells future litigants that, even when a statute is clear on its face, and its effects clear upon the record, statements from the legislative history may help (and presumably harm) the case. If so, they must be researched and discussed by counsel–which makes appellate litigation considerably more time consuming, and hence considerably more expensive, than it need be. This to my mind outweighs the arguable good that may come of such persistent irrelevancy, at least when it is indulged in the margins: that it may encourage readers to ignore our footnotes.

For this reason, I join only the judgment of the Court.

NOTES AND QUESTIONS

1. After the passage of the Massachusetts statute, the EU and Japan had lodged formal complaints against the United States in the WTO, claiming that the statute violated provisions of the Agreement on Government Procurement, Annex 4B of the WTO Charter. Review the Agreement, and see if you can determine what provisions might have been violated.

2. The WTO dispute proceedings were suspended at the request of the EU and Japan, in light of the District Court's ruling in *Crosby*. Letter of Ole Lundby, Chairman of the Panel, to Ambassadors from the European Union, Japan, and the United States (Feb. 10, 1999). The proceedings have since automatically lapsed, in accordance with DSU, Article 12, ¶ 12. If *Crosby* had ultimately decided that the Massachusetts statute was *not* preempted by § 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, would the the EU and Japan have been barred under the DSU from reinstating their challenge to the Massachusetts statute? The EU, as amicus before the Supreme Court, had specifically indicated that it intended to begin new WTO proceedings if the current injunction against the statute were lifted.

3. In *Crosby* Massachusetts also argued that, under federal law implementing the WTO, Congress foreclosed suits by private persons and foreign governments challenging state law on the basis of the WTO/GATT in federal or state courts and allowed only the federal government to raise such a challenge (which the executive branch had not done, appearing only as amicus). *See* 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1). In effect, Massachusetts suggested, by referring to the WTO challenge as evidence of the damage to U.S. foreign policy, the challenge by the National Foreign Trade Council effectively violated this ban allowing a challenge to state procurement laws in domestic courts. Is this argument sound? Is *Crosby* a challenge to state law based on inconsistency with Annex 4B, or based on inconsistency with federal law?

4. Can *Crosby* be reconciled with previous Supreme Court decisions upholding extraterritorial franchise taxes imposed by California on foreign corporations doing business in the state? *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327-329 (1994) (giving limited weight to evidence of formal diplomatic protests, risk of foreign retaliation, and Executive Branch statements); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (recognizing limits of Court's ability to "determin[e] precisely when foreign nations will be offended by particular acts").

5. Justice Scalia's criticisms of the use of legislative history in his concurring opinion may suggest some practical problems with the majority's extensive use of this history and other extraneous sources in relation to individual states' imposition of economic

sanctions or other trade-related matters. Consider the Court's discussion of prior positions taken by legislators and the executive branch on, for example, individual state sanctions against South Africa, *supra* at [redacted]. Is the Court's treatment of these sources convincing, especially in light of its own extensive reliance on simlar sources in support of preemption of the Massachusetts statute? Would Justice Scalia have the same problem in preempting the statute in the face of these contrary sources?

C. BASIC PROVISIONS OF THE WTO SYSTEM

1. Introduction

In the WTO system, the operative rules of international trade regulation are contained not in the WTO Charter, but in its annexes. State accession to the Charter *ipso facto* makes a member state subject to Annexes 1, 2 and 3 (Charter, Article II, ¶ 2). Adherence to Annex 4 is optional (Article II, ¶ 3).

Annex 1 consists of three separate undertakings. Annex 1A, the GATT 1994, is legally distinct from GATT 1947 (Article II, ¶ 4). It consists mainly of amendments to and other understandings concerning the GATT 1947, which is itself incorporated by reference (GATT 1994, Article 1(a)). Annex 1B, the General Agreement on Trade in Services (GATS), is an innovation in GATT practice, creating binding international rules with respect to trade in such services as banking, insurance, and securities.[1] Annex 1C, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), requires member states to provide a specified minimum level of protection for, and procedures for enforcement of, intellectual property such as patents, copyrights, trademarks and similar intangible property.[2]

Annex 2, the Dispute Settlement Understanding (DSU) is both constitutive and procedural. The DSU creates the Dispute Settlement Body (DSB) as an organ within the WTO (DSU Article 2, ¶ 1) and authorizes the DSB to establish a standing Appellate Body (Article 17, ¶ 1). It also specifies the procedures governing the resolution of disputes between member states (Articles 4-16, 19), including appellate procedures (Articles 17-19) and adoption and implementation of decisions (Articles 20-22).[3] The DSU formalizes and revises many of the practices that had grown up around earlier GATT practice, but it sharpens the procedural requirements in a more concrete fashion. However, it does not replace provisions concerning procedures and remedies that exist in the text of GATT 1947 itself.[4]

Annex 3, the Trade Policy Review Mechanism (TPRM), is an interesting administrative innovation. The TPRM creates surveillance and review procedures to "improve[] adherence by all Members to rules, disciplines and commitments" under the requirements and obligations imposed on WTO member states (TPRM, Article A).

The Plurilateral Agreements of Annex 4 are optional for member states. These

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[1] For background on the GATS, see Chapter I, *supra* at [redacted]. *See also* Chapter XIV, *infra* (discussing regime governing trade in services).

[2] For discussion of the TRIPS, see Chapter XV, *infra* at [redacted]; Chapter XVI, *infra* at [redacted].

[3] On WTO dispute resolution, see Chapter IX, *infra*.

[4] *Compare* GATT 1947 Articles XXII-XXIII (establishing procedures for consultation and disputes) *with* DSU Articles 3, ¶ 1, 26 (referring to GATT 1947 provisions). The relationship between these two sets of provisions may be the source of some ambiguity as WTO practice continues to develop. *See* Chapter IX, *infra* at [redacted] (discussing such ambiguity).

potentially govern trade in civil aircraft between member states (Annex 4A); create rules with respect to direct governmental involvement in international trade transactions through government procurement programs (Annex 4B); establish rules with respect to national regulation of trade in dairy products (Annex 4C); and, promulgate rules with respect to national regulation of trade in bovine meat (Annex 4D).

2. From GATT to WTO

In broad outline, the WTO system created as a result of the Uruguay round responds to a range of problems that existed in practice under the former GATT system. The principal problems addressed by the new system are as follows. First, the GATT 1947 was intended only as an agreement under the charter of the International Trade Organization (ITO), which had yet to be established.[5] As such, the GATT lacked important details with respect to organizational structure, procedures and enforcement; these details were expected to be covered by the ITO charter. With the failure of the United States to accept the charter, GATT practice was forced to cobble together substitute arrangements and procedures. This ad hoc quality is eliminated with the establishment of the WTO.

Second, one byproduct of the provisional nature of the GATT itself was that many exceptions and limitations existed with respect to the coverage of GATT rules and the rules found in various "codes" negotiated separately in the course of GATT rounds. By making the provisions of Annexes 1, 2 and 3 mandatory for members, the WTO Charter has created a more consistent and generally applicable trade regulation regime.

Third, another byproduct of this provisional status was that GATT-as-treaty resulted in a "consensus" approach to decision-making and interpretation in GATT practice. Since the GATT was technically a treaty rather than an process-driven organization, signatories to the treaty ("Contracting Parties") might otherwise not consider themselves bound to an interpretation of the GATT or a decision taken under GATT authority if they were not willing to consent to it individually. In contrast, the WTO is clearly an international organization with specific interpretive and decision-making powers to which the *member states*–no longer just "contracting parties"–are subject. By the terms of the agreement creating the organization, consensus is rarely required.

Fourth, lacking organizational status, the GATT had difficulty in operating a credible and consistent dispute resolution process. Considerable process over time had improvised a process, formalized to a great extent in an understanding drafted during the Tokyo Round, but the process remained somewhat improvisational. The DSU has regularized and reinforced dispute settlement procedures.

3. Basic Provisions of the WTO System

While the WTO replaces the GATT as the organization responsible for international regulation of trade, it does not supplant the substantive rules contained in the GATT. For the most part, these rules remain the core of the legal obligations imposed on member states. In reviewing the overall structure of the GATT, you should pay

[5] The GATT 1947 was given transitional effect by the signing of a protocol by 22 signatories of the GATT. Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5-6, TIAS No. 1700, 55 UNTS 308.

particular attention to nine provisions. These, and other pertinent provisions of GATT 1947, will be discussed in detail throughout the remaining chapters of this book.

Article I of GATT 1947 imposes a general MFN obligation on each member in relation to all other members. This obligation will be echoed in other specific contexts, such as the GATS Article II.

GATT Article II committed parties to the GATT to limit tariffs in accordance with then current levels and to later negotiated lower levels–but only to the extent lower levels were in fact negotiated. This provision was the focus of subsequent MTNs, in which major trading parties would negotiate *inter sese* for acceptable levels of tariff reductions. The benefits of any such reductions would of course redound to all other GATT parties by application of Article I.

Article III imposes a "national treatment" obligation on each member in relation to all other members. Like Article I, this is essentially a nondiscrimination obligation, but with a different focus. The national treatment obligation requires each member to treat goods imported from other WTO members like domestically produced goods for purposes of domestic taxation and regulatory purposes. This obligation is echoed with respect to trade in services in GATS Article XVII.

GATT Article VI is the basic enforcement provision with respect to goods that are sold in the export market at less than their fair value (*i.e.*, as compared with prices of the goods in their home market). The remedy contemplated by this provision is the imposition of an antidumping duty to counteract the predatory price advantage of the imported goods.

Article XIX, the "escape clause," allows a member state to depart from its obligations under the GATT to the extent necessary to address serious injury to a domestic industry caused by imports. The provision has engendered considerable controversy over the appropriate application of the concepts of "serious injury," "domestic injury," and "cause."

Article XX provides general exceptions to GATT obligations for measures undertaken with respect to morals, life or health regulation, precious metals, compliance with certain regulatory laws, products of prison labor, national treasures or patrimony, conservation, certain commodity agreements, world-price adjustment, and materials in short supply in the domestic market. Here again, the provision has an analog in the GATS, Article XIV.

GATT Article XXI contains an exception for national security concerns. This provision has been particularly controversial, largely because by its own terms it is self-judging, *i.e.*, it applies in any given situation to measures that the member state invoking the exception "considers necessary for the protection of its essential security interests."[6] The GATS provides a similar exception in Article XIV *bis*.

GATT Article XXII mandates consultation between member states with respect to disputes between them with respect to the application of the provisions of the GATT. This provision is reinforced by the DSU, which includes detailed consultation procedures in DSU Article 4.

GATT Article XXIII is the only provision in the agreement that approaches a set of procedures for dispute resolution. This article will be examined at length later in this

[6] *See, e.g., Panel Report on Nicaraguan Complaint*, GATT ACTIVITIES 1986 58-59 (1987) (noting that GATT panel examining complaint by Nicaragua concerning U.S. trade sanctions not authorized to examine U.S. invocation of GATT, art. XXI).

book.[7] One problem that we shall address in that context is the interrelationship between this article and the detailed provisions of the DSU itself governing dispute resolution in the WTO system.[8]

Aside from the WTO Charter itself and the DSU, the other marked innovation in the WTO system is the emergence of a binding international regime governing trade in services, the GATS. The provisions of the GATS are discussed in detail in Chapter XIV. In general, the GATS establishes "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization,"[9] by applying GATT nondiscrimination principles to trade in services.[10] The requirements of nondiscriminatory treatment do not, however, prevent WTO member states from enforcing domestic regulations for "prudential reasons, including for the protection of ... depositors, ... or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system."[11]

Under the GATS, each WTO member is required to accord MFN treatment to services and service suppliers of other WTO members.[12] Current restrictions on trade in services of each member must be transparent.[13] Member states are also required to administer current restrictions "in a reasonable, objective and impartial manner."[14]

A series of general exceptions applies to GATS obligations, similar to the general exceptions under the GATT.[15] More importantly, perhaps, the GATS includes a self-judging special exception for essential security interests of member states, similar to the special security exception contained in the GATT.[16]

NOTES AND QUESTIONS

1. The discussion in this part of the chapter is intended only as an introductory survey of the structure and legal framework of the WTO system. It will be supplemented by detailed discussion of various parts of that framework throughout the chapters that follow. For example, we shall take up the impact of the escape clause of GATT Article XIX in the next chapter. Article VI is discussed in Chapter V, dealing with antidumping duties, and Chapter VI, dealing with subsidies and countervailing duties. GATT Article XXI will be touched upon in Chapter XIII. GATT Articles XXII and XXIII--and the detailed provisions of the DSU--will be treated in Chapter IX and at various points in

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[7] *See* Chapter IX, *infra* at [redacted]-[redacted] (discussing GATT Article XXIII).

[8] *See id*. at [redacted]-[redacted] (discussing problem).

[9] GATS, preamble.

[10] *See, e.g.*, GATS, art. II, ¶ 1 (applying most-favored-nation treatment to services and service suppliers); GATS, art. XVII, ¶ 1 (applying national treatment to services and service suppliers of other WTO member states).

[11] GATS, Annex on Financial Services, § 2(a).

[12] GATS, art. II, ¶ 1.

[13] *See* GATS, art. III (requiring publication and reporting of restrictive measures).

[14] GATS, art. VI, ¶ 1. *Cf*. GATS, art. X, ¶ 1 (requiring that any emergency safeguard measures be administered in a nondiscriminatory manner).

[15] *Compare, e.g.*, GATT, art. XX *with* GATS, art. XIV (excepting from GATS requirements measures undertaken for morals or public order, life or health, compliance with certain regulatory laws, and taxation).

[16] *Compare* GATT, art. XXI *with* GATS, art. XIV *bis*, ¶ 1 (providing exceptions from GATS obligations with respect to any measure undertaken that a member "considers necessary for the protection of its essential security interests"). *But cf.* GATS, art. XIV *bis*, ¶ 2 (requiring reporting of certain excepted measures and of their termination to WTO Council for Trade in Services).

Chapter XX. The GATS will be discussed in Chapter XIV and at various points in Chapters XVII through XIX. The TRIPS will be considered in Chapters XV and XVI. For present purposes, the questions in the notes that follow offer an opportunity simply to become better acquainted with certain basic provisions of the WTO Charter documents.

2. *Status of the WTO*: Under public international law principles, an entity has "legal personality" as an international organization if it exhibits the following characteristics: (*i*) it is relatively permanent and operates through established, formal "organs;" (*ii*) it has the capacity to conduct its own international relations with states and other international entities; (*iii*) it exists and operates separately and distinct from its members (typically, member states); and, (*iv*) it has the capacity to generate and enforce rules within its area(s) of competence.[17] Review and compare WTO Charter Articles III-VI, VIII-XII with GATT 1947 Articles XXII-XXIII, XXV-XXVI, XXXII. Did the pre-WTO GATT qualify as an international organization? Does the WTO qualify?

3. *Membership*: Recall WTO Charter Articles XI-XII, and then consider the following problems.

a. Nusquam, a small newly industrialized country, wishes to secure its membership in the WTO. How does it do so? Does it make a difference whether Nusquam had been a contracting party in the GATT?

b. Freedonia is a former province of Nusquam that has recently split off from Nusquam. Some armed conflict is still occurring between forces of the Provisional Government of Freedonia and the Nusquami Army, and the precise boundaries between the respective territories of Nusquam and Freedonia have not been fixed. Nusquam is recognized as a state by virtually all other states, but Freedonia has been formally recognized so far only by the United States, the United Kingdom and twenty other states. Is Freedonia eligible for membership in the WTO?

c. Now consider the situation of the People's Republic of China (PRC) in relation to the WTO system. China was one of the original GATT contracting parties, represented by the "Republic of China," located on Taiwan since its ouster by the Government of the PRC in 1949. In 1950 the Taiwan regime withdrew China from the GATT. Progressively over time, the PRC has sought and obtained membership in many international organizations, and it eventually enjoyed "observer" status in the GATT. In 1986 the PRC began negotiating to resume China's status as a GATT contracting party, and eventually (after the creation of the WTO) to obtain WTO membership. Essentially, the terms of reference for PRC membership were those established by WTO Charter Article XII, ¶ 1. While the negotiations were in principle between the applicant state and the WTO itself, parallel understandings needed to be achieved with major trading centers, like the EU and the United States, for two basic reasons. First, of course, the PRC needed to achieve sufficient support among WTO member states to satisfy voting requirements. Second, the PRC would need to finalize its schedules of commitments under GATT Article II and GATS Articles XVI-XVII, vis-á-vis its trading partners. As a practical matter, the second line of parallel negotiations controlled the pace of the first. Progress was slow, in no small part because of U.S. hesitation to exchange a continuing WTO relationship with the PRC for yearly renewal of its bilateral MFN treatment of the PRC. The crucial breakthrough came in May 2000, when the EU and the PRC concluded

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[17] *See, e.g., Reparation for Injuries Suffered in the Service of the United Nations,* [1949] I.C.J. Rep. 178-179 (advisory opinion; discussing status of United Nations Organization). *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 677-681 (3d ed., 1979) (discussing *Reparation* case).

a trade agreement clearing the way for WTO membership,[18] thus virtually assuring that it would have sufficient support to achieve WTO membership without regard to any U.S. position in opposition.[19] However, beyond the issue of membership, a host of other interpretive questions relating to PRC participation in the WTO system will arise with respect to applicability of various provisions and compliance with and enforcement of WTO obligations–particularly in such areas as national treatment of foreign investors, intellectual property protection, and pricing of exports.[20] These questions will be addressed as appropriate in the pertinent chapters that follow.

d. The PRC became a WTO member in November 2001,[21] almost simultaneously with the admission of the "Republic of China" on Taiwan.[22] This timing was deliberate.[23] Assume that the PRC had become a WTO member without the admission of Taiwan having been decided. Would that have meant that *as a legal matter*, the "Republic of China" located on Taiwan *could not* become a WTO member? In answering this question, recall the terms of WTO Charter Article XII, ¶ 1.

e. If the "Republic of China" *could have* become a WTO member after PRC admission, would that mean that all WTO members would be required to extend the benefits of favorable trade treatment to the "Republic of China"–even those members that voted against the membership application, as the PRC presumably would have? In considering this issue, review the language of WTO Charter Article XIII.

4. *Voting Rules*: Consensus voting was the norm in GATT practice. Was that practice required by GATT Article XXV itself? Specialized majority and super-majority provisions are specified under the WTO Charter in certain situations. Review the following provisions of the Charter, and consider in each instance what the voting requirement is and the reasons why the Charter adopts it: (*i*) Article IX, ¶ 1 (general rule for ordinary decisions); (*ii*) Article IX, ¶ 2 (interpretations); (*iii*) Article IX, ¶ 3 (waivers); (*iv*) Article X (amendments); Article XII, ¶ 2 (accession to membership).

5. *Tariff Bindings and MTNs*: What is a state's obligation as to its import tariffs when it becomes a member of the WTO? How do tariffs subsequently get reduced in MTNs? In answering these questions, review WTO Charter Article XII, ¶ 1; GATT Articles II, XXVIII, XXVIII *bis*, and consider the following excerpt for further explanation.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW
§ 803 (1986 Main Vol.)

§ 803. Commitment to Tariffs Bound by International Agreement

(1) Under the General Agreement on Tariffs and Trade, a state party, subject to specified exceptions,

[18] *See* James Kynge, *EU trade deal clears China's way into WTO*, FIN. TIMES, May 20, 2000, at 1, col. 1; Neil Buckley, *EU foreign ministers back China deal*, FIN. TIMES, May 23, 2000, at 7, col. 1.

[19] Congressional approval of a U.S.-PRC trade agreement according permanent MFN treatment occurred shortly after the EU action. *See* Helene Cooper & Ian Johnson, *America Opens Door to China Trade*, WALL ST. J. EUROPE, May 26-27, 2000, at 1, col. 4.

[20] For example, at the beginning of 2001, negotiations between the PRC and the WTO temporarily stalled over the issue of PRC subsidies for its 900 million farmers. *See* Elizabeth Olson, *New Talks on China's Entry to World Trade Group Fail*, N.Y. Times, Jan. 18, 2001, at W1, col. 2 (discussing subsidy problem).

[21] *See* Joseph Kahn, *World Trade Organization Admits China, Amid Doubts*, N.Y.Times, Nov. 11, 2001, at § 1, A12, col. 1 (describing final negotiations leading to admission of PRC).

[22] *See* Mark Landler, *Change Ahead As Taiwan Enters W.T.O.*, N.Y.Times, Nov. 10, 2001, at C1, col. 6 (discussing implications of Taiwan admission).

[23] *See id*. at C1 (explaining that simultaneous entry was deliberate, to avoid subsequent controversy over entry).

(a) is obligated not to increase a tariff to a level above the rate to which it is bound by schedule,

(b) may withdraw a binding on a product if, in negotiation with the principal beneficiaries of the original binding, it offers to give them substantially equivalent concessions.

(2) Under the law of the United States, the President, by authority delegated to him by Congress, may proclaim modification of tariffs in implementation of international agreements.

Comment:

a. *Binding of tariffs*. Together with the most-favored-nation obligation of [GATT Article I], the obligation not to increase customs duties above those at which a country has bound them is the cornerstone of the GATT system. A tariff is "bound" when a state has filed with the GATT a commitment either not to increase an existing rate or to lower it; the commitment is indicated by including it in a tariff schedule. A tariff is bound as the outcome of a negotiating process through which the state that is bound obtains, in return for its bindings, concessions from other states that it deems to be of equivalent value. That process is multilateral, as contrasted with the bilateral procedures involved in earlier trade agreements such as those concluded pursuant to the Trade Agreements Act of 1934 and subsequent acts. A state may bind other kinds of restrictions on imports; for example, it may agree not to extend a requirement that a category of goods sold within the state contain a specified proportion of parts of local origin.

b. *Deviation from bound tariffs*. Though a tariff is bound, the GATT provides for withdrawal of a binding under certain conditions. Article XXVIII provides that every three years (beginning January 1, 1958) a state may modify or withdraw any concession by agreement with the party with which it was originally negotiated and with any other party found "to have a principal supplying interest." Article XXVIII contemplates that the state withdrawing a concession will afford equivalent concessions on other goods. If no agreement is reached, the state "proposing to modify or withdraw the concession shall, nevertheless, be free to do so," and the other negotiating parties may withdraw "substantially equivalent concessions initially negotiated with the applicant contracting party." A state may reserve in advance the right to renegotiate at off-cycle intervals. Article XXVIII(5). The GATT authorizes renegotiation other than at the three-year intervals in special circumstances. Article XXVIII(4). These qualifications, designed to overcome reluctance to agree to tariff reductions, have not often been used by the important trading states.

At the creation of a customs union [*see* GATT Article XXIV, ¶¶ 5-10], renegotiation of external tariffs of the custom union's individual members is, according to Article XXIV(6), to be conducted through the procedures set forth in Article XXVIII. Apart from renegotiation under that article, a state may take action under Article XIX in response to injury resulting from imports. . . .

c. *Delegation of Congressional authority*. The United States Constitution grants Congress the power to regulate commerce with foreign nations. It also grants Congress the power to lay duties, Article I, Section 8, and denies such power to the States without the consent of Congress, Article I, Section 10. The tariff rates established by Congress appear in the Tariff Schedules of the United States, 19 U.S.C. § 1202, in Column 2. However, Congress has delegated authority to the President to deviate from the rates it sets. Modified rates proclaimed by the President appear in Column 1. *See* Reporters' Note 4[, *infra*]. Imports on most products are subject to the rates set forth in Column 1, reflecting the results of negotiations under the trade agreements program; those rates are applicable to products from all states entitled to most-favored-nation treatment under the law or treaties of the United States. ... (Another column captioned "GSP Item" indicates the products designated by the President to be eligible for the general system of preferences. . . .)

REPORTERS' NOTES

1. *The binding process*. [Under pre-WTO practice,] [t]he binding process [took] place largely at the successive meetings of the Contracting Parties of the GATT, referred to as "rounds". Past "rounds" have taken place as follows: Geneva, 1947; Annecy, 1948; Torquay, 1950; Geneva, 1956; Geneva, 1960-61 ("Dillon"); Geneva, 1964-67 ("Kennedy"); and Geneva, 1973-79 ("Tokyo").

The presence of all the Contracting Parties makes it possible for State X to make a concession that benefits State Y even though it receives no corresponding concession from that state, because it simultaneously receives one from State Z. As a result of the most-favored-nation provisions in GATT, any concession benefits not only the state that negotiated the concession but all other states as well. Negotiating rules are established prior to each round. In the earlier rounds, the rules provided for negotiation item-by-item with the principal supplier; beginning with the Kennedy Round, a "linear technique" was used, under which states were expected to offer to cut all tariffs according to an agreed formula, and to negotiate about exceptions.

2. *"Principal supplier."* The determination of who has a "principal supplying interest" (Comment b[, *supra*]) affects both negotiations of concessions and renegotiations after withdrawal of concessions. Note 4 to Paragraph 1 ad Article XXVIII provides that a party should be found to have such an interest only if it "had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated." The note also provides for situations in which discriminatory restrictions prevented a party from achieving such a share. The United States was in such a situation vis-a-vis the Federal Republic of Germany, with respect to poultry following the creation of the European Economic Community[, currently the European Union (EU)]. Germany had become bound as a result of negotiations with Denmark. In 1958, the United States had sold only one-third as much poultry to Germany as did Denmark; it had moved to approximate equality with Denmark in 1959, and exceeded it in 1960. Thereafter, import restraints pursuant to the [EU] Common Agricultural Policy led to a sharp decline in imports of poultry into the [EU], and the United States filed a formal complaint with the GATT. A GATT panel subsequently ruled on the amount of compensation due to the United States, assuming (without formally deciding) that the United States had standing under Article XXVIII as a principal supplier, although the concession was originally granted to Denmark. *See Report of Panel on Poultry*. GATT Doc. No. L/2088 (Nov. 21, 1963), *repr*. 3 Int'l Leg.Mat. 116 (1964); Walker, "Dispute Settlement: The Chicken War," 58 Am.J.Int'l L. 671 (1964); 1 Chayes, Ehrlich and Lowenfeld, International Legal Process 249-305 (1968). The United States withdrew concessions in an amount equal to that found by the GATT panel, selecting products of which the [EU] was a principal supplier, but generalizing the increased duties to all suppliers of those products. *See United States v. Star Industries, Inc*., 462 F.2d 557 (C.C.P.A.), *certiorari denied*, 409 U.S. 1076, 93 S.Ct. 678, 34 L.Ed.2d 663 (1972); Lowenfeld, "Doing Unto Others, The Chicken War Ten Years After," 4 J.Mar.L. & C. 599 (1973).

3. *Measurement of "substantially equivalent concessions."* The simplest measure of substantial equivalence is the amount of trade in the period before the binding, unbinding, or impairment of a concession, in some instances adjusted to reflect trends. Thus, if state X withdraws a concession covering $25 million of exports from state Y, Y may levy a burden on $25 million of X's exports. A more sophisticated measure would be the change in the rate of the tariff, or the trade effect of such change, but such calculations are regarded as so complex as often to be administratively not feasible. See the decision, of the panel on poultry, Reporters' Note 2[, *supra*]. . . .

6. *Customs Unions and Free Trade Areas*: Under GATT Article XXIV, special rules apply to tariff bindings in the case of customs unions and free trade areas (FTAs). How would you justify the inclusion of these special rules? What is the distinction between a customs union and a free trade area? (*See* GATT Article XXIV, ¶ 8.) How would you decide whether or not a specific customs union is consistent with the GATT? The United States and the West European participants in the EU have each moved dramatically in the direction of "economic integration,"[24] through the use of FTA and customs union devices, respectively. This "neoregionalism" movement will be explored in the next part of this chapter.

7. *Countertrade and the GATT*: Is a mandated governmental counterpurchasing requirement for private and public entities consistent with the letter and spirit of the GATT? In this regard, consider the implications of GATT Articles I-III, XVII, XXIII. *See* Gadbaw, *The Implications of Countertrade under the General Agreement on Tariffs and Trade*, in B. FISHER & K. HARTE (eds.), BARTER IN THE WORLD ECONOMY (1985).

8. *Prospects for the WTO System*: The creation of the WTO engendered many questions about the desirability of a stronger international trade institution and its implications for national sovereignty, the possibility that national policies with respect to, for example, environmental protection might be compromised by an institution committed to free, transparent trade as the primary directive in international economic policy, and the likelihood that the WTO would be any more effective in policing international trade practices than its predecessor. With operation of the WTO reaching the five-year mark, a body of literature is already growing assessing, *inter alia*, the effectiveness of the WTO dispute resolution process,[25] the progress in implementing the international regime for trade in services,[26] the adequacy of intellectual property protection under the TRIPS,[27] and the negative effects of WTO decisions on environmental concerns.[28] It may still be too early to tell whether the WTO will fulfill the expectations of its supporters. For a useful discussion of at least some of those expectations, see U.S. General Accounting Office, *The General Agreement on Tariffs and Trade–Uruguay Round Final Act Should Produce Overall U.S. Economic Gains* (GAO/GGD 94-83A, 1994), *available at* 1994 WL 836267.

D. "NEO-REGIONALISM": THE EU AND NAFTA

We suggested at the beginning of this chapter that the historical development of such principles as MFN–eventually embedded in the GATT as a fundamental commitment–represented a movement *from* regionalism *to* multilateralism. While this multilateralism certainly remains the norm in international trade regulation, it has been

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[24] For more information on economic integration, see B. BALASSA, THE THEORY OF ECONOMIC INTEGRATION (1961); S. DELL, TRADE BLOCS AND COMMON MARKETS (1963).

[25] *See, e.g.*, Monika Butler & Heinz Hauser, *The WTO Dispute Settlement System: A First Assessment from an Economic Perspective*, 16 J.L. ECON. & ORG. 503 (2000); Gary N. Horlick, *A Problem of Process in WTO Jurisprudence: Identifying Disputed Issues in Panels and Consultations*, 31 L. & POL'Y INT'L BUS. 573 (2000); Andrew W. Shoyer, *The Process and Procedure of Litigating at the World Trade Organization: A Review of the Work of the Appellate Body*, 31 L. & POL'Y INT'L BUS. 677 (2000).

[26] *See, e.g.*, Jeffery M. Lang, *The First Five Years of the WTO: General Agreement on Trade in Services*, 31 L. & POL'Y INT'L BUS. 801 (2000).

[27] *See, e.g.*, Charles S. Levy, *Implementing TRIPS - A Test of Political Will*, 31 L. & POL'Y INT'L BUS. 789 (2000).

[28] *See, e.g.*, Susan Bisong, *The WTO Panel Decision on the U.S. Shrimp Embargo: Another Ruling Against U.S. Enforcement of Species Protection in Trade*, 40 NAT. RESOURCES J. 699 (2000).

increasingly accompanied by an interesting countertrend, "neo-regionalism." We would define neoregionalism as the development of regional trading systems positioned *within* the multilateral system and operating more or less in accordance with rules of the multilateral system itself.

In this part we shall examine two examples of neoregionalism–the European Union (EU),[1] which began emerging within the first ten years of the operation of the GATT, and the NAFTA, the successor of the U.S.-Canada Free Trade Agreement that emerged at roughly the same time as the WTO. We shall also review the multilateral rules that allow for the operation of these regional trading systems, despite the commitments that their participants undertook as members of the GATT/WTO. We begin, however, with an introductory treatment of the problems posed by neoregionalism for the international trading system.

1. Introduction[2]

There has been a gradual historical progression towards greater convergence of regulatory standards among international regulators–particularly trade regulators and, increasingly, financial services regulators as well. This process of convergence is still slow and fragile and needs to be better understood. Nevertheless, it seems clear that, as a matter of fact, the change in the contours of our trade and financial markets is directed towards increasing "internationalization." If this is so, then internationalization must be considered not just in terms of the size and character of those markets, but also in terms of the manner in which they should be regulated.

Certain forms of convergence may already be operating in international regulation. These are: (1) a loose institutional framework for the regulation of the international financial environment;[3] (2) a coalescence among individual financial markets into an internationalized set of markets; and (3) an expanding framework of regional cooperation that may ground the process of internationalization,[4] or interfere with that process.

Trade and financial services regulation remains–for the most part–a dynamic of individual, domestic systems of regulation that interact in various ways transnationally. The nature of these interactions is such that convergence of regulatory standards may be impeded, to the detriment of the internationalized markets. In many respects, the basic project of the GATT and the WTO has been to accelerate the convergence of trade rules. However, as the next reading will suggest, bilateral and regional arrangements are becoming more common and may undercut the impact of the WTO regime.

In the financial services sector, progress towards convergence has been even slower. National systems of regulation predominate. Bilateral arrangements are common, but they may frustrate the competitiveness of the financial services providers who are affected by them. In a concrete case, for example, tying U.S. and U.K. banks to significant capital adequacy requirements–and the costs to banks attendant on such rules–ex-

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[1]In an earlier manifestation, this body was known as the European Economic Community, but in the United States, it is often referred to as the "Common Market." This term has not been in use in Europe since the early 1970s and is almost never heard today.

[2]The text of this section is adapted from Michael P. Malloy, *Bumper Cars: Themes of Convergence in International Regulation*, 60 FORDHAM L. REV. S1 (1992). Reprinted with permission of the copyright owner.

[3]See Wegen, *Transnational Financial Services-Current Challenges for an Integrated Europe*, 60 Fordham L. Rev. S91, 92- 94 (1992) (discussing international institutions and groups involved in financial services regulation).

[4]See Note, Banking on Europe: 1992 and EMU, 60 Fordham L. Rev. S395, S395-428 (1992) (discussing developments in convergence of standards within the European Community).

acerbated the impact of competition with Japanese banks that might be subject to more favorable capital adequacy requirements. The bilateral approach has therefore not often worked as an independent response to regulatory concerns, although it may be effective as a first step or prelude to a broader coordinated response. This has been the case, in fact, in the area of capital adequacy supervision, where the U.S.-U.K. arrangement was quickly replaced by a multilateral response, including Japan, the other members of the Group of Ten ("G-10"),[5] and Luxembourg and Switzerland under the aegis of the Committee on Banking Regulations and Supervisory Practices of the Bank for International Settlements ("BIS"),[6] with little dissent or variation.[7] In effect, this multilateral response has managed to create a converged pattern of regulation.

International coordination of trade and financial services regulation is needed, not because of an abstract desire for symmetry, but because individual national regulation cannot, as a practical matter, be truly effective unless it is coordinated with the efforts of other members of the international community. Similarly, convergence of international regulatory standards is not needed to satisfy an abstract need for harmony, but rather because variations among national standards create inefficiencies and inequities among participants in the same set of international markets.

Ironically, the greatest threat to the consistent development and application of the multilateral regime of international trade regulation may be from within. The emergence of strong *regional* trading systems, sanctioned by the GATT and by the WTO, raises serious concerns about the continued efficacy of international trade regulation. The excerpt that follows explores some of these concerns.

SUNGJOON CHO, BREAKING THE BARRIER BETWEEN REGIONALISM AND MULTILATERALISM: A NEW PERSPECTIVE ON TRADE REGIONALISM

42 Harv. Int'l L.J. 419 (2001)[1]

. . .

A desire for rapid commercial expansion often creates an incentive for the formation of certain types of preferential regional alliances, which are usually intended to serve the exclusive interests of selected participants. The formation by neighboring territorial units of alliances to boost economic and, subsequently, political integration through free trade

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[5]The Group of Ten is a group of industrialized western democracies that offer primary support to the Bank for International Settlements (BIS) located in Basle, Switzerland. The Group consists of: Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States.

[6]*See* Malloy, *U.S. International Banking and the New Capital Adequacy Requirements: New, Old and Unexpected*, 7 Ann. Rev. Banking L. 75, 112-121 (1988) (discussing the BIS initiative).

[7]*See, e.g.*, Final Report for International Convergence of Capital Measurement and Capital Standards, *reprinted in* 1 Fed. Banking L. Rep. (CCH) § 5403 (July 15, 1988), at 3310 n.3 (noting argument of one BIS member that international definition of capital should be narrower); *id*. at 3314 n.4 (noting argument of one BIS member that lower risk-weight should be applied to certain categories of assets); *id*. at 3318 (discussing discretion of national authorities administering rules with respect to calculation of potential future credit exposure of items contingent on foreign exchange and interest rates).

[1]Reprinted with permission.

areas (FTAs)[2] or customs unions (CUs)[3]–collectively referred to as "regional trading arrangements" (RTAs)–is not a new phenomenon. . . . Yet trade regionalism has not always yielded uniformly beneficial effects. The inherent exclusiveness of RTAs has always held the potential for conflict with the interests of non-members. To be sure, this conflict does not always manifest itself; members often enjoy regional prosperity relatively free of outside interference. Yet, under certain circumstances, the guild-like exclusiveness of trade regionalism directly collides with the economic interests of non-members when members refuse to share business opportunities with them. More problematically, the zeal for regionalism can be contagious, particularly under circumstances of economic distress. The effects of this situation can be disastrous to members and non-members alike, as was the case with the Second World War. Following a period of robust globalism during the 1920s, the so-called "destructive regionalism" of the 1930s set the stage for the creation of imperial blocs throughout the world, deepened the impact of the Great Depression, and ultimately precipitated the Second World War. . . .

As a partial solution to these developments, the post-war architecture of the international trade system, symbolized by the General Agreement on Tariffs and Trade 1947 (GATT 1947), set forth non-preferential and non-discriminatory principles based on an ethos of globalism or multilateralism. Regionalism was permitted only to the extent that it complied with the provisions of Article XXIV.[8] The tension between the multilateralism ethos and the allowance for regionalism as an exception under Article XXIV continues to this day in the 1994 version of GATT.

. . . GATT Article XXIV has proven inadequate in several respects. First of all, it never worked in a legal way because it lacked legal discipline. Since GATT panels were unable to interpret the nebulous text of Article XXIV in a consistent manner, GATT contracting parties managed to utilize the provision in self-serving ways, and no case law developed. In this legal vacuum, RTAs mushroomed, abusing or misusing Article XXIV. . . .

Even if Article XXIV did not suffer from a lack of legal discipline, there are other inherent flaws that would, if left unaddressed, continue to plague the global trading system. In particular, Article XXIV was designed to address the formation, as opposed to the operation of RTAs. While the text of Article XXIV provides discipline for the establishment of RTAs, it is regrettably silent on critically important issues pertaining to operational relationships between RTAs and the World Trade Organization (WTO), or among RTAs after their formative stage. [T]hese two key defects of Article XXIV render it incapable of dealing with certain realities: namely, that numerous RTAs do exist, are institutionalized, and have particular roles to play in the global trading system.

In the 1950s, with the approval of the United States, the European Community (EC) emerged onto the international landscape, ushering in a new wave of regionalism. Its

[2]A typical definition of free trade area (FTA) is provided in GATT Article XXIV as "an association of nations with duty free treatments for imports from members." General Agreement on Tariffs and Trade, October 30, 1947, art. XXIV(8)(b), 61 STAT. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947]. A typical definition of free trade area (FTA) is provided in GATT Article XXIV as "an association of nations with duty free treatments for imports from members." General Agreement on Tariffs and Trade, October 30, 1947, art. XXIV(8)(b), 61 STAT. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

[3]Similarly, GATT Article XXIV provides a typical definition of a customs union (CU) as "an association of nations with duty free treatments for imports from members and a common level of external tariffs for imports from non-members." Id. art. XXIV(8)(a).

[8]*See* GATT 1947, *supra* note 2, art. XXIV.

main purpose, expressed in the Schuman Declaration,[41] was to prevent another war by binding European states through economic ties. U.S. efforts to rehabilitate war-stricken Europe by means of measures such as the Marshall Plan, which was itself conditioned by concerns about the proliferating Soviet bloc, provide a firm foundation for the establishment of the EC. In the 1960s, what Bhagwati terms the "First Regionalism"[45] flourished across the world in such forms as the Latin American Free Trade Association (LAFTA), the proposed North Atlantic Free Trade Area, and the Association of South East Asian Nations (ASEAN). Trade regionalism in this era, however, was driven mainly by strategic motivations. . . . [T]he United States paved the way for the formation of the European Community in the forties and fifties in order to counterbalance the rising influence of the Soviet bloc in Central and Eastern Europe. Similarly, LAFTA members tried to form their own bloc for the purpose of maintaining internal solidarity against the Western powers, an effort motivated largely by anti-colonialism, dependency theory,[50] and the Calvo doctrine.

Nevertheless, few of these early efforts achieved the desired objectives. The futility of the First Regionalism stemmed mainly from the rationale and format of these initiatives; that is to say, regional trading blocs under the First Regionalism either neglected, or perhaps misunderstood, the economic aspects of their operation since they were motivated principally by political considerations. As a result, their trade-generating effect was greatly limited by their inward-looking orientation and pursuit of import-substitution policies.

The "Second Regionalism"[56] emerged much later, in the late eighties and early nineties, reaching its apex with the launch and completion of the Uruguay Round of GATT negotiations. This Second Regionalism, which was unprecedented in its intensity, is represented by the North American Free Trade Agreement (NAFTA),[58] the Southern Cone Common Market (Mercosur),[59] and the Asia Pacific Economic Cooperation (APEC), among others. Between 1948 and 1989, GATT contracting parties notified only 80 RTAs. Since 1995, by contrast, 90 RTAs have been notified.[61] The trade-generating effect of these RTAs has been very impressive. The economic successes of the Second Regionalism stand in stark contrast to the generally poor economic record of the First Regionalism, demonstrating that a strong economic, rather than political, motivation for the formation of an RTA is key to its success. To be sure, the Second Regionalism was greatly facilitated by certain other events that help to account for the shift in primacy from political to economic motivations in forming RTAs. These include the end of the Cold War and the subsequent reemergence of globalization as a general trend. . . .

[41]*See* Pascal Fontaine, a New Idea for Europe: the Schuman Declaration, 1950-2000, at 5-8 (2d ed. 2000), http://europa.eu.int/comm/dg10/publications/brochures/docu/50ans/en.pdf (visited May 22, 2001).

[45][Jagdish] Bhagwati, Regionalism [and Multilateralism, 15 WORLD ECON. 535,] 538-39 [(1992)].

[50]"Dependency theory" reflects a hierarchical conception of the global economy in which developed and developing economies are positioned at the "core" and "periphery," respectively. The relationship between core and peripheral economies is characterized by the perpetuation of a fixed division of labor in which peripheral economies exist to provide primary factor inputs to core economies. *See* James M. Cypher & James L. Dietz, the Process of Economic Development 189-96 (1997). *See also*, Richard Peet, Theories of Development 107-11 (1999); Stephan Haggard, Pathways from the Periphery 16-22 (1990).

[56]*See* Bhagwati, Regionalism, *supra* at 535.

[58]North American Free Trade Agreement, Dec. 8-17, 1992, Can.-Mex.- U.S., H.R. DOC. NO. 103-159, 32 I.L.M. 296 [hereinafter NAFTA].

[59]Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.- Para.-Uru., 30 I.L.M. 1041.

[61]WTO, Regionalism in the WTO, http://www.wto.org/english/tratop_ e/region_e/region_e.htm (visited Apr. 22, 2001). It is worth noting that the slow progress of Uruguay Round negotiations in the late 1980s and the early 1990s contributed to the proliferation and intensification of regionalism across the globe. Consequently, significant new RTAs appeared during this period in North America (NAFTA), Europe (EU), and Asia (APEC), reflecting a widespread desire for an"insurance policy" in the event of the failure of the Uruguay Round negotiations. . . .

. . . [D]ebate as to the desirability of RTAs now focuses not only on the question of whether they result in trade creation or trade diversion, but also on the question of whether they represent stumbling blocks or building blocks to accomplishing broader goals of the global trading community such as "raising standards of living" and promoting "sustainable development."[66] . . .

The view that RTAs are stumbling blocks is based on the claim that RTAs eventually cause a reduction in aggregate global welfare as they compete not only with non-member states but also with other RTAs to shift the terms of trade in each bloc's favor by raising tariffs against other blocs. Global welfare is diminished, it is argued, because RTA member products are protected irrespective of whether they are of the same quality or their industries are as efficient as those of their non-member counterparts. . . . Although this conduct obviously violates the liberal idea of free trade, it nonetheless survives today in the form of policy options reflecting the political reality of protectionism. Mantras such as "national competitiveness" may be understood from this perspective.[70] . . .

NOTES AND QUESTIONS

1. The RTAs have had a peculiar status within the GATT/WTO system–in principle acknowledged by Article XXIV, but in fact rarely affected by or conformed to the provisions of that article–and a significant potential impact on the system. GATT Article XXIV in principle governs formation of RTAs, *i.e.*, creation or expansion of RTAs. Its basic purpose is to authorize the formation of an RTA if it complies with requirements stipulated in paragraphs 4 to 8. What about the subsequent operation of the RTA vis-a-vis other trading units including the WTO? Article XXIV's limited scope is obvious on its own terms, and as well as in the context of other WTO legal documents such as the Article XXIV Understanding. Note that the 1999 *Turkish QRs* decision, the first case in GATT/WTO history that directly involved Article XXIV, concerned the expansion of an existing RTA, namely, the EU.

2. In another part of his analysis, Cho noted most working party reports touching on Article XXIV issues "lacked legal discipline or legal certainty," Cho, *supra*, at 439, and as a result seem relatively inconclusive. Can these reports now be viewed as moot or superseded, in light of the emergence of the WTO and the Understanding? In fact, these past reports express views and analysis with respect to Article XXIV that are still basic references points in Article XXIV law and policy. Some critical positions taken by working party reports are reflected in the Understanding itself.[1]

3. Assume that the Megalo Bilateral Trade Area ("MBTA"), established in 1951 and given a "GATT waiver" under Article XXV, has a common external tariff schedule ("CETS") that averages 7.5 percent for the total volume of goods imported into the MBTA. Country *A*, which shares a border with one of the MBTA members, has been admitted into the Area. As a result, Country *A* is amending its import duties to conform with the CETS, and this will result in the imposition of a 3 percent duty on the importation of widgets and gadgets into Country *A*. Prior to its admission into the MBTA, Country *A*'s tariff binding for widgets was 2.2 percent, and gadgets were duty

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[66] WTO Agreement, pmbl.

[70] *See generally* Paul Krugman, *Competitiveness: A Dangerous Obsession*, 73 FOR. AFF. 28 (1994).

[1] *See, e.g.*, Turkish Quantitative Restrictions, Appellate Body Report, *infra*, at [redacted] (discussing GATT working party reports in course of WTO dispute resolution).

free. Manufacturers located in Country *B* regularly export widgets and gadgets to Country *A*. Country *A* and all the other MBTA members, as well as Country *B*, are WTO members. Does Country *B* have a viable complaint against Country *A* under GATT Articles I and II? *See* Accession of Portugal and Spain to the European Communities: Report of the Working Party adopted on 19-20 October 1988, L/6405, Oct. 19-20, 1988, GATT B.I.S.D. (35th Supp.) §§ 19, 22 (1989) (reviewing accession of Portugal and Spain to EC; noting that GATT art. XXIV, ¶ 4 did not outline "obligation" but "objective"). The EC argued that members could introduce new trade barriers, or extend existing barriers to new members, if the net impact of all barriers were less than those prevailing before the creation of the RTA. *Id.* §§ 17, 22. *See also* Working Party on the Free-Trade Agreement between Canada and the United States: Report of the Working Party adopted on 12 November 1991, L/6927, Nov. 12, 1991, GATT B.I.S.D. (38th Supp.) § 76 (1992) (reviewing Canada-U.S. free trade agreement).

4. Cho suggested that a "new paradigm" needs to be developed to deal with the tension between RTAs and the WTO. What would or should this new paradigm look like? Should the WTO seek aggressively to contain RTAs? Should individual RTAs embrace their independent status and seek to grow into "competitors" of the WTO system? Cho argued for a movement towards "convergence" between the WTO and the RTAs, both institutionally and in terms of the respective substantive jurisprudence of each. *See* Cho, *supra* at 454-459 (discussing convergence). Does this seem to be a practical or likely solution?

2. The EU

Materials on the EU are included here for two purposes. First, they provide background information and an example to compare with the United States–the EU is an important trading partner and has its own elaborate set of procedures for trade negotiations. Second, as an effort to establish completely free trade within a single region, the EU represents the most significant example of neoregionalism. In a sense, it has been much more fully successful than the pre-WTO GATT, and–being at a relatively more mature stage than the WTO–it may provide some suggestions as to what is needed to realize a fully free-trade-oriented international trading system.

To some extent, suggestions from the EU experience have already had an important role to play in the development of the WTO system. For example, the basic regulatory structures that the WTO adopted in such fields as the Agreement on Sanitary and Phytosanitary Measures (SPS)[1] and the Agreement on Technical Barriers on Trade (TBT)[2] were modeled on the EU's harmonization efforts.[3]

a. Background

The EU is the result of a series of transformations and expansions of what was originally a relatively limited regional trading arrangement. In its current manifestation, it represents a rather expansive and complex regional structure, with varying degrees of

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[1]Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, pmbl, WTO Agreement, Annex 1A [hereinafter SPS]

[2]Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A.

[3]*See* European Commission, Guide to the Implementation of Directives Based on the New Approach and the Global Approach, http:// europa.eu.int/comm/enterprise/newapproach/legislation/guide/document/1999_1282_ en.pdf.

competence and power depending upon the subject matter–political, social, economic, and the like. The following excerpt explains the overall structure of the EU as it exists today.

JANICE R. BELLACE, THE EUROPEAN WORKS COUNCIL DIRECTIVE: TRANSNATIONAL INFORMATION AND CONSULTATION IN THE EUROPEAN UNION

18 COMP. LAB. L.J. 325 (1997)

. . .

III. Legislative Powers of the European Union

The powers of the European Union are set forth in the Treaty of Rome.[9] This treaty, creating the European Economic Community (EEC), was signed in 1957 by the six founding members: Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. For the initial thirteen years of its existence, the EEC consisted only of civil law countries, most of which were organized as classic parliamentary democracies. This orientation was an extremely strong influence on the structure of the EEC and on the way in which directives were framed and interpreted. The addition of common law Member States[11] and the enlargement of the European Union[12] has not altered this initial orientation.

In the Treaty of Rome, the Member States accorded to the supranational body power to act on certain matters. In a sense, the EEC is a "government" of enumerated powers. The Treaty adopted, as one commentator has described it, "a minimalist approach to social policy law."[13] . . . In the late 1960s and early 1970s, a period of widespread social discontent in Europe, the recently renamed European Community (EC) was criticized by some for focusing on economic matters at the exclusion of social affairs. The EC subsequently turned its attention to social affairs and directly addressed the issue of "the social dimension" of the European Community. . . .

When Jacques Delors became president of the European Commission in 1984, he initiated a plan to re-energize the EC and to move it forward. In 1985, the Commission issued a report entitled White Paper on Completing the Internal Market. Referred to as the Cecchini Report, this document represented a bold initiative to attain a much greater level of European integration.[20] To engineer the changes contemplated by the Cecchini Report, it was necessary to amend the Treaty of Rome. This was done by the 1986

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[9]Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The Treaty of Rome was amended in 1987 by the Single European Act, Feb. 17, 1987, 1987 O.J. (L 169) 1 [hereinafter SEA] and in 1992 by the Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992) [hereinafter TEU]. The numbering of articles in the Treaty of Rome has remained consistent. Unless otherwise noted, the term "the Treaty" in this article refers to the Treaty of Rome as it stood with amendments at the point in time in question.

[11]In 1973, the United Kingdom and Ireland acceded to the European Community. These are the only two common law Member States.

[12]The European Union now [*i.e.*, as of 1997] has fifteen Member States: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade*, 16 MICH. J. INT'L L. 349, 394 (1995). [It has since expanded to 25 members, including many Central and Eastern European states.]

[13]RUTH NIELSEN & ERIKA SZYSZCZAK, THE SOCIAL DIMENSION OF THE EUROPEAN COMMUNITY 17 (2d ed. 1993).

[20]To instill some urgency in this initiative, the Commission used the marketing slogan "Europe 1992" to describe the concept of integration, even though integration would not have been possible in 1992. . . .

Single European Act (SEA), which strictly speaking is not a statute but a treaty.[21] The SEA reformed the institutions of the EC and expanded their sphere of influence.

A. Structure of the European Union

The administrative and decision making structure of the EU consists of five bodies: the Council of Ministers, the Commission, the Parliament, the Economic and Social Committee (ESC), and the European Court of Justice (ECJ).

Despite its name, the European Parliament does not exercise legislative power in the EU. That power rests with the Council of Ministers.[22] The Council of Ministers makes the final decision on all Commission proposals, either by unanimous or qualified majority vote. Council actions take several forms. There are several "community instruments," some binding and others nonbinding.[23] The most important are the regulation[24] and the directive.[25]

The Commission is charged with the day-to-day administration of the EU, the initiation of policies to further its objectives, and the enforcement of Treaty provisions and EU law. The Commission has the critical power of making proposals for directives and it has a degree of control over the timing of presenting such proposals to the Parliament and the Council. [The internal structure of the Commission consists of over twenty directorate generals covering the main functional areas. . . .

The European Parliament[27] is not a legislative body; rather, it is a body that represents the views of people throughout the EU.[28] Its function it is to voice those views to the Commission and the Council of Ministers. The Parliament exercises its consultative role in several ways. Most important is the rule that the Council cannot act on a Commission proposal until the Parliament has issued a formal opinion on the proposal. The Parliament may postpone its vote until the Commission has stated its position on amendments suggested by Parliament. If the Commission states its intention not to accept the amendments, Parliament has a right to reconsider the proposal. Parliament

[21] The SEA took effect in 1987 after ratification by all the Member States. *See* EEC Treaty (as amended by SEA in 1987).

[22] The Council has a membership consisting of one minister from each of the Member States. The identity of the minister attending a specific Council meeting depends on the issue before the Council. [For example,] [w]hen matters relating to employment are on the agenda, the minister of each Member State with responsibility for employment issues attends. The presidency of the Council, which has some discretion over the agenda for Council meetings, rotates through the Member States every six months. Three times each year, the Council meets as "the Council of Europe." At these summit meetings, the heads of state represent each national government. Because the specific identity of those participating in a Council of Ministers meeting changes, ensuring continuity in the Council's deliberations is an important task. The daily operations of the Council are handled by the Committee of Permanent Representatives, known by the French acronym COREPER, which consists of one ambassadorial level appointee from each Member State. *See* NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN COMMUNITY 106-14 (2d ed. 1991).

[23] For example, opinions are nonbinding. *See* KLAUS-DIETER BORCHARDT, EUROPEAN DOCUMENTATION, THE ABC OF COMMUNITY LAW 32 (1991).

[24] A regulation is binding and directly applicable throughout the EU.

[25] A directive is binding as to the result to be achieved. However, the Member States are left to decide what form and methods will be used to implement the directive. Directives are generally written in such a way as to direct the Member States to take action to achieve a certain result. Directives typically are short and not detailed, in part because the laws and practices in the Member States can vary greatly. Because directives are often used to harmonize law among the Member States, the Member States commonly may use a variety of methods to implement the policies dictated by the directive. *See* JAMES D. DINNAGE & JOHN F. MURPHY, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 113-19 (1996).

[27] Since 1979, the Members of the European Parliament (MEPs) have been directly elected, with the number of seats allocated to each Member State based on its population. MEPs from the same country do not sit together in the European Parliament; rather, following the tradition of most parliamentary governments, MEPs from the same political persuasion sit together; for instance, in the Socialist group or the European People's Party group. In 1996, the 626 MEPs hailed from nearly 100 political parties and were organized into eight political groupings. *See* OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, SERVING THE EUROPEAN UNION: A CITIZEN'S GUIDE TO THE INSTITUTIONS OF THE EUROPEAN UNION 7 (1996) [hereinafter Serving the European Union]. . . .

[28] The Parliament has the power, on a two-thirds vote, to dismiss the Commission and to veto the annual budget. . . . *See* DINNAGE & MURPHY, *supra* note 25, at 300-06 for a discussion of European Court cases on the power of the Parliament over the budget.

also can request new consultations with the Commission if the Commission responds to Parliament by withdrawing or substantially amending a proposal.[29]

The Economic and Social Committee (ESC) is an advisory body included in the Treaty to provide a direct role for non-governmental interests in the decision making process. This type of body is found in some European countries, such as the Netherlands, where the government engages in formal trilateral discussions with employer and worker groups on an ongoing basis. The ESC consists of 222 members selected every four years by the Council of Ministers on nomination from the Member States. Its membership derives from three main groups: worker representatives, company representatives, and representatives of the general interests (often agricultural or consumer groups). The ESC's function is to advise the Commission and the Council.

The European Court of Justice (ECJ), which sits in Luxembourg, consists of one judge from each Member State, appointed for a six-year term, with the president selected by the judges themselves.[31] The ECJ also has nine advocate generals[32] who issue preliminary opinions in all cases before the Court. The European Court's procedural[33] and substantive[34] jurisdiction is set forth in the Treaty of Rome.[35] The ECJ has exclusive authority in interpreting the treaties, acts, and directives adopted by other bodies of the EU. In addition, the Court can strike down EU laws.[36] The ECJ's decisions are final and binding on the parties.[37]

By the grant of jurisdiction to the ECJ in the Treaty, the Member States sought to achieve a certain harmony or uniformity by avoiding, as much as possible, conflicting decisions by different national courts and the ECJ on matters of EU law. A particularly important device used to accomplish this goal of balance between national courts and the ECJ is the preliminary ruling. The Treaty gives the ECJ the ability to issue preliminary rulings,[38] which are somewhat similar to certified questions that U.S. federal courts issue to state supreme courts. . . .

B. Bases for EU-Level Action

Cognizant that the differing conditions that prevailed in the Member States would prevent the proper functioning of a common market, the founders of the EEC believed it was necessary to make conditions more similar to achieve the goals of a common market. From the outset, the founders recognized that it was infeasible to make

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[29] DAVID W.P. LEWIS, THE ROAD TO EUROPE: HISTORY, INSTITUTIONS AND PROSPECTS OF EUROPEAN INTEGRATION 1945-1993, 114 (1993). Originally, the European Parliament was cast in the role of a consultative assembly, without real power. Since the advent of directly elected Members of the European Parliament in 1979, there has been a movement on the part of MEPs to gain more power in the legislative process in relation to the Commission's role in that process.

[31] EEC Treaty art. 167.

[32] The position of the advocate-general, found in some civil law systems, presents to the Court a neutral, learned view on the issues in dispute. This is in contrast to the advocates for the two parties, who are expected to argue the position that best favors their clients.

[33] The Court has procedural jurisdiction over four types of actions: (1) a national court or tribunal request for a preliminary ruling on a Treaty provision or an EU law; (2) an individual request for the protection of EU law by persons who have exhausted their state law remedies; (3) requests to review the legality of actions taken by an EU institution; and (4) Commission enforcement actions to compel Member States to apply EU law or Treaty provisions.

[34] The Court has substantive jurisdiction in cases involving: (1) the interpretation of the Treaty; (2) the validity and interpretation of acts of the institutions of the EU; and (3) the interpretation of the statutes of bodies established by an act of the Council of Ministers, when those statutes so provide.

[35] *See* EEC Treaty arts. 164-92; *see also* Protocol on the Statute of the Court of Justice of the European Economic Community, 298 U.N.T.S. 147 (1957) (annexed to the Treaty of Rome).

[36] *See* EEC Treaty art. 173.

[37] For a discussion of the relationship between the European Court of Justice and national courts, see Christopher Docksey & Barry Fitzpatrick, *The Duty of National Courts to Interpret Provisions of National Laws in Accordance with Community Law*, 20 INDUS. L.J. 113 (1991).

[38] *See* EEC Treaty art. 177.

conditions uniform throughout the EEC, and thus sought the more modest goal of "harmonization" of conditions. The implementation of this approach is found in directives that typically provide for the "approximation"[39] of laws among the Member States.

1. General Legal Basis for Exercising Legislative Power

The basis for exercising this power is found in the 1957 Treaty of Rome, which states that "[t]he Council shall, acting by means of a unanimous vote on a proposal of the Commission, issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market."[40]

Article 235 is also relied upon for the exercise of the Council's legislative power when there is no other article in the Treaty that empowers the Council to act on a specific matter before it. This article states that for the Council to act, there must be a need for European Community-level action to attain one of the objectives of the Treaty in the course of creating or maintaining the operation of the Common Market.[41] When acting under Article 235, the Council of Ministers must do so unanimously.[42]

Prior to the 1986 Single European Act,[43] all matters in the labor and employment field required a unanimous vote in the Council of Ministers to be approved. This resulted in part from Treaty provisions and in part from the tradition, first enforced by France, that a Member State could veto a directive it believed to be against its national interest. This tradition of unanimity, however, lost support in the 1980s when the United Kingdom succeeded in blocking several measures that had strong support in the Council of Ministers. Some felt that progress in the social affairs area could not be made if all the other Member States had to wait for the approval of certain Member States that had very different notions on many issues.[45] In addition, smaller countries felt that large countries could use their power to block items to which they were opposed, whereas it was politically infeasible for smaller countries to do so.

In designing the 1992 initiative, many in the Commission and the Council believed that the work on the integration of the internal market would proceed at an unacceptably slow pace unless the burden imposed by the need for uniformity could be lessened. In response to this, the 1986 Single European Act added article 100a to the Treaty.[47] Paragraph one of the article extends the use of a qualified majority voting procedure[48] in the Council of Ministers, which involves the European Parliament in the cooperation

[39]The word "approximation" is rarely used except in the formal language of directives. The word "harmonization" is used more widely. Strictly speaking, "approximation" refers to the process of orienting different Member States' laws and legal processes to a defined standard. The word "harmonization" is used more broadly to mean simply acting to make differing conditions more similar to each other.

[40]EEC Treaty art. 100.

[41]*See id.* art. 235.

[42]*See id.*

[43]EEC Treaty (as amended by SEA in 1987).

[45]. . . The United Kingdom far exceeded any other large Member State on the number of issues on which it desired no EU action. This opposition is motivated not only by the specific subject matter of the directive but also by general antipathy to EU action as inconsistent with strongly-held notions of national sovereignty. *See* Grainne de Burca, *The Quest for Legitimacy in the European Union*, 59 MOD. L. REV. 349 (1996).

[47]*See* SEA art. 18.

[48]The qualified majority voting procedure is essentially a two-thirds majority. The number of votes each Member State has is based on population, but is not strictly one person-one vote. France, Germany, Italy, and the United Kingdom have 10 votes each; Spain has 8; Belgium, Greece, the Netherlands and Portugal have 5 each; Austria and Sweden have 4 each; Denmark, Finland and Ireland have 3 each; and Luxembourg has 2. When a matter is subject to the qualified majority voting procedure, it takes 62 votes out of a total of 87 to pass, with a blocking minority consisting of five Member States having at least 25 votes. . . .

procedure when a measure affects the functioning and establishment of the internal market.[49] Paragraph two of the article provides that unanimous voting in the Council of Ministers still is required for measures relating to fiscal provisions, the free movement of persons, and the rights and interests of employed persons.[50] Paragraph three lists measures that are seen as falling under the procedure outlined in paragraph one. . . .

When the Commission drafts a directive, it states at the outset the basis in the Treaty for the exercise of the Council's power. Given that some issues now are subject to unanimity and some to qualified majority voting, the Commission's choice for the basis of the Council's power is extremely important. . . .

C.Impact of the Maastricht Treaty

Following the ratification of the 1986 Single European Act, . . . debate went beyond specific issues to the overall question of the nature of the European Union. While some countries urged greater integration on social, political, and economic levels, others preferred to cede to the EU only those issues that could be better handled on a supranational basis.[59] . . . This political controversy expressed itself in the United Kingdom's refusal to sign the European Social Charter[61] in December 1989. . . .

In late 1991, the Ministers of the EU Member States met in Maastricht, in the Netherlands, to agree on steps that should be taken to further European integration. The agreement that resulted from this meeting is the Treaty on European Union (TEU),[67] popularly known as the "Maastricht Treaty," signed by the twelve Member States on February 7, 1992. The Treaty includes various "protocols," that are detailed statements of agreement on specific topics.[68] . . .

NOTES AND QUESTIONS

1. *Expanded role of the Parliament*. The Maastricht Treaty enhanced the role of the European Parliament in the legislative process, and increasing its ability to shape the content of legislation. ALthough Parliament still does not have the authority to initiate legislation, it shares the power of decision with the Council in most areas. Once a Commission proposal has been submitted to the Council of Ministers and the European Parliament, the three institutions work together to produce a satisfactory result. In agreement with the Commission, the Council can amend a proposal by a qualified majority. If, however, the Commission does not agree, such an amendment requires unanimity by the Council.

2. *Movement toward greater consolidation*. With the expected expansion of the EU by the accession of ten new member states, predominately from Central and Eastern

[49]*See* EEC Treaty art. 100a.

[50]*See id.*

[59]The leading proponent of a more limited role for the EU . . . is the United Kingdom. One commentator has noted that the real challenge is "not from those who oppose certain policies [but] from those who continue to believe in the nation state as the only rightful political authority and who oppose the exercise of autonomous power by the Union." De Burca, *supra* note 45, at 351.

[61]*See generally* COMMISSION OF THE EUROPEAN COMMUNITIES, CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS (1990). *See also* THE FUTURE OF EUROPEAN SOCIAL POLICY (Lammy Betten, ed., 2d ed. 1991). Popularly known as "the Social Charter," it was adopted as a "Solemn Declaration" by eleven of the twelve prime ministers at the Strasbourg Summit of the Council of Ministers in December 1989. The Social Charter of the EU should not be confused with the Council of Europe's "European Social Charter," drafted in 1961, which contains a broad declaration of basic human rights, including freedom of association.

[67]Feb. 7, 1992, 31 I.L.M. 247 (1992).

[68]For instance, the controversial topic of European monetary union is covered in the Protocol on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, 31 I.L.M. 355 (1992).

European, the member states agreed in December 2001 to initiate a study of the procedural steps toward a closer affiliation.[1] The central document emerging from their discussions was the Laeken Declaration, which outlined key political questions, including whether an EU constitution should be adopted. The member states agreed to set up a kind of convention charged with drawing a road map for the future of the EU. Steering the convention was a twelve-member presidium headed by former French President Valery Giscard D'Estaing. The convention was scheduled to conclude by June 2003, at which point a traditional Intergovernmental Conference, made up of member state representatives, would take up the convention's recommendations, with the member states making the final decisions, independent of any recommendations from the convention.

3. *Further steps toward integration.* After the establishment of the European Union by the Maastricht Treaty in 1992, further steps towards greater integration continued with the approval of the 1997 Amsterdam Treaty and the 2001 Nice Treaty. After two years of highly contentious debate, the text of the proposed EU constitution was finalized in June 2004 by a constitutional convention.[2] In October 2004 the proposed constitution was signed by heads of state and government. In January 2005, members of the European Parliament from the 25 EU member states approved the text of the constitution, by a vote of 500 to 137, with 40 MEPs abstaining and 55 not participating. The constitution was designed, among other things, to streamline the operation of the enlarged EU. It would have required member states to cede further authority to the EU in areas ranging from health policy to justice affairs and foreign policy, increased the legislative powers of the European Parliament, and provided explicit guarantees on human rights. To be effective, the constitution needed to be ratified by all EU member states. Hungary and Lithuania had already ratified the constitution through their own parliamentary procedures, and ten other member states–the Czech Republic, Denmark, France, Ireland, Luxembourg, the Netherlands, Poland, Portugal, Spain, and the United Kingdom–planned to hold referenda to approve the constitution. The ratification process was to continue until October 29, 2006, two years after the heads of state and government had signed the text.

4. *Failure of the constitution*. Despite the initial euphoria following the Parliament's action, the vote in the European Parliament hinted at a relatively high level of opposition to the constitution, particularly among MEPs from former Communist states in Central and Eastern Europe that had joined the EU in May 2004. In addition, all participating British Conservative MEPs voted against approval. Ironically, the drive towards integration under the constitution was ended by the negative reaction of two founding members of the European Community–France and the Netherlands. In May 2005, French voters rejected the constitution in a referendum,[3] followed by the Netherlands in June. After four years of concentrated efforts, the constitution was dead.

b. The EU in Operation: The Case of Agriculture

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[1]Joe Kirwin, *European Union: Eu Charts Next Phase of Unification; New Body Created to Recommend Reforms*, BNA INT'L BUS. & FIN. DAILY (Dec. 18, 2001), at d3.

[2]Joe Kirwin, *EU Leaders Break Through on Constitution for Enlarged Bloc; New President Not Named*, BNA INT'L BUS. & FIN. DAILY (June 21, 2004), *available at* http://pubs.bna.com/ip/BNA/ibd.nsf/is/A0A8Y3B3Z5.

[3]Joe Kirwin, *French Vote, Expected Dutch Rejection Deal Damaging Blows to EU Constitution*, BNA INT'L BUS. & FIN. DAILY, June 1, 2005, *available at* http://pubs.bna.com/ip/BNA/ibd.nsf/is/A0B0X7F4T0.

One lesson to be learned from the fate of the proposed European constitution is that, despite the already high level of political, economic and social integration in the EU, individual national interests and attitudes can never be safely ignored. Although the EU's programs, once defined, are carried out with a high degree of supranationalism, the negotiation of these programs is very much an exercise in nationalism–an exercise in which each member state calculates its gains and losses quite precisely. The result is frequently an elaborate package negotiation, in which each nation's losses in some areas are compensated by gains in others.

Probably the clearest example in this regard is the EU agricultural price support system, initially a benefit to French agriculture that balanced the benefits of the free trade zone to German manufacturing. The Common Agricultural Policy (CAP) has been referred to as the "glue" or "cement" holding the EU together. Today, the politics and the program are both much more complicated, and the persistence of EU agricultural policy is one stumbling block confronting the Doha Development Round of multilateral negotiations in the WTO.

The agricultural system seeks to benefit the farmer by maintaining high farm prices (as opposed to direct subsidies). There is a Community fund, the "European Agricultural Guidance and Guarantee Fund" (EAGGF) that intervenes in the agricultural markets to buy specific commodities should the price fall below levels that are renegotiated each year. The prices and sometimes the allocation of the intervention costs are revised annually in a marathon negotiation.

This was complicated enough when the only price differences within the Community were those deriving from transportation and local supply arid demand differences. When EEC currencies began to vary against one another in the 1970s, the task became even more complicated because currency fluctuations would modify effective prices. The Community responded with a detailed system of border adjustments (monetary compensation amounts or MCAs) and assumed exchange rates. The latter were actually politically negotiated as part of the overall balance and typically diverged from the real exchange rate, so that the value of the "Green Pound" might well be different from that of the real pound.

The following excerpt provides a view of the Common Agricultural Policy, as well as a sense of EU documentation. The excerpt is from the Commission's defense of the agricultural program, which has come under increasing attack because of its cost to both the consumer and the Community budget. The student should closely analyze the justifications given by the Commission for its high domestic support prices and export restitutions (subsidies). The problems posed by the CAP for U.S. agricultural exporters continue, and have been the subject of several GATT panels.

REFLECTIONS ON THE COMMON AGRICULTURAL POLICY

Commission of the European Communities. ¶1911-lB (1980)

GENERAL CONSIDERATIONS

The Reasons for the CAP, its Principles and its Results

Reasons

2. The common agricultural policy was set up with the objective of permitting free trade in agricultural produce within the newly-created common market. While the freeing of trade in industrial products was to be based essentially on the removal of

customs barriers and quantitative restrictions, for agricultural products it was necessary to put an end to the multiplicity of State aids, market organizations and income support systems which existed in all Member States.

Furthermore, the maintenance of different agricultural systems would have led to distortions of competition which would have impeded trade and produced differences in the cost of food, and hence in the cost of living and in wage costs, which would have been prejudicial to true economic integration.

For the above reasons the founding Member States considered that there should be free trade in agricultural products as well as a common market in industrial products and that therefore there should be a common policy for agriculture. Agricultural policy and free trade in industrial products thus remain indissolubly linked and together constitute the very basis of the Community.

Principles

3. The common agricultural policy has been based since its inception on three principles:

freedom of trade and Community preference;
the creation of market organizations based on common prices;
the sharing of the cost of this common policy.

These three principles are interdependent and cannot be dissociated from the objective to be achieved. In order for there to be free trade, it is necessary to have a common support policy and a single price level. Once prices are decided on in common it is not only natural but essential for the financial consequences of that common agricultural, policy to be borne jointly.

Single price. The experience of the last ten years since the introduction of compensatory amounts has shown how difficult it is to avoid distortions of production and distortions of trade once the concept of price unity is set aside, The introduction of the European Monetary System in 1979 and the close relationship between the currencies maintained since then have caused this ‘sickness’ of compensatory amounts to recede. It was high time, because their continuation and their increase would certainly have led to the break-up of the common agricultural policy.

Cost-sharing. Once there is a Community decision on the fixing of prices, and hence indirectly on the development of budgetary expenditure, it is only natural for the consequences to be borne by the budget of the Community.

Without a common system of financing there can be no certainty about the fixing of single prices. We need only consider the following examples, which are not exhaustive but will serve as illustrations for readers who are acquainted with the nature of discussions in the Council of Agriculture Ministers: Would Ireland accept high prices for beef and veal if it had to bear the consequences from its own budget? Would France have agreed to high prices for cereals and sugar for fifteen years if it had to meet the expenditure itself?

Would Italy have subsidized olive oil or processed fruit and vegetables to the same extent if the Italian Parliament had had to vote the necessary appropriations each year?

The answer is clearly no.

4. If we look closely at the internal structure of the common agricultural policy it is evident that these three principles, or pillars erected by the architects of the policy, are not merely decorative features. They are essential foundations for the insertion of any common agricultural policy into a common market based on freedom of trade. Calling

these principles into question would affect the balance between the agricultural policy and the free circulation of industrial products and could thus lead to a change or a weakening in the rules applicable to the latter.

The common agricultural policy may be characterized as a system of support of farmers' incomes mainly through support of market prices with certain elements of direct aid to incomes. For political, financial and administrative reasons, one could not envisage a radically different model for the Community's agricultural policy than the support of market prices. But this does not mean that, in fixture, problems of a special regional nature or concerning particular commodities cannot be solved by Community measures involving direct income support, as indeed has already been done in certain specific cases.

Results

5. If we are to judge the results of the common agricultural policy after fifteen years of existence, we should look to see, objectively and on the basis of statistics, whether the objectives set have been attained.

6. Since the creation of the common market the consumption of foodstuffs has improved in both quantity and quality to an extent never before known. This development, to the advantage of consumers, was helped by the spectacular development of agriculture and of intra-Community trade in agricultural produce.

7. Similarly, if we look at agricultural production, which has increased by 2.5% a year over the last twenty years, the growth in productivity and the optimum use made of production factors, we can see that the common agricultural policy has encouraged the modernization of European agriculture.

The growth in productivity revealed by the figures shows the extent to which agriculture, supported by the common policy, contributed in the 1960s and 1970s to the remarkable boom in the industrial and tertiary sectors by providing them with the necessary labour: between 1958 and 1979 more than 10 million members of the working population left agriculture, *i.e.* at the rate of one a minute.

In 1980 the agricultural policy enables 8 million persons to be directly employed in agriculture. If we add the employment 'upstream' (fertilizers, equipment) and 'downstream' (foodstuffs, processing), agriculture and agribusiness form one of the major branches of economic activity in the Community.

8. The common policy has enabled agricultural income to keep on growing and at the same time it has protected the sector from the recessions which have affected the economy since 1974. Since 1968 real income in agriculture has on average increased by 2.8% a year, a rate equal to the increase in the other branches of the economy over the period 1968-76.

9. As regards security of supply, Europe has not only been shielded from any physical shortage of foodstuffs but it has also been protected from the speculative movements which sometimes affect the world markets in raw materials. We need only think of the dependence of Europe as regards energy and of the vulnerability of supplies from overseas in order to understand that an entity such as Europe, with a population of 260 and perhaps soon more than 300 million, cannot afford to rely on others for its food supplies and has the duty to exploit the richness of its soil.

10. On the subject of exports, it should not be forgotten that the CAP has facilitated the export of agricultural products both within the Community and to non-member countries and has thus had important consequences for the trade balance of the Member States. Neither should we forget the contribution of European agriculture to satisfying world demand for food, including the demand from those parts of the world unable to

pay for it. If the FAO's [Food and Agriculture Organization of the United Nations] forecasts are correct, the world will need all its available resources in order to meet its future food requirements.

Any change in the CAP which substantially disturbed these trade flows would seriously upset the balance which has existed within the common market since its inception. One cannot expect to have a common market for the sale of one's industrial goods, or to take advantage of the free movement of capital and services, and at the same time refuse to provide the instrument which is essential to the free movement of agricultural produce.

Difficulties Encountered by the CAP: Possible Solutions

Criticisms

11. The main difficulty encountered by the common agricultural policy, after fifteen years of operation, is the lack of sufficiently effective regulatory mechanisms whereby the development of production is geared to the needs of the internal and external markets. As the common agricultural policy is based essentially on mechanisms which support farmers' incomes by means of guaranteed prices or direct product subsidies, the continual increase in production engenders an uncontrollable rise in expenditure.

Of the EAGGF chapters which have shown rapid increases over the last three years, it is evident that those for milk, beef and processed fruit and vegetables represent rises in expenditure which can no longer be kept under control as the rules stand at present. For wine, although the development of expenditure from year to year is strongly influenced by the ups and downs of the harvest, the trend is for output to rise while consumption continues to fall. Similarly for cereals and sugar, despite annual variations, the trend has been for Community production to increase rather faster than consumption. The difficulty with regard to the milk surpluses stems from the fact that there is no internal market or external market tha.t can pay where disposal is possible at a reasonable cost, and that the scope for increasing food aid is limited. To get rid of stocks it has proved necessary to grant even higher export refunds or subsidies for internal disposal, sometimes equivalent to 80% of the product's value.

Similarly, the aid for processed fruit and vegetables may exceed the price received by agricultural producers, since the aid is in fact a deficiency payment to cover the difference between the production cost of the European industry and the world market price.

This being the case, it is clear that, unless prices are drastically readjusted. any guarantee arrangements applicable to unlimited quantities are bound to result in further increases in production. This is only common sense: without physical or economic control, no system can function properly in the long term.

12. The second criticism which may be directed at the common agricultural policy concerns the way in which the common market organizations, based as they are on price guarantees or product subsidies, work to the advantage of the largest producers, who already have the most favourable production structures.

It is not really surprising that, in a market economy, farms should tend to become larger and larger. In the long term, there is no valid reason why agricultural production should not follow industry in the trend towards larger and more rational economic units with better allocation of resources and economies of scale.

Criticism centres round those situations where prices (*i.e*. incomes, to a great extent) receive direct support from public finds. In other words, in a Europe facing, because of the energy crisis, a long slowdown in its economic growth, voices are being raised in protest against public money being used, for the most part, to support the incomes of the richest farmers.

13. The view that this system whereby incomes are supported by prices is a source of social inequality, under the cloak of economic equality, is akin to a third criticism, namely that the common agricultural policy has been of greater assistance to the regions which were already rich than it has been to the least-favoured areas of the Community.

This criticism is clearly connected with the differences in natural resources and the stnuctural disparities which already existed when the Community was set up. However, it must be recognized that there are large differences in income and productivity between the Community agricultural regions, and, worse still, in spite of some closing of the gap in some regions in Ireland and north-eastern Italy, these differences have increased during the 1970s. There are two basic reasons why the price and markets policies are connected with this growth in regional disparities. Firstly, the richer Community regions, on account of the type of their production (cereals, milk and sugar), receive more substantial support than the less-favoured regions, which are largely in the Mediterranean area and mainly produce fruit and vegetables and wine. Secondly, it should be borne in mind that the common market organizations tend to favour the more well-to-do producers, who are mainly concentrated in the richer regions. Only in recent years has more sustained attention been given to the Mediterranean production sector or, more generally speaking, to areas with economic or natural handicaps. Special consideration must be given to this aspect now that the Community is to take in three Mediterranean countries whose agricultural structures are very disparate and, in most cases, extremely weak and now that consideration is being given to recasting the CAP.

It is true that the prices fixed at the outset by the Community are generally higher than world prices, but they are not necessarily higher than the prices on other major markets, such as the USA or Japan. The price of milk, for instance, is at present higher in the USA than in the Community. Also, everybody knows that world prices relate only to limited, often marginal quantities and that it would be wrong to think that European consumers could be sup-plied for long at low and stable world prices. But on the other side it is the world market price on which exports have to be based as far as the financial aspects are concerned,

The common price level reflects Europe’s stage of industrial and social development. However, more important than price levels is the trend of agricultural prices. This trend has been particularly prudent in recent years and European agriculture has thus made a highly effective contribution to the fight against inflation. Common agricultural prices have been falling by about 4% per annum in real terms.

If since 1972 agricultural price support in national currencies (common prices translated into national currencies via green rates) has increased in the Community slightly faster than the general price index, it is because until 1976/77 prices increased in real terms. Since then they have decreased owing to the prudent price policy. This prudent price policy is one of the reasons why–after a satisfactory evolution for a number of years–real farm incomes decreased in 1980 for the second successive year.

14. The fourth and last criticism, which is of a financial and budgetary nature, has given rise to differences over the budget not only between the Member States but also between the European institutions, particularly where Parliament was concerned.

This criticism falls under four distinct headings.

15. Some take the view that the overall burden which agriculture imposes on public funds is too high in absolute terms. . . .

16. Others consider that agriculture’s share of the Community budget is disproportionately large and retarding the development of other common policies.

17. Another reason for criticism relating to the budget has been the way in which the financial burden is shared among the Member States. Some are net contributors because of the structure, type and volume of their agricultural production, while others are substantial net beneficiaries.

This criticism cannot be rebutted, but it should be said that this disparity results from the very structure of the Community and its external trade arid from the different degrees to which its common policies have been developed. It does not, by itself justify a reconsideration of the single common policy–agriculture. If the principle of equal burdens and equal benefits . . . is to be introduced, how shall we assess what is a fair common market in industrial products? . . . [T]he principle of a fair return is incompatible with the notions of financial solidarity and common policy, whether on agriculture or on anything else. No State, unitary or federal, has been able to achieve unity or integration by applying it. The same will hold true for the Community.

A discussion paper on the common agricultural policy is not the place for an 'assessment' of the mechanisms of the Financial Regulation. It should be pointed out, however, that from the strictly agricultural point of view any reform of these mechanisms should maintain effective solidarity and ensure that the agricultural levies and customs duties are used for their proper purpose in a customs union, *i.e*. as own [community] resources.

18. Lastly, the criticism on budgetary and financial counts is also directed against the way in which the agricultural appropriations are spent for ever-larger structural surpluses without reducing the income disparities in the agricultural sector and with the criticism that agricultural expenditure has an anti-social facet.

In plain terms, then, what is being criticized is not so much the total expenditure of 1000 million units of account against the EAGGF Guarantee Section as the expenditure of 4500 million units of account on milk products for which the market outlook is unlikely to improve in the near future, or the fact that, the richer you are, the larger your share of this bounty.

A very close correlation can be discerned between the regional agricultural income level and of the level of support expenditure per unit, Expressed on the basis of an average index for the Community of 100, agricultural expenditure per labour unit exceeds 150 in most regions in the Paris basin, Belgium, northern Germany, the Netherlands and Denmark, but is generally below 50 in one out of three regions in italy and lower than 80 in most other Italian regions and in the mountain regions and in southwest France. The regions with the highest agricultural incomes are those which incur the most expenditure.

It is this fourth aspect of the financial criticism which we see as most pertinent and which calls for certain amendments to the common agricultural policy. The Commission believes that it is wrong to assess the common agricultural policy solely in terms of budgetary implications, although a rigorous approach to the growth of agricultural expenditure, as for other items, is of course indispensible. The common policy has assumed responsibility, by substitution, for expenditure formerly borne by the governments, and there is in fact no evidence that this has led to an increase–if anything, there has been a decrease in Member States' total transfers of public funds to agriculture. It should also be remembered that the Community's agricultural budget includes expenditure which could just as well be assigned to other policies (social, regional, external policy). . . .

QUESTIONS

1. What would you regard as success for your nation in the EU's annual agricultural negotiation? How would your views differ if you were Minister of Agriculture? Finance? Consumer Affairs? In what ways might your position depend on your political party?

2. As suggested in the introduction, arrangements in the EU are negotiated in elaborate packages, with trade-offs being made across various areas. Is that practice any different from the GATT? From any national legislature?

3. What does the description of the CAP tell you about the role of special interests in the EU? If you were a European citizen, would you support the CAP? Which constituencies would support it?

4. *Pigs get fed. . . .* The following decision of the European Court of Justice suggests the limits of agricultural aid under the CAP, and it also illustrates the interactions between the Commission and the Council, particularly on sensitive issues of EU law and policy.

RE AID TO PIG FARMERS: COMMISSION OF THE EUROPEAN COMMUNITIES v. COUNCIL OF THE EUROPEAN UNION (Portugal, Intervening)

Case C-110/02, [2004] 2 C.M.L.R. 58)

Before the Court of Justice of the European Communities (Full Court)

[Opinion of Advocate General Jacobs]

In these proceedings, brought under Art.230 EC, the Commission seeks the annulment of Council Decision 2002/114.

That decision (hereinafter the "contested measure") was taken pursuant to the third sub-paragraph of Art.88(2) EC, which empowers the Council, where justified by exceptional circumstances, to declare compatible with the common market an aid which a Member State is granting or intends to grant. It authorises Portugal to make payments to a group of Portuguese pig farmers equivalent in amount to aid which those farmers have already received but have been required to repay following Commission decisions declaring it incompatible with the Common Market.

The contested measure is apparently not the only recent decision of the Council relying on the procedure laid down in the third sub-paragraph of Article 88(2) EC to authorise an aid which serves to reimburse its recipients for having to repay another aid previously subject to a negative Commission decision.[4] The present proceedings therefore offer the Court the opportunity to determine whether such a use of the Council's power is consistent with the system laid down by the Treaty for the control of State aid.

Legal framework

Article 87(1) EC states that "save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incom-

[4] *See* Council Decision 2000/257 concerning aid granted in Italy by RIBS SpA in accordance with the provisions of national law No.700 of December 19, 1983 on the restructuring of the sugar beet sector: [2000] O.J. L79/38.

patible with the common market". Article 87(2) specifies categories of aid which are compatible with the common market. Article 87(3) lays down categories of aid which may be considered to be so compatible.

The Treaty confers a central role on the Commission in supervising and controlling the granting of aid by the Member States. Under Art.88(1) EC, it is for the Commission, in cooperation with the Member States, to "keep under constant review all systems of aid existing in those States". The first sub-paragraph of Art.88(2) empowers and requires the Commission to assess the compatibility of an aid with Art.87, and, if such aid is incompatible, to "decide that the State concerned shall abolish or alter it" within a specified time period. Article 88(3) requires Member States to notify the Commission of any plans to grant or alter aid, and prohibits them from implementing such plans until the Commission has reached a decision pursuant to the first paragraph of Art.88(2). Should the State in question not comply with such a decision, the second sub-paragraph of Art.88(2) permits the Commission or any other interested State to refer the matter directly to the Court of Justice.

The third and fourth sub-paragraphs of Art.88(2) provide as follows:

> "On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first sub-paragraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.
>
> If, however the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case."

Article 89 empowers the Council to make regulations for the application of Arts 87 and 88. Pursuant to that power, the Council has adopted Regulation 659/1999, which lays down detailed rules regarding the procedures to be followed in the application of Art.88 EC.

Under Art.36 EC, the competition rules contained in the Treaty, including those relating to State aid, apply to production of and trade in agricultural products only to the extent determined by the Council in legislation working out and implementing the common agricultural policy pursuant to Art.37 EC.

Article 21 of Council Regulation 2759/75 on the common organisation of the market in pigmeat states that, except as otherwise specified in that Regulation, the State aid provisions of the Treaty are to apply to the production of and trade in pigs and pigmeat products.

The factual background and the contested measure

In 1994 and 1999, Portugal granted aid to its pig farming sector (hereinafter the "original aid"). The 1994 aid was not notified to the Commission, and the 1999 aid was notified but implemented before the Commission decided as to its compatibility with the common market.

By decisions 2000/200 and 2001/86 (hereinafter the "Commission decisions") the Commission declared most of the original aid to be incompatible with the common market and ordered it to be repaid.

On January 21, 2002, following an application from the Portuguese Government, the Council adopted the contested measure, which declared compatible with the common market a grant of aid by Portugal to the pig farmers who had benefited from the original aid "equivalent to the amounts which those beneficiaries must reimburse" under the Commission decisions.

Recitals 13 and 14 in the preamble to the contested measure contain the following justification for that measure:

> "... refunding the [original aid] threatens the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50% of the pig herd is concentrated in less than 5% of the territory.
>
> Exceptional circumstances therefore exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to remedy the imbalance which has arisen, to be compatible with the common market on the terms specified in this Decision."

. . .

Identification of the issues . . .

The Commission develops a number of overlapping arguments to show that once it has decided against a given aid, the Council may not adopt a contrary decision. The following four of its submissions appear to me the most important. First, it has the primary competence to determine the compatibility of aid with the common market, and that the Council's power to do likewise is exceptional and should be narrowly interpreted. Secondly, the procedure specified in respect of that power only makes sense on the assumption that the Commission has yet to reach a decision. Otherwise, there would be no point in the requirement that the Commission suspend its investigation for a three-month period following a Member State's application to the Council. Thirdly, if the Council were able to override the Commission, there would be the risk of a conflict between the supervision of the Commission by the Community judicature and that exercised by the Council. Fourthly, a loss of legal certainty would also result. . . .

It seems to me clear that, as the Commission contends, the relationship between the competences conferred upon the Council and the Commission under Art.88(2) must be regulated on the basis of a principle of pre-emption, so that once either institution has decided upon the compatibility of a given aid, the other is thereby pre-empted from reaching a decision with regard to that aid. . . .

The Council . . . argues that the principle of pre-emption, advocated by the Commission, would run counter to the second paragraph of Art.7(1) EC, which provides that each institution is to act within the limits of the powers conferred on it by the Treaty, in that it would render the competence of an institution conditional upon the willingness and speed of another institution to act first.

Finally, the Council notes that ordinarily, in the case of incompatible legal acts which are not subject to any formal hierarchy, it is the subsequent act that overrules the former in time and not the reverse. . . .

. . . I [do not] consider that the principle of pre-emption would in any way infringe the principle of attribution of competences, enshrined in Art.7(1) EC. In my view, the Council's competence under the third sub-paragraph of Art.88(2) only accrues on the assumption that there has yet to be a Commission decision relating to the same aid. There is no reason why the competence of one institution should not depend upon whether or not there has been some prior act by another. Such is an essential feature of the legislative procedures specified in the Treaty.

Lastly, it is not clear to me that the principle *lex posterior derogat priori* is of any application in the present context, which concerns two decisions relating to the same circumstances rather than two conflicting pieces of legislation. In any event, for the reasons set out above, I consider that there are good reasons for applying instead a principle of pre-emption. . . .

JUDGMENT [by the Court]

[T]he Commission of the European Communities sought the annulment, pursuant to Art.230 EC, of Council Decision 2002/114 authorising the Government of Portugal to grant aid to Portuguese pig farmers who were beneficiaries of the measures granted in 1994 and 1998. . . .

Legal background

Article 88(2) and (3) EC provide:

"(2) If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 and 227, refer the matter to the Court of Justice direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first sub-paragraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

(3) The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

The contested decision and its context

By Decree-Law No.146/94 of May 24, 1994, the Portuguese Republic established an aid scheme setting up lines of credit for reducing the debt burden on intensive stock farms and assisting the recovery of pig farming. That aid system was not notified to the Commission.

Acting under the first paragraph of Art.88(2) EC, the Commission adopted Decision 2000/200 concerning an aid scheme implemented by Portugal with a view to reducing the debt burden of intensive stock farms and assisting recovery in the pig-farming sector. Under Art.1(1) of that decision, it declared the credit line for reducing the debt burden on intensive stock farms incompatible with the common market in cases where, together with the investment aid received, the grant equivalent exceeded 35 per cent in farming areas other than less-favoured farming areas. Article 1(2) declared the credit line for assisting recovery in the pig-farming sector incompatible with the common market. Repayment of the aid already unlawfully paid to the beneficiaries, with interest, was ordered under Art.3 of that decision.

By Decree-Law No 4/99 of January 4, 1999, the Portuguese Republic further introduced a moratorium extending by one year the period for repayment of certain loans contracted by pig farms which produced, fattened and slaughtered pigs in a closed cycle, and also introduced short-term financing for such farms by means of loans at favourable rates. Although those measures were notified to the Commission, they were put into effect before the Commission stated its position in respect of them.

Those aid measures were declared incompatible with the common market, and their repayment was ordered by Commission Decision 2001/86 on the aid scheme implemented by Portugal in favour of the pigfarming sector.

On November 23, 2001, the Portuguese Republic requested the Council of the European Union to adopt, on the basis of the third sub-paragraph of Art.88(2) EC, a "decision authorising it to grant aid to Portuguese pig farmers obliged to repay the aid granted in 1994 and 1998 and [declaring] that aid compatible with the common market".

Acceding to that request, the Council adopted the contested decision, Art.1 of which is worded as follows:

> "Exceptional aid by the Portuguese Government to the Portuguese pig sector involving the grant of aid to beneficiaries covered by the Commission Decisions of 25 November 1999 and 4 October 2000, totalling not more than EUR 16,3 million, equivalent to the amounts which those beneficiaries must reimburse under those Decisions, shall be considered compatible with the common market."

After setting out the particular circumstances and features of the Portuguese pig farming industry which had led the Portuguese Republic to adopt the Decree-Laws of 1994 and 1999, the grounds for the contested decision state, in paragraph 9, that "... as the pattern of trade shows, [the aid instituted under those Decree-Laws] did not have any particular effect on intra-Community trade and consequently did not cause any distortion of competition".

According to paras 12 to 14 of the grounds for the contested decision:

> "(12) In its decisions of 25 November 1999 and 4 October 2000, the Commission held that the measures in question were not compatible with the common market. Pursuant to those decisions, the Portuguese authorities initiated a procedure to recover the aid granted.
>
> (13) However, refunding the aid granted threatens the economic viability of not a few beneficiaries and would have extremely damaging social effects in certain regions because 50% of the pig herd is concentrated in less than 5% of the territory.
>
> (14) Exceptional circumstances therefore exist, making it possible to consider such aid, by way of derogation and to the extent strictly necessary to remedy the imbalance which has arisen, to be compatible with the common market on the terms specified in this Decision."

The action

The Commission makes five pleas in law in support in its action, claiming that the Council did not have the power to adopt the contested decision, misuse of powers and procedure, infringement of the EC Treaty and various general principles, manifest error of assessment, and failure to state sufficient reasons for the contested decision....

Findings of the Court

In order to rule on the Commission's first plea in support of its action, it first needs to be determined whether, as the Commission has argued, Art.88(2) EC must be interpreted in such a way that, where the Commission has adopted a decision finding aid incompatible with the common market, the Council no longer has the power to decide, on the basis of the third sub-paragraph of that provision, that that aid must be regarded as compatible with the common market.

In that respect, it should be noted that the intention of the Treaty, in providing through Art.88 EC for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the Community judicature, by means of an appropriate procedure which it is the Commission's responsibility to set in motion. Arts. 87 EC and 88 EC thus reserve a central role for the Commission in determining whether aid is incompatible.

As is clear from its very wording, the third sub-paragraph of Art.88(2) EC covers an exceptional case. According to that provision, the Council acting unanimously, "on application by a Member State", may decide that aid which that State is granting or intends to grant must be regarded as compatible with the common market "in derogation from the provisions of Article 87 or from the regulations provided for in Article 89", if such a decision is justified by "exceptional circumstances".

It follows that, as the Commission has rightly pointed out, the power conferred upon the Council by the third sub-paragraph of Art.88(2) EC is clearly exceptional in character.

In such a context, the further provisions in the third and fourth sub-paragraphs of Art.88(2), whereby, on the one hand, application to the Council by a Member State suspends examination in progress at the Commission for a period of three months, and, on the other, in the absence of a decision by the Council within that period, the Commission is to give a ruling, undeniably indicate that, where that period has expired, the Council is no longer competent to adopt a decision under that third sub-paragraph in relation to the aid concerned. The taking of decisions the operative parts of which might contradict is thereby avoided.

The enactment of a temporal limitation of that kind on the Council's competence where the Commission has already opened the procedure under the first sub-paragraph of Art.88(2) EC, without, however, yet having adopted a decision declaring the aid incompatible with the common market, and the fact that, at the end of the three-month period laid down by the fourth sub-paragraph of that provision, the Commission alone retains the competence to rule on the aid concerned, also demonstrate that, if the Member State concerned has made no application to the Council under the third sub-paragraph of Art.88(2) EC before the Commission declares the aid in question incompatible with the common market and thereby closes the procedure referred to in the first sub-paragraph of Art.88(2), the Council is no longer authorised to exercise the exceptional power conferred upon it by the third sub-paragraph in order to declare such aid compatible with the common market.

It may be observed on that latter point that, in Case C-l22/94 Commission v Council,[34] the contested decision of the Council did not follow a Commission decision declaring aid incompatible with the common market, the Commission in that case having merely taken the view on the basis of Art.88(3) EC that the aid project in question was not compatible with the common market and opened the procedure laid down by the first sub-paragraph of Art.88(2).

As the Commission has rightly pointed out, the interpretation adopted in . . . . of this judgment, which makes it possible to avoid the same State aid being the subject of

[34] [1996] E.C.R. I-881.

contrary decisions taken successively by the Commission and the Council, contributes to legal certainty. It should be noted in particular that the definitive nature of an administrative decision which is acquired on the expiry of reasonable time-limits for bringing an action or by the exhaustion of remedies contributes to such certainty.

As for the argument of the Portuguese Government that the third sub-paragraph of Art.88(2) EC also authorises the Council to rule on aid which a Member State is "granting", whereas in accordance with Art.88(3) any "grant" of aid requires precisely that the Commission should have expressed a view on it first, so that the Council has the power to rule on aid which has already been the subject of a previous decision by the Commission, the Court finds that this argument arises from a contradiction in terms. It cannot concomitantly be argued that an aid which a Member State is "granting" within the meaning of the third sub-paragraph of Art.88(2) EC is an aid which must necessarily have been previously declared compatible with the common market by the Commission, pursuant to the provisions of Art.87 EC, and that the Council has the power subsequently to declare such an aid compatible with the common market in derogation from those provisions.

Secondly, the Court has to determine whether the fact that the Council does not have the power to rule on the compatibility with the common market of an aid in relation to which the Commission has already definitively ruled implies, as the latter argues, that the Council also lacks the power to rule on an aid measure whose aim is to allocate to beneficiaries of the illegal aid previously declared incompatible by a Commission decision an amount designed to compensate for the repayments which they are obliged to make pursuant to that decision.

It should be noted first in that respect, contrary to what the Council maintains, that it cannot be inferred from the case law of the Court of Justice that, in relation to such aid, the Community institutions retain full liberty to make such a ruling without being required to pay due regard to the previous decision of the Commission finding the aid originally granted to the persons concerned incompatible with the common market.

The Court has, on the contrary, held that when the Commission considers the compatibility of a measure of State aid with the common market, it must take all the relevant factors into account, including, where relevant, the circumstances already considered in a prior decision and the obligations which that previous decision may have imposed on a Member State. The Court deduced in particular that, where the Commission has not been informed of any new fact allowing it to assess whether the aid in question might have the benefit of a derogation under the Treaty, it is justified in basing its decision on the assessments it has already made in its previous decision and the failure to comply with the condition it has imposed thereby.

Similarly, the Court has held that a transitional system maintaining the effects of a State aid scheme not notified to the Commission and declared incompatible with Community law by a Commission decision-without, however, the Commission demanding repayment of the aid concerned-had to be interpreted as far as possible in such a way as to ensure its compatibility with that decision, namely in such a way that it does not authorise the granting of new State aid after the abrogation of the aid scheme censured by that Commission decision.

It has, moreover, consistently been held that the abolition, by means of recovery, of State aid which has been unlawfully granted is the logical consequence [of] its being found unlawful.[39]

The aim of obliging the State concerned to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation, and that objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored.

In those circumstances, to hold that a Member State is able to grant to beneficiaries of unlawful aid, which has previously been declared incompatible with the common market by a Commission decision, new aid in an amount equivalent to that of the unlawful aid, intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to that decision, would clearly amount to thwarting the effectiveness of decisions taken by the Commission under Arts 87 EC and 88 EC.

Finally, it should be noted that, . . . where a decision finding an aid incompatible with the common market has been adopted by the Commission, the Council cannot paralyse the effectiveness of that decision by itself declaring the aid compatible with the common market on the basis of the third sub-paragraph of Art.88(2) EC.

Nor, therefore, can the Council thwart the effectiveness of such a decision by declaring compatible with the common market, in accordance with that provision, an aid designed to compensate the beneficiaries of the unlawful aid declared incompatible with the common market for the repayments they are required to make pursuant to that decision.

In such circumstances, moreover, the aid granted in the second instance is so indissolubly linked to that previously found by the Commission to be incompatible with the common market that it appears largely artificial to claim to make a distinction between those aids for the purposes of applying Art.88(2) EC.

It follows from the whole of the above considerations that, on a proper interpretation of the third sub-paragraph of Art.88(2) EC, the Council cannot, on the basis of that provision, validly declare compatible with the common market an aid which allocates to the beneficiaries of an unlawful aid, which a Commission decision has previously declared incompatible with the common market, an amount designed to compensate for the repayments which they are required to make pursuant to that decision.

In this case, it is undisputed that the Portuguese Republic has not applied to the Council under the third sub-paragraph of Art.88(2) EC for a declaration that the aids granted by the Decree-Laws of 1994 and 1999 are compatible with the common market. It is also undisputed that those aids have been declared incompatible with the common market and that their recovery has been ordered by Decisions 2000/200 and 2001/86.

As for the contested decision, it is obvious from the very wording of its title, and from the wording of Art.1 thereof, that the aid which it sought to declare compatible with the common market was specifically designed to grant to the beneficiaries of the aids previously declared incompatible with that market, by Decisions 2000/200 and 2001/86, an amount intended to allow them to meet the repayments which they are required to make pursuant to those two decisions.

[T]he Council could not validly adopt such a decision.

It follows that the Commission's first plea in support of its action, arguing that the

[39] Belgium v Commission (Tubemeuse) (C-142/87): [1990] E.C.R. I-959; [1991] 3 C.M.L.R. 213, para.[66]; Italy v Commission (C-310/99): [2002] E.C.R. I-2289, para.[98].

Council lacked the competence to adopt the contested decision, is well founded, and that the latter must therefore be annulled.

The second, third, fourth and fifth pleas

Since the Commission's first plea has been accepted, and the contested decision must be annulled on that account, it is not necessary to examine the Commission's other pleas in support of its action. . . .

NOTES AND QUESTIONS

1. Advocate General Jacobs identifies four of the Commission's arguments as being "the most important"–the Commission's primary competence; limitation of the procedure governing the Council's power to situations where the Commission has not yet reached a decision; the risk of conflict between the supervision of the Commission by the EU court and by the Council; and, the loss of legal certainty. All of these considerations appear to relate only to the first of the Commission's five pleas, claiming that the Council did not have the power to adopt the contested decision. Neither the Advocate General nor the Court expresses a view on the remaining four pleas–misuse of powers and procedure; infringement of the Treaty and various general principles; manifest error; and, failure to state sufficient reasons for the contested decision. Why does the Court decline to rule on them?

2. Article 36 of the Treaty, which establishes the EU competition rules including those relating to member state aid, applies to the production of and trade in agricultural products only to the extent determined by the Council in legislation implementing the CAP pursuant to Article 37 of the Treaty. As the Advocate General points out, Article 21 of Council Regulation 2759/75, on the common organization of the market in pigmeat, generally applies the state aid provisions of the Treaty are to the production of and trade in pigs and pigmeat products. Recall the Commission's description of the criticism of the CAP to the effect that its provisions favor the agricultural sectors of certain (*i.e.*, richer, northern) member states over those of other (*i.e.*, poorer, southern) member states. Is the policy with respect to pigs and pigmeat products an example of this criticized tendency of the CAP? Should the Council consider amending its regulation in response?

3. Is the Council's contested action simply a form of adjustment assistance to ensure that Portuguese pig farmers are not wiped out by the Commission's two decisions? So long as Portugal complies prospectively with those decisions, is there any great harm to EU competition policy, or to the CAP, in helping the pig farmers survive temporarily?

4. In arguing that the Commission's plea should be upheld, the Advocate General invokes a principle of preemption in favor of the Commission's competence under Article 88(2). Can one EU institution really be preempted by another? Analogizing to the U.S. constitutional structure, would this mean that the Congress could be preempted by the President, so long as the President acted first? If so, under what circumstances?

5. What if the Council had ruled that the Portuguese aid to pig farmers was compatible with the common market *before* the Commission had even completed its investigation? What would happen next under Article 88(2)? Could the Commission still preempt the Council's decision?

6. How do the process and the underlying issues described in *Aid to Pig Farmers* differ from those in the U.S. delegation law cases, *Yoshida* and *Starkist, supra?* Note that the Council-Commission relation is only in part parallel to the U.S. Congress-Executive relation. For another example of similar issues, *see* Re the Draft Convention

on the Physical Protection of Nuclear Materials, Facilities and Transport (Opinion 1/78), [1979] 1 C.M.L.R, 131.

7. How would a case like *Aid to Pig Farmers* come out in the United States? For a general discussion, *see* Jackson, *The General Agreement on Tariffs arid Trade in United States Domestic Law*, 66 Mich. L. Rev. 249 (1967).

8. Why do you suppose the United States supported the creation of the Common Market? For an analysis of the economic effects of the EU on the United States, see L. KRAUSE, EUROPEAN ECONOMIC INTEGRATION AND THE UNITED STATES (1968); and H. Jacobsen, *Trade Between the European Community and the United States: The Diminishing Asymmetry*, in W. FELD (ed.), WESTERN EUROPE'S GLOBAL REACH: REGIONAL COOPERATION AND WORLDWIDE ASPIRATIONS (1979).

9. The CAP has generated a great deal of criticism by and controversy with EU trading partners. Is the CAP consistent with the GATT? Consider GATT Articles I, VII, XI, XXIII, XXIV and XXVIII. Are the export restrictions under the CAP consistent with the GATT? *See* GATT Article XVI and the SCM Agreement discussed in Chapter VI, *infra*. Note also that under the WTO, in the specific context of agricultural policy there is also the Agreement on Agriculture to consider, as is illustrated by *European Communities–Export Subsidies on Sugar*, WT/DS265/R, 2004 WL 2377976 (Oct. 15, 2004), excerpted in Chapter VI, *infra* at [redacted].

3. NAFTA

Despite the tension that exists between the regional and multilateral dimensions of international trade regulation, different trading arrangements have assimilated important features from each other. For example, NAFTA incorporates into its text the basic structure of GATT Article III.[1] Furthermore, NAFTA adopts the GATT dispute settlement system as an optional forum for settling NAFTA disputes.[2] Conversely, Uruguay Round negotiators drew upon NAFTA experience to handle a number of emerging issues. For example, the NAFTA service sector provisions offered the GATT/WTO system an important model for the GATS. The following excerpt presents an overview of the structure of NAFTA and some insights into the implementation of the agreement.

GENERAL [ACCOUNTABILITY] OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT–STRUCTURE AND STATUS OF IMPLEMENTING ORGANIZATIONS

GAO/GGD 95-10BR, 1994 WL 810195 (October 7, 1994)

On January 1, 1994, the North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico entered into effect. NAFTA, the most comprehensive free trade agreement ever negotiated, is expected to create the world's largest free trade zone when it is gradually implemented over the next decade. Since NAFTA

[1]NAFTA, art. 301, § 1
[2]*Id*. art. 2005, § 1.

was such a controversial treaty, the three countries agreed to adopt NAFTA-related accords in order to address concerns about environment, labor, and border area development. A series of secretariats, commissions, working groups, and other bodies are now being created to execute the intent of these NAFTA-related agreements. . . .

NAFTA and its related agreements created a number of bodies in three general categories: those created by NAFTA itself; those created by trilateral agreements between the United States, Canada, and Mexico; and those created by a bilateral agreement between the United States and Mexico. These agreements each established an organizational structure, headed by a commission or board of directors made up of government ministers from each country, to carry out the terms of the agreements. These organizations are the

- Free Trade Commission (FTC), designated by NAFTA to supervise the implementation of the agreement, which has no permanent location or staff and rotates meeting places among the three countries;
- Commission for Environmental Cooperation (CEC), a trilateral body created by the North American Agreement on Environmental Cooperation and located in Montreal;
- Commission for Labor Cooperation (CLC), a trilateral body created by the North American Agreement on Labor Cooperation and to be located in Dallas;
- board of directors of the Border Environment Cooperation Commission (BECC), set up under a bilateral agreement between the United States and Mexico and to be located in Ciudad Juarez, Mexico; and
- board of the North American Development Bank (NADBank), also set up under a bilateral agreement between the United States and Mexico and to be located in San Antonio, TX.

Each of the commissions and boards oversees its own organization composed of bodies variously called committees or working groups to address issues related to their areas of responsibility. . . .

The responsibility for establishing and managing the various NAFTA bodies is generally being shared equally by the three partners. This shared partnership extends to leadership, location, and staffing of the bodies. Similarly, the budgets for each of the related bodies will be shared equally by the three countries. . . .

The potential exists to expand the number of NAFTA organizations. FTC has the authority under NAFTA to create additional committees and working groups if it deems necessary. Four new working groups have been set up by the trade ministers of the three governments in addition to the 20 groups specifically established by NAFTA. However, USTR officials state that all the committees and working groups under FTC will only meet on an as-needed basis and will require minimal resources. CEC, CLC, and the board Of NADBank also have the authority, based on their charters, to create new committees and working groups. . . .

The three countries' trade ministers have also proposed a body that would require new staff and a permanent site: the NAFTA Coordinating Secretariat (NCS). The trade ministers, after NAFTA entered into effect, agreed in principle to form a coordinating secretariat, to be located in Mexico City. . . .

NAFTA Free Trade

The Free Trade Commission serves as the governing body of NAFTA. According to NAFTA, FTC members must be cabinet-level representatives of the three countries. They currently are the U.S. Trade Representative, Canada's Minister of Trade, and Mexico's Secretary of Trade and Industrial Development. FTC's responsibilities include

- supervising the implementation of NAFTA,
- resolving disputes that may arise regarding NAFTA's interpretation or application,
- supervising the work of the NAFTA Secretariat and NAFTA committees and working groups, and
- establishing additional committees and working groups as needed. . . .

NAFTA's Secretariat, comprised of three National Sections, is primarily responsible for supporting NAFTA's dispute resolution processes, including providing administrative assistance for dispute resolution panels formed under chapters 19 and 20 of NAFTA. National Sections originated in the U.S.-Canada Free Trade Agreement to administer binational procedures for panel reviews. In NAFTA, dispute resolution provisions were extended to Mexico as well, and a Section for Mexico was added. ...

A number of committees and working groups have been formed to facilitate NAFTA's implementation. Most were specified in various chapters of NAFTA, while several were created by FTC at its first official meeting in January 1994. The purpose of these groups is to provide a channel for discussion of issues of ongoing concern to the NAFTA countries; the groups are generally comprised of government experts. For example, USTR officials stated that several of the groups were created to provide a standing forum for issues that were unresolved under NAFTA. The groups are expected to meet at least annually but are generally likely to get together when one or more of the countries requests a meeting. . . .

The [CEC] is comprised of (1) a three-member Council of cabinet-level or equivalent representatives from each country: the U.S. Environmental Protection Agency Administrator, Mexico's Secretary of Social Development, and Canada's Minister of Environment; (2) a Secretariat led by an Executive Director who was selected by the Council; and (3) a Joint Public Advisory Committee, consisting of 15 members, 5 appointed from each country.

The Council, as CEC'S governing body, oversees all CEC operations and is supposed to meet at least once every year. Its first meeting was held March 23, 1994. The Secretariat is to provide technical, administrative, and operational support both to the Council and to committees and groups established by the Council. The Joint Public Advisory Committee is expected to convene at least once a year at the time of the Council's regular session, or at its members' discretion. The Joint Public Advisory Committee may advise the Council or provide technical information to the Secretariat. Each party may also convene a national and a governmental committee to provide advice on NAFTA's implementation. . . .

Development Bank

NADBank has two components. It is managed by a board of the bank, which oversees the operation of NADBank and approves its budget and all financial operations. Its members are the U.S. Secretaries of the Treasury and State and the Administrator of EPA; and Mexico's Secretaries of Finance, Trade and industrial Development, and Social Development. The board, which plans to meet at least annually, held its first meeting in San Antonio on June 17, 1994. NADBank and its support staff are to be located in San Antonio.

NADBank has a second component, called the Community Adjustment and Investment Program (CAIP). It will utilize up to 10 percent of NADBank capital to provide services in both countries, which need not be in the border region. The United States plans to set up an office for this program, called the "CAIP window," in Los Angeles....

NOTES AND QUESTIONS

1. Recall the previous discussion of the structure of the WTO, *supra* at [redacted]. How does the NAFTA structure compare to that of the WTO? To the extent that they differ, what would explain this? WTO has well over 150 members; NAFTA has three. Why is the NAFTA structure as complex as it is?

2. Congressional approval of the implementation of the NAFTA was a very controversial proposition. Thereafter, the scholarly literature was replete with questions about the constitutionality of NAFTA[1]–one issue, among others, was whether NAFTA should have been ratified by the Senate as a *treaty*, rather than being effectuated (as it was) by congressional enactment of legislation implementing NAFTA as an executive agreement. Several unions and a nonprofit group brought action challenging the constitutionality of NAFTA and the NAFTA Implementation Act. The District Court held that NAFTA had been properly adopted pursuant to the Commerce Clause. *Made in the USA Foundation v. U.S.*, 56 F.Supp.2d 1226 (N.D.Ala. 1999). The plaintiffs appealed. Excerpts from the decision on appeal follow. Does the Circuit Court's decision resolve anything about the propriety of the use of executive agreements in international trade?

MADE IN THE USA FOUNDATION v. UNITED STATES

242 F.3d 1300 (11th Cir. 2001), *cert. denied sub nom. United Steelworkers of America, AFL-CIO, CLC v. U.S.*, 122 S.Ct. 613

FLETCHER, Circuit Judge:

This case presents complex issues of first impression in this circuit in the realm of constitutional interpretation–namely, whether certain kinds of international commercial agreements are "treaties," as that term is employed in Article II, Section 2 of the United States Constitution; and if so, whether the Treaty Clause represents the sole means of enacting such agreements into law. The appellants, comprised of national and local labor organizations as well as a nonprofit group that promotes the purchase of American-made products, urge that the North American Free Trade Agreement (commonly referred to as "NAFTA") be declared unconstitutionally void, as it was never approved by a two-thirds supermajority of the United States Senate pursuant to the constitutionally-mandated procedures governing treaty ratification. The Government, on the other hand, invokes the political question doctrine and also claims that this court lacks jurisdiction due to the appellants' lack of standing. In addition, the Government argues on the merits that NAFTA's enactment did not require Senate ratification as a "treaty." The parties' respective arguments thus require us to engage constitutional issues of unusual breadth, complexity and import. . . .

We agree with the district court that the appellants have standing in this matter, and affirm the principle, as enunciated by the U.S. Supreme Court, that certain international

[1] *See, e.g.*, Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L.Rev. 799 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously; Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L.Rev. 1221 (1995); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L.Rev. 1075, 1157 (2000).

agreements may well require Senate ratification as treaties through the constitutionally-mandated procedures of Art. II, § 2. *See, e.g., Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-43 (1872); *Missouri v. Holland*, 252 U.S. 416, 433 (1920). We nonetheless decline to reach the merits of this particular case, finding that with respect to international commercial agreements such as NAFTA, the question of just what constitutes a "treaty" requiring Senate ratification presents a nonjusticiable political question. Accordingly, we dismiss the appeal and remand with instructions to dismiss the action and vacate the decision of the district court. *See Goldwater v. Carter*, 444 U.S. 996, 1005 (1979); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

I. Introduction and Background

The United States, Mexico and Canada entered negotiations in 1990 to create a "free trade zone" on the North American continent through the phased elimination or reduction of both tariff and non-tariff barriers to trade. Following extensive negotiations, the North American Free Trade Agreement was completed and signed by the leaders of the three countries on December 17, 1992. Through the passage of the NAFTA Implementation Act ("Implementation Act") on December 8, 1993,[2] Congress approved NAFTA and provided for a series of domestic laws to effectuate and enforce NAFTA's provisions.[3]

Neither NAFTA nor the Implementation Act were subjected to the ratification procedures outlined in the Treaty Clause.[4] Summoning primarily historical arguments, the appellants contend that this failure to go through the Art. II, § 2 procedures contravenes the original understanding of the Framers and therefore renders NAFTA and the Implementation Act unconstitutional. In support of their argument, the appellants marshal a considerable array of historical evidence. Relying heavily on the research of the late Arthur Bestor, a Professor of History at the University of Washington, the appellants claim that records from the Constitutional Convention evidence a careful and conscious decision on the part of the Framers to require a two-thirds Senate majority for approving treaties, with the deliberate intention of preventing national majorities from binding minority interests under the Supremacy Clause to international accords against their wishes.[5] Furthermore, the appellants point to several early examples in our Nation's history (such as the Jay Treaty debate)[6] when the United States entered into major

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[2]Pub.L. No. 103-182, 107 Stat.2057 (1993), codified at 19 U.S.C. §§ 3301-3473. The Implementation Act was passed by a vote of 234 to 200 in the House, and 61 to 38 in the Senate. See 139 Cong. Rec. H10,048 (daily ed. Nov. 17, 1993); 139 Cong. Rec. S16,712-13 (daily ed. Nov. 20, 1993).

[3]*See* 19 U.S.C. §§ 3311 *et seq.*

[4]Instead, President Clinton conducted the negotiations leading up to NAFTA under the so-called "fast-track" authority delegated to him by Congress in the Omnibus Trade and Competitiveness Act of 1988, codified at 19 U.S.C. §§ 2902-03. Congress then approved NAFTA without amendment and passed implementing legislation pursuant to these same provisions, as well as those of the Trade Act of 1974, codified at 19 U.S.C. §§ 2191-94.

[5]The Government contests this historical account, noting that not all commentators agree with Bestor's conclusions regarding the adoption of the Treaty Clause. Perhaps most prominently, Professors Myres McDougal and Asher Lans, two of the early advocates of the congressional-executive agreement as an alternative to the Treaty Clause, contend that "three salient facts emerge" from what we know of the Framers' discussions regarding the constitutional framework for the governance of foreign affairs: (1) the Framers paid relatively little attention to the matter; (2) as a general rule, "the delegates ... sought to remove the determination of foreign policy at least in the immediate future as far as possible from popular control"; and (3) the language used by the Framers "clearly permits utilization of other methods than that provided in the treaty clause for securing validation of international agreements ...." Myres S. McDougal and Asher Lans, II Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 Yale L.J. 534, 536-37 (1945) (hereinafter "McDougal and Lans II").

[6]See 5 Annals of Cong. 760-62 (1796) (reprinting President Washington's message denying that the House had any role in deciding whether to implement treaties approved by the Senate and ratified by the President). Under James Madison's leadership, the House responded by adopting a resolution disclaiming "any agency in making Treaties," but also insisting that "when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must

commercial agreements with other countries, each of which was ratified as a treaty and approved by a two-thirds supermajority of the Senate.

Based on the near-contemporaneous writings of Emmerich de Vattel,[8] the appellants contend that the key distinction in the minds of the Framers in determining whether a given agreement required ratification as a treaty turned on the relative importance of the accord; significant agreements were to be deemed treaties, while less important ones were to be considered compacts or executive agreements.[9] Thus, according to the appellants, an accord such as NAFTA, with its wide-ranging scope and impact–including the harmonization of financial, commercial, labor, and environmental laws and regulations and the establishment of supranational adjudicatory bodies to settle disputes between the signatories–surely falls into the class of agreements which require ratification as a treaty. . . .

Remarkably, although perhaps not altogether surprisingly, the United States Supreme Court has never in our nation's history seen fit to address the question of what exactly constitutes and distinguishes "treaties," as that term is used in Art. II, § 2, from "alliances," "confederations," "compacts," or "agreements," as those terms are employed in Art. I, § 10.[10] Accordingly, the Court has never decided what sorts of international agreements, if any, might require Senate ratification pursuant to the procedures outlined in Art. II, § 2. Indeed, as will be discussed below, the only extended pronouncement of the Court's Treaty Clause jurisprudence can be found in *Goldwater v. Carter*–a case in which the Court effectively refused to require President Carter to submit the abrogation of a mutual defense treaty with Taiwan for Senate ratification, but failed to garner a majority of the Court behind a single rationale.[11] In light of the Constitution's silence on the meaning of the word "treaty," as well as the relative dearth of Supreme Court

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depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress." Id. at 771-72. Implementing legislation for the Jay Treaty eventually passed in the House by a vote of 57 to 35. Id. at 782-83.

[8]The Supreme Court discussed Vattel's influence in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), with respect to the constitutional definitions of the terms "treaty," "alliance," "compact," and "agreement":

> Some commentators have theorized that the Framers understood those terms in relation to the precisely defined categories, fashionable in the contemporary literature of international law, of accords between sovereigns.... The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel.... Vattel differentiated between "treaties," which were made either for perpetuity or for a considerable period, and "agreements, conventions, and pactions," which "are perfected in their execution once for all." E. Vattel, Law of Nations 192 (J. Chitty ed. 1883). Unlike a "treaty" or "alliance," an "agreement" or "paction" was perfected upon execution: "[T]hose compacts, which are accomplished once for all, and not by successive acts,–are no sooner executed then they are completed and perfected. If they are valid, they have in their own nature a perpetual and irrevocable effect ...." *Id*. at 208. This distinction between supposedly ongoing accords, such as military alliances, and instantaneously executed, though perpetually effective agreements, such as boundary settlements, may have informed the drafting in Art. I, § 10.

434 U.S. at 462 n.12 (citations omitted).

[9]The Government disputes this characterization, arguing that the distinctions made by Vattel were based on whether or not the agreement was to have long-term effects, as well as the degree of permanence that the agreement carried with it. The Government also notes that some scholars analyzing Vattel's work have concluded that the author considered the terms "convention," "agreement," and "arrangement" to represent forms of the general category called "treaties." *See, e.g.*, David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L.Rev. 1791, 1910 n.361 (1998).

[10]Significantly, the Supreme Court has acknowledged that a determination of what the Framers actually meant when they used the word "treaty" is difficult in light of the fact that "[w]hatever distinct meanings the Framers attributed to the terms [treaty, alliance, confederation, agreement and compact in the Constitution]", "those meanings were soon lost." *United States Steel*, 434 U.S. at 463. *See also* Laurence H. Tribe, *Taking Text and Structure Seriously; Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L.Rev. 1221 (1995) (hereinafter "Tribe") ("What the Founders saw as the precise definitions of treaties, alliances, confederations, agreements, and compacts is largely lost to us now. Consequently, line-drawing in this area is especially complex.") (footnote omitted).

[11]We note in this regard that although the Cases-and-Controversies Clause of Art. III, § 2, states that "the judicial power shall extend to all cases . . . arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ," this passage does not speak to whether the court's jurisdiction extends to challenges to the treaty-making procedures employed by Congress and the President. Nor does this passage preclude the Government's argument that the appellants lack standing or that this case presents a nonjusticiable political question.

jurisprudence in this area, the question of NAFTA's constitutionality has generated significant debate amongst prominent legal scholars. . . .

II Standing

[As to the appellants' standing to challenge the constitutionality of NAFTA and the Implementation Act, the court concluded that they had sufficiently alleged injuries that were fairly traceable to NAFTA, and that there was a substantial likelihood that their injuries would be redressed by a favorable decision. Hence, the court agreed with the district court that while "[s]ome previously accrued injuries may not be redressable ... that is not to say that future injuries may not be avoided," and that this was enough to establish that "it is substantially likely that at least some of the institutional plaintiffs' alleged injuries will be redressed." . . . The court therefore turned to the issue of whether the question of constitutionality of the agreement and the legislation was justiciable.]

III. Political Question

. . . According to the Government, because the text of the Constitution fails to define what is meant by a "treaty" or to dictate the proper procedure for approving international commercial agreements, and because the Constitution has clearly granted the political branches an enormous amount of authority in the areas of foreign affairs and commerce, the choice of what procedure to use for a given agreement is committed to the discretion and expertise of the Legislative and Executive Branches by virtue of the political question doctrine. We substantially agree with the Government's contentions that this case does not present the type of question that can be properly addressed by the judiciary, given our belief that Supreme Court precedent and historical practice confirm the wisdom of maintaining the practice of judicial nonintervention into such matters. Drawing heavily from (then Associate) Justice Rehnquist's plurality opinion in *Goldwater v. Carter*, 444 U.S. 996 (1979)–as noted earlier, the only extended exposition of the Supreme Court's Treaty Clause jurisprudence–we conclude that this case presents a nonjusticiable political question.

The political question doctrine emerges out of Article III's case or controversy requirement and has its roots in separation of powers concerns. *Baker v. Carr*, 369 U.S. 186, 210 (1962). In *Baker*, the Supreme Court enumerated six criteria that courts should consider in determining whether a case is nonjusticiable:

> Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. Significantly, any one of the above-listed characteristics may be sufficient to preclude judicial review. *Id.*

In *Goldwater*, Justice Powell's concurrence suggested that the *Baker* analysis could be condensed into a three-question inquiry:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government?
>
> (ii) Would resolution of the question demand that a court move beyond areas of judicial

expertise?

(iii) Do prudential considerations counsel against judicial intervention?

444 U.S. at 998. Inasmuch as it incorporates the *Baker* criteria without abridging them, we find Justice Powell's analytical framework to be useful and proceed to apply each of these inquiries to the present case.

A. Constitutional Textual Commitment to Coordinate Branches

The term "treaties" appears four times in the text of the Constitution. The Treaty Clause, U.S. Const. Art. II, § 2, cl. 2, states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The Compacts Clause, U.S. Const. Art. I, § 10, cl. 3, delineates the power of the states to deal with foreign powers, completely prohibiting the states from making "treaties" with foreign nations, but permitting states to enter into "agreements or compacts" with foreign powers with the consent of Congress. The Cases-and-Controversies Clause, U.S. Const. Art. III, § 2, states, in pertinent part, that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made ...." And finally, the Supremacy Clause, U.S. Const. Art. Art. VI, cl. 2, states that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." However,as noted earlier, the text of the Constitution does not (1) define the term "treaties"; (2) delineate the difference between treaties and other types of international agreements; (3) mandate that treaties are the exclusive means by which the federal government may make agreements with foreign powers; or (4) state that the Treaty Clause procedure is the only manner in which a treaty may be enacted. *See also Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (acknowledging that the Treaty Clause is worded in "general terms, without any description of the objects intended to be embraced by it").

The Constitution confers a vast amount of power upon the political branches of the federal government in the area of foreign policy–particularly foreign commerce. The breadth of the President's inherent powers in foreign affairs arises from his role as Chief Executive, U.S. Const. Art. II, § 1, cl. 1, and as Commander in Chief, U.S. Const. Art. III, § 2, cl. 1. In addition to his power to "make Treaties" with the advice and consent of two-thirds of the Senators present, the President's authority in foreign affairs is further bolstered by his power to "appoint Ambassadors . . . and Consuls," U.S. Const. Art. II, § 2, cl. 2, and "to receive Ambassadors and other public Ministers," U.S. Const. Art. II, § 3. Meanwhile, Congress's enumerated powers in the realm of external affairs include its power "to declare war," U.S. Const., Art. I, § 8, cl. 11; "to raise and support armies," U.S. Const., Art. I, § 8, cl. 12; "to provide and maintain a navy," U.S. Const., Art. I, § 8, cl. 13; and the Senate's advice-and-consent role in the treaty-making process. Most significantly, the Constitution also confers on the entire Congress (and not just the Senate) authority "to regulate commerce with foreign nations," U.S. Const. Art. I, § 8, cl. 3–an express textual commitment that is directly relevant to international commercial agreements such as NAFTA.[28]

The Supreme Court has repeatedly recognized that the President is the nation's

[28]Other relevant enumerations of power include Congress's authority to levy and collect taxes, duties, imposts and excises, U.S. Const. Art. I, § 8, cl. 1.

"guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948); *see also Department of Navy v.. Egan*, 484 U.S. 518, 529 (1988) ("recogniz[ing] 'the generally accepted view that foreign policy [i]s the province and responsibility of the Executive'" (citation omitted)). With respect to NAFTA, it is especially important to note that the Supreme Court has long since recognized the power of the political branches to conclude international "agreements that do not constitute treaties in the constitutional sense." [*United States v.*] *Curtiss-Wright* [*Export Corp.*, 299 U.S. 304 (1936)] at 318.

These cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary. As the Supreme Court stated in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative–'the political'–departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *See also Crosby v. Nat'l Foreign Trade Council*, [*supra* at [redacted]] (acknowledging that "the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court' ") (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)). Within this circuit, we have declared that "[m]atters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir.1997) (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

To be sure, the *Baker* Court deemed it "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Furthermore, the Court has recognized that "foreign commitments" cannot relieve the government of the obligation to "operate within the bounds laid down by the Constitution," and that "the prohibitions of the Constitution . . . cannot be nullified by the Executive or by the Executive and Senate combined." *Reid v. Covert*, 354 U.S. 1, 14, 17 (1957). We therefore have little doubt that courts have the authority–indeed, the duty–to invalidate international agreements which violate the express terms of the Constitution. Nonetheless, with respect to commercial agreements, we find that the Constitution's clear assignment of authority to the political branches of the Government over our nation's foreign affairs and commerce counsels against an intrusive role for this court in overseeing the actions of the President and Congress in this matter.

The appellants concede, as they must, that the Constitution affords the political branches substantial authority over foreign affairs and commerce. The appellants also concede that the Supreme Court has recognized the constitutional validity of the longstanding practice of enacting international agreements which do not amount to full-fledged treaties. . . . Nonetheless, the appellants argue that what is at issue here is not the authority of a branch of government over a certain subject matter, but whether that branch "has chosen a constitutionally permissible means of implementing that power." *I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983). This contention leads us to the second *Goldwater*/*Baker* inquiry: whether the resolution of this issue would require this court to move beyond recognized areas of judicial expertise.

B. Judicial Expertise

Under *Baker*, the second criterion by which we evaluate the justiciability of this case is whether or not there exist judicially manageable standards for determining when a given international commercial agreement must be approved pursuant to the Art. II, § 2 procedures. *Baker*, 369 U.S. at 217. The Government contends that such a decision would require this court to consider areas beyond its judicial expertise. We agree.

As noted earlier, in *Goldwater v. Carter*, members of Congress challenged the President's unilateral termination of a mutual defense treaty with Taiwan (formerly known as the Republic of China). As in the present case, the crux of the challenge centered on the allegedly unconstitutional procedures used to abrogate the treaty, and not on the treaty's substantive provisions. A plurality of the Court determined that the case was nonjusticiable because the text of the Constitution failed to provide any guidance on the issue; joined by three other members of the Court, Justice Rehnquist noted that "while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to the body's participation in the abrogation of a treaty." *Id*. at 1003.[31] Justice Rehnquist thus concluded that "in light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties . . . the instant case . . . must surely be controlled by political standards" rather than by judicial standards. *Id*. (internal quotations omitted).

While the nature of the issue presented in *Goldwater* differs somewhat from the present case, we nonetheless find the disposition in *Goldwater* instructive, if not controlling, for our purposes, in that the Supreme Court declined to act because the constitutional provision at issue does not provide an identifiable textual limit on the authority granted by the Constitution.[32] Indeed, just as the Treaty Clause fails to outline the Senate's role in the abrogation of treaties, we find that the Treaty Clause also fails to outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial agreements.

Significantly, the appellants themselves fail to offer, either in their briefs or at argument, a workable definition of what constitutes a "treaty." Indeed, the appellants decline to supply any analytical framework whatsoever by which courts can distinguish international agreements which require Senate ratification from those that do not. Rather, the appellants offer up the nebulous argument that "major and significant" agreements require Art. II, § 2 ratification, without defining how courts should go about making such distinctions. According to the appellants, it is neither possible nor necessary to define the meaning of a "treaty" to decide this case, so long as we find that if any commercial agreement qualifies as a treaty requiring Senate ratification, NAFTA surely does. We disagree, given that under *Baker* and *Goldwater*, the ascertainment of judicially manageable standards is essential before we may rule that this court even has jurisdiction to reach the merits of the case.

The appellants contend that this case does not push the court into areas beyond the limits of judicial expertise, inasmuch as it does not involve a ruling on the policy merits of NAFTA, but only a determination as to the constitutionality of the procedures employed in its enactment. . . . Thus, in the appellants' view, the lack of a constitu-

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[31]Justices Powell and Brennan expressly disagreed with the conclusion that the case involved a nonjusticiable political question. *Goldwater*, 444 U.S. at 998. Justices Blackmun and White would have set the case for oral argument and plenary consideration, deeming it "indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness." *Goldwater*, 444 U.S. at 1006. The ninth justice, Justice Marshall, simply concurred in the result of the case, leaving no indication as to his position on the political question issue.

[32]*See also Nixon v. United States*, 506 U.S. 224 (1993) (holding that because the Constitution does not place any limits on the Legislative Branch's discretion in dictating the procedures surrounding impeachment proceedings, a former federal judge's claim that the rules and procedures used by the Senate in trying impeachments were improper was not justiciable).

tionally-provided definition for the term "treaty" does not deprive this court of judicially manageable standards by which to rule on the merits of this case. . . .

. . . [W]e believe that in requesting, as the appellants do, that this court adjudicate the "significance" of an international commercial agreement as the critical determinant of whether or not it constitutes a treaty requiring Senate ratification, we would be unavoidably thrust into making policy judgments of the sort unsuited for the judicial branch.

C. Prudential Considerations

Finally, under the *Goldwater*/*Baker* criteria, we find that a number of prudential factors are relevant to the resolution of this case, including: (1) the necessity of federal uniformity; (2) the potential effect of an adverse judicial decision on the nation's economy and foreign relations; and (3) the respect courts should pay to coordinate branches of the federal government. *See Goldwater*, 444 U.S. at 998 (Powell, J., concurring); *Baker*, 369 U.S. at 217.

As the Supreme Court stated in *Coleman v. Miller*, 307 U.S. 433, 454-55 (1930), "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." In *Baker*, the Court recognized the special importance of our nation speaking with one voice in the field of foreign affairs. *Baker*, 369 U.S. at 211. The Court has further observed that "federal uniformity is essential" in the area of foreign commerce, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979), and that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." *Michelin Tire Corp. v. Commissioner*, 423 U.S. 276, 285 (1976).

A judicial declaration invalidating NAFTA at this stage would clearly risk "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. Although the appellants argue that these considerations are irrelevant to an assessment of the constitutionality of the treaty-making procedures, we believe in this case that a challenge to the procedures used to enact NAFTA is inextricably bound to its substantive provisions, inasmuch as a judicial declaration invalidating NAFTA would be aimed at forcing the withdrawal of U.S. participation in the agreement, with serious repercussions for our nation's external relations with Mexico and Canada.

A judicial order contradicting the actions of the President and Congress could also have a profoundly negative effect on this nation's economy and its ability to deal with other foreign powers. Significantly, granting the appellants' requested relief in this case would not only affect the validity of NAFTA, but would potentially undermine every other major international commercial agreement made over the past half-century. ... In reporting to Congress on the effects of NAFTA in 1997, the President stated that "[c]ooperation between the Administration and the Congress on a bipartisan basis has been critical in our efforts to reduce the deficit, to conclude trade agreements that level the global playing field for America, to secure peace and prosperity along America's borders, and to help prepare all Americans to benefit from expanded economic opportunities." President Clinton, Study on the Operation and Effect of the North American Free Trade Agreement (1997). Furthermore, myriad individual decisions and governmental measures which have been carried out in reliance on NAFTA; since it took effect on January 1, 1994, the governments, private businesses and citizens of the United States, Mexico and Canada have conducted their affairs in reliance on the lowered tariffs and reduced trade and investment restrictions enshrined in the new regime. While perhaps not individually arising to the level of "an unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 U.S. at 217, such considerations further militate in favor of judicial restraint, given that a decision declaring NAFTA unconstitutional would be likely to have a destabilizing effect on governmental relations and economic activity across the North American continent.

Finally, a review by this court of the process by which the President and Congress enter into international agreements would run the risk of intruding upon the respect due coordinate branches of government. As Justice Powell concluded in his concurrence in *Goldwater*, "Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority." *Goldwater*, 444 U.S. at 996 (Powell, J., concurring). Similarly, Justice Rehnquist's concurrence admonished that "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach an impasse." *Id*. at 1005 n. 1. Since no such impasse has been reached with respect to NAFTA, we believe this requires greater deference on the part of the Judiciary to the decisions of coordinate branches of government.[34] In this regard, we note that no member of the Senate itself has asserted that body's sole prerogative to ratify NAFTA (or, for that matter, other international commercial agreements) by a two-thirds supermajority. In light of the Senate's apparent acquiescence in the procedures used to approve NAFTA, we believe this further counsels against judicial intervention in the present case.

QUESTIONS

1. If appellants have standing to challenge the constitutionality of NAFTA and the Implementation Act–because they "sufficiently alleged injuries that were fairly traceable to NAFTA, and . . . there was a substantial likelihood that their injuries would be re-dressed by a favorable decision"–how is it that the question of whether they have suffered a constitutional violation is nonjusticiable?

2. If the constitutionality of NAFTA–and, presumably, any other trade agreement–*is* nonjusticiable, then what effective protection is there against the implementation of a trade agreement that is truly wrong-headed and likely to have serious adverse effects on certain sectors of the U.S. economy?

3. For another constitutional challenge to the NAFTA, see *American Coalition for Competitive Trade v. Clinton*, 128 F.3d 761 (D.C. Cir. 1997) (rejecting challenge to NAFTA arguing that designation of binational dispute panels violated Appointments Clause of Constitution). Writing in 2001, one commentator noted:

> no constitutional challenge of an international regime has prevailed [in U.S. courts]. But that does not mean that such challenges should not be taken seriously in the future. We would, for example, have no qualms in ruling that a provision of a treaty violated a provision of the first eight amendments of the Bill of Rights, and the Supreme Court has indicated that it would rule to strike down such an international arrangement as unconstitutional [citing *Reid v. Covert*, 354 U.S. 1 (1957)].

[34] Given that three other Justices joined Justice Rehnquist's concurring opinion, it is arguable that when added to Justice Powell's ripeness rationale, a majority of the *Goldwater* Court agreed with the proposition that the case was nonjusticiable absent an impasse between the political branches.

David J. Bederman, *Globalization, International Law and United States Foreign Policy*, 50 Emory L.J. 717, 731-732 (2001) (footnotes omitted).

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