RECEPTION OF MULTILATERAL TRADE AGREEMENT (GATT) AND BILATERAL TRADE AGREEMENT IN THE AMERICAN INTERNATIONAL LAW

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The author explains the reception of multilateral agreements of GATT and bilateral agreements in the United States domestic Law.

He also deals with the problem raising from the principle of separation of power between Congress and Executive on international relations regarding reception of international agreements in the American domestic law.

The solution of this problem remains in the conduction of commercial relations by the Executive, but a new way has been found in the fast track procedure.

Dan ce texte l'auteur traite de la réception de l'accord multilateral du GATT et des accords bilatéraux dans le droit international américain.

Il explique le problème que soulève le principe du partage des pouvoirs entre le congres et l'exécutif en matière de relations internationales et quant à la réception des accords internationaux dans le droit interne des États Unis.

La solution à ce problème résiderait dans la conduite des relations commerciales par le président, mais un arrangement nouveau a été trouvé dans le procédure de "la voie rapide" (*fast track*).

The author concludes by giving a current overview of American legislation on foreign trade.

L'auteur termine en donnant un aperçu général de la législation américaine en matière de commerce international.

I. INTRODUCTION

Written provisions in an international treaty or agreement do not easily became part of the national legal system of the United States of America. This is not a trait which is exclusive to the North American system, but there are some features in this regime that differentiate it from other systems of government like Mexico's and Canada's. Specifically, we must consider.

II. THE SEPARATION OF POWERS PRINCIPLE, AND ITS EFFECT ON FOREIGN RELATIONS AND THE RECEPTION OF INTERNATIONAL AGREEMENTS IN US DOMESTIC LAW

1. *Tensions between Congress and the Executive*

The legislature as established in article I of the 1787 Constitution, is the most important branch in the Federal and State governments. The Constitution[1] gives Congress the power "to regulate commerce with foreign nations".

1 Art. I. S. 8, clause 3. See final translation included in Smith (Coord.) *Derecho constitucional comparado México-Estados Unidos*, tomo II, p. 982 (IIJ-UNAM 1990). (Hereinafter "Derecho constitucional México-Estados Unidos").

In the United States, we use the term separation of powers to describe the system of government, while in the other countries, including Mexico and Canada, we speak of "division of powers". The difference between the two concepts is not only semantic, but important to our topic here; in international relations, the Executive branch represents the United States.[2]

Therefore, the drafters of our Constitution, imposed an implicit conflict between the Legislative and Executive branches regarding international commercial relations. Undoubtedly, Congress has prevailed, because it has the last word. The Executive must conduct the international negotiations that define commercial and other foreign commitments in the United States, but only Congress must approve and implement those commitments. Throughout the diplomatic history of the United States, there are abundant examples of foreign agreements entered into and ratified by the Executive, but rejected by Congress. Salient examples include the League of Nations, the Havana Charter (that would have established the International Trade Organization), the Interamerican Private International Law Committee's Conventions (CIDIP).

The American Congress, due to the method by which it is elected, is made up of differing parochial and chauvinistic points of view. Global viewpoints receive short shrift with local voters. Thus, a Congressman represents his district's constituens and their special interests against all competing inter-

2 Constitution, Art. II

ests and points of view or risks loosing his seat in the elections which take place every two years.

Voters do not need a long memory to vote a representative out of office. This phenomenon insures that the consensus of opinions in the House of Representatives rarely produces an "American" vision. Instead, of achieving consensus representatives are must likely to insist on a congeries of diverse points of view within a single forum. This makes it difficult to unite their differing points of view into one single policy, a fact that explains why many federal laws are enacted with peculiar details that will apply only in certain isolated parts of the nation, or only to certain limited special interests.

In addition, we must bear in mind that the State Department (foreign relations ministry), although part of the Executive, traditionally functions as the well-spring of the international viewpoint within the federal government, to the exclusion of national and local interests. Often the State Department and the President or other cabinet members disagree on fundamentals of international policy.[3] Although many commercial issues are dealt with in other sectors of the Executive, specially in the offices of the Special Trade Representative, frequently international attitudes prevail over national and certainly local interests. This further increases the possibility for clashes between the concerns of those who conduct foreign relations, and the views of congressmen who have to give their approval to those relations.

3 This has been the source of many jokes, including the anecdote of the taxi driver who in time of war took his fare to the State Department Building in Washington D.C., and upon learning that the individual worked there, asked him "whose side are you on war?"

2. *Separation of powers complicates the task of implementing foreign relations at the national level*

In spite of its predominant constitutional power and its heterogenous nature, or rather as a result of these, a few years back, Congress began to become aware that it was not well-qualified to conduct foreign trade relations or draft agreements.[4] Therefore, it delegated that power to the Executive, albeit in a circumspect fashion. Ironically[5] Congress has retained an almost veto-like power regarding the Executive external acts.

The system imposed by the separation of powers guarantees civil liberties and a democratic process with widespread public debate before official decisions or measures are taken, but exacts a high price in loss of efficiency and speed in the decision-making process. The more complex a question is, the more difficulties the American government will have in facing it, understanding it, and solving it. Fundamental changes take place at "glacial" speed. Foreign trade problems are extremely complex and frequently fall within the lagunae of American rules, and therefore have a tendency to paralize the already slow political system. This generates much discussion and little action in the short term.

On the other hand, the American legal system provides abundant opportunites to an individual[6] who wishes to challenge and defeat any law or other official act of his

4 See text, note 28 *infra*.

5 Because, in the American system the veto corresponds to the President, who can exercise it regarding the laws enacted by the legislature. Constitution, Art. I, S. 7, cl. 3.

6 Who need not be a US, citizen or resident.

government, to a large extent because Congress has encouraged individual challenges by providing administrative and legal procedures to private parties.

3. *The problem of international agreements and their domestic enforcement*

There is great confusion in American law, regarding the exact process through which international agreements enter into force. According to the Constitution,[7] a "treaty"[8] will be negotiated and ratified by the President or his representative, but will be approved only in the Senate, by a two—thirds vote of the senators present, a majority which is relatively difficult to obtain. If the treaty is not the self-executing type, —*i. e.*, if its norms provide guidelines instead of definitive rules which would give birth to a right directly enforceable through litigation, or Congress has required a specific law to enforce it—,[9] it will require positive legislation from Congress in order to incorporate it into the national norms.

7 Art. II, S. 2.

8 We recognize the generic meaning of the word "treaty" confirmed in the Treaty of Treaties, or Vienna Convention, Art. 2, comment 2, but here we refer to a "treaty" in the limited sense established by the US, Constitution. See Third Restatement of The Foreign Relations Law of the United States (1987) §. 301, § 303 (1) and its comment (a). (Hereinafter "Restatement." an excellent "official" treatise compilation on American Public International Law, highly regarded and frequently quoted by the courts in their judicial opinions. The Restatement currently enjoys greater authority because of its recent updating, the first since 1965)

9 See "Restatement" §. 111 (4) and 5th Report.

Although the treaty-creations process is well defined in the Constitution, or perhaps precisely because it is, the American government almost never uses treaties to conduct foreign trade relations, or any other type of relations. They use executive agreements of another type,[10] springing from two possible sources of power: *a*) Congress can always delegate authority to the President to exercise powers which belong to Congress,[11] and/or *b*) the President can "act under his constitutional power to conduct foreign relations".[12] Frequently, it difficult to distinguish between a delegated and an implicit power.[13] For example, it is not currently clear whether the General Agreement on Tariffs and Trade (GATT) was adopted under congressional delegation or original presidential power.[14]

Regarding international agreements which fall outside the narrow constitutional definition of proper treaties, there is no constitutional procedure that con-

10 See "Restatement" §. 303 and Reptrs. 8-9, where the agreements known as "Congressional-Executive", are considered as the preferred form in current practice, replacing treaties as the basic mechanism.

11 See Zamora, "El poder presidencial y la economía de los Estados Unidos", in "Derecho constitucional México-Estados Unidos" 841 (Hereinafter "Zamora, Poder presidencial"), "Restatement" §. 303 (2).

12 "Restatement" § 303 (4) See Constitution Art. II, §. 2, clauses 1-2; Art. II, §. 3; "Zamora, Poder presidencial" 846-51, 865-74.

13 See "Restatement" §. 303 and its Commentaries g-i and its Rptrs. 8-12.

14 Its is more difficult to defend a basis in Presidential Power, but it has been done. See Jackson, "The General Agreement on Tariffs and Trade in United States Domestic Law," 66 *Mich. L. rev.* 249, 274-75 (1967) (Hereinafter "Jackson, GATT"). "Restatement", in its introductory note to §. 801-812, Chapter on "International Trade Law", "cryptically comments: The GATT is an international agreement, but its status as an international law cannot be easily declared... The GATT has in American law, a status different from the status described in §, 111-15 of this Restatement, on International Agreements in general".

templates their ratification and enactment as national laws. Supposedly, any norm which is formally approved through the legislative process in Congress enters into force as a federal law, so long as the President does not veto it, and the norm is not unconstitutional. In this fashion, there is always the possibility of passing all international agreements through the legislative process. However, this would entail an even more rigorous process than the approval process that is required under the Constitution for treaties.

There are other less demanding possibilities. Through "proclamation" the President can enforce agreements which are a product of his legitimate exercise of the Executive power. The place that a "proclamation" might enjoy in the American hierarchy of laws is not defined either, but tradition and practice have defined it with precision: if an international agreement is published in the Official Gazette it then enters into force, as a proclamation at least as long as nobody challenges it by legal means.

4. *The problem of international agreements in the hierarchy of nationals laws*

Even though an international treaty or agreement may be properly promulgated, there remain doubts regarding their category in the hierarchy of American norms. Article VI, clause 2 of the Constitution establishes: [15]

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the

15 The same text appears in the Mexican Constitution in Article 133.

United States, will be the supreme law of the Land and Judges in every State will be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

From this text one can extract the following hierarchy:

a) Treaties[16] and international agreement [17] prevail over State Constitutions and laws;[18] while:

b) The Federal Constitution prevails over international treaties and agreements,[19]

c) Between an international treaty or agreement and federal legislation, the last text enacted prevails,[20] except in cases where a "grandfather clause" applies, sustaining application of prior existing contradictory provisions,[21] while

d) Prior existing federal legislation prevails over subsequent executive agreements (in the other words, those that fall short of treaty category)[22] as long as

16 United States v. Pink, 315 US, 203 (1942); United States v. Belmont, 301 US, 324, 331 (1937).

17 B. Altman & Co. v. United States, 224 US 583 (1912); Texas Ass'n of Steel Importers v. Texas Higway Comm'r, 364 S.W. 2d. 749 (1963); Baldwin-Lima-Hamilton v. Superior Court, 208 Cal. App. 2d 803, 25 Cal. Rptr. 799 (1962). See Gordon, "La Constitución y la legislación económica", en "Derecho constitucional México-Estados Unidos" 897, 907.

18 See "Restatement" §. 111(1).

19 Reid v. Covert, 354 US 1 (1957); "Restatement" § 111 (2) and its "a" Commentary.

20 The Chinese Exclusion Case, 130 US 581 (1889); Whitney v. Robertson, 124 US 190 (1888); "Restatement" § 115.

21 For example, as was done in the Protocol for the Provisional Application of the GATT signed by the parties on October 30, 1947. See 61 Stat. A(3), (5), (6); T.I.A.S. No. 1700, 55 U.N.T.S. 308 (1950).

22 United States v. Guy W. Capps. Inc., 204 F. 2d 655, 660 (4th. Cir. 1953), approved for other reasons, 348 US 296 (1955); Fisher, "Relaciones Ejecutivo-Legislativas en política exterior," in "Derecho constitucional México-Estados Unidos" 917, 921.

the agreement does not encompass constitutional powers inherently within the exclusive scope of the President.[23]

Thus, in the United States we have a fragmented system with little provision to accomodate the regulation of foreign commercial relations. In a decision delivered in 1986, the Supreme Court stated that the interrelation between laws and the conduct of foreign relations required "reciprocal action... and we acknowledge the leading role that Congress and the Executive play in this field".[24]

Congress has the constitutional power to "regulate trade with foreign nations", but lacks the institutional means to exercise it. The President lacks said constitutional power, but is the only branch whose structure and operation create the possibility to carry it out. The infirmities imposed by our form of constitutional government then dictate that any concrete measure taken in the area of foreign trade by Congress or by the President, shall remain vulnerable to challenge under separation of powers doctrine and the legal challenges brought by private parties may threaten it constantly.

The only solution has been found in customs and

23 Dames & Moore v. Reagan, 453 US 654 (1981). There is great debate regarding "inherent powers" of the President with respect to foreign relations. United States v. Curtis-Wright Export Corp., 299 US 304 (1936), is offen cited, as a source for those powers, but as is the cas with many of the fundamental concepts in this essay, it lacks precise limits. See United States v. Yoshida, 526 F. 2d 560 (Customs & Patents 1975); Consumers Union v. Kissinger, 506 F. 2d 136 (D. C. Cir. 1974), cert denied, 421 US 1004 (1975); "Zamora, Poder presidencial" 866-67.

24 Japan Whaling Ass'n v. American Cetacean Soc., 106 S. Ct. 2866 (1986).

usages which may distort the system originally foreseen under the Constitution, but adapts it to functional reality. However, the tension produced in the system by the countervailing constitutional provisions, will never be relaxed. A shifting balance is always at play: "ithere are no static legalism in a dynamic world!".[25]

III. THE SOLUTION: CONDUCT OF TRADE RELATIONS BY THE PRESIDENT

Conduct of trade relations represents a special case in American foreign relations. Due to the complex process of negotiating tariffs and other conditions of commercial exchange, the task has to be carried out by the Executive branch, a fact which Congress has recognized belatedly and grudgingly. Thus, Congress has not grant ad to the President a full delegation of constitutional powers in the area of foreign trade, nor has it encouraged the negotiations of treaties in that area.

The United States is a party to many treaties approved by the senatorial two-thirds majority required by the Constitution. American participation in the United Nations is contemplated in a treaty, properly approved through the senatorial process, and strengthened by an implementing bill. America's participation in the International Monetary Found was made possible in the same fashion, to cite another important example.

The GATT, however, was never put before Con-

25 "Jackson, GATT" 273.

gress for its consideration, and its constitutional validity is still in doubt today. In spite of its fragile roots, the GATT has become the principal vehicle used by the President, to direct his country's trade relations with other nations. This vehicle became increasingly powerful between the years 1945 and 1975, but it never completely escaped Congress' final control, and more recently Congress has cut back Executive's powers under the GATT.

1. *Background of the President's control over tariffs*

In a 1798 act, the American Congress delegated to the President, the power to enter into trade with France "through proclamation".[26] For over a century, although foreign trade did never took on today's importance, this tradition was in force. The President determined the tariff policy of the United States through sporadic delegations from Congress. The results produced by the Executive's efforts were not turned over to Congress for its review. They were normally "proclaimed", and published in the Official Gazette.[27]

The First World War changed America's trade activity. It became a creditor country in the international arena, and its influence grew, a fact duly noted by the several branches of the federal government. President Wilson advocated free trade at the same time he did his League of Nations, but his initiatives failed badly in Congress, when congressmen

26 Act of 13th of July of 1798, ch. 53, 1 Stat. 151, 203.

27 See "Restatement" § 312 and its Comment "K" and Rptrs. 4-5.

became aware of the strategic uses of international trade attempted by the Germans as part of their war program.

Prompted by the new circumstances emerging in the aftermath of the war, Congress reclaimed its power and control over tariffs and other aspects of trade relations with foreign countries. Legislative enthusiasm over direct control culminated in the infamous Smoot-Hawley Tariff of 1930, thereafter quoted as one of the factors which triggered the Great World Depression. Legislators repented after their disastrous experience. They became aware of their institutional incompetence regarding tariff matters, and since then have not insisted on repeating the fiasco. In the opinion of a senator expressed in 1934:

> Our experience in drafting legislation on tariffs... has not been too positive... We did not draft a national tariff law. Instead, we threw into the same pot, at the behest of diverse non-sacred alliances and other combinations of interests, a stew or pot-pourri of regional and local tariffs, which when mixed, make our problems worse and increase misery worldwide.[28]

Humbled by recent experience, in 1934 Congress once again delegated power over commercial relations to the President, through the Trade Agreement Act (TAA).[29] The original TAA expired in three years, but Congress replaced it with another and

28 Senator Cooper, in 78 Cong. Rec. 10379 (1934).

29 Act of 12th of July of 1934, 48 Stat. 943. In Chapter 19 of the United States Code ("USC"), the provisions of the Act formed § § 1351-66.

thereafter, TAA's were always extended, until 1967.[30] This act, in its 1945 version, specified two functions of the Executive branch: 1) "entering into foreign trade agreements", 2) "proclaiming amendments of tariffs and other restrictions on importations... which are required in order to activate any foreign trade agreement".[31]

Under the authority delegated by the TAAs, President Roosevelt entered into trade agreements with 32 countries in 10 years, including agreements with Canada (1935) and Mexico (1942).

The latter were bilateral agreements, and probably Congress did not think about the possibility of making multilateral agreements, but the Executive took advantages of the delegation of powers contained in the 1945 TAA to sponsor the deliberations on the Havana Charter, which sought to create the International Trade Organization. The GATT originally was drafted as a provisional appendix to fix tariffs, until the Charter itself was ratified by enough party countries to enter into force. The GATT was ratified with a Protocol for Provisional Application signed in Geneva on October 30, 1947, and since then, no additional formalities have been

30 There were Acts in 1934, 1937, 1940, 1943, 1945, 1948, 1949, 1951, 1953, 1954, 1955, 1958, and 1962. Not always was the new Act enacted before the expiration of the previous Act, leaving temporary gaps in each extension after 1945.

31 Act of July 5, 59 Stat, 410.

added to validate it with respect to the domestic laws of the United States.[32]

The GATT was not submitted to Congress for its approval because the Havana Charter was presented before the Senate for its approval as a treaty. When the Havana Charter was not approved, the GATT remained "temporarily" in force. This fact did not pass unnoticed, but Congress vacilated regarding the course it should follow. Congress did resent the Executive exercise of power under the GATT, and when the TAA was extended in 1948 and 1949, its provisions omitted any reference to the GATT. The law that extended the TAA in 1951, stated that: "The enactement of this law will not be construed as determining or indicating approval or disapproval by Congress of the Executive agreement know as the GATT".[33]

The same reservation was included in the next four TAA, in 1953, 1954, 1955 and 1958.

For several years the controversy circulated within the Congress, but the legislative branch never took concrete steps to resolve the matter. It complained a lot, but it did not act. However, Congress inevitably had the face the question in the 1962 TAA. Know as the Trade Expansion Act,[34] the 1962 renovation

32 Extended periods of enforcement give a doubtful law force through continued practice and application. In 1954, when there were complaints regarding the GATT in Congress, then Secretary of State, John Foster Dulles, in testimony before Congress Senate Finance Committee, stated: "I do not believe that this Act which has remained on the law books for twenty-one years without challenge is unconstitutional." Quoted by "Jackson, GATT" 257 n. 36.

33 65 Stat. 72.

34 Act of October 11, 1962, 76 Stat. 872. With this Act the reference to the Acts was changed in USC: the provisions which appeared in 19 USC § § 1351-66, were changed to 19 USC § § 1801-1991.

of the TAA established the Office of the Special Trade of the Executive and authorized the Kennedy Round to negotiate tariffs within the GATT, events which raised the legal status of the GATT to a higher level. Although it abstained from an explicit approval, Congress tacitly approved the GATT by recognizing and certifying the United States' participation in the Kennedy Round in that forum.[35]

Five years later, however, when they learned of the results obtained in the Kennedy Round, the members of Congress reacted in a very negative fashion:[36] they refused to enact as a law the Agreement on Chemicals, when the President requested it; they expressed many doubts regarding the Antidumping Code negotiated and accepted by the President, because it seemed to them that he had exceeded his delegated powers; and when the Executive powers expired under the Trade Expansion Act of 1967, they did not extend them with a new TAA. In any case, Congress permitted the enforcement of the majority of the programs ratified at the Kennedy Round, via presidential proclamation.

Ambivalent, legislators hesitated to overturn the fact described by professor John Jackson in 1967: "In the past three decades, there was an important shift in power foreign trade affairs from Congress to the Executive".[37] There ware no major congressional rumblings and foreign trade went relatively well, but in the Senate and in the House there was unrelenting

35 19 USC § 1821 (1964).
36 See Evans, *The Kennedy Round in American Trade Policy* 299-317 (1971).
37 "Jackson, GATT" 254.

resistance against a definitive transfer of powers to the Executive. Actually, the problem did not surface, because no one acknowledged its existence until the debates on the Trade Act of 1974 (TA),[38] the first organic law on the subject in American legislative history.

Among other causes, the initiative for the TA became irresistable when the President reported that other countries did not wish to enter into trade negotiations with the United States because they did not trust the Executive's authority, due to the lack of the TAA since 1967 and the bitter reception of the Kennedy Round results in the US Congress.

2. *The dawn of a new era: The Foreign Trade Act of 1974*

Somehow, the Legislative branch had to legitimize the exercise of power in the area of foreign trade and fill the vacuum left by seven years without a TAA. It was not as propitious moment to delegate more powers to the President; we had just witnessed the Watergate scandal and other instances of power abuse perpetrated during the Nixon "imperial" presidency.[39] Congress did not want to procrastinate as before, however.

At this time Congress invented a mechanism to

38 These discussions began in 1971, with the delivery to Congress of the Report by the Williams Commission, appointed by President Nixon to recommend policy in the field of foreign trade. The Williams Commission Report proposed the global modification of the laws on foreign trade which originated the Foreign Trade Act of 1974.

39 "Zamora, Poder presidencial" 862-63, 870-71; Jackson, "United States Law and Implementation of the Tokyo Round Negotiation", in Jackson, Louis & Matsushita, *Implementing the Tokyo Round* 139, 147 (1984) (Hereinafter "Jackson, Tokyo Round").

control the Executive in its various fields of activity, namely: the controversial legislative veto. Basically, it is a process through which Congress delegates powers to the President, or the President exercises powers given to him by the Constitution, but Congress retains the power to review the Executive's acts and veto them *post hoc*, thus negating the President's initiative. Many argue that the legislative veto violates the constitutional principle of the separation of powers, but the debate remains unresolved to date.[40]

The House of Representatives proposed applying a legislative veto to Executive acts dealing with foreign trade, but resistance surfaced in the Senate, due to doubts about the constitutionality of such a measure.[41] In the end, the Senate accepted a control shared between Congress and the President, guaranteeing final review of international agreements by the legislative chambers, according to provisions contained in the TA.[42] Currently in force, those provisions apply to any free trade agreement negotiated by the President with Mexico and Canada, whether it be bilateral or trilateral.

IV. THE NEW ARRANGEMENT; THE "FAST TRACK" PROCEDURE (WHICH IS NOT SO FAST)

The TA established a "fast track" for the enactment of international agreements on foreign trade, as-

40 Inmigration and Naturalization Service v. Chadha, 462 US 919 (1983); "Zamora, Poder presidencial" 849-50.

41 "Jackson, Tokyo Round" 147-48.

42 Act of January 3, 1975, 88 Stat. 1978 (1975), Known as the Foreign Trade Act "of 1974" because it was approved in Congress on 19th December, 1974. The Acts provisions entered 19 USC § § 2101-2487, but there were also important amendments to other sections of 19 USC.

signing, and defining official functions.[43] The provision has certain limitations; according to its language, the "fast track" is used only "when the President enters into a Trade Agreement *under this section* (19 USC § 2112) for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade".[44] In other words, the law supposes that there are foreign trade related, issues, where the Executive has its own constitutional power and, where the legislature cannot act. Those issues have not been defined, however.

The President will negotiate trade agreements,[45] but 90 days before entering into any internatitonal agreement, he must notify the two chambers[46] and consult with the proper congressional committees.[47]

Having carried out the necessary consultations, the President will "enter into" the agreements and will submit them to Congress together with drafts of

43 19 USC §§ 2112, 2191.

44 19 USC § 2112(b)-(d).

45 Constitutuionally, the Executive is empowered to negotiate at any given moment on any given international issue. Regarding trade issues, however, there should not be very much credibility in the Executive should he depart from the Foreign Trade Act.

46 19 USC § 2112(e)(1). It is important to have in mind that the "90 days", are days in which the *two* chambers of Congress are in official session. Such days usually occur at most four per week; however, in times of emergency session, as during the Persian Gulf War in 1990-1991, they can accumulate seven days a week, a fact which greatly speeded up the "fas track" travelled by the Trilateral Agreement, the period expiring at the end of February, 1991, and needing a legislative extension.

47 19 USC § 2112(c). This is an important point for those who negotiate with the US, Executive: as long as the negotiators do not consult with Congress, they will be negotiating in a vacuum and all "agreements" could vanish in thin air when they reach the legislative halls.

all bills as may be necessary to incorporate them into the national law of the US.[48] The law requires presentation of a draft bill together with "an explanation of how the implementing bill and the administrative measures proposed, will change or affect the existing laws", as well as a comprehensive Presidential justification.[49]

In spite of the presentation of a "normal" draft, the internal rules of both legislative chambers opened up the possibility for a "fast track" in the form of special procedures[50] regarding three aspects of international agreements and their companion draft bills:

a) the committees, through which all bills must pass and where many *die* by inertia, cannot hold the trade agreements for more than a short period (normally 45 days) before delivering them for plenary debate, even if they do not take action on them;[51]

b) no legislative amendments whatever are allowed regarding the trade agreement bills submitted by the Executive;[52] and

c) debate in the chambers is limited, normally to a maximum of 20 hours of full debate or a period of fifteen days, regardless of debate. On the other hand, a motion presented in either chamber to take up or consideration of an implementing bill "will be highly privileged and not subject to debate".[53]

48 19 USC § 2112(b)-(e).
49 19 USC § 2112(e) (2).
50 19 USC § 2191.
51 19 USC § 2191(e).
52 19 USC § 2191(d).
53 19 USC § 2191(f)-(g).

The total effect of the law requires Congress to reach a decision regarding any trade agreement entered into by the President within the period of 60 days of two-chamber plenary sessions, which, remember, does not entail 60 calendar days. The Congress may render its legislative decision in a shorter period, of course, and should do so, if the fast track has worked as it is-supposed to. If Congress disapproves, it kills the agreement brought forward on the "fast track", although presumably Congress should not kill an agreement after the legislature has participated in its drafting.

1. *The practice; enforcement of the 1974 Trade Act and the Tokyo Round Agreements and Codes*

In their first major application, the Trade Act and the "fast track" procedure proved effective in serving foreign trade needs. Over several years, the Executive worked with congressional committees and requested their opinions, formed consulting groups of people from the private sector, and distributed their reports and drafts among the interested public.[54] On the other hand, Congress established panels of experts to aid its committees, convened public hearings, and set its personnel to the negotiations in, Geneva as observers.

Other countries participating in the GATT perceived the legislative character which the United States had given the process. In an example quoted by Professor Jackson,[55] the European Community

54 As should have been done according to 19 USC §§ 2111-2213, 2155.
55 "Jackson, Tokyo Round" 164-65.

utilized parallel avenues of access to the US policy-makers from the very star of the international negotiations of the Tokyo Round; 1) one avenue to the Executive, through the GATT forum and the President's offices in Washington, and 2) another avenue to the legislature, through the offices and chambers of the Capitol in another part of the District of Columbia. The European Community often made its points in the American legislative committees through successful lobbying efforts, and returned to the GATT's international forum without needing to deal with those issues any further. Their agenda, or at least parts of it, was taken care of elsewhere, and the Executive had no further say in the matter.

The "fast track" worked so efficiently (although not rapidly, because years passed amid discussions over the GATT agreements being drafted at the Tokyo Round that said agreements, in their final versions, contained no surprises for Congress. To a large extent, this was due to the fact that Congress was kept informed at every step and had ventilated and resolved almost all of its concerns along the way, entering them as amendments to the agreements debated at the GATT. On the other hand, many subjects simply did not provoke any reaction in Congress, which passively accepted despite being well informed) the measures and provisions sponsored by the President.

The Executive-Legislative cooperation produced results at the Tokyo Round: the Executive signed the agreements in the Geneva Protocol on June 11,

1979 and almost immediately thereafter delivered them to Congress with their implementing bill[56] and justifications prepared by the Executive in the latter part of June, 1979. Both Chambers passed them with their implementing bill on July 23, 1979. Perhaps most impressive was the vote: 90 yeas, 4 nays in the Senate; 395 yeas, 7 nays in the House. ¡This in a Congress where its members most adept at keeping in the good graces of voters in their electoral districts have through the years followed a policy which advocates that "you never lose votes by voting against an international agreement"! The law was signed on the 26th of July, of 1979.

2. *The 1979 practice regarding national provisions*

This undeniably optimistic event, unprecedented, and against all tradition in the treatment of Foreign Relation Executive Agreements, closed the first stage of the TA on a positive note. However, it does answer our main concern here: how did the agreements of the Tokyo Round enter US domestic law?

In order to answer that question, one must first consider the dual theory of international law held in the US. All international agreements have an *international* validity which is independent of its *national* effects. This distinction is obvious in the Third Restatement of the Foreign Relations Law of the United

56 Which by the way followed almost to the letter a "draft" prepared by several congressional committees.

States, where some sections state that the nation must honor its commitments to other sovereign States,[57] while simultaneously, other sections –supposedly non-conflictive– establish that the Constitution and the federal laws of the United States prevail over international agreements in the domestic arena.[58]

Interestingly enough, the agreements of the Tokyo Round formally became part of the domestic law of the US, even before becoming an international commitment of the US. The law enacted by Congress on July, 1979, completed the incorporation of those conventions in national domestic law, while the same law authorized the President thereafter to accept those agreements as binding international obligations for his country. The President decided to accept seven of the Agreements from the Tokyo Round on December, 1979, and six of them were signed by his representative in Geneva on the 17th of December, 1979, the first day of the three year signing period established by GATT. The remaining agreements were entered into gradually, although always without delays, through ratification signatures, protocols and proclamations,[59] as required in each case.

The 1979 legislation which approved the Tokyo Round amended the TA to add a clear rule on the effect of traties with respect to federal law, however. It satates in a provision, still in force, that:

57 "Restatement" §§ 111, 115(1)(b), 311, 312, 321, 322, 331-339.
58 "Restatement" §§ 111(3)-(4), 115(1)(a), (3).
59 "Jackson, Tokyo Round" 168.

> American laws shall prevail in case of conflict. No provision contained in a trade agreement approved by Congress under [this law], nor the application of said provision to any one person or circumstance which enters into conflict with any law of the United States, will be enforceable under the laws of the United States.[60]

Greater force was given to the latter provision by another amendment also added in 1979, in the same section of the TA:

> No nospecified particular remedies will be created. No agreement approved under [this law], nor the enactment of this law, will be construed as the creation of a specific right to legal claims or remedies not expressly provided for under this law, or under the laws of the United States.[61]

The latter provision is necessary to implement the former provision, because in the United States, self-executing agreements take on the force of law.[62] Thus Congress had to avoid the possibility that the Conventions and other agreements produced in the GATT might contain self-executing provisions. The Executive and the two chambers took pains in their official declarations to disclaim any possibility for self-execution in the case of the 1979 agreements.[63] In other words, they perpetrated and honored the "official" legal conclusion that detailed implementing bills were needed to bless 1979 GATT treaties with the domestic imprimatur.

60 19 USC § 2504(a).
61 19 USC § 2504(d).
62 "Restatement" § 111(3).
63 "Jackson, Tokyo Round" 170.

V. CURRENT LEGAL OVERVIEW OF AMERICAN LEGISLATION ON FOREIGN TRADE

Although the first harvest produced under the TA model was fruitful, there continue to exist tensions between the two branches which are mutually responsible for the draftin of international agreements and for their enforcement or incorporation into the domestic law of the United States. It remains to be seen what rules will affect a trade agreement between Mexico and Canada in the domestic law of the US. It is not the same thing as negotiating in the GATT. In the first place, the Tokyo Round dealt with many directly under the Executive power to negotiate without any participation from Congress. Nevertheless, *all* subjet matter passed through the same process in the national legislature. In other words, the legislative power which had transferred control over international trade to the Executive between 1934 and 1974, more than made up for the ground lost, and even invaded Presidential territory.

Although Professor Jackson's comment regarding the dominance of the Executive after the 1967 Kennedy Round[64] was correct then, it has little currency in 1991. In twenty four years, the situation changed entirely. The vigorous and ultimate arbiter of US trade relations is its Congress.[65] The President continues to be active on the from line of negotiation, but with a noticeably diminished power in drafting

64 See note 37 *supra.*

65 Fisher, "Relaciones Ejecutivo-Legislativas en política exterior",: "Derecho constitucional México-Estados Unidos" 929.

the international trade agreements and the laws which incorporate them into the national legal regime.

The TA, in addition, weakened the Presidential role in the internal administration of foreign trade laws. In the first place, in the well known text of article 301 of the TA,[66] Congress established an administrative claim process that "any interested person" can activate to present their complaints before the Foreign Trade Commision. The TA establishes time limitations for these processes,[67] and if the Commission does not solve a dispute within the established time limits, it will be deemed settled in favor of the plaintiff. Furthermore, the administrative courts are open to arguments from interested third parties, including official agencies and private persons, unions and producers' associations, foreign and American. Whoever has an opinion may go before the administrative court in order to defend his interests. The overall effect often results in a *quasi* legislative process instead of a legal process. Instead of resolving a dispute between the parties, a general debate may ensue to define a general policy, in contrast to those occasions where the only arguments are presented by the parties and the holding affects only the parties.

It is important to keep in mind that in the United States, there always exists the possibility privately-initiate litigation that may challenge and even repeal trade agreements. This constitutional guarantee cannot be overcome, and at any given moment an in-

66 19 USC § 2251(a).
67 19 USC §§ 2412, 2414.

dividual (who does not have to be a citizen or a American resident) may succeed in overturning the agreements which were achieved at the cost of blood, sweat, toil and many tears in international fora and in the American Legislative and Executive branches. This possibility higlights the differentiation made in domestic American law between an international commitment and domestic law: the former may exist without the latter, even though sanctions in trade matters are usually strictly national. In the US case, the domestic system renders international agreements vulnerable to continuing sporadic attacks in the courts.

Recently the United States has made two bilateral free trade agreements: with Israel[68] and with Canada.[69] The agreement with Israel is not a great legal edifice; it consists of six sections and only a few pages. The agreement signed with Canada, on the contrary, is a veritable organic law, with complete guidelines for a trade relationship with a great deal of exchange. It is a law that will be used often, and it has been in the early years of its existence. It serves as a good model for what may become the agreement between Mexico and the United States, whether it is bilateral or trilateral.

The two free trade agreements, the succinct one with Israel and the elaborate Canadian one, contain a common provision regarding the insertion of their regulations in domestic American law. The agreements echo

68 Act of June 11, 1985, 99 Stat, 82 (1985).
69 Act of 28 September, 1988, 102 Stat. 1852 (1988).

the text of the TA, 19 USC § 2504 (a),[70] which states that in case of conflict it subordinates the terms of the agreement to "any law of the United States."[71]

They also contain language drawn from 19 USC § 2504 (d), the clause forbidding any trade agreements with self-executing efect. It is interesting to point out the difference between the Israel-United States Agreement, that repeated the language contained in the TA, and the Canada-United States Agreement, that abandoned the language contained in the TA in order to invest the federal government with the exclusive right to sue under the terms of the agreement.

At first glance, the language contained in the United States-Canada Agreement does not seem to make much sense, but when one reviews sections 405 to 407 of the Agreement, which create a comprehensive quasi-judicial system for the settlement of disputes regarding unfair trade practices, one becomes aware of the progress achieved in the Canada-United States Agreement. It contemplates bilateral processes for the resolution of problems which will surface with the enforcement of the Agreement. The mechanism is still evolving, and other participants in this seminar will be better qualified than I am to comment on it. I mention it because it leaves the door ajar regarding the legal sovereignty of federal laws, prevailing over trade agreements, and is a process that should form an important part of the FTA between Mexico, the United States and Canada. The processes

70 See note 60 *supra* and its accompanying text.
71 Agreement with Isareal, 5; Agreement with Canada, 102.

of dispute resolution will provide the final *de facto* word regarding the insertion of the Agreement in the domestic law of the party countries.[72]

VI. CONCLUSIONS

There will be a free trade agreement reached between the United States, Mexico and Canada. In many ways we have one already, although not yet formalized with a unified agreement. I do not predict when it will enter into force, because there are many factors both against it and in its favor. Europeans and South Americans can probably recall the vicissitudes of integration, how difficult it becomes, and the suspicions and worries which accompany it. It is somewhat as if a marriage should be arranged by the whole family instead of trough the impulse of the bride and groom. There are always relatives who are against the engagement. Regarding marriage the couple usually forges ahead and the relatives must yield or tag along, "as long as they know what they are doing". But if all relatives had equal participation or vote, and the engagement were to be submitted to public debate, how many marriages would be consummated?

To a great extent, this is the process with which we must live. The mutual advantages –in my view, to create the world's largest consumer market in an era in which integrated markets in other areas of the world are already functioning, to recognize already

72 It must not be forgotten that there is always the alternative possibility of taking the controversy under the US-Canada Agreement before the GATT, or before a national court. The bilateral process is not exclusvie, but it does work as control mechanism reviewing the other processes.

existing trade relations to apply the phenomenon of comparative advantage, and to regulate evermore intense exchanges of persons, goods, and services, to mention only the most outstanding advanteges—will lead us to an agreement, sooner or later. En route, however, many opposition voices will be heard. They serve their function by anticipating problems and solving them within realistic possibilities.

The problem of the incorporation of a bilateral or trilateral agreement into the domestic law of the involved party countries is not clearly defined, nor does it have an established clear doctrine, although I have made an effort in this short presentation to outline some guidelines and limitations which already exist. As with the process of integration, which is already in motion with or without the agreement, the latter guidelines and limits will also evolve. We will learn a lot as we participate in and live through the process.