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Articles

The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement

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Introduction

International trade law has lived the four decades since its curious birth as a legal stepchild, largely unembraced by its sibling fields of public international law, domestic administrative law, and private commercial law. Ironically, trade law owes much of its intellectual isolation to its topical richness. Exclusively inhabiting no single domain, it straddles the borders of public and private law, international and domestic law, and law and economics. International trade law cuts across these domains because the international trade system operates at not one, but three discrete legal levels: the level of the private trade transaction, the level of national governmental regulation, and the level of international intergovernmental regulation. Each of these levels is governed by different bodies of legal doctrine and is shaped by the interaction of different institutional players. Thus, as in a game of three-dimensional chess, con-

1. The General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3 (Part 5), T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT], spawned the modern law of international trade. The GATT was never designed to function either as a comprehensive constitution for world trade law or as the central multilateral organization for coordinating national trade policies. Rather, national leaders intended the GATT to serve merely as a subsidiary agreement under the charter of the so-called International Trade Organization (ITO). The U.S. Congress persistently refused to ratify the ITO's charter, however, leaving the GATT by default as both the focal international trade law accord and the central international trade organization. See J. Jackson & W. Davey, Legal Problems of International Economic Relations 293-96 (2d ed. 1986).

2. For two recent casebooks exploring each of these three levels of international trade law, see generally J. Jackson & W. Davey, supra note 1, and J. Barton & B. Fisher, International Trade and Investment: Regulating International Business (1986).

3. At the first level, private individuals and companies import and export goods, services, and technology across national borders. A private trade transaction thus comprises four elements: sale, transport, cargo insurance, and financing. The law of international commercial transactions merely mirrors these four dimensions, defining the contractual rights and duties of the key institutional players at this level: buyers, sellers, shippers, insurers, and banks. See generally Berman & Kaufman, The Law of International Commercial Transactions, 19 Harv. Int'l L.J. 221 (1978) (the law of international commercial transactions encompasses the laws of international sales, international carriage, cargo insurance, and financing).

At the second level, national governments regulate and inhibit what private entities do at the first level by promulgating statutes, executive regulations, and judicial decisions. Here, Congress, the President, the federal courts, administrative agencies such as the International Trade Commission, and domestic industries play the key institutional roles. The legal product of their interaction adds to the public domestic law of the administrative process and what has come to be known as the "Foreign Relations Law of the United States." See generally J. Mashaw & R. Merrill, Introduction to the American Public Law System (2d ed. 1986); Restatement (Revised) of the Foreign Relations Law of the United States (Proposed Final Draft 1986) [hereinafter Restatement (Revised)].

At the third level, governments seek collectively through international organizations and agreements to restrain one another from unduly interfering in the conduct of private trade transactions through national regulation. At this level, national governments and international organizations, such as the GATT, are the key institutional actors, and public international law and the law of international organizations provide the relevant legal doctrine. See
stant and complex interplay transpires within and among each of these three legal levels.

Because of its complexity, international trade law inevitably lends itself to many diverse schools of methodological analysis. This article briefly describes the competing methodologies of international trade law. It then applies one of them—a rule-based, procedural, institutional analysis—to an event of unusual importance to the world trading system: the ongoing bilateral negotiations between the United States and Canada to consummate a comprehensive Free Trade Agreement (FTA). Viewed purely in economic terms, these negotiations carry enormous international significance, for the two nations’ bilateral trading relationship currently forms the world’s largest economic partnership. Rather than evaluating the FTA with econometric models designed to forecast its likely economic consequences, however, this article sketches a legal “model,” which I believe has an analogous predictive capacity regarding future legal developments surrounding the FTA. The model rests upon a simple premise: that the forthcoming FTA negotiations will transpire within and among three discrete legal “markets,” governed respectively by U.S. law, Canadian law, and international law, as reflected in the General Agreement on Tariffs and Trade (GATT). This article argues that, by systematically examining each legal market and exploring their interrelationship, we can predict with unusual precision how legal, as opposed to economic and political, considerations will influence and channel the course of the FTA negotiations. Moreover, by analyzing the United States-Canada FTA negotiations in terms of legal “markets,” this

generally Restatement (Revised), id.; F. Kirgis, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING (1977).

4. On St. Patrick’s Day, 1985, Prime Minister Mulroney and President Reagan met in Quebec City, Quebec. Their “Shamrock Summit” culminated in a joint declaration agreeing in principle to pursue free trade negotiations. See 21 WEEKLY COMP. PRE$ DOC. 325 (Mar. 23, 1985). Since that announcement, the two leaders have met annually to reiterate their desire to conclude a bilateral free trade accord. See Roberts, Reagan Says He’ll Consider Talks With the Canadians on Acid Rain, N.Y. Times, Apr. 7, 1987, at A1, col. 4; Taylor & Urquhart, Reagan and Canada’s Mulroney Said to Reach Accord to Combat Acid Rain, Wall St. J., Mar. 19, 1986, at 7, col. 1. See generally infra text accompanying notes 64-90 (recounting the rocky course of the negotiations thus far).

5. In 1986, bilateral trade between the two countries ran at approximately $116.7 billion per year, representing nearly seven percent of the world’s trade. See Shribman & Fine, Canada’s Quick Retaliation for Shingles Tariff Prompts Some on the Hill to Rethink Protectionism, Wall St. J., June 19, 1986, at 64, col. 2; Rub out the 49th Parallel, ECONOMIST, June 14, 1986, at 18.

6. The current version of the GATT appears in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter GATT, BISD] (Supps. I-XXX). Both the United States and Canada are GATT signatories. This article uses the term “GATT” to describe both the underlying legal agreement and the international organization of 92 nations that subscribe to its terms.
article seeks to demonstrate how law matters in the conduct of international trade, both in shaping national and international decision-making structures regarding international trade and in guiding the specific policy outcomes that those structures generate.

I. The Methodologies of International Trade Law

Within the realm of international trade law scholarship, one may broadly distinguish between two groups: those I call the “rule partisans” and those I call the “rule skeptics.” Broadly speaking, the “rule partisans” believe that legal rules matter in the conduct of international trade, and that greater clarification of trade law rules at both the domestic and international levels will promote the substantive goal of trade liberalization through a multilateral trading system. The “rule skeptics” in contrast, deny that law or “legalism” plays any meaningful role in promoting substantive trade policies. Because, in their view, “the law as such has no power; only nations have power,” the creation and invocation of legal rules serve only to mask and legitimate exercises of power politics.

7. Professor Jackson has drawn a similar distinction between “power orientation” and “rule orientation” in the conduct of international economic diplomacy. See Jackson, Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States, 82 Mich. L. Rev. 1570, 1571-72 (1984). Professor Trimble describes the same divide as a debate between “the pragmatists—[who] attribut[e] the GATT’s success to the ‘nonlegalistic,’ ‘impressionistic’ approach it takes to the application of rules” and the “legalists,” who believe that “a central objective of the [international trade] system is to enable private entrepreneurs to plan economic decisions and thereby maximize efficiency” through the promulgation of stable, predictable, and clear international trade rules elaborated through impartial adjudication. Trimble, International Trade and the “Rule of Law,” 83 Mich. L. Rev. 1016, 1017 (1985).

8. Professor Jackson is the international trade law scholar most identified with this view. See, e.g., J. Jackson, World Trade and the Law of GATT (1969); Jackson, International Economic Problems and Their Management in the 21st Century, 9 Ga. J. Int’l & Comp. L. 497 (1979); Jackson, The Crumbling Institutions of the Liberal Trade System, 12 J. World Trade L. 93, 98 (1978); Jackson, The Puzzle of GATT, Legal Aspects of a Surprising Institution, 1 J. World Trade L. 131 (1967). Rule partisans won a recent victory with the inclusion of a chapter on the law of international trade in the Revised Restatement. See Restatement (Revised), supra note 3, part VIII, ch. 1. The victory was not surprising, however, given that Professor Henkin, the Restatement’s Reporter, is a leading rule partisan in the realm of public international law. See, e.g., L. Henkin, How Nations Behave (2d ed. 1979) (arguing that public international law observably influences national conduct).


10. This view is promoted most vigorously by the “neorealyst” school of international political science, which attributes changes in international trade regimes principally to the decline of American hegemony. See, e.g., S. Krasner, Structural Conflict 64 (1985); R. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984); R. Keohane & J. Nye, Power and Interdependence (1977); see also Lipson, The Transformation of Trade: The Sources and Effects of Regime Change, 36 Int’l
Among those scholars who concede some role for rules in international trade regulation and management, one may further distinguish between those who apply "substantive" and "procedural" approaches to trade law.\footnote{11} Substantive rule partisans critique the content of international trade rules from normative perspectives that range from economic welfare analysis\footnote{12} to critical legal studies.\footnote{13} Proceduralists, in contrast, fo-

\footnote{11} Obviously, the lines among these various scholarly camps frequently blur. For example, some of the less extreme rule skeptics—those Professor Trimble dubs the "pragmatists," see supra note 7—have conceded that detailed substantive rules do exert some influence on how trade policy is made, but suggest that the GATT should turn away from strict rules-oriented regulation toward broader use of nonlegalistic, consultative procedures. See, e.g., K. DAM, THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975); Hudec, GATT or GABBP The Future Design of the General Agreement on Tariffs and Trade, 80 YALE L.J. 1299 (1971). Consequently, these scholars urge that the GATT play a primarily "managerial," rather than adjudicative, role in the future conduct of international economic affairs. See, e.g., S. RUBIN \& T. GRAHAM, MANAGING TRADE RELATIONS IN THE 1980's (1983); Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 CORNELL INT'L L.J. 145 (1980). Even the most ardent rule partisans concede and embrace the growing need to "manage" economic interdependence. See, e.g., J. JACKSON \& W. DAVEY, supra note 1, at 1241-46.

\footnote{12} Such critiques generally ask whether trade rules, as currently written, actually promote economic efficiency and enhance economic welfare. Two well-known examples of a substantive approach based on economic welfare analysis are Professor Dam's 1970 study of the GATT, which recommended that certain GATT rules be revised to promote actual trade-creating effects, and Professor Warren Schwartz's critique of domestic and international economic rules regarding subsidies. See, e.g., K. Dam, supra note 11, at 214-21 (border tax adjustments); id. at 274-95 (regional economic arrangements); Goetz, Granet \& Schwartz, The Meaning of "Subsidy" and "Injury" in the Countervailing Duty Law, 5 INT'L REV. L. \& ECON. 17 (1986); Schwartz, Zenith Radio Corp. v. United States: Countervailing Duties and the Regulation of International Trade, 1978 SUP. CT. REV. 297 (1978); Schwartz \& Harper, The Regulation of Subsidies Affecting International Trade, 70 MICH. L. REV. 831 (1972) (arguing that countervailing duty laws are unjustified because government subsidies do not necessarily induce economic distortions or alter the efficient allocation of resources).

\footnote{13} See, e.g., Tarullo, Beyond Normalcy in the Regulation of International Trade, 100 HARV. L. REV. 546 (1987) [hereinafter Tarullo, Beyond Normalcy]; Tarullo, Logic, supra note 9. Applying techniques of Critical Legal Studies (CLS) scholarship, Professor Tarullo has argued that international trade rules fail principally because they incorporate a principle of "normalcy," which assumes that all national governments should behave like those of industrialized, capitalist nations and not interfere in the "normal" operation of the market. Legal standards based upon norms of economic efficiency dictated by an autonomous market are incoherent, he argues, because sovereign governments make myriad economic policy decisions that largely dictate how the market operates. Professor Tarullo's substantive critique draws upon the broader CLS view that the economic market is not an autonomous creation, separate from government, that sets standards of economic efficiency through such devices as contract law. See, e.g., Tarullo, Beyond Normalcy, supra, at 559 nn.32-33 (citing Kennedy \& Michelman, Are Property and Contract Efficient?, 8 HOFSTRA L. REV. 711 (1980)). Professor Tarullo also follows other critical legal scholars, as well as those I have called the extreme "rule skeptics," see supra notes 9-10 and accompanying text, in asserting that doctrinal reform has only limited potential for changing the basic structures of international economic relations. See Tarullo, Logic, supra note 9, at 551. Nevertheless, I group him with the "substantive rule partisans" because he ultimately recommends sweeping reforms of the U.S. trade laws that would reject "market-correction" measures designed to promote economic efficiency in favor

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cus primarily upon the process by which international trade rules are made, applied, and revised. One may further subdivide procedural rule partisans into three camps: the trade litigators, who strategically invoke particular trade rules to win particular cases; the political economists, who dissect the international trade rulemaking process with tools of social choice theory; and the institutionalists, who analyze how institutional relations influence the evolution of national and international trade policies.

The ongoing United States-Canada FTA negotiations provide a useful vehicle for illustrating the differences among these competing trade methodologies. Rule skeptics view these bilateral talks as largely a formalistic exercise, reasoning that legal rules will ultimately influence neither the terms of any FTA nor the manner in which those terms will be negotiated. In contrast, rule partisans who take a primarily substan-
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tive approach to international trade urge the negotiators to adopt those legal rules that will maximize certain normative goals, for example, the economic gains from freer trade.\textsuperscript{18}

In my view, however, a rule-based, procedural, institutional analysis of the ongoing FTA negotiations provides the most interesting insights into how the FTA negotiations will likely unfold and what they broadly portend for the international trading system. Unlike the rule skeptics, I contend that law will matter in the FTA negotiations, just as much, if not more, than the economic will of markets or the political will of domestic and international institutions. Moreover, unlike those who would focus solely on the substance of the rules emerging from the FTA talks, I would focus upon the interaction among the domestic and international institutions legally entitled to participate in the FTA’s making. I believe that it is this process of institutional interaction, not principles of economic efficiency, that will ultimately determine the FTA’s substantive content.

In this article, I seek to demonstrate the value of a rule-based, procedural, institutional approach to international trade law by analyzing the ongoing FTA negotiations in four stages: first, by systematically examining the United States law, Canadian law, and international law “markets” within which the FTA negotiations are transpiring; second, by identifying the institutions within each market that are legally entitled to participate in the FTA’s making; third, by illuminating the legal constraints to which those institutions are subject; and fourth, by using historical precedents\textsuperscript{19} to predict what future policy compromises those


\textsuperscript{19} As Part II(A) of this article reveals, a comprehensive FTA between the United States and Canada would be neither the first FTA concluded between the two countries nor the first comprehensive FTA that the United States has entered into with another country. See infra text accompanying notes 24-63. During the last 20 years, the United States has negotiated two accords that raised legal issues closely resembling those raised by the current proposal: the United States-Canada Automotive Products Agreement of 1965, Jan. 16, 1965, United States-Canada, 17 U.S.T. 1372, T.I.A.S No. 6093 (entered into force Sept. 16, 1966) [hereinafter Automotive Products Agreement], which is a limited, sectoral, bilateral agreement, and the comprehensive United States-Israel Free Trade Agreement of 1985, signed Apr. 22, 1985, 50 Fed. Reg. 35,172 (1985) [entered into force Aug. 19, 1985] [hereinafter United States-Israel FTA]. These two historical precedents greatly aid our ability to chart the specific issues of U.S., Canadian, and GATT law that the current FTA proposal is likely to raise.
institutions are likely to strike because of their peculiar legal constraints.20

Part II of this article begins that analysis by studying the U.S. legal market, the primary legal backdrop against which the FTA will be negotiated. This historical review reveals that the FTA proposal arises after a more than half-century tug-of-war between the U.S. Congress and President for control of the U.S. trade policy-making process. This intragovernmental struggle, which has resulted in nearly unprecedented congressional influence over U.S. trade policy, has given Congress extraordinary input into the FTA's formation. Turning to the Canadian legal market, Part III concludes that a parallel institutional role under Canadian law will be played not by Parliament, but by the provinces. Part IV then argues that in the international legal market, the letter and spirit of the GATT will impose additional, but relatively elastic, constraints on the FTA's structure and substance.

Each of these sections thus generates specific legal predictions regarding the FTA's future through what might be termed a "partial equilibrium analysis"—that is, by analyzing the interaction among key institutions and legal constraints within each of the relevant markets. Part V suggests that one may hazard even broader legal predictions regarding the FTA by subjecting the U.S., Canadian, and GATT law markets to a form of "general equilibrium analysis." This analysis recognizes the simple reality that these three legal markets are not independent, but inextricably interdependent. Part V seeks to apply such a "general equilibrium analysis" to derive answers to two questions crucial to the FTA's future: how long the negotiations are likely to last and what elements the agreement is likely to include. Part VI concludes by asking what broader significance the FTA will carry for the upcoming GATT round of multilateral trade negotiations (the Uruguay Round).21

20. Of course, these legal constraints are themselves generally products of inter- and intramarket compromises—for example, judicial decisions, statutes, treaties, or executive agreements that resolved earlier political conflicts among key institutional players. But once created, these legal constraints take on a life of their own. In particular, they structure future relationships among competing political institutions within a particular market, for example, by imposing substantive and procedural requirements upon those institutions or by giving them political bargaining chips to use in their future dealings with one another. Thus, by fully understanding the legal constraints imposed by each of these three legal markets, we can better predict what specific policy "outcomes" each market is likely to generate with respect to the FTA.

21. Seven rounds of multilateral trade negotiations (MTN) have been conducted under the GATT's auspices. The most recent, commonly called the Tokyo Round, concluded in 1979. A meeting of GATT ministers held in Punta del Este, Uruguay in September 1986 launched the formal opening of the eighth MTN round, called the Uruguay Round, which will last at least four years and will probably be the last GATT round conducted in this century. See infra note 144 (describing the new Round's agenda).
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II. The United States Legal Market

To predict how the FTA negotiations will unfold in the U.S. market, one must first recognize that they arrive at an historical moment of nearly unprecedented congressional control over U.S. trade policy-making. As I have elaborated elsewhere, this state of affairs did not always exist; rather, it has evolved after a struggle between the President and Congress for dominion over international trade that has spanned most of this century. This historic struggle between Congress and the President—the two key institutional players in the U.S. market—has resulted from the Constitution's own ambiguity regarding the precise division of labor in international trade matters. That constitutional tension has manifested itself in five identifiable regimes of congressional-executive management of trade, each associated with a particular statute or set of statutes. As these five regimes have succeeded one another, the pendulum of trade policy-making power in the United States has swung first from Congress to the President, and gradually back to Congress again.

A. The Five Regimes of U.S. Trade Policy-Making

1. The Smoot-Hawley Regime

During the first ill-fated regime, initiated by the now-infamous Smoot-Hawley Tariff Act of 1930, Congress attempted to manage trade itself, with disastrous consequences. By setting the highest tariff levels in U.S. history, Congress triggered a series of foreign retaliatory measures that

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23. The President has historically asserted dominance over international trade despite the textual paucity of his constitutionally enumerated foreign affairs powers. See U.S. CONST. art II, §§ 1, 2 (vesting "[t]he executive Power" in the President; naming him "Commander in Chief of the Army and Navy of the United States and of the Militia of the several States"); granting him power "to make Treaties" and to appoint "Ambassadors, other public Ministers and Consuls" with the advice and consent of two-thirds of the Senate; and charging him to "receive Ambassadors and other public Ministers" and to "take Care that the Laws be faithfully executed"). In so doing, the President has often claimed an unenumerated constitutional authority to conduct foreign affairs, usually citing famous Supreme Court dicta proclaiming him to be the "sole organ of the nation in its external relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (citation omitted).

In response, Congress has traditionally asserted that the President's authority to regulate trade derives entirely from statutes passed pursuant to its own constitutionally enumerated powers to "regulate Commerce with foreign Nations" and to "lay and collect Taxes, Duties, Imposts and Excises." See U.S. CONST. art. I, § 8, cls. 3, 1. The Supremacy Clause of the U.S. Constitution has, of course, dramatically limited the ability of the separate states to play a major role in regulating international trade. See id. art. VI, cl. 2. See generally J. JACKSON & W. DAVEY, supra note 1, at 169-95.

fueled the worldwide Depression and left an enduring impression that congressionally-managed trade leads inevitably to protectionism.25

2. The Reciprocal Trade Agreements Act Regime

In response to the Smoot-Hawley fiasco, Congress passed the Reciprocal Trade Agreements Act of 1934,26 which delegated to the President broad advance authority to negotiate and conclude reciprocal tariff-cutting executive agreements with foreign nations.27 This second regime ushered in twenty-eight years of presidentially-managed trade, during which time Congress restrained presidential initiative only minimally with “sunset” provisions that periodically terminated executive negotiating authority.28 This political compromise not only succeeded domestically, but also promoted U.S. adherence to evolving norms and structures of international trade law.29

25. Congress set more than 20,000 tariff levels in the Smoot-Hawley Tariff Act, item by item, a process that enabled congressional logrolling to drive up individual duty rates to all-time highs. See R. Pastor, Congress and the Politics of U.S. Foreign Economic Policy 78 (1980) (Smoot-Hawley set an average ad valorem rate on dutiable imports of 52.8 percent). Within a year, 26 countries had retaliated, and within two more years world trade had fallen by $22 billion. See id. at 79.


27. Id. § 350. The 1934 Act authorized the President not only to bind the United States under international law, but also to implement the new duties as domestic law by proclamation, thereby eliminating the need for further congressional reference or subsequent approving legislation. Thus, as a constitutional matter, trade agreements that were negotiated and concluded during this regime were not “treaties” made by the President with the advice and consent of the Senate in the article II sense of that term, see supra note 23, but rather “congressional-executive agreements” negotiated by the President pursuant to specific congressional authorization or approval. See Restatement (Revised), supra note 3, § 303, comment c (“The prevailing view is that the Congressional-executive agreement can be used as an alternative to the treaty method in every instance.”). Both treaties and congressional-executive agreements should be distinguished from more controversial “sole executive agreements,” i.e., international agreements negotiated and concluded pursuant to the President’s independent constitutional powers without any congressional involvement whatsoever. See generally id. § 303.


29. Under the 1934 Act’s broad advance delegation, the President concluded 32 reciprocal trade agreements between 1935 and 1945. Under the authority of the 1945 renewal, the President accepted the GATT, thereby consummating the United States’ post-war entry into multilateral trade management. See J. Jackson, J.-V. Louis & M. Matsushita, Implementing the Tokyo Round: National Constitution and International Economic Rules 141 (1984). Meanwhile, the frequent statutory sunsetting enabled successive Congresses to extract a variety of concessions from the President as the price of renewed negotiating authority, including the first version of the modern “escape clause” (discussed infra note 74), and the first “legislative veto” found in the trade laws (discussed infra note 50). See Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 673, 676 (1958).
3. The Kennedy Round Regime

The years between the enactment of the Trade Expansion Act of 1962 and the close of the Kennedy Round multilateral negotiations in 1967 marked a third regime of trade policy-making: an era of intense congressional-executive debate over the nature of the legislative approval necessary to effect the United States' entry into international trade accords. The tensions of the Kennedy Round Regime were typified by the struggle over the United States-Canada Automotive Products Agreement of 1965 ("auto pact"), the United States' first, sectoral free trade accord with Canada. The Johnson Administration secretly negotiated that pact for more than a year and only then presented it to Congress for approval. This fait accompli not only enraged Congress, but also inspired it to

31. Automotive Products Agreement, supra note 19.
32. The auto pact counteracted a $500 million U.S. automotive trade surplus by eliminating most transborder tariffs on specified vehicles and auto parts and accessories traded between the two countries. Negotiations began after the Canadian government chose to stimulate local auto production by rebating duties charged to local vehicle producers on certain auto parts imported into Canada. See Macrory, The U.S.-Canadian Automotive Products Agreement: The First Five Years, 2 LAW & POL’Y INT’L BUS. 1, 1 (1970); 6 A. LOWENFELD, supra note 17, at 394. The Canadian duty rebate plan triggered lawsuits by several U.S. automotive parts manufacturers, but the conclusion of the auto pact averted further escalation of the dispute. See generally A. CHAYES, T. EHRLICH & A. LOWENFELD, supra note 14, at 307-83 (reproducing materials relating to the negotiation and conclusion of the pact).
33. The Johnson Administration apparently took this route too avoid consulting with Congress. Had the Administration treated the pact as a treaty, the President would have been constitutionally required to win the approval of the Senate Foreign Relations Committee (which has jurisdiction over treaties) and of two-thirds of the Senate. Had the Administration treated the pact as a congressional-executive agreement subject to prior legislative approval, the President would have been obliged to gain House as well as Senate approval, and to consult during negotiations with the House Ways and Means and Senate Finance Committees (which historically exercise jurisdiction over trade bills). See Library of Congress Legislative Reference Service, A Critical Appraisal of the Legal Arguments Presented in an Opinion Submitted by the Acting Legal Adviser to the State Department, reprinted in A. CHAYES, T. EHRLICH & A. LOWENFELD, supra note 14, at 363 [hereinafter cited as CRS REPORT] (observing that the President had ignored section 243 of the 1962 Act, which required him to include congressmen from those two committees as members of the U.S. delegation to the auto pact negotiations).
34. Predictably, the Senate Foreign Relations Committee Chairman protested that the pact should have been submitted to his committee as a treaty for advice and consent. See Letter from J.W. Fulbright, Chairman, Senate Foreign Relations Committee, to Hon. Dean Rusk, Secretary of State, Feb. 15, 1965, reprinted in A. CHAYES, T. EHRLICH & A. LOWENFELD, supra note 14, at 359. See also Hearings on H.R. 9042 Before the Senate Comm. on Finance, 89th Cong., 1st Sess. 85-87 (1965) (remarks of Sen. Gore) (arguing that the President had denied Congress the opportunity to comment on the pact at a meaningful time). A legal analysis commissioned by Congress accused the President of deliberately submitting "an understanding which is in excess of the statutory authority which Congress hitherto accorded him," thereby "gambl[ing] that the Congress would . . . extricate him from his dilemma by adoption of the necessary legislation." CRS REPORT, supra note 33, at 365.
pass implementing legislation that strictly limited the President's future ability to conclude such accords without consulting Congress.\(^{35}\)

The multilateral Kennedy Round talks further escalated these executive-legislative tensions. Fearing that the President might negotiate and accept nontariff, as well as tariff, barrier reductions during those talks, Congress shortened the President’s leash by authorizing him to negotiate multilateral trade agreements, but requiring him to bring them back to Congress for subsequent approval.\(^{36}\) Notwithstanding these restraints, the executive branch went on to negotiate two nontariff concessions during the Kennedy Round without prior congressional approval.\(^{37}\) Congress balked at both concessions\(^{38}\) and for the next eight years declined to delegate the President advance negotiating authority, thereby diminishing the executive’s negotiating credibility with foreign trading partners.\(^{39}\)

\(^{35}\) See Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016 (codified as amended at 19 U.S.C. §§ 2001-2033 (1982)). Congress authorized the President to enter similar agreements in the future, but conditioned that authority upon prior consultation with Congress, see id. § 202(c), 79 Stat. at 1017 (expired 1965) and subsequent reporting requirements, see id. § 205(a), 79 Stat. at 1018 (codified as amended at 19 U.S.C. § 2015(a)(1982)). Congress also subjected the President’s agreement-making authority to a legislative veto, see id. § 202(d)(2)(B), 79 Stat. at 1017 (expired 1965). For further discussion of the legislative veto, see infra notes 30, 54.

\(^{36}\) As tariffs declined worldwide, nontariff barriers and trade distortions, such as quantitative restrictions and subsidies, loomed larger as potential subjects for multilateral negotiation. Because the authority to grant nontariff concessions appeared to fall outside Congress’s constitutionally enumerated power to “lay and collect Taxes, Duties, Imposts and Excises,” U.S. CONST. art. I, § 8, cl. 1, Congress began to fear that the President might grant such concessions in future trade rounds, relying upon his sole constitutional authority to accept executive agreements. See supra note 27.

\(^{37}\) During the Kennedy Round, the executive branch accepted a comprehensive Antidumping Code over congressional objection, relying upon the President’s sole executive agreement authority. See J. Jackson & W. Davey, supra note 1, at 670-73. U.S. negotiators also agreed to eliminate the so-called American Sales Price (ASP) method of customs valuation in exchange for certain European and Japanese tariff and nontariff barrier concessions. See J. Jackson & W. Davey, supra note 1, at 385.

\(^{38}\) After failing to block implementation of the 1967 Antidumping Code as domestic law by concurrent resolution, see S. Con. Res. 38, 90th Cong., 1st Sess. (1968), reprinted in International Antidumping Code: Hearing Before the Senate Comm. on Finance, 90th Cong., 2d Sess. (1968), and statutory amendment, see Amendment to H.R. 17,324, 90th Cong., 2d Sess. 114 CONG. REC. 26,133 (1968), Congress ultimately permitted limited domestic application of Code provisions. See Renegotiations Amendment Act of 1968, Pub. L. No. 90-634, § 201, 82 Stat. 1345, 1347. Congress similarly opposed repeal of the ASP method of customs valuation, first by concurrent resolution, see Senate Comm. on Finance, Expressing the Sense of Congress with Respect to Certain Trade Agreements, S. Rep. No. 1341, 89th Cong., 2d Sess. (1966), and then by repeated refusal to approve the repeal agreement. After waiting five years for congressional approval, the European parties to the repeal agreement allowed it to lapse. See J. Jackson & W. Davey, supra note 1, at 385.

\(^{39}\) See, e.g., Trade Reform: Hearings on H.R. 6767 Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. 394 (1973) (testimony of Deputy Special Representative for Trade Negotiations William R. Pearce) ("[O]ur trading partners are reluctant to negotiate with us until they have some assurance that agreements can be implemented, and implemented rather promptly.").
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4. The Tokyo Round Regime

By the early 1970's, such congressional-executive clashes over international trade had grown increasingly commonplace. A Congress bloodied by these clashes addressed these tensions by enacting the Trade Act of 1974 (1974 Act), which established a fourth regime of U.S. trade policymaking.

The 1974 Act sought to bolster executive credibility in negotiating with foreign governments in the next multilateral trade round (the Tokyo Round) while simultaneously tightening congressional controls on executive discretion. This Act delegated to the President broad advance authority to negotiate nontariff barrier reductions in the Tokyo Round. In addition, to reassure trading partners that negotiated Tokyo Round agreements would receive swift legislative consideration, Congress enacted an innovative "fast-track" procedure, whereby it committed itself to approve or disapprove negotiated agreements quickly and without amendment. Under this expedited legislative procedure, House and Senate rules were modified to guarantee negotiated trade agreements and implementing legislation an up or down vote, without amendments, within sixty legislative days after introduction. In exchange, the President was obliged to notify the House Ways and Means and Senate Finance Committees at least ninety days before entering into any such agreement and to satisfy an array of reporting and consultation requirements. The speedy congressional approval of agreements negotiated during the Tokyo Round soon illustrated that the fast-track procedure could accommodate executive and legislative interests, while promoting the rapid conclusion of multilateral trade accords.


41. See 1974 Act, §§ 102(d), 151(e)(1), 19 U.S.C. §§ 2112(d), 2191(e)(1). Section 151 of the 1974 Act modified existing House and Senate rules in three important respects. First, it prevented committees from bottling up a negotiated trade agreement and its draft implementing legislation by specifying that such a package could be automatically discharged from committee consideration after 45 legislative days, regardless of whether committee action had been taken upon it. See 19 U.S.C. § 2191(e)(1). Second, it barred floor amendment of such packages. See id. § 2191(f)(1)-(g)(1). Third, it prevented congressmen in both chambers from "filibustering" to prevent the package from coming to a final vote by limiting debate on the floor of each House to twenty hours, id. § 2191(f)(2)-(g)(2), and requiring that the package be voted upon within 15 legislative days. Id. § 2191(e)(1).

42. See 1974 Act § 102(e)(1), 19 U.S.C. § 2112(e)(1) (requiring the President to notify both houses 90 days before finally entering into the agreement and promptly thereafter to publish in the Federal Register his intent to enter such an agreement). Under the Act, the President was obliged to complete numerous procedural steps before gaining access to the fast-track procedures. See id. §§ 102, 131(a), 132-33, 135 (codified at 19 U.S.C. §§ 2112, 2151(a), 2152-53, 2155). For a description of how this provision currently operates, see infra notes 60-61 and accompanying text.

43. After that Round concluded, the entire U.S. legislative process for approving nine multilateral agreements negotiated there consumed only 34 legislative days from presidential noti-
Largely overlooked, however, was the degree to which the Tokyo Round Regime also revealed Congress's pervasive distrust of executive discretion in foreign affairs following Watergate and Vietnam. Congress manifested its distrust by combining in the 1974 Act numerous discretion-controlling tools, some of which had first appeared in earlier regimes. In a nod to the first two regimes, Congress sought to limit presidential discretion by specifying negotiating objectives and subjecting the President's negotiating authority to a sunset provision. Following its Kennedy Round practice, Congress further required the President to engage in extensive prior consultations with congressional and private sector advisors before negotiating, and imposed upon him numerous formal certification and subsequent reporting requirements. In a new innovation, Congress vastly increased the executive branch's public accountability through the "judicialization" of trade remedies; by authorizing private parties to police administrative discretion, Congress greatly enhanced indirect third-party leverage upon executive action.


46. Section 101(a) of the 1974 Act, 19 U.S.C. § 2111(a), extended the President's negotiating authority with respect to both tariff and nontariff barriers for five more years. Section 124 of the 1974 Act, 19 U.S.C. § 2134, then provided two years of residual authority to negate tariff cuts. Section 1101 of the 1979 Trade Agreements Act, 19 U.S.C. § 2112(b)(1982), later extended only the President's nontariff barrier negotiating authority for eight more years, through January 2, 1988. Thus, unless new legislation is enacted, the President will lack delegated nontariff barrier negotiating authority after January 2, 1988.

47. The 1974 Act created an elaborate structure of congressional and private sector advisory committees. See 1974 Act, § 161(b)(1), 19 U.S.C. § 2211(b)(1) (requiring that ten members of the House and Senate be accredited as official advisors to the U.S. negotiating delegations); id. § 135, 19 U.S.C. § 2155 (requiring President to establish overall private sector advisory committee and three sectoral sub-policy committees).


49. Under this heading falls much of modern U.S. statutory law of import relief, including the modified escape clause, antidumping and countervailing duty provisions, customs fraud
over, Congress wreathed the 1974 Trade Act with six legislative vetoes, which during the post-Vietnam era had become Congress's favorite device for controlling executive discretion in foreign affairs.\(^{50}\) Finally, by authorizing either house to block passage of a fully negotiated trade agreement simply by voting down the agreement or its implementing legislation, the fast-track procedure could itself be considered an additional check upon executive discretion.\(^{51}\) Five years later, the Trade Agreements Act of 1979 (1979 Act) went on to strengthen four of these discretion-controlling devices.\(^{52}\) Thus, as the Tokyo Round closed, Congress had firmly reasserted its grip on the process of U.S. trade policy-making.

penalties, and remedies against patent infringement and unfair trade practices. See generally Sandler, supra note 15 (cataloging current provisions). Through these remedies, Congress vastly expanded citizen access to the trade process (and limited executive discretion) by empowering private individuals to initiate proceedings directly against foreign industries via private complaint, requiring executive branch action on private complaints within strict statutory time limits, and subjecting that action to extensive judicial oversight. See generally Ehrenhaft, The "Judicialization" of Trade Law, 56 NOTRE DAME L. 595 (1981).

50. A "legislative veto" is a "simple" resolution approved by a majority of one house ("one-house veto") or a "concurrent" resolution approved by majority votes in both houses ("two-house veto") that purports to alter or override completed executive action. Article I, section 7 of the Constitution requires that all legislation be approved by a majority of both the House and the Senate (the "bicameralism" requirement) and then presented to the President for his signature or veto (the "presentment" requirement). Thus, both types of resolutions are actions that purport to have legislative effect even though they are not accomplished by legislation. Concurrent resolutions satisfy the prerequisite of bicameralism, but not the requirement of presentment; simple resolutions meet neither prerequisite. See How Our Laws Are Made, H.R. Doc. No. 120, 97th Cong., 1st Sess. 7-8 (1981). The 1974 Act included six legislative veto provisions. See 1974 Act, § 203(c)(1), 19 U.S.C. § 2253(c)(1); id. § 302(b), 19 U.S.C. § 412(b); id. § 31 (amending 19 U.S.C. § 1303(e)(2)); id. §§ 402(d), 153, 19 U.S.C. §§ 2432(d), 2193; id. § 405(c), 19 U.S.C. § 2435(c); id. § 407(c)(3), 19 U.S.C. § 2437(c)(3). Before the Supreme Court finally invalidated the legislative veto in 1983, see infra note 54 and accompanying text, Congress rarely exercised legislative veto provisions. See generally Pomerance, United States Foreign Relations Law After Chadha, 15 CAL. W. INT'L L.J. 201 (1985). Nevertheless, it inserted them into nearly every foreign affairs statute enacted during this period. See Franck & Bob, The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case, 79 AM. J. INT'L L. 912, 913 n.3 (1985) (listing statutes containing such provisions).

51. By effectively permitting one house to disapprove a fully negotiated trade agreement, the fast-track procedure functionally resembled the legislative veto. Cf. supra note 50. The fast-track procedure did not formally constitute a legislative veto, however, because it required trade agreements to be approved by legislation that had been duly enacted by both houses and presented to the President, albeit on an expedited basis. See supra notes 41-42 and accompanying text.

5. The Current Regime

In 1983, as the President's statutory authority under the 1979 Act was expiring, the United States and Israel announced their intent to conclude a comprehensive bilateral FTA, the first such accord ever negotiated between the United States and another country. At roughly the same time, the Supreme Court declared the legislative veto unconstitutional, thereby stimulating a legislative overhaul of various provisions of the trade laws. By jointly spurring the enactment of the Trade and Tariff Act of 1984 (1984 Act), these events ushered in the fifth and current regime of U.S. trade policy-making and set the stage for the current United States-Canada FTA discussions.

The FTA with Israel posed the same dilemma raised two decades earlier by the United States-Canada auto pact: how to endow the President with sufficient statutory authority to negotiate, while still ensuring full congressional participation. Congress and the Reagan Administration addressed this dilemma by coupling prior authorizing legislation with subsequent implementing legislation. At the same time, however, Congress greatly accelerated the trend toward judicialization of trade remedies, cf. supra note 49, adding numerous provisions to the antidumping and countervailing duty laws in the 1979 Act and upgrading the Customs Court into the Court of International Trade one year later. See Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified at scattered sections of 19 and 28 U.S.C. (1982)); Cohen, The Trade Agreements Act of 1979: Executive Agreements, Subsidies, and Countervailing Duties, 15 Tex. Int'l L.J. 96, 105-114 (1980) (describing changes); see also Jackson, supra note 7, at 1573 ("The clear trend manifested in [the 1962, 1974, and 1979] statutes is toward a greater 'legalization' or 'judicialization' of the system.").

53. See United States-Israel FTA, supra note 19. That agreement was designed both to spur Israel's economic development and to cement strategic ties between the two nations. The FTA phased out duties and other restrictive regulations of commerce on substantially all trade between the two nations over a ten-year period. The text of the agreement, letters of understanding, declaration on trade in services, tariff package, implementing legislation, and reciprocal offers for product staging are all reprinted in 24 L.L.M. 653-87 (1985).

54. See INS v. Chadha, 462 U.S. 919 (1983). In Chadha, the Supreme Court invalidated a one-house veto provision with sweeping reasoning that apparently doomed all legislative vetoes. See Chadha, 462 U.S. at 959 (Powell, J., concurring in the judgment) ("The Court's decision . . . apparently will invalidate every use of the legislative veto."). In addition to the six legislative vetoes in the 1974 Trade Act, cited supra note 50, Chadha also struck down provisions in four other major trade laws. See Koh, supra note 22, at 1208-09 n.49 (citing invalidated provisions). For a discussion of the broader impact of Chadha on trade policy-making, see generally Koh, supra note 22.


57. Title IV of the 1984 Act, §§ 401-05, prospectively authorized the President to negotiate a comprehensive FTA with Israel. The United States-Israel Free Trade Area Implementa-
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gress modified the 1974 Act's fast-track procedure to anticipate and authorize future bilateral free trade negotiations with nations other than Israel.\textsuperscript{58} The modification, drafted with Canada particularly in mind,\textsuperscript{59} required the President to follow special fast-track rules when negotiating a bilateral FTA with a country other than Israel. In such cases, the President was obliged to notify and consult with the House Ways and Means and Senate Finance Committees for a period of sixty legislative days before giving the statutorily required ninety-day notice of his intent to sign an agreement; if he failed to do so, any agreement subsequently negotiated would not receive fast-track consideration.\textsuperscript{60} As the Canada FTA experience would shortly reveal, this seemingly modest change in the fast-track procedure dramatically enhanced the influence of Congress as a whole, and of the House Ways and Means and Senate Finance Com-

\textsuperscript{58} See 1984 Act, § 401 (to be codified at 19 U.S.C. § 2112(b)(4)(A)). Congress was particularly concerned that nations to whom the United States had promised most-favored-nation treatment in reciprocal trade agreements or bilateral Friendship, Commerce, and Navigation treaties might demand the trade concessions being extended to Israel. See Platt, supra note 56, at 17-18.

\textsuperscript{59} As Congress was well aware, Canada had made a number of free trade overtures to the United States during the previous decade. The 1974 Trade Act had included a sense-of-the Congress provision authorizing the President to “initiate negotiations for a trade agreement with Canada to establish a free trade area.” 1974 Act, § 612. The 1979 Act amended that proviso by ordering the President to study the desirability of such an agreement. See 1979 Act, § 1104(a), 19 U.S.C. § 2486(a). The U.S. Trade Representative (USTR) had completed a study of North American trade liberalization options in 1981, and concluded that a U.S.-Canada FTA would be premature. See North American Trade Agreements, a Study Mandated in Section 1104 of the Trade Agreements Act of 1979 (July 26, 1981), cited in Hubbauer & Samet, U.S. Response to Canadian Initiatives for Sectoral Trade Liberalization: 1983-84, in D. Stairs & G. Winham, THE POLITICS OF CANADA'S ECONOMIC RELATIONSHIP WITH THE UNITED STATES 179, 205 n.29 (1985).

Two years later, however, the Trudeau Government had proposed a sectoral free trade arrangement relating to informatics, farm machinery, communications services, furniture, steel, and government procurement, with an emphasis on surface transportation equipment. See generally Hubbauer & Samet, id. Accordingly, the Senate had originally included Canada along with Israel for special consideration in the 1984 Act. Ultimately, however, the two houses decided to treat Canada just as any other country seeking an FTA, largely because numerous recent United States-Canada trade disputes had made certain key congressmen less enthusiastic about free trade with Canada. See Price, supra note 55, at 329. One of those disputes was reflected in section 232 of the 1984 Act, which expressly incorporated a presidential proposal retaliating against Canada for denying tax deductions to Canadian companies who advertise over U.S. television or radio. See id., at 324.

\textsuperscript{60} See 1984 Act, § 401(a)(4), 19 U.S.C. § 2112(b)(4)(A). To the fast-track procedure described supra notes 41-42, the 1984 Act added a sixty-day prenotice committee consultation period. 19 U.S.C. § 2112(b)(4)(A)(i). If neither committee disapproved of the negotiations during this sixty-day period, any subsequently negotiated agreement would receive the expedited legislative consideration described above. If either committee disapproved negotiations during that period, however, the package would be considered for legislative approval under normal, unexpedited procedures.
mittees in particular, in the FTA negotiation process. The new procedure afforded Congress not one, but three, bites at any proposed FTA. As would soon become clear, the modified fast-track procedure, coupled with the numerous other discretion-controlling devices dotting the 1984 Act, transformed the fifth, prevailing U.S. trade policy-making regime into the most congressionally dominated trade regime since Smoot-Hawley.

B. Charting the Course of the FTA Under the Current U.S. Regime

The foregoing identification of the key institutional players in the U.S. market and the legal constraints that bind them greatly enhances our understanding of how the FTA negotiations have proceeded thus far. Three recent events have boldly underlined the President's limited discretion to conduct the FTA negotiations under the current trade regime: the Senate Finance Committee's April 1986 effort to disapprove the FTA negotiations and two bilateral skirmishes over softwood lumber and cedar shingles and shakes.

61. First, the sixty-day prenotice committee consultation period secured the involvement of the two committees months before negotiations began, and allowed them to extract concessions from the President as a condition of letting negotiations proceed. Second, the Administration's awareness that any negotiated agreement must ultimately return to those same committees for subsequent approval promoted continuing consultation as the agreement evolved. Third, either House retained the option to vote down a fully negotiated agreement even after it had been discharged from committee.

Significantly, nothing in the language of the 1984 Act requires the President to engage in the sixty-day committee consultation period before negotiations begin. In theory, he could consult during the 60 legislative days immediately prior to the day that he would be obliged under section 102(e)(1) of the 1974 Act, 19 U.S.C. § 2112(e)(1), to notify the same committees of his intent to enter an agreement (i.e., 150 legislative days before the day the agreement was to be signed) or just as negotiations were coming to a close. See supra note 42. Such a construction of the sixty-day prenotice consultation requirement could significantly lessen the amount of input that the key committees would have in the negotiation process. However, the Reagan Administration chose to construe the provision cautiously, notifying the committees of its intent to negotiate the Canada FTA 60 legislative days before the date it intended to initiate formal negotiations. See infra note 64.

62. These include amended escape clause provisions, see, e.g., 1984 Act, § 249, 19 U.S.C. § 2251(b); the most extensive congressional specification of negotiating objectives to date, id. tit. III, 19 U.S.C. §§ 2101 et seq.; elaborate amendments to the antidumping and countervailing duty provisions that improved the position of domestic industry petitioners, id. tit. VI, 19 U.S.C. § 2112; and additional consultation and reporting requirements, id. § 303, 19 U.S.C. § 2241, § 906, 19 U.S.C. § 2805. See generally Price, supra note 55 (describing these amendments).

63. This conclusion is further developed in Koh, supra note 22. That article argues that the legislative veto's demise in Chadha has not, as some observers had predicted, diminished Congress's influence over trade policy-making. As this section makes clear, the legislative veto represented only one of a broad array of oversight devices available to Congress in the international trade field. In the course of replacing it, Congress has seized more, rather than less, effective control over the trade area.
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The first incident, the FTA's brush with extinction at the hands of the Senate Finance Committee, dramatically revealed Congress's extraordinary power under the 1984 Act's modified fast-track procedure. Until April 1986, preliminary FTA negotiations had proceeded uneventfully.64 Shortly before the sixty-day committee consultation period specified by the 1984 Act was to expire, however, a majority of the twenty-member committee stunned the negotiators by threatening to disapprove the FTA talks.65 Only intensive presidential lobbying and a last-minute switch by one Senator prompted the committee to divide evenly on the motion to disapprove, which permitted formal FTA negotiations to begin in May 1986.66

The incident demonstrates how seriously the U.S. and Canadian negotiators had underestimated the Senate Finance Committee's enhanced power under the current trade regime's modified fast-track procedure.67

64. As noted above, under the 1984 Act's modified fast-track procedure, four steps must occur before formal negotiations may begin: (1) Canada must request negotiations; (2) the President must give 60 legislative days notice of the impending negotiations to the Senate Finance and House Ways and Means Committees; (3) the President must consult with those committees during the sixty-day period; and (4) neither committee may disapprove of the negotiation of such agreement before the consultation period closes. See 1984 Act, § 401(a)(4), 19 U.S.C. § 2112(b)(4).

The first three steps occurred without incident. On September 26, 1985, shortly after receiving two reports from his government favoring a bilateral FTA, Prime Minister Mulroney requested formal negotiations. See Martin, Canada Seeking Pact with U.S. on Freer Trade, N.Y. Times, Sept. 27, 1985, at A1, col. 2. On December 10, 1985, President Reagan notified both committees of his intent to enter free trade talks with Canada; both committees then proceeded to solicit public comments on the proposed negotiations. See Also in the News, 3 Int'l Trade Rep. (BNA) 286 (Feb. 26, 1986) (Senate Finance Committee); Also in the News, 3 Int'l Trade Rep. (BNA) 388 (Mar. 19, 1986) (House Ways and Means Committee).

65. Twelve committee members stated that they would support a resolution disapproving the FTA, which would have denied fast-track consideration to any future agreement. See Auerbach, Panel Criticizes U.S.-Canada Trade Pact, Wash. Post, Apr. 12, 1986, at G1, col. 3. During the next two weeks, a number of committee members urged the Administration to resubmit its request at a later date. See Farnsworth, 12 Senators Opposing Reagan on Canada Trade, N.Y. Times, Apr. 17, 1986, at D5, col. 3; Administration Wins Narrow Victory to Gain Fast-Track Authority for Free Trade Talks, 3 Int'l Trade Rep. (BNA) 565 (Apr. 30, 1986)[herein after Narrow Victory].

66. Senator Matsunaga of Hawaii changed his vote after a meeting with the President on the morning of the final voting. This change, coupled with another Senator's earlier switch, destroyed the majority for the motion to disapprove. See Farnsworth, President Backed on Canada Talks, N.Y. Times, Apr. 24, 1986, at D1, col. 3; Shribman & Pine, Reagan Gains Canada-Trade Victory As Senate Effort to Impede Talks Fails, Wall St. J., Apr. 24, 1986, at 5, col. 2.

67. Most observers agree that the FTA's disapproval by the Senate Finance Committee would have scuttled the talks. See Farnsworth, supra note 66, at D18, col. 1 (reporting comments of Canadian officials "that they would back away from the negotiations without the [fast-track] authority"); Shribman & Pine, supra note 66, at 5, col. 2 ("Ottawa had warned it wouldn't negotiate unless it had ... assurances" of fast-track approval). The incident reveals that the modification of the fast-track procedure has not only enhanced the power of Congress vis-à-vis the President, but has also effectively elevated the Senate Finance and House Ways and Means Committees over other committees that might arguably claim jurisdiction over the
That procedure allows an ad hoc coalition of key committee members to jeopardize a proposed FTA that otherwise enjoys broad congressional support, simply to signal their general discontent with the President’s trade policies. 68 Perhaps more significant, fallout from the incident has continued even months after formal FTA talks have commenced. Although insiders dispute exactly what presidential concessions were made in exchange for the Senate votes necessary to avert committee disapproval, President Reagan publicly promised committee members that they would be deeply involved in the upcoming FTA talks 69 and reportedly agreed to take specific action against Canada over alleged softwood lumber subsidies. 70

FTA, for example, the Senate Foreign Relations Committee, the House Committee on Energy and Commerce, or the Subcommittee on International Economic Policy and Trade of the House Foreign Affairs Committee. In this case, for example, the vote of one more Senator on the Finance Committee would have effectively doomed the FTA, even though it enjoyed general congressional support and had encountered no opposition before the House Ways and Means Committee (which declined even to hold hearings about it).

68. Although some members of the ad hoc coalition that nearly disapproved the FTA were Senators concerned about Canadian trade issues, the majority claimed no animosity toward Canada. Those members voted for disapproval primarily to send the Administration the message that they desired a greater voice in trade policy-making. See, e.g., Shribman & Fine, supra note 66, at 5, col. 3 (quoting Sen. Packwood) (“There’s no animosity about Canada at all. . . . Canada is the unfortunate victim in a dispute over trade views, all of which are unrelated to Canada.”); Farnsworth, supra note 66, at D18, col. 2 (some votes were prompted “by the Administration’s refusal to support anything but very minor trade legislation this year”); Farnsworth, supra note 65, at D5, col. 4 (quoting statement of Sen. Mitchell) (“The irony is that the committee is not angry at the Canadians, but rather at the Administration, which refuses to enforce U.S. trade laws.”).

69. The President publicly promised one Senator to “consult with members of the Finance Committee in every way.” See Farnsworth, supra note 66, at D1, col. 3 and D18, cols. 1-2 (reporting remarks of Sen. Matsunaga); Narrow Victory, supra note 65, at 565. In a letter to Senate Finance Committee Chairman Packwood, President Reagan further promised that the committee members would be involved in the Canadian talks from the beginning and would receive formal quarterly briefings as well as more frequent informal ones after talks began, and that the Administration would present views on all trade bills pending in Congress and “engage in thorough and meaningful discussions with the Finance Committee relating to all pending trade legislation.” Narrow Victory, supra note 65, at 565; Shribman & Fine, supra note 66, at 5, col. 3 (reporting USTR Yetteur’s pledge to “consult closely with Congress at each stage of the negotiations”); Senate-White House Trade Policy Quarrel Endangers Talks on Free Trade Agreement, 3 Int’l Trade Rep. (BNA) 530 (Apr. 23, 1986) [hereinafter Trade Policy Quarrel] (reporting that the White House had promised to “provide the Senate with a list of specific negotiating objectives for the Canadian talks”).

70. Senator Symms of Idaho, a key lumber state, stated that he had received executive branch assurances that the lumber talks would be put on an expedited schedule, that the President would consider initiating a section 301 action against Canada, and that the Commerce Department would take a “strong stand” on the lumber import dispute. See Trade Policy Quarrel, supra note 69, at 530; Farnsworth, supra note 66, at D18, col. 2 (reporting remarks of Sen. Symms). Other sources reported that the President had made similar promises to Senator Packwood in exchange for his vote. See Martin, The Great Lumber Dispute, N.Y. Times, May 8, 1986, at D1, col. 2; Hammering Canada’s Shingles, N.Y. Times, June 7, 1986, at A26, col. 1 (stating that the timber-state Senators on the Finance Committee—Packwood of Oregon, Symms of Idaho, and Baucus of Montana—had “extracted a Presidential promise of prompt
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Responding to this promise, only two days before formal FTA talks began, the U.S. softwood lumber industry filed a countervailing duty petition against Canada’s administrative pricing system for collecting stumpage fees. The petition triggered a preliminary administrative determination that the Canadian practice had threatened or caused material injury to the U.S. lumber industry. The rigid statutory deadlines for countervailing duty actions would have required the President to impose duties upon Canadian lumber imports in early 1987, but a last-minute intergovernmental pact narrowly averted that result.

attention to timber concerns as the price of agreeing to expedite Senate review of the free-trade pact”). Moreover, the International Trade Counsel of the Senate Finance Committee was quoted as saying that the President had made a “clear deal” with key Senators to take some action against Canadian products in exchange for their vote against disapproval. See No Deal Between President Reagan, Congress on Softwood Lumber, Canadian Official Says, 3 Int’l Trade Rep. (BNA) 768 (June 11, 1986) (reporting remarks of Len Santos). But see Offer by Canada To Elevate Lumber Talks Delays Filing of Countervailing Petition, 3 Int’l Trade Rep. (BNA) 644 (May 14, 1986) [hereinafter Offer by Canada] (reporting denials by Canadian officials that any deal had been struck).

71. Three years earlier, U.S. producers of pine, spruce, cedar, fir, and hemlock had unsuccessfully sought a similar Commerce Department ruling that the Canadian treatment of stumpage fees (the price charged to softwood lumber companies who harvest standing timber from government lands) constituted a countervailable subsidy. Although the ITC made a preliminary injury determination, the Commerce Department ruled that stumpage fees constituted only de minimis subsidies and subsequently persuaded the lumber producers to withdraw their petition.

In late 1985, however, the Court of International Trade held that Mexican preferential pricing of carbon black feed stocks could constitute countervailable subsidies, thereby inspiring U.S. softwood lumber producers to file their petition. See Cabot Corp. v. United States, 620 F. Supp. 722 (Ct. Int’l Trade 1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986). The Reagan Administration asked the industry petitioners to delay their filing until the question of whether separate lumber talks should be conducted could be resolved. See Offer by Canada, supra note 70. Discussions to elevate the talks to an envoy level failed, however, spurring a coalition of U.S. lumber companies to file their petition two days before the FTA talks were to begin. See Lumber Coalition Submits Countervailing Duty Petition Against Canadian Imports, 3 Int’l Trade Rep. (BNA) 690 (May 21, 1986).

72. The complex statutory sequence that governs a U.S. countervailing duty investigation requires first that the Commerce Department find warrant for a full investigation, followed by a preliminary determination by the International Trade Commission (ITC) that a U.S. industry has been “materially injured” or threatened with material injury as a result of the allegedly subsidized imports. If the ITC should find reasonable indication of material injury, the investigation returns to the Commerce Department for a preliminary determination that a subsidy to the imports exists, in which case the Commerce Department must also preliminarily and finally determine the amount of subsidy involved. The ITC may then make a final determination that a U.S. industry is being materially injured (or so threatened), allowing the Commerce Department to issue a final order assessing countervailing duties. See generally 19 U.S.C. §§ 1671-77 (1982). On June 6, 1986, the Commerce Department concluded that the industry’s petition contained enough evidence to warrant a probe; about three weeks later, the ITC without dissent rendered a preliminary determination of material injury. See International Trade Commission Votes 5-0 To Continue Canadian Lumber Investigation, 3 Int’l Trade Rep. (BNA) 855 (July 2, 1986).

73. Following the ITC’s preliminary injury determination, the Commerce Department found a 15% net subsidy. See Commerce Finds Canadian Lumber Subsidies Preliminarily, Margin Lower Than Expected, 3 Int’l Trade Rep. (BNA) 1275 (Oct. 22, 1986). Just before the
Private invocation of the escape clause—yet another trade remedy provided by the 1974 Trade Act—stimulated the third controversy, over cedar “shingles and shakes.” Just one day after FTA talks formally opened, President Reagan announced that he would respond to the U.S. industry’s request for escape clause action by imposing stiff tariffs on Canadian shingles and shakes. That action, taken without prior consultations with the Mulroney Government, triggered a firestorm of Canadian protest and provoked Canada’s retaliatory imposition of duties on a range of U.S. goods. While the Reagan Administration has now made concerted efforts to calm Canadian sensibilities, the shingles and shakes dispute has exacerbated already inflamed bilateral relations.

Commerce Department’s final subsidy ruling was due, at the end of 1986, Canada offered to impose a 15% surtax on Canadian softwood exports to the United States, in exchange for which the U.S. lumber producers withdrew their countervailing duty complaint. See U.S., Canadian Negotiators Reach Last Minute Accord in Softwood Lumber Dispute, 4 Int’l Trade Rep. (BNA) 6 (Jan. 7, 1987).

74. “Shakes” are a type of rough-hewn shingle often used in house sidings. In late 1985, Western U.S. red cedar shakes and shingle producers filed an action against Canadian imports under the so-called “escape clause,” section 201 of the 1974 Act, 19 U.S.C. §§ 2251-53. Under the escape clause, the ITC may recommend that the President proclaim import relief for a domestic producer who can demonstrate that foreign products are “being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof” to a competing U.S. industry. Id. § 2251(b)(1). Unlike countervailing duty investigations, see supra notes 72-73, escape clause actions do not involve allegations of unfair trade actions and are subject to presidential discretion. In February 1986, the ITC determined by a four to two vote that Canadian imports were a “substantial cause of serious injury” to the U.S. cedar shingles and shakes industry. See ITC Issues Affirmative Ruling on Shakes, Shingles, Mid-March Remedy Vote Planned, 3 Int’l Trade Rep. (BNA) 308 (Mar. 5, 1986).

75. Three ITC commissioners had recommended that the President propose a five-year, 35% increase on import tariffs, while two others had favored trade adjustment assistance, and a sixth had proposed no relief. See Divided ITC Recommends Tariff Increase, TAA Relief for Wood Shakes and Shingles Industry, 3 Int’l Trade Rep. (BNA) 375 (Mar. 19, 1986). The President modified the first recommendation, ordering a graduated schedule of tariffs that would start at 35%, then drop to 20% after 30 months, and finally to 8% after two more years, with a review after 30 months to evaluate the domestic industry’s recovery. Makers of Red Cedar Shakes, Shingles Get Import Protection, Wall St. J., May 23, 1986, at 6, col. 4.

76. Prime Minister Mulroney responded by filing a formal diplomatic protest, calling the Reagan Administration’s action “bizarre,” “inappropriate,” and “at variance with all [prior] undertakings.” President Orders Higher Tariffs on Shakes, Shingles from Canada, Modifying ITC Proposal, 3 Int’l Trade Rep. (BNA) 708 (May 28, 1986). In what it characterized as a “measured response,” the Canadian government then announced that it would reimpose duties on computer parts, semiconductors, and certain books and periodicals. Urquhart & Berkowitz, Canada Imposes Levies to Check New U.S. Tariff, Wall St. J., June 3, 1986, at 18, col. 1; Duties on U.S. Computer Parts, Publications Imposed in Retaliation for Shingles, Shakes, 3 Int’l Trade Rep. (BNA) 734 (June 4, 1986). Canada also imposed new duties on numerous items whose tariffs were set below GATT levels—tea and teabags, Christmas trees, oatmeal, rolled oats, diesel rail cars, cider, asphaltum oil, ozone generators, and airlifters. Martin, Canada Sets Tariff Retaliation, N.Y. Times, June 3, 1986, at D1, col. 6.

77. The United States chose not to counter-retaliate, partly to avoid escalation of the dispute and partly because the Canadian duties were imposed on products that either were not bound by or whose tariffs were already below internationally agreed-upon levels. Farnsworth, U.S. Move on Canada Doubted, N.Y. Times, June 4, 1986, at D1, col. 6. President Reagan
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Viewed in isolation, none of these three skirmishes seems significant enough to undermine the FTA. Taken together, however, they demonstrate that, under the current U.S. trade policy-making regime, Congress must be treated virtually as a coequal player with the President. The FTA's near miss before the Senate Finance Committee reveals the costs of underestimating Congress's direct influence over the negotiating process via the modified fast-track procedure; the softwood lumber and cedar shingles controversies illustrate how much Congress now indirectly influences that process by empowering private domestic parties directly to force executive branch action against foreign governments.78

These influences will undoubtedly affect both the substance and form of the forthcoming agreement. The lumber and shingles incidents demonstrate that statutory import deadlines imposed by Congress have dramatically limited the President's flexibility in resolving particular trade disputes. Moreover, they suggest that the President cannot pursue comprehensive free-trade talks with Canada without continually considering and appeasing the interests of even relatively insignificant domestic industries.79 Thus, as the FTA talks progress, U.S. domestic industries

formally apologized to Prime Minister Mulroney "for not being as sensitive as he might have been," Canada, U.S. stiffen in talks on free trade, New Haven Reg., June 3, 1986, at 31, col. 1 (quoting William Fox, Prime Minister Mulroney's communications advisor), and sent Vice President Bush to Ottawa to soothe tempers. Kilborn, Bush Canada Visit to Focus on Trade, N.Y. Times, June 10, 1986, at D8, col. 1.

78. The shingles and shakes controversy particularly illustrates how much pressure Congress and private parties may jointly exert on the President to take import relief measures. The domestic industry's escape clause petition engendered an affirmative ITC recommendation regarding relief, which the President was authorized by statute to accept, modify, or reject. See 19 U.S.C. §§ 2252-2253. A presidential decision to deny import relief would not have been surprising, given that only 20% of all escape clause investigations carried out since 1974 have resulted in import relief for the petitioning domestic industry. See Comment, United States Trade Laws: Reexaming the Escape Clause, 26 Va. J. Int'l L. 261, 263 (1985). As the statutory deadline for presidential action approached, however, Congress expressed its sentiment for broader protectionist action not only through the Senate Finance Committee's vote on the FTA, but also through the House's overwhelming passage of a protectionist omnibus trade bill. Vice President Bush later admitted that the President's action on shingles and shakes (announced the same day as the passage of the House bill) was designed to blunt these protectionist pressures. Boyd, Bush Urges Restraint by Canada, N.Y. Times, June 13, 1986, at D4, col. 4 (statement of Vice President Bush: "Frankly, we are trying as hard as we can to derail the protectionist juggernaut now sweeping through the United States Congress. . . . That's one more reason why our recent actions have been necessary.").

79. The effect of statutory deadlines was illustrated by the awkward timing of the President's announcement of shingles and shakes tariffs only 48 hours before the statutory deadline for escape clause action and just hours after the first round of formal talks concluded. Nor could the President prevent the lumber industry from filing its countervailing duty petition only two days before formal FTA talks commenced. See supra note 71. By shrewdly utilizing these statutory import remedies, particular industries may exert an influence on intergovernmental negotiations that is grossly disproportionate to their relative importance. The U.S. cedar shingles and shakes industry, for example, has dramatically affected the atmosphere of the FTA talks even though it currently employs only 1650 people in the northwestern United
will probably be able to influence the substance of the U.S. bargaining position, as well as the tone of the talks, both directly, by pursuing statutory trade remedies and indirectly, through their congressional representatives. Moreover, the specific presidential promises made to avert Senate Finance Committee disapproval of the FTA negotiations will limit the trade concessions the executive branch will now be willing to offer. Thus, while the Reagan Administration publicly espouses a comprehensive approach to the FTA, these countervailing forces within the U.S. market will almost certainly operate to contract the FTA’s substantive scope.

The legal constraints imposed by the current U.S. trade regime will also determine the legal form under which any negotiated FTA must be brought back to Congress for approval. Based upon the United States-Israel FTA experience, we may expect the President to seek fast-track approval of a Canada FTA in the form of a congressional-executive agreement, rather than as a treaty to be submitted to the Senate for advice and consent. Accompanied by draft implementing legislation, the

States. Chop, Chop, ECONOMIST, June 7, 1986, at 83; see also Shribman & Pine, Canada’s Quick Retaliation for Shingles Tariff Prompts Some on the Hill To Rethink Protectionism, Wall St. J., June 19, 1986, at 64, col. 1 (citing Commerce Department figures indicating that U.S. imports of Canadian shingles and shakes comprise less than one-seventh of one percent of the total volume of United States-Canada trade).

80. The lumber and shingles controversies represent only two of the many current irritants that may adversely affect the tone and the flow of the talks. Numerous U.S. industries have recently filed actions seeking import relief against Canadian imports. See, e.g., ITC Hears Arguments in Steel Fork Arms Case, Petitioner Dyson Accused of Mismanagement, 3 Int’l Trade Rep. (BNA) 661 (May 14, 1986) (escape clause action filed by U.S. steel fork arm producers); By Tie Vote, ITC Finds Injury from Canadian Whole Groundfish, But No Harm from Fillets, 3 Int’l Trade Rep. (BNA) 622 (May 7, 1986) (countervailing duty action filed by U.S. fishing industry against imports of Canadian groundfish); Oil Country Tubular Goods from Canada Subsidized, Sold at Less Than Fair Value, 3 Int’l Trade Rep. (BNA) 624 (May 7, 1986) (antidumping and countervailing duty action filed against oil country tubular goods from Canada); Trade Representative Accepts Section 301 Petition Against Canadian Fish Processors, 3 Int’l Trade Rep. (BNA) 685 (May 21, 1986) (petition filed by Washington and Alaska fish processing firms under section 301 of the 1974 Act, 19 U.S.C. § 2411, claiming that Canadian laws unfairly restrict the export of Canadian herring or salmon).

81. In his letter to Senator Packwood following the Senate Finance Committee’s vote on the motion to disapprove the FTA talks, the President assured the Committee that the talks would provide for “comparable treatment for America and Canada in investment and intellectual property rights in both countries.” He also promised that the United States would seek elimination or reduction of tariff barriers, increased access to government procurement opportunities in Canada, reduced government subsidies, nondiscriminatory treatment of suppliers of services, and protection against transshipment problems. Finally, the President assured the Committee that the FTA would “satisfactorily resolve outstanding trade disputes such as those we have had in agriculture and forestry, and resolve the challenge of implementing the terms of the agreement at the federal and provincial levels of Canada.” Narrow Victory, supra note 65, at 565 (quoting from President’s letter).

82. See infra text accompanying notes 156-62 (discussing likely scope of FTA).

83. Part V(A), infra, discusses the likely timing of the executive branch’s submission of the FTA to Congress. See infra text accompanying notes 144-54. As in the case of both the Israel
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agreement would then be submitted to the two committees, then to both houses for approval by a majority vote. Should Congress and the President differ at that point over the wisdom of the proposed trade package, however, either committee or house could pass a resolution either denying fast-track approval to the fully negotiated free trade package, or imposing conditions upon the package as a prerequisite for fast-track treatment.

Should this eventuality arise, the President would face three unappealing options. First, he could resubmit the agreement and implementing legislation for congressional approval under normal unexpedited congressional procedures. Should that occur, the package would be vulnerable to post-negotiation amendment and could be bottled up in committee or halted by filibuster on the floor. Second, he could submit the package with a request that it be given ad hoc fast-track consideration, notwithstanding the prior committee or House or Senate disapproval.

FTA and the 1965 Canada auto pact, the parties would probably abstain from putting the agreement into force through a bilateral exchange of instruments of ratification until after the respective legislatures had executed the agreement as domestic law. See supra notes 35, 53. This legislation would probably resemble the United States-Israel Free Trade Agreement Implementing Act. See supra note 53.

Either scenario would raise the question of whether the President could claim a legal “right” to fast-track procedures, based on the Senate Finance Committee’s failure to disapprove the negotiations in April 1986. The President could argue that the Committee’s failure to disapprove the negotiations gave the executive branch a statutory entitlement to fast-track consideration for any subsequently negotiated FTA. In response, Congress could point to a key provision of the fast-track procedure, which explicitly recognizes “the constitutional right of either House to change the [fast-track] rules . . . at any time, in the same manner and to the same extent as in the case of any other rule of that House.” 1974 Act, § 151(a)(2), 19 U.S.C. § 2191(a)(2). Under that provision, Congress could argue that either house reserves the right to withhold fast-track consideration “at any time,” and whenever it sees fit, even after the sixty-day renegotiation period for committee disapproval has expired. The President could then retort that allowing a single house to derail a fully negotiated free trade agreement from the fast track, after its own committee had allowed negotiations to proceed, would trivialize the sixty-day prenotice consultation period provided in the 1984 Act. Such an action, the President might further argue, should therefore be effected not by one-house action, but by a statutory amendment to the modified fast-track procedure (which presumably would be subject to presidential veto).

The “slow-track procedure” would afford ample opportunity for amendment or delay of the FTA. Without the fast track, the implementing legislation approving the FTA would originate in the House Ways and Means Committee, subject to public hearings, a committee markup, and a committee vote. Should the Committee report the bill, the House Rules Committee could bring it to the floor under an “open” rule, where it would be subject to amendment. Additional crippling amendments could potentially be added in the Senate Finance Committee, on the Senate floor, or in the conference between the two houses on the final legislation. Given the importance of the FTA, however, the possibility would remain that Congress might choose to approve it even after its “derailment” from the fast track. Congress approved the United States-Canada auto pact, for example, in precisely this manner. See supra text accompanying notes 31-35.

The President could claim that the 1984 Act in no way binds a later Congress to deny a negotiated FTA package fast-track consideration, even if all of the other procedural prerequisites for fast tracking are not satisfied. Cf. Black, Amending the Constitution: A Letter to a
Third and most risky, he could accept the FTA on behalf of the United States on his sole executive authority, thereby risking a constitutional confrontation with Congress of the type that occurred during the Kennedy Round. It seems most unlikely that the President would willingly force such a constitutional showdown, particularly at this time of renewed congressional distrust of executive discretion in foreign affairs. We might therefore reasonably expect U.S. negotiators to seek to avoid inter-branch confrontation by keeping Congress fully apprised of and involved in the Canada FTA negotiations as they progress.

Congressman, 82 YALE L.J. 189, 191-94 (1972) (judgments of one Congress cannot bind a subsequent Congress).

88. See supra text accompanying notes 38-39. Congress would most likely protest that the President lacks inherent constitutional authority to accept any aspect of the agreement providing for the modification or elimination of tariff barriers, which arguably fall within Congress's exclusive constitutional authority to "lay and collect Taxes, Duties, Imposts and Excises." See supra notes 23, 36. Alternatively, Congress could assert that the 1984 Act had preempted the field, thus obligating the President to comply with its terms. See, e.g., Consumers Union v. Kissinger, 506 F.2d 136, 146 (D.C. Cir. 1974) (Leventhal, J., dissenting) (arguing that detailed congressional scheme preempted President from entering into voluntary restraint agreements with Japanese steel producers), cert. denied, 421 U.S. 1004 (1975). In response, the President would probably claim that the language of the 1974 Act is broad enough to encompass the tariff as well as the nontariff liberalizing aspects of the proposed agreement. See 1974 Act, § 102(b)(1), 19 U.S.C. § 2112(b)(1) (authorizing President to "enter into trade agreements . . . providing for the harmonization, reduction, or elimination of . . . barriers (or other distortions) of international trade"). Alternatively, he could claim that his inherent constitutional authority permits him to accept at least those aspects of the negotiated package relating to nontariff barriers without congressional approval of any kind. Cf. supra notes 27, 36-37. But see United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955) (finding sole executive agreement regulating Canadian export of potatoes to the United States unauthorized by Congress and preempted by existing statute).

89. At this writing, the Iran-contra affair has noticeably increased the level of congressional distrust. Were the President willing to force such a showdown, however, it remains unclear whether any of the issues outlined supra note 88 could be judicially resolved. An array of justiciability doctrines—including ripeness, the political question doctrine, and, if the action were challenged by congressmen plaintiffs, the doctrine of congressional standing—would likely bar U.S. courts from reaching the merits. For further discussion of each of these issues in the context of a congressional challenge to the constitutionality of presidential action in foreign affairs, see generally Goldwater v. Carter, 444 U.S. 996 (1979); see also Henkin, Is There a "Political Question" Doctrine?, 85 YALE L.J. 597 (1976); McGowan, Congressmen in Court: The New Plaintiffs, 15 GA. L. REV. 241 (1981) (discussing congressional standing). One final possibility, however, is that third parties injured by the President's actions might successfully raise these issues in a lawsuit challenging the constitutionality of any executive orders that would be required to implement the FTA. Cf. Dames & Moore v. Regan, 453 U.S. 654 (1981) (third-party challenge to constitutionality of executive orders implementing accord freeing Iranian hostages).

90. The FTA negotiators could use Tokyo Round procedures as a model for executive-congressional cooperation. During those negotiations, members and staffs of the House Ways and Means and Senate Finance Committees directly discussed trade issues with foreign officials in Geneva. See Cassidy, Negotiating About Negotiations: The Geneva Multilateral Trade Talks, in THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER 264, 273 (T. Franck ed. 1981). Moreover, the Committees and the USTR even entered a formal memorandum of understanding, whereby the USTR agreed to supply the two Committees with classified incoming and outgoing cables relating to the negotiations. Id. at
III. The Canadian Legal Market

By identifying the Canadian institutions entitled to participate in the FTA's making, the specific legal constraints to which they are subject, and the compromises that they are likely to strike based upon historical experience, we may also predict what policy outcomes the Canadian legal market will most likely generate. Like the United States, Canada is a federal nation with a national executive and legislature and subnational provincial governments. Canadian international trade law differs from that of the United States, however, in three crucial respects. First, Canadian treaty law does not require the Parliament to approve either the signing or ratification of an international agreement.91 Second, Canadian import relief law does not yet afford private parties as much leverage over trade policy-making as does its U.S. counterpart.92 Third, although Canada's national government possesses full power to bind the country to the FTA under international law,93 no supremacy clause analogous to

271-72. Full-time committee staffers monitored the negotiations and were sometimes even present during negotiating sessions. See J. JACKSON, J.-V. LOUIS & M. MATSUMITA, supra note 29, at 153.

91. Canada's law of international agreements derives not from domestic constitutional law, as in the United States, but from unwritten custom. See Memorandum of July 21, 1952 from the Government of Canada, reprinted in A. CHAYES, T. EHRlich & A. LOWENFeld, supra note 14, at 338. That custom recognizes the Canadian executive's sole prerogative to enter solemn treaties with other nations. See Franck, The Bricker Amendment in Canada . . . a Rose-coloured Optical Illusion, 34 Neb. L. Rev. 59, 60 (1955)("The [treaty-making] process calls for no legislative participation whatsoever except when the executive seeks to bind not merely the country as a whole in international law, but also the individual subject in domestic law. Only then is legislation required.") (emphasis in original); Read, International Agreements, 26 Can. B. Rev. 520, 526 (1948) ("Legally, the approval of Parliament is not necessary, at any stage, to create an international obligation.").

92. Canadian industries have regularly invoked Canada's longstanding antidumping laws against U.S. industries. See M. SMITH, BRIDGING THE GAP: TRADE LAWS IN THE CANADIAN-U.S. NEGOTIATIONS 7-9 (1987) (pointing out that Canadian industries filed more than three times as many antidumping actions against U.S. products between 1980 and 1985 as vice versa). Canadian countervailing duty laws affording recourse to private petitioners, however, have existed only since 1984, when the Canadian Special Import Measures Act, 25 Can. Stat. (1984), took effect. See M. SMITH, supra, at 21. Similarly, Canadian private parties may not directly initiate "escape clause" or safeguard actions; they must ask the government to launch such an investigation for them. See id. at 30-31.

93. The Letters Patent of 1947 authorized the Governor-General of Canada to exercise all powers and authorities formerly exercised with respect to Canada by the British Crown. Those powers and authorities included treaty-making. Even without that express delegation, however, some scholars have suggested that Canada's full independence carried with it the power to make international agreements, a power that necessarily vested in the federal government. See A. GOTLIB, CANADIAN TREATY-MAKING 28-29 (1968). Canadian legal scholars have not widely accepted a controversial minority view: that the federal government's power is not exclusive, permitting the provinces, too, to exercise treaty-making power. See, e.g., P. HOGG, CONSTITUTIONAL LAW OF CANADA 254-56 (2d ed. 1985); Morris, The Treaty-Making Power: A Canadian Dilemma, 45 Can. B. Rev. 478 (1967); A. GOTLIB, supra, at 27-32 (all describing and criticizing this argument).
that found in the U.S. Constitution\textsuperscript{94} would simultaneously bind the provinces to the accord. These three distinctions dictate that the domestic institution with which the Mulroney Government must most carefully reckon will not be Parliament or private interests, as in the United States, but rather the provinces.

A. \textit{Constraints on Parliamentary Action}

Because treaty-making in Canada lies within the executive's sole prerogative, the Mulroney Government theoretically retains the option of not submitting a negotiated FTA to Parliament at all. The Canadian executive could conceivably implement it immediately by an Order-In-Council (the equivalent of a presidential executive order in the United States), while seeking legislative approval sometime later. In 1965, the Lester Pearson Government pursued this course, for example, with respect to the United States-Canada auto pact, when it admitted no legal obligation to obtain parliamentary approval of the agreement, and introduced a motion seeking such approval only one and one-half years \textit{after} the pact had been entered.\textsuperscript{95}

While legally permissible, a decision to delay legislative consideration of the FTA would seem politically impractical, given the accord's enormous nationwide impact and high public profile.\textsuperscript{96} Pragmatic and symbolic, rather than strictly legal, concerns will therefore dictate the FTA's form under Canadian law. In the auto pact case, the executive dismissed Parliament's claim of a legal right of approval by styling the pact an

\begin{itemize}
\item \textsuperscript{94} U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").
\item \textsuperscript{95} In that case, the Pearson Government implemented the pact by an Order-in-Council, which the Governor-General put into effect immediately under his preexisting powers to remit duties under existing customs and tariff legislation. \textit{See} A. Chayes, T. Ehrlich & A. Lowenfeld, supra note 14, at 343. After considerable grumbling, \textit{see infra} note 96, both houses finally approved the pact. \textit{See} 5 CAN. PARL. DEB., H.C. 4745, 4820 (1966); 1 CAN. PARL. DEB., Sen. 853 (1966-67).
\item \textsuperscript{96} Perhaps the best measure of how much legislative criticism such an action might arouse would be the parliamentary hostility to the Pearson Government's actions regarding the 1965 auto pact, an accord of far lesser national significance. \textit{See}, e.g., 1 CAN. PARL. DEB., H.C. 1111 (1965), \textit{reprinted in} A. Chayes, T. Ehrlich & A. Lowenfeld, supra note 14, at 335-37 (remarks of Mr. Douglas) ("Our Government, simply by Order in Council, put this far reaching agreement into effect and has left parliament dangling for four months with no power to do other than ask the occasional question on the Orders of the Day."); 5 CAN. PARL. DEB., H.C. 1111 (1965), \textit{reprinted in id.} at 336-37 (remarks of Mr. Churchill) ("[P]arliament was bypassed. Now, almost a year and a half later, . . . Parliament is asked to be a rubber-stamp for executive action. . . . A blunderbuss is placed at the head of parliament. We are in effect told to approve of the treaty or a chaotic condition will result in the automotive industry.").
\end{itemize}
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intergovernmental agreement rather than a treaty. The Mulroney Government’s perception of the FTA’s greater importance would probably lead it, however, to conclude the agreement with all the solemnities of a treaty. Historically, the Canadian executive has obtained formal legislative approval of important treaties by laying them before Parliament during the interval between signing and ratification, then either moving for a resolution of approval (to be adopted by a majority in each House) or asking Parliament to enact a statute embodying the accord.

Should the Mulroney Government follow either course, the next question would become whether the Cabinet could implement the agreement domestically over express parliamentary refusal to approve it. This problem, however, is not likely to arise, given that the Parliament’s failure to approve the FTA would amount to a no-confidence vote on an issue of the highest national importance. So long as the Mulroney Government retains a legislative majority, the strong Canadian tradition of parliamentary discipline (which far overshadows the U.S. tradition of party loyalty to the President) virtually ensures legislative approval of any FTA that might be negotiated.

B. Possibilities for Private Leverage

Numerous influential Canadian national interest groups, particularly farm organizations, trade unions, and protected industries—such as the textile, footwear, beer, publishing, and film and recording industries—have publicly opposed the FTA. Because Canada’s countervailing

97. During the parliamentary debates, for example, Mr. Drury, the Pearson Government’s Minister of Industry, claimed that the auto pact was not a treaty, but merely “an agreement between the administrations of two countries governing the exercise of their normal administrative functions . . . in carrying out” their authorized duties. 5 CAN. PARL. DEB., H.C. 4815 (1966), reprinted in A. CHAYES, T. EHRLICH & A. LOWENFELD, supra note 14, at 337.

98. See Read, supra note 91, at 527-28; P. HOGG, supra note 93, at 244; A. GOTLIB, supra note 93, at 18-19. If Parliament should enact a statute, that statute would alone, or in combination with a resolution of approval, confirm the agreement and authorize its ratification, give its provisions the force of law, or empower the Governor-in-Council to give its provisions effect. See Read, supra note 91, at 528.

99. Growing popular opposition has spurred parliamentary opposition to the FTA. Liberal leader John Turner has opposed the talks, see Edmonds, Menu for Canada Trade Talks: Hold the Rhetoric, Wall St. J., July 11, 1986, at 21, col. 4. In May 1986, the House of Commons debated an opposition party resolution proposing that the start of negotiations be delayed until the United States had promised to withdraw all existing countervailing duties against Canada and to begin no new actions until after the talks had concluded. See Offer by Canada, supra note 70, at 645. Following President Reagan’s announcement of the shingles and shakes tariffs, see supra notes 74-77 and accompanying text, a number of opposition members demanded that talks be suspended unless the United States dropped the import levy. See Urquhart & Berkowitz, Canada Weighs Steps To Counter U.S. Trade Move, Wall St. J., May 27, 1986, at 3, col. 1.

100. In recent months, the coalition opposing the FTA has grown to include the Canadian Labor Congress, the socialist New Democratic Party (which won 19% of the votes in the most
duty law is of relatively recent vintage and its escape clause law affords private industries no access, however, private Canadian industries have had fewer opportunities than their U.S. counterparts to invoke Canadian analogs to U.S. import remedies to influence the FTA negotiations.101 Recently, however, the Ontario corn growers initiated the first foreign countervailing duty action ever successfully brought against U.S. exports; the action impelled the Canadian government to launch a countervailing duty investigation and to impose import levies against American corn.102 This Canadian action, which some have viewed as a response to the perceived politicization of the U.S. softwood lumber case,103 has already aroused protests from Congress and U.S. executive action before the GATT.104 Regardless of how the corn dispute ultimately plays out, recent national election), the National Action Committee on the Status of Women, which embraces 450 women’s groups, the artistic community, and Canadian egg producers. Berkowitz, Canadian Fears over ‘Americanization’ Are Rekindled by Trade Talks with U.S., Wall St. J., May 19, 1986, at 46, col. 4; Canadian Egg Producers Head Says Free Trade Agreement Would Devastate Industry There, 3 Int'l Trade Rep. (BNA) 475 (Apr. 9, 1986). That opposition alignment has now formed the Pro-Canada Network, a lobbying group to campaign against the FTA. Burns, Trade Pact Foes Rally in Canada, N.Y. Times, Apr. 6, 1987, at D1, col. 6.

101. Compare supra note 92 with supra text accompanying notes 49, 70-82. Canadian industries have, however, successfully won several recent antidumping actions against U.S. industries. See, e.g., Also in the News, 4 Int'l Trade Rep. (BNA) 562 (Apr. 22, 1987) (yellow onions); Also in the News, 3 Int'l Trade Rep. (BNA) 451 (Apr. 2, 1986) (potatoes); see also M. Smith, supra note 92, at 7 (between 1980 and 1985, Canadian industries filed 27 antidumping actions against U.S. products that led to findings of domestic injury).

102. The Canadian corn growers alleged that subsidized U.S. corn had caused material injury to the Canadian market and should be countervailed. After investigation, the Canadian Revenue Department ruled that subsidization had occurred, and imposed a provisional duty of $1.05 (U.S.) per bushel on U.S. corn imports. Urquhart, Canada Sets Duty on U.S. Corn Imports After Ruling Growers Are Subsidized, Wall St. J., Nov. 10, 1986, at 5, col. 3. The Canadian Import Tribunal then went on to investigate whether those exports had caused or were likely to cause material injury to Canadian corn growers. Urquhart, Canada Probes Corn Growers' Charges That U.S. Heavily Subsidizes Exports, Wall St. J., July 3, 1986, at 2, col. 3. In March 1987, the Tribunal upheld a countervailing duty on American corn imports of 84.9e (U.S.) per bushel. Canada Stand on U.S. Corn, N.Y. Times, Mar. 7, 1987, at 45, col. 5. Recently, the Canadian Import Tribunal scheduled a special public hearing to determine whether the duty should be removed. Removal of Countervailing Duty on U.S. Corn To Be Considered at Revenue Canada Hearing, 4 Int'l Trade Rep. (BNA) 402 (Mar. 25, 1987). Under the Canadian Special Import Measures Act, supra note 92, the tribunal may recommend that the Cabinet exercise its discretion to remove the duty in the public interest. Removal of Countervailing Duty on U.S. Corn To Be Considered at Revenue Canada Hearing, supra.

103. See supra notes 70-73 and accompanying text.

104. USTR Clayton Yeutter called the corn decision “totally unjustified,” claiming that U.S. exports had not injured the Canadian corn industry. Urquhart, Canada Imposes Duty on Imports of Corn from U.S., Wall St. J., Mar. 9, 1987, at 11, col. 4. See also id. at col. 5 (remarks of Agriculture Secretary Richard Lyng) (Canadian corn ruling “isn’t helpful in the context” of the current FTA negotiations). The Senate reinforced these protests by unanimously approving a concurrent resolution directing the Commerce Department and the USTR to determine whether the Canadian Import Tribunal’s findings violated the GATT. Senate Approves Resolution Countering Canadian Grain, EC Soybean Export Actions, 4 Int'l Trade Rep. (BNA) 435 (Apr. 1, 1987). In response, the USTR challenged the Canadian ruling under
the case demonstrates that in Canada as well as in the United States, the executive branch cannot ignore private interests when negotiating the FTA. Although private Canadian interests exercise only limited influence over the negotiations through their parliamentary representatives, statutory import remedies afford them a continuing, if relatively minor, measure of direct influence.

C. The Power of the Provinces

Under Canadian law, the provinces, and not the federal legislature or private interests, will pose the greatest obstacle to the FTA’s approval. The two largest provinces, Ontario and Quebec, have expressed doubts about the wisdom of a comprehensive FTA. Moreover, history reveals that the provinces have periodically exploited Canada’s lack of a supremacy clause to create problems during past treaty-making debates.

The refusal of Canadian constitutional law to recognize a concluded international agreement as part of national municipal law exacerbates the provincial problem. Consequently, even a fully negotiated FTA would not be self-executing. Under the famous Labour Conventions doctrine, international agreements may not be enforced as Canadian domestic law unless specifically implemented by the particular legislature vested by the Constitution Act with jurisdiction over the agreement’s subject matter. That Act gives the federal government exclusive power over “[t]he

the GATT Subsidies Code, prompting an emergency meeting of the GATT Subsidies Committee to hear the complaint. GATT Subsidies Committee Hears U.S. Complaint on Canadian Countervailing Duty on Corn, 4 Int’l Trade Rep. (BNA) 607-08 (May 6, 1987).

105. See New Quebec Premier Seeks Veto on Free Trade with U.S. as Controversy Continues, 2 Int’l Trade Rep. (BNA) 1578 (Dec. 18, 1985) [hereinafter New Quebec Premier]; Urquhart, Opposition Is Mounting in Canada to Trade Pact Talks with the U.S., Wall St. J., Dec. 10, 1985, at 35, col. 3 (“Almost all the provinces are demanding a direct role in the bargaining and some are insisting on veto rights.”); Martin, Trade Stirs Concern in Quebec, N.Y. Times, Dec. 6, 1985, at D5, col. 1; Martin, Free Trade Stirs Doubt in Ontario, N.Y. Times, Oct. 7, 1985, at D1, col. 6; see also Edmonds, supra note 99, at 21, col. 5 (describing concerns expressed by Don Getty, Alberta’s conservative Prime Minister). In recent months, however, Ontario’s Premier has expressed greater receptivity to such an accord. See Ontario Might Be Willing To Support Free Trade Agreement with U.S., Premier Says, 4 Int’l Trade Rep. (BNA) 558 (Apr. 22, 1987).


107. See P. Hogg, supra note 93, at 245-46.


Regulation of Trade and Commerce."\(^{110}\) Thus, the federal government would presumably argue that all of the domestic changes required to carry out the FTA fall under that power and may be implemented by federal statute alone.\(^{111}\) The provinces would likely respond, however, that some changes fall within their exclusive jurisdiction to make laws in relation to "Property and Civil Rights in the Province."\(^{112}\) Thus, they would argue, the executive and Parliament cannot fully implement the FTA unless each affected province also enacts concurrent implementing legislation.\(^{113}\)

Were concurrent provincial implementing legislation legally unnecessary, the federal government could simply negotiate the FTA without provincial participation. But such legislation will almost certainly be necessary, a reality that affords the provinces considerable leverage and perhaps a de facto veto over the accord.\(^{114}\) Additional de jure opportunities for provincial veto would arise if, as some provincial officials urge, the FTA were deemed sufficiently important to be adopted via constitutional amendment\(^{115}\) or some similar procedure.\(^{116}\) The provinces may

\(^{110}\) Id. § 91(2).

\(^{111}\) See supra note 98. The Canadian courts, however, have tended to construe the Canadian federal government's power under this section more narrowly than U.S. courts have construed Congress's parallel power under the commerce clause, U.S. Const. art. I, § 8, cl. 3 (authorizing Congress "to regulate commerce with foreign nations, and among the several States"). See P. Hogg, supra note 93, at 439.

\(^{112}\) Constitution Act, supra note 109, § 92(13).

\(^{113}\) Ontario has maintained, for example, that domestic implementation of the FTA would require it to amend a number of local laws that fall within its exclusive provincial jurisdiction, including those governing liquor sales, agricultural marketing boards, transportation, and financial services. Canadian Auto Negotiator Chosen to Lead Ottawa Team in Bilateral Trade Talks, 2 Int'l Trade Rep. (BNA) 1454 (Nov. 13, 1985) (statement of David Cooke, chairman of Ontario legislative committee on bilateral trade with the United States) ("If we don't pass enabling legislation, [the FTA] ain't going to work").

\(^{114}\) The provinces could exercise that veto simply by withholding the concurrent legislation necessary to implement the FTA. Without provincial legislation, the Canadian courts would have to decide on a case-by-case basis whether particular features of the federal legislation implementing the FTA unconstitutionally intruded upon exclusive provincial jurisdiction. Two recent cases illustrate the difficulties of predicting how the courts would rule with respect to such questions. Compare In re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198 (upholding a federal marketing statute that regulated interprovincial elements of an interlocking federal-provincial agricultural marketing scheme) with Dominion Stores, Ltd. v. The Queen, [1980] 1 S.C.R. 844, 106 D.L.R. (3d) 581 (striking down part of the federal Canada Agricultural Products Standards Act as an intrusion upon provincial jurisdiction).

\(^{115}\) For many years, the British North American Act of 1867 lacked a provision for its own amendment. During the search for an amending procedure in the late 1960's, a procedure known as the "Victoria Charter" formula was proposed, whereby any constitutional amendment required the concurrent assent of the federal Parliament, every province that had had at any time 25% of the national population, at least two of the Atlantic provinces, and at least two of the Western provinces. See P. Hogg, supra note 93, at 54-55. After substantial controversy, a federal-provincial agreement was reached in November 1981, whereby future amendments would be made by Parliament and at least seven of ten provinces having 50% of the country's population. See McConnell, Cutting the Gordian Knot: The Amending Process in
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therefore use their veto power, whether de facto or de jure, to obtain not
only a right to be consulted, but also a right to influence the substance of
the negotiations. 117

Should the federal government fail to secure provincial approval of the
negotiated FTA, it could, theoretically, ratify the agreement with a reser-
vation declaring that the federal government does not thereby bind itself
to carry out any obligations that lie within exclusive provincial com-
petence. Under a so-called “federal-state” clause, the Canadian federal
government undertakes to perform only those obligations which lie
within its exclusive competence, while notifying the provinces of a
treaty’s conclusion and urging that the provinces also implement it by
local legislation. 118 Either option, however, would make the FTA far

Canada, 44 LAW & CONTEMP. PROBS. 195, 196 (1981). Although the Canadian Supreme
Court later found no strict legal requirement that the provinces consent to constitutional
amendments, see Re Resolution to Amend Constitution of Canada (Patrition Reference
that decision and applied the terms of the November 1981 accord by statute. See section 38(1)
of the Constitution Act of 1982, Schedule B to the Canada Act of 1982 (U.K.). Thus, under
current law, if the provinces were able to force application of current constitutional amend-
ment procedures to the FTA, the dissent of four provinces would suffice to veto its adoption.

Recently, additional uncertainty has been added by Quebec’s May 1987 decision to sign the
Canadian Constitution. Burns, Quebec Accepting a Role in Canada in a Constitution, N.Y.
Times, May 2, 1987, at A1, col. 4. If formally approved by the provinces and the federal
government, a process which could take several years, the accord securing Quebec’s signature
would grant every province a veto over constitutional changes affecting national institutions
and provincial boundaries. Id. It remains unclear, however, whether such a provincial veto
would encompass ratification of the FTA.

116. Quebec Premier Robert Bourassa has recently proposed application of the Victoria
Charter formula, see supra note 115, to approval of the FTA. Under that proposal, Ontario,
Quebec, the federal government, and the combined Eastern or Western provinces would each
have a veto of the FTA’s terms. See New Quebec Premier, supra note 105, at 1578 (statement
of Premier Bourassa) (“There is an argument I can use with some provinces saying that if they
are nervous about the consequences of a free trade treaty, the amending formula that Quebec
proposes—the Victoria formula—would permit them to feel more secure.”). Ontario’s Prem-
ier has also expressed receptivity to ratifying the FTA according to a revised version of this
“regional veto” formula. Progress of Free Trade Talks Will Be Debated in Parliament, 4 Int’l
this ad hoc procedure would vastly expand provincial veto opportunities, there seems to be no
legal rationale for substituting it for either the normal treaty-making approval or the normal
constitutional amendment procedures described supra notes 98-115 and accompanying text.

117. As FTA talks proceed, Canada’s negotiators will need to consult constantly with pro-
vincial officials. See New Quebec Premier, supra note 105, at 1578-79 (statement of Ontario
Premier David Peterson) (“Because there’s so much at stake that’s under the provinces’ jur-
diction, [the negotiators] must have our participation, not just consultation. The negotiator
must take instructions from the [provincial] first ministers, and that’s where the authority
must lie.”).

118. See I. BERNIER, supra note 106, at 155-57; A. GOTLIEB, supra note 93, at 78. Under
prevailing treaty practice, the federal government usually asks the provincial governments in-
formally, by letter exchanged between the responsible federal minister and the provincial gov-
ernment, whether the provinces would be willing to take the action necessary to implement the
agreement within their exclusive jurisdiction. See id. at 77-78 & n.30 (citing examples).
less attractive to the U.S. Congress and would thus probably be deemed politically unacceptable. 119

In sum, Canada's ability to negotiate an FTA will hinge upon the federal government's ability to secure some advance assurances from the provinces that they will accept whatever FTA emerges from intergovernmental negotiations. Without such assurances, the provinces could conceivably reject those portions of the FTA that fall within their exclusive jurisdiction and erect independent barriers to U.S. imports. 120 Although the United States could anticipate that possibility by negotiating for an FTA provision precluding the provinces from enacting such laws or authorizing the United States to retaliate directly against noncomplying provinces, 121 the Canadian national government would be powerless to enforce such treaty provisions against the provinces through federal legislation. Thus, sometime before the FTA negotiations conclude, the Mulroney Government will face severe pressure to negotiate a separate binding federal-provincial agreement, which would commit the provinces to implement a negotiated FTA as provincial law. 122 Failure to secure such a binding federal-provincial ratification accord could be enough to doom the FTA altogether.

119. Indeed, the chief U.S. negotiator, Peter O. Murphy, has declared that it "will be very difficult" for the FTA to win congressional approval absent Canadian government assurances that portions of the agreement relating to provincial jurisdiction will be implemented. Free Trade Talks Off to Controversial Start with Debate over Including Social Programs, 3 Int'l Trade Rep. (BNA) 720 (May 28, 1986) [hereinafter Free Trade Talks].

120. Some Ontario officials, for example, have raised the possibility that the Ontario Securities and Exchange Commission might exclude U.S. financial institutions from their province even after an FTA is signed. See Provincial Conflicts May Jeopardize FTA if Canadian Government Fails To Prevail, 2 Int'l Trade Rep. (BNA) 1505, 1506 (Nov. 27, 1985).

121. Great Britain proposed inclusion of a similar provision in the Convention between the United States and the United Kingdom for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. See S. Exec. Doc. K, 94th Cong., 2d Sess., art. 9(4)(1976) (precluding the states of the United States and local taxing authorities from utilizing the "worldwide combined reporting method" of taxation to assess the income tax liability of British corporations and their controlled subsidiaries doing business locally). Although the U.S. executive branch originally agreed to that concession, the states of the United States opposed it as interfering with their sovereign right to regulate local affairs in the absence of preemptive federal legislation. After a lengthy congressional battle, the Senate ratified the treaty, but reserved as to that provision. See generally Meron, The Treaty Power: The International Legal Effect of Changes in Obligations Initiated by the Congress, in THE TETHERED PRESIDENCY, supra note 90, at 103, 123-28.

122. Progress in achieving such an agreement has been slow. In November 1985, Prime Minister Mulroney and the provincial prime ministers agreed to a brief, ambiguous statement regarding the provinces' role in the FTA talks. New Quebec Premier, supra note 105. Subsequent meetings did not substantially clarify that statement. Free Trade Talks, supra note 119. At this writing, the federal and provincial governments are still struggling to reach an accord regarding FTA ratification, with the question being postponed until the next federal-provincial prime ministers' meeting in June 1987. Canadian Governments Unable To Agree on Ratification Process for Free Trade Deal, 4 Int'l Trade Rep. (BNA) 384 (Mar. 18, 1987).
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IV. The International Legal Market

The third and final legal structure influencing the bilateral FTA negotiations is the GATT, which provides both the international legal forum and the structure of international legal rules by which any agreement will eventually be judged. Within the international legal market, the two most relevant historical precedents are the United States’ first comprehensive free trade agreement—the 1985 accord with Israel—and the United States’ first free trade agreement with Canada—the 1965 sectoral automotive products agreement. Both pacts raised two GATT questions that now seem likely to recur: whether the bilateral agreement comports with the substantive and procedural requirements of GATT article XXIV, and if not, whether the two nations could obtain a waiver from that article’s provisions.

Article I, section 1 of the GATT embodies the most-favored-nation (MFN) principle: each contracting party’s cardinal commitment to accord “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country” “immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” Even the first GATT drafts, however, carved out an exception to this generalized, unconditional MFN regime for regional arrangements, an exception drafted, ironically enough, at least partly in anticipation of a United States-Canada free trade accord.123

This exception, now embodied in GATT article XXIV, exempts from the MFN requirement customs unions, free trade areas, and “interim agreements” leading to the formation of either of the other two arrangements124 so long as they meet three substantive criteria:125 first, the elim-

123. Hufbauer & Samet, supra note 59, at 181 (Article XXIV was “drafted in anticipation of, and designed to accommodate, a Canada-U.S. accord. Negotiations resulted in a draft agreement for a free trade area, but talks were abandoned by Prime Minister Mackenzie King at a late hour.”).

124. Art. XXIV, para. 8(b) of the GATT defines a “free-trade area . . . to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories” (emphasis added). Paragraph 8(a) defines a “customs union” as an association of nations that affords imports from member states duty-free treatment but also applies “substantially the same duties and other regulations of commerce” to nonmember states, i.e., a common external tariff. An “interim agreement” is an arrangement that will lead to one of the other two arrangements “within a reasonable length of time.” Id. para. 5(c).

125. In addition to these three substantive criteria, article XXIV also imposes two procedural requirements. Under paragraph 7(a), the United States and Canada would first have to notify the other contracting parties of their intention to negotiate an FTA and “make available to them such information regarding the proposed . . . area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.” After the
ination of duties and other restrictive regulations on "substantially all the trade between the constituent territories," second, the retention of duties and regulations in the constituent territories that are no "higher or more restrictive than the corresponding duties and other regulations of commerce" previously in effect; and third, the implementation of the FTA "within a reasonable length of time." There seems little dispute that the United States-Israel Agreement fully satisfied each of these three substantive criteria, while the Canadian auto pact, which was limited to the automotive sector, unambiguously violated the first.

A comprehensive United States-Canada FTA would pass muster under each of article XXIV's substantive criteria, particularly if it were modeled upon the United States-Israel FTA. Satisfaction of the first criterion would depend upon both the percentage of trade freed (the quantitative dimension of "substantially all trade") and the extent to which the FTA would effect some overall liberalization of trade between the two parties (the qualitative dimension). Although GATT jurisprudence offers no clear definition of either dimension, both would probably be evaluated in light of the breadth of the sectoral exclusions condoned by the FTA and the character of the tariff and nontariff reductions undertaken within it. History suggests that if the United States-Canada agreement has been negotiated, the countries would be further obliged to submit the accord to a working party for study and evaluation under article XXIV's substantive criteria. In negotiating the auto pact, the United States satisfied only the second of these procedural prerequisites. See infra notes 139, 142 (Canada did not appear before the GATT to defend the auto pact; the United States submitted the pact for GATT evaluation, but only after the pact had been concluded).

126. GATT art. XXIV, para. 8(b).
127. Id. para. 5(b).
128. Id. para. 5(c).
130. K. DAM, supra note 11, at 48 (the United States-Canada auto pact was one important "preferential arrangement that could not possibly be passed off as a good faith attempt to conform to Article XXIV").
131. For further discussion of the elements likely to be included in the FTA, see infra notes 155-76.
132. See GATT, BISD, supra note 6, (Supp. IX) at 83 (1961) ("[T]he phrase 'substantially all the trade' [has] a qualitative as well as quantitative aspect and ... it should not be taken as allowing the exclusion of a major sector of economic activity."); see also J. JACKSON, WORLD TRADE, supra note 8, at 610 ("[N]ot only is it difficult to arrive at a proportion that could be deemed 'substantially all' within the GATT regional criteria but it has so far been impossible for GATT parties to agree on even the qualitative aspects of interpreting this term. Some agreement appears for the proposition that no important segment of trade can be omitted from an arrangement and still have that arrangement meet the 'substantially all' test.").
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FTA provided for the phased elimination of both tariff and nontariff trade barriers on eighty percent or more of bilateral trade, the GATT would probably not condemn it.133 Moreover, the two parties could probably satisfy the qualitative dimension of the first criterion by excluding few product sectors and expressly incorporating GATT principles and trade-liberalizing nontariff accords into the FTA.134

The parties could also easily satisfy the second substantive requirement—that the pact not be designed to raise any additional barriers to trade—so long as they modeled specific provisions upon those found in the Israel FTA.135 Nor would the third requirement, that the FTA be

133. The European Free Trade Association (EFTA), which covered industrial goods representing 90% of all industrial trade among the constituent territories, easily won GATT approval in 1960; other FTAs covering between 50 and 77% have been tolerated, although not unanimously endorsed, by the GATT. See Sarna, The Canada-U.S. Free Trade Option, 13 J. World Trade L. 303, 307 (1979). See generally J. Lambrinidis, The Structure, Function, and Law of a Free Trade Area (1965). The Israel-EEC FTA, which currently covers approximately 80% of all trade, applies to nearly all trade sectors and encompasses both tariff and nontariff barriers. See generally Langer, The Israel-EEC Free Trade Agreement: An Analysis of the Agreement and Its Effects on Investments, 9 SYRACUSE J. INT’L L. & COM. 63 (1982). Although that agreement was submitted to a GATT working party in July 1976, the working party reached no consensus on its legality and the GATT contracting parties have as yet taken no action with respect to it. See Note, supra note 129, at 211-13.

134. As one GATT official has noted, the two countries probably could not exclude from the FTA’s coverage a major sector of economic activity, such as agricultural trade, without triggering retaliatory action by other GATT signatories. See Prospects for U.S.-Canada Free Trade Talks Assessed at Conferences in Ottawa, New York, 3 Int’l Trade Rep. (BNA) 665, 666 (May 14, 1986) [statement of William Kelly, Deputy Director-General of the GATT] [hereinafter Prospects]. Perhaps the most prudent course would be to follow the lead of the United States-Israel FTA, which expressly operates within a GATT framework and directly incorporates GATT principles into the text of the bilateral accord. See United States-Israel FTA, supra note 53, art. 3 (affirming the parties’ respective rights and obligations with respect to one another under the GATT); art. 4 (agreeing not to apply new bilateral restrictions except as permitted by the GATT “as in effect on the date of entry into force of this Agreement and as interpreted [sic] by the CONTRACTING PARTIES to the GATT”); arts. 6, 10, 11 (incorporating specific agricultural, infant industries, and balance of payments exceptions permitted by the GATT); art. 7 (incorporating general exceptions and security exceptions of GATT articles XX and XXI).

135. The United States-Israel FTA contains numerous novel provisions, but none appears to create trade barriers higher or more restrictive than those previously in effect. Article 4 expressly provides that no new bilateral trade restrictions may be applied unless specifically permitted by the terms of the Agreement or the GATT. Annex 3 sets out detailed rules of origin to avoid transshipment of goods through the territory of the FTA member with the lower external tariff, but was not designed to create new external barriers to trade. Article 5 leaves domestic antidumping and countervailing duty laws untouched and limits application of the escape clause by requiring the parties to consult if the importing party grants import relief to domestic industries seriously injured or threatened with serious injury by increased imports. Furthermore, the Israel FTA reduces numerous other nontariff barriers. See, e.g., id. art. 12 (prohibiting imposition of most import license requirements); id. art. 13 (restricting the use of export requirements as a condition of establishing a business in the other country and restricting the use of “buy local” requirements as a condition of that business’s receiving government incentives); id. art. 14 (reaffirming parties’ commitment to national and MFN treatment with respect to intellectual property); id. art. 15(3) (extending government procurement commitment beyond requirements of GATT Procurement Code); id. annex 4 (committing Israel to
phased in within a “reasonable period of time,” pose a serious obstacle so long as the phase-in period lasted no more than twenty-two years. Even if the United States-Canada proposal fell short of FTA criteria during this phase-in period, it would almost surely qualify as an “interim agreement” toward the formation of an FTA under article XXIV(5). Because such interim agreements comply prima facie with the GATT, other GATT members would bear the burden of objecting to it. As a political matter, those GATT parties most likely to protest a United States-Canada FTA would probably be estopped from objection by their own regional arrangements or past public remarks.

Even if the FTA could not be reconciled with any or all of these article XXIV prerequisites, it seems unlikely that either a GATT working party or the contracting parties as a whole would ever disapprove it, if only because article XXIV has historically been so laxly enforced. The

eliminate certain export subsidies and to sign the GATT Subsidies Code); id. art. 16 & Declaration on Trade in Services, Apr. 22, 1985, United States-Israel, reprinted in 24 I.L.M. 679 (1985) (declaring the parties’ commitment to a more open exchange in services).

136. Although the GATT nowhere defines this term, and GATT working parties have developed no consistent definition of it, phase-in periods ranging from 10 to 22 years have historically been considered “reasonable.” J. Jackson, World Trade, supra note 8, at 606. Again, the FTA would probably satisfy this criterion so long as it followed a schedule similar to the U.S.-Israel FTA, which phases out all duties on both industrial and agricultural products traded between the two nations in four stages over a ten-year period. See United States-Israel Agreement, supra note 53, annexes 1 & 2. Following the Israel FTA model, each party could identify certain items as “import-sensitive” goods, on which duties could initially be frozen, then later made subject to consultations. Alternatively, the two parties might choose to deviate from the Israel FTA model by phasing out their duties on different time schedules.

137. J. Jackson, World Trade, supra note 8, at 604-05.

138. Given the EEC’s own article XXIV history, it seems unlikely that that body would object to a United States-Canada FTA. Similarly, Japan, as Canada’s second largest trading partner, could gain considerably if Canada were to extend to it key trade benefits negotiated in an FTA with the United States. See U.S.-Canada Bilateral Trade Pact Would Offer Benefits for Trade with Japan, Study Asserts, 4 Int’l Trade Rep. (BNA) 420-21 (Mar. 25, 1987). Thus, it is not surprising that Prime Minister Nakasone has already given his qualified blessing to a United States-Canada FTA. Nakasone Gives Qualified Endorsement of Canada-U.S. Free Trade Negotiations, 3 Int’l Trade Rep. (BNA) 141 (Jan. 22, 1986).

139. Once again, the Israel FTA and Canada auto pact precedents seem to be like harbinger of future GATT conduct. Thus far, the United States-Israel FTA has aroused only minimal objection from the other GATT parties. See GATT Council Appoints Panel To Study U.S. Nicaragua Embargo, Reviews Other Disputes, 2 Int’l Trade Rep. (BNA) 1313-14 (Oct. 16, 1985) (describing Indian and Brazilian criticisms of the Israel FTA). Moreover, the GATT’s treatment of Canada’s domestic implementation of the auto pact in 1965 typifies the permissive attitude that that body has taken even toward accords that unambiguously violate article XXIV. See supra notes 125, 130 and accompanying text. The Canadian Order-in-Council implementing that pact purported to extend duty-free entry to all imported automotive products on a most-favored-nation basis; in fact, that order granted duty-free entry as of right only to automotive products imported by subsidiaries of U.S. companies, thus arguably violating the MFN principle. See Order-in-Council, Jan. 16, 1965, Motor Vehicles Tariff Order 1965, P.C. 1965-99, [1965] 99 Stat. O. & R. 143 (No. 42), § 2(1)(e), reprinted in Documents Supplement to A. Chayes, T. Ehrlich & A. Lowenfeld, supra note 14, at 239. Nevertheless, the final decision of the GATT contracting parties analyzing the pact neither mentioned any
contracting parties have traditionally assumed an extremely liberal attitude toward literal compliance with article XXIV's terms, focusing instead on whether or not the agreement promotes trade liberalization in some general sense. Even in the unlikely event that a working party should find the FTA violative of the GATT, the two countries would retain the option of applying for a waiver from the GATT's provisions. As the auto pact episode illustrates, such waivers have been liberally granted, particularly when the parties seeking the waiver assert that the FTA will not divert trade from third countries.


140. As of 1974, 34 regional arrangements had been presented to the GATT, in addition to those specifically exempted upon the drafting of the GATT, and the contracting parties had condemned none of them. STAFF OF SEN. COMM. ON FINANCE, EXECUTIVE BRANCH GATT STUDIES, 93d Cong., 2d Sess., 139-40 (Comm. Print 1974) [hereinafter EXECUTIVE BRANCH GATT STUDIES]. Some commentators have consequently charged that the GATT has wholly failed to discharge its responsibility to regulate the formation of FTAs. See, e.g., Dam, Regional Economic Arrangements and the GATT: The Legacy of a Misconception, 30 U. CHI. L. REV. 615, 660-61 (1963) (“Not a single ... free-trade area agreement which has been submitted to the Contracting Parties has conformed fully to the requirements of article XXIV. Yet the Contracting Parties have felt compelled to grant waivers of one kind or another for every one of the proposed agreements.”). The recent report by Eminent Persons on Problems Facing the International Trading System (the so-called “Wise Men’s Report”) echoes this criticism. See Trade Policies for a Better Future, reprinted in 24 I.L.M. 716, 735 (1985) (stating that the GATT rules governing FTAs “have been distorted and abused” and recommending that they “be clarified and tightened up”).

141. The parties could conceivably apply for two types of waiver. Article XXV, para. 5 of the GATT permits the contracting parties to waive a GATT obligation “[i]n exceptional circumstances not elsewhere provided for in this Agreement ... Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.” Article XXIV, para. 10 separately provides for waivers by a two-thirds majority of the contracting parties of proposals “which do not fully comply with the requirements of [article XXIV,] paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.”

142. Of the 34 regional arrangements presented to the GATT before 1974, 11 were granted waives under article XXV(5). EXECUTIVE BRANCH GATT STUDIES, supra note 140, at 139. During the United States-Canada auto pact incident, for example, Great Britain, West Germany, and other auto-exporting GATT members protested the pact's formation. The United States responded by requesting a waiver of its MFN obligations under article XXV(5) from the working party convened by the contracting parties. In support of the waiver, the United States confessed that the Agreement “technical[ly]” violated the GATT, but argued that the pact comport with the GATT's spirit, because it diverted no trade away from any third countries. See Report of the GATT Working Party, reprinted in A. CHAYES, T. EHRLICH & A. LOWENFIELD, supra note 14, at 372-74. Although some working party members “expressed their concern that the United States/Canada Agreement ... in fact instituted preferential treatment by one highly developed country in favour of another,” id. at 373, the contracting parties unanimously granted the auto pact a renewable article XXV(5) waiver. That waiver was conditioned upon the U.S. agreement to consult with any requesting third-country GATT party that alleged a substantial interest in U.S. automotive product trade and a significant diversion of imports resulting from the pact. See GATT Auto Pact Decision, supra note 139, at 374-75.
In sum, the key historical precedents indicate that the jurisprudence of the GATT will set general guidelines, but will impose few stringent legal restrictions upon the substance and form of the bilateral FTA proposal. So long as the United States and Canada attempt in good faith to satisfy article XXIV, it seems most unlikely that the institution of the GATT will stand in the way of the FTA’s implementation.

V. Toward a “General Equilibrium Analysis” of the FTA

The foregoing survey has illustrated how a “partial equilibrium analysis” of the U.S., Canadian, and international legal markets enhances our ability to predict how the United States-Canada FTA is likely to evolve. The FTA will not be written on a blank slate; many of the issues of U.S., Canadian, and GATT law raised will resemble those aired during the United States-Israel FTA and the United States-Canada auto pact experiences. These historical precedents therefore enable us to identify those institutions within each market that are legally entitled to participate in the FTA’s making, as well as those legal constraints that will structure their interaction. Each legal market affords certain institutions, in addition to the Canadian and U.S. executive branches, special influence over the negotiation process. U.S. law confers special status upon Congress and private interests; Canadian law grants that role primarily to the provinces. Moreover, so long as the parties conform to minimal international law requirements, they can limit the GATT’s interference in the formation and operation of the FTA.

This individualized analysis does not explicitly account, however, for the fact that these three legal markets are themselves interdependent. Negotiating decisions made by the key institutional decision-makers to satisfy legal constraints imposed in any one of these markets will inevitably cause ripple effects in the other two, which will, in turn, affect the original market. Thus, we can further enhance our understanding of the FTA by subjecting the three legal markets to a general equilibrium analysis. Such an analysis would not only view each market in isolation, predicting the policy compromises likely to be struck within that market, but would also trace the effects of such compromises through each of the other two markets and back to the first. By so doing, we may derive “general equilibrium” solutions—that is, overall policy compromises

143. By the same token, legal constraints peculiar to each of these markets diminish the influence of other potential institutional players in the FTA drama. Under U.S. law, the supremacy clause will limit the role of the states, see supra note 23 and accompanying text, while Canadian treaty law similarly constricts Parliament’s role, see supra notes 91-99 and accompanying text.
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that are most likely to satisfy the interests of all concerned institutional players in light of the legal constraints fixed by all three markets.

Even without applying this type of analysis to all facets of the accord, we can illustrate how such an analysis might operate by examining the two questions most crucial to the FTA’s future: how long negotiations are likely to last, and what elements any comprehensive FTA is likely to include.

A. Length of Negotiations

To determine the likely termination date of the FTA negotiations, a general equilibrium analysis would ask what date would best satisfy the interests of the key institutional players in all three legal markets. Beginning with the international law market, that analysis would first recognize that the United States and Canada have pursued the FTA talks even while they have helped to launch the Uruguay Round of multilateral trade negotiations.144 Assuming that the executive branches in each country would prefer to present a united front on matters of mutual interest at that Round, pressures from the international law market would encourage both nations to conclude their bilateral talks sometime before the Uruguay Round negotiations hit full stride, that is, by mid-1988.

Pressures generated by the two domestic markets only reinforce those emanating from the international market. On the Canadian side, Prime Minister Mulroney has now staked his political future on the outcome of the FTA negotiations.145 Under Canadian law, Mulroney and his party must call national elections before February 1989.146 Thus, the Canadian executive branch and parliamentary majority have strong legal and political incentives to forge a federal-provincial agreement and to produce an FTA well before that date.147


145. See Urquhart, Canadian Premier Gambles on Accord with U.S. to Reverse Slide in Popularity, Wall St. J., Apr. 2, 1987, at 25, col. 1 (remarks of Prime Minister Mulroney) (an FTA will be “an important part of my record and I will run on it and be reelected”).

146. Id.

147. A number of the provincial prime ministers have pressed the Mulroney Government to produce a draft of the FTA at the federal-provincial meeting scheduled for June 1987. See
Looking at the international and Canadian law markets together, one might conclude that mid-1988 would be the most likely date for the FTA’s conclusion. But forces within the U.S. market have now produced potentially dispositive legal pressures to end negotiations earlier. Ordinarily, President Reagan’s personal political timetable would give him leeway to conclude negotiations at any time before he left office in January 1989, or at least before his successor was elected the previous November. But under the sunset provision of the 1979 Trade Act, the President’s statutory authority to negotiate with respect to nontariff barriers expires on January 2, 1988.148 To ensure the FTA access to the modified fast-track approval procedure, the President would therefore be obliged to notify Congress of the negotiation of the agreement ninety days before that statutory procedure disappeared, that is, by the start of October 1987.149 In the various proposed omnibus trade bills currently pending before Congress, the Administration has requested that its general negotiating authority with respect to both tariff and nontariff barriers be extended past January 1988.150 Conspicuously, however, the Administration has not requested that that authority be extended with respect to Canada, largely because neither the House nor the Senate has shown any willingness to grant such an extension.151 One may reason-

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148. See supra note 46.
149. See supra notes 41-42, 60.
150. At this writing, both houses of Congress are working on omnibus trade bills that would grant the President additional negotiating authority to conduct the Uruguay Round. The House recently passed an amended version of H.R. 3, which would extend the President’s nontariff agreement negotiating authority for four years (with the possibility of a further two-year extension), his general tariff agreement authority for six years, and his authority to enter bilateral trade agreements for six years. With respect to Canada, however, the bill did not extend the President’s bilateral agreement authority and extended his tariff agreement authority for only five years. See House Overwhelmingly Passes Omnibus Trade Bill, Deletion of Gephardt in Conference Seen, 4 Int’l Trade Rep. (BNA) 600 (May 6, 1987); Ways and Means Committee Press Release (5-A) Summarizing Committee Action on Titles I, II, and VIII of HR 3, “The Trade and Economic Policy Reform Act of 1987,” 4 Int’l Trade Rep. (BNA) 465 (Apr. 1, 1987) [hereinafter Ways and Means Press Release]. The Senate has completed markup on its own omnibus trade package, S. 490, which would extend the President’s tariff and nontariff negotiating authority for ten years, but would impose additional preconditions on its use. See Description of Omnibus Trade Act of 1987 (S 490), Introduced by Senate Finance Committee Chairman Lloyd Bentsen (D-Texas), as Prepared by Committee Staff, 4 Int’l Trade Rep. (BNA) 204, 204 (Feb. 11, 1987). Finally, the Administration has offered its own “competitiveness package,” which would renew the President’s tariff barrier negotiating authority for ten years, and his nontariff barrier authority without time limit. See Reagan Administration Sends Massive Package of Competitiveness Legislation to Capitol Hill, 4 Int’l Trade Rep. (BNA) 280 (Feb. 23, 1987).

151. The House omnibus trade bill extended the President’s general bilateral trade agreement authority for six years, “except for negotiations underway as of January 1, 1987 (Canada).” Ways and Means Press Release, supra note 150, at 465. Furthermore, in December 1986, Senator Bentsen, now Chairman of the Senate Finance Committee, warned that any
ably conclude that the Reagan Administration has made the calculated gamble that all FTA negotiations can be finished by mid-summer of 1987, and that the political difficulties of obtaining further extensions of negotiating authority will discourage the Canadians from dragging their heels with respect to the FTA's most controversial issues. If the Reagan Administration's gamble should fail, however, and the negotiators conclude no accord by late fall of 1987, the FTA would not necessarily die. As has already been noted, the President retains several options for obtaining ad hoc fast-track consideration of the pact. But any of these options would greatly enhance Congress's ability to undercut the accord, and none would guarantee the Canadian government that the FTA would receive expedited legislative approval. Moreover, the two governments' failure to conclude the FTA in a timely fashion would probably discourage or impair the progress of the Uruguay Round.

For these reasons, executive branch officials on both sides are determined that the FTA negotiations bear some fruit. That desire will powerfully motivate both sides to conclude initial bargaining by early summer of 1987, and to present a tentative framework FTA to Congress, Parliament, and the provinces by mid-summer, with an eye toward producing a final draft version in time for the legislatively mandated deadline of October 1, 1987. Thus, a negotiation timetable that would

United States-Canada FTA must come before the Senate by October 1, 1987 in order to have a realistic chance of passage. Aho & Levinson, A Canadian Opportunity, 66 FOREIGN POL'Y 143, 155 (1987).

152. First, rather than actually submitting the FTA to the Senate Finance and House Ways and Means Committees on October 1, 1987, the Administration could notify those committees on or after that date (but before January 2, 1988) that the agreement had been negotiated, then submit it 90 legislative days later. This option would allow the President to complete negotiations while his statutory negotiating authority remained intact, and leave Congress with the decision whether or not to apply "grandfathered" fast-track approval procedures to the FTA package. Second, the Administration could request special legislation granting the President additional negotiating authority to continue the Canadian talks after January 1988. Both Congress and the Executive would prefer to avoid this option, given that extension of the bilateral negotiations into 1988 would simply subject congressmen and the President to growing protectionist pressures as the November 1988 presidential and congressional elections approached. Third and most risky, the Administration could simply ignore all statutory deadlines, submit the package after January 2, 1988, and ask Congress at that time to afford the FTA ad hoc fast-track consideration. See supra text accompanying notes 86-89 (describing the President's options in the absence of a fast-track procedure).

153. Many of the issues raised by the FTA talks, including trade in services, investment, agricultural policies, concessional financing, limited market access, and protection of intellectual property rights, also arise in the Uruguay Round. Compare infra text accompanying notes 172-76 with supra note 144. "[I]f neighbors with a long history of close relations are unable to reach agreements on the newer issues now facing trade negotiators, the prospects of an accord among 92 countries in Geneva are dim indeed." Aho & Levinson, supra note 151, at 144.

154. Until then, Congress will probably be fully occupied by the omnibus trade bill, supra note 150, which also must be enacted before January 1988 in order to sustain the President's
produce an FTA by the fall of 1987 would represent a general equilibrium solution, in the sense of accommodating the interests of all key players in all three markets. That schedule would permit both countries legislatively to approve and domestically to implement the FTA sometime in 1988. Under this scenario, the FTA’s most critical days would come in September 1987. At that time, the House Ways and Means and the Senate Finance Committees will probably engage in a “premarkup” markup of the proposed agreement and its draft implementing legislation to determine whether Congress should accept the negotiated package for fast-track approval on October 1, 1987.

B. Elements of the Agreement

The initial stages of the FTA negotiations have uncovered three principal areas of controversy: the agreement’s substantive scope; the nature of tariff and nontariff barrier reductions (particularly the extent to which each nation will exempt the other from its import relief laws); and the rules regarding emerging Uruguay Round issues, such as trade in services, foreign investment restrictions, intellectual property protection, government procurement, and dispute-settlement mechanisms. Even without examining each of these issues in detail,155 we can use a general equilibrium analysis to sketch briefly the probable resolution of each of these three controversies.

1. Scope

Starting with the U.S. market, the Israel FTA experience teaches that an FTA of fairly limited scope, which would reduce both tariff and nontariff barriers across the board, establish rules of origin, and set forth fairly nonspecific mutual understandings regarding services, investment, intellectual property, and dispute-settlement procedures, would almost certainly pass muster before Congress.156 Both the U.S. and the Canadian governments have expressed their desire to make the agreement more inclusive than the Israel FTA.157 But, as we have seen, Canada

authority to negotiate the Uruguay Round. It is of course possible that Congress will not complete consideration of the omnibus trade bill until the year’s end. If so, one might expect Congress to treat more favorably an Administration request for special legislation extending into 1988 its negotiating authority with respect to Canada. See supra note 152. Should such special legislation be enacted, Congress probably would not consider the FTA until mid-1988.

155. For detailed discussions of each of these controversial areas of negotiation, see P. WONNACOTT, supra note 18; M. SMITH, supra note 92; Aho & Levinson, supra note 151; Finlayson & Thomas, The Elements of a Canada-United States Comprehensive Trade Agreement, 20 INT’L LAW. 1307 (1986).

156. See supra notes 53, 56-58, 134-36 and accompanying text.

157. In the early 1980’s, the Trudeau Government tentatively broached the idea of a sectoral free trade accord. See supra note 59. Both governments now prefer a comprehensive
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could not domestically implement an FTA with an overly broad sectoral reach without changing provincial laws or threatening national programs that key Canadian interest groups consider sacrosanct. Thus, forces within both the U.S. and the Canadian legal markets favor limiting the scope of the agreement.

Constraints within the international legal market push in the opposite direction, however. Article XXIV of the GATT requires that any negotiated accord be comprehensive enough to cover “substantially all the trade” between the two nations. If the parties wholly excluded any major product sector from the deal, such as automobiles or agriculture, they would have difficulty satisfying this requirement. Thus, the approach, however, which obviates the need to assemble balanced sector-by-sector packages of reciprocal concessions. See Hufbauer & Samet, supra note 59, at 192.

158. For example, the Canadian government would probably seek to avoid extending the FTA to liquor sales, agricultural marketing, transportation, and financial services, all of which would arguably fall within the scope of exclusive provincial jurisdiction and require concurrent provincial legislation. See supra notes 112-13 and accompanying text. Similarly, national interest groups with direct and indirect clout in the Canadian market would likely press their parliamentary representatives to oppose the FTA’s coverage of politically sensitive issues, such as the status of Canadian social and regional development programs, and issues of cultural sovereignty, such as broadcasting and publishing. See supra note 100; see also Maule, Trade and Culture in Canada, 20 J. WORLD TRADE L. 615 (1987) (culture as crucial to Canada’s national interest as defense is to the United States and agriculture to the EEC); White House Tries To Soothe Raised Hackles over USTR Yeutter’s Free Trade Talks Remarks, 4 Int’l Trade Rep. (BNA) 193, 194 (Feb. 11, 1987) (remarks of Prime Minister Mulroney) (suggestions that FTA negotiations should include Canadian cultural industries “are completely insensitive and totally unacceptable to the government and the people of Canada”).

159. See supra notes 126, 132-34 and accompanying text.

160. The auto pact has dramatically increased employment in the Canadian auto industry and lowered Canadian consumer prices. See Dunn, Automobiles in international trade: regime change or persistence, 41 INT’L ORG. 225, 240 (1987). For that reason, the Canadians have publicly resisted U.S. proposals to put the auto pact on the bargaining table. See Burns, Canadians Anxious To Preserve U.S. Auto Pact, N.Y. Times, Jan. 26, 1987, at D8, col. 1. The aspect of Canadian auto policy to which the United States has objected most strenuously is the Canadian automobile duty-remission program, which rebates duties to Japanese and European manufacturers that buy or make automotive parts in Canada for export. See Berkowitz, Canada Is Asked To End Aid Plan for Car Makers, Wall St. J., Sept. 23, 1986, at 10, col. 4. That program arguably offends proscriptions against export subsidies on nonprimary products found in both the GATT and the GATT Subsidies Code. See RESTATEMENT (REvised), supra note 3, § 806. Thus, the interests of all three markets with respect to the auto pact could be accommodated if the FTA did not comprehensively review the auto pact, but called instead for revision or abatement of the Canadian duty-remission program.

161. See supra note 134. All three markets discourage a sweeping accord regarding agricultural products. Both nations maintain complex agricultural support systems, which they could not quickly dismantle. See J. PERRY, UNFINISHED BUSINESS: THE GREAT TRADE DEBATE; DEFENCE—THE CONTINUING DILEMMA 33-34 (1986). Precedents exist in the international market for FTAs that extend only to industrial goods. See supra note 133 (discussing EFTA). Canada could not implement an accord that reached egg production or agricultural marketing, for example, without obtaining provincial approval or offending national interest groups. See supra notes 100, 158; see also P. WONNACOTT, supra note 18, at 117.

At the same time, however, all markets exert some pressure to reach a minimal consensus with regard to agriculture accords. At the Uruguay Round, both nations oppose the EEC's
compromise that would best satisfy all three markets would be an accord loosely modeled on the Israel FTA, which would be comprehensive enough to encompass all major product sectors, but which would relegate particularly controversial, narrowly delineated sectors to separate bilateral pacts.162

2. Treatment of Tariff and Nontariff Barriers

Canada has pressed for an FTA primarily to obtain more secure and enhanced access to the U.S. market.163 Secure and enhanced market access entails two forms of trade liberalization: the gradual elimination of tariffs on most bilaterally traded goods and the reduction or removal of what the Canadians call "contingent protection"—the threat of U.S. import relief measures triggered by private antidumping and countervailing duty actions.164

The first objective seems easily achievable. All three markets would look favorably upon across-the-board tariff reductions on nonagricultural (and perhaps some agricultural) goods, creation of rules-of-origin to avert transshipment problems, and transition arrangements to govern the phase-out of tariffs over a five to fifteen-year period.165 On the nontariff

Common Agricultural Policy, and the Reagan Administration has publicly proposed a worldwide standstill with regard to and eventual rollback of agricultural subsidies. See Dairy, prairie, ECONOMIST, Nov. 15, 1986, at 13. The recent private countervailing duty actions brought by Canadian corn growers, see supra notes 102-04 and accompanying text, and the U.S. softwood lumber industry, see supra notes 70-73 and accompanying text, have enhanced both governments' desire to reach an understanding regarding agricultural and natural resource subsidies. If the parties could reach a modest agricultural agreement—for example, agreeing what constitutes an agricultural subsidy, revising de minimis subsidy levels upward, and limiting crop price-support programs—both nations could achieve greater certainty while reducing the cost of their own domestic agricultural programs. Such an accord might also forestall application against Canada of the natural resource and agricultural subsidy provisions that are included in the House of Representatives' current trade bill. See Ways and Means Press Release, supra note 150, at 464.

162. Because of the softwood lumber incident, supra notes 70-73 and accompanying text, lumber already falls under a separate bilateral accord. In light of the Canadian sensitivities described supra note 158, social programs, pharmaceutical patents, telecommunications, and copyrighted broadcast materials would also be likely candidates for separate negotiations. See USTR Yeutter Quizzed on Wide Range of Issues During Senate Appropriations Panel Hearings, 3 Int'l Trade Rep. (BNA) 628, 629 (May 7, 1986); U.S., Canada To Get Down to Business on Trade Talks in Ottawa May 21 and 22, 3 Int'l Trade Rep. (BNA) 610 (May 7, 1986) (testimony of USTR Yeutter that these issues will likely be negotiated on separate tracks).

163. Finlayson & Thomas, supra note 155, at 1309 (1986); Fried, Barriers to United States-Canadian Trade: Problems and Solutions, The Canadian Perspective, 19 GEO. WASH. J. INT'L L. & Econ. 433, 436-37 (1985) (Canada's three main objectives in the FTA negotiations are to secure, enhance, and enshrine market access).

164. To Canadians, the term "contingent protection" connotes those statutory proceedings whereby private U.S. parties seek relief from "unfair" imports, alleging the existence of factors such as domestic injury, dumping, and subsidization. Hufbauer & Samet, Free trade hurt by pigheadedness, Financial Post, Mar. 9-15, 1987, § 3, at 1, col. 1.

165. Negotiated tariff reductions are, of course, the raison d'être for the GATT generally and for free trade agreements in particular. The United States has a strong incentive to negoti-
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side, however, Canada's announced desire to win total exemption from U.S. import relief laws seems unachievable. As the institution which controls whether the United States will approve the FTA, Congress will exercise crucial leverage on this issue. The Israel FTA experience strongly suggests that Congress would reject any effort to exempt "unfair" Canadian trade practices from the U.S. countervailing duty and antidumping laws. The current trade climate, coupled with the cedar shingles and softwood lumber controversies and the number of U.S. import relief actions currently pending against Canada, will only enhance Congress's unwillingness to grant an exemption.

The key question thus becomes whether Canada would accept an FTA that merely alleviated, rather than eliminated, the threat of future U.S. import relief actions. The simple reality that key Canadian decision-makers need and desire a comprehensive FTA far more than do their

ate such reductions, because Canadian tariffs are generally higher than their U.S. counterparts. See Parker, Barriers to United States-Canadian Trade: Problems and Solutions, The United States Perspective, 19 GEO. WASH. J. INT'L L. & ECON. 443, 444 (1985). Canada has little incentive to resist, given that even without an FTA, 91% of U.S. industrial exports currently enter Canada at tariff levels less than or equal to five percent. Finlayson & Thomas, supra note 155, at 1314-15. Following the United States-Israel FTA, both nations could initially retain certain tariffs on particular import-sensitive goods, such as textiles. Compare supra note 136.

166. Prime Minister Mulroney has recently gone so far as to declare that "[t]he trade remedy laws cannot apply to Canada, period." Burns, Mulroney Sees U.S. Trade Pact, N.Y. Times, Apr. 3, 1987, at D2, col. 4; see also Canada Demands Exemption from U.S. Trade Laws, Wall St. J., Apr. 3, 1987, at 3, col. 4 (statement of Prime Minister Mulroney) ("You can't have a free trade arrangement and expect the traditional laws of countervail to apply" which "can be triggered by any disgruntled group in the U.S. at any given time.").

167. Although the Israel FTA received overwhelming congressional support, Israel was unable to secure an exemption for its products from U.S. antidumping and countervailing actions. See Parker, supra note 165, at 447; Hufbauer & Samet, supra note 164, at 1, col. 2. In the 1984 Trade Act, Congress expressly denied Canada the favorable treatment which it afforded to Israel because of perceived Canadian unfair trade practices. See supra note 59.

168. The pending trade legislation described supra note 150 would strengthen, rather than weaken, existing statutory import relief remedies. The House bill expressly limits executive discretion and increases private sector involvement in trade policy-making by transferring decision-making authority under certain statutes from the President to the USTR, requiring mandatory presidential retaliation and negotiation in certain cases, defining new unfair trade practices, and accelerating existing timetables for presidential investigation of and action against unfair trade practices. See Ways and Means Press Release, supra note 150, at 461. The Senate's bill contains similar restrictions on presidential discretion. See generally Yeutter Opposed to Senate Omnibus Trade Bill, Offers Point-By-Point Criticism, 4 Int'l Trade Rep. (BNA) 475 (Apr. 8, 1987). If enacted, this legislation would initiate a new, sixth regime of U.S. trade policy-making in which Congress and private parties would exert an even greater influence than they currently do. Cf. supra text accompanying notes 24-63.

169. Following the Senate Finance Committee's near-disapproval of the FTA talks, supra notes 64-70 and accompanying text, President Reagan sent a letter to Senator Packwood declaring that the United States would continue to retain full access to its sanctioned trade remedy laws against Canada. Narrow Victory, supra note 65, at 565. Since that time, numerous other U.S. import relief actions have been filed against Canada. See supra note 80. Given this trend, it seems inconceivable that the current Congress would approve an FTA that appeared to license Canadian industries to engage in unfair trade practices.
U.S. counterparts will likely persuade the Mulroney Government to retreat from its rhetorical demands. In order to prevent the FTA from failing altogether over the contingent protection issue, however, we might expect the two governments to settle upon a compromise proposal that would not totally remove the threat of U.S. import relief measures, but would reduce it. A likely compromise would treat antidumping and countervailing duty cases separately, set forth common understandings regarding injury and subsidization, and establish a procedural mechanism whereby the countries could refer newly initiated import relief cases to nonbinding dispute-settlement procedures.

3. Rules Regarding Emerging Uruguay Round Issues

The current FTA negotiations deal with a range of novel and difficult questions that the Uruguay Round is simultaneously addressing. These include trade in services, investment, government procurement, intellectual property, and dispute-settlement. Domestic pressures from Congress and private industry—two of the key players in the U.S. market—have forced the U.S. government to give priority to the services, investment, and intellectual property issues in both the FTA and the Uruguay Round. Recognizing these pressures, the Mulroney Government has

170. "The blunt reality is that while these trade negotiations ... constitute the main foreign-policy issue of Canadian politics for the next election and well into the next decade—the same cannot be said for the U.S., where the trade relationship with Canada is only one of a great many ongoing foreign-policy matters." Edmonds, supra note 99, at 21, cols. 4-5. While concluding an FTA stands at the very top of the Mulroney Government's national priorities, see supra text accompanying note 145, the FTA has received only sporadic presidential attention in the United States, and has encountered both a Congress hostile to trade liberalization and general public indifference. See Prospects, supra note 134, at 666 (only 27% of the American public is aware of FTA talks).

171. Canadian companies have recently filed more antidumping actions than their U.S. counterparts, see supra note 92, and "[b]oth countries have used the [antidumping] statute for small cases . . . ." Hubbauer & Samet, supra note 164, at 1, col. 3. For these reasons, the negotiators might simply postpone agreement on antidumping duties, or limit negotiations to defining more specific standards on injury. See M. SMITH, supra note 92, at 19. With respect to countervailing duties, the two sides could attempt to narrow definitional differences by agreeing upon lists of prohibited subsidies, increasing the de minimis level of a countervailable subsidy, and setting standards for information disclosure and evidence of injury. See generally Horlick, Comments, in M. SMITH, supra note 92, at 52-54 (proposing these and other changes).

172. U.S. business interests seek to enter the Canadian services market, particularly in the areas of aviation, banking, construction, engineering, insurance, leasing, telecommunications, and transportation. See P. Wonnacott, supra note 18, at 120. Moreover, they have repeatedly pressed Congress to encourage Canada to modify its relatively restrictive investment rules, which have limited their access to Canadian cultural and energy industries. See generally U.S. Economic Relations with Canada, Hearing Before the Subcomm. on International Economic Policy of the Sen. Comm. on Foreign Relations, 97th Cong., 2d Sess. (Mar. 10, 1982). Both private and congressional interests strongly urged the President to "self-initiate" three actions in September 1985 under section 301 of the 1974 Act, 19 U.S.C. § 2411, against foreign restrictions upon services and intellectual property rights. Bello & Holmer, Significant Recent Developments in Section 301 Unfair Trade Cases, 21 INT'L LAW. 211 (1987) (describing sec-
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negotiated on these questions in the FTA talks with an eye primarily toward extracting concessions from the United States in three other areas: contingent protection, government procurement, and dispute-settlement.173

Because of their mutual interest in presenting a united front before the international legal market, both nations have a strong incentive at least to define rudimentary rules regarding trade in services, investment, and intellectual property that can serve as models for the Uruguay Round.174 But the severe time constraints to which the negotiators are subject, as well as the sheer strain of conducting both the FTA and the GATT talks simultaneously, will almost certainly limit the complexity of these accords.175 At a minimum, the two parties should be able to announce general principles regarding trade in services, government procurement, intellectual property, and trade-related investment, based upon the provisions contained in the Israel FTA.176 Discussions regarding questions of

173. M. Smith, supra note 92, at 4. Canada would probably be willing to give U.S. firms national treatment with respect to federal government procurement. Because of the problems of provincial implementation described supra notes 105-13, however, the Mulroney Government would face difficulties forcing provincial governments to eliminate their "buy local" or "buy national" laws or to end provincial discrimination against U.S. alcoholic beverages. As the smaller of the two parties to the FTA, Canada is also understandably more committed to creating a strong dispute-settlement process as a way of compensating for disparities in size and power. See Fried, supra note 163, at 437.

174. See, e.g., Aho & Levinson, supra note 151, at 147 ("[F]or many U.S. companies, agreement on rules covering services, foreign investment, and intellectual property is the key to an agreement both with Canada and within GATT. . . . Without such [an FTA], the Reagan administration has little hope of building an effective constituency to support a new round of [GATT] talks.").

175. The inability of the Office of the USTR to devote sufficient resources to simultaneous negotiation of the Uruguay Round and the FTA talks might contribute to this scenario. See Stokes, Feeling the Strain, Nat’l J., July 19, 1986, at 1770, 1771 (pointing out that the U.S. government has been able to allocate fewer than 12 professionals to the FTA talks, while some 80-150 professionals are on Canada's team).

176. See provisions cited supra note 135. One might expect the parties to reach an "umbrella code" on services similar to that currently proposed before the GATT, which would list various service sectors as covered by the rules of the FTA that apply to trade in goods. For detailed discussions of the services questions, see Berg, Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States, 28 Harv. Int’l L.J. 1 (1987); Shelp, Trade in Services, Foreign Pol’y 64 (1986-87). The parties would probably strive for FTA provisions creating rights of establishment and national treatment in the area of investment. In the area of intellectual property, they will probably focus upon reducing or eliminating Canada's compulsory product licensing practices in exchange for greater Canadian access to the U.S. broadcasting market.

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dispute-settlement will undoubtedly prove more complex, however. The pivotal question will be whether to establish a permanent bilateral commission to administer the FTA, which would use formal procedures and possess binding authority to decide trade disputes, as the Canadians would prefer, or to adopt a nonbinding, informal consultative mechanism to which each country may voluntarily refer complaints. Congress's strong resistance to modifying the normal operation of import relief provisions will most likely dictate settlement upon the latter option. Thus, the most likely result will be a "soft" dispute-resolution provision that announces mutually acceptable definitions regarding permissible subsidy practices and designs a nonbinding, advisory dispute-settlement mechanism to promote early negotiated settlements of trade disputes.

In sum, a general equilibrium analysis suggests that a less, rather than more, ambitious FTA package will probably emerge from the bilateral negotiations. The FTA negotiators are operating under severe time constraints and subject to stringent congressional scrutiny. These two factors alone strongly suggest that a "minimalist" FTA package will more likely be produced than an accord that attempts sweeping modification of both nations' domestic import relief laws.

VI. Is the FTA Compatible with the Uruguay Round?

The analysis thus far has suggested at least one value of applying a rule-based, procedural, institutional approach to international trade law. By using such an approach to dissect the structure and interdependence of the U.S., Canadian, and international legal markets, we can predict with unusual precision what specific legal issues are likely to arise during the FTA negotiations and how those specific questions are likely to be resolved. But the detailed analysis above leaves unanswered one final, broader question: whether, in some larger sense, the negotiation of a comprehensive bilateral free trade agreement between the world's two largest trading partners conflicts with the post-war process of multilateral liberalization that the upcoming GATT round exemplifies. Given that multilateral trade negotiation through successive GATT rounds has been the dominant mode of international trade liberalization since World War II, does the negotiation of a United States-Canada FTA ultimately reinforce or undercut the existing world trading order?

I would argue that our understanding of the legal markets of international trade now enables us not only to make specific legal predictions, but also to answer this broader question. As we have seen, the United States and Canadian governments seek to use the Uruguay Round to extend the GATT's coverage to new and developing subject matters. The so-called "Gang of Ten" developing nations have, however, just as
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vigorously opposed the GATT's extension into those areas. Key U.S. officials have virtually conceded that they have used the threat of a Canada FTA in the first way: to bring intransigent GATT members—and particularly the developing nations—back to the multilateral negotiating table. But were this its only purpose, the FTA would already have fulfilled its role and would have little continuing significance for the world trading system.

The two nations' continued interest in the FTA suggests, however, that the bilateral talks also serve the second, broader function. As these two nations now recognize, the extended preliminary sparring over the inclusion of services in the new GATT Round portends a significant likelihood of multilateral deadlock during that round. A United States-Canada FTA can therefore provide a fallback form of trade liberalization for both countries in case the Uruguay Round should prove unproductive. Through the FTA, the two countries can secure broadened access to each other's markets—and real economic gains from freer trade—long before any market-opening effects from this Round could be realized.

177. Those ten developing nations—Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia—initially opposed the extension of the GATT to services on the ground that the industrialized countries should eliminate their own market barriers to developing country exports before extending the GATT's reach. See Dispute over Services in MTN Round Heats Up as Third World Threatens Not To Participate, 3 Int'l Trade Rep. (BNA) 864 (July 2, 1986); Dunkel Prepared To Issue Report on His Own, But Hopes Other GATT Members Will Support It, 3 Int'l Trade Rep. (BNA) 154 (Jan. 29, 1986). The developed nations largely overcame these objections, however, and won inclusion of services in the Ministerial Declaration that issued from the September 1986 GATT ministerial meeting at Punta del Este. See generally Ministerial Declaration on the Uruguay Round, supra note 144.

178. See, e.g., U.S. May Go Outside GATT Framework for Trade Talks if LDCs Continue To Balk, Yeutter Says, 2 Int'l Trade Rep. (BNA) 1465, 1466 (Nov. 20, 1985) [hereinafter Go Outside GATT] (Statement of USTR Clayton Yeutter before the Senate Finance Committee) ("[T]his Administration will not permit a small number of inward-looking nations, representing a nominal percentage of world trade, to control the trading destiny of nations which conduct 95 percent or more of the world's commerce. . . . [T]he Administration is prepared to negotiate on a plurilateral or bilateral basis with like-minded nations. This path would become all the more important and urgent if the movement towards a new trade round is stalled . . . "").

179. Now that the other GATT contracting parties have agreed to the Uruguay Round, the U.S. executive branch might still lose interest in the FTA negotiations, particularly if those talks cannot be concluded before October 1, 1987. See supra text accompanying notes 144-54.
What neither of these first two perspectives fully accounts for, however, is the interaction among the internal dynamics of the U.S., Canadian, and international legal markets. The third perspective, which views the FTA as "a shot in the arm" that would both complement and invigorate the new round, more explicitly takes this interaction into account.

Looking first to the United States market, it seems clear that since World War II, U.S. trade policy has been characterized by two overriding legal commitments that are embodied in the U.S. adherence to the GATT: a substantive commitment to free and freer trade, whereby the United States has generally obeyed a legal obligation to offer trade concessions to foreign countries on a most-favored-nation basis; and a procedural commitment to multilateralism as the appropriate framework within which the negotiation and resolution of trade disputes should take place. Historically, the President has exhibited a greater commitment than has Congress both to trade liberalization and multilateralism. Much of the U.S. willingness to resolve trade matters within the framework of the GATT, therefore, can be attributed to the President's historical domination of international trade policy-making. Under the current U.S. regime, however, Congress has seized an increasingly active role in trade policy-making, spurred in recent years by an unprecedented trade deficit and extraordinary protectionist pressures from private domestic interest groups. The Uruguay Round thus arrives at a time of intense congressional questioning of the appropriateness not only of the substantive goal of trade liberalization, but also of the GATT as the best procedural forum within which to conduct international trade discussions.

I would argue that this evolution of the U.S. domestic legal structure for international trade management from a presidentially-managed regime into a regime of shared congressional-executive control has effected


181. At one point, 782 bills and resolutions regarding international trade were pending before the 99th Congress. One study concluded that 248 of these contained protectionist provisions. 3 Int'l Trade Rep. (BNA) 1047 (Aug. 13, 1986). The pressure to pass trade legislation has only intensified in the 100th Congress. See Democrats Make Passage of Trade Bill This Year Top Priority, Floor Votes Seen in Spring, 4 Int'l Trade Rep. (BNA) 49 (Jan. 14, 1987); see also supra note 150.

182. See Senators on Asian Trip See Lack of Trade Progress, Say Congress Getting Impatient, 3 Int'l Trade Rep. (BNA) 137, 138 (Jan. 22, 1986) (statement of Sen. Danforth) ("All of the energy behind 'calling for' a new GATT round in the United States comes from the Administration, none of it from the Congress."); Go Outside GATT, supra note 178, at 1466 (statement of Sen. Baucus) (GATT is "the gentleman's agreement to talk and talk"); id. (statement of Sen. Moynihan) ("[T]he GATT arrangement may be breaking down and the United States might have to consider a new regime in international trade altogether.").
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a profound change in the type of international trade structures that the United States is now willing to enter.\textsuperscript{183} As the balance of power between Congress and the President in the management of international trade has begun to shift in Congress's favor, Congress's biases toward protectionism and against the GATT have weakened both the U.S. substantive commitment to free trade and its procedural commitment to multilateral decision-making. During the past two years, congressional agitation has not only placed intense pressure upon the Reagan Administration's rhetorical commitment to free trade as the substantive core of U.S. trade policy,\textsuperscript{184} but has also spurred an extraordinary array of unilateral, bilateral, and plurilateral presidential trade initiatives undertaken outside the multilateral framework of the GATT.\textsuperscript{185}

Each of these actions, I would argue, may be viewed as a reactive or preemptive presidential strike designed to head off even more drastic or

\textsuperscript{183} I have argued elsewhere that the United States' procedural flight from multilateralism in trade matters has not been an isolated phenomenon, but rather is symptomatic of a pervasive loss of faith at all levels of the U.S. government in multilateralism as the principal procedural mechanism for international conciliation and dispute-resolution. \textit{See generally} Koh, \textit{supra} note 22, at 1229-30 (discussing recent U.S. disengagements from UNESCO and the compulsory jurisdiction of the International Court of Justice). In some areas, such as international trade, the Reagan Administration has acquiesced in the flight from multilateralism. In other cases, such as the recent U.S. withdrawal from the World Court's compulsory jurisdiction, the executive branch has led the flight and Congress has acquiesced in it.

\textsuperscript{184} This pressure has been manifested in the Reagan Administration's recent rhetorical shift from endorsement of "free trade" to "fair trade." \textit{See generally} Kleinfield, \textit{A Critical Evaluation of U.S. Fair Trade Policy}, 18 \textit{VAND. J. TRANSNAT'L L.} 515 (1985).

\textsuperscript{185} Recent unilateral actions include: U.S. tariffs imposed on Japanese electronic products, European wines, and Canadian shingles and shakes, \textit{see supra} text accompanying notes 74-77; punitive trade sanctions against South Africa, Libya, Nicaragua, and Syria; numerous self-initiated Presidential trade investigations under section 301, \textit{see supra} note 172; the first self-initiated investigation under section 307(b) of the 1984 Act, 19 U.S.C. \textsection 2114(d); and a national security action against Taiwan, West Germany, Japan, and Switzerland on behalf of domestic machine tool builders under section 232 of the Trade Expansion Act of 1962, 19 U.S.C. \textsection 1862 (1982).

In addition to the United States-Israel FTA, recent bilateral and plurilateral efforts include: voluntary restraint accords on automobiles, steel, and semiconductors; the so-called Caribbean Basin Initiative, \textit{see} the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, \textsection 201 \textit{et. seq.}, 97 Stat. 369, 384-98 (1983), 19 U.S.C. \textsection 2701-06 (1982 & Supp. I 1983) (trade, tax, and aid package for Caribbean Basin countries); free trade feelers toward the Association of South East Asian (ASEAN) nations and Egypt; the "MOSS" (market-oriented, sector-specific) trade liberalization talks with Japan, which are designed to improve U.S. access to the Japanese markets for legal services, pharmaceuticals, medical equipment, radio and telecommunications equipment, and forestry; the Treasury Department's September 1985 intervention with other developed nations to bring down the value of the dollar; the "Baker Plan" to spur World Bank investment in Third World countries; and the ongoing Bilateral Investment Treaty (BIT) program, under which the United States has signed agreements with ten developing countries regarding national or most-favored-nation treatment of investors and protection against expropriation. For further discussion of these various measures, \textit{see} Koh, \textit{supra} note 22, at 1224-25 & nn.93-94, 1226-27 & nn.102-07.

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protectionist congressional action.\textsuperscript{186} Taken together, they represent a self-conscious effort by the President to preserve some of the U.S. substantive commitment to trade liberalization by softening its procedural commitment to pursue that liberalization in multilateral fora.\textsuperscript{187} From the U.S. perspective, then, the executive branch's free trade initiative toward Canada may be viewed as yet another preemptive attempt by the executive to separate the weakening U.S. procedural commitment to multilateralism from its substantive commitment to freer trade.

Turning to the Canadian market, we find that the Mulroney Government, like the Reagan Administration, has a global interest in using the FTA as a forum to forge bilateral compromises on matters of intense mutual concern, which the two nations may then jointly present to the GATT parties at the Uruguay Round.\textsuperscript{188} But the Mulroney Government's dominant concern is with the demonstrable economic gains that would result from securing and enhancing Canadian access to U.S. markets. Given the novelty and difficulty of the issues that the Uruguay Round will address, that Round seems certain to focus principally on establishing clearer multilateral rules of trade conduct, rather than on actual liberalization of market access. Thus, for the Canadian provinces, Parliament, private interest groups, and executive branch, the bilateral FTA provides a far better forum for meaningful reductions of tariff and nontariff barriers than does the Uruguay Round. In short, the United States' decision to pursue a bilateral FTA as a means of diversifying its trade liberalization "portfolio" neatly dovetails with the desire of all key

\textsuperscript{186} A vast majority of the recent presidential trade actions described \textit{supra} note 185 either averted or were designed to defuse imminent congressional action that was even more drastic or protectionist. \textit{See} Boyd, \textit{supra} note 78 (quoting Vice President Bush) (U.S. tariff on Canadian shingles and shakes was necessary to avoid "sterner medicine from Congress"); \textit{Trade High on Democrats' National Agenda, Stern Says Omnibus Bill Offers Contribution}, 3 Int'l Trade Rep. (BNA) 750 (June 4, 1986) (statement by Representative Tony Coelho) (Reagan Administration's trade policy has consisted of "issuing a few ad hoc, item-by-item decisions when Congress forced them to").


Bilateral trading relationships are of growing importance to the United States. While our government remains strongly inclined to pursue a broad multilateral trading system based on the GATT, . . . a growing body of opinion in this country holds that we should not place exclusive reliance on GATT negotiations involving all trading countries, but rather should pursue negotiations among what we call "like-minded" countries to achieve higher levels of trading discipline than are possible if more countries are involved.

\textsuperscript{188} The United States and Canada agree, for example, that the new GATT Round must address the elimination of farm subsidies and other barriers to agricultural trade. The EEC nations, which view the North American nations' position as a threat to their Common Agricultural Policy, have recently rejected the compromise position on agricultural trade urged by Canada and the United States, leaving the matter to be addressed at the Uruguay Round. \textit{See} Fine, \textit{Agricultural Subsidies Would Be Jointly Cut Under U.S. Trade Plan}, Wall St. J., Apr. 7, 1987, at 1, col. 6; \textit{supra} note 161.
institutions within the Canadian market to pursue trade liberalization principally within a bilateral, rather than a multilateral, context. Turning finally to the international market, it could be argued that a **bilateral** FTA between the United States and Canada violates the spirit, if not the letter, of an international process ostensibly committed to **multilateral** trade management through the GATT. This need not be the case, I would argue, if one views the United States-Canada FTA not as a major exception to the existing multilateral world order, but as merely one manifestation of the more complex emerging international economic order that de facto, if not de jure, currently dominates international trade management. This order incorporates not only GATT norms and procedures, but also norms and procedures developed by non-multilateral trade regimes. Unilateral actions, bilateral trade accords, and plurilateral trade coalitions all currently generate a body of positive and customary international trade law that coexists with, complements, and in many cases overshadows the GATT framework.  

While an accord like the FTA may potentially detract from the Uruguay Round, it may also invigorate and spur the sagging multilateral negotiation process by providing an opportunity for two sophisticated, economically developed neighbors and political allies to reaffirm, in a bilateral setting, their shared trade values regarding novel areas, such as services, investment, intellectual property, agricultural trade, and dispute-resolution. Successful United States-Canada accords in these areas, concluded under the umbrella of the FTA, could provide momentum for a more effective global grappling with those issues during the Uruguay Round. Moreover, by adding to the body of state practice regarding highly controversial trade questions, the legal terms outlined in the United States-Canada

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189. The various trade actions and arrangements described *supra* note 185 all fit within this new, more complex order, which the U.S. is now consciously seeking to foster. *See U.S. Trade Representative, Administration Statement on International Trade Policy, Sept. 23, 1985, reprinted in PRACTISING LAW INSTITUTE, UNITED STATES IMPORT RELIEF LAWS: CURRENT DEVELOPMENTS IN LAW AND POLICY 339, 350-51 (1985):*  
While our highest priority remains the improvement of the world trading system through a new round of multilateral trade negotiations, the United States is interested in the possibility of achieving further liberalization of trade and investment through the negotiation of bilateral free-trade arrangements such as the one recently concluded with Israel. We believe that, at times, such agreements could complement our multilateral efforts and facilitate a higher degree of liberalization, mutually beneficial to both parties, than would be possible within the multilateral context.  

190. Although the congruence of the two nations' interests in some of these areas has yet to be tested—not, particularly in the areas of investment and intellectual property—the basic compatibility of their trading philosophies makes the FTA a good test of whether the upcoming trade round has any hope of success. As one U.S. official recently observed, "These negotiations also will say a lot about international trade relations in the years to come. If the U.S. and Canada can't work out their differences, there's not much hope for the next GATT round." *Prospects, supra* note 154, at 667 (statement of Deputy Assistant USTR William Merkin).
FTA could contribute to the development of an international legal consensus regarding these issues and instruct the GATT parties on how to develop substantive rules to deal with them.

In short, the FTA can serve as an experimental laboratory for addressing numerous substantive legal issues that are likely to arise during the Uruguay Round. In the process, the FTA can demonstrate to the world at large that the decline of multilateralism as a procedural method of rule change need not necessarily sound the death knell for the substantive norm of trade liberalization.\footnote{Indeed, the political leaders of both Canada and the United States have sought to win public support for the FTA negotiations by arguing that "[w]hat is available here is a liberalized trading arrangement that could serve as a model for the rest of the world." Burns, supra note 166 (statement of Prime Minister Mulroney); Roberts, supra note 4, at A17, col. 2 (remarks of President Reagan) ("our free-trade discussions [would be] a model of cooperation to the world"); accord, Criticisms of Bilateral Free Trade Talks Unfounded, Based on Emotion, Kelleher Says, 3 Int'l Trade Rep. (BNA) 170, 171 (Jan. 29, 1986) (remarks of International Trade Minister Kelleher) ("If Canada and the United States could lead the way, if we could show the rest of the world that trade liberalization is to everyone's advantage, I believe it likely that the multilateral negotiations would yield better results—that more [trade] barriers would come down faster throughout the world.").} The structure of the international legal market has evolved to the point where the GATT provides only one of many organizations and sources of jurisprudence for the promotion of trade liberalization policies. The United States-Canada FTA is but one manifestation of this emerging, more complex post-war legal order.

Conclusion

The proposed United States-Canada Free Trade Agreement is a political device motivated by economic concerns that, upon analysis, proves to be rich in legal issues. In this article, I have argued that the application of a rule-based, procedural, institutional perspective to the United States-Canada FTA illuminates how domestic and international law structure the conduct of international trade. By analyzing the structure and interdependence of domestic and international legal markets and applying a general equilibrium analysis to them, we may predict not only what legal issues will arise during the course of the FTA negotiations, but also how they will be resolved. Perhaps more important, however, by viewing the FTA in light of the legal markets of international trade, we can recognize its broader legal significance. In the end, the United States-Canada FTA may prove less important for its short and long-term economic effects than for what it more broadly portends: namely, a marked \textit{domestic} trend away from executive branch domination of both U.S. and Canadian trade policy-making and an accelerating \textit{international}
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trend toward new modes of unilateral, bilateral, and plurilateral trade management conducted outside the traditional context of the GATT.