

ARTICLES

INSULATING DOMESTIC POLICY THROUGH INTERNATIONAL LEGAL MINIMALISM: A RE-CHARACTERIZATION OF THE FOREIGN AFFAIRS TRADE DOCTRINE

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TABLE OF CONTENTS

1. INTRODUCTION.....	2
2. THE FOREIGN AFFAIRS TRADE DOCTRINE.....	15
3. THE STEEL INDUSTRY AND ANTI-DUMPING RULES: SOME HISTORY AND CONTEXT THAT HAS SHAPED U.S. AND GATT/WTO ANTI-DUMPING LAW.....	48
4. INTERNATIONAL LEGAL MINIMALISM IN ACTION: AN INCISIVE ANALYSIS OF THE <i>HOT-ROLLED STEEL PRODUCTS</i> CASE	69
5. CONCLUSION.....	103

1. INTRODUCTION

The use of law in international institutions is witnessing a recent revival.¹ This Article contributes to the exploration of this revival by closely and analytically examining the foreign affairs trade doctrine in the context of the domestic incorporation of international anti-dumping rules. The primary finding concludes that the domestic incorporation of international anti-dumping rules is not driven by a desire to establish a tight-fit system that comports domestic anti-dumping law to match the obligations of the United States (or "U.S.") under international anti-dumping rules; but that rather, domestic incorporation of international anti-dumping rules is best described as constituting international legal minimalism.

This international legal minimalism is characterized by the following elements. First, there is decreased attention to matching domestic implementing legislation to formally reflect international rules in a rigorously formal manner. Second, the attention given to policy considerations counterbalances the attention given to the formal clarity of rules. Third, there is some ambivalence regarding the normative authority of international law in the sense that the U.S. foreign trade doctrine is very accommodating of relative degrees of bindingness as opposed to a formal approach of characterizing U.S. obligations under international anti-dumping rules as strictly categorical. Fourth, for these reasons, adjudications in the World Trade Organization ("WTO") dispute settlement body ("DSB") are often unpredictable. Ultimately the implementation of the DSB recommendations is not entirely driven by compliance to the extent that it provides room for negotiation, compromise and accommodation arising from implementation difficulties within a WTO member's legal system.

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¹ Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 388 (2000).

This account of the foreign trade power differs from a predominant discourse that analyzes U.S. foreign trade policy particularly in the anti-dumping area along two dominant axes: the first theory proposes that U.S. anti-dumping law is simply a good case of U.S. protectionism;² while the second theory contends that the international anti-dumping rules of the General Agreement on Tariffs and Trade (“GATT”) and the WTO are criticized as being invasive of, and therefore leading to, the loss of U.S. sovereignty to a supranational organization inconsistently with domestic constitutional requirements. By contrast, in the alternative or *new* account traced in detail and at length in this Article, it is far more accurate to examine the incorporation of rules of international anti-dumping law into U.S. law as a case of international legal minimalism. International legal minimalism is facilitated by the interlocking domestic and international anti-dumping legal regimes as follows.

On the domestic side are U.S. constitutional and legal rules. The various distinctive features of this regime are a significant mediating backdrop against which U.S. incorporation of international trade norms occurs.³ Specifically, this legal framework incorporates international trade norms into U.S. law *only* to the extent that international trade norms are consistent with U.S. policy considerations. The foreign trade power involves a

² GARY C. HUFBAUER, ANALYZING THE EFFECTS OF U.S. TRADE POLICY INSTRUMENTS 6 (1981). See also *infra* Sections 3.1-3.2.

³ For example, Article II, Section 2, Clause 2 of the U.S. Constitution (the “Constitution”) presupposes legislative authority before a rule of international law can alter domestic legislation. See U.S. CONST. art. I, § 2, cl. 2. As Justice Holmes opined in *In re Western Maid*,

In deciding this question, we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

In re Western Maid, 257 U.S. 419, 432 (1922) (emphasis added). The involvement of the U.S. Congress (“Congress”) in treaty-authorization in turn injects domestic policy considerations into the Executive’s role of negotiating treaties. David M. Golove defines this as the nationalist conception of the treaty power. See generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); *infra* Section 2.

balance between competing policy goals mandated by the U.S. Congress ("Congress"), on the one hand, as against those embodied in international legal trading norms embraced by the U.S., on the other. Hence, the commitment to a global free trade regime⁴ is often in tension with the imperative to ensure the continued viability of strategic U.S. industries and domestic labor in the face of foreign competition.⁵ In the debate running up to the

⁴ The first goal has been a primary objective of the General Agreement on Tariffs and Trade ("GATT")/World Trade Organization ("WTO") regime to which the United States (or "U.S.") has remained an integral member. The second has been a primary objective of the Congress particularly in the period after the formation of GATT. While opening markets around the world has been achieved through lowering tariffs particularly in the first several decades of GATT, the imperative to ensure the continued viability of strategic U.S. industries such as steel has been achieved through both domestic trade remedy laws such as countervailing and anti-dumping duty laws. This tension has spawned other axes of conflict regarding the sharing of authority between congress and the executive branch (see *infra* Section 3.3) as well as between perspectives based on fairness versus those based on efficiency (see *infra* Sections 3.1 and 3.2). The high watermark of the efficiency perspective in trade remedy laws is best exemplified in the Supreme Court decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589-95 (1986) (quoting several antitrust articles authored by Frank H. Easterbrook and Robert H. Bork, scholars who are leading examples of the efficiency perspective of the Chicago School of Law and Economics). See generally Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 26-27 (1984); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 145 (1978).

⁵ As Robert Kuttner notes:

Americans are not sure how much the state should interfere with the private economy domestically, but the confusion about the appropriate roles for the state and the market is most muddled in thinking about the desirable norms for the international trading system The confusion is worst in the United States, because the United States, as guarantor of the global trading system and purveyor of the ideal of liberal trade, is unsure how to reconcile those goals with its own national interest as an economy.

ROBERT KUTTNER, *THE END OF LAISSEZ-FAIRE: NATIONAL PURPOSE AND THE GLOBAL ECONOMY AFTER THE COLD WAR* 122 (1991). Similarly, Jeffrey E. Garten wrote:

In abandoning the rhetoric of Adam Smith, President Clinton only recognized the reality that totally free markets are a myth. But without the kind of clear ideological direction that free market theory provides, actions will often seem inconsistent and subject to the political winds of the moment. President Reagan could exalt the "magic of the marketplace" while protecting automobiles, steel and machine tools, and still appear consistent. President Bush's image as charter member of the friends-of-GATT club allowed his chief trade negotiator, Carla Hills, to brandish a crowbar at America's trade partners with nowhere near the outcry that has greeted Clinton's get-tough message.

Trade Act of 2002,⁶ this tension was perhaps best demonstrated by the desire to empower the President to enter into new free trade agreements, while at the same time a growing sense that domestic labor and the environment ought to be protected from foreign investors in the United States. Yet, there was a simultaneous desire to ensure that U.S. investors would not have to be encumbered by similar limitations abroad.

At the international level, international legal minimalism is facilitated by the plasticity or the possibility of ascribing multiple permissible interpretations of U.S.⁷ and international anti-dumping rules and their interrelationship.⁸ This plasticity in the rules and in adjudications arising from the rules, provides legal legitimacy to the administration of the anti-dumping rules consistently—albeit not always—with the U.S.’s priority of balancing international trade commitments and domestic policy priorities. By plasticity here, it is suggested that international anti-dumping rules are not a seamless legal regime that fits tightly onto U.S. implementing legislation.⁹ In many respects, the rules are negotiated

Jeffrey E. Garten, *Clinton’s Emerging Trade Policy: Act One, Scene One*, 72 FOREIGN AFF., 182, 185 (1993).

⁶ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).

⁷ The existence of gaps, conflicts, and ambiguities in domestic legislation and treaties is widely acknowledged. See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE (1997); Joel P. Trachtman, *Institutional Linkage: Transcending “Trade and . . .”*, 96 AM. J. INT’L L. 77, 88 (2002).

⁸ In this sense therefore, it is suggested that GATT/WTO rules are as legislative as they are contractual. In other words, they lay down broad rules of conduct for states generally. Even strictly construing GATT/WTO rules as being contractual and therefore creating only binding legal obligations as between GATT/WTO parties does not in and of itself resolve ambiguities, gaps and conflicts in the rules. In fact, Oscar Schachter noted that unlike multilateral treaties that proclaim rules of international law that virtually all states in principle agree upon, bargained-for compromise treaties such as those involving trade that do not readily admit an inference of *opinio juris* (that states are acquiescing to some prescribed conduct because it is legally binding) cannot easily be inferred. See Oscar Schachter, *Recent Trends in International Law Making*, 12 AUSTL. Y.B. OF INT’L L. 1, 7 (1988-1989). Kenneth Dam has also argued that unlike in public international law, in international economic law, “[i]t is better . . . that 100 commitments should be made and that 10 should be withdrawn than that only 50 commitments should be made and that all of them should be kept.” KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 80 (1970). In other words, international trade law, unlike contract law, is not concerned with assuring that commitments that are made are kept, but instead with the promotion of making commitments in the first place.

⁹ At times, implemented U.S. legislation takes advantage of loopholes in international anti-dumping laws such as the ambiguities between investigations

compromises. They are therefore often left vague, indeterminate, and at times inconsistent with each other to accommodate negotiating countries with differing priorities and views.¹⁰ There are various ways in which this plasticity is demonstrable as I illustrate with specific examples in this paper. For example, while international anti-dumping rules permit anti-dumping actions, they outline the substantive and procedural conditions that such actions must take and it is upon individual countries to enact legislation and rules to implement them. Since international anti-dumping rules are often vague, indeterminate and at times

and review in the 1994 GATT/WTO Anti-dumping Agreement. See David W. Leebron, *Implementation of the Uruguay Round Results in the United States*, in, IMPLEMENTING THE URUGUAY ROUND, 175, 236 (John H. Jackson & Alan O. Sykes eds., 1997). See also *infra* Section 4.

¹⁰ A leading classic course book in public international law alludes to thinking of international law in terms of a broad policy of cooperation as opposed to a regime of strict formal rules in the following terms: “[t]he United Nations, its specialized agencies and other international organizations, some on a universal and others on a regional level, marked the transition of international law from the traditional system of formal rules of mutual respect and abatement to an incipient system of organized, cooperative efforts.” LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS, at xxxiv (4th ed. 2001). This theme of the shifting locus of international law from co-existence to cooperation was invoked in the 1960s by scholars such as Wolfgang Friedmann. See MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 125-27 (1979) (citing Wolfgang Friedmann). See generally Wolfgang Friedmann, *Droit de coexistence et droit de cooperation: quelques observations sur la structure du droit international*, *Revue Belge du Droit International* 1, 6 (1970). In the 1970s, third-world scholars also emphasized that the New International Economic Order proposed by developing countries indicated a shift in international law away from “exclusive field of formal and traditional diplomatic relations” towards cooperation and solidarity particularly in equitably addressing the concerns of the poorest of the world. See BEDJAOU, *supra*, at 125-27. Wolfgang Friedmann further espoused this move to pragmatism from formalism in the following terms:

It is in this direction rather than in blueprints for a worldwide military security force that the main hope lies for the development of an international legal system that will correspond to the needs of a society which is anachronistically divided into more than one hundred thirty “sovereign” states, but which is, for the fateful questions of survival or extinction, indivisible. Unless social and legal organization catches up with the physical and technological realities of our time, the prospects for survival are indeed slender.

Wolfgang Friedmann, *The Reality of International Law – A Reappraisal*, 10 COLUM. J. TRANSNAT'L L. 46, 60 (1971). See also RICHARD A. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970) (arguing that international law ought to shift away from being merely concerned with avoiding war to focus on improving the world by reducing economic inequality—hence suggesting the need for more international cooperation through international law).

inconsistent with each other, they often provide room for a variety of permissible interpretations consistent with treaty interpretation principles for a country putting in place its own anti-dumping regime.¹¹ For that reason, U.S. implementing legislation is at times designed to exploit this interpretive space in addition to often embodying latent inconsistencies with international anti-dumping law awaiting challenge by other countries.¹² Sometimes the implementing legislation merely adopts those parts of international anti-dumping rules that the U.S. believes to be consistent with international anti-dumping law while leaving out others that are believed to be inconsistent.¹³ A last example will illustrate what I mean by plasticity. The U.S. often mobilizes informal or open-ended administrative agency praxes in responding to attacks of formal GATT/WTO inconsistency by other countries since GATT/WTO jurisprudence allows discretionary authority to executive officials that might be used in a WTO-inconsistent manner. By doing so, the U.S. is simply mobilizing what GATT/WTO jurisprudence allows. That is to say, that under this jurisprudence, discretionary authority given to an executive official by legislation is not illegal even though there is a possibility that it might be used in a manner inconsistent with GATT/WTO rules. In essence, under this jurisprudence only measures which mandate or require inconsistent action under GATT/WTO rules are prohibited.¹⁴

¹¹ In addition, as Joel P. Trachtman notes, many WTO rules are stated in quite general terms and have as such been often referred to as standards rather than rules. See Trachtman, *supra* note 7, at 88; see also Kalypso Nicolaïdis & Joel P. Trachtman, *From Policed Regulation to Managed Recognition in GATS*, in *GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION* 241, 241-82 (Pierre Sauvé & Robert M. Stern eds., 2000).

¹² See, e.g., Alan F. Holmer et al., *Enacted and Rejected Amendments to the Anti-dumping Law: In Implementation or Contravention of the Anti-dumping Agreement*, 29 INT'L LAW. 483 (1995) [hereinafter Holmer] (stating that the amendments to the U.S. anti-dumping law caused a spirited debate between U.S. producers).

¹³ See Leebron, *supra* note 9, at 234 (stating that the U.S. only took legislative actions for laws that were blatant violations of WTO agreements, and a "wait to see" approach for possible violations that were not as clear).

¹⁴ This mandatory-discretionary distinction was upheld in the Section 301 case. See WTO Panel Report on the United States—Sections 301-310 of the Trade Act of 1974, WT/DS152/R, paras. 7.51-54, 7.97 n.675 (Dec. 22, 1999) [hereinafter Section 301 Case], available at http://www.wto.org/English/tratop_e/dis_status_e.htm. The panel also found that the question of whether legislation that allows discretion to executive authorities is WTO-inconsistent should be considered in its context. *Id.* para. 7.57.

It is important to emphasize that this plasticity does not play out in a vacuum. Rather, it plays out against the backdrop of a very organized domestic-industry lobby. This lobby is experienced in repeatedly propelling anti-dumping actions through established mechanisms to cover as many situations that would provide them relief from the products of foreign competitors. In a context where consumer interests are diffused, producer interests and congressional concerns of stemming job losses in turn drive the U.S. government's aggressive use of anti-dumping against foreign producers. Further, this government/public sector collaboration has sought to exploit the open-endedness of international anti-dumping rules through the dispute settlement process of the GATT/WTO. The intensive use of the GATT/WTO's dispute settlement process in seeking and defending anti-dumping actions has transformed dispute settlement on anti-dumping into a very specialized arena. As such, it is now heavily factually-bound, contextualized and perhaps less rule-bound. The use of the dispute settlement process in this respect has therefore given the U.S. an enviable bargaining advantage over foreign producers whose countries do not have the cumulative experience that the U.S. has been able to garner. In addition, the sheer expense of the dispute settlement process serves to further buttress the U.S.'s ability to use anti-dumping actions even in cases where the use is clearly in violation of international anti-dumping rules. After all, the U.S. can afford to defend its actions against countries that cannot afford to use the dispute settlement process as effectively as it can. For countries that challenge the use of anti-dumping against their producers by the U.S. at the WTO, the elaborate dispute settlement process and its open-endedness gives the U.S. the leverage to stretch the dispute out during which time the anti-dumping actions are still effective as against the foreign producers.¹⁵

¹⁵ Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, 5 SUSTAINABLE DEVELOPMENT AND TRADE ISSUES: ICTSD RESOURCES PAPER (Mar. 2003), available at http://www.ictsd.org/pubs/ictsd_series/resources_papers/DSU-2003.pdf. Also, the reader may refer to Shaffer's article with papers published by Victor Mosoti and Asif Qureshi in the same volume. Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?* SUSTAINABLE DEVELOPMENT AND TRADE ISSUES: 5 ICTSD RESOURCE PAPER (Mar. 2003), available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf; Asif Qureshi, *Interpreting WTO Agreements for the Development Objective*, SUSTAINABLE DEVELOPMENT AND TRADE ISSUES: 5 ICTSD RESOURCE PAPER (Mar. 2003), available at <http://www.ictsd.org/>

In sum, the negotiation, administration and adjudication of trade remedy laws in the area of anti-dumping law (particularly with reference to the steel industry which forms a major backdrop of this study) manages the axis between the U.S.'s commitments to international anti-dumping rules, on the one hand, and ensuring the continued viability and competitiveness of U.S. industries and labor against foreign competition, on the other. This is achieved through a complex amalgam or combination of policy balancing at the domestic level and an arena of international anti-dumping rules and a dispute settlement system that provides a hospitable legal environment for selective implementation of international obligations. At the domestic level, the legislative imperative of policy balancing is reigned in by "domestically oriented metrics of legal and constitutional discourse,"¹⁶ which provide the mandate and context for balancing domestic policy commitments with international anti-dumping rules in the United States. In a sense therefore, the policing of the domestic policy arena against the direct effect of international rules within the U.S., leaves the open-ended domain of GATT/WTO dispute settlement to reign in inconsistencies with the international standards.¹⁷ As my discussion of dispute settlement in the extensive analysis of the *Hot-Rolled Steel Products from Japan* case in Section 4 will show, the WTO's dispute settlement cannot withstand close scrutiny as a true watchdog that effectively reigns in GATT/WTO inconsistencies among all its members. The detailed analysis that follows in this Article establishes that domestic incorporation of international anti-dumping rules is not driven towards establishing a tight fit that complies with international anti-dumping rules. Rather, domestic incorporation of international anti-dumping rules is best described as exemplifying international legal minimalism.¹⁸

pubs/ictsd_series/resource_papers/DSU_2003.pdf.

¹⁶ See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002). To put it in the protectionist lingo used by economists, anti-dumping is ordinary protection with a good public relations program (stating that global standards may affect constitutional norms beyond traditional notions of foreign relations law). See ANTI-DUMPING: HOW IT WORKS AND WHO GETS HURT (Michael J. Finger ed., 1993).

¹⁷ Indeed, this is one of the advantages of WTO rules as defined by the WTO itself. See generally The World Trade Organization Website, at <http://www.wto.org> (last visited Feb. 29, 2004).

¹⁸ As noted, international minimalism is an outcome conditioned by a variety of factors, including domestic legal and constitutional imperatives as well as the nature of GATT/WTO norms which operate in a manner that facilitates the

To conclude, I argue that the extent to which international anti-dumping rules are far too blunt to reign in inconsistencies with U.S. anti-dumping law is not simply a function of the open-endedness of these rules. Rather, it demonstrates that international anti-dumping rules in and of themselves do not necessarily determine the policy of international minimalism or the free reign the U.S. has historically had in remaining free from the arguable constraining power of these rules, particularly with regard to the steel industry. International anti-dumping rules are often much too vague to reign in the U.S.'s extensive use and abuse of its anti-dumping regime. It could very well be that the motley of mediating devices within this open-ended framework of international anti-dumping rules has been deployed in a manner that maintains a shifting equilibrium favorable to the U.S. without

incorporation of rules of international trade only in so far as those rules are consistent with the policy priorities required by the domestic legal and constitutional imperatives. International minimalism does not therefore, refer to the project of positivist philosophers that began in the late nineteenth and early twentieth century of justifying the existence of international law while upholding sovereignty as a basic predicate of the international system. This project served to suggest that international law was only law when states voluntarily consented to be bound. Georg Jellinek, for example, accounted for international law by developing a doctrine of "self limitation" of the state, by deciphering sovereign consent from the body of agreements entered into by states as did Heinrich Tripel. See, e.g., GEORG JELLINEK, ALLGEMEINE STAATSLEHRE (1905); GIORGIO DEL VECCHIO, LEZIONI DI FILOSOFIA DEL DIRITTO (1952). John Austin rejected the validity of international law, calling it positive morality, since it did not express the will of a definite superior and had not power of sanction. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 10 (David Campbell & Philip Thomas eds., 1998) (1832). In addition, international minimalism does not coincide with contemporary attempts to establish the validity of international law because those governed by a particular norm of international law believe in its legitimacy since it has come into being and operates in accordance with generally accepted principles of right process. See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990). Legitimacy is also established from processes that ensure transparency, resolve ambiguity, and strengthen states' capacities to comply with international undertakings. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 135-54 (1995). Finally, legitimacy is given strength in the existence and development of a sense of legal obligation and the growth of a "culture of compliance." See 1 OPPENHEIM'S INTERNATIONAL LAW 8-13 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). See generally THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY THE LATE JAMES LESLIE BRIERLY (Hersch Lauterpacht & C. H. M. Waldock eds., 1958). On U.S. compliance in the Hot-Rolled Steel Products from Japan case illustrating how the foregoing arguments with regard to the bindingness of norms of international law in the U.S. have been deployed over the last several years in the context of the foreign trade power, see *infra* Section 4.2.

aggressively requiring the U.S. to eliminate barriers erected by its anti-dumping laws to other countries. In that sense, international anti-dumping rules do not play a role independent of other elements, such as the relative bargaining power and ability of the U.S. to exploit spaces within international anti-dumping rules of the WTO's dispute settlement system. Although the U.S.'s ability to mobilize or exploit these spaces within international anti-dumping rules camouflages the subtle ways in which the U.S. selectively or minimally exercises its foreign trade power, it does not independently account for the continued tension of U.S. anti-dumping rules with international anti-dumping rules. As such, rather than constraining U.S. sovereignty, international anti-dumping rules seem to promote U.S. power and influence.

In addition, this extensive study of the U.S.'s history of engagement with international anti-dumping rules reveals that international adjudication of anti-dumping disputes manages the tensions within the U.S. foreign trade agenda while simultaneously foreclosing other analogous interpretations of international trading rules especially to reign in the extensive and often questionable use of anti-dumping remedies by the United States. This tilts international trade favorably towards the U.S. and unfavorably against U.S. trading partners. In addition, anti-dumping law as applied by the relevant U.S. agencies and interpreted by U.S. courts has provided a way through which domestic labor (and the environment as well since the Trade Act of 2002) can be protected from international competition. Yet, labor and the environment in countries other than the U.S. have not, and perhaps cannot, be protected from the effect of international trading rules in the same way.¹⁹ This foreclosure reveals the contested ideological terrain

¹⁹ Section 2102 of the Trade Act of 2002 provides as a negotiating objective a "no greater rights" objective that requires new trade agreements not to accord foreign investors in the U.S. greater substantive rights (e.g., expropriation, fair and equitable treatment, and full protection and security) with respect to investment protections than U.S. investors in the U.S. See Trade Act of 2002, Pub. L. No. 107-210, § 2102(a), 116 Stat. 933, 994 (2002). This in effect protects challenges to U.S. environmental protection from foreign businesses in the U.S. unlike under the North American Free Trade Agreement ("NAFTA") Investment provisions (Chapter 11). Under the "no greater rights" negotiating objective, foreign investors in the U.S. will not be entitled to compensation for government actions where a similarly situated U.S. investor would be entitled to a high level of protection "consistent with or greater than the level required by international law." See *id.* § 2102(b). Section 2102(c)(5) provides that the President report to Congress the impact of future trade agreements on U.S. employment, including labor markets and to make the report public. See *id.* § 2102(c)(5). The Trade Act of

over the stakes of free trade on questions of distributive justice especially with reference to labor and the environment within the GATT/WTO framework. This foreclosure in turn raises the question on the place of human rights and other issues thought of as non-trade issues in the context of the free trade GATT/WTO regime.²⁰ For if the U.S.'s contested regime of anti-dumping law has survived international legal scrutiny over eight decades, notwithstanding some of its latent inconsistencies with these rules, why have labor and analogous issues such as environmentalism and human rights not found similar accommodation within the international trading regime?²¹

2002 also establishes Trade Adjustment Assistance which authorizes the President to provide relief to workers adversely affected by the reduction in production or sales which results from international competition arising from a free trade agreement. See *id.* § 113 (noting Group Eligibility Requirements of the Trade Act of 2002). Another factor that might reign in the asymmetry of rights U.S. and foreign investors, labor and the environment under the Trade Act of 2002 is a recent ruling by the WTO Appellate Body ("AB") authorizing unilateral environmental measures undertaken by the U.S. as a condition for access to its shrimp market thereby legitimizing extraterritorial effect of U.S. environmental legislation. See WTO Appellate Body Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia, WTO Dispute Settlement Decisions, WT/DS58/AB/RW, para. 97 (Oct. 22, 2001), available at http://www.wto.org/english/tratop_e/dispu_status_e.htm (last visited Feb. 24, 2004); see also B.S. Chimni, *WTO and Environment: Legitimation of Unilateral Trade Sanctions*, ECON. & POL. WKLY., Jan. 12-18, 2002, at 133 (criticizing the WTO AB report as trampling upon sovereign rights of states to have their own environmental protection regimes and legitimizing green protectionism).

²⁰ Joel P. Trachtman argues that less detailed legislative acts accord greater discretion to tribunals to determine institutional linkages between trade and other so-called non-trade issues and, by contrast, that specific legal rules may entail greater political determination of the international linkage between trade and other areas. However, the dispute settlement system in the WTO has not taken advantage of such discretion to undertake such a balancing. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999). For a good take on this lack of balancing, see Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, Rights & Democracy* (2000), at <http://serveur.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> (last visited Jan. 30, 2004) (stating that the WTO agreement does not make free trade an end in itself, but establishes WTO's objective as related to the fulfillment of basic human values and that this and the GATT text have often been construed very restrictively). See also Symposium, *The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002).

²¹ It is noteworthy that one of the negotiating objectives under the 2002 Trade Act includes establishing consultative mechanisms to strengthen the capacity of U.S. trading partners to promote and respect core labor rights and to deal with "the worst forms of child labor." See Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(11), (17), 116 Stat. 933 (2002).

This paper proceeds as follows: Section 2 analytically examines treaties, Executive Agreements and Congressional Executive Agreements with a particular focus on the exceptionalism of the foreign affairs power in the context of establishing the status of GATT/WTO law within the constitutional order and the federal legal system. This Section also updates the literature in this area by locating the foreign affairs trade doctrine in the context of the important amendments to the 1974 Trade Act enacted by the 2002 Trade Act. Section 3 traces the strategic importance of the U.S. steel industry and its influence on U.S. negotiations of international anti-dumping rules as well as in shaping an emerging foreign affairs trade doctrine in terms of the balance between congressional and executive power over foreign commerce. Here, I argue that it becomes apparent that U.S. anti-dumping law and policy shifted from competition goals towards broader goals of balancing between domestic policy goals and international competition very early in the twentieth century when paying attention to this history and context. Section 4 is a detailed analysis of the WTO's Appellate Body decision in the *Hot-Rolled Steel Products from Japan* case decided in late 2001 between the U.S. and Japan. Section 4 develops in great detail how the foreign affairs doctrine, developed in the crucible of congressional and executive negotiation over the direction of foreign commerce under pressure from domestic interest groups (such as the steel industry) and trading partners (such as Japan), has led to the emergence of the doctrine of international legal minimalism. The issue by issue analysis of this case, which like many anti-dumping cases flows from the history and nature of the GATT/WTO anti-dumping rules, demonstrates the U.S.'s ability to exploit the ambiguity of the WTO's anti-dumping rules. The complexity of the dispute settlement system, as well as the availability of treaty interpretation principles flexible to accommodate challenged interpretations of U.S. implementing legislation or the application of the legislation as being inconsistent with the WTO's anti-dumping rules, contributes to the phenomenon of international legal minimalism. Section 4 therefore ties together Sections 2 and 3 by showing how domestically oriented metrics of legal and constitutional discourse serve to reign in the effect of international anti-dumping rules consistently with U.S. interests and policy preferences. Ultimately, this study demonstrates that neither the sovereignty critics nor the supporters of U.S. participation in the WTO are entirely correct. Rather, the WTO's anti-dumping rules, treaty interpretation

principles, as well as domestic constitutional and legal constraints impose requirements that almost invariably ensure that decisions adverse to the U.S. are not automatically implemented or rejected. While this is a delicate balance, it is my contention that should the U.S. consistently tilt the balance too much in the direction of maximizing its interests²² without counterbalancing them with maintaining integrity in the effectiveness of the WTO's dispute settlement process in reigning in divergences from its anti-dumping rules, the utility and credibility of the WTO as a framework built on the rule of law will erode substantially. Hence, while the uncertainty in the international anti-dumping legal regime has played a role in enhancing the U.S.'s incentives to bargain particularly with Japan in the context of steel, this has involved high transaction costs for Japan in a manner that questions the efficacy of the WTO as a true watchdog that reigns-in departures from treaty commitments among *all* its members.

The approach pursued throughout this paper is a richly contextual one that is particularly attentive to legal doctrine, historical background, and policy considerations both within the domestic foreign affairs trade doctrine, as well as within the GATT/WTO treaty framework. The analytical style borrows from various approaches including legal realism, post-realism, and critical analysis. This is also an interdisciplinary study that combines legal, as well as economic analysis, and countervailing public policy considerations in the domestic and international domains of international trading relations. It is in this rich crucible that international legal minimalism has been forged and will continue to thrive.

²² For example, section 2102(c)(6) of the 2002 Trade Act requires that the President, in negotiating trade agreements, "take into account . . . legitimate United States domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, and consumer interests and the law and regulations related thereto . . ." *Id.* Section 2102(c)(6). Also, Section 2102(b)(14)(A) provides that:

[The President is required] to preserve the ability of the United States to enforce rigorously its trade laws, including anti-dumping, countervailing duty, and safeguard laws, and avoid agreements . . . that lessen the effectiveness of domestic and international safeguard provisions, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions . . .

Id. Section 2102(b)(14)(A).

2. THE FOREIGN AFFAIRS TRADE DOCTRINE

2.1. *Treaties, Executive Agreements and Congressional-Executive Agreements*

There are at least four ways through which the U.S. can commit itself to international legal obligations: a treaty, as provided under Article II, Section 2, Clause 2 of the U.S. Constitution (the "Constitution"); a solo Executive Agreement; an Executive Agreement pursuant to treaty; and a U.S. Congressional-Executive Agreement.²³ Each of these forms goes through a different process to become legally effective both within the U.S. and the international legal system. However, once the commitment is made, there is "no significant difference" in the legal effect of the

²³ See Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L. L. 479, 482-83 (1990). Article I, Section 10, Clauses 1 and 3 of the U.S. Constitution recognize different forms of international agreements: treaties, alliances, confederations, agreements, and compacts. However, Article I creates an unencumbered power to the extent that it does not provide how the U.S. may enter into international agreements that do not require Senate ratification as under Article II. As the Supreme Court held in *United States v. Curtiss-Wright Exp. Corp.*, "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our own internal affairs powers." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-16. *But see* 1 LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 212-13 (3d ed. 2000) (refuting this position). John H. Jackson proposes five forms through which international agreements become part of U.S. law: treaties, Congressional previously authorized Executive Agreements, Congressional subsequently approved Executive Agreement, Presidential Executive Agreement, and Treaty-authorized Executive Agreement. JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO 297-301 (2000). The State Department, however, uses a four-part classification: treaties, agreements pursuant to a treaty, agreements pursuant to legislation, and agreements pursuant to the constitutional authority of the President. See Circular 175, *Foreign Affairs Manual*, Vol. XI, Ch. 700, U.S. Dept. of State, Digest of the United States Practice, in INTERNATIONAL LAW 199 (1974). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW provides four categories of international agreements and the mode through which they become part of U.S. law. Where the Agreement: (1) is accompanied by the advice and consent of the Senate (a treaty), (2) is authorized or approved by Congress and the matter falls within the constitutional authority of Congress (a Congressional-Executive Agreement), (3) is authorized by a prior treaty which received the advice and consent of the Senate (an executive agreement pursuant to treaty), or (4) is based on the President's own constitutional authority (a solo executive agreement). See 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1987) (providing authority to make international agreements subject to U.S. laws).

form that the commitment to the international obligation takes under the Supremacy Clause of Article VI of the Constitution.²⁴ In other words, the ratified treaties/agreements will supersede any conflicting state laws to the extent of their inconsistency.

The first of these routes of domesticating international legal commitments is embodied in Article II, Section 2 of the Constitution which provides that the President "shall have Power, by and with the Advice and Consent of the [U.S.] Senate ["Senate"], to make Treaties, provided two thirds of the Senators present concur."²⁵ To the Supreme Court, a treaty is the legal equivalent of a federal statute.²⁶ Therefore, where there is a conflict between a valid treaty and a valid statute handed down by Congress, the one enacted later supercedes the former because "the last expression of the sovereign will must control."²⁷ However, there is authority for the proposition that where there is a conflict between a U.S. law and a GATT provision, the U.S. law must prevail.²⁸

²⁴ See *United States v. Pink*, 315 U.S. 203, 230 (1942) (stating that a treaty is a "Law of the Land" under the supremacy clause of the U.S. Constitution); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 284 (1997); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 805 (1995) ("[T]here is no significant difference between the legal effect of a Congressional-executive agreement and the classical treaty approved by two-thirds of the Senate.").

²⁵ U.S. CONST. art. II, § 2.

²⁶ In *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), the Supreme Court explained:

If the treaty contains stipulations which are self-executing . . . they have the force and effect of a legislative enactment By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.

See also *TRIBE*, *supra* note 23, at 643-45.

²⁷ *Ping v. United States*, 130 U.S. 581, 600 (1889). *But see Whitney*, 124 U.S. at 194 ("[I]f there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.").

²⁸ See *Algoma Steel Corp. v. United States*, 865 F.2d 240, 242 (1989) (citing 19 U.S.C. § 2504(a)); In *Suramerica de Aleaciones Laminadas*, the Federal Circuit rejected the argument that a statutory provision should be read consistently with the obligations of the United States as a signatory of GATT and reasoned that:

[E]ven if . . . [the] Commerce [Department's] interpretation conflicts with the GATT . . . the GATT is not controlling. While we acknowledge Congress's interest in complying with U.S. responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not

The second method of incorporating international legal commitments onto domestic law is through a solo executive agreement. A solo executive agreement, unlike an Article II treaty, "is an agreement between the U.S. and a foreign country that is effective when signed by the President and the head of the other government."²⁹ In other words, the President does not need a super-majority Senate ratification to make a solo executive agreement as he is required to do in order to conclude a treaty under Article II, Section 2.³⁰ Moreover, although the constitution expressly mentions an Article II treaty in its text, it does not refer to solo executive agreements.³¹ Rather, the President's authority to make a solo executive agreement comes from his "inherent foreign affairs power" in Article II, as for example embodied in his power as the Commander-in-Chief.³² Therefore, the Supreme Court has in the past regarded solo executive agreements as constitutionally valid. In fact, the Supreme Court has yet to declare a solo executive agreement as unconstitutional on the basis that it

trump domestic legislation; if the statutory provisions at issue here are inconsistent with GATT, it is a matter for Congress and not this court to decide and remedy.

966 F.2d 660, 667-68 (Fed. Cir. 1992).

²⁹ CHEMERINSKY, *supra* note 24, at 271.

³⁰ *Id.*

³¹ *Id.* However, Article I, Section 10, Clause 1 of the Constitution makes a distinction between "treaties" which states cannot enter into, and other types of foreign "agreements," which states may enter with congressional approval. See Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean By "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453 (1936) (giving a historical analysis of treaties).

³² See TRIBE, *supra* note 23, at 648-51. Tribe argues that the "President is empowered to employ executive agreements within the penumbras of enumerated presidential power . . ." *Id.* at 648. Philip B. Kurland argues against two extra-constitutional bases of the President's foreign affairs powers: that the President alone is the sole spokesperson for all American people which he finds hard to justify, and that the President alone has all the information necessary to make an appropriate foreign policy decision which reflects a decline in the authority Congress has to keep itself informed and involved in foreign policy matters. See Philip B. Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 622-23 (1968). Kurland summarizes the extent to which Congress has lost much of its legislative authority to the Executive in the following terms: "Congressional oversight is more a myth than a reality This is the sorry state to which Congress has been reduced. Its legislative power has been all but restricted to a veto function. Its duty of oversight has been mostly ignored." *Id.* at 632-33 (noting that the Supreme Court has granted the President the power to negotiate executive agreements that include major foreign policy commitments).

constitutes a usurpation of the senate's treaty-approving function.³³

The third manner in which the U.S. could become bound by rules of international law is through an executive agreement pursuant to treaty. This type of an executive agreement is made where an agreement is necessary to implement the terms of a treaty that the U.S. is already party to and the terms of the treaty contemplate such an agreement.³⁴ Such an agreement may be necessary to clarify certain "lacunae" or to "develop specific applications" of the treaty.³⁵ A solo executive agreement and an executive agreement pursuant to treaty are subject to some restrictions, and therefore they are not equivalent in their legal effect as treaties entered into under Article II of the Constitution. Hence, although in *United States v. Pink*, the Supreme Court held that executive agreements have the same legal validity as if they proceeded from the legislature under the supremacy clause³⁶ and that they supercede any conflicting state laws,³⁷ unlike Article II

³³ See CHEMERINSKY, *supra* note 24, at 273. Tribe argues that the Presidency is the most representative office in the United States. See Phillip R. Trimble, *Foreign Affairs Law and Democracy*, 89 MICH. L. REV. 1371, 1376 (1991).

³⁴ See 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. f (1986) ("An executive agreement may be made by the President pursuant to a treaty . . . when the executive agreement can fairly be seen as implementing the treaty, especially if the treaty contemplated implementation by international agreement.").

³⁵ JACKSON, *supra* note 23, at 300.

³⁶ See *United States v. Pink*, 315 U.S. 203, 230 (1942) (citing THE FEDERALIST No. 64).

³⁷ In *United States v. Belmont*, 301 U.S. 324, 331 (1937), the Court held that "in case of all international compacts and agreements . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *United States v. Belmont*, 301 U.S. 324, 331 (1937). Quincy Wright suggests that executive agreements stand on the same footing as treaties. See Quincy Wright, *The U.S. and International Agreements*, 38 AM. J. INT'L L. 341, 348 (1948). But Laurence Tribe is doubtful of Wright's reading of *Belmont*. See TRIBE, *supra* note 23, at 649.

It is unclear if there is any difference between a solo executive agreement and an executive agreement pursuant to treaty regarding its superiority over conflicting state law. John H. Jackson seems to deal with this issue by collapsing the distinction between a solo executive agreement and an executive agreement pursuant to a treaty by treating both as executive agreements in his discussion of the superiority of executive agreements over state laws.

See JACKSON, *supra* note 23, at 320. The only source that refers to particular characteristics of an executive agreement pursuant to treaty is the RESTATEMENT (THIRD) which provides that an executive agreement pursuant

treaties they “cannot override a prior act of Congress.”³⁸

Finally, the U.S. makes international legal commitments part of domestic law through Congressional-Executive Agreements. Congressional-Executive Agreements become effective after being “negotiated by the President and submitted to both houses of Congress for simple-majority approval, rather than to the Senate for two-thirds approval.”³⁹ Although they are called Congressional-Executive “Agreements,” they are treated “as the equivalent of the treaty form with respect to supremacy over state or prior federal law.”⁴⁰ Since 1934, the U.S. has favored Congressional-Executive Agreements over Article II treaties as a way of making trade agreements, such as the North American Free Trade Agreement (“NAFTA”) and the WTO.⁴¹ In fact, Congressional-Executive Agreements, as opposed to ratification as required by Article II, Section 2, have been the preferred form of entering into international trade commitments.⁴² The constitutional propriety of Congressional-Executive Agreements relies on Article I, Section 8, “the broad reach of Congress’ power

to a treaty “has the same effect and validity as the treaty itself.”

1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 303 cmt. (f) (1986). In *Crosby v. Nat’l Foreign Trade Council*, a case that did not involve executive agreements, the Supreme Court, under the Supremacy Clause, preempted the Massachusetts Burma Law, which contradicted the Foreign Operations, Export Financing, and Related Programs Appropriations Act. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

³⁸ See *TRIBE*, *supra* note 23, at 648 (citing *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff’d on other grounds*, 348 U.S. 296 (1955)). In *Guy W. Capps, Inc.*, the U.S. Court of Appeals invalidated an Executive Agreement with Canada that restricted the importation of potatoes because the agreement conflicted with a prior congressional enactment that fell under its authority to regulate foreign commerce. *Id.* at 658-59. It is noteworthy that while Laurence Tribe argues that *Guy W. Capps, Inc.* supports the proposition that an executive agreement cannot override a prior congressional enactment, John H. Jackson seems to take a different view. According to Jackson, while holding that the agreement could not override a prior congressional enactment, the court “refused to consider the question of hierarchy, thus weakening the *Guy W. Capps, Inc.* precedential effect.” JACKSON, *supra* note 23, at 320.

³⁹ See *TRIBE*, *supra* note 23, at 652.

⁴⁰ *Id.* See also Ackerman & Golove, *supra* note 24, at 805 (“[T]here is no significant difference between the legal effect of a congressional-executive agreement and the classic treaty. . .”).

⁴¹ See *TRIBE*, *supra* note 23, at 652.

⁴² See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 *BROOK. J. INT’L L.* 143, 146 n.7 (1992) (explaining the use of executive agreements). For a fuller discussion, see *infra* Section 3.3.3.

over foreign commerce, combined with its authority under the Necessary and Proper Clause."⁴³ An alternative viewpoint questions the constitutional propriety of Congressional-Executive Agreements and argues that "structural considerations outside of Article I, § 8 limit congressional authority."⁴⁴ For example, while the constitution does not expressly mention any role for the House of Representatives in approving international agreements to which the U.S. is a party, Professor Tribe argues:

the Constitution's enumeration of other instances in which Congress may give bicameral consent to conduct implicating the nation's foreign relations—is powerful evidence that the Treaty Clause is not simply an optional alternative to treaty approval by Legislation. Indeed, even where § 10 of Article I grants Congress the power to approve a specifically identified category of agreements and compacts—between or among the different states, or between states and foreign governments—Congress' approval power extends only to state agreements that *do not qualify as "treaties."*⁴⁵

⁴³ TRIBE, *supra* note 23, at 653 (footnotes omitted); ACKERMAN & GOLOVE, *supra* note 24, at 908-09, 913-14. For a contrary opinion, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); David Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998). Section 303 cmt. (e) of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW of the U.S. notes that:

[S]ince any agreement concluded as a Congressional-Executive Agreement could also be concluded by treaty . . . either method may be used in many cases. The prevailing view is that the Congressional-Executive Agreement can be used as an alternative to the treaty method in every instance. Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.

1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 303 cmt. (e) (1986).

⁴⁴ TRIBE, *supra* note 23, at 653-54 (citing *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992)).

⁴⁵ *Id.* at 655 (footnotes omitted). Tribe further challenges Ackerman and Golove's contention that congressional executive agreements legitimately arose in the 1940s as an international agreement was shifted by involving both Houses rather than following the requirements of Article II of the Constitution. This shift, in Ackerman and Golove's view, represented an extraordinary moment of

By contrast, Ackerman and Golove trace the appropriateness of the role of the House of Representatives to a self-conscious moment of constitutional transformation of Article II of the Constitution in international agreement-making in the 1940s from requiring supermajority support in the senate to requiring approval of both houses of Congress. This post- World War II transformation occurred through a strong national consensus in favoring innovations in the structure of the federal government particularly in light of American support for internationalism. This support is reflected in the U.S. signing of the Charter of the United Nations and its participation in the Bretton Woods institutions and GATT.⁴⁶ Ackerman and Golove further justified this transformation in view of the House's power over appropriations under Article I, Section 9, Clause 7 and its taxing power under the origination clause, Article I, Section 7, Clause 1 of the Constitution.⁴⁷ Another commentator on executive agreements traces the expanded role of the Executive in the realm of foreign relations at the expense of the Congress and the judiciary to a new method of interpreting the President's powers broadly in responding to geopolitical circumstances.⁴⁸ In an earlier exposition

constitutional change such as that associated with the New Deal that justified changing the Constitutional requirement of Article II without a formal Constitutional amendment as required by Article V. See *id.* at 653 (describing Ackerman's and Golov's thesis). In a later article, David Golove argues that his original article with Ackerman (Ackerman & Golove, *supra* note 23, at 24) argues that there was a much narrower basis for the transformed meaning of Article II than the theory of higher law-making associated with extraordinary moments of constitutional change. See Golove, *supra* note 43. This narrower justification is that the constitutional text is indeterminate to the extent that it can plausibly be construed to support the constitutionality of Congressional-Executive Agreements. See also Jack S. Weiss, *The Approval of Arms Control Agreements as Congressional Executive Agreements*, 38 UCLA L. REV. 1533, 1538-57 (arguing that the following reasons make the constitutional text indeterminate: history and original meaning of Article II, Section 2; the framers' vision; judicial precedent; and practice).

⁴⁶ ACKERMAN & GOLOVE, *supra* note 24, at 873-75 (noting that the Constitutional question dropped off Senate Committee reports as the Senate joined the House and the President in approving money agreements).

⁴⁷ *Id.* at 923. Tribe is uncertain of this conclusion and asserts that the "necessary involvement of the House of Representatives or Congress as a whole in implementing some treaties cannot support the conclusion that one might as well replace the Senate's supermajority with a bicameral majority in the process of approving those treaties—or others." TRIBE, *supra* note 23, at 654 n.55.

⁴⁸ See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998). Paul's argument is not confined to examining the Constitutional authority for the foreign relations power and as

of the constitutionality of congressional executive agreements, Myers McDougal and Asher Lans argued that 150 years of constitutional history, practice, and interpretation provided an adequate basis for Congressional-Executive Agreements as a distinct treaty-making procedure.⁴⁹ Notwithstanding their reservations of the consistency of the argument with the intention of the framers⁵⁰, McDougal and Lans further fortified their case by arguing that treaties entered into under Article II, Section 2 of the Constitution were undemocratic.⁵¹ They based this objection on the fact that this procedure exclusively involved the Senate and because of the difficulty in obtaining a super-majority vote of approval in the Senate.⁵² The expansive powers created by Executive Agreements and Congressional-Executive Agreements for the Executive have certainly created space for novel ways to embrace internationalism⁵³ that are sensitive to domestic strategic

such, it is a much broader analysis of the U.S.'s foreign policy goals, which have necessitated those powers in the first place.

⁴⁹ Compare discussion in Myers McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 237 (1945); Edwin Borchard, *Treaties and Executive Agreements – A Reply*, 54 YALE L.J. 616, 627-64 (1945); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?* 53 YALE L.J. 664, 677-80 (1944).

⁵⁰ See McDougal & Lans, *supra* note 49, at 212-15, 290-91.

⁵¹ Louis Henkin similarly argues that to the extent the present U.S. system of government reflects an outcome not intended by the framers (that being the fear of direct popular government, which Henkin proposes is now largely embraced by virtue of universal suffrage and direct elections because popular sovereignty and representative government are the foundations of the government), this supports the non-exclusivity of Article II, Section 2 as the only basis of treaty-making. See LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* (1990). Henkin agrees with McDougal and Lans that the Senate's role in treaty-making under Article II is undemocratic and is contrary to basic notions of democracy and as such that congressional executive agreements "could serve . . . the cause of greater democracy." *Id.* at 60.

⁵² McDougal & Lans, *supra* note 49, at 186-89 (discussing objections to themes in arguments resisting the non-exclusivity of treaties).

⁵³ Chantal Thomas argues that with the inauguration of the WTO in 1994, an international branch of government has emerged as "a solution to a dilemma arising from a deeply challenging economic phenomenon . . . economic globalization." Chantal Thomas, *Constitutional Change and International Government*, 52 HASTINGS L. J. 1, 4 (2000). However, one of Thomas's central theses is that a branch of international governance has emerged by virtue of the fact that Congress' delegation of power to enter into trade agreements has in turn been delegated to international organizations like the WTO by the President. While Thomas is agnostic that there is consensus for such a development, she argues that the Constitution is indeterminate on whether such an outcome is constitutionally valid. See *id.* at 26-32.

and policy commitments.⁵⁴

Therefore, Article II treaties, executive agreements, and Congressional-Executive Agreements have different processes for their ratification before they can become the supreme law of the land under the supremacy clause of Article VI of the Constitution. The primary difference is that while Article II treaties and Congressional-Executive Agreements supersede prior federal law,⁵⁵ executive agreements do not.⁵⁶ Substantively, these forms of engaging in international relations have designated the foreign affairs powers of the Executive branch of the government as exceptional especially in relation to its domestic affairs power.⁵⁷ It is this exceptionalism in the context of international trade agreements that I now turn to.

⁵⁴ Indeed as has been noted, "the distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." HARVARD RESEARCH IN INTERNATIONAL LAW, DRAFT CONVENTION ON THE LAW OF TREATIES, 29 AM. J. INT'L L. 657, 667 (Supp.) (1935).

⁵⁵ The similarity between Article II treaties and Congressional-Executive agreements is emphasized by the fact that there is no pattern in practice of distinguishing between the two. See Weiss, *supra* note 45, at 1548-50 (interpreting *Dames & Moore*, 453 U.S. 654 (1981) to hold that the manner of agreement used should be left to the political process).

⁵⁶ See JACKSON, *supra* note 23, at 320-21. John Jackson argues that in view of the Supreme Court's decision in *Dames & Moore*, the "Executive branch itself has apparently accepted that Presidential Executive Agreements do not always prevail over prior Congressional acts." *Id.* at 321. The Third Restatement of the Law of Foreign Relations of the U.S., however, uses the authority of *Dames & Moore* to the effect that the Supreme Court upheld the President's action pursuant to a solo executive agreement that was claimed to be inconsistent with an earlier act of Congress, the Sovereign Immunity Act. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 reporters' note 7 (1986). See also LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 228 (1996). On a related matter, and on the authority of *Zschernig v. Miller*, the President's authority in the realm of foreign affairs, which is shared with the Senate under Article II of the Constitution, limits the power of states to legislate in matters affecting foreign relations. Cf. *Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (asserting that the President's authority shared with the Senate under Article II limits the power of states to legislate if their legislation impairs the effective exercise of U.S. foreign policy). See also *supra* notes 36-38 (discussing the effect of executive agreements and congressional executive agreements on state law).

⁵⁷ Laurence H. Tribe notes that "[d]octrines recognizing greater presidential power in the foreign sphere rest on an increasingly dubious separation between foreign and domestic policy and an increasingly false premise that steps taken abroad have little impact at home and vice versa." TRIBE, *supra* note 23, at 637 n.2.

2.2. *The Exceptionalism of the Foreign Affairs Power: Curtiss-Wright and Youngstown*

Unlike the exercise of domestic powers, the exercise of the foreign affairs powers is largely unconstrained by the ordinary constitutional restraints of balance of power between the three branches of government or even judicial review.⁵⁸ The distinction between the foreign affairs and domestic realms is often justified by the functional needs of the President to act decisively in dealing with foreign leaders.⁵⁹ For example in *Curtiss-Wright*, Justice

⁵⁸ Laurence H. Tribe, however, suggests that distinction may have once been true in "an era gone by," suggesting that the exercise of domestic executive power is as unbridled as in the foreign affairs realm. See *id.* at 637. Justice Sutherland in *United States v. Curtiss-Wright Exp. Corp.* noted in relation to the distinction between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs, "[t]hat there are differences between them, and that these differences are fundamental, may not be doubted." *U.S. v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936). Justice Sutherland continued,

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.

Id. at 315-16.

⁵⁹ The Executive Branch recently won congressional approval of the Trade Promotion Authority, which lapsed and was not renewed for most of President Clinton's tenure. This was accomplished partly by arguing it was important for the President to have this power in order to give confidence to the U.S. trading partners that the President was credibly making commitments that the United States could keep. According to the White House, the Trade Promotion Authority ("TPA") is simply "about asserting American leadership, strengthening the American economy, and creating American jobs." See OFFICE OF MANAGEMENT AND BUDGET, *Statements of Administration Policy*, H.R. 3005—BIPARTISAN TRADE PROMOTION AUTHORITY ACT OF 2001 (Dec. 5, 2001), available at <http://www.whitehouse.gov/omb/legislative/sap/107-1/HR3005-r.html> (last visited Feb. 24, 2004). Further, the White House argued that the TPA "is [g]ood for American global leadership." See THE WHITE HOUSE, EXPANDING OPPORTUNITY: WHAT IS TRADE PROMOTION AUTHORITY, at <http://www.whitehouse.gov/infocus/internationaltrade/talkers.html> (last visited Feb. 29, 2004). In *Crosby v. Nat'l Foreign Trade Council*, the Supreme Court, under the Supremacy Clause, preempted the Massachusetts Burma Law. This law conflicted with the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). In holding that the

Sutherland noted: “[I]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”⁶⁰ By contrast, the “federal regulation of domestic affairs has its constitutional origins in the people and the states, and its initiation is allocated primarily to Congress.”⁶¹

While some scholars have noted that the role of the President in the foreign affairs realm is merely functional,⁶² it is certainly clear that there is a wide consensus favoring wide latitude of executive action among those that favor an unconstrained Executive role in the realm of foreign affairs. However, there are those that suggest that there may be, or that there are, some definite constitutional limits to this power.⁶³ *Curtiss-Wright* and *Youngstown* illustrate these two different approaches of foreign affairs

Massachusetts law was unconstitutional, the Court opined that it inhibited the “President’s authority to speak for the U.S. among the world’s nation to develop a multilateral Burma Strategy,” as intended by Congress. *Id.* at 380.

⁶⁰ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 (1936). Similarly, John Marshall defended President John Adams before the House of Representatives for having surrendered an alleged murderer to the British authorities without any judicial process, the “President is the sole organ of the nation in its external relations and its sole representative with foreign affairs.” *Id.* (citing 6 ANNALS OF CONG. 613 (1800)).

⁶¹ *TRIBE*, *supra* note 23, at 636. Under Article II, Section 2 of the Constitution, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Services of the United States” U.S. CONST. art. II, § 2, cl. 1. The President may act as Commander in Chief under two situations: in war with a congressional declaration under Article I, Section 8 and in war without a congressional declaration. See *HENKIN*, *supra* note 56, at 46-50. With a congressional declaration of war, “the President has exercised full and exclusive control of the conduct of war.” *Id.* at 46. In the circumstance without a Congressional declaration of war, “the President has power not merely to take measures to meet the invasion, but to wage in full the war imposed upon the United States” such as retaliation against a nuclear attack. *Id.* at 48 (asserting that most individuals assume that the President would have the power to retaliate against a nuclear attack).

⁶² *HENKIN*, *supra* note 56, at 42-43.

⁶³ Indeed, in *Myers v. United States*, the Supreme Court noted: “[t]he executive power [under Article II, Section 1 of the Constitution] was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed *Myers v. United States*, 272 U.S. 52, 118 (1926). This contrasts with the power of Congress which is restricted to enumerated powers. See *HENKIN*, *supra* note 56, at 39-41; Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV., 53, 54 (1953) (arguing that “[t]he chief constitutional value which overextension of presidential power threatens is, of course, the concept of a ‘government of laws and not of men’ – the ‘Rule of Law’ principle).

constitutionalism.⁶⁴ While *Curtiss-Wright* suggests very wide latitude of executive action in the foreign affairs realm, *Youngstown* embraces some suggestion of executive limits in some instances.⁶⁵ However, as applied by the Supreme Court in *Dames Moore*, *Youngstown* has come to look very much like *Curtiss-Wright*.⁶⁶

2.2.1. *Curtiss-Wright: The Foreign Affairs Power As A Plenary and Exclusive Presidential Power Deriving From National Sovereignty*

Curtiss-Wright involved the Joint Resolution of Congress that authorized the President to ban the sales of arms to countries engaged in the Chaco border dispute⁶⁷ after being charged for a violation of the offences enacted under the Joint Resolution for selling arms to Bolivia. *Curtiss-Wright* challenged the constitutionality of the congressional delegation of authority to the President under the Joint Resolution.⁶⁸ A central legal issue in this case was therefore whether the joint resolution unconstitutionally delegated legislative power to the Executive. This issue is best

⁶⁴ Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 194 (1998).

⁶⁵ In *Yoshida Int'l, Inc. v. United States*, the Customs Court held that "neither need nor national emergency will justify the exercise of a power by the Executive not inherent in his office not delegated by congress." *Yoshida Int'l, Inc. v. United States*, 378 F. Supp. 1155, 1175 (Cus. Ct. 1974), *rev'd*, 526 F.2d 560 (C.C.P.A. 1975) (concerning a case where President Nixon's imposition of a ten percent surcharge on most articles imported into the U.S. was challenged). In addition, Louis Henkin has argued that implicit in Article II, Section 2's requirement of the Senate's advice and consent in the treaty-making power is a foreclosure to unilateral Presidential action and as such that Congress shares in this "unenumerated foreign affairs power." See HENKIN, *supra* note 56, at 64. The appropriations power is yet another of the devices which Congress can use to limit Presidential exercise of the foreign affairs power such as the second Hickenlooper to the Foreign Assistance Act which required the President to terminate foreign aid if "the government of any country has nationalized or expropriated or seized ownership or control of property owned by any U.S. citizen," without providing the "speedy compensation" required by international law, 22 U.S.C. § 2370(e)(2). Congress has also used its powers under Article I, Section 8 of the U.S. Constitution to regulate foreign commerce by prohibiting the President from making arms sales to countries involved international terrorism. TRIBE, *supra* note 23, at 642.

⁶⁶ *Dames & Moore v. Regan*, 453 U.S. 654, 665 (1981).

⁶⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 311-12, 320 (1936).

⁶⁸ Sale of arms to countries involved in the Chaco Dispute was criminalized by the President under the authority of the Joint Resolution.

understood against the backdrop of the doctrinal climate of the 1930s, particularly given the Supreme Court's disapproval of too much delegation of power to the Executive.⁶⁹ The Supreme Court held that this congressional delegation was proper. This in turn made the Joint Resolution constitutional.

Justice Sutherland's opinion in *Curtiss-Wright* favored the President as the "sole organ of foreign affairs" and explained that the President's authority for conducting foreign affairs is derived from the national sovereignty coming from "literally and legally outside of the Constitution."⁷⁰ This contrasts with accepted constitutional doctrine in the context of domestic affairs where Congress' authority is regarded to derive from the people and the states under the Constitution.⁷¹ Justice Sutherland's views in *Curtiss-Wright* reflected views he had expressed much earlier regarding the Presidency as the ideal loci to express American sovereignty and of the acquisition of U.S. sovereignty not from the people and the states, but from Great Britain.⁷² Thus in his view, the President's power in the realm of foreign affairs did not necessarily emanate from the constitution, but rather from "the inevitable incidents of a claim of sovereignty."⁷³

[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the U.S. from some other source. During the Colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the U.S. of America" declared the United [not the several] Colonies to

⁶⁹ See, e.g., *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935) (invalidating a section of the National Industrial Recovery Act); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1934) (limiting delegation to the executive branch); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (enjoining enforcement of a federal statute).

⁷⁰ Gott, *supra* note 64, at 194-95 (citing *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318-19).

⁷¹ TRIBE, *supra* note 23, at 636.

⁷² See *id.* at 634 n.7 (citing Sutherland, *The Internal and External Powers of the National Government*, S. Doc. No. 417, 61st Cong. (1910) (providing a discussion regarding national powers); see also GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919).

⁷³ TRIBE, *supra* note 23, at 634.

be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do. As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.⁷⁴ Rulers come and go, governments end and forms of government change, but sovereignty survives. A political society cannot endure without a supreme will. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Britannic Majesty and the United States of America.⁷⁵

Justice Sutherland's opinion thus traces the source of the President's powers not merely from within, but also from outside the Constitution—in its sovereign competence as passed down from the British Crown and not to the colonies severally, but to them in their collective capacity as the United States of America. Although tracing the powers of the Executive in the foreign affairs realm from outside the Constitution has been regarded as

⁷⁴ Laurence H. Tribe summarizes Justice Sutherland's position as follows:

[b]ecause the trappings of sovereignty passed from the British Crown to the states in their collective, rather than individual capacity, the Constitution which merely allocates between the federal government and the states *those powers previously lodged in the separate states*, should not be deemed an exhaustive catalogue of the federal government's powers in the realm of foreign affairs.

Id. at 634-35.

⁷⁵ *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-17.

controversial⁷⁶ and even as inaccurate,⁷⁷ a leading international law jurist has argued that the doctrine of the case with regard to the foreign affairs power is not challenged by Justice Sutherland's arguably erroneous historical account.⁷⁸

Rather, the novelty of Justice Sutherland's opinion lay in distinguishing between legislation whose "whole aim . . . is to affect a situation entirely external to the United States, and falling within the category of foreign affairs,"⁷⁹ and domestic legislation that was subject to the tests of permissibility of delegated legislation developed by the Court in that period. Hence, rather than finding that the congressional delegation was valid or that either legislative or judicial precedent permitted it, Justice Sutherland preferred to ground his decision in the early practice as evidencing first principles. Thus, in deriving the President's power over foreign affairs outside the Constitution, he was not endorsing unconstitutional action.⁸⁰ However, as Charles Lofgren's excellent analysis of Justice Sutherland's opinion in *Curtiss-Wright* shows, the best basis for tracing the foreign relations power outside the constitution that Sutherland gave included the U.S. attributes of sovereignty as a nation, which he argued justified this power by maintaining "an effective control of foreign relations."⁸¹ Even then, perhaps what the *Curtiss-Wright* decision could arguably be said to represent is a need for the President to have independent authority to make treaties rather than that there is an extra-constitutional or inherent basis for that power.⁸²

⁷⁶ These extra-constitutional sources of Presidential authority have been contested. See, e.g., Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

⁷⁷ For example, Charles A. Lofgren argues that there was an interim period under the Articles of Confederation where states were recognized as having certain external powers and actually exercised them in some circumstances such as making treaties with Indian tribes. Charles A. Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 17 (1973). Lofgren also argues that Sutherland's position was inconsistent (not only with the state sovereignty arguments), but also with the popular sovereignty which the Constitution is argued to be predicated upon. *Id.*

⁷⁸ HENKIN, *supra* note 56, 19-22.

⁷⁹ *Curtiss-Wright Exp. Corp.*, 299 U.S. at 315.

⁸⁰ SUTHERLAND, *supra* note 72, at 55.

⁸¹ Lofgren, *supra* note 77, at 23 (quoting *Burnet v. Brooks*, 288 U.S. 378, 396 (1933), *quoted in* *Curtiss-Wright Exp. Corp.*, 299 U.S. at 318).

⁸² David Levitan therefore notes:

2.2.2. *Youngstown: Balancing Presidential and Congressional Power in the Foreign Affairs Realm or Presidential Prerogative as Primus Inter Pares*

In *Youngstown*, the President issued an Executive Order directing the government to seize and operate the nation's steel mills during the Korean War in an attempt to avert a nation-wide strike that the President believed would have jeopardized the national defense.⁸³ The steel companies brought the suit against the government on the ground that the seizure was neither authorized by Congress⁸⁴ or by the Constitution. The steel companies argued that Congress, having established procedures for resolving labor disputes, did not authorize the seizure of private property under the authority of a Presidential order as one way of resolving labor disputes. The Supreme Court declared that the executive order was unconstitutional because it infringed upon congressional legislative or lawmaking authority, which was expressly reserved to the Congress under the Constitution. As Justice Black's opinion pointed out, there was no legislative authority for a Presidential seizure of steel mills.⁸⁵

Mr. Justice Sutherland's theory of the nature of the foreign relations power represents the most extreme interpretation of the powers of the national government. It is the furthest departure from the theory that United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power. In terms of democratic theory this represents an unfortunate departure from the long accepted and cherished notions as to the nature of the American system. Through the doctrine that this is a government of enumerated powers had already undergone much interpretation and expansion so that the doctrine was in fact little more than a fiction, the basic theory had remained generally undisturbed.

Levitan, *supra* note 76, at 493.

⁸³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸⁴ To no avail, Truman approached Congress to pass legislation to supercede his order.

⁸⁵ *Youngstown*, 343 U.S. at 585. In particular, Justice Black noted that:

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

Id. at 589. Justice Frankfurter's concurring opinion outlined legislation that had previously authorized seizure of private property. *Id.* at 593-620. (Frankfurter, J., concurring).

Justice Jackson's concurring opinion underscored that the nature of the foreign affairs power was "relativized" and "institutionally balanced" between the President and Congress.⁸⁶ This approach differs from Justice Sutherland's view of Presidential authority in *Curtiss-Wright*. Proceeding from this view of the President's power as being relativized and institutionally balanced, Justice Jackson laid down a three-point sliding scale for determining the constitutionality of presidential actions in the foreign affairs realm. On this sliding scale, where 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. When by contrast the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distributions are uncertain. Finally, when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.⁸⁷

While *Youngstown* involved the issue of analyzing presidential assertions of inherent authority where there was congressional silence,⁸⁸ it also raised the broader issue of the exercise of executive power in the field of legislative power. Several of the Justices in the majority in *Youngstown* considered congressional silence as "tantamount to a legally binding expression of intent to forbid the seizure"⁸⁹ of the steel industry and it was only the dissenting opinion of Chief Justice Vinson that explicitly argued that absence

⁸⁶ In Justice Jackson's own words,

[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

Id. at 635 (Jackson, J., concurring). Gott, *supra* note 64, at 195-97 is the source of the quoted words ("relativized" and "institutionally balanced") in the main text.

⁸⁷ *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring).

⁸⁸ See *TRIBE*, *supra* note 23, at 674.

⁸⁹ *Id.* at 672. *Youngstown*, 343 U.S. at 602-03 (Frankfurter, J., concurring), 635-40 (Jackson, J., concurring), 662 (Clark, J., concurring).

of specific congressional authority to seize the steel mills to defend the U.S. did not preclude the President from seizing them under other bases of authority such as the power of eminent domain.⁹⁰

2.2.3. *Dames & Moore v. Regan: Acquiescing to Executive Legislation in Foreign Affairs*

It was, however, in *Dames & Moore*⁹¹ that the Supreme Court eventually affirmatively endorsed presidential assertions of inherent authority in the face of congressional silence. In issue in this case was an Executive Agreement with Iran, which facilitated the release of U.S. citizens held hostage in Iran, directing the termination of all legal proceedings in the U.S. "involving claims of U.S. persons and institutions against Iran and its state enterprises." The agreement further provided for the nullification of all attachments and judgments obtained in such proceedings and that any further proceedings would be resolved through binding arbitration.⁹² Under this agreement, all Iranian assets that the U.S. government had blocked, even those subject to writs of attachment and preliminary injunctions, were to be transferred in a security account to satisfy awards rendered by arbitration of the Iran/U.S. Claims Tribunal.⁹³

Dames & Moore, an American corporation, obtained a \$3.4 million judgment with interest for breach of contract against Atomic Energy Organization of Iran, among other Iranian institutions. The judgment was stayed and all prejudgment and

⁹⁰ *Youngstown*, 343 U.S. at 680, 667-710 (Vinson, J., dissenting). Edward S. Corwin argues that the Taft-Hartley Act made *Youngstown* less a case regarding congressional silence on an issue as the majority of the justices concluded (with the exception of Justice Clark), but rather that Congress "having entered the field, its ascertainable intention supplied the law of the case." Corwin, *supra* note 63, at 65.

⁹¹ *Dames & Moore v. Regan*, 453 U.S. 654, 665 (1981).

⁹² Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 224, 226 (1981).

⁹³ The Tribunal was established by an Executive Agreement with Iran, for the "purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States." Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. II(1), Jan. 19, 1981, 20 I.L.M. 230, 230-31 (1981). President Reagan subsequently ratified this and other agreements that President Carter had entered into and issued an executive order suspending all claims in other forums that were eligible to be resolved by the claims tribunal. Exec. Order No. 12, 294, 46 Fed. Reg. 14, 111 (Feb. 24, 1981).

attachments against the Iranian defendants were vacated. *Dames & Moore* brought suit against the U.S. Department of the Treasury ("Treasury") to enjoin the enforcement of the Executive Orders and the Treasury regulations alleging that these laws were not authorized by the Constitution and were therefore unconstitutional. The issues in this case brought before the Supreme Court involved the authority of the President to suspend legal proceedings instituted by American plaintiffs in U.S. courts, his nullification of attachments obtained in such cases, as well as his authority to transfer assets subject to attachment back to Iran.

Justice Rehnquist who wrote the decision for a unanimous court found debatable authority for granting the President authority to nullify attachments in the International Emergency Economic Powers Act ("IEEPA").⁹⁴ With regard to the transfer of foreign property in the U.S., the Court found that the President had power to permanently transfer such assets back to foreign citizens even when U.S. citizens had rights over them although a plain reading and the legislative history of section 1702(a)(1)(B) of the IEEPA, which only allows the President to temporarily freeze such assets.⁹⁵ On the question of the President's authority to suspend the claims of American citizens on the foreign assets, the Court relied neither on the Constitution or a congressional delegation under statute such as the IEEPA,⁹⁶ the Hostage Act⁹⁷ or under a plenary power⁹⁸ which are acknowledged as providing legal legitimacy for the exercise of Presidential power. Rather, the court

⁹⁴ *Dames & Moore*, 453 U.S. at 669-74. For doubts on the tenability of this position, see Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 80-83, 76-94 (1982).

⁹⁵ *Id.* at 78-80. In particular, they note that such a conclusion "leads to the anomalous result that if the President 'vests' foreign property during wartime under the Trading with the Enemy Act ["TWEA"] he must distribute to American claimants pursuant to a statutory claims procedure. However, the President may also freely transfer property back to the foreign debtor under his supposedly more restrictive International Emergency Economic Powers Act ["IEEPA"] peacetime powers." *Id.* at 80.

⁹⁶ *Dames & Moore*, 453 U.S. at 675, 677.

⁹⁷ 22 U.S.C. § 1732 (2000).

⁹⁸ *Dames & Moore*, 453 U.S. at 654, 688 (noting the Court's unwillingness to decide whether the President has plenary power to settle claims even where foreign governmental entities were involved). This holding differentiates the decision in *Dames & Moore* from Justice Sutherland's decision in *Curtiss-Wright*, which was based on principles of extra-constitutionality. *Curtiss-Wright Exp. Corp.*, 299 U.S. 654.

based its decision on the acquiescence of Congress to the exercise of such and similar powers. To justify its doctrine of legislative acquiescence, the Court relied on Frankfurter's concurring opinion in *Youngstown*⁹⁹ where the Court found that the failure of Congress to question a "systematic, unbroken executive practice" known to it "may be treated as a gloss on the Executive power vested in the President by Article II Section 1."¹⁰⁰ Justice Rehnquist argued that even though past practice does not suffice to create such Presidential power, a presumption that Congress had consented to a practice may be raised where the practice was known and acquiesced to by Congress.¹⁰¹ That acquiescence by itself can constitute congressional delegation to the President is debatable especially with regard the suspension of valid judicial claims made by U.S. citizens.¹⁰² In other words, the Court held that the President, through an Executive Agreement, "can change the substantive law governing litigation in the United States,"¹⁰³ a rather broad power which as we saw above is hard to sustain.¹⁰⁴

In *Dames & Moore* therefore, the Supreme Court unanimously held that congressional silence in the use of executive agreements "could be construed to create a rule of customary constitutional law legitimizing unilateral presidential agreements."¹⁰⁵ As Gil Gott observes, Justice Rehnquist substantially altered Justice Jackson's formula in *Youngstown* "by shifting metaphors, from 'pigeonholes'

⁹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

¹⁰⁰ *Dames & Moore*, 453 U.S. at 661-62.

¹⁰¹ *Id.*

¹⁰² See Marks & Grabow, *supra* note 94 at 84-92, 103, (noting that "[a]fter *Dames & Moore*, absent congressional action, a President may, by executive agreement, suspend and effectively terminate the enforcement agreement, suspend and effectively terminate the enforceable claims of American citizens in United States courts"). They further noted "[a]dherence to this rule effectively obliterates the rights of American claimants against Iran and creates an unwieldy standard of congressional delegation by acquiescence." *Id.*

¹⁰³ *Id.* at 97.

¹⁰⁴ Professor Redwood argues that because an executive agreement has the same legal status as treaties, it is "in effect an act of legislation." James Redwood, Note, *Dames Moore v. Regan: Congressional Power over Foreign Affairs Held Hostage by Executive Agreement with Iran*, 15 LOY. L.A. L. REV. 249, 280 (1982). Therefore, "allowing the branch which is to execute the laws the power to conclude international agreements, which are admittedly laws of the land, gives the President a legislative function which is clearly unconstitutional." *Id.* at 282.

¹⁰⁵ *Id.* at 254.

to 'spectrum.'"¹⁰⁶ Rehnquist, who clerked for Jackson in the same term as the *Youngstown* decision was made, re-characterized Jackson's three-tiered classification in *Youngstown* as follows:

Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown* (concurring opinion), that "[t]he great ordinances of the Constitution do not establish and divide fields of "black and white." Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes [referring to Jackson's three-tiered formula], but rather along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.¹⁰⁷

In effect, *Dames & Moore* seems rather similar in outcome with the *Curtiss-Wright* decision to the extent that both upheld Presidential authority inconsistently with accepted constitutional axioms of Presidential power and authority.¹⁰⁸ *Dames & Moore*, in essence, legitimizes a form of constitutionalism that strays "from requiring the President to obtain fairly explicit legislative authorization for action he seeks to take."¹⁰⁹

¹⁰⁶ Gott, *supra* note 64, at 198.

¹⁰⁷ *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

¹⁰⁸ *See id.* at 654; TRIBE, *supra* note 23, at 674; Gott, *supra* note 64, at 198.

¹⁰⁹ TRIBE, *supra* note 23, at 675-76.

2.3. *The Legal Status of GATT/WTO Law Within the Foreign Affairs Trade Doctrine*

2.3.1. *GATT's Early Years*

In 1947, GATT was established as a provisional document that "would have created an International Trade Organization ["ITO"] to administer the GATT."¹¹⁰ However, because of the opposition to the ITO in the U.S. "where the Marshall Plan had commanded most of the country's interest in international economics," President Truman decided not to pursue the Senate's consent to the ITO Charter¹¹¹ in order to ward off a tussle with the Senate over its adoption. GATT, unlike the ITO Charter, did not seek to establish an institution sought to enact a set of rules to liberalize trade.¹¹² In other words, the U.S. entered into GATT not under a "direct act of Congress," but rather under an "executive agreement and a proclamation of its effectiveness."¹¹³

In this period, the status of the GATT under the Constitution and the domestic U.S. legal order was in limbo.¹¹⁴ For example, Congress did not express an opinion on the validity of GATT.¹¹⁵ It is therefore clear that the validity of the GATT at the time could not be said to arise from a Congressional-Executive Agreement¹¹⁶

¹¹⁰ PAUL B. STEPHAN III ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY* 74 (2d ed. 1996) [hereinafter STEPHAN].

¹¹¹ *Id.* See also Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 *STAN. J. INT'L. L.* 479, 482 (1990) ("However, plans for the ITO were confounded when the Truman administration, faced with a populace whose post-war approval of international organizations was giving way to distrust, was forced to withdraw its request for Senate consent to the ITO Charter.").

¹¹² See *id.* at 482 ("Originally, the GATT was intended to be only an interim agreement, effective until the establishment of a mere comprehensive institutional arrangement under the Charter of the . . . [ITO].").

¹¹³ *Id.*

¹¹⁴ Brand notes that "[s]ince U.S. agreement to the Protocol of Provisional Application in 1947, Congress has been careful to avoid explicit approval or rejection of the GATT." *Id.* at 485. Notwithstanding this congressional ambivalence, courts continued to regard GATT as valid. *Id.* at 486.

¹¹⁵ STEPHAN, *supra* note 110, at 75. See also Brand, *supra* note 111, at 482-83 (describing how an international agreement can become the law of the United States according to the RESTATEMENT (THIRD)).

¹¹⁶ Brand, *supra* note 111, at 485. See also Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in *THE EUROPEAN COMMUNITY AND GATT* 187, 202 (Meinhard Hilf et al. eds., 1986) ("[T]he Congress passed no statute implementing the GATT-, not then, nor at any time since then."). *But see* John H.

although it certainly could be argued that at a minimum Congress acquiesced to the Executive branch's participation in the formulation of GATT.¹¹⁷ The Reciprocal Trade Agreements Act of 1934 and the amended Act of 1945 did not expressly authorize the President to negotiate or enter into multilateral agreements like GATT perhaps because Congress only contemplated bilateral agreements. In fact, all prior accords negotiated under the Act had been bilateral.¹¹⁸

However, scholars have challenged the absence of explicit congressional opinion on the validity of multilateral treaties as determinative of the status of GATT by advancing the view that a shift towards internationalism away from isolationism in U.S. foreign policy in the 1940s, as reflected in the signing of the Charter of the United Nations¹¹⁹ and support for the adoption of the Bretton Woods institutions, constituted an extra-textual constitutional change in favor of Congressional Executive Agreements such as GATT.¹²⁰ According to Ackerman and Golove, the historical record supports the view that Article II, Section 2, Clause 2 is not an exclusive treaty-making clause to the extent that the 1940s shift towards internationalism heralded a constitutionally valid practice of Congressional approval by majority vote of any international agreement that the President could submit for two-thirds approval by the Senate under Article II Section 2 of the Constitution.¹²¹

2.3.2. *The 1974 Trade Act: Formalizing Congressional Participation in Trade Negotiation*

Although the House of Representatives (the "House") in 1944

Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 312 (1967) ("GATT is a valid executive agreement, entered into by the United States pursuant to authority of congressional legislation.").

¹¹⁷ Brand, *supra* note 111, at 483.

¹¹⁸ *Id.* at 484.

¹¹⁹ Both the United Nations Participation Act of 1945 and the Bretton Woods Agreement Act reflected the shift not only towards internationalism, but also acknowledged the Executive's broad competence in this area. See United Nations Participation Act, 22 U.S.C. § 287 (2000) (enacting the United Nations Educational, Scientific, and Cultural Organization); Bretton Woods Agreement Act, 22 U.S.C. § 286 (2000) (creating the International Monetary Fund and Bank for Reconstruction and Development).

¹²⁰ Ackerman & Golove, *supra* note 24, 861-87, 889-96.

¹²¹ For a critique of this position, see Tribe, *supra* note 43, at 1284-85. For a response, see Golove, *supra* note 43, at 1935-42.

passed a proposal to amend Article II, Section 2, Clause 2 that would have given the House a role in treaty-making through Congressional Executive Agreements¹²², it was during the Tokyo Round of the GATT negotiations which started in 1973 that led to a formal recognition of legislative participation in treaty-making in the trade context. In the 1974 Trade Act, Congress formalized its participation by requiring a joint resolution of Congress to authorize all international commercial agreements.¹²³ The 1974 Trade Act also empowered Congress for the first time to authorize payment of the U.S. share of GATT expenses. The Act also directed the President both to conform with GATT balance-of-payment restrictions and to consider in import relief actions "the international obligations of the United States."¹²⁴ Since the 1974 Trade Act, Congress also began to implement legislation with respect to agreements negotiated under the GATT auspices, beginning with the results of the Tokyo Round in 1979.¹²⁵ Like the Trade Act of 1974, the Omnibus Trade and Competitiveness Act of 1988 ("OCTA") further confirms that status of GATT as a Congressional-Executive Agreement.¹²⁶

The explicit recognition of the agreements negotiated under the GATT's auspices as Congressional Executive Agreements in effect implies that such agreements are not self-executing to the extent that implementing Congressional legislation was formally

¹²² Amendment to the Constitution Relative to the Making of Treaties, Hearings Before Subcomm. No.3 of the Comm. on the Judiciary and the Comm. on the Judiciary House of Representatives 78th Congress, Sec. Sess. on H.J. Res. 6, H.J. Res. 31, H.J. Res. 64, H.J. Res. 238, H.J. Res. 264, and H.J. Res. 320, Proposing an Amendment to the Constitution of the U.S. Relative to the Making of Treaties, Mar. 8, Nov. 29 and 30, and Dec. 1 and 2, 1944, Serial No. 21, Government Printing Office, Washington 1944.

¹²³ STEPHAN, *supra* note 110, at 147.

¹²⁴ Brand, *supra* note 111, at 485.

¹²⁵ Accordingly, a Senate Report on the 1974 Trade noted that the "relationship between the trade agreements and U.S. law is among the most sensitive issues in the Bill. As stated in the statement of proposed administrative action, the trade agreements can only be achieved as is provided in the Trade Act of 1974." Jackson, *supra* note 116, at 346 n.80 (quoting S. Rep. No.249, 96th Cong. 1st Sess. 36 (1979)). See also STEPHAN, *supra* note 110, at 75. On the status of the self-executing doctrine, see NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, in PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY 261, 261-327 (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994).

¹²⁶ Brand, *supra* note 111, at 508.

regarded as an essential precondition to the negotiation and approval of future GATT agreements.¹²⁷

Similarly, The Uruguay Round Agreements Act of 1994 carries forward this limitation that in effect prohibits the applicability of the Uruguay Round Agreements “to any person or circumstance, that is inconsistent with any law of the United States.”¹²⁸ It is also significant that since 1974 Congress seems to have fully acquiesced to GATT as having legal status under U.S. law unlike in the period prior to 1974. Hence, the Omnibus Trade and Competitiveness Act of 1988 embraces GATT and calls for its expansion in a manner that implies Congressional recognition of the potential of GATT law becoming U.S. law with its blessings.¹²⁹

The process by which Congress would be involved in negotiating and approving agreements until 2002 under the auspices of GATT in the 1974 Trade Act was referred to as the “fast track” process.¹³⁰ Hence, Congressional-Executive Agreements are the formal way in which GATT and WTO agreements become part of U.S. law, and the “fast track” was the process of facilitating Congressional participation in negotiating and approving trade agreements. This process was in large measure necessitated by Congressional concern over the Executive’s unilateralism in negotiating trade agreements without Congress’ involvement.¹³¹

¹²⁷ JACKSON, *supra* note 23, at 211-13. John Jackson notes that Congress did not approve the 1955 Draft Charter for the Organization for Trade Cooperation under GATT auspices and that there were Congressional concerns regarding the United States’s participation in GATT without Congressional involvement until 1952 when Congress authorized the Kennedy Round of Tariff Negotiations by the Trade Expansion Act of 1962. *Id.* For another view regarding parts of GATT 1947 that could have been construed as self-executing, see Brand, *supra* note 111, at 508.

¹²⁸ STEPHAN, *supra* note 110, at 150 (quoting section 102(a)(1) of the Uruguay Round Agreement Act, 19 U.S.C. § 3512(a)(1)). In addition, the Omnibus Trade and Competitiveness Act of 1988 provides that trade agreements only become U.S. law when implementing legislation is enacted by Congress. See 19 U.S.C. § 2903(a)(1) (2000) (describing the implementation of trade agreements).

¹²⁹ Brand, *supra* note 111, at 502.

¹³⁰ In the 2002 Trade Act, this process has been revamped and renamed trade promotion authority. See *infra* notes 142-66.

¹³¹ According to Lael Brainard and Hal Shapiro, prior to the twentieth century, Congress alone seemed to have an exclusive authority over foreign commerce. See Lael Brainard & Hal Shapiro, *Fast Track Trade Promotion Authority*, available at <http://www.brook.edu/comm/policybriefs/pb91.pdf> (Dec. 2001) (“Prior to the twentieth century, regulation of foreign commerce was almost exclusively a congressional prerogative.”). Since tariffs were considered to fit into the part of domestic tax policy rather than that of foreign affairs, they “were subject to change only by an act of Congress. *Id.* at 2. On the other hand, the

As we shall see below, an immediate reason for the 1974 Trade Act was the disappointment of Congress at the Executive's negotiation of an International Anti-dumping Agreement in the 1967 Kennedy Round without involving Congress.¹³² The fast track process therefore serves the dual purpose of enabling Presidential consultation with and accountability to Congress¹³³ while at the same time enhancing the President's negotiating ability.¹³⁴ Fast track authority was also designed to overcome the weakness of other mechanisms of domesticating international trade agreements. The perceived weakness of Article II treaties was that the supermajority requirement in the Senate would stand in the way of the President's negotiating authority. Executive agreements by contrast gave Congress no room to participate in negotiating or entering into a trade agreements, while Congressional-Executive Agreements gave Congress too little input into the process.¹³⁵

The 1974 Trade Act required congressional approval at various

President had primary responsibilities on trade "to collect the tariffs set by Congress and to negotiate bilateral Treaties of Friendship, Commerce, and Navigation, which extended to treaty partners the most favorable tariff rates available." *Id.* The Great Depression brought "a major change in U.S. trade policy" while the "Trade Act of 1934 effectively 'pre-approved' presidential authority to lower U.S. tariffs within certain limits by authorizing the president to enter into reciprocal tariff-reduction agreements." *Id.* In the Trade Act of 1962, Congress authorized the President to eliminate certain U.S. tariffs in the Kennedy Round under the GATT. *Id.* The conclusion of the Kennedy Round brought two contradictory consequences. The successful array of tariff-reduction commitments and "two controversial 'non-tariff' agreements governing antidumping and customs valuation . . ." *Id.* Some lawmakers refer to the latter consequence by observing that "the president had overstepped his authority." *Id.* By enacting the 1974 Trade Act, Congress then "decided to maintain final control over non-tariff agreements" in the GATT Tokyo Round. *Id.* The Act saw the legislation as the only means to implement non-tariff agreements and required the President to "consult with Congress prior to entering into them." *Id.*

¹³² JACKSON, *supra* note 23, at 43-44.

¹³³ Harold Hongju Koh argues that Fast Track authority as embodied in the 1974 Trade Act "was wreathed with provisions that manifested Congress' pervasive post-Watergate, post-Vietnam distrust of unchecked executive discretion in foreign affairs: specified negotiation objectives; sunset provisions on presidential negotiating authority; extensive consultation, certification and reporting requirements; dramatic 'judicialization' of trade remedies." Koh, *supra* note 42, at 145.

¹³⁴ *Id.* at 143.

¹³⁵ Harold Koh notes that the immediate reasons for Fast Track arose in part as a result of "skirmishes" between the President and Congress regarding the balance between the role of Congress and the President in domesticating international and bilateral trade agreements such as the Anti-dumping Code following the Kennedy Round. *Id.* at 146.

stages. For example, the President was required to notify the House Ways and Means Committee and the Senate Finance Committee at least before entering into an international trade agreement. Members of both Houses form part of the President's negotiating team.¹³⁶ Ultimately, both Houses are required to vote up or down, within sixty days of their introduction, the agreements negotiated together with their implementing legislation.¹³⁷ In 1984, amendments to the 1974 Act enhanced Congress' role in negotiating international trade agreements by requiring that the President to notify and consult with the House Ways and Means Committee and the Senate Finance Committee for "a period of sixty legislative days before giving the statutorily required ninety-day notice of his intent to sign an agreement."¹³⁸ In 1988, Congressional control of the President's negotiating authority¹³⁹

¹³⁶ Trade Act of 1974 § 161, 19 U.S.C. § 2211 (2000).

¹³⁷ See 19 U.S.C. §§ 2191-93 (2004) (defining Congressional procedures with respect to Presidential Actions). Koh notes that the policy advantages of the Fast Track process are:

First, it allowed Congress to overcome both the political inertia and the procedural obstacles that frequently prevent a controversial measure from coming to a vote at all. Second, it controlled domestic interest special group pressures that might otherwise have provoked extensive, *ad hoc* amendment of a negotiated accord. Third, it bolstered the Executive Branch's negotiating credibility with United States allies, which had suffered serious damage during the Kennedy Round, by reassuring trading partners that negotiated trade agreements would undergo swift and non-intrusive legislative consideration. Fourth and finally, it acted functionally like a one-house legislative veto to control executive discretion, for it authorized either House to block passage of a fully negotiated trade agreement simply by voting down the agreement or its implementing legislation.

Koh, *supra* note 42, at 148.

¹³⁸ *Id.* at 149.

¹³⁹ The President's negotiating authority under the 1974 Trade Act included entering into agreements reducing non-tariff barriers and other trade distortions. Trade Act of 1974 § 102, 19 U.S.C. § 2112, § 2191 (2000). With regard to the President's authority to enter into voluntary export agreements in light of the Constitution's grant of that power to Congress, see *infra* Section 3.3.4 (describing the fate of competition policy in foreign trade in the 1970s-1980s). 19 U.S.C. § 2902(a)(1)(B)(ii) empowers the President, within limits, to proclaim such modification or continuance of any existing duty, duty-free or excise treatment, or such additional duties, "as he determines to be required or appropriate to carry out" certain trade agreements. Hence, Harold Koh argues that the Fast Track process "does not legally bind the two branches so much as it erects a legislative framework within which political accommodations can occur." Koh, *supra* note 42, at 159.

was further enhanced by empowering either House to block the extension of the chief executive's authority past the original expiration period under the 1984 Act.¹⁴⁰

The significance of the fast track procedure is perhaps best illustrated by how it shaped the Uruguay Round. The negotiation timetable for the Uruguay Round hinged very closely on the availability of fast track authority. U.S. negotiators scheduled the final meeting of the Uruguay Round in December 1990, ahead of the March 1, 1991 deadline for introducing legislation in Congress under the authority.¹⁴¹ President George H. W. Bush then sought a two-year extension to enable him to complete negotiations of the Uruguay Round and NAFTA. To galvanize political support for Congress' willingness to extend the authority, the President was requested to submit an Action Plan illustrating how labor and environmental issues were raised by the proposed NAFTA.

2.3.3. *The 2002 Trade Act: Strengthening Congressional Participation in Trade Negotiations*

While Congress succeeded in making labor and environmental standards a concern of trade negotiations in the 1990s, it was not until the 2002 Trade Act ("the Act" or "2002 Trade Act") that Congress gave these considerations traction. The unprecedented re-approval of Presidential authority to negotiate trade agreements after an eight year hiatus demonstrated the extent to which the post-World War Two consensus on international trade in the U.S. had frayed. The perceived and real adverse impact on U.S. industries, jobs, and the environment made Congress reluctant to empower the President to negotiate new trade agreements. The Act seeks to address these concerns in a variety of ways in addition to naming the process "trade promotion authority" as opposed to a "fast track method." First, it expands the principle that GATT/WTO law cannot supersede U.S. law by providing that even oral, not just written, agreements not disclosed to Congress cannot become effective within the United States.¹⁴²

¹⁴⁰ *Id.* at 151.

¹⁴¹ Edmund W. Sim, *Derailing the Fast Track for International Trade Agreements*, 5 FLA. J. INT'L L. 471, 493 (1990). On September 25, 1990, President Bush gave notice to the respective committees of both Houses of his intention to negotiate NAFTA. Koh, *supra* note 142, at 153.

¹⁴² Section 2105(a)(4)(A) and (B) of the Trade Act of 2002 provides that any trade agreement or understanding with a foreign government (*oral* or written) not

Second, the Act establishes unprecedented opportunities for consultation between Congress and the President in negotiating trade agreements. For the first time, a set of negotiating objectives in congressional authorization of presidential negotiating authority specifically mandates consideration of a variety of issues. The primary negotiating objectives include assuring “more open, equitable and reciprocal market access,” eliminating market distortions and barriers, and strengthening the international trading system.¹⁴³ These objectives further require that future trade agreements “ensure that trade and environmental objectives are mutually supportive” and that they “seek to protect and preserve the environment and enhance the international means of doing so.”¹⁴⁴ The broadness with which these goals are stated indicates the compromising nature of the Act. This in turn suggests that it is the process of implementation and adjudication that will give specific meaning to such ambiguities. The Act requires that the U.S. Trade Representative (“USTR”) keep all of

disclosed to Congress will not be considered “as being part of trade agreements approved by Congress and shall have no effect under U.S. law or in any dispute settlement body.” See Trade Act of 2002 § 2105(a)(4)(A), (B) (noting the disclosure of commitments); 19 U.S.C.A. § 3805(a)(4) (emphasis added). Notice that the provision is very broad, encompassing both written and non-written agreements.

¹⁴³ Trade Act of 2002 § 2102(a)(1)-(3), 19 U.S.C.A. § 3802(a)(1)-(3). In addition, § 2102(a)(5) of the Act also provides that fostering economic growth, raising living standards and promoting full employment and enhancing the global economy to overall objectives of U.S. trade.

¹⁴⁴ *Id.* at § 2102(a)(5). Section 2101(a)(6) requires a respect for and an “understanding of the relationship between trade and worker rights.” Notably, the American Federation of Labor-Congress of Industrial Organizations (“AFL-CIO”) opposed the Act because it did not require the President to include enforceable protections for the environment and workers’ rights in trade agreements. See AFL-CIO, *John J. Sweeney, President, AFL-CIO – Remarks to Senate Finance Committee Regarding Proposed Fast Track Legislation*, at <http://www.aflcio.org/mediacenter/prspmt/tm06202001.cfm> (June 20, 2001). In addition, the Sierra Club criticized the Act because it failed to encourage environmental protection and to guard against weakening of environmental standards. See Sierra Club, *Responsible Trade: Oppose H.R. 3005, the Trade Promotion Authority Act of 2001: A Letter from 12 Environmental Groups*, at <http://www.sierraclub.org/trade/fasttrack/12groups.asp> (Oct. 16, 2001). According to the Sierra Club, the Act also fails to “provide sufficient assurances to Congress that the administration will bring back trade and investment agreements that meet congressional negotiating objectives to safeguard the environment” because it only includes “voluntary negotiating objectives on the environment.” In addition, unlike the Jordan Free Trade Agreement and NAFTA, Sierra Club criticized the Act for doing nothing “to prevent countries from lowering their environmental standards to gain unfair trade advantages, and fail[ing] to actively promote meaningful improvement in environmental protection and cooperation.” *Id.*

them “fully appraised of the negotiations” at all times during negotiations of trade agreements both “closely and on a timely basis” with a newly established Congressional Oversight Group¹⁴⁵ as well as with “all committees of Congress with jurisdiction over laws that *would be* affected by such agreements.”¹⁴⁶ Section 2105(b)(1)(B) makes provision for a non-binding procedural resolution in either House during debate on an implementing bill in instances where the President “failed or refused to notify and consult in accordance with the provisions of the Act.”

With respect to entering into trade agreements relating to tariff and non-tariff barriers, the President’s authority begins on June 1st, 2005, and ends on June 1, 2007. Such an agreement must meet all the negotiating objectives as well as the consultation and assessment requirements provided for under the Act.¹⁴⁷ The Act provides that the President may apply for an extension of this authority.¹⁴⁸ The Act provides that a member of Congress may file an “extension disapproval resolution” thereby precluding extension of the President’s negotiating authority.¹⁴⁹

As under the 1974 Act, the 2002 Act requires the President to notify Congress ninety days before initiating negotiations¹⁵⁰ and ninety days before the day on which the President enters into a new trade agreement.¹⁵¹ The Act adds new layers of consultation,

¹⁴⁵ Trade Act of 2002 § 2102(d)(2)(A). The Group is comprised of the chairman and ranking member of the Committee on Ways and Means including three other members of that Committee, the Chairman and ranking member of the Committee on Finance, and three additional members, provided, in both cases, that no more than two are members of the same party and the Chairman and the ranking members, of the House of Representatives, as well as of the Senate, have jurisdiction over provisions of law affected by a trade agreement. *Id.* Members of the Oversight Group will be accredited by the United States Trade Representative (“USTR”) “as an official advisor to the United States delegation in the negotiations” for any trade agreement. *See id.* at § 2107(a)(4). The Act contemplates the Group shall have “the closest practicable coordination” with the USTR (§2107(b)(2)(C)) have access “to pertinent documents relating to negotiations including classified materials (§ 2107(b)(2)(B)); get “regular, detailed briefings . . . regarding negotiating objectives . . . beginning as soon as practicable after the Congressional Oversight Group is convened, with more frequent briefings as trade negotiations enter the final stage (§ 2107 (b)(2)(A)).”

¹⁴⁶ *See id.* § 2102(d)(1) (emphasis added).

¹⁴⁷ *Id.* § 2103(b)(2).

¹⁴⁸ *Id.* § 2103(a)(1)(B)(i).

¹⁴⁹ *Id.* § 2103(c)(5).

¹⁵⁰ *Id.* § 2104(a)(1).

¹⁵¹ *Id.* § 2105(a)(1)(A).

notification and certification regarding the negotiations to the committees of jurisdiction in both Houses as well as to the newly established Congressional Oversight Group. There are new and extensive consultation and reporting requirements and meetings¹⁵² as well as a particular focus on the impact of new trade agreements to specified industries and sectors of the economy.¹⁵³ In addition, the International Trade Commission (“ITC”) has a mandate to perform an assessment of “the likely impact” of a trade agreement ninety days before the President enters into it focusing on the economy as a whole as well as a host of enumerated sectors.¹⁵⁴ The Act also requires environmental reviews of future trade agreements,¹⁵⁵ reviews on their impact on employment and labor markets,¹⁵⁶ and requires that the agreements take into account “other legitimate” domestic objectives including the “protection of legitimate health or safety, essential security and consumer interests.”¹⁵⁷

The debating requirements on trade implementing legislation in both Houses for the first time provides for non-binding disapproval resolutions if the agreement is inconsistent with the negotiating objective that precludes damming down U.S. trade remedy laws under Section 2102(b)(14).¹⁵⁸ This compromise provision was formulated after a far more reaching Amendment, the Dayton-Craig Amendment, was defeated. The Dayton-Craig Amendment would have required a separate vote on any part of an implementing bill that dammed down U.S. trade remedy laws.¹⁵⁹

¹⁵² *Id.* § 2104 (a)(1)-(3).

¹⁵³ For example with respect to agriculture, see § 2104(b)(1), (3), respectively; with regard to import sensitive products, see § 2104(b)(2); with respect to textiles, see § 2104(c). Generally with respect to consultation before Agreement is entered into, see § 2104(d). With regard to trade remedy laws, see § 2104(d)(3). With regard to specific reports to the House and the Senate, see § 2104(d)(3)(C), and with respect to Advisory Committee reports, see § 2104(e).

¹⁵⁴ *Id.* § 2104(f)(2).

¹⁵⁵ *Id.* § 2102(c)(4).

¹⁵⁶ *Id.* § 2102(c)(5).

¹⁵⁷ *Id.* § 2102(c)(6).

¹⁵⁸ *Id.* § 2104(d)(3)(c).

¹⁵⁹ The Dayton-Craig Amendment would in effect have allowed “Congress to debate parts of trade agreements that threaten the ability of U.S. industries and workers to seek remedy for unfair trade” separately from the entire trade agreement as negotiated by the President and thereby to block those parts. See Larry Craig, *The Truth About the Dayton-Craig Amendment*, WASH. TIMES (May 28,

Third, the reporting, certification, and consultation requirements in the Trade Act of 2002¹⁶⁰ are informed by the principle that U.S. labor¹⁶¹ and the environment¹⁶² are non-derogable. The Trade Act of 2002 reinforces this principle by establishing Trade Adjustment Assistance that authorizes the President to provide relief to workers, farmers, communities, and fishermen "seriously injured or threatened with serious injury due to surges of imports."¹⁶³ The Act is therefore unprecedented to the extent that it acknowledges the gains from free trade. It also recognizes that free trade produces losers and therefore provides for Presidential attention to such outcomes in addition to authorizing the appropriation of monies for programs such as worker re-training. The scope of those covered is far-reaching. It includes secondary workers and self-employed persons such as farmers and ranchers. It covers income support for two years as well as a 65% tax credit for health insurance while these workers are in re-training.

2002) (arguing in favor of the Dayton-Craig Amendment), at <http://asp.washtimes.com/printarticle.asp?action=print&ArticleID=20020528-2173180>.

The White House strongly opposed the amendment because "a key element of TPA is the requirement for Congress to consider and vote on trade agreements as a whole." See OFFICE OF MANAGEMENT AND BUDGET, *Statements of Administration Policy*, H.R. 3009—ANDEAN TRADE PREFERENCE EXPANSION ACT (REP. CRANE (R) IL AND 29 COSPONSORS) (May 8, 2002) (expressing the Administration's views on the Trade Adjustment Assistance Programs), at <http://www.whitehouse.gov/omb/legislative/sap/107-2/HR3009-s.html>. According to the White House, the Amendment would have allowed Congress to remove "certain items from consideration under TPA procedures," which in turn encourage trading partners "to exclude issues of their own from future negotiations, particularly in areas like agriculture that are of vital interest to U.S. exporters." *Id.* This, according to the White House, would have had the potential of undermining the President's ability to negotiate for America's best interest in trade agreements. *Id.*

¹⁶⁰ For example, with respect to agriculture, see Trade Act of 2002 § 2104(b)(1). On reports to Congress regarding changes in U.S. trade remedy laws, see *id.* § 2104(d)(3).

¹⁶¹ Section 2102 (c)(4) requires the President (by use of the term "shall"), to "conduct environmental reviews of future trade and investment agreements, consistent with Executive Order 13141 of November 16, 1999 and its relevant guidelines, and report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on such reviews." *Id.* § 2102(c)(4).

¹⁶² An overall negotiating objective in the Act provides that negotiators of a new trade agreement ought to "strive to ensure that they do not weaken or reduce protections afforded in domestic environmental and labor laws as an encouragement for trade." *Id.* § 2102(a)(7).

¹⁶³ See *supra* note 19 and accompanying text.

Fourth, on investment, the Act has introduced the “No Greater Rights Than” principle under which foreign investors have no greater rights than the U.S. citizen under the U.S. Constitution and local laws. In effect, while a U.S. corporation abroad has the full protections of an investor under the equivalent of Chapter 11 of NAFTA, which enables corporations to challenge foreign laws standing in the way of their investment opportunities, foreign investors in the U.S. enjoy no such rights.¹⁶⁴

Fifth, consistent with maintaining the competitiveness of U.S. industries against foreign competition, the 2002 Trade Act also re-authorized the Customs Service for five years. This re-authorization strengthens the search procedures for goods entering the U.S. thereby precluding entry of goods that would injure U.S. industries inconsistent with WTO/GATT and U.S. law. The Customs reauthorization in the 2002 Trade Act traces its origins to the failed 1999 Bipartisan Steel Bill that passed in the House, but

¹⁶⁴ This amendment, eventually included in the Trade Act of 2002 as a negotiating objective, proposed by Senator Kerry was justified as “a modest reform that guaranteed much-needed changes in the NAFTA Chapter 11 investment model in future trade agreements,” so as to ensure that foreign investors have no greater rights than the U.S. citizen under the U.S. Constitution. Public Citizen, *Defeat of Kerry Amendment Thwarts Trade Bill's Prospects in House: Senate Rejection of Modest Reform of Investor Protections Reinforces House "Free Trade" Democrats' Fast Track Opposition* (May 21, 2002), at <http://www.citizen.org/pressroom/release.cfm?ID=1115>. Supporters of the bill noted that “the Kerry Amendment will safeguard the regulatory authority of state, local and federal governments.” *Id.* The White House, nevertheless, opposed the amendment arguing that its effect would “fundamentally weaken longstanding protection for U.S. companies abroad, leaving our investors vulnerable to unfair treatment by foreign governments.” OFFICE OF MANAGEMENT AND BUDGET, *supra* note 159. An immediate reason relating to the U.S. concern about Chapter 11 of NAFTA arises from a suit filed against the U.S. by Methanex, a Canadian company claiming \$970 million compensation for loss of business it would lose because of California’s plan to phase out the use of Methyl Tertiary Butyl Ether (“MTBE”)—an oxygenate that cleans gasoline because of concerns the additive was contaminating drinking water supplies. Methanex argued that the ban was not based on scientific evidence and the water pollution could be solved by fixing leaking underground storage tanks at gas stations. California, the largest market for Methanex, was important since it sets environmental standards that are adopted by other states. Methanex alleged in the suit that the ban was necessitated by political considerations, including the financial contributions to the campaign of Governor Gray Davis of California by Archer Daniel Midlands Corporation, which produces a competing oxygenate from corn. In August 2002, a bi-national panel decided not to proceed with the case since there was inadequate evidence to make a determination. Allen Dowd, *NAFTA Panel Says Cannot Rule on Methanex MTBE Case*, REUTERS (Aug. 7, 2002), at <http://www.mindfully.org/WTO/Methanex-MTBE7aug02.htm>.

failed in the Senate. A primary purpose of the bill was to empower the Customs Service to seize imports, particularly of steel, before they entered the United States.

The re-authorization of Customs and the non-binding disapproval resolution on trade remedy in the 2002 Trade Act largely reflects the successive efforts of the steel industry and other domestic industries vulnerable to international competition to make U.S. trade remedy laws impregnable against internationally negotiated trade agreements. The steel industry in fact sought more than it got. An example is an amendment proposed by Senator Daschle (called the Daschle Substitute) whose effect would have been to extend health insurance assistance for steel retirees. The White House objected to this Amendment citing the excessive estimated cost would bankrupt Trade Adjustment Assistance.¹⁶⁵ Such an attempt to make the 2002 Trade Act somewhat of a retirement program for retired steel workers¹⁶⁶ demonstrates the extent to which international trade has become imprisoned by domestic imperatives and the protectionist dangers associated with balancing free trade, on the one hand, and domestic policy goals, on the other, as a platform for building a coalition in favor of free trade.

3. THE STEEL INDUSTRY AND ANTI-DUMPING RULES: SOME HISTORY AND CONTEXT THAT HAS SHAPED U.S. AND GATT/WTO ANTI-DUMPING LAW

3.1. *The U.S. Steel Industry: A Brief Overview*

By the middle of the last century, the steel and automobile industries were the backbone of the U.S. economy. In the mid-1960s, steel accounted for about 95% of the metals used by the United States. Consolidation and price leadership within the U.S. steel industry kept foreign competition at bay until the 1960's. The U.S. was a net exporter of steel. However, circumstances changed

¹⁶⁵ OFFICE OF MANAGEMENT AND BUDGET, *supra* note 159.

¹⁶⁶ The United Steelworkers of America ("USWA") opposed the Act due to its potential effect in destroying jobs in the United States, and the loss of steel industry retirees' health care benefits "following bankruptcies and liquidations among their former steel company employers." See United States Steel Workers of America, *Steel Crisis Deepens as Job Losses Rise to 46,700: January Increase Largest In More Than A Decade* (Feb. 1, 2002) (documenting the increasing jobless rate of steel workers), at <http://www.uswa.org/press/steelcrisis020102.html>.

in the 1960s for a variety of reasons. A strike in the steel industry in the 1950s, the opening of the St. Lawrence seaway which made the industrial heartland of the U.S. accessible to foreign shipments of steel, and competition from Japanese steel where steel production outstripped consumption all contributed to a crisis in the U.S. steel industry.¹⁶⁷

By 1959, the United States became a net importer of steel. Steel was an important ingredient in many other products and a major source of employment in the country, as a congressional study of the crisis demonstrated. One attempt at arresting the crisis was President Truman's attempted seizure of the country's steel mills in the wake of the nationwide strike in the 1950's. The justification of the seizure was to arrest the deterioration of the national defense.¹⁶⁸ By an executive order, President Truman directed the Secretary of Commerce to seize and operate the country's steel mills. The presidents of the mills were required to operate the mills as managers of the United States.¹⁶⁹ Although Congress had established statutory procedures for dealing with such situations, it declined to authorize the seizure of the steel plants as a way of resolving the labor dispute.¹⁷⁰ The steel companies sued the Secretary of Commerce in federal court where they sought declaratory judgment and injunctive relief.¹⁷¹ The Supreme Court held that under Article 1, Section 8 of the Constitution, Congress was not divested of its exclusive constitutional authority vested to it by the Constitution.¹⁷² According to Justice Black, in so far as Congress had passed legislation providing a statutory scheme for

¹⁶⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952) (providing the government's argument that actions were necessary in order to "avert a national catastrophe which would inevitably result from stoppage of steel production").

¹⁶⁸ *Id.* at 583.

¹⁶⁹ See Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952) (directing the Secretary of Commerce to take possession of and operate plants of certain steel companies in the wake of a labor strike).

¹⁷⁰ See Defense Production Act of 1950, 64 Stat. 798 (1950) (repealed 1966) (stating the terms of national defense under which Congress allowed the President to seize energy concerns); Labor Management Relations (Taft-Hartley) Act of 1947 (amended 1952) (authorizing the government to obtain an eighty-day injunction against any strike perilous to national health or safety); Selective Service Act of 1948, 62 Stat. 604 (1948) (stating Congress view that national security requires maximum effort to utilize the nation's critical manpower resources).

¹⁷¹ *Youngstown*, 343 U.S. at 583-710.

¹⁷² *Id.* at 585-89.

dealing with labor disputes, the President did not have any power to seize the steel mills absent congressional authorization—in essence there was no basis for “presidential power in a field of congressional power.”¹⁷³

From the 1970s to date, the steel industry has continued to experience difficulties in the face of steel imports. For example, in the second half of the 1990s over 10,000 workers in the steel industry lost their jobs while fourteen steel companies filed for bankruptcy. At least two competing thesis have emerged regarding the source of the steel industry crisis. First, the crisis is traced to uncompetitive practices such as predatory pricing and government subsidies which circumvent market pricing.¹⁷⁴ Among the countries most cited for these policies are Japan, Brazil and Russia. A major theme of the steel industry efforts to get government action to address the crisis has therefore been based on the unfairness of the present global market for steel: That while the U.S. plays by the rules of the markets, other countries which have access to the U.S. market do not.¹⁷⁵ Hence according to one commentator,

[T]here may be isolated cases in which dumping is the result of other factors, such as exchange rate changes, long-run declines in marginal costs, and related factors.” On the whole, however, repeated dumping is a predatory practice inevitably directly associated with mercantilistic practices, such as a sanctuary home market, subsidies, and cartels. In fact without the existence of one or more of these conditions, repeated dumping is simply impractical.¹⁷⁶

Another response to the claims of unfairness has emerged from economists who analyze industrial performance on the basis of competitiveness and efficiency rather than on a criteria of fairness or equity. These economists argue that U.S. anti-dumping laws

¹⁷³ Corwin, *supra* note 63, at 57.

¹⁷⁴ U.S. DEP'T OF COM., REPORT TO THE PRESIDENT ON GLOBAL STEEL TRADE: STRUCTURAL PROBLEMS AND FUTURE SOLUTIONS 2, 107-13 (2000).

¹⁷⁵ See Statement of the Basic Steel Industry Conference, United Steelworkers of America, Jan. 23 2001 (summarizing the problems facing the steel industry today), available at <http://www.naftalawsuit.uswa.org/SaveSteel012201.htm>.

¹⁷⁶ GREG MASTEL, ANTI-DUMPING LAWS AND THE U.S. ECONOMY 137 (1998).

have adopted standards of margins of dumping and injury, such as like grade and quality, that facilitate relief for U.S. products against foreign products that are not directly competitive. This in essence amounts to protection of U.S. industries against global competition.¹⁷⁷ These economists thus claim that to the extent that anti-dumping laws in developed countries keep product prices higher, they reduce consumer welfare because the price and cost tests they use bear no resemblance to below-cost pricing.¹⁷⁸

In response to the crisis, various administrations have sought to respond to the growing urgency of the unfairness claims while somewhat paying attention to the concerns raised by economists regarding the shaky economic justifications of taking unwarranted anti-dumping actions against foreign steel producers.¹⁷⁹ For example, besides anti-dumping actions, the Clinton Administration used diplomatic pressure to persuade Japan to cut steel exports.¹⁸⁰ By a 289-141 margin, the House of Representatives passed H.R. 975, the Bipartisan Steel Recovery Act of 1999 ("the Bill"), on March 17, 1999. The primary purpose of the Bill was to stop the "flood of illegal steel imports" dumped into the United States in the second half of the 1990s. The Bill would have authorized the Customs Service to "refuse entry into the customs territory of the U.S. of any steel products that exceed allowable

¹⁷⁷ Robert A. Lipstein, *Using Antitrust Principles to Reform Anti-dumping Law*, in GLOBAL COMPETITION POLICY 405, 425-28 (Edward M. Graham & J. David Richardson eds., 1997) [hereinafter GLOBAL COMPETITION POLICY].

¹⁷⁸ See Kalypso Nicolaïdis & Raymond Vernon, *Competition Policy and Trade Policy in the European Union*, in GLOBAL COMPETITION POLICY, *supra* note 177, at 271; Graeme Thomson, *Australia and New Zealand* 271, in GLOBAL COMPETITION POLICY, *supra* note 177, at 385; see also Raj Bhala, *Rethinking Anti-dumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1 (1995) (noting that in the 1980s other countries also began using anti-dumping law as a potent protectionist weapon).

¹⁷⁹ In releasing the administrations steel plan on August 5, 1999, President Clinton noted that: "[t]he administration will, first and foremost, continue to vigorously enforce our trade laws to ensure that our trading partners play by the rules." Statement by the President, The White House, Aug. 5, 1999 [hereinafter The Steel Action Program], at <http://www.naftalawsuit.uswa.org/whSteelAction.html>. He then immediately thereafter went on to say that, "Unfair trade has been a significant factor in the [steel] import surge and recent cases show that unfair trade remains a problem." *Id.* (emphasis added). The Clinton Administration in this instance was therefore clearly cognizant of the unfair trade claims, but was unwilling to go as far as embracing full-fledged protection of the steel industry. *Id.*

¹⁸⁰ Jonathan Peterson, *Clinton Warns Japan Must Slow Steel Exports to Pre-Crisis Level*, L.A. TIMES, May 4, 1999, at 1.

levels of imports of such products."¹⁸¹ However, the Bill did not garner sufficient support in the Senate. The Clinton administration distanced itself from the legislation and instead released a 12-point blueprint primarily focusing on elimination of unfair trade practices through vigorous enforcement of U.S. trade laws.¹⁸² As noted earlier, much of the Bill passed more recently as part of the 2002 Trade Act.

Much more recently, the Bush Administration has initiated a steel war with its trading partners after imposing 30% tariff safeguards on major steel products as part of a three year plan to give the steel industry an opportunity to restructure itself so that it could compete effectively in the global steel market.¹⁸³ On May 27, 2002, China filed a request to commence WTO proceedings against the U.S. alleging inter alia that the measures undertaken by the Bush administration are inconsistent with U.S. GATT/WTO obligations.¹⁸⁴ On July 11, 2002, a WTO Panel ruled that the U.S. had acted inconsistently with the Safeguards Agreement and Article XIX:1 of the GATT.¹⁸⁵ This adverse ruling created an uproar in Congress and among the steel companies.¹⁸⁶ The USTR's

¹⁸¹ *Id.* The Bill proposed that to measure allowable levels of steel by ensuring that the volume of imported steel does not exceed "the average volume of steel products that was imported monthly into the U.S. during the 36-month period preceding July 1997." *Id.*

¹⁸² The Steel Action Program, *supra*, note 179.

¹⁸³ These measures were taken pursuant to § 201 of the 1974 Trade Act which requires the U.S. International Trade Commission ("ITC") to investigate if a domestic industry has been materially injured by an increase in imports. Trade Act of 1974 § 201, 19 U.S.C. § 2252 (2000). If the Commission establishes that an increase in imports has been a substantial cause of injury to domestic industries, it reports to the President who in turn is authorized to take measures to protect the industry for a temporary period of time in June 2002 indicating that the U.S. steel industry had suffered from increased quantities of steel entering the country. Proclamation 7529, 67 Fed. Reg. 45 (Mar. 5, 2002). See also Press Briefing, U.S. Trade Representative Robert Zoellick (Mar. 5, 2002), at <http://www.whitehouse.gov/news/releases/2002/03/20020305-11.html>.

¹⁸⁴ See Request for the Establishment of Panel by China, Definitive Safeguard Measures on Imports of Certain Steel Products, WTO/DS252/5 (May 27, 2002). Efforts to settle the dispute through GATT Article XXII consultations commenced by China and Switzerland at the WTO failed. Other countries that joined in the consultations included Japan and New Zealand.

¹⁸⁵ WTO Final Reports of the Panel on United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/R (July 11, 2003), available at <http://www.wto.org>.

¹⁸⁶ *Politicians, Steel Workers and Companies Decry WTO Ruling*, BUS. J. ONLINE, July 2003, available at <http://www.businessjournal.com/LateJuly03/WTO>

office then issued a statement outlining the grounds of its appeal and the appeal was lodged. However, upon losing the appeal and under the threat of EU sanctions on domestic steel producers, the Bush administration withdrew the safeguards measures in December 2003.¹⁸⁷

3.2. *The Purpose of Anti-Dumping Law Under GATT/WTO Law and Its Attractiveness to the United States*

The purpose of anti-dumping law is to counteract the effects of price discrimination in sales by a foreign producer which results in injury to the industry of the importing country. Unlike countervailing duty law which aims to counteract subsidies given to industries by governments, anti-dumping law is aimed at protecting industries in importing countries from unfair pricing policies or predatory competition engaged in by an industry in a second country. The premise of anti-dumping law under the theory of competitive advantage is that an industry in one country is selling its products in a second country at below cost of production, or less than fair value.¹⁸⁸ Under this theory, such sales, in turn, results in an injury to the industry in the second country where the equivalent industry is not engaging in similar anticompetitive practices. In essence, anti-dumping law compares the open market of comparable products in the exporting and importing country to determine if dumping is occurring. Although dumping may be advantageous to consumers who pay lower prices,¹⁸⁹ the rationale of anti-dumping law under the theory of

ruling.html (last visited Jan. 16, 2004). See also U.S. House Representatives News Release, Members of Congress Urge ITC to Dismiss Tainted Testimony in Steel Tariff Review (July 23, 2003) (reporting the arguments of Congressional members for foreign trade transfers), available at <http://www.house.gov/strickland/TaintedSteelTestimonyRel.html> (last visited Feb. 29, 2004).

¹⁸⁷ Fary G. Yerkey and Daniel Pruzin, *U.S. Will Appeal Final WTO Ruling on Steel Tariffs Imposed Last Year*, 20 INT'L TRADE REP., 1217 (2003); President's Statement on Steel Proclamation (Dec. 4, 2003), available at <http://www.ustr.gov/sectors/industry/steel201/2003-12-04-president-statement.htm>; Christopher S. Rugabar, *U.S. Steel Consumer Optimistic That Administration Will Lift Tariffs*, 20 INT'L TRADE REP., 1862-63 (2003).

¹⁸⁸ 19 U.S.C. § 1673. Section 1673 (b) provides that to obtain less than fair value requires a comparison of "normal value" of the goods with their "export price." *Id.*

¹⁸⁹ The efficacy of anti-dumping law has often been challenged since its effect for consumers in the export market might well benefit from lower prices. See, e.g., J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 132-47 (1966) (exploring the consequences of dumping to the importing country); Bart S. Fisher, *Dumping:*

comparative advantage is that efficient industries cannot compete effectively against predatory industries abroad. The role of anti-dumping law is therefore to remedy the injury caused to industries that have suffered from unfairly traded imports.

However, not all low-priced imports constitute private acts of international predation.¹⁹⁰ They could for example reflect a "pro-competitive, pro-consumer response by producers abroad who have market power at home and who face an overseas market with greater elasticity of demand than their home markets."¹⁹¹ Under such circumstances, lower prices in the foreign market do not necessarily constitute an intent to engage in predatory competition. This is one of the primary reasons anti-dumping, as opposed to competition law, is a much more attractive remedy for domestic producers whose sales are affected by low-priced imports. Producers affected by low-priced imports may benefit from anti-dumping relief even though the foreign competitors are not engaged in predatory pricing. This can largely be accounted for by the different aims and standards of review of anti-dumping and competition law. Anti-dumping law is largely defined by the norms of market access of the GATT/WTO regime specifically in the context of predatory pricing.¹⁹² By contrast, competition policy aims at consumer-welfare and arguably adopts more rigorous scrutiny of industrial structure and policy than does anti-dumping law.¹⁹³ Indeed, that in part explains the reluctance of the U.S. to introduce competition policy within the ambit of the

Confronting the Paradox of Internal Weakness and External Change, in ANTI-DUMPING LAW: POLICY AND IMPLEMENTATION 11 (John Jackson ed., 1979). William Wares argues that different prices in different countries merely reflect different demand curves in those countries. See WILLIAM A. WARES, *THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY* 59 (1977).

¹⁹⁰ A. Paul Victor, *Anti-dumping and Antitrust: Can the Inconsistencies Be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339, 350 (1983).

¹⁹¹ Eleanor M. Fox, *Competition and World Markets: Law and Economics*, 15 N.Y.U. J. INT'L L. & POL. 229, 305 (1983); see also Janusz Ordovery et al., *Unfair International Trade Practices*, 15 N.Y.U. J. INT'L L. & POL. 323 (1983).

¹⁹² Studies have found that national anti-dumping regimes are biased towards finding dumping and towards overstating dumping margins. See RANIER M. BIERWAGEN, *GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTI-DUMPING LAW* (1990); *DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS* (Richard Botluck & Robert E. Littan eds., 1991).

¹⁹³ Daniel K. Tarullo argues that to introduce competition policy into the GATT/WTO would be "forcing the square peg of competition policy into the round hole of trade policy." Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 479 (2000).

GATT/WTO.¹⁹⁴

There are other reasons intrinsic to the nature of GATT/WTO anti-dumping rules that make them a very attractive remedy for producers in the United States. First, the rules allow discriminatory action, although by and large GATT/WTO norms require non-discriminatory treatment relative to domestic goods and services. Second, since GATT/WTO anti-dumping rules do not concisely define anti-dumping and instead provide for substantive and procedural safeguards that national regulators should follow in anti-dumping investigations, they confer enormous discretion to national regulators.¹⁹⁵ The investigatory and administrative rules that countries such as the U.S. have adopted, in the context of determinations of dumping and measurement of injury, increases the legal and administrative costs for foreign exporters under investigation. In addition, investigations come with uncertainties that might require a back dating of anti-dumping duties.¹⁹⁶ Third, as we shall see below, the GATT/WTO's anti-dumping rules are very deferential to national regulators so that even where a country adopts a methodology of calculating dumping margins that is inconsistent with that country's obligations under the rules, the dispute settlement process only has discretion to order such a country to fix the methodological problem but not to lift the order.¹⁹⁷

3.3. *The Administration and Application of Implementing Legislation on Anti-dumping*

3.3.1. *An Early Shift in Anti-dumping Law: From the 1916 to the 1921 Act*

The Anti-dumping Act of 1916 was the U.S.'s first anti-dumping statute. This Act defined dumping in competition rather

¹⁹⁴ *Id.* at 478 n.1.

¹⁹⁵ The goal of the 1967 Anti-dumping Code is defined as being concerned with the elimination of "the unfair trade practice of price cutting by exporters in sales to one country." Eugenia S. Pintos & Patricia Murphy, *Congress Dumps the International Anti-dumping Code*, 18 CATH. U. L. REV. 180, 180 (1968).

¹⁹⁶ J. M. Finger, *The Industry-Country Incidence of "Less Than Fair Value" Cases in U.S. Import Trade*, in EXPORT DIVERSIFICATION AND THE NEW PROTECTIONISM: THE EXPERIENCES OF LATIN AMERICA 260, 260-79 (Werner Baer & Malcom Gillis eds., 1981).

¹⁹⁷ See *infra* Section 4.

than unfair trade terms. Perhaps for this reason, as Paul Victor¹⁹⁸ has argued, during the first half of the twentieth-century, the 1916 Anti-dumping Act was "essentially dead."¹⁹⁹ To the extent that the 1916 Act has been adjudicated, courts generally treated it as an antitrust rather than as an anti-dumping statute. Hence, for example, in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*,²⁰⁰ Judge Becker noted that the 1916 Act was "intended to complement the antitrust laws by imposing on importers substantially the same legal strictures relating to price discrimination as those which had already been imposed on domestic businesses by the Clayton Antitrust Act of 1914."²⁰¹

The 1916 Anti-dumping Act was amended by the Anti-dumping Act of 1921²⁰² and again by the Trade Agreements Act of 1979,²⁰³ which for the first time made the U.S. a signatory of GATT's Anti-dumping Code negotiated in the Tokyo Round Agreement.²⁰⁴ Relative to the 1916 Act, the 1921 Anti-dumping Act and its progeny have been "viewed as more protectionist in nature and have been administered without regard for the traditional antitrust objective of promoting price competition."²⁰⁵ The 1921 Act, unlike the 1916 Act, adopted a formula referred to as the margin of dumping and abandoned the price competition model that underpinned the 1916 Act. Hence, while the 1916 Act addressed predatory practices very much like an antitrust statute, the 1921 Act adopted the much broader ambit of combating price discrimination. According to one commentator, present day U.S. anti-dumping laws do not actually merely counter price discrimination, but also profit discrimination to the extent that they "force foreign sellers to earn the same profit, or return, on export

¹⁹⁸ Victor, *supra* note 190, at 339-350.

¹⁹⁹ *Id.* at 339.

²⁰⁰ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1197 (E.D. Pa. 1980).

²⁰¹ *Id.*

²⁰² The Anti-Dumping Act ch.14, § 201, 42 Stat. 11 (codified as amended in 19 U.S.C. § 160-71 (1976)).

²⁰³ Trade Agreement Act, Pub. L. No. 96-39, 93 Stat. 144 (1979), amended by Title VII of the Tariff Act of 1930, 19 U.S.C. § 1673 (Supp. V 1981).

²⁰⁴ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, MTN/NTM/W/232 (Apr. 9, 1979). It is reprinted in *Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations*, H.R. Doc. No. 153, at 311 (1979).

²⁰⁵ *Id.* Victor, *supra* note 190, at 339-50.

sales as on domestic sales.”²⁰⁶

It is this tension between price competition and the need to combat unfair trade practices as the purpose of anti-dumping law that will be discussed in greater detail in this part of the paper. My aim is to demonstrate that this tension was, and remains, critical in shaping the balance between congressional and executive roles in negotiating and approving international trade agreements. To restate this tension in other terms, it involves balancing between the goals of free trade through competitive markets, on the one hand, and domestic policy priorities like labor, on the other.

3.3.2. *The 1960s and 1970s: Anti-dumping Law as a Backdrop to Laying Down Executive/Congressional Roles in the Realm of Foreign Trade*

Once Congress added the unfairness mandate to anti-dumping law, the Executive branch faced the ire of its trading partners for translating its anti-dumping law into a mechanism to protect U.S. industry against international competition.²⁰⁷ The deployment of U.S. anti-dumping law away from its initial competition goals partially explain the desire of the U.S.’s European trading partners to draw up an international anti-dumping code.²⁰⁸ The United Kingdom in particular criticized the uncertainties created by the remedial provisions of the Act which it viewed as a major barrier to free trade.²⁰⁹ As interpreted by the Tariff Commission, injury was defined as “anything more than de minimis harm” a rather broad definition lacking in precision for European trading partners with the United States.²¹⁰

The adoption of the Anti-dumping Code of the Kennedy

²⁰⁶ Lipstein, *supra* note 177, at 406.

²⁰⁷ Hence, while some recent commentaries regard the 1980s as the moment when U.S. anti-dumping became protectionist, this in fact happened much earlier. See Bhala, *supra* note 178, at 3-4 (noting “[i]n the 1980s the U.S. began to utilize anti-dumping law as its weapon of choice Anti-dumping law also became a potent weapon for protectionists in other countries in the 1980s.”).

²⁰⁸ John R. Rehm, *Development in the Law and Institutions of International Economic Relations: The Kennedy Round of Negotiations*, 62 AM. J. INT’L L. 403, 427-28 (1968). See also Russell B. Long, *U.S. Law and the International Anti-Dumping Code*, 3 INT’L LAW. 464 (1968).

²⁰⁹ Rehm, *supra* note 208, at 428-29.

²¹⁰ See Pintos & Murphy, *supra* note 195, at 189 (comparing the specific provision of the Code to the more amorphous language of the Act); Long, *supra* note 208, at 473.

Round was therefore negotiated against the backdrop of European dissatisfaction with the U.S.'s 1921 Anti-dumping Act and its adverse application towards them. As negotiated, the 1967 Anti-dumping Code sought to resolve these differences. Hence, the Code provided for specific criteria to guide signatories regarding what would constitute injury for purposes of justifying assessment of dumping duties.²¹¹ The Code also included a provision requiring a "rigid causal relationship" between dumping and injury before anti-dumping duties could be imposed.²¹² The provisions of the Code would in effect require the Tariff Commission to abandon its much looser *de minimis* standard in making injury determinations. In addition, under Article 5(b)(c) of the Code, the U.S. would be required to have one agency make the findings on dumping and injury simultaneously rather than under the requirements of the 1921 Tariff Act that bifurcated the two decisions between the Treasury Department and the Tariff Commission.²¹³

These and several other provisions of the Code at variance with the 1921 Act and U.S. law in general²¹⁴ were not well received by

²¹¹ See *id.* at 473-74 (discussing the specific criteria within the code for defining injury).

²¹² Article 3 of the Code:

A determination of injury *shall be made only* when the authorities concerned are satisfied that the dumped imports are *demonstrably the principle cause of material injury* or of threat of material injury to a domestic industry or the principle cause of material retardation of the establishment of such an industry. In reaching their decision the authorities *shall weigh*, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry In the case of retarding the establishment of a new industry in the contrary of importation, convincing evidence of the forthcoming establishment of an industry must be shown, for example, as the plans for a new industry have reached a fairly advanced state, a factory is being constructed or machinery has been ordered.

Id. (emphasis supplied).

²¹³ Article 5(b)(c) of the Code:

Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously in any event, and the evidence of both dumping and injury *shall be considered simultaneously* in the decision of whether or not to initiate an investigation, and thereafter during the course of the investigation. . . .

Id. at 478-79.

²¹⁴ For details of additional differences between the two, see generally Long, *supra* note 208; Rehm, *supra* note 208; and Pintos & Murphy, *supra* note 195.

Congress or domestic producers such as the steel industry. The response from Congress to the 1967 Anti-dumping Code therefore became one of the initial post- World War II moments that shaped the respective roles of Congress and the Executive branch in negotiating future trade agreements. The Code was, however, only one of several factors that signaled to Congress that the application of the 1921 Anti-dumping Act by the Tariff Commission had become problematic even before 1967.

For example, in the *Wire Rod* cases before the Tariff Commission in the early 1960s,²¹⁵ the steel industry argued that the Tariff Commission applied a narrow reading of U.S. anti-dumping law.²¹⁶ Hence, by distinguishing between foreign and domestic competition within the steel industry in computing dumping margins, the steel industry argued that the Tariff Commission favored foreign competitors at its expense.²¹⁷ The premise of the commission's distinction was that unless the two could be distinguished, U.S. anti-dumping law would constitute some unfairness to foreign competitors. Several other issues were unresolved such as: the extent of the industry, whether relief should be granted under U.S. law if the domestic industry expanded in absolute terms in the period in question, or if the decrease of sales and/or profits by domestic industry from abroad at less than fair value raised strong evidence of injury to others.

The inherent difficulties of calculating the margin of dumping under the prevailing law at the time prompted the steel industry to seek legislative change. The industry sponsored an amendment to the Anti-dumping Act in the 88th Congress with a view to tilting the balance in favor of domestic industries by lowering the high standards of proof that the Tariff Commission had set for the steel industry in showing sufficient impact on domestic industry to warrant relief as well as the strict distinction between fair and unfair competition.²¹⁸

²¹⁵ See, e.g., Amendment Notice, 28 Fed. Reg. 7368b (July 15, 1963) (announcing the determination of no injury or likelihood thereof from the sale of hot-rolled carbon steel wire rods from France).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ The Amendment to Section 201(a) of the Anti-dumping Code of 1921 would have read in part:

The Commission shall then determine . . . whether in any line of commerce in any section of the Country an industry or labor in the United States has been, is being, or is likely to be more than

The International Anti-dumping Code therefore exacerbated rather than addressed the anxieties of the steel industry regarding the perceived disutility of the 1921 Anti-dumping Act in protecting it against unfair foreign competition. Hence, just as Congress opposed the International Anti-dumping Code for having been negotiated without congressional consultation, domestic industrial groups strongly opposed the International Anti-dumping Code for imposing an even higher standard of proof of injury than the Tariff Commission was already using and that they had already found problematic. In the Senate, two objections were made against U.S. adoption of the International Anti-dumping Code. A resolution on the floor of the Senate summarizes them best:

It is the sense of Congress: (1) that the provisions of the International Anti-dumping Code conflict with the [1921 Anti-dumping] Act; (2) that the International Anti-dumping Code should be submitted to the Senate for approval as provided by Article II, Section 2, Clause 2 of the Constitution; (3) that the International Anti-dumping Code should come into effect in the U.S. only upon passage of implementing legislation by Congress.²¹⁹

Opposition to the International Anti-dumping Code was partly based on the fact that President Lyndon Johnson committed the U.S. to the 1967 Anti-dumping Code of the Kennedy Round by an Executive Agreement without involving Congress.²²⁰ Some

insignificantly injured (or prevented from being established), in whole or in part, by reason of the importation of such merchandise into the United States from the country or countries with respect to which the Secretary has made [an] affirmative determination [of sales at less than fair value], whether or not such merchandise is sold with predatory intent or at prices equivalent to or higher than prices of such or similar merchandise imported from other countries.

ANDREAS F. LOWENFELD, *PUBLIC CONTROLS ON INTERNATIONAL TRADE* 168 (2d ed. 1983).

²¹⁹ See S. Con. Res. 38, 90th Cong. (1967). S. Con. Res. No. 38 was introduced by Senator Vance Hartke (D-Ind.) on August 2, 1967. 113 CONG. REC. 20,894 (1967).

²²⁰ According to Senator Hartke, the President had therefore exceeded his negotiating authority as provided in the Trade Expansion Act of 1962. Under the former RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 144(1) (titled Effect on Domestic Law of Executive Agreement Pursuant

Senators also regarded the President's signing of the International Anti-dumping Code as a violation of the doctrine of separation of powers.²²¹ As we saw above,²²² this sole exercise of Presidential power eventually led to the fast-track process which involves Congress in committing the U.S. to international trade rules. The Code was also found objectionable for: making a determination of injury only if dumping was a primary cause; narrowly defining domestic industry; and its requirements of the consideration of both injury and less than fair value sales in making determinations on preliminary decisions on whether or not to conduct an investigation. However, there were Senators who argued that the International Anti-dumping Code was beneficial to the U.S. to the extent that it sought to curtail the growth of restrictive anti-dumping laws in the industrialized world which would open other markets to U.S. goods.²²³

Though the Senate prohibited both the Treasury and the Tariff Commission from implementing the International Anti-dumping Code, the House declined to follow the Senate.²²⁴ In a compromise reached between the House and the Senate, the Code was subordinated to the U.S. anti-dumping law. In other words,

to President's Constitutional Authority):

An executive agreement, made by the United States without reference to a treaty or act of Congress, conforming to the constitutional limitations stated in section 121, and manifesting an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States (a) supercedes inconsistent provisions of the laws of the several states (b) but does not supercede inconsistent provisions of earlier acts of Congress.

RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 144(1). For a discussion of Executive Agreements, see *infra* Section 2.

²²¹ Senator Hartke was its one of its most vocal critics. See Pintos & Murphy, *supra* note 195, at 187 (discussing the inconsistencies between the Act and the Code). According to Hodges, then Secretary of Commerce, the President negotiated the Code under his constitutional authority to conduct foreign affairs as well as pursuant to § 241(a) of the Trade Expansion Act of 1962. See *International Anti-dumping Code, Before the Senate Comm. on Finance, 90th Cong., 2d Sess. at 42-43 (June 27, 1968)* (providing statement of William Roth, Special Representative for Trade Negotiations).

²²² *Infra* Section 2.

²²³ Among them was Senator Jacob Javits (R-NY). See Pintos & Murphy, *supra* note 195, at 185-86 (noting that Javits believed the Code would measurably lessen future protective barriers against U.S. exports and international trade in general).

²²⁴ *Id.*; Long, *supra* note 208.

Congress directed the Treasury to disregard the International Anti-dumping Code in so far as it was inconsistent with U.S. Law.²²⁵ This did not, however, improve the consistency with which the Tariff Commission made determinations on dumping. For example, while in cases construing the International Anti-dumping Code it had declined to assess the impact on a segmented industry, it did so in the post-Code era.

3.3.3. *The 1980s and Beyond: Strengthening the Administration of Anti-dumping*

The problems facing the steel industry in the 1960s carried over into the 1980s—as shown by administrative changes and judicial interpretations of the U.S. anti-dumping law, perhaps intended to address a growing sense within the U.S. steel industry and other export industries that foreigners had an unfair advantage over them.²²⁶ As a result, towards the end of the 1980s anti-dumping law became the U.S.'s “weapon of choice” in its trade wars.²²⁷

Administratively in 1980, the International Trade Administration (“ITA”), which is part of the Department of Commerce, replaced the Treasury Department in determining whether imports are being brought into the U.S. at “less than its fair value.” The ITA also replaced the Tariff Commission in

²²⁵ The compromise amendment provided that:

Nothing contained in the International Anti-dumping Code shall be construed to restrict the discretion of the U.S. Tariff Commission in performing its duties and functions under the Anti-dumping Act, 1921, and in performing their duties and functions under such Act the Secretary of the Treasury and the Tariff Commission shall (1) resolve any conflict between the International Anti-dumping Code and the Anti-dumping Act, 1921, in favor of the Act as applied by the agency administering the Act, and (2) take into account the provisions of the International Anti-dumping Code only insofar as they are consistent with the Anti-dumping Act, 1921, as applied by the agency administering the Act.

Renegotiation Amendment Act of 1968, 19 U.S.C.S. § 160 (1976) (repealed 1979).

²²⁶ See AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patricks eds., 1990) [hereinafter AGGRESSIVE UNILATERALISM] (providing an excellent discussion of the unfairness trade claims). For observations challenging the view that foreign trade is directly related to labor shortages in the United States, see JAGDISH BHAGWATI, TRADE AND WAGES: A MALIGN RELATIONSHIP? (Dept. of Economics, Columbia University Discussion Paper Series No. 761, Oct. 1995) [hereinafter BHAGWATI, TRADE AND WAGES] and DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR 1 (1997).

²²⁷ Bhala, *supra* note 178, at 3-4.

conducting inquiries on whether or not the less than fair value sales caused or threatened to cause material injury to a domestic industry.²²⁸ The Customs Court Act of 1980 established the Court of International Trade,²²⁹ whose powers are equivalent to a federal district court, although most of its cases concern unfair import practices by trading partners, which includes anti-dumping law, customs duties and the classification and valuation of imported merchandise. Appeals from the Court of International Trade are directed to the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit"). However, according to Paul Stephan, the establishment of a special court with exclusive jurisdiction over foreign trade makes it susceptible to overstate its role as opposed to empowering a federal district court to serve this role.²³⁰

This thesis can, however, be best explored by examining the decisions of the ITC, especially when they come up for review by the Federal Circuit. For example, in the 1989 decision in *Algoma Steel Corporation v. U.S.*, an anti-dumping dispute with Canada, the Federal Circuit upheld a calculation of less than fair value that was doubtful under the 1979 dumping codes and the U.S.'s obligations under the Uruguay Round.²³¹ The Federal Circuit held that in case of a conflict between U.S. legislation and the U.S.'s obligations under the then 1979 dumping codes, U.S. legislation prevails. Therefore, the Federal Circuit upheld the U.S. International Trade Commission's finding. In calculating what constitutes material injury or less than fair value sales, it included lost sales to imports even though those imports had been sold at fair prices. Such an interpretation questions the efficacy of domestic enforcement of the international trading regime to the extent that it fails to distinguish between the presence of successful import competition, on the one

²²⁸ See Custom Duties, 19 U.S.C. § 1673 (2003) (setting guidelines for imposition of anti-dumping duties).

²²⁹ Nine judges sit on this court. They are appointed for life by the President of the United States with the advice and consent of the Senate.

²³⁰ Paul B. Stephan, *Further Reflections on the Implementation of Comparative Advantage Principles in Trade Law*, 2 J. LEGAL ECON. 111, 115-117.

²³¹ *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989). The 1994 Anti-dumping Agreement provides that a country determining whether or not to impose an anti-dumping duty must isolate factors other than dumped imports that have injured a domestic industry, that "the injuries caused by other factors must not be attributed to the dumped imports." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 12, 1979, T.I.A.S. 9650, 31 U.S.T. 4919, art. 3.4 [hereinafter Anti-dumping Agreement].

hand, and injury caused by imports, on the other.

To the extent that the 1994 Anti-dumping Code does not prohibit taking into account lost sales to imports in the calculation of the dumping margin, it implicitly leaves room for national authorities to overstate the injury that exports have to industries. Similarly, it leaves room for those accused of dumping to question such over-inclusive calculations. The possibility of construing legitimate export competition as dumping, in my view, demonstrates the malleable nature of the trade regime. The regime can be used to protect domestic values, such as jobs and the U.S. steel industry, as *Algoma Steel Corporation* demonstrates, as much as it can be contested from alternative points of view. In conclusion, the lack of any firm requirement for distinguishing between dumping and economic distress in WTO agreements provides space for outcomes that obviously depart from the goal of obviating dumping. In the context of the European Community, the situation is not very different.²³²

3.3.4. *The Fate of Competition Policy in Foreign Trade in the 1970s-1980s: Voluntary Export Agreements*

If the 1921 Anti-dumping Act succeeded in distancing competition policy, voluntary export agreements virtually eclipsed it in the foreign trade policy realm. Voluntary export agreements embodied negotiated quantitative restrictions of steel and automobiles coming from other countries to the United States. In the 1960s and early 1970s, the President entered into a variety of quantitative restrictions with respect to fairly traded goods including steel.²³³ Arguably, these voluntary export agreements may be said to have arisen from the President's foreign affairs power. However, since 1974, Section 201 of the Trade Act expressly authorizes the President to enter into "orderly marketing agreements." Voluntary export agreements were designed to help industries facing distress²³⁴ notwithstanding the fact that they are

²³² See Case C-179/87, *Sharp Corp. v. Council*, 1992 E.C.R. I-2069 (indicating that the outcome of certain European policies also stray from their intended goal of eliminating dumping).

²³³ That is in contrast to unfairly traded goods that have been dumped or subsidized without any express congressional authority.

²³⁴ A fact not in dispute, "Steel imports into the United States increased more than tenfold over the period between 1958 and 1968 . . ." See *Consumers Union of U.S., Inc. v. Kissinger*, 506 F. 2d 136, 138 (D.C. Cir. 1974).

arguably contrary to the GATT/WTO prohibition against quantitative restrictions.²³⁵ Since the crisis in the steel industry continued into the 1970s, in 1972 the Nixon administration pursuant to pressure from the steel industry and union representatives²³⁶ extended the limitations on steel shipments into the U.S. from 1972 to 1974.

In *Consumers Union v. Rogers*,²³⁷ a public interest group challenged this extension arguing, first, that the voluntary restraint agreements were a regulation of foreign commerce inconsistent with Article I, Section 8, Clause 3 of the Constitution and Sections 232 and 352 of the Trade Expansion Act of 1961 and, as such, were argued to be illegal since they were beyond the President's power. Second, they argued that the agreements were contrary to U.S. antitrust laws. Additionally, a federal district court held that the President is not preempted from entering into agreements with private steel concerns as he had done with the voluntary restraint agreements, but that the President could not in so doing violate legislation regulating foreign commerce such as the Sherman Act. The district court was upheld by the U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") finding that the "exclusive congressional regulation of foreign commerce" under Article I of the Constitution was not in conflict with "assurances of voluntary restraint given to the Executive."²³⁸ The Appeals court also vacated the antitrust ruling since the issue had been withdrawn in the district court and was not therefore properly before it.²³⁹ Soon thereafter, Congress amended the 1974 Trade Act to specifically exempt the participants in the steel voluntary restraint agreements from antitrust liability where such arrangement was at the request of the U.S. Secretary of State and ended no later than January 1, 1975.²⁴⁰ As the dissent in this case

²³⁵ For complete schedules of Voluntary Export Agreements ("VEA") and Voluntary Export Restraints ("VER"), see GLOBAL COMPETITION POLICY, *supra* note 177, at 477-78.

²³⁶ *Kissinger*, 506 F.2d at 139. The steel industry argued that additional time within which it could enjoy less competition from abroad was necessary to allow it to make changes necessary to enable it to be more competitive.

²³⁷ *Consumers Union v. Rogers*, 352 F. Supp. 1319, 1322-24 (D.D.C. 1973), *vacated in part by* 421 U.S. 1004 (1975).

²³⁸ *Kissinger*, 506 F. 2d at 143.

²³⁹ *Id.* at 140, 143.

²⁴⁰ Sections 6-7 of the Trade Act of 1974 provide that:

No person shall be liable for damages, penalties, or other sanctions under

noted, the Court's opinion did not address whether the agreements were inconsistent with the congressional delegation of the foreign commerce power to the President to limit imports only under two circumstances: to negotiate orderly marketing agreements²⁴¹ and on the basis of national security with the consent of foreign producers.²⁴² In other words, Justice Leventhal's dissent, while recognizing the role for an inherent role for the Executive, nevertheless found that the agreements were inconsistent with this scheme since Congress had established a "comprehensive scheme occupying the field of import restraints."²⁴³

This issue arose again in the 1980s when the Reagan Administration negotiated further restraint agreements with Japan particularly in the area of automobiles. The automobile import restraints were necessitated by a sense that Japanese automobile manufacturers were unfairly competing with U.S. automobile manufacturers. This sense within the U.S. automobile industry was however found wanting by the ITC in a 1980 case brought before it under Section 201 of the Trade Act. In *Certain Motor Vehicles and Certain Chassis and Bodies*,²⁴⁴ the ITC on a 3-2 vote found that Japanese imports were not the primary cause of injury to American manufacturers. With no affirmative finding of injury

the Federal Trade Commission Act [15 U.S.C. §§ 41-77] or the Antitrust Acts (as defined in section 4 of Federal Trade Commission Act [15 U.S.C. § 44]), or under any similar State law, on account of his negotiating, entering into, participating in, or implementing an arrangement providing for the voluntary limitation on exports of steel and steel products into the United States, or any modification or renewal"

19 U.S.C. § 2485 (2003).

²⁴¹ Trade Expansion Act of 1962 § 352, 19 U.S.C. § 1982 (1994).

²⁴² Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862 (1994). According to Justice Leventhal, there is a distinction "between executive actions that rest wholly in the domain of appeals and exhortations, and executive actions that culminate in obligations. A good faith agreement with the kind of specificity present here puts an obligation on the foreign producer, in any realistic assessment. Accordingly, . . . the executive negotiation and acceptance of these undertakings are activity in a field that has been preempted by Congress, and can only be engaged in by following the procedures set forth in the Congressional enactments." *Kissinger*, 506 F. 2d at 152.

²⁴³ *Id.* at 146. Justice Leventhal relied on Justice Jackson's judgment in *Youngstown* to the effect that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 149.

²⁴⁴ 2 I.T.R.D. 5241 (1980).

to the U.S. automobile industry, this case in effect closed the door on the Reagan Administration to exercise its power to negotiate an orderly marketing agreement with Japan as provided by Section 201 of the 1974 Trade Act. The only other power available to the administration was to negotiate with Japan under the President's foreign affairs powers. This time, the central issue was no longer whether or not the President was so authorized to act, but rather, whether in so acting, the President could immunize Japanese automobile companies from antitrust liability.

To dodge this issue, the U.S. administration advised the Japanese government to be centrally involved in "ordering, directing, or compelling any agreement restraining exports into the U.S. in terms as specific as possible"²⁴⁵ to avoid Japanese companies from being exposed to private antitrust suits. The Japanese government did eventually give written directives specifying the details of the export controls. This in essence amounted to some form of compulsory compliance with government directives which in essence immunized Japanese companies from antitrust liability.²⁴⁶

Thus in the 1980s, the President's *inherent* authority in the foreign trade realm continued to solidify, but not without challenge in the courts and from Congress. Most prominent of these problems was of course the place of competition policy in the context of voluntary export agreements, an objective at odds with protecting domestic industries and social values. Both anti-dumping law and presidential constitutional and legal authority over foreign commerce were increasingly deployed to protect domestic industries. These protections and social values formed the legal backdrop against which the era of managed trade emerged in the 1990s.

3.3.5. *The 1990s: Managed/Strategic Trade and Its Impact on U.S. GATT/WTO Commitments*

While the emerging framework of trade remedy law laid a

²⁴⁵ Attorney General William Smith of the Reagan Administration in writing to then-U.S. Trade Representative Bill Brock as cited in Joel Davidow, *Cartels, Competition Laws and the Regulation of International Trade*, 15 N.Y.U. J. INT'L L. & POL. 351, 372-73 (1983).

²⁴⁶ According to Davidow, one way of dealing with the problem the Reagan Administration faced in this instance would be to expand the state action defense to include voluntary, and not just compulsory, compliance. *Id.*

basis for the emergence of a regime of managed or strategic trade in the 1990s, other factors played a role as well. A primary impetus was a widespread perception, especially in various hi-tech sectors and the steel and automobile industries, that imports from Japan and the newly industrializing countries of South East Asia (and with those of developing countries) were responsible for the market share loss of U.S. products, slowing economic growth rates and the attendant loss of jobs or the inability of U.S. workers to maintain their standards of living. One variation of this theme was based on the spectacular economic growth of the Japanese and the East Asian economies without the type of nineteenth century industrialization that either the U.S. or England underwent. In another variation of the theme, labor²⁴⁷ and industry groups claimed that while the U.S. had progressively opened its borders to international trade, its trading partners had not reciprocated in opening their borders to U.S. goods. One consequence of this era of trade debates was the quest by the U.S. to pry open foreign markets perceived as closed to U.S. commerce.²⁴⁸

²⁴⁷ See generally PATRICK J. BUCHANAN, *THE GREAT BETRAYAL: HOW AMERICAN SOVEREIGNTY AND SOCIAL JUSTICE ARE BEING SACRIFICED TO THE GODS OF THE GLOBAL ECONOMY* (1998) (describing the history of labor in the U.S.). Robert Kuttner notes that "[t]he system we have today is a far cry from either free trade or common rules. And the de facto rules we live with profoundly disadvantage the United States economy." KUTTNER, *supra* note 5, at 116.

²⁴⁸ According to Peter F. Cowhey and Jonathan D. Aronson, the emerging regime was less about removing barriers to trade at international boundaries but more about demanding access for investment and the international review of domestic policies to ensure fair market competition. See generally PETER F. COWHEY & JONATHAN D. ARONSON, *MANAGING THE WORLD ECONOMY: THE CONSEQUENCES OF CORPORATE ALLIANCES* (1993).

Robert Kuttner describes the outcome of the debate within the Carter Administration in the following terms:

The economists and their laissez-faire allies in the State Department and the Treasury won the ideological debate: free trade remained official American dogma. However, the industrial nationalists at Commerce, Labor, USTR, Pentagon, and CIA won at least half a loaf when it came to actual policies. Unfortunately, because of the ideological dissembling, it was the worse half of the loaf.

KUTTNER, *supra* note 5, at 125. See *AGGRESSIVE UNILATERALISM*, *supra* note 226; ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM* (1992); Robert B. Reich, *Who is Us?* HARV. BUS. REV. 53-64 (Jan.-Feb. 1990); Laura D'Andrea Tyson, *They Are Not Us: Why American Ownership Still Matters*, AM. PROSPECT, Winter 1991, at 37 (addressing Robert Reich's question, "Who is us?," she suggests five propositions about foreign firms operating in the U.S.); Robert B. Reich, *Rejoinder: Who Do We Think They Are*, AM. PROSPECT, Winter 1991 No.4, at 50 (responding to Tyson's propositions and stating that "the object

While it is arguable that foreign competition has hurt the U.S., it is inaccurate to attribute the loss of low scale jobs and the lowering of wages entirely to developing countries.²⁴⁹ There are a variety of factors that need to be taken into account in this context other than foreign competition, such as demographic factors in conjunction with domestic economic practices. Scholars like Jagdish Bhagwati have suggested that it is not entirely clear that the low wages in developed countries can be accounted for by labor saving technologies and skills.²⁵⁰ The effects of globalization, in and of themselves, cannot account for the loss of these jobs. However, Dani Rodrick has argued that there is a probable relationship between the loss of labor's bargaining power in the U.S. and globalization because the latter makes the substitutability of labor across national boundaries much easier.²⁵¹ In addition, as Jagdish Bhagwati has demonstrated, there are few sound economic arguments for suggesting Japanese imports into the U.S. are dumped merely because Japan practices industrial policies that are uncommon in the United States. If anything, Japanese producers are much more efficient than U.S. industries at various stages of production and what are often depicted as indicia of industrial policy are simply superior methods of industrial production than those of the United States.²⁵²

4. INTERNATIONAL LEGAL MINIMALISM IN ACTION: AN INCISIVE ANALYSIS OF THE HOT-ROLLED STEEL PRODUCTS CASES

4.1. *Anticipating the Case: International Minimalism and the Uruguay Round Fallout*

The legal issues presented to the WTO and litigated in the U.S. in the hot-rolled steel products cases were largely anticipated.²⁵³ These legal issues included: captive production; price comparison

of American industrial policy should be to enhance the value that American workers can add to the world economy, not to increase the profitability or global market share" as there is a "crucial, and growing, difference between the two").

²⁴⁹ See generally PAUL KRUGMAN, *POP INTERNATIONALISM* (1996) (writing about international trade).

²⁵⁰ BHAGWATI, *supra* note 226.

²⁵¹ See RODRIK, *supra* note 226, at 4 (noting the sources of tension between the global market and social stability).

²⁵² JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 13-57 (1991).

²⁵³ Holmer, *supra* note 12, at 484.

methodology; use of facts available and adverse facts available, as well as the issue of causation and non-attribution; and the calculation of the all others' rate. The debate within the U.S. on the extent to which it implemented legislation of the Uruguay Round on the Agreement Implementing Article VI did not resolve differences within the U.S. regarding the exact scope of the legislation.²⁵⁴ Partly to steer clear of the objections to various WTO agreements, the U.S. "took a minimalist approach to implementation: if the provisions of its law were not clearly in violation of the WTO agreements as the U.S. interpreted them, the U.S. took no legislative action."²⁵⁵ This approach is a central part of the U.S. attitude towards international law. There are at least five aspects that characterize this approach: (1) there is a less pronounced attention to matching domestic implementing legislation to reflect formally international rules in a rigorously formal manner; (2) the attention given to policy considerations counterbalances the attention given to the formal clarity of rules; (3) there is some ambivalence regarding the normative authority of rules of international law,²⁵⁶ which is more accommodating of relative degrees of bindingness as opposed to a formal approach of characterizing U.S. obligations under international law as strictly categorical;²⁵⁷ and for these reasons, (4) adjudications in the WTO's DSB are often unpredictable; and (5) the implementation of the DSB recommendations is not entirely driven by compliance to the extent that it provides room for negotiation, compromise and accommodation in view of implementation difficulties within a WTO member's legal system.

This Section of the Article will demonstrate how the U.S.'s policy of international minimalism in the context of the foreign trade power plays out. To do so, I discuss how the negotiating history of the Uruguay Round as well as that of the implementing legislation (particularly on the Agreement to Implement Article VI,

²⁵⁴ The semiconductor and automobile industries, for example, vigorously objected to the Agreement's restriction of the scope of start-up costs that could be exempt from dumping calculations. *See id.* at 486.

²⁵⁵ Leebron, *supra* note 9, at 234.

²⁵⁶ For a discussion of normative authority of rules of international law in related context, see James Thuo Gathii, *Neo Liberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2027-34 (2000).

²⁵⁷ For further discussion, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 19-22 (1999).

the anti-dumping code) foreshadowed the hot-rolled steel products cases at the WTO and within the U.S. federal judiciary.

4.1.1. *Captive Production*

Although this was not an issue negotiated during the Uruguay Round, the steel industry seized upon the debate on implementing legislation following the completion of the round to raise the issue. An immediate reason for the steel industry seizing the moment was its loss on that issue in the *Flat-rolled Carbon Steel* case before the ITC in 1993.²⁵⁸ The claim in that case by U.S. steel producers was that in failing to distinguish between captive production and merchant sales in identifying U.S. industry, the ITC's practice double-counted upstream steel products. Captive production occurs in situations where an industry has vertically integrated manufacturing stages so that one stage of the manufacturing process produces goods for the next stage. These goods are referred to as "captive" products in the sense that they are primarily intended for reuse towards a final product within a vertically integrated manufacturing process. Since they are manufactured for internal reuse rather than for sale to third parties, captive products often raise the question of double-counting. Using the *Flat-rolled Carbon Steel Products* case as an example, U.S. steel manufacturers claimed that hot-rolled steel was counted twice because it also counted again once transformed into cold-rolled steel.²⁵⁹ However, as ITC Commissioner Askey stated in the *Hot-Rolled Steel Products* investigation: "significant captive consumption effectively protects the domestic industry by providing integrated producers with a guaranteed market in which they do

²⁵⁸ Certain Flat-rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom, Investigation Numbers 701-TA-319-332, 334, 336-42, and 347-53 (Final) and 731-TA-573-579, 581-92, 594-97, 599-609, and 612-19 (Final), USITC Pub. 2664 (Aug. 1993), Vol. 1 (finding that the U.S. steel industry was not "materially injured" or "threatened with material injury" by reason of the imports of flat-rolled carbon steel products that the U.S. Department of Commerce found to be subsidized by the governments of the nations subject to this investigation).

²⁵⁹ See Holmer, *supra* note 12, at 490 (citing the ITC's decision: "Petitioner's proposal to exclude internal transfers of upstream or 'semi-finished' products from calculations of apparent consumption, market share and financial performance relating to such products similarly is not supported by the statute, commission or practice or judicial precedent where investigations involve more than one industry.").

not compete with imports or with non-affiliated domestic producers.”²⁶⁰

The implementing legislation, however, included a new captive production provision²⁶¹ which effectively and legislatively overruled the ITC's *Flat-rolled Carbon Steel Products* case. In its statement of administrative action, the U.S. required the ITC to consider the production of the domestic-like product sold in the merchant market generally to be used in the production of the downstream products if a significant portion of the production that enters that merchant market is actually processed in the same downstream product as the product that is produced from the internally transferred captive market.²⁶²

It is noteworthy that consistent with its policy on international minimalism, the U.S.-implementing legislation on the Uruguay Round, particularly with regard to the standards to be used by the ITC in making determinations on captive production, was also contained in a Statement of Administrative Action (“SAA”). This manner of committing to international obligations—through a statement of administrative action as opposed to implementing legislation—raises the question of the legal authority of the statement under GATT/WTO agreements.²⁶³ Congress authorized the SAA in the Uruguay Round Amendments Act (“URAA”), and it has already received a WTO panel acknowledgement as a source

²⁶⁰ U.S. International Trade Commission, *Certain Hot-Rolled Steel Products From Japan*, Investigation No. 731-TA-807 (Final), USITC Pub. 3202, June 1999, available at <http://www.usitc.gov/er/nl1999/ER0611W1.HTM>.

²⁶¹ The administration initially opposed the amendment but “caved in to political pressure.” Later, it cited a similar Canadian practice to justify the amendment. See Holmer, *supra* note 12, at 490-91.

²⁶² The Uruguay Round Agreements Statement of Administrative Action 167, in *Message from the President of the U.S. Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 316, Vol. 1, 103d Cong., 656, 837 (1994). The Statement of Administrative Action in relation to anti-dumping is authorized by Section 771(7)(E)(ii) of the Tariff Act of 1930. 19 U.S.C. § 1677(7)(E)(ii).

²⁶³ In the Indian Pharmaceuticals case, an administrative basis, as opposed to a sound legal basis, to protect a product's novelty, was ruled to be insufficient to create legally binding obligations to protect such novelty as required by the TRIPS Agreement. See WTO Appellate Body Report on *India—Patent Protection for Pharmaceutical and Agricultural Products*, WT/DS50/AB/R (Dec. 19, 1997). The point expressed in the text was also made by Petros Mavroidis in response to a question in the 2000 American Society of International Law Annual Meeting on a panel titled, *The WTO and a Constitutional Framework for the World Economy*, 94 AM. SOC'Y INT'L LAW PROC. 291, 292 (2000).

of U.S./WTO-implementing obligations.²⁶⁴ Under the URAA, the ITC's determinations of captive production does not "necessarily give decisive guidance with respect to the determination by the Commission of material injury."²⁶⁵ This is pertinent since it formed an important part of the U.S.'s argument in defending its captive production provisions in the *Hot-Rolled Steel Products* case at the WTO as we shall see below.

In *Hot-Rolled Steel Products*, the Japanese claimed that the captive production provisions in the U.S. legislation "biased," "distorted," or "skewed" the ITC's anti-dumping determinations or that these provisions led the ITC to ignore the "shielding effects" of captive production in its injury determinations.²⁶⁶ The "shielding effect" referred to here is that, when applied, the captive production provision segments the domestic industry by distinguishing between those segments that are selling their like products to third parties and those that use the like products for their own consumption. This in turn understates the extent of domestic industry for purposes of determining injury in a manner that might potentially distort injury calculations against second countries and in favor of the United States.²⁶⁷

Japan therefore argued that the captive production provision under U.S. law was inconsistent with Articles 3 and 4 of the Anti-dumping Agreement. Specifically, Japan argued that to the extent to which the captive production provision required the ITC to "focus primarily" on a segment of an industry was contrary to the

²⁶⁴ See Section 301 Case, *supra* note 14. In the Panel Report, the Panel observed the statement of administrative action is "an authoritative expression by the Administration regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. . . it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." WTO Panel Report on United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, para. 7.198, WT/DS184/R (Feb. 28, 2001) [hereinafter Panel Report on Hot-Rolled Steel Products].

²⁶⁵ Tariff Act of 1930, § 771(7)(E)(ii), 19 U.S.C. § 1677(7)(E)(ii). Similarly, Article 3.4 of the Anti-dumping Agreement states that its list of considerations in the determination of the impact of dumped imports on the domestic industry "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." Anti-dumping Agreement, *supra* note 231, art 3.1.

²⁶⁶ See WTO Appellate Body Report on the United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan, paras. 27-28, WT/DS184/AB/R (July 24, 2001) [hereinafter Appellate Body Report on Hot-Rolled Steel Products].

²⁶⁷ This was also alluded to by Chile. See *id.* para. 41.

requirement under Article 3.4 of the Anti-dumping Code that requires "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry."²⁶⁸ Brazil argued that the captive production provisions in the U.S. legislation foreclosed the ITC from considering the captive portion of the market under the conditions specified in the legislation thereby heightening the risk that the ITC "may attribute to imports the effects of other causes, since an industry may itself have chosen to decrease its merchant market shipments in favour of captive shipments to downstream production that reap higher profits."²⁶⁹ The essence of the complaint against the U.S. was that its captive production provision permits the U.S. to examine only a portion of domestic producers of like products rather than all of them as a whole—a policy that is inconsistent with its obligation to undertake an objective assessment.²⁷⁰

In its defense, the U.S. in part argued that to succeed in demonstrating that its provisions were WTO inconsistent, Japan had to show that the provision "itself mandates WTO-inconsistent action," which it had failed to do.²⁷¹ Besides arguing that the captive production provision was inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6, and 4.1 of the Anti-dumping Agreement, Japan also argued that the ITC's application of the provision was inconsistent with the same provisions of the Agreement.²⁷² The Appellate Body ("AB") found that the requirement of examining the effect of dumped imports on the domestic market in Article 3.1 of the Anti-dumping Agreement is subject to an objectivity requirement, meaning that it "must conform to the dictates of the basic principles of good faith and fundamental fairness."²⁷³ In

²⁶⁸ Anti-dumping Agreement, *supra* note 231, art. 3.4.

²⁶⁹ Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, para. 34.

²⁷⁰ Article 3.1 of the Anti-dumping Agreement provides that an injury determination "shall . . . involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products." Anti-dumping Agreement, *supra* note 231, art. 3.1. Article 17.6 of the Anti-dumping Agreement provides that a WTO panel in determining whether national authorities' establishment of facts in anti-dumping actions were proper have to consider whether the evaluation of facts was unbiased or objective. *See id.* art. 17.6.

²⁷¹ *Id.* para. 27.

²⁷² *Id.* para. 182.

²⁷³ *Id.* para. 193. Hence the AB ruled that "in short, an 'objective examination'

addition such an examination must be based on “positive evidence,” or “the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.”²⁷⁴

While the AB concurred with the U.S. that Article 3.4 of the Anti-dumping Code opened up the possibility of examining a segment of an industry in assessing the state of the industry as a whole,²⁷⁵ it nevertheless observed that “investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.”²⁷⁶ In essence, the AB upheld the captive production provision since as the U.S. argued, it did not mandate any particular interpretation since its meaning has not been decisively determined even within the United States.²⁷⁷ According to the AB, the captive production provision is useful in enabling investigating authorities in comparing segments of the industry to “make an appropriate determination about the state of the domestic industry as a whole.”²⁷⁸ Hence, to the extent that the AB found that the captive production provision was not per se exclusive,²⁷⁹ it was not inconsistent with the U.S.’s obligations under the Anti-dumping Agreement. Thus the U.S. prevailed in its argument that the captive production provision did not mandate an inconsistent outcome with GATT/WTO. This outcome continues a WTO jurisprudence tradition that sustains discretionary authority to executive officials that might be used in a WTO- inconsistent manner, while only prohibiting measures mandating WTO inconsistent action.²⁸⁰

However, although the AB upheld the captive production

requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.” *Id.*

²⁷⁴ *Id.* para. 192.

²⁷⁵ *See id.* paras. 194-95, 198 (finding that evaluation of certain sectors in order to assess the state of an industry as a whole is an acceptable requirement).

²⁷⁶ *See id.* paras. 196 (noting the obligation to “examine the impact”).

²⁷⁷ *See id.* para 200 (presenting the finding of the Appellate Body that there is not currently any definitive interpretation of the captive production provision).

²⁷⁸ *Id.* para. 207.

²⁷⁹ *See id.* para 208 (finding no necessary inconsistency between the captive production provision and the Anti-dumping Agreement).

²⁸⁰ This mandatory-discretionary distinction was upheld in the Section 301 Case. *See* Section 301 Case, *supra* note 14.

provision as not being inconsistent with Articles 3 and 4 of the Anti-dumping Agreement,²⁸¹ it nevertheless found the provision application in this case inconsistent with the objectivity requirement of Article 3.1. According to the AB, the ITC had to examine all other parts of the industry as it had examined the captive production segment "or, in the alternative, provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts."²⁸² Thus the strongest ground on which Japan could stand on this issue was less its formal inconsistency with GATT/WTO law than its application. Japan therefore prevails but the challenged provision is left standing thereby opening the door to future similar applications and challenges.

4.1.2. *Price Comparison Methodology and Sales "in the Ordinary Course" of Trade*

The methodology of price comparison was an issue in the negotiations of the 1994 Uruguay Round because countries sought to have fair comparisons of prices in the import and in the foreign market. The use of different price comparisons and individual sales versus weighted average sales increased dumping margins favorably towards the United States.²⁸³ Having agreed to these changes to the Anti-dumping Agreement on the pretext that they were necessary to obviate targeted dumping,²⁸⁴ the U.S. sought to limit their effect of these changes on the prior practice of increased margins. To do so, the U.S. argued that Article 2.4.2 limited average-to-average or transaction-to-transaction comparisons to the investigation phase (when the ITC determines whether or not dumping is occurring) and not to the review phase (when anti-dumping duties are assessed). Thus in its implementing legislation, the U.S. read ambiguity into Article 2.4.2 of Anti-

²⁸¹ Thereby the AB upholding the panel decision on this point. See Appellate Body Report on Hot-Rolled Steel Products, *supra* note 263, para. 219.

²⁸² *Id.* para. 211. See also *id.* para. 214 (restating that all parts of an industry should be examined in a like manner barring satisfactory explanation otherwise).

²⁸³ See generally CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, HOW THE GATT AFFECTS U.S. ANTI-DUMPING AND COUNTERVAILING DUTY POLICY (1994).

²⁸⁴ Holmer, *supra* note 12, at 492. According to Stewart, the outcome that is obviated here is "preventing the windfall to those buying dumped merchandise having some part of the dumping duties that should be paid to those importers paying fair value." *Id.* at 494.

dumping Agreement as a basis for continuing its prior practice. This practice, some have argued, is inconsistent not only with Article 2.4 but also Article 18.3 of the Anti-dumping Agreement.²⁸⁵ Moreover, this practice is also inconsistent with clear Congressional authority since 1984 that average-to-average price comparisons be used both in the investigation as well as review phases.²⁸⁶

While the U.S.'s practice of comparing individual sales in the import market to weighted average sales in the foreign market was not challenged in *Hot-rolled Steel Products from Japan*, Japan nevertheless challenged another aspect of the U.S.'s price comparison methodology: the determination of sales "in the ordinary course of trade" under the 95.5% test or the "arms length" test. The U.S. uses this test with respect to home market sales to determine if home market sales to affiliated customers by an exporter affected the pricing of the product. Pursuant to this test, sales are made at arm's length where the prices to affiliated customers are, on average, at least 99.5% of the price charged to unaffiliated customers.²⁸⁷ The DOC first determines the weighted average selling price for the product by the exporter to each affiliated party. Then it calculates the weighted average selling price for all the non-affiliated parties, as opposed to individual selling prices in the case of affiliated parties. Where "the weighted average price for sales to an *individual affiliated party* is 99.5%, or more, of the weighted average price of sales to *all non-affiliated parties*, all of the sales to that affiliated party are treated as being made 'in the ordinary course of trade.'²⁸⁸ If the weighted average sales price for sales to an *individual affiliated party* falls below the 99.5% threshold, all of the sales to that affiliated party are treated as being made *outside* 'the ordinary course of trade' and are disregarded in calculating normal value."²⁸⁹

The U.S. defended excluding sales below the 99.5% threshold

²⁸⁵ *Id.* at 493; Leebron, *supra* note 9, at 236-37.

²⁸⁶ 19 U.S.C. § 1677f-1 (2000).

²⁸⁷ Section 771(33)(E) of the Tariff Act of 1930 defines the term "affiliated persons" as including "[a]ny person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization." 19 U.S.C. § 1677(33)(E).

²⁸⁸ The term "in the ordinary course of trade" was adopted by the AB from the U.S. Department of Commerce ("DOC") policy.

²⁸⁹ Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, para. 132.

in calculating normal value on several grounds. First, the U.S. argued that such sales to unaffiliated customers are "generally recognized" as being outside the ordinary course of trade.²⁹⁰ Second, the 99.5% rule eliminates the "distort[ing]" effect of artificially low-priced sales to affiliates.²⁹¹ Third, the U.S. argued that the test was "not mandated" by any U.S. law or provision of the code, but was a "consistent" DOC practice as "reflected in certain federal notices issued by the U.S. Government."²⁹²

Hence, as with the case regarding captive production, the U.S. advanced informal or open-ended administrative agency praxes in responding to attacks of formal GATT/WTO inconsistency by other countries. Here the U.S. exploited WTO jurisprudence to the extent that it allows executive authorities to exercise discretion in trade matters without spelling out in detail the constraints imposed by GATT/WTO agreements.²⁹³

Rather than directly challenging the 99.5% test, Japan challenged its application as inconsistent with Article 2.1 of the Anti-dumping Agreement. According to Japan, the effect of the test in excluding low-priced sales to affiliates inflated the normal value.²⁹⁴ In addition, Japan argued the test was an "arbitrary threshold that did not take account of the usual variation of prices in the marketplace."²⁹⁵ The Panel report had indicated that the 99.5% test had the effect of establishing only lower than 99.5% sales to affiliated customers, but not sales above that margin to affiliated customers.²⁹⁶ Hence, rather than comparing differences in prices between affiliated and non-affiliated customers, the 99.5% test only targeted lower sales to affiliated customers with a resulting tendency of excluding them thereby "skew[ing] the normal value upward."²⁹⁷ The AB upheld the panel's determination that the 99.5% test did not rest on a permissible interpretation of Article 2.1

²⁹⁰ *Id.* para. 14.

²⁹¹ *Id.* para. 15.

²⁹² *Id.* para. 133.

²⁹³ See Frederick M. Abbott, *The TRIPS-Legality of Measures Taken to Address Public Health Crisis: A Synopsis*, 7 WIDENER L. SYMPOSIUM J. 71, 84 (2001) (discussing the invocation by the U.S. of WTO jurisprudence in its arguments).

²⁹⁴ See Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, paras. 134, 144.

²⁹⁵ *Id.* para. 134.

²⁹⁶ See *id.* para. 135 (citing the Panel Report on *Hot Rolled-Steel Products* found *supra* in note 264 under paragraph 7.110).

²⁹⁷ *Id.* para. 136.

of the Anti-dumping Agreement, or within the meaning of Article 17.6(ii) thereof.

According to the U.S., the 99.5% rule was a “‘bright-line’ test” that operated “automatically” to exclude all low-priced sales without giving exporters a right to show that such sales were made in the ordinary course of trade.²⁹⁸ By contrast, the U.S. had no similar bright-line rule for testing for high-priced sales to affiliates, nor did it test for them systematically like it did in the case of low-priced sales.²⁹⁹ Instead, the U.S. only tested for low-priced sales and excluded them in calculating normal value while including high-priced sales.³⁰⁰ According to the AB:

In our view, there is lack of *evenhandedness* in the two tests applied by the United States, in this case, to establish whether sales made to affiliates were “in the ordinary course of trade.” The combined application of these two rules operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved upon request, to be aberrationally high-priced. The application of the two tests, thereby, disadvantaged exporters.³⁰¹

²⁹⁸ *Id.* para. 149.

²⁹⁹ *Id.* para. 151.

³⁰⁰ *Id.* para. 152. The U.S. argued it had a practice of excluding aberrationally high priced sales. *Id.* In this case, the U.S. argued that none of the exporters had sought to avail themselves of the exclusion of high-priced sales, and in any event this did not prejudice them. However, the AB noted that:

We are not persuaded by this argument. The rule applied to high-priced sales, in this case, was not contained in any guidelines, or other document conveyed to the interested parties. It is, therefore, not clear to us that exporters would have known of the rule applied to high-priced sales. Moreover, even if exporters knew of the rule itself, there seems to have been no means for them to ascertain which of their sales might satisfy the particular threshold of “aberrationally” high-prices applied by USDOC in this case. Viewed in this light, we cannot attach significance to the absence of formal requests in this case for the exclusion of high-priced sales from the calculation of normal value. In addition, the lack of even-handedness in the rules applied, in this case, to low-priced and high-priced sales might, in itself, have created prejudice to exporters.

Id. para. 155.

³⁰¹ *Id.* para. 154.

For these reasons, among others, the AB affirmed the Panel's finding that the 99.5% test does "not rest on a permissible interpretation of the term 'sales in the ordinary course of trade . . .'"³⁰²

4.1.3. *Use of Facts Available – Rigid or Flexible Submission Deadlines?*

In both the captive production and price comparison methodology issues, the U.S. primarily exploited the discretionary/mandatory distinction especially in showing how the exercise of administrative discretion did not prejudice exporters. However, with regard to the issue of facts available, the U.S. construed the Anti-dumping Agreement as imposing a rigid, as opposed to an open-ended, submission deadline for questionnaires. This would in turn preempt the DOC from proceeding only on the basis of facts available. In a sense, therefore, the U.S. defended its decision to decline accepting questionnaires after the deadline it imposed on the basis of a bright-line rule that did not give the Japanese respondents much flexibility. In short, it is reasonable to suppose that the U.S. in this case defended its captive production provision as well as the calculation of dumping margins by arguing that its administrative practices did not mandate or amount to GATT/WTO illegality or an application inconsistent with the U.S.'s GATT/WTO obligations, though when it came to the conduct of foreign respondents, the U.S. argued that they had violated bright-line rules.³⁰³

The facts at issue in this case relate to the rejection by the DOC of information on "weight conversion factors" supplied by the two Japanese respondents, NKK Corporation ("NKK") and Nippon Steel Corporation ("NSC"), at the investigation stage. The DOC rejected the information because it was submitted after the deadlines for responses to the DOC's questionnaires.³⁰⁴ NKK alleged "that it was 'impracticable or impossible' to calculate the requested weight conversion factor" while NSC alleged that "it had no way of calculating a weight conversion factor, because it

³⁰² *Id.* para. 158.

³⁰³ Japan in fact argued that the U.S. was asserting "mechanical deadlines" that would "eliminate any need to consider the facts and circumstances of a case." *Id.* para. 17.

³⁰⁴ *See id.* para. 63.

did not know the actual weight of the steel products sold on a theoretical weight basis.”³⁰⁵ The companies were given eighty-seven days to respond to the questionnaires. NSC submitted its weight conversion information fourteen days before verification, while the Kawasaki Steel Corporation (“KSC”) did so nine days before the verification date. NSC alleged that it had discovered this information separate from its main sales database in a production facility southwest of Japan. NKK submitted its “best estimate” as a surrogate for an actual weight conversion factor upon the DOC’s acceptance of KSC’s “best estimate.”³⁰⁶ The DOC, however, rejected the weight conversion information submitted as untimely³⁰⁷ because it was submitted “after the relevant deadlines for questionnaire responses” established by the DOC.³⁰⁸

The legal issues at stake therefore related to whether the U.S.’s application of adverse facts in the dumping margin calculations were inconsistent with the U.S.’s obligations under Articles 2.4, 6.1, 6.6, 6.13, 9.3 and Annex II of the Anti-dumping Agreement with respect to NKK and NSC, and Articles 2.3 and 9.3 with respect to KSC.³⁰⁹

The U.S. defended having to make “adverse inferences to uncooperative parties” and further sought to have this practice declared consistent with the Anti-dumping Agreement as a “substitute for information not provided by uncooperative parties” because lack of such an interpretation would “encourage exporters to be uncooperative in anti-dumping investigations, and allow them to benefit by doing so.”³¹⁰ For the U.S., Article 6.8 of the Anti-dumping Agreement enables investigating authorities to use information submitted by exporters where it is submitted in a timely manner, and as such within established deadlines where it is verifiable and can be used without undue difficulty.³¹¹

³⁰⁵ *Id.* para. 65. However, both Nippon Steel Corporation (“NSC”) and NKK Corporation (“NKK”) avoided giving the information during the investigation. *See id.* para. 65 n.44.

³⁰⁶ *Id.* para. 68.

³⁰⁷ *Id.* para. 69.

³⁰⁸ *Id.* para. 71 (emphasis added).

³⁰⁹ *See id.* para. 49(f)(ii), (iii).

³¹⁰ *Id.* para. 30. The U.S. further argued that “such an interpretation would seriously undermine the object and purpose of the entire Anti-dumping Agreement.” *Id.* For a similar point raised by Canada in its conditional appeal, *see id.* para. 37.

³¹¹ *Id.* para. 71.

Korea, a third party supporting Japan's case, by contrast argued that the U.S. advanced the view that "regulatory deadlines *per se* define the 'reasonable period,' as opposed to an approach that takes into account 'the totality of the facts and circumstances'"³¹² and is therefore flexible. The Panel found that the application of the facts available by the DOC was inconsistent with the U.S.'s obligations under Article 6.8 of the Anti-dumping Agreement,³¹³ a finding that the U.S. appealed on the basis that Articles 6.8 and 6.1.1 require investigating authorities to establish and enforce reasonable deadlines for submission of information.³¹⁴ The U.S. had further argued that such deadlines were necessary to "ensure a rules-based, transparent, and predictable administration of anti-dumping law."³¹⁵

The AB first observed that Article 6.1.1 "does not explicitly use the word 'deadlines'" but rather anticipates that investigating authorities "may impose appropriate time limits on interested parties for responses to questionnaires."³¹⁶ However, the AB held that once imposed, such time limits are not "necessarily absolute and immutable."³¹⁷ Although "timeliness" is not defined, the AB noted that Article 6.8, paragraph 1 of Annex II indicate that, "upon cause shown," investigating authorities could extend set deadlines.³¹⁸ Paragraph 3 of the Annex further supports flexibility in the deadlines by making reference to "reasonable time" or "reasonable period."³¹⁹ The DOC had rejected the information supplied by NSC and NKK for the sole reason that it was submitted after the deadline and, according to the AB, the DOC did not "consider any other facts and circumstances—even though several were raised,"³²⁰ as contemplated in Articles 6.1.1 and 6.8

³¹² *Id.* para. 44.

³¹³ *Id.* para. 70.

³¹⁴ *Id.* para. 71 (noting that Article 6.1.1 specifically provided for the use of pre-established deadlines for questionnaire responses).

³¹⁵ *Id.* para. 10.

³¹⁶ *Id.* para.73.

³¹⁷ *Id.* para 74.

³¹⁸ *Id.* para. 82.

³¹⁹ *Id.* para. 83. The AB noted that "what constitutes a reasonable period or reasonable time, under Article 6.8 and Annex II of the Anti-dumping Agreement, should be defined on a case-by-case basis, in light of the specific circumstances of each investigation." *Id.* para. 84.

³²⁰ *Id.* para. 87.

and Annex II of the Anti-dumping Agreement.³²¹ The AB therefore upheld the Panel³²² without finding that the DOC “could not, consistently with the *Anti-dumping Agreement*, have rejected the weight conversion factors submitted by NSC and NKK.”³²³ Hence, the DOC’s rejection of the questionnaires was held not to have rested upon a permissible interpretation of Article 6.8 of the Anti-dumping Agreement. In other words, submission of the responses after the deadline by itself could not be a justifiable reason under the Anti-dumping Agreement to reject the information.³²⁴

At the end of the day, the U.S. failed to have the Anti-dumping Agreement construed to set a bright-line rule for exporters in submitting information. Rather, the AB construed Articles 6.1.1 and 6.8, and Annex II of the Anti-dumping Agreement as “striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.”³²⁵ This outcome contrasts with the argument that characterized the U.S. arguments with reference to issues of “captive production” and “ordinary course of trade.” On those issues, the U.S. argued that anti-dumping rules ought to be construed to allow play for administrative discretion, yet on the issue of facts available the U.S. argued that the rules called for “strict deadlines.” While such litigation strategies may be typical, what is striking is that differing attitudes towards the anti-dumping rules in question demonstrate the potential for inconsistent yet plausible interpretation of these rules.

4.1.4. *Adverse Facts Available with Respect to KSC – Contrasting the AB and the USCIT*

Besides the application of “adverse” facts available to both NKK and NSC, the DOC further applied “adverse” facts available as against KSC for failure to submit information it was unable to obtain. The information the DOC requested from KSC concerned sales that its joint venture partner in the United States, California

³²¹ *Id.* para. 88.

³²² *Id.* para. 90.

³²³ *Id.* para. 89 (emphasis added).

³²⁴ *Id.*

³²⁵ *Id.* para. 86.

Steel Industries, Inc. ("CSI"), had on products it resold after purchasing from KSC. This information was necessary to construct an export price of KSC's U.S. export sales.³²⁶

KSC was unable to obtain the information from CSI over a thirteen-week period, even after writing five letters to CSI. CSI even declined to entertain a visit by KSC's lawyers to obtain the information.³²⁷ Japan did not request its joint venture partner in CSI to help it obtain information, or even exercise rights under the joint venture agreement that might lead to the production of the information.³²⁸ Japan, however, maintained that the application of "adverse" facts available as against KSC on the basis of its failure to "cooperate" "went far beyond any reasonable understanding of any obligation to cooperate" under the terms of paragraph 7 of Annex II of the Anti-dumping Agreement.³²⁹ Japan used the same anti-formalist argument it made with reference to NSC and NKK that the U.S. improperly asserted mechanical deadlines without referring to the facts and circumstances surrounding the inability of KSC to produce the information requested by the DOC.³³⁰

Japan further asserted that cooperation was a two-way street that while KSC did as much as it could to provide the DOC with the information, the DOC did nothing to help it obtain the information notwithstanding the fact that Article 6.13 of the Anti-dumping Agreement anticipates the necessity of such help where "an interested party is experiencing difficulties providing requested information."³³¹ For this reason, Japan argued that the DOC failed to cooperate.³³² The AB agreed with Japan in upholding the Panel's finding on this point.³³³ The AB defined cooperation as:

³²⁶ *Id.* para. 91-92.

³²⁷ *Id.* para. 92.

³²⁸ *Id.* para. 93.

³²⁹ *Id.* para. 19.

³³⁰ *See, e.g., id.* paras. 17-18; *see also supra* notes 301-23 and accompanying text.

³³¹ Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, para. 19.

³³² For the AB's agreement with the Japanese argument, and a statement that is consistent with Articles 6.1 and 6.11 of the Anti-dumping Code, *see id.* para. 106.

³³³ *Id.* para. 109. The AB concluded on the basis of Article 6.13 of the Anti-dumping Code that 'cooperation' is "indeed, a two-way process involving joint effort." *Id.* para. 104.

[A] process, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well “cooperate” to a high degree, even though the requested information is, ultimately not obtained. This is because the fact of “cooperating” is in itself not determinative of the end result of the cooperation. Thus investigating authorities should not arrive at a “less favourable” outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has “cooperated” with the investigating authorities, within the meaning of paragraph 7 of Annex II of the Anti-dumping Agreement.³³⁴

As in the decision of the DOC, declining to receive information submitted after the deadline, the AB found that the DOC’s finding that KSC failed to cooperate did not reflect the balance presumed in the Anti-dumping Agreement between the effort a respondent like KSC can be expected to make in responding to a questionnaire and the “practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities.”³³⁵

By contrast, when KSC challenged the DOC’s non-cooperation finding before the U.S. Court of International Trade (“USCIT”),³³⁶ KSC lost on the basis that commerce’s application of the adverse inference in calculating dumping margin for KSC’s sales to CSI was in accordance with law and supported by substantial evidence.³³⁷ Though the USCIT proceeds on the basis of U.S. legislation, while the AB proceeds on the basis of GATT/WTO law, both forums serve to implement the U.S.’s anti-dumping mandate in different ways. While the USCIT may seem to perfectly fit within the U.S.’s policy of international legal minimalism, as in the KSC case, the U.S.’s policy of international legal minimalism can be

³³⁴ *Id.* para. 99.

³³⁵ *Id.* para. 101. The AB further invoked the principle of good faith as undergirding this balance particularly in restraining “investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable.” *Id.* The AB inferred this balance from paragraphs 2 and 5 of the Anti-dumping Code. *Id.* para. 102.

³³⁶ See *Kawasaki Steel Corp. v. United States*, 110 F. Supp. 2d 1029, 1033 (Ct. Int’l Trade 2000) (“KSC claims that Commerce erroneously concluded that KSC did not cooperate to the best of its ability in the investigation.”).

³³⁷ *Id.* at 1037.

said to succeed with similar legal fancy footwork as the domestic and international regime before the GATT/WTO's dispute settlement system.

4.1.5. *Causation and Non-Attribution*

Another important issue before the AB concerned the ITC's failure to examine the effect of other causes on the problems relating to the domestic hot-rolled steel industry. Japan appealed a finding by the WTO panel ("Panel") that attributed injury to the domestic industry to dumping from Japan. Japan's basis for appeal was the finding's inconsistency with prior AB rulings on this issue, since these rulings interpreted the Anti-dumping Agreement as requiring proof that dumping caused material injury before the imposition of anti-dumping duties.³³⁸ In particular, Japan argued that the Panel set a lower standard than that required by the Anti-dumping Agreement by failing to find that the ITC did not "separate" and "distinguish" other factors and their impact on the domestic industry contrary to Article 3.5 of the Anti-dumping Agreement.³³⁹ Japan alluded to four factors in particular: increase in production capacity of mini-mills; a 1998 strike at General Motors; declining demand from the U.S. pipe and tube industry; as well as the effects of prices of non-dumped imports.³⁴⁰

The U.S. by contrast contended that the ITC was not required to isolate and exclude or even to quantify the effects of other causes from effects of imports. Rather, its obligation was to "examine other causes to ascertain that injury caused by those other factors is not attributed to dumped imports."³⁴¹ Further, the U.S. argued

³³⁸ Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, paras. 25, 218-19. The prior AB reports on which the Panel relied are WTO Appellate Body Report on United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R (Dec. 22, 2000) and WTO Appellate Body Report on United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001), available at <http://www.wto.org>. See also Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, para. 47 (pointing out that Korea has, like Japan, sought reversal of the Panel's findings).

³³⁹ The AB affirms this view. See Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, paras. 25, 223 (noting Japan's argument and supporting it by stating the importance of assessing the injurious effects of all potential factors).

³⁴⁰ *Id.* para. 216.

³⁴¹ *Id.* para. 29.

that the standard of review proposed by Japan was inapplicable to the Anti-dumping Agreement and that the cases relied on by Japan were more applicable to the Agreement on Safeguards. The U.S. further defended the Panel's reliance on the *U.S. – Atlantic Salmon Anti-dumping Duties* case ("*Atlantic Salmon*"),³⁴² which expressly disallowed the requirement of identifying or separating and distinguishing the injurious effects of other factors as opposed to those caused by dumping.³⁴³ The U.S. strategy here was therefore that of differentiating the arena of dumping from that of safeguards in terms of the applicable interpretive authority. The U.S. argued the requirements of separation and distinction of other factors was foreign to the anti-dumping context, and as such, previously decided cases on the Agreement on Safeguards was inapplicable in the context of the Agreement on Anti-dumping.³⁴⁴

Indeed, as the AB conceded, the analogous sections of the Anti-dumping Agreement (Article 3.5) and the Agreement on Safeguards (Article 4.2(b)) are "by no means identical."³⁴⁵ The AB, without overruling the U.S. on this point, observed that all the cases relied on by Japan and the U.S. were "persuasive." To justify reliance on the cases on the Agreement on Safeguards that require identification and separation of other factors, the AB noted the "considerable overlap" between the two agreements.³⁴⁶ Ultimately, the AB found that the Panel erred in its determination that Article 3.5 of the Anti-dumping Agreement did not require the ITC to separate and distinguish the injurious effects of other known factors.³⁴⁷

The AB was unable to complete the analysis of the four other

³⁴² WTO Panel Report on United States – Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, B.I.S.D. 41S/Vol. I/229 (Apr. 27, 1994), available at <http://www.wto.org>.

³⁴³ Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, para. 226.

³⁴⁴ The U.S. argued that the provision interpreted in *Atlantic Salmon*, "closely tracks the wording of Article 3.5 of *Anti-dumping Agreement*," and that the AB's "interpretation in *U.S. – Wheat Gluten Safeguard* and *U.S. – Lamb Safeguard* does not, and cannot, govern the interpretation of non-attribution in the *Anti-dumping Agreement*." *Id.* para. 29. See also *id.* para. 228 (noting and disagreeing with the U.S. position on whether investigating authorities must attempt to identify and assess factors separately).

³⁴⁵ *Id.* para. 230.

³⁴⁶ *Id.*

³⁴⁷ *Id.* paras. 233-34.

factors since no evidence was taken at the panel,³⁴⁸ making this a somewhat pyrrhic victory for Japan. However, the interpretive authority arrived at by the AB is sure to form the basis of future anti-dumping cases between the U.S. and its trading partners. The AB's legal interpretation also raises another related legal implication: the manner in which the AB approached its task of defining the meaning of Article 3.5 of the Anti-dumping Agreement. This is important since there was a sound legal basis for the Panel's interpretation of Article 3.5 although *Atlantic Salmon* suggested otherwise. The arrival at a different result from that in a prior decided case resulted in a favorable outcome for the United States. In short, the AB's departure from the *Atlantic Salmon* holding illustrates how "the argumentative tools that legal culture makes available to judges trying to generate the effect of legal necessity"³⁴⁹ might turn out to be more contested than settled. Hence, there seems to be no single unassailable argument that the U.S. or another GATT/WTO contracting party can make without the possibility of a valid counter-argument being made, even when it is made by analogy as was the case here between the Agreement on Safeguards and the Anti-dumping Agreement.

Thus, what the non-attribution issue in this case most aptly demonstrates is how a GATT/WTO party seeking a favorable determination can prod and provide an interpreter an opportunity to deploy her training, skill, and insight, as well as to allocate her intellectual energies to arrive at a decision that is acceptable within the prevailing legal culture even when prior precedent suggests otherwise.³⁵⁰

4.1.6. Calculation of "All Others Rate" Under the Tariff Act Found GATT/WTO Inconsistent

While the U.S. sought to avoid findings that its anti-dumping laws are inconsistent with the Anti-dumping Agreement on the other issues, the AB found the provision of the U.S. statute

³⁴⁸ *Id.* para. 236.

³⁴⁹ See Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 797 (addressing the role of political ideology).

³⁵⁰ According to Karl Klare, *The Politics of Duncan Kennedy's Critique*, 22 CARDOZO L. REV. 1073, 1087 (2001), the choices that an interpreter makes in turn depend on the political sensibilities and convictions of the interpreter, since it is often the case that the meaning and constraining power of the legal materials is unknown or uncertain without the intervention of legal work. At the WTO, the lack of a system of precedent further facilitates such outcomes.

providing for the calculation of the all others' rate and its application to be inconsistent with Article 9.4 of the Anti-dumping Agreement.³⁵¹

Section 735(c)(5)(A) of the U.S.'s Tariff Act of 1930,³⁵² as amended, provides a method for calculating a rate of anti-dumping duties for those exporters who were not individually investigated in a DOC anti-dumping investigation. Hence, in this case, such a rate would apply for exporters besides NKK, KSC, and NSC. Under this method, exporters who were not investigated are subject to anti-dumping duties, or margins,³⁵³ on the basis of the information gathered by the DOC from the representative sample of exporters. However, according to Japan, the DOC had acted inconsistently with Article 9.4 of the Anti-dumping Agreement by

³⁵¹ Article 9.4 of the Anti-dumping Agreement in part provides:

When the authorities have limited their examination . . . [to a sample of exporters or producers], any anti-dumping duty applied to imports from exporters or producers not included in the examination *shall not exceed*: (i) the weighted average margin of dumping established with respect to those selected exporters or producers . . . *provided that the authorities shall disregard for the purposes of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6.*

Anti-dumping Agreement, *supra* note 231, art. 9.4 (emphases added).

³⁵² Section 735(c)(5) of the Tariff Act of 1930 provides:

(A) General rule: For purposes of this subsection and section 733(d) [19 U.S.C. § 1673b(d)], the estimated all-others rate *shall be* an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined *entirely* under section 776 [19 U.S.C. § 1677e]. (B) Exception: If the estimated average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined *entirely* under section 766 [19 U.S.C. §1677e], the administering authority may use any reasonable method to establish the estimated all-other rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

19 U.S.C. § 1673d (2000) (emphases added).

³⁵³ The AB interpreted margins under Article 9.4 to be as it appears in Article 2.4.2 of the Anti-dumping Agreement and specifically as meaning "the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions." Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, para. 118.

including de minimis and zero margins based on facts available in determining the all others rate (that is the anti-dumping rate for exporters who were not individually investigated). The central legal issue here was whether Article 9.4 prevents or permits the inclusion of margins based partially on facts available. The U.S. argued it did. Japan by contrast argued that Article 9.4 did not permit the inclusion of margins based partially on facts available in the calculation of the all others' rate, but rather on real information. In essence, Article 9.4 prevented the U.S. from basing its calculation of the all others' rate on facts available. According to Japan, the U.S. could have avoided being in violation of Article 9.4 by using a composite "consisting of those portions of the investigated companies' margins that were *not* based on facts available."³⁵⁴ Further, Japan contended that the use of de minimis and zero margins based on facts available "dramatically inflated" the all others' anti-dumping margin.³⁵⁵ For all these reasons, Japan sought to have the AB uphold the panel's decision holding section 735(c)(5) of the Tariff Act inconsistent with Article 9.4 of the Anti-dumping Agreement.

The U.S., by contrast, argued that the panel erred in so holding because the requirement of excluding any margin containing even the smallest amount of facts available under Article 9.4, when read together with Article 6.8 of the Anti-dumping Agreement, was not entirely based on facts available. According to the U.S., margins under Article 6.8 "are 'founded' upon facts available, but *not* margins that include only *minimal amounts* of facts available."³⁵⁶ In other words, the U.S. drew a distinction between partial and entire facts available by contending that, to the extent that section 735(c)(5) calculated dumping margins for the "all others" rate partially – as opposed to entirely – based on data submitted by the investigated exporters, it was consistent with Article 9.4 of the Anti-dumping Agreement. To find otherwise, the U.S. argued would "render it impossible to calculate an 'all others' rate in most cases, and for that reason frustrates the purpose of Article 9.4."³⁵⁷ The European Communities ("EC") supported this reading of Article 9.4 as opposed to the panel's "rigid" interpretation arguing that "such facts are used simply to fill gaps in the information

³⁵⁴ *Id.* para. 20. For similar arguments by Chile, see *id.* para. 39.

³⁵⁵ *Id.* para. 20.

³⁵⁶ *Id.* para. 12.

³⁵⁷ *Id.* para. 13.

supplied by a cooperating exporter and the investigating authority has drawn no adverse inferences.”³⁵⁸

The AB dismissed the U.S.’s appeal on the basis that section 735(c)(5)(A) requires the inclusion of facts available in the calculation of the all others rate which results in an all others rate in excess of the maximum allowable rate under Article 9.4 of the Anti-dumping Agreement.³⁵⁹ As such, the AB like the Panel, read Article 9.4 to require the exclusion of all margins calculated in part using facts available thereby dismissing the U.S. distinction between partial and entire facts available as a permissible interpretation of Article 9.4.³⁶⁰ The AB further disagreed with the U.S. that the Panel erred in applying the appropriate standard of review under Article 17.6(ii) of the Anti-dumping Agreement. Under this standard of review, the DSB is required to use multiple permissible interpretations consistent with the Agreement in the assessment of the factual determinations of national authorities.³⁶¹ Hence, the U.S.’s interpretation of Article 9.4 of the Anti-dumping Agreement was found to be an impermissible interpretation under this very broad and deferential standard of review. The U.S. may have won on other issues, but it lost on the calculation of the all others rate on both the question of statutory inconsistency (section 735(c)(5)(A)) with GATT/WTO law (Article 9.4 of the Anti-dumping Agreement) as well as on the question of its application being inconsistent with U.S. obligations under Article 9.4 of the Anti-dumping Agreement.

This appeal however left open a lacuna in Article 9.4 of the Anti-dumping Agreement. This lacuna arises where in calculating the all others rate Article 9.4 mandates the exclusion of all margins from the calculation thereby leaving no margins to arrive at an all others’ rate.³⁶² Since the AB found the U.S.’s approach under section 735(c)(5)(A) of the Tariff Act to be inconsistent with Article 9.4 of the Anti-dumping Agreement, this leaves further room for

³⁵⁸ *Id.* para. 42. The European Communities (“EC”), however, argued that the Panel had correctly found section 735(c)(5) to be inconsistent with Article 9.4 of the Anti-dumping Agreement. *Id.*

³⁵⁹ *Id.* para. 128. The AB found that Article 9.4 of the Anti-dumping Code “establishes a prohibition, in calculating the ceiling for the all others rate, on using ‘margins established under circumstances referred to’ in Article 6.8.” *Id.* para. 122.

³⁶⁰ *Id.* para. 129.

³⁶¹ *Id.* paras. 57-60, 130.

³⁶² *Id.* para. 126.

the U.S. to amend its law to achieve a favorable result for its producers as long as it does not violate the provisions of Article 9.4.³⁶³

4.2. *U.S. Compliance with the AB's Decision in the Hot-Rolled Steel Case: Can the WTO's DSB Change U.S. Law?*

"I must say, the very idea that the creation of the World Trade Organization—an international governance body with real powers over the United States, whose sanction decisions against the United States we cannot veto—the very idea that would not require approval as a treaty is frankly mindboggling."³⁶⁴

"No ruling by a dispute panel under this new dispute settlement system, [the WTO's DSB], . . . can force us to change any Federal, State or local law of the U.S.. Not the City Council of Los Angeles, nor the Senate of the U.S., can be bound by these dispute settlement rulings, and I think, that is critical for the American people to understand that."³⁶⁵

The AB's findings recommended that the U.S. bring its measures found inconsistent with the Anti-dumping Agreement and the WTO Agreement into conformity with its obligations under those Agreements.³⁶⁶ There were two main categories of measures that the U.S. had to bring into conformity with the Anti-dumping Agreement and the other WTO Agreements: legislative and administrative. Legislatively, AB's *Hot-rolled Steel* decision recommended that the U.S. amend § 735(c)(5)(A) of the Tariff Act in connection with anti-dumping margin determinations for

³⁶³ The AB recommended that the U.S. "bring its measures found . . . to be inconsistent with the Anti-dumping Agreement and the WTO Agreement, into conformity with its obligations under those Agreements." *Id.* para. 241.

³⁶⁴ *Testimony of Lawrence Tribe to the Senate Committee on Science, and Transportation, Hearings on S.2467 Before the Comm. on Commerce, Science, and Transportation of the U.S. Senate*, 103d Congress, 295 (1994) [hereinafter *Hearings*].

³⁶⁵ *Hearings*, *supra* note 364, at 37 (citing testimony of Michael Kantor).

³⁶⁶ *Id.*

exporters not individually investigated. Administratively, the U.S. was required to review the DOC's:

- application of "facts available" to NSC, NKK and KSC;
- exclusion from the calculation of normal value, as outside the "ordinary course of trade," of certain home market sales to parties affiliated with an investigated exporter on the basis of the 95.5% or arms length test; and
- application of § 771(7)(c)(iv) of the Tariff Act of 1930, otherwise referred to as the captive production provision, in the determination of injury sustained by the U.S. hot-rolled steel industry.

Critics of the WTO in the U.S. immediately pointed to these requirements of conforming to GATT/WTO rules as evidence of how changes to U.S. law "at the behest of an international organization" thwarts America's democratic process.³⁶⁷ These

³⁶⁷ See Letter from Robert E. Lighthizer, Deputy, U.S. Trade Representative, Reagan Administration, and Alan Wolff, Deputy U.S. Trade Representative, Carter Administration, to Gloria Blue (Executive Secretary of the Trade Policy Committee in the USTR's office) (July 10, 2000) (following request for public comment on U.S. objectives and proposals for improving the functioning of the World Trade Organization). In the 1994 Hearings on the Implementing Legislation on the Uruguay Round, Senator Breaux wondered aloud to the then-USTR, Michael Kantor:

Let me ask another question . . . It is the question of the fact that if we have a World Trade Organization somehow running the trade rules and regulations, they are the umpire. They are the referee. If the group that serves as the referee is 120 nations or what-have-you, and the U.S. has 1 vote, I mean, are we not giving up our legitimate interest? I mean, it always disturbs me in international meetings when countries that are the size of this building have the same vote as the U.S., I am not saying anything derogatory against them because of their size, but to give them in these international organizations the same weight as the U.S. or another developed country seems very unfair. Can you comment on that?

Hearings, *supra* note 364, at 50.

In legal parlance, those who worry about GATT/WTO law and rulings overriding U.S. law and democracy also argue that all agreements constraining U.S. sovereignty must be subjected to the requirements of Article II, Section 2, Clause 2 which provides for Senate approval as a pre-condition of manifesting U.S. consent to such agreements. Tribe, *supra* note 43. At the Senate Hearings on the Uruguay Round's implementing legislation, Tribe argued that it is not enough, as the USTR had argued, that GATT/WTO panel reports finding U.S. law and GATT/WTO inconsistent would not immediately override U.S. law because they provided the U.S. with wiggle room. Tribe stated:

[that] amounts to an assurance that we might just decide to violate our

critics in particular pointed to the legalization or the juridification³⁶⁸ of GATT under the WTO's Uruguay Round Dispute Settlement Understanding ("DSU") as evidence of U.S. laws being subjected to legal scrutiny by an external adjudicatory body with the power of sanction.³⁶⁹ The DSU is authorized to resolve disputes between members under the WTO agreements and members are obliged to abide by its rules and procedures.³⁷⁰

solemn commitments under the WTO agreement. Well, what kind of argument is that? If that kind of reply could justify circumventing the treaty clause, then it seems to me the only thing that would count as a treaty would be a pact in which the United States solemnly turned over all of its military power to a foreign body that could then simply force us to do its bidding. But clearly the treaty clause encompasses vastly more than that.

Id. at 292-93. Also according to Tribe,

the treaty clause's provision for supermajority approval is an independent guarantee of especially serious deliberation and especially strong national consensus for those international agreements that significantly constrain American sovereignty by seriously implicating normal State or Federal lawmaking processes. It seems plain to me that the characteristics of the WTO agreement plainly qualify it as the sort of agreement that . . . warrants a high degree of consensus and solemnity.

Id. at 294-95. By contrast, Bruce Ackerman countered Tribe's position by stating:

an effort to limit Article I might be justified [since Tribe's position was largely premised on the view that the legislative power under Article I and the treaty power under II are not coextensive or inter-changeable – in effect that that which the Constitution requires to be accomplished through a treaty cannot be accomplished through mere legislation] if the Constitution had explicitly said that "only" the Senate could give its advice and consent to fundamental international agreements [Tribe would be correct]. But the text of Article II does not contain the word only. It simply creates an alternative route which the President and the Senate may use if in their judgment it is appropriate . . .

Id. at 313. See also Ackerman & Golove, *supra* note 24, at 801 (pointing out that although the Constitution requires two-thirds Senate approval for treaties, many have been approved for treaties, many have been approved by simple majorities of both Houses).

³⁶⁸ Dr. Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 N.W. J. INT'L L. & BUS. 775 (1997).

³⁶⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, pt. 2, Annex 2, 33 I.L.M. 112 (1994) [hereinafter Dispute Settlement Understanding]. The Dispute Settlement Understanding ("DSU") is annexed to the Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations (Apr. 15, 1994). See WTO, *WTO Legal Texts*, at http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Feb. 5, 2004). The DSU establishes the Dispute Settlement Body.

³⁷⁰ Dispute Settlement Understanding, *supra* note 364 art. 23.1. In the Section

Article 19.1 provides that where, pursuant to the DSU, a panel or the AB “concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”³⁷¹ The withdrawal of non-conforming measures is in fact the first objective of the WTO’s dispute settlement process.³⁷² Where these recommendations to withdraw non-conforming measures or bring non-conforming measures into consistency with GATT/WTO law are not implemented within a reasonable period of time,³⁷³ compensation and the suspension of concessions or other obligations are temporary options available against such a WTO member.³⁷⁴ To give the dispute settlement process certain guarantees of fair process and to prevent delay, the DSU has elaborate time limits within which the dispute settlement process is required to proceed from the initial consultations³⁷⁵ prior to the formation of a panel;³⁷⁶ to the appellate stage at the AB;³⁷⁷ to the

301 Case, the finding of consistency between Section 301 of the U.S.’s Trade Act of 1974 as amended and GATT/WTO law raised the possibility that Article 23 of the DSU is not the exclusive means of determining the nullification and impairment of benefits under the GATT/WTO Agreements. See Section 301 Case, *supra* note 14. The primary issue in the Section 301 Case was whether Article 23 of the DSU was the exclusive dispute settlement process of the WTO, and if so, whether Section 301 was inconsistent with it. The EC had attacked Section 301 as inconsistent with Article 23 of the DSU because it authorizes the U.S. to make unilateral determinations of injury based on GATT/WTO law and to take countermeasures which can only be undertaken pursuant to the GATT/WTO’s dispute settlement understanding. In *Shrimp-Turtle II*, the AB upheld a U.S. measure providing that unilateral trade measures directed at other countries’ policies are not, in principle, excluded from justiciability under Article XX. The AB pointed out that this finding, which also legitimated the fact that unilateral trade measure could be used to protect the environment consistently with the requirements of GATT, was not dicta but intended to give guidance to future panels. See WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, paras. 107, 137-38, WT/DS58/AB/RW (Oct. 22, 2001); see also, B.S. Chimni, *WTO and Environment: Shrimp-Turtle and EC-Hormone Cases*, *ECON. & POL. WKLY.*, May 13, 2002, at 1752-61.

³⁷¹ Dispute Settlement Understanding, *supra* note 359, art. 19.1.

³⁷² *Id.* art. 3.7.

³⁷³ Prompt compliance with DSU recommendations or rulings is considered “essential in order to ensure effective resolution of disputes to the benefit of all Members.” *Id.* art. 21.1.

³⁷⁴ *Id.* art. 22.1. However, such temporary compensation and suspension are not preferred to bringing the infringing measure into conformity under Article 22.1 of the DSU. *Id.*

³⁷⁵ *Id.* arts. 4.3, 4.7, 4.8, 4.11.

³⁷⁶ *Id.* arts. 12.5, 12.8, 12.12, 15.3, 16.1, 16.2, 16.4.

compliance or implementation stage.³⁷⁸ Where there is a dispute regarding the deadline set by the parties or by the Dispute Settlement Board ("DSB") for implementing the recommendations of a panel or the AB, the parties may under the DSU resort to binding arbitration under the DSU.³⁷⁹ Critics of the Uruguay Round commitments the U.S. made in 1994 specifically point to the possibility of the DSB authorizing retaliatory sanctions against the U.S. for failing to implement its recommendations as evidence of how the new dispute settlement regime would undermine U.S. sovereignty.³⁸⁰ According to these critics, this possibility removes

³⁷⁷ *Id.* art. 17.5.

³⁷⁸ *Id.* art. 21.3(c). The Dispute Settlement Body ("DSB") also has a surveillance responsibility over the implementation of recommendations and rulings under Article 21 of the Dispute Settlement Understanding on Rules and Procedures Governing the Settlement of Disputes. *Id.* art. 21.6.

³⁷⁹ *Id.* art. 26.1(b)-(c).

³⁸⁰ *Id.* arts. 26.1, 22. 1 (presenting the argument by Steve Charnovitz that the mandatory nature of the DSU procedures, and particularly Article 22.8, provides that suspension actions "shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed . . ." and that Article 23.2(c) which provides that suspension actions are "in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time" amounts to a WTO-authorized sanction and that this departs from the practice under Article XXXII:2 of GATT 1947 which was construed as merely allowing compensation equivalent to the value of damages assessed for a party's failure to carry out its obligations under the Agreement). See Steve Charnovitz, *Should the Teeth Be Pulled?: An Analysis of WTO Sanctions*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT HUDEC 602-35 (Daniel L. M. Kennedy & James D. Southwick eds., 2002) [hereinafter THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW]. Charnovitz further argues that the WTO's dispute settlement system changes the regime of compensation under GATT 1947 whose central goal was to re-equilibrate (or to restore the balance of benefits and obligations) in the trading system with a system based on sanctions and retaliation. He gives examples of the authorization of trade sanctions in the EC Bananas case (Decision by the Arbitrators, WTO, European Communities—Regime for Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS27/ARB (Apr. 9, 1999)) and the EC Beef Hormones case (Decision by the Arbitrator, WTO, European Communities—Measures Concerning Meat and Meat Products (Hormones)—Original Complaint by the U.S., Recourse to Arbitration by the European Communities under Article 22.6 of the Dispute Settlement Understanding, WT/DS26/ARB (July 12, 1999)) to illustrate where this new direction in dispute settlement has been effectuated. See JACKSON, *supra* note 23, at 167 (arguing that WTO rules are binding in the "traditional international law sense . . . although not always in a 'statute like' sense However, the international law 'bindingness' of a [panel] report certainly can and should have an important effect in domestic U.S. jurisprudence, as in the jurisprudence of many other nation-states."). But see David Palmeter & Stanimir A. Alexandrov, "Inducing

the flexibility the U.S. or any other country had under the 1947 GATT dispute settlement process to block the adoption of panel recommendations which in effect makes them inutile.³⁸¹

By contrast, Ambassador Michael Kantor told a congressional hearing on the Uruguay Round Implementing Legislation that the fears that American democracy and sovereignty would be sacrificed "have no foundation."³⁸² Kantor also pointed out that

Compliance" in WTO Dispute Settlement, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW, supra, 650-59 (disagreeing with Charnovitz and advancing the view that the DSU, unlike the WTO's Agreement on Subsidies and Countervailing Measures which provides for special remedy rules, continues GATT 1947 practice of re-equilibrating concessions as opposed to imposing sanctions).

³⁸¹ Article 16.4 of the DSU requires the DSB to adopt a panel report within sixty days from its publication unless there is no consensus to adopt it. See Dispute Settlement Understanding, *supra* note 369, art. 16.4. This differs from the practice of unanimous adoption under GATT 1947 which gave any one member the unilateral power to stand in the way of adoption. To strengthen the case for the bindingness of panel reports under international law, consider John H. Jackson (who is otherwise critical of the view that the WTO would limit U.S. sovereignty) to the effect that examining the language of various provisions of the DSU "in the light of the practice of GATT, and perhaps supplemented by the preparatory work of the negotiators . . . strongly suggests that the legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report." John H. Jackson, *The WTO Dispute Settlement Understanding - Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62-63 (1997). But see Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 417 (1996) (expressing a different view on this point). Ambassador Kantor argued:

[Failure to implement a panel report that finds a member's law inconsistent with GATT/WTO Agreements] within an agreed time, offer satisfactory trade compensation, or reach some other mutually acceptable solution, the DSU provides for automatic authorization of retaliation on request That said, dispute settlement panels formed under the new agreement will not have the power to change U.S. law order us to change our laws. We will remain free, as we are under GATT today, not to implement panel reports.

Hearings, *supra* note 364 at 42.

³⁸² See Hearings, *supra* note 364, at 41 (providing the prepared statement of Ambassador Michael Kantor entitled *The Importance of the Uruguay Round*). Senator Rockefeller noted that, in addition to § 102, the Bill also provided other safeguards such as congressional review of the U.S. commitment to GATT/WTO every five years and the safeguard of state and other local laws from the GATT/WTO challenge, which together led him to conclude that he could "not imagine how we could have protected our sovereignty more than we have under this agreement." *Id.* at 55 (providing opening statement of Senator Rockefeller). By contrast, in a letter to the Senate Committee on Commerce, Science and Transportation, Professor Anne-Marie Slaughter (then at Harvard Law School) argued that "[w]here an international agreement effectively supercedes or directly

U.S. law takes precedence over WTO Agreements,³⁸³ a principle that is further expanded in the Trade Act of 2002.³⁸⁴ According to John H. Jackson, sovereignty critics failed to appreciate the fact that GATT/WTO agreements did not have a direct effect on U.S. law and the fact that the U.S. could choose to withdraw from the WTO if it was opposed to implementing adverse recommendations. This, among other arguments of sovereignty critics in Jackson's view, gives the U.S. a buffer zone against GATT/WTO agreements.³⁸⁵ Robert E. Hudec, another leading trade law specialist, argued that the process of negotiating trade treaties and follow-up implementing legislation provides a setting within

constrains ordinary state and federal law-making authority, the people have in effect agreed to delegate their sovereignty not to the state or federal governments, but to the federal government acting in concert with a foreign government or governments." Letter from Prof. Anne-Marie Slaughter, Professor, Harvard Law School, to Senator Ernest F. Hollings 3-4 (Oct. 18, 1994), *reprinted in* GATT Implementing Legislation: Hearings, 302-11.

³⁸³ Section 102(a)(1) of the Uruguay Round Agreements ("URA") provides: "No Provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the U.S. shall have effect." 19 U.S.C. § 3512(a)(1) (2000). *See also supra* Section 2.3 (discussing the effect of international trade agreements on U.S. law).

³⁸⁴ Section 2105(a)(4) of the Trade Act of 2002 provides that any trade agreement or *understanding* with a foreign government (*oral* or written) not disclosed to Congress will not be considered to be part of trade agreements approved by Congress and shall have no effect under U.S. law or in any dispute settlement body. *See* Trade Act of 2002 § 2105(a)(4), 19 U.S.C.A. § 3805(a)(4) (emphasis added). Notice that the provision is very broad, encompassing both written and non-written agreements.

³⁸⁵ *See* JACKSON, *supra* note 23, at 367-95. A review of Jackson's founding role in the U.S. of the field of international economic law summarizes Jackson's view of the relationship between domestic and international trade law as follows:

Jackson's academic achievement was to displace international business transactions and the tradition of transnationalism by capturing the intellectual energy and hope for international public law and the felt necessity of dealing with the "foreign" without losing the basic American legal materials and the national private law order. By focusing largely on the reciprocal interaction of national governmental and legislative institutions, he imagined an international "trade constitution" which brought international trade into the domestic public order to revitalize it as an international system He recast clashes between national regimes not as political disputes awaiting international regulatory harmonization nor as deeply estranged cultural differences to be compared, but as an imperfect "interface" mechanism through which different legal cultures related to one another.

David Kennedy, *The International Style in Postwar Law and Policy*, UTAH L. REV. 7, 62 (1994).

which affected constituencies could participate and therefore confer legitimacy on the outcome.³⁸⁶ Notwithstanding these reassurances, the Trade Act of 2002 requires the Secretary of Commerce, in consultation with the Secretaries of State and Treasury, the Attorney General, and the USTR, to report to Congress regarding whether or not the DSB has added to the obligations or diminished the rights of the United States.³⁸⁷

The debate between those that thought American sovereignty and democracy would or would not be limited by the Uruguay Round Agreements replicates an old dichotomy between formalism and anti-formalism in international law.³⁸⁸ Critics of the U.S. for joining these agreements proceed from a sovereignty-centered conception of obligation in international law. For these critics, by consenting to be bound to an international legal obligation, the U.S. is giving up its sovereignty. By contrast, Ambassador Kantor and others who are agnostic about the U.S. giving up its sovereignty by joining in the WTO Agreements, proceed from a different premise than the formalist stance of the significance of consent. This alternative school of thought holds the view that the WTO's dispute settlement procedures should be seen as part of a larger informal structure of open-ended and at times conflicting policy goals among trading partners whose economies are integrated with that of the U.S., and that this structure has been negotiated through consensus (as opposed to consent) such that it gives the U.S. broad discretion in protecting its rights and interests.³⁸⁹ John H. Jackson also argued that panel

³⁸⁶ ROBERT E. HUDEC, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 219-20 (1999). Hudec further notes that domestic protectionist measures taken by state legislatures in the U.S. express electoral or democratic preferences and as such they are not any more legitimate than the "democratic" expression of "electoral will achieved by the process of international negotiations plus implementing legislations." *Id.* at 320.

³⁸⁷ See Trade Act of 2002 § 2105(b)(3) (detailing the procedure for failure to meet other requirements).

³⁸⁸ For excellent elaboration on this debate, see Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 782-91 (1966) (elaborating on the debate over the competence of the General Assembly in their quasi-legislative capacity).

³⁸⁹ The USTR's office has therefore asserted:

[The U.S.] government was careful to structure the WTO dispute settlement rules to preserve our rights. The findings of a WTO dispute settlement panel *cannot* force us to change our laws. Only the United States determines exactly how it will respond to the recommendations of a WTO panel, if at all. If a U.S. measure is ever found to be in violation

decisions are not legally binding on the U.S. to the same degree as formal interpretations of the WTO Agreement which are based on the super-majority requirements of a three-fourths majority of the highest body in the WTO, the Ministerial Conference.³⁹⁰

To examine the tension between critics of the WTO's encroachment on American sovereignty and democracy, on the one hand, and administration support of U.S. participation in the WTO, on the other hand, I next explore U.S./Japan negotiations in the compliance stage of *Hot-Rolled Steel Products* from Japan case, particularly by examining the arguments and counterarguments advanced at the WTO Arbitration hearing by both parties.³⁹¹

Having been unable to agree on what time period the U.S. would implement the DSU's recommendations, it joined with Japan in seeking a binding arbitration under Article 21.3 of the DSU. In this arbitration, the U.S. argued that it would implement the DSB's findings and that it would need a "reasonable period of time" to do so as provided in Article 21.3 of the DSU.³⁹² The U.S.

of a WTO provision, the United States may on its own decide to change the law; compensate a foreign country by lowering tariff barriers of equivalent amount in another sector; or do nothing and possibly undergo retaliation by the affected country in the form of increased barriers to U.S. exports of an equivalent amount. But America retains full sovereignty in its decision of whether or not to implement a panel recommendation.

U.S. TRADE REPRESENTATIVE, AMERICA AND THE WORLD TRADE ORGANIZATION 13 (1999) (releasing this report ahead of the Seattle WTO Ministerial meeting), available at http://www.ustr.gov/pdf/wto_usa.pdf (last visited Feb. 6, 2004).

³⁹⁰ JACKSON, *supra* note 23, at 388. Jackson emphasizes that the consensual character of the WTO circumscribes its ability to override U.S. domestic law and policy. *Id.* 382-83. Similarly, Jackson has described the regime of international economic law of the WTO as presenting themes and problems such as the "dilemma of rule versus discretion," and the "'effectiveness' of the trade rules," among others, rather than as a seamless legal web. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 25 (1989). Jackson further argues in this pre-WTO book that in the implementation of the Tokyo Round Agreements, the U.S. government (the Judicial and Executive branches as well as Congress) departed from theories of "strict sovereignty." *Id.* at 197-98. See also Kennedy, *supra* note 384, at 67 (noting Jackson's discussion on the unanswerable dilemmas raised among individual nations attempting to implement international agreements).

³⁹¹ WTO Appellate Body Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (award of the Arbitrator Florentino P. Feliciano), WT/DS/184/13 (Feb. 19, 2002) [hereinafter Arbitration on Hot-Rolled Steel Products].

³⁹² *Id.* para. 1.

argued that eighteen months would be a reasonable time period within which to implement the recommendations notwithstanding that Article 21.3(c) of the DSU calls for a period of fifteen months and that Article 21.1 requires “prompt compliance” while Article 21.3 requires “immediate” compliance.³⁹³ Hence, a primary issue in the arbitration was whether the fifteen-month implementation period in Article 21.3(c) is a fixed or non-extendable period.³⁹⁴ According to the U.S., the needed statutory changes to section 735(c)(5)(A) of the Tariff Act would take fourteen months “in the light of the United States legal system and prior experience.”³⁹⁵ The U.S. argued that this complex and unpredictable legislative process necessitated that period of time. In addition, the U.S. argued that administrative changes, required pursuant to the DSB’s recommendations (especially the recalculation of the all others’ rate) required certain due process safeguards including preparation of a new methodology, preparation of a draft re-determination, and a comment period by interested parties required by the Anti-dumping Agreement,³⁹⁶ the issuing of the final determination with accommodation for correction of errors would require a period of four months after the enactment of the amending legislation.³⁹⁷

Japan, by contrast, argued that experience shows shorter periods for legislative changes upon DSB recommendation were possible³⁹⁸ and that not all the administrative recalculations recommended were contingent upon the legislative changes.³⁹⁹ In effect, that prompt and immediate compliance would not be met if the U.S. was allowed an eighteen month implementation period. In addition, Japan noted that previous arbitrations on

³⁹³ *Id.* para. 5.

³⁹⁴ *Id.* para. 25.

³⁹⁵ *Id.* para. 10.

³⁹⁶ *Id.* para. 13. The Arbitrator declined to be drawn into making a determination on this reliance of the Anti-dumping Agreement that would have necessitated giving the U.S. more time but made observations on the applicable U.S. law. *Id.* para. 35.

³⁹⁷ *Id.* paras. 13-15.

³⁹⁸ *Id.* para. 20 (arguing that an amendment within a seven-month period was possible, given that the U.S. Foreign Sales Corporations legislation was enacted in three and a half months).

³⁹⁹ *Id.* para. 23 (noting that two weeks only would be necessary for changes contingent upon the new law). Japan also argued that only forty-five days were required for those changes not contingent upon legislative changes. *Id.* para. 22.

implementation had shied away from considering the complexity of the issues involved or even their contentiousness, since these were non-legal issues in establishing implementation schedules under Article 21.3(c). In Japan's view, a ten-month period was adequate.⁴⁰⁰

The arbitrator first began by finding that the fifteen-month period found in Article 21.3(c) of the DSU was a guideline that called for a reasonable period of time as opposed to being a strict legal requirement, especially when immediate compliance is impracticable.⁴⁰¹ The arbitrator then very interestingly borrowed from the AB's finding of reasonableness in its decision in this case, on the unrelated issue of Article 6.8 of the Anti-dumping Agreement. Here, the AB found that Article 6.8 did not require a strict deadline in the submission of questionnaires because reasonableness implied a degree of flexibility as well as consideration of all the circumstances of a particular case.⁴⁰²

The arbitrator made several observations regarding the submissions of Japan and the United States. First, the dispute between them indicates that there is a lack of clarity, at least between the U.S. and Japan, regarding whether or not Article 21 of the DSU provides strict time guidelines for implementation in the same way that there is bindingness of previous arbitrations interpreting Article 21 on subsequent cases.⁴⁰³ This observation is consistent with the AB's general approach in the main dispute between Japan and the U.S. — that the Anti-dumping Agreement is more a general guideline to be interpreted in context rather than a strict code of rules. This perspective of the WTO's DSU therefore contributes to a view of both the substantive as well as the dispute settlement rules of the WTO as open to contestation with differing interpretations of doubtful precedential value. It is a legal regime whose outcomes are not therefore easily predictable.

Proceeding from the view that he was unconstrained by precedent and taking into account the various submissions of the U.S. and Japan, the arbitrator determined that a period of fifteen months from August 23, 2001, was the reasonable period of time within which the U.S. would be required to comply with the

⁴⁰⁰ *Id.* paras. 16-23.

⁴⁰¹ *Id.* para. 25.

⁴⁰² Appellate Body Report on Hot-Rolled Steel Products, *supra* note 266, para. 84.

⁴⁰³ Arbitration on Hot-Rolled Steel Products, *supra* note 391, para. 39.

recommendations and rulings of the DSB.⁴⁰⁴ This period expired on November 23, 2002. On December 5, 2002, the DSB agreed to extend the reasonable period of time for implementation until December 31, 2003, or the end of the first session of Congress, whichever is earlier.⁴⁰⁵ This extension confirms the assertion above of the possibility of endlessly elongating dispute settlement, thereby curtailing the utility of the DSB to effectively check WTO-illegal action.

The Trade Act of 2002 also provides that trade authorities cannot apply any implementing legislation with respect to an agreement negotiated under the auspices of the WTO unless the Secretary of Commerce has issued a report to Congress before December 31, 2002, addressing the concerns of Congress on whether or not the DSU has either added or diminished the rights and obligations of the U.S. under GATT/WTO agreements.⁴⁰⁶ The Secretary of Commerce transmitted that report to Congress on December 30, 2002.⁴⁰⁷ It allayed congressional fears that the DSU was heavily biased against the U.S. by systematically marshalling evidence to demonstrate that the rulings had benefited a wide array of U.S. industries and that in those cases in which the U.S. had lost, the “findings involved technical or procedural elements of a law or regulation, or its application, and the U.S. was easily able to implement the DSB recommendations without affecting the underlying law or regulation.”⁴⁰⁸

5. CONCLUSION

As the GATT/WTO legal system becomes all the more complex and subtle, especially in its open-endedness, governments such as the U.S. are better able to balance tensions between competing interests at the domestic and international levels as well as increase their propensity to devise ingenious methods that “beat” the rules

⁴⁰⁴ *Id.* para. 40.

⁴⁰⁵ UNITED STATES TRADE REPRESENTATIVE, DISPUTE SETTLEMENT UPDATE (Sept. 29, 2003), available at <http://www.ustr.gov/enforcement/update.html>. See generally Daniel Pruzin, *U.S. and Japan to Agree Further Delay for Compliance with 2001 WTO Steel Ruling*, 20 INT'L TRADE REP., 2004 (2003).

⁴⁰⁶ The Trade Act of 2002 § 2105(b)(2)(D)(3), 19 U.S.C. § 3805(b)(2).

⁴⁰⁷ UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE BRANCH STRATEGY REGARDING WTO DISPUTE SETTLEMENT PANELS AND THE APPELLATE BODY: REPORT TO THE CONGRESS TRANSMITTED BY THE SECRETARY OF COMMERCE (Dec. 30, 2002), available at <http://www.ita.doc.gov/FinalDec31ReportCorrected.pdf>.

⁴⁰⁸ *Id.* Sec. III, Part C, at 6.

or to adopt a policy of international minimalism.⁴⁰⁹ In so doing, the U.S. consolidates, rather than weakens, its sovereignty. This has largely been achieved because of the malleable way in which trade rules are crafted, applied, implemented and adjudicated.⁴¹⁰ After all, these rules are bargained-for outcomes as opposed to strict rules etched in stone.

This play in the crafting, application, implementation, and adjudication facilitates the accommodation of divergent interpretations which in turn encourages policy balancing between invariably conflicting policies both at the domestic and at the international level. The adjudication and implementation of cases before the GATT/WTO's dispute settlement bodies is further subject to negotiation through arbitration and diplomacy. The fact that the sanctions of the GATT/WTO system are for the most part compensatory rather than punitive go towards making it more open-ended, and flexible, also lead to consequences which the system is intended to reign in.⁴¹¹

Since the dispute settlement system of the WTO is coming under the intense scrutiny of Congress, a central issue in the debate is whether the plasticity of WTO anti-dumping rules is an advantage or disadvantage. As we have seen with regard to the *Hot-rolled Steel from Japan* case, the use of standards as a baseline for the anti-dumping regime of the WTO results in a measure of uncertainty in the outcomes of the dispute settlement process. To avoid this uncertainty, WTO members could negotiate more specific rules. However, game theory predicts that some degree of uncertainty—or unpredictability—may enhance the parties' incentives to bargain to a lower-cost solution under circumstances of high transaction costs for formal reallocation.⁴¹² This would disadvantage poorer countries who are unable to be repeat players

⁴⁰⁹ For an analogous point made by John H. Jackson, see JACKSON, *supra* note 23, at 123-31.

⁴¹⁰ James Gathii, *Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members*, 96 AM. SOC'Y INT'L L. PROC. 157, 160-62 (2003).

⁴¹¹ Kenneth Dam therefore argues that "because of the economic nature of tariff concessions and the domestic politics sensitivity inherently involved in trade issues, a system that made withdrawals of concessions impossible would tend to discourage the making of the concessions in the first place." DAM, *supra* note 8, at 80.

⁴¹² Cf. Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256 (1995) (comparing two alternative property regimes—definite, ex ante entitlement versus contingent, ex post entitlement—and applying game theory to show that ex ante regimes may induce immediate ex post agreements).

in the DSU.

This study therefore shows in a detailed fashion that neither the sovereignty critics nor the supporters of U.S. participation in the WTO are entirely correct. Rather, there is a wide degree of latitude enjoyed by the U.S. in acquiescing to and rejecting WTO DSB recommendations. In other words, not all WTO DSB recommendations are automatically implemented nor are all automatically rejected. The process of negotiation on how the U.S. would implement recommendations requiring legislative and administrative changes gives the U.S. room to carefully craft its compliance thereby ensuring that it maximizes its best interests while maintaining international leadership in the integrity of a dispute settlement process based on the rule of law. The opportunity provided by this process of negotiation is in part what produces a minimalist approach to international legal governance as a safeguard to maintaining the various tensions international trade produces within and beyond the United States.⁴¹³ Ultimately, these outcomes are further conditioned by a background of constitutional and legal constraints that impose requirements which counterbalance the perceived effects of international trade rules on priorities of domestic policy such as labor, the environment, and specific industries.

⁴¹³ The GATT/WTO agreements are indeed regarded at times as helpful to governments to overcome domestic special interest groups. The WTO argues that "governments need to be armed against pressure from narrow interest groups, and the WTO system can help." WTO, *Ten Benefits of the WTO Trading System*, No. 9, available at http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b09_e.htm (last visited Feb. 4, 2004). See also STEFANIE ANN LENWAY, *THE POLITICS OF U.S INTERNATIONAL TRADE: PROTECTION, EXPANSION AND ESCAPE* 54 (1985) (arguing that trade regime rules constrain the influence of domestic pressure groups); see generally C. MICHAEL AHO & JONATHAN DAVID ARONSON, *TRADE TALKS: AMERICA BETTER LISTEN!* (1985). However, the findings in this study demonstrate that this is not an unassailable argument.