

CONGRESSIONAL CONTROLS ON  
PRESIDENTIAL TRADE POLICYMAKING  
AFTER *I.N.S. V. CHADHA*

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The current controversy over U.S. trade policy swirls around the clash between the substantive policies of protectionism versus free trade. In this article, I ask not *what* U.S. trade policy should be, but rather *who* will make it? More specifically, by what devices will Congress seek to influence and oversee Executive Branch management of U.S. international trade policy in the months and years to come?

One need not be a visionary to see that those who make our trade policy inevitably determine its content. To put it simplistically, if Congress consistently adopts a more protectionist stance in trade matters than does the White House, then greater congressional input into trade policymaking will likely signal a more protectionist U.S. trade policy, and vice versa. A reexamination of the tools currently available to Congress to check, oversee, and influence presidential initiative in trade policymaking seems particularly timely in the wake of the Supreme Court's ruling in *Immigration & Naturalization Service v. Chadha*,<sup>1</sup> which not only struck "down in one fell swoop provisions in more laws enacted by Congress than the [Supreme] Court [had] cumulatively invalidated in its history,"<sup>2</sup> but also swept away numerous legislative veto provisions in five major international trade laws.<sup>3</sup>

After *Chadha*, observers asked whether the Court's ruling had dramatically tipped the balance of power in international trade matters away from Congress and toward the Executive, or whether the Court had simply eliminated one visi-

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1. 462 U.S. 919 (1983).

2. *Id.* at 1002 (White, J., dissenting).

3. See provisions cited *infra* notes 46 & 49.

ble, useful, but otherwise dispensable and replaceable congressional control device. Part I of this article addresses that question from an historical perspective by reviewing the four major legal regimes of congressional control that governed decisionmaking in the trade field during the fifty years before *Chadha*. Against this background of the shifting balance of power between Congress and the Executive, Part II then examines both *Chadha* and the new era of trade policymaking to which it has given rise, as embodied in the recently enacted Trade and Tariff Act of 1984.<sup>4</sup>

I conclude that, because the legislative veto was only *one* of a broad array of oversight devices developed by Congress to assert and retain influence in the international trade field, its death in *Chadha* will not seriously diminish Congress' influence over trade policymaking. To the contrary, recent U.S. trade actions, as well as proposed omnibus trade legislation currently pending before Congress, strongly suggest that the legislative veto's demise has triggered an *expansion*, rather than a contraction, of congressional involvement in trade matters, particularly in two key areas: negotiating authority and import relief. Finally, Part III addresses some of the broader theoretical implications of this conclusion for the substance of future U.S. trade policy.

### I. THE FOUR PRE-*CHADHA* REGIMES

As a matter of constitutional law, the precise division of labor in international trade matters between the President and Congress has always been ambiguous, primarily because international trade occupies an area that apparently falls within each of their subject matter competences. Despite the textual paucity of his constitutionally enumerated foreign affairs powers,<sup>5</sup> the President has historically asserted domi-

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4. Pub. L. No. 98-573, 98 Stat. 2948 (1984) (amending scattered sections of 19 U.S.C. (Supp. III 1985)).

5. Article II of the U.S. Constitution vests the "executive Power" in the President. U.S. CONST. art. II, § 1, cl. 1. It also names him "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" and grants him "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur" and to nominate and appoint "Ambassadors [and] other public Ministers and Consuls" of the United States, subject to the Senate's advice and consent. *Id.* art. II, § 2, cls. 1-2. Finally, it charges

nance over international trade, relying upon Justice Sutherland's infamous dictum from *United States v. Curtiss-Wright Export Corp.*<sup>6</sup> proclaiming the President to be the "sole organ of the nation in its external relations."<sup>7</sup> In response, Congress has contended that tariff and import regulation lies exclusively within its constitutionally enumerated powers to "lay and collect Taxes, Duties, Imposts and Excises" and to "regulate Commerce with foreign Nations."<sup>8</sup> Thus, in Congress' eyes, the President's authority to regulate trade derives entirely from powers that Congress has delegated to him by statute.

How has this constitutional tension manifested itself in legislation regulating the President's discretion to make

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him to "receive Ambassadors and other public Ministers" and to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3.

6. 299 U.S. 304 (1936).

7. *Id.* at 319 (quoting John Marshall's March 7, 1800 argument before the House of Representatives). Of course, Congress' joint resolution authorizing the President's action in *Curtiss-Wright*, *see id.* at 311-12, arguably rendered as dictum Justice Sutherland's suggestion that the "investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution," *id.* at 318, or on congressional approval. Numerous commentators have criticized the historical accuracy of Justice Sutherland's "extraconstitutional theory" of paramount unenumerated presidential power in foreign affairs. *See, e.g.*, Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946). Nevertheless, *Curtiss-Wright* remains the point of departure for virtually every constitutional debate over executive power in foreign affairs and receives prominent citation in every U.S. Government brief in a foreign affairs case. *See, e.g.*, Brief for the Federal Respondents at 30, 40, 44, 52, & 53, *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

8. U.S. CONST. art. I, § 8, cls. 1, 3. Historically, Congress has supplemented its enumerated powers in the trade area with its own unexpressed power to legislate in foreign affairs, which the Supreme Court has characterized as a legislative component of the powers that inhere in the sovereignty and nationhood of the United States. *See, e.g.*, *Perez v. Brownell*, 356 U.S. 44, 57 (1958), *overruled on other grounds in Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Because trade bills have frequently affected tariffs, they have traditionally been subject to the requirement in Section 7 of Article I that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." This historical anomaly also accounts for the continuing jurisdiction of the House Ways and Means Committee and the Senate Finance Committee over international trade matters. *See infra* notes 30 & 63.

trade policy? In my view, the fifty years that preceded *Chadha* may be divided into four identifiable trade regimes. A historical review of those regimes serves not only to catalogue the oversight devices available to Congress in the trade area, but also to illustrate how congressional-executive tensions have grown as the pendulum of trade policymaking power has swung from Congress to the President and gradually back again.

A. *The Smoot-Hawley Regime: Congress Manages Trade Itself*

The first ill-fated regime began and ended with the now-infamous Smoot-Hawley Tariff Act of 1930.<sup>9</sup> In this regime, Congress refused to delegate responsibility for international trade administration and instead set every tariff level itself. Because congressional logrolling and horsetrading contributed to every individual duty rate, Smoot-Hawley set the most protectionist tariff levels in U.S. history. The Act triggered a series of retaliatory measures by U.S. trading partners, and has been widely viewed as having fueled the worldwide Depression.<sup>10</sup> For present purposes, Smoot-Hawley's most lasting legacy has been a lingering public impression, fostered by the President, that near-total congressional control of international trade is synonymous with protectionism.<sup>11</sup>

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9. Pub. L. No. 71-361, 46 Stat. 590 (1930).

10. For the classic account of the logrolling that led to Smoot-Hawley, see generally E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF* (1935). For the modern reader, not the least of Smoot-Hawley's many defects is that it is extraordinarily boring, listing more than 20,000 tariff levels item by item in 173 pages of the *Statutes at Large*. Over a six-month period, the Senate amended the House bill that became Smoot-Hawley 1253 times, leading to an average *ad valorem* rate on dutiable imports of 52.8%. See R. PASTOR, *CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY* 78 (1980). One Senator suggested that "we have taxed everything in this bill except gall." See *Senate Completes Revision of Tariff After Weary Fight of Six Months, Eighteen Days*, N.Y. Times, Mar. 23, 1930, at 1, 30, col. 3 (remarks of Senator Caraway). By the end of 1931, 26 countries had retaliated, and within two more years, world trade had fallen by \$22 billion. See R. PASTOR, *supra*, at 79.

11. Indeed, the Executive Branch rarely tires of bringing Smoot-Hawley out of the closet to remind the public that Congress, left to its own devices, will not manage trade in the public interest. Thus, a plea frequently heard in recent months from President Reagan—that the country

B. *The Reciprocal Trade Agreements Act Regime:  
Delegation plus Sunsetting*

The Smoot-Hawley fiasco spawned the second trade regime, which began with the Reciprocal Trade Agreements Act of 1934<sup>12</sup> and lasted until 1962. In this regime, Congress sought to mitigate the Smoot-Hawley tariff levels by surrendering some of its plenary control over trade. Congress delegated broad advance authority to the President to negotiate and conclude reciprocal tariff-cutting agreements with foreign nations without further congressional reference,<sup>13</sup> but preserved its check on presidential initiative via "sunset" provisions that terminated the President's negotiating authority after brief periods, usually three years.<sup>14</sup>

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should not return to the days of Smoot-Hawley, *e.g.*, N.Y. Times, Aug. 3, 1986, § 4, at 5, col. 1; N.Y. Times, Sept. 18, 1985, at B6, col. 1—could be read to conceal the subtext: "We don't wish to return to the days of congressionally managed trade."

12. Pub. L. No. 73-316, 48 Stat. 943 (1934).

13. *Id.* § 1, 48 Stat. at 943-44. The 1934 Act broadly authorized the President not only to bind the United States under international law, but also to implement the new duties domestically by proclamation, eliminating the need for subsequent approving legislation. *Id.*

Under U.S. constitutional law, the President may constitutionally enter into three types of executive agreements: international agreements negotiated to carry out existing treaties ("treaty-related executive agreements"), international agreements negotiated pursuant to specific congressional authorization or approval ("congressional-executive agreements"), and international agreements negotiated pursuant to the President's independent constitutional powers (so-called "sole executive agreements"). See generally 2 RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (Tent. Draft No. 6, 1985) [hereinafter cited as REVISED RESTATEMENT]. Thus, as a constitutional matter, trade agreements that were negotiated and concluded during this regime were not Article II "Treaties" made by the President with the advice and consent of the Senate, *see supra* note 5, but rather, congressional-executive agreements negotiated pursuant to specific authorization. Treaties and congressional-executive agreements are now generally treated as interchangeable instruments of U.S. foreign policy. See McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II*, 54 YALE L.J. 181, 534 (1945); accord REVISED RESTATEMENT, *supra*, § 303 comment e ("The prevailing view is that the Congressional-executive agreement can be used in all cases as an alternative to the treaty method.").

14. 1934 Act, § 2(c), 48 Stat. at 944. The President's authority under the Act was extended in 1937, 1940, 1943, 1945, 1948, 1951, 1953, 1955, and 1958. See R. PASTOR, *supra* note 10, at 93-104.

The Reciprocal Trade Agreements regime proved relatively successful both as a domestic political compromise and in promoting U.S. adherence to evolving norms and structures of international trade law. The frequent sunseting enhanced Congress' ability to review and monitor executive actions; successive Congresses extracted a variety of concessions from the President as the price of renewed negotiating authority,<sup>15</sup> including the first "legislative veto" found in the trade laws.<sup>16</sup> Meanwhile, the broad advance delegation per-

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15. These concessions included the now-defunct "peril-point reporting requirement" and the first version of the "escape clause." The peril-point reporting provision (which was enacted in 1948, repealed in 1949, restored in 1951, and finally eliminated in 1962) constrained the President's ability to negotiate for tariff rates below certain "peril points," beneath which tariffs would cause or threaten serious injury to competitive domestic industry. Under the escape clause, first enacted in 1951 and now codified in 19 U.S.C. §§ 2251-2253 (1982), Congress authorized the Tariff Commission (now the International Trade Commission or ITC) to recommend that the President afford import relief to a domestic producer who could demonstrate that foreign products are "being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof" to the competing U.S. industry. *Id.* § 2251(b)(1).

16. A "legislative veto" is an action with legislative effect that is not accomplished by legislation. Legislation results when a bill or "joint resolution" has been approved by a majority of both the House and the Senate (thereby satisfying the requirement of "bicameralism" in U.S. CONST. art. I, § 7) and then presented to the President for his signature or veto (thereby satisfying the requirement of "presentment" in U.S. CONST. art. I, § 7). A "concurrent" resolution, which requires a majority vote of both houses, but is not presented to the President for his signature or veto, satisfies bicameralism, but not presentment; a "simple" resolution, which requires a majority vote of only one house, meets neither prerequisite. *See* HOW OUR LAWS ARE MADE, H.R. DOC. NO. 120, 97th Cong., 1st Sess. 7-8 (1981). A legislative veto is thus a simple resolution by one house ("one-house veto") or a concurrent resolution by both ("two-house veto") that fails to satisfy either bicameralism or presentment, but nonetheless alters or overrides completed executive action. For a description of the demise of the legislative veto in *Chadha*, see *infra* text accompanying notes 48-52.

During the Reciprocal Trade Agreements Act regime, Congress was particularly concerned that the President might ignore the Tariff Commission's recommendations of import relief under the escape clause. *See supra* note 15. Thus, in the Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673, Congress asserted the authority to override the President's disapproval of a Commission recommendation "by the yeas and nays by a two-thirds vote of each house." *Id.* § 6, 72 Stat. at 676. In 1962, Congress converted that provision into a true two-house veto, which

mitted the President to negotiate and accept thirty-two bilateral agreements between 1935 and 1945 and to consummate the United States' post-war entry into multilateral trade management through the acceptance of the General Agreement on Tariffs and Trade (hereinafter GATT).<sup>17</sup>

C. *The Kennedy Round Regime: Delegation plus Subsequent Approval*

President Kennedy's 1961 call for even greater negotiating authority to deal with the emerging Common Market provided the impetus for the Trade Expansion Act of 1962,<sup>18</sup> which in turn triggered the third regime of international trade policymaking. In that regime, which expired in 1967 along with the Kennedy Round of multilateral trade negotiations (hereinafter MTN), Congress conceded the President's need for advance negotiating authority, but refused to delegate without strings for fear that the President might agree

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authorized legislative override of the President's action by a concurrent resolution endorsed by "a majority of the authorized membership of each House." See Trade Expansion Act of 1962, Pub. L. No. 87-794, § 351(a)(2)(B), 76 Stat. 872, 899.

17. *Opened for signature* Oct. 30, 1947, 61 Stat. A3 (Part 5), T.I.A.S. No. 1700, 55 U.N.T.S. 187; see J. JACKSON, J.-V. LOUIS & M. MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* 141 (1984). Seven rounds of multilateral trade negotiations have been conducted under the auspices of GATT, a term commonly used to describe both the underlying legal agreement and the international organization of 92 signatory nations that subscribe to its terms. The current version of GATT is contained in *GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS* (Supps. I-XXX). Despite the silence of the Trade Agreements Extension Act of 1945, Pub. L. No. 79-130, 59 Stat. 410, regarding multilateral negotiations, the President signed GATT's Protocol of Provisional Application under its authority and never submitted the Agreement itself to Congress; "in fact, there was never even a plan to do so." Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 253 (1967).

18. Pub. L. No. 87-794, 76 Stat. 872 (1962). "The innovative aspect of the Trade Expansion Act, as introduced and essentially as passed, was contained in a grant of authority to the President to reduce duties below 50 percent of their existing rate or to eliminate them entirely pursuant to an agreement with the European Economic Community with respect to any article in a category of goods in which the EEC and the United States together accounted for 80 percent of world trade." 6 A. LOWENFELD, *PUBLIC CONTROLS ON INTERNATIONAL TRADE* 114 (1983).

to reduce *nontariff* as well as tariff barriers during the next MTN round. Such nontariff concessions not only potentially threatened domestic antidumping laws, which congressmen guarded zealously,<sup>19</sup> but on their face, nontariff restrictions also seemed to fall outside Congress' constitutionally enumerated power to "lay and collect Taxes, Duties, Imposts and Excises."<sup>20</sup> Thus, Congress feared that a runaway President might, instead, negotiate and accept nontariff barrier reductions without congressional authorization, relying upon his independent constitutional authority to accept sole executive agreements.<sup>21</sup> In an effort to shorten the President's leash, the Trade Expansion Act authorized him to negotiate multilateral trade agreements, but required that he

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19. Congressmen sensitive to their constituents have historically defended their right to protect domestic industries from foreign imports "dumped" into the United States at less than fair market value by enacting statutory antidumping laws, a form of nontariff barrier. Even before the Kennedy MTN Round began, the Senate Finance Committee declared that the negotiations should under no circumstance impair the Antidumping Act of 1921, 19 U.S.C. §§ 160-172. See REPORT OF THE SENATE FINANCE COMM. ON THE TRADE EXPANSION ACT OF 1962, S. REP. NO. 2059, 87th Cong., 2d Sess. 19, reprinted in 1962 U.S. CODE CONG. & AD. NEWS 3110 ("Other laws not intended to be affected include the Antidumping Act . . .").

20. U.S. CONST. art. I, § 8, cl. 1; see *supra* note 8.

21. See *supra* note 13. The Kennedy Round Regime coincided with both domestic litigation and growing congressional concern over the scope of the President's authority to enter sole executive agreements in all areas of foreign relations, including international trade. In *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), the Fourth Circuit refused to give effect to a sole executive agreement regulating Canadian export of potatoes to the United States, because the agreement lacked congressional authorization and was inconsistent with an existing statute on the same subject. On appeal, however, the Supreme Court declined to consider the significant constitutional and statutory questions raised and affirmed on other grounds. In 1972, Congress considered legislation that would have provided congressional review of executive agreements. See *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972). Congress ultimately enacted a watered-down version of that legislation as the Transmittal Act of 1972, Pub. L. No. 94-203, 86 Stat. 619 (codified at 1 U.S.C. § 112b (1982)) (the so-called "Case Act"), which requires the Secretary of State to transmit to the Congress any international agreement other than a treaty as soon as practicable after its entry into force with respect to the United States.



bring them back to Congress for subsequent approval.<sup>22</sup>

Congress' fears proved well-founded. The Executive Branch went on to accept a comprehensive Antidumping Code over congressional objection, relying not on the President's delegated authority under the 1962 Trade Expansion Act, but on his sole executive agreement authority.<sup>23</sup> Congress reacted by refusing to approve the proposed repeal of the American Selling Price method of customs valuation, which the Executive had also negotiated without congressional approval.<sup>24</sup> These impasses produced serious domes-

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22. Although a number of provisions of the 1962 Trade Act gave the President greater negotiating discretion, Congress displayed its growing distrust of the President in a number of provisions: a five-year sunset provision resembling those used in the Reciprocal Trade Agreements Act regime, 1962 Act, § 201, 76 Stat. at 872; a section resembling the Case Act's requirement that the President promptly transmit to each house a copy of each trade agreement entered, together with a statement of his reasons for entering it, *id.* § 226, 76 Stat. at 876, *see supra* note 21; denial of discretion to the President to grant most-favored-nation status to Communist countries, *id.* § 231, 76 Stat. at 876-77; and the creation of the Office of the Special Trade Representative (now United States Trade Representative or USTR) as a new, presumably more independent, agency to represent the United States at the upcoming multilateral trade talks, *id.* § 241, 76 Stat. at 878.

23. The Senate first attempted to block implementation of the Antidumping Code as domestic law by concurrent resolution, *see* S. Con. Res. 38, 90th Cong., 1st Sess. (1968), then by an amendment that would have suspended the United States' acceptance of the Code. *See* Amendment to H.R. 17,324, 114 CONG. REC. 26,133 (1968). Ultimately the House and Senate Conference Committee reached a compromise that permitted the domestic application of Code provisions to the extent that they did not conflict with domestic law or limit the Tariff Commission's statutory discretion to implement the antidumping laws. *See* Renegotiations Amendment Act of 1968, Pub. L. No. 90-634, § 201, 82 Stat. 1345, 1347. For a Senator's view of the controversy, *see* Long, *United States Law and the International Anti-Dumping Code*, 3 INT'L LAW. 464 (1969).

24. During the Kennedy MTN Round, U.S. negotiators agreed to eliminate the American Selling Price (hereinafter ASP) method of customs valuation. That method posed a nontariff barrier to imports by computing tariff rates based on the usual wholesale price at which an imported product was freely offered for sale when manufactured in the United States, rather than on the lower import price. In exchange for the repeal, the United States won certain European and Japanese tariff and nontariff barrier concessions. When Congress learned that the Executive Branch was negotiating the repeal of the ASP method, the Senate adopted a concurrent resolution urging the President to instruct U.S. negotiators to bargain only on provisions specifically authorized in the Trade Expansion Act of

tic as well as international fallout. During the next eight years, Congress refused to delegate to the President additional advance negotiating authority.<sup>25</sup> In turn, U.S. trading partners grew increasingly reluctant to negotiate nontariff barrier agreements with U.S. officials who, in their eyes, lacked negotiating credibility because of their accountability to an unpredictable Congress.<sup>26</sup>

D. *The Tokyo Round Regime: Consultation, Reporting, the "Fast Track," and the Legislative Veto*

By the early 1970's, congressional-executive clashes in trade matters had become increasingly commonplace.<sup>27</sup> A

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1962. See REPORT OF THE SENATE COMM. ON FINANCE EXPRESSING THE SENSE OF CONGRESS WITH RESPECT TO CERTAIN TRADE AGREEMENTS, S. REP. No. 1341, 89th Cong., 2d Sess. (1966). Subsequently, Congress refused to approve the negotiated agreement. The European parties to the agreement extended the deadline for acceptance several times, but finally refused to wait any longer, causing the agreement to lapse. See J. JACKSON, INTERNATIONAL ECONOMIC RELATIONS 464-65 (1977).

25. Abortive attempts were made in 1969 and 1970 to extend the President's authority, but protectionist pressures resulting from Vietnam and the collapse of the Bretton Woods exchange rate system combined to defeat both bills. See H.R. 18,970, 91st Cong., 2d Sess. (1970); H.R. 14,780, 91st Cong., 1st Sess. (1969).

26. See *Trade Reform: Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. 394 (1973) (testimony of Deputy Special Representative for Trade Negotiations William R. Pearce) ("our trading partners are reluctant to negotiate with us until they have some assurance that agreements can be implemented, and implemented rather promptly. After all, when you put an offer on the table, you spend some political capital. You are offering to expose some part of the domestic economy to competition it hasn't had before, whether it's a tariff negotiation or N[on] T[ariff] B[arrier] negotiation. No country is willing to do that—ourselves included—unless when we make an offer we have reasonable chance that, if accepted, it will result in agreement—and fairly soon.").

27. Perhaps the best example was the congressional-executive struggle over a bilateral, sectoral free trade agreement on automotive products negotiated with Canada in 1964. See *Agreement Concerning Automotive Products*, Jan. 16-Mar. 9, 1965, United States-Canada, 17 U.S.T. 1372, T.I.A.S. No. 6093 (entered into force Sept. 16, 1966). The Johnson Administration negotiated the pact without consulting Congress and presented it for congressional approval by implementing legislation two months *after* the deal had been struck. This led numerous congressmen to protest that a *fait accompli* had denied them an opportunity to provide their views on the agreement at a meaningful time. Although Congress ulti-

Congress bloodied by these clashes, wary of the imperial presidency, and awash in Vietnam and Watergate enacted the Trade Act of 1974.<sup>28</sup> That statute not only authorized U.S. participation in the Tokyo MTN Round, but also lay the foundations for the current regime of U.S. trade policymaking.

The drafters of the 1974 Trade Act approached their task with two objectives. Mindful of the Executive Branch's weakened negotiating credibility after the Kennedy MTN Round, they sought on the one hand to bolster that credibility. They sought on the other hand, however, to rein in a runaway President by crafting statutory procedures that would impose greater congressional control on executive discretion and ensure unprecedented congressional participation in the upcoming multilateral negotiations.

The 1974 Act addressed the first objective—bolstering Executive negotiating credibility—by adopting an innovative approach to legislative approval of trade agreements. Historically, such approval of trade agreements had taken one of three forms: as a treaty made with the advice and consent of two-thirds of the Senators, as a congressional-executive agreement authorized in advance by omnibus legislation, or as a congressional-executive agreement authorized *after* negotiation by a joint resolution or by implementing legislation approved by a majority of both houses.<sup>29</sup> Although each method afforded both houses and certain committees of

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mately approved the agreement by legislation, *see* Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016 (current version at 19 U.S.C. §§ 2001-2033 (1982)), the victory proved a Pyrrhic one for the Executive. The final implementing legislation authorized the President to enter similar agreements in the future, but conditioned that authority upon his prior consultation with Congress, *id.* § 202(c), 79 Stat. at 1017; subsequent reporting requirements, *id.* § 205(a), 79 Stat. at 1018; and subjected it to a legislative veto, *id.* § 202(d)(2)(B), 79 Stat. at 1017. *See generally* 1 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 307-83 (1968); Macrory, *The U.S.-Canadian Automotive Products Agreement: The First Five Years*, 2 LAW & POL'Y INT'L BUS. 1 (1970).

28. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101-2487 (1982)).

29. *See supra* notes 5 & 13. Of course, the President had also occasionally exercised a fourth option: to attempt to accept nontariff trade agreements on his sole constitutional authority without seeking legislative approval at all. *Compare supra* note 13 with *supra* text accompanying note 23.

Congress varying degrees of input at different points in the negotiating process, each had arguably been found wanting.<sup>30</sup> As a compromise, the drafters of the 1974 Act created a new legislative mechanism. Known commonly as the "fast-track" procedure, this device structured the President's discretion to negotiate trade agreements in exchange for a congressional commitment to approve or disapprove those agreements quickly and without amendment.

Sections 102 and 151 of the 1974 Act<sup>31</sup> delegated to the President broad advance authority to negotiate agreements reducing nontariff barriers and other trade distortions, but obliged the President to notify the House Ways and Means Committee and the Senate Finance Committee at least ninety days before entering any such agreement.<sup>32</sup> More-

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30. The treaty method of approval excluded the House altogether and accorded primacy to the Senate Foreign Relations Committee, which has jurisdiction over treaties. However, that method had largely fallen into desuetude because of the persistent presidential practice of concluding trade accords by executive agreement, *see supra* text accompanying notes 12-17, and because of the Executive Branch's desire to involve the House of Representatives in major trade undertakings. The United States-Canada Automotive Products Agreement experience demonstrated that congressional-executive agreements negotiated without prior legislative oversight offered Congress too little input into the trade process. *See supra* note 27. On the other hand, the Executive's experience with the repeal of the ASP method, *see supra* note 24, suggested that congressional-executive agreements negotiated pursuant to prior authorization and subsequent approval by implementing legislation arguably offered the two houses (and particularly, the House Ways and Means Committee and the Senate Finance Committee) too much input. Under that method, Congress had two bites at the apple—input early in the negotiations via statutory "prior consultation" provisions, and last-minute statutory review opportunities just before the agreement was finalized—with all the attendant opportunities for congressional delay, amendment, and filibuster.

31. 19 U.S.C. §§ 2112, 2191 (1982).

32. *See* Trade Act of 1974, § 102(e)(1), 19 U.S.C. § 2112(e)(1). More specifically, the 1974 Act required the President to complete numerous procedural steps before gaining access to the fast-track procedures: to consult with both the Senate Finance Committee and the House Ways and Means Committee and any joint committee whose jurisdiction would be affected by such a trade agreement, *id.* § 102(c), 19 U.S.C. § 2112(c); to notify both houses 90 days before entering the agreement and promptly thereafter to publish notice in the *Federal Register* of his intent to enter such an agreement, *id.* § 102(e)(1), 19 U.S.C. § 2112(e)(1); to publish in the *Federal Register* and to supply to the International Trade Commission lists of all articles whose duties might be modified, *id.* § 131(a), 19 U.S.C.

over, the Act modified the House and Senate rules to establish an expedited legislative procedure whereby the two chambers would guarantee negotiated agreements and implementing legislation an up-or-down vote without amendments within sixty legislative days after their introduction.<sup>33</sup> The 1979 Tokyo MTN Round soon illustrated both the procedure's domestic effectiveness in accommodating executive and legislative interests and its international effectiveness in promoting multilateral trade accords. After that Round concluded, the entire U.S. legislative process for approving the nine multilateral agreements negotiated there consumed only thirty-four legislative days from presidential notification to final approval.<sup>34</sup>

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§ 2151(a); to seek information and advice from various departments and agencies, *id.* § 132, 19 U.S.C. § 2152; to arrange for and receive a summary of public hearings, *id.* § 133, 19 U.S.C. § 2153; to seek guidance from private sector advisers, *id.* § 135, 19 U.S.C. § 2155; to negotiate and complete the tentative international agreement; to notify Congress and consult with the key committees 90 days before signature, *id.* § 102(e), 19 U.S.C. § 2112(e); then to complete the final agreement and submit a draft of proposed implementing legislation to the appropriate committees in the form of a normal bill, *id.* § 102(e)(2)(A), 19 U.S.C. § 2112(e)(2)(A).

33. Section 151 of the 1974 Act modified existing House and Senate rules in three important respects. First, it specified that a negotiated nontariff barrier agreement and its draft implementing legislation would be automatically discharged from committee consideration after 45 legislative days, regardless of whether the committees had considered the package or taken any action on it. *Id.* § 151(e)(1), 19 U.S.C. § 2191(e)(1). This prevented a committee chairman or any individual member from bottling up the package to prevent it from coming to the floor for a vote. Second, it provided that a bill or resolution approving each agreement would be placed on the appropriate calendar for a final vote on the floor of each House without possibility of amendment, thereby averting the "Christmas tree" phenomenon characteristic of much federal legislation. *Id.* § 151(f)(1), (g)(1), 19 U.S.C. § 2191(f)(1), (g)(1). Finally, it limited debate on the floor of each house to 20 hours, *id.* § 151(f)(2), (g)(2), 19 U.S.C. § 2191(f)(2), (g)(2), and required that the package be voted upon within 15 legislative days, *id.* § 151(e)(1), 19 U.S.C. § 2191(e)(1). This forestalled the time-honored practice of one or more congressmen "filibustering" a proposal they opposed and preventing it from ever coming to a final vote in their house.

34. The President notified Congress of his intent to enter the trade agreements in January 1979. Congressional hearings were held in February and April, and the United States signed the agreements by *procès-verbal* in April. The negotiated agreements and implementing legislation were then introduced in the House of Representatives on June 19, 1979, and

As Watergate unraveled, the drafters' second objective—tightening congressional controls on executive discretion—gained prominence. The 1974 Act made its way through Congress with minimal presidential involvement, virtually no executive leadership, and amidst a mood of unprecedented congressional distrust for the Presidency.<sup>35</sup> The 1974 Act expressed Congress' hostility by curtailing presidential initiative in trade matters through five discretion-controlling tools. Significantly, nearly all of these had first appeared in one form or another during one of the three predecessor trade regimes.

First, in a nod to the Smoot-Hawley regime, Congress sought to limit presidential discretion by specifying negotiating objectives itself, a device it later applied throughout the Trade Agreements Act of 1979.<sup>36</sup> Second, as in the Reciprocal Trade Agreements Act regime, Congress subjected the

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passed the House by a 395-to-7 margin on July 11, 1979. *See* 125 CONG. REC. 18,017 (1979). The package then passed the Senate over only four nay votes on July 23. *See id.* at 20,194. Congress forced renegotiation on only one point. Some congressmen complained that a provision of the Government Procurement Code would have disrupted existing federal set-aside programs for small and minority-owned businesses. At their request, this requirement was sent back for renegotiation and was eventually excluded from the Code's coverage. *See* J. JACKSON, J.-V. LOUIS & M. MATSUSHITA, *supra* note 17, at 165-66.

35. President Nixon resigned while the bill was still before the Senate Finance Committee. *See* J. JACKSON, *supra* note 24, at 160.

36. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 and 26 U.S.C. (1982)). In the 1974 Act, Congress structured presidential negotiating authority by prescribing an overall negotiating objective, 1974 Act, § 103, 19 U.S.C. § 2113; a sector negotiating objective, *id.* § 104, 19 U.S.C. § 2114; standards for evaluating bilateral trade agreements; *id.* § 105, 19 U.S.C. § 2115; and a list of steps to be taken toward GATT reform, *id.* § 121, 19 U.S.C. § 2131. Congress took this device one step further in the 1979 Trade Agreements Act, where it structured the President's statutory discretion to *accept* agreements that were negotiated during the Tokyo Round, 1979 Act, § 2(b), 19 U.S.C. § 2503(b). Congress further directed the President to seek new opportunities for U.S. exports in future negotiations and to designate major industrial countries as eligible for nondiscriminatory bidding under the agreement only if they had signed the Government Procurement Code, *id.* tit. III (not codified); and ordered the President to study and report within two years on the desirability of negotiating trade agreements with North American countries, including Canada, *id.* § 1104(a), 19 U.S.C. § 2486(b).

President's negotiating authority to a sunset provision.<sup>37</sup> Third, Congress required the President to engage in extensive consultations with congressional and private sector advisers<sup>38</sup> and also imposed on him a range of formal certification and postnegotiation reporting requirements.<sup>39</sup>

Fourth, Congress chose not only to limit administrative

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37. See *supra* text accompanying note 14. Section 101(a) of the 1974 Act, 19 U.S.C. § 2111(a), extended the President's negotiating authority with respect to both tariff and nontariff barriers for five more years, and Section 1101 of the 1979 Act, 19 U.S.C. § 2112(b), extended that authority with respect to *nontariff* barriers for eight more years, through early 1988. Section 124 of the 1974 Act, 19 U.S.C. § 2134, provided the President with two-year residual authority to negotiate tariff cuts, but the 1979 Act failed to renew it, causing the President's tariff-cutting authority to run out in 1982. This created the post-1982 anomaly that the President had statutory authority to negotiate with respect to nontariff barriers, but not with respect to tariffs.

38. 1974 Act, § 135, amended by 1979 Act, § 1103 (codified as amended at 19 U.S.C. § 2155). Congress had previously used a rudimentary form of this oversight device in the legislation implementing the United States-Canada Automotive Products Agreement. See *supra* note 27. The 1974 Act created a far more elaborate structure of congressional and private sector advisory committees, however. Section 161 required that 10 members of the House and Senate be accredited as official advisers to the U.S. negotiating delegations and required the USTR to "keep each official adviser currently informed on United States negotiating objectives, the status of negotiations in progress, and the nature of any changes in domestic law or the administration thereof which may be recommended to Congress to carry out any trade agreement." 1974 Act, § 161(b)(1), 19 U.S.C. § 2211(b)(1). Similarly, section 135 of the 1974 Act, 19 U.S.C. § 2155, required the President to establish an overall private sector advisory committee for policy advice and three sub-policy committees to provide the views of the industrial, labor, and agricultural sectors. The 1979 Act preserved this committee structure and broadened its mandate to include advice on how the Tokyo Round agreements should be implemented. See 1979 Act, § 1103, 19 U.S.C. § 2155.

39. The most famous of these was the Jackson-Vanik Amendment, Title IV of the 1974 Trade Act, 19 U.S.C. §§ 2431-2441, which required the President to certify a country's compliance with freedom-of-emigration requirements as a condition of granting it nondiscriminatory treatment and other trade benefits. Congress has subsequently required similar formal presidential certifications of subject nation compliance with detailed conditions in numerous other foreign affairs statutes. See, e.g., 22 U.S.C. §§ 2151n, 2304(a)(2) (1982) (no security assistance may be provided to any country whose government engages in a "consistent pattern of gross violation of internationally recognized human rights" unless the President certifies in writing that "extraordinary circumstances" exist that warrant such assistance).

discretion directly, but also to enhance *indirect* third-party leverage on executive action through the "judicialization" of trade remedies. This heading encompasses much of the modern U.S. statutory law of import relief, including the modified escape clause, antidumping and countervailing duty provisions, customs fraud penalties, and remedies against infringement and unfair trade practices.<sup>40</sup> In significant part, these remedies grew out of Congress' determination to delegate to private parties the task of policing executive discretion in the import relief area. Congress expanded citizen access to the trade process, empowered private individuals to initiate proceedings directly against foreign industries by private complaint, eased standing requirements, required executive branch action on private complaints within strict statutory time limits, and subjected that action to extensive judicial oversight.<sup>41</sup> This accelerating trend toward judicialization, symbolized by the upgrading in 1980 of the Customs Court into the Court of International Trade,<sup>42</sup> rendered the Executive Branch far more publicly accountable for its trade decisions than ever before.<sup>43</sup>

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40. See generally Ehrenhaft, *The "Judicialization" of Trade Law*, 56 NOTRE DAME LAW. 595 (1981); Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1573 (1984) ("The clear trend manifested in [the 1962, 1974, and 1979] statutes is toward a greater 'legalization' or 'judicialization' of the system."). This trend greatly accelerated with the 1979 Trade Act, which added numerous provisions to the antidumping and countervailing duty laws. See Cohen, *The Trade Agreements Act of 1979: Executive Agreements, Subsidies and Countervailing Duties*, 15 TEX. INT'L L.J. 96, 105-14 (1980) (describing changes). Current import relief provisions are catalogued in Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW. 761 (1985), and Jackson, *supra*, at 1584-87. See also Restani, *An Introduction to Statutory Responses to Import Penetration*, 18 N.Y.U. J. INT'L L. & POL. 1087 (1986).

41. See Jackson, *supra* note 40, at 1574.

42. See Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified in scattered sections of 19 and 28 U.S.C. (1982)).

43. The congressional technique of structuring administrative agency discretion through statutory expansion of private participation rights in administrative proceedings is, of course, hardly confined to the trade area. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670, 1748-60 (1975) (increasingly, the function of administrative law is to provide a surrogate political process whereby a wide range of affected private interests are ensured fair representation in the decision-making process).



Fifth and finally, Congress wrenched the 1974 Trade Act with a device which, during the post-Vietnam, post-Watergate era, had become the congressional control method of choice in the foreign affairs realm: the legislative veto.<sup>44</sup> Although Congress rarely exercised such legislative veto provisions, it nevertheless inserted them as Damoclean swords into statute after statute enacted during this period. Prominent examples include the War Powers Resolution, international emergency powers legislation, arms export control and nuclear nonproliferation laws, and foreign assistance bills.<sup>45</sup> Congress manifested its unusual fondness for this mechanism by embedding six legislative vetoes into the 1974 Act alone.<sup>46</sup> Five years later, when Congress passed

44. See *supra* note 16.

45. For a detailed listing of statutes, see generally Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912 (1985); Pomerance, *United States Foreign Relations Law After Chadha*, 15 CAL. W. INT'L L.J. 201 (1985). Perhaps the best-known examples of the genre are the War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1982)); the International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626-29 (1977) (codified at 50 U.S.C. §§ 1701-1706 (1982)); and the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601-1651 (1982)).

Each of these statutes sought to constrain executive discretion via "prior consultation, subsequent reporting, plus legislative veto" packages of the type found in Automotive Products Trade Act of 1965. See *supra* note 27. Some incorporated even more extensive safeguards against presidential abuse. For example, the most controversial of these measures, the War Powers Resolution (which became law only over President Nixon's veto), not only included consultation, reporting, and legislative veto provisions, 50 U.S.C. §§ 1542, 1543, 1544(c), but also a legislative enumeration of the bases of presidential warmaking authority, *id.* § 1541(c), a clause declaring that "[a]uthority to introduce United States Armed Forces into hostilities . . . shall not be inferred" from any provision of law or treaty that does not expressly authorize it, *id.* § 1547(a), a nondelegation clause, *id.* § 1547(d), and a severability clause, *id.* § 1548.

46. See 1974 Act, § 203(c)(1), 19 U.S.C. § 2253(c)(1) (Congress may, by concurrent resolution, override presidential determination not to provide import relief under the escape clause) (discussed *supra* notes 15-16); *id.* § 302(b), 19 U.S.C. § 2412(b) (Congress may, by concurrent resolution, disapprove presidential action under Section 301); *id.* § 331(a), 19 U.S.C. § 1303(e)(2) (amending the countervailing duty provision so that either house may, by simple resolution, disapprove presidential decision to waive imposition of countervailing duties); *id.* §§ 153, 402(d), 19 U.S.C. §§ 2193, 2432(d), (President may waive freedom-of-emigration require-

the Trade Agreements Act of 1979, it tightened nearly every one of these discretion-controlling devices,<sup>47</sup> thereby making its strongest bid for dominance over trade policymaking since the days of Smoot-Hawley.

## II. *I.N.S. v. CHADHA* AND THE CURRENT REGIME OF INTERNATIONAL TRADE POLICYMAKING: THE TRADE AND TARIFF ACT OF 1984

As the statutory authority provided in the 1979 Act was expiring in 1983, the Supreme Court, traditionally a bit player in the intragovernmental struggle over trade management, stepped to center stage with its sweeping decision in *I.N.S. v. Chadha*.<sup>48</sup> By a vote of 7-2, the Court declared the legislative veto unconstitutional, thereby striking down nearly 200 legislative provisions, including parts of five major trade laws.<sup>49</sup> Chief Justice Burger's much-criticized opin-

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ments of Jackson-Vanik Amendment for 18 months, but extensions of waiver authority must be approved by concurrent resolution either in their entirety or with respect to particular countries) (discussed *supra* note 39); *id.* § 405(c), 19 U.S.C. § 2435(c) (Congress must, by concurrent resolution, approve adoption of bilateral commercial agreements with countries not previously accorded most-favored-nation treatment and may disapprove, by concurrent resolution, agreements entered before date of 1974 Act); *id.* § 407(c)(3), 19 U.S.C. § 2437(c)(3) (either house may, by simple resolution, disapprove a presidential Jackson-Vanik compliance report with respect to a nonmarket economy country) (discussed *supra* note 39).

47. See *supra* notes 36-40 and accompanying text. It should be noted that the fast-track procedure itself constitutes a sixth executive discretion-controlling device, in the sense that under that procedure, either house can prevent the implementation of a fully negotiated trade agreement simply by voting it down. See *supra* note 33. In that sense, the expedited legislative procedure provided by the fast-track *functionally* resembles a legislative veto, which also permits either house unilaterally to disapprove a fully negotiated agreement. This resemblance is hardly surprising, given that the 1974 Act's fast-track procedure grew out of a provision in the House bill that would have subjected both a negotiated trade agreement and its implementing legislation to a one-house legislative veto. The Justice Department objected so strenuously to that provision on constitutional grounds that the current expedited legislation procedure was substituted in its place. See J. JACKSON, *supra* note 24, at 145-54.

48. 462 U.S. 919 (1983).

49. See *id.* at 967 (White, J., dissenting). In addition to the six legislative vetoes in the Trade Act of 1974, see *supra* note 46, *Chadha* also struck down provisions in the Export-Import Bank Amendments of 1974, Pub. L. No. 93-646, 88 Stat. 2333 (1975); the Export Administration Act of 1979,

ion for six justices turned crucially on the conclusion that the one-house veto at issue<sup>50</sup> “was essentially legislative in purpose and effect” in the sense that it “had the purpose and effect of altering the legal rights, duties, and relations of persons . . . *outside* the Legislative Branch.”<sup>51</sup> Thus, the Court concluded, Congress had acted unconstitutionally by failing to effect its action “in conformity with the express procedures of the Constitution’s prescription for legislative action [found in Article I, Section 7 of the Constitution]: passage by a majority of both Houses and presentment to the President.”<sup>52</sup>

Assuming that *Chadha* killed all legislative vetoes,<sup>53</sup> including all those found in trade statutes, the question be-

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Pub. L. No. 96-72, 93 Stat. 503; the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629; and the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 369 (1983), which, ironically, passed Congress *after Chadha* was decided. See Pomerance, *supra* note 45, at 238-44 (describing invalidated provisions).

50. The particular provision struck in *Chadha* was the one-house veto provision of the Immigration and Nationality Act, which authorized either house, by simple resolution, to invalidate the Attorney General’s decision to withhold the deportation of an otherwise deportable alien. See 8 U.S.C. § 1254(c)(2) (1982).

51. 462 U.S. at 952 (emphasis added). Many commentators have questioned the wisdom of the Court’s formalistic opinion. See, e.g., Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125; Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789 (1983); Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. LEGIS. 1 (1984).

52. 462 U.S. at 958. See generally *supra* note 16.

53. A number of commentators have argued that the legislative veto in the War Powers Resolution, 50 U.S.C. § 1544(c), may have survived *Chadha*. See, e.g., Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 129-33 (1984). As those commentators recognize, however, *Chadha*’s broad reasoning provides no basis upon which that provision could be saved. See *id.* at 133 (conceding that the arguments for the continued constitutionality of the legislative veto provision in the War Powers Resolution “may not be terribly convincing”). Moreover, even those justices who expressed concern about the sweep of the decision never claimed that it exempted the War Powers Resolution. See 462 U.S. at 959 (Powell, J., concurring in the judgment) (“The Court’s decision . . . apparently will invalidate every use of the legislative veto.”); *id.* at 967, 971 (White, J., dissenting) (“Today the Court . . . sounds the death knell for nearly 200 . . . statutory provisions” and listing the legislative veto provision in the War Powers Resolution among them).

comes whether the decision significantly shifted the balance of power in the international trade area in the President's favor. The analysis above strongly suggests a negative answer, given that *Chadha* deprived Congress of only one of its many statutory checks on executive discretion laced throughout the trade laws.<sup>54</sup>

By invalidating so many provisions, *Chadha's* extraordinary sweep necessitated a major legislative overhaul of the trade statutes. After *Chadha*, the imperative to replace invalid legislative vetoes with constitutionally permissible discretion-controlling devices spurred the final enactment of the Trade and Tariff Act of 1984.<sup>55</sup> Ironically, by depriving Congress of its favorite administrative control device, *Chadha* stimulated Congress to take a far more comprehensive and "hands-on" approach to trade policymaking than it had previously adopted under the regime of the legislative veto. By so doing, *Chadha* ushered in the fifth, current regime of congressional control of trade policymaking.

Two focal points of proposed trade legislation introduced to the 99th Congress<sup>56</sup> illustrate this post-*Chadha* ac-

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54. See *supra* text accompanying notes 36-47.

55. Pub. L. No. 98-573, § 248, 98 Stat. 2948, 2998 (amending 19 U.S.C. §§ 1330(d)(4), 2192(a)(1)(A), 2253(c)). Draft versions of this omnibus legislation were under consideration when *Chadha* came down, and a number of provisions were adopted to conform with the Supreme Court's ruling. The prime example is the 1984 Act's amendment of the escape clause provision of the 1974 Act, § 203 (c)(1), 19 U.S.C. § 2253(c)(1), to substitute a joint resolution for the now-unconstitutional concurrent resolution override. See *supra* notes 15-16. The practical effect of this amendment is discussed in Comment, *United States Trade Laws: Reexamining the Escape Clause*, 26 VA. J. INT'L L. 261, 281-83 (1985).

56. During the 99th Congress, the major trade packages under consideration included S. 1837, 99th Cong., 1st Sess., 131 CONG. REC. S15,109 (daily ed. Nov. 7, 1985) (introduced by Senator Bentsen) [hereinafter cited as Bentsen Bill]; S. 1860, 99th Cong., 1st Sess., 131 CONG. REC. S15,959 (daily ed. Nov. 20, 1985) (introduced by Senator Danforth) [hereinafter cited as Danforth Bill]; H.R. 3522, 99th Cong., 1st Sess., 131 CONG. REC. H8507 (daily ed. Oct. 8, 1985) (introduced by Representative Michel) [hereinafter cited as Michel Bill]; and H.R. 3777, 99th Cong., 1st Sess., 131 CONG. REC. H10,308 (daily ed. Nov. 19, 1985) (introduced by, among others, Congressman Dingell) [hereinafter cited as Dingell Bill]. The House Ways and Means Committee also developed a discussion draft, dated March 21, 1986, which contemplated comprehensive trade policy reform. See *Ways & Means Trade Subcommittee Draft Bill Serving as Basis for Omnibus Trade Hearings*, 3 INT'L TRADE REP. (BNA) 394 (Mar. 26, 1986)

cretion of congressional power: enhanced congressional control of the President's authority to negotiate bilateral and multilateral trade agreements, and proposed statutory limits on the President's discretion to deny import relief to affected domestic industries. In each of these areas, far from crippling Congress, *Chadha* has inspired Congress to seize *more*, rather than less, effective control. As a consequence, the post-*Chadha* trade policymaking regime has emerged as the most congressionally influenced trade regime since Smoot-Hawley.

#### A. *Negotiating Authority*

In November 1983, while Congress pondered how to revamp the trade laws after *Chadha*, President Reagan and Israeli President Yitzhak Shamir announced their intent to negotiate a comprehensive bilateral free trade agreement (hereinafter FTA) between the United States and Israel.<sup>57</sup> The proposed Israeli FTA presented Congress with a dilemma: how to endow the President with sufficient statutory authority to negotiate the FTA while ensuring full congressional participation in this major trade undertaking.<sup>58</sup> Although Congress and the Reagan Administration ultimately settled upon an approach that secured legislative approval of the Israeli FTA through a combination of advance

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[hereinafter cited as House Discussion Draft] (copy of the draft bill available in the Author's file at the offices of the *Journal of International Law and Politics*, New York University School of Law). H.R. 4800, a modified version of the House Discussion Draft, was adopted by the full House on May 22, 1986. H.R. 4800, 99th Cong., 2d Sess., 132 CONG. REC. H3225 (daily ed. May 22, 1986). At this writing, the Senate is considering its own omnibus trade measure, modeled on the Danforth Bill, in a effort to obtain passage by the full Senate before the close of the 99th Congress. It seems unlikely, however, that sufficient time remains in the session to enact a comprehensive Trade Act of 1986. See *infra* note 85.

57. That agreement, the first comprehensive bilateral FTA ever concluded by the United States with another country, was ultimately signed on April 22, 1985, and entered into force on August 19, 1985. See Entry into Force of U.S.-Israel Free Trade Area Agreement, 50 Fed. Reg. 35,172 (1985). The text of the agreement, letters of understanding, declarations, tariff package, implementing legislation, and reciprocal offers for product staging are all reprinted in 24 I.L.M. 653-87 (1985).

58. The President could not negotiate the FTA pursuant to preexisting statutory authority because his tariff-cutting authority had lapsed in 1982 and had not been renewed. See *supra* note 37.

authorizing legislation and subsequent implementing legislation,<sup>59</sup> the most innovative feature of the 1984 Act was its modification of the 1974 Act's "fast-track" procedure, which had proven so successful during the Tokyo MTN Round.<sup>60</sup>

This modification specifically accommodated the possibility of future bilateral free trade negotiations with nations other than Israel.<sup>61</sup> The new procedure provided that if a country other than Israel requested free trade negotiations with the United States, the President must notify the House Ways and Means Committee and the Senate Finance Committee and consult with those two committees for a period of sixty legislative days *before* giving the statutorily required ninety-day notice of his intent to sign an agreement. If

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59. The advance authorizing legislation, Title IV of the Trade and Tariff Act of 1984, authorized the President to enter into an agreement eliminating substantially all duties and import restrictions on United States-Israeli trade. See 1984 Act, §§ 401-406, 98 Stat. at 3013-18 (codified at 19 U.S.C. § 2112 & note (Supp. III 1985)). See generally Price, *The Trade and Tariff Act of 1984: An Analytical Overview*, 19 INT'L LAW. 321 (1985). The subsequent legislation, the United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 1985 U.S. CODE CONG. & AD. NEWS (99 Stat.) 82, approved and implemented the terms of the negotiated agreement as domestic law.

60. See *supra* text accompanying notes 29-34. Because the fast-track procedure is an expedited *legislation* procedure, not a legislative veto, see *supra* note 47, *Chadha* did not oblige Congress to modify that procedure. Nevertheless, Congress chose to revise the fast-track procedure for two reasons. First, no existing legislation specifically anticipated and authorized the possibility of FTAs with nations *other* than Israel, a serious drawback given persistent Canadian free trade overtures. Second, Congress perceived that other nations to whom the United States had promised most-favored-nation treatment in reciprocal trade agreements or bilateral Friendship, Commerce, and Navigation treaties might demand any trade concessions being extended to Israel. For a more detailed description of the political pressures that led to the new grant of statutory negotiating authority in 1984, see generally Platt, *Free Trade with Israel: A Legislative History* 5-11 (unpublished manuscript forthcoming in THE UNITED STATES-ISRAEL FREE TRADE AGREEMENT (A. Samet & M. Goldberg eds. 1986)) (copy available in the Author's file at the offices of the *Journal of International Law and Politics*, New York University School of Law).

61. Originally, the Senate had included Canada, along with Israel, for special consideration, but in the end the two houses decided to treat Canada just as any other country seeking an FTA, partly because of numerous recent U.S.-Canadian trade disputes and partly because some congressmen were simply less enthusiastic about free trade with Canada than with Israel. See Price, *supra* note 59, at 329.

neither committee disapproved of the negotiations during this sixty-day committee consultation period, any subsequently negotiated agreement would receive expedited legislative consideration subject to the fast-track procedures provided in Sections 102 and 151 of the 1974 Act.<sup>62</sup>

On its face, the modified fast-track procedure significantly enhances the influence of Congress as a whole in the negotiation of future trade agreements. Equally important, the procedure dramatically expands the influence of the House Ways and Means Committee and the Senate Finance Committee vis-à-vis the rest of Congress.<sup>63</sup> In effect, the modified fast-track procedure offers Congress three bites at the apple. The statutory requirement of a sixty-day prenegotiation consultation period with the two committees secures their involvement months before negotiations begin and allows them to extract concessions from the President as a condition of letting negotiations proceed.<sup>64</sup> The Adminis-

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62. See 1984 Act, § 401(a), 19 U.S.C. § 2112(b)(4)(A) (Supp. III 1985). Thus, after negotiations were concluded, the President would give the two committees 90-day notice and submit the negotiated agreement and draft implementing legislation to them for 45 legislative days, after which time the unamended package would be automatically discharged to the floor of each house, to be voted up or down after limited debate within 15 legislative days. See *supra* notes 32-33. If either committee disapproved negotiations in advance or either committee or house refused to approve the post-negotiation package submitted by the President, the President would be free to resubmit it for consideration under normal legislative procedures.

63. The 1984 Act effectively elevates the House Ways and Means Committee and the Senate Finance Committee over other committees that might arguably claim jurisdiction, for example, the Senate Foreign Relations Committee, the House Committee on Energy and Commerce (the instigator of the Dingell Bill described *supra* note 56), and the Subcommittee on International Economic Policy and Trade of the House Foreign Affairs Committee.

64. Significantly, nothing in the language of the 1984 Act requires the President to engage in the 60-day committee consultation period *before* negotiations begin. In theory, he could consult during the 60 legislative days immediately prior to the day that he would be obliged under Section 102(e)(1) of the 1974 Act, 19 U.S.C. § 2112(e)(1), to notify the same committees of his intent to enter an agreement (*i.e.*, 150 legislative days before the day the agreement was to be signed), or just as negotiations were coming to a close. Although this construction of the 60-day preconsultation requirement could significantly lessen the amount of input that the key committees would have in the negotiation process, the Reagan Adminis-

tration's awareness that any negotiated agreement must ultimately return to these same committees for subsequent approval then promotes continuing consultation as the agreement evolves.<sup>65</sup> Finally, either house retains the option to vote down a fully negotiated agreement even after it has been discharged from committee.<sup>66</sup> In sum, short of direct congressional control of the negotiating process, the modified fast-track procedure constitutes the most restrictive legislative control on executive negotiating authority yet devised.

The extraordinary powers afforded to the two key committees under the modified fast-track procedure were graphically illustrated by the recent furor over the proposed U.S.-Canadian FTA, an outgrowth of President Reagan's and Canadian Prime Minister Brian Mulroney's 1985 "Shamrock Summit."<sup>67</sup> Prime Minister Mulroney formally requested ne-

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tration has construed this provision cautiously. One recent illustration is President Reagan's decision to notify the committees of his intent to negotiate a U.S.-Canadian FTA 60 legislative days before the date he intended to *initiate* formal negotiations. *See infra* note 69.

65. During the Tokyo Round, the first trade negotiations conducted pursuant to the fast-track procedure, for example, members and staffs of the House Ways and Means Committee and the Senate Finance Committee directly discussed trade issues with foreign officials in Geneva. *See Cassidy, Negotiating about Negotiations: The Geneva Multilateral Trade Talks*, in *THE TETHERED PRESIDENCY* 264, 273-74 (T. Franck ed. 1981). The extent of continuing committee involvement was demonstrated by a formal memorandum of understanding between the committees and the USTR, whereby the USTR agreed to supply the two committees with classified cables relating to the negotiations. Full-time committee staff members monitored the negotiations and were sometimes even present during negotiating sessions. *See* J. JACKSON, J.-V. LOUIS & M. MATSUSHITA, *supra* note 17, at 153.

66. *See supra* note 62.

67. On St. Patrick's Day, 1985, Prime Minister Mulroney and President Reagan met in Quebec City, Quebec. Their "Shamrock Summit" culminated in a joint declaration setting forth their agreement "to give the highest priority to finding mutually-acceptable means to reduce and eliminate existing barriers to trade in order to secure and facilitate trade and investment flows." *See* 21 WEEKLY COMP. PRES. DOC. 325, 325 (Mar. 25, 1985). At their repeat Shamrock Summit, held in Washington, D.C., on March 18-19, 1986, the two leaders confirmed their intention to begin bilateral trade negotiations without preconditions. *See* Taylor & Urquhart, *Reagan and Canada's Mulroney Said to Reach Accord to Combat Acid Rain*, *Wall St. J.*, Mar. 19, 1986, at 7, col. 1; *see also* *President Reagan, Prime Minister Mulroney Vow Commitment to Free Trade Negotiations*, 3 INT'L TRADE REP.



negotiations in September 1985.<sup>68</sup> Two months later, in accordance with the 1984 Act's fast-track procedure, President Reagan notified the House Ways and Means Committee and the Senate Finance Committee of his intent to commence negotiations.<sup>69</sup> Under the terms of the 1984 Act, that notice gave either committee until April 23, 1986 to disapprove of the negotiations.<sup>70</sup> To the surprise of negotiators on both sides, shortly before the sixty-day prenegotiation consultation period was scheduled to expire, a majority of the Senate Finance Committee threatened to disapprove the negotiations<sup>71</sup> and even urged the President to withdraw his request.<sup>72</sup> After intensive presidential lobbying and a last-minute switch by one Senator, the twenty-member committee ultimately divided evenly on the motion to disapprove.<sup>73</sup> That deadlock, which permitted formal negotiations to proceed, resulted only after the President had made concessions to one key Senator<sup>74</sup> and promised another to "consult with

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(BNA) 396, 396 (Mar. 26, 1986) (statement of Prime Minister Mulroney) (both sides have agreed "to an early and clean launch" of the talks). For an analysis of the U.S., Canadian, and GATT legal issues likely to arise in any U.S.-Canadian free trade discussions, see generally Koh, *Domestic and International Legal Aspects of the Proposed United States-Canada Free Trade Agreement* (unpublished manuscript forthcoming in PERSPECTIVES ON A U.S.-CANADIAN FREE TRADE AGREEMENT (R. Stern, P. Trezise & J. Whalley eds. 1986)) (copy available in the Author's file at the offices of the *Journal of International Law and Politics*, New York University School of Law).

68. See Martin, *Canada Seeking Pact with U.S. on Freer Trade*, N.Y. Times, Sept. 27, 1985, at A1, col. 2.

69. See Farnsworth, *Reagan to Seek Talks on Freer Canada Trade*, N.Y. Times, Dec. 10, 1985, at D1, col. 1.

70. The 60-day preconsultation period ran from December to April because statutory "days" are calculated in terms of congressional working days, *i.e.*, excluding weekends and days when either house is out of session. See 1984 Act, § 401(a), 19 U.S.C. § 2112(b)(4)(C) (Supp. III 1985).

71. See Auerbach, *Panel Criticizes U.S.-Canada Trade Pact*, Washington Post, Apr. 12, 1986, at G1, col. 3.

72. See Farnsworth, *12 Senators Opposing Reagan on Canada Trade*, N.Y. Times, Apr. 17, 1986, at D5, col. 1.

73. See Farnsworth, *President Backed on Canada Talks*, N.Y. Times, Apr. 24, 1986, at D1, col. 3; Shribman & Pine, *Reagan Gains Canada-Trade Victory as Senate Effort to Impede Talks Fails*, Wall St. J., Apr. 24, 1986, at 5, col. 3.

74. The President reportedly promised one key Senator that he would expedite negotiations with Canada over alleged lumber subsidies, as well as possibly initiate an unfair trade action against Canada. See Farnsworth, *supra* note 73, at D18, col. 2 (reporting remarks of Senator Symms).

members of the Finance Committee in every way.”<sup>75</sup>

Ironically, the committee disapproval mechanism created by the 1984 Act permits the House Ways and Means Committee and the Senate Finance Committee to exercise a power closely analogous to that formerly exercised by committees under “committee veto” provisions of the type declared unconstitutional in *Chadha*.<sup>76</sup> Although strictly speaking, the committee disapproval mechanism conforms to the letter of *Chadha*,<sup>77</sup> it *functionally* resembles the committee veto insofar as it permits a single committee of Congress to

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75. See *id.* at D1, col. 3, D18, cols. 1-2 (reporting remarks of Senator Matsunaga); see also Shribman & Pine, *supra* note 73, at 5, col. 3 (reporting USTR Yeutter’s pledge to consult closely with Congress at each stage of the negotiations); *id.* at col. 6 (“Mr. Matsunaga [the swing vote] said he made his decision [to switch his position and vote against disapproval of the free trade talks] after winning an acknowledgement by Mr. Reagan in a telephone call that, as the lawmaker put it, the president ‘had learned his lesson.’”). In a letter to Senate Finance Committee Chairman Packwood, President Reagan further promised that the committee members would be involved in the Canadian talks from the beginning and would receive formal quarterly briefings as well as more frequent informal ones after talks began and that the Administration would present views on all trade bills pending in Congress and “engage in thorough and meaningful discussions with the Finance Committee relating to all pending legislation.” See *Administration Wins Narrow Victory to Gain Fast-Track Authority for Free Trade Talks*, 3 INT’L TRADE REP. (BNA) 565 (Apr. 30, 1986); *Senate-White House Trade Policy Quarrel Endangers Talks on Free Trade Agreement*, 3 INT’L TRADE REP. (BNA) 530 (Apr. 23, 1986) (reporting that the White House had promised to provide the Senate with a list of specific negotiating objectives for the talks).

76. As noted above, *Chadha* declared a one-house veto unconstitutional because it violates both the bicameralism and the presentment requirements of Article I, Section 7 of the Constitution. See *supra* notes 16 & 52 and accompanying text. A committee veto, which is a resolution of a single committee of Congress that blocks or overrides otherwise completed executive action, is *a fortiori* unconstitutional under *Chadha* because it does not even satisfy the requirement of unicameralism.

77. The provision does not contravene the letter of *Chadha* because the active disapproval of the House Ways and Means Committee or the Senate Finance Committee would not invariably kill a negotiated FTA or proposed implementing legislation, but would merely switch them from expedited to unexpedited legislative approval procedures. See *supra* note 62. Because the committee’s disapproval governs only what internal House and Senate rules will apply to a legislative proposal, it would not be “legislative” in *Chadha*’s sense of “altering the rights, duties, and relations of persons . . . outside the Legislative Branch.” 462 U.S. at 952 (emphasis added); see *supra* text accompanying note 51.

pass a resolution that practically eliminates the chances that completed executive action (a negotiated agreement) will become law. As was the case with the committee veto, committee members need not give reasons why they vote to disapprove negotiations; they may vote to disapprove out of a desire to hold a particular agreement "hostage" or simply to send the President a message that Congress desires a greater voice in trade policy.<sup>78</sup>

While formal committee disapproval would not kill an agreement as a matter of law,<sup>79</sup> the U.S.-Canadian FTA ex-

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78. Such concerns plainly motivated some of the votes against the Canadian free trade negotiations. See, e.g., Farnsworth, *supra* note 73, at D18, col. 2 (some votes were prompted "by the Administration's refusal to support anything but very minor trade legislation this year"); Shribman & Pine, *supra* note 73, at 5, col. 3 (quoting Senator Packwood) ("There's no animosity about Canada at all. . . . Canada is the unfortunate victim in a dispute over trade views, all of which are unrelated to Canada."); Farnsworth, *supra* note 72, at D5, col. 4 (quoting statement of Senator Mitchell) ("The irony is that the committee is not angry at the Canadians, but rather at the Administration, which refuses to enforce U.S. trade laws.").

79. Formal disapproval would "derail" any agreement that subsequently emerged from negotiations from the fast track and render it vulnerable to amendment, delay, and filibuster. Yet even if one committee or the other voted to disapprove negotiation, the President would retain three options. First, he could resubmit the agreement and implementing legislation for congressional approval under normal unexpedited congressional procedures. See *supra* notes 32-33 & 62. As the United States-Canada Automotive Products Agreement demonstrated, it is possible for negotiated agreements and accompanying legislation to be approved after negotiations on an unexpedited basis. See *supra* note 27. Second, the President could resubmit the package after negotiations, but request that it be given ad hoc "fast-track" consideration, notwithstanding the prior committee disapproval. The President could claim that the vote of a single committee could in no way bind a later Congress to deny a negotiated FTA package fast-track consideration, particularly if the agreement were particularly important. Cf. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191-94 (1972) (decisions of one Congress cannot bind a subsequent Congress).

Third and most risky, the President could accept the agreement on behalf of the United States on his own constitutional authority, as occurred during the Kennedy Round with the Antidumping Code. See *supra* text accompanying note 23. Congress would likely protest that the President lacked inherent constitutional authority to accept any aspect of an agreement providing for the modification or elimination of tariff barriers, which arguably fall within Congress' exclusive constitutional authority to "lay and collect Taxes, Duties, Imposts and Excises." See *supra* text accompanying notes 8 & 20. Alternatively, Congress could assert that the Trade

perience strongly suggests that committee disapproval would doom most agreements politically. By denying a potential trading partner assurance that any subsequently negotiated agreement would ever receive prompt legislative approval, a committee disapproval resolution would likely deter such a nation from proceeding with the negotiations at all.<sup>80</sup>

It is of course ironic that the Executive Branch's "victory" in *Chadha* should stimulate congressional imposition of a device that guarantees more, rather than less, congressional input into the trade agreement negotiating process. Yet it is simply one measure of *Chadha's* formalism that it holds legislative vetoes unconstitutional, while still permit-

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and Tariff Act of 1984 preempted the field, thus obliging the President to comply with its terms. *Cf.* *Consumers Union v. Kissinger*, 506 F.2d 136, 146 (D.C. Cir. 1974) (Leventhal, J. dissenting), *cert. denied*, 421 U.S. 1004 (1975); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953) (discussed *supra* note 21), *aff'd on other grounds*, 348 U.S. 296 (1955). In response, the President might claim that the statutory language of Section 102(b)(1) of the 1974 Act, 19 U.S.C. § 2112(b)(1), which authorizes him to "enter into trade agreements . . . providing for the harmonization, reduction, or elimination of . . . barriers (or other distortions)" of international trade, is broad enough to encompass the tariff, as well as nontariff, liberalizing aspects of the proposed agreement. He could also claim that his inherent constitutional authority permits him to accept at least those aspects of the negotiated package relating to *non-tariff* barriers without congressional approval of any kind. *See supra* text accompanying note 23.

If the two branches cannot resolve the dispute between themselves, it remains unclear whether the contested constitutional issues could be judicially resolved, in light of the numerous judicial doctrines that would potentially bar U.S. courts from reaching the merits: ripeness, the political question doctrine, and, if the action were challenged by congressmen plaintiffs, the doctrine of congressional standing. *See generally* *Goldwater v. Carter*, 444 U.S. 996 (1979) (raising these issues); Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597 (1976); McGowan, *Congressmen in Court: The New Plaintiffs*, 15 *GA. L. REV.* 241 (1981).

80. *See* Farnsworth, *supra* note 73, at D18, col. 1 (reporting comments of Canadian officials "that they would back away from the negotiations without the [fast-track] authority"); Shribman & Pine, *supra* note 73, at 5, col. 2 ("Ottawa had warned it wouldn't negotiate unless it had . . . assurances" of fast-track approval); Martin, *Free Trade: Doubts Grow in Canada*, *N.Y. Times*, Apr. 21, 1986, at D1, col. 4 (describing how Senate Finance Committee opposition has dampened Canadian enthusiasm for a free trade pact); Farnsworth, *supra* note 72, at D5, col. 5 (reporting Canadian Ambassador's comment that Finance Committee disapproval would set back U.S.-Canadian relations by a half-century).

ting Congress to employ functional substitutes that may obstruct executive action just as effectively.<sup>81</sup> The demonstrated effectiveness of the modified fast-track procedure in assuring congressional input into the U.S.-Canadian free trade negotiations may well inspire Congress to substitute it as the new technique of choice to restrain presidential negotiating authority in other fora.

This is hardly an idle concern. Notwithstanding a noticeable lack of congressional enthusiasm,<sup>82</sup> the President is currently seeking statutory authority to engage in a new multilateral trade round before GATT.<sup>83</sup> Several of the omnibus

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81. See Spann, *Spinning the Legislative Veto*, 72 GEO. L.J. 813, 815 (1984) (pointing out the functional similarity between the role played by a "derailing resolution" under a fast-track legislative procedure and a legislative veto under an expedited legislative scheme). See generally Elliott, *supra* note 51 (criticizing the Court's opinion in *Chadha* for relying on syllogism rather than sense).

82. See *Senators on Asian Trip See Lack of Trade Progress, Say Congress Getting Impatient*, 3 INT'L TRADE REP. (BNA) 137, 138 (Jan. 22, 1986) (statement of Senator Danforth) ("All of the energy behind 'calling for' a new GATT round in the United States comes from the Administration, none of it from Congress."); *U.S. May Go Outside GATT Framework for Trade Talks if LDCs Continue to Balk, Yeutter Says*, 2 INT'L TRADE REP. (BNA) 1465, 1466 (Nov. 20, 1985) (statement of Senator Baucus) (GATT is "the gentleman's agreement to talk and talk"); *id.* (statement of Senator Moynihan) ("the GATT arrangement may be breaking down and the United States might have to consider a new regime in international trade altogether.").

83. The United States has called for a new MTN round under the auspices of GATT, and a Preparatory Committee has met in Geneva to plan its agenda. That committee's program was placed before a meeting of the GATT ministers in Punta del Este, Uruguay, in September 1986, which signalled the formal opening of the new round. The United States hopes that the "Uruguay Round" of negotiations will extend GATT to trade in services, complete work on a safeguards code, create a stiffer dispute-settlement code, protect intellectual property rights through anti-counterfeit trade provisions, and lay down clearer rules regarding export subsidies, agricultural trade, natural resource pricing, health and safety standards, and trade-related foreign investment performance requirements. See *U.S. Drops Insistence that High Technology Be Separate Item on Agenda of New MTN Round*, 3 INT'L TRADE REP. (BNA) 379 (Mar. 19, 1986); *President Reagan's Remarks on Major Trade Policy Initiatives and Accompanying White House Statement and Fact Sheet*, 2 INT'L TRADE REP. (BNA) 1210-19 (Sept. 25, 1985). The so-called "Gang of Ten" developing nations—Brazil, India, Yugoslavia, Egypt, Argentina, Cuba, Nicaragua, Nigeria, Peru, and Tanzania—have just as vigorously opposed the extension of GATT into those areas, especially services, on the ground that the industrialized countries should do more to eliminate their own market barriers to developing country ex-

trade bills proposed to the 99th Congress would have explicitly granted the President authority to negotiate a new round, but would have subjected that authority to prenegotiation committee disapproval under modified fast-track procedures identical to those contained in the 1984 Act.<sup>84</sup> Should any of those provisions become law, the specter of negotiating credibility that plagued the Kennedy Round might once again rear its head,<sup>85</sup> potentially threatening not only the success of future bilateral FTAs with nations like Canada, but also of United States' participation in the up-

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ports before extending GATT into new areas. See *Dunkel Prepared to Issue Report on His Own, but Hopes Other GATT Members Will Support It*, 3 INT'L TRADE REP. (BNA) 154, 154 (Jan. 29, 1986).

84. See Danforth Bill, *supra* note 56, § 401, 131 CONG. REC. at S15,966; Bentsen Bill, *supra* note 56, § 7, 131 CONG. REC. at S15,112; House Discussion Draft, *supra* note 56, § 128.

85. See *supra* text accompanying note 26. On May 22, 1986, the House overwhelmingly passed H.R. 4800, an omnibus trade bill that consolidated nine trade bills previously adopted by six different House committees. See *supra* note 56. That bill addresses such diverse subjects as unfair trade and labor practices, telecommunications, natural resource subsidies, intellectual property, import relief, monetary reform, and third world debt and trade. If that bill were to be enacted into law, it would initiate a new, sixth regime of U.S. trade policymaking in which Congress and private parties would exert even greater influence than they currently do. Cf. H.R. 4800, Parts I & II, *supra* note 56; see text accompanying notes 5-98. Key provisions of the bill would further limit executive discretion and increase private sector involvement in trade policymaking by transferring decision-making authority under certain statutes from the President to the USTR, requiring mandatory presidential retaliation and negotiation in certain cases, defining new unfair trade practices, and accelerating existing timetables for presidential investigation of and action against unfair trade practice.

Not surprisingly, President Reagan has assailed the bill as "kamikaze legislation," an "A-1 candidate for veto," "openly and rankly political," and likely to "plunge the world into a trade war." See *House Approves Omnibus Trade Bill by Wide Margin Despite Threat of Presidential Veto*, 3 INT'L TRADE REP. (BNA) 706 (May 28, 1986); *President Calls House Omnibus Trade Bill 'Kamikaze Legislation,' Issues Veto Warning*, 3 INT'L TRADE REP. (BNA) 737 (June 4, 1986). At this writing, the Senate is working on its own, more moderate omnibus trade package, but the current legislative session will most likely expire before the two houses can reach a compromise. See Stokes, *Risky Trade Strategy*, NAT'L J., June 28, 1986, at 1590. Even if no compromise is reached in 1986, however, Congress will likely produce a new omnibus trade bill sometime before the end of 1987, in order to renew the President's expiring negotiating authority with respect to nontariff barriers. See *supra* note 37.

coming multilateral trade round.<sup>86</sup>

### B. *Import Relief*

The trend toward increased congressional involvement in the trade negotiation process has been matched by a parallel trend regarding import relief.<sup>87</sup> At this writing, protec-

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86. Cf. Bradley, *For Trade Talks with Canada*, N.Y. Times, Apr. 22, 1986, at A31, col. 2 (op-ed article by Senate Finance Committee member) (arguing that "a 'no' vote [by the Committee on the United States-Canada free trade pact] would damage the prospects for a new round of multilateral trade negotiations").

87. Two recent incidents arising out of the Canadian FTA episode illustrate this trend. In exchange for key Senate votes to avert committee disapproval of the FTA, President Reagan reportedly agreed to take specific action against Canada over alleged softwood lumber subsidies. See *supra* note 74; see also *No Deal Between President Reagan, Congress on Softwood Lumber*, *Canadian Official Says*, 3 INT'L TRADE REP. (BNA) 768 (June 11, 1986) (reporting remarks of Leonard Santos, International Trade Counsel of the Senate Finance Committee, that the President had made a "clear deal" with key Senators to take some action against Canadian products in exchange for their votes against disapproval of the FTA). Accordingly, the U.S. softwood lumber industry filed a countervailing duty petition alleging that Canada's administrative pricing system for collecting stumpage fees constituted a subsidy that should be subject to a U.S. countervailing duty. That petition not only triggered a formal Canadian protest before GATT, see *Canadian Government Files Protest with GATT Against U.S Lumber Countervailing Petition*, 3 INT'L TRADE REP. (BNA) 712, 713 (May 28, 1986), but has also led to a preliminary determination by the ITC that the Canadian practice has threatened or caused material injury to the U.S. lumber industry. See *International Trade Commission Votes 5-0 to Continue Canadian Lumber Investigation*, 3 INT'L TRADE REP. (BNA) 855 (July 2, 1986). Under the complex statutory sequence that governs U.S. countervailing duty investigations, the investigation now goes to the Commerce Department for a preliminary subsidy determination. See generally Restani, *supra* note 40, at 1094-98. Under the rigid statutory deadlines for countervailing duty actions, the action could trigger final imposition of countervailing duties on Canadian lumber imports in early 1987, at precisely the moment when FTA talks would be fully underway.

A second controversy grew out of private U.S. parties' invocation against Canadian importers of the escape clause, another judicial remedy provided by the 1974 Trade Act. See *supra* note 15. Following an ITC recommendation, President Reagan announced shortly before the statutory deadline for presidential action under the escape clause that he would impose stiff tariffs on Canadian "shingles and shakes," products commonly used in house siding. See *Divided ITC Recommends Tariff Increase, TAA Relief for Wood Shakes and Shingles Industry*, 3 INT'L TRADE REP. (BNA) 375 (Mar. 19, 1986); *Makers of Red Cedar Shakes, Shingles Get Import Protection*,

tionist legislative activity in Congress is proceeding at an astonishing rate.<sup>88</sup> The appeal of the trade issue across party lines has engendered powerful coalitions of unlikely congressional bedfellows urging the President to adopt measures to protect domestic industry.<sup>89</sup> Like the Senate Finance Committee's actions regarding the U.S.-Canadian FTA, these bills are symptomatic of widespread congressional dissatisfaction with the Reagan Administration's substantive trade policies.<sup>90</sup>

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Wall St. J., May 23, 1986, at 6, col. 4. That action, taken without prior consultations with the Mulroney Government just one day after formal FTA talks began, triggered a firestorm of Canadian protest and provoked the imposition of Canadian duties on a range of U.S. goods. See Urquhart & Berkowitz, *Canada Weighs Steps to Counter U.S. Trade Move*, Wall St. J., May 27, 1986, at 3, col. 1; Urquhart & Berkowitz, *Canada Imposes Levies to Check New U.S. Tariff*, Wall St. J., June 3, 1986 at 18, col. 1.

As these two incidents graphically illustrate, Congress has asserted considerable *indirect* influence over the trade negotiation process by creating statutory import relief remedies that empower private domestic parties to force Executive Branch action against foreign governments. Cf. *supra* text accompanying notes 40-43. As these incidents reveal, statutory import deadlines imposed by Congress have dramatically limited the President's flexibility in resolving particular trade disputes, while congressionally created import remedies have enabled even relatively insignificant industries to exert a grossly disproportionate influence over intergovernmental negotiations. See *Chop, Chop*, *ECONOMIST*, June 7, 1986, at 83 (pointing out that the U.S. cedar shingles and shakes industry has dramatically affected the atmosphere of the FTA talks, even though that industry currently employs only 1650 people). For further discussion of these incidents, see generally Koh, *supra* note 67.

88. About 180 bills under consideration in the House and 300 before the Senate in the 99th Congress urged adoption of protectionist measures. Lodha, *U.S. Trade Deficit Spells Danger for Economy*, *New Haven Register*, Mar. 6, 1986, at 17, col. 1. For a listing and brief description of the most significant, see Broad, *Less Restrictive Trade Legislation Is Expected This Year After Reagan Textile Veto*, 3 *INT'L TRADE REP.* (BNA) 69 (Jan. 8, 1986).

89. See, e.g., Cooper & Stokes, *Trade May Be a Tricky Issue . . . for GOP and Democrats in 1986*, *NAT'L J.*, Nov. 9, 1985, at 2526, 2527 (quoting Robert G. Beckel, former campaign manager for Walter F. Mondale) ("On the trade issue, [Sen. Jeremiah] Denton in Alabama and [Sen. Mack] Mattingly in Georgia will have to leave Reagan.").

90. See *supra* text accompanying notes 71-75 & 78. Congress has begun to express its dissatisfaction with the President's import relief policies in curious new ways. One of these includes a new kind of legislative "veto," whereby the two houses pass a resolution that both fully expect to be vetoed by the President. The best recent example of this new phenomenon came in December 1985, when both houses passed and sent to the Presi-



In addition to the modified fast-track procedure, numerous provisions of the Trade and Tariff Act of 1984 reflected this dissatisfaction by specifically limiting Presidential discretion to deny import relief to affected industries.<sup>91</sup> If enacted, the various omnibus legislation packages currently being considered in Congress would dramatically accelerate this trend.<sup>92</sup>

Regardless of whether any of these bills ultimately become law, their impact has already been felt. In recent months, the President has engaged in almost unprecedented unilateral trade activity. He has imposed punitive trade sanc-

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dent a protectionist bill to restrict imports of textiles, apparel, and shoes. As the sponsors expected, the President ultimately vetoed the bill and the attempted legislative override of that veto proved unsuccessful. Nevertheless, the goal of its supporters was never to make law. Instead, as one cosponsor pointed out, Congress' aim was to send the President a message that he should take a tougher stance on trade. See Feuerbringer, *Anti-Import Bill Sent to President; Veto Expected*, N.Y. Times, Dec. 4, 1985, at D5, col. 4 (quoting statement of Representative Matsui) ("You don't want this thing to become law. . . . It is really just to send a signal to both the President and to our foreign competition.").

91. These include amended escape clause provisions, *see, e.g.*, 1984 Act, § 249 (amending 19 U.S.C. § 2251(b)); elaborate amendments to the antidumping and countervailing duty provisions that widened standing and improved the position of domestic industry petitioners, *id.* §§ 601-625 (amending 19 U.S.C. §§ 1671-1677); and additional consultation and reporting requirements, *id.* §§ 303, 906, 19 U.S.C. §§ 2241, 2805 (Supp. III 1985). See generally Price, *supra* note 59 (describing these amendments).

92. See *supra* note 85. For example, the Danforth Bill, upon which any Senate bill would almost certainly be based, *see supra* note 56, would require the President to initiate more actions under Section 301 of the 1974 Trade Act, 19 U.S.C. § 2411, establish mandatory deadlines for retaliation against uncorrected violations, accelerate schedules for administrative action, require the President to grant certain relief equivalent to that recommended by the International Trade Commission unless Congress recommended lesser relief, require the President to coordinate monetary and fiscal policies with other nations, set deadlines for imposing trade restrictions in the name of national security, and substitute the USTR (which Congress believes is more responsive to Congress than the President) for the President as the administrative authority for certain import relief laws. Similarly, H.R. 4800, *see supra* note 56, which has already passed the House, would transfer authority to administer escape clause actions from the President to the USTR, make Section 301 actions mandatory for foreign trade agreement violations, require the USTR to self-initiate certain actions, reduce time limits for action, and impose time deadlines for national security relief.

tions on South Africa, Libya, and Nicaragua,<sup>93</sup> initiated trade investigations under Section 301 of the 1974 Trade Act against South Korea, Brazil, and Japan,<sup>94</sup> encouraged "voluntary" Japanese export restraints,<sup>95</sup> and intervened in

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93. Each of these has been effected by an Executive Order issued after the declaration of a national emergency under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982). *See, e.g.*, Exec. Order No. 12,532, 3 C.F.R. 387 (Supp. 1985) (banning exports of computers, nuclear goods and technology, and certain loans to South Africa, and barring imports into the United States of South African arms, ammunition, military vehicles, or, subject to consultation with the GATT parties, Krugerrands).

94. Since September 1985, President Reagan has initiated numerous actions under section 301 of the 1974 Trade Act, 19 U.S.C. § 2411. In late 1985, § 301 actions were commenced against three U.S. trading partners: two against Korea for its intellectual property rights protection laws and restrictive fire and life insurance statutes; one against Brazil for its computer imports policy; and one against Japan for its prohibitive tariffs on U.S. tobacco products. *See Reagan Administration Launches New Actions Against Unfair Practices at GATT Under § 301*, 2 INT'L TRADE REP. (BNA) 1289, 1289 (Oct. 16, 1985); *Tokyo Says Unfair Trade Charges Groundless but Moves to Address Urgency of Conflict*, 2 INT'L TRADE REP. (BNA) 1105, 1105 (Sept. 11, 1985). These four section 301 actions were unprecedented because the President initiated them without instigation by a prior private petitioner. In December 1985, the Commerce Department initiated an antidumping investigation of 256K dynamic random access memory components from Japan at the recommendation of President Reagan's new trade strike force. *See Commerce Self-Initiates Investigation on 256K Chips, Finds Dumping Margins in 64K Chip Case*, 2 INT'L TRADE REP. (BNA) 1543 (Dec. 11, 1985). Moreover, in March 1986, the White House announced that the United States would retaliate against the European Economic Community for anticipated losses of agricultural exports to Europe arising from the Community's enlargement of its membership to include Spain and Portugal. *See White House to Pursue Retaliatory Action Against EC over Spain, Portugal Accession*, 3 INT'L TRADE REP. (BNA) 426 (Apr. 2, 1986). Recent unilateral trade actions by the United States also include the first self-initiated investigation under section 307 of the Trade Act of 1984, 19 U.S.C. § 2114d (Supp. III 1985), against Taiwanese export performance requirements in the automotive sector, *see U.S. Targets Toyota and Taiwan for First Export Performance Requirement Complaint*, 3 INT'L TRADE REP. (BNA) 427 (Apr. 2, 1986), and a national security action on behalf of domestic machine tool builders under section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1982), against Taiwan, West Germany, Japan, and Switzerland. *See President Says U.S. Will Seek Machine Tool Restraints, National Security Ruling Delayed*, 3 INT'L TRADE REP. (BNA) 711 (MAY 28, 1986).

95. In May 1981, to forestall protectionist legislation in Congress and with the promise of antitrust immunity from the Justice Department, the Japanese Government agreed "voluntarily" to restrict the number of

world currency markets to bring down the value of the dollar.<sup>96</sup> Each of these “unilateral” presidential actions may be explained as a preemptive executive strike prompted by imminent congressional action that was even more drastic or protectionist.<sup>97</sup> Indeed, the Senate Finance Committee’s action regarding the U.S.-Canadian FTA itself resulted largely from congressional frustration caused by the President’s refusal to cooperate on omnibus protectionist legislation.<sup>98</sup> Regardless of how the legislative scenario ultimately plays out, the broader trend is clear: in the post-*Chadha* U.S. trade policymaking regime, Congress will play its most active role in trade management since the Smoot-Hawley regime.

### III. TOWARD A BROADER THEORY OF U.S. TRADE POLICYMAKING

What are the broader implications of rising congressional influence for the substance of U.S. trade policy? Since

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automobiles its manufacturers export to the United States. For an analysis of the domestic and international legality of those voluntary restraints, see generally Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Trade Principles of United States Antitrust Laws*, 27 HARV. INT’L L.J. 99 (1986).

96. See Destler, *Protecting Congress or Protecting Trade?*, 62 FOR. POL’Y 96, 105 (1986).

97. See Cooper & Stokes, *Buying Time on Trade*, NAT’L J., Nov. 9, 1985, at 2524, 2528. Indeed, the President’s actions on Canadian shingles and shakes, see *supra* note 87, can best be understood as a preemptive executive action prompted by congressional pressure. See Boyd, *Bush Urges Restraint by Canada*, N.Y. Times, June 13, 1986, at D4, col. 4 (statement of Vice President) (“Frankly, we are trying as hard as we can to derail the protectionist juggernaut now sweeping through the United States Congress. . . . That’s one more reason why our recent actions have been necessary. If we don’t demonstrate good faith in enforcing our existing trade laws, we risk inviting sterner medicine for Congress.”).

98. See *supra* note 78 and accompanying text; see also *Canada Talks in Doubt as Showdown Nears*, New Haven Register, Apr. 23, 1986, at 16, cols. 1-2 (statement of Senator Danforth explaining his intent to vote against the U.S.-Canadian FTA) (“[Administration officials] take offense at the Congress trying to assert some constitutional responsibility [for trade] and . . . I can’t go along with that when we’re little more than the dirt under their feet and we have no role.”); Auerbach, *supra* note 71, at G2, cols. 4-5 (quoting statement of Senator Danforth) (“There is resentment on the committee on the way we have been treated on the trade issue. The administration has stiffered us all year long. . . . The president is stonewalling us.”).

World War II, U.S. trade policy has been characterized by two overriding legal commitments: a *substantive* commitment to free nondiscriminatory trade, whereby the United States has generally obeyed a legal obligation to offer trade concessions to foreign countries on a most-favored-nation basis, and a *procedural* commitment to multilateralism as the appropriate framework within which the negotiation and resolution of trade disputes should take place. Both the substantive and the procedural commitments are embodied in the United States' adherence to GATT.

In recent months, however, both of these commitments have been severely tested. The rising tide of U.S. domestic protectionism,<sup>99</sup> spurred by an unprecedented trade deficit,<sup>100</sup> has placed intense pressure upon the Reagan Administration's commitment to free trade as the substantive core of U.S. trade policy. This protectionist pressure has been matched by an apparent softening of the United States' *procedural* commitment to multilateral trade liberalization.<sup>101</sup> In the past two years, the world has witnessed an array of unilateral and bilateral U.S. trade initiatives: the imposition of numerous unilateral trade sanctions,<sup>102</sup> the Caribbean Basin

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99. See *supra* note 88.

100. Projecting from Commerce Department figures for the first half of 1986, the United States' annual external trade deficit would exceed \$170 billion, the largest trade deficit in history. See Hershey, *U.S. Trade Deficit Continues to Soar at a Record Pace*, N.Y. Times, July 31, 1986, at A1, col. 6.

101. See United States Trade Representative, *Administration Statement on International Trade Policy*, Sept. 23, 1985, reprinted in PRACTISING LAW INSTITUTE, UNITED STATES IMPORT RELIEF LAWS: CURRENT DEVELOPMENTS IN LAW AND POLICY 339, 350-51 (1985):

While our highest priority remains the improvement of the world trading system through a new round of multilateral trade negotiations, the United States is interested in the possibility of achieving further liberalization of trade and investment through the negotiation of bilateral free-trade arrangements such as the one recently concluded with Israel. We believe that, at times, such agreements could complement our multilateral efforts and facilitate a higher degree of liberalization, mutually beneficial to both parties, than would be possible within the multilateral context. . . . Finally, the prospects for significant progress in a new round of multilateral trade negotiations will also influence our deliberations on such bilateral initiatives.

102. See *supra* notes 93-97 and accompanying text.

Initiative,<sup>103</sup> the U.S.-Israeli FTA,<sup>104</sup> free trade feelers toward Canada, the Association of South East Asian Nations, and Egypt,<sup>105</sup> the ongoing MOSS (market-oriented, sector-specific) trade liberalization talks with Japan,<sup>106</sup> and the ongoing Bilateral Investment Treaty program.<sup>107</sup>

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103. President Reagan signed the Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701-2706 (Supp. I 1983) (also called the Caribbean Basin Initiative or CBI) on August 5, 1983. The CBI, sometimes labelled "the Marshall Plan for the Caribbean Basin," constitutes a three-pronged trade, tax, and aid package whereby the United States offers eligible exports from beneficiary nations preferential tariff treatment in the form of duty-free entry into the United States, *see id.*, permits U.S. businesses to deduct from federal income taxes expenses incurred while attending conferences in the Caribbean Basin, *see* 26 U.S.C. § 274(h), and provides foreign aid to the countries in the region, *see* General Supplemental Appropriations Act of 1982, Pub. L. No. 97-257, tit. I, ch. VI, 96 Stat. 818, 833 (1983).

104. *See supra* note 57 and accompanying text.

105. Last year, the U.S. Government proposed Free Trade Area negotiations to Egypt and the Association of South East Asian Nations, whose members include Singapore, Hong Kong, Malaysia, Thailand, Indonesia, and Brunei. *See ASEAN Negotiates with U.S. on Free Trade Zone Accord*, Central News Agency, June 6, 1985 (available on NEXIS). The USTR has not pursued those initiatives in recent months, however, due to the pressure placed on his negotiating resources by statutory budget cuts. *See Exchange Rates, Unfair Practices, New Round of GATT Talks Among Top Issues, Yeutter Says*, 3 INT'L TRADE REP. (BNA) 266, 266 (Feb. 26, 1986).

106. At the MOSS talks, the United States and Japan have been negotiating on improving access to the Japanese market with respect to legal services, pharmaceuticals, medical equipment, radio and telecommunications equipment, and forestry. The talks have been sufficiently productive that a new round is now being contemplated that would include chemicals, processed food, aluminum, supercomputers, and automotive parts. *See Administration Choosing Candidates for New Round of MOSS Talks, Deputy USTR Smith Says*, 3 INT'L TRADE REP. (BNA) 156, 156 (Jan. 29, 1986).

107. Since late 1983, the United States has entered market-opening discussion with advanced developing countries (for example, Taiwan and Korea) and has instigated Bilateral Investment Treaty (hereinafter BIT) negotiations with developing countries that would provide for national or most-favored-nation treatment of investors in both countries, protection against expropriation, the right of free transfer of capital and profits, the arbitration of investment disputes, and the protection of U.S. investors' rights in intellectual property. Since the BIT program began, the U.S. Government has signed ten BITs, with Egypt, Panama, Zaire, Haiti, Senegal, Morocco, Turkey, Cameroon, Bangladesh, and, most recently, Grenada. *See Also in the News*, 3 INT'L TRADE REP. (BNA) 388, 388 (Mar. 19, 1986). For a description of the provisions of the Model BIT, *see* generally Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolu-*

It now appears that, at least in international trade matters, the Reagan Administration has softened its *procedural* commitment to multilateralism and is wavering, at least rhetorically, on its substantive commitment to free trade.<sup>108</sup> The question then becomes: did the Reagan Administration jump from these commitments or was it pushed? The analysis above convinces me that the Administration has been pushed at least as hard as it has jumped and that the pushing has come from both within and without—domestically from Congress and externally from political and economic pressures in the international arena.

My account of the historical tug-of-war between Congress and the President over the control of international trade matters suggests that growing domestic pressures to enact protectionist legislation have recently spurred Congress to take an increasingly active role in U.S. trade policymaking. Every major piece of omnibus trade legislation currently being considered by Congress was initiated by Congress, rather than by the President.<sup>109</sup> And, as I have argued, the recent flurry of trade actions by the Executive Branch has resulted less from presidential initiative than from the President's preemption that he must react to or preempt even more drastic congressional activity.<sup>110</sup>

This pattern of "unilateral" presidential trade actions in response to congressional initiatives has been paralleled by a series of presidential actions responding to *external* initiatives. The recent responsiveness of the United States to requests from trading partners for bilateral or multilateral trade liberalization talks, reactions against foreign protectionist conduct, and efforts to stabilize or manage the standing of the dollar in international currency markets are not easily explained *solely* as reactions to domestic congressional

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*tion and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L L. & POL. 1 (1983).

108. This pressure has been manifested in the recent shift in Reagan Administration rhetorical emphasis from "free" to "fair" trade. See generally Kleinfeld, *A Critical Evaluation of U.S. Fair Trade Policy*, 18 VAND. J. TRANSNAT'L L. 515 (1985).

109. See *supra* note 56. Indeed, Congress' frustration with the President has derived in large part from his adamant refusal to back any of these trade reform packages. Cf. *supra* notes 97-98.

110. See *supra* note 97.

pressures.<sup>111</sup>

To accept that the President's recent role in the trade area has been largely reactive forces reassessment of casual assumptions that unilateral presidential trade initiatives necessarily reflect imperial presidential power.<sup>112</sup> Moreover, such a conclusion strongly suggests that the particular constitutional arrangement for the management of the United States' international trade that seemed appropriate when the United States was committed to an international regime of multilateral decisionmaking becomes outmoded and obsolete once that regime has evolved into one of *de facto* unilateralism, bilateralism, and plurilateralism.

Far from being an isolated phenomenon, the United States' procedural flight from multilateralism in trade matters is symptomatic of a pervasive loss of faith at all levels of the U.S. Government in multilateralism as the principal procedural mechanism for international conciliation and dispute-resolution. The United States has recently exhibited this broader loss of faith in multilateralism not only through its querulous conduct toward GATT, but more concretely in

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111. See *supra* notes 93-97 & 102-07 and accompanying text.

112. The hostage crisis in Iran perhaps best illustrates this point. During the 444 days that U.S. hostages were held captive in Tehran, President Carter engaged in what was undoubtedly the most dramatic exercise of the President's peacetime foreign affairs power in U.S. history: he declared a national emergency, imposed a trade embargo and an extraterritorial assets freeze, cut off lines of communication and embargoed travel to Iran, sued Iran in the International Court of Justice, expelled Iran's diplomats, forced Iranian students to report to local immigration offices for visa checks, attempted to rescue the hostages by military force, and concluded an executive agreement that suspended all private property claims against Iran, while sending U.S. commercial claimants to arbitration in the Hague before the Iran-U.S. Claims Tribunal. See generally W. CHRISTOPHER, *AMERICAN HOSTAGES IN IRAN* (1985); 4A Op. Off. Legal Counsel 71-333 (1980) (describing each of these actions and reproducing the legal opinions stating the international and domestic legal arguments asserted in support of each action). Many of these actions were sustained in U.S. courts. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Some, like the extraterritorial assets freeze, were condemned as violative of international law. See generally Edwards, *Extraterritorial Application of the U.S.-Iranian Assets Control Regulations*, 75 AM. J. INT'L L. 870 (1981). Nevertheless, on the day President Carter left office, he was widely viewed not as an "Imperial President," but rather, as the weakest, most reactive U.S. President in recent memory.

its recent disengagements from UNESCO<sup>113</sup> and the International Court of Justice,<sup>114</sup> two political institutions that the United States helped to create and nurture in the post-war era.

One question frequently asked about these recent disengagements, as well as recent unilateral uses of military force in Grenada, Libya, and Nicaragua, is whether they illustrate the Reagan Administration's abandonment of the international rule of law.<sup>115</sup> With respect to international trade, this question, in my view, breaks into two. First, has the United States actually lost faith in the rule of international law, or has it lost faith in the *particular* rules of law that have governed international economic relations in the post-Bretton Woods period? And second, to what extent does this loss of faith represent a U.S. *government-wide* loss of faith in the international trade system or merely a reallocation of domestic decisionmaking authority over trade management toward Congress, a body that has traditionally been skeptical of that system?

The answers to these questions carry great significance both for the upcoming MTN round and for the development of domestic import relief policy. The new trade round will

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113. The United States notified the Director General of the United Nations Educational Scientific and Cultural Organization of its intent to withdraw on December 28, 1983, and formally withdrew on December 31, 1984, but stated that "[w]hen UNESCO returns to its original mission and principles, we will rejoin UNESCO and participate in the full range of its multilateral scientific programs." 21 WEEKLY COMP. PRES. DOC. 338, 338 (Mar. 20, 1985); see also *U.S. Notifies UNESCO of Intent to Withdraw*, U.S. Dep't of State Bull., Feb. 1984, at 41-42 (letters of withdrawal).

114. On January 18, 1985, following an adverse ruling on jurisdiction and admissibility, the United States notified the International Court of Justice of its withdrawal from the proceedings in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 1984 I.C.J. 392 (Judgment of Nov. 26, 1984). See U.S. Dep't of State Bull., Mar. 1985, at 64. On instruction from President Reagan, Secretary of State George P. Shultz notified United Nations Secretary-General Javier Pérez de Cuéllar by a letter dated October 7, 1985, that the United States would terminate its acceptance of the compulsory jurisdiction of the International Court of Justice in six months from October 7, 1985. See U.S. Dep't of State File No. P85 0189-0461, reprinted in 24 I.L.M. 1742 (1985).

115. See, e.g., Boyle, *International Lawlessness in Grenada*, INT'L PRAC. NOTEBOOK, Jan. 1984, at 25; Gill, *The United States and the Rule of Law*, INT'L PRAC. NOTEBOOK, July 1985, at 17.



transpire not only amidst growing domestic strife between the President and Congress over trade policy, but also amidst congressional questioning of the appropriateness of GATT as the forum in which to conduct international trade discussions.<sup>116</sup> Historically, the President has exhibited a far greater commitment than Congress both to free trade as a substantive norm of international conduct and to multilateralism as a procedural norm.<sup>117</sup> Much of the United States' historical willingness to seek trade liberalization measures within the framework of GATT, therefore, can be attributed to continued presidential domination of international trade policymaking.

If, as I have argued, the balance of power between Congress and the President in the management of international trade has shifted in favor of Congress, it seems logical that the United States' substantive commitment to free trade and procedural commitment to multilateral decisionmaking should now be challenged by a congressional drive toward both protectionism and bilateral and unilateral action. Whether that drive will succeed depends upon both domestic and international factors: the relative priority given trade matters on the congressional election year agenda vis-à-vis other pressing domestic and foreign policy issues, the extent to which the President continues successfully to avert protectionist pressures by preemptive unilateral trade actions, the further trade initiatives by our trading partners, and perhaps most important, the international standing of the dollar.<sup>118</sup>

It should be clear by now that I believe that international and domestic legal structures are inextricably intermeshed. In my view, one question that permeates all of contemporary U.S. foreign policy is whether particular domestic legal regimes for the management of foreign affairs, which evolved in response to particular post-war international legal structures, have either adopted by evolution or become outmoded as those international legal structures be-

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116. *See supra* note 82.

117. The Executive Branch has served as the principal force spurring U.S. participation in each of the multilateral GATT rounds. *See supra* note 17 and accompanying text.

118. *See generally* Kubarych, *Trade Policy and the Dollar*, 18 N.Y.U. J. INT'L L. & POL. 1113 (1986).

gin to change.<sup>119</sup> Surrounding this question are four others, which I believe may appropriately asked with regard to *all* of the Reagan foreign policy: first, whether the United States' recent flight from the post-war ideal of multilateralism has been the symptom or the cause of a presidentially dominated foreign policy; second, to what extent sporadic *judicial* interventions into foreign policy have preserved or reallocated the delicate balance of foreign policymaking power between Congress and the President;<sup>120</sup> third, whether Congress' post-Vietnam, post-Watergate efforts to reassert influence in foreign policymaking<sup>121</sup> has spurred or slowed the United States' flight from multilateralism; and fourth and finally, whether this growing disjunction between domestic and international regimes has been responsible for the increasingly frequent United States' departures from post-war norms of positive international law embodied in the United Nations Charter and the Bretton Woods system.<sup>122</sup> To the extent

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119. Donald Elliott has recently undertaken a similar inquiry in a quite different context. *See, e.g.*, Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985); Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113 (1984).

120. *See, e.g.*, *Regan v. Wald*, 104 S. Ct. 3026 (1984); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Goldwater v. Carter*, 444 U.S. 996 (1979).

121. *See generally* THE TETHERED PRESIDENCY (T. Franck ed. 1981).

122. Once the U.S. Government concludes that particular post-war rules of international law to which it has bound itself by treaty no longer adequately protect its national interest, then a U.S. violation of international law frequently follows. As a matter of domestic law, however, all such violations may not be analytically identical. For example, the U.S. Government's current approach to its multilateral obligations may be divided into four paradigms. The first is the case where both the President and Congress agree that the United States should terminate its international obligations. The United States decision to pull out of UNESCO was one such case. *See supra* note 113. In the second case, both branches agree that the United States should live up to and even expand its multilateral obligations, as recently occurred, for example, with respect to the World Bank and the International Monetary Fund. *See generally Documentation Concerning Development and International Debt Issues*, 25 I.L.M. 412 (1986) (describing recent proposals of U.S. Treasury Secretary James A. Baker III). The two more interesting cases, in my view, are those in which the executive branch leads the flight from multilateralism and Congress acquiesces or ineffectively protests, as recently occurred during the United States' withdrawal from the compulsory jurisdiction of the International Court of Justice, *see supra* note 114, and those in which Congress leads the flight from multilateralism and the executive branch acquiesces (as is occurring, I would

that Congress' efforts to remake the trade policymaking process after *Chadha* casts light on all of these questions, those efforts may ultimately prove as important for what they reveal about the constitutional allocation of decisional authority over foreign affairs as for what they portend for the substance of future U.S. trade policy.

#### IV. CONCLUSION

In sum, any reports of the death of Congress' role in international trade policymaking after *Chadha* have been greatly exaggerated. If anything, the demise of the legislative veto has breathed new life into Congress' determination to claim an active role in trade matters and fostered a new domestic regime of trade policymaking. That regime is one which, if not congressionally dominated, is at least jointly managed between the political branches. While definitive pronouncements are premature, preliminary indications are that this new, fifth regime of U.S. trade policymaking may ultimately reflect and influence the structure of a new international trade regime, based on substantive norms of "fair" as opposed to "free" trade, and procedural norms of unilateral, bilateral, and plurilateral, rather than multilateral, trade management.

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argue, in the area of international trade). In such cases the tantalizing question arises whether, as a matter of domestic law, one political branch has greater prerogative than the other to place the United States in violation of its international obligations.

