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# The Domestic Legal Status of the GATT: The Need for Clarification

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# The Domestic Legal Status of the GATT: The Need for Clarification*

## *I. Introduction*

> The growing economic interdependence of the nations of the world needs no comment. Armed conflict and social unrest in the Middle East affect farmers in Iowa and France and motor vehicle workers in Michigan and Germany Interest-rate decisions taken in Washington have a profound influence on the external debt of many developing countries, which in turn affects their ability to purchase goods made in industrial countries and to provide their citizenry with economic advancement. Environmental problems have obvious cross-border effects. More and more frequently, government leaders find their freedom of action circumscribed because of the impact of external economic factors on their national economies.[1]

For more than forty-five years, the General Agreement on Tariffs and Trade (GATT)[2] has been the preeminent instrument governing international trade relations.[3] The drafters intended for the GATT to promote the expansion of trade, as well as international cooperation and interdependence.[4] Current international economic and trade conditions suggest that

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1. JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 1-2 (1990).

2. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

3. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 27 (1989) [hereinafter JACKSON, WORLD TRADING SYSTEM]; John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV 249, 250 (1967) [hereinafter Jackson, *GATT in U.S. Law*].

4. *See* GATT, *supra* note 2, pmbl. (discussing goals and aspirations of GATT); Kuo-Lee Li, *The Law of GATT. Study and Research*, 18 J. WORLD TRADE L. 357, 357 (1984) (stating that GATT is most significant achievement in development and liberalization of international trade since World War II); *see also* JACKSON, *supra* note 1, 9-10 (discussing origins of GATT). According to Professor Jackson, a desire for lower tariffs and the recognition that protectionist economic policies were in part responsible for the disasters leading to World War II led the United States and its allies to establish post-war economic

the GATT has succeeded in carrying out this design and that it will continue to be the preeminent instrument governing international trade for years to come.[5]

The GATT plays an important role in the trade policy of the United States.[6] Although Congress has not expressly approved the GATT, Congress recognizes the GATT as the primary instrument of United States trade policy.[7] Moreover, all three branches of the federal government recognize the binding effect of the GATT.[8] An opinion by a panel of the United States Court of Appeals for the Fifth Circuit in *Mississippi Poultry Ass'n v Madigan*,[9] however, raises questions about the force of the GATT as a binding international obligation of the United States. In *Mississippi Poultry*, nonprofit trade associations consisting of domestic poultry producers and processors (Associations) challenged a regulation that the Secretary of Agriculture and the Food Safety and Inspection Services (Agency) promulgated pursuant to section 466(d) of the Poultry Products Inspection Act (PPIA).[10] Section 466(d) provides that all imported poultry

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institutions. *Id.*

5. *See supra* note 1 and accompanying text (discussing economic interdependence among nations). The successful conclusion of the Uruguay Round of the Multilateral Trade Negotiations cemented the GATT's position as the primary instrument of international trade. *See* Peter Behr, *U.S., Europe Reach Trade Agreement; Global Tariffs to Fall; Last Issue Sidestepped*, WASH. POST, Dec. 15, 1993, at A1 (noting that after seven years of talks, stage is set for "historic accord" that will bring almost all forms of international commerce under GATT).

6. *See* Thomas L. Friedman, *The World Trade Agreement: The View in Washington; Clinton and Some in Congress See Less Trouble This Time*, N.Y TIMES, Dec. 16, 1993, at D8 (noting President Clinton's enthusiasm for new GATT agreement). President Clinton asserted that the new GATT agreement will increase American exports and "cement[ ] our position of leadership in the new global economy " *Id.*

7 Jackson, *GATT in U.S. Law*, *supra* note 3, at 265-69. The President has the power to make treaties with the advice and consent of the Senate. U.S. CONST. art. II, § 2. The President controls the negotiation process, and if two-thirds of the Senate approve the treaty, the President can ratify the treaty *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 130 (1972) (discussing operation of treaty power).

The GATT has never been formally submitted to the Senate for advice and consent. Jackson, *GATT in U.S. Law*, *supra* note 3, at 253, 265. Thus, the GATT operates as an executive agreement rather than a treaty obligation. *Id.* at 253-54; *see also infra* note 75 and accompanying text (noting that GATT operates as congressional-executive agreement).

8. Jackson, *GATT in U.S. Law*, *supra* note 3, at 260.

9. 992 F.2d 1359 (5th Cir. 1993).

10. Mississippi Poultry Ass'n v Madigan, 992 F.2d 1359, 1360-61 (5th Cir.) (concluding that regulation promulgated by Secretary of Agriculture and Food Safety and

products shall be subject to "the same" inspection standards as those applied in the United States and shall be processed under "the same" conditions as similar products produced in the United States.[11] The Agency's implementing regulation required foreign inspection systems to maintain a poultry inspection program that was "at least equal" to that applied in the United States.[12] The Associations argued that the Agency's regulation violated the plain language of section 466(d) and, therefore, was arbitrary and capricious.[13] The United States District Court for the Southern District of Mississippi agreed and granted the Associations' motion for summary judgment.[14]

The court of appeals, in affirming the district court's judgment, held that Congress clearly expressed an intent in both section 466(d) and a subsequent declaration inserted into the Food, Agriculture, Conservation, and Trade Act of 1990 (1990 Act),[15] that "the same as" language in section 466(d) means "identical."[16] In reaching this conclusion, the court dismissed the Agency's argument that the court should reject the interpretation

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Inspection Services (Agency) was not consistent with congressional intent), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc).

11. 21 U.S.C. § 466(d) (1988).

12. *Mississippi Poultry*, 992 F.2d at 1361. More than three-fourths of the comments the Agency received during the notice and comment period opposed the "at least equal" regulation. *Id.*

13. *Id.* at 1362.

14. *Id.*

15. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990). Section 2507 of this Act provides:

> (3) [O]n October 30, 1989, the Secretary of Agriculture, through the [FSIS], promulgated a regulation implementing the 1985 amendment providing that a foreign inspection system seeking certification for export of poultry to the United States merely impose requirements at least equal to those applicable in the United States.
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> (b) SENSE OF CONGRESS.—It is the sense of the Congress that—
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> (1) the regulation promulgated by the Secretary of Agriculture, through the [FSIS], with respect to poultry products offered for importation into the United States does not reflect the intention of the Congress; and
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> (2) to urge the Secretary, through the [FSIS], to repeal the October 30, 1989, regulation and promulgate a new regulation reflecting the intention of the Congress.

*Id.*

16. Mississippi Poultry Ass'n v Madigan, 992 F.2d 1359, 1364-65 (5th Cir.), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc).

equating "same as" with "identical" because this interpretation violated GATT obligations.[17]

The panel opinion in *Mississippi Poultry* suggests that the GATT is more susceptible than other international obligations to the whims of Congress.[18] Congress has the authority to enact legislation that abrogates or violates an existing international treaty or agreement.[19] Absent a clear expression of congressional intent to abrogate or violate an existing international agreement or treaty, however, courts generally will construe domestic legislation consistently with prior international obligations.[20] In *Mississippi Poultry*, the court suggested that this rule of construction does not apply when Congress enacts a statute that potentially conflicts with the United States GATT obligations.[21]

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17 *Id.* at 1365-69. The Agency argued that the Associations' interpretation of the PPIA violated the GATT, the Uruguay Round of the Multilateral Trade Negotiations, and the United States-Canada Free Trade Agreement. *Id.* at 1365. The court held that if the PPIA violated the GATT, it did so as the result of a policy choice Congress made. *Id.* at 1367 Consequently, the court refused to interfere with what it viewed as a policy dispute between Congress and the Executive Branch. *Id.*

The Fifth Circuit agreed to hear the case en banc, thereby vacating the panel opinion, and a majority of the court affirmed the district court's grant of summary judgment in favor of the poultry associations. Mississippi Poultry Ass'n v. Madigan, 31 F.3d 293, 310 (5th Cir. 1994) (en banc). The majority agreed with the panel's conclusion that the Agency's interpretation of "the same as" was impermissible. *Id.* at 300-05. The en banc opinion focused solely on the proper statutory interpretation of "the same as" and did not address the GATT issue. Nonetheless, the panel opinion is significant because it illustrates the confusion and uncertainty that exist regarding the status of GATT obligations when they potentially conflict with subsequent federal laws.

18. *Mississippi Poultry*, 992 F.2d at 1365-68 (holding that Congress may violate GATT without clear expression of intent to do so).

19. *See infra* notes 41-45 and accompanying text (discussing authority of Congress to supersede existing international obligations of United States).

20. *See infra* notes 46-49 and accompanying text (discussing rule of construction when statute and international agreement may conflict).

21. *See* Mississippi Poultry Ass'n v Madigan, 992 F.2d 1359, 1365 (5th Cir.) (holding that rules of construction for statutes implicating international obligations were not applicable to present case), *amended*, 9 F.3d 1113, 1114 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc). The court identified three maxims of statutory construction that govern when a statute collides with an international obligation. *Id.* The three maxims are: (1) Congress must clearly state its intention to abrogate a treaty or international obligation of the United States; (2) Congress must clearly state its intent to apply domestic law extraterritorially; and (3) courts should not construe an act of Congress in a manner that violates the law of nations if any other possible construction remains. *Id.* According to the court, these maxims were not applicable in *Mississippi Poultry* because Congress in enacting

In light of *Mississippi Poultry*, this Note analyzes the status of the GATT relative to other international obligations of the United States. Part II begins by examining the domestic legal status of international treaties and agreements generally in the United States. Part II continues with an examination of the general rule of statutory construction when subsequent domestic legislation potentially conflicts with existing international obligations.

Part III analyzes the GATT and its status in United States domestic law This Part first identifies the GATT's origins and examines the GATT in general. The discussion then focuses on the GATT's domestic legal status and concludes that the GATT operates as a valid congressional-executive agreement.

Finally, Part IV analyzes the panel opinion in *Mississippi Poultry* This Part begins with a review of prior cases involving a potential conflict between an act of Congress and the GATT Part IV continues with an analysis of the panel opinion and suggests an alternative course the panel could have taken in deciding *Mississippi Poultry* This Note concludes by suggesting that the panel opinion failed to account adequately for the GATT's significance as the primary instrument of United States trade policy and that GATT obligations deserve the same deference as other international obligations when there is a potential conflict with domestic law

## *II. Interaction Between International Obligations and Domestic Law*

### *A. Status of International Treaties and Agreements*

Federal statutes and self-executing treaties have equal status under United States domestic law [22] They have equal authority as federal

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the PPIA did not abrogate the GATT, apply domestic law extraterritorially, or violate the law of nations. *Id.* at 1366-67 In finding that the first maxim did not apply, the court held that Congress did not abrogate, but merely violated the GATT. *Id.* at 1366.

22. *See* Whitney v Robertson, 124 U.S. 190, 194 (1888) (stating that Constitution places treaty on equal footing with act of legislation); HENKIN, *supra* note 7, at 163-64 (citing *Whitney* in support of proposition that statutes and treaties are equal); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV 1555, 1563 (1984) (discussing relation between federal statutes and treaties for purposes of later-in-time rule); David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 387 (1992) (stating that international agreement has same domestic law status as statutes).

A self-executing treaty does not require an implementing act of Congress to operate domestically *See* HENKIN, *supra* note 7, at 157-58 (discussing difference between self-executing treaties and non-self-executing treaties).

law, and both are superior to state law [23] The Supremacy Clause of the Constitution provides the basis for the conclusion that federal statutes and treaties are equal in status and authority [24] The Supremacy Clause states:

> 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 [25]

Equality of treaties and federal statutes does not inevitably follow from this language.[26] However, one can plausibly argue that the language implies equality, and courts and commentators almost universally have accepted this argument.[27]

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23. Henkin, *supra* note 22, at 1563.

24. *Id.*

25. U.S. CONST. art. VI (emphasis added).

26. *See* HENKIN, *supra* note 7, at 163 (stating that conclusion that federal statutes and treaties are equal does not inevitably follow from Supremacy Clause).

27 *See id.* at 164 (stating that equality of statutes and treaties in domestic law seems established).

Customary international law, or the "law of nations," is incorporated as domestic law, even though neither the Constitution nor any act of Congress expressly provides that customary law shall be incorporated. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law"); Henkin, *supra* note 22, at 1557 (stating that both state and federal courts have treated customary international law as incorporated since national beginnings). Like treaties, customary law has status equal to that of an act of Congress for domestic purposes. *Id.* at 1566. Professor Henkin states that while the co-equal status of customary law is not authoritatively established, "[t]he obligations of the United States under customary law are of the same status as its treaty obligations." *Id.* at 1564-65; *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV 1007, 1026 (1989) (stating that international law and treaties of United States are supreme law of land).

Henkin argues that customary international law is self-executing domestic law Henkin, *supra* note 22, at 1557 Law that is self-executing is enforceable even without congressional enactment or implementation. *Id.* at 1561. Treaties may be either self-executing or non-self-executing. *Id.* at n.25. The distinction between self-executing and non-self-executing law is important for determining the legal status of international obligations created through executive agreements, as well as treaties. *See* Jackson, *GATT in U.S. Law*, *supra* note 3, at 285-86 (arguing that GATT is not self-executing agreement).

Like treaties, executive agreements may operate as domestic law [28] In fact, most of the United States international agreements are in the form of executive agreements.[29] Unlike treaties,[30] however, executive agreements have no explicit constitutional basis.[31] Four principal methods exist whereby executive agreements become domestic law [32] First, Congress may enact a statute subsequent to the agreement giving the President authority to accept the agreement or confirming what the President has already done.[33] Second, Congress may pass a statute in advance authorizing the President to negotiate and enter into an international agreement.[34] Third, an existing treaty may delegate to the President limited authority to enter into executive agreements that implement the treaty [35] Fourth, the President may enter into an executive agreement under some inherent constitutional authority [36] Applying executive agreements to domestic law can be a confusing exercise,[37] due in part to the variety of ways in which

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28. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (1986) (discussing operation of § 115 and status of international obligations) [hereinafter RESTATEMENT (THIRD)]; Henkin, *supra* note 22, at 1565 (stating that President, in exercising constitutional authority, makes law alone through executive agreement). According to the RESTATEMENT (THIRD), "[a]cts of Congress, treaties, *and other international agreements* of the United States are all federal law, § 111." RESTATEMENT (THIRD), *supra*, § 115 cmt. a (emphasis added).

29. *See* Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479, 496-97 (1990) (stating that executive agreements are most common form of U.S. international agreement).

30. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 62 (describing manner in which treaties are handled for domestic law purposes). A treaty becomes law when the Senate approves the treaty, and the President ratifies it. U.S. CONST. art. II, § 2.

31. *See* RESTATEMENT (THIRD), *supra* note 28, § 303 (describing methods by which executive agreements may operate as domestic law); JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 63 (same); Brand, *supra* note 29, at 482-83, 493 (same).

32. *See* RESTATEMENT (THIRD) § 303 (describing how executive agreements operate as domestic law).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37 *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 64 (stating that application of international agreements to domestic law creates great deal of confusion); Brand, *supra* note 29, at 494 (stating that executive agreements present more difficult problem than treaties for domestic law purposes); Wirth, *supra* note 22, at 389-90 (describing domestic status of executive agreement lacking statutory authorization as

such agreements may become enforceable for domestic purposes.[38] Some executive agreements that qualify under the fourth method operate as domestic law without congressional action.[39] Agreements classified under the first three methods may operate as the law of the United States, but only as a result of actions taken by both Congress and the President.[40]

### *B. Later-in-Time Rule*

The later-in-time rule serves as a mechanism to determine precedence between statutes and self-executing treaties.[41] The later-in-time rule provides that "[a]n act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States."[42] Accordingly, Congress may enact legislation that supersedes a prior treaty or agreement,[43] and the Supreme Court will sanction

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"cloudy"). Professor Brand states that the fact executive agreements have no constitutional foundation "makes the rules applicable to executive agreements somewhat less certain than the rules applicable to treaty law or statutory law." Brand, *supra* note 29, at 498.

38. *See supra* notes 32-36 and accompanying text (describing how executive agreements operate as domestic law).

39. *See* Henkin, *supra* note 22, at 1565 (stating that President may make law alone through executive agreement under constitutional authority). *But cf.* RESTATEMENT (THIRD), *supra* note 28, § 303 cmt. j (questioning whether sole executive agreement can supersede earlier federal statute under later-in-time rule). Professor Henkin recognizes that an executive agreement may not supersede an earlier statute, but states that such a scenario remains a hypothetical. Henkin, *supra* note 22, at 1565 n.36.

40. *See supra* notes 31-36 and accompanying text (describing requirements that executive agreements must satisfy to become law).

41. Henkin, *supra* note 22, at 1563.

42. RESTATEMENT (THIRD), *supra* note 28, § 115(1)(a).

43. *See* Brand, *supra* note 29, at 504 (noting that Congress may supersede treaties through subsequent legislation); Richard Cummings, *The PLO Case: Terrorism, Statutory Interpretation, and Conflicting Obligations Under Domestic and Public International Law*, 13 HASTINGS INT'L & COMP. L. REV 25, 26 (1989) (discussing domestic law status of treaty when Congress enacts legislation conflicting with that treaty); Henkin, *supra* note 22, at 1566 (stating that Congress may supersede treaties through subsequent legislation); Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, *in* THE EUROPEAN COMMUNITY AND GATT 187, 191-92 (Meinhard Hilf et al. eds., 1986) (same); *see also* Henkin, *supra* note 22, at 1568-69 (discussing role of courts in enforcing international obligations). Professor Henkin contends that the courts will not command Congress or the President to comply with international obligations if either has rejected that obligation through a proper exercise of authority *Id.*

Self-executing treaties may also supersede domestic statutes. *See* Brand, *supra* note 29, at 504 n.140 (discussing Supreme Court dicta indicating that treaty may displace

Congress's rejection of an international obligation by applying the later-in-time rule.[44] As a result of the later-in-time rule, a treaty or agreement that represents an internationally binding obligation of the United States may have no domestic effect, even if the obligation is self-executing.[45]

### *C. Clear-Intent Rule of Construction*

The primary limitation on the later-in-time rule is that Congress must clearly express an intent to supersede an existing international obligation.[46] Under the *Restatement (Third) of Foreign Relations Law of the United States* (*Restatement (Third)*), "[w]here fairly possible, a United States

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statute).

44. *See* Chae Chan Ping v United States (The Chinese Exclusion Case), 130 U.S. 581, 599-602 (1889) (finding clear legislative intent to abrogate previous treaty, and giving effect to that intent); Edye v Robertson (The Head Money Cases), 112 U.S. 580, 597-99 (1884) (same); HENKIN, *supra* note 7, at 164 (stating that courts regularly give effect to acts of Congress inconsistent with existing treaty).

45. *See* RESTATEMENT (THIRD), *supra* note 28, § 115 cmt. a (stating that conflicting domestic statute would place United States in violation of international law); HENKIN, *supra* note 7, at 164 (same); Henkin, *supra* note 22, at 1568 (same). Professor Henkin states that Congress does not repeal a treaty, but "legislates without regard to the international obligations of the United States." HENKIN, *supra* note 7, at 164. The treaty obligations remain valid, but conflicting legislation "compels the United States to go into default." *Id.* According to Professor Cummings, the later-in-time doctrine obscures international treaty obligations that remain "binding on the international level but only conditionally operative on the domestic level." Cummings, *supra* note 43, at 26.

46. *See* United States v Palestine Liberation Org., 695 F Supp. 1456, 1471 (S.D.N.Y 1988) (holding that Congress did not intend to violate U.N. Headquarters Agreement by enacting Anti-Terrorism Act); RESTATEMENT (THIRD), *supra* note 28, § 114 (stating that courts should construe federal statute so as not to conflict with international obligations of United States); Eskridge, *supra* note 27, at 1026-27 (noting that courts construe statutes consistently with international law unless clear indications exist that Congress meant to supersede earlier agreement); Henkin, *supra* note 22, at 1558 n.15 (noting that courts have long assumed that Congress intended to act consistently with international law and have "construed statutes accordingly"); Jackson, *GATT in U.S. Law*, *supra* note 3, at 293 n.239 (asserting that attempt to construe consistently will be made when legislation and executive agreement conflict); Dorothy J. Black, Note, *International Trade v. Environmental Protection: The Case of the U.S. Embargo on Mexican Tuna*, 24 LAW & POL'Y INT'L BUS. 123, 140 (1992) (stating that Congress may violate treaty obligations so long as intent is clear); Andrew R. Horne, Note, U.S. v Palestine Liberation Organization: *Continued Confusion in Congressional Intent and the Hierarchy of Norms*, 10 MICH. J. INT'L L. 935, 947 (1989) (finding that presumption that Congress would not surreptitiously violate international obligations is part of original foundations of American jurisprudence).

statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[47] The Supreme Court has traditionally and consistently applied this canon of construction.[48] Moreover, cases applying this canon indicate that courts should construe federal statutes consistently with executive agreements, as well as treaties and customary law [49] This is important because the GATT is an executive agreement.[50]

In *United States v Palestine Liberation Organization*,[51] the United States District Court for the Southern District of New York held that the

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47 RESTATEMENT (THIRD), *supra* note 28, § 114.

48. *See* Weinberger v Rossi, 456 U.S. 25, 32-33 (1982) (holding that Congress did not intend to repudiate executive agreement providing for preferential employment of Filipino citizens at U.S. military bases in Philippines); Washington v Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (expressing reluctance to find abrogation of treaty rights without clear statutory instruction), *modified*, 444 U.S. 816 (1979); McCulloch v Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (finding no clearly expressed congressional intent to extend National Labor Relations Act to maritime operations of foreign-flag ships employing alien seamen); Clark v Allen, 331 U.S. 503, 510-11 (1947) (holding that act prohibiting removal of money or property from United States by German nationals did not conflict with prior treaty granting right of inheritance for German nationals); United States v. Cook, 288 U.S. 102, 120 (1933) (stating that Congress must express clear intent to abrogate or modify treaty); Chew Heong v United States, 112 U.S. 536, 550 (1884) (holding that unless Congress declared intent in unmistakable terms, it did not intend to violate treaty allowing certain class of Chinese laborers to go to and from this country); Murray v The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that courts should not construe act of Congress to violate "law of nations" if possible alternative construction exists).

49. *See* Weinberger v. Rossi, 456 U.S. 25, 32-33 (1982) (applying clear-intent canon to executive agreement); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (same); RESTATEMENT (THIRD), *supra* note 28, § 114 (stating that courts should construe statute so as not to conflict with *international agreement* of United States). The Supreme Court in *Weinberger* construed a statute prohibiting discriminatory employment practices on U.S. military installations consistently with a 1947 executive agreement entered into with the Republic of the Philippines, even though the agreement provided for preferential employment of Filipino citizens at United States military facilities in the Philippines. *Weinberger*, 456 U.S. at 32-33. The statute prohibited discrimination in hiring civilian personnel "'[u]nless prohibited by treaty '" *Id.* at 28. The Court held that the word "treaty" could have more than one meaning and that Congress here intended for "treaty" to include executive agreements. *Id.* at 29, 36.

50. *See* Brand, *supra* note 29, at 483 (stating that GATT is valid under U.S. law only as congressional-executive agreement); *supra* note 7 and accompanying text (describing status of GATT).

51. 695 F Supp. 1456 (S.D.N.Y 1988).

Anti-Terrorism Act of 1987[52] (ATA) did not supersede the *Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations*[53] (Headquarters Agreement).[54] In 1974, pursuant to the Headquarters Agreement, the Palestine Liberation Organization (PLO) became an observer at the United Nations.[55] In October 1986, members of Congress, upset at the presence of PLO offices in the United States, requested that the United States Department of State close the PLO offices.[56] When the State Department denied this request, these members of Congress introduced the ATA.[57] The ATA forbade the presence of PLO offices or facilities in the United States if such offices or facilities were intended to further the interests of the PLO [58] The Justice Department argued that the ATA required the closure of the PLO Observer Mission at the United Nations.[59] Because the Justice Department's interpretation of the ATA conflicted directly with the Headquarters Agreement, the district court sought a different construction that would reconcile the ATA with the Headquarters Agreement.[60] The court, applying the clear-intent rule of construction, found that Congress did not intend to contravene the Headquarters Agreement.[61] The ATA mentioned neither the Permanent Observer Mission nor the Headquarters Agreement,

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52. 22 U.S.C. §§ 5201-5203 (1988).

53. G.A. Res. 169 (II), 11 U.N.T.S. 11, No. 147 (1947).

54. United States v Palestine Liberation Org., 695 F Supp. 1456, 1471 (S.D.N.Y. 1988).

55. *Id.* at 1459.

56. *Id.* at 1459-60.

57 *Id.* at 1460.

58. *Id.* The Anti-Terrorism Act of 1987 (ATA) provides:

> It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this chapter—
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> (3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

22 U.S.C. § 5202 (1988).

59. *Palestine Liberation Organization*, 695 F Supp. at 1464.

60. *Id.*

61. *Id.* at 1465.

and this omission led the court to conclude that Congress did not clearly express an intent to violate the Headquarters Agreement.[62] The court's construction of the ATA in *Palestine Liberation Organization* is illustrative of the extent to which some courts have been willing to apply the clear-intent rule of construction.[63]

## *III. The GATT*

### *A. Background*

Despite the significance of the GATT in shaping international economic relations,[64] it never has achieved formal status as a treaty [65] In 1946, the newly formed United Nations, acting through a subordinate body, adopted a proposal to create an International Trade Organization (ITO).[66] The negotiations over the ITO eventually gave birth to the GATT, initially as a temporary measure.[67] Due principally to the failure

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62. *Id.* at 1468-71. The lack of any unequivocal guidance in the legislative history of the ATA and the longstanding practice under the language of the Headquarters Agreement supported the court's conclusion that the ATA did not include the Headquarters Agreement. *Id.*

63. *Compare* Cummings, *supra* note 43, at 69 (concluding that district court properly construed ATA so as not to conflict with Headquarters Agreement) *and* W Michael Reisman, *An International Farce: The Sad Case of the PLO Mission*, 14 YALE J. INT'L L. 412, 431 (1989) (stating that judicial approach in PLO case was innovative) *and* Beth DeBernardi, Note, *Congressional Intent and Conflicting Treaty Obligations:* United States v Palestine Liberation Organization, 23 CORNELL INT'L L.J. 83, 105 (1990) (stating that district court's decision was "thoughtful and conscientious") *and* Horne, *supra* note 46, at 954 (concluding that district court's reasoning was flawed, but result was correct) *with* M.A. Thomas, *When the Guests Move In: Permanent Observers to the United Nations Gain the Right to Establish Permanent Missions in the United States*, 78 CAL. L. REV 197, 244-45 (1990) (criticizing *PLO* decision for its judicial activist approach and for ignoring "constitutional balance" between executive and legislative branches in "treaty making process").

64. *See supra* notes 1, 3-5 and accompanying text (discussing role GATT occupies in governing international trade relations).

65. JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 27

66. *Id.* at 32; *see also* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 42-46 (1969) (discussing preparatory meetings held from 1946 to 1948 to draft GATT and ITO charter).

67 *See* JACKSON, *supra* note 66, at 42-46 (discussing negotiations over ITO); JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 32 (same). Beginning in October of 1946, meetings dedicated to drafting an ITO charter took place. *Id.* The drafters held the principal meeting from April to November 1947 and divided this meeting into three parts.

of the United States Congress to grant approval, the ITO never came into being.[68] The GATT, however, taking on a life of its own, became the primary forum for handling trade problems.[69]

Although the GATT has not come into force technically as a treaty, it operates as a treaty obligation under international law through the Protocol of Provisional Application (PPA).[70] The PPA secures implementation of the GATT [71] Nations that sign the PPA agree to apply Part II of the GATT "to the fullest extent not inconsistent with existing legislation."[72] The "existing legislation" language is significant because it allows

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*Id.* The first part involved preparing a charter for the ITO, the second part involved negotiation of multilateral tariff reductions, and the third part focused on "drafting the 'general clauses' of obligations relating to the tariff obligations." *Id.* The final two parts of the 1947 meeting constitute the GATT. *Id.* For a comprehensive summary of the formation and history of the GATT, see generally *id.* at 27-39.

68. JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 34. The United States was the dominant economic power in the world during the drafting of the ITO, and the other countries involved in forming the ITO did not want an ITO which did not include the United States. *Id.* Therefore, the United States effectively buried the ITO when President Truman announced at the end of 1950 his decision not to seek congressional approval. *Id.*

69. *See id.* at 37 (discussing how GATT filled vacuum when ITO did not come into being); JACKSON, *supra* note 66, at 49-53 (discussing end of ITO and subsequent development of GATT).

The GATT contains several obligations, "some of which have been further elaborated through separate treaty instruments often called 'codes.'" John H. Jackson, *National Treatment Obligations and Non-Tariff Barriers*, 10 MICH. J. INT'L L. 207, 207 (1989). A primary GATT obligation that member nations agree to "is the 'tariff binding' which sets a maximum tariff rate for massive lists of products." *Id.* Including the Uruguay Round, there have been eight major trade negotiating rounds, "mostly concerned with negotiating the tariff bindings." *Id.* at 208.

70. *See* JACKSON, *supra* note 66, at 59 (discussing general features of GATT); JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 34 (discussing GATT and PPA).

71. *See* JACKSON, *supra* note 66, at 60 (stating that all original contracting parties apply GATT by virtue of PPA); JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 35-36 (discussing how PPA was solution to problem of bringing GATT into force).

72. GATT, *supra* note 2, 55 U.N.T.S. at 308. The PPA provides in part:

> 1. The Governments undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than November 15, 1947, to apply provisionally on and after January, 1 1948:
>
> (a) Parts I and III of the General Agreement on Tariffs and Trade, and
>
> (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

nations to bypass legislative or parliamentary approval and agree to the GATT through the exercise of executive authority [73]

### B. Status Under United States Domestic Law

The GATT does not operate as a treaty of the United States because the Senate never provided "advice and consent."[74] Accordingly, whatever status the GATT has as the law of the United States exists on the basis of its status as a congressional-executive agreement.[75] Professor John Jackson contends that the GATT is a valid congressional-executive agreement because the President proclaimed the GATT pursuant to authority Congress delegated in the 1945 Amendments to the Reciprocal Trade Agreements Act of 1934.[76] However, Jackson's conclusion that the

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*Id.*, *see also* JACKSON, *supra* note 66, at 60-63 (discussing PPA); JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 36 (discussing how nations implement GATT through PPA). The exception to GATT adherence is referred to as the "grandfather rights" or "existing legislation" exception. *Id.*

Part I contains the tariff concessions. *Id.* Part II contains the principal nontariff obligations, including provisions for customs procedures, quotas, subsidies, and antidumping duties. *See id.* at 36 (discussing how implementation operates through PPA). For a detailed analysis of the substantive obligations of the GATT and the manner in which they operate, see generally JACKSON, *supra* note 66, at 193-534.

73. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 36 (stating that most governments would need to submit GATT for legislative approval without "existing legislation" provision); JACKSON, *supra* note 66, at 62 (discussing inclusion of "existing legislation" provision in final draft of GATT). At the Geneva meeting, the drafters asked all participating delegations whether their respective governments could adopt the GATT. *Id.* Most governments could agree to lower tariffs through executive authority, but could not agree to the removal of certain nontariff barriers and general matters, primarily contained in Part II, without parliamentary approval. *Id.* The "existing legislation" clause sought to allow governments to give immediate effect to the GATT without deleting the nontariff provisions. *Id.*

74. *See* Brand, *supra* note 29, at 483 (stating that GATT does not operate as treaty because Senate never gave advice and consent); Jackson, *GATT in U.S. Law*, *supra* note 3, at 253, 265 (same).

75. *See* Brand, *supra* note 29, at 483 (stating that GATT can validly operate under U.S. law only as congressional-executive agreement).

76. *See* Jackson, *GATT in U.S. Law*, *supra* note 3, at 255-73 (discussing presidential proclamation of GATT under 1945 amendments to Reciprocal Trade Agreements Act of 1934). Winthrop Brown, acting with full powers, signed the Protocol on behalf of the United States. *Id.* at 253 n.22. President Truman subsequently proclaimed all provisions of the GATT. Proclamation No. 2761A, 12 Fed. Reg. 8863, 8866 (1947). Truman claimed authority to proclaim the GATT from the 1945 Amendments to a 1934 Act (Trade Agree-

1945 Amendments gave the President the authority to bind the United States to the GATT has not garnered universal acceptance.[77]

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ments Act) that amended the 1930 Tariff Act to facilitate foreign trade. *See id.* (citing Trade Agreements Act as basis for entering GATT). The Trade Agreements Act, in amending § 350 of the Tariff Act of 1930, authorized the President to enter into trade agreements with foreign governments and to proclaim modifications in existing law regarding tariffs and foreign trade in accordance with such trade agreements. Act of June 12, 1934, ch. 474, 48 Stat. 943 (current version at 19 U.S.C. §§ 1351-1354 (1988)). The Act of 1934 provided:

> (a) the President is authorized from time to time—
>
> (1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and
>
> (2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

*Id.* Congress, in the 1945 Amendments to the Trade Agreements Act, extended the President's authority to enter into and proclaim foreign trade agreements for a period of three years. Act of July 5, 1945, ch. 269, 59 Stat. 410 (current version codified at 19 U.S.C. §§ 1351-1354 (1988)).

According to Professor Jackson, the 1945 Amendments delegated to the President statutory authority to bind the United States to the GATT. *See* Jackson, *GATT in U.S. Law*, *supra* note 3, at 273 (stating that it is fairly clear that President had statutory authority to enter GATT). Jackson states that the two primary legal attacks on the proposition that adherence to the GATT is properly based on the Trade Agreements Act are that the Act unconstitutionally delegated legislative power and that the GATT was beyond the scope of authority delegated by the Act. *Id.* at 256-57 Jackson quickly dismisses the first attack, but experiences difficulty in addressing the second. *Id.* at 257

After analyzing the statutory language, the legislative history, and prior trade agreements that dealt with provisions similar to those in the GATT, Jackson concludes that the Trade Agreements Act delegated to the President the authority to proclaim the GATT. *Id.* at 273. For a more in-depth look at Jackson's analysis, see *id.* at 259-70 (discussing validity of presidential authority to enter GATT under Trade Agreements Act).

77 *See* Hudec, *supra* note 43, at 199 n.41 (commenting on Jackson's effort to establish GATT's domestic legal status). The GATT is a multinational agreement, and the primary attack on the authority of the President to enter into and proclaim the GATT under the Trade Agreements Act rests on the fact that neither the Trade Agreements Act nor the 1945 Amendments expressly delegated power to the President to enter into a multilateral agreement. *See* Brand, *supra* note 29, at 484 (stating that neither 1945 nor 1934 Acts explicitly grant authority to President to enter into multilateral agreements); Jackson, *GATT in U.S. Law*, *supra* note 3, at 257-58 (acknowledging argument that Trade Agreements Act does not apply to multilateral agreements). All previous trade agreements negotiated under the Trade Agreements Act, with one exception, were bilateral agreements. *See* Brand,

Congress never has been entirely comfortable or enamored with the GATT [78] Congressional suspicion of the GATT results in part from the inherent tension between the executive and legislative branches in the area of international economic relations.[79] Traditionally, the President plays the preeminent role in the conduct of foreign affairs.[80] The Constitution, however, grants Congress the power to regulate foreign commerce,[81] and members of Congress guard this power jealously [82] Congress's reluctance

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*supra* note 29, at 484 (stating that with exception of agreement made with Belgo-Luxembourg Economic Union, all agreements negotiated under Trade Agreements Act have been bilateral); Jackson, *GATT in U.S. Law*, *supra* note 3, at 258 (same). This does not necessarily refute Jackson's contention that the Trade Agreements Act authorized the President to enter into and proclaim the GATT. *See id.* at 258-59 (arguing that Trade Agreements Act does not preclude multilateral agreements). Jackson points out that the legislative history of the 1945 Amendments contained statements referring to the Trade Agreements Act "as one of several postwar economic policy building blocks, side by side with such others as the Bretton-Woods Agreements, which did set up two multilateral organizations." *Id.* at 258. While admitting that Congress may have been surprised when the executive branch entered into multilateral tariff negotiations with 15 other nations, Jackson argues that the Trade Agreements Act did not explicitly prohibit multilateral agreements. *Id.* at 259. Nonetheless, the multilateral nature of the GATT draws Jackson's contention into question. *See* Brand, *supra* note 29, at 484 n.25 (stating that some commentators have considered Jackson's argument to be "less than convincing"). Professor Hudec concludes that Jackson's detailed analysis of the authority granted by the Trade Agreements Act, rather than closing the door on the question of whether the Trade Agreements Act delegated the President authority to enter into and proclaim the GATT, demonstrates that no clear source of specific authority existed for the GATT as a congressional-executive agreement at the time the GATT came into existence. *See* Hudec, *supra* note 43, at 199 n.41 (commenting on Jackson's analysis of GATT's domestic legal status).

78. *See* John H. Jackson et al., *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV 267, 344-45 (1982) (discussing congressional hostility to GATT and noting that for several decades Congress refused officially to recognize GATT); John J. Reinke, Note, *An Analysis of the Conflicts Between Congressional Import Quotas and the General Agreement on Tariffs and Trade*, 9 FORDHAM INT'L L.J. 734, 745 (1986) (stating that Congress is hostile to GATT because Congress did not ratify GATT).

79. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 61 (noting tension between Congress and President regarding respective roles in area of foreign affairs); Jackson, *supra* note 78, at 341-42 (discussing tension between Congress and President resulting from separation of powers); Reinke, *supra* note 78, at 745 (stating that frictions between executive and legislative branches impede implementation of GATT).

80. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 61-62 (stating that Congress enjoys reminding President of special powers Congress exercises in matters of international trade).

81. U.S. CONST. art. I, § 8.

82. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 62 (stating that Congress

to embrace the GATT is due, in large part, to the fact that Congress never explicitly approved the GATT [83]

Despite its hesitancy about the GATT, however, Congress has never rejected the GATT explicitly [84] In fact, during the first two decades of the GATT's existence, Congress rarely mentioned the GATT, and when it did, it generally took a neutral position.[85] Moreover, in the last twenty years, congressional enactments regarding matters of international trade reflect an implicit acceptance of the GATT [86] Professor Ronald Brand argues that the

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reserves special power over matters of international trade and enjoys reminding executive branch of this power); Jackson, *supra* note 78, at 341-42 (stating that congressional power to regulate foreign commerce limits "Presidential foreign affairs power").

83. *See supra* note 7 and accompanying text (discussing fact that GATT did not receive Senate advice and consent); *supra* note 78 and accompanying text (discussing congressional reluctance, as well as hostility, regarding GATT).

84. *See* Brand, *supra* note 29, at 485 (stating that Congress has carefully avoided explicit approval or rejection of GATT).

85. *See id.* (discussing provisions in 1951, 1953, 1954, 1955, and 1956 acts extending President's power to negotiate trade agreements that staked out neutral position on GATT); Jackson, *GATT in U.S. Law*, *supra* note 3, at 267 (same).

86. *See* Brand, *supra* note 29, at 485, 501-02 (discussing Trade Act of 1974 and Omnibus Trade and Competitiveness Act of 1988). Professor Brand states that Congress has tempered its reluctance to accept the GATT since the Trade Act of 1974. *Id.* at 501. For instance, the Trade Act of 1974 implicitly recognized the GATT as a binding trade agreement of the United States, and instructed the President to take whatever actions that were necessary to bring the GATT into conformity with certain foreign trade principles enumerated in the Act. Trade Act of 1974, Pub. L. No. 93-618, § 121(a), 88 Stat. 1978 (1975) (current version at 19 U.S.C. §§ 2101-2495 (1988)). Furthermore, the 1974 Act authorized an annual appropriation of the sums necessary to cover the United States share of GATT expenses and instructed the President to comply with balance of payment restrictions set out in the GATT. *Id.* §§ 121(d), 122(a) (current version at 19 U.S.C. §§ 2131-2132 (1988)); *see also* Brand, *supra* note 29, at 485 (discussing 1974 Act).

Despite these indications of approval, Congress reiterated that the 1974 Act "does not imply approval or disapproval" of the GATT. Trade Act § 121(d) (current version at 19 U.S.C. § 2131 (1988)). Moreover, Congress took a tougher stand against the GATT in the Trade Agreements Act of 1979. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (current version at 19 U.S.C. §§ 2501-2582 (1988)). The 1979 Act provided that no provision of the GATT that conflicts with any statute enacted by Congress "shall be given effect under the laws of the United States." Trade Agreements Act § 3 (current version at 19 U.S.C. § 2504 (1988)).

The Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903(a)(1) (1988), provided the clearest indication of congressional acceptance of the GATT. *See* Brand, *supra* note 29, at 501 (stating that 1988 Act implies GATT's "full legal status"). In the 1988 Act, Congress, rather than qualifying its support for the GATT, made several positive references to the GATT. *See id.* (discussing various positive references to GATT contained in 1988 Act).

GATT has full legal status in the United States because Congress has consistently acquiesced in prolonged United States participation in the GATT [87]

Justice Frankfurter's concurring opinion in *Youngstown Sheet & Tube Co. v Sawyer*[88] lends support to the conclusion that the GATT has full legal status in the United States.[89] In *Youngstown*, Justice Frankfurter wrote: "[A] systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned may be treated as

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Some of the positive references Brand identified are provisions "ensuring that GATT mechanisms provide for effective and expeditious dispute settlement, enhancing the status of the GATT," and "improving the operation and extending the coverage of the GATT." *Id.*, *see also* 19 U.S.C. § 2901(b) (1988).

Most observers expect Congress to approve the agreements resulting from the recently concluded Uruguay Round. *See* Friedman, *supra* note 6, at D8 (noting that President Clinton and senior lawmakers are optimistic that Congress will approve GATT). Beginning in 1995, the new agreement would bring agriculture, financial services, and intellectual property under GATT rules for the first time; eliminate tariffs on thousands of products; and create a permanent institution consisting of GATT members that would enforce trade rules. Peter Behr, *117 Nations' Representatives Approve Historic Trade Pact*, WASH. POST, Dec. 16, 1993, at A41.

87 *See* Brand, *supra* note 29, at 502 (stating that combination of prolonged U.S. participation in GATT and congressional acquiescence to that participation demonstrate that GATT has full legal status); *see also* Jackson, *GATT in U.S. Law*, *supra* note 3, at 260 (arguing that all three branches of government currently recognize legal status of GATT). Jackson, in arguing that the Trade Agreements Act granted the President authority to enter into and proclaim the GATT, states that one of the "most telling arguments" supporting the validity of the GATT is "the passage of time." *Id.*

88. 343 U.S. 579 (1952).

89. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952). In *Youngstown*, the Supreme Court decided the constitutionality of President Truman's Executive Order directing the Secretary of Commerce to seize and operate most of the nation's steel mills. *Id.* at 582. The steel mill owners argued that the President's order amounted to lawmaking and, therefore, usurped Congress's legislative powers. *Id.* In response, the Government argued that a potential nationwide steelworkers strike threatened the Korean War effort and that the President in issuing the order exercised his constitutional powers as the nation's Chief Executive and Commander in Chief. *Id.* The Supreme Court held that the President's power to issue the order could originate only from an act of Congress or the Constitution. *Id.* at 585. According to the Court, no act of Congress explicitly or implicitly authorized the President to seize the steel mills. *Id.* at 585-86. Moreover, the Court held that neither the President's military power as Commander in Chief nor his executive power under the Constitution could sustain the order to seize the steel mills. *Id.* at 587-89. Accordingly, the Court affirmed the United States District Court for the District of Columbia's judgment voiding the seizure order. *Id.* at 589.

a gloss on 'Executive Power' vested in the President by § 1 of Art. II."[90] A "long-continued practice, known to and acquiesced in by Congress" raises the presumption that the executive branch has acted with Congress's consent.[91] As Professor Brand argues, the United States prolonged, active participation in the GATT constitutes a "long-continued practice, known to and acquiesced in by Congress."[92] Despite problems with Jackson's contention that the 1930 Tariff Act, with the 1934 and 1945 Amendments, delegated authority to the President to enter into and proclaim the GATT, congressional actions since 1974 indicate that Congress has resolved any doubts about the GATT [93] Accordingly, the GATT operates implicitly, if not explicitly, as a valid congressional-executive agreement.[94]

### *IV Analysis*

Along with the President and Congress, federal courts have played a major role in shaping the GATT's domestic legal status.[95] Although commentators may disagree about how the GATT operates as domestic law, it is clear that most courts in this country assume that the GATT is binding domestic law [96] This assumption appears valid in light of the actions that the President and Congress have taken since the GATT's inception.[97] The panel opinion in *Mississippi Poultry* does not question the binding character of the GATT, but does question whether the rule that courts should

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90. *Id.* at 610-11.

91. Dames & Moore v Regan, 453 U.S. 654, 686 (1981) (quoting United States v Midwest Oil Co., 236 U.S. 459, 474 (1915)).

92. Brand, *supra* note 29, at 500-01 (quoting Dames & Moore v Regan, 453 U.S. 654, 686 (1981) (quoting United States v Midwest Oil Co., 236 U.S. 459, 474 (1915))).

93. *See id.* at 501 (stating that Congress has overcome its reluctance and resolved its questions regarding GATT).

94. *See Dames & Moore*, 453 U.S. at 686-87 (finding implicit delegation of authority to President to issue executive order blocking Iranian assets in United States and staying any judicial proceedings against Iran in U.S. courts).

95. *See* Brand, *supra* note 29, at 486 (noting importance of case law in shaping GATT's "domestic law status").

96. RESTATEMENT (THIRD), *supra* note 28, pt. VIII, ch. 1, introductory note at 265; *see also* Brand, *supra* note 29, at 486-93 (discussing case law regarding status of GATT). Brand examines several cases in which the validity of the GATT was a primary or peripheral issue and concludes that these cases "indicate judicial support for the 'binding character' of the GATT." *Id.* at 486.

97 *See supra* notes 74-94 and accompanying text (discussing GATT's status in U.S. law).

construe acts of Congress consistently with international obligations applies when subsequent federal legislation potentially conflicts with the GATT [98] An examination of prior cases involving federal law that allegedly violated GATT obligations raises doubts about the validity of the court's conclusion on this point.[99]

### *A. Prior Case Law*

The United States Customs Court in *Bercut-Vandervoort & Co. v United States*[100] followed a common approach for resolving conflicts between federal law and the GATT [101] In *Bercut*, importers of ninety-proof gin challenged a 1951 amendment to the Internal Revenue Code of 1939 (IRC).[102] The IRC taxed distilled spirits below fifty percent alcoholic content (below proof) at a higher rate than distilled spirits above fifty percent alcoholic content (above proof).[103] Plaintiffs argued that the IRC violated the GATT's prohibition against discriminatory internal taxes[104] because importers of below proof alcohol had to pay the higher tax, but domestic producers could subject their product to the tax when the alcohol was above proof, and then redistill the alcohol for sale below proof.[105]

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98. *See supra* note 18 and accompanying text (discussing court's holding in *Mississippi Poultry* that Congress does not have to express clearly its intent to violate GATT).

99. *But cf.* Hudec, *supra* note 43, at 210-18 (discussing court decisions involving conflict between GATT and federal law and concluding that no decision has ever proclaimed GATT's superiority over federal law). Professor Hudec's analysis focused on the question of whether federal law is superior to the GATT and did not discuss the applicability of the clear-intent canon to conflicts between federal law and the GATT. *Id.*

100. 151 F Supp. 942 (Cust. Ct. 1957).

101. *See* Bercut-Vandervoort & Co. v. United States, 151 F Supp. 942, 946 (Cust. Ct. 1957) (holding that tax assessed on imported proof alcohol did not contravene GATT).

102. *Id.* at 942-43.

103. *Id.* at 944-45.

104. GATT, *supra* note 2, art. 3, § 2, 62 U.N.T.S. at 82. Article 3, § 2 provides:

> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

*Id.*

105. *Bercut*, 151 F Supp. at 945-48. After distillation, domestically produced alcohol went into packages or storage tanks in bonded warehouses. *Id.* at 944. The government levied the internal tax when the producer removed the alcohol from bond. *Id.* at 943 (quoting Internal Revenue Code). Domestic producers could remove the alcohol when it

The court held that the IRC did not distinguish between foreign and domestically produced alcohol and, therefore, did not contravene the GATT [106] Moreover, the court held that the plaintiffs' claim—that the United States should tax imported below proof alcohol as if the alcohol were above proof at the time of importation—violated the statutory scheme and discriminated against domestic producers, a result the GATT did not endorse.[107] Finally, the court held that because Congress enacted this statutory scheme on more than one occasion, both before and after the GATT came into existence, and because the relevant GATT provisions were general in nature, the GATT provisions were intended to be consistent with the IRC.[108]

By construing the GATT to be consistent with the statute, the court appeared to turn the clear-intent rule on its head.[109] The *Restatement (Third)* instructs courts to construe the statute, not the treaty or obligation, consistently [110] Nonetheless, the court did strain to find harmony between the GATT and the IRC.[111]

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was above proof, pay the tax, and then redistill the alcohol and sell at below proof. *Id.* at 947 Foreign alcohol was taxed at the time it was imported. *Id.* at 944. Thus, the only way a foreign producer could similarly avoid taxation was to establish a plant for processing and packaging in the United States or to sell the above proof alcohol in bulk to a domestic purchaser who would then process and package it. *Id.* at 947

106. *Id.* at 946.

107 *Id.* at 947-48. The court held that the plaintiffs' scheme would break down the explicit statutory classifications because imported underproof alcohol and imported overproof alcohol would be subject to the same tax rate. *Id.* at 947 Moreover, the court held that the plaintiffs' theory discriminated against the domestic producer because "the foreign product would pay internal revenue tax on the proof-gallon basis on the quantity actually entered or withdrawn for consumption, whereas domestic merchandise would pay the tax on the quantity withdrawn, whether or not all of that quantity were processed and sold for consumption." *Id.* at 948. The court stated that the GATT did not intend to discriminate against domestic producers. *Id.*

108. *Id.* at 947

109. *See supra* note 46 and accompanying text (stating that courts should construe *statute* consistently with international agreement).

110. *See* RESTATEMENT (THIRD), *supra* note 28, § 114 (stating that courts should construe frderal statute so as not to conflict with international obligations of United States).

111. Judge Donlon, in his dissent, also construed the Revenue Code to avoid conflict with the GATT, although he did so in a much different manner and reached a much different result from the majority Bercut-Vandervoort & Co. v United States, 151 F Supp. 942, 948-53 (Cust. Ct. 1957) (Donlon, J., dissenting). Donlon found merit in the plaintiffs' argument that the tax amounted to the type of indirect discrimination prohibited by the GATT. *Id.* at 948. According to Donlon, it was a regular "practice of the domestic

The Court of Customs and Patent Appeals in *United States v Star Industries, Inc.*[112] also sought to avoid conflict between a domestic statute and the GATT [113] President Johnson, responding to high import fees that the European Economic Community (EEC) had implemented on poultry, issued Proclamation No. 3564.[114] Proclamation No. 3564 withdrew tariff concessions on certain products, including brandy, in retaliation against the EEC pursuant to section 252(c) of the Trade Expansion Act of 1962.[115] The President chose the products targeted for higher import fees in Proclamation No. 3564 because EEC member nations were the primary exporters of those products.[116] However, Proclamation No. 3564 imposed higher import duties on brandy imported from Spain, a non-EEC member.[117]

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industry to withdraw gin from bond while it is overproof and unbottled, pay internal tax on the proof gallon, and, thereafter, merely by adding water and bottling the watered-down gin," create an underproof commercial gin for sale along with the imported product. *Id.* at 949. Donlon found that this practice supported the conclusion that the tax, as applied, contravened the GATT by indirectly discriminating against foreign importers. *Id.* at 952. In the Revenue Act of 1951, Congress provided that "[n]o amendment made by this Act shall apply in any case where its application would be contrary to any treaty obligation of the United States." *Id.* at 951 (quoting § 615 of the Revenue Act of 1951). Donlon concluded that Congress, through this provision, expressed an intent that the Revenue Act of 1951 be applied so as not to violate the GATT. *Id.* at 952. Consequently, Judge Donlon wanted to remand the case to give the parties the opportunity "to argue as to the method of applying tax [sic] in order to effectuate the intention of Congress." *Id.* at 953.

112. 462 F.2d 557 (C.C.P.A. 1972).

113. *See* United States v Star Indus., Inc., 462 F.2d 557, 564 (C.C.P.A. 1972) (holding that Presidential Proclamation withdrawing tariff concessions on certain products was valid).

114. *Id.* at 558-59.

115. *Id.* at 558-60. Section 252(c) provides:

> (c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States—
>
> (1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or
>
> (2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality

*Id.* at 560 (quoting 19 U.S.C. § 1882(c) (1988)).

116. *Id.* at 559.

117 *Id.* Prior to Proclamation No. 3564, brandy importers paid a duty of $1.25 per

Brandy importers from Spain challenged Proclamation No. 3564. They argued that section 252(c) permitted the President to withdraw tariff concessions only against offending countries, not equally against all countries on a most-favored-nation basis.[118] The government argued that section 252(c) did allow the President to withdraw concessions on a most-favored-nation basis.[119]

The Customs Court, sustaining the importer's challenge, held that section 252(c) authorized selective action against an offending "country or instrumentality," not action on a most-favored-nation basis.[120] In doing so, the court rejected the argument that requiring the President to act selectively in withdrawing trade concessions conflicted with GATT obligations.[121] The court held that Article XXVIII, paragraph three of the GATT did not require most-favored-nation treatment.[122] The Customs Court reached this conclusion because the specific language in Article XXVIII, paragraph three did not mention or imply such treatment.[123] Following the lead of the court in *Bercut*, the Customs Court construed the GATT, rather than the statute, to avoid a conflict.[124]

The Court of Customs and Patent Appeals followed the clear-intent rule that the *Restatement (Third)* sets out and construed section 252(c) consistently with the GATT [125] Even though the specific language of section 252(c) permitted the withdrawal of concessions to a "country" or

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gallon. *Id.* at 558. Proclamation No. 3564 raised the duty to $5.00 per gallon. *Id.*

118. *Id.* at 560. Under most-favored-nation treatment, GATT members treat like products from all contracting parties alike for tariff purposes. *See id.* at 561 (citing Article I of GATT). Therefore, a member nation must withdraw tariff concessions from all parties, not solely a particular party *Id.*

119. *Id.* at 560.

120. *Id.*

121. *Id.* The court held that the President did not need to act with "due regard for the international obligations of the United States" because the GATT did not require most-favored-nation treatment. *Id.* (quoting Customs Court).

122. *Id.* When a contracting party has withdrawn tariff concessions negotiated pursuant to the GATT, Article XXVIII allows the other contracting parties to make reciprocal modifications in concessions. GATT, *supra* note 2, 61 Stat. A3, T.I.A.S. No. 1700.

123. United States v Star Indus., Inc., 462 F.2d 557, 561 (C.C.P.A. 1972).

124. *See supra* note 109 and accompanying text (discussing how *Bercut* court construed GATT so as not to conflict with Revenue Act).

125. *See Star Industries*, 462 F.2d at 561-64 (finding that § 252(c) permitted President to act on most-favored-nation basis). The appellate court, holding that Article XXVIII, paragraph three, taken in context with the rest of the GATT, required most-favored-nation treatment, rejected the Customs Court's construction of the GATT. *Id.* at 562.

"instrumentality," the court found that the application of most-favored-nation treatment was consistent with section 252(c)'s instruction to take the international obligations of the United States into account.[126] Moreover, the application of most-favored-nation treatment did not conflict with any of the general purposes of the statute.[127] While the statutory interpretation here was not as creative as that in *Palestine Liberation Organization*, the Court of Customs and Patent Appeals nevertheless expanded the meaning of section 252(c) beyond its specific language to avoid conflict with the GATT [128]

*United States Steel Corp. v United States*[129] provides perhaps the clearest support for the proposition that courts should construe acts of Congress consistently with the GATT whenever possible.[130] In *United States Steel*, the plaintiff objected to carbon steel imports from Europe and filed countervailing duty and antidumping petitions with the International Trade Administration of the Department of Commerce (ITA).[131] The ITA suspended liquidation pending a final determination of the plaintiff's petition.[132] Pursuant to section 606 of the Trade and Tariff Act of 1984, the plaintiff requested that the ITA delay the final decision on the countervailing duty case and consolidate that case with the antidumping

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126. *Id.* at 562-63.

127 *Id.* The purposes of the Trade Expansion Act of 1962 are:

> (1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce;
>
> (2) to strengthen economic relations with foreign countries through the development of open and *nondiscriminatory* trading in the free world; and
>
> (3) to prevent Communist economic penetration.

19 U.S.C. § 1801 (1988) (emphasis added).

128. *See* Brand, *supra* note 29, at 493 (stating that GATT influenced decision in *Star Industries*); *supra* notes 51-63 and accompanying text (discussing creative statutory interpretation applied in *Palestine Liberation Organization*).

129. 618 F Supp. 496 (Ct. Int'l Trade 1985).

130. *See* United States Steel Corp. v. United States, 618 F Supp. 496, 500-01 (Ct. Int'l Trade 1985) (holding that Congress intended suspension of liquidation in countervailing duty proceedings to be terminated after 120 days to make domestic law consistent with GATT); Kenneth S. Komoroski, *The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?*, 10 HOUS. J. INT'L. L. 189, 191 n.15 (1988) (citing *United States Steel* for proposition that absent clear congressional statement to contrary, courts should read U.S. law consistently with U.S. obligations under GATT).

131. *United States Steel*, 618 F Supp. at 498.

132. *Id.*

case.[133] The ITA granted this request, but terminated the suspension of liquidation, fearing that continuation of the suspension would violate the GATT because it would not make the final determination within 120 days of the original complaint.[134] United States Steel, claiming that section 606 mandated suspension until the ITA made a final determination, brought suit.[135] The United States Court of International Trade disagreed and held that Congress intended that section 606 conform to the GATT 120-day limit for suspending liquidation.[136] Because the statute was silent, the court held that section 606 "should not be interpreted by means of tenuous arguments to yield a construction which would be in contravention of GATT "[137]

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Walter Holm & Co. v Hardin*[138] reveals another approach courts take to avoid express rejection of the GATT when the GATT and federal law clash.[139] In *Walter Holm*, tomato importers attacked regulations that the Secretary of Agriculture issued pursuant to the Agricultural Marketing Agreement Act of 1937 regulating the size of tomatoes imported from Mexico.[140] The importers argued, inter alia, that the regulations were consistent with neither the objectives of the Agricultural Marketing Act nor the GATT [141] The court held that the Agricultural Marketing Act delegated to the Secretary the power to promulgate regulations restricting the size of imported tomatoes,[142] but also held that the importers had a right to an oral hearing in challenging the regulations,

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133. *Id.* at 497

134. *Id.* at 498. Part three of Article Five of the GATT Subsidies Code provides that the "imposition of provisional measures shall be limited to as short a period as possible, not exceeding four months." GATT, *supra* note 2, 31 U.S.T. 526, T.I.A.S. No. 9619.

135. United States Steel Corp. v. United States, 618 F Supp. 496, 498 (Ct. Int'l Trade 1985). While § 606 did not expressly require that the ITA carry out suspension until making a final determination, United States Steel argued that "§ 606 was designed to conform to an existing body of countervailing duty law which mandates suspension of liquidation" until a "final finding." *Id.*

136. *Id.* at 500-01.

137 *Id.* at 501-02.

138. 449 F.2d 1009 (D.C. Cir. 1971).

139. *See* Walter Holm & Co. v Hardin, 449 F.2d 1009, 1011 (D.C. Cir. 1971) (upholding validity of regulations Secretary of Agriculture issued pursuant to Agricultural Marketing Agreement Act of 1937 limiting size of imported tomatoes).

140. *Id.* at 1011.

141. *Id.* at 1013.

142. *Id.* at 1011.

due in part to the foreign policy implications of the regulations.[143] In reaching this holding, the court declined to address the GATT issue because the matter may "have [had] a different cast" when remanded to the Secretary for review [144] Notably, *Walter Holm* is not the only instance in which a court avoided construing a statute to conflict with the GATT by declining to address the GATT question altogether.[145] Nonetheless, the court was careful not to reject or minimize the GATT's significance in domestic law [146] By holding that an oral hearing was necessary for coordinating foreign policy, the court implied that the GATT is an important foreign policy consideration and that the executive branch should take heed when imposing regulations that may contravene the GATT [147]

In *Select Tire Salvage Co. v United States*,[148] the United States Court of Claims held that imported tire carcasses were not "tires" for excise tax purposes.[149] In the process, the court briefly addressed the concern that

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143. *Id.* at 1015-16.

144. *Id.* at 1013. Although the court refused to address the GATT questions, the court was careful to avoid giving the impression that it was trivializing the role of the GATT in determining congressional intent. *Id.*, *see* Brand, *supra* note 29, at 489 n.52 (citing *Walter Holm* for proposition that some courts have avoided question of "GATT applicability").

145. *See* Japan Line, Ltd. v. County of L.A., 441 U.S. 434, 440 n.4 (1979) (deeming argument that local property tax imposed on Japanese vessel contravened GATT to be frivolous); Select Tire Salvage Co. v United States, 386 F.2d 1008, 1013 (Cl. Ct. 1967) (stating that GATT does not have treaty status, but is "agreed code of international good behavior").

146. *See Walter Holm*, 449 F.2d at 1015 (discussing need to consider intention and effect of GATT and "Government's policy with respect to GATT").

147 *See id.* at 1016 (stating that "need for coordination with Government foreign policy" is one important factor requiring oral hearing).

148. 386 F.2d 1008 (Ct. Cl. 1967).

149. *See* Select Tire Salvage Co. v. United States, 386 F.2d 1008, 1015 (Ct. Cl. 1967) (holding that tire carcass importers had no duty to file excise tax returns). In *Select Tire*, the plaintiffs imported tire carcasses from Europe and sold the carcasses to domestic recappers. *Id.* at 1008. The Internal Revenue Service (IRS) assessed an excise tax on the carcasses pursuant to § 4071 of the Internal Revenue Code of 1954. *Id.* at 1009. Section 4071 imposed an excise tax on "'tires wholly or in part rubber' or 'tires of the type used on highway vehicles.'" *Id.* According to the Court, § 4071 was ambiguous regarding the meaning of "tires." *Id.* at 1010. The government argued that "tires" included "all forms of the article, however worn, defective, disapproved, or unsafe," while the plaintiffs argued that § 4071 did not encompass tire carcasses. *Id.* at 1011. The court, using the GATT, as well as case law and legislative history, held that Congress intended for § 4071 "to raise revenue, to impose a moderate burden, and to be non-discriminatory" and that the construction the government advanced failed to accomplish these goals. *Id.* at 1011-15.

taxing imported tire carcasses violated GATT obligations.[150] The court stated that the GATT is not a treaty, and thus, does not bind Congress.[151] Nonetheless, the court construed the Internal Revenue Code of 1954 consistently with the GATT, and held that Congress intended that the Revenue Code be nondiscriminatory and, therefore, that it operate harmoniously with the GATT.[152] The court stated that an ambiguous statutory command required a nondiscriminatory interpretation.[153] Like the court in *Walter Holm*, the Claims Court carefully avoided finding that the GATT was controlling, but did construe the federal statute consistently with the GATT.[154]

Even when courts have summarily dismissed arguments that the GATT controls when a federal statute violates the GATT, they have construed federal law consistently with the GATT. In *Suramerica de Aleaciones Laminadas, C.A. v United States*,[155] the Federal Circuit rejected the plaintiffs' claim that the Commerce Department's interpretation of a statutory provision that gave domestic industries the power to initiate countervailing and antidumping investigations against importers violated GATT obligations.[156] The Federal Circuit stated that "the GATT is not

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Consequently, the court held that the IRS erred in taxing the imported tire carcasses under § 4071. *Id.* at 1015.

150. *See id.* at 1013 (discussing GATT implications).

151. *Id.* The court described the GATT as an "agreed code of international good behavior." *Id.*

152. *Id.* at 1013, 1015. The court noted that the IRS did not similarly apply the excise tax to domestic carcasses because the IRS felt that "any tax obligation respecting such carcasses is satisfied if the original tire of which the carcass is the remanent was taxed upon its sale as new." *Id.* at 1014. Accordingly, the court held that the application of the tax to imported tire carcasses violated congressional intent that the tax "'be imposed uniformly and without discrimination.'" *Id.* at 1013.

153. *Id.*, *see* Hudec, *supra* note 43, at 212-13 (stating that statutory interpretation applied in *Select Tire* was supportive of GATT). The GATT provision involved here was the same Article III, § 2 at issue in *Bercut*. *See supra* notes 101-11 and accompanying text (discussing *Bercut*).

154. *See supra* text accompanying note 146 (noting that *Walter Holm* court carefully avoided finding that minimized GATT's importance); *see also* Hudec, *supra* note 43, at 214 (discussing GATT's influence over statutory interpretation in *Select Tire*).

155. 966 F.2d 660 (Fed. Cir. 1992).

156. *See* Suramerica de Aleaciones Laminadas, C.A. v United States, 966 F.2d 660, 667-68 (Fed. Cir. 1992) (holding that "on behalf of" language in Tariff Act allowed any interested party to initiate countervailing and antidumping investigations). In 1987, the leading domestic producer of electrical conductor aluminum redraw rod (E.C. rod)

controlling" when a federal statutory provision conflicts with the GATT [157] This statement appears merely to restate the later-in-time rule.[158] The court implied, however, that it will not attempt to construe a statutory provision consistently with the GATT even if such a construction is possible.[159] Nonetheless, the court based its decision in part on the conclusion that the statutory provisions at issue, and the Commerce Department's interpretation

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petitioned the Commerce Department to investigate Venezuelan producers of E.C. rod for countervailing and antidumping duty violations. *Id.* at 661. The producer filed the petitions pursuant to 19 U.S.C. §§ 1671(b), 1673(b), which allow an interested party to initiate countervailing and antidumping proceedings by filing "a petition with the administering authority, on behalf of an industry " *Id.* at 664. The Commerce Department investigated the matter and issued final determinations in both the countervailing and antidumping investigations against the Venezuelan producers. *Id.* at 662. In doing so, the Commerce Department held that an interested party files a petition "on behalf of" the domestic industry so long as a majority of domestic producers do not oppose the petition. *Id.* at 662-63. The United States Court of International Trade, vacating the Commerce Department's determinations, held that "'the petition was not filed on behalf of the relevant domestic industry'" because §§ 1671(b), 1673(b) required that a majority of the domestic industry support the petition. *Id.* at 663. On appeal, the Federal Circuit held that because the statute was not clear as to the meaning of "on behalf of," the question was whether the Commerce Department's interpretation was a permissible one. *Id.* at 666. The court held that several possible interpretations existed and that the Commerce Department took a middle position. *Id.* at 667 According to the court, the Commerce Department's interpretation was therefore within the range of permissible interpretations. *Id.* The court also held that the Commerce Department's interpretation did not violate the GATT. *Id.* Consequently, the court reversed the lower court decision. *Id.* at 668.

157 *Id.* at 667

158. *But see id.* (discussing effect of GATT on court's decision). The court stated that "even if we were convinced that *Commerce's interpretation* conflicts with the GATT the GATT is not controlling" and thus implied that courts are bound not only by inconsistent statutory provisions, but also by inconsistent executive interpretations. *Id.* (emphasis added). Such a reading of the court's opinion dramatically expands the scope of the later-in-time rule. *See supra* note 41 and accompanying text (stating that later-in-time rule applies when *statute* conflicts with prior self-executing treaty).

159. *See Suramerica*, 966 F.2d at 667-68 (discussing court's lack of authority to bring statutory provisions into conformity with GATT). The court stated that although it recognized Congress's interest in complying with GATT obligations, the court was "bound not by what [it] think[s] Congress should *or perhaps wanted to do*, but by what Congress in fact did." *Id.* (emphasis added). This indicates that when statutory language conflicts with GATT provisions, courts are bound to interpret the language as conflicting with the GATT even though there is no express indication that Congress wanted to violate the GATT. The court further implied that it was powerless to bring statutes into conformity with the GATT by stating that where statutory provisions are inconsistent with the GATT, "it is a matter for Congress and not this court to decide and remedy " *Id.* at 668.

of those provisions, did not violate the GATT [160] Thus, the *Suramerica* decision did not involve a conflict between the GATT and federal law and, therefore, does not provide much guidance as to what courts should do when faced with two plausible statutory interpretations, one of which conflicts with the GATT [161]

The court in *Suramerica* relied upon 19 U.S.C. § 2504(a) and *Algoma Steel Corp. v United States*[162] in concluding that the GATT was not controlling.[163] In *Algoma*, the Federal Circuit held that § 2504(a) controls when a conflict between domestic legislation and the GATT exists.[164] Section 2504(a) requires courts to give effect to legislation that conflicts with the GATT [165] The *Suramerica* opinion implied that § 2504 instructs courts to decline to construe federal statutes consistently with the GATT when statutory provisions appear to conflict with GATT provisions.[166] However, the language of § 2504, standing alone, does not explicitly or implicitly reject the canon that courts should construe a domestic statute

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160. *Id.* at 667 The court concluded that the statutory provisions and the GATT did not conflict despite a ruling by a GATT panel rejecting the Commerce Department's definition of "on behalf of." *Id.* In distinguishing the panel's finding, the court stated that the "panel itself acknowledged and declared that its examination and decision were limited in scope to the case before it." *Id.*

161. *See id.* (holding that Commerce Department's interpretation of Tariff Act does not violate GATT).

162. 865 F.2d 240 (Fed. Cir. 1989).

163. Suramerica de Aleaciones Laminadas, C.A. v United States, 966 F.2d 660, 668 (Fed. Cir. 1992).

164. Algoma Steel Corp. v. United States, 865 F.2d 240, 242 (Fed. Cir. 1989). The International Trade Commission (ITC) held that Algoma Steel Corporation (Algoma), a Canadian steel producer, injured domestic steel producers by selling certain products in the United States at less than fair value (LTFV). *Id.* at 241. Algoma, challenging the ITC's injury determination, argued that the ITC erred in considering other sales Algoma made at more than fair value (MTFV). *Id.* The Court of International Trade held that the ITC did not error in factoring MTFV sales into the injury determination. *Id.* On appeal, the Federal Circuit held, inter alia, that the relevant statutory provisions did not preclude consideration of MTFV sales in making an injury determination. *Id.* at 242. The court stated that in its view, the GATT did not embody a contrary position. *Id.* Accordingly, the court affirmed the lower court decision. *Id.* at 243.

165. 19 U.S.C. § 2504(a) (1988); *see also supra* note 86 and accompanying text (discussing 1979 Trade Agreements Act and setting out language of § 2504).

166. *See Suramerica*, 966 F.2d at 668 (stating that Congress, not courts, should remedy inconsistencies between statutory provisions and GATT); *supra* note 159 and accompanying text (discussing *Suramerica* decision).

consistently with an international obligation "where fairly possible."[167] Moreover, if Congress intended § 2504 to limit the authority of courts to interpret statutes, a separation of powers question may exist.[168]

In *Sneaker Circus, Inc. v Carter*,[169] the United States District Court for the Eastern District of New York held that President Carter complied with GATT provisions in issuing import relief for domestic shoe makers.[170] The court carefully reached this conclusion despite holding that the GATT did not have congressional approval and was, therefore, not applicable.[171] This holding, like the holding in *Suramerica*, implies that courts are concerned with finding conformity between federal law and the GATT even in cases when the court rejects the GATT's binding effect.[172]

In several of the decisions discussed above, the statute at issue arguably benefited domestic industries at the expense of foreign import-

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167 *Compare* 19 U.S.C. § 2504(a) (1988) (stating that no trade agreement conflicting with domestic statute "shall be given effect") *with* RESTATEMENT (THIRD), *supra* note 28, § 114 (instructing courts to construe domestic statutes consistently with international obligations "[w]here fairly possible").

168. *See* U.S. CONST. art. III, § 1 (granting Judicial Branch "the judicial [p]ower").

169. 457 F Supp. 771 (E.D.N.Y 1978).

170. *See* Sneaker Circus, Inc. v Carter, 457 F Supp. 771, 795 (E.D.N.Y. 1978) (holding that even if GATT was controlling, President did not violate GATT obligations). Pursuant to the Trade Act of 1974, the United States negotiated Orderly Marketing Agreements (OMAs) with the governments of Taiwan and South Korea regarding the amount of nonrubber athletic footwear those countries could export to the United States. *Id.* at 777 The plaintiffs, an importer and a retail wholesaler of the type of footwear covered by the OMAs, brought suit to enjoin the signing of the OMAs. *Id.* The plaintiffs argued, inter alia, that the President did not comply with certain provisions of the Trade Act of 1974 in negotiating the OMAs and that the OMAs violated the United States GATT obligations. *Id.* at 778. The United States District Court for the Eastern District of New York first held that the plaintiffs had standing, that the case was ripe for adjudication, and that the court had personal jurisdiction over the defendants. *Id.* at 779-83. With regard to the merits, however, the court held, inter alia, that the President complied with all of the provisions of the Trade Act of 1974 and that the OMAs did not violate the GATT. *Id.* at 789-95. Accordingly, the court denied the plaintiffs' request for declaratory judgment and injunctive relief. *Id.* at 796.

171. *Id.* at 795. The court stated that even if the GATT was applicable, the United States could suspend GATT obligations when the import of a particular product would threaten domestic producers of the same product with serious harm or damage. *Id.*, *see* Brand, *supra* note 29, at 490 (noting that court's finding that GATT was not applicable did not affect outcome of case).

172. *See* Suramerica de Aleaciones Laminadas, C.A. v United States, 966 F.2d 660, 667 (Fed. Cir. 1992) (holding that Commerce Department's statutory interpretation did not conflict with GATT obligations).

ers.[173] Congress, from time to time, attempts to benefit domestic industries by enacting legislation designed to restrict or hinder imports.[174] Courts likely will decline to challenge Congress in these instances, even when such legislation violates GATT obligations.[175] However, Congress also supports the general goals and designs of the GATT [176] Thus, courts face the difficult task of reconciling Congress's conflicting desires to please specific domestic constituents while supporting the general principals of the GATT

Some of the decisions discussed above proclaimed the superiority of federal law over the GATT [177] Other decisions were more deferential to the GATT,[178] or avoided the issue altogether.[179] However, no court has refused

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173. *See* Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1012 (D.C. Cir. 1971) (noting that Congress realized that its restrictions on commodities could limit quantities of imports); Bercut-Vandervoort & Co. v United States, 151 F Supp. 942, 947-48 (Cust. Ct. 1957) (discussing argument that statute provided hidden benefits for domestic producers). In *Mississippi Poultry*, the domestic trade associations argued for an interpretation of § 466(d) of the PPIA that would impose a greater burden on poultry importers. *See* Mississippi Poultry Ass'n v Madigan, 992 F.2d 1359, 1365 (5th Cir.) (suggesting that "effective lobbying" by domestic poultry industry motivated Congress's policy choice), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc). Also, in the en banc opinion, the dissent stated that both "the panel opinion and...the *en banc* opinion, hint[ed] at a latent congressional purpose of trade protectionism." Mississippi Poultry Ass'n v Madigan, 31 F.3d 293, 311 (5th Cir. 1994) (en banc) (Higginbotham, J., dissenting).

174. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 65 (discussing perception that Congress favors protective trade measures). Professor Jackson states "that congressmen, senators, and a plethora of committees often seem bent on adopting a certain proposal to please specific constituent groups by restricting imports." *Id.*, *see also* Hudec, *supra* note 43, at 240 (noting that Congress has will to legislate in violation of GATT).

175. *Cf.* Hudec, *supra* note 43, at 210-11 (stating that no court has ever sustained claim that GATT obligation overrides federal law).

176. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 9 (quoting 1970 Senate document stating that "principal goal of American foreign policy" since 1934 has been removal of trade barriers); *supra* notes 78-87 and accompanying text (discussing congressional acceptance of GATT obligations).

177 *See* Hudec, *supra* note 43, at 211-15 (discussing line of cases finding GATT inferior to federal statutes); *supra* note 151 and accompanying text (noting holding in *Select Tire* that GATT does not bind Congress); *supra* note 171 and accompanying text (discussing holding in *Sneaker Circus*). Professor Hudec argues that *Select Tire* and *Sneaker Circus* are correct in concluding that the GATT is inferior to federal statutes, but that they fail to explain this conclusion adequately Hudec, *supra* note 43, at 215.

178. *See* Hudec, *supra* note 43, at 215-16 (discussing cases in which GATT influences statutory interpretation); *supra* notes 100-37 and accompanying text (discussing holdings in *Bercut*, *Star Industries*, and *United States Steel*).

179. *See* Hudec, *supra* note 43, at 211 (claiming that eight prior cases "avoided the

to construe a domestic statute, or the GATT itself, to avoid conflict between the GATT and federal law as boldly as the court did in *Mississippi Poultry* [180]

### B. *Mississippi Poultry*

The court in *Mississippi Poultry* recognized three maxims governing the construction of statutes that potentially conflict with international obligations.[181] According to the court, the first maxim is that Congress must clearly state its intention to abrogate a treaty or international obligation of the United States.[182] The second maxim holds that Congress must clearly state its intent to apply domestic law extraterritorially [183] The final maxim is that courts should not construe an act of Congress in a manner that violates the law of nations if another plausible construction exists.[184] Of these three maxims, the court correctly concluded that the latter two did not apply to the GATT.[185] However, the court's finding that the first maxim did not apply is troublesome.[186]

The court's definition of the first maxim was unduly narrow in that the court referred to "abrogation" as opposed to "violation" of a treaty or international obligation.[187] The *Restatement (Third)* states that courts shall

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issue" when there was claim that GATT obligation prevailed over federal law); *supra* notes 138-47 and accompanying text (discussing decision in *Walter Holm*).

180. *See* Hudec, *supra* note 43, at 211 (discussing prior cases). Professor Hudec states that courts have often "indicated a willingness to *interpret* federal law in ways that facilitate United States compliance with GATT." *Id.* Hudec notes that although the court in *Select Tire* held that the GATT does not bind Congress, the court nonetheless considered the GATT in construing the federal statute at issue. *Id.* at 215.

181. Mississippi Poultry Ass'n v. Madigan, 992 F.2d 1359, 1365 (5th Cir.), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc); *see also supra* note 21 (discussing three maxims of statutory construction).

182. *Mississippi Poultry*, 992 F.2d at 1365.

183. *Id.*

184. *Id.*

185. *Id.* at 1366-67 The court clearly was correct in concluding that *Mississippi Poultry* did not involve an extraterritorial application of domestic law and that the GATT is not customary law. *Id.*

186. *See id.* at 1366 (discussing why first maxim does not apply).

187 *Id.* at 1365-66. The court suggested that Congress needs to express clearly its intention only when its actions nullify an international obligation. *Id.* at 1366. This is a novel suggestion, however, for all other authority appears to indicate that something less than outright nullification of an international obligation triggers the clear-intent canon. *See*

construe statutes "so as not to *conflict* with international law or with an international agreement."[188] "Conflict" encompasses more than "abrogation."[189] Moreover, case law indicates that the clear-intent rule applies when the statute violates, but does not nullify, an existing international obligation.[190] In a 1933 case, the Supreme Court stated that "[a] treaty will not be deemed to have been abrogated *or modified* by a later statute unless such purpose on the part of Congress has been clearly expressed."[191] The court's narrow construction of the clear-intent rule in *Mississippi Poultry* clearly conflicts with this language.

The court concluded that existing authority strongly supported the proposition that the clear-intent rule does not apply when Congress violates GATT obligations.[192] *Suramerica* was the specific authority the court relied upon for this conclusion.[193] The *Suramerica* decision did question the applicability of the clear-intent rule to statutes that violate the GATT [194] However, the *Suramerica* court opined that the Commerce Department's statutory interpretation did not violate the GATT [195] The court expressed no such belief in *Mississippi Poultry* [196] Moreover, not all existing case law supports the conclusion that the clear-intent rule does not apply when an act

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*supra* notes 46-47 and accompanying text (discussing canon of construction when statute may conflict with international obligation).

188. *See supra* note 47 and accompanying text (setting out § 114 of RESTATEMENT (THIRD)).

189. *See* RESTATEMENT (THIRD), *supra* note 28, § 114 cmt. a (discussing § 114). The title to comment (a) is "Interpretation to avoid *violation* by the United States." *Id.* (emphasis added).

190. *See* United States v. Cook, 288 U.S. 102, 120 (1933) (stating that Congress must express clear intent before courts will interpret statute in manner that abrogates or modifies treaty); United States v Palestine Liberation Org., 695 F Supp. 1456, 1465 (S.D.N.Y 1988) (rejecting argument that ATA *contravened* Headquarters Agreement); *see also* RESTATEMENT (THIRD), *supra* note 28, § 114 (reporters' notes) (stating that Supreme Court has interpreted statutes consistently with "earlier treaty *provisions*") (emphasis added).

191. *Cook*, 288 U.S. at 120 (emphasis added).

192. Mississippi Poultry Ass'n v. Madigan, 992 F.2d 1359, 1365 (5th Cir.), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc).

193. *Id.* at 1365-66.

194. *See* Suramerica de Aleaciones Laminadas, C.A. v United States, 966 F.2d 660, 660, 667-68 (Fed. Cir. 1992) (stating that GATT does not control when conflict between GATT and domestic legislation exists).

195. *Id.* at 667

196. *See Mississippi Poultry*, 992 F.2d at 1367-68 (rejecting Agency's argument that court should not interpret PPIA to conflict with GATT).

of Congress conflicts with the GATT [197] Accordingly, the conclusion that the clear-intent rule does not apply to legislation that violates GATT obligations is not as obvious as the court in *Mississippi Poultry* assumed.[198]

The court characterized *Mississippi Poultry* as a policy dispute between the legislative and executive branches and declined "to enter the fray "[199] In so doing, the court, alluding to the distinction between foreign affairs and foreign commerce, rejected the Agency's argument that the executive branch's exclusive domain over foreign affairs mandated that the Agency's interpretation of section 466(d) of the PPIA prevail.[200] Clearly, Congress, pursuant to the Constitution, more actively regulates foreign commerce than other foreign affairs.[201] Moreover, the court, in rejecting the Agency's interpretation of section 466(d), perhaps correctly realized that disputes like the one in *Mississippi Poultry* are based primarily on economic, as opposed to foreign policy, considerations and, therefore, do not require blind deference to the desires of the executive branch.[202] Nonetheless, the court,

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197 *See supra* notes 100-37 and accompanying text (discussing cases that gave deference to GATT).

198. *See* Mississippi Poultry Ass'n v Madigan, 992 F.2d 1359, 1365 (5th Cir.) (summarily dismissing Agency's argument that court must construe PPIA consistently with GATT because Congress did not clearly express its intent to violate GATT), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc). The court appeared reluctant even to recognize that the clear-intent canon exists. *See id.* (indicating reluctance to recognize clear-intent rule). The court qualified its discussion of the clear-intent rule with the following language: "Even when we grant *arguendo* that these truisms of statutory construction exist, we find them inapplicable and therefore not controlling in the instant case." *Id.* (emphasis added).

199. *Id.* at 1367

200. *Id.*

201. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 62 (stating that Congress reserves special powers over matters of economic trade); *supra* note 82 and accompanying text (same).

202. *See* Hudec, *supra* note 43, at 246 (arguing that trade matters should receive "objective" judicial supervision). Professor Hudec questions the treatment of foreign trade matters as "matters of high foreign policy" and characterizes trade disputes as conflicts between domestic industries that will profit from protectionist trade measures and domestic groups that will pay for reduced competition. *Id.* Hudec states that these trade disputes involve "precisely the sort of potentially smelly dispensation of economic favours" that deserves active judicial supervision. *Id.* Following this reasoning, the court in *Mississippi Poultry* correctly rejected the Agency's contention that, absent a clear statement of congressional intent, the executive branch had exclusive authority to interpret the PPIA because the PPIA had foreign policy implications. *See Mississippi Poultry*, 992 F.2d at 1365 (rejecting Agency's argument that executive branch had exclusive authority).

by refusing to defer to the Agency's interpretation, departed from the normal course taken by courts in these types of disputes.[203] Also, the court's refusal to defer to the Agency served to minimize the GATT's significance, a result that does not reflect the reality of United States foreign trade policy [204]

### *C. Alternative Decision*

The result in *Mississippi Poultry* was not necessarily inconsistent with the results in prior cases involving an alleged conflict between federal law and the GATT because other courts have also been reluctant to disturb federal law and risk raising the ire of Congress.[205] Moreover, in light of the statements Congress inserted into the 1990 Act, the court may have had little choice but to find that Congress intended that "the same" mean "identical."[206] Nonetheless, the court could have reached the same result in *Mississippi Poultry* without disregarding the clear-intent rule.

The clear-intent rule does not require courts to engage in the type of creative statutory construction that the court in *Palestine Liberation Organization* employed.[207] In stating that Congress made a policy choice,

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203. *See* JACKSON, WORLD TRADING SYSTEM, *supra* note 3, at 67 (stating that judicial deference to executive branch in foreign affairs "has carried over" to affairs of international commerce); Hudec, *supra* note 43, at 246 (arguing that courts continue to defer excessively to executive branch).

204. *See supra* note 6 and accompanying text (discussing GATT's role as primary instrument of U.S. trade policy).

205. *Cf.* Hudec, *supra* note 43, at 211 (concluding that case law indicates that GATT rules are never superior to federal statutes).

206. *See supra* note 15 and accompanying text (discussing provision in 1990 Farm Bill stating that Agency erred in interpreting "same as" to mean "at least equal"). *But see* Mississippi Poultry Ass'n v Madigan, 992 F.2d 1359, 1368 (5th Cir.) (Reavley, J., dissenting) (arguing that Congress did not choose between "identicality" and "equivalence"), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc). Judge Reavley argued that the evidence in *Mississippi Poultry* could not support the conclusion that Congress intended "the same" to mean identical. *See generally id.* at 1368-80 (discussing statutory language and legislative history of PPIA). The dissent to the en banc opinion made a similar argument. *See* Mississippi Poultry Ass'n v Madigan, 31 F.3d 293, 310-16 (5th Cir. 1994) (en banc) (Higginbotham, J., dissenting).

207 *See* RESTATEMENT (THIRD), *supra* note 28, § 115(1)(a) (discussing situation in which inconsistency between international obligation and domestic law exists). Section 115(1)(a) provides:

> (1)(a) An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the

the court in *Mississippi Poultry* implied that Congress had considered the possibility that section 466(d) would place the United States in violation of international trade obligations.[208] This, along with the finding that the language of section 466(d) "clearly demonstrate[d] that Congress intended 'the same' to be a synonym for 'identical,'" suggests that the court believed that congressional intent was clear and was inconsistent with the GATT.[209]

Precedent exists for finding that a congressional enactment supersedes a GATT obligation. In *Farr Mann & Co. v United States*,[210] sugar importers argued that President Carter violated the GATT's most-favored-nation requirement by exempting Malawian sugar imports from a presidential proclamation increasing the import duty on sugar.[211] The Court of International Trade held that Congress, in a 1951 amendment to section 22 of the Agriculture Adjustment Act of 1933,[212] intended to supersede the GATT's most-favored-nation provision.[213] The court reached this conclusion after examining the language of section 22, as well as the legislative history of the 1951 amendment.[214] Although neither the language

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purpose of the act to supersede the earlier rule or provision is clear *or if the act and the earlier rule or provision cannot be fairly reconciled.*

*Id.* (emphasis added); *see also supra* notes 51-63 and accompanying text (discussing *Palestine Liberation Organization* decision).

208. *See* Mississippi Poultry, 992 F.2d at 1367-68.

209. *Id.* at 1368.

210. 4 Ct. Int'l Trade 55 (1982).

211. *See* Farr Mann & Co. v United States, 4 Ct. Int'l Trade 55, 56-57 (1982) (discussing plaintiffs' claim). President Carter issued Proclamation No. 4547, which increased duties on sugar imports. *Id.* at 56. Proclamation No. 4547 exempted Malawian sugar from the higher duties, and the plaintiffs brought suit, claiming, inter alia, that an 1853 Treaty and a subsequent Trade Agreement between Argentina and the United States, as well as the GATT, precluded the United States from granting an exemption to a single country only. *Id.* at 56-57, 62. The Court of International Trade held that Congress intended for § 22 of the Agriculture Adjustment Act of 1933 (AAA) to give the President the authority to grant preferential trade concessions, regardless of any international trade agreements or obligations. *Id.* at 63-66. Accordingly, the court held that the President's exercise of authority pursuant to § 22 of the AAA superseded the requirements of any international obligations and granted the government's motion for summary judgment. *Id.* at 66.

212. Act of June 16, 1951, ch. 141, § 8(b), 65 Stat. 75 (current version at 7 U.S.C. § 624(f) (1988)).

213. *Farr Mann*, 4 Ct. Int'l Trade at 66.

214. *Id.* at 64-66. Section 22(f) provides:

No trade agreement or other international agreement heretofore or hereafter

of section 466(d) nor the PPIA's legislative history contained an explicit congressional declaration that section 466(d) was to supersede all international obligations, the court in *Mississippi Poultry*, like the court in *Farr Mann*, found that Congress's intent was clear.[215] Moreover, the court did not reject the Agency's claim that the "identical" interpretation of section 466(d) violated the GATT.[216] Assuming that Congress understood the United States obligations under the GATT when it enacted section 466(d), the court, like the court in *Farr Mann*, could have found that Congress intended that section 466(d) supersede the GATT.[217]

## *V Conclusion*

The GATT does not exhibit the characteristics of more traditional international obligations.[218] Accordingly, courts have struggled to articulate clearly and consistently the GATT's status in relation to federal law when federal law allegedly conflicts with GATT obligations.[219] One can analyze the panel opinion in *Mississippi Poultry* as an attempt to clarify the GATT's status in United States domestic law. The panel opinion implies that the GATT does not deserve the same level of deference as other international obligations. However, the panel's characterization of the GATT does not

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entered into by the United States shall be applied in a manner inconsistent with the requirements of this section.

7 U.S.C. § 624(f) (1988).

215. *See* Mississippi Poultry Ass'n v. Madigan, 992 F.2d 1359, 1365-68 (5th Cir.) (holding that Agency's interpretation of "same as" did not comport with congressional intent), *amended*, 9 F.3d 1113 (5th Cir.), *reh'g granted*, 9 F.3d 1116 (5th Cir. 1993) (en banc).

216. *See id.* (rejecting Agency's interpretation despite Agency's claim that competing interpretation placed United States in violation of GATT).

217. *See supra* note 208 and accompanying text (discussing § 115(1)(a) of RESTATEMENT (THIRD)). The court's finding with regard to congressional intent leads to the conclusion that § 466(d) of the PPIA cannot be "fairly reconciled" with the GATT. RESTATEMENT (THIRD), *supra* note 28, § 115(1)(a). *But see* Mississippi Poultry Ass'n v. Madigan, 31 F.3d 293, 312 & n.12 (5th Cir. 1994) (en banc) (Higginbotham, J., dissenting) (stating that "Congress made no indication whatsoever" in legislative history that PPIA was intended to do anything other than promote health and safety of domestic poultry market).

218. *Cf.* Jackson, *GATT in U.S. Law*, *supra* note 3, at 252 (stating that GATT is "an anomaly among major international institutions").

219. *See* Brand, *supra* note 29, at 490 (noting that no courts have provided "direct authority on" or "probing analysis" of GATT's status in domestic law); Hudec, *supra* note 43, at 199 (concluding that courts have failed to provide adequate analysis of GATT's status in domestic law).

accurately reflect the important role that the GATT occupies in United States trade and economic policy [220] Consequently, *Mississippi Poultry* fails to provide a persuasive, or even adequate, analysis of the GATT's status in United States domestic law

Future courts, when faced with a statutory interpretation that violates GATT obligations, should decline to follow the reasoning the court employed in *Mississippi Poultry* Courts should apply the clear-intent rule in such situations because no indication exists that the GATT is any less deserving of deference than other international obligations.[221] Moreover, the clear-intent rule is sufficiently flexible for courts to uphold legislation when Congress clearly has indicated an intent to legislate in a manner that violates GATT obligations.[222]

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220. *See supra* note 6 and accompanying text (noting GATT's significance in U.S. trade policy).

221. *See supra* notes 74-94 and accompanying text (discussing GATT's status in U.S. domestic law).

222. *See supra* note 208 and accompanying text (discussing § 115(1)(a) of RESTATEMENT (THIRD); in particular, language indicating that courts should find that statute supersedes international obligation if statute cannot be "fairly reconciled" with obligation).