EDITORIAL COMMENTS

THE EXCLUSIVE TREATY POWER REVISITED

It is now a half century since the last vigorous debate whether there are types of agreements that can only be concluded as treaties to which the Senate has given its advice and consent. Thus, there are only a few veterans to whom the current debate on how the Uruguay Round trade agreements are to be concluded is déjà vu all over again. In 1945 the controversy was about the power of the presidency (and a majority of both Houses) to commit the United States to long-term comprehensive agreements such as the major international organizations then being born. Of course, controversy and anger were also voiced about the President's powers to enter into agreements solely by virtue of his own constitutional powers. The story of the Roosevelt-Stalin understanding at Yalta and its supposed betrayal of Eastern Europeans to the Soviet Union was a common theme. This, it is now clear, is an analytically separate problem. The comparison of the treaty and the congressional/presidential executive agreement arises again in 1994–1995 because eminent scholars have claimed that the United States should not ratify the Uruguay Round amendments to the General Agreement on Tariffs and Trade except through a two-thirds vote of the Senate.[1] Others, particularly those more habituated to the foreign trade field, have responded vigorously.[2] In their view, approval of the agreement by a majority vote of each House is an appropriate means.

Both groups, it appears, accept the idea that the question is not justiciable. In other words, neither a private party nor a body of senators, even a majority of them, could get the courts to rule on the matter. One can derive from the language of Article I, section 8 of the Constitution some sort of differentiation between levels of agreements that might then be read into the terms of Article II. The states are forbidden to enter into "any Treaty, Alliance, or Confederation." They may, but only with "the Consent of Congress, . . . enter into [an] Agreement or Compact with another State, or with a foreign Power." This seems to suggest that there is a category of arrangement so dangerous to the unity of the country that it is absolutely barred to the states. Presumably, this would include modern military alliances such as NATO. Possibly a state could not join the European Union or North American Free Trade Agreement by itself—if any such organization (a confederation?) would accept its application. Then there are "Agreements and Compacts" that states may make with congressional assent. These must be of lesser political impact and importance. Perhaps the differentiation established in Article I can be transferred to Article II. But the language does not point to the conclusion that a trade agreement is not an "Agreement" with a capital "A" rather than a "Treaty, Alliance or Confederation." Thus, the problem is not one in which linguistic or precedential analysis can be helpful in generating bright

[1] Letter from Professor Laurence Tribe to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice (Oct. 5, 1994), *modified by* letter to Sen. George J. Mitchell et al. (Nov. 28, 1994); letter from Professor Anne-Marie Slaughter to Senator Ernest F. Hollings (Oct. 18, 1994).

[2] Letter from Professors Bruce Ackerman et al. to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice (Nov. 11, 1994).

lines. Indeed, some scholars have argued that there is no line at all, bright or foggy, and that the treaty and executive agreement are interchangeable.[3]

If so, the question of choice is a political one. Thus, one falls back on the second line of defense, the power of the Senate to defend its position that *this* document needs to be done as a treaty. The backbone of that defense has been the threat of the Senate not to give a majority vote to a resolution approving an agreement.[4] On occasion, senators have made wholesale assertions on behalf of the exclusivity of the treaty power. For example, one version of the Bricker Amendment bluntly said, "Executive agreements shall not be made in lieu of treaties." [5] Twenty years later, the Senate denied its consent to the Vienna Convention on the Law of Treaties because it wished to entrench the proposition that any document called a "treaty" in that Convention was a treaty in the sense of Article II of the Constitution.[6] More usually, the defense of the treaty power has been on a retail, case-by-case basis. Negotiators in the executive branch have taken account of this through the procedures stated since 1955 in State Department Circular 175. That document bids them first examine history to see how similar agreements were processed in the past. Extradition arrangements have always been treaties, as have income and estate tax accords. On the other hand, there is a tradition of processing trade agreements through the House-Senate route. This pays tribute to the traditional position of the House, as successor to the House of Commons, as holder of the pursestrings. To alter tariffs without participation by the House would flout that tradition. It might also be futile since it is difficult, if not impossible, to make trade agreements self-executing. Nothing is gained by routing an agreement once over a two-thirds Senate hurdle and then again through both Houses for a vote on implementing legislation. Nothing, that is, unless one wants to make approval of the agreement as difficult as possible because one disapproves of it as a matter of substance.[7]

One should be cautious about departing from the traditional division of categories lest one upset those who are vigilant to defend the prerogatives of their respective Houses. If no agreement of the type in question has ever been concluded, one operates by analogy. Thus, the first prisoner transfer treaties were considered to be like extradition treaties and were sent to the Senate.[8] If there is no guidance, the legislative liaison personnel discuss the matter with the chairs of the congressional committees that will be most deeply involved.

How does this process play out with regard to the agreement on the World Trade Organization? In a general sense, it seems to fall into the category of "trade agreements" and should thus be handled by the bicameral process. In a more specific approach, one notes that Congress has over the years painstakingly devel-

[3] Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 534 (1945). The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §303 comment *e* (1987) characterized this as "[t]he prevailing view."

[4] RESTATEMENT, *supra* note 3, §303 comment *e*.

[5] Arthur Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305, 1306 (1952).

[6] *See* 1974 DIGEST, ch. 5, §1, at 195–97.

[7] A picture of the difficulty of obtaining Senate consent can be derived from scanning the multivolume compendium, CHRISTIAN WIKTOR, THE UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA, 1776–1965 (1979).

[8] *See, e.g.*, Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.-Mex., 28 UST 7399.

oped the so-called fast-track procedure.[9] This mechanism assures the President that the agreement that results from the long and intricate negotiations he conducts will be considered quickly and will be voted upon in an "up or down" mode without giving members of Congress the chance to propose amendments that would obligate the President to renegotiate the document with his foreign counterparts. This fast-track arrangement is in effect a self-denying ordinance and could be repealed at any time by regular means. But in the meantime it stands as a commitment to deal with trade agreements in a specified way. From there the argument moves to the proposition that reasserting the Senate's prerogative at this time would be a breach of faith with the Executive and the House. It would badly damage the capacity of the United States to negotiate externally since it would sow uncertainty about our capacity to carry through with the agreements we get other states to agree on. The counterargument is that the new GATT agreement is qualitatively different from earlier trade agreements because of the scope that it gives international panels acting under the agreement to make final decisions on certain questions, when formerly the United States retained the option of defying the international working groups' recommendations on those matters. The contrast, however, is much less drastic if one takes into account the more recent Free Trade Agreement with Canada and the North American Free Trade Agreement with Canada and Mexico. Each of these arrangements shifts the power to resolve significant disputes to organizations not controlled by the United States. From there to the GATT/WTO arrangement is not so long a step, although many more foreign countries are involved than just our neighbors. This progression—all of it undertaken by House-Senate approval—argues strongly that it is appropriate to move ahead with the planned bicameral vote.

Afterword

The night before this Editorial Comment went to press, the Senate approved the GATT/WTO agreement by a vote of seventy-six to twenty-four, rendering academic the question whether a vote of sixty-seven to thirty-three was required. Nonetheless, I thought it useful to memorialize this controversy so that readers of the *Journal* will have something to refer to the next time that this issue is raised, perhaps a generation from now.

DETLEV F. VAGTS

CONFLICT, BALANCING OF INTERESTS, AND THE EXERCISE OF JURISDICTION TO PRESCRIBE: REFLECTIONS ON THE *INSURANCE ANTITRUST CASE*

Now that the dust has settled on the *Insurance Antitrust Case*,[1] decided by the U.S. Supreme Court on the last day of its 1992–1993 term, it may no longer be inappropriate for me to make some observations about the case in print. I have been reluctant to do so up to now, both because I was a member of the legal team

[9] See the review of the development of this legislation in Harold Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992).

[1] Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891 (1993).