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The General Agreement on Tariffs and Trade in United States Domestic Law

John H. Jackson
University of Michigan Law School

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THE GENERAL AGREEMENT ON TARIFFS AND TRADE IN UNITED STATES DOMESTIC LAW

John H. Jackson

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THE GENERAL AGREEMENT ON TARIFFS AND TRADE IN UNITED STATES DOMESTIC LAW

John H. Jackson*

I. INTRODUCTION

THE General Agreement on Tariffs and Trade,¹ "GATT," is a multilateral international agreement which is today the principal instrument for the regulation of world trade. Over eighty nations, including the United States, participate in GATT and it has been estimated that about eighty per cent of world trade is governed by this agreement.² With the recent completion of five agonizing years of "Kennedy Round"³ tariff negotiations under GATT auspices, tariffs for many goods will be reduced to a point where they will no longer be effective barriers to world trade.⁴ For this reason, non-tariff trade barriers of wide variety and ingenuity⁵

* Professor of Law, University of Michigan. A.B. 1954, Princeton University; J.D. 1959, University of Michigan. Editorial Board, Vol. 57, *Michigan Law Review*.—Ed.

The author is indebted to Walter Hollis, Legal Advisor's Office, United States State Department, who generously read the manuscript of this article and made a number of useful suggestions. The author is also indebted to members of the GATT Secretariat in Geneva for assisting his general research into GATT.—J.H.J.

1. General Agreement on Tariffs and Trade, 61 Stat. pt. 5, at A3 (1967); 55 U.N.T.S. 194 (1967) (hereinafter referred to as GATT). GATT has been extensively amended and modified, as can be seen from app. C. A more current version of GATT can be found in GATT, 3 Basic Instruments and Selected Documents (rev. vol. 1958) (hereinafter referred to as BISD). Subsequent changes may be found in GATT Doc. IPRO/65-1 (1965) (which added pt. IV) and GATT Doc. INT(61) 34 (1961) (which modified art. XIV:1).

Although the full text of GATT is not being reprinted in this article, the general subject matter of each article can be seen from the table in app. A. On GATT generally, see Jackson, *The Puzzle of GATT—Legal Aspects of a Surprising Institution*, 1 J. WORLD TRADE L. 131 (1967) and authorities cited therein. For an economist's view, see G. CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY* (1965). As to GATT documents in general and their availability, see GATT Docs. INF/121 & INF/122 (1966); Jackson, *supra* at 131 n.2.

2. Statement issued by the Director General of GATT, GATT Press Release 990, reprinted in N.Y. Times, May 16, 1967, at 20, col. 3; GATT Press release 973 (Nov. 1, 1966).

3. See Farnsworth, *Kennedy Round Succeeds*, N.Y. Times, May 16, 1967, at 1, col. 8. See also International Monetary Fund, *Kennedy Round Agreements*, 19 INT'L FINANCIAL NEWS SURVEY 213 (1967).

4. See Statement by Eric Wyndham-White, Director General of GATT, to the Deutsche Gesellschaft für Auswärtige Politik at Bad Godesberg, GATT Doc. INT(66) 567 (Oct. 27, 1967); address by Eric Wyndham-White at the meeting of the Trade Negotiating Committee at Geneva, GATT Press Release 993, at 4 (June 30, 1967); Chase Manhattan Bank, *Perspective on World Business*, 7 WORLD BUS. 3 (July 1967).

5. See, e.g., Lawrence, *State "Buy U.S." Laws on Increase*, J. Commerce, June 15, 1967, at 1, col. 2. See also *Not for State Capitals*, J. Commerce, July 25, 1967, at 4, col. 1; Lawrence, *Anti-dumping Code Foes Face Stiff Odds*, J. Commerce, July 5, 1967, at 1, col. 1; Lawrence, *No U.S. Push on Non-tariff Walls Likely*, J. Commerce, July 3, 1967, at 1, col. 7; *Revised Wool Import Testing Rule Reviewed*, J. Commerce, June 28, 1967,

are now becoming relatively more significant.⁶ In the United States, federal, state, and local legislators and officials, under pressure from special interest protectionists, have been experimenting with various types of barriers on foreign imports.⁷ Since much of the general language of GATT concerns non-tariff barriers, GATT's position in United States domestic law⁸ may well take on increasing importance. However, determining the status of GATT in domestic law is a surprisingly complex problem, partly because of uncertainties that still lurk in our constitutional law relating to executive agreements,⁹ and partly for reasons unique to GATT.¹⁰

GATT was negotiated at Geneva in 1947 at the same time that the final preliminary draft of the Charter for the International Trade Organization (ITO) was being prepared.¹¹ GATT was intended to embody concrete tariff commitments within the frame-

at 11, col. 4; Milche, *Buy U.S. Laws: Are They Legal*, N.Y. Times, July 23, 1967, at 1F, col. 1; Reed, *President Orders a Slash in Imports of Dairy Products*, N.Y. Times, July 1, 1967, at 1, col. 3.

6. There have been over 100 bills introduced in the current session of Congress relating to non-tariff import restrictions of one kind or another. See CCH CONGRESSIONAL INDEX for the 90th Congress under the subject headings *Dairies & Dairy Prod.*, *Imports & Importation*, and *Meat & Meat Prod.*

7. See cases cited in notes 261-64 *infra*; articles cited in note 5 *supra*; discussion in text at pt. III.B. In August 1967 the Pennsylvania legislature passed a bill which would have required all state-financed projects in Pennsylvania to use only steel produced in the United States. The bill was vetoed, however, in response to State Department opposition. Walker, *Steel Bill Vetoed in Pennsylvania*, N.Y. Times, Aug. 11, 1967, at 41, col. 1.

8. Often the term "municipal law" is used by international lawyers to describe the law of one country as distinguished from international law. See I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 29 (1966). The term "national law" is also used. See W. BISHOP, *GENERAL COURSE OF PUBLIC INTERNATIONAL LAW*, 1965, 191 in 2 *ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS* (1965). In this article the term "domestic law" is used synonymously with "municipal law" and "national law" and unless the context indicates otherwise will refer to United States domestic law. "Domestic law" seems to be more understandable to the American lawyer and is the term used by the American Law Institute. *RESTATEMENT (SECOND) OF THE LAW, Foreign Relations Law of the United States* (1965) (hereinafter cited as *RESTATEMENT*).

9. See, e.g., E. BYRD, *TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES* (1960); W. MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941); MacDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 *YALE L.J.* 181, 534 (1945); Comment, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 *U. CHI. L. REV.* 580 (1967); Note, 61 *COLUM. L. REV.* 505 (1961).

10. In particular, the Protocol of Provisional Application and art. XXIV, para. 12 of GATT introduce complexities. See the discussion in text at pt. III, especially pts. III.A.2 & III.B.2.

11. The relationship of the preparatory work for the International Trade Organization (ITO) and that for GATT is described in Jackson, *supra* note 1, at 134. Four international conferences were held to draft the ITO Charter. The first three of these conferences were officially titled Meetings of the Preparatory Committee, and were held in London from October 15 to November 26, 1946; in Lake Success, New York from January 20 to February 25, 1947; and in Geneva from April 10 to October 30, 1947. Most of GATT was actually negotiated at Geneva, but portions of the preparatory work at the previous two meetings are also relevant.

work of the ITO when the latter came into existence.¹² The United States failed to accept the ITO Charter, however, and the ITO consequently failed to materialize;¹³ thus, GATT became, by default, the general regulatory institution for world trade, filling the gap left by the demise of the ITO. This misdirected beginning, the political sensitivity and trade protectionism in the United States in the late 1940's, and the shifting of the power over foreign economic affairs from the legislative to the executive branch in this country¹⁴ all caused GATT to be established in a halting "provisional" manner that continues to make it an anomaly among major international institutions.¹⁵

This article will undertake a two-step analysis. First, in Part II, the question whether GATT is legally a part of United States domestic law will be examined. Then, assuming GATT is part of this law, Part III will examine the extent of GATT's domestic law effect and its general relationship to other law, both federal and state. The chosen focus of this article thus excludes treatment of substantive obligations under specific GATT clauses.¹⁶ It also excludes intensive development of the myriad details of the scope of executive authority to negotiate particular trade concessions under legislation such as the Trade Expansion Act of 1962,¹⁷ especially since the extent of this authority is perhaps more heavily

12. For instance, para. 2 of GATT, art. XXIX states: "Part II of this agreement shall be suspended on the day on which the Havana Charter enters into force."

13. The Administration had repeatedly stated to Congress that, while GATT was being negotiated pursuant to authority which the Executive already possessed, the ITO would be submitted to Congress for approval. S. REP. NO. 107, 81st Cong., 1st Sess., pt. II, at 4 (1949) (minority report); *Hearings on House Joint Resolution 236 Providing for Membership and Participation by the U.S. in the ITO Before the House Comm. on Foreign Affairs*, 81st Cong., 2d Sess. (1950); *Hearings Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 549-50 (1949); *Hearings Before the House Comm. on Ways and Means*, 80th Cong., 1st Sess. 11 (1947); *Hearings Before the Senate Comm. on Finance*, 80th Cong., 1st Sess. 2 (1947). Finally, however, the executive branch decided not to resubmit the ITO to Congress. State Department Press Release, Dec. 6, 1950, reprinted in 23 DEP'T OF STATE BULL. 977 (1950); *Hearings Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 13, 1247 (1951). For a further description of the causes behind the decision not to submit the ITO, see R. GARDNER, *STERLING DOLLAR DIPLOMACY* (1956); Diebold, *The End of the ITO* (Princeton Essays in International Finance No. 16, 1952).

14. See text accompanying notes 27 & 135 *infra*.

15. See discussion in text at pt. III.A.2; Jackson, *supra* note 1. Provisional application means, among other things, that a nation may withdraw upon only sixty days notice. Protocol of Provisional Application, 61 Stat. pt. 6, at A2051 (1947), 55 U.N.T.S. 308 (1950).

16. Examination of certain of the clauses may be found in Jackson, *supra* note 1.

17. See list of statutes in app. D. The U.S. Tariff Schedules in GATT contain literally tens of thousands of items, and the question can be raised as to executive authority to negotiate any one of them. There are a number of especially interesting cases, many of which do not appear on the record and are known only to government officials who have spent lifetimes dealing with the subject.

dependent upon executive-congressional political relationships than upon legal notions.

II. GATT AS UNITED STATES DOMESTIC LAW

Even though GATT is binding on the United States under international law,¹⁸ it could fail to be effective as domestic law if either the agreement were not validly entered into under United States constitutional law or, though validly entered into and recognized by this country as an international legal obligation, it were not under its own terms or for United States constitutional reasons, domestic law.¹⁹

A. Authority for United States Participation in GATT

It is generally settled that under our Constitution international "treaty"²⁰ obligations can be established in any of the following ways: (1) an agreement negotiated by the President, with advice and consent by a two-thirds vote in the Senate; (2) an executive agreement of the President, acting under authority delegated by an act of Congress; and (3) an executive agreement of the President, acting under his constitutional power to conduct foreign affairs.²¹ The adherence of the United States to GATT rests upon the so-called "Protocol of Provisional Application," which was signed in Geneva October 30, 1947.²² GATT has never been submitted to the Senate; in fact, there was never even a plan to do so.²³ Thus the

18. It is accepted, by some at least, that a nation may be bound under international law to a treaty, even though it has not followed its own internal constitutional or domestic law in accepting the treaty. See International Law Commission of the United Nations, Draft Articles on the Law of Treaties and Commentaries, UN Doc. A/6309/Rev. 1, reproduced in 61 AM. J. INT'L L. 248, 291 (comment 9 to art. II) (1967); RESTATEMENT § 123. GATT was made effective by the Protocol of Provisional Application, which was signed by the requisite number of states to bring it into effect, including the signature of the United States representative with full powers. 55 U.N.T.S. 308, 312 (1950). See also *Hearings Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1092 (1949).

19. RESTATEMENT § 141; BISHOP, *supra* note 8, at 201.

20. The term "treaty" has two senses. On the one hand it is a generic term referring to all international agreements. See International Law Commission, *supra* note 18, at comment 2 to art. 2. This is the use in the text above. On the other hand, in the United States constitutional law sense the word "treaty" refers only to those international agreements to which the Senate must and does give its "advice and consent." This country, then, can enter into "treaty" obligations in the international sense without Senate consent. See RESTATEMENT § 123 (comment).

21. See RESTATEMENT §§ 130, 131; MacDougal & Lans, *supra* note 9.

22. 61 Stat. pt. 6, at A2051 (1947), 55 U.N.T.S. 308 (1950). The Protocol was signed on behalf of the United States by Winthrop Brown, then Chief, Division of Commercial Policy, Dep't of State, who acted with full powers.

23. See State Department Press Release, Dec. 13, 1945, reprinted in 13 DEP'T STATE BULL. 970 (1945), announcing that invitations had been sent to a group of countries for negotiations on trade matters, and stating: "The latter agreements, so far as the United States is concerned, would be negotiated under the Reciprocal Trade Agree-

authority for American participation in GATT must stem from one of the two types of executive agreement mentioned above. Representatives of the executive branch have not always displayed certainty as to the true legal basis for GATT: some have stated that the executive agreement was based entirely upon congressional authorization;²⁴ others have said that the basis, at least in part, was the independent constitutional power of the President to conduct foreign affairs.²⁵

1. *Congressional Delegation of Authority to the President*

The United States Constitution provides in article I that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises [and] . . . To regulate Commerce with foreign Nations"²⁶ Thus, it seems clear that congressional participation is essential for entry into any broad and detailed international trade agreement, such as GATT. But, although Congress at one time legislated tariff matters in great detail, this, as its own members have stated, proved to be unsatisfactory. Not only was it unduly burdensome, but the results by any fair appraisal were abominable. As one Senator put it in 1934:

[O]ur experience in writing tariff legislation . . . has been discouraging. Trading between groups and sections is inevitable. Log-rolling is inevitable, and in its most pernicious form. We do not write a national tariff law. We jam together, through various unholy alliances and combinations a potpourri or hodgepodge of section and local tariff rates, which often add to our troubles and increase world misery²⁷

Consequently, in the last three decades, there has been an accelerating shift of power over foreign economic affairs from Congress to the executive. Moreover, because of GATT's unusual and unexpected origin, Congress has played a relatively minor role in the

ments Act." See also statements made by executive branch spokesmen in *Hearings on the International Trade Organization Before the Senate Comm. on Finance*, 80th Cong., 1st Sess. 70-74 (1947); *Hearings on the Reciprocal Trade Agreement Program Before the House Comm. on Ways and Means*, 80th Cong., 1st Sess. 11 (1947).

24. 94 CONG. REC. 12662 (1949).

25. See H.R. REP. NO. 2007, 84th Cong., 2d Sess. 113 (1955); *Hearings on Extension of the Trade Agreements Act Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 1153 (1951); *Hearings on the Extension of Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1051 (1949); Statement by the Legal Advisor to the State Department, reprinted in *Hearings of the Senate Finance Comm. on the ITO*, 80th Cong., 1st Sess. 173-76 (1947). See also app. B for the State Department analysis of authority for entry into GATT on an article-by-article basis.

26. U.S. CONST. art. I, § 8.

27. 78 CONG. REC. 10379 (1934) (remarks of Senator Cooper), quoted in S. REP. NO. 258, 78th Cong., 1st Sess. 49 (1943).

development of our relationship with GATT as an instrument of United States policy.²⁸ While admittedly these factors must be distinguished from the legal questions involved, their presence must also be noted since it colors those legal questions and influences the advocates of differing legal positions.

The basic congressional delegation of power relied upon by the President in accepting the GATT Protocol of Provisional Application is contained in the Reciprocal Trade Agreements Act as amended and extended for three years in 1945.²⁹ The acceptance by

28. Congressional complaints about this can be found sprinkled throughout the large number of hearings on extensions of the Trade Agreements Acts from 1947 down to the present. For some particularly salient examples, see H.R. REP. NO. 2007, 84th Cong., 2d Sess. 34 (1956) (supplemental views of Representative Thomas B. Curtis); *Hearings on the Extension of the Trade Agreements Act Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 1096 (1951); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1253 (1949).

29. 59 Stat. 410 (1945). See app. D for a complete listing of the citations to the successive trade agreements acts. The basic trade agreements authority delegated by the 1945 statute was in the following terms:

Sec. 350. (a) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by that means hereinafter specified, is authorized from time to time—

(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and

(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any rate of duty, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress), or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly or indirectly: *Provided*, That the President may suspend the application to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts including the operation of international cartels or policies which in his opinion tend to defeat the purposes set forth in this section; and the proclaimed duties and other import restrictions shall be in effect from and after such time as is specified in the proclamation. The President may at any time terminate any such proclamation in whole or in part.

(b) Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on Decem-

the United States of subsequent amendments to GATT depends on later versions of this Act, and will be discussed below.³⁰ The question before us at this point, then, is whether this 1945 Statute authorized the President to bind the United States to GATT, which at the time consisted of approximately 45,000³¹ tariff concessions (commitments as to maximum tariffs on items listed) and thirty-four (later thirty-five) articles obligating the signatory governments on such matters as most-favored-nation treatment, non-discrimination in internal taxation, quantitative restrictions on imports, duties of consultation with other signatories, and duties to act "jointly" with other parties to GATT in certain situations.³² If this question is answered in the negative, then the source of authority must be sought in the President's independent constitutional powers or in other legislation.³³

Legal attacks on the argument that our adherence to GATT is properly based upon this Statute have usually been on two fronts: (1) the Statute unconstitutionally delegated legislative power;³⁴

ber 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba: *Provided*, That the duties on such an article shall in no case be increased or decreased by more than 50 per centum of the duties, however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress).

(c) As used in this section, the term "duties and other import restrictions" includes (1) rate and form of import duties and classification of articles, and (2) limitations, prohibitions, charges, and exactions other than duties, imposed on importation or imposed for the regulation of imports.

(d) (1) When any rate of duty has been increased or decreased for the duration of war or an emergency, by agreement or otherwise, any further increase or decrease shall be computed upon the basis of the post-war or post-emergency rate carried in such agreement or otherwise.

(2) Where under a foreign trade agreement the United States has reserved the unqualified right to withdraw or modify, after the termination of war or an emergency, a rate on a specific commodity, the rate on such commodity to be considered as "existing on January 1, 1945" for the purpose of this section shall be the rate which would have existed if the agreement had not been entered into.

(3) No proclamation shall be made pursuant to this section for the purpose of carrying out any foreign trade agreement the proclamation with respect to which has been terminated in whole by the President prior to the date this subsection is enacted.

30. See discussion in text at pt. II.A.3.

31. See H.R. REP. NO. 2009, 80th Cong., 2d Sess. 12 (1948).

32. See app. A for list of the GATT articles and their general subject matter. See also note 1 *supra*.

The strongest legal battles over the validity of GATT have been fought not in the courts, but in the congressional hearings. See the list of renewal acts and related House and Senate Reports in app. D. See also *Hearing on the ITO Before the House Foreign Affairs Comm.*, 81st Cong., 2d Sess. (1950); *Hearings on Operation of the Trade Agreements Act and the Proposed ITO Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. (1947); *Hearings on the Operation of the Trade Agreements Act and the Proposed ITO Before the Senate Finance Comm.*, 80th Cong., 1st Sess. (1947).

33. See discussion in text at pt. II.A.2.

34. See *Hearings on the Extension of the Trade Agreements Act Before the Senate Finance Comm.*, 78th Cong., 1st Sess. 143 (1943); *Hearings on the Extension of*

(2) an agreement such as GATT is beyond the scope of the authority delegated by the Statute. At least one court has upheld this Statute in the face of the constitutional argument.³⁵ Indeed, the history of similar delegations, which goes back almost to the beginning of the Republic,³⁶ and several Supreme Court opinions³⁷ rendered on similar statutes confirm the many memoranda³⁸ contained in the congressional committee reports on the Reciprocal Trade Agreements Act and its extensions which conclude that the Statute is not challengeable for unconstitutionality.

The second line of attack, that GATT goes beyond the authority delegated by the Statute, is more complex. The arguments that the Statute does not delegate such power can be sorted into three groups: (1) GATT is a multilateral agreement, whereas the Act authorized only bilateral agreements; (2) various specific substantive clauses of GATT go beyond the statutory authorization (for example, provisions on quantitative restrictions, national treatment of imported goods, dumping, and customs valuation); and (3) GATT is an international organization, with voting and other administrative clauses, and the United States executive was given no authority to enter such an organization. Let us deal first with the multilateral question.

By the time the trade agreements authority was renewed in 1945, this country had entered into thirty-two separate trade agreements under the Reciprocal Trade Agreements Act and its exten-

the Reciprocal Trade Agreements Act Before the Senate Finance Comm., 76th Cong., 3d Sess. 698 (1940); *Hearings on the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 73d Cong., 2d Sess. 60 (1934).

35. *Starkist Foods, Inc. v. United States*, 47 C.C.P.A. 52 (1959). See also Note, 61 COLUM. L. REV. 505 (1961).

36. See S. REP. NO. 1297, 76th Cong., 3d Sess. 5 (1940); *Hearings on Extension of Reciprocal Trade Agreement Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1095 (1949); memorandum of the State Department entitled Congressional Legislation and Reciprocal Executive Agreements Concerning Tariff and Related Matters, reprinted in *Hearings on Reciprocal Trade Agreements Before the Senate Finance Comm.*, 73d Cong., 2d Sess. 82 (1934). The effect of practice over a period of time was succinctly stated by Secretary Dulles when, in reference to the Trade Agreements Acts, he said: "I don't believe that this law which has remained on the books 21 years unchallenged is unconstitutional . . ." *Hearings on the Trade Agreements Extension Before the Senate Finance Comm.*, 84th Cong., 1st Sess. 1252 (1955).

37. *Hampton & Co. v. United States*, 276 U.S. 394 (1928); *Field v. Clark*, 143 U.S. 649 (1892).

38. See H.R. REP. NO. 2007, 84th Cong., 2d Sess. app. G, at 113 (1956); *Hearings on the Extension of the Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1059 (1949); *Hearings on Extension of the Trade Agreements Act Before the Senate Finance Comm.*, 80th Cong., 2d Sess. 470-71 (1948); *Hearings on Extension of Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 76th Cong., 3d Sess. 729 (1940); State and Justice Departments memoranda reprinted in *Hearings on Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 73d Cong., 2d Sess. 82 (1934). See also Note, 61 COLUM. L. REV. 505 (1961).

sions since the original Act was adopted in 1934.³⁹ Except for an agreement with the Belgo-Luxembourg Economic Union,⁴⁰ these agreements were all bilateral. A search of the legislative history for the 1945 Act, as well as that for the predecessor enactments in 1934, 1937, 1940, and 1943, reveals no explicit mention of the possibility of a multilateral agreement pursuant to the authority delegated, although one statement spoke of the agreements being "reciprocal rather than bilateral."⁴¹ On the other hand, several statements in the 1945 legislative history refer to the Act as one of several postwar economic policy building blocks, side by side with such others as the Bretton-Woods Agreements, which did set up two multilateral organizations.⁴² In addition, some of the early congressional criticism of the trade agreements program was directed at the most-favored-nation policy, which allowed some nations to reap the benefits of bilateral negotiations between the United States and third countries.⁴³ The logical way to prevent these "free rides" was to develop some sort of multilateral procedure for negotiation.⁴⁴ All

39. These agreements are listed in *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Comm. on Ways and Means*, 79th Cong., 1st Sess. 932 (1945).

40. Agreement between the United States of America and the Belgo-Luxembourg Union, 49 Stat. 3680 (1935).

41. 91 CONG. REC. 5049 (1945). See app. D for a list of the acts and some of their legislative history.

42. *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Comm. on Ways and Means*, 79th Cong., 1st Sess. 45-46, 819 (1945); 91 CONG. REC. 4885, 6019 (1945).

43. H.R. REP. NO. 594, 79th Cong., 1st Sess. 49 (1945); *Hearings of the House Ways and Means Comm.*, 79th Cong., 1st Sess. 41, 432, 819, 837 (1945); 91 CONG. REC. 4979, 5049, 5086, 5089, 5100, 5142, 6210 (1945).

44. The policy of unconditional most-favored-nation application of foreign trade agreements was adopted by the United States in 1923 [91 CONG. REC. 4979 (1945)], and enacted into law as § 350(a)(2) of the Reciprocal Trade Agreements Act of 1934, 48 Stat. 943. The statute provides: "The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly or indirectly . . ." The most favored nation clause was typically worded like that in the United States-Mexico Reciprocal Trade Agreement of 1942 (57 Stat. 833) which read:

With respect to customs duties . . . [etc.] any advantage, favor, privilege, or immunity which has been or may hereafter be granted by the United States of America or the United Mexican States to any article originating in or destined for any third country shall be accorded immediately and unconditionally to the like article originating in or destined for the United Mexican States or the United States of America, respectively.

Id. at 835. Thus, if the United States agreed with Great Britain that it would limit the amount of tariff on widgets to 10%, it was committed by the MFN clause in various other treaties to limit its tariff on widgets to the same amount when those widgets were imported from those other countries. If the United States negotiated with Great Britain for the lowering of widget tariffs, it would usually receive some benefit or concession in return from Great Britain. But if the percentage of its total imports of widgets which originated in Great Britain were 50%, then another 50% of widget imports would come in under the same duty reduction, without anything having been received in compensation to the United States. The rationale or justification for this type of policy is that when all trading partners apply it, then the United

things considered, however, it is understandable that Congress was surprised when, less than six months after it extended the Trade Agreements Act without discussion of the possibility of a multilateral trade agreement, it learned that the executive branch had called on fifteen other nations to join with it in multilateral tariff negotiations.⁴⁵

From examining the text of the Statute,⁴⁶ one can see that it places no *explicit* hurdle against multilateral trade agreements. Furthermore, it was stressed in testimony before the congressional committee⁴⁷ that the 1947 GATT negotiations would in reality be "bilateral," as before, with the results of the many bilateral negotiations simply drawn together in one instrument, for the sake of convenience. Even an opposing Congressman commented that merely because the result was one instrument signed by all, did not in itself mean that the President had exceeded his statutory authority.⁴⁸ Thus, one can conclude that GATT does not go beyond the statutory authority merely because of its multilateral nature.

A more serious statutory assault on GATT is the argument that specific provisions of GATT exceed the authority delegated to the President by the Trade Agreements Act. Careful analysis is required to evaluate this argument, but to discuss each clause of GATT here would be tedious and lengthy. Appendix A outlines the sources, if the reader wishes to pursue the matter as to any specific article of GATT. Without reference to specific GATT provisions, however, the arguments for the statutory validity of our adherence to GATT can be summarized as follows: (1) the language

States also reaps the benefit of negotiated concessions between other countries. Nevertheless, there is the danger of the free ride by third parties whenever the United States negotiates a tariff concession with another country. One way to prevent this is to develop multilateral negotiations (as was done in GATT), so that a tentative concession could be arranged between country A and country B, and then the importing country could go to its other trading partners who exported the same item and ask for compensatory concessions for the advantage they would receive by the lower tariff on those items. Thus if country B and C each exported 50% of the imports of widgets into A, and A negotiated a tentative tariff concession with B, A could then go to C during the multilateral negotiations and ask for some compensatory concession for the advantage C would receive by the lowering of the tariff on the widget.

45. State Department Press Release, Dec. 16, 1945, reproduced in 13 DEP'T STATE BULL. 970 (1945). See also *Hearings on the Operation of the Trade Agreements Act and the Proposed International Trade Organization Before the House Foreign Affairs Comm.*, 80th Cong., 1st Sess., pt. 1, at 6 (1947).

46. See note 29 *supra*.

47. *Hearings on Operation of the Trade Agreements Act and Proposed ITO Before the House Ways & Means Comm.*, 80th Cong., 1st Sess. 191-95, 235 (1947).

48. *Id.* at 235. The author has been informed that United States participation in the multilateral Universal Postal Union is also based on statutes which had been drafted with bilateral agreements in mind. This could be a precedent for GATT participation.

of the Statute can be read to permit United States entry into GATT, since it authorizes "trade agreements" either without explicit limitation or with limitations that can be interpreted not to preclude an agreement such as GATT; (2) the legislative history shows that provisions such as those in GATT were contemplated by Congress; (3) prior trade agreements known to Congress had provisions like those of GATT, thus further evidencing congressional intent; (4) later actions of Congress can be taken as recognizing or accepting GATT; and (5) several court cases, while not directly litigating the validity of GATT, have resulted in decisions and opinions that necessarily imply its validity.

In a very real sense, one of the most telling arguments is simply the passage of time. The practice today of all three branches of our government recognizes the legal existence of GATT;⁴⁹ to disown GATT at this point would be a jolt to this nation's foreign policy and, indeed, to the stability of international economic relations throughout most of the world. While the political arms of the government might administer such a jolt, one can only conclude that, in any imaginable test of GATT's legality in American courts, the agreement as a whole will continue to be upheld. The legal arguments, however, can directly influence the future scope and extent of the impact of GATT. Additionally, legal arguments illustrate aspects of the congressional-executive relationship concerning GATT which have already affected GATT to a great extent and which will continue to do so.

The statutory language. The language of the Statute is curiously bifurcated in form: it makes two grants of power to the President,⁵⁰ first to "enter into foreign trade agreements," and second "to proclaim such modifications of existing duties and other import restrictions . . . as are required or appropriate to carry out any foreign trade agreement" Then follow certain *limitations* on the power to proclaim.⁵¹

It has been argued⁵² that the first clause is unlimited: the President is given the power to enter into any "foreign trade

49. As to the effect of passage of time on the legal issue, see note 36 *supra*. The executive branch initiated GATT and has, of course, continuously argued for its validity. When faced with a GATT question, the judiciary has assumed the valid existence of GATT. See notes 108 & 109 *infra* and accompanying text. As for Congress, even it today recognizes and relies on the validity of GATT; for example, legislation authorizing the Kennedy Round would make little sense unless the background of GATT existed. See note 108 *infra* and accompanying text.

50. See § 350(a) of the Trade Agreements Extension Act of 1945, quoted in note 29 *supra*.

51. *Id.*

52. Memorandum of the Department of State, printed in H.R. REP. No. 2007, 84th Cong., 2d Sess. 113 (1956).

agreement," the only limitation on this power being implicit in the definition of "foreign trade agreement." This does not necessarily mean that the President could *carry out* all parts of such an agreement (for instance, domestic legal action might be necessary to do so), but merely that he has the authority to obligate the United States in the international sense to anything that can reasonably be called a "foreign trade agreement." If this be the case, it is possible to test the validity of GATT as an international obligation by checking each of its parts to see if it appropriately belongs in a "foreign trade agreement." Historical examples would help define "trade agreement," and the analysis below as to prior trade agreements known to Congress⁵³ would certainly be relevant, although not determinative. The broadest scope that can be argued for the Statute is that anything that affects foreign trade (and, as nations are learning, there is little that does not)⁵⁴ is appropriate in a foreign trade agreement. The provisions of GATT would fall easily within this definition.

Arguably, the definition of "trade agreement" is much more restricted: it is possible to read the limiting language in the second clause, relating to the proclamation power, as also attaching to the grant of power in the first clause. The propriety of this reading is reinforced by the notion that it is idle (or worse, bad policy) to authorize the President to commit the United States internationally without giving him sufficient means to carry out this commitment; such would be the case if the powers of implementation were restricted in a way that the power to agree was not. This interpretation would result in limiting the President's authority to enter into "trade agreements" to those agreements concerned with "duties and import restrictions." An examination of GATT provisions, however, reveals that most of the general articles⁵⁵ can be justified as

53. See text following note 72 *infra*.

54. Even interest rates in the respective countries are now becoming a subject of international understanding or agreement. See Cowan, *U.S. and 4 Nations Join To Seek Cuts in Interest Rates*, N.Y. Times, Jan. 23, 1967, at 1, col. 8. The potential broad reach of this argument was recognized in the 1949 *Senate Finance Comm. Hearings*, 81st Cong., 1st Sess. 1156:

Senator Millikin: I think you gave us a measuring stick a while ago that gave us, as I see it, a glimpse of your philosophy. Is it your contention that you can take any economic situation, any place, and say that this puts a hindrance upon trade, or puts up a hurdle to trade, export or import, and that if you find that to be a fact you can make an agreement of any nature that in our [sic] opinion will remove or tend to remove that hurdle?

Mr. Brown: No, sir.

55. The original General Agreement, as drafted at Geneva in 1947 and implemented on January 1, 1948, contained thirty-four articles. As a result of some changes made in 1948, a new article, art. 35, was added to GATT. Since this article was added so soon after the origin of GATT, it is generally considered that GATT has always had thirty-five articles. Today, of course, due to the addition of pt. IV to GATT,

embraced within the term "import restriction."⁵⁶ Of the remaining articles, some merely contain exceptions to commitments against tariff or non-tariff barriers and thus are within the statutory language.⁵⁷ The articles which deal with administrative matters, such as consultation over disputes, accession of new parties, "waivers," amendments, and withdrawal, however, are the hardest to bring within the statutory language. Clearly, some of these provisions may be implicitly authorized as essentially concomitant to any foreign agreement, especially a foreign trade agreement.⁵⁸

The scope of executive authority might also be limited by statutes other than the Trade Agreements Act, however, most such problems were avoided when Part II of GATT, the "trade conduct code" containing most of the questionable articles, was made subject to "existing legislation."⁵⁹ Likewise, the President might turn to other statutes to expand the scope of his authority to enter trade agreements, as appears necessary to support the GATT clauses that deal with *export* controls.⁶⁰

In sum, looking only at the explicit language of the statutory delegation, the argument that GATT is within its scope as a "trade agreement" appears persuasive. But even if one chooses to apply other limiting language in the Statute to the scope of authority to enter agreements, most of GATT can be justified under the express language.

Legislative history. It is clear from the legislative proceedings in 1945 that Congress contemplated that provisions in trade agreements

which came into force in June 1966, GATT has a total of thirty-eight articles. See note 160 *infra*. In addition, there are the various annexes and bulky schedules of tariff concessions which are incorporated by reference.

56. The general subject matter of each article is stated in app. A, which also indicates a congressional justification or precedent for each article. As to the limits of tariff cutting authority, see DEP'T OF STATE, ANALYSIS OF GENERAL AGREEMENT ON TARIFFS AND TRADE (Commercial Policy Series 109, Publ. No. 2983, 1947), which states that the limits on executive negotiating power as to tariff rates were observed.

57. If authority exists to negotiate on a subject, such authority would seem usually to extend to negotiating exceptions to commitments regarding the subject.

58. See discussion in text at pt. III.A.2; note 56 *supra*; text following note 111 *infra*.

59. See discussion in text at pt. III.A.2; lists of "inconsistent legislation" cited in notes 250 & 251 *infra*.

60. GATT articles and paragraphs which mention "exports" are I:1, VI:1; VI:5; VI:6(b); VI:7(a); VIII:1 & 4; IX:2; XIII:1; XI:1; XVI:B; XX:i. At the time GATT was negotiated, the President had authority to govern exports under § 6(d) of the Act of July 2, 1940, 54 Stat. 714, as amended by 56 Stat. 463 (1942) and 61 Stat. 946 (1947). A thorough study of United States export controls can be found in Bermann & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791 (1967). See also app. A. President Truman's 1947 Proclamation of GATT relies not only on § 350 of the Tariff Act [19 U.S.C. § 1351 (1964)], but also upon § 304(3) [19 U.S.C. § 1304 (1964)] which embodied a 1938 amendment relating to marking requirements.

authorized under the Statute would go considerably beyond tariff concessions. Not only did Congress have before it previously negotiated trade agreements with extensive non-tariff provisions,⁶¹ but criticisms of these agreements as well as other statements made in committee hearings show clearly that Congress was cognizant of the importance of non-tariff barriers to international trade and of the dangers of tariff concessions being effectively nullified by import quotas, currency devaluations, and other ingenious devices.⁶² One Congressman listed twenty-nine trade barriers that he claimed had been used against the United States.⁶³ To have concluded a foreign trade agreement without provisions to protect the value of tariff concessions would have run counter to congressional intent; indeed, American negotiators at Geneva in 1947 refused to enter into tariff commitments without the protection of the general provisions which were included in the GATT agreement.⁶⁴ Likewise, there was considerable discussion in Congress about the most-favored-nation clause⁶⁵ and about the "escape clause"⁶⁶ (including an informal commitment by the Administration to include the escape clause in all future trade agreements).⁶⁷ In fact, most of the individual provisions of GATT, when matched against pertinent legislative history, relate to specific discussions in the latter (see Appendix A).

61. See text accompanying note 72 *infra*.

62. H.R. REP. NO. 594, 79th Cong., 1st Sess. 43, 51 (1945); 91 CONG. REC. 4876 (remarks of Congressman Knutson), 4886 (remarks of Congressman Robertson), 4998-99 (remarks of Congressman Reed), 5070 (remarks of Congressman Curtis) (1945); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the Senate Comm. on Finance*, 79th Cong., 1st Sess. 41-42, 83, 92 (1945); *Hearing on the Extension of the Reciprocal Trade Agreements Act Before the House Ways and Means Comm.*, 79th Cong., 1st Sess. 63, 194, 226, 307, 309, 409, 576, 2337, 2339 (1945).

63. 91 CONG. REC. 4999 (1945) (remarks of Congressman Reed).

64. Meeting of the Trade Agreement Committee in Geneva, U.N. Doc. E/PC/T/TAC/PV/3, at 17-19 (1947). Preparatory materials for drafting GATT, which were prepared in 1946-1947 under the auspices of the United Nations, bear the document identification U.N. Doc. E/PC/T. For purposes of simplification, these documents will be cited as EPCT/.

65. H.R. REP. NO. 594, 79th Cong., 1st Sess. 49 (1945); 91 CONG. REC. 4979 (remarks of Congressman Cooper), 5049 (remarks of Congressman Mills), 5086 (remarks of Congressman McCormack), 5100 (remarks of Congressman Lewis), 5142 (remarks of Congressman Hale), 6210 (remarks of Congressman Thomas) (1945); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Comm. on Ways and Means*, 79th Cong., 1st Sess. 41, 432, 819, 837 (1945).

66. H.R. REP. NO. 594, 79th Cong., 1st Sess. 8 (1945); 91 CONG. REC. 4872, 4891 (1945); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 79th Cong., 1st Sess. 84, 86, 90, 459 (1945); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Comm. on Ways and Means*, 79th Cong., 1st Sess. 273 (1945).

67. 91 CONG. REC. 4872 (1945) (remarks of Congressman Doughton). Later the President issued an executive order providing that an escape clause similar to that found in the Mexican Treaty would be included in all future trade agreements. See Executive Order No. 9832 of Feb. 25, 1947. 3 C.F.R. 1943-1948 Comp. 624.

The clauses which do not so relate are of three types: (1) those concerned with administrative matters;⁶⁸ (2) those which deal with import barriers not specifically mentioned in the legislative history, but similar to barriers expressly mentioned, and thus arguably within the scope of the general authority to protect the value of tariff concessions against non-tariff barriers;⁶⁹ and (3) two clauses which except economic development arrangements⁷⁰ and regional trading blocks⁷¹ from the application of the agreement.

Previous foreign trade agreements. During the 1945 debate, Congress had before it the previous thirty-two trade agreements negotiated under the authority of the Trade Agreements Acts.⁷² It is logical to conclude that, as Congress extended the authority to enter into "foreign trade agreements," it intended to grant authority which at least encompassed subjects dealt with in prior agreements. Consequently, it is useful to compare the subject matter of some of these previous agreements with that of GATT, to see in what respects, if any, GATT departs from precedent and tradition.⁷³ It may be noted that the GATT negotiators at Geneva expressed the view on several occasions that GATT was to take merely the "usual form of trade agreements," and should include only clauses which were normally found in such agreements⁷⁴ and which were essential to safeguard the value of the tariff concessions negotiated.⁷⁵

An analysis comparing GATT with certain of these prior agreements is also contained in Appendix A. It shows that almost the entire range of GATT's substantive subject matter had been dealt with in one or more prior United States trade agreements, including the regulation of exports. (The only exceptions to this are films and export or import-reduction subsidies.) Of course, the GATT administrative provisions are different from those of prior agreements due to the multilateral nature of GATT, but many of these

68. GATT, arts. XXII-XXXV and specific portions of other articles.

69. See app. A.

70. GATT, art. XVIII.

71. GATT, art. XXIV.

72. See list of the agreements reproduced in the *Hearings on Extension of the Trade Agreements Act Before the House Comm. on Ways and Means*, 79th Cong., 1st Sess. 38, 636, 932 (1948). A list of U.S. agreements with most-favored-nation clauses appears at p. 837 of these hearings. A full reprint of the agreement with Mexico, which is representative, may also be found at p. 237.

73. See app. A.

74. Report of the Tariff Negotiation Working Party—General Agreement on Tariffs and Trade, U.N. Doc. EPCT/135, para. 6, at 2 (1947); U.N. Doc. EPCT/TAC/PV.3, at 19 (1947).

75. Report of the First Session of the Preparatory Committee of the U.N. Conference on Trade and Employment 50 (Oct. 1946); U.N. Doc. EPCT/TAC/PV.2, at 19 (1947).

provisions are simply multilateral parallels to bilateral provisions in prior agreements.⁷⁶ Given the complexity and comprehensiveness of United States trade agreements prior to the 1945 Act, and allowing for GATT's multilateral nature, it is hard to conclude that GATT was a radical or even a substantial departure from the pattern of prior agreements. Arguably, then, the general subjects of GATT were within the contemplation of Congress when it extended the authority to the President to enter "trade agreements." This, however, is a conclusion as to the then-existing intent; it may well be that Congress did not envision the resultant vast extension of power by the President. Particularly, GATT may have resulted in an unforeseen extension of executive power, simply because the same provision may have a greater impact in a multilateral context than in the context of bilateral relations.

Congressional ratification. The GATT provisions have never been formally submitted to Congress. The theory of the executive branch has been that GATT was authorized by a combination of existing statutes and presidential power, and that therefore there was no need to submit it to Congress.⁷⁷ It was intended that the ITO agreement be submitted to Congress;⁷⁸ this would have given Congress a formal opportunity to review provisions many of which are identically worded in GATT. The ITO was abandoned, however, so that, while the GATT provisions were extensively discussed in committee,⁷⁹ Congress has never formally approved them.

Congress has been acutely aware of GATT over the two decades of GATT's existence. Each time it extended the Trade Agreements Act, GATT was debated.⁸⁰ In 1955, the Draft Charter for the Organization for Trade Cooperation (OTC), which was prepared at GATT meetings and would have set up a formal international organization to oversee GATT, was submitted to Congress,⁸¹ but

76. For an example of administrative provisions in a bilateral trade agreement, see clauses VI & X of the Agreement between the United States and the Netherlands regarding, *inter alia*, "sympathetic consideration" and the appointment of a committee to handle certain disputes. 50 Stat. 1504 (1935).

77. State Department Press Release, Dec. 13, 1945, reprinted in 8 DEP'T STATE BULL. 970 (1945); *Hearings on ITO Before the Senate Finance Comm.*, 80th Cong., 1st Sess. 71 (1947); *Hearings on ITO Before the House Comm. on Ways and Means*, 80th Cong., 1st Sess. 11 (1947).

78. *Hearings on ITO Before the House Foreign Affairs Comm.*, 81st Cong., 2d Sess. (1950); *Hearings on the Operation of the Trade Agreements Act and the Proposed ITO Before the House Comm. on Ways and Means*, 80th Cong., 1st Sess. 11 (1947).

79. *Hearings on the Trade Agreements Extension Act of 1951 Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 1142 (1951).

80. See app. D; note 78 *supra*.

81. H.R. REP. NO. 2007, 84th Cong., 2d Sess. (1956).

Congress did not approve it.⁸² Arguments for and against the legality of GATT have continued in congressional proceedings at least up to the end of the 1950's.⁸³

Congressional enactments have mentioned GATT explicitly only a few times. The first of these was in the 1950 amendment to section 22 of the Agricultural Adjustment Act (AAA).⁸⁴ This section concerns import quotas on agricultural goods, a subject to which article XI of GATT is intimately related. In 1948, just after GATT came into being, Congress had amended section 22(f) to read:

No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party.⁸⁵

In 1950, certain Senators had attempted to reverse this order of precedence by proposing the following amendment:

No international agreement hereafter shall be entered into by the United States, or renewed, extended or allowed to extend beyond its permissible termination date in contravention of this section.⁸⁶

Instead Congress enacted the following amending language:

No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party; but no international agreement or amendment to an existing international agreement shall hereafter be entered into which does not permit the enforcement of this section with respect to the Articles and countries to which such agreement or amendment is applicable to the full extent that the general agreement on tariffs and trade, as heretofore entered into by the United States, permit such enforcement with respect to the Articles and countries to which such general agreement is applicable⁸⁷

This was the first explicit statutory reference to GATT,⁸⁸ and, it may be argued, was express recognition by Congress of the existence and validity of GATT.

82. A check of the index to 102 CONG. REC. and the CCH CONG. INDEX for the 84th Congress show that H.R. 5550 never came to a vote. After being reported to the House in H.R. REP. NO. 2007, 84th Cong., 2d Sess. (1956), it was given to the Committee of the Whole House on the State of the Union. No further congressional action was ever taken.

83. *Hearings on Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 85th Cong., 2d Sess. 155, 1355 (1958).

84. 64 Stat. 261 (1950).

85. 62 Stat. 1248 (1948).

86. S. REP. NO. 1375, 81st Cong., 2d Sess. 9 (1950); S. REP. NO. 1326, 81st Cong., 2d Sess. 5 (1950).

87. 64 Stat. 261 (1950).

88. Based on an extensive search through federal statutes and reading of the legislative history for the various reciprocal trade agreements acts. See note 91 *infra*.

In 1948 and 1949, Congress extended the Trade Agreements Act for the fifth⁸⁹ and sixth⁹⁰ times. Although neither extension mentioned GATT, it was discussed in the legislative history; thus, arguably, this re-enactment of the statutory authority under which the President claimed to enter GATT comprises a "ratification" of GATT.⁹¹ The extensions, however, were for one year and two years respectively, instead of the usual three years, reflecting the uncertainty over foreign economic policy which existed in Congress at that time.⁹² Administration officials testifying before Congress in 1951 refused to raise the ratification argument.⁹³

The fortunes of politics change, however, and the 82d Congress had other ideas about GATT. The Trade Agreements Extension Act of 1951 provides, in section 10, the second explicit statutory reference to GATT:⁹⁴

The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade.

This provision was repeated in the 1953, 1954, 1955, and 1958 extensions of the trade agreements authority.⁹⁵ Furthermore, in 1951 Congress amended the Defense Production Act of 1950 by adding a section which required import quotas on fats, oils, and certain dairy products in contravention of GATT.⁹⁶ In addition,

89. 62 Stat. 1053 (1948).

90. 63 Stat. 697 (1949).

91. This argument is implicit in an affidavit of Williard L. Thorp of the State Department made before the District Court of the United States for the District of Columbia in *Rodes v. Acheson*, Civil No. 3756-49 (1949):

The justification for discriminations by a country in balance of payments difficulties under certain circumstances is recognized by the United States and the 22 other parties to the General Agreement on Tariffs and Trade (treaties and other international acts series 1700). The authority to negotiate for the excession of additional countries to this agreement has recently been extended by Congress without qualification (public law 307, 81st Congress), following hearings in which the provisions of the agreement, including those as to discriminations (Article XIV) were examined in detail (Finance Committee, Senate, extension of reciprocal Trade Agreements Act hearings, vol. 2, 1250 ff.).

This affidavit was disapprovingly noted by Senator Milliken in *Hearings on Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 1191 (1951).

92. In *Territory v. Ho*, 41 Hawaii 565, 567 (1957), the Court noted with respect to the Trade Agreements Act and GATT that, "[t]he constitutionality of the grant of such authority has been repeatedly questioned in and out of Congress. Nevertheless, Congress has extended from time to time the period during which the President may exercise such authority."

93. *Hearings on Extension of the Trade Agreements Act Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 1191-92 (1951).

94. 65 Stat. 72 (1951).

95. 72 Stat. 673 (1958); 69 Stat. 162 (1955); 68 Stat. 360 (1954); 67 Stat. 472 (1953).

96. 65 Stat. 131, 132 (1951).

that year Congress once again amended section 22(f) of the AAA, this time to read:

No trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section.⁹⁷

This was done despite congressional recognition that this might require the United States to breach GATT,⁹⁸ and, in fact, forced the President to obtain a GATT waiver to avoid such a breach.⁹⁹

These actions illustrated congressional hostility toward GATT, and caused the Randall Commission on Foreign Economic Policy to state in 1954:

The General Agreement on Tariffs and Trade has never been reviewed and approved by the Congress. Indeed, questions concerning the constitutionality of some aspects of the United States participation in the General Agreement have been raised in the Congress. This has created uncertainty about the future role of the United States in the General Agreement.¹⁰⁰

When the OTC was submitted to Congress in 1956, Congressmen again complained that they had not had an opportunity to review GATT, since the Administration carefully avoided submitting it to them.¹⁰¹

As a practical matter today, however, GATT is recognized by Congress as well as the executive branch as an important cornerstone of United States policy. The Kennedy Round of tariff negotiations authorized by the Trade Expansion Act of 1962,¹⁰² makes very little sense without GATT. The evidence of congressional ratification of GATT is thus equivocal. Immediately after GATT came into being Congress seemed to go along, at least until the ITO was scuttled. Then Congress backpedalled. Yet GATT has

97. 65 Stat. 75 (1951).

98. Congress recognized the possibility that this statutory provision would be inconsistent with GATT. See S. REP. NO. 299, 82d Cong., 1st Sess. 7 (1951); *Hearings on the Trade Agreements Extension Act of 1951 Before the Senate Comm. on Finance*, 82d Cong., 1st Sess. 11 (1951). See also Waiver Granted to the United States in Connection With Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act of 1933, as amended, 3d Supp. BISD 32 (1955).

99. Decision of the Contracting Parties of GATT of March 5, 1955, GATT, 3d Supp. BISD 32 (1955).

100. COMMISSION ON FOREIGN ECONOMIC POLICY, REPORT TO THE PRESIDENT AND THE CONGRESS 49 (1954).

101. H.R. REP. NO. 2007, 84th Cong., 2d Sess. 34 (supplemental views of Honorable Thomas B. Curtis), 46 (minority views).

102. 19 U.S.C. § 1821 (1964). See *Hearings on the Trade Expansion Act of 1962 Before the House Comm. on Ways and Means*, 87th Cong., 2d Sess. 240 (1962) (memorandum on negotiating procedures under GATT). Compare 19 U.S.C. § 1882 (1964), with GATT, art. XXIII.

been so central to Western foreign economic policies that Congress has as a practical matter recognized and accepted its existence.

Court opinions. Another factor that reinforces the argument for the validity of GATT is that it has been recognized by both federal and state (including territorial) courts. The specific issue of GATT's validity was raised in only one case, but that case was dismissed on other grounds.¹⁰³ However, a number of other cases have resulted in decisions necessarily implying the validity of GATT—particularly in tariff cases before the Customs Court and the Court of Customs and Patent Appeals.¹⁰⁴ In fact, since tariff concessions embodied in GATT are so extensive, the majority of cases in those courts now involve tariff rates proclaimed by the President pursuant to GATT or amending protocols.¹⁰⁵ Other than in these courts, only seven American cases, and three opinions of the California Attorney General,¹⁰⁶ have been found which explicitly cite or mention GATT.¹⁰⁷ Of these, four were in state or territorial courts¹⁰⁸ and three in federal courts.¹⁰⁹ In each case GATT's va-

103. *Morgantown Glasswork Guild v. Humphrey*, 236 F.2d 670 (D.C. Cir. 1956).

104. *See, e.g., Bercut-Vandervoort v. United States*, 151 F. Supp. 942 (C.C.P.A. 1957); *George E. Bardwil & Sons v. United States*, 42 C.C.P.A. 118 (1955).

105. Examination of any current volume of these courts' reports reveals that the vast majority of the cases cite a presidential proclamation which effectuates a GATT agreement. For instance, in vol. 44 only twelve out of fifty-three fully reported decisions do not cite such a proclamation. *See app. C* for presidential proclamation citations for various GATT agreements.

106. The California Attorney General's opinions are 59-164, 34 Cal. A.G. 302; 60-141, 36 Cal. A.G. 147; 62-165, 40 Cal. A.G. 65.

107. The Shepard citators for all states and territories of the United States and for all federal courts of the United States were searched since 1947 to the most currently available supplement in June of 1967 for all cases which cite 61 Stat. pts. 5 & 6, at A 3. Since GATT is sometimes cited without using the "Stat." reference, it is possible that persons who prepare the citator could have missed some cases if they did not translate a different citation into the statutory citation. In addition to searching the citators, various attorneys both in and out of government were contacted who might have knowledge of other cases.

108. *Baldwin-Lima-Hamilton v. Superior Court*, 208 Cal. App. 2d 803, 25 Cal. Rptr. 799 (1962) (California "Buy American Act" held to be unenforceable because violative of GATT); *Bethlehem Steel Corp. v. Board of Comm'rs*, Civil Nos. 899165 & 897591 (Super. Ct., County of Los Angeles 1966) (also challenged the California "Buy American" Act); *Territory v. Ho*, 41 Hawaii 565 (1957) (struck down as unconstitutional and contrary to GATT a territorial law requiring retailers selling imported eggs to advertise that fact); *Texas Ass'n of Steel Importers v. Texas Highway Comm'r*, 364 S.W.2d 749 (Tex. Ct. App. 1963) (administrative ruling of the highway commission requiring the use of domestic steel in highway projects challenged as contrary to state law, the Constitution, and GATT—disposed of on state law grounds). The *Bethlehem* case held that *Baldwin-Lima-Hamilton* was controlling and that the plaintiffs had an adequate remedy at law and therefore denied a petition for a preliminary injunction. On May 2, 1967, defendant's motion to dismiss was granted. The author has been informed that the case has been appealed. *See note 286 infra. See also Comment, GATT, The California Buy American Act, and the Continuing Struggle Between Free Trade and Protectionism*, 52 CALIF. L. REV. 335 (1964); *Note*, 17 STAN. L. REV. 119 (1964).

lidity was either assumed, upheld, or not decided. No opinion citing or mentioning GATT has yet been rendered by the United States Supreme Court.

It is appropriate now to turn to the third question as to the statutory validity of GATT mentioned at the outset of this subsection: whether the administrative provisions¹¹⁰ of GATT constituted it an international organization which the President did not have the statutory power to join. Most previous United States trade agreements had provisions in them for certain types of administrative functions,¹¹¹ such as arrangements for consulting¹¹² or agreeing on changes in tariff commitments.¹¹³ Early in GATT's drafting history it was recognized that some of these administrative functions would be necessary to implement GATT.¹¹⁴ It was hoped that the ITO would eventually assume these functions, but until that time a GATT mechanism was required.¹¹⁵ Early GATT drafts consequently provided for an "Interim Trade Committee."¹¹⁶

Soon after these early drafts, and before negotiations opened at Geneva in the spring of 1947, House and Senate committees held extensive hearings on the proposed ITO and GATT negotiations.¹¹⁷ Some members of Congress challenged the authority of the President to enter into GATT on the specific ground that he was not authorized to join an international "provisional organization."¹¹⁸ At subsequent GATT drafting sessions in Geneva, the term "Interim

109. *Talbot v. Atlantic Steel*, 275 F.2d 4 (D.C. Cir. 1960); *Morgantown Glassware Guild v. Humphrey*, 236 F.2d 670 (D.C. Cir. 1956); *C. Tennant, Sons & Co. v. Dill*, 158 F. Supp. 63 (S.D.N.Y. 1957).

110. These provisions are found in GATT, arts. XXII-XXXV. See app. A; text accompanying note 58 *supra*.

111. See app. A for illustrative prior trade agreement provisions that correspond to various articles of GATT.

112. *E.g.*, Article XI of the Reciprocal Trade Agreement with Canada, 49 Stat. 3960 (1935); art. XIV of the Trade Agreement with Mexico, 57 Stat. 833 (1943).

113. *E.g.*, Article XIV of the Reciprocal Trade Agreement with Canada, 49 Stat. 3960 (1935).

114. Report of the First Session of the Preparatory Committee of the U.N. Conference on Trade and Employment, annexure 10, § i, at 51 (Oct. 1946).

115. *Id.*

116. Draft of GATT, art. XX in U.N. Doc. EPCT/C.6/W.58 (1947); Draft of GATT, art. XXII in EPCT/C.6/85 (1947); Draft of GATT, art. XXII in Report of the Drafting Committee on the Preparatory Committee of the U.N. Conference on Trade and Employment EPCT/34, at 78 (1947).

117. *Hearings on the Trade Agreements Act and the Proposed ITO Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. (1947); *Hearings on Operation of the Trade Agreements Act and Proposed ITO Before the Senate Finance Comm.*, 80th Cong., 1st Sess. (1947).

118. *Hearings on the Operation on the Trade Agreements Act and the Proposed ITO Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 191-95 (1947); *Hearings on the Trade Agreements Act and the Proposed ITO Before the Senate Finance Comm.*, 80th Cong., 1st Sess. 74, 202, 335 (1947).

Trade Committee" was omitted and instead the term "Contracting Parties" was used.¹¹⁹ The expressed purpose of this change was to remove any connotation of formal organization.¹²⁰ The Administration has tried to maintain this fiction that GATT is not an organization¹²¹—going so far, in the 1955 Senate hearings, as to characterize GATT as merely a "forum."¹²² Consistently, our contributions to GATT have been drawn from the State Department "Conferences and Contingency Fund" with the accounting entry listing GATT as a "provisional organization."¹²³ Furthermore, GATT has never been designated as an "international organization" for purposes of the Privileges and Immunities Act.¹²⁴

Despite this fiction, GATT has all the essential characteristics of an "international organization"—it utilizes a secretariat,¹²⁵ it "contracts" with states,¹²⁶ and it makes decisions which bind mem-

119. See Draft of GATT, art. XXIII, *Joint Action by the Contracting Parties*, in EPCT/135 (1947); Draft of GATT, art. XXIII, *Joint Action by the Contracting Parties*, in EPCT/189 (1947); GATT, art. XXV.

120. U.N. Doc. EPCT/TAC/PV/12, at 3 (1947). See also GATT, ANALYTICAL INDEX TO THE GENERAL AGREEMENTS 133 (2d rev. 1966).

121. See *Hearings on Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1080, 1456-57 (1949).

122. *Hearings on H.R. 1 Before the Senate Finance Comm.*, 84th Cong., 1st Sess. 1254 (1955). In testifying further, however, Secretary Dulles did refer to GATT as an organization, "where representatives of some thirty-odd countries subscribed to certain, what you might call, good business principles, and it provides primarily a forum or a place for carrying on multilateral negotiations . . ." See also H.R. REP. No. 2007, 84th Cong., 2d Sess. 9 (1956).

123. For fiscal year 1967, for example, the United States contribution to GATT (\$420,000) is listed on page 764 of the appendix to the budget, and is contained in the Department of State, Justice, Commerce and the Judiciary Appropriation Act for fiscal year 1967 under the general heading "International Organizations and Conferences," and the specific heading "International Conferences and Contingencies." For previous years, the fiscal year and the page on which the GATT appropriation can be found are as follows: FY 1966, p. 690-91 of the app.; FY 1965, pp. 628-29 of the app.; FY 1964, pp. 642-43 of the app.; FY 1963, pp. 608-09 of the app.; FY 1962, pp. 862-63 of the app.; FY 1961, pp. 788-89 of the app.; FY 1960, pp. 819-20 of the budget; FY 1959, p. 769 of the budget; FY 1958, p. 872 of the budget; FY 1957, pp. 891-92 of the budget; FY 1956, p. 901 of the budget; FY 1955, p. 874 of the budget; FY 1954, p. 858 of the budget; FY 1953, p. 907 of the budget; FY 1952, p. 767 of the budget; FY 1951, p. 985 of the budget. The 1951 fiscal budget appendix shows that GATT contributions were made as far back as 1949, but prior to the 1951 fiscal year report the budget item was not broken down to show the contribution to GATT.

124. 22 U.S.C. § 288 (1964). Organizations are designated by executive order, and the 1967 supplement to U.S.C.A. does not list GATT among the organizations so designated.

125. Technically, GATT does not have a secretariat, but it contracts for such services from the Interim Commission for the International Trade Organization (I.C.I.T.O.). See Rule 15 of the GATT Rules of Procedure, printed in GATT, 5th Supp. BISD 11 (1957). This technical distinction is one of form and not substance as the Secretariat concerned performs functions only for GATT and is generally recognized as the GATT Secretariat. See Jackson, *The Puzzle of GATT—Legal Aspects of a Surprising Institution*, 1 J. WORLD TRADE L. 131 n.3 (1967).

126. Article XXXIII of GATT provides that non-member governments may accede

bers.¹²⁷ This latter function is accomplished by the "Contracting Parties acting jointly,"¹²⁸ but this seems to be a distinction without substantive difference. In fact, article XXV of GATT relating to such joint action is remarkably broad in scope:

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this agreement. Wherever reference is made in this agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.
-
3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.
4. Except as otherwise provided for in this agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.
-

In early years, GATT was very cautious in developing useful institutions to carry out its work.¹²⁹ But as the years passed, a series of committees gradually evolved into an institutional scheme.¹³⁰ GATT also broadened the scope of its attention and became a

to GATT "on terms to be agreed between such government and the contracting parties." In practice, when a decision is made by the contracting parties to admit a new member [e.g., GATT, 14th Supp. BISD 13 (1966)], a protocol with that new member is opened for signature by all contracting parties. However, the protocol sometimes states that it will come into effect as soon as the new member signs it, which suggests that it is in essence a contract between the GATT contracting parties acting jointly, and the new member nation. *See, e.g.,* protocol for the recession of Switzerland, GATT, 14th Supp. BISD 6 (1966). In addition, GATT has, through its I.C.I.T.O. Secretariat (*see* note 125 *supra*), made contractual arrangements with the host country (Switzerland) for loans for construction of headquarter space, and pursuant to art. XV entered into "Special Exchange Agreements" with several countries.

127. Although executive branch officials of the United States try to play down this aspect of GATT [e.g., Secretary Dulles in the *Hearings on Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 84th Cong., 1st Sess. 1239-67 (1955)], art. XXV certainly contemplates actions which must be considered to be "binding" as an international obligation on contracting parties. The principal such action is a waiver.

128. GATT, art. XXV.

129. *See* Report adopted by the Contracting Parties on December 16, 1950, GATT Doc. CP.5/49, reprinted in GATT, 2 BISD 194 (1952); discussions at the fifth session of the Contracting Parties to GATT concerning intercessional arrangements for continuing administration, GATT Docs. CP.5/SR 17, SR 18, & SR 25 (1950).

130. The Council is perhaps the most significant of the GATT institutions and one of the most interesting in development. *See* GATT, 9th Supp. BISD 7 (1961). Other GATT standing committees include the Balance of Payments Committee, 7th Supp. BISD 10 (1959), and the Trade and Development Committee, 13th Supp. BISD 75 (1965).

policy-making body for a wide variety of subjects touching on international economics and trade.¹³¹ Is or was this aspect of GATT authorized? The administrative clauses of previous bilateral trade agreements furnish precedent and legislative history to show such authorization.¹³² Additionally, authority to enter "trade agreements" arguably implies authority to agree to necessary administrative provisions.¹³³ Finally, it should be remembered that presidential powers may be the source of the requisite authority.¹³⁴

Even conceding that the President was authorized to join GATT as it was constituted at its outset, it can be argued that there is no such authorization to adhere to the institution into which GATT has evolved. This is a difficult argument, however, and illustrates the problem of "static legalisms" in a dynamic world. The very practice which GATT developed, step by step, in a sense furnishes its own precedent. Gradually, acceptance of changes in a viable institution lead after some years to acceptance of an institution radically different than its origins would have suggested. GATT is not the first such phenomenon—it does, however, warrant special interest since it occurred in the international arena and has constitutional implications.

Thus, in answer to the question whether the President had statutory authority to enter GATT, it seems clear that he did. The wording of the statute, legislative history, and the known precedents of prior trade agreements at the time of the 1945 Act combine to show a delegation of authority to enter into all particular portions of GATT, subject to "existing legislation" under the Protocol of

131. See GATT, GATT: WHAT IT IS, WHAT IT DOES, HOW IT WORKS (1966). Current GATT activities include administering the General Agreement itself, sponsoring tariff negotiations such as those in the Kennedy Round, undertaking studies of economic problems of less developed countries [e.g., Report of the Working Party of Economic Problems of Chad, GATT Doc. COM.TD/44 (1967)], and preparing studies of various aspects of international trade (e.g., the so-called Haberler Report, *Trends in International Trade*, GATT Sales No. GATT/1958-3; *Restrictive Business Practices*, GATT Sales No. GATT/1959/-2).

132. Examples of administrative provisions in previous bilateral trade agreements can be seen from the chart in app. A, provisions that correspond to arts. XXII-XXXV of GATT. The fact that these trade agreements were known to Congress supports the argument that Congress contemplated such administrative provisions in the trade agreements which it was authorizing.

133. This argument was made in congressional hearings: *Hearings on Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1282 (1949); *Hearings on Extending Authority To Negotiate Trade Agreements Before the Senate Finance Comm.*, 80th Cong., 2d Sess. 469, 471 (1948).

134. The State Department has, in part, relied upon this source. See H.R. REP. No. 2007, 84th Cong., 2d Sess. 113 (1956); *Hearings on the Trade Agreements Extension Act of 1951 Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 1153 (1951); *Hearings on Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1051 (1949), partially reproduced in app. B.

Provisional Application, with the possible exception of some of the "administrative" clauses of GATT. Even agreement to these provisions can be justified as implicit in the basic authority to enter trade agreements, and as being merely multilateral applications of clauses and principles previously established in the bilateral context.

Nevertheless, the development of GATT has brought with it some important policy questions. Even assuming that GATT is valid as a matter of United States domestic law, it is clear that the circumstances of its history have resulted in a considerable shift of power to the executive branch without the statutory framework which defines executive-legislative relations in connection with our participation in other international institutions, such as the International Monetary Fund, the International Bank for Reconstruction and Development, and the United Nations.¹³⁵ Lack of meaningful congressional participation in foreign affairs is a problem not unique to the economic sphere.¹³⁶ Nevertheless, the regular renewal of the trade agreements acts¹³⁷ does provide one opportunity for congressional review of trade policy, and informal and formal participation of Congressmen at GATT negotiations provides other opportunities.¹³⁸ Whether or not this limited role relegated to the Congress in economic policy-making through GATT is adequate, either from a policy or constitutional standpoint, may yet be legitimately questioned.

2. Constitutional Powers of the President

The executive branch, in justifying our adherence to GATT, has usually relied, at least in part, upon the constitutional powers of the President to conduct foreign affairs.¹³⁹ A State Department memorandum, submitted during the 1949 Senate committee hearings on the Trade Agreements Act, noted precedents for presidential agreements relating to foreign commerce.¹⁴⁰ This memorandum

135. See, e.g., United Nations Participation Act, 22 U.S.C. § 287 (1964); Bretton Woods Agreement Act, 22 U.S.C. § 286 (1964).

136. E.g., Senator Fulbright's remarks reported in Kenworthy, *Fulbright Sees Senate Influencing Policy Again*, N.Y. Times, July 20, 1967, at 5, col. 1.

137. See app. D.

138. Congressmen have participated informally in major GATT negotiations since the mid-1950's. This practice was formalized in the Kennedy Round. See Trade Expansion Act of 1962, § 243, 19 U.S.C. § 1873 (1964); 111 CONG. REC. 12348 (1965). The delegation included: Rep. Thomas B. Curtis, Rep. Cecil King, Sen. John Williams, Sen. Herman Talmadge, and alternates Sen. Frank Carlson and Sen. Abraham Ribicoff. For reports on these negotiations see 113 CONG. REC. 3819, 4128, 4891 (1967).

139. See app. B.

140. *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess. 1051-55 (1949).

further specified the sources of authority for this country's agreement to each article of GATT, relying in a number of places, particularly as to the administrative provisions, on the President's constitutional authority. Arguments based on president authority are, however, weakened by a federal court of appeals case¹⁴¹ which held that the President overstepped his delegated powers when he entered into an agreement with Canada which regulated trade. The court's statement on this issue was unmistakable:

The power to regulate foreign commerce is vested in Congress, not the executive or the courts; and the executive may not exercise the power by entering into executive agreements and suing in the courts¹⁴²

The earlier discussion concerning statutory authority, however, demonstrates that it is probably unnecessary to rely upon independent presidential authority for GATT, but to be able to do so would reinforce the basic proposition that United States participation in GATT is valid.

3. *Later GATT Agreements*

Heretofore, for purposes of clarity and simplicity, I have spoken of GATT largely as if it were a single agreement coming into force at one point of time. This is not the case—in fact, over 100 international agreements (listed in Appendix C), some not yet in force, can officially be termed “GATT agreements.”¹⁴³ In order completely to present the picture of GATT in United States domestic law, it would be necessary to analyze many of these later agreements with respect to the President's power to enter into them. This would, of course, be unduly cumbersome, and for that reason, will not be attempted. However, some generalizations can be made.

In the first place, from 1945 down to the present except for several short gaps, there has been a statute in force with basic authorizing language similar to that of the 1945 Trade Agreements Extension Act.¹⁴⁴ Consequently, the analysis of the statutory lan-

141. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1954).

142. 204 F.2d at 658.

143. The definition of an “official” GATT agreement must be somewhat arbitrary, but it is convenient to include all those GATT agreements which were deposited with the United Nations prior to 1955 [and listed in U.N. Doc. ST/LEG/3/Rev. 1 (1963)], and all those which have been deposited with the Executive Secretary of GATT since 1955 [and listed in Status of Multilateral Protocols of Which the Executive Secretary Acts as Depository, GATT Doc. PROT/2/Rev. 2 (1966) or in more recent GATT documents].

144. Appendix D contains a chart of each of these statutes with their respective

guage of the 1945 Act as a source of presidential authority will apply to these amendments and protocols, subject to some different limiting clauses in the subsequent acts.¹⁴⁵ Second, all such protocols and agreements which affect the general language of GATT, except for the later agreement adding Part IV and certain recent agreements resulting from the Kennedy Round (which I shall discuss below), have concerned subject matter sufficiently close to the original GATT that the conclusions based on legislative history and other arguments as to the scope of authority under the 1945 Act should be applicable in the case of these later protocols.¹⁴⁶ (This is especially so when it is remembered that Part II, the "safeguarding provisions," is subject to "existing legislation.")¹⁴⁷ Third, some of these subsequent protocols and agreements could as well be based on presidential power alone.¹⁴⁸ For example, protocols of rectification are arguably within the executive's implicit power to continue to administer prior agreements.¹⁴⁹

At the close of the Kennedy Round negotiations on June 30, 1967, a series of protocols and agreements were completed,¹⁵⁰ four of which related to accession of new members,¹⁵¹ while four others embodied other results of the negotiations.¹⁵² Two of these latter

time spans. In each statute, there is authority to "enter into foreign trade agreements" and to "proclaim such modifications" subject to certain limitations. *See* note 29 *supra*.

145. These limiting clauses related primarily to the allowable percentage cuts in tariff rates and, in some of the statutes, to certain other negotiating limits (*e.g.*, peril point or escape clauses). No instance of violation of negotiating limits has been found by this writer, but the subject is vast and technical since tens of thousands of items are involved. *See* note 56 *supra*. This author has been told that some specific minor portions of the proclamations for the original GATT agreement arguably exceed some of these limits.

146. This is the judgment of the author. To analyze each clause of each amendment and protocol in detail would be too cumbersome to include in this article. Nevertheless, the reader can see from the chart of amendments and protocols in app. C the general nature of those amendments and protocols.

147. The general practice within GATT has been to assume that protocols amending Pt. II are subject to the Protocol of Provisional Application by which GATT was originally applied. One could argue that the subsequent protocols and amendments stand upon their own feet and thus circumvent the Protocol of Provisional Application. A more appropriate analysis seems to be that technically the subsequent protocols or amendments are amendments to the Protocol of Provisional Application, which in turn incorporates by reference the General Agreement on Tariffs and Trade including the amending article, which article provides the authority for amending the Protocol of Provisional Application.

148. *See* discussion in text at pt. II.A.2.

149. These protocols merely correct mistakes in prior protocols. *See* app. C.

150. Final Act Authenticating the Results of the 1964-67 Trade Conference held under the Auspices of the Contracting Parties to the General Agreement on Tariffs and Trade, GATT Doc. L/2813 (1967).

151. Argentina, Iceland, Ireland, and Poland. *See* app. C.

152. Geneva (1967) Protocol to the General Agreement on Tariffs and Trade; Agreement relating principally to Chemicals, supplementary to the Geneva (1967)

agreements are admittedly not authorized by the Trade Expansion Act of 1962, which is the current trade agreements legislation. Of these two, the Administration will probably ask Congress to pass legislation authorizing one, but argues that it has authority to carry out the other under existing statutes.¹⁵³

There is one problem as to these and other GATT amendments, however, that is not only potentially troublesome in the GATT context but could come up in relation to other international agreements. This problem is posed by the inclusion of a power to amend in the agreement itself. Even if a procedure for adopting future amendments (article XXX in GATT) were built into the original agreement, a question exists as to the scope of the President's power to agree to new amendments. It was argued above that the amending clause of GATT, like the other administrative provisions can be justified as within the congressional delegation of power either as a necessary and implicit concomitant to the trade agreement power, or by analogy to prior bilateral trade agreement provisions known to Congress.¹⁵⁴ But as worded in GATT article XXX, there are no subject matter limits at all to this amending power.¹⁵⁵ Can the President then argue that since Congress delegated to him the power to agree to amend GATT, that any amendment he now desires to agree to is authorized by that congressional delegation? This bootstrap argument must be answered in the negative. If the amending clause were indeed that broad, it can simply be argued

Protocol to the General Agreement on Tariffs and Trade; Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. See app. C.

153. The Chemicals Agreement, note 152 *supra*, provides that the United States will eliminate the "American Selling Price" method of valuing certain goods (primarily Benzenoid chemicals) which is contrary to GATT art. VII but was "existing legislation" in 1947 when GATT was signed and therefore not contrary to GATT as applied by the Protocol of Provisional Application. The Administration will likely ask Congress to accept the ASP changes, but argues that it can implement the anti-dumping provisions under art. VI of GATT without further legislative authority. See discussion in text at pt. III.B.2; note 153 *supra*. See also Dale, Jr., *Details Emerge on Tariff Accord*, N.Y. Times, July 8, 1967, at 29, col. 1; Lawrence, *Single Trade Bill in '67 Seen Likely*, J. Commerce, July 12, 1967, at 1, col. 1; GATT Doc. L/2375/Add. 1 at 17 (1965).

154. See discussion in text at pt. II.A.1.

155. GATT, art. XXX reads:

1. Except where provisions for modification is made elsewhere in this Agreement amendments to the provisions of Part I of this Agreement or to the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

that it was not originally authorized and so is itself *ultra vires*. A better approach, however, would be to assume that the amending power itself is valid, but then to construe the President's authority to agree to amendments as limited in the same way as his power to enter into a trade agreement independent of the amending clause of GATT.¹⁵⁶ In this connection, it is interesting to note that both the Bretton-Woods Agreements Act¹⁵⁷—which governs our participation in the International Monetary Fund and in the International Bank for Reconstruction and Development—and the United Nations Participation Act¹⁵⁸ impose explicit limits on the presidential power to agree to amendments to the relevant international agreements. An argument could be made in favor of congressional action to regularize United States participation in GATT on the pragmatic ground that such an act would afford an opportunity to spell out explicitly the limits on the power of the executive to agree to amendments of GATT, thus obtaining greater congressional participation in any future major shift in GATT policy.¹⁵⁹

The "Part IV amendments" to GATT, entitled "Trade and Development,"¹⁶⁰ require separate analysis. These consist of three articles which detail matters relating to the use of trade to promote the economic development of less developed countries. The articles "commit" those members who are deemed developed countries to "accord high priority to the reduction . . . of barriers

156. There is at this point another argument which could give some trouble, namely, that since the amending article was agreed to under the 1945 Statute, that that Statute gives the scope and limitation to the amending article for all future time. Following this analysis, later statutes of the United States which amend the Trade Agreements Act could not expand or contract the authority to amend art. XXX of GATT. This argument must be rejected, however, since not only is it impractical and unduly rigid, but the intent of Congress in delegating authority to enter into an agreement with an amending provision must have been that the amending provision would take on the scope of authority of future congressional acts. Alternatively, it can be argued that each subsequent statutory amendment is an authorization to the executive branch to continue to participate in GATT and the amending authority would take on the scope and extent of the then current statutory authority of the Executive.

157. 22 U.S.C. § 286 (1964).

158. 22 U.S.C. § 287 (1964).

159. The arguments contained in this subsection concerning art. XXX apply also to the authority contained for joint action under art. XXV, including the authority to grant a waiver, and possibly certain other "joint action" provisions. Of course, for Congress to impose a tight rein on the President in connection with joint action of the contracting parties would be a mistake, since a certain amount of flexibility is essential. Congress might appropriately require specific reports of United States' votes at GATT meetings, however, so that the interested Congressional committee could have an opportunity to appraise the executive branch activities on a continuing basis.

160. The text of pt. IV of GATT can be found in GATT Doc. IPRO/65-1 (1965) and in 51 U.S. STATE DEP'T BULL. 922 (1964).

to products . . . of . . . export interest to less-developed contracting parties . . . ,” to refrain from fiscal measures that would hamper imports from less-developed countries, and to “make every effort,” “give active consideration,” and “have special regard” for certain similar policies that affect the economic development of less developed countries. The commitments are qualified by exceptions for “compelling reasons, which may include legal reasons.”

Part IV was completed February 8, 1965, and signed on that day by a number of nations. Some countries also agreed to apply Part IV de facto pending its entry into force on June 27, 1966.¹⁶¹ At this time, the statutory authority for the United States to enter trade agreements was the Trade Expansion Act of 1962 which contained the standard language already discussed,¹⁶² authorizing “entry into trade agreements” and proclamation of duty modifications.

Can the President’s acceptance of Part IV be justified on the authority of this Statute? Two arguments can be made. First, we can reiterate the argument that separates the first clause from the limitations of the second clause and thereby authorizes any “trade agreement.”¹⁶³ Part IV deals with trade and so is arguably authorized. Second, insofar as Part IV clauses relate to other GATT clauses, all the arguments made for the validity of GATT in 1947 apply to urge the validity of Part IV.¹⁶⁴ However, Part IV is a most radical departure from prior GATT language. True, the “old GATT” included article XVIII which contains elaborate provisions regarding economic development of less developed countries. But these provisions are exceptions to, or escapes from, the other GATT commitments. No additional obligations, other than to consult and report, are imposed by article XVIII. Part IV, on the other hand, commits developed countries to “refrain from introducing” barriers on products from less developed countries (whether subject to tariff schedule concessions in GATT or not),¹⁶⁵ to refrain from new fiscal measures that would hamper exports from these countries,¹⁶⁶

161. GATT Doc. IPRO/65-1 (1965). *See also*, GATT Press Release 962 (June 28, 1966).

162. 19 U.S.C. § 1821(a) (1964):

- (1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
- (2) proclaim such modification on continuance of any existing duty on other import restrictions such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement.

163. *See* text accompanying notes 50-54 *supra*.

164. *See* discussion in text at pt. II.A.1. and app. A.

165. GATT, art. XXXVII, para. 1(b).

166. GATT, art. XXXVII, para. 1(c).

and so forth. It further provides that GATT shall establish institutional arrangements to accomplish the purposes of Part IV.¹⁶⁷ These commitments have purposes which arguably go beyond anything contemplated by the Trade Agreements Act of 1945.¹⁶⁸ Does the 1945 statutory language re-enacted in 1962 have a new and expanded meaning? There is some basis for the argument that it does.¹⁶⁹ However, the failure of Congress to approve the OTC in 1956 argues against an expanding interpretation of the trade agreements authority.¹⁷⁰ Consequently, to justify United States entry into the Part IV amendments, it may be necessary for the President to rely on his executive powers. Since the commitments in Part IV are carefully hedged and expressly subject to contrary "compelling reasons, which may include legal reasons,"¹⁷¹ it is possible to argue that Part IV entry was within the presidential power even without statutory authority. If anything, the entry into Part IV demonstrates the anomaly of United States participation in GATT without a statutory framework for congressional participation, and shows to what extent foreign commerce matters have come under the control of the executive branch of the government.

B. *Is GATT "Law" in the United States?*

A question separate from the validity of GATT as an international agreement of the United States is the "domestic law" effect of GATT within this country. To put it another way, the United States may have validly entered GATT, but it may only obligate the United States internationally, without being directly applicable in domestic courts or proceedings. In this section will be examined the general question of whether GATT has a domestic law effect in the United States, leaving for Part III the discussion of the extent and nature of that effect, if it does exist.

First, some general propositions about international agreements under constitutional law must be reviewed. The reader will recall

167. GATT, art. XXXVIII, paras. 1 & 2(f).

168. Article XXXVI, para. 2, for instance, states as a principle objective the "need for a rapid and sustained expansion of the export earnings of the less developed contracting parties."

169. The Trade Expansion Act of 1962 contains some recognition of the problems of less developed countries by providing for the possibility of free entry of tropical, agricultural, and forestry commodities. See 19 U.S.C. § 1833 (1964). An early proposed version of this statute listed as one purpose, "to assist in the progress of countries in the earlier stages of economic development." H.R. REP. NO. 2518, 87th Cong., 2d Sess. 5 (1962). This was omitted at a later stage.

170. See text accompanying note 101 *supra*.

171. GATT, art. XXXVII, para. 1.

the established rule that treaties, submitted only to the Senate, can be domestic law just as if the treaty were enacted by both houses as legislation.¹⁷² This is true, so the doctrine goes, if the treaty is "self-executing," which, in turn, is ascertained by examining the language of the treaty ("does it give direct rights to a litigant?") and the intent of its draftsmen.¹⁷³ This rule contrasts with the law of many nations, particularly the Commonwealth and Scandinavian countries, where no international treaty or agreement has a domestic law effect.¹⁷⁴ The doctrine for "treaties" also applies to executive agreements, both those entered pursuant to an act of Congress and those entered pursuant to the President's powers,¹⁷⁵ as the well-known *Belmont*¹⁷⁶ and *Pink*¹⁷⁷ cases illustrate.

These propositions seem simple enough, and there is an extensive literature concerning them,¹⁷⁸ but the application of these rules can be very difficult, and specific situations give rise to analytical difficulties that lurk behind the generalities.

1. *An Agreement Authorized by Congress*

Examination of the domestic law effect of GATT in this country must begin with the Trade Agreements Act as it existed in 1945. Once again we meet the interesting bifurcated power delegation to the President:

- (1) To enter into foreign trade agreements . . .
- (2) To proclaim such modification of existing duties and other import restrictions . . . [etc.,] . . . as are required or appropriate to carry out any foreign trade agreement¹⁷⁹

This language seems to indicate that only clause (2) authorizes a domestic law effect. To express it another way, this Statute appears

172. W. BISHOP, *GENERAL COURSE OF PUBLIC INTERNATIONAL LAW*, 1965, 201 in 2 *ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS* (1965); E. BYRD, *TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES* ch. 5 (1960); *RESTATEMENT* § 141.

173. W. BISHOP, *GENERAL COURSE OF PUBLIC INTERNATIONAL LAW*, 1965, 201 in 2 *ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS* (1965); *RESTATEMENT* § 141 (comment and illustrations).

174. W. BISHOP, *GENERAL COURSE OF PUBLIC INTERNATIONAL LAW*, 1965, 201 in 2 *ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS* (1965); I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 43 (1966); Buerghenthal, *The Domestic Status of the European Commission of Human Rights: A Second Look*, 7 *J. OF THE INT'L COMMISSION OF JURISTS* 55 (1966) (the author discusses the domestic law effect of treaties in a synoptic fashion for a number of European countries in relation to the European Convention of Human Rights).

175. *RESTATEMENT* §§ 142, 143, & 144.

176. *United States v. Belmont*, 301 U.S. 324 (1937). Of course, the extent of that domestic effect may differ.

177. *United States v. Pink*, 315 U.S. 203 (1941).

178. See notes 172-74 *supra*.

179. See note 29 *supra* for the full text of § 350.

to distinguish the authority to obligate the United States internationally in clause (1) from the authority to make domestic law in clause (2).¹⁸⁰ On this view, then, only the President's proclamation and not the trade agreement, as such, has a domestic law effect.

This hypothesis will now be tested by examining the statutory language, the legislative history of the Statute, the GATT language and preparatory work, judicial decisions, and the presidential practice regarding proclamations.

The statutory language. The bifurcated power delegation noted above does not necessarily lead to the conclusion stated by the hypothesis. One can argue that the word "proclaim" refers simply to a convenient symbolic act, a mere "announcement," in order that the public can take cognizance of the international agreement.¹⁸¹ The notes to the *Restatement (Second) of Foreign Relations Law* provide some support for this view by indicating that "[e]xecutive [a]greements are not usually proclaimed by the President unless they modify tariff schedules."¹⁸² Also, sometimes an international agreement will itself provide that it becomes effective upon "proclamation,"¹⁸³ simply because this is a convenient act to use as the "starting gun." Furthermore, the executive branch might be hesitant to accept the proposition that the domestic law effect of trade agreements stems only from the "proclaiming power," since, as argued above, the "trade agreements" power might well be broader than the power to proclaim.

The word "proclaim" is an interesting one in United States law, and seems to defy precise or narrow definition. A perusal of presidential proclamations¹⁸⁴ demonstrates that most are used to establish

180. See State Department memorandum printed in H.R. REP. No. 2007, 84th Cong., 2d Sess. 113 (1956).

181. For instance, art. XV of the Reciprocal Trade Agreement Between the United States and Canada, 49 Stat. 3960 (1935) states:

The present agreement shall be proclaimed by the President of the United States of America and shall be ratified by His Majesty the King of Great Britain . . . in respect of the Dominion of Canada.

.
The entire agreement shall come into force on the day of the exchange of the proclamation and ratification at Ottawa.

182. RESTATEMENT § 131 (Reporter's note). The Reporter's note to § 130 concerning treaties notes the use by the President of a proclamation to establish the entry into effect of a treaty.

183. See note 181 *supra*.

184. Many presidential proclamations are printed in the Federal Register and the Code of Federal Regulations as well as in the weekly compilation of Presidential Documents. The Proclamations are gathered each year in the United States Code and Congressional Service. See 1 C.F.R. §§ 7.1-7.6 (1966) as to the preparation of presidential proclamations and executive orders, excluding those proclaiming treaties or international agreements.

In *Texas Ass'n of Steel Importers v. Texas Highway Comm'n*, 364 S.W.2d 749, 750 (Tex. Civ. App. 1963), the Texas court used the term "proclamation" in connection with state laws and regulations as follows: Articles 6665 and 6666 provide for the

ceremonial days, or weeks, and holidays. But a sprinkling of other types exist.¹⁸⁵ Proclamations have in the past, for instance, been used to establish the legal effect of statehood for new states.¹⁸⁶ The language of the particular Statute involved here seems to use the word "proclaim" in a more significant sense than a mere signal, and the legislative history bears this out.

Legislative history. The language of the Statute, including the bifurcated power approach, was probably chosen for the original 1934 Act more as a result of tradition and precedent than for any calculated purpose. As early as 1798, an act empowered the President to undertake commercial intercourse with a foreign country (France) and "to make proclamation thereof."¹⁸⁷ This terminology was followed in a series of other international trade statutes during the ensuing century. The 1897 Tariff Act, for example, gave the President power to enter into "commercial agreements" with foreign governments, and separately to suspend duties on products subject to the agreement "by proclamation to that effect."¹⁸⁸ The Supreme Court, in passing on the constitutionality of the delegation of power to the President under the Tariff Act of 1890, held that no "legislative power" was delegated because the President could only issue a proclamation based on particular findings of fact specified in the Statute.¹⁸⁹ Later tariff statutes reinforced this practice of establishing a proclamation power as the normal means for the President to implement tariff changes.¹⁹⁰

The 1934 legislative history does indicate, however, that the two powers delegated in the Statute were considered separate and distinct. Both the Senate Finance Committee and the executive branch

organization of the Commission and for the establishment and public proclamation of all rules and regulations" This usage suggests that proclamation can be used almost synonymously with "issuing a regulation."

185. See, e.g., Presidential Proclamation No. 3754, 3 C.F.R. 1966 Comp. 90 (effectuating the Florence Agreement on importation of educational, scientific, and cultural materials); Presidential Proclamation No. 3681, 3 C.F.R. 1964-1965 Comp. 139 (giving Australian Military Courts jurisdiction over offenses committed in the United States by Australian servicemen).

186. Enabling acts set forth the conditions which the state must meet to be admitted and, when those conditions were met, authorize the President to proclaim statehood. See, e.g., Act of March 3, 1875, ch. 139, 18 Stat. 474 (Colorado); Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Oklahoma). See also J. SAX, WATER LAW: CASES AND MATERIALS 355, 355 n.25 (1965).

187. Act of June 13, 1798, ch. 53, 1 Stat. 565, 566. See *Hearings on the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 73d Cong., 2d Sess. 82 (1934).

188. Act of July 24, 1897, ch. 11, § 3, 30 Stat. 151, 203.

189. *Field v. Clark*, 143 U.S. 649, 681 (1892).

190. See *Hearings on the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 73d Cong., 2d Sess. 82-95 (1934).

witnesses in the 1934 hearings appear to have recognized this separation, relying on the case of *Field v. Clark*¹⁹¹ to establish that neither delegation was unconstitutional.¹⁹² The 1934 House Report also stated:

Former enactments have delegated to the President the power to fix tariff rates and have also delegated to the President the power to enter into executive agreements concerning tariff rates.¹⁹³

The Report went on to note that these enactments had not been held unconstitutional by the courts.

The distinction was perhaps even more forcefully presented by Senator George speaking for the 1934 Act on the floor of the Senate. Although certain of his premises were either overbroad or need modification in the light of *Belmont* and *Pink*, his statement is certainly significant evidence of congressional intent:

The well-recognized distinction between an executive agreement and a treaty is that the former cannot alter the existing law and must conform to all prior statutory enactments, whereas a treaty, if ratified by and with the advise and consent of two-thirds of the Senate itself becomes the supreme law of the land and takes precedence over any prior statutory enactment.

If the contemplated agreements to be effective should require Senate's ratification, there would be no need for the proposed legislation, inasmuch as the President would then simply negotiate a treaty which, if ratified by the Senate, would itself have the effect of changing the tariff rates. However, in the present bill, the Congress proposes to change the prevailing tariff law so that the proposed executive agreements may be made in harmony with the revised law. This is a fundamental distinction and answers the question as to why the bill is here. A mere executive agreement can be made by the President without the consent of Congress. It is equally true—and the fact demonstrates beyond all question the real nature of the agreements—that the agreements contemplated in the present bill could not be made effective by the President without prior Congressional authorization.¹⁹⁴

The Senate and House Reports at the time of the Act's extension in 1943 reinforce this position. The Senate Report, for instance, stated:

Under the Trade Agreements Act changes in our tariff rates are made, so far as our domestic law is concerned, by the President's proclamation under the authority of the Trade Agreements Act.

191. 143 U.S. 649 (1892).

192. See *Hearings on the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 73d Cong., 2d Sess. 59, 60 (1934).

193. H.R. REP. NO. 1000, 73d Cong., 2d Sess. 11 (1934).

194. 78 CONG. REC. 10072 (1934).

Changes in the Tariff rates are not made by the agreements, per se

. . . .

It is precisely the same procedural principle as that on which the Interstate Commerce Commission is authorized by Congress to fix fair and reasonable railroad rates.¹⁹⁵

The congressional meaning of "proclaim" in the trade agreements context, then, is not the simple ceremonial signal involved in a Thanksgiving Day proclamation, but rather is the means by which bargains struck with foreign trading nations are carried into law at home by the President.

GATT language and preparatory work. Even if, contrary to the view propounded above, the President was delegated the authority under the Act to enter a self-executing trade agreement, if he did not choose to enter this type of agreement (and the language of the agreement reflects this choice), then it would not be domestic law per se.¹⁹⁶ An examination of the 1947 trade agreement and its preparatory work is thus in order to ascertain if that agreement purported to be self-executing or non-self-executing. It can be argued that the latter is the better interpretation, although the evidence is at least equivocal.

Many clauses of GATT read as though they were meant to be directly applicable as domestic law.¹⁹⁷ Moreover, several of these clauses were drawn from those portions of the ITO Draft Charter¹⁹⁸ which were intended to be applied in a self-executing manner.¹⁹⁹ However, it will be remembered that GATT itself has never tech-

195. S. REP. NO. 258, 78th Cong., 1st Sess. 47, 48 (1943).

196. RESTATEMENT § 143 (comment).

197. For instance, para. 3 of art. VI of GATT begins: "No contravailing duty shall be levied on any product of the territory of another contracting party in excess of"

198. The general provisions of GATT are drawn mostly from what became ch. IV ("Commercial Policy") of the charter for the ITO. See Final Act, United Nations Conference on Trade and Employment, (1947-1948), reprinted in U.N. Doc. ICITO/1/4 (1948). In previous drafts of the ITO Charter this chapter was ch. V. See U.N. Doc. EPCT/34 (1947). The draft of GATT contained in U.N. Doc. EPCT/34, at 65 (1947) includes notes relating the GATT articles to articles in the then ITO Charter draft. GATT, ANALYTICAL INDEX TO THE GENERAL AGREEMENT (2d rev. 1966) also gives corresponding numbers of the Havana Charter to the related GATT article.

199. At the London meeting of the Preparatory Committee of the United Nations Conference on Trade and Employment, Harry Hawkins, representing the United States, said:

This Charter would deal with the subjects which the Preparatory Committee has assigned to its five working committees. It should deal with these subjects in precise detail so that the obligations of member governments would be clear and unambiguous. Most of these subjects readily lend themselves to such treatment. Provisions on such subjects, once agreed upon, would be self-executing and could be applied by the governments concerned without further elaboration or international action.

U.N. Doc. EPCT/C.II/PV2, at 8 (1946).

nically come into force:²⁰⁰ it is applied by the United States and other original parties only by virtue of the Protocol of Provisional Application. The language of this Protocol is that of commitment to apply GATT, not language of immediate application.²⁰¹ Moreover, there are other indications that the draftsmen of the Protocol did not intend a self-executing effect.²⁰² For example, at one point the American delegate spoke as follows:

[P]rovided there is simultaneous publication and entry into force of the document, there would be no objection if there were differences in the actual time at which they were put provisionally into force, provided there was a date before which that must be done²⁰³

Since by definition a self-executing agreement requires no further steps to be put into force, this language is evidence of a non-self-executing intent.

Court application. Once again the American court treatment of GATT can be discussed in two parts. The Customs Court and the Court of Customs and Patent Appeals uniformly refer to GATT by citing the relevant Presidential Proclamation as reprinted in the *Treasury Decision* series.²⁰⁴ In these courts, then, at least in tariff matters, it can be assumed that it is the proclamation which is the "law," not the executive agreement.

200. See introduction to pt. II of the text.

201. 61 Stat. pt. 6, at A2051 (1947); 55 U.N.T.S. 308 (1950):

The Government of . . . [eight named nations including the United States] . . . undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than November 15, 1947, to apply provisionally on and after January 1, 1948:

(a) Parts I and III of the General Agreement on Tariffs and Trade, and
(b) Part II of that agreement to the fullest extent not inconsistent with the existing legislation.

2. The foregoing government shall make effective such provisional application of the General Agreement, in respect of any of their territories other than their metropolitan territories, on or after January 1, 1948, upon the expiration of 30 days from the day on which notice of such application is received by the Secretary-General of the United Nations.

3. Any other government signatory to this protocol shall make effective such provisional application of the General Agreement, on or after January 1, 1948, upon the expiration of 30 days from the day of signature of this protocol on behalf of such government.

(Emphasis added.) Compare the discussion of self-executing treaties in W. BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* 146-49 (2d ed. 1962). In particular, the case of *Robertson v. General Elec. Co.*, 32 F.2d 495 (4th Cir. 1929) which, in holding a treaty provision non-self-executing, noted that the language of the statute provided that a patent period "extension shall be made, not by the instrument itself, but by each of the high contracting parties."

202. See U.N. Doc. EPCT/TAC/PV.4 at 15, 19, 22 (1947).

203. U.N. Doc. EPCT/TAC/PV.4 at 22 (1947).

204. See note 105 *supra*. Although the chances are that at least some Customs Court or Court of Customs and Patent Appeals opinions fail to cite the proclamation reference when relying on GATT, no such opinion has been found and it is clear that the usual practice is to cite the Treasury Decision which incorporates the proclamation.

In other courts, usage is less clear. Apparently, only three federal court cases have cited GATT.²⁰⁵ Although the courts in these cases mentioned GATT only by its name, or by the *Statutes at Large* reference²⁰⁶ (which does not contain the proclamation), the issues were such that GATT was not directly applied. In the only four state and territorial court decisions which mention GATT, the situation differs. One of these was decided without ruling on the legal effect of GATT,²⁰⁷ but the other three purported to rely, at least in part, directly on GATT.²⁰⁸ In each of these latter cases GATT was treated as a "treaty," and applied as law without citing its proclamation,²⁰⁹ although one court mentioned generally that such agreements were proclaimed.²¹⁰ In three California Attorney General's opinions that involve GATT,²¹¹ there was also no mention of the proclamation.

Yet in each of these seven cases and opinions, the provision of GATT involved was one which had in fact been proclaimed.²¹² So the distinction between the court's approach and that being pro-

205. See note 109 *supra*.

206. *Morgantown Glassware Guild, Inc. v. Humphrey*, 236 F.2d 670 (D.C. Cir. 1956), simply mentions "General Agreement on Tariffs and Trade, Geneva, 1947." *Talbot v. Atlantic Steel Co.*, 275 F.2d 4 (D.C. Cir. 1960) also merely uses the title of the agreement. *C. Tennant, Sons & Co. v. Dill*, 158 F. Supp. 63, 66 (S.D.N.Y. 1957), refers to "General Agreement on Tariffs and Trade, commonly known as GATT, 61 Stat., Part 5, pp. A3, A7 et seq."

207. *Texas Ass'n of Steel Importers v. Texas Highway Comm'n*, 364 S.W.2d 749 (Tex. Civ. App. 1963).

208. *Territory v. Ho*, 41 Hawaii 565 (1967); *Baldwin-Lima-Hamilton Co. v. Superior Court*, 208 Cal. App. 2d 803, 25 Cal. Rptr. 799 (1962); *Bethlehem Steel Corp. v. Board of Comm'rs*, Civil No. 899165, 897591 (Super. Ct. County of Los Angeles 1966).

209. For an example of this sort of judicial treatment of GATT when applied as law, see *Territory v. Ho*, 41 Hawaii 565, 568 (1967):

This case poses the question: Is an executive agreement, such as the General Agreement on Tariffs and Trade, a treaty within the meaning of this constitutional provision, [the supremacy clause of Article VI, Section 2] so that it has the same efficacy as a treaty made by the President by and with the advice and consent of the Senate? We think it is, under the decisions of the Supreme Court of the United States in *United States v. Belmont* . . . and *United States v. Pink* . . .

210. *Baldwin-Lima-Hamilton v. Superior Court*, 208 Cal. App. 2d 803, 820, 25 Cal. Rptr. 799, 820 (1962).

211. See note 106 *supra*.

212. The *Ho* case invoked art. III, paras. 1 & 4, and art. XX of GATT. These provisions were proclaimed in the United States by Presidential Proclamation No. 2761A (3 C.F.R. 1943-1948 Comp. 139) and subsequent amendments to these provisions were also proclaimed by Presidential Proclamations Nos. 2790 (3 C.F.R. 1943-1948 Comp. 204), 3513 (3 C.F.R. 1959-1963 Comp. 246) and 2829 (3 C.F.R. 1949-1953 Comp. 7). See app. C. The *Baldwin-Lima* case invoked art. III, paras. 2 & 5 of GATT which were proclaimed by Presidential Proclamation No. 2761A (3 C.F.R. 1943-1948 Comp. 139) and subsequently amended by Presidential Proclamation No. 2829 (3 C.F.R. 1949-1953 Comp. 7). The *Bethlehem Steel* case relied on *Baldwin-Lima* and, insofar as it depended upon GATT, involved the same articles. See note 286 *supra*.

pounded in this article would not have led to a difference in result in the cases that have so far arisen. The careful attorney must, however, beware of possible pitfalls in the distinction between a trade agreement proclaimed and one unproclaimed, particularly as to those portions of GATT, or agreements concerning GATT obligations, which have not been proclaimed.

The presidential practice of proclamation. Appendix C contains a detailed analysis of the GATT agreements and protocols, including whether or not each has been proclaimed in whole or in part. This chart reveals an apparently bewildering diversity of treatment. Up to the time of this writing, there have been over one hundred international agreements of various labels which have been opened for signature to GATT contracting parties, and deposited either at the United Nations (up to 1955) or at GATT headquarters (after 1955). About four-fifths of these have come into force. The United States has signed most of the GATT agreements, and proclaimed a large number of those signed but some which it signed and which are in force have not been proclaimed, whereas some which it signed but which are not yet in force have been proclaimed.²¹³

Despite the apparent diversity of treatment, however, there is a discernible pattern in the proclamation practice. First, whenever a United States tariff rate is changed by an agreement, it has been proclaimed.²¹⁴ At times, for convenience, the proclamation may precede the effective date of the agreement, in which case the proclamation specifies the condition subsequent which effectuates the changes.²¹⁵ Second, a number of GATT agreements or parts of agreements which affect only tariff schedules of other countries have not been proclaimed by the United States.²¹⁶ Since these are obligations running to this country, there is no need for a domestic law effect here, and it is reasonable to omit proclaiming them. In fact, in some of these cases the United States is not even a party to the agreements.²¹⁷ Third, some of the unproclaimed agreements are short-term temporary measures or are confined to administrative matters for which it is difficult to see why domestic legal consequences would or should occur.²¹⁸

213. See, e.g., agreements nos. 30 & 52 in app. C.

214. See agreements nos. 41, 52, 57 & 83 in app. C.

215. See agreement no. 57 in app. C.

216. See, e.g., agreements nos. 18, 19, 29 & 30 in app. C.

217. See, e.g., agreement no. 48 in app. C.

218. See, e.g., agreements nos. 4 & 36 in app. C.

Most of the original GATT agreement was proclaimed, of course, as well as almost all of the modifications to the general articles,²¹⁹ except for the recently added Part IV which apparently is not intended to be domestic law.²²⁰ However, certain agreements which affect basic GATT obligations, but which do not actually modify the text, have not been proclaimed.²²¹ In addition, some agreements providing for provisional accession of new members to GATT have not been proclaimed, although it could be argued that such proclamation is unnecessary.²²²

Sometimes there is a considerable time gap between entry into force of a particular GATT agreement and its proclamation in this country. This may be due more to the political complexion of the executive branch than to the operation of any legal theory. Thus, during the mid-1950's, GATT agreements tended not to get proclaimed at all. It is difficult to ascertain from published sources whether this state of affairs was due to antagonism to GATT and GATT policy on the part of certain governmental officials, or to the Bricker Amendment²²³ "scare" which may have prompted the Republican Administration to avoid using executive agreements to generate domestic law whenever possible. These political factors might also explain the State Department position, taken in its letter to the Hawaii court,²²⁴ that GATT has no legal effect on state law. In late 1962, with a new administration in office, there were several massive presidential proclamations which incorporated a number of early previously unproclaimed GATT agreements.²²⁵

The presidential proclamation practice, then, supports the hypothesis that it is the proclamation which is domestic law. This is clearest when domestic tariff schedules are concerned. Whether it is also true when the general clauses of GATT are involved cannot, perhaps, be inductively proved from the record.

2. Presidential Power To Give Domestic Legal Effect to Trade Agreements

Although it is clear that the President can, in some contexts, enter into an executive agreement which will itself have domestic

219. See app. C.

220. See agreement no. 98 in app. C.

221. See agreement no. 59 in app. C. But see agreement no. 78 in app. C.

222. See, e.g., agreements nos. 87 & 92 in app. C.

223. See W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 104-05 (2d ed. 1962); P. KAUPER, CONSTITUTIONAL LAW, CASES AND MATERIALS 265 (3d ed. 1966).

224. See note 288 *infra*.

225. Presidential Proclamation No. 3513, 3 C.F.R. 1959-1963 Comp. 246. See app. C.

legal consequences,²²⁶ there has been no assertion of this power in connection with GATT.²²⁷ Insofar as the President makes agreements pursuant to the power delegated to him by the various trade agreements acts, it seems very dubious that he can give them domestic legal effect without proclaiming them.

The court of appeals opinion in the *Capps* case, mentioned earlier,²²⁸ while holding that the executive agreement there involved was ultra vires and void, announced another reason for not enforcing a contract which was made pursuant to the agreement:

There was no pretense of complying with the requirements of this statute. The President did not cause an investigation to be made by the Tariff Commission, the Commission did not conduct an investigation or make findings or recommendations, and the President made no findings of fact and issued no proclamation. . . .²²⁹

Although the Supreme Court did not discuss this aspect while affirming on different grounds, the *Capps* case suggests that where regulation of foreign commerce is involved, the statutory scheme must be followed. If this suggestion were accepted, few if any trade agreements could have domestic law validity through the exercise of presidential powers. The statutory scheme would need to be followed, and as argued above, proclamation would be essential for domestic law validity. It may be noted that the government's petition for certiorari in the *Capps* case took a less restrictive view of the executive's power.²³⁰

C. Summary

To summarize the analysis of GATT's place in United States domestic law, it seems that insofar as GATT (including all its related protocols) is entered into by the President pursuant to the trade agreements acts, it becomes domestic law only by virtue of a "proclamation." Both the statutory language and the legislative history lead to this conclusion. The practice of the courts and the presidential proclamation practice have not, at least, been incon-

226. *E.g.*, *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); RESTATEMENT § 144.

227. This statement is limited to the GATT agreements listed in app. C.

228. *See United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1954); text accompanying note 141 *supra*.

229. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1954).

230. Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1954).

sistent with this proposition. Moreover, this method of handling the domestic law effect of executive agreements has many admirable features from a policy viewpoint. One of the difficulties in determining the domestic legal effect of treaties and international agreements is the question of whether they are self-executing or not.²³¹ In the case of executive agreements, this difficulty can be largely overcome if a domestic legal effect results only from a proclamation or other domestic law-giving action. Not only are some ambiguities resolved by this methodology, but in certain circumstances this technique adds flexibility to the conduct of foreign relations. For example, the effectiveness or domestic application of an international agreement can be conditioned upon factual or other conditions precedent, with the proclamation being the certification of the meeting of the conditions. Additionally, and speaking pragmatically, this technique gives the President affirmative control over the domestic legal effect which he may need to exercise in some cases, even if it means a breach of an international obligation. It also gives Congress greater flexibility and control since Congress can prescribe limits to the power to proclaim, just as it may prescribe limits to the power to enter into agreements, and the extent of the two powers need not always coincide.

On the other hand, requiring a presidential proclamation is cumbersome and, because of the technical nature of the subject, may lead to error.²³² A court confronted with a case where the proclamation deviated from the trade agreement for no apparent reason would probably find a way to follow the trade agreement language,²³³ either by "construing" the proclamation to be consistent with the agreement, or by concluding, in the face of the arguments to the contrary, that the agreement had a direct legal effect on domestic law. Perhaps an appropriate solution in future trade agreement legislation would be to abandon the old two-part formula, which, it will be remembered, stemmed from a period when fear of Supreme Court invalidation on grounds of delegation

231. See RESTATEMENT §§ 141 (comment), 142 (comment).

232. See, e.g., Presidential Proclamation No. 2865 (recital no. 10), 3 C.F.R. 1949-1953 Comp. 38; Presidential Proclamation No. 3190 (recital no. 13), 3 C.F.R. 1954-1958 Comp. 118; Presidential Proclamation No. 3278, 3 C.F.R. 1959-1963 Comp. 9; Presidential Proclamation No. 3562, 3 C.F.R. 1959-1963 Comp. 315; Presidential Proclamation No. 3597, 33 C.F.R. 1964 Supp. 51. As to the formalistic nature of the recitals, see H.R. REP. 1761, 85th Cong., 2d Sess. 72 (1958) (minority views).

233. Of course, if the differential were substantial or based on substantive reasons, the proclamation would be followed as domestic law. An example of a proclamation deviating from the related GATT agreement is Presidential Proclamation No. 3040 (para. 8 relating to Uruguayan accession to GATT), 3 C.F.R. 1949-1953 Comp. 211.

of legislative power were greater, and when (prior to *Belmont* and *Pink*) executive agreements were even less understood than they are today. The advantages of the old formula, mentioned above, could be retained and some of the disadvantages discarded if a regulation procedure were adopted authorizing the President or his delegate to take action which would give domestic legal effect to a trade agreement to the extent desired by the President and within his power as delegated by Congress.

III. THE EXTENT OF GATT'S DOMESTIC LAW EFFECT IN THE UNITED STATES

Part II dealt with the question whether GATT has any domestic law effect in the United States. The conclusion reached was that to the extent GATT and subsequent protocols have been "proclaimed" by the President they have a domestic law effect. It was suggested that it was very dubious that GATT agreements and protocols would have domestic legal effect in the United States *per se*, that is, without proclamation. Since the original GATT agreement and many amending protocols have, in fact, been proclaimed,²³⁴ the next question concerns the relationship of this GATT "law" to both federal and state law in the United States. To put it another way, assuming GATT is "law" in the United States, at least to the extent that it has been proclaimed, is that law superior or inferior to other federal or state laws?

Two GATT provisions have a profound influence on this question; consequently, much of this part of the article is concerned with interpreting these two clauses. First, and most significant, is the clause in the Protocol of Provisional Application (through which GATT is applied) which states that governments will apply "Part II of that Agreement to the fullest extent not inconsistent with existing legislation."²³⁵ Second, of concern only to the relation of GATT to state or territorial law, is paragraph 12 of article XXIV which states:

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.²³⁶

²³⁴ See app. C, and text accompanying note 105 *supra*.

²³⁵ 61 Stat. pt. 6, at A2051 (1947); 55 U.N.T.S. 308 (1950).

²³⁶ GATT, art. XXIV, para. 12. Originally this was art. XXIV, para. 6 of GATT, but the amendments contained in the "Special Protocol Relating to Art. XXIV" (see app. C, agreement no. 7) renumbered the paragraphs.

A. GATT and Federal Law

The general principles of American law concerning executive agreements which have domestic law effect are typically stated as follows: (1) executive agreements pursuant to acts of Congress supersede prior inconsistent legislation and are superseded (as domestic law) by subsequent inconsistent legislation; (2) executive agreements pursuant only to the President's independent authority do not supersede inconsistent legislation, whether prior or subsequent.²³⁷ For this purpose GATT would probably be considered an executive agreement by most lawyers and officials, but since it derives its domestic law effect from the presidential proclamations, it is technically more precise to analyze these proclamations as if they were regulations issued by the executive.²³⁸ As regulations, however, they apparently have the same impact on prior and subsequent legislation as executive agreements: if pursuant to congressional authority, the later in time prevails; if not, the legislation prevails.²³⁹

Analysis of GATT vis-à-vis federal law must give separate treatment to Part II, which alone is subject to the "existing legislation" clause of the Protocol of Provisional Application. The others—Parts I, III, and IV—may be treated as ordinary executive agreements.

1. Parts I, III & IV of GATT

Parts I and III were part of the original GATT and were proclaimed by the President.²⁴⁰ The more recent addition, Part IV, has not been proclaimed,²⁴¹ and therefore probably has no domestic law effect.²⁴² In any case its provisions are such as to make it unlikely

237. RESTATEMENT §§ 142, 143, 144. See authorities cited in note 172 *supra*.

238. See the discussion in text at pt. II.B.

239. Of course, if a court were faced with such a case, an attempt would be made to construe so as to avoid inconsistency. Also, a regulation would probably yield even to prior legislation unless the legislation authorizing that regulation clearly manifested an intent to override prior legislation. See, e.g., *United States v. Mersky*, 361 U.S. 431 (1960). However, it has been the general practice of the courts to give precedence to the tariff proclamations (a form of regulation) over such prior inconsistent legislation as the Tariff Act of 1930. See authorities cited in notes 104 & 105 *supra*.

240. See app. C.

241. The text of Pt. IV of GATT is contained in GATT Doc. IPRO/65-1 (1965), and at 51 DEP'T STATE BULL. 922 (1964). Part IV entered into force for the countries which had signed it on June 27, 1966. GATT Press Release 962 (June 28, 1966).

242. As contended in the text, a proclamation is probably necessary for domestic law effect. It could be argued, however, that Pt. IV was entered into pursuant to presidential constitutional powers and not pursuant to authority delegated by the Trade Agreements Act, thus, no proclamation would be needed to give domestic law effect. Indeed, as indicated in the discussion in the text at Pt. II.B., there may be some difficulty in tying United States entry into Pt. IV to authority under the Trade

that a concrete case could come up in domestic law,²⁴³ and its language strongly suggests that it was not intended to be self-executing.²⁴⁴

Part I, containing the most-favored-nations and tariff concession provisions, and Part III, consisting mostly of administrative provisions, as proclaimed, appear to supersede *prior* inconsistent federal legislation.²⁴⁵ This is clearly the case where domestic tariff rates are involved; the courts have uniformly held the latest GATT protocols to be the current law.²⁴⁶ Indeed, no case holding a pre-GATT federal law superior to Part I or Part III of GATT has been found. Subsequent federal legislation would, of course, prevail under the "later in time" rule.²⁴⁷

2. Part II of GATT and the "Existing Legislation" Clause

The major example of subsequent United States legislation inconsistent with Part II of GATT is the 1951 amendment to the AAA²⁴⁸ requiring certain agriculture import quotas to be imposed

Agreements Act. On the other hand, the language of Pt. IV can also be read as non-self-executing. I have intentionally set out the alternatives in a qualified and tentative manner to illustrate the ambiguous position that Pt. IV has in United States law.

243. See discussion in text at II.A.3. Part IV consists primarily of general principles and objectives, or procedures for consultation. The article involving commitments, art. XXXVII, is qualified by the language "to the fullest extent possible," or phrases such as "make every effort" or "give active consideration."

244. The qualifying language mentioned in the previous footnote also suggests that Pt. IV is not self-executing.

245. Unless specific exception for prior legislation is made in a particular clause, such as that in art. II, para. 1(b).

246. See text accompanying note 104 *supra*.

247. In a 1951 statute, for example, Congress stipulated as follows:

As soon as practicable, the President shall take such action as is necessary to suspend, withdraw or prevent the application of any reduction in any rate of duty, or binding of any existing customs or excise treatment, or other concession contained in any trade agreement entered into under authority of section 350 of the Tariff Act of 1930, as amended and extended, [the Reciprocal Trade Agreements provisions] to imports from the Union of Soviet Socialist Republics and to imports from any nation or area dominated or controlled by the foreign government or foreign organization controlling the world communist movement.

At that time Czechoslovakia was the only communist country which was a party to GATT, and the President withdrew GATT "application" from that country. Presidential Proclamation No. 2935, 3 C.F.R. 1949-1953 Comp. 121, carried out by letter to the Secretary of the Treasury (reproduced in T.D. 52837). This action may have been inconsistent with GATT, although the United States obtained a "declaration" from GATT which "took note" of the United States action and may constitute a waiver under art. XXV of GATT, BISD II/36. See also Jackson, *The Puzzle of GATT—Legal Aspects of a Surprising Institution*, 1 J. OF WORLD TRADE L. 131, 153 (1967).

In other post-GATT statutes, "escape clause" language was adopted that did not coincide with the relevant GATT clause in art. XIX. 65 Stat. 73 (1951); 69 Stat. 166 (1955). The United States Executive, however, apparently took the position that the 1951 statute was consistent with art. XIX. Report on Trade-Agreement Escape Clauses. Message from the President, H.R. Doc. No. 328, 82d Cong., 2d Sess. (1952). But cf. S. METZGER, *TRADE AGREEMENTS AND THE KENNEDY ROUND* 47 (1964).

248. See text accompanying note 87 *supra*.

irrespective of GATT commitments contained in article XI, Part II of GATT. This example confirms the superiority of later federal legislation over GATT in United States domestic law.

More interesting, however, is the case of pre-GATT legislation. Because the Protocol of Provisional Application applies Part II of GATT subject to "existing legislation,"²⁴⁹ the usual rule making executive agreements superior to prior inconsistent legislation is reversed. Although the Administration has undertaken to furnish Congress²⁵⁰ and, later, GATT headquarters²⁵¹ with a listing of such prior inconsistent legislation, there are several interpretative difficulties relating to the terms "existing" and "inconsistent" in the Protocol.

As to "existing," the question naturally arises: "existing when?" This ambiguity was considered in an early GATT session and was resolved there when the Contracting Parties "accepted" a ruling by their chairman that "existing legislation" refers "to legislation existing on 30 October 1947, the date of the Protocol as written at the end of its last paragraph."²⁵² The argument that the relevant point of time is the date on which a given nation signed the protocol was not adopted.²⁵³ Another puzzle relating to the meaning of "existing" is the treatment of amendments to Part II. For example, a sequence such as the following could occur: (1) October 30, 1947, the Protocol of Provisional Application is signed agreeing to apply GATT; (2) in 1950, United States legislation consistent with the existing GATT is enacted; (3) in 1955, a protocol amending GATT

249. 61 Stat. pt. 6, at A2051 (1947); 55 U.N.T.S. 308 (1950).

250. *Hearings on Trade Agreements Extension Act of 1951 Before the Senate Finance Comm.*, 82d Cong., 1st Sess. 1195 (1951). See also Note, 61 COLUM. L. REV. 505 (1961).

251. See GATT Doc. L/2375/Add.1, at 17 (1965), which reproduces information submitted by governments in January 1955 and previously included in document L/309/Add. 1 & 2. This list, and that cited in note 250 *supra*, may not be all inclusive—see the language used to introduce those lists.

252. Ruling by the Chairman on Aug. 11, 1949, GATT, 2 BISD 35 (1952); GATT Doc. CP.3/SR.40, at 4-7 (1949). See Jackson, *supra* note 247, at 139.

253. Protocols that involved accession of new contracting parties under art. XXXIII of GATT, subsequent to the Protocol of Provisional Application, have been more explicit as to the date of "existing legislation." See, e.g., the Annecy Protocol of Terms of Accession in GATT, ANALYTICAL INDEX 173 (2d rev. 1966); The Protocol for the Accession of Switzerland, GATT, 14th supp. BISD 6 (1966). As to countries which became GATT contracting parties through sponsorship under art. XXVI, it is not clear what is the relevant date for "existing legislation," although technically it is probably that date which was the relevant date for the sponsoring contracting party. This would be consistent with the view that the sponsored government accepts GATT on the terms and conditions "previously accepted by the metropolitan government on behalf of the territory in question." See Report adopted on December 7, 1961 by the Contracting Parties, GATT, 10th supp. BISD 69, 73 (1962). Jackson, *supra*, note 247, at 144.

enters into force, and this protocol is inconsistent with the 1950 statute. What would be the status of the 1950 legislation? Technically, the later in time would prevail, which here is the GATT protocol. Since the GATT amending provision²⁵⁴ states that amendments are applicable only to those nations which accept them, the President can always refuse to accept an amendment which is inconsistent with domestic law if he desires to avoid the inconsistency.²⁵⁵

An interpretative difficulty also turns on the word "inconsistent." The following hypotheticals will assist in forming the issues:

- A. Legislation at the time the United States entered GATT *authorized* the President to impose quotas on widgets, and previously the President had imposed such a quota.
- B. Similar legislation existed when the United States entered GATT, but the President only later imposed the widget quota.
- C. Existing legislation *required* the President to impose the quota whenever he found fact X, and the President had previously found that fact and imposed the quota.
- D. Similar legislation existed when GATT was entered, but only later did the President find fact X and impose the quota.

Under interpretations developed in the practice of GATT, cases *A* and *B* would not be "inconsistent" and would be violations by the United States of its *international obligation* if the quotas were permitted to continue. Cases *C* and *D*, however, are "inconsistent" and would not be such violations. The GATT interpretation is that measures are within the "existing legislation" clause, provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character—that is, it imposes on the executive authority requirements which cannot be modified by executive action.²⁵⁶ This interpretation is supported by statements in the preparatory work of GATT which will be discussed below.²⁵⁷

But what is the domestic law effect of cases *A* through *D*? Where

254. GATT, art. XXX.

255. The President could, if he had the trade agreements authority to do so, always enter a trade agreement which was inconsistent with GATT, but refuse to proclaim it. In this event, the agreement would not have a domestic law effect, and would not override the domestic law. The United States would be in a technical breach of its international obligation, but the President might decide to do things in this manner in the hope that a change in the legislation could ultimately be obtained to bring it into conformity with the international obligation. Of course, a more desirable procedure might be to sign the international agreement *ad referendum* and then seek congressional approval.

256. Report approved by the Contracting Parties on August 10, 1949, GATT Doc. CP.3/60/REV.1, para. 99, reprinted in GATT 2 BISD 49, 62 (1952). See the discussion of GATT preparatory work contained in text at pt. II.B.1.; Jackson, *supra* note 247, at 140. See also GATT documents reproduced in GATT, 7th supp. BISD 104-07 (1959), 6th supp. BISD 60-61 (1958), 3d supp. BISD 249 (1955), 1st supp. BISD 61 (1953).

257. See text accompanying note 277 *infra*.

the legislation, although inconsistent with Part II of GATT, is not deemed a violation of the international obligation pursuant to the "inconsistent legislation" clause (cases *C* and *D*), it would seem clear that it should be considered superior to GATT as domestic law even though GATT is subsequent.²⁵⁸ This puts the domestic law interpretation of the "inconsistent legislation" clause in line with the international obligation, and recognizes the superiority of the domestic law.

In case *B*, the quota imposed, being subsequent to GATT, would prevail in domestic law under the "later in time" rule, even though this would be a clear violation of the international obligation.²⁵⁹ Case *A*, however, is more difficult. If for domestic law purposes an inconsistency is found, then the "later in time" rule would provide that the previously established quota was abrogated automatically when GATT became domestic law. But the scope of the President's proclamation should be determinative of this question as to domestic law, and the impact on the previous inconsistent quota would depend on the tenor and interpretation of the subsequent GATT proclamation.

B. GATT and State Law

When GATT is considered in relation to inconsistent state law, both of the "problem" clauses of GATT, the "existing legislation" clause already discussed and the "local governments" clause, are involved. Additionally, an important constitutional problem is presented: whether federal control of "foreign commerce" is exclusive and precludes any state regulation of foreign imports or exports. The classic case, of course, was *Brown v. Maryland* in 1827,²⁶⁰ holding invalid a state law requiring an importer of foreign goods to obtain a state license for a fee. In recent years, several cases in-

258. There is a logical circularity involved in cases *C* and *D* in a nation like the United States where an executive agreement pursuant to legislative authority can override previous legislation. Since the Protocol of Provisional Application clause on "existing legislation" was intended to make GATT apply to the fullest extent of executive authority, if the Executive has the authority to enter into and proclaim an international agreement which then has the domestic law effect of overriding previous legislation, it could be argued that GATT, even if applied by the Protocol of Provisional Application, should override previous legislation, if this country is to fulfill its international obligations. However, the whole gist of the preparatory work of GATT, and the representations made by the executive branch to Congress, is to the effect that existing legislation would not be affected by GATT without further action by Congress. Thus, despite the fact that to apply GATT to the fullest extent of executive authority would be to override previous federal legislation, it is clear that that was not the intent of the GATT draftsmen.

259. See authorities cited in note 237 *supra*.

260. 25 U.S. (12 Wheat.) 419 (1827).

volving various types of local government regulation of imports²⁶¹—for example, labeling regulations²⁶² and state agency purchasing preferences²⁶³—have been decided, including one Supreme Court case concerning a tax which discriminated against imports.²⁶⁴ It is not my intention here to deviate from the purpose of this article to examine this constitutional question in detail. I do want to draw the reader's attention to the issue, however, and note that it can be used as an alternative argument for the invalidity of state law in virtually every case involving a conflict between GATT and state law.²⁶⁵

1. The "Existing Legislation" Clause

In the four state or territorial cases found which cite GATT,²⁶⁶ Part II clauses have been invoked to override a state law. Some of

261. The four state and territorial cases involving GATT cited in note 108 *supra* are among those cases. In addition, there have been several such cases which do not make any reference to GATT. These include, for example, *Ness Produce Co. v. Short*, 263 F. Supp. 586 (D. Ore. 1966), *aff'd.*, 385 U.S. 537 (1967) (holding that a meat labeling law which was based on country of origin, not quality, was not a valid exercise of police power); *Tuppmann Thurlow Co., Inc. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1966) (holding invalid a Tennessee meat labeling statute); *Tuppmann Thurlow Co., Inc. v. Todd*, 230 F. Supp. 230 (M.D. Ala. 1964) (holding invalid an Alabama Meat Inspection Law which had resulted in seizure of meat imports); *Cunard S.S. Co. v. Lucci*, 94 N.J. Super. 440 (Super. Ct. 1966) (holding unconstitutional a state statute requiring that every advertisement for maritime passage indicate the flag of registry of the vessel); *City of Columbus v. Miqdadi*, 25 Ohio Op. 2d 337, 195 N.E.2d 923 (Mun. Ct. 1963); *City of Columbus v. McGuire*, 25 Ohio Op. 2d 331, 195 N.E.2d 916 (Mun. Ct. 1963).

262. The Tennessee *Tuppmann-Thurlow* and *Ness* cases cited in note 261 *supra* involved labeling statutes.

263. The *Baldwin-Lima* and *Bethlehem Steel* cases (*see* note 108 *supra*), as well as the California Attorney General's opinions, cited in note 106 *supra*, involved state "Buy American" statutes. The opinion in the *Bethlehem Steel* case suggests that even this type of statute is unconstitutional under the federal Constitution. *See* note 286 *infra*. This view is propounded by Note, 12 STAN. L. REV. 355 (1960).

264. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

265. Since GATT is entirely concerned with the question of international trade within the definition of "foreign commerce" in the United States Constitution, it can be seen that every portion of GATT in relation to state laws involves this constitutional issue. Presumably, the federal power over foreign commerce, even if it is exclusive and pre-empts state regulation of foreign commerce, would have to be balanced against the police power of the state and necessary state regulation for the health, welfare, and morals of its citizenry. GATT, art. XX excepts from the application of GATT measures "necessary to protect public morals," "necessary to protect human, animal, or plant life or health," and similar purposes, provided that "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" It is possible that as the cases and United States constitutional law develop, this article of GATT may play a part in defining the borderline between federal pre-emption in matters of foreign commerce, and state regulation for the protection of the health, welfare, and morals of its citizens.

266. *See* note 108 *supra*.

these laws existed prior to the signing of the Protocol on October 30, 1947;²⁶⁷ the relevant date for the "existing inconsistent legislation" exemption.²⁶⁸ There is some question whether this clause was meant to apply to local as well as federal legislation. Three sources of interpretive evidence relating to this question will be examined: the GATT preparatory work, GATT practice, and United States government interpretations and practice.

The first several drafts of GATT did not mention an exception for "existing legislation" for any part of GATT.²⁶⁹ After tariff negotiations had begun at Geneva, however, all participating delegations were asked whether their respective governments could put GATT into effect at the end of the conference.²⁷⁰ From the answers received, it was learned that a number of governments, while having authority to agree to lower tariffs, could not, without parliamentary approval, agree to those portions of GATT which dealt with non-tariff barriers and other general matters, most of which were contained in Part II of GATT.²⁷¹ Some delegates, therefore, urged postponing GATT's entry into force until the end of the Havana Conference (when the ITO Charter would be complete),²⁷² but others feared that such a postponement would be dangerous, since the momentum of the tariff negotiations would be lost, leaks in information might occur, political opposition to the tariff concessions might develop, and disruption in international trade could result.²⁷³ The alternative of putting the tariff concessions into effect without any general non-tariff provisions was unacceptable to some representatives, who felt that the tariff commitments could be too easily evaded without the additional protective clauses of Part II.²⁷⁴ Consequently, when a working party reported a full draft of GATT, its recommendation was to include, as an article of GATT, a clause similar to the "existing legislation" language ultimately adopted in the Protocol of Provisional Application. The working party's explanation was as follows:

It will be noted that application of Part II is to take place "to the fullest extent not inconsistent with existing legislation." The posi-

267. This is true for this California statute invoked in the California cases and in the California Attorney General's opinions.

268. See text accompanying note 252 *supra*.

269. The latest of these early drafts is contained in Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. Doc. EPCT/34, at 65 (March 5, 1967).

270. U.N. Doc. EPCT/100 (June 18, 1947).

271. U.N. Doc. EPCT/135 (July 24, 1947).

272. U.N. Doc. EPCT/TAC/PV/4, at 8 (Aug. 20, 1947).

273. U.N. Doc. EPCT/TAC/PV/1, at 3 (Aug. 5, 1947).

274. U.N. Doc. EPCT/TAC/PV/1, at 24 (Aug. 5, 1947).

tion of governments unable to put Part II of the Agreement fully into force on a provisional basis without changes in existing legislation is, therefore, covered.²⁷⁵

Later, this clause was taken out of the Agreement itself, and put into the separate Protocol.²⁷⁶

Explanations of the "existing legislation" clause were made on several occasions. A committee, reporting on the countries that would be able to give provisional application to GATT, stated that "provisional application is interpreted as meaning that action in accordance with Article XXXII which can be taken by executive action."²⁷⁷ At another point in the deliberations, an American delegate explained the clause as follows:

I think the intent is that it should be what the executive authority can do—in other words, the Administration would be required to give effect to the general provisions to the extent that it could do so without either (1) changing existing legislation or (2) violating existing legislation. If a particular administrative regulation is necessary to carry out the law, I should think that that regulation would, of course, have to stand; but to the extent that the Administration had the authority within the framework of existing laws to carry out these provisions, it would be required to do so.²⁷⁸

Thus the purpose of the "existing legislation" clause is clear: it was to enable governments which would not otherwise be legally able to do so, to put GATT into provisional effect soon after the Geneva Conference closed. Additionally, it was realized that the Havana Conference might result in some changes to portions of the GATT agreement, particularly Part II,²⁷⁹ and it seemed reasonable to allow countries with inconsistent legislation to wait until the results of that conference were known before taking legislative action. In any event, it appears that the clause thus excepted from GATT only those laws that could not be affected by executive action without the help of the legislature.

As previously indicated, the Administration in 1951 presented to Congress a list of legislation it deemed inconsistent with GATT.²⁸⁰ No state legislation was contained in this list. This could be taken as evidence that it was felt that the "existing legislation"

275. U.N. Doc. EPCT/135, at 9 (July 24, 1947).

276. U.N. Doc. EPCT/196 (Sept. 13, 1947).

277. U.N. Doc. EPCT/W/301, at 7 (Aug. 15, 1947).

278. U.N. Doc. EPCT/TAC/PV/5, at 20 (1947). *See also* U.N. Doc. EPCT/TAC/PV/23, at 15-16 (1947).

279. *See* GATT, art. XXIX, para. 2.

280. *See* note 250 *supra*.

clause was not intended to exempt state legislation. A counter argument, however, would be that the Administration did not believe it was necessary to bring state legislation under the "existing legislation" clause because, under article XXIV:12, it was not affected anyway. More likely, the Administration simply was not aware of this problem when the list was compiled.

As to the practice of GATT, a thorough search for relevant documents turned up only one instance when the issue of the relation of the "existing legislation" clause to state legislation was recognized. This was in the report of India in response to a request for a list of "existing legislation" from each GATT party:

At the outset it is necessary to point out that in India the powers to legislate over matters affecting trade and commerce vest not only in the Indian Parliament but also in the Legislatures of the States (formerly Provinces of British India and Indian States). Within the time given, no attempt whatsoever could be made to examine the legislation of the various States and no idea can, therefore, be formed at this stage of the possible scope of the Government of India's obligation under paragraph 12 of Article XXIV.²⁸¹

What, then, can one conclude about state "existing legislation" and GATT? I suggest that, based on the preparatory works of GATT, the purpose of the "existing legislation" clause was to require a country to apply GATT to the fullest extent of its "executive power." In the context of the preparatory meetings, "executive" meant federal executive. Following this line of reasoning, the question depends on whether the federal executive authority can override state legislation. In the United States it is settled that a valid executive agreement is superior to state law.²⁸² Additionally, a President's valid proclamation or regulation is, under the supremacy clause, superior to state legislation.²⁸³ Thus, it can be concluded that state legislation "existing" at the time of GATT was not within the meaning of the exception in the Protocol of Provisional Application.

This position can also be supported as a matter of policy. The need for federal control over matters affecting foreign commerce, recognized in the Constitution, should tip the scales in favor of federal law. This rationale has, as was discussed above, led a number

281. GATT Doc. L/2375/Add.1, at 11 (1965), reproducing GATT Doc. L/309 (1955).

282. See cases cited in note 226 *supra*; RESTATEMENT §§ 141-44 (1965).

283. *Pennsylvania R.R. v. Illinois Brick Co.*, 297 U.S. 477 (1936) (holding regulations of the Interstate Commerce Commission superior to state law). Consequently, insofar as the President's order is pursuant to delegation of Congress, this case supports the proposition in the text.

of courts to negate state laws affecting foreign commerce without relying on GATT at all. Where federal law on the subject exists, there is even more reason to hold that the states cannot regulate.

2. The "Local Government" Clause

Even if state law is not excepted from GATT superiority by other provisions of the agreement, it has been argued²⁸⁴ that it is made so exempt by the language of Article XXIV, paragraph 12:

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.²⁸⁵

Simple and straightforward as it appears, this language contains an ambiguity that has an important impact on the domestic law application of GATT. The opposing interpretations can be expressed as follows:

- (A) The language does not change the binding application of GATT to political subdivisions, but it recognizes that in a federal system certain matters are legally within the power of subdivisions and beyond the control of the central government. In such a case, the central government is not in breach of its international obligations when a subdivision violates GATT, as long as the central government does everything *within its power* to ensure local observance of GATT.
- (B) On the contrary, this language indicates that GATT was not intended to apply as a matter of law against local subdivisions at all, and even when the central government has legal power to require local observance of GATT, it is not obligated under GATT to do so, but merely to take "reasonable measures."

If the second interpretation is correct, then GATT cannot be invoked as a matter of law in any state proceeding involving state law. This precise issue has arisen in several cases, including a very recent California case.²⁸⁶ The unanimous conclusion of the courts

284. Brief for Petitioner, *Bethlehem Steel v. Board of Comm'rs*, Civil Nos. 899165, 897591 (Super Ct. County of Los Angeles 1966). The argument is discussed in 36 CAL. ATT'Y GEN. OP. 147, 148-49 (1960).

285. This paragraph was originally numbered 6 of art. XXIV, 55 U.N.T.S. 194 (1950). Subsequently, amendments to art. XXIV (*see* authorities cited in note 236 *supra*) changed the number to 12.

286. *Bethlehem Steel v. Board of Comm'rs*, Civil Nos. 899165, 897591 (Super. Ct. County of Los Angeles 1966). The court, while finding that the *Baldwin-Lima* case (*see* note 108 *supra*) was controlling, indicated that if the case were one of first impression that he would hold that "the Buy American Act is a violation of the commerce clause of the United States Constitution." Further, relying on the Imposts

thus far has been that GATT does apply to and override state or territorial law.²⁸⁷ However, the State Department took the contrary position in a letter to the Hawaii Territorial Supreme Court in the earliest of these cases. This letter,²⁸⁸ signed by the then State Department Legal Advisor, Herman Phleger, referring to Article XXIV:12, stated:

This provision . . . has always been interpreted as preventing the General Agreement from overriding legislation of political subdivisions of contracting parties inconsistent with the provisions of the Agreement; by placing upon contracting parties the obligation to take reasonable measures to obtain observance of the Agreement by such subdivisions, the parties indicated that as a matter of law the General Agreement did not override such laws. . . . In light of the provisions of paragraph 12 of Article XXIV . . . the reliance by the Supreme Court of the Territory on Article VI, clause 2 of the United States Constitution to invalidate the legislation would appear to have been based on a misconception of the General Agreement and of its effect on the legislation of the parties to it . . . it is suggested that you might desire to request a rehearing of the case on the basis that the particular constitutional grounds relied on are not appropriate in view of paragraph 12 of Article XXIV.

This letter is consistent with the testimony of a State Department official in hearings before a Senate Committee in 1949, one-and-one-half years after GATT was signed. Referring to article XXIV:12, the colloquy was as follows:

Senator MILLIKIN. Well, with reference to that, what can we do about it? Supposing any of our States, within their proper constitutional authority, put up a tax that is inconsistent with the pro-

and Duties clause of the Constitution (art. I, § 10), the court stated that a state could not constitutionally impose such a "complete embargo" as results from the Buy American Act. The court did not undertake to examine the bases of GATT in United States law, but accepted it as superior to state legislation without discussion, while denying the injunction petition on grounds of existence of an adequate remedy at law. Oral Opinion of the Court, *Bethlehem Steel Corp. v. Board of Comm'r's*, *supra*, Judge Charles A. Loring, rendered December 22, 1966. Copy on file *Michigan Law Review* office. On May 2, 1967, the court granted defendant's motion for summary judgement. Letter from Kenneth W. Downey, Deputy City Attorney of Los Angeles, dated May 9, 1967; copy on file *Michigan Law Review* office. It is understood that the decision is being appealed.

287. The Texas case turned on another legal issue, but the remaining state and territorial cases (*see* cases cited in note 108 *supra*) so applied GATT.

288. Letter from Herman Phleger, Legal Advisor of the Department of State, to Mr. Sharpless, Acting Attorney General of Hawaii, February 26, 1957. This letter is on file in the Department of the Attorney General of Hawaii, as contained and certified in an affidavit of April 5, 1967, by Burt T. Kobayashi, Attorney General of the State of Hawaii. It was filed by the attorneys for plaintiff in *Bethlehem Steel Corporation v. Board of Comm'r's*, Civil Nos. 899591 (Super. Ct. County of Los Angeles 1966). Portions of this letter are also quoted in L. EBB, *REGULATION AND PROTECTION OF INTERNATIONAL BUSINESS, CASES, COMMENTS AND MATERIALS* 763 (1964).

visions of this article which we have been discussing? What is our obligation?

Mr. BROWN. I do not think we could do anything about it, Senator.

Senator MILLIKIN. Have we promised, or held out an implied promise, to do something that we could do anything about?

Mr. BROWN. I don't think so.

Senator MILLIKIN. Let us read that.

Mr. BROWN. Let me just check.

The only commitment that we have taken, on that point, Senator, is in the last paragraph of article XXIV, page 82.

Senator MILLIKIN. Article XXIV of GATT?

Mr. BROWN. Article XXIV of the general agreement; yes. Because it was recognized that the Federal Government did not have the power to compel action by the local government. It only had powers of persuasion.

Senator MILLIKIN. Well, can we accept it as beyond "if's," "but's," "maybe's" that it is not intended that the Federal Government shall attempt to conform State laws by any method whatsoever, to the provisions of this agreement?

Mr. BROWN. That may be taken categorically, but that does not mean that the Federal Government might not get in touch with a governor and suggest to him that he consider that a course of action which the State is following has certain effects. But that would be simply a matter of persuasion and consultation.

. . . .

Senator MILLIKIN. Would the provisions of this article or any other part of GATT impose upon the Federal Government any duties to do anything as to local State laws or movements, which are intended to promote State products, such as "Buy Georgia Peaches," "Buy Colorado Cantaloupes," state advertising campaigns out of public funds to promote those local buying movements?

Mr. BROWN. No, sir.

Senator MILLIKIN. Is there anything in this agreement any place that imposes any obligation on the Federal Government to stop anything of that sort?

Mr. BROWN. I don't think so, sir.

Senator MILLIKIN. Is there any question about it?

Mr. BROWN. No; I don't know of anything. It was not intended.²⁸⁹

The actual drafting history of GATT, however, leaves one with a somewhat different impression. The language of article XXIV:12 was drawn directly from an identical provision that was in the draft ITO Charter²⁹⁰ at the time the GATT draft was formulated.²⁹¹

289. *Hearings on H.R. 1211, Extension of Reciprocal Trade Agreements Act, Before the Senate Comm. on Finance*, 81st Cong., 1st Sess., pt. 2, at 1161-62 (1949).

290. This so-called Geneva draft of the ITO Charter, the result of the Geneva meeting, is contained in the Report of the Second Session of the Preparatory Com-

A later attempt to delete this language from GATT was rebuffed at Geneva, with the United States delegate explaining:

Mr. Chairman, this particular paragraph was drawn from the Charter and I think some rather careful consideration went into its framing. I believe it is necessary to distinguish between central or federal governments, which undertake these obligations in a firm way, and local authorities, which are not strictly bound, so to speak, by the provisions of the Agreement, depending of course on the constitutional procedure of the country concerned.

I think it really would be preferable to retain this language; it has some relationship with references in other parts of the Agreement dealing with action taken by governments. I am afraid that if we change the language of Paragraph 7 we shall probably disturb some of the interpretations and understandings that have been arrived at with respect to other parts of the Agreement, as well as raising questions with regard to the Charter when we get to Havana. Therefore I should be rather inclined to take the present draft.²⁹²

A previous attempt to transfer the clause to Part II of GATT, so that it would be subject to "existing legislation," also failed.²⁹³

In working back into the history of this language as it developed in the ITO Charter, it appears that the question of treaty application to federal subdivisions came up very soon after the start of the first preparatory meeting in London in 1946. In connection with a draft commitment to prevent internal tax and regulatory discrimination against imported goods (compare article III of GATT), Australia noted:

Where the matter is one solely of action by a state, and our "external powers" laws do not give the Commonwealth authority to act, we would agree to use our best efforts to secure modification or elimination of any practice regarded as discriminatory.²⁹⁴

And, at a later point, a United States delegate noted:

The obligation to accord fair and equitable treatment in awarding contracts applied to both central and local government where

mittee of the United Nations Conference on Trade and Employment, U.N. Doc. EPCT/186 (1947). Article 99, para. 3 of this draft is the language identical to the present art. XXIV:12 of GATT, except for minor changes reflecting the difference in the instruments in which the language is located. Earlier GATT drafts likewise had included ITO Charter versions of this same clause.

291. The earliest Geneva draft of GATT, following the fairly complete redraft of the ITO Charter, is contained in EPCT/135 (1947). At this point the local government clause was in art. XXII of GATT. Subsequent drafts of GATT carried this language forward without change. See art. XXII of U.N. Doc. EPCT/189 (1947); art. XXIV of U.N. Doc. EPCT/196 (1947); art. XXIV of U.N. Doc. EPCT/214 (1947).

292. U.N. Doc. EPCT/TAC/PV/19, at 32-33 (1947).

293. U.N. Doc. EPCT/TAC/PV/11, at 43-46 (1947).

294. U.N. Doc. EPCT/13, at 1 (1946). See also U.N. Doc. EPCT/C.II/7 (1946).

the central government was traditionally or constitutionally able to control the local government. Although he could not speak decisively, he thought that the United States Government would be able to control actions of states in this matter.²⁹⁵

A subcommittee later reported as follows:

Several countries emphasized that central governments could not in many cases control subsidiary governments in this regard, but agree that all should take such measures as might be open to them to ensure the objective.²⁹⁶

Therefore, the subcommittee proposed the addition of a new clause which read:

Each member agrees that it will take all measures open to it to assure that the objectives of this Article are not impaired in any way by taxes, charges, laws, regulations or requirements of subsidiary governments within the territory of the member governments.²⁹⁷

This language, as a part of the "national treatment article," was carried over to the next preparatory meeting in New York in early 1947. At this meeting, the clause was changed to read:

Each accepting government shall take such reasonable measures as may be available to it to assure observance of the provisions of this Charter by subsidiary governments within its territory.²⁹⁸

It was further pointed out that this problem of federal-state power allocation also applied to other parts of the draft charter. The clause was then transferred from the article on national treatment to a general miscellaneous article.²⁹⁹ It was in this form that the clause first found its way into the draft GATT,³⁰⁰ only to be changed later to accord with the draft ITO Charter changes as they occurred.³⁰¹

Before drawing some conclusions from this history, one complicating factor must be mentioned. An interpretative note in Annex I to GATT, relating to paragraph 1 of article III, states:

The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting

295. U.N. Doc. EPCT/C.II/27, at 1 (1946).

296. U.N. Doc. EPCT/C.II/54, at 4 (1946). *See also* U.N. Doc. EPCT/C.II/64, at 3 (1946).

297. U.N. Doc. EPCT/C.II/54, at 6 (1946).

298. U.N. Doc. EPCT/34, at 52 (art. 88, para. 5 of the Geneva draft of the ITO Charter), 79 (art. XXV, para. 5 of the then GATT draft) (1947).

299. U.N. Doc. EPCT/C.6/6, at 3 (1947), U.N. Doc. EPCT/C.6/55 at 5-6 (1947).

300. U.N. Doc. EPCT/C.6/W.58 (art. XXII, para. 5) (1947).

301. *See* note 290 *supra*. Ultimately, the "Havana Charter," the final version of the ITO Charter as drafted at Havana in the early part of 1948, included the local government clause as art. 104, para. 3. U.N. Doc. ICITO/1/4 (1948).

party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit if its repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

This note was explained in the 1949 Senate hearings:

Senator MILLIKIN. Well, is it understood that this does not apply to the United States?

Mr. BROWN. Yes, sir, because it applies only to a national law, and we don't have any.³⁰²

It can be argued that the interpretative note indicates that GATT was not intended to apply to state law, since it interprets "reasonable measures" not to require immediate overriding of a state law. One could argue, however, that this note applies only to *national* legislation. A look at the history of this troublesome note may help elucidate its meaning.

The note was drafted at the Havana Conference on the ITO Charter in early 1948, some months after GATT was signed.³⁰³ In September 1948, at the Second Session of the Contracting Parties of GATT, protocols were drafted to amend some specific portions of GATT to take account of changes made at Havana in the corresponding ITO articles.³⁰⁴ Among the changes made to GATT were those that tightened up article III, dealing with "national treatment."³⁰⁵ Since the Havana Conference had added an interpretative note to the Charter when it changed the corresponding provision, the same note was carried over into GATT when the changes were

302. *Hearings on H.R. 1211, Extension of Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 81st Cong., 1st Sess., pt. 2, at 1162 (1949).

303. Final Act and Related Documents of the United Nations Conference on Trade and Employment, Havana, Cuba (1947-1948), U.N. Doc. ICITO/1/4, at 62 (1948). This interpretive note was in the ITO Charter at annex P, art. 18, para. 1.

304. See GATT Doc. CP.2/SR.1-25 (1948); Report adopted by the contracting parties (1948), GATT Doc. CP. 2/22/REV. 1, reprinted at GATT, 2 BISD 39 (1952); GATT, 2 BISD para. 32, at 45 (1952).

305. GATT, 2 BISD 40 (1952).

306. See authorities cited in notes 303 & 304 *supra*.

made to article III.³⁰⁶ Reports of the Havana Conference³⁰⁷ suggest that the interpretative note was a result of a compromise and a desire to accommodate several countries who feared the political and administrative consequences, including the revenue loss to subsidiary governments, of immediate revocation of discriminatory internal taxes.³⁰⁸ The solution agreed upon was to permit gradual elimination of such taxes, but it was thought easier to handle this in an interpretative note than in the text of the article itself.³⁰⁹ It seems doubtful that this note was intended to affect the language in article XXIV:12 at all. Its placement as a note to the "national treatment" article confirms this view.³¹⁰

What, then, can be concluded from the preparatory history of article XXIV:12? The fragments of that history which were recorded suggest that this clause was intended to apply only to the situation in which the central government did not have the constitutional power to control the subsidiary governments. Australia and other countries made reference to this situation. The United States delegate did likewise, adding his tentative judgment that the United States did not find itself in this circumstance. Thus, it can be argued that interpretation (A) which was presented at the outset of this section is the correct one, despite the opposing view expressed in the 1949 Senate Finance Committee hearings. It should be added that the witness at that hearing may have been suffering under a misunderstanding of United States law at the time of his testimony. He said that "it was recognized that the Federal Government did not have the power to compel action by the local government,"³¹¹ but the supremacy clause of the Constitution seems to belie that statement. Furthermore, this hearing was held at a time when political opposition to ITO and GATT was apparently growing, and several of the Senators at the hearing were obviously hostile and were challenging the validity of GATT in its entirety. Under these circumstances, it is natural that the Administration spokesman would desire to play down the scope of GATT.³¹²

307. U.N. Conference on Trade and Employment, Reports of Comm. & Principle Subcomm., U.N. Doc. ICITO/1/8, at 62 (Report of Subcomm. A of the 3d Comm. on arts. 16, 17, 18 & 19, U.N. Doc. E/CONF.2/C.3/59, at para. 38) (1948).

308. U.N. Conference on Trade and Employment, U.N. Doc. E/CONF.2/C.3/A/W.30, 31-35, 47, 52 (1948); U.N. Doc. E/CONF.2/C.3/SR.40, at 2 (1948).

309. U.N. Doc. E/CONF.2/C.3/A/W.30, at 1 (1948); U.N. Doc. E/CONF.2/C.3/A/W.50, at 3 (1948).

310. U.N. Doc. E/CONF.2/C.3/A/W.50, at 3 (1948).

311. *Hearings on H.R. 1211, Extension of Reciprocal Trade Agreements Act, Before the Senate Comm. on Finance*, 81st Cong., 1st Sess., pt. 2, at 1161 (1949).

312. See authorities cited in note 223 *supra* and accompanying text.

One can, of course, also raise the question of the comparative relevance to GATT legal questions of the GATT preparatory work as against United States Senate hearings. Theoretically, the preparatory work should weigh more heavily.³¹³ Indeed, the legislative hearings that occurred after GATT was in force are arguably irrelevant, although in practice, they are accepted as having some value.³¹⁴ Yet the practical problem in attempting to ascribe any meaning at all to certain GATT provisions has been the difficulty of finding and obtaining access to any GATT interpretative materials. The legislative hearings are relatively easy to find and read, whereas GATT preparatory work is just the opposite. For a number of years, the preparatory work material was restricted and unavailable for public use—even now, only a few libraries or locations have a reasonable collection.³¹⁵ Moreover, the sheer volume is so great³¹⁶ and indexing so poor (or non-existent),³¹⁷ that even with access the attorney needs a wealthy and willing client to be able to undertake the necessary search. There is something of an anomaly in the fact that an instrument can have legal force in domestic law while important interpretative material relating to that instrument is, as a practical matter, unavailable to the domestic lawyer or court. The anomaly is even more difficult to accept when

313. The *Restatement's* "criteria for interpretation" of treaties and executive agreements include "the circumstances attending the negotiation of the agreement," and "drafts and other documents submitted for consideration, action taken on them, and the official record of the deliberations during the course of the negotiation" *RESTATEMENT* § 147.

314. *Id.* This section does not consider legislative discussion of an international agreement subsequent to the time the agreement enters into force to be relevant, although subsequent practice of one party, if the other party or parties knew or had reason to know of it, is relevant. *Id.* § 147(f). As a matter of practice, legislative materials of a major member of an international organization tend to be regarded as significant in interpreting the agreement, even by the international staff. See Gold, *Interpretation by the International Monetary Fund of Its Articles of Agreement: II*, 16 *INT'L & COMPARATIVE LAW Q.* 289, 296 (1967). The Supreme Court of the United States has recognized the relevance of administrative interpretations of international agreements by the department charged with its negotiation and enforcement. *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

315. GATT headquarters in Geneva, of course, has a very complete collection. In the United States, fairly complete collections exist at the United Nations Headquarters Library, at the State Department offices in Washington, and at the International Monetary Fund offices in Washington. The situation has improved, however, as most of the preparatory work is now available on microfilm. Also, GATT has recently liberalized its restrictive policy as to current documents. See GATT Docs. INF/121 & INF/122.

316. I would estimate that the volume of materials comprising the preparatory work for GATT and ITO (which is intermingled), amounts to something on the order of 27,000 pages—about 100 volumes.

317. A very small number of references to the preparatory work can be found in GATT, *ANALYTICAL INDEX TO THE GENERAL AGREEMENT* (2d rev. 1966).

these materials are available only to government attorneys. This situation is not unique to foreign trade matters; indeed, it is pervasive. Such a situation can have the practical effect of giving the administering government agency undue influence on the ultimate interpretation of important domestic laws.³¹⁸ Interestingly enough, however, in the one clear case in which a government agency has tried to influence a state court's interpretation of GATT, the agency's position has so far not been followed.³¹⁹

Since there are these problems in using the preparatory work or United States legislative history concerning GATT, and since these materials are contradictory, it is worthwhile to note briefly some policy arguments relating to GATT's position vis-à-vis state or local law. There are two broad policy groupings that any state court will face in the appraisal of the significance of GATT to state law. The first group will consist of the policies of the particular state law being compared with GATT, whether explicitly admitted by the court or not. If the court feels, for example, that a state "Buy American" statute is based on weak or faulty premises, it will be more likely to apply GATT to override this statute, particularly if it feels the legislature is not likely to correct defects in the law. The second policy group involves basic questions of constitutional law and the powers of the federal government to control foreign commerce. Various non-tariff trade barriers can be even more inhibiting to international trade than tariffs. This fact has clearly been recognized by both the legislative and executive branches of the federal government.³²⁰ Local government actions are certainly capable of frustrating international trade almost as significantly as federal government actions.³²¹ Therefore, meaningful international agreement on trade matters must regulate local government actions. In this country, the Constitution gives the federal government power so to affect local actions.³²²

318. These interpretations are likely to be influenced by current policy positions of the government agency, which in turn usually reflect current political conditions. It is fundamental to an independent judiciary that there be free access to relevant interpretive materials in order to formulate its conclusions independently of the administration, even though the final result may be the same.

319. See text accompanying note 288 *supra*.

320. See authorities cited in note 62 *supra*.

321. See note 261 *supra* and accompanying text. See also excerpts from the memorandum of the United States as amicus curiae in *Tuppmann-Thurlow Co. v. Moss*, 252 F. Supp. 641 (M.D. Tenn. 1966), reproduced in 5 AM. SOC'Y OF INT'L LAW, INT'L LEGAL MATERIALS 483 (1966).

322. U.S. CONST., art. VI (the "supremacy clause"); art. I, § 8 ("to regulate commerce with foreign nations . . ."); art. I, § 10 ("no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports . . .").

But such general statements do not answer the GATT question: Is there any reason peculiar to GATT for interpreting it (or not) to override directly state law? The policies already expressed seem to indicate that in case of doubt GATT should be so applied. But countering this are the following arguments: (1) to interpret article XXIV:12 of GATT in this manner means that GATT will apply to different countries in different ways depending on their constitutional structure; and (2) United States constitutional uncertainty and controversy regarding executive agreements should lead courts to be cautious in applying such agreements to override state law.

In reply to the first argument, it may be said that uniformity of application is not essential, especially when the mechanism for registering complaints and urging corrective action exists within GATT.³²³ Moreover, the "existing legislation" clause of the Protocol of Provisional Application clearly already allows non-uniformity depending on constitutional structure.³²⁴ Indeed, it can be argued that such international recognition and allowance for individual national constitutional differences is salutary and analogous to the policies of federalism within nations. As to the second argument, while self-restraint by the federal legislative and executive branches is well received in many contexts, once the executive agreement has become effective the courts should not be deterred by this argument from giving full force under the supremacy clause to such agreements when other policies urge such effect. Both the supremacy clause and the foreign commerce clause of the Constitution should, in the context of GATT, lead to a presumption that federal law, including proclaimed executive agreements on trade, supersedes state law.

Furthermore, this country is likely to have future occasion to protest the use of foreign regional and local laws to restrict our exports. In such a case, the United States, an exporting nation, will be in a stronger position to use diplomatic means to obtain revocation of those laws, if, within this country, state and local laws are automatically subject to GATT.

IV. CONCLUSION

The legal position of GATT in United States domestic law turns out to be surprisingly complex. This may be only a natural result—

323. GATT, arts. XXII & XXIII (nullification and impairment, and the complaint procedure); GATT, art. XXV (waivers and joint action).

324. See discussion in text at pt. III.B.1.

GATT itself was a highly intricate and perplexing instrument when born. Years of amendments and subtle changes in practice have made it even more difficult to understand fully. It appears, however, that the following generalizations can be made about the domestic legal position of GATT:

1. GATT is a valid executive agreement, entered into by the United States pursuant to authority of congressional legislation.³²⁵
2. To the extent entry into GATT is pursuant to congressional authority, its domestic legal effect is probably achieved only through "proclamation." Not all parts of GATT have been proclaimed, but proclaimed parts do include all changes to United States tariff schedules and notes, as well as the original full text of GATT's general provisions, but not some subsequent textual amendments.³²⁶
3. Part II of GATT is expressly subject to pre-GATT federal legislation, pursuant to the Protocol of Provisional Application (which was proclaimed). It is inferior to subsequent federal legislation by virtue of the usual legal principles concerning executive agreements. Thus, Part II of GATT is inferior to any inconsistent federal legislation. Parts I and III are superior to pre-GATT legislation, and Part IV is probably not domestic law in the United States.³²⁷
4. It is this author's opinion that GATT is directly applicable to state and local governments in the United States, and supersedes state or local law even when that law is not automatically preempted by federal law, and even when such law existed prior to GATT.³²⁸

325. See discussion in text at pt. II.A.1.

326. See discussion in text at pt. II.B. and app. C.

327. See discussion in text at pt. III.A.

328. See discussion in text at pt. III.B.

APPENDIX A

Analysis of GATT in Relation to 1945 United States Statutory Authority, Congressional History, and Prior Trade Agreements

The following chart briefly presents for each article of GATT (1) its general subject matter, (2) its statutory basis, (3) the relevant congressional history, and (4) similar provisions in various trade agreements entered into by the United States prior to the 1945 Trade Agreements Extension Act.

Abbreviations used are as follows:

- CR: 91 CONG. REC. (1945). The number which follows is the page.
- EXC: "Exception" (meaning the article can be justified under the Statute as being merely an exception to commitments otherwise authorized).
- HH: *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Ways & Means Comm.*, 79th Cong., 1st Sess. (1945). The number which follows is the page.
- HR: H.R. REP. NO. 594, 79th Cong., 1st Sess. (1945). The number which follows is the page.
- IMP: "Implied" (suggesting that the article is an administrative provision that can be justified as impliedly authorized by the Statute as a necessary measure to carry out the other commitments).
- IR: "Import Restrictions" (referring to this language in the TAEA).
- SH: *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 79th Cong., 1st Sess. (1945). The number which follows is the page.
- TAEA: § 350 of the Tariff Act of 1930 as amended by the Reciprocal Trade Agreements Act of 1934 and extended by the Trade Agreements Extension Act of 1945 [19 U.S.C. § 1351 (1964)]. If a small letter follows, it refers to a subsection of 350. If a number follows, it refers to another section of the same Act.
- I, etc: Relevant articles in prior trade agreements.
- N.I, etc: Notes at the end of the chart.

It should be noted that the congressional history on any clause is often extensive, and that only one illustrative reference may have been selected for inclusion on this chart. This analysis does not purport to show that explicit congressional approval existed for any specific clause, but merely that the general subject matter of each GATT article was mentioned in the congressional history, and thus is arguably within the intended scope of the legislative delegation of power. It should also be noted that, even though unmentioned in legislative history or prior precedents, clauses which are similar to subject matter already so mentioned, such as art. IV, can be justified as within the general *overall* scope of negotiating authority.

APPENDIX A

GATT Article	General Subject	Statute	Congress- sional History	Prior U.S. Trade Agreements		
				Mexico 1942	Uruguay 1942	Other Trade Agreement Precedents
<i>Part I</i>						
I	Most-Favored-Nation Clause	TAEA	CR-5071	I	I	
II	Commitment on Maximum Tariffs	TAEA	HH-274	VII, VIII	VII, VIII	
<i>Part II—Safeguarding Provisions</i>						
III	Internal Taxation and Regulations	IR, N.1 TAEA(c)	HR-8 CR-4999	III, IX	II	Canada (1938), V
IV	Cinematograph Films	IR, EXC				
V	Freedom of Transit	IR	CR-4999	XIII		
VI	Anti-Dumping	IR	CR-5071			Costa Rica (1936), XI El Salvador (1937), XI
VII	Customs Valuation	IR	HH-274	XII	X	
VIII	Customs Fees and Formalities	TAEA(c)	CR-4999	VI		
IX	Marks of Origin	IR				Canada (1938), IX
X	Publication/Administration, Customs Regulations	TAEA(c)	HH-274	VI	VI	
XI	Quantitative Restrictions	TAEA(c)	HR-8	III, X	XI	
XII	Quantitative Restrictions (BOP Exception)	TAEA(c), EXC	HR-8	III, X		
XIII	Quantitative Restrictions (MFN)	TAEA(c)	HR-8	III, X	III	See Peru (1942), III
XIV	Quantitative Restrictions (BOP Exception)	TAEA(c), EXC	HR-8	III, X		
XV	Currency Manipulations and BOP	IR	CR-4886	IV	IV	
XVI	Subsidies on Exports or to Reduce Imports	IR	CR-5070			
XVII	State Trading & State Monopolies	IR	CR-5071	V	V	
XVIII	Assisting Economic Development	EXC				
XIX	Escape Clause	EXC	HR-8	XI		
XX	Health and Morals Regulations	IR, EXC	CR-4999	XVII	XV	
XXI	National Security Exceptions	EXC	CR-5070	XVII	XV	
XXII	Consultation	IMP	HH-274	XIV	XII	
XXIII	Nullification (Sanction)	IMP	HH-409	XIV	XII	

APPENDIX A (Continued)

GATT Article	General Subject	Statute	Congres- sional History	Prior U.S. Trade Agreements		
				Mexico 1942	Uruguay 1942	Other Trade Agreement Precedents
<i>Part III—Administrative</i>						
XXIV	Territorial, Application/Regional Blocs	EXC		XV, XVI	XIII, XIV	
XXV	Voting, Decisions, Waivers	N.2			XII	
XXVI	Acceptance, Entry in Force	IMP		XVIII	XVII	
XXVII	Withholding Concessions to Nonmembers	IMP		N.7	N.7	
XXVIII	Negotiating and Modifying Tariff Concessions	TAEA	HH-275		XVIII	
XXIX	Relation to ITO	N.3				
XXX	Amending GATT	N.4		N.7	N.7	
XXXI	Withdrawal from GATT	IMP	HH-274	XVIII	XVIII	
XXXII	Contracting Parties Defined	IMP		N.8	N.8	
XXXIII	Accession of new Members	N.5		N.7	N.7	
XXXIV	Annexes Incorporated by Reference	IMP		N.8	N.8	
XXXV	Withholding Application of GATT to New Members	N.5		N.7	N.7	
	<i>Part IV—Trade and Development</i>	N.9				
<i>Annexes:</i> Relate to specific GATT articles		IMP				
<i>Schedules:</i> Contain tariff concessions and relate to art. II		TAEA				
<i>Some special clauses:</i>						
"Exports"		N.6		III	III	
"Principal Supplier Rule" in tariff negotiations			CR-5050			
"Provisional Application" of the Protocol						Canada (1938) XVIII
"Local Governments," (XXIV:12)					XV:2	

- Note 1: Part II is subject to "existing legislation." *See* discussion in text at II.B.1.
- Note 2: The joint action provisions of art. XXV can also be justified as administrative provisions necessarily implied in the authority delegated to enter GATT. The language of art. XXV, however, is very broad on its face; it may well be argued that it should be limited by the scope of GATT itself or at least that United States representatives should be subject to some limitations in voting to exercise joint action.
- Note 3: Since ITO was intended to be submitted to Congress, it can be argued that a provision governing the relationship to ITO was not beyond the scope of the trade agreements delegation. Some provisions of art. XXIX, however, provide positive commitments themselves. Paragraph 1 commits parties to observe chapters I to VI and IX of the ITO Charter "to the fullest extent of their executive authority," thereby ducking the ultra vires problem. Paragraph 6 provides that GATT parties "shall not invoke the provisions" of GATT to prevent operation of any provision of the Havana Charter, but this seems merely an exception to GATT, not an additional commitment. In practice the ITO Charter has apparently become a dead letter, other than as a generalized statement of principle.
- Note 4: The amending article, like art. XXV, is probably justified as a necessary administrative clause. This article is discussed in more detail in the text at II.A.3.
- Note 5: Articles XXXIII (new members) and XXXV (withholding application of GATT to a new member) must be read together. Article XXXV simply gives an option to new or old parties of GATT not to apply GATT to each other. This is analogous to a refusal to enter a bilateral trade agreement, and is a remnant of bilateralism in GATT.
- Note 6: At the time GATT was negotiated, the President had other statutory authority over exports (*see* note 60 to text *supra*). Even if that authority would not expressly support the clauses in GATT, it is evidence that the President had general authority to negotiate on export matters. In addition, prior trade agreements dealt with exports.
- Note 7: These provisions of GATT are not needed in a bilateral agreement because the same purposes could be effectuated by bilateral negotiations.
- Note 8: Definitional clauses or incorporating clauses do not need authorization.
- Note 9: Part IV was added in 1965-1966. Its basis in United States law is discussed in text following note 160 *supra*.

APPENDIX B

State Department Memorandum

The following is an excerpt from a memorandum submitted by the State Department at the *Hearings on Extending the Trade Agreements Act Before the Senate Finance Committee*, 81st Cong., 1st Sess., at 1054-55 (1949):

ANALYSIS BY ARTICLES

The following analysis of the General Agreement on Tariffs and Trade briefly indicates the principal authority for the inclusion in the agreement of the basic provisions of each article. Several of the substantive articles also contain provisions as to consultation with respect to the matter covered, which are clearly within the President's general authority as to consultation with other governments in the carrying out of international agreements, or exceptions which in one way or another merely limit the extent of the substantive commitments. Moreover, the provisions of part II of the agreement, that is, articles III through XXIII, are applicable only to the extent not inconsistent with legislation existing on October 30, 1947.

Article I—General most-favored-nation treatment as to customs duties, the treatment of imports, with limited geographical exceptions as to duties: Under authority for continuance of duties, customs treatment, and treatment of imports, most-favored-nation treatment also being recognized in generalization provision of section 350 (a) and preferences by section 350 (b).

Article II—Giving effect to tariff concessions with provisions as to excise, valuation, and government-monopoly treatment to protect concessions: Under authority to modify and continue duties, and continue customs and excise treatment and the treatment of imports.

Articles III and IV—Nondiscriminatory treatment of imports, as compared with domestic products, in respect of taxes and other regulations: Under authority as to continuance of excise treatment and treatment of imports.

Article V—Transit rights: Under authority as to continuance of duties, customs treatment, excise treatment, and the treatment of imports.

Article VI—Antidumping and countervailing duties: Under authority as to continuance of duties and customs treatment.

Article VII—Valuation for customs purposes: Under authority as to continuance of duties and customs treatment.

Article VIII—Customs formalities: Under authority as to continuance of customs treatment, including charges.

Article IX—Marks of origin: Under authority as to continuance of customs treatment.

Article X—Publication and administration of trade regulations: Under the President's general authority as to international relations (especially as to publication) and authority as to continuance of customs treatment.

Articles XI and XII—Elimination of quantitative restrictions and exceptions thereto for balance of payment and other reasons: Under authority as to modification of import restrictions, continuance of customs treatment, and treatment of imports.

Articles XIII and XIV—Nondiscriminatory application of quantitative restrictions and exceptions thereto for balance of payment and other reasons: Under authority as to continuance of customs treatment and treatment of imports.

Article XV—Cooperation with International Monetary Fund on exchange matters: Under the President's general authority as to international relations, relations with the fund having been recognized by Public Law 171, Seventy-ninth Congress, first session (see especially sec. 14), and authority as to continuance of customs treatment.

Article XVI—Consultation as to subsidies: Under the President's general authority as to international relations, subsidies having been recognized as capable of impairing trade agreement benefits.

Article XVII—State trading activities: Under authority as to continuance of customs treatment, and the treatment of imports, state trading practices having been recognized as capable of impairing trade-agreement benefits.

Article XVIII—Exceptions for the assistance to industrial development: Under authority as to modifications and continuance of duties and import restrictions and treatment of imports.

Article XIX—Escape clause in case of domestic injury: Under authority as to modification of duties and import restrictions and expressly recognized by congressional report as desirable.

APPENDIX B (Continued)

- Article XX—General exceptions: Under the President's general authority as to international relations and authority as to continuance of customs treatment, and treatment of imports, also recognized in numerous laws as those relating to sanitary regulations and trademarks.
- Article XXI—Security exceptions: Under the President's general authority as to international relations and authority as to continuance of customs treatment, and treatment of imports, also recognized in numerous laws such as regulation of arms traffic and export-control legislation.
- Article XXII—Consultation as to customs and related matters: Under the President's general authority as to international relations, also recognized by authority as to continuance of customs treatment and treatment of imports.
- Article XXIII—Permissive action in case of nullification or impairment: Under the President's general authority as to international relations and authority as to modification of duties and import restrictions.
- Article XXIV—Territorial application and certain territorial exceptions from most-favored-nation treatment: Under the President's general authority as to international relations, territorial exceptions to most-favored-nation treatment having been recognized by section 350 (b).
- Article XXV—Joint action: Under the President's general authority as to international relations, especially the effective execution of multilateral international agreements, and authority as to modification of duties and import restrictions and termination of proclamations under last sentence of section 350 (a) (as to withholding of benefits under paragraph 5 (b)).
- Article XXVI—Procedures as to entry into force following provisional application: Under the President's general authority as to international relations to include appropriate procedural provisions in agreements.
- Article XXVII—Withholding and withdrawal of concessions: Under authority as to modification and continuance of duties and import restrictions and termination of proclamations under last sentence of section 350 (a).
- Article XXVIII—Modification of schedules: Under authority as to modification and continuance of duties and import restrictions and termination of proclamations under section 350 (a) with recognition of termination provisions as to trade agreements in section 2 (b) of Trade Agreements Act.
- Article XXIX—Relation to International Trade Organization: Under the President's general authority as to international relations to include appropriate termination provisions in agreements, with recognition of section 14 of Public Law 171, Seventy-ninth Congress, first session, and intention to submit International Trade Organization Charter to Congress.
- Article XXX—Amendments: Under the President's authority as to international relations, and authority as to modification of import restrictions, and treatment of imports.
- Article XXXI—Withdrawal from the agreement: Under the President's general authority as to international relations, with recognition of section 2 (a) of Trade Agreements Act as to termination of agreements, and authority to terminate proclamations under the last sentence of section 350 (a).
- Articles XXXII to XXXIV—Certain procedural provisions, including accession: Under the President's general authority as to international relations to include appropriate procedural provisions in agreements (new tariff negotiations in connection with accession would be in accordance with procedures of Trade Agreements Act).
- Article XXXV—Withholding application: Under the President's general authority as to international relations, with recognition of procedures provided for in the Trade Agreements Act.

APPENDIX C

GATT Agreements and United States Proclamations

Listed below are all "official" GATT agreements, as of October 15, 1967. "Official" GATT agreements are arbitrarily defined as those which have been deposited with the United Nations (prior to 1955) and listed in U.N. Doc. ST/LEG/3, Rev. 1, ch. X, subch. 1 and those which have been deposited with the Executive-Secretary of GATT since 1955 which are listed in GATT Doc. PROT/2 (as revised to August 1967). The United States proclamation listed is the principal one for that agreement, although others may also affect domestic application of the agreement. Other agreements relating to GATT, such as Final Acts or various bilateral trade agreements, are not listed here. Those other bilateral agreements which the United States has entered and which have also been proclaimed by the President can be found in the compilation of Presidential Proclamations in the annual United States Code Congressional Service. Proclamations which are also published as Treasury Decisions are contained in the *Treasury Decision Reports* (T.D.) or the new *Customs Bulletin*, and are listed in the index under the heading "Presidential Proclamations." Additional proclamations affecting United States obligations to GATT may also be found in these reports.

In the chart which follows, these abbreviations and symbols are used:

- / —: The number before the slash indicates the volume; the number following indicates the page.
- G : Indicates that the document is deposited at GATT headquarters. The number following indicates the list number (PROT/2), if known.
- U : Indicates that the document is deposited at U.N. headquarters. The number following indicates the list number (ST/LEG/3, Rev. 1), if known.
- NC : Indicates that the agreement did not change the United States schedule. This does not imply that omission of that statement elsewhere means that an agreement *did* change the United States schedule.
- None : Indicates that none was found, but proving a negative is very difficult and these proclamations are verbose and technical, so no warranty is made that "none" exists.

Footnotes (a, b, etc.) are located at the end of chart.

"Date in force" refers to that date as to any country, not necessarily the United States. The source is GATT Doc. PROT/2.

APPENDIX C

#	Date Done	Title	Signed by U.S.	Date In Force	U.N.T.S. Cite	Stat. or U.S.T. Cite	Pres. Proc.	Fed. Reg. Cite	T.D. Number
1	10/30/47 U1	General Agreement on Tariffs and Trade			55/194	61/Pt. 5, 6	2761Aa	12/8863	51802
2	10/30/47 U2	Protocol of Provisional Application of the General Agreement on Tariffs and Trade	X	1/1/48	55/308	61/Pt. 5, 6	2761A	12/8863	51802
3	3/24/48 U3	Protocol of Rectifications to the General Agreement on Tariffs and Trade	X	3/24/48	62/2	62/1988	2790b	13/3269	51939
4	3/24/48 U4	Declaration Signed at Havana 24 March 1948	X	3/24/48	62/26	62/1962	None	None	None
5	3/24/48 U5	Protocol Modifying Certain Provisions of the General Agreement on Tariffs and Trade	X	3/24/48	62/30	62/1992	2790	13/3269	51939
6	3/24/48 U6	Special Protocol Modifying Article XIV of the General Agreement on Tariffs and Trade	X	5/9/49	62/40	62/2000	2790	13/3269	51939
7	3/24/48 U7	Special Protocol Relating to Article XXIV of the General Agreement on Tariffs and Trade	X	6/7/48	62/56	62/2013	2790	13/3269	51939
8	9/14/48 U8	Second Protocol of Rectifications to the General Agreement on Tariffs and Trade	X	9/14/48	62/74	62/3671	2829	14/1151	52167
9	9/14/48 U9	Protocol Modifying Part I and Article XXIX of the General Agreement on Tariffs and Trade	X	9/24/52	138/334	3/5355	2829	14/1151	52167
10	9/14/48 U10	Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade	X	12/14/48	62/80	62/3679	2829	14/1151	52167
11	9/14/48 U11	Protocol for the Accession of Signatories of the Final Act of 30 Oct. 1947	X	9/14/48	62/68	62/3663	2829	14/1151	52167
12	8/13/49 U12	Third Protocol of Rectifications to the General Agreement on Tariffs and Trade	X	10/21/51	107/311	3/57	2867	14/7723	52373
13	8/13/49 U13	First Protocol of Modifications to the General Agreement on Tariffs and Trade	X	9/24/52	138/381	3/5368	2867	14/7723	52373

14	8/13/49 U14	Protocol Modifying Article XXVI of the General Agreement on Tariffs and Trade		3/28/50	62/114	2/1583	2867	14/7723	52373
15	8/13/49 U15	Protocol Replacing Schedule I of the General Agreement on Tariffs and Trade	X	10/21/51	107/83	3/123	2867	14/7723	52373
16	8/13/49 U16	Protocol Replacing Schedule VI of the General Agreement on Tariffs and Trade	X	9/24/52	138/346	3/5383	2867	14/7723	52373
17	10/10/49 U17	The Annency Protocol of Terms of Accession to the General Agreement on Tariffs and Trade	X	11/30/49	62/122	64/B139	2867 ^c	14/7723	52373
18	4/3/50 U18	Fourth Protocol of Rectifications to the General Agreement on Tariffs and Trade	X	9/24/52	138/398	3/5399	None (NC)	None	None
19	12/16/50 U19	Fifth Protocol of Rectifications to the General Agreement on Tariffs and Trade	X	6/30/53	167/265	4/29	None (NC)	None	None
20	4/21/51 U20a	Decision by the Contracting Parties Agreeing to the Accession of the Republic of Austria to the General Agreement on Tariffs and Trade	X	6/21/51	142/9	3/597	None ^d	None	None
21	4/21/51 U20b	Decision by the Contracting Parties Agreeing to the Accession of the Federal Republic of Germany to the General Agreement on Tariffs and Trade	X	6/21/51	142/13	3/600	None ^d	None	None
22	4/21/51 U20c	Decision of the Contracting Parties Agreeing to the Accession of the Republic of Korea to the General Agreement on Tariffs and Trade	X	6/21/51	142/18	3/603	None ^d	None	None
23	4/21/51 U20d	Decision of the Contracting Parties Agreeing to the Accession of Peru to the General Agreement on Tariffs and Trade	X	6/21/51	142/22	3/606	None ^d	None	None
24	4/21/51 U20e	Decision by the Contracting Parties Agreeing to the Accession of the Republic of the Philippines to the General Agreement on Tariffs and Trade	X	6/21/51	142/26	3/609	None ^d	None	None

APPENDIX C (Continued)

#	Date Done	Title	Signed by U.S.	Date In Force	U.N.T.S. Cite	Stat. or U.S.T. Cite	Pres. Proc.	Fed. Reg. Cite	T.D. Number
25	4/21/51 U20f	Decision by the Contracting Parties Agreeing to the Accession of the Republic of Turkey to the General Agreement on Tariffs and Trade	X	6/21/51	142/30	3/612	None ^d	None	None
26	4/21/51 U21	Torquay Protocol to the General Agreement on Tariffs and Trade	X	6/6/51	142/34	3/588	2929	16/5381	52739
27	4/21/51 U22	Declaration on the Continued Application of the Schedules to the General Agreement on Tariffs and Trade	X	10/24/52	147/390	3/1802	None	None	None
28	10/27/51 U23	First Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	10/21/53	176/2	4/2313	3513	28/107	55816
29	10/27/51 U24	First Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Germany & S. Africa)	X	5/25/52	131/316	3/3963	None (NC)	None	None
30	11/8/52 U25	Second Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	2/2/59	321/245	10/1098	None (NC)	None	None
31	11/22/52 U26	Second Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Austria and Germany)		8/30/53	172/340	4/1631	None (NC)	None	None
32	10/24/53 U27	Third Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	2/2/59	321/266	10/347	None (NC)	None	None
33	10/24/53 U28	Declaration on the Continued Application of Schedules to the General Agreement on Tariffs and Trade	X	1/1/54	183/351	4/2755	None	None	None
34	3/24/48 U-B2	Havana Charter for an International Trade Organization		Never	None	None	None ^e	None	None

35	9/14/48 U-C2	Agreement on Most-Favored-Nation Treatment for Areas of Western Germany under Military Occupation	X	10/14/48	18/267	62/3653	None*	None	None
36	8/13/49 U-C2	Memorandum of Understanding Relative to Application to the Western Sectors of Berlin of the Agreement on Most-Favored-Nation Treatment for Areas of Western Germany Under Military Occupation	X	8/13/49	42/356	63/2795	None*	None	None
37	10/24/53 G1	Declaration Regulating the Commercial Relations Between Certain Contracting Parties to the General Agreement on Tariffs and Trade	X	11/23/53	None	5/219	None	None	None
38	2/1/55 G2	Proces-Verbal Extending the Validity of the Declaration of 24 Oct. 1953 Regulating the Commercial Relations Between Certain Contracting Parties to the General Agreement on Tariffs and Trade and Japan	X	2/4/55	None	6/6163	None	None	None
39	3/7/55 G3	Fourth Protocol of Rectifications and Modifications to the Annexes and to the Texts of Schedules to the General Agreement on Tariffs and Trade	X	1/23/59	324/300	10/213	3513	28/107	55816
40	3/10/55 G4	Declaration on the Continued Application of Schedules to the General Agreement on Tariffs and Trade	X	7/1/55	220/154		None	None	None
41	3/10/55 G5	Protocol Amending Part I and Articles XXIX and XXX of the General Agreement on Tariffs and Trade	X	Not yet	None		3513	28/107	55816
42	3/10/55 G6	Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade	X	10/7/57	278/168	8/1767	3513	28/107	55816
43	3/10/55 G7	Protocol of Organizational Amendments to the General Agreement on Tariffs and Trade	X	Not yet	None		None	None	None

APPENDIX C (Continued)

#	Date Done	Title	Signed by U.S.	Date In Force	U.N.T.S. Cite	Stat. or U.S.T. Cite	Pres. Proc.	Fed. Reg. Cite	T.D. Number
44	3/10/55 G8	Proces-Verbal of Signature Concerning the Protocol of Organizational Amendments to the General Agreement on Tariffs and Trade	X	Not yet	None		None	None	None
45	3/10/55 G9	Agreement on the Organization for Trade Co-operation	X	Not yet	None		None	None	None
46	6/7/55 G10	Protocol of Terms of Accession of Japan to the General Agreement on Tariffs and Trade	X	9/10/55	220/164	6/5833	3105	20/5379	53865
47	6/15/55 G11	Protocol of Rectification to the French Text of the General Agreement on Tariffs and Trade	X	10/24/56	253/316	7/2943	3513	28/107	55816
48	7/15/55 G12	Third Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Denmark & Germany)		9/19/56	250/292	7/2393	None (NC)	None	None
49	7/15/55 G13	Fourth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Germany & Norway)		9/19/56	250/297	7/2407	None (NC)	None	None
50	7/15/55 G14	Fifth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Germany & Sweden)		9/19/56	250/301	7/2421	None (NC)	None	None
51	12/3/55 G15	Proces-Verbal of Rectification Concerning the Protocol (Amending Part I and Art. 29 and 30 of the General Agreement on Tariffs and Trade, the Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade and the Protocol of Organizational Amendments to the General Agreement on Tariffs and Trade	X	10/7/57	278/246		3513	28/107	55816
52	12/3/55 G16	Fifth Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	Not yet	None		3513	28/107	55816

53	5/23/56 G17	Sixth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade	X	5/23/56	244/2	7/1083	3140	21/4237	54108
54	2/19/57 G18	Seventh Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Austria & Germany)		9/1/58	309/364	10/1720	None (NC)	None	None
55	4/11/57 G19	Sixth Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	Not yet	None		3513	28/107	55816
56	6/20/57 G20	Eighth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Cuba and U.S.)	X	6/29/57	274/322	8/1343	3190	22/4705	54398
57	11/30/57 G21	Seventh Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	Not yet	None		3513	28/107	55816
58	11/30/57 G22	Declaration on the Continued Application of Schedules to the General Agreement on Tariffs and Trade		1/1/58	285/372		None	None	None
59	11/30/57 G23	Declaration Extending the Standstill Provisions of Article 16:4 of the General Agreement on Tariffs and Trade	X	5/11/59	328/290	10/1842	None	None	None
60	11/22/58 G24	Proces-Verbal Extending the Validity of the Declaration Extending the Standstill Provisions of Article 16:4 of the General Agreement on Tariffs and Trade	X	5/11/59	328/298	10/1848	None	None	None
61	11/22/58 G25	Ninth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Finland & Germany)		Not yet	None		None (NC)	None	None
62	11/22/58 G26	Declaration on the Provisional Accession of the Swiss Confederation to the General Agreement on Tariffs and Trade	X	1/1/60	350/2	11/745	3513	28/107	55816
63	12/31/58 G27	Protocol Relating to Negotiations for the Establishment of New Schedule III—Brazil—to the General Agreement on Tariffs and Trade	X	3/15/61	398/318		3517	28/1195	55830

APPENDIX C (Continued)

#	Date Done	Title	Signed by U.S.	Date In Force	U.N.T.S. Cite	Stat. or U.S.T. Cite	Pres. Proc.	Fed. Reg. Cite	T.D. Number
64	2/10/59 G28	Process-Verbal Containing Schedules To Be Annexed to the Protocol Relating to Negotiations for the Establishment of New Schedule III—Brazil—to the General Agreement on Tariffs and Trade	X	Not yet	None		None	None	None
65	2/18/59 G29	Eighth Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	Not yet	None		None (NC)	None	None
66	3/10/59 G30	Process-Verbal Containing a Schedule To Be Annexed to the Protocol Relating to Negotiations for the Establishment of a New Schedule III—Brazil—to the General Agreement on Tariffs and Trade (Brazil—Benelux)		Not yet	None		None	None	None
67	5/13/59 G31	Process-Verbal Containing Schedules To Be Annexed to the Protocol Relating to the Negotiations for the Establishment of New Schedule III—Brazil—to the General Agreement on Tariffs and Trade (Brazil & U.K.)		Not yet	None		None	None	None
68	5/23/59 G32	Process-Verbal Supplementary to the Process-Verbal Containing Schedules To Be Annexed to the Protocol Relating to Negotiations for the Establishment of New Schedule III—Brazil—to the General Agreement on Tariffs and Trade (Brazil & U.S.)	X	Not yet	None		3517	28/1195	55830
69	5/25/59 G33	Declaration on Relations Between Contracting Parties to the General Agreement on Tariffs and Trade and the Government of the Federal People's Republic of Yugoslavia	X	11/16/59	346/312	10/2142	None	None	None
70	5/29/59 G34	Declaration on the Provisional Accession of Israel to the General Agreement on Tariffs and Trade	X	10/9/59	344/304	10/2135	None	None	None

71	8/17/59 G35	Ninth Protocol of Rectifications and Modifications to the Texts of the Schedules to the General Agreement on Tariffs and Trade	X	Not yet	None		None (NC)	None	None
72	11/9/59 G36	Declaration on Relations Between Contracting Parties to the General Agreement on Tariffs and Trade and the Government of the Polish Peoples Republic	X	11/16/60	381/386	11/2580	3513	28/107	55816
73	11/12/59 G37	Declaration on the Provisional Accession of Tunisia to the General Agreement on Tariffs and Trade	X	5/21/60	376/406	11/1538	3513	28/107	55816
74	11/13/59 G38	Proces-Verbal Containing Schedules To Be Annexed to the Declaration on the Provisional Accession of the Swiss Confederation to the General Agreement on Tariffs and Trade (Japan and Switzerland)		4/29/60	358/258	11/1299	None	None	None
75	11/19/59 G39	Proces-Verbal Further Extending the Validity of the Declaration Extending the Standstill Provisions Article 16:4 of the General Agreement on Tariffs and Trade	X	1/1/60	349/314		None	None	None
76	11/18/60 G40	Declaration on the Provisional Accession of Argentina to the General Agreement on Tariffs and Trade	X	10/14/62	442/302	13/2190	3513	28/107	55816
77	11/19/60 G41	Declaration on the Continued Application of Schedules to the General Agreement on Tariffs and Trade		Did not enter into force	None		None	None	None
78	11/19/60 G42	Declaration Giving Effect to the Provisions of Article 16:4 of the General Agreement on Tariffs and Trade	X	11/14/62	445/294	13/2605	3513	28/107	55816
79	11/19/60 G43	Declaration on the Extension of Standstill Provisions of Article 16:4 of the General Agreement on Tariffs and Trade	X	11/14/62	445/304	15/2571	None	None	None
80	12/8/61 G44	Proces-Verbal Extending the Declaration on the Provisional Accession of the Swiss Confederation to the General Agreement on Tariffs and Trade	X	12/9/61	424/324	13/184	None	None	None

APPENDIX C (Continued)

#	Date Done	Title	Signed by U.S.	Date In Force	U.N.T.S. Cite	Stat. or U.S.T. Cite	Pres. Proc.	Fed. Reg. Cite	T.D. Number
81	11/12/61 G45	Proces-Verbal Extending the Declaration on the Provisional Accession of Tunisia to the General Agreement on Tariffs and Trade	X	1/8/62	424/334	13/189	3513	28/107	55816
82	4/6/62 G46	Protocol for the Accession of Israel to the General Agreement on Tariffs and Trade	X	7/5/62	431/244	13/2806	3479	27/5929	55649
83	4/6/62 G47	Protocol for the Accession of Cambodia to the General Agreement on Tariffs and Trade	X	Not yet	None		3513	28/107	55816
84	4/6/62 G48	Protocol for the Accession of Portugal to the General Agreement on Tariffs and Trade	X	5/6/62	431/208	13/2739	3479	27/5929	55649
85	7/16/62 G49	Protocol to the General Agreement on Tariffs and Trade Embodying Results of the 1960-61 Tariff Conference	X	8/15/62	440/2	13/2885	3513 3517	28/107 28/1195	55816 55830
86	11/7/62 G50	Proces-Verbal Extending the Declaration on the Provisional Accession of Argentina	X	11/20/62	452/290	13/3900	3517	28/1195	55830
87	11/13/62 G51	Declaration on the Provisional Accession of the Federal People's Republic of Yugoslavia to the General Agreement on Tariffs and Trade	X	4/28/63	462/330		None	None	None
88	11/13/62 G52	Declaration on the Provisional Accession of the United Arab Republic to the General Agreement on Tariffs and Trade	X	1/9/63	452/298	14/292	3596	29/9419	None
89	1/28/63 G53	Tenth Protocol of Supplementary Concessions to the General Agreement on Tariffs and Trade (Japan & New Zealand)		8/15/63	476/254	14/1052	None (NC)	None	None
90	5/6/63 G54	Protocol Supplementary to the Protocol to the General Agreement on Tariffs and Trade Embodying Results of the 1960-61 Tariff Conference.		7/7/63	501/304		None (NC)	None	None
91	1/7/63 G55	Protocol for the Accession of Spain to the General Agreement on Tariffs and Trade	X	8/29/63	476/264	15/2571	3553	28/9859	None

92	12/12/63 G56	Second Proces-Verbal Extending the Declaration on the Provisional Accession of Tunisia to the General Agreement on Tariffs and Trade	X	11/24/64	525/278		None	None	None
93	3/5/64 G57	Second Declaration on the Extension of the Standstill Provisions of Article 16:4 of the General Agreement on Tariffs and Trade	X	3/5/64	525/308		None	None	None
94	3/5/64 G58	Declaration on the Provisional Accession of Iceland to the General Agreement on Tariffs and Trade	X	4/19/64	496/326	15/2067	None	None	None
95	10/30/64 G59	Second Proces-Verbal Extending the Declaration on the Provisional Accession of the Swiss Confederation to the General Agreement on Tariffs and Trade	X	11/25/64	525/270	15/2425	None	None	None
96	10/30/64 G60	Second Proces-Verbal Extending the Declaration on the Provisional Accession of Argentina to the General Agreement on Tariffs and Trade	X	11/25/64	525/288	15/2417	None	None	None
97	10/30/64 G61	Proces-Verbal Extending the Declaration on the Provisional Accession of the United Arab Republic to the General Agreement on Tariffs and Trade	X	11/25/64	525/298	15/2409	None	None	None
98	2/8/65 G62	Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development	X	6/27/66	None		None	None	None
99	12/14/65 G63	Third Proces-Verbal Extending the Declaration on the Provisional Accession of Tunisia to the General Agreement on Tariffs and Trade	X	1/6/66	None		None	None	None
100	12/14/65 G64	Third Proces-Verbal Extending the Declaration on the Provisional Accession of the Federal Republic of Yugoslavia to the General Agreement on Tariffs and Trade	X	12/28/65	None		None	None	None
101	12/14/65 G65	Proces-Verbal Extending the Declaration on the Provisional Accession of Iceland to the General Agreement on Tariffs and Trade	X	12/28/65	None		None	None	None

APPENDIX C (Continued)

#	Date Done	Title	Signed by U.S.	Date In Force	U.N.T.S. Cite	Stat. or U.S.T. Cite	Pres. Proc.	Fed. Reg. Cite	T.D. Number
102	4/1/66 G66	Protocol for the Accession of Switzerland to the General Agreement on Tariffs and Trade	X	8/1/66	None		None	None	None
103	7/20/66 G67	Protocol for the Accession of Yugoslavia to the General Agreement on Tariffs and Trade	X	8/25/66	None		None	None	None
104	11/17/66 G68	Third Proces-Verbal Extending the Declaration on the Provisional Accession of Argentina to the General Agreement on Tariffs and Trade	X	1/9/67	None		None	None	None
105	11/17/66 G69	Second Proces-Verbal Extending the Declaration on the Provisional Accession of the United Arab Republic to the General Agreement on Tariffs and Trade	X	1/18/67	None		None	None	None
106	3/2/67 G70	Protocol for the Accession of Korea to the General Agreement on Tariffs and Trade		4/14/67	None		None	None	None
107	10/1/62 G71(a)	Long-Term Agreement Regarding International Trade in Cotton Textiles. [‡]	X	10/1/62	471/296				
108	5/1/67 G71(b)	Protocol Extending the Agreement Regarding International Trade in Cotton Textiles of 1 October 1962. [‡]	X	10/1/67	None				
109	6/30/67 G72	Geneva (1967) Protocol to GATTs	X						
110	6/30/67 G73	Agreement Relating Principally to Chemicals, Supp. Geneva Prot.	X						
111	6/30/67 G74	Memorandum of Agreement on . . . World Grains Arrangement	X						
112	6/30/67 G75	Agreement on Implementation of Article VI	X						
113	6/30/67 G76	Protocol for the Accession of Argentina	X	10/11/67					

114	6/30/67 G77	Protocol for the Accession of Iceland	
115	6/30/67 G78	Protocol for the Accession of Ireland	12/22/67
116	6/30/67 G79	Protocol for the Accession of Poland	10/18/67

^a Supplemented by Presidential Proclamations 2764, 2769, 2782, 2784, 2791, 2792, 2798, 2829, 2865. Certain parts of GATT, namely, the foreign nation tariff schedules and certain annexes, were not proclaimed. The object of Proclamation 2761A is to proclaim "such modifications of existing duties and other import restrictions of the United States of America and such continuance of existing customs or excise treatment of articles imported into the United States of America as are specified or provided for in parts I, II, and III, annexes D, H, and I, and part I of, and the general notes in, schedule XX of said general agreement" GATT is in force only through the Protocol of Provisional Application (#2).

^b Supplemented by Presidential Proclamation 2809.

^c Supplemented by Presidential Proclamations 2874, 2884, 2888.

^d These are not international agreements but decisions under art. XXXIII of GATT and probably need not have been deposited. The practice in later years has been not to deposit decisions regarding accession.

^e These three agreements, although listed in U.N. Doc. ST/LEG/3, Rev. 2, Ch. 1, are not truly "GATT agreements." Since they relate so closely to GATT, it is convenient to include them here.

^f The Cotton Textile agreements are deposited at GATT since, although they do not modify GATT, they relate to GATT. Consideration of these agreements is outside the scope of this article.

^g This and the next seven agreements were the results of the Kennedy Round trade negotiations which were completed June 30, 1967. As of this writing, only two had entered into force although others should do so in the near future. The author has been informed that the United States will soon proclaim certain of these agreements.

APPENDIX D

United States Trade Agreements Acts

The following list of the trade agreements acts since 1934 sets out the period when each act's trade agreement authority was effective. In some acts, portions of the authority granted lapsed after a given time, while other portions retained effectiveness until specifically repealed. Where this is the case, only the former expiration date is listed. Numbers separated by a slash indicate volume before, page number or public law number after.

Year	Title	Stat.	19 USC §§	Pub. Law	Date Effective	Date Expired	House Report	Senate Report	Congress/ Session
1934	An act to amend the Tariff Act of 1930, Part III	48/943	1351-66	316	6/12/34	6/12/37	1000	871	73d/2d
1937	Joint Resolution to extend the authority of President under § 350 of the Tariff Act of 1930, as amended	50/24	1351-66	*10	3/1/37	6/12/40	166	111	75th/1st
1940	Joint Resolution to extend the authority of the President under § 350 of the Tariff Act of 1930, as amended	54/107	1351-66	*61	4/12/40	6/12/43	1594	1297	76th/3d
1943	Joint Resolution to extend the authority of the President under § 350 of the Tariff Act of 1930, as amended	57/125	1351-66	66	6/7/43	6/12/45	409	258	78th/1st
1945	An act to extend the authority of the President under § 350 of the Tariff Act of 1930 and for other purposes	59/410	1351-66	129	7/5/45	6/12/48	594	352	79th/1st
1948	Trade Agreements Extension Act of 1948	62/1053	1351-66	792	6/26/48	6/30/49	2009	1558	80th/2d
1949	Trade Agreements Extension Act of 1949	63/697	1351-66	307	9/26/49	6/12/51	19	107	81st/1st
1951	Trade Agreements Extension Act of 1951	65/72	1351-66	50	6/16/51	6/12/53	14	299	82d/1st
1953	Trade Agreements Extension Act of 1953	67/472	1351-66	215	8/7/53	6/12/54	521	472	83d/1st
1954	An act to extend the authority of the President under § 350 of the Tariff Act of 1930, as amended	68/360	1351-66	464	7/1/54	6/12/55	1777	1605	83d/2d
1955	Trade Agreements Extension Act of 1955	69/162	1351-66	86	6/21/55	6/30/58	50	232	84th/1st
1958	Trade Agreements Extension Act of 1958	72/673	1351-66	85-686	8/20/58	6/30/62	1761	1838	85th/2d
1962	Trade Expansion Act of 1962	76/872	1801-1991	87-794	10/11/62	6/30/67	1818	2059	87th/2d

* Public Resolution.