

1982

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John H. Jackson
University of Michigan Law School

Jean-Victor Louis
University of Brussels, Belgium

Mitsuo Matsushita
Sophia University, Tokyo, Japan

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Recommended Citation

John H. Jackson, Jean-Victor Louis & Mitsuo Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267 (1982).

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IMPLEMENTING THE TOKYO ROUND: LEGAL ASPECTS OF CHANGING INTERNATIONAL ECONOMIC RULES

*John H. Jackson**

*Jean-Victor Louis***

*Mitsuo Matsushita****

International economic and political interdependence has increased dramatically since the close of World War II. We now watch foreign wars on our living room television sets, move billions of dollars worth of funds across national borders daily,¹ and feel the effects of political violence in the Mideast throughout our domestic farmlands. A corollary to economic and political interdependence, however, is the less visible but equally pervasive problem of legal interdependence. Any attempt, in the contemporary world, to create new international rules or institutions necessarily depends on the national legal and constitutional systems of a number of countries. This Article analyzes the Tokyo Round² negotiations of the General Agreement on Tariffs and Trade³ as a case study of the legal

* Professor of Law, University of Michigan. — ed.

** Professor of Law, University of Brussels, Belgium (Free University of Brussels). — ed.

*** Professor of Law, Sophia University, Tokyo, Japan. — ed.

This is an advance and summary version of a book, to be published in the near future by the University of Michigan Press, which reports on the results of a joint research project on comparative legal aspects of implementing the results of the Tokyo Round of international trade negotiations. Professor Jackson is responsible for Part IV concerning the United States; Professor Louis is responsible for Part II, concerning the European Economic Community, and Professor Matsushita is responsible for Part III, concerning Japan. The authors collaborated on other portions of the manuscript and assisted each other on all the parts. The authors are indebted to the DANA Foundation for a grant which assisted with some of the expenses of this study, and to the Cook Endowment of the University of Michigan for support of this project.

1. N.Y. Times, Sept. 21, 1981, at D5, col. 1.

2. See generally 1 DIRECTOR-GENERAL OF GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1979); 2 DIRECTOR-GENERAL OF GATT, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1980).

3. Articles of Agreement for the International Monetary Fund, *opened for signature* Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, *as amended in* IMF Survey 97 (1978); The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. The current version of GATT is contained in 4 GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter cited as GATT, BASIC INSTRUMENTS]. See generally D. CARREAU, T. FLORY & P. JUILLARD, DROIT INTERNATIONAL ECONOMIQUE (2d ed. 1980); K. DAM & J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1977) [hereinafter cited as INTERNATIONAL ECONOMIC RELATIONS]; C. COOMBS,

processes and constraints that influence international economic negotiations.

The interplay of national and international legal structures has already demonstrated its influence on global economic policy. At the end of the Kennedy Round of the GATT negotiations (1962-1967), the United States' negotiators agreed to a separate adjunct package of tariff reductions and the elimination of certain nontariff barriers. Despite support for the package from the executive branch, congressional approval was never obtained, and the package never came into force.⁴ Similarly, negotiators for the European Economic Community during the Tokyo Round were not always certain if they could, through their own power, bind Member States of the EEC to international agreements on certain subjects. As a result, the negotiators chose to omit certain subject areas from the negotiation, to reduce the risk of "constitutional challenge."⁵ The Japanese constitutional structure imposes its own unique restraints on actions

THE ARENA OF INTERNATIONAL FINANCE (1976); G. CURZON, MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES (1965); J. HORSEFIELD, THE INTERNATIONAL MONETARY FUND, 1945-1965: TWENTY YEARS OF INTERNATIONAL MONETARY COOPERATION, VOL. I: CHRONICLE (1969); R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975); J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) [hereinafter cited as WORLD TRADE]; A. LOWENFELD, THE INTERNATIONAL MONETARY SYSTEM (1977); 25 THE COLLECTED WORKS OF J.M. KEYNES: SHAPING THE POSTWAR WORLD (D. Moggridge ed. 1980); F. SOUTHARD, *The Evolution of the International Monetary Fund* in 135 PRINCETON ESSAYS ON INT'L FINANCE (1979); Caireau, Flory & Juillard, *Cronique de Droit International Economique*, 1976 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL (Centre National de la Recherche Scientifique).

4. See DEPARTMENT OF STATE, U.S. NONTARIFF BARRIERS in WILLIAMS COMMISSION, PAPERS I at 712-14 (1971). See also S. REP. NO. 2059, 87th Cong., 2d Sess. 19; S. CONG. RES. 38, 90th Cong., 1st Sess. 1; Amendment to H.R. 17324, 114 CONG. REC. 26,133 (1968); Renegotiations Amendment Act, § 201, 19 U.S.C. § 160 (congressional reaction to the International Anti-Dumping Code).

5. The line between constitutional challenge and strong political challenge is difficult to draw. Often the constitutional structure is what positions the potential political challenge. For example, if the Constitution requires Congress to approve an agreement, then the politics of Congress become all-important. Some of the results of the 1967 Kennedy Round were strongly challenged in United States congressional and other procedures, and these challenges and criticisms were in part the influence for developing a new procedure in the United States for negotiating in the Tokyo Round. See Part IV *infra* (describing procedure). Since this new procedure depended heavily on congressional approval of the results under a normal statutory but "fast track" procedure, the potential for "constitutional" challenge in the courts was sharply reduced, so the true potential challenge in the Tokyo Round resulted from the politics of Congress. This clearly limited certain kinds of potential negotiations. For example, the 1974 Act authorizing U.S. participation made it rather clear that certain industrial sectors, such as textiles, or certain sensitive steel products, would probably not be negotiable. The situation in the EEC was more complex and, in general, during the Kennedy Round the EEC seemed reluctant to embark on major reformulations of international economic rules. Even with a certain amount of caution, the EEC negotiators ended the Tokyo Round with a large amount of ambiguity as to the constitutional distribution of powers for approving the results of the Tokyo Round. See Part II *infra*.

taken by international negotiators, and influences international rulemaking in the same way.⁶

This experience suggests the importance of the relationship between domestic legal rules and international economic negotiations. Our goal in this study is to identify the legal and constitutional constraints on the development of international trade policy, and to analyze the degree to which those constraints are changeable. This analysis is conducted by considering how the various Tokyo Round agreements were implemented in the national legal system of each of the three key actors in the GATT process. The basic technique of investigation was for each author to examine the procedure of implementation in his own country. At the end of this process, after dealing with their separate national legal systems, the authors together formulated some cross-cultural conclusions comparing various legal systems as they affect international economic rules today. Needless to say, it has not been possible to answer all the questions which motivated this study. The law in this area is very much in a state of transition, attempting to cope with the new and alarmingly difficult situations presented by ever increasing international interdependence and rapidly changing economic conditions. Three general subject areas, however, are compared and contrasted, using the Tokyo Round experience as the principal basis for empirical evidence. These three subjects are: (1) the legal requirements in each legal system for approving and accepting the various Multilateral Trade Negotiation (MTN) agreements (as international law obligations); (2) the questions of "direct effect," that is, the legal status within each legal system of the MTN agreements; and (3) the question of "hierarchy of norms," that is, which will prevail among contradictory legal instruments such as the MTN agreements, prior or later statutes or regulations, or each legal system's "constitution."

These comparisons reveal some important constraints on the negotiations process by identifying the sort of international agreement which is precluded by domestic legal structures. This, in turn, can help identify areas where domestic legal systems enable and facilitate new initiatives in international trade negotiations. By properly recognizing the role of domestic legal institutions in the formulation of international economic policy, the authors hope to contribute to a better understanding, and a more fruitful pursuit, of international trade negotiations.

6. See Part III *infra*.

I. INTRODUCTION

The international rules governing global economic activity today have been drafted primarily since World War II. Although there were a number of international congresses to coordinate customs administration dating as far back as 1900, none of these developed a successful program of international discipline on international economic behavior. This failure was viewed by many as a primary cause of both the Great Depression and World War II.⁷ As a result, a multinational effort at the close of World War II sought to develop a viable set of international economic rules.

At the 1944 Bretton Woods conference, charters were drafted for the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development. Although that conference focused primarily on financial matters, the participants publicly noted the need for a counterpart international institution to govern trade.⁸ As soon as the United Nations was organized, its Economic and Social Council adopted a resolution calling for the convening of a "United Nations Conference on Trade and Employment." In late 1946, a committee was convened to pave the way for such a conference. During 1947, preparatory conferences were held in New York and Geneva. These conferences resulted in drafts of both a charter for an International Trade Organization (ITO) and a multilateral reciprocal tariff reduction agreement, the General Agreement on Trade and Tariffs (GATT). Although the executive branch in the United States had been a major supporter of the ITO, Congress refused to approve it, and the ITO failed to come into existence. Absent support from the United States, the major economic power in the world at the time, the ITO had no chance for success.

The GATT met with a more favorable response. Although the GATT treaty instrument was itself never officially brought into force, the GATT was applied as international law by the Protocol of Provisional Application. Since the GATT was never intended to be the principal institution to govern international trade activity, it does not have extensive institutional provisions to carry out this responsibility. Similarly, the Protocol of Provisional Application provides that Part II of the GATT will be implemented only where it is "not inconsistent with existing legislation." This is the source of the so-called "grandfather rights,"⁹ discussed in detail below, which often

7. WORLD TRADE, *supra* note 3, at 37-39.

8. United Nations International Monetary and Financial Conference, July 1-22, 1944, U.N. Doc. 1941 (U.S. Dept. of State Pub. No. 2866, 1948).

9. Protocol of Provisional Application of the GATT, Oct. 30, 1947, 61 Stat. A2051, T.I.A.S.

limit the effectiveness of the GATT. Despite these limitations, the GATT, in conjunction with the other international economic organizations, such as the IMF and the Organization for Economic Cooperation and Development (OECD), now functions as the backbone of the international economic system.

Under the auspices of the GATT, there have been seven major "rounds" of tariff and trade negotiations.¹⁰ The first five of these rounds (the 1947 Geneva negotiation of the original GATT; a 1949 round in Annecy, France; 1950 in Torquay, England; 1955 in Geneva; and the 1960-1961 "Dillon Round") were primarily item-by-item negotiations for the reduction of tariffs, with very little attention paid to nontariff barriers. Because of the growing complexity of this sort of negotiation, the sixth round of tariff reductions (the "Kennedy Round") attempted a "linear tariff reduction" approach. It set a goal of a fifty percent, across-the-board cut in tariffs. The Kennedy Round also attempted to address major nontariff barriers. Although the Round was not entirely successful, it did yield across-the-board tariff reductions that averaged about thirty-five percent, with a variety of exceptions and adjustments. The only significant agreement on nontariff barriers, however, was the 1967 Anti-Dumping Code.

After 1967, there was a period of delay and confusion, before there developed an effort to launch a new round of negotiations. In the early 1970s, the United States took the initiative in encouraging a seventh round of trade negotiations. This time, it was decided to try to focus negotiation on nontariff barriers, because these had become increasingly significant as restraints on international trade. In light of the successful reduction of tariffs over a period of several decades, nontariff barriers became major obstacles to further trade liberalization. The seventh trade round was launched in September 1973 in Tokyo, and thus the name "Tokyo Round."

Although this negotiation contained a significant element of tariff reduction, a large part of the activity in the Tokyo Round was focused on a variety of nontariff barriers. These proved most difficult to negotiate, for a number of reasons. For example, it is very hard to quantify many of the nontariff barriers. Nations in previous GATT negotiations habitually insisted on "reciprocity." Each nation's negotiators wanted to be able to report home that they had obtained

No. 1700, 55 U.N.T.S. 308; WORLD TRADE, *supra* note 3, at 60; INTERNATIONAL ECONOMIC RELATIONS, *supra* note 3, at 401.

10. WORLD TRADE, *supra* note 3, at 218-29; Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POLY. INTL. BUS. 21 (1980).

from the negotiation at least as much as they had given up. In negotiating tariffs, there were various quantitative and statistical ways to support such claims. For example, the percentage reduction in the tariff would be multiplied by the value of the goods imported in recent periods, and that would be designated as the "value of the tariff concession" made in the negotiations. When it came to negotiation of nontariff barriers, such as the rule governing how a country should apply its anti-dumping duties, it was hard to quantify the value of such rules.

Despite these difficulties, the Tokyo Round negotiations were surprisingly successful in formulating a series of agreements designed to reduce barriers to international trade, both tariff barriers and nontariff barriers. Ten major agreements and several "understandings" resulted from the negotiations. Because of the difficulty of amending the GATT,¹¹ none of the nontariff agreements or understandings were incorporated into the GATT system as a technical change to the text of GATT. Instead, most of the MTN agreements are "stand-alone" treaty instruments. The "understandings" of the "Group Framework" negotiations were adopted by the GATT Contracting Parties as "decisions." The relationship of these agreements and decisions to the GATT itself is not a simple subject, but it is not within the scope of this Article. Some of the agreements purport to be "interpretations" of various GATT articles, and in a number of cases the agreements create problems of discriminatory treatment that could violate the Most Favored Nation (MFN) clause of GATT. A few words about each of these MTN results may help the reader to understand materials in later sections.

(1) *Tariff reduction agreements*: Little needs to be said about the Geneva (1979) Protocol and the Protocol Supplementary to the Geneva (1979) Protocol. Basically, they are lists of items with the reduction in tariff that has been agreed to by each country. Each country has its own "tariff schedule" in GATT, and the results of the Tokyo Round negotiations on tariffs have become incorporated as amendments to those tariff schedules of GATT, through the GATT processes. The negotiation was carried out on a "linear" basis, with a target of an overall reduction of sixty percent in tariffs (at least this was the target of the United States' authorizing legislation for its negotiators). Nevertheless, the results have generally been estimated as approximately a thirty-five percent reduction in the industrial tar-

11. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, *supra* note 10, at 32.

iffs of the major industrial participants of the negotiations.¹²

(2) *The Subsidies-Countervailing Duty Code*: officially entitled "Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade," it is perhaps the most important of the nontariff barrier codes negotiated in the Tokyo Round. It certainly was the most difficult to negotiate. This Code tries to address the increasingly difficult problem of government subsidies to exports and other goods.

It is very difficult to define "subsidy." A myriad of governmental practices could be called subsidies, including certain income tax exemptions, as well as governmental support for research. Subsidies tend to be divided into "export subsidies," whereby the subsidy is obtained only for goods which are exported; and "general subsidies," or "production subsidies," whereby the subsidy is received for all goods produced. The Subsidies-Countervailing Duty Code is basically divided into two subjects: (1) rules that govern the procedures by which a country is authorized to apply a countervailing duty to imports which have benefited from a subsidy; and (2) some rules directly applying to subsidies, along with a complaint procedure that allows one country to complain about the subsidy practices of another which seem to be harming economic competitors in the importing country. The Code is exceedingly complex, and represents a number of uneasy compromises between the contending international negotiators.

(3) *Anti-Dumping Code*: officially entitled "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade." Dumping is generally the practice of a firm selling its goods abroad at a lower price than it sells them in its home market. For most of a century, there has been general international agreement among nations that dumping is an unfair international trade practice, and that each importing country should have the right to impose anti-dumping duties on goods that are dumped in its market, to protect its competing domestic industry. An Anti-Dumping Code was negotiated in the Kennedy Round (1967), but was not very successful. Indeed, United States constitutional problems and congressional antagonism prevented the United States from fully implementing this Code. At a late day in the Tokyo Round, it was decided to revise the Anti-Dumping Code, and to enter into a new code which embodied many of the concepts that had already been negotiated in the Subsidies-Countervailing Duty Code. The defini-

12. See note 4 *supra*.

tion of "injury" to domestic competing industry was copied from the Subsidies-Countervailing Duty Code into the Anti-Dumping Code. This may have been an unfortunate step, since the two subjects, although seemingly parallel, differ substantially in their underlying policy foundations. Dumping involves activity by particular, often private, firms. Subsidy activity, in contrast, is basically governmental activity, and can stem from legitimate internal social policies being pursued by the government. Nevertheless, the new Code brings a series of new rules and concepts to the anti-dumping activity of nations, and must be considered one of the significant results of the Tokyo Round.

(4) *The Government Procurement Code*: officially entitled "Agreement on Government Procurement." For many years, it has been increasingly obvious that "buy-national" practices of governments are a significant obstacle to further liberalization of international trade. The GATT has explicit exceptions for governmental purchases from some of its important trade obligations (the National Treatment Clause). Consequently, the enactment of government procurement rules requiring preference for domestically produced goods was a major loophole in the GATT system. For many years there have been discussions among nations, mostly in the context of the OECD, with the view to developing some sort of international discipline on these government procurement rules. This effort was moved into the Tokyo Round negotiation of GATT and resulted in a new international agreement. The agreement, at first reading, appears to go very far in establishing a general nondiscriminatory "national treatment" rule of behavior for governments in their purchases of goods. However, there are important exceptions, and governments are bound to follow the Code only as to "entities" explicitly negotiated and placed on their respective "entities lists." This practice significantly narrows the initial coverage of the Government Procurement Code; however, it does provide a framework for future negotiation to expand the entities lists.

(5) *Standards Code*: officially entitled "Agreement on Technical Barriers to Trade." A panoply of different kinds of product standards, such as food and drug standards to protect human health, standards for product operation to prevent pollution, or standards on goods to enhance their safety, have increasingly burdened the flow of international trade. Most standards have a legitimate policy basis, but standards can be written in such a way as to be an effective limitation on imports, or to discriminate in favor of domestic goods over imports. The Tokyo Round negotiators approached this problem

primarily as a procedural one, establishing a new agreement which allows governments and other interested parties to have an opportunity to protest the development of standards which unnecessarily discriminate against imports.

(6) *Customs Valuation Code*: officially entitled "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade." The various methods employed for valuing imported goods for customs purposes have served as non-tariff barriers. The variety of complicated valuation methods and the often arbitrary administration of valuation rules have been an impediment to trade. Prior to the implementation of the Customs Valuation Code, United States law included nine different valuation methods — including the American Selling Price method that has been criticized by trading partners of the United States since before the Kennedy Round of trade negotiations. The Customs Valuation Code is an attempt to bring some uniformity to national valuation procedures by providing a series of procedures for valuation, ranked according to preference of use, *i.e.*, lower ranked methods of valuation cannot be used unless a value is not determinable under a higher ranked basis for valuation. "Transaction value" is the preferred basis for valuation. The agreement will be administered through two committees. Dispute settlement will be administered by a Committee on Customs Valuation under the auspices of GATT, while technical issues will be submitted to a Technical Committee on Customs Valuation under the auspices of the Customs Cooperation Council. A protocol to the Customs Valuation Code was also negotiated which was designed to attract more developing countries to accept the Code.

(7) *Licensing Code*: officially entitled "Agreement on Import Licensing Procedures." This Code expresses a concern that licensing *procedures* designed to implement a trade restriction may serve as additional restrictions in and of themselves. It calls for neutral rules and fair and equitable application and administration of those rules. Application forms and procedures for licensing should be as simple as possible. A concern for transparency of procedures is reflected in the Code's requirement that rules governing import licensing procedures be published.

(8) *Civil Aircraft Code*: officially entitled "Agreement on Trade in Civil Aircraft." One of the goals at the commencement of the Tokyo Round negotiations was to develop agreements relating to particular industrial sectors such as steel or chemicals. This goal was not achieved. The Civil Aircraft Agreement is the one agreement which embraces a range of trade barriers affecting a specific indus-

trial sector. The Agreement eliminates duties on civil aircraft, engines and parts of civil aircraft, and repairs on civil aircraft. The provisions of the agreements on Technical Barriers to Trade and on Subsidies, as well as the GATT rules relating to quantitative restrictions, are incorporated into the Civil Aircraft Agreement. The Agreement also covers government procurement of civil aircraft.

(9) *Dairy Products Code*: officially entitled "International Dairy Agreement." This agreement provides for a consultative arrangement. The International Dairy Products Council established by the Agreement will serve as a forum for discussions and monitoring of the international dairy market. In addition, protocols attached to the Agreement set minimum export prices for various dairy products.

(10) *Arrangement Regarding Bovine Meat*: Like the International Dairy Agreement, the Bovine Meat "Arrangement" sets up a consultative group, called the "International Meat Council." The Arrangement basically establishes procedures for information exchange and market monitoring, and consultation through meetings of the council, and otherwise.

(11) *Framework Arrangements*: One of the negotiating committees of the MTN was called the "Group Framework" Committee, and was responsible for formulating four specific understandings. These concern differential treatment for developing countries; balance of payments measures; safeguard actions for development purposes; and an understanding regarding notification, consultation, and settlement of disputes. These arrangements were not established as separate treaty agreements, but were instead accepted by a decision of the Contracting Parties (on November 28, 1979) of GATT.¹³ As such, they do not stand alone, but are part of the totality of GATT jurisprudence. For the most part, these arrangements do not have precise obligations; however, they do have significant impacts, at least in two respects: (1) the understanding with respect to differential treatment for developing countries has been deemed to perpetuate the GATT 1971 waiver regarding "Generalized System of Preferences"; (2) the understanding with respect to dispute settlement procedures, with its annex (an "Agreed Description of the Customary Practice of GATT in the Field of Dispute Settlement"), established more precisely the framework of the various procedures regarding dispute settlement under the GATT Article XXII and XXIII procedures.

13. Action by the Contracting Parties on the Multilateral Trade Negotiations, Nov. 28, 1979, GATT Doc. L/4905 (1979), *reprinted in* GATT, BASIC INSTRUMENTS 201 (26th Supp. 1979).

In addition to these major "codes" and understandings, there were certain other multilateral agreements, and a large number of bilateral agreements. All of these faced similar national legal and constitutional constraints on their implementation. With the general framework of the GATT in mind, we now turn to a comparison of three very different legal systems to analyze those constraints in more detail.

II. IMPLEMENTING THE TOKYO ROUND IN THE EUROPEAN ECONOMIC COMMUNITY

Jean-Victor Louis

This section will examine the legal problems of the European Economic Community (EEC) in connection with the conclusion and implementation of the agreements resulting from the Tokyo Round of negotiations. The most significant issues confronting the EEC in this context are the allocation of authority between the Community and its Member States, and individuals' ability to challenge the validity of a Community or national act that is alleged to be contrary to international agreements.

After a short introduction on EEC commercial policy and its importance in the EEC Treaty and practice, we then examine the negotiating process in the Tokyo Round from 1973 to the conclusion in 1979. There follows an analysis of the problems of the coming into force and the potential direct effect of the agreements which resulted from these negotiations.

The EEC is a regional organization created by the Treaty of Rome on March 15, 1957.¹⁴ Since its membership was enlarged in 1973 and in 1981, the EEC includes ten West European countries as members.¹⁵ The EEC serves as a regional customs union for Europe, developing, *inter alia*, common policies between its members in the fields of agriculture, transportation, and external trade relations.

A number of difficulties in implementing multilateral trade agreements in EEC Member States stem from the structure of the EEC itself. The EEC is divided into two functional elements: the Commission, which represents the interests of the EEC as a whole,

14. Treaty establishing the European Economic Community, March 25, 1957. (Belgium - Federal Republic of Germany - France - Italy - Luxembourg - Netherlands).

15. In 1973, Denmark, Ireland and the United Kingdom acceded to the European Communities (EEC, EURATOM, and European Coal and Steel Community) and on January 1, 1981, Greece became the tenth member of the Communities. Accession of Portugal and Spain is also expected.

and the Council, which is composed of members of the governments of each of the Member States.¹⁶ There thus exists a constant tension between the interests of the EEC as a whole and the interests of any particular Member State.¹⁷ Individual nations tend to want to control their own foreign policy, since this is a "jealously guarded area of national sovereignty." The Council has been diligent in keeping a tight rein on the Commission acting as the negotiator of the Commu-

16. Technically, there are three European Communities, based on three separate treaties: the Coal & Steel Community, based on the Treaty establishing the European Coal & Steel Community, signed in Paris, April 18, 1951; EURATOM, based on the Treaty establishing the European Atomic Energy Community, signed in Rome, March 25, 1957; and the European Economic Community, based on the Treaty establishing the European Community, signed in Rome, March 25, 1957.

The four basic institutions of the three European Communities are the Commission, the Council, the Court of Justice, and the Assembly (or "European Parliament"). Although a convention annexed to the two Rome treaties provided for a single Court of Justice and a single European Parliament to apply the three Community treaties, it was not until 1965 that a single Council and a single Commission were established. After this merger a particular institution plays a role for all three communities, although that role will differ among the communities. The Commission has fourteen members, one from each Member State, plus an additional member from the four major States. It is analogous to the executive arm of government and administers the largest bureaucracy (about 9,000 professional-level persons). The Council, composed of a representative from each Member State (a Minister), primarily decides upon policy and passes upon legislative initiatives presented to it by the Commission.

The third institution is the Court of Justice, which sits in Luxembourg and has eleven judges and five Advocate Generals. The Court has fairly ample jurisdiction to decide questions of interpretation involving the basic treaties, regulations, directives, and other EEC acts, international agreements, and other legal matters of the EEC. Finally, there is the European Parliament, which since 1979 has been elected by direct elections in the Member States, but has limited powers, except in financial matters.

The EEC can act by adopting various formal instruments, termed "regulations," "directives," "decisions," etc. These are normally adopted by the Council upon a proposal from the Commission. A "regulation" has immediate and direct applicability in the Community. The "directive" was designed to provide a means by which the EEC would direct Member States to take action to carry out the directive. However, this has not prevented the Court of Justice from ruling that in some cases, portions of a directive have direct effect for individuals or enterprises. The "decision" designates an act which applies to particular cases and particular persons.

The Council, or Council of Ministers, meets with different officials of the Member States' governments according to the specific matter at hand. For example, when the Ministers of Foreign Affairs of the Member States meet, the Council is then called the Council of Ministers of Foreign or General Affairs. The Council also has a secretariat, including a legal service, and has a number of subordinate committees or bodies, such as the COREPER (Council of Permanent Representatives), or the 113 Committee, explained at Part II B *infra*.

In recent years a "European Council" has evolved in which the heads of government from the Member States meet. Although there is no written "constitutional" status for the "European Council," its decisions generally have great force within the Community, since the prime ministers or presidents can subsequently instruct their representatives in the EEC Regular Council to act in accordance with the decisions of the European Council.

Paralleling the procedures established by the treaties is the very important process of political cooperation in the field of foreign policy. Heads of government in the European Council and Ministers of Foreign Affairs meet to coordinate the foreign policies of the Member States and to achieve common positions at the level of the Ten.

17. See Weiler, *The European Parliament and Foreign Affairs: External Relations of the European Economic Community*, in *PARLIAMENTARY CONTROL OVER FOREIGN POLICY* 151-89 (A. Cassese & A. aan den Rijn eds. 1980).

nity.¹⁸ The Tokyo Round of the GATT provides a classic example of the tensions between a regional organization and the member states that it represents in international negotiations. These tensions reveal themselves in the form of legal and constitutional constraints on the implementation of international agreements.

A. The EEC Negotiating Process in the Tokyo Round

1. An Overview of the Ordinary Negotiating Process of a Trade Agreement

The ordinary negotiating process of a trade agreement — either bilateral or multilateral — concluded by the EEC generally includes the following stages:

- (1) Preliminary talks between the Commission and the State(s) concerned.
- (2) Report by the Commission to the Council including a recommendation to open formal negotiations with the third State.
- (3) Authorization of the Commission by the Council to negotiate along the directives (“mandate”) approved by the Council on the recommendation formulated by the Commission and, as usual, carefully examined by the Committee of Permanent Representatives (COREPER).
- (4) Negotiation of the agreement by the Commission with the assistance of a special committee composed of representatives of the Member States in charge of international economic relations (so-called “Committee of Article 113” or “113 Committee”).
- (5) Authentication of the formal result of the negotiation by way of an exchange of letters or the initialling (“paraphe”) of the agreement by the Commission.
- (6) Report by the Commission to the Council which approves by a regulation or a decision the result of the negotiation and decides to proceed to the final conclusion of the agreement.
- (7) Formal conclusion through a complex procedure (approbation plus conclusion) or by the signature on the part of the Community by the persons designated by the Council.

If the agreement is deemed to be a “mixed agreement,” that is, for reasons of the allocation of competence between the EEC and its

18. Weiler, note 17 *supra*, at 156. One could have more accurately written that the Council has been reluctant to authorize the Commission to open and conduct negotiations since, under the terms of the treaty, the Commission has the capacity to negotiate.

Member States the agreement (such as the LOMÉ agreement) requires not only EEC acceptance but also acceptance by Member States, then certain additional procedures by the Member States will be required.

This ordinary procedure outlined above, which results partly from the joint requirements of Articles 113 and 228 of the EEC Treaty, and partly from the practice followed by the Community, has to be adapted to the process of multilateral negotiations such as the MTN.

We shall look at the various stages of the MTN negotiations on the part of the Community, analyzing the role and influence of each Community institution and organ involved.

2. *The Preliminary Stages of Tokyo Round*

On February 11, 1972, the United States and the EEC issued a joint declaration supporting the opening of multilateral trade negotiations.¹⁹ This declaration was endorsed by the first Summit of Heads of State and Government of the enlarged EEC on October 20, 1972.²⁰ The endorsement is notable because it highlights several crucial aspects of the EEC's negotiating posture: first, that reciprocity would be demanded in all concessions;²¹ second, that attention would be paid to the link between commercial and monetary problems; and third, the desire to seek a reduction in both tariff and nontariff barriers. It was partially with these ends in mind that the EEC began preparing for the Tokyo Round of negotiations.

In early April 1973 the Commission sent the Council a communication on the "elaboration of a *global conception* in view of the next multilateral negotiation." Although a majority of the members of the Council approved of the statement, French Minister Michel Jobert, supported by the Irish and Italian ministers, reproached the Commission for proposing compromises to be made with the rest of the world, rather than setting forth the EEC negotiating posture. Jobert asked for a restatement of the goals of the EEC, emphasizing that the negotiations would have to be balanced, and that commercial negotiations were meaningless absent consideration of the convertibility of the U.S. dollar.²² Jobert insisted on the crucial

19. 5 BULL. EUR. COMM. (No. 3), 57-60 (1972).

20. See the final declaration of the Summit, 5 BULL. EUR. COMM. (No. 10), 14-23 (1972).

21. This principle had also been stressed in the declaration of December 12, 1971, and in the joint declaration of February 11, 1972.

22. *Le Monde*, May 16, 1973, at 38, col. 2; *In the Same Boat*, *ECONOMIST*, June 9, 1973, at 11-12.

importance of the common tariff and on the need for respect for the common agricultural policy.

The Commission then prepared a preamble to its communication, and rewrote several sections to conform to the views of the Council. On May 24, the communication was finally presented to the Committee of Permanent Representatives (COREPER), an internal organ of the Council.²³ The final draft was clearly influenced by Jobert's comments in a number of respects.²⁴ First, the discussion of the link between monetary and commercial negotiations had been reworded to incorporate the French view. France wanted to insist on a new monetary order, based on fixed but adjustable parities and the general convertibility of monies, before agreeing to any international trade proposals. The Commission held a more moderate view, insisting only on parallel efforts during the trade negotiations to help create an adequate monetary system. The final text constituted a compromise between these two positions,²⁵ incorporating the following proviso into its discussion of the Tokyo Round: "The Community shall evaluate the progress of those negotiations in the light of the progress which will be realized in the monetary field. When it will consider the result of those negotiations, it will do so taking into account that progress." Although these sentences do not make clear exactly what actions the EEC would take if an adequate monetary agreement was not reached, they do serve to hide the divergent opinions of the Member States.

The second split of opinion between France and the rest of the EEC revolved around the Common Agricultural Policy (C.A.P.). The original text affirmed that the principles of the C.A.P. could not be put into question. The final text declared more categorically that the C.A.P. principles *and their mechanisms* were not open to negotiation. The final text also did away with an earlier allusion to the possibility of a declaration of intent by the Community to consider a more economically oriented structural policy. Such compromises combined to provide the EEC with a more united common front as they entered the new round of negotiations.

3. *Negotiation from 1975-1979: The Actors for the EEC*

The final draft of the communication to the Council, together with the approval that was granted at a meeting of the Council of

23. Le Monde, May 27-28, 1973, at 23, col. 3.

24. Lemaitre, *Pour une Réciprocité Effective*, Le Monde, May 27-28, 1973, at 23, col. 3.

25. The text was adopted after a marathon session by the Council of Ministers of Foreign Affairs in Luxembourg on June 26, 1973.

Ministers, authorized the opening of formal negotiations for the EEC. Throughout the negotiations that followed, the Commission played a prominent role. A series of initiatives directed to the Council and the Member States resulted in acceptance of the "Swiss Formula" for the reduction of tariffs — greater reductions for higher tariffs — notwithstanding the objections of certain Member States. The Commission also attempted to convince the Member States of the desirability of selectivity in the application of the safeguard clause, although this effort proved unsuccessful.

Another organ that played a surprisingly prominent role in the GATT negotiations was the "Committee of Article 113." Composed of representatives of the Member States, this Committee normally plays the role of a "watchdog" of the Commission, overseeing its activities and suggesting interpretations of Council directives. Throughout the Tokyo Round, the Committee was primarily responsible for a number of compromises reached between the Commission and the Member States. A number of reasons have been suggested for the prominent role played by the Committee of Article 113 during the Tokyo Round. These include the following.

First, the Tokyo Round negotiations, although they were initiated in Japan, later tended to be localized in Geneva. This made it impossible for COREPER, seated in Brussels, to exert its usual political control over the Commission. Second, the technical complexity of a number of issues raised, including the difficult issues of non-tariff barriers, demanded input by experts. Since the Council was unable to provide specific guidance on a number of these issues, the Committee's influence expanded. Third, throughout the lengthy period of negotiations, the Commission required an ongoing source of information as to each Member State's negotiation positions. To achieve this goal, the Committee was given an expanded role in the negotiations. The minutes of the Council meeting on January 17, 1978, recognized this increased authority when it spoke of "a rigorous coordination [of the Commission] with this country's [Federal Republic of Germany] delegation in the Committee of Article 113." Finally, the global conception that was set forth in the Commission's original communication freed the negotiators from the need to refer back constantly to the Member States for guidance. Thus freed from some political restraints, the Commission could rely more heavily on technical advice provided by the Committee.

Just as these factors tended to increase the Committee's power, they tended to undercut the role of the usually influential COREPER. A number of Member States, particularly France, ob-

jected to this redistribution of power, and often raised questions in this regard. When these issues proved irresolvable, or when the Committee itself was unable to agree on policy issues, the disputes were brought to the attention of the Council as a whole.

The Council devoted many deliberations to the Tokyo Round. It examined related problems

- on February 10, 1975, when it adopted the directives for the negotiations of the MTN in the GATT following the adoption of the Trade Act by the American Congress;
- on January 17, 1978, before the beginning of the substantial part of the negotiations. It examined the "working hypothesis" elaborated by the groups or sub-groups of negotiation;
- on April 4, 1978, when it analyzed the tariff offers made by the main participants in the negotiation. It decided to authorize the Commission to present demands to its partners to improve their offers and to envisage a list of possible retractions of concessions;
- on June 27, 1978, for the adoption of a schema of global agreement with the hope of soon concluding the negotiations;
- on September 19, 1978, after the adoption of the Declaration of July 13, it expressed its deep concern over the situation which would be created by the expiration of the powers given to the Government of the United States by the Trade Act to waive the application of countervailing duties in the case of export subsidies, in the absence of an injury test. It stated that it would not be realistic to envisage the conclusion of the negotiations without an assurance of the continuance of the waiver. On this point, the Council fully endorsed the position of the Commission;
- on October 17, 1978, after the decision of the United States Congress to adjourn its work until after January 15, 1979, without having taken a decision on the waiver problem. The Council affirmed that an unequivocal confirmation of the application of the waiver was necessary to conclude the negotiations but, in the meantime, the Community declared that it was willing to pursue the negotiations;
- on November 21, 1978, after bilateral contacts between the Commission and Mr. Strauss (the chief U.S. negotiator). The Council confirmed its October position;
- on December 12 and 18, 1978, to examine progress reports made by the Commission on the negotiations;
- in three sessions on February 5 and 6, 1979, March 5 and 6, and

April 2 and 3, to analyze the results of the negotiations. The Council took note of the intention of the Commission to authenticate the various texts and agreements which resulted from the negotiations, upon reservations of a final examination by the Committee of Article 113;

- on November 20, 1979, when it decided to conclude the agreements resulting from the MTN.²⁶

Many of these deliberations dealt with controversies between members of the Community. As a result, many of the Council's final recommendations are compromise solutions to problems. The debate on the maximum percentage of tariff reductions provides a case in point. The Commission favored a forty percent maximum; and Germany, as high a maximum as possible. The final position adopted by the Council contained an apparent contradiction that resulted from these divergent goals.²⁷

Just as the Commission played a prominent role in the Tokyo Round negotiations, the European Parliament played a surprisingly very small role.²⁸ The EEC Treaty does not require that the Council consult Parliament while negotiating "commercial agreements." Consultation, however, is required for association agreements under Article 238. There are important arguments which plead for consultation of the Parliament in respect of trade agreements, such as the MTN. First, trade agreements often take place in a context similar to association agreements. Accordingly, parliamentary participation in these agreements should be uniform. Second, Parliament has extensive power over EEC budgetary matters. Since trade agreements, through tariff reductions, affect EEC resources, Parliament, as a budgetary authority, ought to have some input into this decision-making process. Finally, national parliaments generally must approve trade agreements. This suggests that the legislative insight of the European Parliament might properly be considered by the Council during negotiations.

On October 15, 1973, the Council adopted the Luns II procedure for Trade Agreements to compensate somewhat for the absence of a

26. Problems related to the Tokyo Round were also discussed at other sessions of the Council, on December 3 and 4, 1973; January 20 and 21, 1974; April 5 and October 18, 1977; March 7, May 2, and June 6, 1978; May 8, June 12, July 24, and October 22 and 29, 1979.

27. See point 7 of the conclusions of the Council of January 17, 1978.

28. See generally, Weiler, *supra* note 17, at 151, 169; Quintin, *Participation de l'Assemblée parlementaire européenne au déroulement de la procédure de négociation des accords commerciaux*, 11 Rev. trim. dr. eur. 211 (1975); RENGELING, ZU DEN BEFUGNISSEN DES EUROPÄISCHEN PARLAMENTS BEIM ABSCHLUSS VÖLKERRECHTLICHER VERTRÄGE IM RAHMEN DER GEMEINSCHAFTSVERFASSUNG, Festschrift für H.J. Schlochauer 877-98 (1981).

formal consultation.²⁹ The procedure provides for three phases:

- before the beginning of the negotiations, the Parliament may debate the orientations forwarded by the Council to the competent parliamentary committees;
- at the end of the negotiations, but before signature, the President of the Council or its representative informs confidentially and unofficially the competent committees³⁰ of the agreement;
- after the signature but before the conclusion, the Council informs the Parliament of the content³¹ of the agreement. Notably, this procedure does not specifically provide for parliamentary intervention *during* the negotiations. The Council felt that such debates would hurt the EEC's negotiating position. The procedure, however, does not absolutely bar these debates. Parliamentary committees retain the right to request confidential information and debate it publicly if they so desire.³²

In practice, Parliament made little use of the Luns II procedure during the Tokyo Round. Only three debates were held from 1973-1978, and they resulted in little more than expressions of general support for the EEC's position and a desire to reach a "substantial and balanced" final result. The reasons for Parliament's inability to participate actively in the trade negotiations are multifold. First, although external trade relations are governed by the Community, the Parliament has little influence over the internal policies of the Member States. Second, Parliament feared that extensive consultation might weaken the position of the Commission in its dealings with the Council. Third, the secrecy of foreign negotiations that results from "international etiquette" made public debates of the Tokyo Round both difficult and improper.³³ Finally, the technical complexity of

29. Formally adopted on October 15, 1973, the procedure had been suggested and already applied at the end of 1972. The first case of application was the conclusion of the first commercial agreement with Egypt (1972). See E. GRABITZ & T. LAUFER, *DAS EUROPÄISCHE PARLAMENT* 165 (1980).

30. In French: "substance."

31. In French: "teneur."

32. See Weiler, *supra* note 17, at 171 (giving an example of the effectiveness of the procedure in the case of the preferential trade agreement with Egypt in 1972: "The relevant parliamentary committees were informed confidentially prior to the signature on 18 December 1972. An amendment by way of protocol was inserted as a result of comments made by the Committee of External Economic Relations. It was then debated in Parliament, on 10 May, which once again called for a better consultation procedure and implementation of all suggestions in the Giraudo report (which led to the resolution of 17 February 1973). The agreement was finally concluded in October 1973.").

33. See Weiler, *supra* note 17, at 154-57. See also Quintin, *supra* note 28.

nontariff negotiations placed much of the Tokyo Round beyond the expertise of the European Parliament.

4. *Terminating the Negotiations: March — April 1979*

The final step in EEC negotiations is the initialling that serves to authenticate relevant documents. The Commission, as the EEC institution responsible for negotiations, is empowered to take this action without formal authorization from the Council. The Tokyo Round minutes and protocols were initialled on April 12, 1979.

Although it is not legally required to do so, the Commission generally issues a report to the Council before finalizing negotiations. The Tokyo Round report was presented to the Council on March 6, 1979. Several Member States requested a supplementary report analyzing the proposed tariff concession.³⁴ When this was provided, unanimity was quickly reached at the April 2-3, 1979, session.³⁵

The Commission was asked to issue reports addressing the domestic legislative measures for implementation adopted by the major developed countries. The Council declared that the EEC would adopt the Tokyo Round concessions only after its developed negotiating partners had themselves successfully implemented the concessions. Finally, it included a sentence in its minutes reserving the question of how power would be divided between the Community and the Member States until the time for definitive conclusion of the agreements. Since Member States thus retained some discretion over whether to adopt concessions authenticated by the Commission, this sentence later caused severe difficulties in the definitive approval of the Tokyo Round.

5. *The Preparation of the Conclusion in 1979: The Legal and Political Problems*

On February 22, 1979, COREPER instructed an ad hoc working group and the legal services of the Council and the Commission to analyze three legal issues: the need for Member States to sign the Tokyo Round agreement; representation of Member States in administrative bodies created by the agreements; and the number of EEC votes in those administrative bodies. The Commission legal service advised that the EEC had authority to conclude the Tokyo Round agreements without consent of the Member States. Article 113 of the EEC Treaty, as well as several decisions by the Court of

34. See *Europe*, No. 2632 (April 5-6, 1979); *Fin. Econ. Tijdy.*, Mar. 7, 1979.

35. Italy removed its ultimate objections some days after the meeting of the Council.

Justice,³⁶ conferred exclusive competence over commercial policy to the EEC as a whole. The ad hoc working group and the Council legal service agreed with this general principle but concluded that certain of the GATT agreements — the “Standards,” “Government Procurement,” and “Civil Aircraft” Codes — exceeded the field of commercial policy. Accordingly, Member State consent would arguably be necessary to adopt these Codes. The so-called “Rubber-Agreement Opinion” of the Court of Justice resolved this dispute,³⁷ holding that the Community is competent to conclude all agreements that involve commercial policy as their primary focus. Thus, the Commission concluded, on October 1, 1979,³⁸ that the Community had the power to adopt all of the Tokyo Round agreements without the consent of each individual Member State. The legal issue resolved, there remained a political difficulty — how to avoid embarrassing those Member States that had insisted that their consent was necessary for adoption of the agreements. It was finally decided, after much debate, that the Community alone would sign the bilateral and multilateral agreements, but that all of the Member States would sign and accept the Tariff Protocol and the Codes on “Standards” and “Civil Aircraft.” This solution can only be explained as a purely diplomatic compromise. There is no legal basis for according a different treatment to the Code of Standards than the Code on Government Procurement.

Although this arrangement was adopted for purely political reasons, it did seem to have a legal impact. International liability is different for “mixed agreements” — signed by the EEC and the Member States — than it is for agreements concluded by the EEC alone. When a third country is injured by violation of a mixed agreement, that country may seek restitution from the EEC, Member State, or both.³⁹

The second legal issue addressed by the ad hoc working group —

36. The most important of these cases is *Commission of the European Communities v. Council of the European Communities*, 1971 C. J. Comm. Rec. 275.

37. This is important because the delegations had agreed that on the points where an agreement existed between the two legal services, the decision of the Council should be in favor of a conclusion by the Community alone; in the absence of such agreement, there should be a joint conclusion by the Community and its Member States.

38. GATT Multilateral Trade Negotiations — Final Report on the GATT Multilateral Trade Negotiations in Geneva (Tokyo Round) and proposal for Council decision, COM (79) 514 final.

39. On this problem, see Steenbergen, *The Status of GATT in Community Law*, 15 J.W.T.L. 337, 343-44 (1981), and Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective*, 19 COMMON MKT. L. REV. 5, 24 (1982), on the impossibility of, and the desire to avoid, stating clearly where the dividing line between the respective powers of the EEC and its Member States lies.

representation of Member States in administrative bodies established by the Tokyo Round — did not pose such severe difficulties. These were partially resolved in the “package deal” prepared by the Council on November 20, 1979. Member States are represented in the Community delegation while working on the Committee of Signatories.⁴⁰ Moreover, all Member States are to be fully informed about any contacts or discussion with the Committee, and the Member States are invited to participate in all nonconfidential meetings. Where any matter deals explicitly with the imports or exports of an individual Member State, that state would be permitted to intervene on its own behalf.⁴¹ Since modes of participation are identical for committees that resulted from mixed agreements and those growing out of agreements entered by the EEC alone, there appears to be no practical reason for the Member States’ insistence that the Codes of Standards and Civil Aircraft be subject to Member State approval.

The final legal issue addressed by the ad hoc working group — the number of EEC votes in administrative bodies — remains unresolved. EEC officials tend to de-emphasize the importance of this problem by arguing that consensus is a tacit rule in GATT matters, so the allocation of votes is irrelevant. Although this is a satisfactory political solution to the issue, it leaves much to be desired from a legal standpoint.

6. *Parliamentary Debate, December 1979: Improving the Involvement of the Assembly*

The European Parliament supported the Commission’s opinion that the EEC had exclusive authority to conclude the Tokyo Round Agreements.⁴² It waited until December 14, 1979, however, to express this support — three weeks after the decisive November 20 session of the Council, and only three days before the agreements were concluded. During the course of the Parliamentary debates, one overriding concern became evident — in the future, Parliament wanted a more active role in the negotiation and conclusion of international agreements by the EEC.

Paragraph 21 of the resolution ultimately passed by Parliament

40. The insistence of (some) Member States on a participation in the groups is understandable for the managing of some codes, such as the Code on Standards. Although there are indeed some two hundred directives in that field, the national standards are multitudinous. It is perhaps true that Commission officials are not in the best position to defend purely individual national points of view.

41. It seems that the Commission was not very happy with the possibility of unilateral intervention of a Member State and insisted on the necessity of a previous scenario.

42. See point 19 of the resolutions.

evinces this concern dramatically: "[Parliament] instructs its appropriate committees to draw up and submit to it proposals for the participation of the European Parliament in future trade negotiations." Sir Fred Catherwood, president of the Committee for Economic External Relations, explained that the European Parliament "needs to take the place of national parliaments, which do not have the competence to discuss these things directly with the Commission and the Council." Many members of Parliament favored a requirement that would require parliamentary approval (or at least deliberation) of EEC international agreements before they could enter into force. The tenor of the debate made clear that Parliament can be expected to seek more active involvement in EEC international policy-making in the future.

A later resolution, adopted on July 9, 1981, reconfirmed Parliament's desire for a more active role in EEC foreign policy. This resolution sought a common declaration between Parliament, the Council, and the Commission urging conciliation in external matters; consultation by the Council before the conclusion of every agreement, and confidential consultation of the parliamentary committees as provided in the Luns agreement. All of these suggestions — which were incorporated into a resolution of February, 18, 1982 — are to be implemented without formal amendment of the EEC Treaties, through agreements between the institutions concerned.

This mechanism raises a question worthy of consideration: what is the legal value of inter-institutional agreements?⁴³ These agreements are obviously easier to enact than amendments to the Treaties, but their legal value is dubious. Some have only political value. Others will have legal impact, but this will usually be assessed on a case-by-case basis. Thus, if Parliament arranges an inter-institutional agreement providing a right of approval — which it does not seek at the moment — for international agreements, it has no legal guarantee that this right can be enforced against the Council.

B. *The Implementation of the MTN Results in the Community Legal Order*

1. *The Problem of the Implementation of International Agreements in the Legal Order of the EEC with Special Reference to the Tokyo Round*

Article 228 of the EEC Treaty makes all bilateral and multilateral agreements concluded by the EEC binding upon the Member

43. See Rengeling, *supra* note 28, at 894.

States. This does not make the Member States parties to the Tokyo Round agreements, but it binds them through the separate legal structure of the Community.⁴⁴ This structure makes it legally impossible for a Member State to denounce a treaty concluded by the EEC alone.⁴⁵ Mixed agreements can be denounced, but the denunciation applies only to those parts of the agreement wherein the EEC exceeded its authority. Since the mixed agreements concluded in the Tokyo Round were the result of political, rather than legal, necessity, it is unlikely that Member States would be able to denounce these agreements.

Agreements concluded by the EEC alone affect the domestic legal order of the Member States. *International Fruit Company* and *Bresciani* make clear that domestic acts of transformation are not needed to give EEC agreements domestic effect.⁴⁶ Upon conclusion by the Council, these international agreements immediately become part of the Community legal structure, subordinate to the EEC Treaty but superior to the acts of EEC institutions.⁴⁷

Although the Tokyo Round agreements had direct effect into domestic legal orders, some of the multilateral agreements required specific measures of implementation to assure judicial remedies in the event of noncompliance. Other agreements did not require internal complements either because they corresponded to preexisting EEC norms or they merely prescribed rules of conduct for Member States. Thus, for example, there was no need for specific implementation of the Agreement on Import Licensing Procedures because the Community rules already conformed to the requirements of this agreement.

Other agreements required EEC internal complements. Regulations governing EEC common agricultural policy were amended to comply with the obligations incurred through the Tokyo Round.⁴⁸ Tariff concessions required the adoption of regulations reducing the

44. See Louis & Brückner, *Relations extérieures*, 12 LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE 62 (J. Mégret ed. 1980), and Bourgeois, *supra* note 39, at 24.

45. See Barav, *Oral Intervention*, in DIVISION OF POWERS BETWEEN THE EUROPEAN COMMUNITY AND THEIR MEMBER STATES IN THE FIELD OF EXTERNAL RELATIONS 90 (1981).

46. See note 54 *infra*.

47. See Louis & Brückner, *supra* note 44, at 182 and the references quoted; Boulouis, *La jurisprudence de la Cour de justice des Communautés européennes relative aux relations extérieures des Communautés*, R.C.A.D.I. 343, 385-86 (1978); Tizzano, *Recenti sviluppi in tema di accordi internazionali della CEE*, DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI 19, 34 (1981).

48. See GATT Multilateral Trade Negotiations — Final Report on the GATT Multilateral Trade Negotiations in Geneva (Tokyo Round) and proposal for Council decision, COM (79) 514 final, at 81.

tariffs fixed by the External Common tariff.⁴⁹ Nontariff barriers required more elaborate domestic implementation:

(1) The Anti-Dumping Code and the Subsidies and Countervailing Duties Code were incorporated into a new regulation "for protection against dumped or subsidized imports from countries which are not members of the [EEC]."⁵⁰ This regulation, effective January 1, 1980, assured a strict parallelism between international and intra-community law.

(2) The Customs Valuation Agreement was implemented through Council Regulation No. 1224/80 which brought a much older regulation (No. 803/68) into conformity with the Tokyo Round results.⁵¹ As with the Anti-Dumping Code, this Regulation incorporated the Tokyo Round Agreement into a single community instrument.

(3) The Agreement on Technical Barriers to Trade posed a much more difficult implementation problem. Unlike the agreements discussed above, this agreement dealt with matters unrelated to the Customs Union, and thus beyond the exclusive authority of the EEC. As a result, there were a number of national rules and statutes governing these areas and the EEC was able only to adopt directives, rather than regulations. The Decision of the Council of January 15, 1980, explained the advantage of having directives to govern national standards. If a directive preexists, Member States may adopt "provisional measures" to implement EEC agreements. The Commission, however, retains the right — after consultation with a Committee composed of representatives of the Member States — to set forth final "appropriate measures" for implementation of the agreements, and these measures become binding on the Member States. In contrast, where there is no directive, Member States retain full power over the adoption of appropriate measures to implement the MTN agreement.

(4) The Agreement on Government Procurement raised an entirely different set of implementation problems. Article 228 of the EEC Treaty made this Agreement immediately binding on the Member States. However, since this Agreement contained provisions more favorable than existing rules governing intra-community activity, a dispute arose. Some experts felt that the principle of Community preference made the Tokyo Round rules automatically binding on all intra-Community transactions. The Commission, believing that these coexisting rules created "the possibility of [public contracts] becoming subject to two sets of irreconcilable agreements,"⁵² chose to adopt an implementing directive. Existing Directive No. 77/62/EEC⁵³ differed from the terms of the Agreement on Government Procurement in two

49. See Regulation No. 3000/79 of Dec. 20, 1979, 20 O.J. EUR. COMM. (No. L 342) (1979).

50. The Council Regulation (EEC) No. 3017/79 of Dec. 20, 1979, 22 O.J. EUR. COMM. (No. L339/1) (1979).

51. 11 O.J. EUR. COMM. (No. L148) (1968). See proposal for a Council Regulation on the valuation of goods for customs purposes, COM (79) 604 final (Oct. 25, 1979).

52. GATT Final Report, *supra* note 38, at 104.

53. See COM (79) 621 final (Oct. 31, 1979), 22 O.J. EUR. COMM. (No. C287/9) (1979).

important respects. First, it applied to supply contracts under all public authority, rather than only those contracts concluded by central (national or federal) authorities. Second, the Directive required larger contracts than the Agreement before it became applicable. Ultimately, the Council chose to adopt Directive No. 80/767, which derogated from the existing directive (77/62/EEC), without rewording it, in order to extend the scope of the preexisting directive. This resulted in two benefits: it avoided the need to consult with the German Bundesrat, which would have been necessary to amend directive 77/6/EEC, due to a specific requirement of the German legislation, and it made further modifications of the terms of the new Directive simpler.

2. *The Problem of Direct Effect of Agreements*

*International Fruit Company*⁵⁴ ("the GATT decision") specifically addressed the question of what effect the GATT would have on internal Community law. The court held that the possibility that the GATT could be derogated by contracting parties, together with the nonlegal dispute resolution process in the Agreement, was persuasive evidence that the GATT could not have direct effect on the EEC internal legal order. Commentators have disagreed with this interpretation, insisting that the very wording of the GATT requires that it be given direct effect.⁵⁵ National courts of Member States provide little help in resolving the direct effect question, since they split on this issue. The Italian Supreme Court left unapplied an act of Parliament to the extent that it failed to conform to the GATT rules. German Courts, on the other hand, have denied the direct effect of the GATT on domestic law.⁵⁶

A second Court of Justice decision, *Nederlandse Spoorwegen*,⁵⁷ stressed the need to be able to substitute Community law for the Member State's law when enforcing international commercial obligations. Thus, an unpublished decision of a tribunal of Milan that gave effect to a provision of the GATT without reference to EEC jurisprudence was contrary to both the Treaty of Rome and the GATT system itself.

The *Bresciani*⁵⁸ decision, although it did not deal with the GATT, gives further insight into the effect of international agree-

54. Judgment of Dec. 12, 1972, *International Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 C. J. Comm. E. Rec. 1219.

55. Waelbroeck, *L'effet direct de l'accord relatif aux échanges commerciaux du 22 juillet 1972 entre la CEE et la Confédération suisse*, A.S.D.I. 113-32 (1973).

56. See Waelbroeck, *Effect of GATT within the Legal Order of the EEC*, 8 J.W.T.L. 614, 619-20 (1974).

57. *Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen*, 1975 E. Comm. Ct. J. Rep. 1439.

58. *Bresciani v. Amministrazione Italiana Della Finanze*, 1976 E. Comm. Ct. J. Rep. 129.

ments on Member States' internal legal structures. There, the Court considered the effect of Article 2, paragraph 1 of the Yaounde Convention, a provision almost identical to Article 13, paragraph 2 of the EEC Treaty. The Court held that the wording of the provision was not decisive. In addition, the absence of reciprocity in association agreements did not bar direct effect where the purpose of those agreements was to favor underdeveloped nations in an effort to encourage their development. In contrast, the original text of GATT, discussed in *International Fruit Company*, centered around reciprocity in trade agreements. Since the Tokyo Round also involved reciprocal trade agreements, the question of the direct effect of some dispositions of those agreements in the internal law of Member States is open to controversy.

In the *Polydor* case — concerning the interpretation of the Free-Trade Agreement between the EEC and Portugal — the Commission argued before the Court of Justice that “the concept of direct effect, as developed in Community law, must not, as such, be transposed to the field of the Community's international relations, for two reasons. The first is based on the different nature and aims of international agreements. The second reason is that it is necessary to maintain in the context of these free-trade agreements a balance of the advantages and disadvantages which may exist between the parties to an international treaty.”⁵⁹

The Commission noted, *inter alia*, that the balance is substantially different if private parties can enforce an international agreement within the Community but cannot do so in other contracting states. The Commission proposed that “the Court should recognize direct effect only where the provisions are drafted in an entirely clear way for all the parties or where provisions which leave room for interpretation have been clarified by the contracting parties.”⁶⁰

The Court did not decide on direct effect in its *Polydor* decision. It avoided this issue by finding a distinction between the interpretation of restrictions on trade pursuant to the Treaty of Rome and the Free-Trade Agreement. The Court held that the two Treaties did not have the same purpose. The purpose of the Free-Trade Agreement is to consolidate and to extend the economic relations existing between the Community and Portugal while the Treaty of Rome seeks to unite national markets into a single market having the characteristics of a domestic market.

59. Oral submissions by the Commission at the sitting of the Court, Judgment of Feb. 9, 1982, *Polydor, Ltd. v. Harlequin Record Shops*, 1980 E. Comm. Ct. J. Rep. 329.

60. These arguments have been elaborated by Bourgeois, *supra* note 39, at 25-26.

In an October 26, 1982 decision, not yet published, *Hauptzollamt of Mainz and C. A. Kupferberg & Cie, KG a.A.*, the Court has ruled in favor of the direct effect of Article 21, first paragraph, of the same Free-Trade Agreement (EEC-Portugal). The decision prohibits fiscal discrimination against the products imported from the other party of the Agreement.

The Court of Justice stated that the contracting parties to an agreement could limit the internal effect of its dispositions. But, in the absence of the expression of such a common will, and especially of an indication in the agreement about the way it should be implemented, it is up to each party to determine how best to achieve the ends fixed by the agreement. Accordingly, the fact that courts of one party would give direct effect to the provisions of an agreement, while courts of the other Party would not, is not, by itself, conclusive evidence of an absence of reciprocity in the implementation of the agreement.

The Court also mentioned that the existence of an institutional framework for consultations and negotiations concerning the application of the agreement does not prevent the courts from directly applying the agreement. Furthermore, the existence of specific escape clauses does not by itself affect the direct applicability of some provisions of the agreement. Thus, the Court concluded that neither the nature nor the "policy" of the agreement are obstacles to a private party trying to invoke provisions of the agreement before the Court.

This conclusion has important implications. It suggests that there is no theoretical obstacle against the direct effect of an agreement resulting from the MTN. The precision and unconditional nature of the provision, which must be examined in the framework of each agreement, will be the test that the Court will likely apply.

These cases also suggest that the method of approval of an international agreement by the Council — decision or regulation — is irrelevant to the problem of direct effect. Rather, it is the nature of a particular provision of Community law which determines its direct effect. Is the provision clear, precise, and unconditional? To what extent are any elements of it discretionary, *i.e.*, to be determined by the final wording of the rule? The simple fact that the norm needs implementation measures does not deprive it of direct effect. The existence of a margin of discretion is the determining criterion. The judge cannot rely on loose standards or best endeavors clauses which are only rules of conduct for the authorities concerned. If there is no room for discretion and if the implementation measure does not con-

form to the result pursued by the international or Community obligation, the judge may check the implementation measure with the international or Community rule. To show a parallel, a well-established jurisprudence exists now on the direct effect of EEC directives. The judge can disregard a national measure incompatible with an EEC directive which the State has not implemented if the obligation concerned is precise and unconditional.⁶¹ He can also compare the implementation measure and the result prescribed by the directive.⁶²

The GATT problem is somewhat more complex. It is possible that a citizen of a non-EEC state would contest a national measure of an EEC Member State before a Member State court. He would argue that this measure is not applicable to him in spite of its conformity to a Community regulation or directive, because the latter is not compatible with a provision of an international agreement concluded by the Community. This was clearly the problem raised before the Court in the *International Fruit Co.* case, where national measures — the refusal to import — were based on Commission regulations that were allegedly inconsistent with the GATT.

Even if this type of challenge is not possible, because the Court maintains its *International Fruit* holding as far as the GATT itself is concerned, it is not an obstacle to the recognition of direct effect of provisions of some other Agreement.

On the other hand, there is no possibility of action before a national tribunal for an enterprise which complains of a violation of an international rule, such as the Anti-Dumping Code, by producers located in other contracting parties, not members of the EEC. The Community regulation in conformity with the GATT Code provides a special procedure normally initiated by a request by or on behalf of the industry affected.⁶³ The national judge cannot interfere with this procedure and substitute his own judgment for that of the Commission on the existence of dumping or of subsidies, the existence and extent of injury, the causal link between the dumped or subsidized imports and injury, and the measures which are appropriate to prevent or remedy the injury.⁶⁴ Those issues must be decided by, and applied uniformly to, the EEC as a whole. The authority to impose anti-dumping or countervailing duties by way of regulations (article 13) is within the exclusive jurisdiction of the Community be-

61. *Pubblico Ministero v. Ratti*, 1979 E. Comm. Ct. J. Rep. 1629, Ground 23.

62. *Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen*, 1977 E. Comm. Ct. J. Rep. 113-126.

63. See Article 5 of the Anti-Dumping Code of 1979 and of Regulation No. 3017/78.

64. See Regulation No. 3017/79, Article 6.

cause it is a measure of common commercial policy under article 113. In the area of anti-dumping, the Community has not satisfied itself with the adoption of common principles; it has unified the rules and the procedure of application in such a way that the intervention of a Member State is purely automatic. For these reasons, the emergency decision of the tribunal of Milan⁶⁵ to stop the importing of some fibers originating in the United States to Italy — because American producers were benefiting from the “artificial advantages” of abnormal prices of oil and natural gas — seems objectionable.

C. Conclusion

A number of conclusions emerge from the above analysis. First, there are important differences between the EEC and American legal systems for negotiating international trade agreements.⁶⁶ The EEC, unlike the United States, requires close collaboration between the Council — the organ of conclusion — and the Commission — the organ of negotiation. There is a rough balance between the Council's right to issue directives for negotiation and the Commission's right to ask for modifications of those directives during the course of the negotiations.

In the case of the Tokyo Round, it appears that the Commission generally received the directives it requested. Typical examples were the adoption of the Swiss Formula for tariff reductions and the tactical approach for the presentation of tariff concessions. Major disputes between the two institutions occurred primarily when the Community had to solve highly sensitive political questions such as the waiver problem at the end of 1978, or the competence of the Community and the Member States to conclude the Agreements. The absence of major difficulties between the two institutions during the negotiations is due to the close collaboration of the Commission with the Committee of Article 113. This collaboration was effective both for the preparation of the Community negotiating positions and for the actual conduct of the negotiations. For example, during the aborted attempt to reach a global agreement in July 1978, simultaneous negotiations were conducted with the titular members of the 113 Committee under the chairmanship of an official of the Commission and by the Commission with the other Contracting Parties.

A second conclusion worth noting is that the technical nature of

65. *Europe*, Nos. 2885 at 6 (Apr. 9, 1980) and 2886 at 7 (Apr. 10, 1980).

66. See Jackson, *United States-EEC Trade Relations: Constitutional Problems of Economic Interdependence*, 16 COMMON MKT. L. REV. 453, 475 (1979).

the negotiations increased the role of experts. An ad hoc committee of national experts accompanied the Commission's officials to the Tokyo Round negotiations. These experts, well-acquainted with national industrial needs, looked out for industrial interests during the negotiations. This explains why it is difficult to find industrial or other interests trying to apply pressure during the actual negotiations.

The central position of the Commission during the negotiations explains why the other contracting parties preferred to address that institution rather than the Council or each Member State of the Community. It was very difficult for third states to enter into bilateral contacts in order to influence the position of the Community when the Community had only six members. With nine (ten) members — or more — it is, and will be, impossible. The mediation function of the Commission is thus increased.

If the process of negotiation appears to be rather effective, it is not democratic. In two or three Member States, national parliaments have been asked to approve some agreements resulting from the MTN. But with the development of the commercial policy of the Community, their intervention will probably not be required in the future. If the jurisprudence of the Court is respected, mixed agreements will become exceptional, required only in the case of commercial treaties. The loss of power of the national parliaments is not balanced by the attribution of like powers to the European Parliament. Consultation with the latter is not compulsory under the Treaty of Rome for trade agreements. One can expect that the European Parliament will continue to ask for a more effective role in external affairs; particularly for trade agreements which traditionally are subject to parliamentary approval by the parliaments of the Member States. It is also likely that the Parliament will increasingly consider the political implications of future trade agreements.

In principle, Article 113 is the legal basis for both the conclusion and implementation of international commercial agreements. Since the Parliament is not consulted on unilateral measures adopted by the Community to implement such agreements, it is effectively removed from the entire implementation process. This is the reason why Sir John Steward-Clark, member of the European Parliament, asked the Commission to ensure that "regular annual reports are made available to us in the Parliament on the success of the implementation of the GATT Agreements."⁶⁷

67. 1979-1980 E. PARL. DEB. (No. 249) 250 (Dec. 13, 1979).

The implementation of the Tokyo Round Agreements raises another set of questions. We have noted the EEC's practice of adopting directives or regulations to incorporate the Agreements into domestic law. The risk exists that the international origin of the rules will disappear, particularly in the cases where national law and regulations have to complete Community acts.

The implementation of the Tokyo Round Agreements by the Community raises the problem of the effectiveness of their provisions in the Community legal order. It is clear from the jurisprudence of the Court of Justice that international law has primacy over Community secondary legislation, but if the Court denies direct effect to the agreements, it will be impossible to give priority to the provision of an international agreement. The Court has decided that it is possible for one contracting party in an agreement based on "balanced and mutually advantageous arrangements" to recognize a direct effect and priority in its own legislation, if the other contracting parties do not also recognize this effect. This author concludes that as far as those agreements are part of Community law, with a position of superiority on secondary legislation, the national judge should be allowed to take those agreements into consideration and to give priority to them if there is a real conflict of norms between a provision of an agreement and a provision of Community law.

The problem of implementation of the Tokyo Round results is not merely legal. It is also a problem of political will and of practical means. Problems raised by dumped or subsidized imports in a time of economic crisis, government procurement, and access to certification are charged with political controversy. The pressures coming from political, national, or regional authorities and the industries concerned will be great. These pressures may hinder the Commission in its attempt to implement the Agreements as part of intra-community law. The Commission does not have the necessary capability to control effectively the application of all the Agreements in the Member States. However precise the international and Community rules are (and they are not always so precise), there are always possibilities for fraud and the resurgence of protectionism. Facing national administrations implementing complex national regulations, the Commission cannot fully exercise its function as a watchdog of the Community. And it is clear that its zeal will be proportional to the goodwill of the partners of the Ten.

III. IMPLEMENTING THE TOKYO ROUND IN JAPAN

Mitsuo Matsushita

Since Japan is a country poor in natural resources, her traditional trade policy has been to import raw materials from abroad, process them into manufactured or semi-manufactured products, and export these products abroad. Therefore, the international trade environment has had a tremendous impact on the welfare of the country. Indeed, it is not too much to say that the dramatic economic growth of Japan in the 1960s and 1970s was made possible by the relatively free world trade system. In this sense Japan benefited a great deal from the Kennedy Round in the late 1960s, and probably is one of the countries in the world that benefited most from the Tokyo Round Negotiations.

The Japanese government has been actively implementing the results of the Tokyo Round Agreements and, as explained later, the National Diet has enacted laws for this purpose. Some trade barriers have been removed or lessened by the implementation of the Tokyo Round Agreements. In due course, other trade barriers and restrictions in Japan will probably be substantially lessened by the implementation of various agreements resulting from the Tokyo Round.

However, with regard to barriers and measures limiting Japanese exports to other countries (especially to the industrialized countries like the United States and the Member States of the European Common Market), and foreign exports to Japan, the Tokyo Round leaves some questions unanswered. The United States Government has alleged that a number of Japanese practices are trade barriers (such as customs inspection processes, various safety standards, etc.). In addition, orderly marketing arrangements between Japan and the United States and European countries have significantly restrained exports from Japan to those countries. These aspects have not been sufficiently covered by the Tokyo Round Negotiation and the resulting agreements. This section will analyze the implementation of the Tokyo Round agreements in Japan, and will note those problems in international trade that were left unanswered by the negotiations.

A. *The Constitutional and Legal Framework of Japan*

Under the Japanese Constitution,⁶⁸ there are three basic organs

68. NIHONKOKU KENPO (The Constitution of Japan) entered into force May 3, 1947. An English translation prepared by the Ministry of Foreign Affairs is reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Binder IX (A. Blaustein and G. Flanz ed. 1973). The following are some of the references on the Japanese Constitution which are available in Eng-

of the state, namely: (1) the National Diet, (2) the Cabinet, and (3) the Judiciary. A brief explanation of each will follow.

The legislative branch of the Japanese government, the National Diet, consists of the House of Representatives and the House of Councillors. The National Diet is the highest organ in the exercise of the state power (article 41), and the members of both houses are elected by the people. A legislative proposal may be introduced in the National Diet either by the Cabinet or by an individual member of the National Diet. A proposal can be introduced in either house except for the budget which must originate in the House of Representatives. For a proposal to become a law it must be approved by both Houses. Whenever the decision of the House of Councillors is different from that of the House of the Representatives with regard to a treaty, the decision of the House of the Representatives shall be regarded as the decision of the National Diet as long as unanimity has not been obtained in a joint conference of both Houses or the House of Councillors has not acted on the treaty proposal within thirty days after it received a decision of the House of Representatives approving of the treaty.

Administrative power is vested in the Cabinet, which is composed of the Prime Minister and other ministers. The Prime Minister is appointed from among the members of the National Diet by a resolution of the National Diet (article 67), all political parties participating. The Prime Minister appoints the other Ministers, a majority of whom must be members of the National Diet. The Cabinet must resign when a resolution of no-confidence is passed in the House of Representatives, or when this House rejects a confidence resolution, unless the House of Representatives is dissolved within ten days. The Cabinet is charged to execute general administrative duties including the following: (1) to execute laws; (2) to establish and maintain diplomatic relationships; (3) to conclude treaties; (4) to prepare the budget and introduce it in the National Diet; (5) to issue Cabinet orders; and (6) to declare clemency.

The third branch of the government is the judiciary, which consists of the Supreme Court and lower courts. Courts have the power of judicial review. Article 98(1) declares that the Constitution is the supreme law of the land, and laws, orders, imperial decrees, and other regulations contrary to the provisions of the Constitution are

lish: S. Fujii, *THE CONSTITUTION OF JAPAN: A HISTORICAL SURVEY* (1965); D. Henderson, *THE CONSTITUTION OF JAPAN, ITS FIRST TWENTY YEARS, 1947-1967* (1969). See also the bibliography in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra*, which follows the text of the Japanese Constitution.

null and void. Article 98(2) of the Constitution declares that treaties to which Japan is a party, and the established international law, shall be faithfully observed.⁶⁹

Since the Japanese governmental system is parliamentary-cabinet rather than presidential, the legislative and executive powers are fused. However, the Judiciary is independent, and it can exercise judicial review of both legislative and administrative actions.

In addition to these constitutionally mandated processes, extra-parliamentary processes are vitally important in the policy-making process in Japan. Often ideas for policies are conceived in various ministries or in the Liberal Democratic Party (LDP), which is the party currently in control. When a policy is formulated within a ministry, officials in charge discuss the matter with key LDP persons and, after obtaining their informal approval, draft a legislative proposal which is sent to the Legal Bureau of the Cabinet. After amendments are made by this Bureau, the proposal is sent back to the LDP for a more formal examination by the party. After this process, it is examined at a Cabinet meeting. After Cabinet approval it is introduced in the National Diet.⁷⁰ As long as the LDP holds the majority in both Houses of the National Diet, a legislative proposal made by the Cabinet, after obtaining extra-parliamentary consent of the LDP, is almost certain to pass. If the opposition parties strongly oppose the proposed legislation, they may try to obstruct debate on the bill. However, in the area of foreign or international economic policies, there has been relatively little opposition raised by the minority parties to proposed bills, possibly because they were too complex and technical and not very interesting to the opposition. Most of the international controversies in the Diet revolve around political issues such as the Security Treaty between the United States and Japan. By the same token, there was not much opposition to the signing and implementation of the Tokyo Round Agreements.

The Cabinet can enter into an international agreement with other nations without Diet approval and this agreement will bind the Japanese Government as a matter of international law. However, until the Diet grants approval, such an agreement cannot be legally enforced in Japan if there is a conflicting domestic statute or if the agreement contains provisions which restrict the rights of citizens.

69. Article 98 of the Japanese Constitution states: "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. The treaties concluded by Japan and established laws of nations shall be faithfully observed." CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Binder IX, *supra* note 68, at 8.

70. I. MURAKAWA, SEISAKU KETTEI KATEI ("The Policy-Making Process") 125-63 (1981).

Despite the relative lack of opposition in the area of international economic policies, one cannot say that there are no conflicts in foreign policy-making in Japan. Quite often differences over foreign economic policies exist among the various agencies and ministries in charge of formulating and executing the policies. For example, the Ministry of Foreign Affairs (MFA) may have a policy of maintaining a friendly relationship with foreign nations and may wish to abolish import quotas for some agricultural products imported from overseas. However, the Ministry of Agriculture, Forestry and Fisheries (MAFF), as the advocate and promoter of Japanese agriculture, may have a different policy and may wish to restrict imports from abroad. Although, theoretically, the Cabinet is the forum in which such conflicts are to be resolved, it is sometimes unable to reconcile a violent disagreement. In these cases the LDP may moderate the conflicts or suggest a compromise solution.⁷¹

In any event, the bureaucracy plays a vital role in Japanese politics and also in economic policy. In key ministries in the Japanese government, the best human resources and information about the industries are pooled together. It is natural then that the real power struggle takes place there, in the very heart of the power structure in Japan. In this sense, something comparable to the conflict and tension between the Congress and the Executive in the United States might be seen in the relationship among the key ministries.⁷²

These ministerial conflicts and rivalries are not openly reported, however. Even though it may be common knowledge among those people who know something about the Japanese government, there are no official reports on these matters. Therefore, we must be satisfied with reports that trickle out through newspaper accounts. Examples of such Ministerial conflicts regarding trade include the following.

During the late 1970s there was an increase of imports into Japan of "adjusted butter" (an ingredient used in confectionary) from Europe. In 1975 imports of this item were about 3,000 tons, and they climbed to a high of 17,000 tons in 1980. MAFF, fearing that this would have some adverse effect on domestic farmers, planned an import restriction. However, MFA and the Ministry of International Trade and Industry (MITI) objected very strongly because these two ministries feared that such a restrictive measure would touch off a trade conflict between Japan and the European exporting countries.

71. I. MURAKAWA, *supra* note 70, at 128-29.

72. See text accompanying notes 166-73 *infra*.

Discussions were held among those ministries, and finally a compromise was reached whereby MAFF would withdraw its plan to restrict imports of adjusted butter from Europe, and the Japanese government would instead request the European producers and/or their governments to adopt some voluntary measure to restrain exports from those countries to Japan.⁷³ In this instance, there was a conflict of policies among the agencies, the MAFF basically representing the interests of domestic producers and other ministries emphasizing the importance of a trade relationship among trading partners.

In the U.S.-Japan negotiations on textiles and autos, there were also policy differences between MITI and MFA. In the 1974 textile negotiations, MITI emphasized the importance of protecting domestic producers of the products and opposed concessions on the part of the Japanese government to the United States government. MFA emphasized the importance of friendly relations and took a more flexible attitude toward such concessions.⁷⁴

In the auto negotiation,⁷⁵ MITI took the position that it should have charge of the negotiations with the United States government, since whatever agreement was reached between the two governments must be implemented domestically by way of administrative guidance or legal measure, and MITI has some control and influence over the auto industry in Japan, whereas MFA does not. MFA, on the other hand, maintained that it should be commissioned with the task of negotiating with the United States government, since such negotiation was part of diplomacy over which it had "exclusive" control and authority. The Minister of MITI, when asked his view regarding the negotiating authority in the Committee on Commerce and Industry of the House of Representatives in the National Diet, answered: "Properly MITI should be in charge of this negotiation."⁷⁶ Eventually, a compromise was reached, whereby MFA "conducted" the negotiation but MITI was extensively involved.

73. Asahi Newspaper, Mar. 4, 1981, at 9 (morning ed.).

74. Details on the textile negotiation and its result are available in *Nichibei senikyotei ni kansuru gyosei sosyo kiroku* (Record of the Administrative Litigation concerning the Textile Agreement between the United States and Japan), SENI SANGYO RENMEI (The Federation of Textile Industries in Japan) (1974). This report has been translated into English and can be found in the course materials on Japanese Law at Harvard Law School (1977-1978).

75. See, e.g., INTL. TRADE REPORTER'S U.S. IMPORT WEEKLY, (BNA) Nos. 70-77 (Mar.-May 1981) and particularly No. 76, at A-1 (May 6, 1981).

76. Nihon Keizai Shinbun, Feb. 28, 1981, at 3 (morning ed.).

B. *The Relationship Between the Constitution, Treaties and Domestic Laws*

Article 73(3) of the Japanese Constitution provides that the Cabinet is empowered to enter into a treaty with other nations. However, an attached proviso requires the Cabinet to obtain prior or, depending on the circumstances, subsequent approval by the National Diet. This approval requirement is designed to protect individual rights that treaties might restrict, by granting the National Diet some control over the treaty-making power of the Cabinet.

Not every international agreement entered into by the Cabinet requires Diet approval. Only if an international agreement entered into by the Cabinet amounts to a "treaty" under article 73(3) of the Constitution, must the Cabinet obtain approval from the National Diet.

It is generally held that an agreement entered into by the Japanese government is a "treaty" in this sense only if it contains provisions binding or prohibiting the conduct of private individuals.⁷⁷

There are international agreements for which no approval by the National Diet is necessary. Some examples are (1) an international agreement pertaining to technical details of diplomacy; (2) an international agreement providing for detailed rules for implementation of a "treaty" which has already been approved by the National Diet; and (3) an international executive agreement within the framework of the powers delegated to the Cabinet by legislation.⁷⁸

Even where theoretically required, the approval requirement is not strictly observed. Often the government argues that agreements fall into the category of international agreements that need not to be submitted to the Diet. The 1974 United States-Japan Textile Agreement is one example. There are also a number of commercial agreements between various nations and Japan providing for rights and obligations of the governments involved which *seem* to affect the rights of individuals, and yet were dealt with as "executive agreements" and not as "treaties." A few examples are (1) the Agreement between the Japanese Government and the Government of Malta Concerning Trade,⁷⁹ (2) the Agreement between the Japanese Gov-

77. I. SATO, *KENPOKAISHAKU NO SHOMONDAI* (Problems in Constitutional Interpretations) 217 (1953); Sato, *Kokkai no joyakushoninken to kokankobun* (Function of the Diet to Approve the Treaty and the Constitutional Problems of *Exchange of Notes*), 19 JOCHI HOGAKU RONSHU (Sophia Law Review) 135-60 (Mar. 1976).

78. Sato, *Kokkai no joyakushoninken to kokankobun* (Function of the Diet to Approve the Treaty and the Constitutional Problems of *Exchange of Notes*), *id.* at 148 & 154-60.

79. MOFA Notification No. 275 (1968).

ernment and the Government of the Republic of Ivory Coast Concerning Trade,⁸⁰ and (3) the Agreement between the Japanese Government and the Government of the Republic of Central Africa Concerning Trade.⁸¹

Japanese government officials often take the position that if an international economic agreement requires domestic legislation to implement it, then the Cabinet need not obtain approval from the National Diet. Rather, the implementation of the agreement will take place either through domestic legislation already enacted by the National Diet or, if such legislation is lacking, the government will introduce the necessary legislation for Diet approval. When the United States-Japan Textile Agreement was entered into between the two governments, the opposition parties asked why the government had entered into such an agreement — which would have a serious impact on the freedom of trade in Japan — without submitting it to the National Diet. The Director General of the Cabinet Legislation Bureau answered as follows:

If . . . an international agreement is enforced not as such but through a domestic law, then restrictions of the rights of individuals are governed by that domestic law. In this situation, we believe that such an agreement need not be submitted to the National Diet. When our government and a foreign government have agreed on a matter under the Constitution, it is not necessary to put such agreement under the democratic control of the National Diet as long as such agreement is not enforced directly (that is, such agreement does not impose obligations and restrictions upon the conduct of citizens in Japan) and is not in conflict with a treaty which has been approved by the National Diet. It is to be understood as an executive agreement of which no such approval is necessary.⁸²

The GATT was submitted to and approved by the National Diet. Accordingly, it is a “treaty” in the sense of Article 73(3) of the Constitution, and the Cabinet probably had broad power to enter into executive agreements in order to implement provisions of GATT. However, some Tokyo Round Codes have been submitted to the National Diet for approval. Also, some amendments to the domestic legislation were made in order to incorporate these agreements into Japanese domestic laws on tariffs and trade. The Cabinet could have chosen not to submit these agreements to the National Diet for its approval on the theory that they are implementations of GATT and

80. MOFA Notification No. 118 (1970).

81. MOFA Notification No. 259 (1970).

82. Testimony of the Director of the Cabinet Legislation Bureau in *Hearing of the Committee of Budget of the House of Councillors*, 67th Diet, the Record of the Committee Hearing No. 7, at 15 (Jan. 9, 1971).

the Cabinet has already been given the power to enter into executive agreements for its implementation. Approval was probably sought because, while the provisions of GATT were so general, much of the language of the Codes was more specific. Consequently the government felt it necessary to submit them to the National Diet to make sure that the National Diet had no objection to the contents of the various codes.

On July 27, 1979, the Japanese government signed the Geneva Protocol incorporating the results of the tariff negotiations in the Tokyo Round. As to most of the other codes, the Japanese government signed them on December 17, 1979, on the condition that the government would accept them when the National Diet had given its approval. These agreements were formally and officially accepted on April 25, 1980, after approval by the National Diet. The Tokyo Round Codes are thus "treaties" in the sense of the Japanese Constitution. In addition, some implementing domestic laws incorporating the terms agreed upon in the Codes have been enacted.

A problem arises when a treaty conflicts with a provision of the Constitution. For example, if a provision of one of the Tokyo Round Codes or implementing legislation conflicts with a constitutional provision, which is given supremacy? The answer is not clear. One theory maintains that the Constitution prevails over a treaty because of the procedure for amending the Constitution. In order to amend the Constitution, a referendum is required. However, the conclusion of a treaty only needs the approval of the National Diet. Thus, should a treaty be given priority over the Constitution, it would mean that the Constitution, which normally requires a national referendum to amend it, can instead effectively be amended by the conclusion of a treaty which conflicts with the Constitution. This would be contrary to the basic principle of the sovereignty of the people that is regarded as one of the fundamental principles of the Constitution.⁸³

On the other hand, the theory that a treaty prevails over the Constitution maintains that the Japanese Constitution is based on the principle of internationalism, under which the Constitution — which is the expression of the national will of one nation, must yield to a treaty — which is the expression of the will of the international community.⁸⁴

The former theory is more persuasive than the latter, since to

83. Professor Sato takes this position in I. SATO, *NIHONKOKU KENPO GAISETSU* (A General Explanation of the Constitution of Japan) 469 (rev. ed. 1980).

84. I. Sato, *supra* note 83, at 467-68.

hold that a treaty prevails over the Constitution would mean that the most fundamental rights provided for in the Constitution (such as the bill of rights) could be overridden if the Cabinet decided to enter into a treaty repudiating such rights. On its face, this seems absurd.

In the *Sunakawa* case,⁸⁵ the Supreme Court implied that the Constitution prevails over a treaty. The case concerned the effect of the Status of Forces Agreement between the United States and Japan which was based on the Security Treaty between those two countries.⁸⁶ The Supreme Court stated that the Security Treaty had great political importance, and was not subject to judicial review by the courts *unless some provisions of the Treaty were clearly and obviously unconstitutional*. In this particular case the Supreme Court adopted the doctrine of "political question" and thereby avoided judicial review of the constitutionality of the Security Treaty. It is, however, noteworthy that, *in dicta*, the Court recognized the possibility of judicial review of certain treaties, when some provisions of the treaties seem clearly unconstitutional.

Article 22 of the Japanese Constitution guarantees the freedom of occupation. Freedom of occupation is interpreted to include the freedom of trade or business. This freedom, however, can be restricted if such a restriction is necessary for the public welfare.⁸⁷ Since the freedom of engaging in export, import, or other types of international economic transactions is regarded as a part of the freedom of occupation, these transactions are covered by Article 22 of the Constitution.⁸⁸ Under the Tokyo Round Government Procurement Code, for example, the Japanese government is, in principle, obligated to maintain open tendering procedures in government procurement contracting. Under the domestic rules enacted to implement this code, the government agencies and some government corporations must use open tendering or selective tendering rather than an individually negotiated contract in purchasing instruments from suppliers. For example, a supplier who, under the individually negotiated contract procedure, has supplied some instruments to the

85. Judgment of Dec. 12, 1959, Supreme Court, Japan, 13 Saiko saibansho keiji hanrei shu [Sai-han Keishu] 3223.

86. In this case, a person was indicted on the charge of trespassing on a military installation of the U.S. Air Force in Japan. The indictment was made under the Criminal Special Measures Law (Keiji tokubetsu ho). The defendant's counsel alleged that this law, implemented by the Status of Forces Agreement and the Security Treaty, violated Article 9 of the Constitution which prohibits Japan from exercising military power for the purpose of solving international conflicts.

87. See cases cited in note 89 *infra*.

88. See The COCOM Decision, Judgment of July 8, 1969, District Court, Tokyo, 20 Gyo-sei saibansho hanketsu roku [Gyo-han] 842.

government corporation operating telecommunications may be defeated in bidding under the new open tendering system, because of a higher price which he offers to the government corporation. This supplier may bring an action against the government alleging that the new domestic bid system based on the Government Procurement Code denies the constitutionally protected freedom of contract which should include a freedom on the part of the government corporation to select a supplier as it sees fit. Moreover, he may argue that this contract system deprives the corporation of the right to choose suppliers and deprives him of the right to be chosen as the supplier. Or the government corporation may raise a claim alleging that it enjoys the right to select a supplier, which cannot be denied by the Government Procurement Code. What is the constitutional implication of such allegations?

A number of cases⁸⁹ address the issue of whether or not domestic legislation restricting the rights of individuals was justifiable under the Constitution if the legislation was designed to achieve some socioeconomic goal. The Supreme Court has held that a judgment as to whether or not a restriction is necessary to achieve a socioeconomic goal is best made by the legislative branch of the government and should, in principle, be left to the discretion of the National Diet.⁹⁰ Under this reasoning, if a law that restricts the rights of individuals is designed to achieve some social or economic policy (for

89. *See* *Shimizu v. Japan*, Judgment of Jan. 26, 1955, Supreme Court, Japan, 26 Sai-han Keishu 586, as translated and reproduced in J. Maki, *COURT AND CONSTITUTION IN JAPAN* (1964) (A translation of this decision is included in the course materials on Japanese Law at Harvard Law School (1977-1978)); K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, Judgment of Apr. 30, 1975, Supreme Court, Japan, 3 Saiko saibansho minji hanrei shu [Sai-han minshu] 665, as translated by M. Kirkpatrick and published in 8 *LAW IN JAPAN* 194-204 (1975). For a comment on this case in English, see Haley, *The Freedom to Choose an Occupation and the Constitutional Limits of Legislative Discretion* — K.K. Sumiyoshi v. Governor of Hiroshima Prefecture, 8 *LAW IN JAPAN* 188-94 (1975).

90. In *Marushin Sangyo K.K.*, a company was indicted for erecting a building which violated the Retail Business Adjustment Special Measures Law (Kouri shogyo chousei tokubetsu sochi ho, Law No. 155 of 1959). This law requires a building developer to file a report with the local government and obtain a license to lease or assign to small shopkeepers. The law delegates to local governments the power to condition licensing on fulfillment of certain terms. The Osaka Prefecture conditioned such licensing on a zoning regulation which required that new buildings for shops be built at least 700 meters from existing buildings housing small shops. The requirement was designed to mitigate "excessive competition" among the existing shops, thereby protecting small "Mom and Pop" stores. The defendant Marushin Sangyo K.K. erected a building within the 700 meter limit and leased it to storekeepers without obtaining a license. Faced with a criminal indictment, the company argued that the Retail Business Law and zoning regulation thereunder violated Article 22 of the Constitution. The Supreme Court held the law constitutional on the ground that the judiciary must not question the wisdom of the National Diet on issues involving protective legislation. Arguably the case supports the principle that courts should adopt "judicial passivism" and refrain from exercising judicial review over the wisdom of legislation when it involves socioeconomic or industrial policies.

example, the protection of small enterprises), the Court will not judge the wisdom of such restriction. Under this rule, any legislation designed to achieve an economic policy (including international economic policy) will be justified as furthering the public interest goal. Incidental restrictions on the freedom of trade will not invalidate the law, unless they are flagrantly unreasonable. Domestic regulations to implement the Government Procurement Code are likely to be regarded as regulations enacted for the purpose of embodying an international economic policy. Thus, it is almost certain that any regulation implementing the Tokyo Round Code on Government Procurement will be held constitutional. More generally, since most of the Tokyo Round Codes and implementing domestic laws are designed to achieve some economic policy goals, it is unlikely that they will be subject to any legitimate constitutional challenge.

A second question arises when a Tokyo Round Code conflicts with a preexisting domestic law. Although there are no cases directly on point, commentators⁹¹ agree that a treaty should be given higher priority than a domestic law or regulation regardless of when the treaty was approved by the National Diet. Accordingly, if there is a conflict between a domestic law or regulation and a provision in the Tokyo Round Codes or implementing laws, the latter will prevail over the former.

Articles maintaining that a treaty overrides a conflicting domestic law are based on Article 98(2) of the Constitution which declares that a treaty and the established international law shall be faithfully observed. To admit that a law can exist which conflicts with a treaty would be contrary to the command of this constitutional provision.⁹² Also, the effectiveness of Article 98(2) of the Constitution is guaranteed only by maintaining the supremacy of a treaty over a conflicting domestic law and that this constitutional provision restrains the National Diet from enacting a law which would deny the effect of a treaty the National Diet has already approved.⁹³ It seems likely that courts will accept this analysis if this issue ever arises.

Governmental inaction can also be a violation of the Tokyo Round Codes. For example, if the government has not taken a measure that it should have taken under one of the Codes, this inaction can be regarded as a violation. Legal remedies for such inaction are discussed below.

91. I. SATO, *supra* note 83, at 467; Y. TAKANO, KOKUSAIHO GAIRON (A General Theory of International Law) 84 (1969).

92. I. SATO, *supra* note 83, at 467. See also note 2 *supra*.

93. Y. TAKANO, KENPO TO JOYAKU (The Constitution and Treaties) 209 (1960).

Only treaties approved by the National Diet are covered by Article 98(2) of the Constitution and given supremacy over domestic law. International agreements entered into by the Japanese government and a foreign government without approval by the National Diet, will not be granted supremacy. This necessarily follows from the fact that only approval of a treaty can guarantee that the Cabinet has not usurped the National Diet's legislative power.

Of course, in practice, a court will always try to reconcile international agreements with domestic legislation, and will not lightly find a conflict.

C. *Laws in Japan Regulating International Trade*

There are various public laws in Japan which regulate and control international transactions. In addition, there are many administrative regulations that implement these basic laws. One salient feature of these laws and their enforcement is that the enforcement agencies (*i.e.*, the various ministries) are given wide powers to enact rules and regulations. Unless one is familiar with these administrative regulations, it is difficult to understand the realities of enforcement. Moreover, there are some laws that regulate domestic affairs (such as various safety standard laws for appliances, foods, cars, and so forth) and yet have a great impact on international trade. Also there may be *de facto* barriers to trade, such as the distribution system, business customs and practices, language and so on. Since it is impossible to describe all of these laws, regulations and customs, we must be satisfied with a description of the most basic laws on trade.

The basic public laws in Japan regulating international trade are (1) the Foreign Exchange and Foreign Trade Control Law⁹⁴ (hereinafter referred to as the Control Law), (2) the Export and Import Transactions Law⁹⁵ (hereinafter referred to as the Transactions Law), (3) the Customs Tariff Law,⁹⁶ and (4) the Tariff Law.⁹⁷ In addition to these, there are a number of laws which affect foreign trade, including the Anti-Monopoly Law,⁹⁸ the Export Insurance Law,⁹⁹

94. Gaikokukawase oyobi gaikokuboeki kanri ho (Foreign Exchange and Foreign Trade Control Law), Law No. 228 of 1949 (as amended).

95. Yushutsunyu torihiki ho (Export and Import Transactions Law), Law No. 299 of 1952 (as amended).

96. Kanzei teiritsu ho (Customs Tariff Law), Law No. 54 of 1910 (as amended).

97. Kanzei ho (Tariff Law), Law No. 61 of 1954 (as amended).

98. Shiteki dokusen no kinshi oyobi koseitorihiki no kakuho nikansuru horitsu (Anti-Monopoly Law), Law No. 54 of 1947 (as amended).

99. Yushutsu hoken ho (Export Insurance Law), Law No. 67 of 1950 (as amended).

the Export Inspection Law¹⁰⁰ and various other laws providing for inspection and approval of products (such as the Food Sanitation Law, the Pharmaceutical Affairs Law, the Industrial Standardization Law, etc.¹⁰¹). This section describes export and import controls exercised under these laws.

1. *Export Control*

The basic laws controlling exports from Japan are the Control Law and the Transactions Law. The former authorizes MITI to enforce an export approval system on some designated commodities, and the latter permits private exporters to enter into export agreements between themselves under some government supervision.

Article 47 of the Control Law provides that "[E]xport of goods from Japan shall be permitted with the minimum restrictions thereon consistent with the purpose of this Law." As is clear from this language, the basic principle is to keep export restrictions to a minimum. It is also clear that export controls must be "consistent with the purpose of this Law." The purpose of the law, as set forth in article 1, is to encourage the healthy development of the national economy and to protect the balance of payments equilibrium. Any restriction of exports beyond these stated purposes would be held outside the scope of this law and therefore "ultra vires."

Under Article 48 of the Control Law, MITI is authorized to enforce an export approval system through a cabinet order. In 1949 the Cabinet issued "the Export Trade Control Order"¹⁰² (hereinafter, the Export Order) authorizing MITI to put into effect an export approval system. This export control has been utilized for a variety of purposes including, among others, to prevent rare materials (such as tungsten) from being drained from the domestic market, to observe international commitments (such as the embargo enforced *vis-à-vis* Rhodesia, COCOM countries, Iran, etc.), to maintain public order (*i.e.*, to prohibit exporting of narcotics, weapons, obscene literature, etc.), and, above all, to carry out orderly marketing agreements.

The constitutionality of export controls under the Export Order has been challenged at least twice. In the COCOM case,¹⁰³ the

100. Yushutsu kensa ho (Export Inspection Law), Law No. 97 of 1957 (as amended).

101. On those laws, see *Japan's Import System*, JETRO EXPORTERS' GUIDE 16 (1979).

102. Yushutsu boeki kanri rei (Export Trade Control Cabinet Order), No. 378 of 1949 (as amended).

103. The COCOM Decision, Judgment of July 8, 1969, District Court, Tokyo, 20 Gyo-han 842.

plaintiffs had planned to exhibit some products in a trade show in Mainland China but their request for export approval had been denied by MITI because those products were contraband under the COCOM agreement. The plaintiffs maintained that whereas MITI could only exercise export controls if the purpose of the control was "within the limit of necessity for the maintenance of the balance of international payments and the sound development of international trade or national economy," the export control in question was exercised for international political or strategic goals and thus fell outside the scope of the Order.

The Tokyo District Court agreed that the controls exerted by MITI were for the purpose of international politics or strategy and thus outside the scope of the Control Law. In particular the Court held that the exercise of controls infringed upon the constitutional guarantee of the freedom of occupation and was unconstitutional. But the plaintiffs were denied pecuniary indemnity since there was no malicious intent or negligence by the government officials who made this decision.

The *Textile* case also challenged MITI's export control.¹⁰⁴ This time the issue was an export control to enforce the 1974 United States-Japan Textile Agreement in which the Japanese Government had agreed to restrain export of textile products from Japan to the United States. The Federation of Textile Industries of Japan, which represented the Japanese textile producers, brought a suit against the government alleging that the contemplated control would be unconstitutional in that (1) it would be contrary to the principle of freedom of occupation embodied in Article 22 of the Constitution; and (2) it would be contrary to provisions of GATT which in principle prohibit restrictions on exports. This suit was withdrawn after the Multifibre Agreement was completed in 1974 within the framework of GATT, and the Federation was satisfied with the treatment of Japanese textile exports under that Agreement.

MITI often uses administrative guidance¹⁰⁵ as a means of control in conjunction with the Export Order. Through informal request,

104. Details on this case can be found in *Nichibei senikyotei ni kansuru gyosei sosyo kiroku* (Record of the Administrative Litigation concerning the Textile Agreement between the United States and Japan) (1974), *supra* note 74.

105. For articles written in English on administrative guidance from a legal standpoint, see Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (1968); Sanekata, *Administrative Guidance and the Antimonopoly Law*, 10 LAW IN JAPAN 65 (1977); Smith, *Prices and Petroleum in Japan: 1973-1974 — A Study of Administrative Guidance*, 10 LAW IN JAPAN 81 (1977); Davis, *Administrative Guidance in Japan*, 41 SOPHIA U. SOCIO-ECON. INST. BULL. (1972); Matsushita, *Administrative Guidance and Economic Regulation in Japan*, 1 JAPAN BUS. L.J. 209 (Dec. 1980).

MITI may ask exporters to increase the price, or reduce the quantity, of exports to a certain country. If this guidance is ignored, MITI will usually invoke an order. A prominent example of this was the 1981 auto export restraint.¹⁰⁶ Faced with the possibility that the United States Congress would pass a law establishing limits on the imports of autos from foreign countries, MITI decided to implement voluntary export restraints on Japanese autos. Accordingly, MITI "directed" that each auto exporter keep the number of autos exported to the United States within a specified maximum indicated by MITI. If this maximum number was likely to be exceeded, MITI would invoke the compulsory export approval system under the Export Order. As this example shows, administrative guidance is often a preliminary stage for initiation of export controls.

The second basic law controlling Japanese exports is the Transactions Law. The function of the Transactions Law is to authorize private exporters to enter into an export agreement which will be exempted from the Japanese Anti-Monopoly Law.¹⁰⁷ If such an export agreement only contains terms of export trade (*i.e.*, export price, quantity, etc.), then it need only be filed with MITI. Conversely, if the agreement contains some business terms restricting domestic trade (*i.e.*, purchase terms of merchandise to be exported¹⁰⁸), MITI's approval must be obtained.

Formally the Transactions Law only provides for private export agreements and does not involve government export control except for orders issued under article 28. In practice, however, the Government is normally involved. Usually MITI advises exporters to enter into export agreements whenever it foresees some possible trade conflict with an importing country. In this way, an export agreement entered into under MITI's advice is used to carry out governmental trade policy. MITI sometimes advises exporters to enter into an export agreement fixing a price or setting a quantity to a specified country with a threat that if such advice is ignored MITI will promptly invoke compulsory export control as provided for in the Export Order.¹⁰⁹

106. See, *e.g.*, INTL. TRADE REPORTER'S U.S. IMPORT WEEKLY, *supra* note 75.

107. Article 33 (1).

108. Articles 5-2 (1) & 11 (4).

109. In connection with *In re Japanese Elec. Prod. Antitrust Litigation*, 513 F. Supp. 1100 (E.D. Pa. 1981), MITI, in a statement issued to an American court, claimed that it "directed" Japanese exporters of television sets to the United States to form an export cartel and fixed export prices. MITI also claimed that if the exporters had failed to comply with this directive, it would have invoked a compulsory export approval mechanism at once. For details see Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INTL. L.J. 103 (1979).

Also, under Article 28 of the Transactions Law, MITI is authorized to issue an order binding export prices, quantity or other terms of business, when a private export agreement is entered and proves inadequate. This provision is invoked when an exporter's agreement is not effective due to activities of outsiders or when the terms of business set up by the agreement (export price or export quantity, etc.) are not satisfactory. If this order is issued by MITI, it is binding on every exporter, including the participants in the agreement.

In the *Zenith* case,¹¹⁰ some Japanese TV manufacturer-exporters were challenged by two American TV manufacturers for alleged dumping and cartel activities. In connection with this case, MITI issued a statement, which was submitted to the American court where the case was pending. MITI alleged that it had advised these enterprises to enter into the export agreement as to TV sets to be exported to the United States, and, had this advice not been honored, MITI would have invoked an order under the Export Order. Such an order would have yielded a result identical to the private export agreement entered into under MITI's device.

Export agreements under the Transactions Law have perhaps been the most important policy tool for MITI to effectuate "orderly marketing agreements" with foreign countries, notably the United States. In 1968, there was an informal discussion between the officials of the U.S. government and Japanese steel industry representatives regarding the voluntary export restraint to be exercised by Japan. This informal restriction was put into effect by means of an export agreement entered into among the Japanese exporters of steel to the United States.¹¹¹ In 1974, the U.S. International Trade Commission decided that the domestic specialty steel industry had been injured due to imports from foreign countries, and the U.S. Government took measures to restrict the quantity of imports of specialty steel into the United States.¹¹² The Japanese Government advised the exporters to enter into a voluntary restraint agreement to supplement the United States import control. Also in 1977, the U.S. International Trade Commission issued a determination that the U.S. television industry had been injured by imports of television sets

110. *In re Japanese Elec. Prod. Antitrust Litigation*, 513 F. Supp. 1100 (E.D. Pa. 1981).

111. This arrangement, however, was challenged in the United States by a U.S. consumer group. See *Consumers Union of the United States v. Kissinger*, 506 F.2d 136 (1974), *cert. denied*, 421 U.S. 1004 (1975).

112. *United States Intl. Trade Commission, Stainless Steel and Alloy Tool Steel, Report to the President on Investigation TA-201-5 Under Section 201 of the Trade Act of 1974*, UNITED STATES INTL. TRADE COMMISSION PUBLICATION 756 (Jan. 1976).

from abroad.¹¹³ President Carter, instead of accepting the tariff increase recommended by the Commission, chose to negotiate with the Japanese government to obtain a voluntary restraint of exports.¹¹⁴ MITI advised exporters of television sets to enter into an agreement fixing the maximum number of sets to be exported to the United States. The agreement between the U.S. government and the Japanese government stated that the Japanese government would utilize the Transactions Law and the private agreement entered into thereunder to effectuate this governmental agreement.

Even though export cartel agreements are formally private in nature, there is usually a strong government hand involved in such agreements, and realistically we can say that the Transactions Law is one of the important policy tools available to MITI in enforcing export controls.

2. *Import Control*

There are several major laws designed to control imports: the Control Law, the Transactions Law and the Customs Tariff Law. Moreover, the Tariff Law provides for procedures concerning imports and the collection of duties. In addition, there are also a number of other laws which prohibit or restrict importation of specific products into Japan.

Article 52 of the Control Law provides for an import approval system. This article states: "In order to ensure healthy development of foreign trade and national economy, any person desiring to effect import may be required to obtain approval therefor as provided for by Cabinet Order." It should be noted that, unlike article 47 and article 48(2) which concern export control, there is no language in this article which requires that import controls be kept within the limits of that necessary minimum in light of "the maintenance of the balance of international payments and the sound development of international trade or national economy." Although the language in article 52 authorizing import controls "in order to ensure healthy development of foreign trade and national economy" may suggest that an import control exercised for a purpose other than that of ensuring healthy development of foreign trade and national economy is "ultra

113. *United States Intl. Trade Commission, Television Receivers, Color and Monochrome, Assembled or Not Assembled, Finished or Not Finished, and Subassemblies Thereof, Report to the President on Investigation TA-201-19 under Section 201(b) of the Trade Act of 1974*, UNITED STATES INTL. TRADE COMMISSION PUBLICATION 808 (March 1977).

114. President's Memorandum for the Special Representative for Trade Negotiations, 13 WEEKLY COMP. PRES. DOC. 761 (May 20, 1977).

vires," the outer limit of the power of the government to control imports is not as clearly defined as in the case of export control. This provision may be interpreted to mean that the freedom of import is not emphasized as much as the freedom of export.

It should also be noted that there is no explicit requirement of a finding of "injury" to a domestic industry before an import control under the Import Order can be initiated. In view of the fact that Article XIX of GATT requires a finding of injury to the domestic industry before invoking import control, and also in view of the fact that Japan is a signatory of GATT, the Japanese Government should probably find an injury to a domestic industry before it enforces an import restriction on a particular item.

Under Article 52 of the Control Law, MITI is authorized to establish an import quota (I.Q.) system. If an I.Q. system is established with regard to a specific item, a person desiring to import this item must obtain MITI's approval before he can apply for an import license for such a product. In the 1950s and 1960s this I.Q. system was widely used to restrict imports of many kinds of items. However, since the late 1960s, the number of items under the I.Q. system has dropped sharply due to the trend toward liberalization.¹¹⁵ There are some residual items which are still controlled: (1) meat and dairy products, (2) marine products, (3) miscellaneous beans and oil-stuff seeds, (4) fruits, vegetables and preparations thereof, (5) cereals, (6) coal, and (7) hides and leather products.¹¹⁶ Import control under the Control Law is exercised for various purposes, among which the most important is the protection of domestic industries.

In addition to the Control Law, there are a number of laws regulating or prohibiting the importation of certain items, as specified in each statute. In 1982 the number was twenty-seven.¹¹⁷ Some of these laws contain a provision which restricts or prohibits the importation of the item covered by the law. Other laws only set up standards of quality of a product to be observed by the seller of such an item, whether domestically manufactured or imported. Yet other laws require the sellers of such items to obtain a license from public authorities. However, they all affect imports in one way or another.

The Transactions Law permits importers of a commodity to enter into an import agreement fixing a purchase price, limiting the maximum quantity to be purchased, setting a minimum standard for

115. See NIPPON NO HIKANZEI SHOKEKI (Nontariff Barriers in Japan) 130 (K. Komiya ed. 1972).

116. *Japan's Import System*, *supra* note 101, at 2.

117. *Id.* at 16.

quality, or restricting channels of import. Unlike an export agreement, an import agreement can be entered into among importers of a commodity only if one of the following requirements is satisfied: (1) there must be a substantial restraint of competition or a monopoly in the country or place of export to Japan of the commodity in question; (2) an import agreement is necessary to carry out an agreement between the Japanese Government and the government of the exporting country; or (3) a pooling of the demand for a raw material through an import agreement is necessary to insure that there is a sufficient demand in Japan for the raw material to be exploited in a foreign country, thereby facilitating the exploitation and development of this raw material in the foreign country.¹¹⁸

When importers wish to enter into an import agreement they must file the agreement with MITI and obtain its approval.¹¹⁹ As in the case of an export agreement, MITI often advises importers to enter into an import agreement. Thus, an import agreement under the Transactions Law is also a policy instrument used by MITI to regulate foreign trade. Import agreements of this type are deemed exempt from Japanese anti-monopoly laws. If necessary, MITI may adopt a binding import order under the Transactions Law.¹²⁰

Import agreements are used less often than export agreements under the Transactions Law. However, import agreements under the administrative guidance of the government will probably become increasingly important in the future, as many Japanese industries lose their comparative production advantages *vis-à-vis* some developing countries.

Two important examples of import agreements should be mentioned. The first is the Scrap-Iron case. In 1974, under the Export Administration Act, the United States embargoed the export of scrap-iron as a result of a domestic shortage. MITI initiated a corresponding import control under the Control Law. When the United States lifted the embargo, MITI dropped its import control and advised the importers of scrap-iron to establish an import agreement to control purchases of scrap-iron and avoid touching off new export controls on the American side.¹²¹

The second case is that of Chinese silk fiber. Due to a loss of comparative advantage, the Japanese producers of raw silk had lost

118. Yushutsunyu torihiki ho (Export and Import Transactions Law), Law No. 299 of 1952 (as amended), Article 7-2 (1).

119. *Id.* at article 7-2 (1).

120. *Id.* at article 30 (1).

121. Nihon Keizai Shinbun, Jan. 8, 1975, at 4 (morning ed.).

their market share to Korean and Chinese producers. To cope with this situation an amendment to the Silk Price Stabilization Law was adopted whereby a government corporation was given the exclusive right to import raw silk from abroad. However, foreign producers could easily avoid this import regulation by processing the silk slightly and thereby converting it to semi-processed fibre, (which was very easy to convert back to raw silk.)¹²² MITI, concerned that Japanese producers would be damaged by imports of this product, advised importers of semi-processed silk to enter into an import agreement to establish a price ceiling. At the same time, a binding order was invoked to ensure that every importer complied with this maximum price.¹²³

The Japanese Government entered into an orderly marketing agreement with the Korean Government to implement a voluntary restraint on the export of semi-processed fibre to Japan.¹²⁴ However, since the Chinese Government refused to restrain exports of the products to Japan, MITI utilized the Transactions Law to effectuate an import agreement to control Chinese imports.

The import control exercised under the Silk Price Stabilization Law has been challenged by necktie producers in Japan. As noted above, the Silk Price Stabilization Law gives a government entity the exclusive right to import raw silk from abroad. The government corporation sells imported raw silk in the domestic market at the price prevailing in the domestic market, which is higher than the international price. Accordingly, Japanese producers of neckties were forced to purchase raw silk at prices higher than the prices paid by foreign tie producers. European producers were able to purchase raw silk at a lower price, produce ties, and export them to Japan. Due to these imports of European ties, the Japanese tie producers lost some of their market. They brought a law suit against the Japanese Government alleging that the Silk Price Stabilization Law was designed to protect only the domestic producers of raw silk and was thus unduly discriminatory against tie producers and consumers. In addition, they argued that the import controls under the Law violated provisions of the Constitution.¹²⁵ At the time of this writing

122. See Ikeda, *Kiito-kinuseihin no yunyu chosai* (Import Adjustment of Raw Silk and Silk Products), 623 JURISUTO 85 (1976).

123. *Tsusho Hakusho* (White Paper on Foreign Trade), *Kakuron* (Itemized Discussion), MINISTRY OF INTL. TRADE AND INDUS. (1981) 209-10 (1981).

124. Ikeda, *supra* note 122, at 91.

125. In January 1979 eleven private individuals and companies engaged in the tie business filed suit against the Government. In their complaint, the plaintiffs alleged that the amendment of the Silk Price Stabilization Law (which gives the government corporation exclusive right to

(February 1983), the suit is still pending in the Kyoto District Court.

Another important statute regulating import trade is the Customs Tariff Law. This law provides for customs valuation, anti-dumping and countervailing duties, and tariff quotas. Some of the most important provisions of this law are highlighted below.

Article 4 of the law provides for customs valuation. According to this provision, the government shall use the "transaction value" as the basis for the tariff. "Transaction value" is defined to be the amount actually paid by the importer to the exporter at the time when the import transaction took place.

Article 7 of the law provides for a retaliatory tariff. The government is given the right to impose a special surcharge on a product imported from a country that unfavorably discriminates against Japanese ships, airlines, or commodities. Articles 8 and 9 are, respectively, the provisions for countervailing duty and anti-dumping duty. These provisions and the amendments which were made to them as a result of the Tokyo Round Negotiation will be explained in detail below.

Under article 9-2 an "emergency tariff" is authorized. When, due to a sharp decline in the price or other unforeseeable changes in the exporting country, there is a sudden increase of imports to Japan, causing material injury to a domestic industry that competes with the imported commodity, or when a threat thereof exists, the government may levy a special tariff in addition to the regular tariff. In addition, article 9-3 provides for tariff quotas, which permit the government to control the quantity of imports of a product to which a certain level of tariff is applied. When the quantity of import of this product exceeds this maximum level, a higher tariff is levied on the product imported in excess of that maximum.

Except for tariff quotas, these special tariffs are rarely used. The major reasons for the nonuse of these tariffs is because until the late 1960s the Japanese market was guarded by an import quota system. Accordingly, there was little need for protective tariffs. Moreover, since liberalization took place, Japanese commodities (especially industrial products) have been quite competitive internationally. However, these protective tariffs may be used in the future as Japanese industries lose international competitiveness due to high labor, overhead, and energy costs.

import raw silk) violated Article 22 of the Constitution's guarantee of freedom of trade and Article 25 of the Constitution's guarantee of right to livelihood.

D. *Implementing the Tokyo Round Agreements in Japan*

The ministries were assigned the task of actually negotiating the Tokyo Round Agreements for Japan. Representatives from a number of ministries composed the Japanese delegation to the negotiations, and inter-ministerial conferences were used to settle internal disputes. The ministries also met with representatives of Japanese industries to aid in formulating Japan's negotiating posture.¹²⁶

Generally speaking, the Tokyo Round Codes which required some changes of domestic laws or regulations for implementation were submitted to the National Diet for approval. One exception was the code on import licensing, which did not require a change in domestic law for implementation, but was submitted for approval because it dealt with a fundamental principle of the GATT. Ultimately, the codes on tariff reduction, subsidies and countervailing duties, anti-dumping, import licensing, customs valuation, technical barriers to trade, government procurement, and civil aviation were introduced in the National Diet for approval, and they were all approved and promulgated on April 25, 1980.¹²⁷ The agreements on dairy products and bovine meat were not introduced in the National Diet for approval, but were signed as executive agreements.

1. *Tariff Reduction*

The Japanese government actively proposed tariff reductions during the Tokyo Round. On March 4, 1978, it made an advance reduction of tariffs on 125 items to facilitate the negotiations. Japan signed the Geneva Protocol on July 27, 1979, as soon as the Cabinet had decided to accept it. In total, the Japanese government made tariff concessions with regard to 2,600 industrial products and 200 agricultural products.¹²⁸ The imbalance between industrial and agricultural items is probably due to Japan's emphasis on industrial products in international trade.

The Tokyo Round tariff reductions did not require changes in

126. There are a number of books written in Japanese on the Tokyo Round Negotiations, among which the following are the most comprehensive: HACHIJUNENDAI NO BOEKI RURU (The Trade Rules for the 1980s) (N. Shinbunsha ed. 1980); TOKYO ROUND NO ZENBO (The Total Picture of the Tokyo Round) (Kenkyukai ed. 1980).

127. *Agreement on Anti-Dumping*, KAMPO GOGAI (Official Gazette — Special Issue) 5-10, May 23, 1980; *Agreement on Countervailing Duty*, *id.* at 18-25; *Agreement on Customs Valuation*, *id.* at 41-50; *Agreement on Technical Barriers to Trade*, *id.* at 71-77; *Agreement on Import Licensing*, *id.* at 89-91; *Agreement on Civil Aviation*, *id.* at 95-100; *Agreement on Government Procurement*, *id.* at 110-29.

128. For details on tariff concessions, see *Tokyo Round kosyo no jishitsuteki daketsu nitsuite* (The Substantive Conclusion of the Tokyo Round Negotiation), 705 JURISUTO 39, 40-42 (1979).

Japanese internal law. Article 3 of the Tariff Law¹²⁹ provides that (1) tariffs shall be imposed as provided for in the Tariff Law or in the Customs Tariff Law; and (2) if there is a special provision for a tariff in a treaty to which the Japanese government is a party, a tariff shall be imposed in accordance with the provision of such treaty. The Cabinet submitted the Geneva Protocol to the National Diet for approval. When this approval was granted, the Geneva Protocol became a treaty and article 3 enacted its tariff provisions automatically.

Due to advance reduction of tariffs on many items, the effective Japanese tariff rate on a number of items was lower than the rate agreed upon in the Tokyo Round. If the Japanese government were to carry out reductions according to the Tokyo Round provisions, initial rates would have been higher than the current effective rate, and there would have been no tariff reductions as required by the Geneva Protocol. This situation did not seem desirable since the Japanese government had actively proposed tariff reductions. Accordingly, it was decided to reduce tariffs from the effective rate of the Protocol. The Tariff Special Measures Law was amended to effectuate this policy.¹³⁰

2. Customs Valuation

Japan is a member of the Brussels Convention on Customs Valuation and has enforced her valuation system in accordance with the principles set forth in that Convention. There was, however, some difference between the language used in Article 4 of the Customs Tariff Law, which provided for customs valuation, and the language contained in the Customs Valuation Code. Article 4 was amended to conform its language to the language in the Code. This amendment became effective January 1, 1981.¹³¹

Originally, article 4 had valued customs based on the price of an imported product at the port of importation, if this price was the result of perfect competition. Based on this general principle, detailed methods for calculating customs value were provided. Under the amended article 4, customs valuation is based on the "transaction value" of an imported commodity, which means the price actually paid or payable by the purchaser to the seller for the imported

129. Kanzei ho (Tariff Law), Law No. 61 of 1954 (as amended). See note 6 *supra*.

130. See Amano, *Tokyo Round kosho no daketsu nitomonau wagakuni kanzeikankeihorei no seibi nitsuite*, (On Adjustment and Administration of Laws relating to Tariff following the Conclusion of the Tokyo Round Negotiation) 721 JURISUTO 84 (1980).

131. Kanzei teiritsu ho no kaisei nikansuru horitsu (Law to Amend the Customs Tariff Law), Law No. 5 of 1981.

goods, plus the cost of transport and some other costs to the extent that they are not included in the price actually paid for the goods. If the "transaction value" cannot be determined, then customs valuation is based on the transaction value of such or similar commodity which was exported on the day on which the imported commodity was exported or some other day close in time. If neither of these values can be determined, customs valuation is based on a price arrived at by calculating backward from the domestic sales price or a price arrived at by adding manufacturing costs and other costs. If this method is also ineffective, then customs valuation will be based on a price as determined by procedures provided for in a Cabinet decree. It seems that under the new valuation system the value of an imported commodity is not necessarily lower than the value under the old valuation system, since the new system is based on the price actually paid by an importer of an imported commodity, whereas the old system was based on a hypothetical price which would have prevailed under perfect competition. If the actual price is not lower than the perfectly competitive price, the new system results in a higher tariff value than the old system.

The new system has the advantage of stability in evaluating the value of commodities, and thus encourages imports. Under the old system, government valuation officials had more discretion to choose the value on which the tariff would be based, since the perfectly competitive price was easily manipulable. Under the new system, the actual price paid by an importer is the basis for tariff valuation, leaving less discretion to government officials.

There had been some complaints about the older customs valuation practices in Japan. The Trade Study Group Report¹³² states that there had been a feeling among foreign exporters that "customs uplifts" had taken place which had caused uncertainty about customs and commodity tax obligations. A U.S. congressional report also mentioned arbitrariness in evaluating the value of the imported commodity.¹³³ The new valuation system should contribute toward a more "transparent" valuation process.

3. *Countervailing and Anti-Dumping Duties*

To date, the Japanese government has never issued either a coun-

132. *A Special Progress Report*, U.S.-JAPAN TRADE STUDY GROUP 17 (April 1980) [hereinafter cited as *Special Progress Report*].

133. *United States-Japan Economic Relations: Hearings Before the Subcomm. on Asian and Pacific Affairs, and International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 156 (1980).

tervailing duty or an anti-dumping duty order. There are a number of reasons for this. First, until 1960, the Japanese economy was shielded from foreign imports by the quota system and other import controls. Accordingly, countervailing or anti-dumping duty orders were unnecessary. Second, by the time of liberalization of imports most Japanese industries were already sufficiently competitive that protection by those special tariffs was not necessary. Third, alternative regulatory means for import control — the Control Law, and the Transactions Law, for example — made countervailing and anti-dumping duties unnecessary. As some sectors of the Japanese economy lose international competitiveness, however, it becomes increasingly likely that some industries (especially the petro-chemical industry) may petition the government to initiate proceedings under the countervailing or anti-dumping duty laws.

The countervailing and anti-dumping duty laws are relatively easy for private industries to utilize. Unlike the Control Law, the Cabinet decrees on countervailing and anti-dumping duties explicitly provide for petition by private parties.¹³⁴ In this sense, private enterprises or labor unions which feel that their interests are adversely affected by imports may petition the government for relief even though these laws do not grant private parties the right to require that the government start a formal proceeding.

On the whole, it may be said that the attitude of the Japanese government in the Tokyo Round Negotiation with regard to countervailing and anti-dumping duty matters was passive. Since the late 1960s, there have been many instances in which Japanese products were challenged in foreign countries as being dumped or subsidized. Those claims were most frequent in the United States, but there were similar claims in Europe, Canada, and Australia. Major areas of concern were steel, electronics, and more recently, automobiles. Accordingly, the Japanese government intended to use the Tokyo Round Negotiations to propose codes which would narrowly limit the powers of national governments to enforce anti-dumping and countervailing duty statutes. The Japanese government was generally handicapped by a lack of experience in enforcing anti-dumping or countervailing duty statutes.

Article 8 of the Customs Tariff Law provides for the imposition of countervailing duties. To implement the Countervailing Duty Code, article 8 and the Cabinet Order Concerning Countervailing Duty were amended. As amended, article 8 provides that when the

134. See section III.D.4 *infra*.

importation of a commodity which has been directly or indirectly subsidized by a foreign government has caused, or is threatening to cause, a material injury to an industry in Japan producing a similar commodity, the Japanese Government may, pursuant to cabinet decree, impose a countervailing duty up to the amount of the net subsidy. The only change required by the Tokyo Round was to include the term "material injury" to the Customs Tariff Law.

Before the Tokyo Round, there was no specific provision in Japanese law providing for petition by an interested party. Accordingly, an amendment was necessary to implement the Countervailing Duty Code. Under Article 2(1) of the Cabinet Order, a person requesting the initiation of a countervailing duty investigation shall file with the Minister of Finance a petition in writing together with sufficient evidence. The Minister then transmits a copy of this to the Minister of MITI. The government may then initiate an investigation.

Under both Article 8(6) of the Customs Tariff Law and the Code, the investigation period is (in principle) limited to one year. This is due to the consideration that prolonged investigation may cause unreasonable uncertainty in the terms of trade. Under article 8(7) the government in the exporting country or the exporter can propose an undertaking, and the Japanese government can accept such an undertaking and terminate the investigation. Under article 8(9) the Japanese government may effectuate a provisional measure before an investigation has come to a conclusion, whenever (1) a subsidized commodity has been imported; and (2) it is possible to draw the inference that an industry in Japan has been materially injured thereby; and (3) a provisional measure is necessary to protect the industry in Japan.

Whenever MOF, the Ministry in charge of the industry in question, or MITI begin an investigation, all three of these Ministries must be notified. These Ministries also make important policy choices during the investigation. When an investigation reveals that a final measure or a provisional measure is necessary, the Minister of MOF, after consulting the Tariff Council, may impose a countervailing duty.

4. *Anti-Dumping Duties*

Japan has ratified as "treaties" both the GATT and the International Anti-Dumping Code of 1967. To implement the 1967 Code and Article 9 of the Customs Tariff Law, a Cabinet Order Concerning Dumping was issued. Article 9 was amended, and a new Cabinet Order issued, to implement the Tokyo Round results.

As amended, article 9 provides that when the importation of a dumped product causes or threatens to cause material injury to an industry in Japan or materially retard the establishment of an industry in Japan, an anti-dumping duty may be imposed to protect that industry. Such an anti-dumping duty must be imposed pursuant to a Cabinet Order. An anti-dumping duty is a duty in addition to the regular customs duty, and is to be equal to or less than the difference between the "normal value" and the dumped price of the product.

E. *Technical Barriers to Trade*

Technical barriers to trade in Japan have been a major area of controversy. Some of the barriers to trade seem real while others are imaginary. Moreover, some of the technical standards, such as emission controls and labels for consumer protection, reflect special circumstances in Japan and cannot easily be removed even if they create trade problems.

It is useful to have a general understanding of the alleged Japanese trade barriers.¹³⁵ Typically, commentators believe that the Japanese standards for product safety, health requirements, and inspection practices are more stringent than those in foreign countries. These standards and requirements are not designed to discriminate against foreign products but simply to meet domestic needs. However, due to implementation and enforcement differences between Japan and foreign countries these requirements sometimes make it difficult for foreign products to penetrate the Japanese market.¹³⁶

According to a survey conducted by the Japan Economic Journal,¹³⁷ there are five categories of complaints raised by foreign and domestic enterprises engaged in importing products to Japan: (1) inspection procedures are too cumbersome and too detailed; (2) foreign test results are not well accepted in Japan; (3) standards are too stringent compared to standards accepted by most countries; (4) the enforcement of standards is arbitrary and capricious; and (5) sometimes foreign manufacturers cannot apply for an import license. Another common complaint is that foreign enterprises have insufficient input into the formulation of technical standards.

135. Some of the difficulties encountered by foreign exporters with regard to technical standards and inspections are described in Weil & Glick, *Japan — Is the Market Open? A View of the Japanese Market, Drawn from U.S. Corporate Experience*, 11 LAW & POLY. INTL. BUS. 845, 865-79 (1979). See also *Special Progress Report*, *supra* note 132, at 13, which contains comments on experience of foreign exporters in this regard.

136. See *Special Progress Report*, *supra* note 132, at 4-5.

137. Nihon Keizai Shinbun, Jan. 4, 1982, at 7 (morning ed.).

While some of these complaints are well grounded, others are rather frivolous. Japan understands that some improvements in these areas are essential to opening the Japanese market and has taken several steps to remedy the situation. Most of these measures do not require amendments to laws, but can be accomplished by changing some internal regulations of the enforcement agencies or simply by changing administrative practices.

To give foreign enterprises greater input into the formulation of standards, a cabinet decision passed on May 22, 1979, contained the following procedural principles:

When adopting or modifying standards, public notification of intention will be made, to the extent possible, sufficiently in advance.

After such notifications are made, opportunity for interested parties, whether domestic or foreign, to submit their views will be provided as much as possible, and views submitted will be given due consideration. For this purpose, improvement in procedures shall be facilitated where necessary.

Following this decision, MITI has started to announce changes in standards in advance, in JETRO's Daily Bulletin.

A common complaint was that import license approvals of sale were given only to importers that had been established in accordance with Japanese laws. The complainants alleged that once the amicable relationship between a foreign exporter and a Japanese importer is broken up, the foreign exporter faces difficulty in obtaining import licensing and approval for sales in Japan, since such license and approval were given only to domestic enterprises. On April 1, 1979, MITI took the remedial step of creating the "commissioned testing system for Category A electrical appliances and materials," under which a foreign applicant is able to submit his products for testing by a "designated testing authority." After completion of a successful test, he receives a certificate of test results. He then sends this certificate to his importer, who forwards it to the "designated testing A authority" to obtain a "type test." After completion of the "type test," the importer receives a successful test certificate, which he sends to MITI, who then issues the "type authorization."¹³⁸ In short, under this system a foreign manufacturer or exporter can apply for testing and license of his product while he is located in a foreign country.

To comply with the requirements of the Tokyo Round Agreement on Technical Barriers to Trade, the Industrial Standardization

138. *Special Progress Report*, *supra* note 132, at 13.

Law was amended¹³⁹ to permit foreign manufacturers or importers to affix a "JIS" mark (Japan Industrial Standard) on goods manufactured in foreign countries. The JIS mark is voluntary, and it has no legal effect in Japan. However, because this mark is greatly respected, its presence often improves consumer acceptance of products. Moreover, *some laws* require that the products or parts used for certain purposes meet the requirements for JIS standards. In such a case, this mark becomes essential for sales.

There have been complaints that Japan refuses to accept the results of product tests conducted overseas. Retesting in Japan often results in undue delay in getting foreign products ready for sale in Japan. This problem was allegedly compounded by foreign exporters' limited knowledge about Japanese testing requirements which increased the expense of testing in Japan.¹⁴⁰ Although this problem has not been solved completely, MITI has made provisions to accept foreign test results under some circumstances.

A Cabinet decision of May 22, 1979 set forth guidelines to encourage acceptance of foreign test results. As a result, some progress has been made in accepting foreign test results for electrical appliances, pharmaceuticals, and agricultural chemicals.¹⁴¹

5. Government Procurement

a. *Opening government procurement to foreign companies.* Government procurement was probably the most controversial issue during the Tokyo Round. The central issue, however, was not whether government agencies in Japan should use an open tendering system to enable foreign enterprises to participate in bidding. The Japanese government was quite willing to do this. Rather, the real problem was whether or not some government-affiliated organization (*i.e.*, some public corporations) should open their purchases to foreign bidders. The purchase of instruments by Nippon Telegraph and Telephone Corporation (NTT) is the major case on point. There was a strong feeling in Japan that NTT purchases should not be opened to foreign bidding.

The arguments against opening NTT purchases were cogently presented by a leader of a labor union in the National Diet.¹⁴² First,

139. The most comprehensive work on the Industrial Standardization Law is *Kogyogijutsuin Hyojunbu Hyojunka, Kaisei kogyo hoyjunkaho — chikujo kaisetsu* (The Industrial Standardization Law, As Amended — Article by Article Comments) in *NIHONKIKAKU KYOKAI* (1980).

140. See *Special Progress Report*, *supra* note 132, at 13.

141. *Id.*

142. The remarks were made by Komori Masao on March 14, 1980. See generally

since the communication system of a country is unified, it requires machines and instruments of uniform quality. If foreign-made goods were introduced, this could disrupt efficient functioning of the Japanese communication system. Second, many of the countries that participated in the Tokyo Round Negotiation, notably some European countries, excluded electric communication instruments from the reach of the Government Procurement Code. Third, and probably most important, is the issue of unemployment. If foreign producers were free to sell instruments to NTT, this would decrease national employment and opportunities for small business. According to this testimony, there were many small enterprises in Japan that manufactured electric communication instruments or parts, and most of them were subcontractors of large entities such as NTT. The testimony alleged that there were 180 small companies, employing 70,000 workers subcontracting to NTT. If twenty percent of NTT purchases were shifted to foreign producers, 14,000 workers would have to be laid off.

A MITI official testified in the National Diet that the Japanese government would try to favor purchases from small enterprises rather than large companies under the Government Procurement Law. This law *requires* that government agencies, including government-affiliated corporations, exert reasonable efforts to increase purchases from small business. This measure may minimize the hardships caused by the Tokyo Round concession.¹⁴³

Throughout the negotiations on government procurement, the basic position of the Japanese Government was that a code should apply only to government agencies which composed the central government. For this reason, the Japanese offer included only those government agencies in Japan to which the "Accounts Law" applied. However, the United States Government strongly requested that some other government affiliated organizations (especially the Nippon Telegraph and Telephone Corporation, the Japan Tobacco and Salt Corporation, and the Japan National Railway) be included. The Japanese Government agreed to include these corporations, and several others during the Strauss-Ushiba Conference held in Washington, D.C., in March 1979. The United States insisted that this offer was still not satisfactory, since some important instruments

Tokushukanzeito nikansuru kokkai gijiroku (The Records of the National Diet on Special Tariff System and Related Matters), MINISTRY OF INTL. TRADE AND INDUS., TRADE AND TARIFF SECTION (1981). This is a compilation of the National Diet debates on tariff and trade matters collected by the Tariff and Trade Section of MITI [hereinafter cited as *The Record*].

143. *Id.*

purchased by the NTT were excluded from the coverage of the offer. The Japanese Government reached an agreement with participating governments other than the United States, and continued to negotiate with the United States Government.

In December 1980, an agreement was reached between the two governments that NTT would open up some more areas for open tendering with some reservations. The Minister of Posts and Telecommunications was to issue administrative guidance to NTT to implement this agreement.

NTT initiated the new system of purchases on January 1, 1981. At first, there was a strong suspicion in the United States that this new system would be as closed as it had previously been, despite the change. In fact, the first year of the Agreement showed a poor performance due to NTT's demand for extremely detailed information from firms seeking to qualify as bidders.¹⁴⁴ However, the Gibbons Report, published in December 1980 by the U.S. Congress, commented favorably on NTT's effort to purchase foreign instruments.¹⁴⁵ According to a press report of December 28, 1981,¹⁴⁶ the President of NTT sent a letter to the U.S. Department of Commerce and requested the Department to advise U.S. firms to utilize this new bid system adopted by NTT. This report stated that despite the opening of the NTT market, there has been insufficient participation by U.S. firms in supplying telecommunication instruments.

b. *The legal system of government procurement in Japan.*¹⁴⁷ Until 1972, there was a provision in Imperial Edict No. 556 (1964) which provided that: "In order to promote use of domestically produced articles, the Minister of each Ministry may use a single tendering in purchasing commodities as designated by the Minister of Finance." In 1972, to establish a more open system of government purchasing, this provision was abolished.

At present, there is one law and several orders concerning government procurement in Japan. These are (1) the Accounts Law, (2) the Cabinet Order concerning the Budget, Auditing and Accounting (Imperial Edict No. 165 of 1947, hereinafter referred to as the "Order of 1947"), (3) Special Provisions for the Cabinet Order concerning the Budget, Auditing, and Accounting (Imperial Edict No. 558 of 1946, hereinafter referred to as "the Special Provisions of

144. SUBCOMM. ON TRADE, HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., REPORT ON TRADE MISSION TO FAR EAST 11-12 (Comm. Print 1981).

145. *Id.* at 12.

146. Nihon Keizai Shinbun, Dec. 28, 1981, at 7 (morning ed.).

147. *Special Progress Report*, *supra* note 132.

1946”), (4) the Cabinet Order stipulating special procedures for government procurement of goods (Cabinet Order No. 300 of 1980, hereinafter referred to as “the Special Cabinet Order”), and (5) Ministerial Ordinance stipulating special procedures for government procurement of goods (Ministry of Finance Ordinance No. 45 of 1980, hereinafter referred to as “the Ordinance of 1980”).

Since some provisions of the Order of 1947, the Special Provisions of 1946, and the Accounts Law were inconsistent with the Tokyo Round Code, some adjustments were required to implement the Agreement. The Special Cabinet Order and the Ordinance of 1980 have thus been issued to provide for special procedures and stipulations to assure full compliance with the requirements of the Agreement. In this way, the Agreement has been incorporated into domestic law.

c. *Single tendering.* Currently, government procurement in Japan revolves around open tendering. If it is impossible to rely on open tendering, selective tendering, which is open to both domestic and foreign persons, is permitted. The use of a single tendering procedure is limited to some exceptional cases. Article 29-3 of the Accounts Law provides that single tendering shall be adopted where the circumstances do not allow the governmental entity concerned to adopt open or selective tendering procedures because of the nature or purpose of the contract concerned, the need for extreme urgency, or where it is deemed that adopting open or selective tendering procedures would be disadvantageous for the agency concerned. Article 29-3 (5) of the Accounts Law provides that, notwithstanding the other provisions, a single tendering procedure may be adopted in the cases specified by Cabinet Order.

Article 99 of the Order of 1947 provides that a single tendering procedure may be used where a government agency purchases products directly from cooperatives composed primarily of small and medium sized enterprises in order to protect them. Utilizing this provision, it is possible for the Japanese government to purchase products exclusively from small domestic enterprises. This is a potential mechanism for the government agencies in Japan to avoid purchasing foreign products.

The implementation of the Government Procurement Code has primarily been effected through amendments to various regulations under the Accounts Law governing purchases by the government agencies. The Accounts Law is applicable to purchases by agencies composing the National Government, which include both Houses of the National Diet, the Supreme Court, the Prime Minister's Office,

and various Ministries. In addition, some government affiliated organizations are covered by the Government Procurement Code. These include, among others, the Japan National Railway, the Japan Tobacco and Salt Corporation, the Nippon Telegraph and Telephone Corporation, and twelve other government affiliated financial organizations.

Since the Japan National Railway, the Japan Tobacco and Salt Corporation, the Nippon Telegraph and Telephone Corporation, and other government-affiliated financial organizations are not subject to the Accounts Law and regulations issued thereunder, the implementation has been effected through administrative guidance of the appropriate Ministries and by amendments to the internal rules and regulations which govern the purchases made by those organizations.

E. Legal Remedies for Violations of the MTN Codes by the Government Agencies

1. An Overview

This Section addresses the domestic legal remedies available to private enterprises and citizens, domestic and foreign, when a Japanese governmental agency violates one or more of the Tokyo Round Codes. Before discussing legal remedies, it should be mentioned that there are several organizations which are designed to handle complaints by foreign enterprises operating in Japan. Three of these organizations will be briefly described.

In 1977, the U.S.-Japan Trade Study Group (TSG)¹⁴⁸ was organized. The work of the TSG is concentrated on two related issues. The first is to identify, analyze, and make recommendations regarding laws, regulations, procedures, or practices that inhibit sales of American goods and services in Japan. The second is to encourage U.S. companies to gain a position in the Japanese market through participation in specific trade promotion programs and to inform American businessmen about the work of the TSG.¹⁴⁹

The TSG is a purely private organization composed of governmental and nongovernmental members, all participating as private

148. The TSG was a bilateral group of Japanese and American volunteers from the U.S. business community in Tokyo, the U.S. Embassy, MITI, the Japanese External Trade Organization, the Federation of Economic Organizations, the Japan-U.S. Economic Council, the Foreign Trade Council of Japan, the Japan Chamber of Commerce and Industry, and others from the Japanese business and government communities, all acting in an individual capacity.

149. See *Special Progress Report*, *supra* note 132, at 1-3.

individuals on a voluntary basis. However, recommendations made by the TSG have had some impact on changing governmental practices in regulating trade. Moreover, the activities of the TSG have been carefully evaluated by a U.S. congressional committee.

Faced with a huge trade deficit with Japan, the U.S. Government wanted to create a common entity to encourage entry of U.S.-made products into the Japanese market. Accordingly, a bilateral sub-cabinet meeting was held in early 1977. This meeting resulted in the establishment of the Joint U.S.-Japan Trade Facilitation Committee (TFC). The TFC is jointly composed of members of the U.S. Department of Commerce and of the Japanese MITI. The TFC discusses allegations of Japanese trade barriers raised by American exporters. Whenever there is a mutually agreeable solution to the difficulty, the Japanese Government takes the necessary measure to remedy the situation. In this sense, the TFC is an informal organization without any legal power. However, many complaints have been successfully handled by this Committee, and it has substantially eased the entry of U.S. products into the Japanese market.¹⁵⁰

In 1982, the Japanese government established the Office of Trade Ombudsman (O.T.O.) to deal with complaints about trade barriers asserted by foreign exporters. O.T.O. is composed of certain Vice-Ministers (EPA, MFA, MOF, MITI, Ministry of Education, MHW, MAFF, Ministry of Transportation, Ministry of Posts and Telecommunications, Ministry of Home Affairs, Agency of Science and Technology) and is chaired by the Vice-Minister of the Cabinet-Secretariat. Also, an executive board has been established, which consists of high ranking officials of important government ministries and agencies. Under this system, complaints may be filed with the relevant sections of these ministries and agencies and with Japanese Embassies and Consulates in foreign countries. When a proper complaint is filed, the relevant ministry or agency shall report to the complainant how the complaint is being considered within ten days and, as promptly as possible, inform him of the final result of the investigation and the remedy.

In formulating remedies, ministries and agencies are required to take into consideration the following factors:

1. When formulating technical standards under domestic laws, efforts shall be made to make them conform to standards that are

150. For details of the TFC activities, see Weil & Glick, *Japan — Is the Market Open? A View of the Japanese Market Drawn from U.S. Corporate Experience*, 11 LAW & POLY. INTL. BUS. 845 (1979).

internationally recognized while giving due considerations to circumstances unique to Japan.

2. Efforts shall be made to accept the results of reliable tests made in foreign countries.

3. Standards shall be made clear, and quantitative representation shall be made as much as possible.

4. Transparency in domestic institutions shall be established as much as possible.

By March 1, 1982, eleven complaints had been filed with the relevant sections of the Japanese government. Among those, seven complaints had been filed by Japanese importers, three by U.S. exporters, one by an Irish exporter, and one by a state in the United States.¹⁵¹

Under this system, there are four types of actions which can be taken: (1) To take an affirmative measure to remedy the situation, (2) To answer to the complainant that his complaint is based on a misunderstanding, (3) To continue consideration of the problem, and (4) To decide that nothing shall be changed.

It is premature to judge whether or not this system will be the answer to trade barrier problems. However, if utilized properly, it may be an effective tool to mitigate trade barrier problems in Japan.

2. *Legal Actions for Indemnification of Damages*

Article 17 of the Constitution provides that "Every person may sue for redress as provided by law from the state or public entity in case he has suffered damage through an illegal act of any public official."¹⁵² This constitutional provision recognizes the individual's right to recover for damage resulting from wrongful conduct of a government official. There is little doubt that Japanese citizens can exercise this constitutional right to recover damages for violations of the Tokyo Round Codes.

There is some question as to whether or not a foreign citizen or enterprise is entitled to this same protection. The answer depends on whether "every person" in Article 17 of the Constitution includes a foreign citizen or enterprise. Generally speaking, the term "every person" includes not only Japanese citizens but also foreign individuals. Thus there are some cases¹⁵³ in which the Supreme Court has

151. Announcement of the Economic Planning Agency (Mar. 29, 1982).

152. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Binder IX, *supra* note 68, at 2.

153. Judgment of Dec. 25, 1957, Supreme Court, Japan, 11 Sal-han keishu 3377; Judgment of Oct. 4, 1978, Supreme Court, Japan, 903 Hanrei Jiho 3.

held that foreigners are protected by the constitutional guarantee of human rights.

However, as quoted above, Article 17 of the Constitution permits the recovery of damage caused by tortious conduct of a government official *in accordance with a provision of a law*. The relevant law in this regard is the State Redress Law.¹⁵⁴ Article 6 provides that when a foreign person has sustained damage due to the tortious conduct of a government official, he is allowed to recover the damage as long as there is a guarantee of reciprocity.¹⁵⁵ Thus, the State Redress Law allows recovery for damages sustained by a foreign person if his country likewise allows a Japanese citizen to recover for tortious acts committed by government officials of that country. In this sense, the application of state indemnification for a foreign person is limited by the rule of reciprocity, and there are some court cases¹⁵⁶ to this effect. However, some commentators argue that the reciprocity provision of Article 6 violates Article 17 of the Constitution which, on its face, extends a remedy to "every person" damaged by the tortious conduct of a government official.¹⁵⁷

In any event, it is clear that a foreign person can recover damages caused by a tortious act of the government when his home country grants such a recovery to a Japanese citizen. Accordingly, a foreign citizen or enterprise can bring an Article 6 suit when his business interest has been adversely affected by an action of the government which violates one of the Tokyo Round Codes. Since most of the Codes have been approved by the National Diet as "treaties" in the sense of Article 98 of the Constitution, they override conflicting administrative actions of the government. To recover, the plaintiff must prove either a malicious intent or negligence on the part of the government official who engaged in the tortious conduct. However, such proof should not be difficult as long as the official's conduct was contrary to the provisions of one of the Codes, since government officials should know the contents of the treaties to which Japan is a party. Nevertheless, the plaintiff must prove the amount of damage sustained by him, as well as the causation between the illegal conduct of the government official and his damage.

154. Kokka baisho ho (State Redress Law), Law No. 125 of 1947.

155. A detailed account of the applicability of the State Redress Law to foreign persons is made in SHIMOYAMA, KOKKA BAISHO HO (The State Redress Law) (1972).

156. Judgment of May 14, 1957, District Court, Tokyo, 8 Kakyu minshu 931; Judgment of Mar. 24, 1965, High Court, Tokyo, 18 Kosai minshu 188; Judgment of Sept. 4, 1969, District Court, Tokyo, 582 Hanrei Jiho 81.

157. T. MIYAZAWA, KENPO II 456 (new ed. 1974); TAKADA, KIHONHO KOMMENTAR KENPO 75 (Arikura ed. 1970); HASHIMOTO, NIHONKOKU KENPO 374 (1980).

The next question is whether a foreign citizen can base his claim for damages on the failure of the National Diet to enact or abolish a law necessary to assure conformity with the obligations of the Tokyo Round Codes. For example, a foreign enterprise may argue that it has suffered a loss of profit by a discriminatory regulation which violates the Code on Technical Barriers to Trade. In a court decision¹⁵⁸ addressing abolition by the National Diet of the home voting system for physically disabled persons, the Sapporo District Court held that the failure of the National Diet to replace an unconstitutional law with a proper law could be regarded as a tortious act by government and could subject the government to liability. Thus, under some circumstances, legislation or failure to enact legislation may be used as a basis for seeking a pecuniary recovery for damage sustained by an individual.¹⁵⁹ The question here is whether the right of compensation under the State Redress Law can be equated with the fundamental right of the people to vote which is regarded as the most fundamental among the political rights of the people.

Generally speaking, the government is not liable for damage to individuals caused by a failure of government economic policies, since these policies are discretionary on the part of the administrative branch of the government. In one case,¹⁶⁰ a plaintiff maintained that unusual consumer price rises were the result of mistaken governmental economic policies and should result in government liability. The Osaka High Court dismissed the claim on the ground that economic policies are entrusted to the administrative branch of government which has wide discretion in selecting policies.

A claim for the recovery of pecuniary loss due to the failure of the National Diet to amend a domestic regulation to conform with the Tokyo Round Codes falls somewhere in between a claim based on voting rights and a claim based on a failure of the government's economic policies. This claim, however, should be regarded as having more substance than a claim based on a purely economic policy matter, since most of the Codes are "treaties" in the sense of the Constitution. Therefore, they are given a higher status than domes-

158. Judgment of Dec. 9, 1974, District Court, Sapporo, 762 Hanrei Jiho 9. In this case, the plaintiff argued that the abolition of the home voting system for physically disabled persons and the failure of the government to enact a law restoring this system was unconstitutional, and the government was liable to compensate for any damages. The court held for the plaintiff.

159. For similar cases, see Judgment of Dec. 18, 1974, District Court, Tokyo, 766 Hanrei Jiho 76; Judgment of Oct. 19, 1979, District Court, Tokyo, 914 Hanrei Jiho 29; Judgment of Jan. 17, 1980, District Court, Sapporo, 953 Hanrei Jiho 18; Judgment of May 14, 1980, District Court, Osaka, 972 Hanrei Jiho 79.

160. Judgment of Feb. 26, 1979, High Court, Osaka, 924 Hanrei Jiho 34.

tic legislation and regulations. In cases where the domestic regulation or legislation is unequivocally contrary to the requirements of one of the Codes, the failure on the part of the National Diet to remedy the situation may constitute actionable tortious conduct on the part of the government.

3. *Legal Action for Cancellation of Governmental Determinations*

The Administrative Cases Litigation Law¹⁶¹ ("the Litigation Law") provides for legal actions against the government for cancellation of governmental determinations which are wrongfully made. We shall examine here the conditions under which a foreign enterprise may challenge a governmental determination that results in a business disadvantage, and the process involved in seeking a court decision to nullify such a determination. The situation arises when, for example, a foreign exporter is placed at a disadvantage as a result of the valuation of products for customs purposes. As explained in the Section above, the Customs Tariff Law has been amended to base the customs valuation on "transaction value" of the imported product. Therefore, if a determination of customs value has been made on the basis of some criteria other than the transaction value, such a valuation is contrary to both the Customs Tariff Law and the Code of Customs Valuation. What are the legal remedies in this situation?

Article 7 of the Litigation Law provides that the Civil Procedure Code will govern all matters not addressed by the Litigation Law. Since the Litigation Law contains no provision for a suit against the government brought by a foreigner, Article 51 of the Civil Procedure Code comes into force. Article 51 of the Civil Procedure Code provides that "[a]n alien is deemed to possess the power to be a party in a litigation whenever he shall possess the power to be a party in a litigation according to the Japanese law, even though he has no such power according to the law of his home country." Accordingly, a foreigner has the power to bring a suit against the government as long as he has the power to be a party to litigation under the provisions of the Civil Procedure Code.

Under Article 3(2) of the Litigation Law, a person whose legal interest has been adversely affected by a government action may bring a suit against the government to nullify that action. In our situation a government decision such as refusal to grant a license to import is amenable to this suit as long as the action is contrary to the

161. Gyosei jiken sosyo ho, (Administrative Procedure Act) Law No. 139 of 1962.

obligations imposed on the Japanese government by the Tokyo Round Codes. This type of action is available to a foreign party as long as he has been specifically addressed by a government decision. For example, if a foreign enterprise has applied for a license to sell a product in Japan, and the Japanese government has issued a determination addressed to this party denying such a license, then the foreign enterprise is entitled to bring suit under Article 3(2) of the Litigation Law. The plaintiff in such a litigation usually seeks a court decision which would cancel the determination. If a governmental determination is contrary to a provision of a treaty as approved by the National Diet, then the court handling the case must declare that such a governmental action is illegal and is subject to cancellation.

However, to qualify as a plaintiff in a suit against the government under Article 3(2) of the Litigation Law, the party must have some legal interest in the issue. This is the question of standing and must be decided before the court addresses the issue of the illegality of the governmental determination. Article 9 of the Litigation Law provides that a person who brings a suit under the Litigation Law must have a legal interest with respect to the cancellation of the determination in question. If a foreign enterprise has been denied a license or approval of sale or import, there is little doubt that it has a legal interest in requesting a court to cancel this administrative determination.

Article 3(5) of the Litigation Law provides for a legal action to nullify governmental inaction. For example, if an administrative agency is required to decide within a reasonable period of time whether or not to grant an application for a license to sell, the agency would be liable for failure to decide within that period of time.

However, whether or not a court will require the government agency to act under Article 3(5) of the Litigation Law depends upon the nature of the administrative action sought by the plaintiff. There are some types of administrative actions which are discretionary.¹⁶² If an administrative action falls within this category it is usually impossible to force the government agency to make a decision. However, there are some government actions that are regarded as ministerial, such as approvals or disapprovals of licenses given to products under the safety standards and laws. If an administra-

162. For example, a decision as to whether the government should effectuate a price control, raise or lower tariffs, or tighten import control of some commodities would be regarded as discretionary, and the failure of those measures would not be amenable to a lawsuit by a private individual.

tive action is ministerial, it is usually possible to force the government agency to act.¹⁶³

4. *Violation of the MTN Codes as a Defense*

When a foreign enterprise is accused of a violation of a law or regulation in Japan which is contrary to the provisions of the Codes, the accused party can assert the nullity of the law as a defense. This defense can be utilized when an enterprise is accused of a criminal offense for a violation of, for example, safety standards or some other standards incorporated in law. The party making use of this defense must of course prove that the law or regulation under which he is being accused is contrary to a provision of a treaty. However, once this proof is established, the legal consequence is rather clear; that is, the court handling the case must decide that the treaty prevails over the conflicting domestic law or regulation. After the criminal action has been dropped for this reason, the party may bring an action against the government for indemnification of all damages that he can prove.

5. *Standing of Foreign Governments*

Since standing to sue for nullification of an administrative action is only granted to those persons whose legal interests have been adversely affected, there appears to be no way in which a foreign government can bring a court action in Japan for cancellation of an action of the Japanese government in contravention of the MTN Codes. On the other hand, under the State Redress Law there is no strict standing requirement. Therefore, it is possible for any person to sue the government for tortious acts. However, the plaintiff must prove both damages and the causation between the damages and the illegal conduct. Foreign governments rarely suffer a property loss due to an action of a Japanese government official that violates the MTN Codes. Thus, there is little chance that a foreign government can assert a claim based on the State Redress Law.

Generally, in litigation addressing the issue of a violation of the MTN Codes on the part of the Japanese government, foreign governments play the limited role of filing opinions stating a position as to the legality of the Japanese governmental action. It is up to the court to decide whether or not to accept such an opinion of a foreign government.¹⁶⁴

163. Judgment of July 14, 1978, District Court, Fukuoka, 909 Hanrei Jiho 27; Judgment of July 30, 1979, High Court, Osaka, 948 Hanrei Jiho 44.

164. Article 310 of the Civil Procedure Code states: "If the court deems it necessary, the

Article 42 of the Litigation Law provides for a lawsuit against the Japanese government by a person or a body not having any legal interest in the court action. According to this provision, such an action by a party without a legal interest is allowed *only* if there is a provision in a law to that effect. Therefore, if the MTN Codes contained a provision permitting a foreign government to bring an action in a Japanese court, foreign governments would be given standing to challenge an action of the Japanese government which is contrary to the Codes.

F. Conclusions

It is probably fair to state that the Tokyo Round Agreements and their implementation have contributed somewhat to the liberalization of international trade in Japan. Especially in such areas as technical standards and government procurement, considerable progress has been made in opening up some areas to foreign imports. There is, however, still some dissatisfaction with the remaining trade barriers in Japan. Some of those allegations are real, while others are based on a lack of understanding as to what has happened in Japan in the past several years. Closure and exclusivity in such areas as services, banking, the distribution system and cartels have been pointed out by a 1981 U.S. congressional document.¹⁶⁵ The Japanese government is to see if such allegations are justified, and, whenever it finds undue restrictions and exclusions in those areas, it should proceed to remedy the situation. At the same time, major efforts are required by the Japanese government to proclaim to the world that the Japanese market is not as closed as is perceived in foreign countries.

Even though the MTN Agreements have accomplished much, there are some problems in trade between Japan and other countries which are left unresolved.

On the export side, most of the important trade problems be-

court may request . . . a foreign government or a foreign public body to render an expert opinion. . . ." MINJI SOSHO HO Art. 310.

165. SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., REPORT ON TRADE MISSION TO FAR EAST 11 (Comm. Print 1981). About Japanese trade barriers *see generally* SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., TASK FORCE REPORT ON UNITED STATES-JAPAN TRADE (Comm. Print 1979); SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 2D SESS., UNITED STATES-JAPAN TRADE REPORT (Comm. Print 1980); *United States-Japan Trade Economic Relations: Hearings Before the Subcomm. on Asian and Pacific Affairs, and International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 156 (1980); Weil & Glick, *Japan — Is the Market Open? A View of the Japanese Market Drawn from U.S. Corporate Experience*, 11 LAW & POLY. INTL. BUS. 845 (1979).

tween Japan and the United States or European countries have been solved by way of orderly marketing agreements whereby the Japanese government and industries undertook to restrain exports of the products in question. Prominent examples are textiles, steel, specialty steel, television and automobiles. The wisdom of solving trade problems by utilizing this technique should be closely reexamined, and, even if this technique is found desirable, it should be subject to international rules to guarantee fairness to everyone concerned.

Some of the alleged trade barriers in Japan have not been covered by the Tokyo Round Agreements. For example, administrative guidance exercised by the Japanese government, the exclusivity in the Japanese distribution system, and the exclusivity in Japanese business groups, are some of the subjects which were not addressed during the negotiations. Some of these alleged restraints are private, rather than legal barriers to trade. This raises an interesting question as to whether non-governmental arrangements initiated by private enterprises, trade-related cultural barriers, or business and social customs may be made the subject of trade negotiation and, if so, how the government should go about changing those non-governmental arrangements. In the future, it will become necessary to give some thought to this question.

As has already been explained, there are some legal remedies available to domestic and foreign enterprises if the Japanese government infringes upon their rights so long as they can show that the government action is contrary to an obligation imposed by one of the MTN provisions. It is recommended that foreign enterprises bring such legal claims to the Japanese government whenever they feel that their rights have been injured by its action. It is less likely that Japanese domestic companies will raise such claims since Japanese companies are less inclined to use legal actions to resolve disputes with the government. Although excess litigation may result in inefficiency and unnecessary waste of time and energy, even in Japan, lawsuits can be an effective means to persuade governmental agencies that the MTN Agreements should be strictly observed. It is worthwhile to give some thought to the possibility of utilizing those legal remedies more fully, not only to secure the rights of foreign enterprises in Japan, but also to better Japanese society as a whole.

IV. IMPLEMENTING THE TOKYO ROUND IN THE UNITED STATES

John H. Jackson

United States law imposes considerable complexity on MTN im-

plementation, and constrains policy makers and diplomats in a number of ways. The United States legal system, however, has some important differences from the other two systems explored in this Article. Some of these differences can be mentioned at the outset.

First, the parliamentary branch in the United States (*i.e.*, Congress) appears to be considerably more powerful than its counterparts elsewhere. This limits executive branch officials, and in some cases makes it nearly impossible to implement — or even negotiate — certain changes in international rules. Second, the U.S. legal system provides a number of mechanisms for individuals to challenge official actions. These procedures limit the power of the executive branch. Third, although not so prominent as in the first century of the republic, there still remains some slight ambiguity about the distribution of powers between the states and the federal government. Even where the legal issues are clear (generally meaning the central government power prevails), there are sometimes practical political constraints preventing the federal government from acting in an area traditionally subject to state government control.

This section will explore these and other themes as they relate to the implementation of the Tokyo Round.

A. *The Constitutional and Legal Framework of U.S. International Trade Relations.*

The draftsmen of the United States Constitution distrusted centralized government. Consequently, they built into the Constitution the principle of separation of powers, explicitly distributing powers among three branches of the federal government (the Presidency, Congress, and the Courts) and reserving certain powers to the state governments.¹⁶⁶ Thus, implementation of international agreements is constantly affected by the tension between these various government powers.

For practical reasons, the Presidency has developed a preeminent role in the conduct of foreign affairs. The President has authority to negotiate international agreements and to carry on international diplomacy. Over the years, Congress has delegated to the President a wide variety of additional powers relating to international affairs. Although, in the post-Watergate era, Congress has imposed some restraints on the President's authority over foreign affairs, the President remains the central figure in U.S. diplomacy. One significant

166. See generally L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 15-412 (1978); THE FEDERALIST, NOS. 47-51 (J. Madison); No. 75 (A. Hamilton).

limit on Presidential foreign affairs power is Article I, Section 8 of the Constitution, under which the Congress claims preeminence as to "Commerce with foreign Nations."

Another major restraint on the President's foreign affairs power is the constitutional requirement that "[t]reaties" be submitted to the United States Senate for "advice and consent" (requiring a two-thirds affirmative vote) before the President can enter into them on behalf of the United States.¹⁶⁷ Nevertheless, over two centuries of constitutional history, there have developed alternative forms for approval of international agreements. United States practice divides international treaty agreements into "treaties" in the U.S. constitutional sense (which must be submitted to the Senate), and "executive agreements."¹⁶⁸ There are several ways in which "executive agreements" can be approved under United States Constitutional practice:¹⁶⁹ (1) They can be submitted to the Congress, for approval by the passage of a statute which grants the authority to the President to accept the international agreement; (2) The Congress can pass a statute which authorizes the President, in advance, to negotiate, enter into, and accept for the United States an international agreement (and to implement it) (This is the approach of the Trade Agreements Acts, as to tariff agreements.¹⁷⁰); (3) A treaty may give the President advance delegated authority within limits to accept an executive agreement designed to implement the treaty;¹⁷¹ and (4) There are some executive agreements which the President can enter into on the basis of his own "inherent" authority under the Constitution, without any participation by the Congress or the Senate either before or after the negotiation.¹⁷² These latter must be agreements which are authorized by explicit constitutional grants of authority to the President (such as his authority as Commander-in-Chief of the Armed Forces), or which can be implied as part of Presidential authorities

167. U.S. CONST. art. II, § 2.

168. U.S. Dept of State, CIRCULAR NO. 175 (1955), reprinted in 50 AM. J. INTL. L. 784 (1956); Stevenson, *Constitutional Aspects of the Executive Agreement Procedure*, 66 DEPT. ST. BULL. 840, (1972); L. HENKIN, *supra* note 166, at 173; McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 234 (1945).

169. *Id.*

170. Trade Act of 1974, § 101, 19 U.S.C. § 2111 (Supp. IV 1980).

171. *See, e.g.*, North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. 1964, 34 U.N.T.S. 243, and accompanying executive agreements which are listed following the NATO treaty in U.S. DEPT. OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1980 277 (1980).

172. These are the most controversial. *See, e.g.*, L. Henkin, *supra* note 166, at 48; J. JACKSON, INTERNATIONAL ECONOMIC RELATIONS 78 (1977); W. BISHOP, INTERNATIONAL LAW 101-04 (1971); U.S. DEPT. OF STATE, *supra* note 168, reprinted in 50 AM. J. INTL. L. 784, 785 (1956).

under the Constitution (such as his "executive power").¹⁷³

In addition to legislative-executive tensions, U.S. foreign policy is affected by the state-federal power struggle.¹⁷⁴ As to domestic affairs, the evolution of U.S. constitutional law has generally been in the direction of concentrating power in the federal government. It is reasonably well established today that the U.S. federal government has supremacy over almost all issues, leaving aside some subject matters which have not really been tested in the Supreme Court. With respect to foreign affairs, there is virtually no Supreme Court opinion which rules against the exercise of federal power on the ground that such federal power is in conflict with state power, as long as the exercise of federal power was itself constitutional.¹⁷⁵ Thus, although the Supreme Court has held that state powers sometimes prevail over international treaties (such as in the off-shore oil cases), the basis for this decision was itself an exercise of federal power, namely, an Act of Congress.¹⁷⁶

Apparently only the government procurement negotiations raised a states' rights issue during the Tokyo Round. Arguably, purchases by state governments are so intimately connected with normal sovereign and administrative authority reserved to the states, that the federal government can not enter into an international agreement that interferes with those activities. Indeed, some states have exercised their authority in this field by enacting statutes that call for preference to be given to the purchase of domestically produced, rather than foreign, goods. Such rules have been challenged both politically and judicially.¹⁷⁷ The litigation has been generally inconclusive. A California court held that a California Buy-American statute was unconstitutional, because the general subject of governmental procurement was precluded by extensive federal regulation of the matter, including a large number of international treaties.¹⁷⁸ The

173. *Id.*

174. See, e.g., W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL RIGHTS AND LIBERTIES* ch. 3, §1 (5th ed. 1981); A. MASON & W. BEANEY, *AMERICAN CONSTITUTIONAL LAW* chs. IV, V (2d ed. 1959).

175. There are very few Supreme Court cases concerning the exercise of federal government power in the area of foreign affairs. Of those cases, those which have ruled that the U.S. government's action exceeded its authority under the Constitution, in cases other than those affecting civil liberties, are even fewer.

176. *United States v. Louisiana*, 363 U.S. 1 (1960).

177. Note, *State Buy-American Laws — Invalidity of State Attempts to Favor American Producers*, 64 MINN. L. REV. 389 (1980).

178. *Bethlehem Steel Corp. v. Board of Commrs. of Dept. of Water & Power*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (Cal. Ct. App. 1969). See discussion at J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 174-80 (1977).

GATT, for example, touches on the question of government procurement, but generally exempts government procurement from the various trade rules of GATT. (It was for this reason that it was felt necessary to negotiate a government procurement code in the MTN.)

A New Jersey Supreme Court case¹⁷⁹ held that state rules regarding procurement that related to a water supply did not violate the GATT (and implied that such rules were not preempted by federal government action). Both of these cases, however, recognized that if the federal government had acted in a way that was explicitly *inconsistent* with state regulations or rules, the federal action would prevail.

During the Tokyo Round, extensive negotiation was held on government procurement. In this portion of the negotiation, the negotiators considered whether international government procurement rules should apply to governmental subdivisions of a federal state. This author has been told that the U.S. government was prepared to accept some such rule, and that the negotiators believed that the federal government had the authority to do so. Apparently, *foreign* objections defeated this proposal. Certain other governments faced considerably more difficult constitutional problems on this issue than did the United States. (For example, the German Länder have much autonomy, and the constitutions of Canada and Australia raise important questions in this connection.)

In short, in the area of foreign affairs, particularly economic affairs, it is hard to conceive of an action taken by the federal government that would not be upheld by the U.S. Supreme Court in the event of direct conflict with state actions. This would be true whether the action was administrative or legislative, and whether it was accomplished by international agreement or by other properly authorized means.

B. *The GATT in the United States' Law*

Originally, the United States accepted the 1947 Protocol of Provisional Application implementing the GATT as an "executive agreement" authorized by the 1945 extension of the Trade Agreement Act. Consequently, the President accepted GATT without reference to Congress. Some members of Congress, angered by this procedure, insisted that the GATT was not a valid international agreement of

179. K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Commn., 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 983 (1978).

the United States.¹⁸⁰ For several decades Congress officially refused to recognize the GATT.¹⁸¹ Although the Trade Act of 1974 seems to recognize the GATT as a valid legal commitment,¹⁸² this congressional hostility to the GATT has affected U.S. international trade relations over the years.

The original concept for GATT was that it would merely be a multilateral agreement appended to the new International Trade Organization when the latter came into being. The GATT itself was not designed to be an international organization, and presidential authority probably would not have extended to entry of the United States into an "organization." When the ITO draft charter was completed at Havana in 1948, it was submitted to governments for acceptance. However, by 1950 it was clear that Congress would not approve the ITO and consequently the President withdrew¹⁸³ it from congressional consideration. The ITO Charter was then dead, and GATT had to fill the gap.

Within the United States government, the GATT developments described above effectively resulted in a substantial shift of power to the President. With the *de facto* development of the GATT as the central international organization regarding trade, more and more trade issues tended to find their way into the GATT fora for discussion and resolution. The GATT provided the only overall systematic code of conduct governing the way many nations regulated their international trade. Additionally, because the GATT agreements provide the authority for the application of a lower tariff on most goods, the GATT became an essential pillar of U.S. international trade policy. If the GATT were somehow to be extinguished, tariffs in the United States could bounce back to the 1930 statutory rates — an action which would be a devastating blow to international trade relations.¹⁸⁴

180. See Jackson, *The General Agreement on Tariffs and Trade in U.S. Domestic Law*, 66 MICH. L. REV. 249, 268 (1967).

181. See *id.* at 265-69, and note statutory formulae used prior to 1974.

182. See Trade Act of 1974, § 121(d), 19 U.S.C. § 2131(d) (1976 & Supp. IV 1980), and Trade Agreements Act of 1979, § 2(c), 19 U.S.C. § 2503(c) (Supp. IV 1980), which approve a number of the MTN agreements.

183. U.S. State Dept., Press Release (Dec. 6, 1950), *reprinted in* 23 DEPT. ST. BULL. 977 (1950).

184. See Trade Act of 1974, § 125(e), 19 U.S.C. § 2135(e) (1976), which provides, however, that the Trade Agreement tariff rates can remain in effect for one year, pending petition to Congress to set the tariff levels, in the event of termination of an International Trade Agreement on which the rates rely.

C. *Events Leading Up to the Trade Act of 1974*

After the completion of the Kennedy Round negotiations in June 1967, there was a backlash in the United States political attitudes toward international trade. Congress refused to authorize acceptance of those portions of the Kennedy Round that required its consent. Likewise, the Anti-Dumping Code, negotiated in the Kennedy Round and accepted by the President, was criticized by members of Congress who felt the President did not have authority to agree to that Code.¹⁸⁵ The U.S. balance-of-payments problems, and the surge of imports into the United States toward the end of the 1960's, led both labor unions and industrial interests to lobby for restrictions on imports.¹⁸⁶ The President's authority, under the 1962 Trade Expansion Act, to negotiate for reductions in tariffs, had expired at the end of June 1967.¹⁸⁷ There was no renewal of that authority until the 1974 Trade Act.

In 1970, the President appointed a commission to make recommendations for United States trade policy. The "Williams Commission" report became the intellectual basis for much of the policy of new legislation to permit United States participation in international trade negotiations.

In 1972, preparations began in earnest for the formulation of a new trade bill to be submitted to Congress. This bill was finally sent to Congress in April 1973.¹⁸⁸ The new bill was the most comprehensive international trade bill yet submitted to the Congress. It addressed not only the renewal of Presidential trade agreements authority, but also contained provisions on the Generalized System of Preferences for developing countries (GSP), extending the Most Favored Nation treatment (MFN) to certain Communist countries,

185. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT, BISD 24 (15th Supp. 1968). See Barcelo, *Anti-Dumping Laws as Barriers to Trade — The United States and the International Dumping Code*, 51 CORNELL L. REV. 491 (1972); Long, *United States Law and the International Anti-Dumping Code*, 3 INTL. LAW. 464 (1964). See also S. REP. NO. 1385, Part 2, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. CODE CONG. & AD. NEWS 4539.

186. For a history of these bills, see F. ROOT, INTERNATIONAL TRADE AND INVESTMENT 183-85 (4th ed. 1978). See also *Tariff and Trade Proposals: Hearings Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. (1970); HOUSE COMM. ON WAYS AND MEANS, TRADE ACT OF 1970, H.R. REP. NO. 1435, 91st Cong., 2d Sess. (1970); *Trade Act of 1970, Amendments 925 and 1009 to H.R. 17550 Social Security Amendments of 1970: Hearings Before the Senate Committee on Finance*, 91st Cong., 2d Sess. (1970); SENATE COMM. ON FINANCE, SOCIAL SECURITY AMENDMENTS OF 1970, S. REP. NO. 1431, 91st Cong., 2d Sess. (1970).

187. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962).

188. H.R. 6767, 93d Cong., 1st Sess. (1973); COMM. ON WAYS AND MEANS, 93D CONG., 1ST SESS., PRESS RELEASE AND OTHER MATERIAL RELATING TO THE ADMINISTRATION PROPOSAL ENTITLED THE "TRADE REFORM ACT OF 1973" (Comm. Print 1973).

amendments to the anti-dumping and countervailing duty laws of the United States, and a number of other matters.

In the fall of 1973, the House of Representatives approved a remarkably liberal trade bill.¹⁸⁹ As a result of the intervening oil crisis, however, the Senate was not nearly as receptive to the idea of freer trade. Furthermore, as the Watergate Crisis deepened,¹⁹⁰ Congress became increasingly reluctant to enact trade legislation that would delegate powers to a President whom the Congress distrusted. Many Congressmen also viewed the Vietnam War as an abuse of presidential powers.¹⁹¹ Consequently, Congress began to reassert its own authority in matters of international affairs, particularly on trade. It was only after President Nixon resigned and President Ford came into office and strongly supported the Trade Act that the Senate began in earnest to finish the work. The bill was finally passed on December 19, 1974, after a number of compromises. On January 3, 1975, the Act was signed by the President and came into force.¹⁹²

In 1972 and 1973, many analysts recognized that the next round of GATT negotiations must address the increasingly troublesome "non-tariff barriers" (NTB's). However, under the U.S. constitutional system, it is considerably more difficult for the President to negotiate non-tariff rather than tariff agreements. Because of their complexity and because of the difficulty of establishing limitations on delegated authority, Congress was unwilling to grant the President advance authority to negotiate, accept, and implement international NTB agreements. On the other hand, because of Congress' failure to implement parts of the Kennedy Round, other nations were unwilling to negotiate with the United States if the results of all negotiations had to be approved by Congress.¹⁹³

189. H.R. 10710, 93d Cong., 1st Sess. (1973).

190. See, e.g., C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* (1974); L. JAWORSKI, *THE RIGHT AND THE POWER* (1976).

191. See War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976); H.R. REP. NO. 287, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2346; S. REP. NO. 220, 93d Cong., 1st Sess. (1973).

192. Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976); see 119 CONG. REC. 40,769 (1973) (House debate and action); 120 CONG. REC. 41,796 (1974) (same); 120 CONG. REC. 39,497, 41,629 (1974) (Senate debate and action); H.R. REP. NO. 571, 93d Cong., 1st Sess. (1973); S. REP. NO. 1298, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186; HOUSE CONF. COMM. TRADE ACT OF 1974 CONFERENCE REPORT, H.R. REP. NO. 1644, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7367.

193. In his testimony before the House Ways and Means Committee, Ambassador William R. Pearce, Deputy Special Representative for Trade Negotiations, said:

our trading partners are reluctant to negotiate with us until they have some assurance that agreements can be implemented, and implemented rather promptly. After all, when you put an offer on the table, you spend some political capital. You are offering to expose some part of the domestic economy to competition it hasn't had before, whether it is a

One proposed solution to this dilemma was the "legislative veto." Under this approach, the President would negotiate and complete a tentative international agreement, consult extensively with the Congress, and then submit a final agreement and implementing legislation to the Congress. If the Congress did not "veto" the action, the President's submissions would become law. The House of Representatives accepted this approach, but the Senate refused, arguing that the approach unconstitutionally extended too much power to the Presidency.¹⁹⁴

The ensuing search for a compromise position resulted in sections 102 and 151 of the Trade Act of 1974, sometimes called the "fast track" NTB authority. Under these provisions, the President would negotiate on various NTB matters and, ninety days before entering into international agreements on these matters, would notify the Congress and consult with key congressional committees about the proposed agreements. After consultation, the President would complete the international agreements, and submit them to Congress along with proposed legislation to implement them into United States law. The submission would be in the form of a normal bill, requiring approval by both Houses of the Congress as well as the President. However, the 1974 Trade Act fast track procedure estab-

tariff negotiation or NTB negotiation. No country is willing to do that — ourselves included — unless when we make an offer we have reasonable chance that, if accepted, it will result in agreement — and fairly soon.

Trade Reform: Hearings Before the Comm. on Ways and Means on H.R. 6767, 93d Cong., 1st Sess. 394 (1973) (testimony of William R. Pearce).

194. There is an extensive debate in the United States, still continuing, about the constitutionality of the legislative veto. Such a veto procedure is embodied in a number of statutes, including several such procedures elsewhere in the 1974 Trade Act itself. Recent writing on the legislative veto includes: Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogative*, 52 IND. L.J. 323 (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash*, 56 N.C. L. REV. 423 (1978); Henry II, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); Miller & Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51 (1979); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593 (1976); Volz, *Legislative Veto in the Arms Export Control Act of 1976*, 9 LAW & POLY. INTL. BUS. 1029 (1977); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); see also S. REP. NO. 1298, *supra* note 192, at 75. The U.S. Court of Appeals for the Ninth Circuit ruled, in *Chadha v. I.N.S.*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 454 U.S. 812 (Oct. 12, 1981), that the one-house veto provision in the Immigration and Nationality Act permitting an override of the Attorney General's decision to suspend deportation of an alien was unconstitutional. A similar legislative veto provision which allowed use of a one-house veto to disapprove a gas-pricing regulation by the Federal Energy Regulatory Commission was struck down in *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *appeal filed*, No. 81-2171, 51 U.S.L.W. 3025 (U.S. Aug. 3, 1982). Both cases have been appealed to the Supreme Court which, as of February 1983, had not rendered a decision.

lished three important procedural modifications: (1) a procedure requiring automatic "discharge" from committee consideration, so that the bill would necessarily have to be considered by the full House and Senate within a certain period of time; (2) a procedure that prohibited any amendments to the bill; and (3) a limitation on the debate on the floor of the House and the Senate. Thus, within a reasonable period of time, normally about sixty days of legislative session, the Congress would act on the negotiation results.¹⁹⁵

It was under this new procedure that most of the MTN results were approved and implemented during 1979.

D. *United States Participation in the Tokyo Round*

1. *Authority to Negotiate*

The President's authority in areas of international *trade* and other *economic* relations is very circumscribed and often depends on particular statutory delegations of authority. Executive participation in the Tokyo Round, therefore, relied heavily on the authority granted by the Trade Act of 1974. Without this Act, it is doubtful that the United States could have participated in a meaningful way.¹⁹⁶ There are at least five categories of sources of negotiating authority for U.S. representatives at the MTN (three of which are contained in the Trade Act of 1974):

First, section 101 of the Act granted the President "advance" authority to negotiate *and to implement* certain specified tariff reductions.¹⁹⁷ This section basically followed the statutory pattern and language of the series of U.S. trade acts beginning with the 1934 Act known as the "Reciprocal Trade Agreements Act." This was the most complete grant of authority given to the President in the 1974 Act. No congressional approval was needed under this provision. The President's authority under section 101, however, expired after five years.

Second, section 102 of the Act set forth explicit authority to negotiate international agreements on "non-tariff barriers and other distortions of trade," and provided the "fast track" NTB authority.¹⁹⁸

195. 19 U.S.C. §§ 2112, 2191 (1976). See S. REP. NO. 1298, *supra* note 192, at 74-77, 107-11; H.R. REP. NO. 1644, *supra* note 192, at 31.

196. See *Trade Agreements Act of 1979: Hearings Before the Subcomm. on International Trade of the Senate Committee on Finance, United States Senate on S. 1376*, 96th Cong., 1st Sess. 393 (1979) [hereinafter cited as *Senate Finance Comm. Hearings* (1979)] (statement of Robert S. Strauss, Special Representative for Trade Negotiations).

197. 19 U.S.C. § 2111 (1976).

198. See text at note 195 *supra*.

This section is carefully worded to apply the procedure only when "the President enters into a trade agreement under this Section."¹⁹⁹ It does not purport to require this procedure as to *all* international NTB or "trade distortion" agreements, because to do so would have raised constitutional issues. In some cases, the President could claim that his own authority (whether originating in the Constitution or stemming from prior statutes) allowed his negotiation and perhaps even implementation of NTB or agreements on trade distortions; *i.e.*, that 102 was unnecessary in certain cases. Additionally, the President always retained his general constitutional authority to negotiate an international agreement and submit it to Congress for approval without the benefit of the fast track.

Third, the Trade Act of 1974 implicitly recognized the authority of the President to negotiate on some matters. For example, section 121 includes a list of reforms that Congress desired relating to GATT and international trade rules. A clause of that section specifically stated, however, that approval and implementation of any agreements designed to achieve the desired reforms must be carried out pursuant to authorities granted elsewhere, *i.e.*, that section 121 did not itself grant any such authority. In addition to the fast track procedure, this section and the legislative history²⁰⁰ recognized a number of other authorities for presidential action such as authority contained in some other statutes to promulgate procedural regulations. For example, the congressional committee noted existing authority of the Secretary of the Treasury to establish regulations regarding "country of origin" marks.²⁰¹ Likewise, the President has diplomatic authority to agree to various procedures for the settlement of disputes.²⁰²

Fourth, the President could always negotiate agreements that were not within the delegations of authority of the Trade Act of 1974, and then, if necessary, he could submit them for approval to Congress under normal constitutional procedures. For example, although the 1974 Trade Act Section 101 tariff agreement authority limited tariff cuts to sixty percent from the tariff existing just prior to the Act, a deeper tariff cut could be agreed upon subject to later approval by Congress. (A few such agreements did occur.)²⁰³

199. 19 U.S.C. § 2112 (1976).

200. S. REP. NO. 1298, *supra* note 192, at 87; Trade Act of 1974, § 102(a), 19 U.S.C. § 2112 (1976).

201. 19 U.S.C. § 1304 (1976).

202. H.R. Doc. No. 153, pt. 2, 526-27 (1979) (Statement of Administrative Action); H.R. REP. NO. 571, *supra* note 192, at 65; S. REP. NO. 249, 96th Cong., 1st Sess. 232-35, 238.

203. See notes 241-42 *infra* and accompanying text.

Finally, there was the possibility of previously delegated or inherent presidential authority to negotiate, accept, and implement agreements. This was to some extent recognized in the 1974 Trade Act.²⁰⁴ But even some authority not recognized by the 1974 Trade Act could supply a residuum of additional authority for the President and his officials for their MTN participation.²⁰⁵

2. *The Structure of the United States Government for Participation in the MTN*

In the legislation which established the authority for U.S. participation in the Kennedy Round of trade negotiations (the Trade Expansion Act of 1962), Congress had established the position of the Special Trade Representative, with ambassadorial rank, reporting directly to the President, for the purpose of taking charge of those negotiations on behalf of the United States. The 1962 Act represented certain compromises, because prior to that time the Department of State and the Department of Commerce had competed for the principal authority to conduct international trade negotiations.

After the Special Trade Representative (STR) was established, a staff was assembled by him (including two deputies at the ambassador rank), and a structure of interagency committees was set up to advise the President about trade policy matters. The most important of these committees was the Cabinet-level Trade Expansion Act Advisory Committee, established by the Trade Expansion Act of 1962.²⁰⁶ Under this were other inter-agency committees, including the Trade Staff Committee, which carried on most of the day-to-day work. Represented on these committees were officials from the Departments of State, Commerce, Labor, Agriculture, and the Treasury. The committees were usually chaired by an official from STR. In later years, they sometimes included representatives from the Department of Justice's Antitrust Division, the Department of Defense,

204. See Trade Act of 1974, § 121(c), 19 U.S.C. § 2131 (1976); S. REP. NO. 1298, *supra* note 192, at 86, 87.

205. See, e.g., Tariff Act of 1930, 19 U.S.C. § 1202, general headnote 11 (1976); S. REP. NO. 249 (1979), *supra* note 202, at 257-58.

206. Trade Expansion Act of 1962, §242. This section calls for a cabinet level advisory committee. Such a committee was established by regulation in 1963. This committee was called the Trade Expansion Act Advisory Committee and the regulations were codified at 48 C.F.R. ch. I (1968). Regulations also established committees below the cabinet level. These other committees were (in descending order) the Trade Executive Committee, the Trade Staff Committee, and the Trade Information Committee. The regulations establishing these committees were codified at 48 C.F.R. ch. II (1968). Title 48 of the United States Code was vacated at the end of 1968. Chapter II of the regulations was transferred to 15 C.F.R. ch. XI (1969), but chapter I was discontinued. The order vacating title 48 does not disclose the fate of the Cabinet-level committee.

the Council on International Economic Policy, the National Security Council, and other agencies. When the various departmental representatives on this committee could agree on a position, it usually became the official United States position. However, if any department disagreed, that department representative's superior could require that the matter be brought to an inter-agency committee at a higher level. Through this process an issue could ultimately be taken to the President himself for a decision.²⁰⁷

The Trade Act of 1974 did not fundamentally change this structure.²⁰⁸ However, the Act upgraded the STR to Cabinet rank,²⁰⁹ and permanently established his office as an agency within the Executive Office of the President.²¹⁰ Nevertheless, at this time, the expenses required for STR conduct of United States representation at the multilateral trade negotiation were controlled jointly by the STR and the Department of State.²¹¹ In addition, matters relating to GATT and international trade *other than* those of the MTN still fell within the jurisdiction of the Department of State. Consequently, there were two lines of authority to Geneva and to GATT: the normal mission to GATT, with a Minister responsible to the State Department charged with ongoing general GATT activities such as the annual Contracting Parties' sessions, as well as the Special Mission to the MTN.

In addition to the White House staff, congressional and private groups desired input into the Tokyo Round negotiations. After the Kennedy Round, the executive branch officials who had conducted the negotiations were criticized for not adequately consulting with Congress, or with the interested business sectors, in the formulation of U.S. positions and negotiating strategy. Consequently, one of the most important changes mandated by the Trade Act of 1974 was the explicit expansion of congressional liaison, and the measures taken for consultation with private business sectors concerning negotiating

207. See Malmgren, *Managing Foreign Economic Policy*, 6 FOREIGN POLY. 42, 48 (1972).

208. Trade Act of 1974, §§ 201-203, 19 U.S.C. §§ 2251-2253 (1976); Trade Act of 1974, § 301, 19 U.S.C. § 2411 (Supp. IV 1981).

209. The position of Executive Director of CIEP, as established by the International Policy Act of 1972, § 208, 22 U.S.C. § 2847 (1972), did not require Senate confirmation. However, in 1973, § 208 was amended to provide for Senate confirmation. 22 U.S.C. § 2847(a) (1976) (amending 22 U.S.C. § 2847). The Special Trade Representative has always required Senate confirmation. Trade Expansion Act of 1962, § 241(a), 76 Stat. 878, as amended.

210. Trade Act of 1974, § 141, 19 U.S.C. § 2171; S. REP. NO. 1298, *supra* note 192, at 105. See also *Senate Finance Comm. Hearings* (1979), *supra* note 196, at 442 for Senator Long's statement on why he fought to upgrade the position of the Special Trade Representative.

211. See, e.g., Act of Nov. 14, 1975, Pub. L. No. 94-131, 89 Stat. 611, 614 (1975).

positions.²¹²

With respect to congressional liaison, even in prior negotiating rounds, it had been the practice to have a congressional delegation to the negotiations consisting of two members of the Senate and two members of the House, officially accredited by the President as advisors to the U.S. delegation.²¹³ Senate and House members cannot devote a great deal of time to this activity, so it was felt that something more was needed. The Trade Act of 1974 specified²¹⁴ that the STR was obligated to keep congressional advisors informed of the negotiation, and the Act explicitly provided that the Chairmen of the House Ways and Means Committee and the Senate Committee on Finance could designate staff members of their committees to have access to information as provided to official advisers. Likewise, the Act required that reports be made regularly to the Congress. In carrying out these measures, both the Senate and House Committees hired additional full-time staff members to follow the progress of the MTN. These staff members were given access both to official documents of the MTN and to U.S. executive branch cables concerning the MTN. When they traveled to Geneva these staff members were sometimes permitted to be present during negotiating sessions.²¹⁵ They also met with representatives from other countries from time to time.

The Trade Act of 1974 also established an elaborate system of private advisory committees for trade negotiations.²¹⁶ The Act required the President to establish an Advisory Committee for Trade Negotiations for overall policy advice, chaired by the STR. In addition, the Act authorized the establishment of three general policy advisory committees, for industry, labor, and agriculture. Finally, the President was also authorized to establish sector advisory committees consisting of representatives of the particular private sectors within industry, labor, or agriculture.²¹⁷ Ultimately, twenty-seven Industry Sector Advisory Committees (ISAC's) and several agricultural sector advisory committees were established. These commit-

212. Trade Act of 1974, §§ 161-163, 135, 19 U.S.C. §§ 2211-2213, 2155 (1976).

213. The Trade Expansion Act of 1962, § 243, called for two members from each House of Congress to be accredited. The Trade Act of 1974, § 161, *supra* note 212, calls for delegations of five members from each House.

214. Trade Act of 1974, § 161(b), 19 U.S.C. § 2211(b) (1976); *see* H.R. REP. NO. 571, *supra* note 192; S. REP. NO. 1298, *supra* note 192.

215. *See* S. REP. NO. 249, *supra* note 202, at 6; H.R. REP. NO. 317, 96th Cong., 1st Sess. 26 (1979).

216. Trade Act of 1974, § 135, 19 U.S.C. § 2155 (1976); *see* H.R. REP. NO. 571 (1973), *supra* note 192, at 38; S. REP. NO. 1298, *supra* note 192, at 101.

217. Trade Act of 1974, *supra* note 216.

tees would meet on the call of the STR during the trade negotiations, to provide policy advice on the negotiations, technical advice, and information.

The possibility of having private citizen members of advisory committees present during actual negotiations was explored and rejected during the drafting of the Trade Act of 1974. It was stated, however, that the Advisory Committee members "can go up to the negotiating door."²¹⁸ This was intended to follow the lead of several foreign countries in encouraging close ties between private industries and the negotiating teams.

3. *Negotiating Tariff Reductions, and the Role of the ITC*

The Tariff Commission was an independent government agency with significant statutory responsibilities relating to anti-dumping and escape clause issues. The Trade Expansion Act of 1962 required the Tariff Commission to hold public hearings addressing possible tariff reductions and their impact on United States industry. This information was a prerequisite to the authority of the United States negotiators and the President to conclude and implement an agreement on tariff reductions. The Trade Act of 1974 continued this practice, but changed the name of the Tariff Commission to the International Trade Commission of the United States (ITC), to make clear that the Agency's authority embraced non-tariff issues.²¹⁹

Although the President's most extensive authority was in the field of tariff reductions, there were a number of explicit statutory procedures with which the executive branch had to comply, before entering into international tariff agreements. In particular, with respect to tariff negotiations, the President was required to submit a list of articles or products whose tariffs might be subject to negotiation. Within six months after receipt of this list the ITC was required to advise the President about the probable economic effects of modifications of duties for each article. During this time, the Commission was charged with investigating and analyzing such information as it could obtain, and holding public hearings. After the ITC issued its recommendations, the STR was then required to hold its own public hearings. Eventually, the ITC's recommendations influenced the

218. *Hearings on H.R. 10710, the Trade Reform Act of 1973, Before the Senate Comm. on Finance*, 93d Cong., 2d Sess. 225 (1974) (statement of William Eberle, Special Representative for Trade Negotiations, Mar. 5, 1974); S. REP. NO. 1298, *supra* note 192, at 104; H.R. REP. NO. 571, *supra* note 192, at 38-40.

219. Trade Act of 1974, § 171, 19 U.S.C. § 2231 (1976); *see* S. REP. NO. 1298, *supra* note 192, at 115.

U.S. negotiating posture during the MTN.²²⁰

4. *The Countervailing Duty Problem*

One of the most perplexing issues of international trade policy is that of subsidies and their effect on international trade flows. The first problem is to determine what is a "subsidy." In a broad sense, a subsidy can include a wide range of government policies that have some effect on international trade flows. For almost a century, it has been established practice in international trade that an importing country is entitled to impose "countervailing duties" on goods benefiting from foreign subsidies.²²¹ The theory is that the countervailing duty offsets the advantage the subsidy gives to the imported goods. GATT Article VI continues this general approach, although it requires that the importing country establish that the subsidized goods are "injuring" competing domestic industry before the importing country is authorized to utilize countervailing duties.²²²

The United States Countervailing Duty law originated with an 1897 statute which provided that the Secretary of the Treasury shall apply countervailing duties to imported goods which benefit from a "bounty or grant."²²³ This statute applied only to dutiable goods, and contained no injury test. Thus, even though GATT Article VI requires an injury test, under the so-called "grandfather rights" mentioned above,²²⁴ the United States was technically in compliance with GATT obligations when it applied countervailing duties to goods even without an injury test, because the U.S. statute pre-dated GATT.²²⁵

As tariffs were reduced over the past several decades through international negotiation under the GATT, various non-tariff measures began to assume greater prominence in their effect on international trade flows. Increasingly, the United States government found that domestic manufacturers were urging it to apply countervailing duties to imported goods. For a variety of reasons,

220. Trade Act of 1974, § 131, 19 U.S.C. § 2151 (1976); U.S. INTL. TRADE COMMISSION, ANNUAL REPORT 15-16 (1977); U.S. INTL. TRADE COMMISSION, ANNUAL REPORT 25-29 (1979).

221. See generally Barcelo, *Subsidies and Countervailing Duties — Analysis and a Proposal*, 9 LAW & POLY. INTL. BUS. 779 (1977).

222. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. VI, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194,214.

223. 19 U.S.C. § 1303(a) (1976).

224. See note 9 *supra* and accompanying text.

225. 19 U.S.C. § 1303 (1976); see Department of Treasury, *Countervailing Duties in Williams Commission Papers* 409; S. REP. NO. 1298 (1974), *supra* note 192, at 185.

however, the Department of the Treasury, which administered these duties, was slow to respond. Sometimes, petitions or complaints for the application of countervailing duties were simply held by the Treasury, for years, without any action. Treasury actions were often the subject of congressional complaint on behalf of constituents who desired countervailing duties. By the time of the drafting of the Trade Act of 1974, a considerable amount of ill-will had built up between Congress and the executive branch on the issue of countervailing duties. As a consequence, the Trade Act of 1974 included a number of measures designed to circumscribe administrative discretion under the countervailing duty statute. In addition, the statute required publication of the Secretary of Treasury's determination on a countervailing duty petition. Finally the statute explicitly provided for judicial review even of a negative determination by the Secretary (that no "bounty or grant" existed).²²⁶ When judicial review had been sought earlier, one court had decided that the Secretary's action was not reviewable by the courts, but was a matter of "executive discretion."²²⁷

At the same time, upon request of the executive branch, the Trade Act of 1974 extended, for the first time, the application of countervailing duties to "nondutiable goods." The argument was that both dutiable and nondutiable goods could harm competing manufacturers if they were subsidized. On the other hand, since the GATT grandfather rights did not extend to *nondutiable* goods, because the statute governing those goods did not precede GATT, Congress included an injury test limiting the imposition of countervailing duties on *nondutiable* goods, but it continued the absence of an injury test on dutiable goods, noting that this would be a subject for agreement during the forthcoming trade negotiation.

To prevent the new U.S. countervailing duty regime with its greatly restricted scope for executive discretion from damaging the prospects for trade negotiations, Congress included a temporary "waiver" provision in the new countervailing duty law, which allowed the United States to suspend or waive countervailing duties under certain conditions.²²⁸ The waiver authority, however, was to

226. Trade Act of 1974, § 321(f)(1) (amending 19 U.S.C. 1516); see S. REP. NO. 1298, *supra* note 192, at 185.

227. *United States v. Hammond Lead Prods., Inc.*, 440 F.2d 1024, 1031 (C.C.P.A. 1971). This discretion could be analogous to "prosecutorial" discretion, especially if the practice triggering the importing government's response is viewed as a breach of law or of international rules of "fair trade." In the House Ways and Means Committee report, *Hammond Lead Products* is cited as the decision necessitating the amendment mentioned in note 36. H.R. REP. NO. 571, *supra* note 192, at 76.

228. These conditions included the following: (1) that there be a reasonable prospect for

expire January 2, 1979 (four years after the enactment of the 1974 Act). By mid-summer of 1978, the main lines of the multilateral trade negotiation were declared "completed," but many details were still left open.²²⁹ It was clear that the results of the MTN, including a potential new agreement on countervailing duties and subsidies, could not be completed before the January 2, 1979 deadline, and that consequently after that date the United States government executive branch would be forced to apply countervailing duties on a number of goods, including dairy products from the European Economic Community.²³⁰ Officials of the European Economic Community made a statement that the application of such duties could cause them to refuse to conclude the MTN negotiations or approve the MTN agreements. They stated that "we can't negotiate with this gun at our head."²³¹

In the fall of 1978, the executive branch therefore tried to persuade Congress to extend the deadline of the waiver authority. Unfortunately, this bill attracted amendments from various interest groups, trying to further certain particular goals they sought. For example, a textile group introduced an amendment to another bill which would have withdrawn the whole textile sector from the negotiation, and there was talk of putting this amendment on the countervailing duty waiver bill. In addition, certain business groups introduced legislation to broaden the potential of "adjustment assistance for firms" (loan and tax measures for manufacturing firms suffering from foreign competition).²³² The waiver extension was then

successful trade negotiations for reduction and elimination of barriers to international trade; (2) that adequate steps had been taken to reduce substantially or eliminate the adverse effects of a bounty or grant; and (3) that the imposition of such a countervailing duty would be likely to "seriously jeopardize the satisfactory completion" of the negotiations. This authority was explicitly provided to last for a four-year period from the enactment of the Act. The general negotiating authority on tariffs and, indeed, on non-tariff barriers, had a duration of five years. The shorter duration of the waiver provision for countervailing duties was understood by the Congress to indicate its view of the importance of negotiating new international rules concerning subsidies and countervailing duties.

Indeed, after the Act was enacted, a number of new petitions were received by the Treasury for the application of countervailing duties and, in nineteen cases, the Treasury felt it necessary to exercise the waiver to prevent jeopardizing the negotiations. *See* S. REP. No. 45, 96th Cong., 1st Sess. 8 (1979); T.D. 75-114, 9 Cust. B. & Dec. 229 (1975); 40 Fed. Reg. 21720 (1975).

229. *See* 214 INTERNATIONAL TRADE REPORTER: U.S. EXPORT WEEKLY (BNA) C-2 (July 11, 1978) [hereinafter cited as ITEX (BNA)]; 215 ITEX (BNA) AA-1 July 18, 1978; 4 GENEVA FOCUS: A REPORT FROM THE INDUSTRY CENTER FOR TRADE NEGOTIATIONS, 1 (No. 5, Oct. 13, 1978).

230. 4 GENEVA FOCUS: A REPORT FROM THE INDUSTRY CENTER FOR TRADE NEGOTIATIONS, 3 (No. 5, Oct. 13, 1978). *See also* European Community News Press Release No. 19/1978 (Oct. 16, 1978); Wall St. J., Oct. 20, 1978, at 22, col. 3.

231. *See* 226 ITEX (BNA) A-9 (Oct. 3, 1978); 227 ITEX (BNA) C-1 (Oct. 10, 1978), discussing the "Hollings Amendment" to the Eximbank extension.

232. *See Hearings on H.R. 1147 Before the Subcomm. on Trade of the House Comm. on*

procedurally linked to this bill by an amendment. Despite a rather intensive scramble to sort out the problems, the Congress adjourned in the early hours of the morning of Sunday, October 15, 1978, without having extended the waiver authority.²³³ Consequently, the U.S. executive branch was faced with the unhappy prospect of trying to mollify the European negotiators in the light of the potential application of countervailing duties, after January 2. Congress was not due to reconvene until January 15, so at the very least there was a two-week gap during which countervailing duties could apply. Moreover, since 1978 was an election year, there would undoubtedly be a substantial delay while the new Congress attempted to organize itself in 1979.

Interestingly enough, the solution was simply to tolerate a messy legal situation for several months until the matter could be rectified. Even though the waiver provision expired on January 2, 1979, any administrative agency would take time to react to the new legal conditions it faced. A "creative bureaucracy" can extend that time. In the early months of 1979, the executive branch forcefully presented its case to Congress for the extension of the waiver authority. In March, Congress agreed to extend the authority until September 30 or until a bill to implement the negotiations was enacted or defeated, whichever was earlier.²³⁴ In the meantime, no countervailing duties had in fact been applied, and the legislation extending the waiver authority clearly absolved companies from any liability for the interim period.²³⁵

5. Sectoral Negotiations

Section 104 of the Trade Act of 1974 established "sector negotiating objectives" for the United States.²³⁶ This provision encouraged

Ways and Means, 96th Cong., 1st Sess. 10-11 (1979) (to extend temporarily the authority of the Secretary of the Treasury to waive the imposition of countervailing duties).

233. See 228 ITEX (BNA) A-11 (Oct. 17, 1978).

234. Pub. L. No. 96-6, 93 Stat. 10 (1979); see H.R. REP. NO. 15, 96th Cong., 1st Sess. (1979); S. REP. NO. 45, 96th Cong., 1st Sess. (1979), reprinted in 1979 U.S. CODE CONG. & AD. NEWS 30; *Extension of Authority to Waive Countervailing Duties: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979). For the notice of administrative action to be taken by the U.S. Customs Service during the period between the expiration of the waiver authority and the subsequent extension of the authority, see 44 Fed. Reg. 141 (1979) and the memorandum reprinted at page 12 of the House Ways and Means Committee hearings.

235. The amendment was effective Jan. 3, 1979. Pub. L. No. 96-6, 93 Stat. 10 (1979). See H.R. REP. NO. 15, 96th Cong., 1st Sess. (1979); S. REP. NO. 45, 96th Cong., 1st Sess. (1979); 125 CONG. REC. H. 3756 (daily ed. Mar. 1, 1979); 125 CONG. REC. S3574 (daily ed. Mar. 28, 1979).

236. Trade Act of 1974, § 104, 19 U.S.C. 2114 (1976). See H.R. REP. NO. 571, *supra* note 192, at 20-23; S. REP. NO. 1298, *supra* note 196, at 22-23, 78-79; *Executive Hearing on Sector Negotiations Before the Senate Comm. on Finance*, 93d Cong., 2d Sess. (1974); A. RIBICOFF, A

the United States negotiators to pursue negotiating techniques in the MTN which would try to establish within "appropriate product sectors" equivalent competitive opportunities in the markets of all countries. Thus, a sectoral free trade agreement could be one result. Another might be, within a particular sector (such as steel) to obtain roughly the same level of protection in each of the major importing countries, whether such protection was afforded by tariffs or non-tariff barriers.²³⁷ Obviously, this is a difficult negotiating objective and the groups proposing this objective were inspired by a variety of motives.

Although some attempt was made to pursue a sectoral approach for certain sectors (particularly steel, aircraft, dairy, meat, and grains), generally, these attempts did not influence the final results of the MTN. Perhaps the most significant sector result of the MTN was for the aircraft sector, in which basically a free trade agreement was reached for a limited number of participating countries.²³⁸

E. *Accepting the MTN Results: U.S. Law*

1. *Legal Authority to Accept MTN International Agreements*

In the traditional academic terminology, the United States embraces a dualist philosophy in its reception of international legal obligations into its legal system. Thus it is possible for the United States to be bound by an international legal obligation under international law, but fail to follow that obligation in its domestic law (and then to be in noncompliance with its international obligation).²³⁹ This subpart focuses on the legal requirements and procedures which were necessary for the United States to *accept* the international law obligations of the MTN results, leaving for the next part the discussion of the implementation and compliance with those obligations.

In some cases the President had explicit authority to accept a MTN agreement. The most important illustration of this was the MTN tariff agreement, known as the Geneva Protocol (1979).²⁴⁰ Section 101 of the 1974 Trade Act authorized presidential acceptance

STRATEGY FOR INTERNATIONAL TRADE NEGOTIATIONS 9 (Comm. Print, Report to Senate Comm. on Finance, 93d Cong., 1st Sess. 1973).

237. See H.R. REP. NO. 571, *supra* note 192, at 22; S. REP. NO. 1298, *supra* note 192, at 79.

238. See generally Piper, *Unique Sectoral Agreement Establishes Free Trade Framework*, 12 LAW & POLY. INTL. BUS. 221 (1980).

239. See L. HENKIN, *supra* note 166, at 151; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 (1965); I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 610-11 (3d ed. 1979).

240. Trade Act of 1974, § 101, 19 U.S.C. § 2111 (1976).

and implementation of certain tariff concessions under these Protocols. Pursuant to that authority, the President's representative to GATT signed these Protocols in Geneva on July 11, 1979. Effectiveness was made contingent, however, on the passage of the Trade Agreements Acts of 1979.²⁴¹

This contingency was necessary because some of the proposed tariff concessions negotiated at the Tokyo Round went beyond the authority of section 101, and consequently required acceptance under section 102. Presidential Proclamation 4707 of December 11, 1979, implemented the tariff concessions in U.S. law relying both on the authority of Section 101 of the 1974 Act and on various sections of the 1979 Act.²⁴²

The President probably had authority apart from the Trade Agreements Act of 1979 to accept certain other MTN agreements as well. For example, the agreements on Bovine Meat and Dairy Products basically only set up an international consultation mechanism, presumably a matter within inherent presidential authority.²⁴³ The Agreement on Licensing needed no legislation for implementation since the President had authority to regulate licensing under existing legislation.²⁴⁴ Consequently, it was also likely that the President had authority to *accept* the Licensing Agreement on his own authority, although analogous activity by the President has been challenged.²⁴⁵

With the exception of the principal tariff agreements mentioned above, Section 2 of the Trade Agreements Act of 1979 provided *explicit* authority for the President to accept all the major MTN agreements, and all the bilateral MTN agreements to which the United States was a party.²⁴⁶ This statutory acceptance authority, however,

241. 265 ITEX (BNA) C-4 (July 17, 1979) and Special Supplement at 29; GATT Doc. 1/4914/Rev. 2 (July 23, 1980).

242. Trade Agreements Act of 1979, §§ 2(b)(2)(A), 502, 503(a)(2)(A), 855(a), 93 Stat. 147, 251, 295. Proclamation to Carry Out the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade and for Other Purposes, Proclamation 4707 of Dec. 11, 1979, 44 Fed. Reg. 72348 (1979).

243. "Arrangement Regarding Bovine Meat," GATT, BASIC INSTRUMENTS 84 (26th Supp. 1980) and "International Dairy Arrangement," GATT, BASIC INSTRUMENTS 91 (26th Supp. 1980).

244. See S. REP. NO. 249, *supra* note 202, at 257.

245. The challenge to the 1967 Anti-dumping Code included the idea that the President did not have the authority to change long-standing administrative practices without congressional approval. See S. REP. NO. 1385, 90th Cong., 2d Sess. Part 2 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 4529, 4551.

246. Section 2(c) of the Trade Agreements Act of 1979, 19 U.S.C. § 2503(c) (Supp. III 1979), lists the following Agreements:

- (1) The Agreements on Implementation of Article VII of the General Agreement on Tariffs and Trade (relating to customs valuation).
- (2) The Agreement on Government Procurement.

was qualified in three important ways.

First, because the MTN had not been completely finalized at the time of enactment of the 1979 Act (certain corrections or later minor changes were expected), the statutory draftsmen were faced with the problem of how to authorize acceptance of nonfinalized agreements and yet not give the Executive a blank check to enter into agreements which have not been approved by Congress. The uneasy solution was language authorizing the President to accept the "final legal instruments or texts" of trade agreements approved by the Congress, if the differences between the final text and the text earlier submitted to Congress were only "rectifications of a formal character or minor technical or clerical changes," or if the changes were only in "annexes" to the agreement and the President determines that the balance of rights and obligations for the United States had been maintained.²⁴⁷ One particular example of the use of this latter authority was the Government Procurements Agreement. The United States and Japan continued to negotiate on the "entities" to be included in the Annex to that agreement until December 1980, at which time agreement was reached and formalized through an exchange of letters. On December 23, 1980, the United States announced that it was accepting the Government Procurement Code and the Code came into effect on January 1, 1981.²⁴⁸

Second, the "acceptance" authority of section 2 of the Trade

(3) The Agreement on Import Licensing Procedures.

(4) The Agreement on Technical Barriers to Trade (relating to product standards).

(5) The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures).

(6) The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to anti-dumping measures).

(7) The International Dairy Arrangement.

(8) Certain bilateral agreements on cheese, other dairy products, and meat.

(9) The Arrangement Regarding Bovine Meat.

(10) The Agreement on Trade in Civil Aircraft.

(11) Texts Concerning a Framework for the Conduct of World Trade.

(12) Certain Bilateral Agreements to Eliminate the Wine-Gallon Method of Tax and Duty Assessment.

(13) Certain other agreements to be reflected in Schedule XX of the United States to the General Agreement on Watch Making Requirements, and to Modify United States Tariffs and Trade, including Agreements —

(A) to Modify United States Tariff Nomenclature and Rates of Duty for Watches.

(B) to Provide Duty-Free Treatment for Agricultural and Horticultural Machinery, Equipment, Implements, and Parts Thereof, and

(C) to Modify United States Tariff Nomenclature and Rates of Duty for Ceramic Tableware.

(14) The Agreement with the Hungarian People's Republic.

Note the exceptional ambiguity of item number 13.

247. Trade Agreements Act of 1979 § 2(b)(1), 19 U.S.C. § 2503(b)(1) (Supp. III 1979).

248. Determination Regarding Acceptance and Application of the Agreement on Govern-

Agreements Act of 1979 imposed the limitation that "No agreement accepted by the President . . . shall apply between the United States and any other country unless the President determines that such country — (1) has accepted the obligations of the agreement with respect to the U.S., and (2) should not be denied the benefits because it has not accorded adequate reciprocity to the commerce of the United States, required from other industrial countries by Section 126(c) of the 1974 Trade Act."²⁴⁹ This condition is obviously troublesome. This problem must be distinguished, however, from Most-Favored-Nation treatment. Even if the U.S. *accepts* an agreement but does not *apply* that agreement to another country, it may still apply its own law implementing the obligations of the agreement, in a non-discriminatory way, to trade of all other nations whether parties to the particular agreement or not.²⁵⁰ Thus, in revising its anti-dumping law to conform to the new Anti-Dumping Agreement of the MTN, the United States did not distinguish between trade from nations who are, or are not, parties to *this* MTN Agreement. In other cases, however, this was not true.

The 1979 statute's reciprocity condition implies a legal mechanism under which the United States could accept a particular MTN agreement without applying it to other countries, some of whom were also parties to the same agreement. As to the obligation to apply a MTN agreement to nations which have not accepted the same agreement, this is a question either of the language of the agreement

ment Procurement, 45 Fed. Reg. 252 (1980). See also Statement Concerning Executive Order 12260 on Agreement on Government Procurement, 46 Fed. Reg. 1657 (1981).

249. No agreement accepted by the President under paragraph (1) shall apply between the United States and any other country unless the President determines that such country — (A) has accepted the obligations of the agreement with respect to the United States, and (B) should not otherwise be denied the benefits of the agreement with respect to the United States because such country has not accorded adequate benefits, including substantially equal competitive opportunities for the commerce of the United States to the extent required under section 126(c) of the Trade Act of 1974 (19 U.S.C. 2136(c)), to the United States."

Trade Agreements Act of 1979, § 2(b)(2), 19 U.S.C. § 2503(b)(2) (Supp. III 1979).

If the President determines under subsection (b) of this section that a major industrial country has not made concessions under trade agreements entered into under this chapter which provides substantially equivalent competitive opportunities for the commerce of the United States, he shall, either generally, with respect to such country or by Article produced by such country, in order to restore equivalence of competitive opportunities, recommend to the Congress —

(1) legislation providing for the termination or denial of the benefits of concessions of trade agreements entered into under this chapter made with respect to rates of duty or other import restrictions by the United States; and

(2) that any legislation necessary to carry out any trade agreement under section 2112 of this title shall not apply to any such country.

Trade Act of 1974 § 126(c), 19 U.S.C. § 2136(c) (1976).

250. *E.g.*, Trade Agreements Act of 1979, §§ 101 (adding title VII to the Tariff Act of 1930), 106 (repealing Anti-Dumping Act of 1921, 19 U.S.C. § 160 & other amendments).

itself, or of a MFN obligation in some other international agreement. The principal other source of such obligation is, of course, the GATT itself (MFN in Article I) which indeed may apply in a number of such cases.²⁵¹ Other agreements, such as bilateral Friendship, Commerce, and Navigation agreements, could also give rise to a MFN obligation.²⁵²

In addition, however, some of the MTN agreements purport to be "agreed interpretations" of provisions in the GATT itself²⁵³ and as such could arguably be interpreted to imply an obligation to treat all other GATT members in the manner required by that specific MTN agreement. It is also theoretically possible (although not the case) that a MTN agreement could explicitly provide that parties to it would treat all GATT members, or all other nations (or some subset of them) in a manner required by that Agreement.²⁵⁴

251. The United States does not apply MFN treatment in its implementation of the results of three of the Multilateral Trade Agreements — The Subsidies and Countervailing Measures Code, the Government Procurement Code, and the Standards Code. *See* Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, GATT, BASIC INSTRUMENTS 56 (26th Supp. 1980), Agreement on Government Procurement, GATT, BASIC INSTRUMENTS 33 (26th Supp. 1980) and Agreement on Technical Barriers to Trade, GATT, BASIC INSTRUMENTS 8 (26th Supp. 1980). *See also* Hufbauer, Erb & Starr, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 LAW & POLY. INTL. BUS. 59 (1980).

252. Friendship, Commerce, and Navigation agreements such as Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593, 273 U.N.T.S. 3 (entered into force July 14, 1956); *see* Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958). *See also* Trade Agreements Act of 1979 § 101, 19 U.S.C. § 701(b)(3) (Supp. III 1979), in which the term "country under the Agreement" is defined to include a country with respect to which the President determines that —

- (A) there is an agreement in effect between the United States and that country which —
 - (i) was in force on June 19, 1979, and
 - (ii) requires unconditional most-favored-nation treatment with respect to Articles imported into the United States,
- (B) the General Agreement on Tariffs and Trade does not apply between the United States and that country, and
- (C) the agreement described in subparagraph A does not expressly permit —
 - (i) actions required or permitted by the General Agreement on Tariffs and Trade, or required by Congress, or
 - (ii) nondiscriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

The Senate Report lists agreements with seven countries which could potentially meet these requirements. These countries are Venezuela, Honduras, Nepal, North Yemen, El Salvador, Paraguay, and Liberia. S. REP. NO. 249, *supra* note 205, at 45.

253. *E.g.*, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (relating to customs valuation), GATT, BASIC INSTRUMENTS 116 (26th Supp. 1980); Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures), GATT, BASIC INSTRUMENTS 56 (26th Supp. 1980); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (relating to antidumping measures), GATT, BASIC INSTRUMENTS 171 (26th Supp. 1980).

254. A search of the MTN agreements revealed no such provision.

As to the nonapplication of a particular agreement to another party to that same agreement, this seeming anomaly (which "reservation" rules might in some cases legitimize under international law)²⁵⁵ stems from the strong precedent of GATT Article XXXV which allows (under certain circumstances) a GATT contracting party to give notice of the nonapplication of the GATT between it and another GATT member.²⁵⁶ An explicit clause in some of the MTN agreements allows this same type of action.²⁵⁷

Third, the final important qualification of the "acceptance" authority in the 1979 Act (section 2(b)(3)) prevents the President from accepting certain agreements (all the major multilateral agreements of the MTN except the tariff agreements) unless all "major industrial country" MTN participants also accept. The statute defines "major industrial country" as the European Communities (whose acceptance is deemed acceptance by the Member States for this purpose), Canada, and Japan and other countries designated by the President.²⁵⁸ Despite the condition, however, the statute allows the President to accept the agreement if: (1) only one major industrial country has not accepted and that country is not a major factor in the trade in products covered by the agreement, (2) the President has authority to deny the benefits of the agreement to that country and takes steps to do so, or (3) U.S. trade would benefit anyway and the President reports that it is in the national interest to accept the agreement.

Under this clause, some difficult situations arose for the acceptance and implementation of the MTN agreements. The United States, through the 1979 Act, was the first major industrial partici-

255. Most of the MTN agreements prohibit reservations without the consent of all parties, *see, e.g.*, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, Art. 23, GATT, BASIC INSTRUMENTS 116 (26th Supp. 1980); Agreement on Import Licensing Procedures, Sec. 18, GATT, BASIC INSTRUMENTS 154 (26th Supp. 1980). *See* Bishop, *Reservations to Treaties*, 103 RECUEIL DES COURS 245 (Hague Acad. of Intl. Law) (1961).

256. *See* WORLD TRADE, *supra* note 3, at 100-02.

257. *See, e.g.*, Agreement on Government Procurement, Part IX, ¶9, GATT, BASIC INSTRUMENTS 33 (26th Supp. 1980); Agreement on Import Licensing Procedures, Sec. 24, GATT, BASIC INSTRUMENTS 154 (26th Supp. 1980); Agreement on Implementation of Article VI, ¶10, GATT, BASIC INSTRUMENTS 171 (26th Supp. 1980); Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of GATT, Art. 19, Sec. 9, GATT, BASIC INSTRUMENTS 56 (26th Supp. 1980); Agreement on Trade in Civil Aircraft, Art. 9.7, GATT, BASIC INSTRUMENTS 162 (26th Supp. 1980).

258. Trade Act of 1974 § 126(d), 19 U.S.C. § 2136(d) (1976) defines the term "major industrial countries" as follows: "For purposes of this section, 'major industrial country' means Canada, the European Economic Community, the individual member countries of such Community, Japan, and any other foreign country designated by the President for purposes of this subsection."

part in the MTN to obtain executive authority to accept the results. It then acted to accept "conditionally."²⁵⁹ The European Economic Community delayed such action partly because of an internal constitutional dispute over which institutions or governments had the competence to authorize acceptance of the MTN agreements. The EEC, however, accepted the agreements by the end of 1979.²⁶⁰ Canada, also, first appeared to be delaying (partly because of an election) but acted before the end of 1979.²⁶¹ This left Japan, which found itself totally unable to finish the acceptance procedure before 1980. A new Parliament was elected in October 1979 in Japan, and this Parliament took time to organize.²⁶² The cabinet officials took the necessary steps to recommend approval of the MTN results, and the Parliament finally acted in April 1980.²⁶³ The uneasy solution utilized in United States law was for the President to determine that,

(ii) in accordance with Section 2(b)(3) of the Act (93 Stat. 147), the acceptance of these agreements by Japan is not essential to the effective operation of the agreements for that period of time during which Japan is completing its Constitutional procedures to accept the agreements and in light of the stated intention of the Government of Japan to act in the interim in line with the agreements within its existing powers.²⁶⁴

2. *The Fast Track Procedure for NTB Agreements, and the Drafting of the Trade Agreements Act of 1979*

Congressional approval was required for the United States both to accept and implement the major nontariff agreements of the MTN. Under the Trade Act of 1979 this was to be accomplished by normal legislation, considered by Congress under the fast track procedure described above.²⁶⁵ The procedures operated in an interesting manner, which are analyzed in this section.

Under the fast track procedure, the President was required to notify the Congress 90 days before he signed any NTB agreements, and to consult with key congressional committees during those 90 days.

259. 287 ITEX (BNA), at A-3 (Dec. 18, 1979).

260. Council Decision of Dec. 10, 1979, concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations, O.J. EUR. COMM. (No. L 71/1) (1980); see also 288 ITEX (BNA), at A-5 (Jan. 1, 1980).

261. See 287 ITEX (BNA), at C-2 (Dec. 18, 1979); 288 ITEX (BNA), at A-6 (Jan. 1, 1980).

262. See 287 ITEX (BNA), at A-3 (Dec. 18, 1979); 4 INTL. TRADE REPORTER: U.S. IMPORT WEEKLY (BNA), at A-11 (Nov. 28, 1979) [hereinafter cited as ITIM(BNA)] .

263. See Part III *supra*.

264. Presidential Determination Regarding the Multilateral Trade Negotiations and Acceptance and Application of Certain International Trade Agreements, 44 Fed. Reg. 74,781, § 1 (Dec. 14, 1979).

265. See Trade Act of 1974 §§ 102, 151, 19 U.S.C. §§ 2112, 2191 (1976).

Congress had been kept informed generally throughout the course of the Tokyo Round negotiations, and key congressional committees had developed professional staff whose full time was devoted to following the course of the negotiations. When the President notified Congress in early January 1979 about the tentative NTB agreements, his officials sent Congress detailed information about the status of the negotiations, including the tentative drafts of various NTB agreements.²⁶⁶ Anticipating this, congressional staff, in consultation with key Senators and Congressmen, had designed a procedure for the consultation which closely paralleled the normal procedure followed in work on bills except that, in this case, no bill was yet introduced in the Congress.

When a Committee of Congress begins formally to consider a bill that has been introduced, and to prepare that bill for report to the floor of the whole House, its session is often called a "markup," indicating that the committee is "marking up" the bill with its proposed changes. The "consultations" with the executive branch during the 90-day period prior to completion of the international agreements were called "non-markup" sessions, and closely followed this type of procedure. One important difference was that the sessions were not open to the public.

The principal committees devoting time to the MTN were the Senate Finance Committee and the House Ways and Means Committee. These committees met extensively with executive branch officials, including the trade negotiators, and occasionally entered into detailed negotiations about the matters which should be included in a U.S. statute implementing the international agreements. Particularly close attention was given to the anti-dumping and countervailing duty laws.²⁶⁷ Perhaps most surprising, the members of Congress informed the executive branch that they wanted their own staff (including the legal staff of the House and the Senate) to develop the actual text of the bill which the President would introduce.

Other procedures also paralleled the normal legislative processes. On certain issues the House Ways and Means Committee and the

266. See COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING NOTICE OF SEVERAL TRADE AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, PURSUANT TO SECTION 102(e)(1) OF THE TRADE ACT OF 1974, H.R. DOC. NO. 33, 96th Cong., 1st Sess. (1979), for a summary of the status of the negotiations at that time.

267. See House Ways and Means Committee, Press Release No. 14 (Mar. 19, 1979); Senate Finance Committee, Press Release No. 112 (Apr. 5, 1979); Senate Finance Committee, Press Release No. 115 (May 3, 1979); Senate Finance Committee, Press Release No. 116 (May 8, 1979); Joint Press Release No. 1 (May 24, 1979).

Senate Finance Committee did not agree, and so they held a "non-conference" joint session,²⁶⁸ at which they resolved their differences, to enable the two Houses to present a united front to the executive branch. Throughout this process the executive branch officials participated, influenced the deliberations, and were in a position of some bargaining power, since it was understood that it was the *President's* bill that would ultimately be introduced and which thereafter could not be amended.²⁶⁹

After the international agreements were initialed in Geneva, the executive branch prepared the bill that the President introduced to Congress. Understanding political realities, the President's officials adopted almost in its entirety the draft bill which had been prepared by the congressional committees and staff. The President then arranged to have this bill introduced in June 1979.²⁷⁰

Since the bill could not be amended, when the bill was introduced the basic substantive work was over. Thus, from the point of view of Congress, the consultation period, including the "non-markup" and the "non-conference," that went on prior to the introduction of the bill, was crucial to shaping the bill in a manner that would gain enough support in both Houses of Congress to permit passage. Thus, after the bill was introduced, the normal procedures for enacting legislation were a formality. To no one's surprise, the bill passed.²⁷¹ What was surprising was the overwhelming vote in favor of the bill: 90 to 4 in the Senate, and 395 to 7 in the House.²⁷²

One unusual development in these congressional proceedings was the degree of foreign involvement they attracted. As the congressional Committees' "non-markup" sessions began their work, officials of the European Economic Community realized the significance of these proceedings. They recognized that the statute Congress was formulating would have a profound effect on the implementation of the MTN Agreements. Once the statute became U.S. law, it would be hard to persuade the U.S. Congress to change it. Thus, other nations might shape their own implementation of the

268. In normal bills, a conference committee session to resolve differences in the two houses is typical.

269. This was probably the most important feature of the "fast track" procedure.

270. H.R. REP. NO. 317, 96th Cong., 1st Sess. 8 (1979).

271. July 23, 1979, signed July 26, 1979. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. § 2501) (Supp. III 1979).

272. See 125 CONG. REC. S10,340 (daily ed. July 23, 1979) and 125 CONG. REC. H5690 (daily ed. July 11, 1979). Destler notes that five of the eleven legislators voting against the Act were from Wisconsin and that the dairy industry in that state objected to increases in cheese imports allowed in U.S. concession. See DESTLER, MAKING FOREIGN ECONOMIC POLICY 202 (1980).

MTN Agreements in accordance with the precedent in the United States. The fact that the United States procedures were moving faster than those of any other country would also be influential. Consequently, the EEC took the logical step: they hired professional (legal and economic) representation in Washington, D.C., to monitor the congressional consultations with the executive branch officials. These representatives reported quickly and frequently to the EEC officials, permitting EEC negotiators to raise certain issues with their American counterparts. If the Congressional-Executive Sessions began moving in an undesirable direction, the EEC could make it known that certain statutory formulations would be deemed a breach of the international obligations assumed by both the EEC and the United States. One example of this was the phrasing of the injury test for the anti-dumping and countervailing duty agreements. U.S. law used the word "injury," rather than the phrase "material injury," in its anti-dumping procedures. GATT Article VI required the phrase "material injury." Since U.S. law preceded the GATT, grandfather right exceptions could be argued. On the other hand, the 1967 Anti-Dumping Code using the term "material injury" had been accepted by the United States. For more than a decade, foreign countries argued that the United States was not living up to its 1967 anti-dumping code obligations. The United States argued, however, that even though the U.S. statute omitted the adjective "material," material injury had existed in fact in all U.S. anti-dumping procedures. This is an exceedingly difficult proposition to refute since it would require a *de novo* examination of the complicated facts.

The word "material" was included in the MTN Countervailing Duty and Anti-Dumping Agreements. Initially, however, the executive branch officials seemed willing to accept statutory formulations that did not include the word "material." Presumably they would continue to argue that a material injury test would *in fact* be utilized. The EEC negotiators let the United States know that this was unacceptable, and that they would insist that the statute include the word "material." As a result of these negotiations, and the presentation of these views to the committees of Congress, the word "material" was finally included in the U.S. statute. Interestingly enough, however, the committee reports describing the meaning of the "material injury" test stated that the meaning (as to anti-dumping law) was to be that which had been previously applied by the International Trade Commission in recent years under the "injury" test. Thus, Congress expressed its view that "material injury" had long been the *de facto*

criterion and that the word "material" added nothing to the word "injury."

The new injury test phrase will have to be applied a number of times before it will become evident if U.S. policy has actually changed. However, the whole incident demonstrates the trend in modern diplomacy for foreign representatives to participate in seemingly domestic governmental procedures.²⁷³

Participants suggest that, throughout this process, congressional committees were responsive to executive branch objectives that nothing be included in the U.S. statute that would require the United States to default in any of its international obligations under the MTN results. Congressmen were careful to avoid such provisions in the proposed statute. In fact, after the bill was forwarded to the Congress in final form, the Commission of the European Economic Communities issued an official statement that, in the opinion of the EEC officials, on the whole the bill reflected both the spirit and the letter of the MTN Agreements.²⁷⁴

Several aspects of this procedure for enacting the Trade Agreements Act of 1979 are potentially significant. First, the Congress was evidently pleased with the procedure. The involvement of the con-

273. About the involvement of the EEC, see 12 BULL. EUR. COMM. 5, 75 (1979), where it is stated that, prompted by rumors that the future American legislation implementing the code on subsidies would not interpret correctly the idea of "material injury," the Community has approached the American authorities. See also 12 BULL. EUR. COMM. 4, 15 (1979); N.Y. Times, Apr. 21, 1979, at 29, col. 6; European Community News Press Release No. 14/1979 (Apr. 25, 1979); European Community News Press Release No. 28/1979 (July 16, 1979). For some comments on U.S. law and the material injury test see Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 L. & POLY. INTL. BUS. 1361, 1421 (1979); Marks, *Recent Changes in U.S. Import Restrictions*, in AIDS AND SAFEGUARD MEASURES IN INTERNATIONAL TRADE LAW (P. Demaret ed. 1980) (XXXIId Conference, University of Liege, Liege, Belgium, Oct. 18-20, 1979); Alberger, *The concept of injury in United States trade law — the role of the U.S. International Trade Commission*, in AIDS AND SAFEGUARD MEASURES IN INTERNATIONAL TRADE LAW (P. Demaret ed. 1980) (XXXIId Conference, University of Liege, Liege, Belgium, Oct. 18-20, 1979).

274. "The European Commission notes that the texts agreed on in Geneva have not been transferred literally into this Act with all the accuracy that is required, but *on the whole, the American Act reflects the spirit and the letter of the agreements*. The Act alone does not provide a full guarantee that the United States will meet all its commitments. Some texts lend themselves to several interpretations and some procedural provisions still have to be stipulated. The Commission therefore intends to follow very closely the way in which the legislation is put into practice, in compliance with the Geneva commitments." *Europe* (Agence Internationale d'Information pour la Presse) Press Release No. 2763 (n.s.) at 7 (Oct. 6, 1979). See also Final Report by the Commission on the MTN where the Commission notes: "With the United States major agreements have been arrived at, both in the industrial and agricultural sectors. The United States customs tariffs will have fewer peaks and in the nontariff field the United States will come into line with the GATT, particularly in relation to the criterion of "material injury," for the application of countervailing duties, abolition of the American Selling Price and Final List systems of valuation, elimination of the discriminatory fiscal system of wine gallon assessment on alcoholic beverages, and significant changes in the application of the Buy American Act." 10 BULL. EUR. COMM. 7, 8 (1979).

gressional committees in the drafting process gave Congress confidence that the executive branch was not trying to enter agreements without congressional input. For example, at one point in the consultative period prior to finalizing the international agreements, a particular criticism was voiced by members of Congress on behalf of small business constituents. They complained that the proposed agreement on Government Procurement would reduce their "small business preference" under existing U.S. law. Executive branch negotiators sensed both the importance of this issue to Congress and the relative unimportance of the issue to the policies underlying the MTN. Consequently, the U.S. negotiators immediately approached other countries and obtained approval from them to alter the proposed agreement in such a way as to take care of the problem.²⁷⁵ The incident illustrated the value of the consultation period before the international agreement was completed.

Congress's satisfaction with the procedure is evidenced not only by statements in the committee reports and other legislative history,²⁷⁶ but more concretely by the fact that the Congress extended the time period for this procedure by eight years beyond the period contained in the 1974 Act.²⁷⁷ In addition, Section 3(c) of the 1979 Act adopted virtually the same procedure for amending U.S. law implementing the MTN Agreements, when such amendments are necessary to fulfill a "requirement of, amendment to, or recommendation under such an agreement."²⁷⁸ Thus, if an international disputes panel rules against the United States on a question of interpretation of an MTN agreement, and U.S. law prevents the executive from implementing the international interpretation, this

275. A front-page story in the Washington Post of March 14, 1979, led to criticism of the U.S. position in the negotiations on a government procurement code. The story stated that the United States would agree to a relaxation of preferences for small and minority businesses in its government procurement practices. Members of the Subcommittee on General Oversight and Minority Enterprise of the House Committee on Small Business expressed concern that small businesses would pay a price for benefits which would flow largely to multinational corporations. They criticized the STR for the lack of prior consultation with those in the executive and legislative branches involved with small and minority business concerns. Special Trade Representative Robert Strauss defended the administration's position in testimony before the subcommittee on March 20, 1979. On March 22, the administration announced that Japan and the European Community had approved a change that would exclude United States set-aside programs for small and minority businesses from the coverage of the agreement. It appears that the inclusion of NASA in the U.S. entity list was part of the deal. See Washington Post, Mar. 14, 1979 at A-1, col. 1; *id.*, Mar. 21, 1979 at D-6, col. 1; *id.*, Mar. 23, 1979 at F-1, col. 1. See generally *Multinational Trade Negotiations: Hearings Before the Subcomm. on General Oversight and Minority Enterprises of the House Comm. on Small Business*, 96th Cong. 1st Sess. (1979).

276. See S. REP. NO. 249, *supra* note 202, at 5.

277. See Trade Agreements Act of 1979, § 1101 (amending 19 U.S.C. § 2112(b) (1976)).

278. Trade Agreements Act of 1979, § 3(c), 19 U.S.C. § 2504(c) (Supp. III 1979).

procedure could be followed to change U.S. law.²⁷⁹

The fast track procedure thus holds considerable potential as a means of providing both executive flexibility in international dealings, and congressional responsiveness to constituents. The fast track procedure may also soften the recurrent disagreements between these two branches of government over the issues of international trade.

Second, there is an unusual problem with the interpretation of the 1979 Act. Normally, United States courts take note of a statute's legislative history when interpreting a statute. This history consists, *inter alia*, of the committee hearings, debates, and reports, and statements on the floor of both houses while considering the bill. The theory is that the intent of Congress, when ambiguous in the statutory language itself, can sometimes be ascertained by congressional statements made during the drafting process. Under the fast track procedure, however, a bill, which could not be amended, was introduced by the *executive*. Thus, the executive was the draftsman, and the executive's intent was arguably the "intent of the draftsman." The executive sent to Congress, along with the final draft of the bill, "Statements of Administrative Action" indicating its intentions in administering the new legislation.²⁸⁰ Thus these statements are an important part of the legislative history, and may be the definitive source of legislative intent. However, the actual history of the executive-congressional consultative process suggests a somewhat different approach, and the House and Senate Committee reports reflect that difference. Although these reports were formulated by the key congressional committees in reporting on the actual bill introduced, and thus came at a time when no amendments were permitted to the bill, the reports state:²⁸¹

The committee emphasizes that virtually all of the provisions of H.R. 4357 [which became the TAA of 1979] reflect the decisions of the House and Senate committees, as coordinated in the joint meetings noted above. The implementing bill was drafted in the offices of the House and Senate Legislative Counsel with the participation of staff members of the committees of jurisdiction in both Houses and representatives from the Administration. The bill reflects the understandings achieved on all issues, as explained in this report.

Thus, the report claims to be a prime source of legislative history,

279. See S. REP. NO. 249, *supra* note 202, at 36.

280. U.S. HOUSE OF REPRESENTATIVES, TRADE AGREEMENTS ACT OF 1979: STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 153 pt. 2, 96th Cong., 1st Sess. (1979).

281. S. REP. NO. 249, *supra* note 202, at 6; see also H.R. REP. NO. 317, *supra* note 270, at 28.

just as it would be in the case of other legislation. Moreover, it also presents a view of the role of the Statements of Administrative Action, and notes that those Statements "are not part of the bill and will not become part of U.S. statutes They will not provide any new, independent legal authority for executive action."²⁸²

Finally, the role of the MTN Agreements themselves in the legislative history must be considered. As will be seen below, it is clear that the Agreements do not themselves become U.S. law, but the Committee Reports state that "[t]his bill is drafted with the intent to permit U.S. practice to be consistent with the obligations of the agreements, as the United States understands those obligations."²⁸³ It seems fair to conclude that the trade agreements (and presumably *their* preparatory work) are a secondary source for legislative history of the 1979 Act.

One additional aspect of the Trade Agreements Act of 1979 should be noted. This Act clearly covers a number of matters which are not explicitly required by any of the MTN Agreements or other negotiation results. Indeed, some of the matters contained in the Trade Agreements Act seem only remotely relevant to the MTN. For example, Section 111 of the Act makes some changes in Title V of the Trade Act of 1974 relating to the Generalized System of Preferences. Among other changes, the President is authorized to designate members of OPEC, meeting certain requirements, as beneficiaries of the Generalized System of Preferences. Nevertheless, although the fast track procedure purports to be a procedure for implementing and approving the trade negotiation results, since the form of the congressional action is that of a typical statute, adopted through the normal constitutional procedures (and not through a procedure such as legislative veto or delegated regulations), the statute provides its own authority for even those matters that go beyond implementation of the MTN results. Thus, it seems impossible to challenge measures of the statute on the ground that they are *ultra vires* the authority of the fast track procedure, as embodied in the Trade Act of 1974, and particularly Sections 102 and 151 of that Act. This is an important bar to constitutional challenges to the fast track procedure.²⁸⁴

282. S. REP. NO. 249, *supra* note 202, at 33.

283. S. REP. NO. 249, *supra* note 202, at 36; *see also* H.R. REP. NO. 317, *supra* note 270, at 41.

284. Title X and Title XI contain measures not necessary to implement the MTN results. Title X amends sections of U.S. law dealing with judicial review of administrative decisions. Title XI is entitled Miscellaneous Provisions and includes the following sections:

§ 1101 Extension of nontariff barrier negotiating authority

3. *United States Acceptance of the MTN Agreements*

Once the Trade Agreements Act of 1979 became law (on July 26, 1979) the President had the authority he needed to accept the MTN Agreements as international obligations of the United States.²⁸⁵

The President made most of the required determinations on December 14, 1979. His document authorized the signing and acceptance of seven of the agreements. Six of these agreements were signed and accepted by Deputy U.S. Trade Representative Michael B. Smith in Geneva on December 17, 1979, the opening day of the three-year signing period.²⁸⁶ The Agreement on Trade in Civil Aircraft was accepted on December 20, 1979. Two agreements, scheduled to enter into force January 1, 1981, were signed, but not accepted at this time. The Agreement on Government Procurement was not accepted at this time because negotiations on "entity coverage" had not been completed. The Customs Valuation agreement was not accepted because the conditions in Section 2 of the Trade Agreements Act had not been met.²⁸⁷

The United States implemented the Customs Valuation Code in U.S. law effective July 1, 1980. The President's proclamation of the early implementation of the Code was authorized by Section 204(a)(2) of the Trade Agreements Act of 1979 which required a determination that the European Economic Community had accepted the obligations of the Code.²⁸⁸ A protocol to the Customs Valuation Code, designed to encourage developing countries to adhere to the Code, came into effect January 1, 1981. This agreement was implemented in United States law by a statute that amended one section of the Trade Agreements Act of 1979.²⁸⁹

The Government Procurement Agreement was accepted by the United States in December 1980²⁹⁰ and came into force January 1, 1981.

§ 1103 Advice from private sector

§ 1104 Study of possible agreements with North American countries

§ 1110 Study of export trade policy

§ 1111 Generalized system of preferences

285. Trade Agreements Act of 1979, § 2(b)(3), 19 U.S.C. § 2503(b)(3).

286. *See* 288 ITEX (BNA), at A-5 (Jan. 1, 1980).

287. Office of the Special Representative for Trade Negotiations — Determination Regarding the Application of Certain International Trade Agreements, 45 Fed. Reg. 1181 (1980).

288. Proclamation to Carry Out the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (the Customs Valuation Code) and for Other Purposes, 45 Fed. Reg. 45,135 (1980).

289. Pub. L. No. 96-490, 94 Stat. 2556 (1980) (codified at 19 U.S.C. § 2503 (Supp. IV 1980)) (amending 19 U.S.C. § 1202 (1976)).

290. 287 ITEX (BNA), at A-3 (Dec. 18, 1979).

F. *Implementing the MTN Results in U.S. Law*

1. *Source of U.S. Domestic Law*

Since international agreements do not always become part of the U.S. domestic law, the United States must be classified as a dualist country.²⁹¹ This section discusses the form of implementation of accepted MTN results into U.S. domestic law.

An international agreement (or part thereof) which is found by the courts to be "self-executing" directly becomes a part of the domestic laws, which U.S. courts must apply in specific cases.²⁹² To avoid extensive analysis of this concept here, suffice it to say that the U.S. courts determine whether an international agreement is self-executing by ascertaining whether the draftsmen intended it to be so, as manifested primarily by the language of the agreement itself, and secondarily by the preparatory work. Since the concept of "self-executing" is itself a domestic U.S. constitutional question (often of little or no interest to other national parties to the agreement), it is not surprising that the courts tend to look at the intent of the *U.S.* draftsmen. For U.S. agreements requiring congressional approval, congressional intent in granting approval becomes very important and perhaps determinative.²⁹³ Often it is difficult to tell either from the language of the agreement or its legislative history whether a particular international agreement is self-executing. If it is not self-executing, whenever the agreement obligates the U.S. to change its domestic law, such change must be implemented by other regular constitutional means, such as enactment of a statute, or, if the executive branch has authority, the promulgation of a regulation.

Sections 3(a) and 3(f) of the Trade Agreements Act of 1979 address the self-execution and implementation of the MTN results. The clauses are clarified by the relevant committee reports and the Statement of Administrative Action. Section 3(a) of the 1979 Act states:

No provision of any trade agreement approved by the Congress under section 2(a), nor the application of any such provision to any person or circumstances, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.

291. See note 239 *supra*; I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 33-59 (1973).

292. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 156-61 (1972); *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW* § 154 (1965); W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 144-49 (1962).

293. In *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976), the court noted that in interpreting treaties courts must "look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution."

Section 3 (f) states:

Neither the entry into force with respect to the United States of any agreement approved under section 2(a), nor the enactment of this Act, shall be construed as creating any private right of action or remedy for which provision is not explicitly made under this Act or under the laws of the United States.

The Statement of Administrative Action on the MTN Agreements states unequivocally that "[t]he Trade Agreements negotiated are not self-executing and accordingly do not have independent effect under U.S. law."²⁹⁴ The Senate and House reports follow suit, saying that "the trade agreements are not self-executing."²⁹⁵ The Senate Report goes on to say that "[i]mplementation of obligations for the United States under the agreements can only be achieved as is provided in the Trade Act of 1974."²⁹⁶ This last statement, however, probably cannot be taken at face value.²⁹⁷

The Trade Agreements Act of 1979 is itself the source of several U.S. domestic laws to implement the major nontariff MTN Agreements. This is true for the agreements on subsidies and countervailing measures, anti-dumping measures, customs valuation, government procurement standards, and civil aircraft. Certain other MTN agreements are implemented through other legal actions. For example, most of the Tariff Agreements could be implemented under the authority of Section 101 of the 1974 Trade Act. This Act (following the forty-year pattern of U.S. trade acts) explicitly authorized the President to enter into tariff change agreements (within specified limits). In a separate clause, it then authorized him to "proclaim such modification . . . of any existing duty, . . . [etc.] as he determines to be required or appropriate to carry out any such trade agreement."²⁹⁸ This statute thus embraces a dualist philosophy. To the extent that the tariff obligations agreed to in the MTN exceeded the authority of section 101 of the 1974 act, however, legislation of approval was necessary. This is found in Title V of the Trade Agreements Act of 1979.²⁹⁹ Pursuant to both of these sources of authority, the President has proclaimed³⁰⁰ the staged reductions and other

294. U.S. HOUSE OF REPRESENTATIVES, TRADE AGREEMENTS ACT OF 1979: STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOc. No. 153 pt. 2, 96th Cong., 1st Sess. (1979).

295. S. REP. No. 249, *supra* note 202, at 36; H.R. REP. No. 317, *supra* note 281, at 41.

296. S. REP. No. 249, *supra* note 202, at 36.

297. As discussed above, the President has some authority not solely derived from that Act; *see* notes 240-42 *supra* and accompanying text.

298. Trade Act of 1974, § 101(a)(2), 19 U.S.C. § 2111(a)(2) (1976).

299. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 503, 93 Stat. 144, 251-52 (codified in scattered sections of 19 U.S.C. (Supp. IV 1980)).

300. Proclamation No. 4707, 44 Fed. Reg. 72,348 (1979).

changes in U.S. tariffs, and this proclamation is the direct source of domestic law applied by U.S. courts and customs officials.

In addition to tariffs, there were several MTN agreements (Dairy, Bovine Meat, Import Licensing)³⁰¹ which the executive claimed, and the Congress agreed,³⁰² did not need legislation to implement. In these cases no U.S. statutes needed changing. The Dairy and Meat agreements merely established international consultative arrangements, and normal U.S. diplomatic activities would embrace these functions. Similarly, the President already had statutory delegations which authorized him or his officials to issue or change regulations to accommodate the procedural obligations of the Agreement on Import Licensing.³⁰³

Some MTN agreements required no direct implementation in U.S. law because they did not require any particular U.S. action. The so-called Framework Agreements, which were approved as decisions of the GATT Contracting Parties³⁰⁴ rather than independent international agreements, contained matters which, although potentially very important, did not require specific actions by the United States except, perhaps, conducting its diplomacy in GATT fora in the future. For example, one Framework Agreement permanently authorizes GATT members to deviate from MFN so as to grant preferences to developing countries. No country is required to act that way, but this text, now a "decision" of the GATT Contracting Parties,³⁰⁵ will, in some instances, deny a GATT member the right to complain about other member nations' actions.

While the Trade Agreements Act of 1979 thus enacted the necessary measures for the United States to carry out its obligations under some agreements, three of its measures exclude some GATT nations from their coverage.³⁰⁶ Thus:

301. International Dairy Arrangement, GATT, BASIC INSTRUMENTS 91 (26th Supp. 1980); Arrangement Regarding Bovine Meat, GATT, BASIC INSTRUMENTS 84 (26th Supp. 1980); Agreement on Import Licensing Procedures, GATT, BASIC INSTRUMENTS 154 (26th Supp. 1980).

302. See U.S. HOUSE OF REPRESENTATIVES, TRADE AGREEMENTS ACT OF 1979: STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 153 pt. 2, 96th Cong., 1st Sess. 526, 527 (1979), reprinted in 1979 U.S. CODE CONG. & AD. NEWS 665, 774-76; S. REP. NO. 249, *supra* note 202, at 257-58; H.R. REP. NO. 317, *supra* note 270, at 148, 186.

303. See S. REP. NO. 249, *supra* note 202, at 257-58.

304. See Texts Concerning a Framework for the Conduct of World Trade, GATT, BASIC INSTRUMENTS 201 (26th Supp. 1980).

305. The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT (GATT/1979-3); The Tokyo Round of Multilateral Trade Negotiations, Vol. II: Report by the Director-General of GATT (GATT/1980-1); BASIC INSTRUMENTS (26th Supp. 1980).

306. Trade Agreements Act of 1979, § 101, 19 U.S.C. § 1202 (Supp. IV 1980) (adding Title

- § 101 (introducing §701) applies the new U.S. countervailing duty law with its new injury test, only to countries that also accept the MTN Agreement on Subsidies and Countervailing Duties (with exceptions for a few other countries).
- § 301 regarding Government Procurement, likewise limits U.S. implementation of the MTN Agreement on this subject mainly to those countries that also accept that Agreement, or provide appropriate reciprocal actions. Section 441 limits certain procedural rights under the Technical Barriers (Standards) Agreement only to certain countries that reciprocate.

Whether or not the U.S. law in these sections fully complies with MTN obligations, the *domestic law* of the U.S. is that stated in the 1979 Act *even if* inconsistent with United States international obligations. In implementing all other MTN agreements, whether required by international obligations or not, the United States has extended its law to all GATT or MFN countries.

2. *Executive Branch Reorganization*

For many decades, Congress has criticized the way the executive branch carries out United States foreign international economic policy. Congress was distressed after the Kennedy Round that the United States had given up too much in those negotiations.³⁰⁷ Likewise, Congress had been increasingly critical of the lack of effective organization of the executive branch with respect to international economic matters. The multiplicity of agencies and inter-agency conflicts had caused delays and mistakes of policy, and made it difficult for members of Congress or their constituents to know where to file their complaints. The extraordinary vote in favor of the Trade Agreements Act of 1979³⁰⁸ suggests that some of these congressional concerns had been lessened by the particular procedures (including the extensive consultation with Congress) that occurred prior to the introduction of the bill. Some Senators, however, desired to go further. They urged reorganization of those parts of the executive branch that govern international economic affairs. Various ideas had been suggested, including unifying the splintered agencies in a new single department devoted entirely to international trade mat-

VII to Tariff Act of 1930); Trade Agreements Act of 1979, §§ 301, 441, 19 U.S.C. §§ 2511, 2561 (Supp. IV 1980).

307. See J. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY 305 (1971).

308. See text at note 272 *supra*.

ters,³⁰⁹ which would gather together the various executive branch agencies and activities relating to international trade.

For a variety of reasons, the idea of a new department devoted to trade was deemed unacceptable, both by Congress and the executive, but some reorganization of trade functions seemed necessary. Indeed, some Congressmen spoke to this effect during the proceedings on the Trade Agreements Act of 1979. They threatened to hold up that procedure unless some commitments were made about an executive branch reorganization.³¹⁰

Consequently, after the Trade Agreements Act of 1979 was enacted, the President was committed to provide some reorganization. He did so with his reorganization Order Number 3 of September 25, 1979. Under a statute previously enacted by the Congress, the President has the authority to reorganize agencies of the United States by issuing a reorganization order which he then lays before Congress for sixty days. If the Congress "vetos" that order, the President is not allowed to proceed with his reorganization. In this case, there was no congressional veto, so on November 29, 1979 the order became law, authorizing the President to carry out the reorganization pursuant to its terms. He did so by Executive Order No. 12188 of January 2, 1980.³¹¹

The most important provisions of the reorganization were those that shifted the administration of the countervailing duty and anti-dumping laws from the Treasury Department to the Department of Commerce.³¹² In the Department of Commerce, a new International Trade Administration (ITA) was set up with three principal divisions: one to handle anti-dumping and countervailing duty matters and to take over the Commerce Department function of export control administration; a second to be concerned with international economic policy; and a third to continue a now embellished function for the Department of Commerce, of export *promotion*.³¹³

309. See, e.g., Ribicoff-Ruth Bill, S. 377, [Feb. 13, 1979] 244 ITEX (BNA) M-1; Byrd Bill, S. 891, [Apr. 10, 1979] 252 ITEX (BNA) P-1; [June 19, 1979] 262 ITEX (BNA) O-1.

310. See *Trade Agreements Act of 1979: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 390-91, 435 (1979) (statements of Senators Ribicoff and Roth).

311. Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980). The reorganization statute can be found at 5 U.S.C. § 901 (Supp. IV 1980).

312. Reorg. Plan No. 3 of 1979, § 2, 44 Fed. Reg. 69,273 (1979).

313. See Undersecretary for the International Trade Administration, Authority and Functions, 45 Fed. Reg. 6141 (1980); International Trade Administration, Organization and Function Order, 45 Fed. Reg. 36,427 (1980). See also ITIM (BNA) Reference File 92: 0103-0104; 5 ITIM (BNA) at A-2 (Dec. 5, 1979); 9 ITIM (BNA) at A-2 (Jan. 9, 1980); 289 ITEX (BNA) at A-8 (Jan. 8, 1980); 298 ITEX (BNA) at A-3 (Mar. 4, 1980).

In addition, the Reorganization Order took a number of international economic functions away from the Department of State, and gave these to the office of the Special Trade Representative, renamed the Office of the United States Trade Representative ("USTR"). The reorganization also provided that the USTR would have primary international negotiating responsibilities on a number of economic matters, including matters relating to anti-dumping and countervailing duty law.³¹⁴

3. *MTN Implementation and the U.S. Regulatory Process*

United States law heavily emphasizes individual rights and fair and open procedures. A significant part of the 1979 implementing statute set forth detailed procedures regarding administration of subjects of the MTN agreements. This was particularly true of the countervailing duty and anti-dumping duty law. Elaborate provisions were included to govern the handling of private citizen complaints about imports. A series of time limits was imposed, and the opportunity for public hearings clarified and broadened.³¹⁵ Attempts were made to insulate administration of these subjects from "political" influences. Finally, disappointed parties were granted right to appeal the results of administrative rulings to the courts.

4. *Private Citizen Complaints and Section 301 Procedures: U.S. Export Access to Markets Abroad*

Section 252 of the 1962 Trade Expansion Act provided a framework for United States citizens to bring unfair foreign trade practices to the attention of the U.S. government. This section then authorized the President to take certain retaliatory countermeasures if he could not obtain satisfaction for the U.S. citizens through negotiations.³¹⁶

This procedure was revised in Section 301 of the Trade Act of 1974. Section 301 sets up an explicit set of procedures designed to give a private United States citizen a channel for bringing international trade complaints to the attention of the United States Government. Section 301 provides that the Office of the USTR shall receive the complaints and shall, on demand, hold public hearings about the

314. See Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980). See also 5 ITIM (BNA) at A-2 (Dec. 5, 1979); 9 ITIM (BNA) at A-2 (Jan. 9, 1980).

315. E.g., Trade Agreements Act of 1979, § 101, adding §§ 702-706 (19 U.S.C. § 1671), and § 751 (19 U.S.C. § 1675).

316. S. REP. NO. 249, *supra* note 202, at 36.

validity of the complaint.³¹⁷

The Trade Agreements Act of 1979 amended section 301, but the basic structure of the complaint procedure was retained. If, after consideration by the USTR, the complaint is considered justified, the President is required to redress the matter, and he is authorized to take a variety of countermeasures — including trade restriction measures — against the foreign government, if negotiations prove unsuccessful.³¹⁸

This procedure may be unique. It stems from a general feeling in the United States that individual citizens should have some right to redress when foreign governments violate their international obligations.³¹⁹ It also stems from congressional distrust of the executive branch's handling of these types of complaints. Various proposals in the 1979 legislative process would have gone yet further in forcing executive branch action against foreign governments. Nothing in the statute *requires* the President to take retaliatory actions, but the requirement of public hearings³²⁰ coupled with the requirement to state publicly the reasons for not acting, make it politically difficult to ignore a reasonable complaint brought through this process.

G. *Summary and Conclusions*

The single most significant constitutional restraint on the ability of United States officials to negotiate international economic agreements is, not surprisingly, the interaction of the executive and legislative branches in the United States Government. This relationship colors every aspect of United States foreign relations, and particularly foreign economic relations, where the Congress has a special claim to jurisdiction due to its enumerated power over foreign commerce. In spite of this constraint, however, the Tokyo Round experience demonstrates that the executive-congressional relationship, managed correctly, can allow effective participation in international negotiations and agreements. The overwhelming vote in favor of the Trade Agreements Act of 1979 may, as some have alleged, be evi-

317. Trade Act of 1974, § 301, 19 U.S.C. § 2411 (1976); Procedures for Complaints Received Pursuant to Section 301 of the Trade Act of 1974, 15 C.F.R. pt. 2006 (1982) (as amended).

318. Trade Agreements Act of 1979, Pub. L. No. 96-39, Title IX, 93 Stat. 144, 295-300 (codified at 19 U.S.C. §§ 2411-2416 (Supp. IV 1980)); Procedures for Complaints Received Pursuant to Section 301 of the Trade Act of 1974, 15 C.F.R. pt. 2006 (1982) (as amended).

319. See S. REP. NO. 249, *supra* note 202, at 232; H.R. REP. NO. 317, *supra* note 270, at 173-74.

320. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 901, 93 Stat. 144, 295-99 (amending §§ 301-302 of the Trade Act of 1974, 88 Stat. 1978, 2041-43) (codified at 19 U.S.C. § 2412(b)(2) (Supp. IV 1980)).

dence of too many concessions by the executive branch to Congress. Nevertheless, the close consultation between the executive branch and the Congress, in certain circumstances resulting in changes in the international negotiation, in other circumstances resulting in congressional changes in attitude, show the effectiveness of the process. This process, however, can lead to certain nontraditional diplomatic activities. For example, foreign nations may closely follow the executive-congressional activities. At appropriate times, they may raise their concerns with potential congressional actions. Although such activity is obvious to persons experienced in government or business, it seems to have been overlooked by those more involved in the theory of international law.

The U.S. system now seems to rely fairly extensively on the section 301 procedures. The notion that a private citizen should have the right almost to compel his government to take action in international fora on his behalf seems to be very attractive to a Congress suspicious of the executive branch.

The technique of resolving legal dilemmas by ignoring them was used during the implementation of the MTN Agreements. For example, the President's authority to waive countervailing duties in certain circumstances ran out before the negotiation was finished, and the application of such duties had the potential to derail the negotiation. Yet, in the end, the messiness was simply tolerated, and the legal constraint did not override important policy goals. Likewise, the inability of Japan to ratify formally the results of the Tokyo Round posed certain legal problems for the U.S. administration. The lawyers for the administration, however, were able to wiggle their way around the problem, albeit uneasily, with verbal formulae in the Presidential findings document.

One might conclude, therefore, that to a certain extent the lawyers were irrelevant — that whenever legal technicalities threatened to obstruct the negotiations, the law was simply ignored. One cannot, however, conclude that this approach would always work, particularly on a matter about which constituent groups in the United States differed strongly.

One of the problems inherent in the congressional-executive tensions is the problem of "oversell" that arises when the executive branch tries to persuade Congress to accept and implement international agreements. There is a risk in this situation that executive branch officials will make unfulfillable promises to Congress. Perhaps the prime example of this was the Subsidies-Countervailing Duty Code. There, executive branch officials made optimistic state-

ments to the Congress, including statements about pressure that the United States would bring on developing countries to abide by the basic principles of the code. It has proved very difficult, if not impossible, to fulfill these promises.

For a number of reasons, United States policies tend to a high degree of "legalization." The limits of congressional power, coupled with suspicions of the executive branch, have led Congress to pursue its goals through detailed legislation that limits executive branch discretion. To help reinforce these limitations, Congress has also designed procedures to make the decisions open and to allow public participation at almost every stage. In addition, the Congress, particularly in the 1979 Act, has provided elaborate Court supervision of the administrative process through the many possibilities for judicial review.

All this "legalization," of course, creates complexity and expense. These costs have, in turn, been challenged by foreign critics as trade barriers by themselves. To a certain extent this may be true, although this author has estimated the public and private annual costs of the U.S. regulatory system for imports (excluding the normal customs processes) to be less than $\frac{1}{10}$ of 1% of the total value of annual imports to the U.S.³²¹ Yet it must be realized that there are also benefits derived from this system. Its openness, comparative objectivity, comparative insulation from undue political influence, and comparative reliance on relatively detailed published criteria, give foreign parties interested in exporting to the United States a degree of predictable access to the U.S. market that may not be available in any other system. It is hard in the U.S. system for representatives of a domestic industry to boast privately that they will see to it that the government will exclude competing imports, unless certain specified criteria are met. Lawyers can give a measure of guidance both to domestic industry representatives desiring to exclude competing goods, and to importing interests, often eliminating the necessity of seeking any formal (or informal) government proceeding. It is at least possible to hypothesize that because of the public access to, transparency of, and stipulated criteria for, the regulation of U.S. imports, more and better access to the U.S. market is available to

321. This figure is based on approximately \$68 million of annual U.S. Government costs for trade agencies such as USTR, ITA (Commerce), etc., plus very rough estimates of private lawyers fees and in-house corporate costs for the procedures occurring under U.S. law. A total of \$101 million annual costs estimated in this manner can be compared with the 1981 total value of imports into the U.S. of \$264 billion, and the resulting fraction is 4/100 of 1%. Allowing leeway for various estimating errors, it would seem almost certain that this ratio is less than 1/10 of 1%.

foreign producers than is the case in most other markets. If liberal trade is the desired goal of the system, such "legalization" may more efficiently promote that goal than systems that rely more heavily on government discretion, or nonpublic decision making.

In addition, the "legalization" (as aggravating as it is sometimes) tends to reduce the "power-orientation" of the system and nudge it more in the direction of a "rule-oriented" system, as this author has elsewhere described.³²²

But there are other costs to be paid by such a system. Clearly it is less flexible (indeed that is its objective, for flexibility generally means less predictability, and possibly, more subject to influence by extraneous or unpredictable goals). One of the questions that has been appropriately raised in connection with the system is whether it can cope with the truly large cases, such as trade problems of the steel or automobile sector, which often are a result of important and painful trends of structural adjustment. If the rules are not adequately tuned to massive problems of this type, they could, when inflexibly administered, *create* problems rather than solve them. One answer to this criticism would be to improve and change the *rules*. But when the world's procedures for such change are as difficult, lengthy, and inflexible as they are, rule changes do not occur easily. Thus, rules sometimes become out-dated, or are ambiguous or misdirected, because they result from difficult and elaborate negotiation processes. In such circumstances the rules tend to break down.

These reflections do not seem to be encouraging for the future of international economic relations. Yet improvisation by intelligent officials, coupled with the discernible trend of not only greater rule detail and complexity, but also greater openness and predictability of the trade rules in the United States, offers the long-run prospect of greater stability of trade and economic relationships. If the rules can be steadily improved, and the experience with them utilized to enhance such improvements, then, in the opinion of this author, one is entitled to be modestly optimistic about the long-run prospects of international trade relations.

V. CONCLUSIONS

In the preceding Parts, we have examined the relationship of

322. See Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98-99 (1978); Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 J. LAW & POLY. INTL. BUS. 21, 27-28 (1980).

three national constitutional systems to the processes of negotiating and implementing international agreements. We have focused on the Tokyo Round Negotiations in the context of GATT, as a case study, so as to add precision to our inquiries. However, we had no intention of simply chronicling the history of the Tokyo Round. Instead, it has been our purpose to examine the constitutional systems of the three major trading partners in the world today, with a view to understanding the effect of those national constitutions on potential future international negotiations. As this is written, it is not clear what the next major international economic negotiation will be. Preparations have begun in the GATT, however, for some further multilateral activity which could possibly lead to some negotiations on certain subjects, such as international trade in services, or negotiation concerning certain international rules relating to merchandise trade such as safeguards.³²³

In three different Parts, we have each explored the constitutional and legal constraints on international economic negotiations, within each of three systems. The reader will realize by now that there are some substantial and interesting differences between those systems. In addition, the reader may by now realize that there are some potential problems for any international economic negotiation, lurking in the disparities between those systems. In this final Part, we propose to draw some comparisons and formulate some tentative hypotheses as to the significance of the differences between the national constitutional systems. As indicated at the outset of this Article, we view our study as only part of the total story. Clearly, there are a number of other countries for which a similar examination of the national constitutional structures would be interesting and valuable for a better understanding of the potential for international economic negotiations. It is our hope that other scholars will now utilize some of the same techniques we have utilized and address some of the same questions that we have explored. We would hope to see articles published in various scholarly legal journals, about other national constitutional systems and their relationship to international economic negotiations.

We have divided the remainder of this final Part into five sections. In section A, we will draw some conclusions and make some general comparisons about the three systems examined. In section B, we will discuss some of the implications of our findings for future negotiations. In section C, we raise a question which seems to be

323. See, e.g., GATT Press Release No. 1310 (Feb. 12, 1982).

more frequently on the minds of statesmen and politicians, namely, whether the international economic structure for trade and other economic affairs is workable and fair. In section D, we make one proposal which could add to the workability and significance of international economic systems, although we do not have any illusions that this proposal is likely to be adopted in the near future. Finally, in section E we bring the Article to a close.

A. *The Three Constitutions Compared*

The three constitutions are very different, and these differences obviously have implications. Japan's constitutional system is one of a highly centralized governmental structure, with a parliamentary system. In some respects, the Japanese constitutional system is rather new (dating technically from the post-World War II period). The European system is even newer. In this Article we have treated the system of the European Economic Community as a sort of "national system" for the purposes of our analysis. The Constitution of the EEC is in a process of rapid change. Starting with the Treaty of Rome of 1957, that Constitution includes the longest written constitutional document of any of the three systems examined. A number of changes have occurred in that written document, particularly changes due to the addition of new Members. In addition, a number of changes have been and continue to be occurring in the way that document gets applied. In all three systems, power struggles among the various branches of the system occur and have considerable influence.

In the United States, we have the oldest continuous government of the three, based on a written Constitution two hundred years old and a large supply of Supreme Court opinions interpreting that Constitution. With respect to international economic relations under that Constitution, however, the Supreme Court has spoken relatively infrequently. Despite the length of its history, the United States Constitution still leaves a number of issues open with respect to multinational relations.

Some brief comparisons (others have been made in the various preceding chapters) can be grouped under two headings: (1) the distribution of power; and, (2) the legal process of implementing the Tokyo Round Agreements.

1. *The Distribution of Power*

A prime attribute of any constitutional system is the way that it distributes power. Power can be distributed within a national gov-

ernment among various branches of that government; and it can also be distributed in a federal system between the central government and the subordinate units of government (such as the states).

a. *Subordinate units of government.* With respect to questions of power distribution between the central government and the subordinate units of government, these questions are the least significant in Japan, and the most significant in the EEC. The Japanese government is highly centralized, and these authors could not find that problems of power distribution to local units, or power held by local units, have any significant implications for international economic negotiations.

In the United States, questions of distribution of powers between the states and the federal government in Washington, D.C., still have some potency, although not nearly so much as was the case a century ago. Basically, today, the U.S. federal government can negotiate and fulfill almost any international agreement which it feels it can obtain, and which is approved by the governmental processes of the federal government. However, there are some political limitations on the processes of negotiating and approving international agreements that stem from the federal system. For example, with respect to the Tokyo Round Government Procurement Code, it seems reasonably clear that if the nations which are parties to that Code had provided in the Code that it would apply also to the governmental purchases of government subdivisions such as states in the United States, in that circumstance the United States federal government would have had the power to require the states to follow the international agreement. However, there were at least some perceptions during the negotiation that there could have been some opposition among members of Congress to the approval of an international government procurement code, if such a code were designed to apply to state government purchases. We do not know the degree or extent of that potential opposition, since the issue was never put to Congress. Indeed, the United States negotiators were at one point probably willing to try to have the international agreement embrace state government purchases, but negotiators from other nations did not desire such a move.

The EEC poses the most serious problems with respect to the distribution of powers between central governmental institutions and member government states or subordinate government units. There continues to be a considerable power struggle between the central institutions of the EEC and the Member State governments (such as England or France). Extra-constitutional mechanisms, such as the

"European Council," have been set up for participation of national government officials at the highest level, and this has tended to strengthen the retention of power by the Member States, as opposed to the EEC institutions.

Within some of the Member States of the EEC, there are also important federalism questions. For example, in West Germany, the Länder retain certain significant rights and powers, and these have had and will continue to have some influence on the potentiality of international economic negotiations.

More specifically, within the EEC the degree of centralization varies with the subject matter. The general subject "commercial policy," which is deemed to include tariffs and trade, and most GATT matters, is delegated to the central institutions of the EEC (Article 113 of the Treaty of Rome). However, a number of other subjects are not, at least not explicitly, so delegated. For example, monetary policy tends to remain with the Member States. Some have argued that the codes concerning government procurement, or standards, touched on matters peculiarly remaining within the power and jurisdiction of the Member States. This may have clouded certain phases of the Tokyo Round Negotiation, but in the end, the actions of the EEC and its Member State governments tend to confirm the proposition that these activities as negotiated in the Tokyo Round are embraced within the "commercial policy" delegation of authority to the EEC institutions. In future international economic negotiations, however, it will be necessary to examine fairly closely the question of whether a subject matter to be taken up is within the jurisdiction of the EEC institutions or not. For example, it has often been stated that the next phase of multilateral discussions and potential negotiations within GATT, will embrace trade in "services" (insurance, shipping, tourism, etc.). It has been argued that power to regulate and to enter into international negotiations with respect to trade in certain types of services remains with the Member States, or at least is not under the authority of article 113. If true, this could necessitate a negotiation of a different type than that which occurred in the Tokyo Round.

b. *Central government institutions.* Power is also distributed among institutions at the central or federal government level. In the United States, these problems are the most significant. The relationship of the executive branch (the President) and the Congress is the single most important factor of U.S. participation in international economic negotiations. This relationship has a number of difficulties. Although it is usually argued that the President has authority to

negotiate on anything in an international context, it is clear under the United States Constitution that the President does not have the sole authority to approve or finally commit the United States to an international agreement on many subjects. In commercial matters, Congress feels that it has the preeminent reserved power, and that the President only has those powers which have been delegated to him by the Congress. This imposes effective restraints on the ability of the President to negotiate in the international context, since the negotiators from other countries are not likely to be willing to negotiate with him with respect to matters for which they feel he cannot obtain approval. There is thus a tendency on the part of the executive branch officials to be more willing to enter into international negotiations on subject matters which they feel are within the powers already delegated to the President. Alternatively, it would be necessary for the President to obtain additional statutory delegations from the Congress before the negotiation, or to take results of a negotiation back to the Congress under one procedure or another for approval. In connection with a major international economic negotiation, a great deal of time, effort, and thought will be utilized in managing these relationships between the executive branch and the Congress.

In the EEC, the power distribution within the various central institutions is also highly significant. To a certain extent, these power relationships mirror the problems encountered in the relationship between the EEC institutions and the Member States. The EEC has a Commission on the one hand, and a Council on the other hand. The Council is composed of representatives of the Member States. This institution is reluctant to yield power to the Commission which is considered to reflect a more general EEC perspective. There is a European Parliament, now selected by popular suffrage, but its powers are extremely limited, at least at this juncture of history. There is also another very important central institution, namely the Court of Justice (sitting at Luxembourg). This court has the final say about legal matters interpreting the Treaty of Rome, and therefore is the arbitrator of the disputes about power distribution within the EEC, both disputes involving the central institutions and those involving the relationship of those institutions to the Member States.

In the Japanese Government, the problem of distribution of power among the national institutions is not so great. In a parliamentary system, the Executive is headed by a cabinet which is largely drawn from the Parliament itself, so at least in theory, there is not a significant tension between the Parliament and the Execu-

tive. In Japan, the power distribution questions at the central government level are of a rather different nature than those in the United States or the EEC. This makes comparison somewhat difficult. Many of the problems of power distribution in the Japanese Government have to do with rivalry between ministries such as the Ministry of Foreign Affairs, as compared to the Ministry of International Trade and Industry. More specifically, the relationships between powerful Ministries and between Ministries and the Liberal Democratic Party, and the pressures of some powerful interest groups (for example, agricultural groups) may affect future negotiations. When looking at the different "constitutional systems" of the three trading partners, to make effective comparison, and to analyze the power distribution questions, one has to look at different information in Japan. The information is often not easily available, because it is rarely embodied in such things as Supreme Court cases, or statutes and explicit regulations which are available to the public. Nevertheless, there are some significant power distribution questions in Japan which could affect future negotiations, and have affected past negotiations.

Finally, in this comparison of power distribution, one must look at the role of the courts. In the United States, the Supreme Court has an extraordinarily powerful role in arbitrating the allocation of power among units of government. It also has an important role in the enforcement of statutes and regulations, and of the Constitution itself. Consequently, many issues in the United States tend to become "judicial issues" and this gives the court a more significant role in the total process of international economic negotiations than is probably the case in the other two constitutional systems explored. In the EEC, the Court of Justice also proves to be very prominent. Indeed, the analogies between the Court of Justice for the EEC and the Supreme Court of the United States are strong and many people have commented upon them. Even though governments within Member States in Europe have not in many cases traditionally had a constitutional system that placed considerable power in a judicial body, in the EEC this is the case.

In Japan, courts including the Supreme Court have the power of judicial review, and, at least in theory, they could play a role as an arbitrator of the allocation of actions enforced by the Ministries in light of the Constitution or laws. However, in reality, the Japanese Supreme Court and lower courts have rarely exercised this power in foreign trade areas. This is probably due to the paucity of court ac-

tions which are raised by government agencies and private individuals, which reflects the nonlitigiousness in the national character.

2. *Implementation of the Tokyo Round Agreements in National Legal Systems*

There is virtually no uniformity between the three constitutional systems as to the way that the results of the Tokyo Round became implemented. In the United States, as we have seen, the Congress generally reserved the power to approve most of the final Tokyo Round Agreements before the United States became committed to them. The statute adopted by Congress to provide this approval and to implement the Agreements clearly provides that the Agreements themselves will not be "self-executing" in the United States law. This means that the Agreements do not become part of the domestic law of the United States. Therefore, a citizen must look to the statute adopted by Congress, which implements the international agreement, for the source of his rights and for judicial and administrative application within the United States. On the other hand, the statute adopted is quite long, and quite detailed. It takes much of the language of the international agreements and applies that language verbatim as part of the United States law. In addition, administrative agencies charged with implementing various parts of that statute have issued regulations that are even more detailed. Thus, there is a vast, elaborate, explicit body of written rules that is part of the United States jurisprudence and designed to implement the Tokyo Round Agreements. Individual citizens have the right to invoke those rules, and to utilize the court system to assist them in such invocation.

In the EEC, the situation is considerably more confused. It is not entirely clear whether the international agreements negotiated in the Tokyo Round will always be considered to have "direct effect" as part of the jurisprudence of national government institutions, including the courts, in the EEC. A recent case, however, leaves open the possibility of such "direct effect." In some cases, the EEC has issued a "regulation" on the subject matter concerned; such a regulation becomes part of the domestic jurisprudence in the Member States of the EEC. In other cases, the EEC has issued a "directive" which directs Member States to take implementing action. Although there have been cases which have held a directive to have certain types of direct effects in Member State law, the general theory is that the thrust of the directive would not normally lend itself to be treated as part of the domestic jurisprudence. Finally, in some situations, the

implementation of the Tokyo Round agreement has simply been left to the Member States. Entering into the agreement by the EEC institutions imposes a legal requirement on the Member States to follow and implement the international agreement.

In Japan, as long as the international agreements negotiated in the Tokyo Round have been approved by the National Diet, they are regarded as "treaties" in the sense of the constitutional provision and, as such, are given not only the power of law but also overriding effect upon the domestic law which comes into conflict with them. As touched upon earlier, such approval has been given to most of the agreements negotiated in the Tokyo Round. Whenever there are differences between the approved international agreements and domestic laws, it has been the practice of the Japanese Government that the Cabinet proposes legislative bills and the National Diet enacts them into laws in order to make the language of domestic laws conform to the language contained in the international agreements. This has been done with regard to some of the international agreements negotiated in the Tokyo Round. With certain limitations, individuals have the right to invoke the rules contained in the agreements and to seek cancellation of administrative actions, regulations or laws which are contrary to these rules, and also to seek recovery for damage sustained by them due to actions or inactions of the government officials contrary to the rules enunciated in the agreements. Here again, however, the likelihood of such court actions by Japanese citizens is rather slim due to the reluctance of the Japanese people to resort to court actions.

One of the striking things that emerges from a study of this type, therefore, is that the processes and degree of implementation of the international agreements, in the three different constitutional systems, differs greatly. This could conceivably lead to some significant disparities with respect to effective implementation of the international obligations. In a society where citizens have direct access to judicial institutions to enforce their rights, and in those procedures such citizens have the right to rely directly on the international agreements, or on statutory implementation of these agreements which embraces the language of the international agreements, it would seem plausible that the international agreements would be treated seriously. On the other hand, where such institutional mechanisms are not available to the ordinary citizen, or where whatever does exist contains considerable leeway for the play of governmental discretion, it is possible that government officials involved will find

themselves at some point tempted to apply the international obligations less rigorously.

B. *Implications for Future Negotiations*

There are at least two important categories of implications with respect to future negotiation on international economic matters which stem from the analysis in this Article. First, there is the question as to in which of the types of subject matter that are likely to be subjects of potential negotiations are constraints resulting from the three constitutional systems most serious? And second, how should negotiators be affected by the fact that the processes of implementation in the three different constitutional systems vary so greatly?

With respect to the first question, one can examine the potential constraints of the national legal constitutional systems on negotiations of a number of subjects, including trade in services, investment and capital flows, and subjects that have or have not been previously negotiated and relate to the more traditional merchandise trade matters. For example, with respect to the negotiation of services, there is likely to be a major jurisdictional question within the EEC as to the methodology of negotiating, approving and implementing international agreements on that subject. The same is likely to be the case with respect to investment and capital flows. On the other hand, with respect to negotiations that might continue on some of the left-over matters from the Tokyo Round negotiation, it is more likely that the jurisdictional question will be considered clear, and that the central EEC institutions will be deemed to have greater control.

In the United States, it is likely that the Congress will have to give either advance authority to the executive branch to enter into international negotiations and agreements on subject matters such as services, or will retain for itself the ultimate right of approval of whatever emerges from the international negotiation. This will have a profound effect on the structure and procedures of the negotiation.

In Japan, there will be little jurisdictional problem in negotiating and entering into international agreements on services and investment, since most of the powers in these areas are vested in some Ministries of the National Government whose Ministers compose the Cabinet. Problems may lie in the reluctance on the part of Ministries in charge of promoting and controlling these matters to adopt international agreements which may adversely affect the interest of industries under their jurisdiction.

C. *The Structure of the International Economic System*

The basic thesis of this Article is that the international economic system is a complex structure involving the intertwining of national constitutional systems, and the international "constitutional system." The international constitutional system is primarily that of GATT, and the other international economic organizations such as OECD, IMF, etc. For purposes of illustration here, we can focus on the GATT. Thus, we see the GATT (which has, as indicated in the introduction, a very frail constitution, not designed to fill the role that it has been forced to fill) as an international institution that strongly depends on certain national governmental structures. Vice versa, some of the national governmental structures concerned (particularly the United States) depend heavily on the existence of the GATT and its "system." United States law makes use of GATT in a number of ways. The Trade Act of 1974 and the Trade Agreements Act of 1979 would make little sense without the existence of GATT. Conversely, at the time the GATT was originally formulated, and at the time the Tokyo Round agreements were being negotiated, the United States constitutional and other law relating to international trade had considerable influence on the shape of GATT and on the various supplementary "codes" negotiated in the context of GATT. This Article has not been an examination of the GATT itself; that task has been taken up elsewhere. It is not our purpose here, therefore, to review some of the statements of concern about whether the GATT can cope with contemporary international economic problems and trends, and whether the GATT needs some substantial revision for that purpose. Our purpose here, however, is to comment upon the total GATT system in the context of the relationship of the GATT to the national constitutional systems of GATT members. In this context, one can see strengths and weaknesses. The GATT has managed to survive despite the disparity of constitutional systems, and indeed, despite the disparity of economic systems. On the other hand, it is clear that the GATT applies in a way that is uneven as between economic systems, and may also be uneven as between constitutional systems. For example, there are practical effects of direct citizen access to national judicial or administrative procedures designed to enforce the international economic obligations. Is an international agreement really fair, when it is in fact implemented in such varying manners in various countries?

In addition, national constitutional structures may influence the ability of national representatives to negotiate effectively on behalf of their national interests. The United States, for example, with its

constant power struggle between the executive branch and the Congress, may in some circumstances find its ability to conduct international negotiations to be constrained, either because Congress has not adequately delegated power to the executive branch which conducts the negotiations, or because in such a delegation the Congress has laid out in too explicit detail the scope or range of maneuver of the negotiators, thereby giving opposing negotiators some important intelligence about those positions.

D. *A Proposal for the Future: Direct Citizen Access to the International System of Economic Obligations*

Much has been written in recent decades about the tendency of international law to accept as subjects of international law, individuals as well as national states. Without trying to get into the somewhat theoretical questions involved in those writings, we would like simply to point out that it has now become established that it is possible to design procedures under which private citizens or firms have some sort of access (usually limited) directly to international bodies for the purpose of asserting their rights.³²⁴ The two prime examples of these types of procedures which come to mind are the European Convention on Human Rights³²⁵ and the International Convention for the Settlement of Investment Disputes.³²⁶ Under the former, an individual citizen can go to an international body with a complaint against his own government, on the grounds that his government has violated its obligations under the international convention, namely the European Convention on Human Rights, in a manner which has directly affected that citizen. The international procedures then call for a commission to look into the complaint and possibly to help mediate a solution between the citizen and his government. Where the commission feels it is justified, it may bring the complaint to a court — the European Court on Human Rights. That court then has the authority to rule whether or not the state concerned has violated its obligations under the European Convention. Only states which have explicitly accepted this fairly far-reaching procedure under the

324. W. FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 225-49 (1964).

325. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. *See generally* R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 560 (1979).

326. Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. *See generally* Broches, *The Convention on the Settlement of Investment Disputes Between States*, 136 *RECUEIL DES COURS* 331 (Hague Acad. of Intl. Law) (1972).

appropriate convention can be brought into these procedures by their own citizens.

Likewise, the ICSID — International Convention for the Settlement of Investment Disputes — set up under the auspices of the World Bank, provides a mechanism by which those governments who have accepted the ICSID in advance can subsequently provide in any contract with a foreign private firm or citizen that disputes about such a contract will be referred to an arbitration process set up by ICSID.

There are some interesting potentials in these precedents for the GATT and the international economic system. Although probably not soon acceptable to governments which participate in the GATT, one can envisage that at some point in the future, the policies that call for greater predictability of national government economic actions in an increasingly interdependent world, and the policies which move governments to desire a greater balance and equality of actual *de facto* implementation of the negotiated international rules on economic matters, could lead governments to be willing to accept some sort of a mechanism by which individual citizens or firms could appeal directly to an international body such as the GATT for a determination about whether a government, obligated under the GATT or one of the GATT codes, has taken action inconsistent with its international obligations.

Several particulars are likely to be necessary in any such procedure. First, a requirement that national internal administrative and judicial remedies be exhausted seems appropriate. Second, some sort of a "filter" would probably be needed, much as is the case currently with the European procedure for human rights. Thus, some international body, such as a GATT unit, could be charged with initially receiving the complaints from private citizens or firms, and making a preliminary investigation to see whether there was any merit in such complaints. This would be desired as a way to prevent spurious complaints from getting very far. Third, it is likely that at the outset, any procedure of this type would have to accommodate itself to the lack of effective sanctions. It is doubtful that states would at this stage be willing to accept such an international procedure if there were truly effective sanctions which could be applied. This does not, however, make such a procedure useless. The mere fact that there could be a reliable third-party determination with respect to the facts and the application of the law (the international obligation) would itself be salutary. To a certain extent, the mere fact of findings by an international arbitration panel, when such

findings are made public, is itself a sort of "sanction," which many governments try to avoid.

Clearly, the typical governmental reaction against relinquishing any power, or against constraining its field of discretion, would discourage a move in the direction of the procedures described. On the other hand, it should be recognized that there are some advantages for governments in such a procedure. For one thing, if the procedure were carefully designed, and became reliable, governments might well find that the procedure would tend to de-emphasize and de-politicize many relatively minor trade or economic complaints that now exist between nations. For example, let us assume that a citizen in country *A* (we will call the citizen Mr. *A*) finds that his exports to country *B* are being restrained improperly by country *B*, inconsistent with country *B*'s international obligations. Under the current procedure, Mr. *A* must go to his own national government and get it to take up his matter with the foreign government. Thus, his case has immediately been raised to a diplomatic level, and it quite often means, by the nature of things, that it has been raised to a fairly high level of official attention and consequently of public perception. On the other hand, if an appropriate international procedure existed, when Mr. *A* came to his government to complain about country *B*, country *A* officials could refer Mr. *A* to that procedure and encourage him to utilize it, without, however, the government of country *A* itself taking any stand on the matter. There is then some possibility that the issue could be handled more expeditiously and routinely. The case would continue to be Mr. *A*'s case, and not become country *A*'s case. The issue would be Mr. *A* versus country *B*, instead of Mr. *A* and country *A* versus country *B*. Country *A* could even make noises that it did not approve of Mr. *A*'s position, without, however, undercutting Mr. *A*'s rights in the international procedure.

It is the view of at least one of the authors of this Article that, in all probability, early versions of such a procedure would require some kind of governmental "right of veto" on its own citizens' attempts to invoke the process. However, if this right were accorded to national governments as a way to make them more comfortable with experimenting with this procedure, such "veto" could be designed so that during the course of time it would gradually die out (at least for all but the most exceptional cases).

*E. Interdependence and Legal Systems:
Some Concluding Remarks*

The stresses currently imposed on the international economic system are formidable indeed. Phrases such as the "demise of GATT," or the "failure of the exchange rate mechanism" are being heard, as political leaders scramble for ideas and policies with which to alleviate the economic pain of their constituents. Many of the traditional assumptions of the Bretton Woods system are being questioned. People are asking if comparative advantage has the same meaning today as in previous years, and whether "industrial policy" as executed by some nations is a fair way to "play" in today's world. Political forces for protectionism loom large, and the traditional rules often seem to be bent more than they are applied.

Arthur Dunkle, the current Director-General of GATT, has said

[I]nternational economic policy commitments, in the form of agreed rules, have far-reaching domestic effects, They are the element which secures the ultimate co-ordination and mutual compatibility of the purely domestic economic policies. They form the basis from which the government can arbitrate and secure an equitable and efficient balance between the diverse domestic interests: producers vs. consumers, export industries vs. import-competing industries [O]nly a firm commitment to international rules makes possible the all-important reconciliation, which I have already alluded to, of the necessary balance on the production side and on the financial side of the national economy³²⁷

But if the rules are so important, they must be kept abreast of the fast changing conditions of the world. This implies an orderly and intelligent system by which the rules themselves can be changed. The complex mix of national legal institutions and constitutions, and the various international institutions are not now structured in a way that gives one confidence that the international economic system can evolve in an orderly fashion. What we have tried to do in this Article is to shed some light on the legal aspects of this international economic system, and particularly on the little-studied interrelationship of the national legal systems to this international system. In doing so we hope we have contributed both to a modestly better understanding of that system and its strengths and weaknesses, and to stimulating further study of this perplexing subject.

327. GATT Press Release No. 1312 (Mar. 5, 1982).