

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records
Subgroup/Office of Origin: Council on Environmental Quality
Series/Staff Member: Kathleen (Katie) McGinty
Subseries:

OA/ID Number: 2614
FolderID:

Folder Title:
NAFTA [North American Free Trade Agreement] [Folder 1] [3]

Stack:	Row:	Section:	Shelf:	Position:
S	61	5	6	3

Katie
Hafsa and enino
info

Good

**Remarks by Senator Max Baucus
Democratic Leadership Conference
New Orleans, Louisiana
May 1, 1992**

Thank you Congressman Price. As some of you may know, David Price is a very respected member of Congress. He has been a strong advocate for affordable housing, literacy in the workplace and consumer protection, and he has done a great deal for the people of his district and for the nation as a whole.

I want to also thank Al Fromm and Will Marshall for their leadership of the DLC. They have given this organization its intellectual edge. I would be delinquent if I didn't thank and recognize my good friend and colleague John Breaux, DLC's Chairman and our host here this weekend.

I want to spend a few minutes with you talking about where we are and where we are going, as a political party and as a country. To me, this is a very exciting time.

All of us in this room are aware of the incredible changes taking place in our country and in our world. There is a sea change brewing. And I suspect that historians will look back on the early 1990s and proclaim it a watershed of American political and economic development.

The election this November will be the first since the end of the Cold War. The first election since World War II without the unifying influence of the Iron Curtain.

And it will be the first in which the preeminent challenge for our country is economic and not military.

Equally significant, this election comes at a time when Americans feel that Washington just doesn't work anymore -- at least not for them.

They're tired of the gridlock. They're tired of the finger-pointing. They've lost faith in the ability of their elected officials to deal with the issues that matter most to their lives.

They see special interests and mismanagement. They see political gamesmanship amidst a 400 billion dollar deficit and 9 million people out of work. And they rightfully ask, "Where's the leadership?"

Clearly the status quo is no longer acceptable. You have only to look at the results of this year's primary elections to see the evidence.

THE FAILURE OF THE 1980'S

Americans now recognize that in the 1980's, the Republican party led us on a spending binge. Only it wasn't tax and spend, it was borrow and spend.

Government, business, individuals, none of us were immune from this siren call. We didn't invest, we spent. We didn't save, we spent.

The way the Reagan and Bush Administrations saw the economy, it was one big party of champagne and cake and dance 'till you drop. Now, the party's over, and a lot of people who never even got an invitation are out of luck and their out of work.

And what we have is the result of a decade of mistakes. Mistakes that could have been avoided if there had been a strong sense of fundamentals, a long-range plan, and some discipline to follow through.

The question now for all of us is this: Have we learned enough from the dissolute, aimless 80's to rebuild the economy into something sound and solid -- not just for today, but for tomorrow as well? Not just for ourselves, but for our children and their children, as well?

I think the Democratic Party has learned plenty. The people who lead the party know America's productivity gains since the mid-1970's are the poorest of all the G-7 nations. They know our per-capita income has dropped far enough to put us in seventh place internationally. Net investment, net savings, our standard of living are all down.

The 1980's produced a forty percent drop in investments for education, training, children's programs, infrastructure, and civilian R&D. Maybe the rank and file don't care much about the numbers, but they sure have to live with the results.

There's serious trouble in this country, and it's not just politicians talking; it's people hurting. And if we're going to stop the hurt and get our economy back on track, there are a few things I think are essential.

A DEMOCRATIC GROWTH AGENDA

First and foremost, the Democratic party must have a real economic growth agenda. An agenda which includes both strategic domestic investment and an aggressive international trade policy to open world markets.

Every major advance in our history, from the Louisiana Purchase to biomedical research, was the result of one generation having sense enough to leave keys under the doormat for the next one. They made investments.

Now, it's our turn. We need a permanent research and development tax credit to help make our science more consistently aggressive. We need to revive Individual Retirement Accounts as a means to increase long-term saving to help create capital. And, yes, we even need a capital gains-style incentive to encourage investments in new, innovative companies.

We need to invest in people through job training, education and family leave policies. And after so many years of breast-beating, we must make a serious investment in our infrastructure.

But we can't just lob money around, and hope it hits where it can do some good. That's already been tried. The result? For more than a decade, the federal deficit's been grazing like Babe the Blue Ox in capital markets around the world.

It has raised the cost of capital in the private sector, added billions to the debt service of all levels of government, and made us more reliant on foreign sources of funds.

Unless we consume less and invest more now, that ox is going to eat us alive. So we have to make focused choices and focused investments.

Business and industry have to make some investments as well. Business must also start scaling back executive compensation to a level more in line with industrial reality than with major league baseball.

We've got the people and the minds to be better than ever before, and better than anybody else. Whether it's zero-defects at Motorola, or renovating management approaches at General Electric. We just have to do it.

But, we also must keep focused on the real goal. The "Long Haul." It's vital that we build to last. We just can't afford a quick, feel-good policy at the expense of long-term growth.

Which reminds me of a comment once made by the comedienne Lily Tomlin. She said if it weren't for false hopes, the economy would just collapse entirely. Sarcasm aside, I think there might be just enough primitive wisdom in that notion to bring our thinking to order.

Investment. Saving. Building. Discipline. Those things are real, not false hopes. They're essential virtues that must be the bedrock of our economic decisions. Our main economic agenda must focus on restoring our long-term economic strength -- so that we can create and sustain the type of jobs which allow Americans to buy their own homes, save for the future and send their kids to college.

It's best for the nation. And it's not bad for Democrats, either. People know something is wrong. If they see Democrats addressing what they in their hearts know to be a fundamental problem, it will not only help restore their confidence in the economy, it will renew their faith in the Democratic party.

AN AGGRESSIVE TRADE POLICY

There is another aspect of U.S. economic policy that I want to touch upon today -- one that must be a critical element of any Democratic growth agenda -- and that is international trade.

The DLC has exercised important leadership in the area of trade. In fact, last year at this time, the DLC threw its support behind the proposal to extend "fast track" negotiating authority to the Administration.

And we did the right thing. Fast track allows the Administration to negotiate with our trading partners to open markets for American products. In supporting fast track, we recognized that the United States will never succeed by sticking its head in the sand. We will not build a competitive economy by building barriers to trade.

Bill Clinton may have put it best when he called protectionism "a fancy term for giving up." I couldn't agree more.

But let me be clear on one point. Democrats -- including Democrats who supported fast track -- have profound differences with the Administration's conduct of trade policy.

Granted, American exporters have experienced significant success in the past two years. However, their success has occurred in spite of the Bush Administration -- not because of it. The Bush Administration has failed to exert the efforts needed to pry open world markets for American products.

In fact, the Administration continues to oppose the extension of Super 301 -- our most powerful tool for opening world markets. Congressman Gephardt, Senator Rockefeller and I are all working to insure that Super 301 is returned to the U.S. trade arsenal.

American exporters don't need a "trade week" -- the White House's newest gimmick. Instead, American exporters need an Administration with a year-round commitment to developing new market opportunities abroad.

So it's time we put our trading partners on notice. Free trade must be a two way street.

BALANCING COSTS OF THE NAFTA

There is one trade area in which Democrats are situated to make a real contribution -- the negotiations for a "North American Free Trade Agreement" -- otherwise known as "NAFTA."

The White House likes to talk about the potential benefits of a trade agreement with Mexico. And they should. A successful NAFTA would grant U.S. businesses unlimited access to a \$6 trillion annual market -- the largest in the world.

And like the Administration, I can point to real potential gains from a trade agreement with Mexico. But I will tell you something that the Administration ignores: There are losers, as well as winners when we enter trade agreements.

While NAFTA will result in some modest gains in overall employment, there is little doubt that some U.S. sectors will be hurt. And there is some very serious environmental issues that must be addressed.

ASSISTING AMERICAN WORKERS

Some job flight to Mexico may be inevitable -- with or without a NAFTA. But in either case, Democrats have a unique opportunity to assist American workers who will lose their jobs.

In 1974, Congress and the Administration entered a deal. When Congress passed the Tokyo Round of GATT amendments, Congress also passed something called the "Trade Adjustment Assistance Act" -- or "TAA."

Like a potential NAFTA, the Tokyo Round benefitted the nation as a whole. Consumers had access to lower cost imports. U.S. exporters had access to more foreign markets.

But the deal had a second element. In return for the broad benefits resulting from the trade agreement, the government would look out for displaced workers. Workers who lost their jobs would receive income support and training for productive new jobs through the TAA.

Until 1981, the bargain held up. But the Reagan and Bush Administrations broke the bargain and betrayed American workers. They have cut TAA funding every year since they entered office. It is an absolute disgrace -- and it must be rectified.

So before a NAFTA passes Congress, Democrats must insist that the TAA bargain be put back in place to once again protect the livelihoods of American workers.

And we must ensure that funds are available for retraining and assistance -- so that we don't allow our workers to become a political football for President's who just don't care. One way to do so would be to create a "Free Trade Trust Fund" for worker assistance and other problems associated with a free trade agreement. The fund would be derived from a small fee on imports and new investments. Here in the United States it would be used to insure a fully funded TAA. And in Mexico, it would be used to cover the costs of enforcing environmental clean-up.

However we fund such a program, one thing is clear. Democrats must talk straight to the American people on trade. An aggressive trade policy is critical to our own economic survival. And while we pursue trade agreements to open world markets, Democrats must also ensure that free trade benefits everyone -- not just a select few.

An aggressive trade policy must be an essential part of any Democratic growth strategy. We will never succeed by closing our borders and retreating to our cocoons.

We have the skills and the ingenuity and the determination to become number one in the world again, we just have to get on with doing the job.

CONCLUSION

The precondition for all of the changes I have discussed, however, is effective leadership. Something we have been lacking for the last four years.

If George Bush has shown us anything, its that he is the "Wannabee President." George Bush wants to be the education President; he wants to be the environmental president; he wants to be the President who creates 30 million new jobs -- remember that promise. But he is unable to provide the leadership to get the job done.

George Bush does not understand that the biggest job any President will have in the 1990's is to move this country from one economic era to the next.

And since he has failed to move this country forward, it is up to us to move him back to Kennebunkport -- and to finally elect a President who has the vision and determination to get our economy and our country back on track.

I believe this country is ready for new Democratic leadership. It desperately needs this kind of leadership. It's up to us now to be ready for them.

Thank you.

MAX BAUCUS

DEMOCRAT - MONTANA

NEWS
RELEASE

706 HART SENATE OFFICE BUILDING

• WASHINGTON, D.C. 20510

• 202-224-2651

FOR IMMEDIATE RELEASE

May 14, 1992

CONTACT: Caleb Marshall
or Will Keyser
(202) 224-2651

Baucus Chides Bush Administration for Neglect of Key Elements in North American Free Trade Agreement Negotiations

Senator Declares He Will Not Support a NAFTA Unless Displaced Worker and Environmental Issues are Addressed

Washington, D.C. -- In a statement on the Senate floor today, Senator Max Baucus (D-MT) admonished the Bush Administration for failing to address important labor and environmental issues in the ongoing negotiations with Mexico for a North American Free Trade Agreement (NAFTA).

Baucus expressed his disappointment with the direction that the free trade talks have taken, saying that negotiators are making decisions "dictated more by politics than by substance."

"I am particularly disturbed by the lack of attention to ensuring that free trade not harm the environment and to addressing the needs of displaced workers," Baucus said. "I still support the concept of free trade, but unless the Administration makes dramatic progress in addressing these issues, I will oppose the NAFTA."

Baucus, who is Chairman of the Senate Subcommittee on International Trade, had given his support to the Administration's request last Spring for "fast-track" authority in forging a free trade agreement. But today he declared that the Administration has not kept its original promises that were laid out in a document known as the "action plan" for the NAFTA, on which the affirmative, bipartisan approval of fast track authority was based. Baucus said that many others in Senate may be forced to remove their support unless the key labor and environmental issues are addressed.

"A successful NAFTA could net significant gains for the U.S. economy," said Baucus. "But there is another side to free trade. There are losers, as well as winners...It's time for the Administration to put its money where its mouth is. Funds must be committed to environmental protection and worker adjustment."

Baucus called for the creation of a "free trade trust fund" that would help pay for the costs associated with free trade. The fund would be created by imposing a small fee -- one-half a percent or less -- on imports and new investments from both countries. "Each government could decide how to use its share of the fund," explained Baucus. "In the U.S., the fund could pay for worker adjustment. In Mexico, it might support environmental protection."

STATEMENT OF SENATOR MAX BAUCUS
NAFTA NEGOTIATIONS
May 14, 1992

Mr. President, in the past couple of weeks the rumor mill has been operating full tilt on the subject of the North American Free Trade Agreement, or "NAFTA."

It is said that the political decision has been made. The Bush Administration wants an agreement to prop up friends in Mexico and Canada and to woo voters in Texas and California. And it will get one almost regardless of its content or consequences.

I have long been a strong advocate of free trade. I voted for the U.S.-Canada FTA and the U.S.-Israel FTA. I supported the Administration's request for fast track negotiating authority to negotiate the NAFTA.

But I am disturbed by the direction the talks have taken. Decisions seem to be dictated more by politics than by substance.

I am particularly disturbed by the lack of attention to ensuring that free trade not harm the environment and to addressing the needs of displaced workers.

I still support free trade. But I cannot vote for a trade agreement that harms the environment and displaces thousands of American workers. Unless the Administration makes dramatic progress to address these issues, I will oppose the NAFTA.

THE FAST TRACK BARGAIN

A little over a year ago, this body engaged in a major debate over extending fast track negotiating authority. Most of the debate focused on the NAFTA.

The debate was contentious and sometimes acrimonious. Much of the controversy centered on concerns about the labor and environmental implications of a trade agreement with a developing nation. Ultimately, in a bipartisan spirit I strongly supported, the Senate voted to grant negotiating authority to the President.

The affirmative vote was based upon a bargain between the Administration and the Congress. In a document known as the "action plan," the Administration set out a series of promises about a NAFTA agreement.

For many in this body, two promises were critical. First, the Administration agreed to address environmental issues in the NAFTA. Second, the Administration pledged to work with Congress to develop a program to address the needs of American workers that might be displaced by the NAFTA.

To date, the Administration has not adequately fulfilled either of these commitments. Unless they are fulfilled before the agreement is sent to Congress, I think congressional

approval of a NAFTA is unlikely.

I still support the concept of a NAFTA. A successful NAFTA could net significant gains for the U.S. economy. In fact, a new study by the Institute for International Economics estimates that 130,000 new American jobs could be created by a NAFTA. A NAFTA would also provide U.S. exporters with unfettered access to the largest market in the world.

ADMITTING THE COSTS

But there is another side to free trade. There are losers, as well as winners from free trade. In particular, there are dangers and costs inherent to liberalizing trade with developing countries.

For example, the NAFTA raises serious environmental issues. Though progress has been made, Mexico does not enforce its environmental laws as strictly as the United States. Unless this disparity in enforcement is addressed, a NAFTA could create an incentive for U.S. manufacturing firms to move south to take advantage of lax enforcement of environmental protection laws.

Further, wage rates in Mexico are one-tenth or less than comparable wage rates in the United States. Some U.S. workers, such as textile and ceramic workers, will be hurt by low cost imports. Some job flight to Mexico may be inevitable -- with or without a NAFTA. But if American workers are going to be displaced by a government decision to pursue free trade we have a responsibility to ease their transition.

THE NEED FOR FAST ACTION

As I said, these issues are hardly new. The Administration has promised to address both environmental and labor concerns.

But the Administration has been heavy on promise and light on results.

On the environmental front, the Administration did commit \$200 million for pollution control on the border. This is an important first step, but most experts recognize that real cleanup will require several billion dollars.

Moreover, little progress has been made on addressing Mexican enforcement of environmental laws. To secure enforcement, there should be an explicit linkage between environmental commitments and the trade agreement. Mexico has made unilateral promises, but no serious effort has been made to incorporate the commitments into the NAFTA. Empty promises from the Bush and Salinas Administrations will not be enough to secure my vote.

The Administration has given even less attention to labor issues. Despite the assurances, I am aware of no Administration plan for providing meaningful worker adjustment to those hurt by trade with Mexico. But the IIE study I alluded to earlier has put the cost of worker adjustment stemming from the NAFTA at more than \$1 billion.

A FREE TRADE TRUST FUND

It's time for the Administration to put its money where its mouth is. Funds must be committed to environmental protection and worker adjustment.

One way to secure funds would be to create a "Free Trade Trust Fund" to pay for the costs associated with free trade. To support the fund a small fee -- one-half a percent or less -- could be placed on imports and new investments. Each government could decide how to use its share of the fund. In the U.S., the fund could pay for worker adjustment. In Mexico, it might support environmental protection.

A Free Trade Trust Fund could allow us to reap the benefits of free trade while responsibly addressing the costs.

CONCLUSION

Our government works only when the Administration and the Congress work together. Last year at this time, Congress put partisanship and parochialism aside by granting the Administration fast track negotiating authority.

But the fast track is a two way street. And the Administration has not lived up to its end of the bargain.

I hope there is still time to fulfill the fast track bargain we struck with the Administration last year. But unless the Administration takes some dramatic steps forward, I will oppose the NAFTA.

FOR IMMEDIATE RELEASE

June 3, 1992

CONTACT: Caleb Marshall
or Will Keyser
(202) 224-2651

Baucus Specifies NAFTA Environmental Concerns

Senator Sends Letters to U.S. Trade Representative Hills and EPA Administrator Reilly

WASHINGTON, DC -- In a letter sent today to both U.S. Trade Representative Carla Hills and EPA Administrator William Reilly, Senator Max Baucus (D-MT) outlined the specific environmental concerns that must be addressed in the final version of the North American Free Trade Agreement (NAFTA) if it is to gain his support.

Baucus, the Chairman of both the Senate International Trade Subcommittee and the Senate Environmental Protection Subcommittee, last week alerted the Administration that he could not support a NAFTA agreement that would "harm the environment and ignore the needs of displaced workers." In today's letter, Baucus cited the specific environmental safeguards he wants included in the NAFTA agreement.

"NAFTA is the first attempt to negotiate a Free Trade Agreement (FTA) between a developed country and a developing country," Baucus wrote. "In order to create a truly level playing field between nations at such disparate levels of development, a whole range of issues not addressed in previous FTAs must be addressed. This certainly includes the environment."

Baucus has been consulting with leading national environmental groups to form a comprehensive set of environmental stipulations that should be part of any free trade agreement. A list summarizing his concerns is attached.

In the past, Baucus has been a consistent supporter of the Administration's free trade policies. However, in recent weeks he has become increasingly impatient with White House's approach to trade policy. He has criticized the Administration for playing election-year politics and breaking its original promises on the NAFTA negotiations.

-30-

Note: A copy of Senator Baucus' letter to Carla Hills and a summary of his concerns are attached.

D. PATRICK MOYNIHAN, NEW YORK
 MAX BAUCUS, MONTANA
 DAVID L. BOREN, OKLAHOMA
 BILL BRADLEY, NEW JERSEY
 GEORGE J. MITCHELL, MAINE
 DAVID PRYOR, ARKANSAS
 DONALD W. RIEGLE, JR., MICHIGAN
 JOHN D. ROCKEFELLER IV, WEST VIRGINIA
 TOM DASCHLE, SOUTH DAKOTA
 JOHN BREAUX, LOUISIANA

BOB PACKWOOD, I
 BOB DOLE, KANSAS
 WILLIAM V. ROTH, JR., DELAWARE
 JOHN C. DANFORTH, MISSOURI
 JOHN H. CHAFEE, RHODE ISLAND
 DAVE DURENBERGER, MINNESOTA
 STEVE SYMMS, IDAHO
 CHARLES E. GRASSLEY, IOWA
 ORRIN G. HATCH, UTAH

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

June 3, 1992

VANDA B. McMURTRY, STAFF DIRECTOR AND CHIEF COUNSEL
 EDMUND J. MIHALSKI, MINORITY CHIEF OF STAFF

The Honorable Carla Hills
 U.S. Trade Representative
 600 - 17th Street, N.W.
 Washington, D.C. 20506

Dear Ambassador Hills:

I am writing to recommend a series of environmental safeguards for the North American Free Trade Agreement (NAFTA).

I have long been a supporter of free trade. I supported both the U.S.-Canada and the U.S.-Israel FTAs. I also vigorously supported the President's request for an extension of fast track trade negotiating authority in order to negotiate the NAFTA.

But the NAFTA is the first attempt to negotiate an FTA between a developed country and a developing country. In order to create a truly level playing field between nations at such disparate levels of development, a whole range of issues not addressed in previous FTAs must be addressed. This certainly includes the environment. There is also a more general concern that trade agreements tend to undermine environmental protections. These factors force us to ensure that the NAFTA includes specific and comprehensive environmental safeguards. This reality was clearly recognized by the Administration in the "Action Plan" that was submitted to Congress before the Congress voted on the President's request for fast track trade negotiating authority.

As Chairman of both the Senate Finance Committee's International Trade Subcommittee and the Senate Environment and Public Works Committee's Environmental Protection Subcommittee, I feel a particular responsibility to assist the Administration in formulating these environmental safeguards. I have worked with a number of leading environmental groups to develop recommendations for these safeguards. The attached list of recommendations represents the results of these consultations.

In my opinion, it is essential that these safeguards be included in the NAFTA. If the NAFTA is seen as a threat to the environment, it will be turned down by the Congress.

In light of the rapidly approaching conclusion of the NAFTA negotiations, I would like to schedule a meeting with you at your earliest convenience to discuss this issue. I believe it is

important that key U.S. environmental groups be included in this meeting.

Thank you in advance for your attention to this matter. I look forward to hearing from you at your earliest convenience.

With best personal regards, I am

Sincerely,

MSB/gre

A handwritten signature in black ink that reads "Max Baucus". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

ENVIRONMENTAL CONSIDERATIONS IN THE NAFTA NEGOTIATIONS

Although economic growth may promote increased environmental protection, additional safeguards are necessary to ensure that the North American Free Trade Agreement promotes sustainable growth without harming the environment.

I. ENVIRONMENTAL LAWS AND REGULATIONS SHOULD NOT BE TREATED AS TRADE BARRIERS UNDER THE NAFTA.

- * Existing U.S. federal and state laws and environmental regulations should be grandfathered and immune from challenge under the NAFTA.
- * Measures taken to enforce or comply with international environmental agreements should not be subject to challenge under the NAFTA.
- * To the extent that efforts are made to harmonize environmental regulations, harmonization should be toward the higher standard. The right of all parties -- including sub-national governmental bodies -- to promulgate legitimate environmental laws and regulations should not be restricted.
- * If any party challenges an environmental measure the challenging party should have the burden of proving that the measure has no legitimate basis, that it constitutes an illegal trade restriction, or that there are alternative, less trade restrictive measures available to achieve the same effect.
- * Dispute settlement panelists in cases involving alleged environmental measures should have an environmental background. In such proceedings, interested non-governmental organizations and sub-national governmental bodies should be given the opportunity to comment.

II. A COMMITMENT MUST BE MADE TO ENSURE THAT FUTURE GROWTH, TRADE, AND INVESTMENT TAKE PLACE IN AN ENVIRONMENTALLY SOUND AND SUSTAINABLE MANNER.

- * All new manufacturing facilities and operations must comply with high environmental standards.
- * All parties to the NAFTA must commit to provide adequate funds to support environmental protection efforts. These funds may be provided by a special dedicated fund derived from import or investment fees or from a firm commitment of governmental spending.

* All parties should give priority to environmental protection and clean-up in border areas. Funds must be committed to the task.

* Provisions must be taken to enforce the above commitments.

III. PROVISIONS SHOULD BE MADE FOR ONGOING REVIEW OF THE ABOVE ENVIRONMENTAL COMMITMENTS AND FOR REVIEW OF THE ENVIRONMENTAL IMPACT OF THE AGREEMENT AND THE RESULTING INCREASED TRADE AND INVESTMENT.

* The NAFTA should create an advisory body to recommend further environmental protection measures. This advisory body should also review the efforts of all parties to fulfill the environmental commitments made in relation to the NAFTA.

FOR IMMEDIATE RELEASE
June 25, 1992

CONTACT: Caleb Marshall
or Will Keyser
(202) 224-2651

Baucus Looks for Real Progress in Santa Fe NAFTA Talks

Senator Continues to Pressure Administration on Environmental Concerns

WASHINGTON, DC -- Senate International Trade Subcommittee Chairman Max Baucus (D-MT) said today he hopes this afternoon's meeting in Santa Fe, NM, between U.S. and Mexican officials will be, "historic for the substantive agreements it produces." In a statement from the Senate floor, Baucus emphasized the importance of resolving environmental problems with the NAFTA in order to win congressional approval.

In recent weeks, Baucus has expressed his concerns to USTR Ambassador Carla Hills about the lack of progress in NAFTA negotiations on environmental issues. Baucus said he received "a positive response" from Hills this past week but stressed in today's statement that issues concerning Mexican enforcement of existing environmental have still not been properly addressed.

"The Administration has pointed to progress in Mexico and largely dismissed this problem," Baucus said. "But a recent review by the Office of Technology Assessment has concluded that lax environmental enforcement could, in fact, be a serious problem."

Baucus said he fears Mexico could become a "pollution haven" if the Administration does not address this issue in the NAFTA. He said that lax environmental enforcement could lead to a devastating flight of American manufacturing firms across the border to Mexico as they seek to escape environmental laws.

-30-

NOTE: The full text of Senator Baucus' statement is attached.

*Statement By Senator Max Baucus
on NAFTA and the Environment
June 25, 1992*

Mr. President, I rise today to discuss the impact of the North American Free Trade Agreement upon the environment.

Mr. President, today in Santa Fe, New Mexico, a potentially historic meeting is taking place. It is a meeting between U.S. and Mexican government officials to discuss the North American Free Trade Agreement and the North American environment.

I hope this meeting is historic for the substantive agreements it produces. But it is certain to be historic for the precedent that it sets. It is the first time that environmental concerns have been more than a footnote in a trade negotiation.

Several weeks ago, I took the floor of the Senate to denounce the Bush Administration for its handling of environmental issues in the NAFTA negotiations.

I argued that the Bush Administration had made many promises on trade and the environment, but had done little to fulfill those promises.

Shortly after making that statement, I wrote U.S. Trade Representative Carla Hills and Environmental Protection Agency Administrator William Reilly with a list of concerns regarding their handling of environmental issues in the NAFTA.

To her great credit, Ambassador Hills responded quickly to the concerns I raised. We have met to discuss these concerns and she and her staff wrote a comprehensive response to my concerns which I would like to place in the Record at this point.

In many areas, the Administration's response reassures both myself and many others interested in the environment. Though further clarifications are necessary on some issues, the Administration has gone a long way toward assuring that the NAFTA dispute settlement procedures will not be used to attack state or federal environmental regulations. And, though more funds may be necessary, the Administration has also worked constructively to address environmental problems in the border area.

Unfortunately, the Administration's response is not forthcoming on another key issue: ensuring that a pollution haven is not created in Mexico.

Though it is a developing country, Mexico has a fairly comprehensive set of environmental laws on the books. In many areas, Mexican laws are very similar to U.S. laws.

However, environmental regulations have not always been vigorously and consistently enforced in Mexico. The Salinas Administration has made a public commitment to improving enforcement of environmental regulations. But in recent weeks a number of questions have been raised about this commitment.

In light of this lax enforcement, many fear that a free trade agreement could create an incentive for some manufacturing businesses to move to Mexico to avoid U.S. environmental regulations. This could have the effect of increasing total pollution in North America and greatly increase pollution in Mexico.

In addition, the disparity in enforcement could create severe economic dislocations in the U.S. because of manufacturing flight. Lax enforcement could also provide Mexican businesses with a cost advantage over their American counterparts.

In a review of the situation, the Administration pointed to progress in Mexico and largely dismissed this problem. But a recent review by the Office of Technology Assessment concluded that lax environmental enforcement could, in fact, be a serious problem. The experience of the furniture manufacturing industry which largely moved from California to Mexico to avoid environmental regulations provides a frightening precedent.

I support the NAFTA and I oppose protectionism. Free and fair trade can generate growth and create jobs. I certainly don't want the environment to be used as a pretext for protectionism.

On the other hand, I also have no sympathy for those who would sacrifice the environment on the altar of free trade.

Free trade need not take place at the cost of the environment. Environmental protection and economic growth can occur hand-in-hand.

But in order to ensure that economic growth take place in an environmentally sensitive fashion, the issue of lax enforcement of environmental regulations must be addressed forthrightly.

Over time, the scope of trade negotiations has steadily expanded to cover tariffs, then quotas, and then product standards. Now, the Administration works in trade negotiations to ensure that laws to protect intellectual property and to break up trusts are enforced overseas. It is time to add environmental protection laws to that list.

More uniform environmental protection is in both the competitive interest of the U.S. and the long term interest of all Mexicans and all Americans.

It is my hope, that this week in Santa Fe the United States and Mexico can begin to address this critical issue. In order to have a truly level playing field we must ensure that minimum environmental protection is provided throughout North America.

This issue can be addressed in a number of ways. But if it is ignored the NAFTA is unlikely to win congressional approval.

LLOYD BENTSEN, TEXAS, CHAIRMAN

DANIEL PATRICK MOYNIHAN, NEW YORK
MAX BAUCUS, MONTANA
DAVID L. BOREN, OKLAHOMA
BILL BRADLEY, NEW JERSEY
GEORGE J. MITCHELL, MAINE
DAVID PRYOR, ARKANSAS
DONALD W. RIEGLE, JR., MICHIGAN
JOHN D. ROCKEFELLER IV, WEST VIRGINIA
TOM DASCHLE, SOUTH DAKOTA
JOHN BREAU, LOUISIANA

BOB PACKWOOD, OREGON
BOB DOLE, KANSAS
WILLIAM V. ROTH, JR., DELAWARE
JOHN C. DANFORTH, MISSOURI
JOHN H. CHAFFEE, RHODE ISLAND
DAVE DURENBERGER, MINNESOTA
STEVE SYMMS, IDAHO
CHARLES E. GRASSLEY, IOWA
ORRIN G. HATCH, UTAH

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

July 24, 1992

VANDA B. McMURTRY, STAFF DIRECTOR AND CHIEF COUNSEL
EDMUND J. MIHALSKI, MINORITY CHIEF OF STAFF

The Honorable George Bush
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

I am writing to express my concerns on the North American Free Trade Agreement (NAFTA) negotiations.

You recently announced a meeting of the trade negotiators of the U.S., Canada, and Mexico to be held on July 25th. There have been numerous statements by leading figures in both the Bush and Salinas Administrations to the effect that the NAFTA negotiations will be completed this summer.

I have previously written you to address the handling of environmental issues in the NAFTA. Your chief trade negotiator - Ambassador Carla Hills -- has been generous enough to meet on two occasions with myself and a number of environmental groups to discuss these concerns. But I am still not convinced that adequate attention has been paid to these issues. Further, I have heard disturbing reports that the U.S. has rejected pro-environmental proposals tabled by some of our trading partners in the NAFTA negotiations.

On another front, the consultations between the Administration and Congress on developing a worker adjustment program are just getting underway.

I have supported previous free trade agreements and argued strongly for Congress to grant authority to negotiate the NAFTA. Although I must reserve judgment on any specific agreement that may be negotiated, I support the concept of a North American Free Trade Agreement.

But I urge you in the strongest possible terms to see to it that adequate environmental protections are included in the NAFTA. If an agreement is submitted to Congress that does not adequately address the environmental issues, I will have no choice but to call for its renegotiation or rejection. Environmental issues are simply too important to be put off into parallel negotiations. They must be included in the NAFTA.

The NAFTA should not be rushed forward to meet an artificial deadline. A congressional vote on the agreement clearly cannot take place before the end of this Congress, so there is no compelling reason to press for a conclusion to the negotiations this year. The NAFTA negotiations should not be concluded until there is an agreement to include adequate environmental protections.

With best personal regards, I am

Sincerely,

A handwritten signature in black ink that reads "Max Baucus". The signature is written in a cursive, flowing style with a long horizontal line extending from the end of the name.

MSB/gre

THE WHITE HOUSE

WASHINGTON

May 1, 1991

Dear Mr. Chairman:

Through the better part of this century, successive Congresses and Administrations -- Republican and Democratic -- have worked to open markets and expand American exports. This partnership has resulted in unparalleled growth in world trade and huge economic benefits for the United States. Opening foreign markets means economic growth and jobs for all Americans.

Historically, the fast track procedures established by the Congress have served us well. On March 1, I requested an extension of fast track so that we could continue to realize increased economic growth and the other benefits of expanded trade. The fast track in no way limits the ability of Congress to review any agreement negotiated, including the Uruguay Round or a North American Free Trade Agreement (NAFTA). If Congress is not satisfied, it retains the unqualified right to reject whatever is negotiated. But refusing to extend the fast track would end negotiations before they have even begun and relinquish a critical opportunity for future economic growth.

Initiatives to open markets will enhance the global competitiveness of the United States and create new opportunities for American workers, American exports, and American economic growth. The Uruguay Round offers a vital opportunity to eliminate barriers to our goods, investment, services, and ideas. A NAFTA offers an historic opportunity to bring together the energies and talents of three great nations, already bound by strong ties of family, business, and culture. Prime Minister Mulroney and President Salinas are both leaders of great vision. They believe, as do I, that a NAFTA would enhance the well-being of our peoples. They are ready to move forward with us in this unprecedented enterprise.

In seeking to expand our economic growth, I am committed to achieving a balance that recognizes the need to preserve the environment, protect worker safety, and facilitate adjustment. In your letter of March 7, you conveyed a number of important Congressional concerns about free trade with Mexico. At my direction, Ambassador Hills and my Economic Policy Council have undertaken an intensive review of our NAFTA objectives and strategy to ensure thorough consideration of the economic, labor, and environmental issues raised by you and your colleagues. The Administration's response is presented in the attached report. Let me emphasize the following:

First, you have my personal commitment to close bipartisan cooperation in the negotiations and beyond. And you have my personal assurance that we will take the time necessary to conclude agreements in which both the Congress and the Administration can take pride.

Second, while economic studies show that a free trade agreement would create jobs and promote growth in the United States, I know there is concern about adjustment in some sectors. These concerns will be addressed through provisions in the NAFTA designed to ease the transition for import-sensitive industries. In addition, my Administration is committed to working with the Congress to ensure that there is adequate assistance and effective retraining for dislocated workers.

Third, based on my discussions with President Salinas, I am convinced that he is firmly committed to strengthened environmental protection, and that there is strong support for this objective among the Mexican people. Because economic growth can and should be supported by enhanced environmental protection, we will develop and implement an expanded program of environmental cooperation in parallel with the free trade talks.

Fourth, President Salinas has also made it clear to me that his objective in pursuing free trade is to better the lives of Mexican working people. Mexico has strong laws regulating labor standards and worker rights. Beyond what Mexico is already doing, we will work through new initiatives to expand U.S.-Mexico labor cooperation.

Thus, our efforts toward economic integration will be complemented by expanded programs of cooperation on labor and the environment. The catalyst for these

efforts is the promise of economic growth that a NAFTA can provide, and the key to these efforts is the extension of unencumbered fast track procedures.

There are great challenges ahead. The world is changing dramatically, as nations move toward democracy and free markets. The United States must continue to open new markets and lead in technological innovation, confident that America can and will prevail in this new and emerging world. By working together, we can negotiate good trade agreements that assure a strong and healthy America as we prepare to meet the challenges of the next century.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Bush". The signature is fluid and cursive, with a large initial "G" and a stylized "Bush".

The Honorable Lloyd Bentsen
Chairman
Committee on Finance
United States Senate
Washington, D.C. 20510

Congress of the United States
Washington, DC 20515

March 7, 1991

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On March 1, you officially notified the Congress of your request to extend the so-called fast-track procedures for implementation of trade agreements. As you know, unless either the House of Representatives or the Senate passes a disapproval resolution before June 1, 1991, such procedures would be automatically extended for agreements entered into during a two-year period ending on June 1, 1993. This authority would be applicable to bilateral or multilateral trade agreements, including the proposed North American free trade agreement and completion of the Uruguay Round.

We recognize that extension of such authority is necessary if the Administration is to have any credibility in pursuing negotiations within either a multilateral or bilateral context. You should be aware, however, that this process will not be easy. (11/10)

A number of Members of Congress have expressed concern about the proposed extension of fast-track authority, particularly as it applies to the proposed free trade agreement with Mexico. They have identified a number of legitimate concerns that, in our judgment, should be addressed in a meaningful way before Congress considers the extension of fast-track authority. Specific concerns include the disparity between the two countries in the adequacy and enforcement of environmental standards, health and safety standards and worker rights.

While we recognize that such as these are not typically addressed in a trade agreement, we believe that such issues need to be addressed in this case, either within the agreement itself or through some appropriate alternative context, within the same time frame as the trade negotiations.

The time period for Committee deliberations on the issue of the proposed extension of fast-track procedures expires on May 15. We, therefore, request that you provide us, by May

*St. to
copy to
to
& per*

*Shaw
Harris
JW
Chapman
Pence*

THE PRESIDENT
MARCH 7, 1991
PAGE 2

thoughts on how the Administration intends to address these and other relevant issues. Such an action plan is essential to the Congress as we deliberate on your fast-track request. More importantly, successful implementation of such an action plan is likely to be exceedingly critical when and if the Congress considers approval of any trade agreement which results from the negotiations. Whether such an agreement is ultimately approved by the Congress will depend on an assessment of whether the agreement has a net positive effect on jobs and wages in the United States.

We also strongly believe that the Administration should not commit itself to an unrealistic time frame to conclude the negotiations. Some Administration officials have publicly stated that they expect the negotiations with Mexico and Canada to be concluded by the end of this year. We do not believe that such a time frame recognizes the complexity of the issues that need to be addressed. Thus, we urge the Administration to use whatever time period may be necessary to resolve the numerous issues critical to the economic interests of the United States, which will serve to maximize Congressional support for the ultimate agreement.

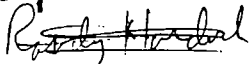
Finally, as you know, it is absolutely essential that the Administration consult fully with the Congress on these and other important issues throughout the negotiations.

We look forward to working with you on these important issues.

Sincerely yours,



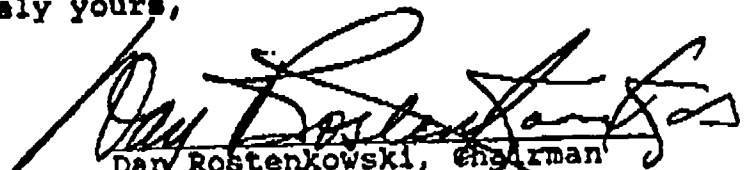
Lloyd Bentsen, Chairman
Committee on Finance
United States Senate



[on staff.]

Bob Kyle

Eric Beal



Dan Rostenkowski, Chairman
Committee on Ways and Means
U.S. House of Representatives

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement

[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does **not support the agreement, but insists on changes:]**

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

[LISTING THE PROBLEMS:]

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

*important
reputation
need
supplemental*

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

✓ [2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

✓ 4. The three countries have just announced [on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

MS 15
four
A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

✓ 5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

X
A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

✓ 6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

² There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.

Draft/September 18

TO: Governor Bill Clinton
Via Tony Lake, Nancy Soderberg, and Gene Sperling

FROM: Barry Carter 

RE: Next Steps on the North American Free Trade Agreement (NAFTA)

OVERVIEW

A good North American Free Trade Agreement (NAFTA) is in the U.S. interest, as well as Canada's and Mexico's. It means expanded jobs and other economic benefits for the three countries. It would strengthen the sometimes difficult relations the United States has had with its neighbors. It will be key to continuing and making more solid the truly impressive changes in Mexico that President Salinas is pursuing.

A good arrangement, however, must include adequate protection for the workers, farmers, and environment on both sides of the border. This includes transition strategies that ensure that U.S. workers will be able to benefit from a more open world trading system.

The proposed NAFTA agreement of the Bush Administration is a considerable achievement. The 1000 pages of text and another 1000 pages of supporting schedules address a wide range of matters. Nevertheless, the proposed agreement is full of important gaps and problems.

Briefly, the proposed agreement does not deal with adequate assistance for workers and communities who are adversely affected, rather it is a concern left for each country to handle. Moreover, the recently-announced Bush program for worker training lacks the necessary funding and has other problems. Other concerns, such as occupational safety and health requirements, and child labor laws, are also left untouched.

Many genuine environmental concerns have yet to be addressed. More can be done to encourage Mexico to enforce its laws. The provisions for dispute resolution on environmental questions are limited and the public can be more fully involved in this process.

The proposed agreement can also harm some U.S. farmers in ways that can be avoided with targetted programs.

In short, we are dealing with a commendable objective, but an inadequate agreement. This creates a grey area where there are several valid and defensible formulations that you can choose from. They really boil down to three principal alternatives:

(1) You can continue to say that you need to study the unsigned document¹ further, because the congressional hearings and other studies are still under way and because the parallel environmental negotiations are not yet concluded.

(2) You can support the proposed agreement grudgingly only if several gaps are filled in, through U.S. programs or additional agreements with Mexico and Canada. At present, the document is incomplete from the U.S. perspective. You can highlight where the gaps still exist. President Bush has not finished the job. Either he must finish it, or you will have to do so as the next President before you can go along with the arrangement.

(3) You can continue your support for a NAFTA good arrangement, but say that this agreement is not a good one and that you cannot support it in its present form. George Bush did not do the job. You can identify the problems and call on Bush to solve them before he signs the agreement. If he cannot or will not, you will do so if you are elected President.

Alternatives 2 and 3 are very similar analytically--#2 is saying the glass is half full and #3 is saying the glass is half empty. However, public perceptions will differ considerably depending on whether you support or do not support the agreement.

If you do move from your present posture of continuing to study NAFTA, you might explain your new position in the context of a general speech criticizing the international economic policies of the Bush Administration. This should help emphasize that you share the concerns of disaffected workers and others about jobs moving to Mexico and other countries with lower wage scales.

If you select alternative 3, I suggest you demonstrate your commitment to eventually obtaining a good NAFTA arrangement and improving hemispheric relations by promising to meet with Prime Minister Mulroney of Canada and President Salinas of Mexico early in the transition period. For a historical analogy, Dwight Eisenhower's 1952 promise to visit Korea was well-received by the voters.

These options should be viewed in the context that the proposed agreement is only part of a complete NAFTA arrangement. Everyone, even the Bush Administration, realizes that there are other pieces to the arrangement. For example, some matters are better treated through each country's own programs--such as worker training. And, there can be supplementary arrangements among the United States and Mexico and/or Canada. For

¹ The Bush Administration calls the document an agreement. However, it is still unsigned. (President Bush provided a draft on September 8. Then, when he notified Congress on September 18 of his intention to sign the agreement on or after December 17, he said he was providing a final version.) So, there seems little reason to give the document a greater status than it deserves. It is a "proposed agreement" or an "unsigned document."

example, the three countries just announced on September 17 that they have agreed "in principle" to create a North American commission on environmental cooperation, which will be formalized in another agreement in early 1993.

Also, the document is still an unsigned, proposed agreement. U.S. law requires that at least 90 days must pass between the time the President notifies Congress of his intention to sign the proposed agreement and his actual signing of the agreement. President Bush just notified Congress on September 18, so that the proposed agreement cannot be signed until at least December 17.

DISCUSSION

The following is a more detailed discussion of the alternatives. Accompanying this memo are Attachment A which provides the outline of a possible statement by you and a listing of problems with the proposed agreement; Attachment B which provides some key future dates in the NAFTA process; and Attachment C which provides some useful background information.

Alternative 1.

Continuing to study the matter (alternative 1) will increasingly wear thin. The "draft" version of the proposed agreement was made available on September 8 and a final version on September 18, much has already come out about the impact of the proposed agreement, and Majority Leader Gephardt has already taken a stance (for renegotiation).

You could still hold to this position for several weeks, and maybe even through the election, but at an increasing cost of appearing to straddle and look indecisive. President Bush is clearly committed to emphasizing NAFTA and your reaction to it.

Probably the strongest argument for this alternative is a political one--that it might be better to absorb the costs of continuing with a straddle, rather than taking a more definite stand under alternative 2 and alienating workers and others in some of the key battleground states (like Michigan). However, if your position under alternative 2 were carefully phrased, the costs with these groups might be minimized. (This is obviously an issue where the polling data and focus groups can be very helpful.)

If you choose to continue with this alternative, you can justify the need for continuing study of the overall NAFTA arrangement on the grounds that:

-- The parallel negotiations on environmental protection are still underway. As noted above, the Sept. 17 announcement by the three environmental ministers of the three countries that they agreed "in principle" on a North American commission on environmental protection indicated that they would not even meet to formalize the arrangement until early 1993!

-- The congressional hearings are still underway. They will continue through at least September 28, and House subcommittees might have some field hearings in early October. See Attachment B.

-- Various studies are being prepared on the impact of this very important proposed agreement, now that its terms are known. (See Appendix C for background information about the scope of the arrangement.) In response to congressional requests, the Congressional Reference Service and Office of Technology Assessment are in the midst of studies that will be completed in early to mid-November, and the International Trade Commission has an impact study that will not be completed until mid-January.

-- Present U.S. legislation provides for 90 calendar days for Congress and others to study a proposed agreement that the President notifies them about--a wise approach. Notification just occurred on September 18.

-- The important implementing legislation that the U.S. Congress must pass will not be available before at least mid-January.

Alternative 2.

This recommended alternative would have you grudgingly support the proposed agreement among the three countries, but only if several gaps are filled in. It is important to recognize that the proposed agreement is only a part of the necessary arrangement that promotes expanded trade while providing adequate protection for workers, farmers, and the environment.

Other parts of the arrangement are still missing or are inadequate. The key here, though, is not to open the proposed agreement to renegotiation (which can start a chain reaction of other calls for change), but to correct the weaknesses through separate side-table agreements between the United States and Mexico and/or Canada, or through U.S. laws (such as for worker training).

You can emphasize specific problems that track your oft-stated concerns for the workers, environment, and farmers. Rather than being exhaustive (and limiting your flexibility to add further criticisms), you should present an illustrative list of major problems with the agreement. Such a list is at Attachment A. However, it should only include items 1-7, since items 8 and 9 would involve renegotiation of the agreement.

Identifying gaps is not calling for renegotiation. You might avoid being specific about this by using generalized language that calls for "a fresh look" (or something similar) at the overall NAFTA arrangement. However, items 1-7 add to the basic agreement that has already been reached.

This alternative implicitly accepts the provisions that do exist in the agreement, including some politically sensitive ones. For example, it accepts the provisions regarding the automobile industry that the UAW opposes. Gephardt identified this as one of the areas where "the Agreement continues lopsided sectoral relationships for far too long." However, to call for revisiting the key provisions in the agreement means that, like Gephardt, you support renegotiation. That's alternative 3, discussed below.

Alternative 3.

This alternative would call for reopening the agreement and renegotiating parts of it, as well as filling in the gaps noted in Alternative 2 above. If you call for "renegotiation" (as Gephardt did), then you are likely to start a chain reaction of various U.S. interest groups wanting provisions about their industries being reviewed (e.g., automobiles, energy, glassware, fruit and vegetables). You also open the door to Mexico and Canada insisting on review of the tradeoffs that they had agreed to (e.g., computers, financial services).

There is a history of changes in proposed agreements. For example, the negotiating history of the NAFTA predecessor, the U.S.-Canada Free Trade Agreement (FTA), saw several major changes in the agreement between the time that an agreement of about 40 pages was reached and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of about 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

Nevertheless, calling for renegotiation will be interpreted by many editorial writers, businesspeople, and others as being inconsistent with your past statements on NAFTA and as your moving to a "protectionist" position in response to the entreaties of labor unions and other interest groups supporting you.

On the other hand, the campaign's polling data might indicate that it will help you in certain battleground states. Those supporting renegotiation include the AFL-CIO, workers concerned about their jobs, and a number of environmentalists.

Attachment A provides a draft outline of a possible statement and listing of problems for either alternative 2 or 3.

Attachment B

Pending Events in the NAFTA Process

Sun., Sept. 20	France votes in referendum on the Maastricht Treaty for strengthening the European Community. (Though not on NAFTA, the vote will highlight regional economic groupings.)
Tues., Sept. 22	American Express Pres. Robinson and AFL-CIO Secretary Donohue testify before Senate Finance
Wed, Sept. 30	Senate Finance has hearings on agricultural and energy provisions
During Sept.	House committees, other than Ways and Means, also have hearings. E.g., Panetta's Budget Committee on the budgetary implications, Wyden's subcommittee on environmental issues.
During early Oct.	Some House committees or subcommittees might have field hearings
Late Nov.	Studies due from Office of Technology Assessment and the Congressional Reference Service.
Dec. 17	Earliest date that the President can sign the NAFTA agreement
Late Jan.	Impact study due from the International Trade Commission

Attachment CBackground Information

Basic Overview. NAFTA covers all of North America, expanding upon and modifying the 1988 Free Trade Agreement between the United States and Canada. By including Mexico, the North American free trade area will encompass over 360 million people and over \$6 trillion in annual output.¹

NAFTA will phase out virtually all tariffs between the United States and Mexico over 0-15 years, with the most sensitive products receiving the longest transitions. But NAFTA extends beyond trade in goods--it reduces barriers to trade in services (such as insurance and banking), to investment, and to establishment of businesses. It also addresses many national regulatory controls. For Mexico, for example, it strengthens intellectual property protection and it limits the regulation of trucking.

Economic Impact. U.S. industries likely to benefit including banking, energy, wheat and feed grains, and electronics. Industries likely to be harmed include fruit and vegetable producers, apparel workers, and other low-wage manufacturers currently enjoying high tariff protection, such as glassware and shoes. The Big 3 auto producers will likely support the agreement, but the UAW will almost certainly oppose it.

Secretary of Labor Lynn Martin admitted that one study, which she did not identify, estimated that the job losses from the NAFTA agreement could be as much as 150,000. This was at the Senate Finance hearings on Thursday, Sept. 10.

In an authoritative study, economists Gary Hufbauer and Jeffrey Schott estimate that NAFTA will create about 325,000 jobs in the United States. It will also displace by 1995 about 150,000 jobs, primarily in unskilled and semi-skilled factory positions. Because the jobs created and those displaced will differ in skills and location, Hufbauer and Schott

¹	<u>Population</u>	<u>Gross Domestic</u> <u>Product</u>	<u>GDP, per capita</u>
Canada	27 million	\$ 570 billion	\$21,418
Mexico	86	238	2,490
U.S.	252	5,392	21,449

(Based on 1990 figures. From reputable sources cited in the New York Times, August 12, 1992, page 1. Other sources might vary slightly, however.) Even without NAFTA, U.S. trade with Mexico--which had a slight deficit in 1990--is expected to reach a surplus of \$7 billion during 1992.

recommend that the United States budget \$1.2 billion over five years to facilitate NAFTA-related job adjustment.

Economists Jeff Faux and Thea Lee of the labor-supported Economic Policy Institute criticize the Hufbauer-Schott estimates as too optimistic. They say that competition from Mexican workers will cause wages of low-skilled U.S. workers to decrease by as much as \$1,000 a worker. Further, they say that 550,000 fewer high-paying jobs will be created in the United States during the next 10 years because added investment will go to Mexico rather than the United States.

Attitudes in Mexico. NAFTA is widely supported in Mexico. Originally proposed by President Carlos Salinas de Gortari, it is the centerpiece of his bold effort to open up Mexico and to modernize it. Defeat of the NAFTA would be a massive setback for Salinas and would place in jeopardy his entire pro-U.S., pro-market strategy. It would also adversely affect Mexican cooperation on a host of common concerns, including drug trafficking and immigration.

Attitudes in Canada. NAFTA is controversial in Canada and its approval by the Parliament is not certain. The 1988 Free Trade Agreement (FTA) between the United States and Canada is unpopular because of a perception that it has hurt Canada economically. Prime Minister Brian Mulroney--who also was in power when the FTA was negotiated and who now has higher unfavorable than favorable ratings--hopes to argue that NAFTA is an improvement for Canada over the FTA. The Canadian leader, who will probably seek a third term, must call elections by the fall of 1993. Many analysts, however, expect a spring 1993 election.

Bush Promises in 1991. In May 1991, President Bush made a number of commitments to Congress when he was seeking "fast-track" authority in order to simplify the later passage of NAFTA (and of a possible GATT Uruguay Round agreement). In his "Action Plan," Bush committed himself "to achieving a balance [with economic growth] that recognizes the need to preserve the environment, protect worker safety, and facilitate adjustment." He also said that "my Administration is committed to working with Congress to ensure that there is adequate assistance and effective retraining for dislocated workers."

Bush has not yet lived up to his 1991 commitments. He has not taken adequate steps to protect the environment and he has failed to deal concretely with worker training and other adjustment measures. The arrangement is still incomplete.

To: Governor Bill Clinton
Fr: Gene Sperling
Re: NAFTA Meeting
Dt: September 19, 1992

We have a meeting scheduled today on NAFTA. We want this to be a substantive meeting that examines the agreement and the political context you will face in responding. In addition to your staff, we have invited three experts to meeting: Barry Carter, a Georgetown Law Professor who has been coordinating information gathering on this issue for us; Mike Wessel, Dick Gephardt's trade expert -- and one of our top overall Congressional advisors; and Bob Kyle, Senator Bentsen's trade expert. Kyle was at the international economics briefing with you in Washington, and authored with Bentsen the recent memo sent to you analyzing NAFTA.

Purpose: The agenda for the meeting is three-fold:

One, to examine the strengths and weaknesses of the agreement. In particular, we need to examine environmental protections, labor practices, worker training, the impact on automobiles and other industries, and overall enforcement mechanisms.

Two, to examine what the avenues for redress are for things we find sub-par. What things can be done only through reopening the treaty and what could be done through implementing legislation or parrallel agreements. Furthermore, are there opportunities for limited negotiations i.e., maritime provisions in U.S.-Canada FTA.

Three, in light of these substantive determinations, what is the best political option. Some believe that which ever you decide, you must be come out clear one way or another. In other words, you should be able to answer the question "are you for or against NAFTA" with a "yes" or "no" answer. Others feel you can take a position that lays out your general support for NAFTA, but makes your support conditional. The three overall main options are as follows:

"Yes, and..." Declare that you believe the agreement should be signed, but that there are things that you would do later to strengthen it. This would be the "yes and" position, because you are saying yes to the agreement but saying that there are additional things you would call for. This position would be interpreted by editorial boards (favorably) and labor (unfavorably) as a clear yes.

"Yes, but only if..." In this option, you would state your support for the agreement, but condition your support on the completion of a few aspects that you believe could be changed with implementing legislation or limited negotiations relating to workers and the

environment. The advantages of this position -- yes, if we satisfy labor and environmental standards -- is that it is perhaps the most popular position with the public. If you hit this with force, you will be able to express both your support for free trade and workers and the environment. The theme would be "I support this if the President will make the following changes, but if he won't do it now, I'll do it later." The "con" to this answer, is that Republicans will try to portray it as you waffling and trying to be all things to all people. Others, may simply see it as a "no" in less than clear language.

"No...and here is why" Under this option, you would come out clearly against the agreement and give the exact reasons why. Again, here you would also express your strong support for free trade and the concept of NAFTA but clearly state that the President has negotiated a bad agreement and that you will negotiate a strong one. The advantage of this is that it will be a clear and decisive answer and it will be popular with many workers particularly in Michigan and Ohio. This "con" is that this will be portrayed by Republicans as a flip-flop and pander to unions. Yet, they will have a harder time doing so if Congressional Democrats in general are coming out in this direction and if Lynn Martin keeps telling people 150,000 jobs will be lost.

Everyone agrees that whatever position you take, you do so in the context of a major speech that lays out your philosophy on trade.

Attached are two pieces:

1. Summary of Agreement: The first four pages is a brief summary and analysis of the main issues from the Senate Finance Committee, (Bob Kyle, Eric Biel, Marcia Miller and Debbie Lamb)
2. Overview of Options: Barry Carter prepared three attachments: Attachment A discusses specific problems with the agreement and how they might be handled. Attachment B lists the coming of the events and Attachment C provides background information.

Summary of NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

Wednesday, August 12, 1992

A. Overview

The NAFTA announced today between the United States, Mexico, and Canada largely includes Mexico in the free trade pact the U.S. and Canada entered in 1988. The agreement eliminates virtually all tariffs between the U.S. and Mexico and liberalizes trade in a variety of areas, including services trade, government procurement and investment. U.S. industries likely to benefit from the agreement include banking, energy, wheat and feed grains, electronics and a variety of other industries currently facing high Mexican barriers. Industries likely to be harmed include fruit and vegetable producers, apparel workers, and other low-wage manufacturers currently enjoying high tariff protection, such as glasswares and shoes. The Big 3 is likely to support the agreement, but the UAW and AFL-CIO are almost certain to oppose. The agreement addresses some environmental issues, but generally leaves resolution of most environmental and all worker retraining issues to the Congressional legislation implementing the agreement -- as the price Congress will demand to approve the agreement. Below is a description of key sections of the agreement.

B. Agriculture

Terms of the Agreement.--The agreement is likely to be a mixed bag for U.S. agriculture. It would benefit U.S. producers of competitive crops like corn, wheat and feedgrains, for which Mexico currently imposes quantity limitations and/or tariffs. In these areas, Mexico has agreed to phase out its restrictions over 0-15 years, depending on the import sensitivity of the product. On the other hand, U.S. fruit and vegetable producers, who are less competitive against low-wage Mexican production, are likely to oppose the agreement, even though they generally received 10-15 year transition periods during the most sensitive growing seasons. Other U.S. crops traditionally protected by quotas (sugar, cotton, peanuts) will also see their protections phased out over 10-15 years. In agriculture, the U.S. and Mexico essentially reached a bilateral agreement because Canada refused to eliminate all of its trade barriers.

Analysis.--It is not yet clear whether producers of corn, wheat and other "winner" crops will feel sufficiently enthusiastic about the agreement to offset the concerns of the fruits and vegetable producers and other farmers that might suffer. The response may vary by region. In the Great Plains and Upper Midwest, benefits to crops like corn and wheat may counterbalance some concerns about industrial job loss. In Texas and California, fruit and vegetable producers may vocally oppose the agreement, but could be placated by the long transition periods. (These states have substantial production of various "winner" crops as well). In Florida, citrus growers are more likely to be vocal in opposition, even though U.S. orange juice restrictions received a 15-year phase-out.

C. Automobiles

Terms of the Agreement.--Generally, Mexico has agreed to eliminate its substantial barriers to auto trade (e.g., 20% auto tariffs, 16% domestic content requirement) over ten years. Over the same period, Mexico will also eliminate its trade balancing requirement that U.S. auto companies producing in Mexico export twice as many cars by value from Mexico as they import from the U.S., a provision ensuring that Mexico has an auto trade surplus. In return, the U.S. would eliminate its low 2.5% tariff on auto imports immediately. Both countries would phase-out their tariffs on light trucks over 5 years. This relatively quick transition could be controversial in the U.S., given that the U.S. now imposes a 25% tariff.

Another major issue for the UAW and the Big 3 concerned the percentage of North American content cars must contain to receive duty-free treatment within North America. The concern was that Japanese car makers, for example, would produce most of the car in Japan, conduct only assembly operations in Mexico, then ship the car duty-free into the U.S. The U.S. auto industry insisted on a 65% North American content requirement; Mexico and Canada favored 50%, the current level under the U.S.-Canada free trade agreement. The negotiators settled on 62.5%, which will be controversial.

Analysis.--By eliminating most Mexican auto barriers, the agreement does provide considerable benefits to U.S. auto producers. Although the Big 3 pressed for the 65% content requirement, they will probably be sufficiently satisfied with the rest of the agreement to support it. The UAW almost certainly will oppose the agreement due to fears that auto plants will relocate to Mexico.

D. Services

Terms of the Agreement.--The agreement liberalizes trade in a number of service areas, including banking, insurance, telecommunications and transportation. Most attention has focused on financial services, where U.S. ownership of Mexican banks is limited to a 34% share and U.S.-owned banks are essentially prohibited from operating in Mexico. U.S. ownership of Mexican insurance companies is limited to a 49% share. The agreement gradually gives U.S. banks a steadily increasing share of the Mexican market, starting at 8% and rising to 15% by the year 2000, after which the cap would be removed. The U.S. industry believes these caps are acceptable, as they are unlikely to reach them that quickly anyway. In the insurance sector, all U.S. firms will be able to hold majority ownership of Mexican insurance companies by 1999, with no market share cap.

Analysis.--The U.S. financial services industry generally is very supportive of the agreement. The support of the industry is important to the Administration because the large firms (American Express, Citicorp, American International Group) have often provided much of the manpower and financial support necessary to sell trade agreements to Congress. That is likely to be the case when selling NAFTA as well.

E. Environmental Issues

Terms of the Agreement.--The agreement addresses some types of environmental concerns, but does not address others. The agreement does address the concern of environmentalists that harmonization of trade regulations would require the U.S. to reduce its environmental and health and safety standards on imported products (e.g., pesticides on vegetables, CFC standards on refrigerators) to Mexican levels. The agreement protects these standards against challenge -- even if they are tougher than those of Mexico -- as long as they satisfy two conditions: 1) the same standards apply to U.S.-made products and 2) the standards can be justified with a sound scientific basis. The negotiators are expected today to reach a separate, but related agreement establishing a U.S.-Mexico commission on the environment, which would oversee progress by the two countries (particularly Mexico) in enforcing their environmental laws. The agreement also provides that specified international environmental treaties shall take precedence over NAFTA.

Analysis.--Mainstream environmental groups are not likely to object strongly to what is in the agreement. The controversy is likely to center around what the Administration intends to do in areas not covered by the agreement, but related to the NAFTA. This includes demands to provide additional funding for pollution cleanup along both sides of the U.S.-Mexican border and improvements in the quality of environmental enforcement by the Mexican government, steps that do not necessarily need to be part of the trade agreement. Your continued emphasis on environmental issues is likely to resonate particularly strongly in such pro-NAFTA states as Texas and California, where support for the free trade agreement is coupled with a clear recognition of the pollution problems along the border. This is likely to be a major focus of Congressional concern as it begins to consider the agreement.

F. Labor Issues

Terms of the Agreement.--The NAFTA agreement itself does not include provisions to help U.S. workers displaced because of increased NAFTA trade, other than to provide long transition periods for sensitive sectors. The heart of this controversy has always been the need to provide a worker retraining and adjustment program for U.S. workers displaced by NAFTA. In May, 1991, President Bush presented an "Action Plan" to Congress, committing to support a NAFTA worker adjustment program as part of the legislation implementing a NAFTA (which will be considered by Congress next year). In order to insulate itself from attacks in this area, the Administration today reaffirmed its willingness to work with Congress to structure such a program. On another subject, the agreement does not require any minimum worker rights or workplace standards for Mexican workers, a demand of the AFL-CIO, who want Mexican wages and working conditions to be improved.

Analysis.--The Administration's statement that it will work with Congress to structure a worker adjustment program should be taken with a grain of salt. The President committed to such a program in the first place only after Congress demanded it as the price necessary to give Bush authority to negotiate the NAFTA. Moreover, for the past ten years, the Reagan and Bush Administrations have tried to eliminate the Trade Adjustment Assistance program, the U.S. program that currently help workers dislocated by imports. That record provides little indication that the Administration is committed to worker retraining and adjustment.

Attachment A

Draft/Barry Carter/Sept. 18

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does not support the agreement, but insists on changes:]

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

[LISTING THE PROBLEMS:]

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

4. The three countries have just announced [on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.¹ In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

¹ There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialed on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.

Attachment B

B. Carter/Draft/Sept. 18

Pending Events in the NAFTA Process

Sun., Sept. 20	France votes in referendum on the Maastricht Treaty for strengthening the European Community. (Though not on NAFTA, the vote will highlight regional economic groupings.)
Tues., Sept. 22	American Express Pres. Robinson and AFL-CIO Secretary Donohue testify before Senate Finance
Wed, Sept. 30	Senate Finance has hearings on agricultural and energy provisions
During Sept.	House committees, other than Ways and Means, also have hearings. E.g., Panetta's Budget Committee on the budgetary implications, Wyden's subcommittee on environmental issues.
During early Oct.	Some House committees or subcommittees might have field hearings
Late Nov.	Studies due from Office of Technology Assessment and the Congressional Reference Service.
Dec. 17	Earliest date that the President can sign the NAFTA agreement
Late Jan.	Impact study due from the International Trade Commission

Attachment C

B. Carter/Draft/Sept. 18

Background Information

Basic Overview. NAFTA covers all of North America, expanding upon and modifying the 1988 Free Trade Agreement between the United States and Canada. By including Mexico, the North American free trade area will encompass over 360 million people and over \$6 trillion in annual output.¹

NAFTA will phase out virtually all tariffs between the United States and Mexico over 0-15 years, with the most sensitive products receiving the longest transitions. But NAFTA extends beyond trade in goods--it reduces barriers to trade in services (such as insurance and banking), to investment, and to establishment of businesses. It also addresses many national regulatory controls. For Mexico, for example, it strengthens intellectual property protection and it limits the regulation of trucking.

Economic Impact. U.S. industries likely to benefit including banking, energy, wheat and feed grains, and electronics. Industries likely to be harmed include fruit and vegetable producers, apparel workers, and other low-wage manufacturers currently enjoying high tariff protection, such as glassware and shoes. The Big 3 auto producers will likely support the agreement, but the UAW will almost certainly oppose it.

Secretary of Labor Lynn Martin admitted that one study, which she did not identify, estimated that the job losses from the NAFTA agreement could be as much as 150,000. This was at the Senate Finance hearings on Thursday, Sept. 10.

In an authoritative study, economists Gary Hufbauer and Jeffrey Schott estimate that NAFTA will create about 325,000 jobs in the United States. It will also displace by 1995 about 150,000 jobs, primarily in unskilled and semi-skilled factory positions. Because the jobs created and those displaced will differ in skills and location, Hufbauer and Schott

	<u>Population</u>	<u>Gross Domestic Product</u>	<u>GDP, per capita</u>
Canada	27 million	\$ 570 billion	\$21,418
Mexico	86	238	2,490
U.S.	252	5,392	21,449

(Based on 1990 figures. From reputable sources cited in the New York Times, August 12, 1992, page 1. Other sources might vary slightly, however.) Even without NAFTA, U.S. trade with Mexico--which had a slight deficit in 1990--is expected to reach a surplus of \$7 billion during 1992.

recommind that the United States budget \$1.2 billion over five years to facilitate NAFTA-related job adjustment.

Economists Jeff Faux and Thea Lee of the labor-supported Economic Policy Institute criticize the Hufbauer-Schott estimates as too optimistic. They say that competition from Mexican workers will cause wages of low-skilled U.S. workers to decrease by as much as \$1,000 a worker. Further, they say that 550,000 fewer high-paying jobs will be created in the United States during the next 10 years because added investment will go to Mexico rather than the United States.

Attitudes in Mexico. NAFTA is widely supported in Mexico. Originally proposed by President Carlos Salinas de Gortari, it is the centerpiece of his bold effort to open up Mexico and to modernize it. Defeat of the NAFTA would be a massive setback for Salinas and would place in jeopardy his entire pro-U.S., pro-market strategy. It would also adversely affect Mexican cooperation on a host of common concerns, including drug trafficking and immigration.

Attitudes in Canada. NAFTA is controversial in Canada and its approval by the Parliament is not certain. The 1988 Free Trade Agreement (FTA) between the United States and Canada is unpopular because of a perception that it has hurt Canada economically. Prime Minister Brian Mulroney—who also was in power when the FTA was negotiated and who now has higher unfavorable than favorable ratings--hopes to argue that NAFTA is an improvement for Canada over the FTA. The Canadian leader, who will probably seek a third term, must call elections by the fall of 1993. Many analysts, however, expect a spring 1993 election.

Bush Promises in 1991. In May 1991, President Bush made a number of commitments to Congress when he was seeking "fast-track" authority in order to simplify the later passage of NAFTA (and of a possible GATT Uruguay Round agreement). In his "Action Plan," Bush committed himself "to achieving a balance [with economic growth] that recognizes the need to preserve the environment, protect worker safety, and facilitate adjustment." He also said that "my Administration is committed to working with Congress to ensure that there is adequate assistance and effective retraining for dislocated workers."

Bush has not yet lived up to his 1991 commitments. He has not taken adequate steps to protect the environment and he has failed to deal concretely with worker training and other adjustment measures. The arrangement is still incomplete.

- 2 -

TO: Governor Bill Clinton
Via Tony Lake, Nancy Soderberg, and Gene Sperling

FROM: Barry Carter *jc*

RE: Next Steps on the North American Free Trade Agreement (NAFTA)

OVERVIEW

A good North American Free Trade Agreement (NAFTA) is in the U.S. interest, as well as Canada's and Mexico's. It means expanded jobs and other economic benefits for the three countries. It would strengthen the sometimes difficult relations the United States has had with its neighbors. It will be key to continuing and making more solid the truly impressive changes in Mexico that President Salinas is pursuing.

A good arrangement, however, must include adequate protection for the workers, farmers, and environment on both sides of the border. This includes transition strategies that ensure that U.S. workers will be able to benefit from a more open world trading system.

The proposed NAFTA agreement of the Bush Administration is a considerable achievement. The 1000 pages of text and another 1000 pages of supporting schedules address a wide range of matters. Nevertheless, the proposed agreement is full of important gaps and problems.

Briefly, the proposed agreement does not deal with adequate assistance for workers and communities who are adversely affected, rather it is a concern left for each country to handle. Moreover, the recently-announced Bush program for worker training lacks the necessary funding and has other problems. Other concerns, such as occupational safety and health requirements, and child labor laws, are also left untouched.

Many genuine environmental concerns have yet to be addressed. More can be done to encourage Mexico to enforce its laws. The provisions for dispute resolution on environmental questions are limited and the public can be more fully involved in this process.

The proposed agreement can also harm some U.S. farmers in ways that can be avoided with targeted programs.

In short, we are dealing with a commendable objective, but an inadequate agreement. This creates a grey area where there are several valid and defensible formulations that you can choose from. They really boil down to three principal alternatives:

(1) You can continue to say that you need to study the unsigned document¹ further, because the congressional hearings and other studies are still under way and because the parallel environmental negotiations are not yet concluded.

(2) You can support the proposed agreement grudgingly only if several gaps are filled in, through U.S. programs or additional agreements with Mexico and Canada. At present, the document is incomplete from the U.S. perspective. You can highlight where the gaps still exist. President Bush has not finished the job. Either he must finish it, or you will have to do so as the next President before you can go along with the arrangement.

(3) You can continue your support for a NAFTA good arrangement, but say that this agreement is not a good one and that you cannot support it in its present form. George Bush did not do the job. You can identify the problems and call on Bush to solve them before he signs the agreement. If he cannot or will not, you will do so if you are elected President.

Alternatives 2 and 3 are very similar analytically--#2 is saying the glass is half full and #3 is saying the glass is half empty. However, public perceptions will differ considerably depending on whether you support or do not support the agreement.

If you do move from your present posture of continuing to study NAFTA, you might explain your new position in the context of a general speech criticizing the international economic policies of the Bush Administration. This should help emphasize that you share the concerns of disaffected workers and others about jobs moving to Mexico and other countries with lower wage scales.

If you select alternative 3, I suggest you demonstrate your commitment to eventually obtaining a good NAFTA arrangement and improving hemispheric relations by promising to meet with Prime Minister Mulroney of Canada and President Salinas of Mexico early in the transition period. For a historical analogy, Dwight Eisenhower's 1952 promise to visit Korea was well-received by the voters.

These options should be viewed in the context that the proposed agreement is only part of a complete NAFTA arrangement. Everyone, even the Bush Administration, realizes that there are other pieces to the arrangement. For example, some matters are better treated through each country's own programs--such as worker training. And, there can be supplementary arrangements among the United States and Mexico and/or Canada. For

¹ The Bush Administration calls the document an agreement. However, it is still unsigned. (President Bush provided a draft on September 8. Then, when he notified Congress on September 18 of his intention to sign the agreement on or after December 17, he said he was providing a final version.) So, there seems little reason to give the document a greater status than it deserves. It is a "proposed agreement" or an "unsigned document."

SEP 20 '92 17:56 CLINTON FOR PRES. 501-399-2645 P.17
example, the three countries just announced on September 17 that they have agreed "in principle" to create a North American commission on environmental cooperation, which will be formalized in another agreement in early 1993.

Also, the document is still an unsigned, proposed agreement. U.S. law requires that at least 90 days must pass between the time the President notifies Congress of his intention to sign the proposed agreement and his actual signing of the agreement. President Bush just notified Congress on September 18, so that the proposed agreement cannot be signed until at least December 17.

DISCUSSION

The following is a more detailed discussion of the alternatives. Accompanying this memo are Attachment A which provides the outline of a possible statement by you and a listing of problems with the proposed agreement; Attachment B which provides some key future dates in the NAFTA process; and Attachment C which provides some useful background information.

Alternative 1.

Continuing to study the matter (alternative 1) will increasingly wear thin. The "draft" version of the proposed agreement was made available on September 8 and a final version on September 18, much has already come out about the impact of the proposed agreement, and Majority Leader Gephardt has already taken a stance (for renegotiation).

You could still hold to this position for several weeks, and maybe even through the election, but at an increasing cost of appearing to straddle and look indecisive. President Bush is clearly committed to emphasizing NAFTA and your reaction to it.

Probably the strongest argument for this alternative is a political one--that it might be better to absorb the costs of continuing with a straddle, rather than taking a more definite stand under alternative 2 and alienating workers and others in some of the key battleground states (like Michigan). However, if your position under alternative 2 were carefully phrased, the costs with these groups might be minimized. (This is obviously an issue where the polling data and focus groups can be very helpful.)

If you choose to continue with this alternative, you can justify the need for continuing study of the overall NAFTA arrangement on the grounds that:

— The parallel negotiations on environmental protection are still underway. As noted above, the Sept. 17 announcement by the three environmental ministers of the three countries that they agreed "in principle" on a North American commission on environmental protection indicated that they would not even meet to formalize the arrangement until early 1993!

SEP 20 '92 17:58 CLINTON FOR PRES. 501-399-2645 P.18
The congressional hearings are still underway. They will continue through at least September 28, and House subcommittees might have some field hearings in early October. See Attachment B.

-- Various studies are being prepared on the impact of this very important proposed agreement, now that its terms are known. (See Appendix C for background information about the scope of the arrangement.) In response to congressional requests, the Congressional Reference Service and Office of Technology Assessment are in the midst of studies that will be completed in early to mid-November, and the International Trade Commission has an impact study that will not be completed until mid-January.

-- Present U.S. legislation provides for 90 calendar days for Congress and others to study a proposed agreement that the President notifies them about--a wise approach. Notification just occurred on September 18.

-- The important implementing legislation that the U.S. Congress must pass will not be available before at least mid-January.

Alternative 2.

This recommended alternative would have you grudgingly support the proposed agreement among the three countries, but only if several gaps are filled in. It is important to recognize that the proposed agreement is only a part of the necessary arrangement that promotes expanded trade while providing adequate protection for workers, farmers, and the environment.

Other parts of the arrangement are still missing or are inadequate. The key here, though, is not to open the proposed agreement to renegotiation (which can start a chain reaction of other calls for change), but to correct the weaknesses through separate side-table agreements between the United States and Mexico and/or Canada, or through U.S. laws (such as for worker training).

You can emphasize specific problems that track your oft-stated concerns for the workers, environment, and farmers. Rather than being exhaustive (and limiting your flexibility to add further criticisms), you should present an illustrative list of major problems with the agreement. Such a list is at Attachment A. However, it should only include items 1-7, since items 8 and 9 would involve renegotiation of the agreement.

Identifying gaps is not calling for renegotiation. You might avoid being specific about this by using generalized language that calls for "a fresh look" (or something similar) at the overall NAFTA arrangement. However, items 1-7 add to the basic agreement that has already been reached.

SEP 20 '92 17:59 CLINTON FOR PRES. 501-333-2825 P.19
including some politically sensitive ones. For example, it accepts the provisions regarding the automobile industry that the UAW opposes. Gephardt identified this as one of the areas where "the Agreement continues lopsided sectoral relationships for far too long." However, to call for revisiting the key provisions in the agreement means that, like Gephardt, you support renegotiation. That's alternative 3, discussed below.

Alternative 3

This alternative would call for reopening the agreement and renegotiating parts of it, as well as filling in the gaps noted in Alternative 2 above. If you call for "renegotiation" (as Gephardt did), then you are likely to start a chain reaction of various U.S. interest groups wanting provisions about their industries being reviewed (e.g., automobiles, energy, glassware, fruit and vegetables). You also open the door to Mexico and Canada insisting on review of the tradeoffs that they had agreed to (e.g., computers, financial services).

There is a history of changes in proposed agreements. For example, the negotiating history of the NAFTA predecessor, the U.S.-Canada Free Trade Agreement (FTA), saw several major changes in the agreement between the time that an agreement of about 40 pages was reached and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of about 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

Nevertheless, calling for renegotiation will be interpreted by many editorial writers, businesspeople, and others as being inconsistent with your past statements on NAFTA and as your moving to a "protectionist" position in response to the entreaties of labor unions and other interest groups supporting you.

On the other hand, the campaign's polling data might indicate that it will help you in certain battleground states. Those supporting renegotiation include the AFL-CIO, workers concerned about their jobs, and a number of environmentalists.

Attachment A provides a draft outline of a possible statement and listing of problems for either alternative 2 or 3.

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement

[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does not support the agreement, but insists on changes:]

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

[LISTING THE PROBLEMS:]

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

SEP 28 '92 18:02 CLINTON FOR PRES. 501-399-2645 on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

² There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

libSEP' 20 '92' 18:03 CLINTON FOR PRES. 501-359-2645f lever(s). This will help protect P.23 against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.

Pending Events in the NAFTA Process

Sun., Sept. 20	France votes in referendum on the Maastricht Treaty for strengthening the European Community. (Though not on NAFTA, the vote will highlight regional economic groupings.)
Tues., Sept. 22	American Express Pres. Robinson and AFL-CIO Secretary Donohue testify before Senate Finance
Wed, Sept. 30	Senate Finance has hearings on agricultural and energy provisions
During Sept.	House committees, other than Ways and Means, also have hearings. E.g., Panetta's Budget Committee on the budgetary implications, Wyden's subcommittee on environmental issues.
During early Oct.	Some House committees or subcommittees might have field hearings
Late Nov.	Studies due from Office of Technology Assessment and the Congressional Reference Service.
Dec. 17	Earliest date that the President can sign the NAFTA agreement
Late Jan.	Impact study due from the International Trade Commission

Background Information

Basic Overview. NAFTA covers all of North America, expanding upon and modifying the 1988 Free Trade Agreement between the United States and Canada. By including Mexico, the North American free trade area will encompass over 360 million people and over \$6 trillion in annual output.¹

NAFTA will phase out virtually all tariffs between the United States and Mexico over 0-15 years, with the most sensitive products receiving the longest transitions. But NAFTA extends beyond trade in goods--it reduces barriers to trade in services (such as insurance and banking), to investment, and to establishment of businesses. It also addresses many national regulatory controls. For Mexico, for example, it strengthens intellectual property protection and it limits the regulation of trucking.

Economic Impact. U.S. industries likely to benefit including banking, energy, wheat and feed grains, and electronics. Industries likely to be harmed include fruit and vegetable producers, apparel workers, and other low-wage manufacturers currently enjoying high tariff protection, such as glassware and shoes. The Big 3 auto producers will likely support the agreement, but the UAW will almost certainly oppose it.

Secretary of Labor Lynn Martin admitted that one study, which she did not identify, estimated that the job losses from the NAFTA agreement could be as much as 150,000. This was at the Senate Finance hearings on Thursday, Sept. 10.

In an authoritative study, economists Gary Hufbauer and Jeffrey Schott estimate that NAFTA will create about 325,000 jobs in the United States. It will also displace by 1995 about 150,000 jobs, primarily in unskilled and semi-skilled factory positions. Because the jobs created and those displaced will differ in skills and location, Hufbauer and Schott

	<u>Population</u>	<u>Gross Domestic Product</u>	<u>GDP, per capita</u>
Canada	27 million	\$ 570 billion	\$21,418
Mexico	86	238	2,490
U.S.	252	5,392	21,449

(Based on 1990 figures. From reputable sources cited in the New York Times, August 12, 1992, page 1. Other sources might vary slightly, however.) Even without NAFTA, U.S. trade with Mexico--which had a slight deficit in 1990--is expected to reach a surplus of \$7 billion during 1992.

recommend that the United States budget \$1.2 billion over five years to facilitate NAFTA-related job adjustment.

Economists Jeff Faux and Thea Lee of the labor-supported Economic Policy Institute criticize the Hufbauer-Schott estimates as too optimistic. They say that competition from Mexican workers will cause wages of low-skilled U.S. workers to decrease by as much as \$1,000 a worker. Further, they say that 550,000 fewer high-paying jobs will be created in the United States during the next 10 years because added investment will go to Mexico rather than the United States.

Attitudes in Mexico. NAFTA is widely supported in Mexico. Originally proposed by President Carlos Salinas de Gortari, it is the centerpiece of his bold effort to open up Mexico and to modernize it. Defeat of the NAFTA would be a massive setback for Salinas and would place in jeopardy his entire pro-U.S., pro-market strategy. It would also adversely affect Mexican cooperation on a host of common concerns, including drug trafficking and immigration.

Attitudes in Canada. NAFTA is controversial in Canada and its approval by the Parliament is not certain. The 1988 Free Trade Agreement (FTA) between the United States and Canada is unpopular because of a perception that it has hurt Canada economically. Prime Minister Brian Mulroney—who also was in power when the FTA was negotiated and who now has higher unfavorable than favorable ratings—hopes to argue that NAFTA is an improvement for Canada over the FTA. The Canadian leader, who will probably seek a third term, must call elections by the fall of 1993. Many analysts, however, expect a spring 1993 election.

Bush Promises in 1991. In May 1991, President Bush made a number of commitments to Congress when he was seeking "fast-track" authority in order to simplify the later passage of NAFTA (and of a possible GATT Uruguay Round agreement). In his "Action Plan," Bush committed himself "to achieving a balance [with economic growth] that recognizes the need to preserve the environment, protect worker safety, and facilitate adjustment." He also said that "my Administration is committed to working with Congress to ensure that there is adequate assistance and effective retraining for dislocated workers."

Bush has not yet lived up to his 1991 commitments. He has not taken adequate steps to protect the environment and he has failed to deal concretely with worker training and other adjustment measures. The arrangement is still incomplete.

- 2 -



SEP 20 '92 18:08 CLINTON FOR PRES. 501-399-2645

100100001000-1101-2:14
THE AMERICAN SOCIETY OF INTERNATIONAL LAW
2223 Massachusetts Avenue, N.W. Washington, D.C. 20008-2864 (202) 265-4313 Fax (202) 797-7133

Friday evening

Dear Nancy:

Voila! Here is the outline of problems with the NAFTA agreement. I put the outline in the context of a proposed statement, offering formulations for either supporting or not supporting the agreement. I hope it is not too complicated. If it is, I arranged the outline so that you can conveniently just drop the first page.

Also included, as we discussed, is the recent communique about the agreement in principle for a North American commission on environmental cooperation, and President Bush's notification today to Congress of his intent to sign the agreement.

I hope to send later tonight a memo discussing the alternatives available to Gov. Clinton. You might want to wait for it before you distribute anything.

My best,

A handwritten signature, likely "George", in cursive script.

Draft/Barry Carter/Sept. 18

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement**[Introduction:]**

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does not support the agreement, but insists on changes:]

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

(LISTING THE PROBLEMS:)

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

4. The three countries have just announced [on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

² There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

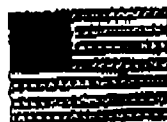
[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.



Environnement
Canada



Environmental Protection Agency
United States



Secretaría de Desarrollo Social
Mexico

FOR RELEASE: THURSDAY, September 17, 1992

Luke Hester @ EPA 202-260-4355
Ramiro Pineda, Mexican Delegation
Javier Trevino @ Mexican Embassy 202-728-1650
Malcolm McKeechie @ Canadian Embassy 202-682-1740

The Ministers responsible for the environment of Canada, Mexico and the United States today held their first joint discussions on possible ways and means to strengthen environmental cooperation in North America. Jean J. Charest, Canada's Minister of the Environment, Luis Donaldo Colosio Murrieta, Mexico's Secretary of Social Development, and William K. Reilly, Administrator of the U.S. Environmental Protection Agency, share the view that more formal cooperation mechanisms are required to meet the environmental challenges leading into the 21st century.

The Ministers recognize that environmental cooperation among the three countries is only possible under the principle of full respect for the sovereignty of each country.

They agreed in principle to the creation of a North American commission on environmental cooperation. The goal is to set in motion a process

(more)

for sustained, long-term and effective trilateral environmental cooperation. Where appropriate, this mechanism will provide for public participation. Ministers instructed officials to work expeditiously to develop proposals to implement this structure.

The Ministers endorse the view that the North American Free Trade Agreement is the most environmentally-sensitive trade agreement ever negotiated. It was emphasized that NAFTA will promote both economic growth and strong environmental protection within the three countries. They noted especially the NAFTA preamble which includes a commitment to sustainable development and environmental conservation and protection. Additional provisions in the agreement ensure that: (a) the integrity of the Parties' domestic environmental regulatory regimes is maintained, (b) efforts are made towards enhancement of standards, (c) disputes concerning environmental measures are resolved in an environmentally sensitive manner; (d) the trade provisions of key international environmental agreements are protected, and (e) Parties refrain from attracting or retaining investment by permitting the creation of pollution havens.

The Ministers draw attention to the important links among trade, economic growth, and the environment. Increasingly, it is recognized that these linkages pose both opportunities and challenges to our

(more)

current and future institutions. One such critical challenge is the need to maintain appropriate, high standards of environmental protection, particularly through strict enforcement of environmental laws and regulations. The Ministers agreed that enforcement and compliance with environmental laws is fundamental.

In order to take advantage of the opportunities and meet the challenges that cooperation on environment offers, they agreed today that this meeting will be the first of many. They instructed their officials to begin discussions as soon as possible on future areas of trilateral cooperation. The Ministers have also asked their officials to consult, as appropriate, with stakeholders to ensure their effective and ongoing participation in this important process.

While recognizing the different economic and financial conditions in each country, the commitment to increased cooperation among the United States, Canada and Mexico is highlighted today by the signing of a Trilateral Memorandum of Understanding on Environmental Education. This agreement seeks to increase public awareness of sustainable development issues by promoting, coordinating and implementing joint environmental education and training activities.

The Ministers also addressed specific cooperation activities. At present, our countries are cooperating successfully on environmental

(more)

4

programs to protect transboundary resources such as the Great lakes, our border waters, the Gulf of Mexico, and air flows between our countries. We are also beginning to cooperate on the exchange of environmental information, the study of economic instruments, and programs for public information, emergency response and emissions reporting procedures for toxic chemicals.

In closing, the Ministers concluded that more formal environmental cooperation is needed among the United States, Canada and Mexico. Therefore, they agreed to meet for the second time early in 1993, when they will review a series of proposals for formalized trilateral environmental cooperation, particularly the formation of a North American commission on environmental cooperation.

##

**OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20508**

September 18, 1992

MEMORANDUM

**FROM: MARY TINSLEY
Assistant U.S. Trade Representative for
Congressional Affairs**

SUBJECT: Notification of the NAFTA

Today the President officially notified the Congress that he intends to enter into the North American Free Trade Agreement. The President's notification is accompanied by:

- o The text of the agreement and the schedule of tariff reductions;
- o Reports prepared, as required by statute, by the 38 private sector advisory committees to the Office of the U.S. Trade Representative; and
- o The "Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments."

Attached is the text of the President's letter to the Speaker of the House and the President of the Senate and White House fact sheet. We will shortly provide every member of the Congress a copy of the text, the report of the Advisory Committee for Trade Policy and Negotiation, and the "Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments." Please call 395-6951 if you have any questions.

R 18 '92 19:13

FROM US 1 DE REP/CONG AF

TO BAUCUS

PAGE. 2/02

THE WHITE HOUSE

**Office of the Press Secretary
(Basking Ridge, New Jersey)**

For Immediate Release

September 18, 1992

**The North American Free Trade Agreement:
Official Notification of Congress**

FACT SHEET

The President today officially notified Congress of his intention to sign the North American Free Trade Agreement (NAFTA) with Canada and Mexico. Under the fast track procedures, the President may sign the agreement 90 calendar days after giving this notice, that is, on or after December 17, 1992. The NAFTA negotiations were concluded on August 12, 1992.

The NAFTA eliminates tariffs and other barriers to the flow of goods and services between the United States, Mexico, and Canada. It lifts barriers to investment, strengthens the protection of intellectual property, and improves upon trade rules to ensure that U.S. firms can reap the full rewards of the market opportunities NAFTA creates.

The President's notification is accompanied by:

- The text of the agreement and the schedule of tariff reductions;
- Reports prepared, as required by statute, by 38 private sector advisory committees to the Office of the U.S. Trade Representative; and
- A "Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments." As the Report demonstrates, the commitments that were made in the context of last year's debate over the extension of fast track negotiating authority have been fulfilled, if not exceeded.

The NAFTA Agreement

NAFTA makes America more globally competitive. It links the United States to our first- and third-largest trading partners, Canada and Mexico, to create one of the largest, richest markets in the world, with over 360 million consumers and \$6.4 trillion in annual output. NAFTA will enhance the ability of North American producers to compete in world markets, spur economic growth on the continent, expand U.S. employment, and raise our living standards.

NAPTA will generate new, higher-paying jobs for Americans. More than 500,000 Americans now owe their jobs to our exports to Mexico. This number is expected to swell to over 1 million by 1995 with NAPTA. Over 1.8 million Americans already owe their jobs to our exports to Canada. This agreement will not only create more jobs, but better jobs, for workers in export-related jobs earn 17 percent more per hour than the average American wage.

NAPTA will help Mexico grow, which has a high payback for us: 70 cents of each Mexican import dollar is spent on U.S. goods and services. Economic growth will not only make Mexico a better customer, but also a stronger and more stable neighbor, easing pressures for illegal immigration. The lesson of history is clear: if opportunities do not go to the people, people will go to the opportunities.

NAPTA will be of particular benefit to small and medium-sized companies that are experiencing the fastest export growth. Unlike big companies, small and mid-sized firms often do not have the resources to get around high trade barriers. With trade barriers removed, U.S. firms need not move to Mexico to sell to Mexico.

NAPTA improves the environment. It maintains U.S. environmental, safety, and health standards; allows us to enact even tougher standards; and encourages our partners to strengthen their standards. NAPTA has also intensified our bilateral cooperation with Mexico to enhance environmental protection.

Finally, NAPTA safeguards U.S. workers by ensuring a smooth transition to free trade over 15 years and by providing strict rules of origin, safeguard protections against import surges, and measures to curb Mexico's artificial export incentives.

Never before has a trade agreement offered such a balance of economic growth, opportunity, worker benefits, and environmental sensitivity.

Next Steps

Today's formal notification is the latest step in the process of Congressional consideration of the agreement. This process is governed by fast track procedures for approval of trade agreements, which were extended by Congress last year for agreements signed before June 1, 1993. Under those procedures:

- Ninety calendar days after giving this notice, the President may sign the agreement.
- Any time after signing the agreement, the President may transmit implementing legislation to Congress. The Administration intends to work closely with Congress on developing such legislation.

- Thus, while it is possible for the President to sign the NAFTA this year, the "fast track" timetable dictates that the Congressional process of approving implementing legislation cannot begin until next year.

● ● ●

CLINTON/GORE '92 COMMITTEE
P.O. BOX 615
LITTLE ROCK, AR 72203

FAX TRANSMITTAL COVER SHEET

TO: Kathy

DEPT: _____

COMPANY: _____

FAX: _____ PHONE: _____

FROM: Jacquie

DEPT. AND PHONE: _____

COMPANY: _____

FAX: _____ PHONE: _____

NUMBER OF PAGES INCLUDING COVER: _____

MESSAGE: _____

PLEASE CONFIRM _____
NO CONFIRMATION NECESSARY _____

CONFIDENTIALITY NOTICE: The documents accompanying this telecopy transmission contain confidential and privileged information belonging to the sender. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited. If you have received this telecopy in error, please immediately notify us by telephone to arrange for its return.

September 11, 1992.

MEMORANDUM

TO: Chairman Newquist
FROM: Charles Hansen
SUBJECT: 1988 U.S.-Canada Free Trade Agreement Process

The following is a chronology of the events leading up to the implementation of the free trade agreement between the United States and Canada.

12/10/85 President Reagan informs Congress of his intent to enter into trade negotiations with Canada.

5/21/86 Trade talks between the U.S. and Canada begin in Ottawa.

10/3/87 U.S. and Canadian negotiators reach tentative agreement on free trade agreement.

10/4/87 "Historic" pact announced by President Reagan. Legal drafting of pact, however, continues.

12/1-7/87 Controversial maritime provisions dropped from pact, dispute settlement provisions modified, telecommunications tariff provisions revised in ongoing negotiations between U.S. and Canadian negotiators.

12/8/87 Negotiators complete work on legal text of pact.

12/11/87 Final legal text released.

12/14/87 Tariff schedules released.

1/2/88 Agreement formally signed by President Reagan and Prime Minister Mulroney.

Winter,
Spring 1988 Negotiations over pact between Reagan Administration and Congress

May 1988 House Ways and Means and Senate Finance Committees hold mock mark-ups of draft implementing legislation.

7/14/88 House Ways and Means and Senate Finance Committees
approve set of recommendations for inclusion in
implementing legislation. Recommendations include
language on autos, dispute settlement, and subsidies.

7/25/88 Implementing legislation formally introduced in
Congress. "Fast-track" clock begins ticking.

8/9/88 Full House approves implementing legislation.

9/19/88 Full Senate approves implementing legislation.

9/28/88 President Reagan signs implementing legislation.

12/30/88 Canadian Parliament approves implementing legislation.

1/1/89 U.S.-Canada Free Trade Agreement takes effect.

cc: Fred Beavers
Mitch Dale

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement

[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does **not support the agreement, but insists on changes:]**

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

[LISTING THE PROBLEMS:]

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

4. The three countries have just announced [on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

² There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.

Outline of a Possible Statement and Listing of Problems with the Proposed NAFTA Agreement

[Introduction:]

From the outset of this campaign, I have stated that I will support a free trade agreement that opens markets for U.S. exports to Canada and Mexico so long as it provides adequate protection for workers, farmers, and the environment on both sides of the border. I have also stated that we must have strong transition strategies that ensure that workers benefit from a more open world trading system.

We now have a part of the proposed NAFTA arrangement represented in the unsigned document that the three countries have reached. The Bush Administration finally released a draft of it on September 8. President Bush just notified Congress [on September 18] of his intention to sign the proposed agreement. Under U.S. law the President must now wait for at least 90 days before signing the agreement in order to hear the views of Congress and others.

[Alternative 2: If Gov. Clinton supports the proposed agreement, but insists on more:]

Based on my initial review of the agreement, I wish more had been done to further U.S. interests in such areas as automobiles, energy, agricultural, and intellectual property. Nevertheless, because of the potential new jobs and others benefits to the United States through expanded exports and because of the state of the negotiations, I support this proposed agreement as far as it goes.

However, more needs to be done--and must be done--to help workers and farmers and to protect the environment. This can be done through U.S. programs and by negotiating with our NAFTA partners for additional agreements. I call on President Bush to finish the job. If he doesn't, I will move quickly to insist on these measures if I am elected President.

[Alternative 3: If Gov. Clinton does not support the agreement, but insists on changes:]

Let me be clear. I'm for a good agreement. However, based on my initial review of the proposed agreement, this is not a good agreement. George Bush did not do the job. I call on Bush to fix the arrangement. If he does not, I will move quickly to do so so if elected President.

More needs to be done--and must be done--to help workers and farmers and to protect the environment.

[LISTING THE PROBLEMS:]

Among the major problems with the proposed agreement are the following:

[Items that do not require changes in the proposed agreement itself or even supplementary agreements with Mexico and Canada:]

1. A good NAFTA arrangement must be accompanied by adequate funding to help U.S. workers and communities who are adversely affected by its provisions. Worker training, relocation assistance, and other necessary support should be viewed as an entitlement for workers. The recent proposals of the Bush Administration do not provide the necessary assurances. Given the long history of efforts by the Reagan and Bush Administrations to eliminate the Trade Adjustment Assistance Act, press releases by the Bush Administration are hardly enough.

2. The success of a good NAFTA arrangement requires that the Administration ensure that there be adequate funding for environmental clean-up and for the necessary infrastructure along the border to handle the development and increased traffic. A funding commitment by the Bush Administration is still lacking.¹

3. The proposed agreement can also cause unnecessary harm to some farmers, unless help is provided them. Besides enactment of my general farm program, for U.S. farmers adversely affected by NAFTA, U.S. programs should help in at least three ways: (a) strict application of U.S. pesticide requirements to imported food; (b) establishing that growers who lose out to Mexican competition are eligible for worker assistance; (c) utilizing more the existing agricultural programs to help growers identify alternative crops where they would be more competitive.

[Items that could be accomplished through a supplementary side-table agreement, which could be signed simultaneously with the present proposed agreement:]

[2A. Adequate funding for environmental clean-up and for the necessary infrastructure along the border, noted in 2. above, could also be assured by a funding commitment by all three NAFTA partners.]

¹ One caveat. In February 1992, Bush announced a plan to clean up pollution along the U.S.-Mexico border. The plan called for \$379 million in U.S. funds over the next two years and some Mexican support. However, these amounts are inadequate and some U.S. funds would have been reprogrammed or reallocated from funds intended for other purposes --such as cleanup of the Chesapeake Bay! It looks as if Congress will cut these funds substantially.

4. The three countries have just announced [on Sept. 17] an agreement "in principle" to create a North American commission on environmental cooperation. However, the environmental ministers were not going to formalize this arrangement until they met again in early 1993! The environment should not be on the slow track. Moreover, there is no assurance that this commission will be much more than meetings without substance.

A commission, or authority, should be created promptly that has substantial powers and resources to clean up and prevent border pollution. It should also encourage the enforcement of the countries' own environmental laws through education, training, and commitments of resources.

[Some items arguably could be accomplished through a supplementary agreement, but critics might say that a renegotiation of the proposed agreement would be required.]

5. The NAFTA dispute resolution process is inadequate in the environmental and health area.

A. There should be an enhanced NAFTA dispute resolution process for enforcement of national environmental and health laws. For example, the proposed agreement does not allow a country to use the formal, binding NAFTA process now if another country lowers its environmental standards to entice investment. The sole NAFTA remedy is government-to-government consultation.

B. There should be greater public participation in this enhanced NAFTA dispute resolution process. The dispute provisions are often secretive, and provide no mechanism for public participation in defending challenges to U.S. laws, or in bringing challenges to the practices of the other NAFTA parties.

6. Enforcement of Mexican laws in the areas of the environment and worker standards (such as health and safety and child labor laws) is essentially ignored by the proposed agreement.² In contrast, the proposed agreement allows for improved enforcement of intellectual property and investment issues through Mexican laws and U.S. import laws--with law suits, damages, and injunctive relief. Similar enforcement provisions should be developed in the area of environment and worker standards.

7. A super safeguard mechanism for the automobile industry might be added. It would provide that if trade during the transition period does not expand on a roughly balanced basis in the industry, then the country which is hurt by a substantive adverse surge of imports can ask the other to accelerate its liberalization measures. If the other country does not agree to some relief, then the first country can adjust the pace of its own

² There are limits on importing goods into the United States that are dangerous to the consumer's health, but this is a fairly narrow sanction.

liberalization (possibly by a "snapback" to earlier tariff levels). This will help protect against unexpected developments during the transition period. [This mechanism would be either alone, or together with, the provisions in # 8 below for changing the transition measures for the automobile industry.]

This super-safeguard approach could also be considered for other industries.

[Provisions which would require renegotiation of key provisions of the proposed agreement:]

8. The provisions for the automobile industry have different transition periods for the United States and Mexico, with [in the view of U.S. workers] an uneven tilt in favor of Mexico. This should be carefully reviewed and revised.

9. [Criticisms can also be leveled against the agreement's provisions for other sectors. Two examples that Majority Leader Gephardt has highlighted are the rules of origin for computers and energy. Details can be provided.]

Many of these problems above can be overcome by new U.S. programs, such as on worker training, and by new supplementary agreements between the United States and Mexico, or between the United States and Mexico and Canada. [If going to include items 8 and 9] Some of these problems might well cause the negotiators to go back to the proposed agreement, which is still unsigned.

We should recall the negotiating history of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (FTA). There were several changes in the agreement between the time that an document of about 40 pages was agreed to and initialled on October 3, 1987, and the time that President Reagan and Prime Minister Mulroney signed a document of over 200 pages on January 2, 1988. Controversial maritime provisions were dropped, for instance.

[Possible Concluding Language:]

My commitment to a good NAFTA agreement is strong. If I am elected President, it will have a high priority. To reassure our NAFTA partners, I will make a meeting with Prime Minister Mulroney and President Salinas one of the first items on my calendar for the transition period.

I will strive for and sign a pro-growth, pro-jobs agreement with Canada and Mexico that does not sell out our people or our environment. If I am President, that is exactly the kind of arrangement we will have.



file - NAFTA

Congressional Research Service • The Library of Congress • Washington, D.C. 20540

December 29, 1992

TO : Hon. Albert Gore, Jr.
Attention: Katie McGinty

FROM : American Law Division

SUBJECT : Materials on Legal Issues Relating to the Creation of an
International Environmental Commission

We are sending the enclosed materials in response to your questions regarding the creation of an international environmental commission that would oversee the enforcement of environmental laws in countries that are party to the North American Free Trade Agreement (NAFTA). We briefly describe these materials below.

The chapters from L. Henkin, *Foreign Affairs and the Constitution* (1972) and L. Henkin, *Arms Control and Inspection in American Law* (1958) discuss United States constitutional issues implicated by activities of international regulatory bodies and international tribunals as these activities affect the United States Government, United States citizens and residents, and United States corporate entities. In *Arms Control* at 112-120, Henkin contrasts a broad internationalist view that would find few if any constitutional restraints on "international machinery" created by treaty, with the view that an international administrative body would in effect be exercising federal power and would thus be subject to the constitutional restraints that apply to the exercise of such power. The author examines various elements of such a body from the latter perspective. Among the topics discussed in these materials are, *inter alia*, the body of law (*i.e.*, international or national) that these entities might apply, functions that they might perform, the need for national implementing legislation, and constitutional problems that would ensue from imposing criminal and other sanctions against individuals.¹

We also enclose the January 1992 Recommendation and Report of the Section of International Law and Practice of the American Bar Association on

¹ With respect to possible penalties that an international environmental commission might impose, we note that the NAFTA generally prohibits the imposition of quantitative, that is, import and export, restrictions, except as allowed by Article XI of the General Agreement on Tariffs and Trade and as otherwise provided in the NAFTA (Art. 309). The NAFTA also provides that in the event that there is any inconsistency between that Agreement and other agreements to which the NAFTA parties are party, the provisions of the NAFTA are to prevail to the extent of the inconsistency, except as otherwise provided in the NAFTA (Art. 103:2).

7-8 301??

dispute settlement under the NAFTA, as printed in 26 *International Lawyer* 855 (1992). This submission sets forth some of the basic problems in establishing an international dispute settlement mechanism, discusses the working of dispute settlement under the United States-Canada Free Trade Agreement, and indicates how provisions in the latter might be built upon in the NAFTA. In this regard, it is important to note that as a general rule national participation in any international adjudicatory regime authorized to issue binding rulings and to enforce its decisions requires the consent of the parties to be bound and thus some diminishment of national sovereignty over the matter at hand. The issue of consent and a number of other questions related to international dispute settlement are discussed in the enclosed American Law Division memorandum, "Legal Issues Involved in Establishing a Binational Mechanism to Settle Trade Disputes" (June 19, 1990). We also enclose a copy of the American Law Division report, *Dispute Settlement Provisions in the United States-Canada Free Trade Agreement* (CRS Rep. No. 88-603A, June 10, 1988), which at 13-18 discusses constitutional questions implicated by the creation of a binational panel to review national antidumping and countervailing duty determinations. Constitutional law experts consulted by Congress at the time the FTA implementing legislation was being considered generally found the new panel system to pass constitutional muster.²

The enclosed sections of American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) dealing with international environmental law indicate the extent to which a nation may be held responsible for violations of its international environmental obligations and discuss the remedies that may be available for injury to another state where the injury affects environmental interests within the latter's own territory, interests outside its territory, such as, for example, fishing interests, and "the common interest in the global commons, such as the high seas." *Restatement*, § 602, Comment a. These sections do not, however, address the question of possible international remedies for a country's failure to enforce environmental laws as this failure affects its own citizens or as it affects another country's economic, rather than, environmental interest.

We also call your attention to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, approved by the Senate August 11, 1992, which, *inter alia*, makes certain traffic in hazardous waste illegal (Art. 9), provides for specific measures to promote international cooperation in the area (Art. 10), establishes a Conference of the parties that will, *inter alia*, set future waste trade policies (Art. 15), and creates a Secretariat to administer the Convention (Art. 16). These provisions illustrate the types of cooperative activities that might be undertaken and the kinds of functions that an international body might have when enforcement of agreement obligations is left to each Party country. Rules and procedures for liability and compensation for damages resulting from the transboundary

² See H.R. Rep. No. 816, 100th Cong., 2d Sess. 1-18 (1988).

movement and disposal of waste have been left for future resolution in a supplementary protocol (Art. 12).³

The United States has entered into various agreements that allow United States officials to conduct foreign inspections involving activities that will have a direct effect in the United States, namely the production of products that will be imported into this country, and has negotiated provisions allowing for inspections involving prospective imports both in the NAFTA and the Uruguay Round of Multilateral Trade Negotiations. Enclosed are copies of memoranda of understanding that cover inspection of foreign seafood processing facilities, the provision of the Meat Import Act providing for foreign inspections (21 U.S.C. § 620(f)), and a discussion of activities under the Act in a 1987 hearing before the House Committee on Government Operations. Foreign inspections are currently provided for in those portions of the sanitary and phytosanitary (S&P) provisions of the NAFTA that would require a party to accept foreign S&P measures as equivalent to its own if the exporting party meets certain requirements (Art. 756:3), require the recognition of pest-free zones in exporting countries provided certain conditions are met (Art. 758:3), and set forth obligations for control or inspection procedures (Art. 759:3). Similar provisions also exist in the Decision on Sanitary and Phytosanitary Measures contained in the Draft Final Act of the Uruguay Round (Dunkel Draft)(See ¶¶ 14, 26; Annex C, ¶ 2). These provisions are also enclosed.

In generally discussing the extent to which foreign country judgments are currently recognized and enforced in the United States, the enclosed sections of the *Foreign Relations Restatement* briefly explain how two national legal systems interact when a claim or other action is adjudicated under one of those systems and enforcement is sought under another and thus indicate to some extent what types of issues might be implicated when one seeks to carry out the latter through an international entity rather than through a national judicial system. Under current law, a foreign country money judgment will generally be recognized and enforced in United States courts provided that the court may assert jurisdiction over either the defendant's person or property. At the same time, however, United States courts are not required to recognize and enforce foreign tax and penal judgments, the latter being held to include the administrative imposition of fines or penalties for regulatory violations. We

³ It has been suggested that determining standards for these matters is one of the more significant unresolved Basel issues, particularly with respect to differing views of industrialized and developing countries as to the scope of liability of exporters and exporting countries. See generally Note, *Regulating International Hazardous Waste Trade: A Proposed Global Solution*, 28 Colum. J. Transnat'l L. 801, 835-40 (1990) and Handl & Lutz, *An International Policy Perspective on the Trade of Hazardous Materials and Technologies*, 30 Harv. Int'l L. J. 351, 370-73 (1989).

note that under the NAFTA, a Party to the Agreement may not provide for a private right of action under its domestic law against another party on the ground that a measure of the latter is inconsistent with the Agreement (Art. 2021).

We hope that this information is helpful to you and that you will call on us if you have any additional questions.

A handwritten signature in black ink, reading "Jeanne J. Grimmett". The signature is fluid and cursive, with the first name "Jeanne" and last name "Grimmett" clearly distinguishable.

Jeanne J. Grimmett
Legislative Attorney
American Law Division

FOREIGN AFFAIRS AND THE CONSTITUTION

by LOUIS HENKIN

1972

Mineola, New York

THE FOUNDATION PRESS, INC.

The United States found much customary law at its birth as a nation † and international law has influenced national behavior since. It is principally the President, "sole organ" of the United States in its international relations, who is responsible for the behavior of the United States in regard to international law, and who participates on her behalf in the indefinable process by which customary international law is made, unmade, remade. He makes legal claims for the United States and reacts to the claims of others; he performs acts reflecting views on legal questions and justifies them under the law, in diplomatic exchange, in judicial or arbitral proceedings, in international organizations or in the public forum. Congress, state legislatures and even state officials also impinge on foreign relations governed by law, for example in determining and giving effect to the rights of aliens in the United States or of foreign vessels off our coasts; and Federal and state courts are major makers of international law when they determine what that law requires in order to decide a case before them.* But these other actors play on the domestic scene only; the President represents what they do to the rest of the world and can seek to justify them under international law or confess violation.

International law is law for the United States and, we shall see, it is also law of the United States to be applied by the courts. (Chapter VIII). But the Constitution does not forbid Congress or the President to exercise their powers in disregard of customary international law as it does not invalidate their violations of treaties and international agreements.**

Like treaties,*** executive agreements and customary international law bow before Constitutional prohibitions, notably those of the Bill of Rights, but some Constitutional safeguards are interpreted to take account of the principles of international law which antedate the Constitution. (See Chapter X).

† See Introduction to Chapter V, note 1.

* See Chapter VIII, p. 221.

** See pp. 221-22 below.

*** See Chapter V, p. 137.

Chapter VII. INTERNATIONAL ORGANIZATION

The constitutional powers to make treaties and other international agreements have seen new uses in the spectacular development of multilateral diplomacy and the mushrooming of international organization. The United States has been a member of almost a hundred international organizations differing widely in scope and function, from the United Nations to, say, the Cape Spartel Lighthouse.¹ They differ, too, in their structures and procedures, in the obligations they impose on the United States, in the degree to which they impinge on activities of her government, her officials and her citizens. Such new uses of international agreements have suggested new constitutional questions and framed old questions in new contexts.

In fact, international organizations and arrangements in being, and those which the United States has seriously considered, raise no significant constitutional difficulties. The United States has adhered to them by treaty or by executive agreement approved by Congress.* They deal with matters clearly of "foreign policy concern" ** and, generally, contain undertakings by the United States that do not differ in kind from those in its traditional bilateral treaties. They raise no issues under the Bill of Rights because they impinge directly only on the United

* The United States joined many organizations by treaty, some by Congressional-Executive agreement. See Chapter VI, note 3. If the President attempted to join an organization by sole executive agreement he would soon have to seek Congressional approval at least in the form of an appropriation to pay the United States contribution to the organization.

** Compare Chapter V, p. 151.

States Government itself (not on individual citizens) and neither "the United States," nor any branch of its government, nor any federal official in that capacity, has constitutional rights to freedom of speech or of silence, to security from unreasonable searches or seizures, to equality or liberty or property or due process of law. (See Chapter X.)

Constitutional obstacles even worth discussing arise only when international organization begins to acquire attributes of government and to impinge directly on the lives and activities of the inhabitants of the United States, or on state government. In such cases one might have to consider whether a treaty or agreement has improperly delegated powers or functions of the federal government to supranational, international, or foreign bodies; has violated the separation of powers by transferring functions among the branches of the United States Government, or has imposed inappropriate functions upon them; has infringed upon any abiding sovereignty of the States; or has denied rights to individuals by subjecting them to foreign authority, or to regulations which the United States itself could not impose.

No international organization to which the United States is now party seriously stirs any of these issues, but since the questions have been raised I shall indicate why that is so for the principal organizations. I consider also constitutional objections that might be evoked by arrangements that are periodically proposed and which might be considered by the United States some future day.

The United Nations

By treaty implemented by acts of Congress and of the President,² the United States has adhered to the United Nations Charter, is a member of the United Nations Organization, and a "Permanent Member" having special rights and obligations in the Security Council.³ The Charter forbids the United States to use or threaten force against other states⁴ and requires it to cooperate with the Organization in maintaining international peace and security and in promoting social and economic ends.⁵

International Organization

By the Charter of the UN, then, the United States has given up the right to go to war at will.⁶ Some have asked whether these undertakings are consistent with the Constitution, which clearly contemplated that the United States might go to war and gave Congress the power to decide to do it. The Charter denies also the constitutional powers of the President to send troops abroad for purposes inconsistent with those of the United Nations.

Such objections misconceive the character of treaties and their place in the constitutional pattern. In every treaty undertaking the United States limits its right to do what it could do freely in the absence of treaty, what is within the constitutional power of some branch of the Federal Government to do. The power to wage war or use other force has no greater constitutional sanctity than other powers, and no greater immunity to limitation by treaty, whether a bilateral treaty of alliance, friendship or non-aggression, or the United Nations Charter establishing general international law. Moreover, we have seen, the UN Charter does not deprive the Congress or the President of constitutional power: both the Congress and the President continue to have their powers—though not the right under international law—to declare war, use force or otherwise act in violation of the UN Charter, as they can disregard other international obligations.*

A different question is whether by adhering to the UN Charter the treaty-makers have delegated powers of Congress or of the President to an international body.⁷ The argument is that the Security Council can direct the United States to take action not determined by Congress or the President and which they may be unwilling to take. And if the United States should yet conclude "Article 43 agreements" to place troops at the disposal of the Security Council,⁸ the Council (rather than the President or Congress) could send American troops to war.[†]

* See Chapter V, p. 151.

† A related objection is that the Charter commits the United States to war in certain circumstances, and that can be done only by act of Congress, not by treaty. In fact, the UN Charter does not commit the United States to go to war unless the Security Council orders

These objections, too, are not substantial. One complete answer is that the United States has a veto:⁹ every such action by the Council, then, would have the concurrence of the President acting under his own vast powers in foreign relations and pursuant to a treaty of the United States implemented by Congress.¹⁰ Another sufficient answer is that even the mandatory decisions of the Security Council cannot be enforced against the United States: as with any other international obligation, the United States has the ultimate decision as to whether it will or will not comply—whether it will or will not go to war, allow its troops to be used by the UN, impose sanctions, break diplomatic relations.¹¹ (I deal with other UN “legislative” and regulatory powers below.)

NATO

American participation in NATO¹² raises the same and other questions. Has the United States delegated the power to declare war to others? Do the treaty and the organization it created impinge in other ways on the powers of the President or of Congress?

Again, these questions do not appear serious. The North Atlantic Treaty does not purport automatically to put the United States into war in given circumstances.* Rather, it provides that if an armed attack occurs against one party, every other party shall take forthwith “such action as it deems necessary, including the use of armed force”; and that provision shall be “carried out by the Parties in accordance with their respective constitutional processes.”¹³ No doubt the treaty imposes the obligation to go to war in some circumstances but that is no different from other treaty undertakings that are to be carried out, and the United States could prevent such an order by its veto. In any event the Constitution does not forbid a treaty that commits the country to war, although it may preclude a provision that would automatically put the country into war in certain circumstances. See Chapter V, p. 159–60, and this chapter, pp. 192–93.

* Compare Chapter V, pp. 159–60, and note 100.

International Organization

ried out by the President or Congress, and which they can refuse to honor.

Nor are there unconstitutional delegations in international command arrangements or deployments of troops. The principal NATO commander, who has always been an American, is under orders not of the President of the United States but of the NATO Council; in the Council, however, the United States has a veto in principle (in the requirement of unanimity), and the dominant voice in fact.¹⁴ Even if United States troops served under foreign command, it could hardly stir constitutional difficulties for the President, temporarily and revocably, to put troops under an allied command in a common cause as was done in both World Wars. The arrangements would have the approval of the President and would be subject to his continuing control, and he could terminate them at any time even if that should involve breach of an international agreement.

International Regulatory Agencies

Every international organization “legislates,” if only the annual budget and rules for the governance of the organization.¹⁵ Many also have broader legislative or regulatory authority.*

* In the UN, in addition to the comprehensive authority of the Security Council to “legislate” in maintaining peace, the Council and the General Assembly make law when they interpret their own authority or the obligations of members under the Charter, and members have found themselves effectively bound in ways they had not intended and do not desire. The Assembly has asserted the right to assess members for various purposes including its peace-keeping efforts and economic and social programs; it has interpreted the Charter as establishing human rights standards which some members at least deny and resist.

For the United States, the Senate, of course, never consented to these interpretations but it can be deemed to have consented to the system that produces them. (There is no Senate consent to later interpretations of any treaty by the President or the courts.) Of course, the United States can refuse to accept these interpretations or to abide by them. General Assembly Resolutions have also purported to declare international law for members, and the United States has rejected some of these assertions. Compare, for example, the

The UN General Assembly can adopt rules for the administration of trust territories, and the Security Council for strategic trust territories (of which there has been only one, administered by the United States).¹⁶ The International Monetary Fund limits the extent to which a government can modify the rate of exchange of its currency.¹⁷ The International Civil Aviation Organization (ICAO) promulgates "international standards and recommended practices."¹⁸ Some organizations fix prices, as under the Commodity Agreements—wheat, sugar, coffee.¹⁹

One can make a case that international organizations have substantial legislative power, and something of a case that they sometimes create law for the United States; there is little case for finding in any of these instances an unconstitutional delegation by the United States of the legislative power of Congress. In most existing instances "legislation" by an international organization is only a recommendation or exhortation which the United States is not bound to accept.* In the few organizations that formally have power to make binding regulations, the United States has either a veto, the benefits of "weighted voting" or other special voting arrangement that render it difficult for any regulation to be established without its concurrence.** These "legislative" or "regulatory" bodies, then, are essentially forums for negotiating agreements; and it could hardly make a constitutional difference that U.S. representatives reach international agreement within some organ of an international organization rather than by negotiating a formal agreement in a plenipotentiary conference. For constitutional purposes, the "agree-

resolution declaring the use of nuclear weapons illegal, G.A.Res. 1653, 16 UN GAOR Supp. 17 at 4-5, UN Doc. A/5100 (1962).

* WHO "regulations," for example, are voluntary and adopted by the United States only if the appropriate federal officials decide it. ILO conventions on labor standards also are only recommended to the United States and would become binding only if formally adhered to by the United States.

** As in the International Monetary Fund, the International Bank for Reconstruction and Development, the Wheat Agreement and the Fishery conventions, notes 17 and 19 this chapter.

ments" produced in these organizations are effectively Presidential agreements. Or, they can be seen as implementations of the original treaty establishing the organization and giving it "regulatory" powers; in consenting to that agreement the Senate may be said to have consented in advance to any regulations authorized by the agreement.²⁰

But even if an organization can assess or impose law upon the United States against its will, it is not exercising powers that belong to Congress, for it is not exercising the "legislative Powers herein granted." * (Article 1, section 1). It is creating law for the United States not of the United States, international law for the government, not domestic law for its inhabitants. Like law made by treaty, that made by international organizations creates international obligation which the United States might be required to implement in this country; again, the United States can refuse to enact that law and incur a violation.

For similar reasons, other arrangements and organizations that have been the subject of more-or-less serious negotiation would not create constitutional difficulties for the United States, though particular forms and details might be troublesome. Under proposals for "General and Complete Disarmament," for example, the United States could agree to abolish existing armies and armaments, and to refrain from the raising of armies, and from the manufacture, possession or research and development of armaments in the future.²¹ It could agree to create a complex international organization to provide comprehensive inspection that would abolish the secrecy of governmental operations, require full reporting, and subject government installations, activities and files to unlimited surveillance, and its officials to international interrogation. Within large limits it could subject the activities of its citizens also to relevant, reasonable limitations and surveillance like those imposed by Congress through domestic regulatory programs. Issues of improper delegation could be wholly avoided if international authority, regulation and administration were brought to bear only on the Gov-

* Clearly, the legislative powers of the United States. Compare Article III, section 1, discussed p. 196 below.

ernment of the United States rather than directly on individuals in the United States.

Consider, even, the original Acheson-Lilienthal plan for the international development and control of atomic energy.²² That proposal might have given to an international authority power to regulate the activities not only of the Government of the United States but of mining companies, manufacturers, scientists, laborers, and citizens generally. A body with such powers and functions, it would have been argued, would be exercising governmental authority within the United States, assuming functions of the President and Congress. Again, constitutional objections would have been eliminated if the United States Government stood between the international authority and the individual, if the requirements of the Authority were imposed upon the Government of the United States and implemented and enforced by the Government in the same ways as other treaty obligations or the regulations of its own administrative agencies. (Of course, some regulations might have been challenged as violating individual rights and liberties. Compare Chapter X.)

International Judicial Tribunals

United States participation in international judicial tribunals would raise similar as well as additional issues.²³ The United States is a party to the Statute of the International Court of Justice²⁴ and was a party to the Nuremberg Charter.²⁵ There are international courts, commissions, and committees that consider charges of violation of human rights.²⁶ There have been proposals for international criminal tribunals.

Article III, section 1, of the Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

That article defines and allocates "the judicial Power of the United States," the power to administer law and justice under the authority of the United States for persons subject to her jurisdiction and laws. When the United States accepts the jurisdiction of the International Court of Justice, or of other judicial or arbitral bodies that decide cases or controversies between nation-states, she is not delegating to those tribunals any of the judicial power of the United States.²⁷ Nor would United States participation in such tribunals raise issues under provisions in Article III and in the Bill of Rights requiring due process of law and particular safeguards in criminal proceedings. The Bill of Rights, like the rest of the Constitution, safeguards individuals; it accords no rights to the Government of the United States. International tribunals with jurisdiction over controversies between states do not apply criminal law, and their proceedings are not "criminal proceedings." The prohibitions and safeguards of the Constitution govern only the United States Government,* not an international body exercising international functions, even if the United States is party to it.²⁸

The United States, then, could accept the jurisdiction of a tribunal like the European Human Rights Court with jurisdiction over complaints of human rights violations brought by other states. She could even, it would seem, adhere to a court that could hear complaints against the United States by individuals, including her own citizens or residents.²⁹ Nothing in the Constitution, we have seen, prevents the United States from undertaking international obligations in regard to her own citizens and residents; ** nothing prevents the United States from submitting her observance of such obligations to scrutiny and judgment by an international tribunal. There seem to be no compelling constitutional reasons why the relations between the United States and her citizens could not be subject to both the laws and courts of the United States and to international law ad-

* And, to a large extent, the States of the United States. Chapter X, p. 269.

** See Chapter V, pp. 155-56.

ministered by international tribunals exercising international judicial power.

Proposals for international tribunals superimposed on national judicial systems have raised different issues. In the days of the Hague conferences, when international arbitration and adjudication were a principal focus of hopes for a better world, one proposed convention would have established an international prize court to hear appeals from national prize courts.³⁰ The United States, it was argued, could not adhere to such arrangements: appeals to the international court directly from lower federal courts would deny the appellate jurisdiction of the Supreme Court; appeals from the Supreme Court to the international court would be inconsistent with its being the *Supreme Court*.³¹ To meet such objections the Convention was modified to provide for a new action in the international court instead of appeal from the national courts.³² Other proposals for appeal from national courts to international tribunals were also modified to avoid constitutional issues for the United States: national courts would be required instead to certify questions of international law or treaty interpretation to an international tribunal, with final decision of the whole case left to the domestic court; should United States courts fail to accept the international court's answer in some case, the United States would be in violation of the treaty and required to compensate those aggrieved.³³

International Criminal Courts

Periodically there have been proposals for international courts to enforce international criminal law against individuals,³⁴ in past times for piracy, slave-running, arms smuggling; more recently, for waging aggressive war, genocide and other gross violations of human rights, or hijacking airplanes. Although the United States has never seriously considered adhering to any such court, lawyers have pondered the constitutional implications of the various proposals.

If an international criminal court sat outside the United States and imposed punishment outside the United States, it would not

be exercising judicial power or other governmental authority of the United States. The United States could adhere to such tribunals, agree that American nationals might be tried by them, and even extradite persons for such trials.³⁵ Constitutional issues would appear, however, if an international court were to sit in the United States, apply law to acts committed in the United States by citizens or residents of the United States, and execute punishment in the United States. The objection might be made that only American law can apply in the United States, and criminal laws only if enacted by Congress (or by the States); and that only American courts can try persons for violations of law in the United States, and such courts must be established by Congress (or by the States).³⁶ If, perhaps, criminal courts could also be created by treaty, they must still be American courts, their judges must be appointed by the President with the consent of the Senate and assured of life tenure and undiminished compensation,³⁷ and their proceedings must include trial by jury and the other safeguards of the Bill of Rights.³⁸

The crux of that argument—that under the Constitution only the law of the United States can apply to acts committed in the United States, and only courts of the United States can sit here in judgment on such acts—is not, however, always and necessarily so. Foreign consuls have long enforced the criminal laws of their countries in the United States, for example against visiting seamen even when their acts are also subject to American law and the jurisdiction of American courts.³⁹ Under the NATO Status of Forces Agreement, allied soldiers and civilian dependents and defense employees in the United States can be tried by allied military courts for acts committed here, even when these are also violations of American law and triable in our courts.⁴⁰ Similarly, during World War II, Congress permitted allied forces in the United States to try their troops by military tribunal, authorized United States courts to order witnesses (presumably even American citizens) to appear before these tribunals, and made contempt of such tribunals or perjury before them federal crimes.⁴¹ While the constitutionality of such hospitality to foreign criminal law has never been considered by the Su-

preme Court, there is no reason to believe that the Court would forbid it. Those tribunals do not apply the law of the United States or exercise judicial power of the United States, but act under authority granted them by their own laws; the United States, in effect, agrees not to apply its laws and its jurisdiction, and to allow the foreign government to exercise its jurisdiction on American territory instead of taking the accused home or elsewhere for trial.⁴²

Similarly, one might argue, there is nothing in the Constitution that forbids the United States to permit an international tribunal to apply international law to acts committed by individuals in the United States, including American citizens and residents.⁴³ It would be international law that governed their acts and was being applied by the international tribunal; international judicial power which the tribunal was exercising; international punishment that was imposed and executed by international authority. The tribunal would not be exercising governmental authority of the United States but the authority of the international community, of a group of nations of which the United States was but one and acting in the same capacity as others not as territorial sovereign.⁴⁴

Some of the constitutional objections I have considered and the constitutional justifications they have invoked must appear artificial, almost grotesque.* It is difficult to accept that United States participation in contemporary forms of multi-national cooperation should depend on "technicalities" about "delegation," "judicial power" and "case or controversy," and on forms and devices to satisfy them. The Framers did not presume to anticipate what the interests of the United States require today, and surely they did not presume to prevent it. They did insist on a few basic safeguards—respect for the political process, the integrity of national institutions, the rights of the individual.

* From the point of view of constitutional law, there are other ways of looking at international tribunals applying criminal law to Americans in the United States, and other, more technical arguments both for and against full participation by the United States. Some of them are suggested in HENKIN, *ARMS CONTROL*, Chapter VIII.

International organization, in sum, raises no constitutional difficulties when it imposes international obligations for the United States to carry out in accordance with its normal constitutional procedures. Novel arrangements might raise significant issues if they distorted domestic institutions or impinged substantially and directly on individuals in the United States, particularly if they deprived persons of their flourishing civil rights and liberties; but no international institutions entailed such domestic intrusions in the past, and none is now in prospect. If one appeared, if the United States should decide that participation in such an organization was in the national interest, the constitutional issues would have to be decided without precedent and on the basis of very general principles that hardly compel the answer. Like many constitutional questions, these cannot be decided with confidence, surely not hypothetically, divorced from a particular proposal and context. Political as well as legal doubts could of course be eliminated by constitutional amendment, but often, even without that slow, uncongenial process, creative legal imagination can find ways and suggest means to bring such arrangements largely within a dynamic, flexible, hospitable Constitution.

*

Separation of Powers S.REP.No.549, 91st Cong., 1st Sess. 16 (1969).

43. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), Chapter IV, p. 98.

44. A century earlier several Justices held that when the Governor of Vermont sought to extradite one Holmes to Canada he was entering into an agreement with Canada which Vermont could not do without Congressional consent. *Holmes v. Jennison*, 14 Pet. 540 (U.S.1840), discussed in Chapter IX, p. 231.

45. Some of this customary law is now being codified and developed by multilateral treaty, principally through the efforts of the International Law Commission. See, *e. g.*, the 1958 conventions adopted April 28, 1958, which codified, clarified, and somewhat modified the law of the seas. Convention on the High Seas, 450 U.N.T.S. 82, T.I.A.S. No. 5200; Convention on the Continental Shelf, 499 U.N.T.S. 311, T.I.A.S. No. 5578; Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205, T.I.A.S. No. 5639; Convention on Fishing and Conservation of the Living Resources of the High Seas, 599 U.N.T.S. 285, T.I.A.S. No. 5969. See also the Vienna Convention on Diplomatic Relations, done April 18, 1961, 500 U.N.T.S. 95; Vienna Convention on the Law of Treaties, printed in 63 AM.J.INT'L L. 875 (1969).

For the suggestion that for our Constitutional Fathers "the law of nations" included also private international law, see Chapter III, note 22. Today the rules of conflicts are largely domestic law except insofar as they may be modified by treaty. But compare Chapter VIII, p. 219, and Chapter V, note 87.

NOTES, CHAPTER VII, INTERNATIONAL ORGANIZATION, pp. 189 to 201.

1. This multilateral "organization" was established in 1865 to direct, administer, and financially support the lighthouse that had been built by the Moroccan government at Cape Spartel. See Convention concerning the Cape Spartel Lighthouse, May 31, 1865, 14 Stat. 679-81 (1868), T.S. No. 245. The Convention was terminated by protocol on March 31, 1958 [1958] 9 U.S.T. 527, T.I.A.S. No. 4029; 320 U.N.T.S. 103. Control was returned to the government of Morocco.

2. United Nations Charter, June 26, 1945, 59 Stat. 1031; T.S. No. 993; United Nations Participation Act of 1945, ch. 583, 59 Stat. 619, *as amended*, 22 U.S.C. §§ 287-287e (1964). Compare the International Organizations Immunities Act, ch. 652, 59 Stat. 669 (1945), 22 U.S.C. § 288 (1952).

No one pressed constitutional objections to U.S. adherence to the UN Charter, whereas proposals for participation in the League of Nations had run into many such objections. See WRIGHT, 113-115; also, Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM.L.REV. 121 (1920). Political change apart, major constitutional change (or clarification) had intervened, *e. g.*, *Curtiss-Wright, Missouri v. Holland* and the New Deal cases. Compare CORWIN, *THE PRESIDENT* 217 *et seq.*

3. UN Charter, articles 23, 27; see generally *id.* Chapters V-VII.

4. *Id.* article 2(4); compare article 51. Article 2 is a treaty undertaking independent of the UN Organization established elsewhere in the Charter. Compare L. HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY*, Chapters X and XI (1968); Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, [1963] PROC.AM.SOC.INT'L L. 147-53.

5. UN Charter, articles 55, 56.

6. It has been urged, indeed, that the legal concept of war and the traditional laws of war have been abolished. See, *e. g.*, Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, note 4 this chapter at 147, 159-61. But *cf.* Déak, *Neutrality Revisited* in TRANSNATIONAL LAW IN A CHANGING SOCIETY (Friedmann, Henkin, & Lissitzyn, eds.) 137 (1972).

7. "The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered." *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

8. UN Charter, articles 43-47.

9. Article 27(3), as amended, [1965] 16 U.S.T. 1134, T.I.A.S. No. 5857, 557 U.N.T.S. 143: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members. . . ."

The General Assembly, in which resolutions can be adopted by majority vote, or two-thirds vote on "important questions," (Article 18 (2)), can only recommend action, not command it. See UN Charter, Chapter IV. Compare the Uniting for Peace Resolution, November 3, 1950, Ga.Res. 377A, 5 UN GAOR, Supp. 20 (A/1775), at 10.

10. The United Nations Participation Act confirms the power of the President to act for the United States in the Security Council, thus lending the support of Congressional authority to his own. The Act requires Congressional approval for article 43 agreements and expressly supports the President's authority (without further approval by Congress) to act for the United States in determining their use by the Council. See 22 U.S.C. §§ 287a, 287d (1970).

11. Compare the decision of Congress to flout UN sanctions against Rhodesia by requiring the President to permit the importation of Rhodesian chrome. See Pub.L. 92-156, § 503, 85 Stat. 423 (1971). Compare 21 U.N. SCOR, 1340th meeting 7 (1966); 23 U.N. SCOR, 1428th meeting 5 (1968); 24 U.N. SCOR 1535th meeting 4 (1970); U.N.S.C. Res. 314 (adopted February 20, 1972); G.A. Res. 2262, 22 U.N. GAOR Supp. 16, at 45, U.N. Doc. A/6716 (1967); see also G.A. Res. 2765 (XXVI) (Nov. 17, 1971).

12. North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243. The United States later accepted additional membership (Greece, Turkey, the Federal Republic of Germany), with Senate consent. [1951] T.I.A.S. No. 2390, 126 U.N.T.S. 350; [1955] T.I.A.S. No. 3428, 243 U.N.T.S. 308.

13. North Atlantic Treaty, articles 5 and 11.

14. Constitutional "niceties" were met also by a two-hat arrangement: the NATO Council asked the United States to make available a U. S. officer as Supreme Commander; the President designated General Eisenhower, whom he also appointed Commander of U. S. Forces in Europe. In this way the President in effect commanded U. S. forces assigned to NATO through his appointee, a U. S. officer. See D. ACHESON, PRESENT AT THE CREATION 486 (1969).

15. I draw here on HENKIN, ARMS CONTROL Chapter VII; see also Henkin, *International Organization and the Rule of Law*, 23 INTERNATIONAL ORGANIZATION 656 (1969).

16. UN Charter, articles 83, 85.

17. See International Monetary Fund Articles of Agreement, 1944, art. IV, 60 Stat. 1401, T.I.A.S. No. 1501.

18. Convention on International Civil Aviation, 1944, Art. 37, 61 Stat. 1180, 1190, T.I.A.S. No. 1591.

19. International Wheat Agreement, March 23, 1949, 63 Stat. 2173, T.I.A.S. No. 1957; International Sugar Agreement, December 1, 1958, T.I.A.S. No. 4389, 385 U.N.T.S. 137; International Coffee Agreement, Sept. 28, 1962, T.I.A.S. No. 5505, 469 U.N.T.S. 169 (1963); also Articles of Agreement of International Cotton Institute, Jan. 17, 1966, T.I.A.S. No. 5964, 592 U.N.T.S. 171.

The World Health Organization and the Universal Postal Union also develop rules and practices in their respective fields, and international officials have propounded cooperative practices for the international control of narcotics. There is regulation also by regional, even by bilateral bodies, especially of fishing. See, e. g., International Convention for the Regulation of Whaling, December 2, 1946, 62 Stat. 1716 (1948); T.I.A.S. No. 1849, 161 U.N.T.S. 72, implemented by the Whaling Convention Act of 1950, ch. 653, 64 Stat. 421 (1950), 16 U.S.C. §§ 916-916l (1970). See HENKIN, ARMS CONTROL 107-108 and notes, and my article *International Organization and the Rule of Law*, note 15, this chapter, at 657-661.

20. Compare *Wilson v. Girard*, 354 U.S. 524, 528-29 (1957), quoted Chapter VI, note 14.

21. These are the conclusions of my book ARMS CONTROL, as summed up in its Chapter IX.

22. U. S. Dep't of State Special Committee on Atomic Energy, *A Report on the International Control of Atomic Energy*, U.S. DEPT OF STATE PUB. NO. 2498 (1946). See also *International Control of Atomic Energy*, U.S. DEPT OF STATE PUB. NOS. 2702 (1946), 3161 (1948). Cf. "Findings on the Safeguards to Ensure the Use of Atomic Energy Only for Peaceful Purposes," in *The International Control of Atomic Energy: First Report of the United Nations Atomic Energy Commission to the Security Council*, U.N. DOC. NO. AEC/18/Rev.1 (1947), also reprinted in U.S. DEPT OF STATE PUB. NO. 2737 (1947). This plan substantially embodied the United States proposal known as the "Baruch Plan," which, in turn, was based on the proposals of the Acheson-Lilienthal Report.

23. I draw here on HENKIN, ARMS CONTROL, Chapter VIII.

24. "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." UN Charter, article 93(1). The jurisdiction of the Court depends on consent of the parties in each case unless the parties had committed themselves to accept its jurisdiction for the solution of disputes in particular treaties or conventions. I.C.J. Statute, Article 36(1). Parties may also accept compulsory jurisdiction of the Court by declaration under Article 36 (2) of the Statute. In numerous instances the United States has ac-

cepted the jurisdiction of the Court for issues arising out of particular treaties. See 106 CONG.REC. 11194 (1960); Bishop and Myers, *Unwarranted Extension of Connally Amendment Thinking*, 55 AM.J.INT'L L. 135 (1961). It has also filed a declaration under Article 36(2) although the reservation imposed by the Senate (including the "Connally Amendment") may have rendered it largely illusory. See 61 Stat. 1218 (1946). But cf. Henkin, *The Connally Reservation Revisited and, Hopefully, Contained*, 65 AM.J.INT'L L. 374 (1971).

25. See DEP'T STATE PUB. NO. 2420 (1945), 39 AM.J.INT'L L. (Supp.) 257 (1945). The Nuremberg Charter established a tribunal for the trial of war criminals. That charter does not itself legally commit the United States to submit to the jurisdiction of similar tribunals in future. The principles of international law recognized by the Nuremberg Charter were unanimously affirmed by the U.N. General Assembly, Res. 95(I) December 11, 1946, 1 UN GAOR, 2d pt., Verbatim Record 1144 (1946).

26. See, for example, the International Covenant on Civil and Political Rights, article 41, and the optional protocol to the Covenant, Annex to G.A. Res. 2200 (XXI), Dec. 16, 1966; the International Convention on the Elimination of all Forms of Racial Discrimination, Annex to G.A. Res. 2106-A (XX), Jan. 19, 1965; the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, and its subsequent protocols; the American Convention on Human Rights, OAS Official Records, OEA/Ser. K/XVI/II, Doc. 65, Rev. 1, Corr. 2, Jan. 7, 1970.

27. That in some circumstances suits between the United States and another power might come before American courts as well is immaterial; such suits might be concurrently within the judicial power of one or more particular countries as well as of extra-national bodies established by agreement. Nor does it matter that the International Court itself decides whether it has jurisdiction, (Statute of the International Court of Justice, Article 36(6), 59 Stat. 1055, 1060 (1945); T.S. No. 933), though at one time a Senate Committee considered it to be unconstitutional to give to a joint commission authority to determine whether a dispute is subject to arbitration under a treaty. S.Doc.No.98, 62d Cong., 1st Sess. 6 (1911), 47 CONG.REC. 3935 (1911); see WRIGHT 111-12.

28. Compare *Hirota v. MacArthur*, 338 U.S. 197 (1948), note 44, this chapter.

29. Compare the European Convention, note 26, this chapter, which provides for proceedings against a state by the European Commission or by another State, not by the individual himself. 213 U.N.T.S. 221, article 48; but compare article 25. Compare also the optional protocol

to the International Covenant on Civil and Political Rights, note 26, this chapter.

30. See the Hague International Prize Court Convention, October 18, 1907, in 3 G. CHARLES, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS* 248 (1913). For the proposed protocol to avoid appeal from the U. S. Supreme Court, see [1909] FOREIGN REL.U.S. 303, 318 (1914); CHARLES, *supra* at 263. Although the Senate consented the United States did not ratify the Convention and it never came into effect. See CHARLES, *id.*; 2 OPPENHEIM, *INTERNATIONAL LAW* 876 (Lauterpacht 7th ed. 1952).

31. It was also argued that if there were an appeal from a federal court to an international tribunal, the domestic proceeding would cease to be a case or controversy of judicial character and be inappropriate for a federal court. See WRIGHT 117-18. The argument, and its reliance on *Gordon v. United States*, 2 Wall. 561 (U.S.1865), also 117 U.S. 697 (Appendix), are not persuasive. In any event Congress could provide for such proceedings to begin not in the regular federal courts but in "legislative courts," special courts established by Congress pursuant to its legislative powers (hence frequently called "Article I courts," after the article of the Constitution vesting legislative power in Congress. The term "legislative courts" originated apparently in *American Ins. Co. v. Canter*, 1 Pet. 516 (U.S.1828).) Such "courts" are not subject to the requirement in Article III that there be a "case or controversy," to the requirements relating to tenure and compensation of judges, or other limitations which may be implicit in that article. In addition to the *Canter* case, see *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); *Williams v. United States*, 289 U.S. 553 (1933); compare *O'Donoghue v. United States*, 289 U.S. 516 (1933); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). See, generally, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 YALE L.J. 979 (1962); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 340-371 (1953); Katz, *Federal Legislative Courts*, 43 HARV.L.REV. 894 (1930); Note, *The Judicial Power of Federal Tribunals Not Organized Under Article Three*, 34 COLUM.L.REV. 746 (1934).

For a defense of the constitutional right of the United States to submit to an international prize court's jurisdiction, see H.R.REP.NO. 1569, 68th Cong.2d Sess. 10 (1925).

32. See Butte, *The "Protocole Additionnel" to the International Prize Court Convention*, 6 AM.J.INT'L L. 799 (1912).

33. That device was used in the Convention for the Pacific Settlement of Disputes Between Sweden and Finland, Jan. 29, 1926, 49

L.N.T.S. 367. See also similar treaties between Denmark and Sweden, Jan. 14, 1926, 51 L.N.T.S. 251; Denmark and Finland, Jan. 30, 1926, 51 L.N.T.S. 367; Norway and Sweden, Nov. 25, 1925, 60 L.N.T.S. 295.

34. *E. g.*, UN Committee on International Criminal Jurisdiction, *Draft Statute for an International Criminal Court*, UN Doc. A/AC.48/4 (1951) reprinted in 46 AM.J.INT'L L. (Supp.) 1 (1952). Wright, *Proposal for an International Criminal Court*, 46 AM.J.INT'L L. 60 (1952).

The Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 578, is directed at individual offenders (Art. 4), and provides that persons charged with genocide may be tried by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." (Art. 6). The international criminal court apparently contemplated by the treaty has never been seriously considered. (The United States has not ratified the Genocide Convention itself but in 1972, after more the twenty years delay, a Senate Committee recommended Senate consent to U. S. adherence. Sen.Ex.Rep. No. 6, 92d Cong., 1st sess. (1971). See Chapter V, note 71.)

35. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); *Charlton v. Kelly*, 229 U.S. 447 (1913); compare 18 U.S.C. § 3184 (1970). The power to extradite American citizens under a treaty was upheld in an early case that aroused wide public interest. *United States v. Robins*, 27 F.Cas. 825, No. 16175 (D.S.C. 1799). (There is some doubt as to whether Robins was in fact an American citizen, but it was apparently assumed that he was.) See Chapter II, note 18.

36. That only courts ordained and established by Congress can exercise the judicial power of the United States, see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330-31 (U.S.1816); *Ex parte Milligan*, 4 Wall. 2, 121 (U.S.1866); *Williams v. United States*, 289 U.S. 553, 566 (1933); *cf. Robertson v. Baldwin*, 165 U.S. 275, 278-79 (1897). It is accepted that federal criminal law can be enacted only by Congress, not by treaty. See Chapter V, p. 159, and note 99.

37. For the suggestion that a person accused of crime in the United States has a constitutional right to trial by a judge enjoying the independence that comes with life tenure and assured compensation, see *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-17 (1955); *Ex parte Milligan*, 4 Wall. 2, 121-22 (U.S.1866); compare the court-martial cases, Chapter III, note 42.

One of the grievances in the Declaration of Independence was that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Compare THE FEDERALIST No. 78 (Hamilton).

38. To meet these objections, there have been suggestions that the United States agree instead to a system that provides trial in American courts with appeal to an international tribunal. That would raise questions as difficult as those it would eliminate. It would involve appeal from U.S. courts to a body other than the Supreme Court, p. 198 above. And if an appeal by the prosecution were permitted after an acquittal in a U.S. court, there would be a serious issue under the double jeopardy clause of the Fifth Amendment. *United States v. Ball*, 163 U.S. 662, 671 (1896); *Peters v. Hobby*, 349 U.S. 331, 344-45 (1955); *Green v. United States*, 355 U.S. 184, 188 (1957); *cf. Kepner v. United States*, 195 U.S. 100 (1914); *United States v. Sanges*, 144 U.S. 310 (1892); *Benton v. Maryland*, 395 U.S. 784 (1969); *Price v. Georgia*, 398 U.S. 323 (1970).

If trial by a U.S. court is constitutionally required, trial by an international court with appeal to a U.S. court might not satisfy the requirement, perhaps even if the U.S. court gave the accused a trial *de novo*. Compare *Callan v. Wilson*, 127 U.S. 540, 556-57 (1888); but *cf. Crowell v. Benson*, 285 U.S. 22 (1932), and *Brandeis, J., dissenting id.* at 86-87; *Ng Fung Ho v. White*, 259 U.S. 276, 283 (1922); *Colten v. Kentucky*, 407 U.S. 104 (1972).

For an unusual instance, in extraordinary circumstances, of a treaty providing judicial review in U.S. courts of determinations of an international body, see *Abrey v. Reusch*, 153 F.Supp. 337 (S.D.N.Y.1957).

39. Indeed, foreign consuls have had the right to call upon officials and courts of the United States for assistance in arresting, interrogating, and imprisoning persons subject to their jurisdiction. See, *e. g.*, *Convention Between the United States of America and Greece Defining the Rights, Privileges and Immunities of Consular Officers in the Two Countries*, Nov. 19, 1902, arts. II, IX, XII, 33 Stat. 2122, T.S. No. 424; *Consular Convention between the United States of America and Ireland*, May 1, 1950, arts. 21-27, [1954] 5 U.S.T. 949, T.I.A.S. No. 2984; *Consular Convention and Protocol Between the United States of America and the Union of Soviet Socialist Republics*, June 1, 1964, art. 13(2), [1968] 19 U.S.T. 5018, T.I.A.S. No. 6503; and the enabling legislation in 22 U.S.C. §§ 256-58a (1970). 22 U.S.C. § 256 confers jurisdiction on a consul only where by treaty the nation he represents gives reciprocal rights to United States consuls in its territory. 22 U.S.C. § 258a provides for enforcement by federal courts or commissioners of consular awards and decrees in differences between captains and crews of the vessels of the nation the consul represents.

Lower federal courts have given effect to foreign consular jurisdiction: *The Koenigin Luise*, 184 F. 170 (D.N.J.1910) (denying court's jurisdiction of alien seaman's libel against vessel, because of

exclusive jurisdiction of consul); but *cf.* *The Neck*, 138 F. 144 (W.D. Wash. 1905) (refusing to dismiss suit for wages by United States citizen who had served as seaman under flag of country whose consul claimed exclusive jurisdiction under a treaty). See also *Glass v. The Betsey*, 3 Dall. 6 (U.S. 1794) (implying that the United States has the power by treaty to permit foreign countries to establish courts in United States); *cf.* *The Belgenland*, 114 U.S. 355, 364 (1884).

40. North Atlantic Treaty Status of Forces Agreement, June 19, 1951, Art. VII, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

41. Service Courts of Friendly Foreign Forces Act, ch. 326, 58 Stat. 643 (1944), 22 U.S.C. §§ 701-706 (1970). The statute also authorized United States military officials to arrest members of the foreign forces at the request of their commanding officer.

42. While not involving criminal law, the disposition of claims of American citizens by international claims commissions affords some analogy. Although judicial or quasi-judicial in character, and deciding cases that might be decided by American courts, they are *ad hoc* tribunals of a special bi-national authority created by international agreement, and are exercising only its "judicial power." See, *e. g.*, Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, art. II, 15 Stat. 679, 681-82, T.S. No. 212; Agreement Between the United States and Germany for a Mixed Commission, Aug. 10, 1922, 42 Stat. 2200, T.S. No. 665. Professor Hudson, writing in 1944, stated that the United States had participated in twenty-six such tribunals in the past one hundred years. M. HUDSON, INTERNATIONAL TRIBUNALS 196 (1944). There have been a number of them since.

Congress has also authorized international and foreign officials to act within this country and to use American courts and processes to support their activities. For example, the United States-Canadian International Joint Commission, under a treaty with Canada as implemented by Congress, is authorized to administer oaths and take evidence in the United States in proceedings within the Commission's jurisdiction. Treaty between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548, as implemented 22 U.S.C. § 268 (1970), and 22 C.F.R. §§ 401.1 (1972). By application to the United States court in the district within which the Commission is sitting, the Commission may compel the attendance of witnesses and the production of evidence and invoke the court's contempt power to insure compliance (FED.R.CIV.P. 45(f); 18 U.S.C. § 401 (1970)).

Congress has also given even broader authority to any international tribunal or commission to which the U. S. is party, considering a

claim in which the United States or any of its nationals is interested, to administer oaths under penalty of perjury and to require the attendance of witnesses and the production of evidence enforceable by contempt proceedings. Ch. 851, § 1, 46 Stat. 1005 (1930). Subsequent amendment permitted the United States agent before such tribunals to invoke the aid of a federal court to order witnesses to appear before the court for examination by the agent. Ch. 50, 48 Stat. 117 (1933). The legislation was repealed in 1964, Pub.L. 88-619, § 3, 78 Stat. 995 (1964), but federal district courts now may order testimony for use in a proceeding in a foreign or international tribunal. *Id.* at 997, 28 U.S.C. § 1782 (1970).

43. United States "services" to such tribunals would also seem acceptable, although constitutional difficulties might be further attenuated if convicted individuals were imprisoned in some international facility rather than in one under the authority of the United States. Seamen convicted by foreign consuls, note 39, this chapter, may be confined in United States prisons, 22 U.S.C. § 258 (1970). Compare also Art. VII, § 7(b) of the NATO Status of Forces Treaty, note 40, this chapter.

44. In *Hirota v. MacArthur*, 338 U.S. 197 (1948), the Supreme Court was asked to review on habeas corpus the constitutionality of the trial of several Japanese for "war crimes" before an international commission which the Allied military commander, who was also United States commander, had established on behalf of the Allied Powers. The Court held *per curiam* that the military tribunal was not a "tribunal of the United States" whose judgments could be subject to review by the Supreme Court or by other federal courts. Mr. Justice Douglas, concurring in the result, was of the opinion that there was no power of review because the military tribunal "was solely an instrument of political power" as to which the President, spokesman for the United States in its foreign affairs, had the final say. *Id.* at 199, 215.

Even if these arguments were accepted in principle, it is unlikely that the courts would tolerate any exercise in the United States of a foreign criminal jurisdiction that entailed violations of fundamental fairness or "shocked the conscience." Compare Chapter X.

ARMS CONTROL AND INSPECTION IN AMERICAN LAW

by LOUIS HENKIN

with a Foreword by PHILIP C. JESSUP

1958



COLUMBIA UNIVERSITY PRESS *New York*

JX1974
H44
Copy 2

23/6/8*

COPYRIGHT © 1958 COLUMBIA UNIVERSITY PRESS, NEW YORK
PUBLISHED IN GREAT BRITAIN, CANADA, INDIA, AND PAKISTAN
BY THE OXFORD UNIVERSITY PRESS
LONDON, TORONTO, BOMBAY, AND KARACHI
LIBRARY OF CONGRESS CATALOG CARD NUMBER: 58-13767
MANUFACTURED IN THE UNITED STATES OF AMERICA



CONTENTS

FOREWORD by Philip C. Jessup	vii
PREFACE by John M. Kernochan	xi
I. INTRODUCTION	1
II. ARMS CONTROL PROVISIONS	17
III. ARMS CONTROL AND THE CONSTITUTION	25
IV. INVESTIGATION OF COMPLIANCE WITH ARMS CONTROL	47
V. CONGRESSIONAL IMPLEMENTATION OF ARMS CONTROL	84
VI. STATE LAWS AND LOCAL COOPERATION	97
VII. INTERNATIONAL ADMINISTRATIVE REGULATION	104
VIII. INTERNATIONAL TRIBUNALS	122
IX. CONCLUSION	153
NOTES	159
CASES CITED	249
CONSTITUTIONAL PROVISIONS	263
SELECTED STATUTES	264
TREATIES AND OTHER INTERNATIONAL AGREEMENTS	266
BOOKS AND ARTICLES	270
INDEX	279

FOREWORD

Disarmament has been advocated by many persons and sporadically sought by many governments throughout this century. It was Russia under Czar Nicholas II which took the lead in advocating it at the First Hague Peace Conference of 1899; it is Russia under Premier Khrushchev whose agreement is vital to even the first steps toward disarmament today. But the agreement of the United States is just as essential. The perfection of thermonuclear weapons leads some to believe that there is reason for hope in a "balance of terror"—in the mutual capacity for annihilation. No government takes the position that we may rest assured that this is true. Even if the insistent fears of nuclear holocaust were quieted, there would still be the demand that the vast sums swallowed up annually in armaments be devoted to needs of man other than mere survival.

Of the obstacles to an accord upon disarmament, or the limitation of armaments, distrust occupies a primary place. If our future safety and very survival are to rest on trustworthy agreement that nuclear weapons will not be used, rather than on the deterrent effect of the possibility of retaliation, we must have more than a bare promise. We assume that the Soviets are equally unwilling to entrust their future to our good faith. Analysis of their slogan, "banning the bomb," leads quickly to the realization that the disarmament problem encompasses all weapons and all the armed forces available to use them.

The elimination of distrust in the relations of the Soviet Union and the United States cannot be achieved by a formula, no matter how ingenious. But in specific relation to disarmament, there is an identified counter to distrust; this counter is inspection. Inspection is the means whereby we tell whether governments, Russian or American, are actually doing or not doing what they have agreed to do or not to do. Much of the recent disarmament discussion has concentrated on the effort to reach agreement upon inspection. The latest impasse (as this is written) involved the United States proposal for international aerial inspection in the Arctic to quiet the fears of both the Soviet Union and the United

States. The United States has been more insistent upon the need for prior agreement on an inspection system, but the Soviets have not denied its importance and have advanced their counterproposals.

Of the other obstacles to disarmament agreement, some are technical. Given the best will in the world on both sides, the problems of technical detail which must be mastered are staggering. Even the perfection of a formula for limiting the number of persons in the armed forces of all the countries of the world presents enormous difficulties, but these difficulties are exceeded as one begins to deal with the vast complex of interrelationships of business and industry required for the manufacture of items which go into arsenals for war.

Curiously enough, despite the vast number of published discussions—both official and nonofficial—of inspection, no one seems to have heretofore studied the problem from the point of view of the legal and administrative problems involved in enforcing an inspection system in the United States. Perhaps the failure to look at these and other implications of disarmament for the United States is one of the reasons why the whole subject has seemed so far removed from the individual, from the community. Control of sputniks and other earth satellites and arctic patrols are remote governmental business. The right of an international inspection team to enter the factory and even the home, on the other hand, concerns every citizen. Is this what we demand as assurance that a disarmament agreement is being kept by those against whom we are on our guard? Is it worth the price? What is the price in terms of the impact on our traditional processes and institutions?

This study by Professor Louis Henkin does not try to outline the technical procedures of an international inspection plan—what can be detected by aerial photography under an “open skies” proposal, what seemingly harmless industrial or mining processes may actually represent preparation for war and how one ascertains this fact. A report just published deals with such matters: *Inspection for Disarmament*, a technical study, edited by Professor Seymour Melman for Columbia University’s Institute of War and Peace Studies, with the support of Earl D. Osborn and the Institute for International Order. Professor Henkin explores, rather, legal and practical paths even less traveled, indeed hitherto largely unsurveyed. To what extent is the treaty power under the Federal Constitution adequate to transmuting an international agreement on disarmament and inspection into effective local law? What further legislation by Congress would be needed? What legislative action

by the States of the Union? Is our whole system of law enforcement from local policemen through courts and sheriffs and marshals and state police and federal forces, created for such different ends, available to guarantee, not only to ourselves but to distrustful foreign nations, that an international inspection system will accomplish its purpose? Until we see clearly the answers to such questions as these, we cannot safely negotiate the final terms of an agreement which must function successfully here as in other countries.

This study should be of interest to every citizen. It will be of particular interest to lawyers. It has special meaning also for all those who are interested in the development of international institutions. Since the Second World War particularly, the number of such institutions has multiplied. There has, however, been no previous study of the impact of international institutions upon those of the United States. The place of international law under the Constitution, the relation of international bodies exercising a form of administrative or judicial power to federal and state institutions, the rights of American citizens when they come into contact with such international bodies, are explored here in the context of arms control but they have significance, too, in other contexts in which international organizations operate. It is high time for such a study. It is time also for this further demonstration of the necessary link between the American lawyer interested primarily in domestic law and affairs and his often distant colleague concerned with matters international. It is time that each be made to see where he meets the other. It is time also—as the American Law Institute has realized in launching its current study of the Foreign Relations Law of the United States—that someone put effort and intelligence trained in American constitutional law to work at the problems of our relations with other nations.

This study required an author with the combination of experiences and skills which Professor Henkin possesses. His years of service in the State Department’s Bureau of United Nations Affairs and Office of European Regional Affairs gave him the close acquaintanceship with the practicalities of foreign policy, with the working of the United Nations and NATO, and, from 1950 to 1954 when he was assigned to problems arising from the aggression in Korea, with the trials of patience required in seeking to reach an agreement with a Communist power. To his understanding of the realities of foreign policy, Professor Henkin joins rare skills in his appreciation of the whole body of constitutional

doctrine, an appreciation developed in contact with two of the keenest American legal minds, those of Judge Learned Hand and Mr. Justice Felix Frankfurter, both of whom he served as Law Clerk. He is now Professor of Law at the University of Pennsylvania Law School. Even the layman will find the felicity of the author's English style leading him through those sections of the book which of necessity deal with legal complexities.

There may be those zealous to advance the cause of disarmament who will be apprehensive because this study calls attention to still more and largely neglected dangers and difficulties. I do not share this apprehension. The disarmament issue demands with imperative urgency that we seek a solution. No one of the possible obstacles or difficulties should be overlooked. Man has not yet found his way into all of the intricate recesses of this issue and into them should be thrown now the light not only of political wisdom, science, and technology, but also of legal knowledge and insight. This Foreword affords me a most welcome opportunity to express to a friend and former colleague in the Department of State and at Columbia University my own appreciation of a contribution courageously undertaken and masterfully rendered.

PHILIP C. JESSUP, *Co-Chairman*
Columbia University Council for
Atomic Age Studies

Columbia University
July 1, 1958

PREFACE

Professor Louis Henkin's study of *Arms Control and Inspection in American Law* presented here by the Legislative Drafting Research Fund of Columbia University has been a welcome undertaking for the Fund. It has offered a fresh opportunity to pursue a traditional Fund objective: the conduct of basic research at what is expected—at least hoped—to be a "growing point" of the law, a focus of significant future legislation. The subject partakes too, as noted in Professor Philip C. Jessup's illuminating Foreword, of the urgency that now attends all arms control matters. That urgency has of course resulted from the accelerating scientific and technological development of our time. Arms control problems thus represent also one aspect of the vast impact of science on society to which the Fund severally, and jointly with Columbia's Council for Atomic Age Studies, has assigned high priorities of exploration.

The study was originally proposed by Earl D. Osborn, President of the Institute for International Order, and executed with his support. In accordance with the terms set for the study, it is, in the author's phrase, a "memorandum of law." It is detailed and specialized, not a popularization. It is wide-ranging, not a selective text on how best to secure arms control by law, or on the legal obstacles thereto, though both avenues and obstacles are inevitably identified. To some extent, the task assigned has called for, and the author has provided, a clear, precise re-examination of relatively familiar areas of law. Mostly, it has covered new ground or explored new approaches. This has occasionally called for speculation or for hypothetical argument—uncongenial to lawyers—but Professor Henkin has dared also the "unpath'd waters, undream'd shores." In sum, he has performed with imagination, fullness, and care much of the legal "spadework" which must precede the establishment of international arms control in this country. The Fund considers itself to have been fortunate indeed to secure Professor Henkin's services as Associate Director in charge of this study. His unusual qualifications for the task are described in Professor Jessup's Foreword. They are, in our view, demonstrated conclusively by the report.

The publication of this study has been determined upon by the Fund, and aided by a grant from the Institute for International Order, in the belief that the insights, analyses, and research materials here developed cannot fail to be valuable to all who plan, build, or work for arms control and to all others who may be seriously concerned to explore its implications for our society.

Many acknowledgments are due. First, and chiefly, to Earl D. Osborn, whose foresight and generous support have made this study possible, and also to George A. Beebe, John F. B. Mitchell, Esq., and other members of the board and staff of the Institute for International Order, for creative assistance graciously given.

On behalf of both Professor Henkin and the Fund, warmest thanks are also extended here to many other persons, whether named or unnamed, for their aid. For example: to Dean William C. Warren of the Columbia University School of Law, for encouragement and courtesies, personal and institutional, extended to the study and its executants; to Professor Jessup (Co-Chairman, Columbia University Council for Atomic Age Studies) of Columbia's School of Law, for his guidance and for his Foreword to the study; to Professors Noel T. Dowling, Harry W. Jones and Herbert Wechsler of Columbia's School of Law, and to Professor William T. R. Fox (member, Columbia University Council for Atomic Age Studies) of Columbia's Department of Public Law and Government, for their critical suggestions and comment; to Grenville Clark, Esq., and to Associate Dean David F. Cavers and Professor Louis B. Sohn of the Harvard University School of Law, for advice in the early stages of the study; to Shirley S. Abrahamson, Herbert Adelman, Peter Ehrenhaft, George Kaufmann, Michael P. Rosenthal, and Richard S. Salzman of the staff of the Legislative Drafting Research Fund, for research assistance; and to Mariana Smith, Patricia Atwater, and Elizabeth S. Albro for secretarial assistance. Barbara Melissa Voorhis of Columbia University Press contributed helpful editorial counsel. None of course bears responsibility—that is Professor Henkin's alone—for the views and conclusions expressed in this study.

JOHN M. KERNOCHAN, *Director*
Legislative Drafting Research Fund
of Columbia University

Columbia University
July 1, 1958

ARMS CONTROL AND INSPECTION IN AMERICAN LAW

Chapter VII. INTERNATIONAL ADMINISTRATIVE REGULATION

To this point we have dealt with an arms control scheme of the kind which the United States has been seeking and which might come about. In this as in the next chapter we shall examine proposals which are not to be found in the deliberations of governments. Here we deal with suggestions once made which might have entailed far-reaching consequences for American law and institutions. They may be examined against the day when they might be made again. It is indeed possible that future proposals may contain some elements once found in plans now discarded; such elements may already be developing in areas other than arms control. Examination may define how far, in fact, they reach, and may suggest alternative methods of achieving desired results which avoid or reduce difficulties.

Once it was contemplated that the control of armaments, so far as applied to the then most important weapons, *i.e.*, atomic weapons, would be effected by an international agreement providing for complete international control and development of all atomic energy.¹ Under that system an international development authority was to have a monopoly of atomic materials and nations would be required to obtain a license from such agency for peaceful uses. Individual nations, under this plan, could be denied the right to prospect, mine, and refine uranium and thorium, to enrich the isotope U-235, to operate various types of reactors and separation plants, to carry on research or develop atomic explosives. International inspectors would scrutinize national activities to assure compliance.

At the time the nations of the world were considering United States proposals along these lines, apparently little public attention was given in the United States to constitutional problems which might be raised by United States participation in such an international scheme. Perhaps it was believed that there was no serious prospect that the plan would be adopted or that the United States would ratify it.² Perhaps it was

believed that so novel a plan would in any event be adopted by the United States by constitutional amendment to eliminate doubts as to its validity and to assure public awareness and support.

In recent years the international control of atomic energy has not even been suggested. The scheme of foreseeable arms control treated to this point in this study does not entail international regulatory activity. The treaty, it was contemplated, would set forth prohibitions and limitations. There would be international inspectors to observe whether a nation was complying with the agreement. Beyond that, if in order to comply with these restrictions a nation considered it necessary to regulate by administrative process the armaments industry or related industries, that was entirely a national matter. It would be carried out through national administrative officials and enforced in national courts.

It may be that some different, unforeseen plan will contain elements definitely requiring a system of regulation, a system which would involve making rules, issuing orders, and granting licenses. And the scheme might lodge these functions in an international body. The United Nations proposal for international atomic development may have contemplated such a system, although since negotiation did not achieve progress on the main principles, proposed details for their implementation were not given careful attention. It appears to have been contemplated in general that an international development authority would have such functions, but perhaps only in relation to nations, that it was not to exercise administrative authority over private citizens and groups in any country.

In regard to any plan containing these or similar regulatory elements it is of course desirable that administrative intrusion be kept at a minimum consistent with achieving the desired results. This cardinal principle of democratic administration requires even stricter observance where there is to be administration by an international body over important national activities. Maximum respect for national sensibilities would obviously render a proposal more acceptable, less onerous in operation, easier to administer, and more effective. And in the United States it would reduce the constitutional problems—themselves an indication that proposals are being considered which are untried or disruptive, which might evoke resistance from the citizen.

In the United States, then, any system of international administrative regulation should minimize the exercise of authority or control by the international agency directly over American industry and the citizen. The

agency should deal with the United States Government and its officials. And the United States would stand between the international body and its citizens. The international administration would promulgate regulations, setting limits to what might be done in the United States. The regulations and requirements of the agency would be directed to the United States; licenses would be issued to the United States Government; the United States would assure compliance with the requirements of the agency. In turn, of course, the United States would, through legislation and national regulation, control activities of persons in this country, in conformity with the limitations imposed by the treaty and the international agency.

Such a system would raise few special problems under American law. We shall mention briefly those arising from "control" by such an international administration over the United States Government and its activities. There would, of course, also be numerous legal problems involved in the administration by the United States of the activities of its citizens, but these will be only incidentally indicated. They are the problems raised by existing national administrative agencies, the Atomic Energy Commission, or the Federal Communications Commission, or the Civil Aeronautics Board.

Of course, the system suggested would mean that, as applied in Russia, the Soviet Government, in turn, would stand between the international agency and its citizens. But in the Soviet Union, as in the United States, the international body through its inspectors should be able to uncover whether the government is perpetrating or permitting violations, whether in fact it is carrying out its obligation to assure compliance with the requirements established by the treaty and the international agency.

Most of the problems with which this chapter will deal should, therefore, not arise in relation to arms control. Still, it may be that because of fear and mistrust, or an inadequate understanding of the operations of government and administrative bodies, there would be a desire to regulate more closely activities in the Soviet Union or Communist China, or other countries not beyond our suspicions. There may then be proponents for a plan, or elements in a plan, which would involve international administration and scrutiny not only of governmental activities, but also directly of private undertakings, the issuance of international regulations and orders to private persons, and the granting of licenses to them. Whatever the consequences of differences between Soviet socialism and American private enterprise, such a suggestion would involve

reciprocal operation in the United States as well. This chapter will consider whether, to what extent, and on what basis the United States could constitutionally accept such direct international administrative regulation in this country.

PRECEDENTS FOR INTERNATIONAL REGULATION

The questions suggested may be described as those raised by international administration and international administrative law. For the United States, perhaps, these have not in the past had practical significance in any sense comparable to similar categories and concepts in domestic law and government. For other countries concepts we know as those of administrative law have, on the contrary, been acquiring an international dimension. The European Coal and Steel Community, for example, is in the process of offering a proving ground for practices and theories of administrative law on an international basis, not unlike those which are familiar within the United States. The European Atomic Energy Community (EURATOM) and the European Economic Community (Common Market) should also contribute to the development of "international administrative law."³

Of course, "administrative" action in the United States includes matters as different as the rummaging through a tourist's valise by the customs inspector, and the regulation of the entire communications industry by the Federal Communications Commission or the aviation industry by the Civil Aeronautics Board. And there are some international activities to which the United States is already party with elements and characteristics which in a domestic context may be viewed as part of the body of administrative practices and problems. Action of the United States Government, for example, may be subject in given respects to decisions and conclusions of international bodies which may be characterized as administrative or regulatory. The activities of the principal organs of the United Nations may in some respects be deemed regulatory.⁴ Among specialized agencies of the United Nations, the International Bank for Reconstruction and Development and the International Monetary Fund, for example, also possess authority to make rules for member nations and to settle disputes among them.⁵ The World Health Organization recommends practices to member states, some of which the United States has adopted and implemented.⁶ The long-established Universal Postal Union has developed common international practices by which the United States abides, and must abide if it is

to maintain the advantages of participating in an international postal system.⁷ Other fields of international regulation include the control of narcotics, where international officials have propounded, and the United States has applied, cooperative practices for making more effective the international control of drugs.⁸ International marketing agreements in various commodities—*e.g.*, wheat, sugar—establish international councils with power to set export and import quotas.⁹ The International Atomic Energy Agency has some supervisory functions as concerns recipients of nuclear materials.

There are also numerous examples of international regulation on a bilateral or regional basis, particularly in the fishing industry. We mention only some arrangements to which the United States is party. A treaty with Canada in 1930 established a mixed commission to make rules limiting or prohibiting the taking of certain salmon and allowing the commission to fix net mesh size; fishing areas and seasons were made subject to approval of the commission. Halibut fishing has also been regulated under comparable arrangements with Canada.¹⁰ And an international convention for the Northwest Atlantic Fisheries, which came into effect in 1950, established an international panel to deal with fishing in that area.¹¹ A wider, multilateral Convention for the Regulation of Whaling established a commission with extensive power to recommend rules.¹² The activities of the United States-Canadian International Joint Commission may also be considered of the character of international administrative action.¹³

The international experience in which the United States is already partaking, however, differs fundamentally from, say, the actions of the Federal Communications Commission, or from the powers once anticipated for a proposed international atomic development agency. The regulatory powers of existing international bodies are, as we have seen, limited in scope. More significantly, whether for legal or political reasons, these bodies cannot, in general, bind the United States without its consent. Some of these bodies have only the power to recommend, *e.g.*, the United Nations General Assembly and comparable bodies in the Specialized Agencies. In the Security Council the United States has a veto. In other international bodies, like the commodity groups, there are "weighted-voting" arrangements, and blocs of countries with similar interests can align themselves to prevent violence to these interests.¹⁴ In some bodies the protection of the United States against the imposition of decisions of which it disapproves lies in its leading political and

economic situation and, in the background, its power to withdraw from the arrangements. Even in regional agreements like the Convention for the Northwest Atlantic Fisheries, the presence of United States members on key panels and the agreed method for reaching decisions make it unlikely that regulations could be established which do not have the concurrence of the United States Government. The halibut and salmon conventions with Canada now require approval by the United States for regulations of the international commissions.

For constitutional purposes, there is a more important, critical distinction between past and present arrangements of the United States and those which international administration and regulation would entail. The regulations of existing international bodies do not control or directly affect the rights and interests of individuals in the United States. In some instances, as suggested, this is so because the United States Government stands between the international body and the American citizen and itself determines whether it will make a regulation proposed by the international body applicable in the United States.¹⁵ Or, in other instances, the character of the regulation is such that it applies to the action of the Government of the United States, not to the actions of private persons.¹⁶ And even, for example, when a treaty with Canada permits its officers to seize an American vessel violating the Sockeye Salmon Treaty, the Canadian officials seizing such vessel must immediately turn it over to United States officials for disposition and any criminal proceedings.¹⁷

The disposition of claims of American citizens by an international claims commission should perhaps be mentioned here. While the disposition may seem judicial or quasi-judicial in character, rather than regulatory, it appears to be an exercise of authority by international or foreign personnel over the rights of Americans. By treaty the United States has at different times agreed that claims of American nationals against another nation or its nationals shall be determined by an international commission, whose findings shall be binding.¹⁸ Disposition of international claims by machinery of this kind has deep historical roots. The United States has treated the claims of its citizens in this way since the Revolution, and there has been no successful challenge to it under the Constitution.¹⁹ Any unfairness to a private citizen might be compensated by voluntary act of Congress, but the citizen could only recover what Congress afforded.²⁰ The accepted rationale of this practice has been that when a nation asserts through diplomatic channels a claim

of one of its citizens, it is deemed to be pressing a claim of the nation. It is the United States which is the party to the international agreement and the United States which is the claimant before an international commission determining claims. The award is made to the United States and turned in to the United States Treasury. Only as Congress sees fit to recognize the merit of a citizen's claim and to appropriate funds is payment made to an individual American claimant.²¹ In general, the courts will not interfere in order to scrutinize the original agreement, the merits of the determinations by the international claims commission, the procedures before it, or the action of Congress pursuant to the award.²² Control of activities in the United States by an international regulatory body would be quite different: there would be continuous supervision and regulation, not merely a quasi-judicial rendering of a money judgment; there would be regulation of activities of private citizens, and not just a determination of rights of the United States; there would be regulation of activities which take place within the United States, and not only those of American citizens which take place in other lands, on the high seas, in far space.

International administrative law involving intensive regulation of American industry—like the armaments industry—would therefore be new for this country. But if the familiar is not to be confused with the necessary, so the novel is not to be assumed to be the undesirable, the unnecessary, the illegal, or the unconstitutional. Although rooted in practices as old as the republic, United States administrative law itself has had its major growth quickly and recently in response to urgent requirement.²³ This growth was not without pain, and was greeted with alarm and forebodings.²⁴ The international community may be and may long remain a wishful concept. But necessity engendered by the scientific revolution may yet mother international machinery, not only of kinds already known, but others yet to be invented. Such international machinery, of a character resembling what has been called "administrative," will then seek acceptance in United States law and institutions.

INTERNATIONAL ADMINISTRATION AND CONSTITUTIONAL LIMITATIONS

Elements in direct international control which might be proposed for a future arms control plan might include the following:

(a) An international agency is to assume title to and control of certain products and materials.

(b) The United States and its officers, as well as its citizens and resi-

dents, may not mine, process, or possess such materials or manufacture weapons from them without approval, license, and supervision by the international agency.

(c) The agency may make rules, administer a licensing system, and enforce its decisions by appropriate remedies—e.g., cease and desist orders, closing down plants, confiscation of illegal materials, or cancellation or nonrenewal of licenses—enforceable perhaps through national tribunals.

One may assume that any treaty to which the United States will be party will seek maximum protection for the rights of Americans which might be affected by the action of an international agency. The personnel selected to administer the agency, the standards established to guide and control the administrator, the procedures he is required to follow in reaching decisions—these would certainly be provided in the plan so as to assure in some measure competence, fairness, and reasonableness. At the same time one must anticipate, keeping in mind that such an administrative agency also has to operate in other countries and "live" with their systems, that an international administrative agency would be independent of American political bodies and American courts. In its method of operation, it would develop its own procedures and its own precedents. If there is to be any review of the decisions of this body, appeal would lie, not—probably—to an American tribunal, but to an international tribunal, whether of a judicial or of a political character. Safeguards against administrative caprice, like those which have developed in the United States, might be available; but these would not, we may assume, include recourse to United States courts.

What constitutional problems are presented by such a system? At the outset we are met again by the suggestion that perhaps constitutional limitations do not apply. In a previous chapter, we considered whether actions of the United States Government under the treaty power are subject to the same limitations which apply to other acts of the federal government, principally to legislation by Congress. We decided that the treaty power is subject to these constitutional limitations. But there may be invoked a different suggestion, that the United States may by treaty establish a system of international law, under international sovereignty, which is not United States law and to which constitutional limitations on United States law are irrelevant. Several nations would by treaty be establishing a new administrative authority with quasi-legislative power. This would not be a United States body; it would be an inter-

national body. Its officials would be international officials chosen by international machinery and responsible to an international parent created by international agreement. In entering into such an arrangement the United States would not be attempting to give new powers to its own officials by exercise of the treaty power; it would be joining with others to establish a new legislative authority in the international field, which, in that limited area, would be acting under an international "sovereignty," in the same way that United States administrative bodies act under the sovereignty of the United States pursuant to legislation by Congress.

In support of this view it would be argued that if nations feel the need to deal with international problems by such international machinery, the treaty power is sufficient to meet this need of the United States to join other nations in this enterprise. The United States has all the sovereignty that other nations enjoy in international affairs,²⁸ and the treaty power is the principal mechanism for exercising it. This treaty law of nations is outside the pattern which the Constitution prescribes for actions by the United States, and the basis for such distinction is inherent in the treaty power. On this view, the authority conferred upon the international body, the law which it will administer, the procedures which it will provide are all outside the framework—and not subject to the limitations—of the Constitution. The Constitution applies to United States action. It does not apply to international action, even international action in which the United States has voluntarily joined.²⁹ American citizens would be subject to the new administrative law of nations established by treaty, as they would be if this law antedated the Constitution and were deemed incorporated into it. On that basis an arms control treaty dealing with matters of international concern and put into effect in accordance with procedures established by the Constitution could create its own pattern of regulation different from administrative programs established—for an instance—by congressional regulation of interstate commerce. Specifically, the international administration of an arms regulation program would not have to meet issues of "delegation" or of judicial review, or satisfy other requirements of due process, substantive or procedural.

One need not conclude that this argument goes too far, to suggest that it goes quite far. The argument against this position may be simply stated. The United States cannot, by treaty or otherwise, set up a new "sovereignty" in the United States over citizens and residents. Any

effort to do so is a delegation of the authority of government and is subject to stringent constitutional limitations. The legislative power is lodged by the Constitution in Congress; no other body can be given legislative power. The executive power is in the President; no other can be given executive power in this country. Congress and the President may delegate their authority to administrative bodies, but these delegations are sharply limited and authority exercised by the delegates remains inevitably federal action subject to all the limitations on the federal government. The treaty power is only another federal power, subject to the Constitution. It cannot circumvent constitutional limitations and the Constitution's careful balance of separated powers by purporting to create an independent sovereignty in the United States outside the framework of the Constitution. The present proposal would mean an administrative process not subject to control or limitation, to check or balance by other branches of the government.

There is no precedent or extended discussion to cite for one or the other of these views. There is also no theory or principle which is conclusive. The argument for the broader view is the unlimited, equal sovereignty of the United States vis-à-vis other nations; against it is the traditional view that the Constitution established limited federal authority of enumerated powers carefully circumscribed. One can state the arguments on both sides; beyond that, although the consequences for the character of American government may be extensive, there is no basis for a clear choice. The broader view would imply virtually no constitutional limitations on the international administrative process, and requires little further consideration. For purposes of this study, it is useful to proceed from the narrower view, and examine what could be done within its limitations. We shall consider, then, that when the United States joins other nations to confer power upon an international body in regard to activities of its citizens within the United States, the international body, for constitutional purposes, is deemed to be exercising federal power and is subject to the limitations which apply to such exercise of federal power.

Since constitutional limitations are deemed to apply, we shall consider problems raised by several aspects of the plan for international development and regulation. Two of these present few difficulties. The prohibition on activities of the United States has been considered, and we concluded that the right of the treaty makers under the Constitution to agree that the United States Government would not manufacture

defined weapons, or process materials related to such weapons, is hardly open to doubt. A second aspect of the regulation might be the assumption of ownership and control by the international agency of nuclear sources and materials. In so far as mines, minerals, or other materials belonging to private persons are taken and transferred to an international body, this would constitute a taking by the United States for a public use, for which the Fifth Amendment requires compensation. The federal government, in effect, would be taking these properties from private persons and then transferring them to the international body. That the federal government did not retain these materials itself would not render the taking any the less a taking for a public purpose. That United States resources are, for example, transferred to allies does not render such transfer unconstitutional; nor does it render the exercise of the federal power of eminent domain or taxation for these purposes an abuse of constitutional power.²⁷ The treaty makers and the Congress may decide that such transfers are in the national interest. Similarly, they might decide that a transfer of strategic materials to an international agency so that other nations would do likewise was also in the national interest.

INTERNATIONAL ADMINISTRATION AS A DELEGATION OF FEDERAL POWER

The major objections on constitutional grounds to international administration would be addressed to the regulation of activities of American citizens.²⁸ The first basis for challenge to international regulatory provisions might be on the ground that the federal government was delegating its authority and control to an international body.

What is the nature of the "delegation" in our hypothetical situation? The treaty makers and Congress would agree that the United States Government and American citizens would not manufacture, possess, or use certain weapons or materials. The policy, therefore, would be established by the federal government and would involve no delegation. The treaty and legislation might go further, however, and require giving possession of products and materials to the international agency; this, too, would seem to involve no serious question of delegation. Finally, there is provision for license and approval by the international agency of certain activities "delegated back," as it were, to the United States and to its citizens. So far as the activities of the United States Government are concerned, there appears to be nothing in the Constitution which deprives the United States of authority to agree by treaty not to

carry on such activities, or to carry them on only subject to approval of an international body.

Serious questions are raised by delegation of control of the activities of private citizens, however. In the past difficult problems in American constitutional law have revolved around the transfer of authority by Congress: the delegation of legislative power to the Executive, to administrative bodies, to the courts, or to private groups; and the assignment of judicial power to administrative agencies.²⁹ At different times such delegations have been upheld; a very few delegations by Congress have been struck down.³⁰ In foreign affairs and in the exercise of the war power, the merged powers of the President and the Congress have never been unraveled and no such delegation by Congress to the President has been struck down.³¹ Today a delegation to an American agency of the powers here envisaged would almost surely be sustained. Would the international character of the administrators affect the validity of the delegation?

The Constitution says: "All legislative Powers herein granted shall be vested in a Congress of the United States," and "The Executive Power shall be vested in a President of the United States of America." Reading these with other pertinent provisions of the Constitution might suggest, therefore, that United States executive and legislative power could only be entrusted to United States officials, appointed by the President, confirmed by the Senate, and taking an oath to support the United States Constitution. Yet as regards some activities on behalf of the United States, these may not be constitutionally essential. Many acts are done on behalf of the United States by persons not officers of the United States. We have seen in an earlier chapter that inspection might be delegated to international officials not meeting the formal requirements noted. Whether regulatory functions can also be delegated to such non-United States officials may well turn on the nature of the system of regulation and the functions reserved to the international administrator. The international character of the agency would loom smaller as a possible constitutional obstacle if it were authorized only to fill the interstices of a policy determined in the treaty, rather than to make broad determinations of policy itself.³² No definite conclusion is possible. Perhaps some support for the exercise of some regulatory functions by international officials might be derived from decisions upholding delegation to private groups in the United States, *e.g.*, tobacco marketing committees, although delegation in those cases left to private

persons only a veto power or, at most, limited "interstitial" determinations." It might also be argued that since by treaty or act of Congress the activities in question could have been forbidden entirely, it is not improper to make them permissible only upon the consent of an international group.³ And this international body, while not immediately subject to congressional control, would be governed by standards established in or pursuant to the treaty, and ultimately subject to control through diplomatic action; and finally the treaty establishing it would be subject to termination and repeal. Again, one can only suggest the questions, and some arguments. There are no confident answers.

There would be no problem of delegation in regard to enforcement. This, we here assume, would be in the hands of the United States. Congress presumably would make it a crime to carry on activities in violation of the agreement and contrary to the regulations issued by the international body. Such legislation would be authorized by the Constitution as an implementation of the treaty; or it might be considered a definition of a new offense against the law of nations.⁴

"DUE PROCESS" BY INTERNATIONAL TRIBUNALS

There are other difficulties. United States administrative law has grown up within limits, not always clearly defined or determined, allowed it by the Constitution. In addition to problems of "delegation," the administrative process has had to meet assertions that administrative regulations deprived persons of constitutional rights, principally the due process of law. Since, we have here assumed, the establishment of an international administration in the United States is an exercise of federal power subject to constitutional limitations, must an international administrative agency meet the same constitutional standards, afford the same constitutional guarantees, be treated for all constitutional purposes as though it were a federal administrative agency for the development of atomic energy? If in the international context it is not possible to fulfill these requirements in the same way, are there international substitutes which might meet the requirements of the United States Constitution?

Even the questions cannot be fully explored here. Possible answers can only be suggested, and with considerable hesitation. Without attempting to distill and restate in a word or paragraph the complex learning of United States constitutional law as it relates to the adminis-

trative process, some propositions may be stated for American administrative law which may at least suggest answers for our international problems.

The difficulties are aggravated by considerable uncertainty in regard to what the Constitution demands of the United States administrative process. There have been statutes and cases setting forth standards which the federal administrator must meet, but which of these are required by the Constitution, which freely accorded by Congress, is not always clear.⁵ Also, administrative action in the United States includes quite different kinds of acts affecting quite different kinds of rights; only the most general kind of generalizations can be made which would apply to all of them.

Still, in regard to the kind of administrative regulation of industry approximating most closely the concern of this chapter, some rules are fairly well established. When a federal regulatory agency acts—e.g., when it grants or withholds, renews or fails to renew, or cancels a license—it must go through proper motions to reach its decisions, that is, it must accord procedural due process appropriate to the particular action or decision.⁶ This would generally include notice and an opportunity to be heard, and a requirement that the administrator receive relevant evidence and give it due consideration.⁷ An applicant will be heard in a United States court to claim that he was not accorded his due procedures, and the court will enjoin the administrative action if it finds that these were not granted.⁸ The right to procedural due process, and the right to assure it by appeal to the courts, appear to be not matters of congressional grace but of constitutional guarantee.⁹

Administrative action must also, the courts tell us, be reasonable; administrators must accord "substantive due process."¹⁰ And the right to challenge the constitutionality of the administrative action in the courts, on the ground that it deprives the petitioner of property without due process of law, or that it violates other substantive provisions of the Constitution, is also, it would seem, guaranteed by the Constitution.¹¹ United States courts have also heard objections, apparently on a constitutional basis, that the administrator exceeded his authority under the statute and was therefore acting outside the law.¹² And the courts have considered claims that administrative action requiring support in evidence was not, in fact, supported by evidence.¹³

Must our international licensing system meet similar standards of substantive and procedural due process? Must there be an opportunity

in the courts to present a claim that these standards were not met? That the action of the administrative body exceeded its authority under the treaty? That there was no evidence to support its finding? If, for example, an American manufacturer sought a license from the international administrator to carry on regulated operations under an arms control or atomic development agreement, must the international licensing body give notice and hold hearings on his application? Must the applicant be afforded an opportunity to challenge the decision denying him a license or canceling a license on the ground that there was no hearing, or that the action was arbitrary or discriminatory? If the opportunity to raise these questions in some tribunal is required by the Constitution, would it be satisfied by review by an international body?

In the first instance, of course, whatever the Constitution requires of the administrative process itself could be accorded by an international administrative agency. Apart from any need to satisfy United States constitutional requirements in order to make United States participation possible, the international community, and its members, concerned for their national rights and the rights of their citizens, would in any event wish to provide fair procedures and reasonable results. All that could be asked in the name of the Constitution, it would seem, is that the procedures satisfy standards of fairness acceptable generally in our civilization. The standard of substantive due process, too, would probably be met if the proposed action did not clearly violate accepted notions of reasonableness. The higher those standards, the less basis would there be, of course, for objection that the international arrangements left something constitutional to be desired. A system of review by international machinery would be an important element in these safeguards. If the standards were high, if some kind of international review were available, there would be less disposition also to hold that those standards could be tested in the courts of the United States.

It is this element in United States administrative-constitutional law—judicial review—which raises what may be the most serious difficulties. In the United States, appeal is generally provided from a final administrative ruling of a regulatory agency to a court. It would seem to be a constitutional right to go to a court to challenge such final administrative action at least on grounds of due process.⁴⁶ In our situation, there could hardly be appeal from the action of the inter-

national agency to an American court,⁴⁷ if only because the nations would not agree—just as the United States might not agree to review of the international administration by courts of some other country. Nor could this need be fully met by an international court. An international body, judicial in character, could perhaps afford some review of the propriety of administrative action; it might conceivably be required to apply standards comparable to those of the United States Constitution. But if there is a constitutional right to have a court consider constitutional objection to administrative regulations affecting the rights of an American citizen, it might need to be provided by a United States court.

One answer to the problem of judicial review of international administrative decisions might be that United States courts would not undertake it. The field of international relations is perhaps the leading example of situations in which, even if private rights are asserted, the courts have declined to scrutinize the activities of the political branches of the government.⁴⁸ The constitutional rights of persons involved in the exercise of foreign relations are in many cases left entirely to the political branches to vindicate; the courts will not interfere. It may be, therefore, that if the political branches of the government, the treaty makers and the law makers, have agreed to the establishment in the United States of an international regulatory body, the decision of the government to enter into this arrangement, as well as all the actions of the international body, might be declared by the courts to constitute "political questions" about which the citizen must go to his Congress or President with any petitions or complaints.

Even if the courts did not treat the entire arrangement and all the actions of the international body as "political questions," it might be that this right to have constitutional claims considered by a United States court would be indirectly avoided. In the United States a principal method for pressing a claim that an administrative ruling does not pass constitutional muster is for the aggrieved to seek an injunction against the administrator. In our case, it may be that the status of the international agency and its personnel would protect it against suit in United States courts, so that an American citizen objecting to a ruling of the agency could not in fact get the opportunity to assert his constitutional claim. In regard to action by the United States Government, the doctrine generally described as the sovereign immunity of the United States to suit in its courts without its consent has been held

not to bar a suit to enjoin action by a federal official under authority of a law, the constitutionality of which is being challenged." For doctrinal purposes, the suit is deemed to be not one against the United States. But an American official has no personal immunity. If as proposed in an earlier chapter the international administrative body and its officials should enjoy diplomatic or quasi-diplomatic immunity, they could not be brought into court, even to challenge the constitutionality of their official action under the treaty. No suit to enjoin the international body or its officers could lie and the constitutional questions could not be raised. Even an indirect attack, by suit against a United States official whose action might also be involved, might fail if the immune international official was an indispensable party to the suit." As said in another connection, such grant of immunity would probably not be invalidated even if its effect were to deprive the citizen of an opportunity to assert a constitutional claim.⁶⁰

On the other hand, that the suit to enjoin might not be available does not preclude all forms of judicial protection. If the claimant were willing to risk the test, he could violate the regulation of the international administrator. This would, as we have assumed, be a violation of federal law. In his trial for such crime he could challenge the validity of the administrative regulation, alleging violation of either procedural or substantive due process; if the allegation were sustained, he would go free.⁶¹ Or, the citizen could refuse to comply with the international ruling, necessitating the use of force to compel him. If the international agency used federal machinery and officials to enforce its orders, the citizen might seek to enjoin the federal marshal. Unless the immune international official were deemed an indispensable party, the action would be entertained. Whether in such an action, or possibly even in a criminal proceeding, the court would look behind the order of the international body and check it for due process might depend on whether it would consider this a "political question."

In sum, it would seem that national administration under international supervision affords in general the best system of regulation and would involve few constitutional difficulties. If direct international administrative regulation were called for, the United States and other nations creating an international agency would have to take measures appropriate in the international context to insure that the actions of the agency were fair procedurally and reasonable in substance. Inter-

national machinery should be available to consider challenges to the action of the international administration, including claims that the administrator had exceeded his authority under the treaty, had acted unreasonably, or had failed to meet the standards established in the international agreement or in regulations approved under it. If some opportunities for challenge and review were afforded, if the international arrangement as a whole were reasonable and fair, courts of the United States might be more disposed to refuse to consider challenges to either the arrangement as a whole or to actions under it. In any event, the doctrine that courts will not interfere in political questions may be a protection to an international agency against interference by United States courts, and the immunity to suit of the agency and its officials would be another. On the other hand, if criminal prosecution of Americans in United States courts were an element in the program, the courts would be reluctant to convict an American without giving him an opportunity to challenge the fairness and reasonableness of the international order which he is accused of violating.

One may mention again that regardless of what courts may do or refuse to do later, the treaty makers and the law makers have also sworn to uphold the Constitution; theirs is a duty to act consistently with the Constitution and to protect the rights of citizens thereunder, whether the courts will or will not.

Chapter VIII. INTERNATIONAL TRIBUNALS

In this chapter we shall consider the impact on American law of international tribunals. While, in general, disarmament proposals and negotiations have not included any significant role for such tribunals, earlier sections of this study may suggest uses for such a body which deserve examination in the light of American law. We shall examine first what functions in support of an arms control agreement might usefully be conferred upon such tribunals—perhaps the settlement of differences, whether between the United States and other parties, or between the United States and an international inspecting body. We shall consider as well possible uses such a tribunal might have in the implementation of the activities of international inspectors in the United States.

Much of what follows is devoted to the possibility of conferring upon international tribunals criminal jurisdiction over individuals performing acts in violation of a control agreement. Even to suggest such inquiry requires explanation.

Arms control, we have said, will consist primarily, if not entirely, of a number of limitations on the activities of nations. Whether there is a ceiling on the number of troops under arms, or a nearly total abolition of armies; whether weapons are reduced in number, or eliminated; whether production of new weapons is stopped or curtailed—it is primarily the government and its policies which are being controlled, regulated. And in a society of sovereign nations the enforcement of such controls and limitations can take few forms: if there is a breach by one party, other parties to the treaty make diplomatic representations, or bring the matter before the United Nations or perhaps the International Court of Justice. They may themselves feel and act free of the treaty's limitations; or take measures—perhaps even go to war.

It seems most unlikely that any foreseeable arms control plan would include, as a principal feature, international enforcement against indi-

vidual violators. While serious arms control violations might be declared "war crimes" and heads of state and political leaders brought to trial, that—as at Nuremberg—could hardly occur except following victory in war. Even as to the kind of "war crime" dealt with there, while the "Nuremberg principles" have been approved by resolutions of the United Nations General Assembly,¹ no nation has bound itself for the future to hand over its leaders for international trial.

International trials for lesser officials or private persons for arms control violations also seem most improbable. The individual violating arms control for private purposes contrary to the wishes of his government would be tried by his government in its own courts. The violations of arms control which would be of most serious international concern—governmental circumvention or violation of treaty obligations—would also involve individuals, official or private. These individuals, of course, would not be tried and punished by their government. But there would also be little purpose in reaching through to punish an individual for acts desired by his government and done on its behalf. Besides, in the present world order there is no way of doing it.

In the United States, too, we must assume that the individual who violates arms control will be treated by American authorities as a violator of American law. He will be dealt with in accordance with the due process of the same laws applicable to violators of national controls on atomic materials, or narcotics, or a host of other subjects and areas whose regulation is enforced by criminal trial and penalty in American courts. If, on the other hand—and some may consider the suggestion insulting or ludicrous—he were acting in collusion with the nation's authorities, he would hardly be prosecuted, even though arms control might still remain officially part of the nation's criminal law. The purposes of the criminal law—whether prevention, or deterrence, or rehabilitation, or even a measure of retribution—are not relevant in those circumstances, and would not be served by punishment of the individual. And this nation, like other nations, would not agree to his punishment by others for such "violations" reflecting the highest national policy. If, in different circumstances, the nations of the world should recognize the need for a system of international criminal law which might apply even to such national violations, the time will be one of supranational needs and tendencies. For the United States, the Constitution, in such a hypothetical contingency, will have been ad-

justed to those needs, and the adjustments can take account also of the need for international criminal tribunals.

For the effective control of arms, then, this study has considered that it is the United States Government which will be responsible to other parties, to any international investigating body created, and to the international community. The United States will undertake to abide by the controls and to enforce them in the United States against all who would violate them. Interference with inspection or infringements of substantive limitations of the control plan will be violations of the law of the United States punished in American courts. Even contempt and perjury proceedings in support of the inspectors would be left to United States courts. This system of enforcement would be effective, easy to accept, and would raise fewest constitutional questions.

Consideration of criminal jurisdiction for international tribunals in this study, then, has different purposes. First, fear and mistrust of the Soviet Union might lead some Americans to the suggestion that arms control be enforced against Russian leaders and citizens by a criminal law which is supranational, in international courts. Then, one must repeat, the same controls would have to be accepted for the United States. And the examination which follows will help put the implications of such a proposal in the context of United States constitutional and legal institutions.

There is another reason for this chapter. At one time there were serious proposals for the establishment of international criminal courts to exercise an agreed jurisdiction. Those courts were intended to deal with offenses by individuals—perhaps piracy, or slave trade, or forms of genocide—which nations might agree would be better handled by international tribunals under an international law. International criminal courts might in the future also be suggested for some purposes related to the control of armaments—not for important breaches on behalf of the nation, but for violations by individuals or groups for their private gain—for example, international “rings” running arms on the high seas or across national borders. In such cases, where arms violations reflect private purposes rather than national policy, nations might more seriously consider cooperative action for their suppression, and in those circumstances, a common system of enforcement through a common system of tribunals in all participating countries might commend itself. Such proposals in the past have not been adequately examined from the point of view of the Constitution;² it

appears desirable to suggest, in the context of arms control, some of the major issues involved.

We shall, then, later in the chapter, deal with such criminal courts, principally as they might apply in the United States to Americans. We shall also suggest special cases and situations where such international criminal courts might raise fewer constitutional difficulties and offer greater likelihood of acceptance.

INTERNATIONAL TRIBUNALS AND THE TREATY POWER

One might begin with basic questions, the answers to which have been assumed, usually without examination. Can the United States agree by treaty to establish international tribunals? To call a body a “tribunal” or even a “court” does not, of course, necessarily determine its status for either international or constitutional purposes. We are concerned here primarily, as will appear, with a body which might exercise functions of “judicial” character; if that phrase is not beyond ambiguity, it has a recognized content in the law of the United States.³

The question we have put, if put that generally, is not difficult to answer. It is not beyond the power of the United States to join by treaty in the establishment of an international body which would exercise judicial functions. The treaty power, we have seen, is broad enough to support any international agreement on matters of legitimate international concern. It is surely a legitimate subject for a treaty for the United States to join with other nations to establish international tribunals to implement international law, or treaty provisions, or the law of nations as developed in treaties. An international arms control agreement is solid basis for the establishment by treaty of a tribunal to make it effective.

If the establishment of a judicial body by treaty suggests questions, it is because of Article III of the Constitution. That article provides that

the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III provides further that the judicial power shall extend to certain cases and controversies, including—what most matters here—“all cases, in Law and Equity, arising under this Constitution, The Laws of the United States, and Treaties made, or which shall be made, under their Authority”; “Controversies to which the United States shall be a Party”; and controversies between citizens and “foreign States, Citizens or Subjects.” One might perhaps object that the power of the United States to establish courts, especially courts dealing with controversies of the categories indicated, is limited to such “constitutional courts” established by Congress under Article III, and that the United States cannot agree to establish different courts, even by treaty.

TRIBUNALS NOT EXERCISING UNITED STATES JUDICIAL POWER

The scope of the objection may be immediately reduced, on grounds which are narrow but adequate. Article III prescribes “the judicial Power of the United States.” This suggests judicial power exercised on behalf of the United States Government, or in places and circumstances where the exercise of judicial power belongs to the United States as a function of its sovereign, governmental authority. As we shall see, if certain functions are accorded to an international tribunal in the United States, particularly if it is to exercise criminal jurisdiction here, the tribunal may indeed be exercising United States judicial power. In general, however, the fact that an international tribunal has judicial functions, that these judicial functions were conferred upon it by a treaty to which the United States is party, and that the United States or its citizens may in some contexts be the object of these judicial functions would not, *per se*, render the power exercised by this tribunal “judicial Power of the United States”; there is then no question raised under Article III. In this regard, the judicial power is no different from the other powers conferred by the Constitution. That other international bodies which the United States has joined by treaty may have a kind of legislative or executive power—*e.g.*, the Security Council of the United Nations—does not mean that those bodies are exercising the legislative power or the executive power of the United States in any sense material to constitutional law.

Consider the following accepted United States actions, some of which have already been mentioned in this study:

—The United States has in a number of treaties agreed that claims

of United States citizens against a foreign government be submitted to an international commission.⁴ It might be argued that such treaties establish a tribunal other than one under Article III of the Constitution to consider a case between a citizen and a foreign state, one of the categories of jurisdiction conferred by that article.

—The United States has accepted and submitted to the jurisdiction of international tribunals, *e.g.*, the International Court of Justice.⁵ It might be argued that since the judicial power of the United States extends to “Controversies to which the United States shall be a Party,” other tribunals for considering such controversies are forbidden.

—By treaty and implementing legislation the United States has given to foreign consular officers exclusive judicial power over matters involving their nation’s seamen,⁶ although these might otherwise be within the admiralty and maritime jurisdiction of the United States courts.

—And the North Atlantic Treaty Organization Status of Forces Treaty, like federal legislation during the Second World War,⁷ has recognized the right of military forces of allied nations to try their personnel in this country by their own Service Courts, even for acts which also violate United States law and would otherwise be subject to trial in American courts.

While there may be argument as to whether some of these foreign or international tribunals are judicial in character, others clearly are. These instances support the view that the United States may agree that other tribunals shall exercise judicial power, where such a tribunal would not be exercising “the judicial Power of the United States”; even if it is a judicial body, it is not one representing the governmental power of the United States. Nor is it material that some of the cases before an international tribunal might, in some other form, have also appeared before a United States court. Claims by an American citizen against a foreign government, for example, might—if that government waived immunity—be the basis for a suit in an American court. When taken up with the foreign government by the United States, however, such a claim, as we have seen, becomes a diplomatic claim of the United States.⁸ It may be settled by diplomatic negotiation, by arbitration, perhaps by an international court in a judicial proceeding. In that context, however, even the judicial proceeding is not an exercise of the judicial power of the United States. So also, controversies between the United States and other countries might conceivably come up in a domestic court of the United States as one of the “Controversies to which the United States shall be a Party”

under Article III; fundamentally, however, they are international and diplomatic in character rather than judicial, and even if subjected to a judicial proceeding before an international judicial tribunal, the latter would be exercising judicial power not of the United States but perhaps of some international community. Again, when the United States allows a foreign sovereign to try its own nationals in the United States for a violation of its own laws, or when the United States extradites a person to a country where he is charged with crime, the foreign tribunal is exercising governmental authority of its own sovereign; the judicial power of the United States is not involved.

ARMS CONTROL JURISDICTION IN RELATION TO THE UNITED STATES GOVERNMENT

The discussion and the precedents cited suggest a number of functions related to arms control which might be conferred upon an international tribunal. Basically, it appears, there are few constitutional problems if it is the Government of the United States, not its citizens, which is subject to the jurisdiction of the tribunal. Thus an international tribunal might usefully serve such purposes as these:

(a) It might settle disputes between the United States and other parties to the arms treaty as to the interpretation, implementation, or application of the control agreement. The nations might agree to compulsory jurisdiction of such a court, and bind themselves to abide by its judgments, decisions, or awards.

(b) A tribunal might hear cases between the United States and the international inspecting body. These might include charges by the inspecting body that the United States had violated the control provisions; that it had failed to cooperate with the inspecting body; or that it had interfered with or frustrated its efforts. Or, the United States might bring charges against the inspectors, *e.g.*, that there had been abuse of the inspection process, or that inspectors had otherwise misused their presence in the country.

(c) The tribunal might even serve in the nature of a claims commission to hear and determine claims by United States citizens—perhaps for damage due to inspection; or on account of wrongful disclosure of trade secrets; or, if the control plan contemplated it, for seizures of goods which the inspectors claimed to be unlawful. In exercising such functions, the tribunal might, in fact, be determining the rights of United States citizens. But if it did so pursuant to an international agreement

by the United States, this would seem analogous to standard United States treaties settling, or arranging machinery for settling, the claims of American citizens against a foreign state or its citizens which we have considered previously. That in this case the arrangement would deal with future claims should not make a critical difference. And it is the United States which may be regarded as the party to these international proceedings, the United States which would have responsibility to assure that the tribunal was acting in accordance with the treaty which established it.

ARMS CONTROL JURISDICTION IN RELATION TO UNITED STATES RESIDENTS

The uses of the tribunal described in the previous section relate primarily to the United States Government, not to its citizens. We now leave the traditional role of international tribunals as determining rights of governments and consider possible functions which would directly impinge on the citizen and resident of the United States. Here we shall consider functions, suggested by earlier chapters of this study, whereby the tribunals might implement the investigating duties of the international inspectors. The activities we consider—particularly the issuance of subpoenas and the administration of oaths—may be an appropriate adjunct also in the operations suggested for the tribunal in the previous section.

SUBPOENAS AND OATHS. While it might be done as well through United States officials and courts, there would seem to be little problem connected with conferring on the international tribunal itself the power to subpoena witnesses or evidence and to administer oaths in relation to arms control. These are not necessarily judicial functions, not necessarily part of the judicial power of the United States; these are auxiliary functions, available to various authorized bodies, including, for example, legislative¹⁰ and administrative agencies.¹¹ Congress, as we have seen, has in implementation of international treaties conferred the power to administer oaths on foreign service courts and on international commissions.¹² And the latter have been authorized to issue subpoenas, not merely to request their issuance by a federal district court.¹³ There is no prohibition or limitation in the Constitution which is violated by granting such powers to an international body by treaty and implementing legislation.

Again, a strong case can be made that such international tribunals,

sitting in the United States, although not United States courts, or exercising United States judicial power, must observe the Fourth and Fifth Amendments. They may not tolerate "unreasonable search and seizure," they must respect the privilege against self-incrimination. The Bill of Rights affords protection against federal authorities." But where the federal government confers upon an international tribunal in the United States authority to obtain testimony or evidence, it is doubtful whether it could do so without including the limitations of the Fourth and Fifth Amendments.

WARRANTS. To the extent that previous discussion has indicated that no warrant is necessary for a particular search or inspection, to provide that inspectors should obtain a warrant from an international tribunal is unobjectionable. Such a warrant is certainly no worse than none at all. Where the Fourth Amendment is deemed to require a warrant, it would be desirable that a warrant be obtained from a United States court or officer by a United States official who would accompany the international inspector on his search, or by the international official himself. But would the requirements of the Fourth Amendment be satisfied by a warrant—otherwise meeting all the constitutional requirements—from an international tribunal established by treaty?

Again we are on uncharted waters. The Fourth Amendment does not say who may issue warrants. And to issue warrants is not necessarily a judicial function, part of the judicial power of the United States. Present legislation and the rules of criminal procedure do not limit the issuance of warrants to United States courts; they provide for warrants not only by federal judges but by other federal officials, or by state courts.¹⁶ On the other hand, no precedent has been found for the issue of warrants by others. And the fact that authority to issue warrants may be conferred on federal officials who are not judges does not necessarily mean that such authority may be given to private persons—or international officials. But if the control and inspection plans are established by treaty, it may be argued that warrants to make them effective are auxiliary powers also within the treaty power, and that international machinery to issue a warrant meets the requirements of the Fourth Amendment. The purpose of the protection would appear to be met by a warrant from such a tribunal, if the warrant meets the constitutional standards of "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the . . . things to be seized." While international officials are not under oath or obligation to support

the Constitution of the United States, there is some control over their activity, initially through the standards set up and the international machinery established by treaty, then through diplomatic means and, in the last resort, by denunciation of the treaty and termination of the arrangements.

Of course, unlike the subpoena which is normally enforced through contempt proceedings for failure to obey it, a warrant is not subject to enforcement in the same way. A person might resist search pursuant to a warrant on the ground that it is an unlawful warrant; ¹⁷ more often, the search will be made and when the evidence seized is introduced in the criminal proceeding, the accused will claim that the search was unlawful because not based on a valid warrant and seek to have the evidence quashed. In regard to arms control, we have assumed that criminal prosecution is not the primary purpose of the search or inspection, but rather obtaining the information that there has been a violation. If there is no criminal prosecution, the normal occasion for testing the validity of the warrant would not arise.¹⁸ If there should be a criminal prosecution in a United States court, the accused would have the opportunity to challenge the validity of the search and the seizure of the evidence in question, and thereby the validity of the warrant.

CONTEMPT PROCEEDINGS. Again, orders of international inspectors should be enforced by United States courts, by citation for contempt where appropriate. But could the United States confer on international tribunals the power to punish for contempt? The power to punish for contempt is not necessarily a judicial function; legislative bodies may themselves cite and punish for contempt.¹⁹ Perhaps, if international tribunals may be established and given power to issue warrants and to subpoena witnesses, the power to protect and give effect to this jurisdiction of the tribunal by contempt proceedings may also be implied. On that basis, the international tribunal could enforce its valid orders by contempt proceedings under its own authority, without invoking the aid of United States courts. Criminal contempt proceedings, on the other hand, have been assimilated in many respects to criminal prosecutions and may involve many of the considerations involved in such prosecutions.²⁰ Certainly a perjury trial before the international tribunal, in support of its power to administer oaths and subpoena witnesses, would be a "criminal prosecution," ²¹ considered in the following sections of this chapter.

INTERNATIONAL CRIMINAL COURTS

We now approach the second part of the inquiry of this chapter. We shall seek to determine whether, to what extent, and on what basis the United States can agree by treaty that international tribunals exercise criminal jurisdiction.

PRECEDENTS FOR INTERNATIONAL CRIMINAL JURISDICTION

Some instances of what may be called international criminal law, and some international tribunals to apply such law, have existed, but these differ in fundamental respects from the kind of law and tribunals to which we are accustomed in the United States, and from those which are here considered. The traditional law of nations includes laws which may be deemed criminal. Most of the principles of international law, however, apply only to the acts of nations, not of individuals, and nations or the heads of nations which violate these rules are not brought for criminal action before any judicial tribunal. Some of the laws of nations do apply to individuals, *e.g.*, the laws against piracy. These, however, are enforced in effect as the law of the nation which captures the accused pirate, by its own criminal procedures, in its own courts.²¹

As noted, the Nuremberg trials and their less renowned counterparts both in Germany and in Japan represent a substantial step toward the application of rules of criminal law to individuals in an international tribunal. This is not the place to examine, from the point of view of international law, the significance of this development and the criticisms directed against it.²² For purposes of the present, we have noted that the principles were promulgated by the nations victorious in war, and the tribunals were established to try officials of vanquished countries after the war. Most relevant here, these trials did not involve the enactment of international criminal law by the exercise of United States treaty power and its enforcement against American citizens through international tribunals sitting in the United States.

In other contexts and for other purposes, it has been noted that the individual—not merely the state—is becoming the concern and the subject of international law.²³ So far as the United States is concerned, moreover, the rights of individuals, including Americans, have been the subject of treaties since this country began, and some of the provisions in these treaties bear some relation to criminal law. An obvious, if not a proximate example, is the extradition provision in many treaties by which

persons—even American citizens—who are charged with having committed crimes in foreign countries may be extradited to those countries for trial in their courts.²⁴ The NATO Status of Forces Agreement, for a different instance, deals with rights and obligations of a host country, as well as of a sending state, in regard to crimes by visiting members of an allied force; these provisions are applicable in the United States to foreign servicemen and in other countries to American servicemen.²⁵

What concerns us here goes far beyond these precedents. We are considering the creation by treaty of new international crimes and the establishment by treaty of international tribunals to bring individuals, including Americans, to trial for violation of these laws. The issues to be examined may be reflected in a number of questions: so far as the United States Constitution is concerned, in what circumstances can criminal jurisdiction be exercised by international courts applying international law? Can such international courts be enlisted to enforce arms control as part of United States criminal law? Can difficulties raised by the international character of the tribunals be alleviated by considering them as special courts of the United States? And whatever the character of these tribunals, must they accord all or any of the safeguards which the Constitution affords to persons accused of crime in the United States? The questions take us into unprobed reaches of the treaty power, into the mysteries of its relation to the legislative and judicial powers of the United States, into the intricacies of federal jurisdiction and the federal courts.

INTERNATIONAL CRIMINAL COURTS UNDER THE TREATY POWER

The States of the Union apart, there can be little doubt that bringing American citizens to trial for acts committed in the United States is a function of government of the United States. And the courts before which such trials are held are exercising judicial power of the United States. Can such functions be vested by treaty in international tribunals?²⁶

It is not the purpose of this study to debate the desirability of such proposals. We seek only to show whether they would fit into the context of the Constitution and the United States legal institutions which have been established under it. Arguments in favor of their validity will be stated, as well as those against.

One may begin with the most sweeping bases for the view that such tribunals may exercise criminal jurisdiction over American citizens and

residents for acts in the United States. Perhaps the broadest is analogous to that discussed in the previous chapter;²⁷ that in its relations to other nations the United States is equally "sovereign" and of equal power; with other countries it can join to establish a system of international law for the community of nations, including a criminal law applicable to individuals everywhere, even in the United States, which is outside the framework of United States national law. And international judicial tribunals to apply this law can similarly be established, even in the United States, to try persons for violations of such international law committed here. Such a law and such a judicial system would be international, not those of the United States. And the American citizen would be directly subject to such laws, just as he is to different levels of law under the American system—*i.e.*, federal and state.²⁸ Neither law nor tribunals would have to be concerned with any limitations in the United States Constitution which can apply only to United States laws and United States governmental bodies.

The arguments against this suggestion are much the same as in the case of international administrative law discussed in the preceding chapter. Perhaps here additional weights in the balance against the broad view might be the argument that criminal law in particular is peculiarly an aspect of a nation's sovereignty and responsibility; that the Constitution evinces especially tender concern for American citizens and residents accused of crime, as reflected in the Constitution's original provisions as well as in several of the amendments. There can be no criminal law in the United States, it would be argued, which is not United States criminal law, subject to the Constitution's limitations on its enforcement. To make acts of Americans in the United States unlawful, to bring them to trial for such acts, to convict and punish them are functions of United States government in relation to its citizens. The United States cannot, even by treaty, delegate them to another sovereignty and wash its hands of them.²⁹

Again, as with many suggestions which rely on the uncertain breadth of the treaty power, no ground exists for a clear choice between arguments for and against. This is true also, then, for other arguments to support international criminal tribunals, based primarily on the treaty power.

A second point of departure, not unrelated to the one just discussed, starts from the position that the law of nations is part of the law of the United States. This was true of the law of nations as it antedated the

Constitution, and is so also, it would be urged, for such law of nations as may have been developed and accepted since the Constitution. It is so also as to any law of nations which is based on treaties. This law must be given effect by federal and state judges in the United States wherever it is applicable.³⁰ But the law of nations could provide for special international tribunals to try offenses against this law. Congress could, of course, reject the law of nations and the proposed tribunals. But if Congress, on the contrary, accepted such law and such tribunals of nations, these would be supreme and independent of limitations and procedures which apply to national laws and tribunals. International tribunals applying the law of nations, although accepted by Congress, thus need not abide by all the provisions of the Constitution governing criminal trials in the federal courts.

The argument to the contrary might distinguish between the law of nations which antedated the Constitution (and might be deemed to be incorporated into it) and that which has followed. It might distinguish also what has been done by treaty, arguing that the treaty makers, like other branches of the federal government, are subject to United States constitutional limitations. In any event, criminal law, even if based on the law of nations, could become law in the United States only if defined as such by Congress, and such criminal laws would stand no better against constitutional requirements than those adopted under other congressional powers.³¹ Finally, whatever crimes might be established pursuant to the law of nations could only be tried in courts of the United States subject to Article III and the Bill of Rights—not in international courts responsible to some other sovereignty.

We pass to other arguments, somewhat narrower, though also based on the breadth and sweep of the treaty power. A third approach, the strongest perhaps, would urge that without asserting the power to establish in the United States a new law under a new sovereignty, the treaty makers may properly agree that cases based on certain laws, part of or incorporated in the law of the United States, may be tried by special tribunals not courts of the United States. The treaty power is separate, independent; within its domain it is paramount; it is subject to specific prohibitions in the Constitution, but is not to be limited by exegesis from radiations of other powers in the Constitution.³² The treaty power, for example, is not limited by the legislative power of Congress and may deal with matters otherwise assigned by the Constitution to that power.³³ The treaty power, similarly, may deal with matters which in other con-

texts are within the judicial power of the United States under Article III, and deal with them without regard to the limits of the judicial power under the Constitution. The United States may then by treaty agree to have offenses against certain of the laws of nations which are incorporated into United States law tried by courts which are not United States courts, and by judges not United States judges. These judges do not have to meet the tenure and compensation requirements of Article III or the other constitutional requirements applicable to United States officials—presidential appointment, confirmation, and oath.

The argument may go further and suggest that these "treaty courts," not being United States courts, need not concern themselves with the Bill of Rights, which applies only to federal authorities. The United States would of course wish to assure a fair trial, but it would not be necessary to meet all the special requirements of Article III or of the first nine amendments to the Constitution, *e.g.*, jury trial, privilege against self-incrimination, trial in the state and district where the act was committed.

And for lack of other precedent, it may be suggested that the role of courts of the States of the Union affords some authority. Although these are not courts of the United States, from the very beginning of the republic Congress has on numerous occasions provided that state courts may carry out judicial functions on behalf of the United States, including even the trial of persons for violations of federal law.³¹ Whether or not Congress could require these state courts to carry out such functions, there seems to have been little question that Congress could request them to do so, that it would not be unconstitutional for Congress to delegate such United States judicial power to state courts or for the state courts to exercise it.³² In doing so the state courts do not become courts of the United States; their judges are not judges of the United States; and they are not subject to all the requirements and limitations which the Constitution imposes on courts of the United States.

The counterargument for more limited scope for the treaty power would of course begin by asserting that the treaty power is subject to the Constitution and the Bill of Rights. It would be pointed out that the only provision in the original Constitution in regard to the trial of crimes is contained in Article III, which provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

That some of these provisions were subsequently repeated in the Bill of Rights, was not intended to affect the basic pattern of the Constitution that criminal trials shall be by a United States court meeting the requirements of Article III including life tenure and assured compensation. On this question, the cases are not wholly silent. There are suggestions in the cases that a person accused of crime in the United States is entitled to trial in such a court.³³ These suggestions would appear to treat the requirement as an implied addition to the other safeguards of the Bill of Rights; in one form, it may be stated as a right of an accused to be tried by a court whose judges offer the additional assurance of independence and impartiality that come from life tenure and compensation not subject to reduction. The Supreme Court, also, has said that Congress can devolve judicial power of the United States—which surely includes criminal trials for violation of United States law—only on courts ordained and established by Congress.³⁴ There is no basis for finding that the treaty power can devolve such judicial power on courts not created by Congress. In any event it has never been held that an American in the United States could be subjected, for an act committed here, to trial before a court which is not a United States court at all, by judges who are not United States judges at all, not appointed by the President, not confirmed by the Senate, not sworn to uphold the Constitution. There may be no explicit prohibition in the Constitution against subjecting American citizens in the United States, charged with violations here of United States law, to trial in non-United States courts; but surely such a prohibition is clearly and strongly implied.

The state courts, it would be pointed out, are hardly a persuasive analogy. Entrusting federal judicial power to state courts, has the sanction of long practice and has support in the history of the development and negotiation of the Constitution.³⁵ In addition, support for the practice may derive from the supremacy of the federal government in federal matters, so that state courts may be deemed to act by assignment from the federal government even if for many purposes the courts do not thereby become United States courts.³⁶ International tribunals, on the other hand, would include foreign judges selected by international machinery; the statute governing their functions would be an international document to which the United States is but one party. These tribunals would not be an inextricable part of the federal system; they would not be subject to "supremacy" of the federal government.

The above, then, are three series of arguments for and against the constitutionality of entrusting criminal jurisdiction to international tri-

bunals. We do not venture to choose here between the thesis and its contrary, or to appraise the relative weights of the various arguments on each side. One point may be worth noting, however. If it is decided that international courts may exercise criminal jurisdiction in the United States, the theory and basis on which this is justified will make a difference. On the last approach suggested, for example, there is a stronger basis for saying that international tribunals are acting in lieu of United States courts and that as such they must afford the protections contained in the Bill of Rights, including indictment, jury trial, and right to counsel.

It has been suggested in another context that these requirements be met by provision that criminal jurisdiction be exercised by United States courts, which would accord the protections of the Bill of Rights, and that an appeal be provided to an international tribunal.⁴⁰ In regard to arms control this may not be acceptable internationally. In any event it would raise constitutional questions perhaps as difficult as those it would eliminate. An appeal from the federal judiciary to an international tribunal was hardly contemplated by Article III of the Constitution.⁴¹ And if in the United States trial court a jury acquits the accused, to permit the prosecution to appeal to an international tribunal, and allow the latter to reverse the acquittal and direct a new trial, would probably violate the safeguards against double jeopardy in the Fifth Amendment.⁴²

INTERNATIONAL CRIMINAL COURTS AS COURTS OF THE UNITED STATES

Proponents of international tribunals seeking additional support even under narrow views of the treaty power might suggest that if a treaty creates international tribunals, these should be viewed as United States courts.

ARTICLE III COURTS. Those who argue thus might say that while Article III of the Constitution speaks of "such inferior Courts as the Congress may from time to time ordain and establish," and Article I specifically authorizes Congress "to constitute Tribunals inferior to the supreme Court," the treaty power, which, within its proper sphere, is also a legislative power, can also "ordain and establish" such courts; it could ordain and establish international tribunals as such courts. Or Congress, in implementation of a treaty, could ordain and establish these international tribunals as inferior courts of the United States.

Attempts to treat the international tribunals as United States courts

would encounter formidable obstacles, formal and substantive. Assuming that the treaty makers or Congress sought to establish international tribunals as inferior courts of the United States, the tribunals would become part of the United States judicial system. They would be subject to all its rules and limitations, including the appellate jurisdiction of the Supreme Court and the requirement that there be a "case or controversy."⁴³ "The judges would have to enjoy life tenure, and their compensation must remain undiminished during their continuance in office. For criminal cases Article III requires jury trial. In addition to the requirements of this article there are also the other constitutional requirements, explicit or implied, applicable to all United States bodies and United States officials. The judges presumably would be officers of the United States, appointed by the President in accordance with the Constitution." Their tenure, the terms of their office, the right to remove them, would have to be determined in accordance with United States law pursuant to the United States Constitution. The international tribunal, on the other hand, would surely include judges who are foreign nationals, and its judges would be selected by some international body or machinery. Its jurisdiction and rules would be determined by international agreement. It is difficult to see that international tribunals of this kind could be formed and fashioned so as to meet the requirements for United States courts. It is inconceivable that the steps necessary even to approximate these requirements would meet with acquiescence by the other parties to the treaty.

INTERNATIONAL TRIBUNALS AS LEGISLATIVE COURTS. Finally, it may be suggested that since there are United States courts other than those established pursuant to Article III, an international tribunal might qualify as such a United States court.

It is no longer open to question that Congress may establish "courts" which are not subject to the limitations of Article III relating to tenure and compensation, the requirement that there be a "case or controversy," or other limitations which may be implicit.⁴⁴ Thus, Congress has created courts to deal with patents, customs, and revenue, whose judges do not enjoy life tenure or guaranteed compensation.⁴⁵ *Ex parte Quirin* upheld the right of Congress to establish a military commission in the United States to try aliens and apparently even citizens for violations of the law of war.⁴⁶ Congress has also established such courts abroad, where consular courts for many years exercised jurisdiction granted to the United States by treaty.⁴⁷ And courts have been established in the territories

pursuant to the power of Congress to make all needful rules and regulations respecting the territory of the United States." Why not then treaty courts, or another kind of legislative court, under the power of Congress to adopt legislation necessary and proper for the implementation of treaties, or under its power to define offenses against the law of nations? Why could not an international tribunal be so treated?

There is some learning and much confusion about the place of legislative courts in the constitutional pattern. It has been suggested that properly viewed there is no distinction in character between "legislative courts" and "constitutional courts." The power to establish courts is one power, and it is subject to the requirements of Article III. The power in Congress, in Article I, to "constitute tribunals inferior to the Supreme Court" is the same power referred to in Article III. Where courts established by Congress do not meet some of the requirements of Article III, this can be justified only on one of two grounds for distinction. Congress might create a body which, while it is called a "court," is not really exercising judicial functions. Such a body, like the Court of Claims as to some of its functions, is really exercising legislative or administrative power by delegation from Congress.⁵⁰ Of course, not being a court, not exercising judicial power, such a "tribunal" need not take account of the provisions of Article III. The second distinction suggests that all courts exercising judicial functions must satisfy Article III; but, as a matter of sound constitutional interpretation, one may imply exceptions from the tenure and compensation provisions of Article III in circumstances where these requirements could not have been intended, and would not have been if the framers had anticipated special situations. Thus, for example, courts in the territories of the United States could not have been intended to be permanent since the territories would probably become states; the Constitution, therefore, could not sensibly be deemed to require life tenure for their judges.⁵¹

Justices of the Supreme Court, on the other hand, have also described the "doctrine" of "legislative courts" in different, broader terms. It has been asserted that there is a power in Congress to establish special courts as necessary and proper for the implementation of its other powers, independent of its power to establish the courts contemplated by Article III. Hence the various kinds of courts created in implementation of various congressional powers, such as those mentioned—revenue, patents, territorial courts, consular courts, and others. Of course, it is admitted, within the territory of the States of the Union, Congress could

not circumvent the requirements of Article III by establishing other courts, not satisfying these limitations, to do the work intended for Article III courts—*e.g.*, for the trial of criminal offences.⁵²

If a clearly federal court could not exercise criminal jurisdiction, then, in the United States unless it satisfied Article III, the most liberal legislative court analogy offers little support for treaty courts exercising such jurisdiction. On the other hand, the fact that criminal jurisdiction, for example, can be exercised in other "legislative courts" outside the territory of the States of the Union may suggest an argument for vesting such criminal jurisdiction—even in the United States—in special courts dealing with a limited field like foreign relations. For whatever its worth, the argument might be stated as follows: the territorial courts, clearly legislative courts, may be granted true judicial functions including the exercise of criminal jurisdiction, by virtue of the power of Congress to govern those areas.⁵³ Other courts outside the United States—the consular courts—have also been accorded judicial power of the United States.⁵⁴ These suggest a geographic line: legislative courts may exercise judicial functions outside the territory of the States of the Union. The geographic line, however, reflects political realities in the federal system. It reflects that in so far as the federal judicial power was being carved out of judicial powers which might otherwise be exercised by the states, its scope was confined as set forth in Article III. One might suggest, then, that a "functional" line, analogous to the accepted geographic line, would accord with the same fundamentals of federal-state relationships. International affairs are, like the territories, an "area" from which the states are, and have always been, excluded.⁵⁵ When by treaty, or under the power of Congress to define offenses against the law of nations, courts are created to deal with matters of international concern, these courts may also be accorded judicial functions without regard to the limitations inferred from Article III. Such judicial functions arising out of international affairs would not, in principle, infringe on the judicial area left to the states or enlarge the area intended for the federal government. The international area has always been intended for the federal government even if hitherto the occasion for federal judicial functions in that area did not arise.⁵⁶ That Congress, as held in the *Quirin* case, could set up military commissions under the law of war, even within the United States, even, it seems, to try an American citizen, may support other "exceptions" to Article III.

If the suggestion that international tribunals might be viewed as

analogous to United States legislative courts were made, the arguments against it would not be wanting. All federal criminal law is enacted by Congress in implementation of its various enumerated powers, yet criminal jurisdiction, within the territory of the States of the Union, cannot be given to legislative courts. There is no basis for selecting from among the powers of Congress the power to implement treaties or legislate on foreign relations, and for saying then that these powers alone may be implemented by criminal law enforced in courts which are not Article III courts. That the states never had control over foreign relations is not an adequate basis for such an exception. Article III prescribes the courts which shall deal with "all cases . . . arising under . . . the laws of the United States." These include all federal criminal laws equally whether in implementation of foreign affairs, or naturalization, or interstate commerce. And all federal crimes in the territory of the States of the Union must be tried in Article III courts subject to the safeguards contained in that article and in the Bill of Rights. The exercise of criminal jurisdiction in territorial and consular courts, the military commission in time of war, are exceptions by virtue of their character, and this exception should not be extended on the basis of unwarranted distinctions.

Another complete answer might be that even if the analogy and distinctions suggested have any validity, the formal obstacles would remain. Other legislative courts are still United States courts; if they need not meet the prescriptions for Article III constitutional courts, they must still satisfy other constitutional requirements applicable to all United States bodies, agencies, and officials—*e.g.*, appointment by the President, Senate confirmation, and oath of office. It would take special arrangements, convolutions, and fictions to make judges selected by international machinery and responsible to an international body into United States officials. If it be suggested that the treaty power and the area of foreign relations are so broad, independent, and special that they may support the creation of United States courts which are not subject to formalities of other United States bodies, one would be calling the international tribunal a "United States court" in order to justify conferring upon it United States judicial power without requiring it to possess the principal characteristics of a United States court. If the treaty power can effect that, it could, perhaps more easily, justify the grant of criminal jurisdiction in the United States to international tribunals openly and avowedly not United States courts.

One distinction among the various arguments for international crimi-

nal tribunals should be reemphasized. The broadest arguments, those which might support an international tribunal which is not a United States tribunal, applying international law which is not United States law, would be free of the limitations and requirements of the Bill of Rights. If an international tribunal were viewed as a United States court, whether a "treaty court" or a "legislative court," it would have to grant jury trial, sit in the state and district where the crime was committed, and accord other guarantees which the Bill of Rights affords to all persons accused of crime under federal authority.

SPECIAL CASES

The previous section indicates some of the problems which would have to be faced in providing criminal trials by an international tribunal for American citizens charged with committing violations in the United States. Normally, we have seen, the enforcement of criminal law by judicial proceedings in the United States is a function of the United States Government, surrounded by safeguards and limitations for the protection of the individual. It cannot be easily delegated, except on the broadest views of the treaty power, and probably not without assuring the protections of the Bill of Rights. If a case of strong national interest should in the future suggest the need for international tribunals, a constitutional amendment might be in order, whether or not strictly required.

In regard to arms control, it was suggested earlier, there may be peripheral areas of enforcement where international cooperation to suppress arms trade might with greater probability suggest a system of international criminal tribunals. If these are to deal with private arms violations on the high seas or elsewhere outside United States territory, international tribunals may receive more serious consideration. As we shall now suggest, these cases may also raise far fewer difficulties under the Constitution. We shall consider whether different rules might apply if the act with which the accused is charged were committed outside the United States; if it were committed in the territory, or by a national, of another country party to the arms control treaty; if the international tribunal were sitting outside the United States, or at the United Nations Headquarters in New York.

ACTS BY AMERICANS ABROAD. Suppose the act violating the arms control plan were performed by a United States citizen not in the United States but in a foreign country or on the high seas—for example, someone running arms forbidden by the treaty. If a statutory or treaty provi-

sion makes such acts by Americans abroad violations of United States law, can the United States agree that such violator be tried before an international tribunal?

This case may be less difficult because the act of the United States citizen was committed abroad. Under the law as it was understood for many years, the United States could provide, in the case of Americans committing violations of American law either on the high seas or on foreign soil, for trial before American legislative courts, e.g., consular courts. And such courts sitting abroad must accord to the accused a fair trial but need not accord him the specific provisions of the Bill of Rights. This was the doctrine of *In re Ross*.⁵⁷

If these persons can be tried by United States consular courts abroad, the United States might perhaps also make them available for trial before an international tribunal abroad. In regard to acts abroad, United States jurisdiction is exercised pursuant to the law of nations or by grant from a host state.⁵⁸ For trial of such violations abroad, the Constitution may not even require United States courts; or an international tribunal might be adequately a "United States court" for this purpose. And if the United States consular court need not accord the privileges and guarantees of the constitutional amendments, there would be no reason for finding that the United States must obtain such rights for Americans from an international tribunal. If the American had since come back to the United States, there might be no constitutional objection to arranging by treaty that he should be "extradited" for trial before an international tribunal abroad.⁵⁹

Such violations abroad might also be tried, perhaps, by an international tribunal sitting in the United States. It might be suggested that since, the act having been committed abroad, the United States could have agreed that the persons be tried before an international tribunal sitting abroad, moving the international tribunal here should not make a constitutional difference. If so, whether the tribunal might have to accord the protections of the Bill of Rights, as would a United States court sitting in the United States, would present another and different issue. Perhaps since the international tribunal would be trying the accused for a violation of United States law, it would be exercising United States judicial power in United States territory, and would have to afford the same procedures and protections which obtain in United States courts in the United States.

These suggestions cannot be stated with confidence. Indeed, the en-

tire basis for the distinction between trials of Americans for acts committed abroad and trials for those committed in the United States may have crumbled with *Reid v. Covert*, decided in 1957.⁶⁰ In that case the Supreme Court held that Congress could not authorize trial by court-martial for dependents accompanying members of the armed forces, charged with having committed murder on foreign soil. There was no opinion on which a majority of the court agreed.⁶¹ Speaking for himself and three other judges, however, Mr. Justice Black asserted, "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." At some points his language suggests a constitutional doctrine of the character of *noblesse oblige*; the United States must act in accordance with the Bill of Rights at all times, no matter who the accused, where the act was committed, where the trial is held. Later in the opinion, after stating that the fact that the trials in question were conducted pursuant to an international agreement made no constitutional difference, Mr. Justice Black concluded "that the Constitution in its entirety applied to the trials." In addition, sufficient aspersions were cast on *In re Ross* both in this opinion of four Justices and in the concurring opinion of Mr. Justice Frankfurter to leave its continued validity in all cases in doubt.⁶² The *Covert* decision owes its majority to the fact that the accused was charged with a capital crime. Noncapital cases were reserved, and one can only speculate whether in the future a court might go further and hold that any trial by a United States tribunal for a violation of United States law, even if the act was committed outside United States territory, must conform to the provisions of the Bill of Rights. In that event, even if in the situation we assumed a case were made for holding such a trial before an international tribunal, where the trial was in fact for a violation of United States law, the tribunal would be sitting as a United States court and all the protections would have to be afforded.

ARMS CONTROL INFRINGEMENTS AS VIOLATIONS OF FOREIGN LAW. In regard to violations of international arms control committed abroad, and even as to those committed on American soil by certain persons, it is possible to work out a basis on which an international tribunal might try American citizens or residents even without according them the specific guarantees of the Bill of Rights.

Assume that an arms control treaty is accepted almost universally, or, at least, that it is in effect in the territory of a country where a violation is committed. The treaty, therefore, is presumably part of the law of

that land, and its violation is a violation of that local law. An act committed there by anyone, including a national of the United States, which violated the arms control agreement, therefore would violate the law of the host country. The host nation could try him in its own courts.⁴³ Or it could in accordance with its own laws and treaties have him tried instead by an international tribunal established pursuant to treaty. If basic principles of fair procedure are observed, the United States would have no basis for objecting, particularly if the United States had itself accepted the statute of the international tribunal. If the violator, United States national or no, were now in the United States, the United States could, so far as the Constitution may be concerned, agree to his extradition for trial by the foreign or international tribunal—by extension from traditional extradition practices. And if the United States agreed that an international tribunal sit in the United States, it could, pursuant to treaty, probably make such violators abroad, even American citizens, available for trial before this international tribunal. In this situation, that court would be trying the accused not for a violation of United States law but for a violation of the law of the country where it was committed. The court would be sitting, not as a United States court exercising United States judicial power, but as a court of that country or of an international community. As such, even though the court sat in the United States, with the consent of the United States, it would not be acting under United States authority and therefore need not accord the privileges of the Bill of Rights.

This suggestion becomes clearer if we consider another group of cases subject to the same principle, *i.e.*, aliens in the United States. The alien who while in the United States committed an act which violated the international control agreement would of course be violating the law of the United States. He might also, however, be violating the law of his country of nationality, if it had accepted the arms control plan and made it applicable to its citizens everywhere. So far as that country would be concerned, its national who violated the control plan in the United States might be in the same situation as if he had committed the violation in his homeland. True, the United States could bring the alien to trial here for violation of its laws in its own courts and he would be entitled to the full protection of the Bill of Rights.⁴⁴ The United States might, however, agree to allow the country of his nationality to try him for violating its laws, even if the act were com-

mitted in the United States, even if it were also a violation of United States law.⁴⁵ The United States could agree to let a foreign court try him here—as is done by foreign consuls in regard to seamen, or by friendly foreign forces to their military personnel. Similarly, the United States might give effect to the desires or agreement of the foreign country to have its national tried by an international tribunal here or elsewhere.⁴⁶ And the United States could even assist in the alien's arrest, hand him over to the international tribunal here, or extradite him abroad.⁴⁷ In this context, we emphasize, the same international tribunal would be trying him not on behalf of the United States for a violation of United States law, but at the behest of his own country of nationality for violation of its law. The international tribunal would be in the character of a foreign court rather than a United States court and would not have to respect the guarantees of the Bill of Rights.

ARMS VIOLATIONS AS INTERNATIONAL CRIMES

In the light of the special cases just discussed, we may now consider the extent to which the United States could join with other nations to establish violations of armaments control as international crime triable in international tribunals. At the beginning of this chapter we discussed and laid aside this proposal as it might relate to acts by American citizens within the United States. This proposal, however, has important possibilities as regards action on the high seas, or elsewhere not subject to the territorial jurisdiction of any national state, perhaps even in the stratosphere or outer space.

A long-established precedent is the traditional pattern of international law for dealing with the international crime of piracy. By the law of nations, piracy is a crime wherever committed on the high seas. The nation capturing the pirate tries him as for a violation of its own laws—before its own tribunals and in accordance with its own procedures.⁴⁸ By analogy, nations could agree that violations of armaments control when committed on the high seas, or elsewhere outside the territory of any state, shall be treated on the same basis as piracy. A person charged with a violation in such circumstances could be tried by the courts of the capturing country in the same manner as for other violations of its own laws. Presumably nations could agree instead to establish international tribunals for the trial of arms violators, which would apply international procedures and international penalties. The

Nuremberg trials and their counterparts in Japan, international tribunals applying "international criminal law," offer some precedent.

The United States could constitutionally agree to such arrangements for persons captured by other nations, even as applied to United States citizens, since the accused would be tried for a violation not of United States law but of a foreign law, whether it be viewed as the law of a nation or as the law of nations.* On that basis even if the violator were seized by United States authorities, or had escaped to United States authorities, or to the United States, the United States could probably turn him over for trial by a foreign or international tribunal, as akin to extradition. If, on the other hand, the United States undertook to deal with a person captured by the United States as for a violation of United States laws, it might have to accord him the protections of the Bill of Rights, if *Reid v. Covert* has indeed replaced *In re Ross*. Certainly the Bill of Rights would apply if the United States brought the accused to trial in this country, even if he were an alien. If the United States presented him for trial before an international tribunal, particularly one sitting in the United States, the rights of the accused before this tribunal might depend on whether in these circumstances the tribunal must be viewed as in the nature of a United States court applying law of the United States.

An international criminal law for arms violations on the high seas might develop from the conviction of nations that this is a problem requiring cooperative, uniform handling through international machinery. Eventually this might suggest to nations that arms control even within and across the territories of national states requires enforcement through international law and international tribunals. States willing, and able under their constitutions, might then agree to establish an international criminal law enforceable in international tribunals against arms violations even within their own territories. Without a constitutional amendment, we have said, the United States might not be able to agree to have such a system applicable in United States territory, at least so far as American citizens are concerned. The United States might, however, agree, on the basis earlier indicated, to join or cooperate in such a system to apply to acts anywhere outside United States territory, even those of American citizens. The constitutional problems for the United States would not be substantially different from those raised by a system limited to the high seas.

A TRIBUNAL AT UNITED NATIONS HEADQUARTERS

At several points in this chapter we have mentioned that whether an international tribunal sits in the United States or abroad may have constitutional significance. A probable site for an international tribunal is the United Nations Headquarters in New York, and question may arise as to whether a tribunal sitting there and exercising criminal jurisdiction has special constitutional qualities.

What is the status of the United Nations Headquarters? Is the Headquarters District United States territory so far as that is relevant to the present constitutional inquiry? More directly, in what circumstances and to what extent does the United States Constitution apply to an international court sitting there?

The territory occupied by the United Nations—the "Headquarters District"—has not, in terms at least, been ceded to the United Nations by the United States.⁷ The Headquarters Agreement between the United Nations and the United States⁸ seems carefully to avoid the conceptual question—who retains "sovereignty" in the Headquarters District. Instead, the agreement distributed authority and function between the United States and the United Nations on a practical, empirical basis without labeling the result. In its most relevant provisions, the agreement provides that "the headquarters district shall be under the control and authority of the United Nations as provided in this agreement." On the other hand, except as otherwise provided, "the federal, state and local law of the United States shall apply within the headquarters district," and "the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the headquarters district as provided in applicable federal, state and local laws." The United Nations, however, "shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state, or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district."

In the light of these provisions, one may argue over whether the United States has retained full sovereignty in the Headquarters District, or whether there has been, in effect, a partial cession of the territory to the United Nations. What appears, from the sum of the provisions quoted

and others in the agreement which have some relevance, is that United States laws (including the United States Constitution) continue to apply in the Headquarters District as in other United States territory. We leave aside for the present the significance of the power of the United Nations, within limits, to supersede United States laws in the Headquarters District.

If the United States Constitution and United States laws normally apply, how would they affect an international tribunal established there? Resuming the previous discussion, we may summarize—with the tribunal at the United Nations Headquarters in mind—the following different cases:

1. Except on the broadest views of the treaty power, where an American citizen, or an alien, is charged with an act in the United States violating United States law (incorporating an international control agreement), he must be tried in the United States by a United States court and accorded all the protections of the Bill of Rights. If on some theory discussed above the United States might perhaps agree to his trial before an international tribunal, such a tribunal, for purposes of the United States Constitution, might be deemed to be sitting as a court of the United States and thus must give the accused the protections he would enjoy in a court of the United States. And, under the Sixth Amendment, one of these is trial in the state and district in which the act was committed. On that basis an international tribunal sitting at the United Nations Headquarters could try only persons accused of committing a crime in the State of New York and in the federal district in which the United Nations Headquarters is situated; of course, it might seek agreement to sit in another district for the purposes of a case.

2. In other circumstances, an international tribunal sitting at the United Nations Headquarters might be sitting not as a United States court administering United States law but as a foreign court administering the law of another nation which had jurisdiction and has agreed to international trial, say in the following cases: any American or alien who while abroad violated arms control provisions incorporated into the law of the host country; anyone charged with violation on the high seas, at least where captured and prosecuted by a nation other than the United States; an alien who, whether abroad or in the United States, violated arms control provisions in the law of his country of nationality. In these circumstances, although the accused were now in the United States, the United States might agree that he be tried by a foreign or inter-

national tribunal and might "extradite" or otherwise make him available for such trial. That the United States was a party to the statute of the tribunal, or had otherwise accepted it, would not impose constitutional limitations on the tribunal or grant the person tried by it full constitutional rights. Nor would the fact that it sits in the United States—and the United Nations Headquarters presents the *a fortiori* case.

3. The close case might be that of the American citizen who is prosecuted by the United States for violating an arms control agreement forming part of United States law, where such violation took place outside of the United States. In such cases, it may still be true, if anything of the *Ross* case survives, that the United States could have him tried by an American court abroad without according him all the protections of the Bill of Rights. The United States, then, could perhaps have him tried by an international tribunal, but in this instance the international tribunal would be sitting in lieu of a United States court, administering United States law. If the tribunal were sitting outside the United States, it need accord the American citizen in these circumstances no greater protection than he would enjoy, say, in a United States consular court. Where, however, the court would be sitting in United States territory, it might be argued that since it was akin to an American court administering American law and sitting in American territory, it must abide by the same constitutional requirements and accord the same constitutional protections as other American courts in the United States. At this point, as to a tribunal sitting at the United Nations Headquarters, the character of the United Nations Headquarters District might become crucial. If the district were United States territory for this purpose, the international tribunal might have to accord the same protections as, say, the Federal District Court in New York. Probably, the question should be framed not as a subsidiary, conceptual question—whether the United Nations Headquarters is United States territory—but rather as whether the United States Constitution applies in these circumstances in the Headquarters District. We have seen that it normally does. We have seen also that the United Nations can supersede United States law in certain cases. The United Nations might decide that it is not feasible for an international tribunal sitting at United Nations Headquarters to accord all the protections of the Bill of Rights. It might therefore by regulation establish its own trial procedures. If these were "in all respects necessary" for the full execution of the functions of the United Nations within the meaning of the United Nations Headquarters Agree-

ment, they might prevail over the requirements of the Constitution. The argument that the United States cannot by international agreement eliminate the applicability of the Constitution, or give the United Nations the power to do so, might be met by suggesting that the international agreement was a partial cession of the territory; the power of the United States to cede territory to a foreign government has not been seriously questioned, even though thereby the Constitution is rendered inapplicable in such ceded territory.

The discussion in this chapter appears to warrant certain conclusions about proposals for international tribunals. There may be useful functions for such tribunals in the general implementation of arms control. They might be used by governments and by international bodies to find facts, to examine charges of violations, and to determine monetary claims arising out of the operation of the plan. Such tribunals might also be given auxiliary functions such as the issuance of subpoenas, the administration of oaths, perhaps even the issuance of warrants in selected cases.

As courts of criminal jurisdiction to punish individuals for those violations of arms control which are intrinsically violations by governments, such international tribunals appear to be neither feasible nor acceptable, either in the United States or elsewhere. To introduce such criminal tribunals into the United States would make a constitutional amendment perhaps necessary, and probably desirable. Without such amendment, complicated and perhaps oversubtle analysis like that essayed in this chapter might develop arguments for squeezing such international tribunals into the scheme of the Constitution. But except on very broad views of the treaty power, the arguments are both complex and artificial, reflecting that we are seeking to fit an international tribunal, part of an international system applicable to different kinds of situations in different countries, Procrustes-fashion into the United States Constitution, a national document concerned primarily with national needs and interests. On the other hand, for international cooperation to prevent private arms smuggling on the high seas or across national boundaries, the international criminal tribunal may have useful possibilities. And here since it would not, in the main, be a substitute for United States criminal jurisdiction, it would more easily fit into the pattern of the Constitution.

Chapter IX. CONCLUSION

This study represents analysis and conclusions, reached and stated with varying degrees of confidence, about the legal implications of an arms control plan as applied in the United States. We have stressed the provisions which make no or few inroads into accepted constitutional limitations. We have examined also more radical proposals strange to constitutional concepts and traditions.

One may put aside the extreme positions. In general, political, practical, and legal problems will be avoided or mitigated if the United States Government stands responsible to an international body established to administer arms control, and if the government regulates the activities of its citizens to assure the nation's compliance with its international undertakings. This would avoid the new and difficult issues which might be raised by a proposal for a system of international administrative process applied directly to the citizen. Any international tribunals which might be proposed also could avoid sharp conflict with traditional constitutional concepts if they decided between governments, or between a government and an international body, but did not seek to exercise in the United States basic governmental functions like criminal jurisdiction.

In sum, it may be said that the probable characteristics of an arms control plan lie largely within the framework of the United States Constitution. Although new elements may be introduced, those which are in the realm of foreseeable negotiation do not violate constitutional limitations, nor do they seriously disturb traditional concepts. International control of armaments, in degrees and by methods reflecting the circumstances and the times, was not unknown in the early days of the country, or in the early days of world wars. The Constitution has accommodated all the arrangements that have been adopted by the United States in the past; it is adequate to the needs and efforts of the United States to solve problems of peace and security in the age of atomic energy and earth satellites.

The crux of arms control for this study, as it has been in recent years of negotiations between nations, is international inspection. If direct

inspection by international officials is called for, one may conclude that, even on a conservative view of the flexibility of the constitutional pattern, such inspection, for the most part, would not do it violence. The essentials of the inspection system—the reports from government and industry, interrogations of officials and citizens, inspection of governmental installations and private industrial establishments related to armaments, perhaps even of any industrial establishment suspected—will not turn the litmus paper of the Constitution. It is the eccentric, perhaps, the extreme suggestion—the improbable incursion into the home—which raises serious warning signals, and this may prove to be only an imaginary dragon. It does not appear necessary to effective investigation of arms control; it would raise major constitutional questions if applied in the United States; it should not lightly materialize in negotiations, in demands by or of other nations.

Congressional implementation will vary, of course, with the details of a plan, and with the extent to which the treaty adopting the plan is not itself self-executing. In general, Congress will be required to establish a system of regulation not unlike that which applies to existing regulated industries. The Atomic Energy Act, for an important example, may require extensive revision. Privileges, immunities, and facilities, generally of a diplomatic character, will have to be accorded the inspection body. And legislation should protect the citizen and the rights of industry subject to inspection from damage or loss due to abuse of the inspection process. For most of the legislation envisaged there is precedent in existing laws.

Arms control may require the cooperation of state and local as well as federal officials, but it promises no grave or novel problems vis-à-vis the rights of the states. In its impact on the citizen, control should not prove more onerous, more jarring to traditional behavior and liberties than control of narcotics, or liquor, or firearms, or filled milk.

If its legal implications need not reach far or wide, arms control will nevertheless contain new elements. The novel aspects in law, as in our traditions, will be the presence of international officials observing operations of the United States Government and its citizens. This may be a grating, even a wrenching concept, which opponents of arms control may exploit. The "foreign" character of the inspectorate and of international control may create some problems like those which earlier in our history resulted from federal operations in areas of the country where "federal"

meant "foreign." But the nation survived these tests, and has prevailed. In peripheral respects, the United States, with other nations, may have to accept minor international intrusion for the sake of peace and its own security. Yet the degree of intrusion may prove rather less than we may be asked to imagine. Few Americans would, in probability, hear of international inspectors; fewer still would have contact with them. And few of these might ever be subjected to adversary, antagonistic requirements, to hostile interrogation, to subpoenas, or to unwelcome nonroutine inspection. The citizen is already accustomed to federal, state, county, and city officials; another small, special group, under federal auspices, should not disturb him. The contacts with international inspectors may be fewer than those with the inspectors of whom he is aware; they need not be more startling or onerous.

The major impact of control of armaments will be on national policy and on governmental activity. If comprehensive arms control and limitation are achieved, they will signify and reflect fundamental change. Recent experience, and the only experience many Americans have known, is of an America laden with heavy military expenditures, engrossed in tremendous defense production, committed to large standing armies. One tends to forget that these are not inevitable, that they are not essential to the ways of nations, especially the ways of this nation. It may be necessary to remind ourselves that this nation does not have a military tradition, that peacetime armies are not natural to us, and that large-scale production need not mean military production. Probably, a control plan would be introduced gradually, however, and there would be some time for adjustments in the economy and in national psychology.

Perhaps the most striking aspect of arms control is the projected effect on secrecy and security. There is an air of unreality, redolent of Utopia, in a discussion which assumes freedom of access, even to foreigners, to United States installations and offices, which may even entail the virtual abolition of security classification and with them security checks, and investigations, and prosecutions for espionage or related crime. And, indeed, if arms control comes, it may still take years to replace habits of secrecy and withholding with easy and free habits of openness and cooperation. It will take legislation to educate the public and education to make legislation possible. It will take bold leadership, enjoying popular confidence, to bring it about and make it work. Again, it is useful to stress that secrecy is not a constitutional principle; to recall times not

beyond the memory of living men when "security" was not a living concept, when there was not a single prosecution for espionage in any form in many years, when classifications were few and relaxed. To remind of this is not to dream idly of better, old days before total war, warm or cold, but rather to recall that openness and freedom have at least as good a claim in the American tradition as secrecy and fear.

Arms control, then, would not present a daunting challenge for American law. The important obstacles to control of armaments are not in law, and the adjustments which such control would ask of our laws are neither radical nor distorting, the new elements not foreign or unassimilable. If arms control has not been achieved, the reasons must be sought in the foreign policies of nations. Perhaps arms control is not needed, or desirable, or feasible, but if it is all these, it is urgent to know why it has not been achieved, how it can be achieved.

A major obstacle to the control of armaments, of course, has been the attitude of the Soviet Union. But we must guard also against obstacles in ourselves. If the Soviet Union were to make important concessions toward reasonable agreement, there might still be reluctance in the United States, and opposition in important circles, to substantial reduction and control of armaments. There is a confidence and reliance in the possession of our own weapons perhaps greater than is warranted in an age of new weapons; they afford a sense of security that may be false. Fear and distrust of the Soviet Union, which go deeper perhaps than toward any other country in our history, may have succeeded in frightening the United States into actions and attitudes not ultimately consistent with the interests and security of this country. It will be necessary to educate ourselves in new habits of thought, free ourselves from suspicion and secretiveness. The purpose of a defense policy is to forestall and, if possible, remove danger. The United States may do that more effectively by disarming its enemies than by frantically building up for itself armaments of uncertain comparative effectiveness. The best defense may be to remove the offensive power of those whom this country fears.

Achieving this security will require effective inspection, and reciprocal inspection. If indeed an agreement to disarm is in the interest of both the United States and the Soviet Union, the continued effectiveness of such an agreement would also seem to be in the interest of both, and inspection should be possible, and desired, to assure that the other side does not fear violations and discontinue the agreement. If to give the United

States this security there must be control and inspection in Russia and elsewhere, this country will have to accept them here too. These limitations on the citizen would be minimal as compared to the restrictions and regulations (not excluding inspection) which the American people have accepted in the interest of national defense through armament, as compared to the limitations and restrictions in time of cold war, and those which might be required in the event of a new war.

But the limitations must be necessary, and the citizen must be persuaded that they are necessary. If he must be assured that we are learning enough to be satisfied of Soviet compliance, he must be assured also that his rights are being protected against unnecessary harassment here. Inspection proposals must be scrutinized not merely to determine how much we can learn of what goes on in the Soviet Union; there must be inquiry also into the burdens which they would place on the United States citizen and into their acceptability to the American people. Examination in the light of the Constitution and of legal institutions affords an important index of the impact of a particular provision or plan on the life of the nation. Where it appears that a proposal could not be assimilated or accepted, surely it could not be lightly or sincerely urged on other nations; and rejection by them need not necessarily be evidence of a refusal to disarm or to permit effective corroboration of compliance with disarmament. One may properly ask that the makers of policy re-examine whether such a proposal is indeed essential to United States security. The need then is to consider methods of control and verification carefully. The Columbia Inspection Study is one effort at this. These efforts should concentrate on what one needs to limit and what one needs to know to assure timely detection at some point of a pattern of action which may suggest preparation for war. In this and other ways, proposals for international regulatory and investigative activity may have to be adjusted to fit more easily into the institutions of this nation and of other nations. To this process, we hope, this study will make its contribution.

The law cannot bring about arms control. It is the citizen and his leaders who must be sufficiently shaken by danger to realize that arms control may not be a duty, only a necessity. If they and if our political institutions reflect sufficient initiative, intelligence, foresight, courage, and restraint to do the utmost needed to achieve arms control, the United States Constitution, its laws and legal institutions will not fail.

delicacy and difficulty of enforcing the affirmative mandates of the federal government against the states, so that both the Constitution's provisions and most subsequent legislation directed at the states have generally been framed in the form of "Do not do . . ." (thus leaving alternative methods of doing open) rather than in the command form of "Do this . . ."; H. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 515 (1954).

The federal government may still punish a state officer, in his individual capacity, who has refused to obey applicable federal law. *Ex parte Virginia*, 100 U.S. 339 (1880).

Federal courts can also direct the actions of state officers to respect rights asserted under the Federal Constitution, e.g., by writs of mandamus or habeas corpus. And the Supreme Court has from the beginning directed its mandate to state courts. *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U.S. 1816).

16. See, e.g., *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947).

17. See, e.g.:

(a) Federal Food, Drugs, and Cosmetics Act, 52 STAT. 1056 (1938), as amended, 21 U.S.C. § 372(a) (Supp. V, 1958), and N.Y. AGRICULTURAL AND MARKETS LAW § 16(25) (joint food inspection).

(b) Migratory Bird Conservation Act, 45 STAT. 1222 (1929), 16 U.S.C. § 715(p) (1952), and N.Y. CONSERVATION LAW §§ 360(1)(d), 364 (migratory bird conservation). United States treaty obligations concerning migratory bird conservation are executed almost entirely by the states, one report indicating that at one time only twenty-seven federal agents were assigned to this task, and then only to supervise state efforts. Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752, 775-76 (1938).

(c) Federal Coal Mine Safety Act, 55 STAT. 177 (1941), as amended, 30 U.S.C. §§ 451-83 (Supp. V, 1958) (joint mine inspections). State inspectors are authorized to conduct investigations on behalf of the Federal Bureau of Mines, and state inspection plans, if as rigorous as those of the federal bureau, may be substituted for the latter's own. State inspectors operating under such bureau-approved plans are then given authority, by the federal law, to enter mines subject to the act on the same terms as federal inspectors.

For a general discussion on the breadth of modern "cooperative federalism," see COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS (1955).

18. The Emergency Price Control Act of 1942, c. 26, § 201, 56 STAT. 29 (1952), authorized the administrator to utilize "services of Federal, State, and local agencies." Local implementing statutes were upheld in most cases. See, e.g., *People v. Sell*, 310 Mich. 305, 17 N.W.2d 193 (1945); *People v. Mailman*, 293 N.Y. 887, 59 N.E.2d 790, *affirming* 182 Misc. 870, 49 N.Y.S.2d

733 (App. Part, Sp. Sess. 1944). See also *Teeval Co. v. Stern*, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950); *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 89 N.E.2d 712 (1949). The importance of municipal cooperation in price control may be gathered from the fact that in some four years, New York City courts heard 96,308 cases involving violations of the New York price control ordinances. Mermin, "Co-operative Federalism" Again: *State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements*, 57 YALE L.J. 1, 201, 217-18 n. 68 (1947).

One state supreme court, however, held a local ordinance implementing federal price controls violative of the state constitution as an unauthorized delegation of legislative power to the federal government. *Cleveland v. Piskura*, 145 Ohio St. 144, 60 N.E.2d 919 (1945).

Of interest also is the Eighteenth Amendment to the Constitution, the Prohibition Amendment, which provided, "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Many states enacted "appropriate legislation," and an Executive Order (No. 4439 of May 8, 1926), authorized the commissioning of state peace officers as federal agents to assist in the enforcement of prohibition. See J. Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 VA. L. REV. 86 (1926). The results were not particularly efficacious, however: "Instead of the two governments each pressing vigorously toward a common end, as was contemplated in the Amendment, they allowed enforcement in large part to fall down between them." Roscoe Pound, in 1 *Report on the Enforcement of Prohibition Laws*, *op. cit. supra* note 1, at 159.

19. There are examples of such cooperation between local authorities and foreign diplomatic, as well as United Nations, officials. These have not been tested in the courts but it is unlikely that such informal "housekeeping" arrangements would be considered a violation of the prohibition that "no State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power." U.S. CONST. art. I, § 10, cl. 3. Also, the courts may find or infer congressional consent in some cases, e.g., when Congress by joint resolution approved the United Nations Headquarters Agreement. See note 3 above.

NOTES TO VII: INTERNATIONAL ADMINISTRATIVE REGULATION

1. The early plans for international control and development of atomic energy and the prohibition of nuclear weapons are set forth in the first three reports of the Atomic Energy Commission of the United Nations. U.N. Doc. Nos. AEC/18/Rev. 1 (1947); AEC/26 (1947); AEC/31 (1948). These plans were based on the Baruch Plan, submitted by the United States, which,

in turn, was substantially the proposal of the Acheson-Lilienthal Report—U.S. Dep't of State Committee on Atomic Energy, *A Report on the International Control of Atomic Energy*, DEP'T OF STATE PUB. NO. 2498 (1946). See p. 5 above.

2. There is legend that one United States official expressed confidence that even if agreement were reached, "the United States Senate would save us from it."

3. Treaty Constituting the European Coal and Steel Community (1951) (Official Translation by the High Authority, 1956), Treaty Establishing the European Atomic Energy Community (1957), and Treaty Establishing the European Economic Community (1957) (Provisional Translations of the European Community Information Service, 1957); unofficial translations may be found in 46 AM. J. INT'L L. 107 (Supp. 1952), and 51 AM. J. INT'L L. 865, 955 (1957). In different degrees similar developments may be seen in other European organizations like the Western European Union and the Organization for European Economic Cooperation. Others may develop from the new International Atomic Energy Agency, 8 U.S. TREATIES 1093 (1957), T.I.A.S. No. 3873.

An important innovation in the European Coal and Steel Community, which has been incorporated into the Atomic Energy and Economic Communities (EURATOM and Common Market) as well, is the establishment of a Court of Justice with a limited power to review the decisions of the executive and rulemaking arms of these supranational organizations. For a discussion of the court's role in the operations of the Coal and Steel Community, see VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY* (1955); Stein, *The European Coal and Steel Community: The Beginning of Its Judicial Process*, 55 COLUM. L. REV. 985 (1955). And cf. Gros, *The Problems of Redress Against the Decisions of International Organizations*, and the following general discussion, 36 GROTIUS SOCIETY TRANSACTIONS 30-48 (1950).

4. The resolutions of the Security Council and of the General Assembly may impinge on activities in the United States. Some operate more or less automatically; others require the intervening action of the President or the President and Congress. See United Nations Participation Act of 1945, 63 STAT. 734, 22 U.S.C. §§ 287-287e (1952).

Under the Trusteeship system of the United Nations also, the United States has undertaken important commitments to the United Nations. These include making reports and permitting inspections, and, perhaps, acting in accordance with United Nations resolutions in administering the Trust Territories. The United States administers only Pacific islands which are considered "strategic," and these come under the supervision of the Security Council rather than the General Assembly. As the Trusteeship Council functions with regard to "strategic" areas also, the reporting and visiting provisions have operated in the same manner as with the territories where the Assembly has the plenary authority. However, a United States veto could prevent the Security Council from adopting any rules for the adminis-

tration of these islands to which the United States might object. The United States is required to make reports to the Trusteeship Council only for the Pacific islands, but has voluntarily made them for other non-self-governing territories such as Alaska, Hawaii, and Guam.

Under the terms of the Charter it is not certain whether the administering authority is required to permit visits to trust territories, because these must be "at times agreed upon with the administering authority"; the better interpretation would seem to be that this provision was designed to prevent surprise inspections but not to permit the administrator to avoid inspection altogether. At the least, there is strong moral pressure to permit visits.

5. See the Articles of Agreement of the International Monetary Fund, (1944), 60 STAT. 1401, T.I.A.S. No. 1501, and Articles of Agreement of the International Bank for Reconstruction and Development (1944), 60 STAT. 1440, T.I.A.S. No. 1502, particularly arts. V and IV, respectively, defining the powers and describing the operations of these agencies.

6. Constitution of the World Health Organization (1946), art. 21, 62 STAT. 2685 (1948), T.I.A.S. No. 1808.

7. See the Documents of the Paris Congress of the Universal Postal Union including the Universal Postal Convention, July 5, 1947, 62 STAT. 3301, T.I.A.S. No. 1850.

8. See the [Geneva] Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 STAT. 1543, T.S. No. 863. For a recent discussion of this subject see Renborg, *International Control of Narcotics*, 22 LAW & CONTEMP. PROB. 86 (1957).

The international obligations of the United States are recognized in the Opium Poppy Control Act of 1942, 56 STAT. 1045, 21 U.S.C. §§ 188-188n (1952), and in the act establishing the Narcotics Bureau, 46 STAT. 587 (1930), 21 U.S.C. § 197 (1952). A recent congressional report also reaffirmed the importance of international control of narcotics, calling it "the most effective means of eliminating illicit traffic in narcotic drugs." *Narcotic Control Act of 1956*, H.R. REP. NO. 2388, 84th Cong., 2d Sess. 68 (1956).

9. International Wheat Agreement, March 23, 1949, arts. IX, X, 63 STAT. 2186, T.I.A.S. No. 1957, implemented by the International Wheat Agreement Act of 1949, 63 STAT. 945, 7 U.S.C. §§ 1641-42 (1952); International Agreement Regarding the Regulation of Production and Marketing of Sugar, May 6, 1937, arts. 20, 21, 59 STAT. 931, T.S. No. 990.

10. Convention Between the United States of America and Canada Concerning the Sockeye Salmon Fisheries, May 26, 1930, 50 STAT. 1355, T.S. No. 918, implemented by the Sockeye Salmon Fishing Act of 1947, 61 STAT. 511, 16 U.S.C. §§ 776-776f (1952). A 1957 protocol extended the coverage of the convention to other types of salmon but also rendered most regulations of the Sockeye Commission subject to the approval of both governments. 8 U.S. TREATIES 1057 (1957), T.I.A.S. No. 3867.

Halibut too has been the subject of conventions with Canada. The earlier conventions established the International Fisheries Commission with both investigatory and regulatory powers: See 43 STAT. 1841 (1924), T.S. No.

701; 47 STAT. 1872 (1930), T.S. No. 837; 50 STAT. 1351 (1937), T.S. No. 917. The name and composition of the commission were modified by the 1953 Convention, 5 U.S. TREATIES 5 (1953), T.I.A.S. No. 2900. The regulations of the new International Pacific Halibut Commission are subject to approval by the President of the United States and the Governor General in Council of Canada. United States implementation was provided by successive Northwest Pacific Halibut Acts, 43 STAT. 648 (1924); 47 STAT. 142 (1932); and 50 STAT. 325 (1937), as amended, 67 STAT. 494 (1953), 16 U.S.C. §§ 772-772i (Supp. V, 1958).

Compare also the Convention With Canada and Japan on High Sea Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S. TREATIES 380, T.I.A.S. No. 2786; also the Interim Convention on North Pacific Fur Seals (United States, Canada, Japan, and the Soviet Union), Feb. 9, 1957, T.I.A.S. No. 3948.

11. International Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 U.S. TREATIES 477, T.I.A.S. No. 2089. The commission makes proposals which, if accepted, have the force of law, enforceable by penal sanctions, within the United States. Northwest Atlantic Fisheries Act of 1950, 64 STAT. 1069, 16 U.S.C. §§ 988, 989 (1952). The Secretaries of State and of the Interior are authorized by the statute to accept on behalf of the United States, and are thus, in effect, empowered to promulgate penal regulations without having to make any additional reference to Congress.

Compare the Tuna Conventions Act of 1950, 64 STAT. 777, 16 U.S.C. §§ 951-61 (1952), implementing the 1949 Tropical Tuna Fishing Conventions with Costa Rica and Mexico, 1 U.S. TREATIES 230, 513 (1950), T.I.A.S. Nos. 2044, 2094. The rulemaking powers of the Inter-American Tropical Tuna Commissions appear to be fewer than those of the Northwest Atlantic Fisheries Commission. See the discussion when all three conventions came before the Senate for ratification, 95 CONG. REC. 11632 *et seq.* (1949).

12. Convention for the Regulation of Whaling, Dec. 2, 1946, 62 STAT. 1716, T.I.A.S. No. 1849, implemented by the Whaling Convention Act of 1949, 64 STAT. 421, 16 U.S.C. §§ 916-916i (1952).

13. The International Joint Commission was established by Treaty With Great Britain Relating to the Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 STAT. 2448, T.S. No. 548, modified in respects not here relevant by convention between the United States and Canada, 1 U.S. TREATIES 694, T.I.A.S. No. 2130 (1950). The commission's principal duties concern the disposition and use of boundary waters, but the treaty provides that if both countries agree, the commission is empowered to decide disputes between them; the approval of the Senate is required to effectuate United States consent. The usual practice, however, is for the commission to make recommendations without receiving prior consent, which recommendations may later be embodied in a new treaty. For the history of such a proceeding, see *Olson v. United States*, 292 U.S. 246, 248-50 (1934).

14. For example, the International Wheat Agreement, March 23, 1949, art. XIII(c), 63 STAT. 2189, T.I.A.S. No. 1957, provides that wheat-importing nations shall have a total of one thousand votes and wheat-exporting nations will have an equal number. Compare the Articles of Agreement of the International Monetary Fund (1944), art. XII, § 5, 60 STAT. 1418, T.I.A.S. No. 1501, providing for a weighted voting system based upon contribution to the Fund's capital. See Metzger, *Settlement of International Disputes by Non-Judicial Methods*, 48 AM. J. INT'L L. 408 (1954).

15. For example, the regulations of the World Health Organization, enacted pursuant to art. 21 of the WHO constitution, 62 STAT. 2685 (1948), T.I.A.S. No. 1808. In authorizing the President to accept membership in WHO, Congress emphasized its "understanding that nothing in the Constitution of the World Health Organization in any manner commits the United States to enact any specific legislative program regarding any matters referred to in said Constitution." Act of June 14, 1948, § 5, 62 STAT. 442, 22 U.S.C. § 290d (1952).

16. This includes most of the decisions of the Security Council, the recommendations of the General Assembly, and the resolutions of the Specialized Agencies. But in some limited respects, international organizations have dealt with the individual. The Trusteeship Council of the United Nations, for example, has liberal procedures for receiving petitions from inhabitants of Trust Territories and other parties. U.N. Trusteeship Council, Rules of Procedure 76-93, U.N. Doc. No. T/1/Rev. 1 (1947). The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art. 25 (Official Translation of the Directorate of Information of the Council of Europe, 1952), provides for petition by aggrieved individuals to the European Commission of Human Rights. Article 48 of the convention, however, prevents individuals from presenting grievances before the European Court of Human Rights.

In the Coal and Steel Community international judicial review has been allowed to industrial enterprises and workers' organizations aggrieved by individual decisions and recommendations affecting them, and by general decisions and recommendations which they deem to involve an abuse of power affecting them, by the High Authority of the Community. Treaty Constituting the European Coal and Steel Community, art. 33, *supra* note 3. Similar rights of appeal are granted to individuals and corporations by the Treaty Establishing the European Economic Community (1957), art. 174, and the Treaty Establishing the European Atomic Energy Community (1957), art. 144, *supra* note 3. See JESSUP, LANDE & LISSITZYN, *INTERNATIONAL REGULATION OF ECONOMIC AND SOCIAL QUESTIONS*, in CHAMBERLAIN, *INTERNATIONAL ORGANIZATION* 15-35, 73-76 (1955); Bebr, *Protection of Private Interests Under the European Coal and Steel Community*, 42 VA. L. REV. 879 (1956).

For a general discussion of the theme that the individual has become a proper subject and object of international law, see JESSUP, *A MODERN LAW OF NATIONS* 15-42 (1948). And see pp. 132-33 above.

17. See the Convention Between the United States of America and Canada Concerning the Sockeye Salmon Fisheries, May 26, 1930, art. IX, 50 STAT. 1359, T.S. No. 918, *supra* note 10.

18. See, e.g., Convention Between the United States of America and the Republic of Mexico for the Adjustment of Claims, July 4, 1868, art. II, 15 STAT. 682, T.S. No. 212; Agreement Between the United States and Germany for a Mixed Commission, Aug. 10, 1922, art. VI, 42 STAT. 2200, T.S. No. 665. Professor Hudson, writing in 1944, stated that the United States had participated in twenty-six such tribunals in the past one hundred years, HUDSON, INTERNATIONAL TRIBUNALS 196 (1944).

19. A leading early case in which the Supreme Court considered the conclusiveness of an award by an international commission to an American citizen is *Comegys v. Vasse*, 1 Pet. 193 (U.S. 1828). While the plaintiff did not object to the award on constitutional grounds, the Court said that so far as concerned the validity of a claim against Spain the decision of the commissioners was final and could not be reviewed by any judicial tribunal. *Id.* at 212. Compare *Meade v. United States*, 9 Wall. 691 (U.S. 1870). In the treaty there involved the United States took over obligations of Spain to American citizens and established a United States commission to consider them. The Court affirmed a judgment of the Court of Claims which dismissed a suit by an American citizen for failure to state a cause of action against the United States. The plaintiff's claims had been dismissed by the commission on the ground that it was not within the commission's jurisdiction; under the treaty it had authority only to consider unliquidated claims against Spain at the time of signature of the treaty. See also *Ware v. Hylton*, 3 Dall. 199 (U.S. 1796), discussed at pp. 40-41 above, involving a treaty confirming obligations of American citizens to British nationals.

But cf. *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955).

20. See *Gray v. United States*, 21 Ct. Cl. 340 (1886), the principal case dealing with claims of American citizens arising out of French spoliation in the early days of the republic. The claims had been renounced by the United States in 1800, in a treaty which also relieved this government of liabilities to France. However, no recovery for American shipowners was possible without legislative authorization, and eighty-five years elapsed before such an act received the approval of Congress and the President. Although the *Gray* case recognized that the right of the government to bargain away the claims of its citizens "is too clear for discussion," the court asserted that there was an obligation on the part of the government, moral, and, under the Fifth Amendment, legal, to compensate these citizens. But the court also recognized that the right to compensation was not enforceable without appropriate legislation. *Id.* at 392-93. See also *Buchanan v. United States*, 24 Ct. Cl. 74, 82 (1889), dealing with similar claims. *Cf.* *Meade v. United States*, 9 Wall. 691 (U.S. 1870), *supra* note 19.

For a series of modern cases arising out of the Yugoslav Claims Agreement of 1948, 62 STAT. 2658, T.I.A.S. No. 1803, implemented in the International Claims Settlement Act of 1949, 64 STAT. 12, 22 U.S.C. §§ 1621-27

(1952), see *American and European Agencies, Inc. v. Gilliland*, 247 F.2d 95 (D.C. Cir.), *cert. denied*, 355 U.S. 884 (1957); *Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir.), *cert. denied*, 355 U.S. 854 (1957); *Dayton v. Gilliland*, 242 F.2d 227 (D.C. Cir.), *cert. denied*, 355 U.S. 813 (1957); *De Vegvar v. Gilliland*, 228 F.2d 640 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 994 (1956).

21. Even when the United States has received payment on the basis of award by an international commission, it may refuse to turn the proceeds over to the claimant. See the cases concerning the La Abra mining claims litigation, in which the Court upheld the refusal of the United States Government to remit payments received from the Mexican government to Americans about whose claims this government had suspicions of fraud. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899); *United States ex rel. Boynton v. Blaine*, 139 U.S. 306 (1891); *Frelinghuysen v. Key*, 110 U.S. 63 (1884). *Cf.* *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941).

22. See cases cited in note 20 above. In *Z. & F. Realization Corp. v. Hull*, 311 U.S. 470 (1941), Mr. Justice Black concurred on the ground that the propriety of the awards by the German-American Mixed Claims Commission was a question "constitutionally committed exclusively to the legislative and executive departments." *Id.* at 490.

23. "Administrative law has not come like a thief in the night. It is not an innovation; its general recognition is." Frankfurter, *Foreword to a Symposium on Administrative Law*, 47 YALE L.J. 515, 517 (1938).

The history of the growth of the administrative process and the development of administrative law is set out in *Final Report of the Attorney-General's Committee on Administrative Procedure* 1-24 (1941); DAVIS, ADMINISTRATIVE LAW §§ 2-4 (1951).

24. Attacks on administrative agencies came from commentators, courts, and members of Congress. Among the chief critics were former Solicitor General BECK, *OUR WONDERLAND OF BUREAUCRACY* (1932), Dean POUND, *CONTEMPORARY JURISTIC THEORY* (1940) (and many essays), and some leaders of the organized bar. See the *Reports of the Special Committee on Administrative Law of the American Bar Association*, in 59 ANNUAL REPORT OF THE ABA 539 (1934); 61 ANNUAL REPORT 720 (1936).

The courts scrutinized and set limits to the administrative process. See, e.g., *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1936); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Crowell v. Benson*, 285 U.S. 22 (1932). Congress, which had created the administrative agencies, sought to curb their power in the Walter-Logan Bills, S. 915 and H.R. 6324, 76th Cong., 3d Sess. (1940).

But the administrative process has had its strong defenders. See, e.g., Mr. Justice Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 16-18 (1936); FRANK, *IF MEN WERE ANGELS* (1942); *Final Report of the Attorney-General's Committee on Administrative Procedure*, *op. cit.* *supra* note 23; GELLIHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS*

(1941). And President Roosevelt vetoed the Walter-Logan Bills, H.R. Doc. No. 986, 76th Cong., 3d Sess. (1940). Today, administrative agencies are many, and firmly established, and administrative law is firmly a part of American government and jurisprudence.

A reevaluation of the administrative process, however, has been going on for some time. See, for example, Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954). See also B. Schwartz, *Administrative Justice and Its Place in the Legal Order*, 30 N.Y.U.L. REV. 1390 (1955). Compare GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956), especially chapters 1 and 3; L. B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

25. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893). See also *Perez v. Brownell*, 356 U.S. 44 (1958). And see p. 27 above.

26. See also discussion at p. 134 above.

Cf. *Hirota v. MacArthur*, 338 U.S. 197 (1948), which held that an international military tribunal in which the United States had participated was not a "tribunal of the United States," whose judgments could be subject to review by the Supreme Court or by other federal courts. Mr. Justice Douglas, concurring, was of the opinion that there was no power of review because the military tribunal "was solely an instrument of political power" as to which the President, spokesman for the United States in its foreign affairs, had the final say. *Id.* at 199, 215. See chapter VIII, note 69.

27. In the case of requisition, the owner of property may raise the question whether the taking is for a public use, but the decision of Congress in authorizing it "is entitled to deference until it is shown to involve an impossibility." *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925). See also chapter III note 69. However, the transfer could probably not be challenged in a taxpayer's suit. *Cf.* *Massachusetts v. Mellon*, 262 U.S. 447 (1923). For suits seeking to prevent expenditure of tax funds for defense and foreign affairs purposes alleged to be unconstitutional, see *Lee v. Humphrey*, 352 U.S. 904 (1956) (motion for leave to file bill of complaint in original Supreme Court proceeding denied); *Farmer v. Rountree*, 149 F. Supp. 327 (M.D. Tenn. 1956).

For a discussion of the validity of a grant of power to an international agency itself to exercise eminent domain, see Deutsch, *Eminent Domain Under a Treaty: A Hypothetical Supreme Court Opinion*, 43 A.B.A.J. 699 (1957).

28. The nature of the remedies available to the international agency, e.g., cease and desist orders, license cancellation, would depend on the scope of the regulative powers granted to it. As long as the required standards of fairness are met, to allow the international agency the types of remedy available to regulatory bodies of the United States would appear to raise no special constitutional problems. Neither would it be invalid to empower

the agency to petition national courts for enforcement of their orders. The agency and the courts would, as we have assumed it, be applying United States law.

29. For an excellent discussion, see Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

30. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

31. Nor is it likely that congressional action in these fields would be struck down on the grounds of undue delegation to the Executive. The power of the President, even without any delegation from Congress, is so broad in these areas that in the absence of a prohibition by Congress few powers are likely to be denied him. When Congress not only refrains from prohibiting presidential action but indeed authorizes it, the broad powers of the President are added to those of the Congress. "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936). See also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *The Thomas Gibbons*, 8 Cranch 421, 428–29 (U.S. 1814).

32. Within the context of the United States Government, this is the standard for determining whether Congress has unduly delegated its legislative power. It was suggested by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 43 (U.S. 1825). Since the cases cited in note 30 above, the Supreme Court has applied this standard broadly and has upheld numerous, extensive delegations. See, e.g., *Lichter v. United States*, 334 U.S. 742 (1948); *Yakus v. United States*, 321 U.S. 414 (1944); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). And see generally GELLHORN & BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 98 *et seq.* (1954).

33. See, e.g., *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939) (setting milk marketing quotas); *Curran v. Wallace*, 306 U.S. 1 (1939) (setting tobacco marketing quotas), distinguishing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), on the ground that the instant scheme was not one "where a group of producers may make the law and force it upon a minority," as in the latter case. *Curran v. Wallace*, *supra* at 15–16. And see Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

34. *Cf.* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 394 (1940); *Mulford v. Smith*, 307 U.S. 38, 48 (1939). But see Note, *Judicial Acquiescence in the Forfeiture of Constitutional Rights Through Expansion of the Conditioned Privilege Doctrine*, 28 IND. L.J. 520 (1953), for a critique of this rule based on the observation of Mr. Justice Sutherland in *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926),

that a state could not impose conditions upon the grant of the privilege of using state highways which would necessitate the surrender of the corporation-petitioner's constitutional rights.

35. Cf. notes 10-12 above. And see Migratory Bird Treaty Act, 40 STAT. 755 (1918), 16 U.S.C. §§ 703-11 (1952).

36. The Administrative Procedure Act, 60 STAT. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1952), is the basic statute establishing administrative procedural standards, but the various acts setting up individual agencies also prescribe procedures. The courts generally review administrative proceedings on the basis of these statutes, but their approach frequently has a constitutional flavor. See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Morgan v. United States*, 304 U.S. 1 (1938).

37. The Supreme Court has frequently distinguished between "rights" and "privileges" in determining the nature of the hearing required and the scope of review. See, e.g., *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921). Thus, aliens subject to exclusion or deportation need not be accorded procedural safeguards granted by regulatory agencies in other circumstances. See *Jay v. Boyd*, 351 U.S. 345 (1956); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). For discussion of the "right-privilege" dichotomy and its limitations, see Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956).

38. See note 36 above.

39. A leading early case is *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). See also *Stark v. Wickard*, 321 U.S. 288 (1944); *Morgan v. United States*, 298 U.S. 468 (1936); *Lester v. Parker*, 235 F.2d 787 (9th Cir. 1956); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955). But cf. *Aircraft & Diesel Equipment Co. v. Hirsch*, 331 U.S. 752 (1947); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

40. See *Crowell v. Benson*, 285 U.S. 22, 54 (1932). And Brandeis, J., concurring in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73, 84 (1936). Also, *Yakus v. United States*, 321 U.S. 414, 442-43 (1944). For a full discussion, see Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769 (1958).

41. The Court's decisions have given considerable leeway to regulatory agencies in the formulation of substantive standards, generally on the basis of statutory interpretation without reference to constitutionality. See, e.g., *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). And see the cases involving state administrative bodies in note 42 below. But at least as to some regulatory bodies, the Court appears to have felt increasingly free to disregard the conclusions of the agency. *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *Public Serv. Comm'n v. United States*, 356 U.S. 421 (1958); cf., e.g., *County of Marin v. United States*, 356 U.S. 412 (1958); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957). The doctrine that the courts have the power to review the reason-

ableness of substantive administrative determinations retains its vitality. In *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), Mr. Justice Black, speaking also for two other Justices, sought to scuttle this doctrine in ratemaking cases, where it had its origin, see *Chicago M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890), but the majority reviewed the commission's decision to determine whether the rate is confiscatory; and the doctrine has not since been seriously challenged. See the discussion of substantive due process at pp. 39 ff. above.

42. See note 40 above. See also cases involving state administrative procedures: *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930); *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); *Ex parte Young*, 209 U.S. 123 (1908).

43. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Gegiw v. Uhl*, 239 U.S. 3 (1915); *Gonzales v. Williams*, 192 U.S. 1 (1904).

44. The standard of review may vary, at least verbally, with the statute being administered. Compare *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (requiring "substantial evidence on the record as a whole" to support Labor Board findings under the Labor-Management Relations Act), with *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103 (1927) (requiring only "some evidence" to sustain a deportation order). See also Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1050 (1956).

45. See notes 40 and 42 above.

46. For an unusual instance, in extraordinary circumstances, of a treaty providing judicial review in United States courts of determinations of an international body, see *Abrey v. Reusch*, 153 F. Supp. 337 (S.D.N.Y. 1957).

47. *United States v. Pink*, 315 U.S. 203 (1942); *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470, 490 (1941) (concurring opinion); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Foster v. Neilson*, 2 Pet. 253 (U.S. 1829). In other areas the Court has refused to consider "political questions" although a violation of constitutional rights was claimed, e.g., *Colegrove v. Green*, 328 U.S. 549 (1946). Compare the international claims cases, *supra* notes 19-22. And see *Hirota v. MacArthur*, 338 U.S. 197 (1948), *supra* note 26, and the discussion below in chapter VIII. See also chapter IV note 93.

48. See cases cited by Frankfurter, J., in his dissent in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 705, 711-12 (1949). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a vigorously litigated case, sovereign immunity was not even offered as a defense by the Secretary of Commerce, acting on behalf of the United States under an executive order, in an injunction proceeding challenging the constitutionality of his order.

49. Compare the cases dismissing suits because the United States was an indispensable party, e.g., *Minnesota v. United States*, 305 U.S. 382 (1939). As is pointed out in Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946), the doctrines

that a state could not impose conditions upon the grant of the privilege of using state highways which would necessitate the surrender of the corporation-petitioner's constitutional rights.

35. *Cf.* notes 10-12 above. And see Migratory Bird Treaty Act, 40 STAT. 755 (1918), 16 U.S.C. §§ 703-11 (1952).

36. The Administrative Procedure Act, 60 STAT. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1952), is the basic statute establishing administrative procedural standards, but the various acts setting up individual agencies also prescribe procedures. The courts generally review administrative proceedings on the basis of these statutes, but their approach frequently has a constitutional flavor. See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Morgan v. United States*, 304 U.S. 1 (1938).

37. The Supreme Court has frequently distinguished between "rights" and "privileges" in determining the nature of the hearing required and the scope of review. See, e.g., *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921). Thus, aliens subject to exclusion or deportation need not be accorded procedural safeguards granted by regulatory agencies in other circumstances. See *Jay v. Boyd*, 351 U.S. 345 (1956); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). For discussion of the "right-privilege" dichotomy and its limitations, see Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956).

38. See note 36 above.

39. A leading early case is *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). See also *Stark v. Wickard*, 321 U.S. 288 (1944); *Morgan v. United States*, 298 U.S. 468 (1936); *Lester v. Parker*, 235 F.2d 787 (9th Cir. 1956); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955). *But cf.* *Aircraft & Diesel Equipment Co. v. Hirsch*, 331 U.S. 752 (1947); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

40. See *Crowell v. Benson*, 285 U.S. 22, 54 (1932). And Brandeis, J., concurring in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73, 84 (1936). Also, *Yakus v. United States*, 321 U.S. 414, 442-43 (1944). For a full discussion, see Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769 (1958).

41. The Court's decisions have given considerable leeway to regulatory agencies in the formulation of substantive standards, generally on the basis of statutory interpretation without reference to constitutionality. See, e.g., *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). And see the cases involving state administrative bodies in note 42 below. But at least as to some regulatory bodies, the Court appears to have felt increasingly free to disregard the conclusions of the agency. *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *Public Serv. Comm'n v. United States*, 356 U.S. 421 (1958); *cf.*, e.g., *County of Marin v. United States*, 356 U.S. 412 (1958); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957). The doctrine that the courts have the power to review the reason-

ableness of substantive administrative determinations retains its vitality. In *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), Mr. Justice Black, speaking also for two other Justices, sought to scuttle this doctrine in ratemaking cases, where it had its origin, see *Chicago M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890), but the majority reviewed the commission's decision to determine whether the rate is confiscatory; and the doctrine has not since been seriously challenged. See the discussion of substantive due process at pp. 39 ff. above.

42. See note 40 above. See also cases involving state administrative procedures: *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930); *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); *Ex parte Young*, 209 U.S. 123 (1908).

43. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Gegiw v. Uhl*, 239 U.S. 3 (1915); *Gonzales v. Williams*, 192 U.S. 1 (1904).

44. The standard of review may vary, at least verbally, with the statute being administered. Compare *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (requiring "substantial evidence on the record as a whole" to support Labor Board findings under the Labor-Management Relations Act), with *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103 (1927) (requiring only "some evidence" to sustain a deportation order). See also Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020, 1050 (1956).

45. See notes 40 and 42 above.

46. For an unusual instance, in extraordinary circumstances, of a treaty providing judicial review in United States courts of determinations of an international body, see *Abrey v. Reusch*, 153 F. Supp. 337 (S.D.N.Y. 1957).

47. *United States v. Pink*, 315 U.S. 203 (1942); *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470, 490 (1941) (concurring opinion); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Foster v. Neilson*, 2 Pet. 253 (U.S. 1829). In other areas the Court has refused to consider "political questions" although a violation of constitutional rights was claimed, e.g., *Colegrove v. Green*, 328 U.S. 549 (1946). Compare the international claims cases, *supra* notes 19-22. And see *Hirota v. MacArthur*, 338 U.S. 197 (1948), *supra* note 26, and the discussion below in chapter VIII. See also chapter IV note 93.

48. See cases cited by Frankfurter, J., in his dissent in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 705, 711-12 (1949). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a vigorously litigated case, sovereign immunity was not even offered as a defense by the Secretary of Commerce, acting on behalf of the United States under an executive order, in an injunction proceeding challenging the constitutionality of his order.

49. Compare the cases dismissing suits because the United States was an indispensable party, e.g., *Minnesota v. United States*, 305 U.S. 382 (1939). As is pointed out in Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946), the doctrines

of sovereign immunity and indispensability of party are frequently confused.

50. See pp. 82-83 above.

51. *Cf. Estep v. United States*, 327 U.S. 114 (1946).

NOTES TO VIII: INTERNATIONAL TRIBUNALS

1. U.N. GENERAL ASSEMBLY RESOLUTIONS, 1st Sess., part 2, p. 188, Dec. 11, 1946. See also *id.*, 1st Sess., part 1, p. 9, Feb. 13, 1946.

2. For discussions of such proposals, see Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952); Yuen-li Liang, *Notes on Legal Questions Concerning the United Nations: The Establishment of an International Criminal Jurisdiction: The First Phase*, 46 AM. J. INT'L L. 73 (1952); Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); Parker, *An International Criminal Court: The Case for Its Adoption*, 38 A.B.A.J. 641 (1952); Finch, *An International Criminal Court: The Case Against Its Adoption*, 38 A.B.A.J. 644 (1952); Ely, *The Treaty-Making Power: The Constitutionality of International Courts*, 36 A.B.A.J. 738 (1950). These articles deal primarily with courts established in connection with an international criminal code relating to international crimes such as genocide or acts against the peace, particularly U.N. Committee on International Criminal Jurisdiction, *Draft Statute for an International Criminal Court*, U.N. Doc. A/AC.48/4 (1951), reprinted in 46 AM. J. INT'L L. 1 (Supp. 1952). Some of the constitutional issues discussed in this chapter are considered at length in the Ely article, and in passing by Parker and Finch. Douglas, J., concurring in *Hirota v. MacArthur*, 338 U.S. 197, 199, 205 (1948), also alludes to them. See note 69 below.

3. See, e.g., *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); *United States v. Ferreira*, 13 How. 40 (U.S. 1851); *Hayburn's Case*, 2 Dall. 409 (U.S. 1792) and reporter's note there; compare the various opinions in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

4. See p. 109 above.

5. 61 STAT. 1218 (1946), T.I.A.S. No. 1598.

6. The statute, REV. STAT. § 4079 (1875), 22 U.S.C. § 256 (1952), confers jurisdiction on a consul only where by treaty the nation he represents gives reciprocal rights to United States consuls in its territory. 22 U.S.C. § 258a provides for enforcement by federal courts or commissioners of consular awards and decrees in differences between captains and crews of the vessels of the nation the consul represents.

Lower federal courts have given effect to foreign consular jurisdiction: *The Koenigin Luise*, 184 Fed. 170 (D.N.J. 1910) (dismissing alien seaman's libel against vessel, because of exclusive jurisdiction of consul). See *The Neck*, 138 Fed. 144 (W.D. Wash. 1905) (refusing to dismiss suit for wages by United States citizen who was seaman serving under flag of country whose consul claimed exclusive jurisdiction under a treaty). See also *The*

Betsey, 3 Dall. 6 (U.S. 1794) (implying that the United States has the power by treaty to permit foreign countries to establish courts in the United States).

7. See NATO Status of Forces Agreement, June 19, 1951, 4 U.S. TREATIES 1792, T.I.A.S. No. 2846; The Service Courts of Friendly Foreign Forces Act, 58 STAT. 643 (1944), 22 U.S.C. §§ 701-6 (1952); see p. 57 above.

8. See pp. 109-10 above.

9. Compare chapter IV note 94.

10. On legislative power to compel testimony and administer oaths, see 52 STAT. 942 (1938), 2 U.S.C. §§ 191-92 (1952). *Cf. Watkins v. United States*, 354 U.S. 178 (1957); *Adams v. Maryland*, 347 U.S. 179 (1954); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

11. For administrative agencies empowered to compel testimony and administer oaths, see, e.g., 38 STAT. 722 (1914), 15 U.S.C. § 49 (1952) (FTC); 49 STAT. 455 (1935), as amended, 29 U.S.C. § 161 (1952) (NLRB). See also *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

12. See p. 57 above.

13. 46 STAT. 1006 (1930), 22 U.S.C. §§ 270a, c (1952). Foreign service courts, on the other hand, must request the issuance of subpoenas from the federal district courts. 58 STAT. 644 (1944), 22 U.S.C. § 703(a) (1952).

14. *Barron v. Baltimore*, 7 Pet. 243 (U.S. 1833). *Cf. Adamson v. California*, 332 U.S. 46 (1947). See p. 55 above.

15. "A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located." FED. R. CRIM. P. 41(a). And see chapter VI, note 13.

United States commissioners are court officers but not judges; they do not exercise "judicial power." *Cf., e.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-54 (1931); *Rice v. Ames*, 180 U.S. 371 (1901); *United States v. Casino*, 286 Fed. 976 (S.D.N.Y. 1923); *United States v. Berry*, 4 Fed. 779 (D. Colo. 1880). Compare also *Collins v. Miller*, 252 U.S. 364, 369 (1920); *Ocampo v. United States*, 234 U.S. 91 (1914); *Robertson v. Baldwin*, 165 U.S. 275 (1897). The commissioner is not deemed to be exercising judicial power even when he is trying persons for petty offenses. See note 49 below.

16. To resist lawful search by United States officers is a federal offense. 18 U.S.C. § 2231 (1952). It was suggested that it might be made criminal to resist lawful search by international officials. See p. 87 above.

17. The victim of unlawful search could bring civil suit against a person performing unlawful search, if the latter is not immune. See p. 82 above.

18. See *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927). *Cf. Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Legislative courts, discussed later in the chapter, may also cite for contempt. The statute giving contempt power to

the courts, 18 U.S.C. § 401 (1952), speaks of "a court of the United States." This term is defined elsewhere to include, *inter alia*, the district courts for Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court. *Cf. Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

It is important also to distinguish between different types of contempt. Contempt may involve an act of disrespect to the body; more usually it consists of noncompliance with its process or orders. With respect to courts, at least, a distinction is drawn between contempt committed within the presence of the court and contempt outside it. There are also important differences between an order holding the accused in civil contempt, which may involve indefinite imprisonment until the court's order is complied with, and criminal contempt, a penalty for past noncompliance. These distinctions are discussed in Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943). The contempt of international tribunals which would be of importance for arms control enforcement would be failure to obey their commands.

19. *Cf. Watkins v. United States*, 354 U.S. 178 (1957); *Michaelson v. United States ex rel. Chicago, St. P., M., & O. Ry.*, 266 U.S. 42, 65-67 (1924); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). *But cf. Green v. United States*, 356 U.S. 165 (1958).

While the legislative power also may not be freely delegated (see chapter VII), power to punish for contempt, it would be argued, is intrinsically neither legislative nor judicial, and may be granted in support of other powers which may be conferred upon international tribunals.

20. The act authorizing friendly foreign forces to try their members in the United States provides a penalty for American citizens who commit an act of contempt or perjury before such a court, but this is a United States offense to be tried in a United States court. 58 STAT. 644 (1944), 22 U.S.C. § 703(c) (1952). The general perjury statute, 18 U.S.C. § 1621 (1952), is applicable by its terms to any oath before a competent tribunal, officer, or person authorized to administer oaths by a law of the United States. Such authorization has been given to international bodies, e.g., the International Joint Commission, 36 STAT. 1364 (1911), 22 U.S.C. § 268 (1952).

21. Piracy as defined by the law of nations is punishable under 18 U.S.C. § 1651 (1952). See discussion later in this chapter at p. 147. Counterfeiting within the United States of securities of other nations is punishable under 18 U.S.C. §§ 478-79 (1952). Such counterfeiting is an offense against the law of nations. *United States v. Arjona*, 120 U.S. 479 (1887). The law of war, as part of the law of nations, has to some extent been made part of United States criminal law. See *Ex parte Quirin*, 317 U.S. 1, 28 (1942). Anyone who swears out a writ or executes process against an immune foreign diplomat is guilty under United States law as a "violation of the laws of nations and a disturber of the public repose." 1 STAT. 117 (1790), as amended, 22 U.S.C. 252-53 (1952). Congress has made it an offense for anyone to assault a foreign diplomat "in violation of the law of nations." 18 U.S.C. § 112 (1952). Violations of regulations of international administra-

tive agencies in the fishing industries are violations of federal law under certain circumstances. See chapter VII note 12. See generally Radin, *International Crimes*, 32 IOWA L. REV. 33 (1946).

22. Compare JACKSON, THE NÜRNBERG CASE (1947); Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396 (1946); Meltzer, *A Note on Some Aspects of the Nuremberg Debate*, 14 U. CHI. L. REV. 455 (1947); Wechsler, *The Issues of the Nuremberg Trial*, 62 POL. SCI. Q. 11 (1947), with *The Nürnberg Novelty*, Fortune, Dec. 1945, p. 140; Rheinstein, Book Review, 14 U. CHI. L. REV. 319 (1947).

23. See, e.g., JESSUP, A MODERN LAW OF NATIONS 15-42 (1948). See chapter VII note 16.

24. Procedures for giving effect to these treaties are contained in 18 U.S.C. § 3184 (1952). See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936); *Charlton v. Kelly*, 229 U.S. 447 (1913).

The power to extradite even American citizens under a treaty was upheld in an early case which aroused wide public interest. *United States v. Robins*, 27 Fed. Cas. 825, No. 16175 (D.S.C. 1799). (There is some doubt as to whether Robins was in fact an American citizen, but it was apparently assumed that he was.) John Marshall, then a member of the House of Representatives, made a major speech supporting Robins's extradition, with emphasis on the international obligations of the United States. The speech is reprinted as note 1 in the appendix to 5 Wheat. (18 U.S.).

25. 4 U.S. TREATIES 1798 (1953), T.I.A.S. No. 2846, art. VII. See notes 65-67 below.

26. Another problem would be the manner of punishment for persons convicted by the international court. Unless international prisons were established, which might create serious political and administrative difficulties, it would be necessary to turn offenders over to national prisons. In this connection the provision for implementing imprisonment of Americans convicted outside of the United States by consular courts is instructive: "Every person who refuses or neglects to comply with the sentence passed upon him shall stand committed until he does comply." REV. STAT. § 4101 (1875), 22 U.S.C. § 155 (1952). Seamen convicted by foreign consuls in the United States (see note 6 above) may be confined in United States prisons. 22 U.S.C. § 258 (1952). Compare also art. VII, § 7(b) of the NATO Status of Forces Treaty, *supra* note 25.

The police and prosecutorial functions would, presumably, also be in an international body. These might raise constitutional problems in regard to arrest and interrogation.

27. See p. 112 above.

28. Judge Parker approximated this view in his article *An International Criminal Court: The Case for Its Adoption*, 38 A.B.A.J. 641, 643 (1952): "There is nothing in the Constitution, however, which limits the power of the United States to join with other nations in setting up a court to try those who have committed crimes against the law of nations. The fact that Congress may provide for the trial of such crimes does not mean that the creation of an international criminal court would impinge upon the power of

Congress, just as the punishment of larceny by the states is no infringement of the power of Congress to punish larceny in interstate commerce. . . .

"So far as requirement of indictment by grand jury and trial by jury are concerned, these apply only to trials in federal courts and can have no application to an international court set up by a group of nations in the exercise of their treaty making power. . . . They do not apply in consular courts or in a court established by the United States by international agreement in China. *In re Ross*, 140 U.S. 453; . . . They do not apply to military tribunals set up to try violations of the laws of war. *Ex parte Quirin*, 317 U.S. 1, 45. If courts may be created in the exercise of the legislative power to which these provisions do not apply (see *Ex parte Bakelite Corporation*, 279 U.S. 438), there is no reason why such courts may not be created in the exercise of the treaty making power."

The precedents cited by Judge Parker, however, did not involve the trial of United States citizens in courts sitting in the United States for acts done in the United States (except perhaps as to one defendant in the *Quirin* case). These would seem to be elements which might be critical, as discussed in this chapter. The cases mentioned by Judge Parker are cited and discussed below.

29. Compare the Chinese Exclusion Case, 130 U.S. 581, 609 (1889). Arguing that, despite an earlier treaty, the United States retained its sovereign power to exclude aliens, the Court said: "The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered."

30. See, e.g., *Mr. Justice Gray in The Paquete Habana*, 175 U.S. 677, 700 (1900): "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

Chief Justice Marshall said earlier, in deciding in favor of private claims in a prize case, that in the absence of an act of Congress "the Court is bound by the law of nations which is a part of the law of the land." *The Nereide*, 9 Cranch 388, 423 (U.S. 1815).

A local court in an early case even convicted a person for assaulting the French Consul General in Philadelphia, on the ground that this was an offense against the law of nations which was *ipso facto* part of the municipal law of Philadelphia. *Respublica v. De Longchamps*, 1 Dall. 111 (Pa. O. & T. 1784).

In the federal courts such an offense could not be punished unless defined by Congress. In *United States v. Hudson & Goodwin*, 7 Cranch 32 (U.S. 1812), the Court ruled that there is no federal criminal common law, and that federal courts have jurisdiction only over crimes defined by Congress. See also *United States v. Coolidge*, 1 Wheat. 415 (U.S. 1816). *But see Warren, New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923).

31. See note 30 above.

32. See *Holmes, J., in Missouri v. Holland*, 252 U.S. 416, 433 (1920). And see chapter III note 14.

33. See pp. 28, 29–31 above. *Cf. Missouri v. Holland, supra* note 32.

34. For a discussion of the power of Congress to use the state courts to enforce federal law see p. 101 above.

35. The Federal Employers' Liability Act, 35 STAT. 65 (1908), as amended, 45 U.S.C. § 51 (1952), is presently perhaps the most important instance of concurrent state court jurisdiction under an act of Congress. See, especially, 35 STAT. 66 (1908), 45 U.S.C. § 56 (1952). Early federal criminal laws gave concurrent jurisdiction to state courts, e.g., the Post Office Act, 1 STAT. 733, 740 (1799). See also p. 101 above and materials in chapter VI notes 9–12. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 395–99 (1953).

36. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15–17, 22–23 (1955); *Ex parte Milligan*, 4 Wall. 2, 121–22 (U.S. 1866).

One of the grievances in the Declaration of Independence was that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Hamilton also urged the enjoyment of judicial tenure as a barrier to oppression and as the best expedient for a steady, upright, and impartial administration of the laws. *THE FEDERALIST* No. 78. Petty offenses on the other hand have been tried before United States commissioners who do not enjoy life tenure and secured compensation. See note 49 below.

37. See *Williams v. United States*, 289 U.S. 553, 566 (1933); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 331 (1816); *cf. Robertson v. Baldwin*, 165 U.S. 275 (1897).

38. See chapter VI notes 7–10.

39. *Testa v. Katt*, 330 U.S. 386 (1947); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912). See p. 101 above.

40. See, Ely, *The Treaty-Making Power: The Constitutionality of International Courts*, 36 A.B.A.J. 738 (1950).

The reverse, i.e., appeal from an international court to a United States court, would probably not satisfy constitutional requirements for trial of criminal offenses before an appropriate United States court, perhaps even if on appeal the United States court accorded the accused a trial *de novo*. *Cf. Callan v. Wilson*, 127 U.S. 540, 556–57 (1888). Compare also *Crowell v. Benson*, 285 U.S. 22 (1932); *id.* at 65, 86–87 (Brandeis, J., dissenting); *Ng Fung Ho v. White*, 259 U.S. 276, 283 (1922).

41. *Cf. Gordon v. United States*, 2 Wall. 561 (U.S. 1865), and the opinion of Chief Justice Taney prepared for this case and printed in 117 U.S. 697 (appendix). This difficulty is given consideration in Ely, *supra* note 40, at 739–40. When the United States adhered to the International Court of Prize, it did so only with the stipulation that the international court would not "reverse or affirm" national tribunals. See Butte, *The "Protocole Additionnel" to the International Prize Court Convention*, 6 AM. J. INT'L L. 799 (1912).

A solution to such difficulties was adopted in a treaty between Sweden and Finland which establishes methods for settling claims between the nations. By its terms these procedures may not be invoked until the courts of the nation against which the claim is made have adjudicated the question, if that nation's laws so require (art. 7). But the treaty provides that if the judgment of that court is found to be contrary to international law in a subsequent international proceeding and the constitution of the "defendant nation" does not permit annulment or modification of the judgment, that nation agrees to compensate the claimant in some other manner (art. 8). Convention for the Pacific Settlement of Disputes Between Sweden and Finland, Jan. 29, 1926, LEAGUE OF NATIONS TREATY SERIES NO. 1192. See also similar treaties between Denmark and Sweden, Denmark and Finland, Norway and Sweden, LEAGUE OF NATIONS TREATY SERIES NOS. 1235, 1242, 1417.

42. See *Kepner v. United States*, 195 U.S. 100 (1904); *United States v. Sanges*, 144 U.S. 310 (1892). *But cf.* *Palko v. Connecticut*, 302 U.S. 319 (1937). See also *Green v. United States*, 355 U.S. 184 (1957); ORFIELD, *CRIMINAL APPEALS IN AMERICA*, c. 3 (1939).

43. The "case or controversy" requirement has been recognized since the beginning of the republic. The leading case cited is the earliest, *Hayburn's Case*, 2 Dall. 409 (U.S. 1792), although it was not decided by the Supreme Court. (The reporter's notes set forth the views of several lower courts including Justices of the Supreme Court sitting as circuit justices.) The various aspects and complexities of the requirement are considered in HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, c. II (1953).

Congress could, however, probably deny the Supreme Court appellate jurisdiction. See *Ex parte McCardle*, 7 Wall. 506 (U.S. 1869).

44. U.S. CONST. art. II, § 2, cl. 2.

45. For a full discussion see Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930). See also Note, *The Restrictive Effect of Article Three on the Organization of Federal Courts*, 34 COLUM. L. REV. 344 (1934); Note, *The Judicial Power of Federal Tribunals Not Organized Under Article Three*, 34 COLUM. L. REV. 746 (1934).

46. *E.g.*, 28 U.S.C. §§ 1541-43 (1952). See *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). Legislative courts to implement various powers of Congress are frequently called "Article I courts," after the article of the Constitution vesting legislative power in Congress. The term "legislative courts" originated apparently in *American Ins. Co. v. Canter*, 1 Pet. 511 (U.S. 1828).

47. 317 U.S. 1 (1942). See 10 U.S.C. § 821 (Supp. V, 1958).

48. 20 STAT. 131 (1878), repealed, 70 STAT. 774 (1956). See *In re Ross*, 140 U.S. 453 (1891), discussed later and in notes 54 and 62.

49. *E.g.*, 39 STAT. 965 (1917), as amended, 48 U.S.C. § 863 (1952). These courts may be described as "Article IV courts" since Congress derives its power over territories from Article IV, Section 3. *Cf.* *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Downes v. Bidwell*, 182 U.S. 244 (1901). The President as Commander in Chief has established courts in occupied terri-

tory for the trial of crimes committed there even by American citizens. His power to do so without legislative approval was upheld even though Congress had provided for an alternative judicial system, the court-martial. *Madsen v. Kinsella*, 343 U.S. 341 (1952). There are thus, also, "Article II courts."

The trial of petty offenses appears also to be exempt from the constitutional requirements of Article III. Such offenses were tried by magistrates and police officials even before the adoption of the Constitution, and may apparently be tried before United States commissioners who do not have life tenure and secured compensation within the meaning of Article III. At least some provisions of the Constitution applicable to trials for criminal offenses do not apply to petty offenses, for example, the requirement of a jury trial. Compare *District of Columbia v. Clawans*, 300 U.S. 617 (1937), and *Schick v. United States*, 195 U.S. 65 (1904), with *District of Columbia v. Colts*, 282 U.S. 63 (1930); see *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942); *cf.* *Wong Wing v. United States*, 163 U.S. 228 (1895). See *Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 81-82 (1948).

50. See *Williams v. United States*, 289 U.S. 553 (1933).

51. Compare *O'Donoghue v. United States*, 289 U.S. 516, 536-38 (1933). See also HART & WECHSLER, *op. cit. supra* note 43, at 348-51.

The same argument might also support exemption of international tribunals from the tenure and compensation requirements, as not appropriate to their circumstances. But on this argument these are the only requirements from which they would be exempt, and they would have to meet all the other requirements for United States constitutional courts. To exempt such courts from other requirements on the ground of "inappropriateness" would render the suggestion that they are United States courts virtually meaningless.

52. See *Downes v. Bidwell*, 182 U.S. 244, 267 (1901); *Benner v. Porter*, 9 How. 235, 244 (U.S. 1850); *American Ins. Co. v. Canter*, 1 Pet. 511, 546 (U.S. 1828); *cf.* *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (discharged serviceman residing in United States may not be tried by court-martial for offense committed during military service); *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866) (military commission may not try citizen in state where federal courts are open). See Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 916-24 (1930). *But cf.* *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the power of Congress to provide for trial by military commission in the United States of violations of the law of war, apparently even by United States citizens.

53. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *cf.* *American Ins. Co. v. Canter*, 1 Pet. 511 (U.S. 1828).

The constitutional guarantees apply to criminal trials in the District of Columbia. *Callan v. Wilson*, 127 U.S. 540 (1888). With regard to United States territories the distinction has been made between territories which

are "incorporated" into the United States, where the Constitution applies, *cf.*, *e.g.*, *Thompson v. Utah*, 170 U.S. 343, 349 (1898), and those which are not, where these rights are not automatically operative, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *cf.* *Downes v. Bidwell*, 182 U.S. 244 (1901). The territories acquired by early conquest from the Indians or by purchase were apparently automatically incorporated. But the treaty with Spain after the war of 1898 expressly provided that there should be no "incorporation," that the rights of the inhabitants should be determined by Congress, and the Supreme Court upheld the provision. *Ibid.*

54. *In re Ross*, 140 U.S. 453 (1891). The consular courts exercised jurisdiction over American civilians for offenses in many "uncivilized" countries under treaties by which these nations granted exclusive jurisdiction to the United States. The history of these courts is given in Justice Frankfurter's concurring opinion in *Reid v. Covert*, 354 U.S. 2, 41, 56-64 (1957). Their constitutionality was upheld in the *Ross* case, in which their purpose is discussed at length, 140 U.S. at 463. For the current status of the *Ross* case, see note 62 below.

The courts sustained in *Madsen v. Kinsella*, 343 U.S. 341 (1952), discussed in note 49 above, were also, of course, located outside of the United States.

55. The point is strongly made by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936). The Constitution itself expressly bars the states from areas of foreign affairs: "No State shall enter into any Treaty, Alliance, or Confederation." U.S. CONST. art. I, § 10, cl. 1. See also *id.* cl. 3. And see pp. 25-27 above.

56. Drawing in particular on suggestions by Mr. Justice Jackson in the *Tidewater* case below, the argument may be put this way. In Article III the Constitution granted to the federal government judicial power carved out of the judicial powers of the states and limited in regard to parties, subject matter, and the pattern of organization of the federal courts. These limitations were imposed by the states because they did not wish to give up more than was here agreed. The establishment of the federal government, however, entailed the exercise of judicial powers by the United States other than those derived from the states and described, and circumscribed, in Article III. These other judicial powers of the United States stem from the national sovereignty and the various powers accorded to the federal government elsewhere in the Constitution. Such judicial power in implementation of other, national functions of the United States does not derive from the states, is not dealt with in Article III, and is not subject to any of the limitations prescribed or implied in Article III. Indeed, there has been auxiliary judicial power pursuant to each of the other articles of the Constitution conferring governmental powers. Under Article I, for example, there is the Court of Claims whose jurisdiction has included judicial functions. Under his Article II power as Commander in Chief, the President has established courts in conquered areas occupied by the United States which exercise

criminal jurisdiction over United States citizens, surely a judicial function. *Madsen v. Kinsella*, 343 U.S. 341 (1952). The United States also exercises judicial power in the territories pursuant to Article IV. This judicial power, too, is not derived from the states but is part of the "general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *American Ins. Co. v. Canter*, 1 Pet. 511, 546 (U.S. 1828). Similarly, judicial power in implementation of the power over foreign affairs would also be a judicial power not derived from the states but one exercised under the "general right of sovereignty" of the federal government in foreign affairs, or under the treaty power.

The Court of Claims would be cited to illustrate this argument. Congress has given it jurisdiction over certain suits against the United States in which the United States was prepared to waive its sovereign immunity. This is judicial power, and for that reason only, judgments of the Court of Claims in such cases are reviewable in the Supreme Court. *United States v. Jones*, 119 U.S. 477 (1886); *cf.* *Gordon v. United States*, 2 Wall. 561 (U.S. 1865), 117 U.S. 697 (appendix). However, these functions could not have been within the judicial power of the states, since suits against the federal government had no meaning before it was created by the Constitution. In addition, the Court of Claims has been accorded nonjudicial functions which Congress need not have accorded to a court, and which could not have been accorded to courts established under Article III. *Hayburn's Case*, 2 Dall. 409 (U.S. 1792). See also *Williams v. United States*, 289 U.S. 553 (1933).

There has been controversy as to whether the courts of the District of Columbia are established under Article I or Article III. See the various opinions in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). But to the extent that these courts partake of the Article III limitations they may be said to do so because the District was created out of two states. In *O'Donoghue v. United States*, 289 U.S. 516, 535-45 (1933), the Supreme Court distinguished between the District of Columbia and territorial courts on this basis.

57. 140 U.S. 453 (1891).

58. See *Wilson v. Girard*, 354 U.S. 524 (1957); *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (U.S. 1812).

59. Strictly, and historically, "extradition" has meant the rendition of an accused by one nation to another for trial in the receiving nation's courts for crime committed in areas under its jurisdiction; the concept could probably, without constitutional difficulty, be extended to rendition for trial by international tribunal. In the example here assumed, however, the accused would be sent abroad for trial by an international tribunal for a violation of United States law; this would be less like extradition to a different sovereign, and more like a transfer of venue by the United States, looking at the international tribunal as being in the nature of a United States court.

60. 354 U.S. 1 (1957).

61. On the precedent value of decisions where there is no opinion of the

Court, see Comment, *Supreme Court No-Clear-Majority Decisions*, 24 U. CHI. L. REV. 99 (1956).

62. Justice Black (for himself and Chief Justice Warren, Justice Douglas, and Justice Brennan) termed the *Ross* case "a relic from a different era," 354 U.S. 1, 12 (1957), and used other language which suggests that the Constitution might govern almost all acts of the United States overseas. Justice Frankfurter, in his opinion, also emphasized the historical context of the *Ross* case, but said only that the Constitution applied in some situations, leaving precise definition to the future. *Id.* at 41, 64. Justice Harlan found that *In re Ross* did not apply to the case before him but emphasized that the applicability of constitutional requirements for United States action abroad would depend on the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it," in a future situation. *Id.* at 65, 75. Justices Clark and Burton said that *In re Ross* controlled *Reid v. Covert*; presumably they would place few specific constitutional limitations on the United States acting abroad.

The opinions leave doubt as to whether the applicability of the Bill of Rights abroad is viewed as an obligation on the United States to all who come within its power, or whether it is considered a right of the United States citizen vis-à-vis the United States. While there is language in Justice Black's opinion implying that the United States can never act outside constitutional limitations, he lays stress on the fact that American citizens are involved in the case before him. For the Justices who take a more limited view of constitutional rights abroad, the citizenship of the claimant might be a critical factor.

Opinions in *Reid v. Covert* also distinguished the *Insular Cases*, e.g., *Balzac v. Porto Rico*, 258 U.S. 298 (1922), and *Dorr v. United States*, 195 U.S. 138 (1904). In those cases, the Court upheld the power of Congress under Article IV, Section 3, to establish courts in the territories acquired after the Spanish-American War without affording all the protections of the Bill of Rights. Justice Harlan particularly saw in these cases important examples of the impropriety of transferring all constitutional protections outside the United States. Although Justice Black sought to limit their authority, the *Insular Cases* appear still to have considerable vitality.

Even Justice Black distinguished military occupation of conquered territory, as to which the Court has held that United States occupation courts do not have to observe the Bill of Rights even in regard to United States citizens; *Madsen v. Kinsella*, 343 U.S. 341 (1952). In that case Justice Black had dissented.

63. See note 58 above.

64. *Wong Wing v. United States*, 163 U.S. 228 (1896). See Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547, 564-69 (1953).

65. A foreigner becomes subject to United States law even if he is only temporarily in United States territory, *Wildenhus's Case*, 120 U.S. 1 (1887), but the United States may decline to apply its laws to him. In a recent civil case the Court said: "The exercise of that jurisdiction is not mandatory but

discretionary. Often, because of public policy, or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all." *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 142 (1957).

• If the accused is tried by one sovereign and acquitted, he would presumably not be tried again by the other, where they have concurrent jurisdiction. The NATO Status of Forces Agreement, June 19, 1951, art. VII, § 8, 4 U.S. TREATIES 1802, T.I.A.S. No. 2846, provides that the accused having been tried by one of the contracting parties may not be re-tried "for the same offence within the same territory" by another contracting party. (That would accord to an American soldier a right against his own government: the right not to be tried by the United States if he has already been tried by the host country for the same offense.) A dictum in an early piracy case expressed the view that the plea of double jeopardy would be accepted "in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state." *United States v. Furlong*, 5 Wheat. 184, 197 (U.S. 1820).

66. Under the NATO Status of Forces Agreement, where the receiving state has relinquished primary jurisdiction there is no requirement that the sending state try the accused in the receiving country. And it has been suggested in this context that where trial by court-martial is not constitutionally permissible the United States district courts may be given jurisdiction to try Americans for offenses committed abroad. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21 (1955).

67. The NATO Status of Forces Agreement requires sending and receiving states to assist each other in arresting offenders and handing them over for trial. The Service Courts of Friendly Foreign Forces Act, 58 STAT. 643 (1944), 22 U.S.C. § 702 (1952), authorized United States military officials to arrest offending visiting troops in the United States upon request of the commanding officer of the visiting force.

68. Thus, Congress has provided: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations and is afterwards brought into or found in the United States, shall be imprisoned for life." 18 U.S.C. § 1651 (1952). The application of earlier similar provisions even to non-citizens has been upheld in many cases, e.g., *United States v. Furlong*, 5 Wheat. 184, 203 (U.S. 1820). See also *United States v. Klinton*, 5 Wheat. 144, 152 (U.S. 1820) (dictum), where Chief Justice Marshall said: "General piracy, or murder, or robbery, committed [on the high seas], by persons on board of a vessel, not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever . . . is punishable in the courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the act of congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to

be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations."

See also 18 U.S.C. § 1653 (1952).

69. The Supreme Court was asked to review on habeas corpus the constitutionality of the trial of several Japanese for "war crimes" by an international commission which the Allied military commander, who was also United States commander, had established on behalf of the Allied Powers. In a brief *per curiam* opinion the Court ruled that it lacked jurisdiction to review the decision of the international tribunal because it was not a "tribunal of the United States." Justice Douglas concurred in the result on the ground that the agreement to try these particular defendants was a political decision of the President as Commander in Chief not subject to judicial scrutiny. He said, however, that in some instances prisoners held by American officials for trial by an international tribunal might challenge the validity of their detention on habeas corpus even though this would involve an indirect challenge to the validity of the tribunal's judgment. *Hirota v. MacArthur*, 338 U.S. 197 (1949).

70. The legislature of New York State authorized the governor to cede jurisdiction over the territory of the United Nations headquarters to the United States, presumably in the expectation that the United States might in turn cede jurisdiction to the United Nations. N.Y. STATE LAW § 59-1. Neither the governor nor the United States has to date executed such cession, except perhaps to the extent that some cession by the United States may be involved in the provisions of the Headquarters Agreement.

71. 61 STAT. 3416 (1947), T.I.A.S. No. 1676.

CASES CITED

- Abrey v. Reusch*, 153 F. Supp. 337 (S.D.N.Y. 1957): p. 235 (c. VII, n. 46)
Adair v. Traco Division, 192 Ga. 59, 14 S.E.2d 466 (1941): p. 222 (c. VI, n. 11)
Adams v. Maryland, 347 U.S. 179 (1954): pp. 194 (c. IV, n. 41), 237 (c. VIII, n. 10)
Adamson v. California, 332 U.S. 46 (1947): pp. 193 (c. IV, n. 38), 195 (c. IV, n. 48), 202 (c. IV, n. 88), 237 (c. VIII, n. 14)
Agnello v. United States, 269 U.S. 20 (1925): p. 200 (c. IV, n. 75)
Aircraft & Diesel Equipment Co. v. Hirsch, 331 U.S. 752 (1947): p. 234 (c. VII, n. 39)
Aktiebolaget Bofors v. United States, 194 F.2d 145 (D.C. Cir. 1951): p. 219 (c. V, n. 55)
Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953): p. 200 (c. IV, n. 77)
American and European Agencies, Inc. v. Gilliland, 247 F.2d 95 (D.C. Cir.), *cert. denied*, 355 U.S. 884 (1957): p. 231 (c. VII, n. 20)
American Ins. Co. v. Canter, 1 Pet. 511 (U.S. 1828): pp. 242 (c. VIII, n. 46), 243 (c. VIII, nn. 52, 53), 245 (c. VIII, n. 56)
American Ry. Express Co. v. Levee, 263 U.S. 19 (1923): p. 223 (c. VI, n. 12)
American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902): p. 234 (c. VII, n. 39)
Antelope, The, 10 Wheat. 66 (U.S. 1825): p. 221 (c. VI, n. 10)
Asakura v. Seattle, 265 U.S. 332 (1924): pp. 173 (c. III, n. 15), 177 (c. III, n. 28)
In re Baiz, 135 U.S. 403 (1890): p. 214 (c. V, n. 27)
Ex parte Bakelite Corp., 279 U.S. 438 (1929): pp. 236 (c. VIII, n. 3), 238 (c. VIII, n. 18), 242 (c. VIII, n. 46)
Balzac v. Porto Rico, 258 U.S. 298 (1922): pp. 242 (c. VIII, n. 49), 243 (c. VIII, n. 53), 246 (c. VIII, n. 62)
Barron v. Baltimore, 7 Pet. 243 (U.S. 1833): p. 237 (c. VIII, n. 14)
Baxter v. United States, 188 F.2d 119 (6th Cir. 1951): p. 204 (c. IV, n. 91)
Beauharnais v. Illinois, 343 U.S. 250 (1952): p. 179 (c. III, n. 44)
Bell v. Hood, 327 U.S. 678 (1946): p. 204 (c. IV, n. 91)
Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947): p. 204 (c. IV, n. 91)
Benanti v. United States, 355 U.S. 96 (1957): p. 189 (c. IV, n. 12)
Benner v. Porter, 9 How. 235 (U.S. 1850): p. 243 (c. VIII, n. 52)

BOARD OF EDITORIAL ADVISORS

Chair

PROFESSOR PETER WINSHIP
SMU School of Law

PROF. DAVID E. ALLAN Melbourne, Australia	PROF. ROBERT E. LUTZ II Los Angeles, California
JAMES R. ATWOOD Washington, D.C.	PAUL MCCARTHY Chicago, Illinois
PROF. RICHARD M. BUXBAUM Berkeley, California	EWELL E. MURPHY, JR. Houston, Texas
GEORGES R. DELAUME Washington, D.C.	RICHARD C. PUGH San Diego, California
SIR JOSEPH GOLD Washington, D.C.	WILLIAM DILL ROGERS Washington, D.C.
JOHN L. GORNALL, JR. Atlanta, Georgia	DEAN JESWALD W. SALACUSE Medford, Massachusetts
DR. CHRISTINE GRAY Oxford, England	PROF. KENNETH R. SIMMONDS London, England
PROF. ROBERT E. HUDEC Minneapolis, Minnesota	MARC I. STEINBERG Dallas, Texas
STANLEY B. LUBMAN San Francisco, California	PROF. WILLEM C. VIS New York, New York

THE INTERNATIONAL LAWYER

Fall 1992

Volume 26

Number 3

CONTENTS

Foreword	Louis B. Sohn	595
Articles		
Destined to Remain Grey: The Eternal Recurrence of Parallel Imports	Harry Rubin	597
Model for Reform: The Offer and Sale of UCITS in the United States	Thomas M. Selman	623
The Development of Insolvency Law as Part of the Transition from a Centrally Planned to a Market Economy	Evan D. Flaschen Timothy B. DeSieno	667
Swiss Statutes Concerning Money Laundering	Franco Taisch	695
Perspectives		
Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law	Harold Hongju Koh John Choon Yoo	715
Recognizing and Countervailing Environmental Subsidies	Thomas K. Plofchan, Jr.	763
The Invasion of Panama and the Rule of Law	Carl T. Bogus	781
Recent Developments		
Argentina—A Judicial Court Intervenes in an Arbitration Started Under the International Chamber of Commerce Rules	Emilio J. Cárdenas	789
<i>U.S. Trade Law and Policy Series No. 21:</i> GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?	Judith H. Bello Alan F. Holmer	795
Regional Developments		
Africa	Sipho Mahamba	803
European Taxation	European Tax Law Subcommittee of the Committee on International Taxation	814

France	Barthélémy Mercadal	817
Poland.....	Cezary P. Banasiński	819
Saudi Arabia	Alexander S. Kritzalis	822

Book Reviews

<i>Legal Effects of Fluctuating Exchange Rates,</i> by Sir Joseph Gold.....	Don Wallace, Jr.	833
<i>Making Global Deals: Negotiating in the International Marketplace,</i> by Jeswald W. Salacuse	William B. Sechrest	837
<i>International Securities Regulation: London's "Big Bang" and the European Securities Markets,</i> by Norman S. Poser.....	Michael Blair	840
<i>International Mergers: The Antitrust Process,</i> by J.W. Rowley and D.I. Baker.....	Joel Davidow	845
<i>International Joint Ventures—The Legal and Tax Issues,</i> edited by Richard P. Casna and John E. McDermott, Jr.	William P. Streng	847
<i>Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant,</i> edited by Thomas E. Carbonneau	Peter Winship	850

Section Recommendations and Reports

American Bar Association Section of International Law and Practice Reports to the House of Delegates		
I. Dispute Settlement Under a North American Free Trade Agreement.....		855
II. Exemption for Capital Gains Derived by Foreign Investors		870

Foreword

The current volume of *The International Lawyer* is the first following its twenty-fifth anniversary volume. The Section of International Law and Practice is proud of the quality of this publication and the role it is playing during the current United Nations Decade of International Law (1990-1999). International law is no longer a sole preserve of diplomats and statesmen. During the last forty-five years, international law has recognized that it has to deal with rights and duties of individuals and corporations. The number of cases involving issues of international law in domestic courts has rapidly increased, and each year several cases of this kind reach even the august Supreme Court of the United States.

Lawyers no longer can serve their clients properly if they do not watch the international aspect of their client transactions. I recently attended a conference on "Uniform Commercial Law in the Twenty-First Century," celebrating the twenty-fifth anniversary of UNCITRAL, the United Nations Commission on International Law. That Commission's main function is to facilitate international trade by drafting uniform laws which now govern a large proportion of international transactions. The readers of *The International Lawyer* are, of course, familiar with the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980), which establishes uniform rules for such contracts that bridge the differences between disparate social, economic, and legal systems and removes important legal barriers to international trade. It has been ratified by more than twenty countries, including the United States, and is applied in fact in many other countries. Its one hundred articles constitute a veritable code of commercial law.

More recently, UNCITRAL prepared the United Nations Convention on International Bills of Exchange and International Promissory Notes, which was approved not by a special international conference, but—at much lesser expense—by the General Assembly of the United Nations, which submitted it for comments to gov-

*Chair, 1992-93, ABA Section of International Law and Practice. Distinguished Research Professor of Law, The National Law Center, The George Washington University.

SECTION RECOMMENDATIONS AND REPORTS

American Bar Association Section of International Law and Practice Reports to the House of Delegates*

I. Dispute Settlement Under a North American Free Trade Agreement**

RESOLUTION

The Joint Working Group of the American Bar Association, the Canadian Bar Association and the Barra Mexicana (hereafter "Joint Working Group") recommends that the American Bar Association, the Canadian Bar Association and the Barra Mexicana adopt the following Recommendation and Report:

RECOMMENDATION

BE IT RESOLVED that (the American Bar Association) (the Canadian Bar Association) (the Barra Mexicana) recommends the adoption by the Governments of Canada, Mexico and the United States, in connection with the North

***CAUTIONARY NOTE:** Only the **RESOLUTION(S)** presented herein, when approved by the House of Delegates, become official policy of the American Bar Association. These are listed under the heading **RECOMMENDATION(S)**. Comments and supporting data listed under the sub-heading **REPORT** are not approved by the House in its voting and represent only the views of the Section or Committee submitting them. Reports containing **NO** recommendations (resolutions) for specific action by the House are merely informative and likewise represent only the views of the Section or Committee.

****The following people worked on this Recommendation and Report:** For the American Bar Association: Henry T. King, Jr., chair; Louis B. Sohn; Jay Vogelston; John M. Stephenson. For the Canadian Bar Association: T. Bradbrooke Smith, chair; Ivan Feltham; George Alexandrowicz; William C. Graham. For the Barra Mexicana: Hector V. Rojas V, chair; Claus Von Wobeser; Jose Louis Siqueiros; Julio Trevino; Carlos Loperena R.

American Free Trade Agreement ("NAFTA"), of adequate and sound dispute resolution procedures embodying shared legal values that, in order of priority, include

- a) the establishment of a Tribunal to decide disputes concerning the interpretation and application of NAFTA;
- b) broad recourse for private parties in respect of trade disputes with which they are concerned; and
- c) an effective and flexible system for the identification and management of disputes.

BE IT FURTHER RESOLVED that (the American Bar Association) (the Canadian Bar Association) (the Barra Mexicana) authorizes the Joint Working Group to submit to government officials of the three countries suitable comments and explanations, consistent with the foregoing principles.

DISPUTE SETTLEMENT UNDER A NORTH AMERICAN FREE TRADE AGREEMENT

A Report by a Joint Working Group of the
American Bar Association, the Canadian Bar
Association and the Barra Mexicana

[This Report represents the collective view of the members of the Joint Working Group on the necessary features of a dispute settlement regime for a North American Free Trade Agreement. It has been submitted to the appropriate officers of the respective bar associations for consideration and endorsement. If a draft Agreement were to be made available in future, the Report could subsequently be revised and updated.]

Introduction

General Considerations

The New Dimension

The Old Precepts

Relationship to the GATT

Treaty Architecture

Dispute Management

Adjudication Regime

Treaty Interpretation

Constitution of the Tripartite Tribunal

Powers of the Tripartite Tribunal

Binding Arbitration and the Panel System

Decisions

Review of Domestic Processes

Private Party Issues

Domestic Proceedings

Before the Tripartite Tribunal

Summary of Recommendations

Introduction

This report represents an attempt by the three bar associations to give some guidance from the perspective of lawyers on the dispute settlement aspect of the proposed North American Free Trade Agreement. The extension of the rule of law to international trade related disputes is important both to the Parties to the proposed Agreement and to the many private parties whose interests may be affected in the course of its application.

The development of a dispute settlement regime involves a careful balancing of many factors. These include many political and economic considerations, not all of which can be taken into account by the Joint Working Group since its members are not privy to the current negotiations. To make a more precise assessment, a draft of the new Agreement embodying their impact would be required.

However, the Group is concerned to produce a report which not only will represent a considered approach by the three bar associations but also will be of assistance to the negotiators. It has sought, therefore, to take into account obvious practical limitations as well as known political and legal constraints. It is hoped, in consequence, that the recommendations in this report, representing as they do the views of legal practitioners in the three countries, will be helpful and will merit close attention by those charged with the elaboration of the Agreement.

The recommendations are concerned with three broad components of an effective dispute settlement formula: first, the management of disputes; second, a regime for the settlement of disputes; and third, private party involvement in the dispute resolution process. Following a review of a number of general considerations which have influenced the Group in arriving at its conclusions, the various considerations bearing on these subjects and related aspects are examined and are summarized. While they form a considered and composite approach to the dispute resolution component of the Agreement, the major recommendations are also capable of individual adoption.

General Considerations

THE NEW DIMENSION:

The addition of a third Party to the existing Canada/U.S. free trade framework adds a whole new dimension to the trading relationship. The interpretation of the Agreement will be important to all three Parties even though a particular issue may involve only two states or a private party and one state administration. The management of the Agreement to ensure its smooth functioning will be of concern to all three.

Moreover, the very fact of extending the formalized trade relationship to a third party and its citizens will increase substantially the difficulties involved in framing an adequate regime of dispute resolution. One must add to this the new

elements of a different legal system, a third language and different culture as well as another framework of domestic trade legislation even though that legislation may take its inspiration from essentially the same sources. Modifications to the existing Canada/U.S. regime of dispute resolution of more than a cosmetic nature will obviously be necessary.

Thus, there is a significant challenge to the Parties in their elaboration of an effective and fair regime of dispute resolution. But in recognizing this challenge one must not overlook the fact that all three countries, because of their heritage, share a mutual concern to work out a law-based regime that will reflect their common adherence to and belief in the rule of law.

THE OLD PRECEPTS:

What is also most relevant in considering the recommendations which follow are the basic principles which have been at the root of previous ABA/CBA reports on international dispute settlement and which are now endorsed by the reconstituted Joint Working Group. These relate to the three main areas taken up in the recommendations.

1. The Group is convinced of the importance to any regime of dispute resolution mechanism of adequate means to manage the Agreement so as to encourage use of nonconfrontational mechanisms to resolve issues. This implies not only increased awareness and dedication of special resources within each administration but also the development of new intergovernmental means for defining and defusing disputes, including fact finding or other processes, when negotiations fail to produce a resolution of a particular problem.
2. A consistent theme of previous reports has been the fundamental importance of having a mechanism for definitive settlement of legal disputes when all other options have failed. This is not only for the purpose of some final resolution to a particular problem, but also to backstop the negotiating process. A mechanism is required to provide the boundaries for negotiations in the same way that the existence of judicial recourse to the courts does in each domestic system.
3. Access of private parties to the regime of dispute settlement is also considered fundamental by the Group. The object is, where possible, to remove disputes from the state-to-state level, where considerations extraneous to the particular dispute may be injected into the process, and to transfer it to a more technical level. As well, particularly in a trade context, neither should states in most cases have to carry the burden of espousing citizens' claims nor citizens be forced to depend on attracting the attention and support of their state. Finally, where there is private party access, it gives to aggrieved individuals some sense that their interests are important and are not entirely subordinated to those of the Parties.

The reconstituted Joint Working Group feels that these considerations are equally relevant to a broader North American Free Trade Agreement. To the

extent they are now reflected in the existing Canada/U.S. Agreement, an effort should be made to maintain and enhance those elements. They are most important, not only to an effective system, but also to ensuring the extension of the rule of law in this area.

Chapters 18 and 19 of the existing Canada/U.S. Agreement cannot be simply incorporated into a new North American Free Trade Agreement without modification. On the assumption that they will be the foundation, or at least principal points of reference, for a new dispute settlement regime, the Group has used them as a framework for this report. The changes required in them ought to reflect the three principal considerations to which the reconstituted Joint Working Group continues to subscribe.

RELATIONSHIP TO THE GATT:

The Group is of the view that recourse to the GATT alternative for dispute resolution should be maintained. The Group is agreed that the mechanism should be triggered by the complaining party only. This follows the Canada/U.S. formula.

TREATY ARCHITECTURE:

An important aspect of the proposed Agreement in relation to dispute resolution is the architecture of the treaty. Here the major issue is the relationship between the dispute resolution provisions of the new Agreement and those of the Canada/U.S. Agreement. The Group proceeded on the basis that it is most unlikely that the existing agreement will be replaced in its entirety. If this be so, the obvious solution is to leave the old provisions in place to the extent that they are not inconsistent with the new Agreement.

This point also raises the issue of the extent of the application of the tripartite Agreement. In this regard, it is also conceivable that the Canada/U.S. Agreement may eventually be rendered without effect if the new Agreement is one that is framed so as gradually to take over the entire field of the trade relationship between the Parties. In any event, the new treaty ought to have a provision to deal with this problem of applicability under and in accordance with rules it establishes.

On this approach, complete accord on all features of the new Agreement is not rendered essential for the two Parties to the existing scheme. The only problem in this latter regard will be the extent to which new and different mechanisms for dispute resolution are developed that may not apply to the existing arrangement but may, indeed, be considered more or, possibly, less desirable than those which are currently in force between Canada and the United States. If a jurisdictional provision is included as suggested, then this problem can be addressed and resolved.

A more technical point is that the Canada/U.S. Agreement has a multiplicity of dispute resolution mechanisms scattered throughout its text. To some extent this is unavoidable. On the other hand, in a new North American Agreement, an

effort should be made to bring together, to the extent it is feasible so to do, all of the dispute resolution mechanisms into a single or several consecutive, inter-connected chapters. Such a consolidation would also focus consideration on dispute resolution generally.

Dispute Management

The Group considers that the complexities arising from a three-Party trade agreement without any background of tripartite dispute resolution between them argues for something more than the essentially *ad hoc* and informal arrangements currently in force between Canada and the United States. However, it is not convinced that a new international bureaucracy is required to be put in place at the inception of the Agreement. Enhanced arrangements within the existing structures may be all that is required at first as long as there is the possibility of adding new institutions in the future. What is essential is that the structure lend itself to meeting certain goals.

Disputes under the Agreement ought to be identified in their nascent stage. They ought to be managed in a way that will see them not only identified early but quickly resolved by negotiation. Where this fails, the system should ensure that issues are

- (a) clearly defined and their parameters narrowed,
- (b) where desirable, devolved for either future resolution or disappearance with the effluxion of time, and
- (c) where necessary, resolved by following other procedures in the Agreement with as little confrontation as possible.

While to date the limited experience with the Chapter 18 mechanism in the Canada/U.S. Agreement seems to indicate that it has functioned reasonably well, the interrelationship between three bureaucracies will prove to be more complicated. A new tripartite North American Free Trade Commission, taking its inspiration from Article 1802 of the current Agreement, ought to provide more clearly for consultative arrangements at the public service level. In this regard Article 1802:4 of the current Canada/U.S. Agreement authorizes the establishment of *ad hoc*, or standing committees or working groups to whom responsibilities may be delegated. This permissive power should be spelled out in more detail.

Not only should the "early warning" mechanism based on existing governmental institutions be improved but also additional arrangements contemplated for the future. It should be possible for the Governments to constitute a modest intergovernmental body, perhaps a standing committee, to assist in the identification of disputes and, possibly, with the modalities of their resolution. It should be possible to effect this without in future having to amend the Agreement.

Besides a possible early warning function, powers in respect of coordination, mediation and fact finding would be desirable for such a body. For example, a fact finding function would enable Parties to put certain disputes in a holding

mode without appearing to neglect them. This could facilitate resolution at a later stage since impartial fact finding is frequently a precondition to the satisfactory resolution of problems. Coordination could become a problem and the existence of an intergovernmental mechanism might also be useful for this purpose.

The Group, therefore, recommends that the Agreement specifically authorize the Parties, if and when they determine it will be of assistance, to establish a permanent mechanism to assist with the resolution of disputes, although not necessarily to have some independent role in their management. It could be international. It could be joint, with three sections. It would be permanent, although it ought to be called upon only when certain tasks are required.

One specific mode of approaching such a mechanism would be through small organizations established in each capital as sections of an appropriately named institution. This is the formula used for the International Joint Commission. This body would be required to meet regularly but on a limited basis and would have as its mandate to undertake specific tasks either itself or through experts at the instance of at least two of the three Parties. One additional function might be to monitor for the Governments the administration of the Agreement from the point of view of dispute resolution.

It is also conceivable that, in future, such a mechanism might well become a catalytic force in dispute resolution. With time, if the Parties supported the evolution, it could acquire some weight in the process which would enable it to make recommendations, or participate in, various dispute resolution processes such as conciliation or mediation which are also implicitly now provided for in Article 1805:2 of the Canada/U.S. Agreement.

If this were done in the Agreement with some particularity, then the changing conditions, brought on by a functioning and important international instrument could, in future, be met in a flexible fashion and with a minimum of dislocation. Indeed, if the Parties contemplate the extension of the new Agreement to other states, such a mechanism would appear to be a necessary concomitant. Good as the existing bureaucracies may be, this optional plan would, in the view of the Group, add to the flexibility the new Agreement will obviously require.

Adjudication Regime

TREATY INTERPRETATION:

The centerpiece of the recommendations of the Group is that a permanent body, fulltime or capable of being convened without delay, be established to deal with disputes between the Parties which involve the interpretation and application of the new Agreement. Such a body would be the key element in the entire dispute resolution process. It would be a permanent institution although it need not involve structures which at the outset require full-time attention by those responsible. A stronger and more elaborate system than that now provided for in Chapter 18 of the Canada/U.S. Agreement is required.

The new Agreement will be new international law. Its interpretation can, therefore, properly be conferred on an international tribunal. There ought to be no national constitutional difficulties on this aspect. There are, however, two elements of concern. One is the application or execution of the decisions of the tripartite body by the Parties. This will be dealt with below. The other, and possibly related element, is the connection between interpretation and application of the Agreement and the national laws which either implement it or are impacted by it. In this area there could arise constitutional problems although it is hard to foresee their nature or extent.

The Group feels strongly that an interpretive body, independent and established under the Agreement in a permanent and not in an *ad hoc* fashion, is essential to the ultimate acceptance and smooth working of the document. While the Parties collectively ought to be able to negotiate issues outside a tribunal framework, any one Party should always be able to initiate proceedings before the Tribunal without the concurrence of the others. There should be provision for notification to a Party not initially involved in a dispute and for its participation in the proceedings.

CONSTITUTION OF THE TRIPARTITE TRIBUNAL:

A permanent Tribunal need not necessarily have members who have no other obligations. What is essential is there be constituted a permanent institution that can be called upon to deal promptly with interpretive issues whenever they arise. The members must be independent in both a formal and a real sense. They could be remunerated on a per diem basis until such time as the work of the Tribunal requires full-time membership and the concomitant requirement of provision for salaries. Clearly, however, the members should not have, and should refrain from, activities which might give rise to a conflict of interest with their Tribunal responsibilities.

Neither does a Tribunal have to begin with a full slate of members. It can commence with a minimum number to which, as workload may demand, others may be added. The new Agreement ought to make provision for such extension. At the beginning it may well be that only three members are required. There should, however, be alternate members so that the Tribunal can function effectively and without delay. Both permanent and alternate members would come from the ranks of the bench, bar, or academic communities of the three Parties. The Agreement could provide for additional members, probably six, plus alternates at the nomination of the respective Parties when they shall have agreed that the Tribunal should be enlarged.

The Group does not favor the constitution of a Tribunal with members other than from the three Parties. The new Agreement will be a North American Agreement with issues familiar to jurists from Canada, Mexico and the United States. One must assume an independence of mind on the part of its members

and the evolution of a Tribunal which, because of its composition, would quickly take on the characteristics of a court rather than an arbitral body.

Consideration should, however, be given to the possibility that the Tribunal be empowered to appoint experts in the role of assessors to assist it in technically difficult cases. The Agreement might provide for these contingencies where, in any given case, all Parties agree that the Tribunal should be so constituted or assisted. This would probably also require a somewhat larger panel and it would be necessary to make provision for spelling out those details. One way of handling this and other details would be to empower the North American Free Trade Commission to make detailed rules for the organization and functioning of the Tribunal.

The new Tribunal, perhaps called the North American Trade Tribunal, would be supported by a very small Registry which, again, could be increased if the workload so demanded. Both the Registry and the Tribunal ought to operate from a central location but, perhaps, away from the capitals. This would underscore the neutrality of the institution. Of course, the Parties may prefer a perambulating body which would hold sessions in the territories of each of the Parties. A fixed location which might be seen to be sufficiently neutral from a geographic point of view is, however, to be preferred.

It may be that, initially at least, the Secretaries of the North American equivalent to the Chapter 19 system under the Canada/U.S. Agreement (Article 1909) could perform the Registry task, assuming, of course, that that system is adopted for the new Agreement and a Mexican Secretariat is established. This would allow gradual evolution of the system and avoid a top heavy bureaucratic structure at the inception of the Agreement. Rules governing the operation of the Registry and proceedings before the Tribunal would be made by the Tribunal.

POWERS OF THE TRIPARTITE TRIBUNAL:

The Joint Working Group considers that a North American Trade Tribunal should have jurisdiction with respect to disputes involving the interpretation and application of the North American Free Trade Agreement. This would include issues of the consistency of national laws with the Agreement. Where there are differing views as to their respective rights or obligations under the Agreement, if the Parties cannot agree among themselves, any one of them should have the right to put the issue to the Tribunal.

There is a second area which could be included in the powers of the North American Trade Tribunal. There may well be instances in the domestic courts of the three Parties where a view must be taken on the interpretation of the Agreement. This could also arise in relation to the activities of Chapter 19 type panels. The Working Group believes it would be desirable for the North American Trade Tribunal to be given power, upon request, to provide an opinion to a domestic court on the interpretation of particular provisions of the Agreement. Compare Article 1808 of the Canada/U.S. Agreement. The precise modalities could be set forth in the Tribunal's rules.

It must be acknowledged that divorcing the issue of interpretation from all the facts of a given case may not be desirable in many circumstances. Likewise, there could be problems of timing. On the other hand, the possibility of securing an opinion—which could be adopted or rejected by the domestic court in its application to the particular facts—might well, over time, provide an interpretive framework that would be most useful. The Group recommends that there be incorporated in the Agreement a scheme for reference of questions on the interpretation of the Agreement at the instance of the domestic court concerned. Domestic law may also have to be amended accordingly.

BINDING ARBITRATION AND THE PANEL SYSTEM:

Whether the suggested Tribunal procedure should be in substitution for or in addition to the arbitration and the panel systems as now provided in Articles 1806 and 1807 of the Canada/U.S. Agreement is less clear. The Group recommends that the regime be rationalized and that the Tribunal procedure be the only one available for the disposition of issues relating to the interpretation and application of the new Agreement. To the extent not overtaken by this formula, the existing system could continue to apply to Canada/U.S. disputes.

With respect to future proposed measures which may affect the operation of the new Agreement, the Group would consider it less complicated if only the new system were to apply. There would be but one recourse in these circumstances to the Tribunal. On the other hand, it is recognized that there may be reasons to retain the current Canada/U.S. formula for proposed measures which may demand a less formal and more flexible approach such as that offered by the panel procedures in Article 1807 of the present agreement. Having regard to the proposed right of any Party to initiate proceedings before the Tribunal, agreement of the Parties to the dispute would be required.

In this event the equivalent of Article 1807 of the present agreement may have to be recast and consideration given to whether only two or all three Parties must be represented on a panel. On the face of it, with three Parties to the Agreement, the latter alternative commends itself. Similar complications would be involved were the Parties to wish to retain the section 1806 process as an alternative where the Parties to a dispute agreed.

DECISIONS:

The Joint Working Group also considered the mechanisms for the implementation of decisions under Chapter 18 of the Canada/U.S. Agreement. While the scheme of retaliation there found may be the only one available at international law to underpin decisions or judgments of a North American Trade Tribunal, the current Chapter 18 mechanism lacks the suasion that could be offered by a general obligation to implement decisions.

The Group recommends, in consequence, that the new Agreement incorporate a basic obligation on the Parties to implement decisions of the North American Trade Tribunal. This obligation would be supported by a system for retaliation if decisions were not implemented within a given period of time or not implemented in an integral fashion. To the extent it may be possible to do so, the amount of retaliation allowed ought to be limited to the degree of default of implementation or the seriousness of the issue. Put another way, the retaliation ought to be at the level of the nullification or impairment produced by the failure to implement the decision.

REVIEW OF DOMESTIC PROCESSES:

A feature of the Canada/U.S. Free Trade Agreement is the Chapter 19 mechanism for dealing with the application of national trade laws. That provision was included because there was no agreement on the substantive issues of anti dumping and countervail. Essentially Chapter 19 provides for recourse to a specially constituted panel for the determination of issues relating to the application of national law where these would otherwise be determined by the national courts. Chapter 19 does not change national laws, it simply establishes what appears to be an independent and bilateral mechanism for their interpretation—an interpretation based on the law of the jurisdiction where the matter arises.

Brief consideration was given by the Group to the alternative of the inclusion in the jurisdiction of the Tribunal of domestic-type issues now dealt with under Chapter 19 of the Canada/U.S. Agreement. There may have been merit in this were the matter to have begun without a history of the considerable experience with the special dispute resolution mechanism in Chapter 19. The Group felt it was not practical to seek to recast the system for the new Agreement assuming, of course, that there will be a Chapter 19 type formula included in it.

While at first blush the Chapter 19 system may appear to be flawed in the sense that it is the laws rather than their administration that may be objectionable, it has in practice worked very well. There has been general, if not total, satisfaction with the results of individual cases as well as with the collective experience. It has also permitted the disengagement of the respective national bureaucracies to some large degree and allowed the aggrieved interests in each country to make their cases without any overhanging linkage to other issues. Moreover, the disposition of contentious matters has been speedy.

The very success of this system makes its extension to a new arrangement most desirable. Whether or not it is altogether logical and whether or not it responds fully to the real legal difficulties in the trade relationship, as between Canada and the United States, experience has shown that the system works. It should also work well in a North American context. An effort should, therefore, be made to make such alterations in it as will fully accommodate the third partner in the new Agreement.

These modifications will not, however, be purely formal. The following new aspects must be addressed:

1. The existence of a dispute involving interests in two of the three Parties will have to be signalled to the third Party in case its interests are an issue directly or indirectly. To this end a system focused on the provision of notice will have to be worked out.
2. The present panel system may well have to be revised. Depending on the issue, it could be that all three Parties should be represented on a panel. This may, in turn, involve panels of a different size. This aspect will have to be carefully thought out so as not to result in any watering down in the effectiveness of the present system.
3. With the addition of a third language in the relationship and the possibility of proceedings on both a bilateral and a trilateral basis, the question of the language of panel proceedings to be conducted will arise. In addition, there may be questions of procedure which heretofore have been taken for granted that will require review.
4. Further consideration will have to be given to the binding character of the decisions and their influence on the tripartite relationship. In this latter regard, will a Canada/U.S. decision involving, say, Canadian law, have any effect on the administration of analogous Mexican trade law for similar goods from the United States?

Because of its success and its importance to private parties and their lawyers, the Group recommends that serious consideration be given to extending the Chapter 19 procedure under the new Agreement to tariff classification, sanitary and other standards and rules of origin. Where in proceedings taken before a panel on any such issue a substantial question arises respecting the interpretation or application of the new Agreement the Panel should be empowered to refer the question to the Tribunal in accordance with the procedure described below.

Private Party Issues

DOMESTIC PROCEEDINGS:

As already noted, the current Chapter 19 arrangements have seen private parties largely in control of issues with which they are directly concerned. It has also seen the elimination from the consideration of the matter at hand of other unrelated issues between the U.S. and Canada. It is most desirable that this continue under a North American Free Trade Agreement and, as suggested above, where possible be extended.

There may, however, be issues arising in relation to the administration of domestic trade laws that affect the larger interests of the Parties to the new Agreement. In consequence, each Party might be given the opportunity to involve itself in such domestic proceedings, even if it means detracting from the position of the aggrieved private party. It is to be hoped that such situations will

be rare, but the paramount interest of the Parties to the Agreement should be recognized. The same approach is even more valid in relation to Chapter 19-type panels.

As well, before Chapter 19-type panel procedures are instituted, issues involving private parties before the administrative apparatus of one of the Parties to the Agreement should have some predictable course. In other words, the new Agreement ought, at the very least, to ensure that domestic administrations cannot frustrate recourse by private parties to the international review process where matters covered by the new Agreement are concerned.

Finally, the Group feels that private parties will have to rely on local legal advice and, subject to the immediately preceding consideration, submit themselves to the local legal system so that no special arrangements should be contemplated. This includes language, procedure and substantive law as amended to implement the Agreement.

BEFORE THE TRIPARTITE TRIBUNAL:

It may also be desirable to allow private parties to appear in proceedings before the North American Trade Tribunal. Where an issue of the interpretation or application of the Agreement arises and where a private party is intimately concerned in a concrete and real way, there should be the possibility of that party becoming involved in the proceeding before the Tribunal, with a right ordinarily limited to submitting written argument unless special conditions for participation are otherwise established.

The Group feels that participation could be controlled by a specific requirement that any private party seeking to participate in proceedings before the Tribunal establish that there is involved a matter in which that party has an identifiable and proximate legal interest. Mere concerned bystanders should not be allowed to involve themselves.

A different situation may, however, pertain where a reference procedure is, as suggested, incorporated in the jurisdiction of the Tribunal. In a case where it is followed, it may well be that private parties are the principal protagonists and will have the burden of argument before the Tribunal. Depending on the circumstances, the Parties to the Agreement may have an equal or greater interest. They should be permitted to involve themselves as of right and as full participants to the proceedings. As they would have a broader interest in the operation of the Agreement as a whole, they should be recognized as having an important role in any proceedings where it is to be interpreted.

A question arises, particularly in circumstances where there may be no Chapter 19 procedure, whether a private party should have some right to initiate proceedings before the Tribunal in respect of the implementation of treaty obligations on, say, tariff classification, rules of origin or like matters. The Group takes the view that the Parties to the agreement remain in form the only persons who can initiate proceedings before the Tribunal.

It recommends, however, that each Party make provision for a system whereby private parties can petition their government to raise issues of interpretation and application before the Tribunal when local remedies are exhausted or unavailable. The system might include the obligation on the government to give due consideration to the matter and on the private party to carry the burden of the proceedings in given circumstances. Such a system would have advantages both for the governments and for private parties as the current Chapter 19 procedure attests.

Summary of Recommendations

The ABA/CBA/BM Working Group, having taken into consideration their respective legal systems and the importance to the effective operation of a North American Free Trade Agreement of adequate and sound dispute resolution procedures embodying shared legal values, consider that the new Agreement should, in order of priority, provide for

- a) the establishment of a Tribunal to decide disputes concerning the interpretation and application of the new Agreement;
- b) broad recourse for private parties in respect of trade disputes with which they are concerned; and
- c) an effective and flexible system for the identification and management of disputes.

These elements are fundamental to such dispute resolution procedures and the Working Group recommends they be given effect through adoption of the following:

1. The new Agreement should provide for more extensive and intensive consultation for dispute resolution than now contemplated by the Canada/U.S. Agreement.
2. Provision should be made for the establishment in the future of an optional institutional mechanism for dispute prevention and management. It could be constituted as an international body or a tripartite body with national components. Its task would be to assist Parties in the resolution of disputes.
3. A system of notification to Parties of existing disputes and of monitoring their progress ought to be instituted. A Party should, where it considers its interests under the Agreement to be affected, be able to intervene at an appropriate level to make representations on the subject matter. The system should permit the adoption of conciliation and mediation where they can be agreed on.
4. A permanent tripartite tribunal consisting of an equal number of members appointed by each Party and with their independence guaranteed should be established to hear and determine cases involving the interpretation and application of the Agreement. To this jurisdiction could be added a power to hear references from national tribunals concerning the interpretation of the Agreement.

5. It would be desirable that the tripartite tribunal replace the binding arbitration and panel review systems in the Canada/U.S. Agreement but it is recognized that one or both methods may provide some desirable flexibility in the operation of the Agreement that the Parties would wish to retain.
6. The Chapter 19 process in the Canada/U.S. Agreement ought to be adopted, with necessary modifications, for the new Agreement.
7. The adjudication regime ought to be extended to tariff classification, sanitary and other standards, and rules of origin.
8. The rights of private parties of one state before the national courts and tribunals of the other two states should be protected so that espousal of their claims by their own state at the international level, although not excluded, would be rendered unnecessary in most cases.
9. The rights of private parties before any permanent or *ad hoc* tribunal under the Agreement should be defined and their involvement in any proceeding that may determine their legal interests specifically permitted and its limits defined.
10. Consideration should be given to permitting the Parties to the Agreement to involve themselves in trade related issues arising out of the Agreement where important questions going to its interpretation or operation are before domestic courts. A system of notice ought to enable this to be made effective.

Joint ABA/CBA/BM Working
Group on Dispute Settlement
Henry King Jr.
T. Bradbrooke Smith, Q. C.
Hector Rojas V.
Co-Chairmen

January 27, 1992



June 19, 1990

FROM : American Law Division

SUBJECT : Legal Issues Involved in Establishing a Binational
Mechanism to Settle Trade Disputes

This memorandum responds to your request for a discussion of legal issues that may be involved in the creation of a binational mechanism to settle trade disputes between the United States and Japan. Given Japan's large trade surplus and the many complaints regarding Japan's recalcitrance toward increased imports and investment, such a body may provide a means of resolving commercial problems that have arisen between the two countries. Nations currently undertake trade dispute settlement on a multilateral basis through the General Agreement on Tariffs (GATT) and its related codes and recently the United States and Canada have embarked on bilateral dispute resolution in the United States-Canada Free Trade Agreement (CFTA). While the provisions of these agreements (and the lessons derived from their use) may to some extent serve as paradigms, it must be noted that the particular political and economic relationship of the United States and Japan, as well as the cultural differences between the two, may call for adaptations of these models to achieve the objectives sought.

We discuss below recent proposals for trade dispute settlement between the United States and Japan, basic principles of international dispute resolution, dispute settlement provisions in the GATT and the CFTA, and the relationship of a bilateral dispute resolution body to the GATT. As evident in this analysis, the legal issues involved in creating such an entity tend to be international rather than national ones. Drawing on our discussion, we conclude with a summary list of matters that would seemingly need to be addressed when two nations seek to formalize the settlement of disputes between them.

Settling Trade Disputes between the United States and Japan: Recent Proposals. The notion of a binational dispute settlement mechanism between the United States and Japan was reportedly suggested in early 1989 by then-Prime Minister Takeshita of Japan and discussed by Secretary of State James Baker and Japanese Foreign Minister Sousuke Uno during a meeting in Washington held simultaneously with talks between the Prime Minister and

President George Bush.¹ The United States International Trade Commission had earlier examined the possibility of a free trade area (FTA) between the United States and Japan containing formal dispute settlement procedures² and at least two bills were introduced in Congress in 1989 to authorize broad-scaled trade negotiations between the two countries aimed at, *inter alia*, the creation of a dispute settlement body.³ Variations on the theme have included a trade agreement limited to tariff elimination and dispute settlement;⁴ an agreement creating (1) a set of guidelines for each country's trade policy, (2) a consultative body for discussion of macroeconomic, microeconomic, and

¹ "Takeshita Seen Urging Bush on Joint Panel," Wall Street Journal, Feb. 2, 1989, at p. A3; "Bush and Takeshita Explore Problem-Solving," The New York Times, Feb. 3, 1989, at p. A5. The Bush Administration reportedly took a cautious and informal approach to the idea with some Administration trade officials seeing it as a means by which the Japanese could avoid United States trade laws. "U.S. Unenthusiastic About Japanese Idea for Subcabinet Level Coordinating Group," 6 Int'l Trade Rep. 169 (Feb. 8, 1989); Kaplan, "The Use of Arbitration to Resolve Market Access Disputes," 22 Cornell Int'l L. J. 469 (1989) [hereinafter cited as *Kaplan*]. See also Fukushima, "United States-Japan Free Trade Area: A Skeptical View," 22 Cornell Int'l L.J. 455, 464-65 (1989). Although there were apparently few details about the proposed entity at the time it was suggested, one commentator has since described it as follows: "[T]he proposal reportedly called for a Cabinet-level mechanism to settle trade and economic disputes and to coordinate policy between the two countries. The proposal also included a provision for the formation of a working-level group comprised of sub-cabinet officials and industry representatives which would hear trade and economic complaints prior to the higher level group. The proposal suggested that these bilateral panels review a variety of issues, including trade disputes, market access problems, exchange rate policy, macroeconomic issues, development assistance, and technology transfer. The Takeshita proposal, though purportedly modeled after the dispute settlement mechanism in the United States-Canada Free Trade Agreement ... , in fact differs significantly from it. The dispute panel would not have 'supranational' authority, as do the FTA dispute settlement panels, nor would its decisions be binding." *Kaplan, supra*, at 469.

² U.S. Int'l Trade Comm'n, *Pros and Cons of Initiating Negotiations with Japan to Explore the Possibility of a U.S.-Japan Free Trade Area Agreement; report to the Senate Committee on Finance on Investigation No. TA-332-255 under Section 332 of the Tariff Act of 1930* (Sept. 1988) (USITC Pub'n 2120) [hereinafter cited as *ITC Study*].

³ See H.R. 1051, 101st Cong., 1st Sess. (1989), authorizing the President to enter into negotiations to determine the feasibility and desirability of an agreement creating a U.S.-Japan free trade area; S. 292, 101st Cong., 1st Sess. (1989), authorizing the President to enter into negotiations with Japan for the purposes of entering into one or more agreements on a variety of specified objectives. One of the aims of negotiations under the House proposal would be to create "a less controversial and formalized dispute-settlement mechanism to resolve bilateral problems before it becomes necessary to resort to special trade law procedures or the General Agreement on Tariffs and Trade." H.R. 1051, § 2(a)(5). The Senate bill also establishes dispute settlement as a negotiating objective, specifying the creation of a joint trade commission between the United States and Japan similar to the Canada-United States International Trade Commission set up under the CFTA. The commission would (1) apply to trade disputes the rules of the GATT and any other trade agreement to which the United States and Japan are parties using a process of formal consultation and arbitration and (2) oversee the implementation of any current or future trade agreement between the two countries. S. 292, § 1(b)(2)(E).

⁴ *ITC Study, supra* note 2, at 32.

structural adjustment matters, and (3) a dispute settlement mechanism;⁵ an FTA for the Pacific Rim;⁶ an arbitration panel, composed of representatives of the United States, Japan, and third countries, with jurisdiction over complaints alleging the violation of existing legal trade norms;⁷ and the use of international arbitration to resolve disputes over market access, one of the most persistent trade problems involving the United States and Japan.⁸ At the same time, others have warned that a United States-Japan FTA would undermine multilateral agreements such as the GATT,⁹ and recently the European Economic Community (EEC), which as a constituent of the European Communities (EC) had requested the GATT in 1983 to consider the harmful trade effects on the EC of certain aspects of the Japanese economy,¹⁰ argued both that any benefits that the Japan grants the United States as a result of the current United States-Japan Structural Impediments Initiative¹¹

⁵ "Senior Japanese Official Suggests Broad Pact to Manage Trade Frictions with United States," 6 Int'l Trade Rep. 665 (BNA, May 24, 1989). This idea appears to be similar to the reported Takeshita proposal. See *supra* note 1.

⁶ "Pacific Rim Trade Pact More Likely to Resolve Bilateral Problems Than SSI[sic], Smith Tells ABA," 6 Int'l Trade Rep. 1067 (Aug. 16, 1989).

⁷ Punke, "Structural Impediments to United States-Japanese Trade: The Collision of Culture and Law," 23 Cornell Int'l L. J. 55, 75-80 (1990).

⁸ Kaplan, *supra* note 1.

⁹ "MITI-Appointed Private Study Group Warns U.S.-Japan FTA Would Harm Multilateralism," 6 Int'l Trade Rep. 811 (June 21, 1989).

¹⁰ The GATT Council did not act on the European Communities' request to establish a working party under GATT Article XXIII:2 to study the Community's complaint. GATT, *GATT Activities in 1983*, at 49-50 (1984). As described in an annual GATT report, "[t]he EC contended that it had not benefited from successive GATT negotiations with Japan because of a series of factors, particular to the Japanese economy, which had resulted in lower levels of imports, especially of manufactured products, into Japan as compared with other industrial countries. During 1982, the Community had held a series of bilateral consultations with Japan under Article XXIII:1. A number of measures had been taken by the Japanese Government but the Communities still held the view that their impact was not commensurate with the magnitude of the problem. In calling for the working party, the EC stated that the bilateral trade balance had moved from broad equilibrium in the 1960s to a persistent and structural deficit during the seventies which reached \$12.5 billion in 1981. It attributed this increasing imbalance to the 'continuing imperviousness of the Japanese market resulting from an inherent tendency to favour domestic products rather than imported goods.' The Japanese representative described to the Council a series of trade liberalization measures taken by his Government, on its own initiative and without seeking reciprocity, to strengthen the GATT system and to help its trading partners, including the European Communities. He said that the Japanese Government was determined to pursue liberal trading policies." *Id.*

¹¹ As described in a joint statement by President Bush and Prime Minister Sosuke Uno of Japan, the Structural Impediments Initiative, a series of negotiations to be carried out through a binational interagency working group, is intended "to identify and solve structural problems in both countries that stand as impediments to trade and balance of payments adjustment with the goal of contributing to the reduction of payments imbalances." 25 Weekly Comp. Pres. Docs. 1098 (July 14, 1989). The two countries produced an interim report in April

must be granted to all GATT members, and that trade disputes between the United States and Japan should be resolved through the dispute settlement procedures of the GATT¹². Nonetheless, Japan was recently reported to be considering a proposal that the United States and that country hold annual Cabinet-level talks for the purpose of avoiding trade problems.¹³

Binational Dispute Settlement: Principles and Practice. In its broadest sense, binational dispute settlement may take various forms ranging from informal talks to adjudication, with resolutions ranging from good faith commitments to remedies theoretically enforceable under international law. The proposals for dispute settlement between the United States and Japan mentioned earlier, existing forms of negotiations between the two countries such as the Structural Impediments Initiative¹⁴ and Market-Oriented Sector-Specific (MOSS) talks,¹⁵ and procedures for formal dispute settlement incorporated in the GATT and the CFTA all take their place on this

1990, 26 Weekly Comp. Pres. Docs. 531 (April 5, 1990), with a final report due in July. It was recently reported, however, that there have been difficulties in reaching a satisfactory resolution of these talks. "Top Bush Aides Say Japan in Stalling in Trade Talks, Press for Quick Action," Wall St.J., June 14, 1990, at A2, col. 3; "Japan Sees No Further Concessions," Wash. Post, June 14, 1990, at C1, col. 6.

The SII was originally announced in May 1989, at the time that the United States Trade Representative submitted her report to Congress identifying particularly restrictive foreign trade practices, a requirement of § 310 of the Trade Act of 1974, as added by the Omnibus Trade and Competitiveness Act of 1988, the so-called "Super 301" provision. 25 Weekly Comp. Pres. Docs. 777-78 (May 26, 1989). As made clear by the Administration, SII negotiations were intended to take place "outside" that statute. *Id.* at 778 and 1098.

¹² "Agreement Reached by U.S., Japan under SII Must be 'Applied Multilaterally,' EC Says," 7 Int'l Trade Rep. 498 (April 11, 1990). In 1988 the EEC had requested the creation of a dispute settlement panel under Article XXIII:2 to study whether the manner in which Japan implemented a portion of the United States-Japan Semiconductor Arrangement conflicted with GATT obligations, alleging in part that the portion of the Arrangement under which Japan agreed to enlarge the market access of foreign companies producing semiconductors in fact granted preferential treatment to United States firms in violation of GATT's most-favored-nation obligation. *Japan - Trade in Semi-Conductors; report of the Panel adopted on 4 May 1988 (L/6309)*, GATT, 35th Supp. BISD 116 (1989)[hereinafter *Semiconductor Case*]. See text at *infra* notes 90-94, and generally Kingery, "The U.S.-Japan Semiconductor Arrangement and the GATT: Operating in a Legal Vacuum," 25 Stanford J. Int'l L. 467 (1989).

¹³ "Japan to Propose Regular Cabinet-Level Meetings to U.S. to Avoid Trade Friction," 7 Int'l Trade Rep. 596 (April 25, 1990).

¹⁴ See *supra* note 11.

¹⁵ Stemming from a proposal by then Prime Minister Nakasone at a January 2, 1985 meeting with President Reagan, these negotiations, which the United States and Japan undertook between 1985 and 1987, resulted in agreements on market access in five commercial sectors: forestry products, telecommunications, medical equipment and pharmaceuticals, electronics, and transportation equipment and automotive parts. See *United States-Japan Relations: The Impact of Negotiated Market Openings; Hearings Before the Subcomms. on Asian and Pacific Affairs and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 100th Cong., 2d Sess. (1989); Congressional Research Service, *The MOSS Talks: Success or Failure?* (1985)(CRS Rept. No. 85-1129E).

continuum. It may be inferred from the international law and practice that the preferable course of conduct is generally viewed to be one of consultation and negotiation, be it a series of informal discussions or the first step in a more formal process designed to adjudicate a claim that international law has been violated.¹⁶

The forum in which parties choose to settle their differences would seem to depend on such factors as the nature of their specific dispute, their attitudes toward disputes of a particular type, their traditional approaches toward dispute settlement,¹⁷ and the nature and history of their own political and economic relationship.¹⁸ As states have traditionally been the subjects of international law, private individuals are generally denied participation in international dispute settlement proceedings, as evidenced, for example, in the GATT and the CFTA.¹⁹ While, as noted above, most international disputes are settled through negotiation, a solution said to be encouraged by the fact that most states expect themselves and others to abide by their international legal obligations,²⁰ and perhaps also because, by its nature, negotiation demands little surrender of sovereignty and, as one commentator has observed, "permits each state maximum control over both the dispute settlement process and outcome,"²¹ the failure or unsuitability of this method often results in the use of a third-party mechanism, be it mediation or conciliation, or recourse to a political body (e.g., the United Nations or the GATT), an arbitral tribunal, or an adjudicatory body such as the International Court of Justice.²²

Mediation and conciliation, two non-coercive forms of dispute settlement, are methods in which "the intervention of a third party aims, not at deciding the quarrel for the disputing parties, but at inducing them to decide it for

¹⁶ W. Bishop, *International Law* 63 (3d ed. 1971)(hereinafter cited as *Bishop*).

¹⁷ See, e.g., J. Jackson, *The World Trading System; Law and Policy of International Economic Relations* 85-88 (1989)(hereinafter cited as *Jackson*)(contrasting "power-oriented" with "rule-oriented" diplomacy).

¹⁸ See generally Bilder, "International Third Party Dispute Settlement," 17 *Denver J. Int'l L. & Pol'y* 471, 486-87 (1989)(hereinafter cited as *Bilder*).

¹⁹ See discussion at *infra* note 52.

²⁰ 1 American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* 338-39 (1987)(hereinafter cited as *Foreign Relations Restatement*).

²¹ *Bilder*, *supra* note 18, at 477.

²² 1 *Foreign Relations Restatement*, *supra* note 20, at 338-39. One commentator notes that "third parties can play an important part in managing, deescalating or damping disputes, even if such efforts do not result in a final resolution of the disputes. That is any enquiry into the role of third parties should appropriately address and encompass their function in 'dispute management and processing,' as well as in 'dispute resolution and settlement.'" *Bilder*, *supra* note 18, at 475.

themselves."²³ In mediation, a political process, the third party takes part in the negotiations to achieve the above-described end or suggests a possible solution to the parties.²⁴ Conciliation, a method that has grown out of the permanent commissions of inquiry developed under the so-called "Bryan Treaties," a series of bilateral conciliation treaties entered into by the United States in the first half of this century,²⁵ entails "the reference of a dispute to a commission of persons whose task is to find the facts and make a report containing recommendations for a settlement, which each party to the dispute remains free to accept or reject as it chooses, without legal obligation and without obloquy for failure to comply with the recommendations."²⁶ Thus, while referral of the dispute to the commission may be binding,²⁷ adherence to its proposals is not. The commission, which may be composed of nationals of the parties to the dispute as well as non-nationals, may in formulating its recommendation rely upon international law or "solely upon considerations of international policy."²⁸ In contrast, settlements recommended in both arbitration, a process similar to conciliation, and adjudication, are generally binding on the parties. In each of these methods a previously agreed-upon body of law, or jurisprudence, is applied to a specific set of facts. In arbitration, however, parties may request an arbitrator to go beyond the law and render an equitable decision, or a decision *ex aequo et bono*, "in which the question of current rights is completely subordinated to the search for a fair and reasonable solution."²⁹

International legal principles regarding dispute settlement generally assume that a party has acted inconsistently with an international legal

²³ Brierly, *The Law of Nations* 373 (6th ed. Waldock 1963).

²⁴ *Id.*; Bishop, *supra* note 16, at 63.

²⁵ *Id.* at 64; 12 M. Whiteman, *Digest of International Law* 948-50 (1971).

²⁶ Bishop, *supra* note 16, at 64.

²⁷ Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate; a Study Prepared for the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess., at 131 (1984)(Comm. Print).

²⁸ Bishop, *supra* note 16, at 64. One commentator notes that this method is useful in disputes "where the main issue are legal, but the parties desire an equitable compromise." Merrills, *International Dispute Settlement* 66 (1984)(also quoted in Bilder, *supra* note 18, at 486)[hereinafter cited as Merrills]. The advantages of this method over its probable alternative, arbitration *ex aequo et bono*, see text at *infra* note 28, derive from two considerations: "First, because of the way conciliation is conducted--through a dialogue with and between the parties --there is no danger of it producing a result that takes the parties completely by surprise, as sometimes happens in legal proceedings. Secondly, a commission's proposals ... are not binding and, if unacceptable, can be rejected. The importance which states attach to retaining control of a dispute ... would appear to be ... relevant here." *Id.*

²⁹ Merrills, *supra* note 28, at 80-81. In such a situation, the arbitrator is siad to exercise a legislative function.

obligation and thus often assume the existence of one or more of the following international agreements: an agreement that may have been breached initially, giving rise to a claim of violation of international law or an international legal obligation; an agreement to negotiate or arbitrate in the event that a certain event occurs, or an *ad hoc* agreement to undertake dispute resolution after a particular dispute has arisen.³⁰ Of interest in the creation of a binational trade dispute mechanism is the reflection of these principles in generally accepted norms regarding international arbitration, a process employed in the United States-Canada Free Trade Agreement. These hold that a state may not be forced to submit to arbitration without its consent; parties may give their consent either by agreeing to arbitrate a particular dispute or by entering into an agreement that authorizes them to submit any dispute or an agreed-upon class of disputes to arbitration.³¹ Thus, parties may agree, for example, to arbitrate disputes that arise out of particular trade agreements or agree to arbitrate a defined class of trade disputes. The matter to be arbitrated, as well as the jurisdiction of the panel is generally set forth in the agreement between the parties, known as a *compromis*.³² Once the decision to arbitrate is made, whether this occurs before or after a dispute arises, a variety of methods may be (and have been) used to establish an arbitral tribunal, to prepare a *compromis* if needed, and to proceed with arbitration in a particular case.³³ While parties intend some arbitral awards to be advisory, most are binding and thus compliance is contemplated.³⁴

Given that the claims that the arbitral body hears are generally based on rights derived from international law or an international agreement, it relies on a jurisprudence, that is, a body or system of law that provides standards and precedents to be applied to the matter at hand. In examining the possibility of a binational dispute settlement mechanism for trade matters, particularly if it is to be conciliatory or arbitral, it is thus necessary to

³⁰ *Foreign Relations Restatement*, *supra* note 20, §§ 901, 902, 904.

³¹ *Id.* § 904, Comment b.

³² *Id.* § 904, Comment c.

³³ *Id.* § 904, Reporters' Notes.

³⁴ *Id.* § 904, Reporters' Note 6. While the specificity and certainty of arbitration may be disadvantageous in particular situations, these characteristics may prove beneficial in others: Arbitration provides the parties to a dispute with the opportunity to obtain a decision from a judge or judges of their own choice. This is important because if governments are to be persuaded to refer disputes to third parties they must have confidence in those who are to give the decision. An arbitral tribunal ... also has the subject matter of the dispute and the criteria for its decision laid down by the parties. Thus another advantage of arbitration is that it can be used to produce a solution to a selected problem and on any agreed basis. Finally arbitration, unlike inquiry and conciliation, results in a decision which is binding. Consequently, provided that no problems of interpretation, nullity, etc., arise, an arbitral award should dispose of the dispute." *Merrills*, *supra* note 28, at 88. See also discussion of pros and cons of U.S.-Japan trade arbitration panel in *Punkte*, *supra* note 7, at 76-80.

consider carefully, along with its procedural aspects, its jurisdictional scope and the specific body or bodies of law that might be applied to the disputes that are referred to it. A dispute settlement mechanism created under a particular trade agreement, such as the GATT or the CFTA, is obviously intended to resolve differences arising from the application or interpretation of the agreement or disputes regarding actions that impair a benefit that one reasonably expects to obtain from adherence to the agreement. As shown below, these agreements establish a set of rules or standards that the parties are obliged to follow; deviations from the norm thus provide the basis for possible complaints. Parties also anticipate that certain trade benefits will flow from participation in the agreements and that those benefits will not be countermanded by any measures, whether they are covered by the agreements or not. The agreements thus create a universe, however limited, within which the propriety or reasonableness of national behavior and expectations may be objectively determined. To this end, some of the dispute settlement proposals mentioned earlier in this paper would require the use of GATT rules, rules of other trade agreements to which the United States and Japan are parties, or other existing standards in the commercial arena.³⁵

Dispute Settlement under the GATT. A useful starting point in the consideration of new dispute settlement techniques is the model provided by the dispute settlement mechanism set forth in the General Agreement on Tariffs and Trade (GATT), a multilateral procedure, akin to conciliation, that is available to the Contracting Parties to the GATT to resolve trade disputes that fall within the Agreement's scope. Disputes may arise from national measures inconsistent with the Agreement's obligations of nondiscriminatory or most-favored-nation (MFN) and national treatment, binding of tariff rates, prohibitions against subsidies and quantitative regulations, and its other standards and requirements, as well as from measures that allegedly impair benefits expected to flow from concessions made under the Agreement. Although forms of dispute settlement or dispute avoidance³⁶ may be found in many GATT Articles, the Agreement's primary dispute settlement provisions are found in Articles XXII and XXIII. The former provides for consultations between parties with respect to any matter affecting the Agreement's operation and allows the Contracting Parties as a whole to consult with a party with respect to any matter which has remained unresolved.³⁷ The latter

³⁵ See, e.g., S. 292, *supra* note 3; Kaplan, *supra* note 1, at 470-71; Punke, *supra* note 7, at 75, 76.

³⁶ See, e.g., Art. XXV providing for joint action by the Contracting Parties, including waivers of GATT obligations.

³⁷ GATT, Art. XXII:1. The mandate for consultation is clear as Professor John Jackson counts some 19 clauses in the GATT requiring parties to consult in particular situations. Jackson, "GATT as an Instrument for the Settlement of Trade Disputes," *Proceedings of the American Society for International Law* 144-46 (April 1967), reprinted in Jackson & Davey, *Legal Problems of International Economic Relations* 333 (2d ed. 1986)[hereinafter cited as *Jackson & Davey*].

sets forth the GATT's formal dispute settlement mechanism, a procedure that begins with consultation and, failing success at this level, continues with the convocation of a panel which will examine the issues at hand and issue a decision that may or may not be adopted by the Contracting Parties as a whole. The concept of nullification and impairment of benefits,³⁸ a term also incorporated in the GATT non-tariff barrier codes negotiated during the Tokyo Round of Multilateral Trade Negotiations³⁹ and in the CFTA,⁴⁰ is used as a vehicle for invoking the Article.

Article XXIII is made available to any Contracting Party who considers that "any benefit accruing to it directly or indirectly under ... [the GATT] is being nullified or impaired or that the attainment of any objective of ... [the GATT] is being impeded as a result of (a) the failure of any other contracting party to carry out its obligations under ...[the GATT], or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of ... [the GATT], or (c) the existence of any other situation."⁴¹ The allegedly injured party, "with a view to the satisfactory adjustment of the matter" may make written representations or proposals to the other party, which is to give "sympathetic consideration" to these suggestions.⁴²

If no resolution is reached "within a reasonable time," the matter may then be referred to the contracting parties, which "shall *promptly* investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate."⁴³ In practice, the GATT has employed

³⁸ While the term "nullification and impairment" generally implies injury, certain GATT cases indicate that *prima facie* nullification and impairment may be found in three situations: breach of a GATT obligation, the use of a domestic subsidy that has the effect of making the domestic product more competitive and causing decreased sales of imports, and the imposition of a quantitative restriction, whether or not it violates the GATT. *Jackson & Davey, supra* note 37, at 351; *Jackson, supra* note 17, at 95. As described by Jackson, "[i]n such cases, the burden of proof that no ... [nullification or impairment] occurred as the result of the breach, subsidy, or quantitative restriction shifted to the country which breached or used those actions. Lacking a clear showing that no ... [nullification or impairment] occurred, the GATT practice assumes that the panel is obligated to make a *prima facie* [nullification or impairment] ruling, usually calling for the offending nation to make its actions conform to the GATT obligation." *Id.*

³⁹ See, e.g., Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Relating to Subsidies and Countervailing Measures), Arts. 8:3, 8:4, 12:3, 13:4.7, GATT, 26th Supp. BISD 56 (1980); Agreement on Government Procurement, Part VII:4., GATT, 26th Supp. BISD 33 (1980).

⁴⁰ CFTA, Art. 1801:1.

⁴¹ GATT, Art. XXIII:1.

⁴² *Id.*

⁴³ *Id.*, Art. XXIII:2 (emphasis added).

panels of from three to five persons from countries not parties to a dispute to undertake investigations and make their recommendations to the contracting parties as a whole.⁴⁴ As the GATT operates by consensus, a party that is the subject of a complaint may block the formation of a panel or the adoption of a panel report, seemingly reflecting the principle that a state may not be forced to arbitrate a dispute or submit itself to the jurisdiction of an international tribunal without its consent. The Contracting Parties generally attempt to persuade a Party to withdraw an offending measure,⁴⁵ but, if circumstances are found to be serious enough to warrant it, contracting parties may authorize a party to suspend the application to any other contracting party of such concessions or other obligations as they determine to be appropriate in the circumstances; if the application of the concession to a contracting party is in fact suspended, that party may withdraw from the GATT.⁴⁶

The procedural vagueness of GATT dispute settlement provisions (its lack of deadlines, for example), the fact that the GATT Contracting Parties operate on the basis of consensus, and the uncertain legal effect of panel reports are factors that have led many to criticize GATT dispute settlement as being ineffective,⁴⁷ a perception that has, for example, inspired the United States Congress to empower, and in some cases, require, the President to act unilaterally to protect United States commercial interests.⁴⁸ A revision of GATT dispute settlement is currently being negotiated in the Uruguay Round of Multilateral Trade Negotiations, with discussions centered on creating deadlines for GATT proceedings, giving complainants the option to choose arbitration, providing an expedited means of selecting panelists, increasing surveillance of the implementation of panel reports, clarifying the legal effect of panel reports, and utilizing several other mechanisms that would give the procedure a somewhat more rule-oriented cast; in their previous negotiating round, GATT members established specific dispute settlement procedures in

⁴⁴ Jackson & Davey, *supra* note 37, at 344.

⁴⁵ Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance: Annex, "Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2), GATT, 26th Supp. BISD 210, 216 (1980)[hereinafter cited as *GATT Understanding* or *GATT Understanding: Annex*].

⁴⁶ GATT, Art. XXIII:2. This approach, that is, the withdrawal of a concession, is treated as a last resort; it has been rarely considered and even more rarely used. *GATT Understanding: Annex, supra* note 45, at 216.

⁴⁷ See, e.g., Jackson, *supra* note 17, at 109-13; Jackson & Davey, *supra* note 37, at 355-56 and references cited at *id.* 355 n.16; Waincymer, "GATT Dispute Settlement: An Agenda for Evaluation and Reform," 14 N.C.J.Int'l L. & Com.Reg. 81, 110-115 (1989).

⁴⁸ Trade Act of 1974, Title III, §§ 301 et seq., 19 U.S.C. §§ 2401 et seq. See, e.g., H.R. Rep. No. 571, 93d Cong., 1st Sess. 66-67 (1973); S. Rep. No. 1298, 93d Cong., 2d Sess. 166-67 (1974).

some of the resulting non-tariff barrier codes⁴⁹ and drafted what has been called a "restatement"⁵⁰ of GATT dispute settlement procedures as had developed in practice.⁵¹

Dispute Settlement under the United States-Canada Free Trade Agreement. While the United States and Canada have provided in the United States-Canada Free Trade Agreement for two types of dispute resolution outside the GATT (one, to resolve disputes involving the Agreement; a second to provide for binational panel review of domestic antidumping and countervailing duty determinations), these mechanisms to some extent rely on GATT concepts and procedures, including, for example, nullification and impairment of benefits, notification and consultation, barring direct participation in proceedings by private parties⁵² and governmental subdivisions. At the same time, some of the problems identified with the GATT dispute settlement article, for example, its non-legalistic approach and the lack of specificity of its procedures, have been addressed in Chapter 18 of the CFTA, which establishes a formalized procedure for resolving disputes regarding the interpretation of the Agreement and disagreements regarding measures that are either inconsistent with the Agreement or diminish the benefits that a Party expects to accrue from it.⁵³ The Agreement establishes two entities: a

⁴⁹ Jackson, *supra* note 17, at 97-98.

⁵⁰ Jackson & Davey, *supra* note 37, at 334.

⁵¹ See GATT Understanding and its Annex, *supra* note 46.

⁵² Under international law, claims and remedies that are resolved under multilateral or bilateral dispute settlement have traditionally been prerogatives of nations, rather than individuals, even though the benefits from many international legal obligations ultimately accrue to private persons. While, in accord with this principle, complaints may be brought to the dispute settlement bodies of the GATT and the CFTA only by the parties to these agreements, national laws may provide a means, generous or not, for private individuals to petition the government to invoke international dispute settlement on their behalf. See Trade Act of 1974, §§ 301 *et seq.*, 19 U.S.C. §§ 2411 *et seq.*; United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, § 408; Jackson, *supra* note 17, at 103-109. Some proposals for a United States-Japan trade arbitration panel would go a step further and grant the panels jurisdiction over actions brought by private citizens. Kaplan, *supra* note 1, at 472; Punke, *supra* note 7, at 75. It is not clear, however, whether a complainant would be required to meet national standards before proceeding internationally or how an arbitral award would be enforced against a domestic company. The extent to which a nation's trade policies would thus be driven by individual complaints might also be considered. Cf. Ehrenhaft, "The 'Judicialization' of Trade Law," 56 Notre Dame Law. 595, 611-13 (1981) (suggesting a bifurcated model for United States trade remedy laws in which, for example, antidumping and countervailing duty cases involving "neither enormous volumes of trade nor sensitive issues in international relations" would be handled through litigation, while large or "policy-sensitive" cases would be subject to "political solutions").

⁵³ See generally Castel, "The Settlement of Disputes under the 1988 Canada-United States Free Trade Agreement," 83 Am. J. Int'l L. 118 (1989) [hereinafter cited as Castel]; Parker, "Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement," 23 J. World

permanent binational trade commission to administer matters connected with the Agreement, and temporary panels to be convened for specific arbitrations. Unlike the dispute settlement procedure set forth in the General Agreement on Tariffs and Trade, Chapter 18 provides for mandatory binding arbitration for safeguards disputes (with the option to choose this procedure in other situations), rosters of panelists chosen on the basis of enumerated criteria, the mandatory creation of a panel upon request of a party, and specific deadlines for the multi-step process created therein. Unlike Chapter 19 of the CFTA, creating binational panels to review national antidumping and countervailing duty determinations and to some extent supplanting national prerogatives regarding judicial review, Chapter 18 was not subject to constitutional objections (generally held to be invalid) claiming, *inter alia*, that panelists would be officers of the United States and thus improperly appointed, that parties' due process rights would be violated by the denial of judicial review in a United States court, and that panels would be exercising purportedly legislative authority, an activity vested solely in Congress.⁵⁴

Article 1801 sets forth the objectives of and the type of disputes covered by the Chapter, exempting disputes involving financial services and review of antidumping and countervailing duty cases. Article 1801:1 establishes that, unless the Parties choose to resolve a dispute using a different procedure, the Chapter applies (1) both to the settlement and avoidance of disputes regarding the interpretation or application of the CFTA and (2) whenever a Party considers that an actual or proposed measure is or would be inconsistent with the obligations of the Agreement or cause nullification or impairment as contemplated in Article 2011.⁵⁵ Where a dispute arises under the CFTA and under the GATT or any agreement negotiated under its auspices, the complaining party may choose either forum; the choice of forum in such a situation is exclusive once the forum's procedures are invoked.⁵⁶

Trade L. 83 (1989).

⁵⁴ See, e.g., *Castel*, *supra* note 53, at 126-27; H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 4, at 4-18 (1988); Christenson & Gambrel, "Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement," 23 Int'l Law. 401 (1989).

⁵⁵ Article 2011 does not define the term "nullification and impairment," establishing instead the remedies that may be invoked by a Party so injured. Thus, "[i]f a Party considers that the application of any measure, whether or not such measure conflicts with the provisions of the ... [CFTA], causes nullification or impairment of any benefit reasonably expected to accrue to that Party, directly or indirectly under the provision of the ... [CFTA], that Party may, with a view to the satisfactory resolution of the matter, invoke the consultation provisions of Article 1804, and, if it considers it appropriate, proceed to dispute settlement pursuant to Articles 1805 and 1807 or, with the consent of the other Party, proceed to arbitration pursuant to Article 1806."

⁵⁶ Arts. 1801:2, 1801:3.

Article 1802 creates a permanent binational body, the Canada-United States Trade Commission, with a mandate "to supervise the implementation of th[e] Agreement, to resolve disputes that may arise over its interpretation and application, to oversee its further elaboration, and to consider any other matter that may affect its operation."⁵⁷ The Commission, which is to convene yearly to review the functioning of the CFTA, establish committees, and devise its own rules and procedures, must make all decisions by consensus.⁵⁸ Its ranking measures are the chief international trade official of each Party or their designees.⁵⁹

The CFTA requires each Party to notify the other in writing of any proposed or actual measure that it considers might materially affect the operation of the Agreement,⁶⁰ and either Party may request consultations with respect to such a measure or any other matter that may affect the FTA's operation, whether or not notification has occurred.⁶¹ If a dispute is not resolved within 30 days of a request for consultation, either Party may request a meeting of the Commission, which is generally required to convene within 10 days and attempt to resolve the dispute promptly.⁶² The Commission is authorized to call on a mutually-acceptable mediator to assist in doing so.⁶³ Further resolution of the dispute might then involve one of two types of *ad hoc* panels: a binding arbitration panel or a general recommendatory one.

If the Commission has not resolved the question within 30 days of the referral, it *must* submit to binding arbitration any disputes involving emergency action taken under Chapter 11,⁶⁴ and *may* do so with respect to any other dispute.⁶⁵ If a Party fails to implement the findings of a binding arbitration panel in a timely manner, and the Parties are unable to agree on appropriate compensation or remedial action, the other Party has the right to

⁵⁷ Art. 1802:1.

⁵⁸ Arts. 1802:3-1802:5.

⁵⁹ Art. 1802:2.

⁶⁰ Art. 1803:1.

⁶¹ Art. 1804:4.

⁶² Art. 1805.

⁶³ Art. 1805:2.

⁶⁴ Similar to the "escape clause" of the GATT (Article XIX), Chapter 11 authorizes temporary measures to counteract import surges resulting from CFTA tariff concessions that cause "serious injury" to an industry of the importing party.

⁶⁵ Art. 1806:1.

suspend the application of equivalent CFTA benefits of the non-complying Party.⁶⁶

A panel may also be convened, upon either Party's request, in the event a dispute referred to the Commission after consultations have failed has not been resolved in 30 days or has not been referred to arbitration.⁶⁷ Withdrawal of benefits by one Party is also authorized under this procedure where the Commission has not reached agreement on a mutually satisfactory resolution and the aggrieved Party alleges an impairment of fundamental rights or benefits.⁶⁸

Article 1807 sets forth detailed procedures for creating the five-member arbitration panels that the Commission may invoke in either of the situations described above and contains procedures and deadlines that must be observed in dispute settlement cases. The Commission is charged with maintaining a roster from which panelists will be chosen.⁶⁹ Panels are to be composed of five members: two Americans, two Canadians, and one chosen jointly, or failing that, by lot.⁷⁰ A panel must establish its rules of procedure, which must assure a right to at least one hearing before the panel as well as the opportunity to provide written submissions and rebuttal arguments.⁷¹ The panel, whose proceedings must be kept confidential, is generally to base its decision on the arguments and submissions of the Parties.⁷²

A panel will have three months to present the Parties with a preliminary fact-finding report, a determination as to whether the disputed measure has an inconsistent or vitiating effect, and any recommendations it may have for resolution of the dispute.⁷³ A Party objecting to the initial fact-finding report is entitled to present its objections to both the Commission and the panel, in which case the panel may consider other views, reconsider its report, and examine the situation further; it must apparently issue a final report within 30 days of providing its initial findings.⁷⁴

⁶⁶ Art. 1806:3.

⁶⁷ Art. 1807:2. See text at *supra* note 65.

⁶⁸ Art. 1807:9.

⁶⁹ Art. 1807:1.

⁷⁰ Art. 1807:3.

⁷¹ Art. 1807:4.

⁷² *Id.*

⁷³ Art. 1807:5.

⁷⁴ Art. 1807:6.

Upon receiving the panel's final report, the Commission must agree on resolving the dispute, and normally do so in a way that will conform with panel recommendations.⁷⁵ Whenever possible, the dispute should be resolved by "nonimplementation" or removal of the offending measure, or if this fails, compensation.⁷⁶ As noted above, in the event that the Commission, within 30 days of receiving the final report, has not agreed on a means of resolving the dispute that is satisfactory to both Parties, and a Party considers that its "fundamental rights or benefits" would be impaired by the existence of the offending measure, that Party may cease to grant the other Party benefits "of equivalent effect" until both resolve the matter at issue.⁷⁷

Finally, the Chapter provides for a means by which either Party may intervene in a domestic judicial or administrative proceeding in which an issue of Agreement interpretation arises.⁷⁸ The CFTA encourages the Parties to agree on any such interpretation before submitting their views to the adjudicating body.⁷⁹

The creation of a binational trade commission and the use of dispute resolution panels in clearly-defined situations imparts a degree of formality and foreseeability to the resolution of disputes that would seem to be lacking in negotiations, mediation, and conciliation, and certainly in agreements simply to discuss differences. While composed of representatives of the parties to a potential dispute, a binational trade commission and the panels created thereunder, though not technically "supranational independent authorities"⁸⁰ might still be viewed as impartial third-party dispute settlement entities to the extent they are "perceived by the disputants as 'external' to the dispute and capable of performing impartially and effectively the role of a third-party."⁸¹ The fact that both parties to the CFTA have agreed to submit to binding arbitration in at least one instance would seem to provide evidence that this perception to some extent exists. In considering the creation of a binational dispute settlement mechanism involving countries other than Canada, however, one might ask whether the third-party approach, possibly including binding determinations, is feasible, given, for example, the political, economic, and

⁷⁵ Art. 1807:8.

⁷⁶ *Id.*

⁷⁷ Art. 1807:9.

⁷⁸ Art. 1807:8.

⁷⁹ *Id.*

⁸⁰ *Castel, supra* note 53, at 120, n.12.

⁸¹ *Bilder, supra* note 18, at 475 (citing the Canada-United States Joint Commission as an example).

cultural makeup of the countries involved, the extent to which parties can realistically adhere to the recommendations of panels, commissions, and the like, and the variety of dispute settlement tools available.⁸²

Multilateral Issues: Relationship of Binational Dispute Settlement to the GATT. Bilateral agreements between GATT parties are often viewed as undermining the multilateral trading system, either because they create a trading relationship outside the GATT or, if they operate under a GATT waiver, create an undesirable tolerance for behavior that is inconsistent with GATT obligations. Not all bilateral agreements violate the GATT, however, and some, such as the CFTA,⁸³ clearly envision a relationship with that Agreement. Moreover, a procedure that proves successfully bilaterally may serve as a model for multilateral application.⁸⁴

Under the CFTA, disputes that simultaneously arise under the CFTA and the GATT or any of its related codes may be heard in either forum at the discretion of the complainant. Thus, the Agreement defers to the dispute settlement provisions of the GATT although it allows an alleged GATT violation to be resolved under the CFTA. This approach would seem to raise the question whether a complaint that involves behavior violative of the GATT must be resolved under the procedures set forth in that Agreement. Where a national law or policy is amended to conform with the GATT as a consequence of a GATT decision, that change must generally be made applicable to all GATT parties under the most-favored-nation principle set forth in Article I. Some derogation from this principle occurs when a free trade area is established in that preferences offered by one member of the group to another or others do not have to be extended to all GATT parties, provided the area fulfills the GATT definition set forth in Article XXIV, requiring, *inter alia*, that the arrangement encompass substantially all trade between the parties. Thus a dispute settlement mechanism may seemingly be created that is unique to that agreement and that supplants GATT procedures. Decisions rendered under that procedure that involved a trade benefit possibly applicable generally may arguably be limited in effect to the other party without violating the GATT.

It is unclear, however, whether a dispute settlement procedure with jurisdiction over matters covered by the GATT but that is not part of a free

⁸² See, e.g., *Bilder*, *supra* note 18, at 497-98.

⁸³ In pursuance of GATT requirements regarding the establishment of customs unions and free trade areas, GATT, Art. XXIV:7, the United States and Canada notified the GATT that they had initialed and signed a free trade agreement and that the agreement had entered into force. GATT, *Review of Developments in the Trading System, October 1987-March 1988*, at 161 (1988); GATT, *Review of Developments in the Trading System, September 1988-February 1989*, at 133 (1989).

⁸⁴ See generally *Parker*, *supra* note 53.

trade arrangement would be compatible with the General Agreement.⁸⁵ Neither the GATT nor its Tokyo Round codes expressly provide that their dispute settlement mechanisms are exclusive. There would of course be no problem with creating a binational forum for matters not covered by these agreements, such as, at least for the time being, trade in services or investment.⁸⁶ Where, however, binational dispute settlement resulted in a decision that gave a preference to one of the parties, in effect discriminating against third countries that are parties to the GATT on a matter covered by the Agreement's MFN principle, the parties would seem to be on less firm footing. In general, the GATT would not seem to be offended by bilateralism *per se*; it is any actual derogation of the MFN obligation that would cause a problem. As one commentator has speculated in the context of a possible agreement between the United States and Canada to supplement the GATT Subsidies Code:

There would seem to be no impediment to a U.S.-Canadian Agreement on joint resolution of disputes over such subjects as what is a subsidy, how it should be measured, how much of a countervailing duty is justified, and so on. If another country expressed interest in a similar agreement, Canada and the United States might both find it awkward to refuse, or indeed to adopt a different interpretation of the same provisions of the particular code. No GATT violation would be charged, however, for failure by either the United States or Canada to enter into a "joint commission agreement with a third country. Again, of course, if a pattern of discrimination could be shown--say it a regional development grant by Canada were found not be countervailable by the joint commission while a similar grant by Italy did lead to imposition of a countervailing duty, the fact that in the first instance the decision was made pursuant to a bilateral agreement would be no defense.⁸⁷

A recent GATT decision appeared to confirm this view of bilateralism in finding no reason to doubt the nondiscriminatory nature of market access provisions of the United States-Japan Semiconductor Arrangement⁸⁸ under which the Japanese government, *inter alia*, agreed to encourage "Japanese producers and users of semiconductors ... to aggressively take advantage of increased market access opportunities in Japan for foreign-based firms which wish to improve their actual sales performance and position," to establish a

⁸⁵ See generally Lowenfeld, "What the GATT Says (Or Does Not Say)," in *Bilateralism, Multilateralism and Canada in U.S. Trade Policy* 55-68 (W. Diebold ed. 1988).

⁸⁶ *Id.* at 60-61.

⁸⁷ Lowenfeld, *supra* note 85, 61-62.

⁸⁸ Arrangement between the Government of Japan and the Government of the United States of America concerning Trade in Semiconductor Products, entered into force Sept. 2, 1986, 25 Int'l Legal Materials 1409 (1986)[hereinafter cited as *Semiconductor Arrangement*].

organization to assist foreign semiconductor producers attempting to penetrate the Japanese market, and to promote "long-term relationships between Japanese semiconductor purchasers and foreign producers, including joint product development with Japanese customers."⁸⁹ The EC had argued that four factors "should lead to a *prima facie* conclusion that the Government of Japan had created a situation in which Japanese importers and users of semi-conductors were under strong political and administrative pressure which, even if indirect and implicit, could not but have discriminatory effects contrary to" the MFN obligation set forth in GATT Article I: (1) Japan had in fact been granting preferential treatment to United States producers and exporters under a government-encouraged "Buy America" policy; (2) the findings of a report by the Semiconductor Industry Association had predicted an increased United States market share, an expectation recognized by the Japanese Government when it signed the agreement; (3) the agreement had used the term "foreign capital-affiliated" company in a way that could refer only to a United States firm, and (4) the agreement generally tended to address issues bilaterally.⁹⁰ The GATT panel found that, given the non-discriminatory language of the Arrangement and the fact that there was no evidence of discriminatory application, Article I was not violated.⁹¹ Rejecting the EEC's argument that bilateralism was inherently preferential, the Panel noted that bilateral agreements did exist that provided for non-discriminatory treatment.⁹²

Elements of a Trade Dispute Settlement Mechanism. In conclusion, an examination of the general aspects of international dispute settlement as well as the specific approaches of the GATT and the CFTA would seem to suggest a number of questions that must be addressed in the formulation of a binational or international dispute settlement mechanism:

What is the goal of binational trade dispute settlement and what can reasonably be expected to be achieved from any one method or institution?

Will the entity created be a permanent or temporary structure? Who will be its members? Will the entities be comprised only of nationals or will non-nationals be involved? How will they be chosen?

Will the procedure be tied to the obligations of a particular trade agreement? If not, which disputes would fall within the

⁸⁹ *Semiconductor Arrangement*, *supra* note 88, Art. I, 25 Int'l Legal Mat. 1409-10.

⁹⁰ *Semiconductor Case*, *supra* note 12, at 135-36.

⁹¹ *Id.* at 160-61.

⁹² *Id.* at 160.

jurisdiction of the body? What body of law will be applied to the resolution of disputes?

To what extent will the mechanism be aimed toward dispute avoidance? If a goal, how is it best achieved?

Will the parties to the dispute be governments or private parties?

Will a party have the option of choosing the binational mechanism or GATT dispute settlement? Will the choice of one preclude the other? Will one be preliminary to the other?

What procedure will be followed once a dispute is submitted? Will the panel operate by consensus or will it be rule-oriented?

Will decisions be binding, precedential? How will they be enforced?

Will any favorable treatment granted one party to the other as the result of a decision have to be accorded other trading partners by virtue of MFN obligations? Will such a body require a GATT waiver?

Are there any national constitutional problems with the establishment of such an entity?

The answers to many of these questions must ultimately be determined by the parties negotiating the establishment of a dispute settlement body; some may in fact be answered in arriving at the mutual decision to negotiate. As noted above, the nature of the disputes to be resolved, the traditional approaches of the parties to dispute settlement and to the diminution of sovereignty that may occur thereby, the importance of creating a permanent forum simply for discussion, and, more generally, the historical relationship of the parties and the cultural similarities and dissimilarities between them are among the factors that will influence the shape that the body would eventually take. It is perhaps from this bi-cultural perspective that the experiences derived from dispute settlement under the GATT and the CFTA may be most beneficially examined.

Additional discussion of international dispute settlement generally and, with respect to the United States and Japan in particular, may be found in the following materials, which we have enclosed for your further reference:

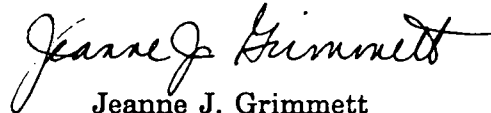
Kaplan, "The Use of Arbitration to Resolve Market Access Disputes," 22 Cornell Int'l L. J. 469 (1989)

Punke, "Structural Impediments to United States-Japanese Trade: The Collision of Culture and Law," 23 Cornell Int'l L. J. 55 (1990)

Castel, J.-G. "The Settlement of Disputes under the 1988 Canada-United States Free Trade Agreement," 83 Am. J. Int'l L. 118 (1989)

Bilder, "International Third Party Dispute Settlement," 17 Denver J. Int'l L. & Pol'y 471 (1989).

We hope that this discussion will be helpful to you and that you will call on us if you have any additional questions.

A handwritten signature in cursive script, reading "Jeanne J. Grimmett".

Jeanne J. Grimmett
Legislative Attorney
American Law Division

CRS Report for Congress

Dispute Settlement Provisions In The United States-Canada Free Trade Agreement

Jeanne Jagelski
Kenneth R. Thomas
Legislative Attorneys
American Law Division

June 10, 1988



DISPUTE SETTLEMENT PROVISIONS IN THE UNITED STATES-CANADA FREE TRADE AGREEMENT

SUMMARY

Chapters 18 and 19 of the United States-Canada Free Trade Agreement (FTA/Agreement) establish both general dispute settlement procedures to resolve questions that may arise under the FTA and a binational panel system to review final antidumping and countervailing duty determinations issued by United States and Canadian agencies. Constitutional arguments have been advanced against the creation and use of the latter, which, when requested, is intended to replace domestic judicial review.

Except for financial services issues and the review of final antidumping and countervailing duty determinations, Chapter 18 is intended to apply to all disputes involving the FTA, including situations where a Party considers that a measure of the other Party is inconsistent with FTA obligations or vitiates FTA benefits, and creates a United States-Canada Trade Commission to achieve the goals of the Chapter. Disputes that are not resolved through consultations may be referred to binding arbitration or submitted to a recommendatory panel, each operating under prescribed deadlines and procedures. Where a Party fails to implement the recommendation of an arbitration panel, or the recommendatory panel system fails to produce mutually-acceptable results, an offended Party may suspend FTA benefits accruing the other.

Chapter 19 establishes a system of five-member binational panels to review final antidumping and countervailing duty determinations issued by United States and Canadian agencies in cases involving the goods of either Party. When requested, a panel is intended to replace domestic judicial review and preclude appeal of both final determinations and panel decisions. United States implementing legislation would, however, allow for constitutional challenges of the panel system as an institution and of issues raised in the facts of specific antidumping or countervailing duty cases. The Chapter also establishes certain rights as to existing laws and their modification and provides for a small Secretariat to facilitate the operation of the Chapter and the work of panels. The Chapter contemplates as well the development of a new system of rules to govern the application of antidumping and countervailing duty laws to the Parties' trade, with the failure to implement a new regime within stated time limits a cause for either Party to terminate the FTA.

Constitutional challenges to the binational panel system hold that this type of dispute settlement violates the Appointments Clause of the United States Constitution, creates what are in effect Article III judges who at the same time lack the protections guaranteed them under that Article, and by precluding judicial review in a federal court, denies United States claimants due process protections constitutionally owed them. International legal precedents regarding international claims, the fact that the delegation of power to the binational panelists does not appear to enhance the power of one branch of the United States Government over the other, and the broad constitutional role of Congress over the judiciary and the adjudication of federally-created rights would seem to weigh heavily in favor of the constitutionality of the provision.

CONTENTS

I.	INTRODUCTION	1
II.	CHAPTER 18: GENERAL DISPUTE RESOLUTION	2
III.	CHAPTER 19: BINATIONAL DISPUTE SETTLEMENT IN ANTIDUMPING AND COUNTERVAILING DUTY CASES	7
IV.	CONSTITUTIONAL ISSUES REGARDING THE FTA BINATIONAL PANEL SYSTEM	13

DISPUTE SETTLEMENT PROVISIONS
IN THE UNITED STATES-CANADA FREE TRADE AGREEMENT

I. INTRODUCTION

This report describes the two chapters of the United States-Canada Free Trade Agreement (FTA/Agreement) that establish mechanisms for settling trade disputes between the Parties, and examines the constitutional arguments that have been advanced against the creation and use of a panel process for the review of antidumping and countervailing duty cases, as provided for in the second of those chapters.

Chapter 18, which in addition to creating the institutional means for managing the FTA, provides for the use of arbitration and ad hoc panels to resolve disputes that may arise with respect to most matters covered by the Agreement. Chapter 19 takes dispute resolution a step further in establishing a binational panel mechanism that, when requested, will generally replace judicial review of final antidumping and countervailing duty determinations issued by agencies of the United States and Canada. The combined effect of these chapters is to institute three types of dispute settlement: binding review of antidumping and countervailing duty determinations, binding arbitration, and resolution through panel recommendations.

While the use of panels to effect binding arbitration and to issue recommendations has seemed to be relatively noncontroversial, constitutional questions have been raised with respect to the use of a binational panel to review determinations made by administrative agencies of the United States Government. Arguments have been made that this type of dispute settlement mechanism violates the Appointments Clause of the United States Constitution,

creates what are in effect Article III judges who at the same time lack the protections guaranteed them under that Article, and, by precluding judicial review in a federal court, denies United States claimants due process protections constitutionally owed them. In general it would seem that the panel process will withstand these constitutional challenges.

II. CHAPTER 18: GENERAL DISPUTE SETTLEMENT

Chapter 18 of the FTA shapes the resolution of disputes that may arise under the Agreement into a multi-tiered process. In providing for notification and consultation, and failing that, the invocation of an institutional mechanism of the Agreement, the FTA may be said to model itself after the dispute settlement procedures of the General Agreement on Tariffs and Trade (GATT). At the same time, the FTA sets forth specific deadlines and detailed panel procedures that give the process a greater degree of formality and, it would seem, predictability.¹ As shown below, the Agreement allows a complaining Party unilaterally to withdraw FTA benefits accruing to the other Party in the event that a dispute is not resolved through the panel process.²

Except for issues dealing with financial services and antidumping and countervailing duty laws, and unless the Parties decide otherwise in a particular case, Chapter 18 is intended to apply to the avoidance and settlement of all disputes regarding the interpretation or application of the FTA and to situations where a Party considers that a measure of the other Party

¹ See infra note 4 for discussion of dispute settlement under the GATT.

² Under GATT Article XXIII and the Subsidies Code, see infra note 4, the withdrawal of concessions or the use of countermeasures must be authorized, respectively, by the Contracting Parties to the Agreement or the Committee on Subsidies and Countervailing Measures established by the Code.

is inconsistent with FTA obligations or nullifies or impairs FTA benefits.³ A Party may choose to seek relief before the General Agreement on Tariffs and Trade (GATT)⁴ in the event an FTA matter arises simultaneously under the General Agreement, but once dispute settlement is initiated in either forum, no other procedure may be used.⁵

The United States-Canada Trade Commission (Commission) established by Chapter 18 is charged with supervising the implementation of the FTA, resolving disputes that may arise over its interpretation and application (including invoking arbitration panels), overseeing its further elaboration, and considering any other matter that may affect the way the FTA operates.⁶ The Commission, whose ranking members will be the chief international trade

³ Art. 1801:1.

⁴ See, e.g., GATT, Arts. XXII (consultation) and XXIII (nullification or impairment of benefits). These provisions establish a general framework for dispute settlement, but do not mandate any specific procedures or deadlines for action by the GATT. This procedural vagueness, as well as the uncertain legal effect of GATT panels reports and Contracting Party decisions on them, has often been criticized as being less than beneficial to those who invoke GATT dispute settlement. See, e.g., H.R. Rep. No. 571, 93d Cong., 1st Sess. 66-67 (1973); S. Rep. No. 1298, 93d Cong., 2d Sess. 164-65 (1974); Jackson, "The Crumbling Institutions of the Liberal Trade System," 12 J. World Trade L. 97 (1978); and, generally, Hudec, "GATT Dispute Settlement After the Tokyo Round: an Unfinished Business," 13 Cornell Int'l L. J. 146 (1980) [hereinafter cited as Hudec]. The GATT Subsidies Code negotiated during the Tokyo Round of Multilateral Trade Negotiations, GATT, BISD, 26th Supp. 56 (1980), attempts to ameliorate this situation where complaints as to export and certain domestic subsidies are involved by providing for a more detailed system that to some extent serves as a rough model for the FTA. See Hudec, *supra*, 173-77. Other Tokyo Round agreements also contain dispute settlement provisions that are generally less formal than those of the Subsidies Code. *Id.* 174-75; Jackson, GATT Machinery and the Tokyo Round Agreements, in *Trade Policy in the 1980's* 185-87 (W. Cline ed. 1983), reprinted in J. Jackson & W. Davey, *Legal Problems of International Economic Relations* 335-36 (1986).

⁵ Art. 1801:2, 3.

⁶ Art. 1802:1.

official of each Party or their designees, is to meet at least once a year to review the functioning of the Agreement.⁷

The FTA requires each Party to notify the other in writing of any proposed or actual measure that it considers might materially affect the operation of the FTA,⁸ and either Party may request consultations with respect to such a measure or any other matter that may affect the FTA's operation, whether or not notification has occurred.⁹ If a dispute is not resolved within 30 days of a request for consultation, either Party may request a meeting of the Commission, which is generally required to convene within ten days hence and attempt to resolve the dispute promptly.¹⁰ The Commission is authorized to call on a mutually-acceptable mediator to assist in doing so.¹¹ Further resolution of the dispute might then involve one of two types of ad hoc panels--a binding arbitration panel or a general recommendatory one.

If the Commission has not resolved the question within 30 days of the referral, it must submit to binding arbitration any disputes involving emergency action taken under Chapter 11, and may do so with respect to any other dispute.¹² If a Party fails to implement the findings of a binding arbitration panel in a timely manner, and the Parties are unable to agree on appropriate compensation or remedial action, the other Party has the right to

⁷ Art. 1802:2, 3.

⁸ Art. 1803:1.

⁹ Art. 1804.

¹⁰ Art. 1805.

¹¹ Art. 1805:2.

¹² Art. 1806:1.

suspend the application of equivalent FTA benefits to the non-complying Party.¹³

A panel may also be convened, upon either Party's request, in the event a dispute referred to the Commission after consultations have failed has not been resolved in 30 days or has not been referred to arbitration.¹⁴ Withdrawal of benefits by one Party is also authorized under this procedure where the Commission has not reached agreement on a mutually satisfactory resolution and the aggrieved Party alleges an impairment of fundamental rights or benefits.¹⁵

Article 1807 sets forth detailed procedures for creating the five-member arbitration panels that the Commission may invoke in either of the situations described above and contains procedures and deadlines that must be observed in dispute settlement cases. While the FTA, under Article 1806:2, requires that arbitration panels are generally to be established and function consistently with Articles 1807:1 (rosters), 1807:3 (composition of panels), and 1807:4 (rules of procedure), the Agreement does not expressly state that an arbitration panel must comply with the deadlines set forth in the remaining provisions of Article 1807. In addition, it would seem that under Article 1806:3 the decision of an arbitration panel is not subject to further Commission action as is apparently contemplated in general panel proceedings.¹⁶

The Commission is charged with maintaining a roster from which panelists will be chosen.¹⁷ Panels are to be composed of five members: two Americans,

¹³ Art. 1806:3.

¹⁴ Art. 1807:2. See text at supra note 12.

¹⁵ Art. 1807:9.

¹⁶ Art. 1807:8.

¹⁷ Art. 1807:1.

two Canadians, and one chosen jointly, or failing that, by lot.¹⁸ A panel must establish its rules of procedure, which must assure a right to at least one hearing before the panel as well as the opportunity to provide written submissions and rebuttal arguments.¹⁹ The panel, whose proceedings must be kept confidential, is generally to base its decision on the arguments and submissions of the Parties.²⁰

A panel will have three months to present the Parties with a preliminary fact-finding report, a determination as to whether the disputed measure has an inconsistent or vitiating effect, and any recommendations it may have for resolution of the dispute.²¹ A Party objecting to the initial fact-finding report is entitled to present its objections to both the Commission and the panel, in which case the panel may consider other views, reconsider its report, and examine the situation further; it must apparently issue a final report within 30 days of providing its initial findings.²²

Upon receiving the panel's final report, the Commission must agree on resolving the dispute, and normally do so in a way that will conform with panel recommendations.²³ Whenever possible, the dispute should be resolved by "nonimplementation" or removal of the offending measure, or if this fails, compensation.²⁴ As noted above, in the event that the Commission, within 30

¹⁸ Art. 1807:3.

¹⁹ Art. 1807:4.

²⁰ Id.

²¹ Art. 1807:5.

²² Art. 1807:6.

²³ Art. 1807:8.

²⁴ Id.

days of receiving the final report, has not agreed on a means of resolving the dispute that is satisfactory to both Parties, and a Party considers that its "fundamental rights or benefits" would be impaired by the existence of the offending measure, that Party may cease to grant the other Party benefits "of equivalent effect" until both resolve the matter at issue.²⁵

Finally, the Chapter provides for a means by which either Party may intervene in a domestic judicial or administrative proceeding in which an issue of Agreement interpretation arises.²⁶ The FTA encourages the Parties to agree on any such interpretation before submitting their views to the adjudicating body.²⁷

III. CHAPTER 19; BINATIONAL DISPUTE SETTLEMENT IN ANTIDUMPING AND COUNTERVAILING DUTY CASES

Chapter 19 sets forth provisions for the creation and use of binational panels to review final administrative determinations in antidumping and countervailing duty cases involving United States and Canadian goods. It also establishes certain rights as to existing laws and their modification and provides for a Secretariat to facilitate the operation of the Chapter and the work of panels. The Chapter also contemplates the development of a new system of rules to govern the application of antidumping and countervailing duty laws to United States and Canadian trade.

In agreeing to the panel mechanism, the United States and Canada have retained the right to apply their antidumping and countervailing duty laws to

²⁵ Art. 1807:9.

²⁶ Art. 1807:8.

²⁷ Id.

each other's imports, as well as the right to modify these laws, provided that amendments applicable to the other Party are expressly stated in the amending statute, the other Party is notified and given the opportunity to consult, and the amendments are consistent with both the GATT and its Antidumping and Subsidies Codes and the "object and purpose" of the FTA and Chapter 19.²⁸ This end is described as having the dual aspect of progressive trade liberalization and the effective discipline of unfair trade practices.²⁹ Amendments to a Party's antidumping and countervailing duty laws may be referred to a panel for a declaratory opinion as to their conformity with the GATT and the FTA or earlier panel decisions.³⁰ Panel procedures, which are similar to those of the general recommendatory panels provided for in Chapter 18, are set forth in Annex 1903.2. Any panel recommendation as to remedying a non-conformity must be immediately followed by 90 days of consultations; if remedial legislation is not enacted within nine months after the end of this period, or no other agreement is reached, the requesting Party may "take comparable legislative or equivalent executive action" or terminate the Agreement upon 60-day written notice to the other Party.³¹

The heart of Chapter 19 would appear to be Article 1904, which provides for binational panel review of prospective final antidumping and countervailing duty determinations to determine whether they accord with the antidumping or countervailing duty law of the importing Party. While this procedure is

²⁸ Art. 1902.

²⁹ Art. 1902:2(d)(ii).

³⁰ Art. 1903:1.

³¹ Art. 1903:3.

intended to replace judicial review of final antidumping and countervailing determinations,³² it is not automatic and will be available only upon request.³³ Once chosen, however, panel review is to preclude appeal in domestic courts of both final determinations and panel decisions.³⁴ The Chapter is inapplicable 1) where neither Party seeks panel review,³⁵ 2) where a revised final determination is issued as a result of judicial review of a final determination that was not the subject of panel review (that is, the former may not be treated as a new final determination for purposes of the Chapter), or 3) where a final determination is issued as a result of judicial review that was initiated before the FTA entered into force.³⁶ The Parties are charged with amending their domestic laws to achieve specific ends related to the successful functioning of the Chapter.³⁷

³² Art. 1904:1.

³³ Art. 1904:2.

³⁴ Art. 1904:11.

³⁵ See text at infra notes 43-47.

³⁶ Art. 1904:12. Proposed United States implementing legislation provides that judicial review is also available in antidumping and countervailing cases that involve issues of "the constitutionality of the binational dispute settlement system or its application to a particular determination" and allows such constitutional issues to be reviewed on a two-track system. General challenges that any provision or amendment in the legislation implementing the binational panel violates the Constitution are to be brought before three-judge panels of the United States Court of Appeals for the District of Columbia Circuit, and are reviewable by appeal directly to the United States Supreme Court. Issues raised in connection with the facts of a specific antidumping or countervailing duty determination will be assigned to a three-judge panel of the Court of International Trade. Interested parties may file a summons and complaint within 30 days after binational panel review is completed, with frivolous claims subject to dismissal and sanctions. See House Comm. on Ways and Means, 100th Cong., 2d Sess., Background and Summary of United States-Canada Free Trade Implementing Legislation 38-39 (Comm. Print 1988)[hereinafter cited as FTA Committee Print].

³⁷ Art. 1904:15.

Where United States law is concerned, "final determinations" are defined in Article 1911 to include the following: final affirmative and negative International Trade Commission (ITC) and Department of Commerce (DOC) determinations as to injury and the existence of subsidies and sales at less than fair value (including any negative part of an affirmative final determination, and vice versa), determinations related to administrative reviews of existing duty orders under 19 U.S.C. § 1675, ITC determinations not to review a determination based on changed circumstances under 19 U.S.C. § 1675(b), and ITC and DOC determinations as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

A panel is apparently intended to review a disputed determination as would a court and, in general, panel proceedings are to resemble judicial ones.³⁸ In addition to specific statutory standards, a panel must apply "the general legal principles that a court of the importing Party would ... apply" (including "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies," see Art. 1911) to a review of the determination at issue.³⁹ With respect to the former, United States determinations will be measured against the standards set forth in 19 U.S.C. § 1516a(b)(1)(B) ("unsupported by substantial evidence on the record, or otherwise not in accordance with law"), except that an "arbitrary and capricious" standard will be used to examine International Trade Commission (ITC) determinations not to initiate administrative reviews because of changed

³⁸ See Arts. 1904:2, 3, 14; 1911.

³⁹ Art. 1904:3.

circumstances.⁴⁰ Rules of procedure are to be drawn up, generally based on judicial rules of appellate procedure and containing specific deadlines aimed at producing final determinations within 315 days of the date on which a panel is requested.⁴¹

Panels are to be chosen from a roster of 25 Americans and 25 Canadians according to procedures set forth in Annex 1901.2. Composed of five members, one of whom will be appointed chairman,⁴² the panels will be subject to codes of conduct and required to sign protective orders for proprietary business and other privileged information, with violations subject to domestic sanctions. Panel decisions will be by majority vote, based on the votes of all panel members.

Briefly, either Party may request panel review and must do so upon the request of a person who would otherwise be entitled to judicial review.⁴³ The request must be made in writing to the other Party generally within 30 days of the official publication of the final determination; the failure to request a panel within this time permanently precludes panel review.⁴⁴ A Party or other person who chooses to commence judicial review must be required under domestic law to notify the Parties or other persons entitled to commence judicial review

⁴⁰ Arts. 1904:4, 1911.

⁴¹ Art. 1904:14.

⁴² A panel, a majority of whose members are to be lawyers ordinarily chosen from the roster, is to be composed of two Americans appointed by the United States, two Canadians appointed by Canada, and a fifth member chosen jointly, or, if needed, by the four other panelists or by lot. The FTA allows a Party to exercise four peremptory challenges to the other's choices. Once a panel is chosen, the panelists must appoint a chairman from their number. Annex 1901.2:2, 3, 4.

⁴³ Art. 1904:4.

⁴⁴ Id.

of this intent no later than ten days before the latest date on which a panel may be requested.⁴⁵ Thus, if the notified Party or individual then requests a panel, judicial review would seem to be precluded in that case.⁴⁶ A Party may not allow judicial review procedures to commence before the period for requesting a panel has ended.⁴⁷

Both the agency issuing the final determination and any party that would have standing to appear in a domestic judicial review proceeding have the right to appear and be represented by counsel before the panel.⁴⁸ The panel may uphold a final determination or remand it, with a deadline, "for action not inconsistent with the panel's decision."⁴⁹ A panel decision is intended to be "binding on the Parties with respect to the particular matter between the Parties that is before the panel."⁵⁰ An extraordinary challenge procedure is available where a Party alleges that the panel or one of its members may have committed legal or ethical improprieties, or acted beyond the scope of their legal mandate.⁵¹

Aside from panel review, Chapter 19 also envisions the development, through a Working Group, of a substitute system of Canadian and American rules to govern the imposition of antidumping and countervailing duties where the

⁴⁵ Art. 1904:15(g)(ii).

⁴⁶ See Art. 1904:11.

⁴⁷ Art. 1904:15(g)(i).

⁴⁸ Art. 1904:7.

⁴⁹ Art. 1904:8.

⁵⁰ Art. 1904:9.

⁵¹ Art. 1904:13, Annex 1904:13.

Parties' bilateral trade is involved.⁵² Chapter 19 will be in effect for five years pending the creation of the new regime, with the period extendable for two years; failure to implement a new system at the end of this time will entitle either Party to terminate the entire FTA on six-month notice.⁵³

IV. CONSTITUTIONAL ISSUES REGARDING THE FTA BINATIONAL PANEL SYSTEM

The establishment of a binational panel system which will review decisions made by administrative agencies of the United States government regarding antidumping and countervailing duties raises a number of constitutional issues. Three arguments which have been considered by various commentators with respect to the binational panels include: 1) whether the provisions of the FTA providing that Canada shall appoint at least two members of the binational panels is a violation of the Appointments Clause of the Constitution, which specifies that "[o]fficers of the United States" are to be appointed by the President and approved by the Senate; 2) whether the binational panels are exercising the "judicial power" of the United States, and thus whether the panelists' positions lack the guarantees that enable an officer to exercise judicial power under Article III of the Constitution, namely lifetime tenure and security of compensation from diminishment; and 3) whether the failure of

⁵² Art. 1906, 1907. The implementing legislation provides for domestic trade relief while the Working Group undertakes its work. Any United States industry having reason to believe it "(1) faces subsidized Canadian competition, and (2) is likely to experience a deterioration of its competitive position before the Working Group develops more effective rules and disciplines concerning the use of government subsidies" may request the United States Trade Representative to determine whether there is a "reasonable likelihood" that these situations exist. The legislation sets forth a number of actions that the Executive Branch may take in appropriate cases, including use of retaliatory authority under § 301 of the Trade Act. FTA Committee Print, supra note 36, at 42-43.

⁵³ Id.

the FTA to provide for judicial review of the decisions of the binational panels by a United States Article III court unconstitutionally precludes the possibility of the cases being heard in a United States federal court, resulting in a denial of due process.

Although United States legislation implementing an agreement with a foreign nation is subject to the constraints of the Constitution,⁵⁴ the courts have shown deference to legislation which addresses matters of international concern.⁵⁵ One such area of international concern is the settlement of claims by United States citizens against other nations or nationals of other countries. Throughout its history, the United States has sought to settle such claims through international negotiations and the establishment of international tribunals. Under long-standing principles, a claim based upon an international law violation is held to be one of the nation of which the claimant is a citizen, and not one of the claimant himself. Consequently, a United States citizen's claims, which are in effect directed against the United States, can generally be extinguished in part or entirely by the United States; further Congress may preclude judicial review based on sovereign immunity principles.⁵⁶ Any constitutional arguments against the FTA should be viewed in the context of these considerations and in recognition of the expansive powers of the Congress and the Executive in the area of foreign policy.

Under Article II, §2, cl. 2 of the Constitution, "[o]fficers of the United States," a term which includes those persons who exercise significant authority

⁵⁴ Reid v. Covert, 354 U.S. 1, 16 (1957).

⁵⁵ Missouri v. Holland, 252 U.S. 416 (1920).

⁵⁶ See Dames and Moore v. Regan, 453 U.S. 654 (1981)(upholding United States-Iranian claims settlement agreements).

pursuant to the law of the United States, must be appointed to office in accordance with the requirements of the clause.⁵⁷ This provision, referred to as the Appointments Clause, grants the President the power to appoint persons to offices established by law, where the appointments have not been otherwise provided for in the Constitution, only by and with the advice and consent of the Senate. In addition, the Congress may grant authority to the President, the courts, or heads of departments to appoint "inferior officers" without the advice and consent of the Senate. The FTA, however, requires that at least two of the panelists be chosen by Canada, impliedly without approval of the United States Executive Branch or Congress, a situation that would arguably preclude these appointments from being made in conformity with the requirements of the Appointments Clause.

For a variety of reasons, however, the requirements of the Appointments Clause appear inapplicable to the binational panelists. The Appointments Clause has generally not been interpreted to require that all persons who execute the laws of the United States be appointed by the President and approved by the Senate, or that the appointment power for such persons must reside in the Executive Branch. For example, there is precedent for Congress to assign the enforcement authority for federal laws to persons appointed or elected by non-federal bodies, such as the numerous statutes where state officers are called upon to enforce federal law.⁵⁸ The reason that such delegation is not a violation of the Constitution is that, presuming the function of the Appointments Clause is to maintain the separation of powers

⁵⁷ Buckley v. Valeo, 424 U.S. 1, 109-143 (1976).

⁵⁸ See Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545 (1925).

between the Executive Branch and the Congress, the delegation of such authority to state governments does not increase the power of one branch of the government at the expense of another.⁵⁹ As the legislation implementing the binational panels under the FTA would appear to delegate the authority to execute United States laws to an international body not controlled by either branch, the creation of the binational panels does not appear to enhance the power of one branch over another, and thus would not be prohibited by the Appointments Clause.

In addition, the premise that the binational panels will enforce domestic law may be no more than appearance. Although the panels are charged with making decisions in accordance with domestic law, they will do so pursuant to an international agreement. As domestic law is thus, in effect, incorporated into the binational agreement, the binational panels will apparently act not as an extension of the United States government, but as international bodies enforcing the FTA. Consequently, it can be argued that the FTA does not confer executive authority on the binational panels, but instead establishes a purely international legal structure.

The argument that the creation of binational panels improperly vests adjudicatory powers in judges who do not enjoy the attributes of judges appointed under Article III, §1 of the Constitution, would also appear to be diminished by the arguments noted above. In addition, the Supreme Court has long allowed Congress to create tribunals which engage in judicial activities without affording the judges of such tribunals the attributes of Article III

⁵⁹ CFTC v. Schor, 106 S.Ct. 3245 (1986). Conversely, Congress would be prevented by the Appointments Clause from placing the power to execute laws into the hands of an authority under congressional control. Bowsher v. Synar, 106 S. Ct. 3181 (1986).

judges, such as lifetime tenure and compensation security. For example, "Article I" courts, so named because they are created by Congress in the exercise of its Article I legislative powers, include the adjudicatory bodies contained in many modern administrative agencies. The constitutionality of these bodies is well established, and, to the extent that the binational panels may be viewed in this way, there is little likelihood that a successful constitutional challenge can be made to the FTA on this basis.

The related, but separate question of whether due process requires that parties to antidumping and countervailing duty cases must be afforded some recourse to an Article III court, is obviated to some degree by the proposed language of the House Committee on Ways and Means Committee Draft Implementing Proposal, which would allow Article III judicial review of constitutional issues regarding the binational dispute settlement system, or its application to a particular determination.⁶⁰ Many matters which involve the application of legal standards to a set of facts in such a way as to affect private interests, but which do not address constitutional issues, are decided by agencies with limited or no review by Article III courts.⁶¹

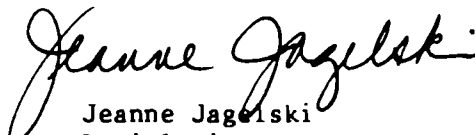
The consensus of many scholars and judges, although not all, is that as the Constitution created only a Supreme Court, appellate jurisdiction was left entirely to the Congress' discretion.⁶² In addition, any lower courts that

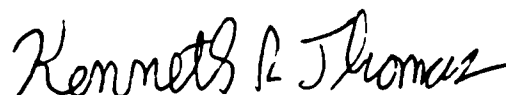
⁶⁰ FTA Committee Print, supra note 36, at 38-39.

⁶¹ Thomas v. Union Carbide Agriculture Products Co., 473 U.S. 568, 583 (1985). See e.g. Export Administration Act §13, 50 U.S.C. App. §2412(e)(Supp. III 1985) ("The Secretary's written decision [regarding an administratively-reviewed export license denial] shall be final and is not subject to judicial review").

⁶² The Constitution of the United States: Analysis and Interpretation, prepared by the Congressional Research Service, S. Doc. No. 16, 99th Cong., 1st Sess. 796 (1987).

Congress chose to create could be conferred such original and appellate jurisdiction as the Congress desired. In general, the cases have held that when Congress creates a right or confers a benefit, as it apparently did in providing for the present system of antidumping and countervailing duties, it may determine how the right or benefit is to be administered, and may deny judicial review of the administrative determinations.⁶³ Again, as the final review of antidumping and countervailing duty cases will lie in an independent body, there appears to be little possibility that either branch has usurped power in derogation of separation of powers principles.


Jeanne Jagelski
Legislative Attorney


Kenneth R. Thomas
Legislative Attorney
American Law Division

⁶³ Switchmen's Union v. National Mediation Board, 320 U.S. 297, 301 (1943). In Switchmen's, the Court stated that "[a]ll constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." Id.; see also Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 80-81 (1982).