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Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties

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Summary

Trade agreements such as the NAFTA and the GATT Uruguay Round agreements have been approved by majority vote of each House of Congress rather than by two-thirds vote of the Senate — that is, they have been treated as congressional-executive agreements rather than as treaties. The congressional-executive agreement has been the vehicle for implementing Congress' long-standing policy of seeking trade benefits for the United States through reciprocal trade negotiations. In a succession of statutes, Congress has authorized the President to negotiate and enter into tariff and nontariff barrier (NTB) agreements for limited periods, while mandating that NTB and free trade area agreements negotiated under this authority could enter into force for the United States only if approved by both Houses in a bill enacted into public law and other statutory conditions were met. The President is currently seeking trade agreement authority utilizing this approval procedure: H.R. 3005, which contains such authority, passed the House December 6, 2001; an amended version of the bill was reported by the Senate Finance Committee February 28, 2002. In February 2001, a U.S. circuit court dismissed an appeal challenging the constitutionality of the NAFTA because it was not entered into as a treaty, the court ruling that the issue was a nonjusticiable political question (*Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001)); the U.S. Supreme Court has since denied review in the case.

Statutory Authority for Trade Agreements. The most recent broad-gauged trade agreements entered into by the United States – the World Trade Organization (WTO) Agreement, the multilateral WTO trade agreements that a country must accept as a condition of WTO membership, and the North American Free Trade Agreement (NAFTA) – were negotiated by the President and submitted to Congress under the terms of the Omnibus Trade and Competitiveness Act of 1988 (OTCA) and the Trade Act of 1974. The OTCA provided the President with authority to negotiate and enter into tariff and nontariff trade barrier (NTB) agreements until June 1, 1993, authority that was later extended to April 15, 1994, in order to complete the GATT Uruguay Round (P.L. 100-418, § 1102, 19 U.S.C. § 2902, as amended by P.L. 103-49). The OTCA also provided

that NTB agreements negotiated under the statute could not enter into force for the United States unless, among other things, the agreements were submitted to Congress along with an implementing bill and the bill was enacted into law (P.L. 100-418, § 1103, 19 U.S.C. § 2903). Such legislation was entitled to so-called fast track or expedited consideration, the expedited procedures being set forth in § 151 of the Trade Act of 1974, 19 U.S.C. § 2191. Section 151(a) defines "implementing bill" as a bill that contains: (a) a provision approving the agreements; (b) a provision approving the statement of administrative action that the President must send to Congress along with the agreements; and (c) if changes to existing laws are needed, provisions "necessary or appropriate to implement such trade agreement or agreements, either repealing or amending existing laws or providing new statutory authority."¹ It is the provision approving the agreements that makes the Uruguay Round agreements, and previously the NAFTA and other free trade agreements and GATT-related agreements, congressional-executive agreements.

Development of the Statutory Trade Agreements Program. The trade agreement authorities and requirements embodied in the OTCA reflect a congressional approach to international trade policy that evolved over a number of years.² As early as 1890, Congress delegated tariff bargaining authority to the President and authorized him to suspend existing duty-free treatment on particular items by proclamation. The Supreme Court subsequently held that the authorizing statute, § 3 of the Tariff Act of 1890, 26 Stat. 612, did not unconstitutionally delegate either legislative or treaty-making authority to the President.³ In the Reciprocal Trade Agreements Act of 1934, as amended and

¹ The negotiation, entry into, and implementation of trade agreements implicates the President's Article II authority to negotiate treaties and international agreements and to conduct foreign affairs (*see* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 319 (1936)) and Congress' express power to impose duties and tariffs and to regulate foreign commerce (U.S. Const., Art. I, § 8, cls. 1, 3). Because of Congress' express power in the area, the President may not impose, reduce, or effect any other change in existing duty rates through an executive agreement unless he has been delegated the authority to do so by Congress. *See* *United States v. Yoshida Int'l Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975)("no undelegated power to regulate *commerce*, or to set tariffs, inheres in the Presidency")(emphasis in the original); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953)("Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone."). Regarding the President's authority to enter into agreements involving foreign commerce, *see* *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 1004(1975)(mandatory or enforceable, but not voluntary agreements limiting exports to the United States are superseded by trade laws).

² The use of the congressional-executive agreement in the trade area has been viewed as a recognition of the House's constitutional role in revenue raising. American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 303, Reporters' Note 9 (1987). Senate deference to the use of the congressional-executive agreement for the Uruguay Round agreements may arguably be inferred from its 76-16 vote to amend the OTCA to extend the date by which the President could enter into the agreements pursuant to this statute, the yeas constituting more than two-thirds of that body. 139 Cong. Rec. 14805 (1993).

³ *Field v. Clark*, 143 U.S. 649 (1892). In denying a motion for a temporary restraining order against tariff reductions on electronic equipment, the U.S. Court of International Trade ruled that plaintiffs were unlikely to prevail in their argument that the tariff proclamation authority used was an unconstitutional delegation of legislative authority. *Kemet Electronics Corp. v. Barshefsky*, 969 F.Supp. 82, 86 (Ct. Int'l Trade 1997). While the court viewed the principles by which the President

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extended, Congress authorized the President, for limited periods, to enter into reciprocal tariff agreements with foreign countries and, within a designated range, to proclaim tariffs needed to implement these agreements without subsequent congressional approval. This authority was used to enter into numerous reciprocal trade agreements, to proclaim new tariffs as a result, and to enter into the General Agreement on Tariffs and Trade (GATT). The President's modification of tariffs under this statute was likewise held to be valid under the Treaty Clause, federal courts having acknowledged that not all international undertakings of the United States are concluded as treaties and that congressional-executive trade agreements could find a constitutional basis in the joint exercise of Congress' tariff and commerce authorities and the President's foreign affairs power.⁴

As GATT parties began to negotiate more extensively to eliminate nontariff trade barriers in a number of areas, Congress enacted legislation that would both provide the President with negotiating credibility and ensure that Congress carried out its constitutional responsibilities regarding legislative implementation of the agreements. Since NTB agreements could address a variety of regulatory matters (*e.g.*, subsidies, government procurement, product standards), these agreements might require more elaborate changes in federal law than tariff agreements, which for the most part could be implemented through a pre-authorized presidential proclamation reducing tariffs on particular items. In contrast, if legislation were needed to implement NTB agreements, Congress could choose not to vote on such legislation or could add amendments that might be viewed as inconsistent with agreement obligations. At the same time, overly broad delegations of authority to the President to implement NTB agreements or legislative vetoes of executive implementing actions might not comport with constitutional requirements regarding the passage of legislation. In the Trade Act of 1974, Congress provided the President with new authority to negotiate multilateral trade agreements for a limited period of time, allowing him to proclaim certain tariff reductions and modifications but requiring him to submit NTB agreements to Congress, which would vote on their approval and on legislation necessary or appropriate to implement them.⁵

³ (...continued)

was to be guided as “allow[ing] a great deal of discretion,” it did not find them to be “unintelligible.” *Id.* at 86; *see also* *Kemet Electronics Corp. v. Barshefsky*, 976 F.Supp. 1012, 1019 (Ct. Int’l Trade 1997)(motion for preliminary injunction denied). The statute at issue was § 111(b) of the Uruguay Round Agreements Act, 19 U.S.C. § 3521(b), under which the President could modify tariffs in order to implement certain trade agreements whose negotiation had begun but had not concluded during the Uruguay Round provided he first consult with Congress. The President proclaimed WTO-agreed tariff reductions on information technology, distilled spirits, pharmaceuticals, and chemical products under this authority. Pres. Proc. 7011, 62 Fed. Reg. 35909 (1997); Pres. Proc. 6982, 62 Fed. Reg. 16039 (1997).

⁴ *Star-Kist Foods, Inc. v. United States*, 169 F.Supp. 268 (Cust. Ct. 1958), *aff’d* 275 F.2d 472 (C.C.P.A. 1959). *See generally* Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Senate Comm. on Foreign Relations* 76-86 (2001)(S. Prt. 106-71).

⁵ Modifying an Administration proposal, the House in 1973 approved legislation that would have authorized the President to negotiate tariff and nontariff barrier (NTB) agreements for a given period. Once the agreements were concluded, the President would submit them to Congress along with any needed draft implementing orders and proclamations. The agreements and orders and
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Because of the complexities of multilateral negotiation, Congress sought to provide the President with a sound negotiating posture by providing that it would consider trade agreement implementing legislation submitted under the terms of the statute (including requirements that the President notify and consult with Congress) within a prescribed period of time and without amendment.⁶

The fast-track procedure contained in the 1974 Act was first used with respect to the GATT Tokyo Round Agreements, which were approved and implemented in 1979 (P.L. 96-39). Temporary statutory authority for bilateral free-trade area agreements (FTAs) was added in the Trade and Tariff Act of 1984 (P.L. 98-473, § 401) and was again provided for in the OTCA. Congress approved bilateral FTAs with Israel and Canada as well as the NAFTA under these authorities (P.L. 99-47, P.L. 100-449, P.L. 103-182). In 1994, the Uruguay Round agreements were approved under OTCA provisions (P.L. 103-465). The FTA with Jordan was statutorily implemented in 2001, though not under a fast-track authorizing statute and without an express approval provision (P.L. 107-43).

Legislation to renew the President's trade negotiation authority with a requirement that resulting agreements be approved by both Houses was considered in the 104th and 105th Congresses but not enacted into public law. President Bush is currently seeking fast-track trade agreement authority (also called “trade promotion authority”) from the 107th Congress. H.R. 3005, which provides such authority along with the two-House approval requirement, passed the House on December 6, 2001.⁷ The Senate Finance Committee reported H.R. 3005 favorably with an amendment in the nature of a substitute February 28, 2002 (S.Rept. 107-139).

⁵ (...continued)

proclamations would become law (thus superseding inconsistent prior statutes) provided neither House had passed a resolution of disapproval by majority of those present and voting within 90 days. *See* H.Rept. 93-571, at 6, 23-34, 41-42. The Senate, whose Finance Committee viewed the veto approach to be of doubtful constitutionality, prevailed in the adoption of the current requirement for two-House legislative approval of NTB agreements and enactment of implementing legislation on a fast-track basis. *See* S.Rept. 93-1298, at 14-15, 22, 76, 107. Objections to the one-House veto procedure had also been raised earlier in dissenting views in the House report. H.Rept. 93-571, at 199. The Supreme Court eventually held legislative vetoes unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

⁶ S.Rept. 93-1298, at 77, 107. While these agreements could be submitted to the Senate as treaties (*see* H.Rept. 93-571, at 24; S.Rept. 93-1298, at 86), neither the agreements nor their implementing legislation would be entitled to expedited legislative consideration. Moreover, while the House would have a role in approving any implementing legislation, it would not expressly approve the agreements, that is, it would not vote on whether the United States should accept the international obligations therein. The United States has undertaken trade obligations in treaties, namely its bilateral friendship, commerce and navigation (FCN) treaties, which contain obligations to accord most-favored-nation tariff treatment and other trade benefits to the goods of treaty partners. With the conclusion of many bilateral tariff agreements pursuant to the reciprocal trade agreements legislation, the subsequent development of the GATT, and the entry into WTO agreements and FTAs, trade obligations between the United States and its trading partners are now primarily defined by these more recent agreements.

⁷ H.R. 3005 (Thomas) was reported by the House Ways and Means Committee October 16, 2001 (H.Rept. 107-246). For other fast-track (“trade promotion authority”) bills, *see* H.R. 2149 (Crane); H.R. 3019 (Rangel/Levin), S. 1104 (Graham/Murkowski); and S. 2062 (Durbin).

Constitutionality of the Congressional-Executive Trade Agreement: Recent Issues. The question whether trade agreements could constitutionally be entered into as congressional-executive agreements rather than treaties emerged during consideration of Uruguay Round implementing legislation. The question originally was posed because of the perceived effect of the agreements on states.⁸ The issue also arose in a judicial challenge to the NAFTA, in which it was alleged that the failure to use the treaty process rendered the Agreement and its implementing legislation unconstitutional. In *Made in the USA Foundation v. United States*, an Alabama federal district court held in July 1999 that “the President had the authority to negotiate and conclude NAFTA pursuant to his executive authority and pursuant to the authority granted to him by Congress in accordance with the terms of the Omnibus Trade and Competitiveness Act of 1988 ... and section 151 of the Trade Act of 1974 ... and as further approved by the [NAFTA] Implementation Act.”⁹ In the court’s view, the Foreign Commerce Clause, combined with the Necessary and Proper Clause and the President’s Article II foreign relations power, provided a constitutionally sufficient basis for agreement. The court preliminarily held that institutional, but not individual plaintiffs, had standing to sue, and that the political question doctrine did not bar it from ruling on the merits.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit, while agreeing that appellants had standing, held that the issue of whether an international commercial agreement such as the NAFTA is a treaty that must be approved by two-thirds of the Senate was a nonjusticiable political question.¹⁰ The court dismissed the appeal and remanded the case to the district court with instructions to vacate its decision. The U.S. Supreme Court denied certiorari in the case November 26, 2001 (*United Steelworkers of America v. United States*, 122 S.Ct. 613 (2001)).

Under the political question doctrine, a court will decline to rule on the merits of a case if it finds that the underlying matter is committed to the discretion and expertise of the Legislative and Executive Branches. In the instant case, the Eleventh Circuit applied

⁸ See "Special Report," *Inside U.S. Trade*, July 22, 1994. Legal arguments and discussion may be found in "Memorandum to Ambassador Michael Kantor, U.S. Trade Representative, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Treaty Ratification of the GATT Uruguay Round: Additional Memorandum" (November 22, 1994) [<http://www.usdoj.gov/olc/1994opinions.htm>]. See also S. 2467, *GATT Implementing Legislation: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 285-381 (1994).

⁹ *Made in the USA Foundation et al. v. United States*, 56 F.Supp.2d 1226 (W.D.Ala. 1999). A similar constitutional challenge was lodged to the 1995 extradition agreement between the United States and the International Criminal Tribunal for Rwanda, which had been entered into as an executive agreement and implemented pursuant to § 1342 of P.L. 104-106. Petitioner argued that a treaty was constitutionally required for an extradition. The U.S. Court of Appeals for the Fifth Circuit disagreed, finding that neither the text of the Constitution, constitutional history, nor historical practice supported such a requirement. *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999). Addressing the Supreme Court’s ruling in *Valentine v. United States*, 299 U.S. 5 (1936), that executive power to extradite must be based in a statute or a treaty, the court found that the required authorization could be found in the above-cited law, which, along with the Agreement, created the constitutionally sufficient “congressional-executive agreement” used in this case.

¹⁰ *Made in the USA Foundation et al. v. United States*, 242 F.3d 1300 (11th Cir. 2001).

a tripartite inquiry that it said was suggested by Justice Lewis Powell in *Goldwater v. Carter*, 444 U.S. 996 (1979), a distillation of criteria for determining justiciability originally identified in *Baker v. Carr*, 369 U.S. 186 (1962). The three questions posed by the court were as follows: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?”

Regarding the first question, the court stated that “with respect to commercial agreements, we find that the Constitution’s clear assignment of authority to the political branches of the Government over our nation’s foreign affairs counsels against an intrusive role for this court in overseeing the actions of the President and Congress in this matter.” Along with the “vast” express constitutional grants of power conferred upon the political branches in the areas of foreign affairs and commerce, the court, citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), pointed to the Supreme Court’s long-standing recognition of the power of the political branches to conclude international “agreements that do not constitute treaties in the constitutional sense.” With respect to the second question, the court concluded that a ruling on the merits would in fact require it to consider areas beyond its expertise, noting that the Treaty Clause did not set forth circumstances under which Clause procedures must be followed when approving international commercial agreements; that the appellants did not provide the court with a useful analytical framework for distinguishing between agreements that require Senate approval and those that do not; that foreign affairs considerations militated against judicial interference; and that having to determine the “significance” of an international agreement as the key factor in determining whether it should be a treaty or not would “unavoidably thrust [the court] into making policy judgments of the sort unsuited for the judicial branch.” As for prudential considerations, the court cited three factors that underlay its decision not to rule on the merits: (1) the need for the nation to speak with uniformity in the area of foreign affairs and commerce, and, quoting *Baker*, not risk “the potentiality of embarrassment from multifarious pronouncements by various departments on one question”; (2) the fact that a judicial order declaring the NAFTA invalid “could have a profoundly negative effect on this nation’s economy and its ability to deal with other foreign powers,” noting that such an order “would not only affect the validity of NAFTA, but would potentially undermine every other major international commercial agreement made over the past half-century”; and (3) the risk of “intruding upon the respect due coordinate branches of government” that would be run by a judicial review of the executive-legislative process for entry into international agreements.

Additionally, the court found support for its conclusion in *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977), where the U.S. Court of Appeals for Tenth Circuit used political question grounds to decline to rule on whether an agreement by the President to return the Crown of Saint Stephen and other related items to Hungary constituted a treaty requiring Senate approval.