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The Great 1994 Sovereignty Debate:
United States Acceptance and Implementation of the Uruguay Round Results

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Sovereignty, strictly, is the locus of ultimate legitimate authority in a political society, once the Prince or "the Crown," later parliament or the people.

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Sovereignty, a conception deriving from the relations between a prince and his/her subjects, is not a necessary or appropriate external attribute for the abstraction we call a state For international relations, surely for international law, it is a term largely unnecessary and better avoided.

* * *

For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era. To this end, it is necessary to analyze, "decompose," the concept; to identify the elements that have been deemed to be inherent in, or to derive from, "sovereignty;" in a system of states at the turn of the twenty-first century. n1

I. INTRODUCTION

It is a privilege and an honor to be invited to contribute to this festschrift volume for so distinguished an international law scholar and teacher as Louis Henkin. Indeed it is a formidable challenge--what can one say that could rise to even the shadow of the standard that Professor Henkin represents. The way that I have chosen to try to reach that shadow, however, is to address one of the many issues on which Professor Henkin has written and that seems to be of great interest to him. n2 For this reason I have chosen to comment on the concept of "sovereignty," which puzzles many of us toiling in the international legal vineyards. I must confess that I also chose this subject because it intrigues me too, and because recently I have had the experience of participating in some major policy debates which engage this concept, namely the 1994 debate in Congress (and other forums) about whether the United States should ratify the treaty embodying the results of the massive decade-long trade negotiation known as the Uruguay Round. This means, of course, that the reader must be aware that I speak at least partly as a "participant observer," n3 hopefully in the best sense of that empirical technique. Thus, the reader is entitled to appraise my judgments accordingly. Professor Henkin himself has written from experiences and will understand the approach.

This brief contribution is designed to complement some of Professor Henkin's thoughts on the subject of sovereignty, and to build on them such as is known to me from his writings. The approach I will take here is to examine one particular "case"--the 1994 Uruguay Round debate--to explore how the concept (or, more appropriately, the concepts) of sovereignty played a role in various policy discussions. Through the examination of this specific case, I will illustrate how the concepts of sovereignty were used (differently in different contexts) and point out the more specific and disaggregated policy issues to which they were linked. In some sort of nominal sense, my views may appear to be somewhat contrary to parts of Professor Henkin's views, especially in those instances when he speaks of relegating "the term sovereignty to the shelf of

history as a relic from an earlier era" n4 or doing away with the "S word." n5 Yet behind and beyond this "nominal sense," it should be clear that I am using the word "sovereignty" in a different context than Professor Henkin. Indeed, Professor Henkin himself notes that it is necessary to "decompose" the word, and to identify which elements of the concept are "appropriate and desirable for a state in a system of states at the turn of the twenty-first century." n6

I could, of course, fashion a new word (or perhaps more modernly, a new phrase with a catchy acronym), but the observable fact is that the word "sovereignty" is still being used widely, often in different settings which imply different "sub-meanings." Consequently, I cling to the word and will use it, knowing that most of my readers should understand it. As I use the word it will not always (indeed almost never) signify the more "antiquated" definition (that is also ambiguous and multi-definitional). In broad brush I see the "antiquated" definition of "sovereignty" that should be "relegated" as something like the notion of a nation-state's supreme absolute power and authority over its subjects and territory, unfettered by any higher law or rule (except perhaps ethical or religious standards) unless that nation-state consents in an individual and meaningful way. It could be characterized as the nation-state's power (embodied in the Prince?) to violate virgins, chop off heads, arbitrarily confiscate property, and all sorts of other excessive and inappropriate actions.

No sensible person would agree that such an antiquated version of sovereignty exists at all in today's world. A multitude of treaties and customary international law norms impose international legal constraints (at least) that circumscribe extreme forms of arbitrary actions on even a sovereign's own citizens. Of course some theories can explain these constraints as having been "consented to" by sovereigns, but these explanations cannot always explain the observable phenomena of modern-day international law applications. Furthermore, policy advocates and political representatives make the argument that their government should decline to accept a treaty because it takes away the nation's sovereignty even when it consents. Indeed, in this sense all treaties "take away sovereignty," and so the argument of some would seem to deny the validity of any treaty acceptance. Let us indeed "relegate" or abolish such use of the "S" word.

But then what does "sovereignty," as practically used today, signify? I will suggest a tentative hypothesis: most (but not all) of the time when "sovereignty" is used in current policy debates, it really refers to questions about the allocation of power; this is normally government decision-making power. I would argue that most of the sovereignty objections to joining an international treaty are arguments about the allocation of power among different levels of different human institutions, mostly governmental. That is, when a party argues that the U.S. should not accept a treaty because it takes away U.S. sovereignty to do so, what that party most often really means is that he or she believes a certain set of decisions should, as a matter of good government policy, be made at the nation-state (U.S.) level and not at an international level. Often this is not articulated and the objection to a treaty is stated in generic and opaque terms, sometimes with "religious fervor," so that the argument seems easy to dismiss. When stated so broadly, opaquely, and categorically, the sovereign argument frequently appears unrealistic. It assumes a degree of independent action for a nation state that in a "real" sense hardly exists anyway. When viewed as a question of allocation of power, however, the debate only begins with the "sovereignty" objection; it must continue with an analysis demonstrating why it is better or worse for such a power shift to occur in certain circumstances. n7 As discussed below, this is rarely done, but ought to be done if the argument is to be persuasive.

I suggest that the allocation of power issue, as often embraced by an invocation of the "sovereignty" argument, is part of a very complex and vast landscape of issues relating to allocation of power for all types of government (and nongovernment) decisions in our world today. First, there is a question of "vertical" allocation of power: at what level should a decision or armed intervention be made? An international body? A national body (federal level)? A subfederal entity? A local neighborhood? Where should a decision about which potholes to fill, which streets to repair, be made? For contrast, where should a decision about standards for products moving in international trade be made? What are the elements for deciding such questions? Second, there are also "horizontal" power allocation questions. Should a certain decision be under the control of the legislature, the executive, the judiciary, another government entity, or even a non-government (such as private business) entity? n8

When sovereignty objection arguments are "decomposed" and examined for underlying reasons, it becomes clear that there is merit to scrutinize closely what is at stake for a nation in accepting the constraints of an international treaty. n9 Clearly what is at stake will differ with the size, power, population, economic circumstances, etc., of the nation-state. A large and powerful state would more likely be hesitant to accept obligations to an international decision-making procedure that would most probably result in decisions contrary to the national goals of such a powerful state. This might be because of a one-nation one-vote decision-making structure with a large membership of mini-states whose national goals are inconsistent with those of the large states. Consequently, what often becomes important is the actual "constitutional" structure of the international institutions put in place by the treaty. n10

By way of contrast, small countries might find that membership in certain types of treaty-based international institutions actually "enhance sovereignty" in certain real senses. By such membership, they may feel less threatened by other nations that are much larger and more powerful. For example, a dispute settlement mechanism might, in the view of a small country, redress some of the imbalance of power when it comes to handling disputes or sources of tension about the way either nation has been applying its international economic policies (such as trade barriers).

Part of the challenge for international law and international relations is to analyze the "decomposed" arguments. This may help nations with divergent perspectives to consider the broader and longer-term perspectives of both national policy and international policy objectives, and to better understand the risks of developing international institutions as weighed against the advantages of such development.

In looking behind the surface of the Uruguay Round Treaty debate in the United States in 1994, we can readily see many issues stirred together. This is why I believe much of this 1994 activity can be termed the "Great Sovereignty Debate" of this decade. It may not have been much noticed in this context. That is partly because the debate occurred in many different forums. These included several committees of the U.S. Congress, the floor of the House and the Senate, and many forms of the media (e.g., radio, television, newspapers, journals, etc.). Yet if one follows the threads of the debate about the U.S. accepting the Uruguay Trade Round results, one constantly discovers references to "sovereignty" as addressing essentially power allocation issues. n11 These include my own statements responding to the arguments of others. n12

Consequently, in the three remaining sections of this paper, I will explore the 1994 debate. In Part II I will outline the background context of the debate and some of the specific parts of it. In

Part III I will discuss in somewhat greater detail the various ways the "sovereignty argument" was used in the debate over whether the United States should accept the Uruguay Round negotiation results. This will be the core of my analysis, and will suggest a number of different contexts and, therefore, different meanings of the "sovereignty objection." In Part IV I will draw some tentative conclusions or perspectives from the material addressed in Part III.

What are some of the different issues discussed? Even in Part III, I will not attempt in this short space to provide a complete and exhaustive inventory of all the different possible "decomposed" policy questions to which sovereignty arguments were addressed in the 1994 debate. However, to illustrate some of the specific issues, I will discuss sovereignty issues in four broad categories, including elements of the World Trade Organization (WTO) decision-making procedures, the structure of the new WTO dispute settlement process, and some questions about the constitutional and other arguments regarding U.S. internal law and procedures and how they would be affected by U.S. acceptance of the Uruguay Round results. Many particular issues are thus discussed below. These include: the implications and risks of the WTO treaty text regarding potential decisions of the WTO affecting national economic regulation; the effect of the WTO dispute processes on domestic environmental standards; and the interrelationship between the U.S. constitutional federal structure and the effects of the WTO institutional procedures.

II. GATT, THE URUGUAY ROUND AND THE WTO: THE BACKGROUND FOR THE 1994 DEBATE

A. The General Agreement on Tariffs and Trade: A Half-Century Trade Treaty

Looking back over the 1946-1996 history of the General Agreement on Tariffs and Trade (GATT) allows one to reflect on how surprising it was that this relatively feeble institution with many "birth defects" managed to play such a significant role for almost five decades. It certainly was far more successful than one might have predicted in the late 1940s.

The GATT, often described as the major trade organization and the principal treaty for trade relations, was technically neither. As a treaty, it never itself came into force. It was always applied "provisionally" by the Protocol of Provisional Application (P.P.A.).¹³ In addition, technically the GATT was not intended to be an organization. The negotiators in the drafting conferences in 1946 (New York), 1947 (Geneva), and 1948 (Havana) expected the International Trade Organization (I.T.O.), created by their draft treaty-charter, to be the institutional framework to which the GATT (an agreement among "contracting parties" to liberalize trade restrictions) would be attached. When the U.S. Congress refused to approve the I.T.O. Charter, declared dead by 1951, the GATT, which came into (provisional) force in 1948 by the terms of the P.P.A., became the focus of attention as a possible institution where nations could solve some of their trade problems. An attempt in 1955 to create a small mini-organization to solve institutional problems also failed. Yet the GATT, through a series of major trade rounds designed to gradually reduce tariffs and other trade barriers (culminating in the Uruguay Round which was the eighth round) along with an increasingly important set of relatively precise (and complex) rules, was able to achieve an astonishing amount of world trade liberalization.

The relative lack of treaty clauses that could serve as a basis for a trade institution, and the ambiguity of those that were contained in the GATT, became increasingly troublesome as the GATT grew in scope and detail in order to cope with a fascinating set of concrete problems of

international economic relations. While most of this story has been told elsewhere¹⁴ and need not occupy us here, several institutional problems in particular relate to the general notion of "sovereignty" and deserve mention.

One of these problems was embedded ambiguously in GATT article 25 regarding decisions of the "Contracting Parties" (C.P.s) acting jointly.¹⁵ The treaty language was extraordinarily broad due to the historical context that expected an I.T.O. charter to oversee and supervise what could be done. Article 25 stated that the contracting parties would meet from time to time "for the purpose of giving effect" to the agreement, and "with a view to facilitating the operation and furthering the objectives of this Agreement." The procedure was mostly one nation one vote, with decisions taken by a majority of votes cast. Despite the generality of the language, however, it is fair to say it was not used to its limit; indeed the contracting parties appeared cautious and arguably never used this authority to impose any new substantive obligation on any nation state. Instead a powerful practice developed of taking major decisions by "consensus," which although not itself defined, generally appeared to require at least the absence of objections from any C.P.¹⁶ When we discuss the "sovereignty" arguments about membership in the new WTO described below, it should be remembered that most of the nations concerned were already previously committed to the broad GATT language.

A second major problem concerned the dispute settlement procedures of the GATT. With only the sparse GATT treaty text to look to, an extraordinarily elaborate (and some argue very successful) dispute settlement procedure was developed in reliance on several decades of GATT practice. During its existence, the GATT procedure handled over 233 formal disputes (and was the background for many more that were settled or abandoned).¹⁷ As practice developed, disputes were considered by a panel of experts (usually three but sometimes five individuals) not to be guided by any government. A report of this panel was sent to a "Council" of the GATT C.P.s (again not a treaty body but one constituted by practice and a resolution of the C.P.s). If the Council "adopted" the report, it was considered binding on the parties. But the decision to adopt the report had to be by "consensus." Thus, the C.P. that "lost" the panel proceeding (as indicated in the report) could "block" the adoption, leaving matters in limbo. Increasingly this was recognized as an anomaly for an effective dispute settlement procedure, and during the 1980s the C.P.s, and panels, struggled with ways to overcome this and other similar "birth defects." The Uruguay Round (U.R.) results contain important provisions on this issue, and instigate further "sovereignty" arguments, as we shall see.

B. The Uruguay Round Trade Negotiations 1986-1994

Almost as soon as the seventh trade round, the "Tokyo Round" of 1973-1979, was at an end, some planning began for a next round. The Tokyo Round was the first to address extensively non-tariff barriers, using the treaty technique (to avoid the difficulties of amending the GATT) of proposing a series of about ten stand-alone "side agreements" or "codes" on various subjects. C.P.s could then pick and choose which ones they would accept.

The eighth round was launched formally at Punta del Este, Uruguay, in September 1986 with an incredibly ambitious agenda. The Uruguay Round agenda called for further work on the "goods" or "product" rules of trade, with attention to revisions of the Tokyo Round codes and some new measures. But even more formidable was the U.R. participants' ambition to bring into

the GATT trading system new subjects such as trade in services (potentially embracing 155 or more specific service sectors such as transport, tourism, financial services, professional services (accountants, lawyers, engineers, etc.)), and also to develop rules for "trade related intellectual property" (T.R.I.P.s) questions. It was not surprising that the original goal of completing this round at a Brussels Ministerial meeting in December 1990 was not achieved. After the "Brussels Impasse," negotiations continued. They were largely concluded by December 15, 1993 (after intensive negotiations during the last half of 1993), and formally concluded at the final Ministerial Meeting at Marrakech, Morocco, on April 15, 1994. These dates were primarily controlled by the provisions of the United States "fast track" legislation that specified the procedure by which the U.S. Congress would consider its approval of the U.R. results.

A key element of the U.R. negotiation approach was the "single package" ideal by which every nation would have to accept the whole U.R. results as one entire package, or stay out of the U.R. treaty system. This was in contrast to the "GATT a la carte" approach, as the Tokyo Round results were called. This U.R. approach also established an entirely new treaty for nations to join, thus avoiding the troublesome amendment requirements of the GATT. The GATT, after a transition period, was to be formally abandoned (with some nations exercising the formal right under the GATT and P.P.A. language to withdraw from those treaties upon sufficient but brief notice).

In the U.R. package two very important institutional structures are established: 1) the new World Trade Organization as a formal international organization; and 2) a new Twenty-Seven-Article Dispute Settlement Understanding (D.S.U.) of twenty-five pages that specify and control the dispute settlement procedure while correcting some of the "birth defects," especially the "blocking" problem.

The WTO Agreement provides, for the first time, a formal international trade organization charter and structure. The "charter" is quite short--about fifteen pages. But it embraces four annexes which include altogether about 26,000 pages of text, schedule commitments, and other matters. Undoubtedly this treaty is a record for its length. With the breadth of subject matter it is also extraordinarily complex and loaded with potential impacts as well as with ambiguities (inevitable when drafting involves 130 or more participating nations). The WTO charter becomes a sort of "umbrella" for this whole single package, with only a few "optional" texts ("plurilateral agreements" in Annex 4) included as part of the single package.

The D.S.U., which is contained in Annex 2, is strikingly significant--as the history of the first two years of the WTO already demonstrates. Over three times the prior GATT annual rate of dispute process initiations occurred during that time. n18 One of the most interesting features of the D.S.U. is the creation for the first time of an "appellate procedure," plus the virtual "automatic adoption" of panel and appeal reports. n19 No longer will a "sovereign state" be able to block consensus adoption of a dispute report. This obviously gives rise to sovereignty arguments.

When negotiators struggle with the concepts of "sovereignty" as implying ultimate choice for the nation-state, the "realism" of such a choice was certainly difficult for many. The U.R. package is incredibly far-reaching, and certainly, as a matter of treaty law, imposes a number of constraints on nation-state members. Of course, the argument is that the members accepted these constraints. But looking at this history realistically, one can see some qualifications about "acceptance." Major players, such as the United States and the European Union took many

months to complete elaborate domestic constitutional procedures, with extensive debates about various aspects. The parliament of a country like Costa Rica, however, took less than one hour! For many small countries, (Costa Rica, one might add, is not atypical), the choices were not very extensive. To stay out of the new trade system could put whole economies in jeopardy, give up "rule based" leverage that the new procedures might afford small nations, and prevent participation in the development of new rules, as well as the elaboration and interpretation of the extensive U.R. texts. n20

C. United States Acceptance of the Uruguay Round Results: The Uruguay Round Trade Agreements Act of 1994

Since the Trade Agreements Act of 1974, the United States Congress has considered approval of all major trade agreements (GATT rounds and Free Trade Agreements such as the N.A.F.T.A.) under a procedure known as the fast track. While somewhat intricate and based on a interesting history, the fast track is essentially a "statutory" treaty approval procedure designed for what in U.S. domestic law are called "Executive Congressional Agreements." This contrasts with the constitutional requirement of Senate approval by a two-thirds vote. n21

Under the fast track process, the U.S. Congress approves a statute (usually proposed by the President after treaty negotiations with foreign states) that authorizes ("delegates power to") the President (sometimes with certain conditions) to accept a proposed treaty. After both houses of the U.S. Congress approve such a statute and the President signs it, this law is the basis for further Presidential action "ratifying" or accepting the proposed treaty. The U.S. Congress usually also includes in the statute the measures that it wishes to enact into domestic law so as to implement the treaty. Whether the treaty itself becomes part of U.S. domestic law is a separate question which depends on the U.S. doctrine of self-executing treaties. However, as to the trade treaties of 1979 and subsequently, statutory phrases and legislative history provide that these treaties are not self-executing, with some possible minor exceptions. n22

The fast track adds several features to the standard Congressional procedure (as embodied in the rules of the House and the Senate). First, the proposed statute may not be amended once it is introduced. Second, once introduced the bill must be considered and discharged from committees of the U.S. Congress within specified time periods. Finally, the floor debate in both houses on this bill is strictly limited. The whole procedure is designed to take a maximum period of 90 to 120 days (depending on some technicalities), and to ensure that the U.S. Congress will vote ("up or down") on the whole proposed bill to accept the treaty that has been negotiated. Thus, foreign countries should be assured that at least the U.S. Congress will consider the results negotiated, and will not (at this step) "reopen the negotiations" through a variety of amendments to the domestic statute, etc.

Other features of the fast track include various deadlines for submission of the near final negotiation results to the Congress, and for the signing of the agreement (subject to national approval procedures, i.e., a referendum). In addition, the fast track provides for extensive consultation with the Congress throughout a negotiation, and the practice has developed that during the specified Congressional consultation period (recently 120 days) before the treaty is signed, key Congressional committees will work extensively with Administration officials to prepare the draft proposed legislation. The fast track process is eagerly sought by foreign nations

who begin a trade negotiation with the U.S. But this procedure has also been criticized by opponents of trade treaty legislation as "undemocratic" or "unconstitutional," or possibly as another track towards "infringement on U.S. sovereignty." n23

The Uruguay Round results were "signed" on April 15, 1994. During the ensuing months the U.S. Trade Representative's office and its officials worked with the Congress to develop a proposed statute. For various reasons (and some miscalculations) the proposed bill was not sent to the Congress until September 27, 1994. Consequently, the timing restrictions of the fast track procedures did not call for a final vote until after the November 1994 congressional elections--at a "lame duck" special session. In fact, the votes were held in the House of Representatives on November 29, 1994, with approval by a vote of 288 to 146. The Senate vote took place on December 1, 1994, with approval by a vote of 76 to 24. During 1994, many congressional hearings in a large number of different committees were held on the Uruguay Round results and the proposed statute (including some ancillary issues). In a number of these hearings the issue of sovereignty was an important focus in one way or another. Combined with a general public debate in all the various media, as well as many academic, business and other public forums, 1994 was a year for a truly major and historical U.S. debate about questions of this nation's economic treaty participation and its relation to various concepts of sovereignty. n24

III. THE U.R. IMPLEMENTING ACT: DECOMPOSING THE SOVEREIGNTY ARGUMENTS

With the background outlined above in mind, we now look more closely and specifically at some of the various issues discussed in the Great 1994 Sovereignty Debate. There will be no attempt here to present an exhaustive inventory of all the varied arguments relating to sovereignty; this would require a much longer work to accommodate. Rather, we will examine certain sets of related arguments in four parts (A through D, below). The basic question is, what did the opponents of the U.R. mean when they argued that the U.S. should not accept the Uruguay Round results because it "detracts from or takes away U.S. sovereignty?" And what did the proponents mean when they said that such arguments did not lead to the opponents' conclusions?

It should be immediately noted that although the conclusion (to accept or not to accept) is basically bipolar, the arguments are not necessarily so. Specific sovereignty considerations may add up to a conclusion one way or the other, but merely because a small bit of sovereignty is taken away does not mean that no treaty should be accepted. Offsetting policies may make it appropriate to "give up some sovereignty" in order to achieve some important policy results. A classic situation is represented by the "prisoner's dilemma," in which independent actions by a group of players can result in worsening the situation for all but cooperation can prevent such a result. n25 Likewise it should be noted that sovereignty "loss" can have a number of different meanings, which different persons weigh differently in their policy advocacy. For example, loss of sovereignty could mean:

1) any diminution of a nation's right/power to pursue certain domestic policies without:

for example, interference by notions of international law constraints, regardless of whether these operate effectively or whether they cause domestic law changes which in turn pose practical or "real" constraints (e.g., because of international economic interdependence);

interference by international law institutions in a manner that changes domestic law and the constraints it offers; or constraints of international treaty law norms which, although ignorable, can result in retaliation, compensation, or other counter actions by other nations or players;

2) treaty acceptance might cause external influences on domestic policy in certain ways disadvantageous to the opponent of the treaty:

for example, an opponent may fear that certain domestic special interests (e.g., large corporations) may have greater abilities than most groups to influence the international body; thus, they might be able to achieve results by the remote pressure of international decisions or norms that could not otherwise be achieved at the national government level. n26

A. General Implications of Accepting Substantive Treaty Norms

Some of the sovereignty arguments of U.R. opponents are aimed at the mere fact of accepting treaty obligations for certain subjects. Other objections may relate to the implications of becoming part of the treaty institutions. This sub-part will explore the former. Later sub-parts will deal with institutional questions.

Focus for the moment on the question of acceptance of a treaty with various substantive norms, but no institutions--for example, no joint decision-making powers or dispute settlement procedures--are contained in the treaty. In other words, consider in the abstract only the fact of accepting a series of substantive treaty norms. When an opponent to such acceptance argues that the treaty "takes away sovereignty," what is he or she likely to mean?

Clearly, acceptance of any treaty, in some sense reduces the freedom of scope of national government actions. At the very least, certain types of actions inconsistent with the treaty norms would give rise to an international law violation. The amount of constraint might then vary not only with the institutional mechanisms for enforcement, but also with the national domestic government structure or political attitude towards international norms. Some skeptics might dismiss an international norm as ineffective and, thus, not constraining. But if a treaty norm were self-executing or directly applicable in a domestic legal system, it could have a greater constraining effect. Even without those effects, a treaty can have important domestic legal effects, such as influencing how domestic courts interpret domestic legislation. n27 Beyond that, a treaty norm even without domestic legal effect can have weight in some domestic policy debates where some advocates will stress that positions contrary to their views would raise serious international or treaty concerns. Thus, the sovereignty objection can be directed more to the question of where a decision should be made, and what influences on that decision should be permitted.

It can also be observed that the lack of direct effect of a treaty in domestic law is considered a possible protection against sovereignty diminution. This is because without direct effect, a nation normally can decide how to respond to a complaint that its actions have breached international law, and one response possible is to ignore the complaint and live with the breach. This may not be particularly admirable but it can act as sort of a buffering process, or safety valve, against international action that might be deemed overreaching or otherwise inappropriate. n28

Finally, it should be noted that the legal ability to withdraw within a reasonable period of notice time arguably reduces the concern about infringement on sovereignty. This option seemed to be interesting to some of those worried about the sovereignty arguments. The Uruguay Round treaty provisions allow withdrawal upon six months notice. Whether this is a realistic option for nations today, in the light of their considerable dependence on international trade and the trade system of the GATT/WTO, is a somewhat different question that can also be considered. n29

Related to the considerations mentioned above, some general objections to a treaty are driven by the substance of particular issues. Many environmental advocates and groups in the 1994 debate were concerned that specific treaty clauses would "trump" U.S. environmental law, or even state laws, such as California's, and would harmonize downward the more stringent U.S. law about which the environmentalists were justifiably proud. Thus, important questions were raised about the legal and practical effect of the WTO and U.R. treaty norms on particular subjects, and sovereignty objections became objections to the substance of the international norms, at least to the extent that those norms appeared not to give enough leeway to domestic U.S. political institutions to adopt more appropriate higher standards.

B. WTO Decision-Making Procedures: Risk to Sovereignty

Some of the sovereignty objections in the 1994 debate were targeted towards the institution of the WTO. Various opponents to the treaty argued that the WTO posed risks to U.S. sovereignty because decisions could be made in the WTO that would override U.S. law. This objection engages a number of particular clauses of the WTO, as well as the legal effect of potential WTO decisions on U.S. domestic law. As to the latter, testimony pointed out that WTO decisions did not have self-executing or direct legal effect in U.S. law. Consequently, once again there was an element of buffering protection which in realistic terms gave the national government some opportunity to resist inappropriate international decisions. n30

But more significant, perhaps, is the fact that the decision-making procedures of the WTO have been significantly circumscribed by negotiated treaty text. In fact, by comparison to the loose language of the GATT--which would have remained in effect if the WTO had failed to emerge--the WTO had many more protections for national sovereignty. These protections were significantly enhanced in the treaty drafting that went on during the fall of 1993, spurred by the U.S. negotiators and other countries who worried about some of the general treaty text of the previous U.R. drafts.

To be more specific, but without going into these matters in depth, n31 an examination of a series of specific decision-making powers for the WTO general bodies shows protections such as super-majorities (often three-fourths requirement of all the members, not just those voting--a very difficult target to achieve) and prohibitions against changing the substantive rights and obligations of the members without more difficult amending or treaty negotiation procedures. In addition, an emphasis on consensus decision-making is manifested in a number of provisions, sometimes with fall-backs to voting only after providing a period of time for an attempt to achieve consensus. Indeed, some of these provisions could be seen to give a "de facto veto" power to a few of the most powerful trading entities. These features can be seen in the texts relating to:

- amending the WTO and subsidiary agreements (article X);
- adopting a formal "interpretation" (article IX:2);
- adopting waivers (article IX:3 & 4);
- adding Plurilateral Agreements (optional agreements) to Annex 4 (article X:9); and
- changing the Dispute Settlement Understanding in Annex 2 (article X:8).

Most sovereignty objections clearly were aimed at power allocation. Members of the Congress were concerned whether the allocation of power regarding WTO decision-making was an inappropriate infringement on U.S. sovereign decision-making. Certainly, this allocation was more protective of national government decision-making than either the GATT or many other international organizations in today's world (although few of those organizations have such an extensive impact on national economies). It was clear in the U.R. negotiation that there was no possibility of achieving any formal weighted voting (such as in the International Monetary Fund or International Bank for Reconstruction and Development), or even a small special body with added power like vetoes or special competence (such as the United Nations Security Council). Thus, the negotiators greatly restricted the decision-making powers of the WTO bodies, even to the point of concern that the WTO will be hamstrung by inaction derived from its "consensus" culture.

C. WTO Dispute Settlement Process and the Sovereignty Arguments

The issue of a nation-state's participation in an international dispute settlement procedure poses sovereignty questions of a different sort. If a nation has consented to a treaty and the norms it contains, why should it object to an external process that could rule on the consistency of that nation's actions with the treaty norms? It might be argued that such objections manifest a lack of intent to follow the norms--sort of accepting the treaty with fingers crossed behind the back. Indeed, there may be some elements of this thinking in this context. It could also be suggested, however, that a nervousness about international dispute settlement procedures reflects a government's desire to have some flexibility to resist future strict conformity to norms in certain special circumstances, particularly circumstances that could pose great danger to essential national objectives. This sort of an "escape clause" idea would allow a nation to accept norms with sincere intent to follow them except in the most severe and egregious cases of danger to the nation or to its political system. n32

Apart from these escape clause notions, however, there is also an institutional concern that the dispute settlement procedures may not be objective, may be subject to procedural irregularities and overreaching, or may have other important defects that even other nations would recognize but that are not redressed by the treaty or its institutional structure. This danger, either at the outset or developing at some later time, could legitimately constrain a nation's willingness to enter into stringent commitments to a dispute settlement procedure.

Clearly some of these considerations played a part in the U.S. Great 1994 Sovereignty Debate. The objections raised to dispute settlement procedures may, thus, not be objections to the substance of the rules discussed in the previous sub-part, but may be objections to the nature, stringency, or automaticity of the enforcement mechanisms for those rules. Since international

institutions are generally less sophisticated or elaborate than most national institutions, various problems can be feared. These might include the difficulty of changing treaties and treaty norms that may become seriously out of date, or the methods of filling in the details of seriously ambiguous texts (a problem often associated with treaties drafted by many countries). The text of the WTO charter may contain some of these problems. An example is the super-majority procedure included in that text for decisions on "formal interpretations." Likewise, the Dispute Settlement Understanding (D.S.U.) contains a number of hedges that reflect concerns about international dispute settlement.

The D.S.U. continues some of the GATT dispute procedures as developed through practice over forty years, but it now includes an elaborate treaty text to govern this practice and adds a number of new features. As in the GATT, a dispute is initiated by a request for consultations by a disputant (or group of complainants), and the consultation period is a prerequisite for further procedures. If no settlement is achieved, then the D.S.U. now makes clear that the complainant is entitled to a panel procedure, and rules spell out the process for forming a panel (usually three impartial individuals). The rules correct some problems seen in GATT by requiring stricter time limits and fall-back procedures when the parties cannot agree to certain aspects such as the panel's composition or its terms of reference. Much more attention is made in the rules to third party participation. Initial experience demonstrates a great desire to use this opportunity to participate. But only "members," (i.e., nation-states or independent customs territories) can bring cases or participate formally. As in GATT, the panel receives oral and written arguments and "testimony," and formulates a report that is sent to the Dispute Settlement Body (D.S.B.), where the parties may comment and urge changes. n33

The major change in the D.S.U., however, is the elimination of "blocking" when the D.S.B. considers the report. The report is deemed adopted unless there is a consensus against adoption (the "reverse consensus"), and since the winning party could always object and block the consensus, the adoption is considered to be virtually automatic. The quid pro quo for this automaticity, however, is a provision that, for the first time, allows for an appeal. If an appeal is taken, then the report is not adopted. Instead, an appellate panel of three individuals, drawn from a permanent roster of seven individuals (with renewable four-year staggered terms), n34 considers the first level report, receives arguments from the parties, and writes its own report. This report also is sent to the D.S.B. where the same reverse consensus rule applies to adoption, again making it virtually certain to be adopted. It is this automaticity that worries some diplomats and critics of the WTO system, although in many other international tribunals automaticity, in the sense of no opportunity to block a report, also exists.

The D.S.U. then has a series of detailed rules regarding an enforcement phase if a losing party is unwilling to carry out the recommendations of the panel as adopted by the D.S.B.. These rules provide for "compensation" through trade measures, and for certain other pressures such as continuous monitoring to enhance the implementation of the dispute results.

In the U.S. 1994 debate, some interests testified that the U.S. should include in its implementing legislation certain measures regarding dumping law, even if those would appear to be vulnerable to dispute settlement procedure challenge at some future time. n35 Other witnesses argued against the WTO partly because the dispute settlement procedure was tougher, and no longer permitted a single nation to "block" acceptance of a panel report. There was criticism of the GATT panels ("decisions by three faceless bureaucrats in Geneva"), and, thus, of the likely form of the WTO panels. Criticism was targeted at the secrecy of the procedures, the

lack of opportunity of private groups (non-government organizations, etc.) to offer views and evidence, the potential conflicts of interest of the panelists, and the possibility that the WTO secretariat lawyers would be biased and have too much influence on the panels, etc. n36 Indeed, although there have been important efforts to "open up" the WTO procedures (even those relating to decision-making discussed above), many constructive critics of the WTO feel there is much more that must be done. n37

A very important consideration affecting a nation's willingness to accept the WTO dispute settlement procedures is its view of the way the treaty and its institutions should play a role in that nation's international economic diplomacy. The U.S. and many other nations have often expressed the view that the GATT and now WTO treaty texts are vitally important to improving a rule-oriented international economic system that should enhance the predictability and stability of the circumstances of international commerce. This enhancement, in turn, should allow private entrepreneurs to plan better for longer term investment and other decisions. In short, a basic goal is to reduce the "risk premium" associated with commerce between nations with vastly differing governmental and cultural structures. n38 If a nation wishes to benefit from these policies, then it becomes difficult for it to oppose dispute settlement procedures when they impinge on it. There is a reciprocity element in these conditions, and this must be taken into account in reflecting on the weight to be given sovereignty objections.

The U.S. has explicitly made these considerations part of its diplomacy and has often expressed the view that the rules of the GATT and the WTO are vital for U.S. commerce, particularly U.S. exports. n39 The U.S. was the most frequent initiator of dispute settlement procedures in the GATT and continues in the WTO with the same approach. It learned very early in the WTO history that to appear to "thumb its nose" at the dispute procedures posed very serious diplomatic risks to its status in the WTO and therefore to the potential usefulness of the WTO to the U.S. n40

How does all this fit with the sovereignty objections? Again, it is abundantly clear that "sovereignty" is not a unitary concept, but is a series of particular considerations that I suggest are centered around the problem of allocation of power. Thus, when an objection is made to the U.S. accepting the WTO because of the WTO dispute settlement procedures, the specific (decomposed) issues of that objection are substantially different from those regarding the problem of treaty norm application or the institutional structure of decision-making. In addition, the sovereignty objection really can be a series of specific objections about the nature or details of the dispute procedure. These in turn must be considered in the aggregate (unless there were options that allowed a nation to accept some details but not others), and that aggregate weighed against the policy advantages of belonging. "Sovereignty" thus is not a magical wand that one waives to ward off any entanglement in the international system. It is a policy-weighting process. And the policies most often address the question of allocation of power: should this nation accept the obligation to allow certain decisions affecting it (or its view of international economic relations) to be made by an international institution rather than retaining that power in the national government?

As heroic as they may appear, the dispute settlement procedures of the WTO have a number of features that are obviously designed to protect the sovereignty of the WTO members and to prevent too much power from being allocated to the dispute process. Many different illustrations could be described here, but only four subjects will be discussed to keep this text manageable. These four subjects are: 1) the obligation to comply with a panel ruling; 2) the legal precedent

effect of a panel report; 3) the standard of review by which the WTO panels examine national government actions; and 4) the broad question of judicial activism or concerns about panels stretching interpretations to achieve certain policy results that they favor. Of course, part of the background of these subjects is the detailed procedures or panel processes and the persons who are on the appellate body roster to be panels. The credibility of these procedures, and, thus, the likely willingness over time of members to accept panel results, is affected by the personnel and the content of the procedures. Of the seven roster members, for example, three are chosen from large trading powers (U.S., E.U., and Japan), while the rest hail from smaller or less powerful members (Philippines, New Zealand, Egypt, and Uruguay). Since policy perceptions about sovereignty might sometimes differ between large and small nations, this majority could create some concerns (at least until practice suggests these are not troublesome) for larger members (who are the most frequent participants in the procedures).

1. Legal Effect and Obligation of a Panel or Appeal Report

One of the interpretive issues that has grown in importance since the WTO came into effect is whether the result of a dispute settlement process obligates the losing respondent to a complaint to change its laws or practices to conform to the panel recommendation. One might think the answer to this should be obvious and affirmative, and certainly most other international tribunal procedures would embrace this result. However, the D.S.U. has much language concerning enforcement and implementation and much of the focus of the language is on compensation. If a nation, particularly a large nation, has the option to perform or compensate, it may have the sense that in many cases brought by small countries, compensation could be relatively painless (small in amount). Thus, such a nation may feel its sovereignty is better protected by the availability of the compensation option.

In fact, U.S. government officials testified to this effect in the Great 1994 Sovereignty Debate, and argued that no international body could require the U.S. (not even in the loose sense of an international law norm) to do anything. In the view of this author, this interpretation is incorrect and not likely to be embraced by future panel reports. The language of the D.S.U. includes a number of clauses that call for an obligation to perform according to panel findings. The D.S.U. makes compensation only a fall-back when performance does not occur, and keeps a matter under surveillance as long as performance has not occurred. Yet it was interesting that as part of the sovereignty debate, U.S. officials thought it would be useful to argue to the public and to the Congress as they did. n41

2. Precedent or Other Effect of Panel Reports

Some discussion about the precedent effect of GATT panels, and now WTO panels, has occurred. Under GATT it was not always clear what the legal effect of the GATT Council adopting a panel report was. n42 Clearly the general international law rule suggests that there is no strict precedential effect such as *stare decisis*. This author has argued that the real intended effect is only that of "practice," which over time and combined with other practice can have effects on interpretation. But concerns about this have been discussed in GATT councils (leading in some cases to reluctance to adopt a panel report which could be a bad precedent). n43

The WTO and the D.S.U. seem to attempt to foreclose the use of precedent for panel reports. The WTO text specifies a particular super-majority procedure for formal interpretations. n44 This seems to suggest that the WTO system does not give power to the panels to create any formal interpretations, i.e., any formal precedents. Thus, the panel reports are binding only on the parties to the particular proceeding, much like the World Court rule. n45 Of course, the reports will have considerable persuasive effect, at least when well-reasoned. Thus, in at least one WTO case won by multiple complainants against a respondent, the complainants reportedly argued most vigorously among themselves about which of several theories should be expressed in the report as the basis of the decision.

The WTO Charter provisions on interpretations can be combined with the thrust of some of the D.S.U. language to reinforce the view that panel reports are not to act as formal interpretations. During the last months of the U.R. negotiation (fall 1993), U.S. negotiators were reportedly eager to prevent the panels from ruling on the WTO Charter itself, but in the end the D.S.U. clearly provides the contrary view. n46 Here again one sees a sovereignty concern not itself significant enough to change a final decision to accept the treaty affecting a specific treaty detail.

3. Standard of Review

There are two standard of review problems in the WTO dispute settlement procedures: that of the Appellate Body review of first level panel reports, and that of the standard of review of any WTO panel regarding judgments about member government actions that might be inconsistent with the treaty norms. It is the latter that will be taken up here.

The standard of review, related sometimes to (inter alia) the "margin of appreciation" concept, n47 is a critical element of allocating power between an international tribunal and a national government. This issue was very prominent in the "end game negotiations" of the U.R. Some negotiators supported a text that would embody a significant limitation on the degree to which WTO panels would second-guess national governments on decisions regarding trade rules, such as anti-dumping rulings. The U.S. negotiators tried to obtain treaty language that would follow the domestic U.S. administrative law approach known as the Chevron Doctrine. n48 Other nations objected, and in the end compromise language with considerable ambiguity was placed in the anti-dumping text but not applied to disputes on other matters (at least until a later study occurred). The D.S.U. does not itself have an explicit text on this type of "standard of review" but there are some clauses that might support a cautious approach by the WTO panels. n49 In the first two appellate body reports, there is panel language that suggest such caution. One states, for example, that "WTO members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement." n50

4. Judicial Activism or Panel "Overreaching"

Clearly there was some concern about the potential power of WTO panels. This was expressed in hearings during 1994, as well as in negotiations and discussions in various public and confidential forums. The other matters expressed above may sometimes influence panel caution

in this regard, but some language in the D.S.U. seems to be designed for the same end. In particular, the D.S.U. says "recommendations and rulings of the D.S.B. cannot add to or diminish the rights and obligations provided in the covered agreements." n51 The proposal for a U.S. national review panel to report on the correctness of WTO panel reports affecting the U.S. could be another caution, as described below.

D. The Uruguay Round, U.S. Law, and Implications for Sovereignty Issues

Several significant issues of U.S. constitutional and other law also, sometimes oddly, became embroiled in the sovereignty debate. Only four particular issues will be very briefly described here.

1. The Famous U.S. Section 301

A considerable amount of venom has been expressed by U.S. trading partners towards U.S. Section 301. n52 This statute has a special role in the U.S. constitutional division of power between the Congress and the President, delegating to the President the authority to retaliate with trade sanctions against certain "unreasonable or unfair" foreign government actions that damage U.S. commerce. This statute has sometimes been used by the U.S. to apply trade sanctions against other nations in a manner inconsistent with U.S. treaty obligations, and major U.R. participants were determined to rein in U.S. unilateralism. This determination was part of the impetus for improved dispute settlement procedures and for the WTO Charter itself.

The U.S. Congress made it very clear, however, that it would not tolerate changes in Section 301, and the Executive negotiating position followed that mandate. Consequently, except for some minor procedural amendments, Section 301 remains intact. Yet, in explaining its position (in ways too complex to recount here), the United States argued that Section 301 could not be found inconsistent with U.S. WTO obligations (in the absence of some specific action). Indeed, Section 301 does call for use of the WTO dispute settlement procedures. This statute, however, was perhaps the most important political bellwether of the sovereignty considerations in the Congress during the 1994 debate.

2. The Treaty Clause and the Fast Track Statutory Approach

Another intriguing manifestation of sovereignty concerns was the interesting debate about the constitutionality of the fast track procedure for approving the U.R. and the WTO. Two levels of sovereignty concerns were raised in this context (demonstrating that the allocation of power concept goes deeper than just the federal level of a nation-state). n53 It was argued that, despite various precedents to the contrary, there were sovereignty concerns when an international agreement required major national commitments and membership in an international organization that might involve yielding U.S. sovereignty to global institutions. It was asserted, moreover, that the constitutional requirement that treaties be approved by a two-thirds vote of the Senate, was the only appropriate procedure. In addition, regarding the second level of "sovereignty" arguments, it was argued that the purpose of the Senate treaty approval requirement was particularly to protect the sovereignty of U.S. sub-federal states. The Senate, it

was argued, was a better protector of such states' rights since each state had equal representation there (two senators) and was traditionally, it was claimed, more assiduous in protecting states' rights.

This portion of the 1994 debate also involved various other constitutional arguments, and an interesting Senate Commerce Committee hearing in October with two debating law professors.ⁿ⁵⁴ In the end, the fast track procedure was followed, and the Senate voted 76 to 24 in favor of the statute with its delegation to the President. It can, thus, be argued that this was yet another precedent for following the statutory procedure (at least for trade treaties or other matters related to the Commerce Clause of the U.S. Constitution), and was also an opinion by three-fourths of the U.S. Senate favoring the constitutionality of the statutory approach.

3. Sub-Federal States in the United States

The question of sub-federal States of the United States received considerable attention in the 1994 Uruguay Round debate. This debate, along with the prior North American Free Trade Agreement (N.A.F.T.A.) debate, were the first times since the origin of the GATT that such attention was given to state interests. A major concern of the states was the potential for a broad scope treaty like the U.R. to invalidate many different state laws governing areas such as economic regulation, environmental affairs, product safety and health standards, etc. (insofar as these were left to the states by Congress or other federal bodies). An organization of state Attorneys General posed "sub-federal sovereignty objections" to the U.S. Office of the Trade Representative, and this office worked with state officials to include language in the 1994 Uruguay Round Agreements Actⁿ⁵⁵ designed to protect state interests, particularly interests of states in potential dispute settlement proceedings that might be brought at the WTO against certain state laws. State laws had already been subject to such proceedings under the GATT in the Canadian challenge to state alcoholic beverage regulations. A GATT panel concluded that many of these state laws were inconsistent with GATT obligations such as the national treatment requirement that imports be treated no less favorably than domestic products.ⁿ⁵⁶

The result for the U.R. Implementing Act was several lengthy sections that gave state government officials various procedural rights to participate and provide input into the U.S. handling of WTO disputes affecting them. After this text was negotiated, state officials indicated satisfaction with the approach and removed their objections to U.S. acceptance of the U.R. treaty.ⁿ⁵⁷

4. The Proposed WTO Dispute Settlement Review Commission

One of the more explicit manifestations of sovereignty concerns, regarding power allocation in the 1994 debate was a compromise proposal between the U.S. President and the Senate Majority Leader. A Democratic President needed votes in a Republican-dominated Senate to achieve passage of the Uruguay Round Agreements Act, and in late November 1994, a few days before the congressional votes were scheduled, the Majority Leader proposed the idea of a statutory "Commission." This Commission would have been composed of five U.S. federal judges who would review the adopted WTO panel reports adverse to the United States, judging them against a list of four particular criteria. The Commission would then advise the Congress whether it

found any panel report to be contrary to any one of these criteria. If the Commission were to make determinations of the contrary nature for three reports, then the Congress would consider a resolution to withdraw from the WTO (giving the requisite six-month notice required by the U.R. agreements). This proposal (as of this writing in August 1997) has not become law, although a series of attempts were made to enact it in 1995 and 1996. Nevertheless, the proposal, its findings, and its criteria, all reveal an explicit concern for various aspects of the sovereignty objections discussed above.

The draft legislation n58 listed the following finding:

the continued support of the Congress for the WTO is dependent upon a WTO dispute settlement system that:

- A) operates in a fair and impartial manner;
- B) does not add to the obligations of or diminish the rights of the United States under the Uruguay Round agreements; and
- C) does not exceed its authority, scope, or established standard of review.

The Bill therefore set forth four specific criteria for evaluating WTO dispute reports, asking whether the panel had: 1) exceeded its authority or terms of reference; 2) added to the obligations of, or diminished the rights of the United States; 3) acted arbitrarily or capriciously or engaged in misconduct, etc.; or 4) deviated from the applicable standard of review including that in article 17.6 of the antidumping text.

Perhaps little needs to be added to the paragraphs quoted above; they clearly show the concerns about some aspects of the WTO dispute settlement system which relate to the broader power allocation concepts of sovereignty. Many observers felt that the final sanction of withdrawal would never be exercised by the Congress or signed into law by the President. And some observers felt that it was very unlikely that the Commission would ever find a WTO dispute report contrary to the criteria stated, although those criteria have significant ambiguities and could be interpreted in different ways depending on the judges who made up the Commission. Nevertheless, there was a perception, particularly among other members of the WTO, that the mere existence of this Commission could subtly influence the work of WTO panels, which might then be hesitant to take positions contrary to U.S. interests, and thereby lose some of their impartiality. Some foreign diplomats suggested that it would be necessary for their governments to adopt a similar procedure to "redress this tilt."

IV. SOME CONCLUDING PERSPECTIVES

Sovereignty, in practical terms, is still an important argument in many government policy debates. It has an emotional appeal and is often used in a blunt and undifferentiated way as a surrogate argument by opponents of some government proposal. Yet when the context of some of the sovereignty arguments is analyzed in detail, it can be demonstrated that there are worthwhile policy issues raised at least in some circumstances, and at least if we abandon some antiquated definitions of the concept of sovereignty. In this article I examined sovereignty arguments and suggested that most often they raised policy issues about allocation of power,

particularly as between international institutions or norms and national or even sub-federal levels of government.

When some of the policy debates are approached in this manner, it becomes clear that there are many facets and many details to the policy issue of appropriately allocating power. In the context of treaty acceptance, for example, questions are raised about the domestic law effect of international norms, about the nature of international decision-making processes that can generate secondary norms obligating the nation-state, about details of dispute settlement procedures affecting the credibility and efficiency of those procedures, and about questions of internal domestic allocation of power that are raised by international treaties, other norms, and institutions. When we examine some of these details in a "decomposed" or disaggregated way, we can more easily determine how to weigh some of the disadvantages of those details against advantages of strengthened international norms and institutions. This process, in turn, may assist governments in evaluating the important policy considerations involved in participating in international institutions. This approach to sovereignty arguments may lead to better government decisions by forcing those who use sovereignty objections against policy proposals to make such objections more concrete and explicit so that they can be better compared to contrasting arguments.

FOOTNOTES:

n1. Louis Henkin, *International Law: Politics and Values* 9-10 (1995).

n2. See *id.*

n3. See Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Finance Comm., 103d Cong. 114 (1994) (March 23, 1994, testimony of John H. Jackson, Hessel E. Yntema Professor of Law, University of Michigan) [hereinafter Jackson March Testimony]; The World Trade Organization and U.S. Sovereignty: Hearings Before the Senate Comm. on Foreign Relations, 103d Cong. (1994) (June 14, 1994, testimony of John H. Jackson, Hessel E. Yntema Professor of Law, University of Michigan), available in 1994 WL 14188767 [hereinafter Jackson June Testimony]. Uruguay Round Agreements Act, Pub. L. No. 103-465.

In addition to the above, the reader may be interested in some of the articles published about the Uruguay Round legislative debate, including the following: William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 *Fordham Int'l L.J.* 427 (1995); Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 *Tul. J. Int'l & Comp. L.* 161 (1996); Julie Long, Note, *Ratcheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements*, 80 *Minn. L. Rev.* 231 (1995); Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 *Duke L.J.* 216 (1995).

n4. Henkin, *supra* note 1, at 10.

n5. Louis Henkin, *The Mythology of Sovereignty*, *Am. Soc'y Int'l L. Newsl.*, Mar.-May 1993, at 1.

n6. Henkin, *supra* note 1, at 10.

n7. The concept of "subsidiarity," currently very heavily debated in Europe, is clearly closely related to this discussion. I do not intend here, however, to get into the middle of the European debate on this subject.

n8. Market economics obviously has much to say about the last in this list. See generally, Richard G. Lipsey & Paul N. Courant, *Microeconomics* (8th ed., 1994).

n9. See Jackson June Testimony, *supra* note 3, at 3-4.

This does not mean that it is frivolous to carefully study the question, as this hearing is designed to do. It is important to assure ourselves that if there develops the rare situation when an international body or rule system operates in a manner to abuse the rules or abuse the procedures of an organization so as to threaten the vital interests of the United States, that the U.S. will still retain the tools to take appropriate counter measures. In the case of the WTO, I believe that the U.S. and other nations are protected in that respect. Among other protections, the WTO Charter allows for withdrawal with a brief six month notice. It is also the case that this Congress is likely to specify in the implementing legislation that the WTO Charter and the Uruguay Round rules are not "self-executing," so again in the rare case of serious abuse of international procedures the U.S. would maintain its own constitutional freedom to act even if inconsistent with international rules. In such a case, of course, the U.S. could be in breach of its international legal obligations and might face counter-measures.

n10. See *id.*

n11. For relevant hearings, see *Uruguay Round Agreements Act: A Legislative History of Public Law No. 103-465* (Bernard D. Reams, Jr. & Jon S. Schultz eds., 1995).

n12. See Jackson June Testimony, *supra* note 3.

n13.

Protocol of Provisional Application to the General Agreement on Tariffs and Trade, signed Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308.

n14. See, e.g., John H. Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (1969); John H. Jackson, *The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?*, *The World Economy* 11 (1995) [hereinafter Jackson, *The World Trade Organization*]; John H. Jackson, *The Uruguay Round and the Launch of the WTO--Significance and Challenges*, in *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation* 5 (Terence P. Stewart ed., 1996) [hereinafter Jackson, *The Uruguay Round*]; John H. Jackson, *The World Trading System* (2d ed., forthcoming 1997).

n15. Note that the terms "member" or "membership" were not used.

n16. The Agreement Establishing the World Trade Organization contains a definition of the "consensus" decision-making procedure: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no member, present at the meeting when the decision is taken, formally objects to the proposed decision." The Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, art. IX n.1, 33 *I.L.M.* 1144, 1148 (1994) [hereinafter WTO Agreement]. See also John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 49-50 (1997).

n17. See Jackson, *supra* note 16, at 99; Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 287 (1993) [hereinafter Hudec, *Enforcing International Trade Law*]; Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (2d ed., 1990).

n18. See World Trade Organization, *Overview of the State-of-Play of WTO Disputes*, constantly updated at the following Web site, <<http://www.wto.org/wto/dispute/bulletin.htm>>. By mid-1997, over 88 disputes were documented. During the 1950s: 53 complaints; 1960s: 7 complaints; 1970s: 32 complaints; and 1980s: 115 complaints. See Hudec, *Enforcing International Trade Law*, *supra* note 17, at 287.

n19. See *Understanding on Rules and Procedures Governing the Settlement of Disputes* [hereinafter DSU], Annex 2 of WTO Agreement, *supra* note 16, arts. 16-17, 33 *I.L.M.* 1226, 1235-37 (1994). See *infra* Part III.C.

n20. See *Implementing the Uruguay Round* (John H. Jackson & Alan O. Sykes, eds., forthcoming 1997) (manuscript at 399, on file with authors) (volume of works by 13 authors including analysis of 11 different countries' implementation processes).

n21. It should be noted that the term "executive agreement" used in United States domestic law to contrast with "treaties" for which a separate constitutional procedure exists is confusing. Clearly both of these categories of international agreement are, under international law, "treaties."

n22. See John H. Jackson et al., *Legal Problems of International Economic Relations* 147 (3d ed. 1995) [hereinafter Jackson et al., *Legal Problems*]; Jackson, *supra* note 16, at 75; John H. Jackson et al., *Implementing The Tokyo Round: National Constitutions and International Economic Rules* 169-70 (1984); *Statement of Administrative Action for the North American Free Trade Agreement*, Title I, Section 101, H.R. Doc. No. 103-59, at 10 (1993); *Statement of Administrative Action for the Uruguay Round Trade Agreements*, Title I, Section 101, H.R. Doc. No. 103-316, at 12 (1994). See also *Statement of Administrative Action for the North American Free Trade Agreement*, Section 102(b), H.R. Doc. No. 103-59, at 13 (discussing the relationship of the agreement to State Law).

n23. *The World Trade Organization and U.S. Sovereignty: Hearings Before the Senate Comm. on Foreign Relations*, 103d Cong. (1994) (testimony of Ralph Nader, Center for Responsive Law), available in *1994 WL 14188790*.

n24. See generally *Uruguay Round Agreements Act: A Legislative History of Public Law No. 103-465*, *supra* note 11.

Four hearings, in particular, are useful in trying to understand the discussion in this article. See *Uruguay Round of Multilateral Trade Negotiations: Hearing Before the Senate Finance Comm.*, 103d Cong. (1994); *Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations: Hearings Before the Comm. on Ways and Means and its Subcomm. on Trade in the House of Representatives*, 103d Cong. (1994); *The World Trade Organization and U.S. Sovereignty: Hearings Before the Comm. on Foreign Relations*, 103d Cong. (1994); S.2467, *GATT Implementing Legislation: Hearings Before the Comm. on Commerce, Science and Transportation in the Senate*, 103d Cong. (1994).

n25. This is a classical trade policy argument. See, e.g., Jackson et al., *Legal Problems*, *supra* note 22, at 33; Peter B. Kenen, *The International Economy* 125 (2d ed. 1989).

n26. For different subjects, this can operate in different directions, so it is not impossible to find a particular domestic interest opposing some treaties and favoring others, even though both "diminish national sovereignty."

n27. Restatement (Third) of the Foreign Relations Law of the United States 114 (1990).

n28. See John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, *86 Am. J. Int'l L.* 310 (1992).

n29. See WTO Agreement, *supra* note 16, art. XV(2), *33 I.L.M. at 1152*.

n30. See The World Trade Organization and U.S. Sovereignty: Hearings Before the Senate Comm. on Foreign Relations, 103d Cong. (1994) (testimony by Rufus Yerxa, Deputy U.S. Trade Representative), available in *1994 WL 14188843* [hereinafter Yerxa Testimony].

n31. See Jackson, The World Trade Organization, *supra* note 14; Jackson, The Uruguay Round, *supra* note 15; see also Jackson June Testimony, *supra* note 3; Jackson March Testimony, *supra* note 3.

n32. Candidly, though, it may also be noted that danger to the political fortunes of the ruling party in such nation may take on great weight in these considerations.

n33. See D.S.U., *supra* note 19, arts. 11-16, *33 I.L.M. at 1233-35*. The D.S.B. has the same members as the WTO General Council, except for its Chairman.

n34. See D.S.U., *supra* note 19, art. 17, *33 I.L.M. at 1236-37*.

n35. See Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Finance Comm., 103d Cong. 108 (1994) (testimony of Steven R. Appleton, representing the Semiconductor Industry Association).

n36. See Jackson June Testimony, *supra* note 3.

n37. This author shares many, but not all, the concerns expressed. See John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, *49 Wash. & Lee L. Rev.* 1227 (1992).

n38. See, generally, e.g., Douglass C. North, Institutions, Institutional Change and Economic Performance (1990).

N39. See Yerxa Testimony, *supra* note 30. See also, USTR Identification of Trade Expansion Priorities (Super 301) pursuant to Executive Order 12901 (last modified, October 1, 1996) <<http://www.ustr.gov/reports/12901report.html>>.

n40. See John H. Jackson, U.S. Threat to New World Trade Order, *Financial Times*, May 23, 1995, at 13; Ben Wildavsky, The Big Deal, *Nat'l. J.*, June 24, 1995, at 1650; Jagdish Bhagwati, The U.S.-Japan Car Dispute: A Monumental Mistake, *Int'l Affairs*, June 1996, at 261.

n41. See generally John H. Jackson, The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation, *91 Am. J. Int'l L.* 60 (1997).

n42. See John H. Jackson, The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections, in *Towards More Effective Supervision by International Organizations Essays in Honour of Henry G. Schermers* 149 (Niels Blokker & Sam Muller eds., 1994).

n43. Discussions by author with GATT Secretariat Personnel (1995).

n44. "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements The decision to adopt an interpretation shall be taken by a three-fourths majority of the members." WTO Agreement, *supra* note 16, art. IX(2), 33 *I.L.M.* at 1148.

n45. For example and contrast, article 94 of the U.N. Charter states: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, art. 94. Similarly, the Statute of the International Court of Justice, article 59, implies such obligation, stating: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the I.C.J., signed June 26, 1945, art. 59, 59 Stat. 1055, 3 *Bevans* 1179.

n46. "The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization." D.S.U., *supra* note 19, art. 1, 33 *I.L.M.* at 1226. For reports on the negotiations in the U.R. working group on Dispute Settlement see *Inside U.S. Trade*, Oct. 1, 1993, at 7; Nov. 5, 1993, at 1; Nov. 19, 1993, at 19; Nov. 26, 1993, at 1; Dec. 17, 1993, at 1.

n47. See Ronald St. John Macdonald, *The Margin of Appreciation, in European System for the Protection of Human Rights* 83 (Ronald St. John Macdonald et al. eds., 1993); Steven Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 *Am. J. Int'l L.* 193 (1996).

n48. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 *Am.J. Int'l L.* 193, 202 (1996).

n49. See, e.g., D.S.U., *supra* note 19, art. 3(2), 33 *I.L.M.* at 1227.

n50. United States--Standards for Reformulated and Conventional Gasoline, Appellate Body Report and Panel Report, World Trade Organization, WT/DS2/9, 20 May 1996, at 30. See also Japan--Taxes on Alcoholic Beverages, Report of the Appellate Body, World Trade Organization, WT/DS8,10,11/AB/R, 4 October 1996, at 22. Both documents are available at World Trade Organization, Overview of the State-of-Play of WTO Disputes (last modified Jan. 23, 1997) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

n51. D.S.U., *supra* note 19, art. 3(2), 33 *I.L.M.* at 1227.

n52. See Trade Act of 1974 301, 19 *U.S.C.* 2411 (1994). See, e.g., Services of the European Commission, in Report on U.S. Barriers to Trade and Investment 11-12 (1994).

n53. See S.2467, GATT Implementing Legislation: Hearings Before the U.S. Senate Commerce, Science and Transportation Comm., 103d Cong. 290-339 (1994) (Statements and discussion of Laurence H. Tribe and Bruce Ackerman); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 4 (1995); Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 6 (1995); "Statutory Procedure for Approval of the Uruguay Round Trade Negotiations and the WTO" Treaty Clause Memorandum sent to various members of Congress and Executive Branch Officials, dated November 11, 1994. Signatories included: Professors Bruce Ackerman, Yale University; Abram Chayes, Harvard University; Kenneth Dam, University of Chicago; Charles Fried, Harvard University; David Golove, Arizona University; Louis Henkin, Columbia

University; Robert Hudec, University of Minnesota; John H. Jackson, University of Michigan; Harold Hongju Koh, Yale University; Myres McDougal, Yale University (on file with author).

n54. See Detlev Vagts, *International Agreements, the Senate and the Consitution*, in this volume, *supra* p. 119.

n55. 108 Stat. 4809 (1994).

n56. *United States Measures Affecting Alcoholic Malt Beverages*, GATT Panel Report, adopted June 19, 1991, GATT Doc. No. DS23/R; G.A.T.T ., *39 Basic Instruments and Selected Documents* 206.

n57. See John H. Jackson et al., *International Economic Relations: Cases, Materials and Texts* 1168 (3d ed., 1995); Matt Schaefer & Thomas Singer, *Multilateral Trade Agreements and U.S. States: An Analysis of Potential GATT Uruguay Round Agreements*, *J. of World Trade*, Dec. 1992, at 31; *Statement of Administrative Action for the Uruguay Round Trade Agreements*, Title I, Section 102, H.R. Doc. 103-316, at 15 (1994); Letter from Michael Carpenter (Attorney General of Maine), Heidi Heitkamp (Attorney General of North Dakota), Charles W. Burson (Attorney General of Tennessee) to Michael Kantor (U.S.T.R.) (July 27, 1994) (on file with author).

n58. See *A Bill to Establish a Commission to Review the Dispute Settlement Reports of the World Trade Organization and for Other Purposes*, S. 16, 104th Cong. (1995).