RECENT DEVELOPMENTS

TRADE LAW—IMPORT QUOTAS—EXECUTIVE AGENCY MAY IMPOSE TEXTILE IMPORT QUOTAS UNDER SECTION 204 OF THE AGRICULTURAL ACT OF 1956 WITHOUT PRIOR SHOWING OF DOMESTIC MARKET DISRUPTION—JURISDICTION—CUSTOMS COURT POSSESSES EXCLUSIVE JURISDICTION OVER ACTIONS PROTESTING IMPORT QUOTAS

In 1973 the United States became a party to a multilateral agreement, popularly known as the Multi-Fiber Agreement.[1] This compact governed the imposition by member nations of tariff and nontariff barriers on cotton, wool and man-made textile and apparel products.[2] Immediately thereafter, the Committee for the Implementation of Textile Agreements (Committee),[3] an executive agency composed of representatives from the Departments of State, Treasury, Labor, and Commerce, began to implement the Multi-Fiber Agreement. The Committee, acting under the authority granted to the President by section 204 of the Agricultural Act of 1956,[4] negotiated and executed bilateral textile import quotas with those countries which accounted for the bulk of United States textile imports.[5]

On July 27, 1974, Consumers Union, a national, non-profit organization which provides information and testing services for consumers,[6] brought suit in the District Court for the District of Columbia. Consumers Union

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[1] Agreement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840.

[2] The Multi-Fiber Agreement provides a framework within which bilateral import quota agreements can be negotiated. Its basic function is to provide an international legal system for establishing quota agreements so that the agreements do not violate the principles of the General Agreement on Tariffs and Trade (G.A.T.T.). GENERAL AGREEMENT ON TARIFFS AND TRADE, *done* Oct. 30, 1947, 61 STAT. pt. 5, A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187; *see* R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 212 (1975).

[3] Established by Executive Order 11651, 3A C.F.R. 152 (1973).

[4] 7 U.S.C. § 1854 (1970). Section 204 originally provided that:

> The President may, whenever he determines such action appropriate, negotiate with representatives of foreign governments in an effort to obtain agreements limiting the export from such countries and the importation into the United States of any agricultural commodity or product manufactured therefrom or textiles or textile products and the President is authorized to issue regulations governing the entry or withdrawal from warehouses of any such commodity, product, textiles or textile products to carry out any such agreement. 70 Stat. 200.

[5] By the time of this action discussions had begun or had been announced between the United States and the governments of Mexico, Hong Kong, Pakistan, Thailand, Taiwan, Japan, Malaysia and South Korea. Brief for Appellant, at 8, Consumers Union of the United States, Inc. v. Committee for the Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir. 1977) (hereinafter cited as Brief for Appellant).

[6] Most notably, Consumers Union publishes a monthly magazine, CONSUMER REPORTS, which boasts a paid circulation of 2.2 million. Complaint for Declaratory Judgment and Mandatory Injunction, at 2, Consumers Union of the United States, Inc. v. Committee for the Implementation of Textile Agreements, No. 74-968 (D.D.C. Sept. 27, 1977) (hereinafter cited as Complaint).

alleged that the Committee had violated the procedural requirements of section 204 in that it had failed to determine, prior to imposing the trade restraints, whether the imports would result in potential or actual disruption of domestic markets.[7] It further contended that in failing to publish such findings the Committee had violated the rulemaking requirements for executive agencies set out in sections 3 and 4 of the Administrative Procedure Act (APA).[8] Consumers Union sought a declaratory judgment sustaining its allegations and a mandatory injunction directing the Committee to issue findings of domestic market disruption prior to initiating further negotiations with foreign governments or imposing additional import quotas.

At trial the Committee first challenged the jurisdiction of the district court, arguing that all actions for relief from import quotas came within the exclusive jurisdiction of the United States Customs Court.[9] The Committee further asserted that its implementation of the textile quota program was insulated from judicial review as an exercise of the President's inherent power to conduct foreign relations.[10] Accordingly, it moved for judgment on the pleadings.

In the alternative, the Committee moved for summary judgment on the two issues raised by Consumers Union. First, it argued that since section 204, on its face, granted the Executive unfettered discretion to determine the appropriate circumstances under which import quotas would be imposed,[11] there was no statutory basis for requiring a finding of domestic

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[7] This "domestic market disruption" standard was derived from the legislative history of section 204. *See* note 25 *infra*. Consumers Union also noted that the Multi-Fiber Agreement required a showing of "domestic market disruption" prior to the imposition of unilateral import restrictions. 25 U.S.T. 1001, 1017.

[8] 5 U.S.C. §§ 552-53 (1976). Section 3 requires federal agencies to make general information about their composition, functions and procedures available to the public. Section 4 regulates rule-making. Agencies are required to publicize rule-making proceedings, explain the legal authority for the agency action, publish the rule when promulgated, and allow for oral and written comment by interested parties.

[9] The Committee cited 28 U.S.C. § 1582 (1970) as granting exclusive jurisdiction to the Customs Court over Consumers Union's cause of action. The relevant portion of that statute is set out in note 23 *infra*. Brief for Appellee, at 9, Consumers Union of the United States, Inc. v. Committee for the Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir. 1977) (hereinafter cited as Brief for Appellee).

[10] As concerns the source and nature of the power which it exercised, the Committee insisted: (1) that its authority is in part derived from the President's constitutional power to conduct foreign relations; (2) that section 204 constitutes congressional recognition and augmentation of that power; and (3) that courts have traditionally refused to review discretionary exercises of the President's constitutional authority. As a result, the Committee argued, its activities were immunized from judicial review. *Id.* at 17.

[11] The Committee cited the clause "whenever he [the President] deems such action appropriate," contained in section 204, as indicating that Congress intended that no constraints be placed on Executive discretion. This congressional expression, it was urged, obviated the necessity of deriving any additional standard for the exercise of section 204 authority from

market disruption. The Committee summarily dismissed Consumers Union's second contention, insisting that the Committee's rulemaking processes fell within the well-established "foreign affairs" exemption to the procedural requirements of the APA.[12]

In response to this assertion, Consumers Union filed a cross-motion for partial summary judgment on its charge of violation of the APA requirements, insisting that the Committee's answer to that complaint raised no material issue of fact.

Initially the district court found the jurisdiction of the court proper, noting that not only was a consumer organization unable to file the protest prerequisite to Customs Court jurisdiction, but also, assuming it were permitted to do so, the Customs Court was not empowered to grant the equitable relief requested.[13] The court then proceeded to deny the Committee's motion for judgment on the pleadings, ruling that an executive action taken pursuant to a congressional delegation of authority does not necessarily invoke such inherent presidential powers as would insulate the action from judicial review.[14] The court did, however, grant the Committee's request for summary judgment, holding that section 204 decisions come under the "foreign affairs" exception to the APA and that the Committee was not required to make a determination of actual or potential market disruption before imposing import restraints on textiles.[15] On appeal, *held,* reversed on jurisdictional grounds alone. Exclusive jurisdiction over the action lies with the Customs Court in its capacity to review protests directed to the exclusion of goods by the customs service. *Consumers Union of the United States, Inc., v. Committee for the Implementation of Textile Agreements,* 561 F.2d 872, (D.C. Cir. 1977), *cert. denied,* 46 U.S.L.W. 3582 (1978).

Under the United States Constitution, the power to regulate foreign commerce is vested exclusively in Congress.[16] Since the passage of the Tariff Act of 1930,[17] Congress has delegated increasingly more of this power

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the legislative history, and would certainly eliminate all grounds for judicial imposition of a "domestic market disruption" requirement. *Id.* at 17, 22.

[12] Section 4 of the APA exempts "military and foreign affairs functions" of the United States government. *See* note 8 *supra.*

[13] Consumers Union of the United States, Inc. v. Committee for the Implementation of Textile Agreements, No. 74-968, at 1 (D.D.C. Sept. 27, 1977) (hereinafter cited as Consumers Union v. C.I.T.A.).

[14] *Id.* at 5 n.12.

[15] *Id.* at 15.

[16] "The Congress shall have power . . . [t]o regulate commerce with foreign nations . . . ." U.S. CONST. art. I, § 8, cl. 2. "While there was disagreement over many portions of the proposed Constitution, every version contained a section to the effect that Congress was to have control over foreign commerce." Bassiouni & Landau, *Presidential Discretion in Foreign Trade and Its Effect on East-West Trade,* 14 WAYNE L. REV. 494, 495 (1968).

[17] 19 U.S.C. §§ 1202-1654 (1970).

to the Executive.[18] This trend seems to reflect a general belief that the President, unlike Congress, is relatively immune from localized pressures favoring strong import barriers.[19]

The increasing complexity of international trade law may also have encouraged Congress to delegate its responsibility for regulating foreign commerce. Traditional legislative approaches such as unilateral trade barriers frequently proved counterproductive, inviting reprisals by injured competitor nations.[20] Eventually, as the folly of unilateral action became generally recognized, it was replaced by bilateral and multilateral agreements, negotiated directly with affected foreign governments.[21] Since Congress itself was unable to conduct these negotiations, congressional delegation to the Executive of its foreign commerce regulatory authority was inevitable.

While the implementation of trade policy requires the President to utilize functions—for example, negotiation with foreign governments—inherent to his power to conduct foreign relations, there is no immediate reason why delegated policy-making authority should necessarily invoke special executive powers.[22] Thus, when Congress grants the Executive the authority to issue trade regulations, rather than merely to adopt appropriate measures for their implementation, the Executive must exercise this policy-making role in a manner consistent with the congres-

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[18] Four examples are: section 22 of the Agricultural Adjustment Act (1933), 7 U.S.C. § 612 (c) (1970); the Trade Agreements Act (1934), ch. 474, 19 U.S.C. § 1351 (1970); section 352 of the Trade Expansion Act of 1962, 19 U.S.C. § 1982 (1970); and the Trade Act of 1974, 19 U.S.C. § 2132(a) (Supp. VII 1977).

[19] This belief may well have lost some of its validity. During the autumn of 1977, the Carter Administration attempted to steer through Congress a Maritime Cargo Preference bill which would have cost consumers untold millions of dollars a year. The bill was defeated only after a sustained publicity effort by a remarkable coalition of opponents ranging from *Human Events* to Ralph Nader's *Congress Watch*. *See*, *Ripon Forum*, Nov. 15, 1977, at 1.

[20] *See* Note, *Presidential Authority in Foreign Trade: Voluntary Steel Import Quotas from a Constitutional Perspective*, 15 VA. J. INT'L L. 179 (1974).

[21] *Id.*

[22] *See* Zemel v. Rusk, 381 U.S. 1 (1965); Pillai v. CAB, 485 F.2d 1018 (D.C. Cir. 1973). If the delegated policy-making authority relates to an area of activity clearly within the President's constitutional power to conduct foreign relations, executive discretion cannot be limited by Congress or the courts. *See* United States v. Pink, 315 U.S. 203 (1942) (involving executive agreements enacted in connection with the President's power to extend diplomatic recognition to foreign governments); Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) (involving the President's duty as Commander in Chief to protect national security); South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622 (Ct. Cl. 1964) (also involving national security considerations). Otherwise, a congressional delegation of authority is unconstitutional unless accompanied by some indication of legislative policy or purpose; "A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President." Star-Kist Foods, Inc. v. United States, 275 F.2d 472, 480 (C.C.P.A. 1959). *See also* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

sional purpose indicated in the enabling legislation.[23]

Section 204 of the Agricultural Act of 1956 is an excellent example of the type of congressional delegation of the power to regulate foreign commerce which allows the Executive considerable control over policy-making. In authorizing the President to negotiate and enact bilateral agreements restricting textile imports, section 204 provides no express criteria linking executive action to the existence of any special circumstances such as domestic market disruptions.[24] The legislative history, however, is replete with references to the threat textile imports pose to the profitability of the domestic textile industry.[25] The immediate rationale for section 204 seems to have been to prevent low-cost American cotton, obtained through overseas discount sales of United States agricultural surpluses,[26] from reenter-

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[23] *See* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (invalidating an executive agreement with Canada which contravened an act of Congress). Judicial review is an essential policing device to ensure that Presidential exercise of delegated authority is consistent with the legislative purpose:

> The principle permitting delegation of legislative power if there has been sufficient demarcation of the field to permit a judgment whether the agency has kept within the legislative will, establishes a principle of accountability under which compatibility with the legislative design may be ascertained not only by Congress but by the courts and the public.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971). Some authority suggests that executive action must be examined even more closely for compatibility with the legislative purpose when the President has, as here, transferred his delegated authority to an executive agency. Devito v. Schultz, 300 F. Supp. 381 (D.D.C. 1969). If Congress has failed to sufficiently circumscribe the scope of permissible executive action, the courts may examine the context and surrounding circumstances of the statutory delegation and infer an appropriate standard. Lichter v. United States, 334 U.S. 742 (1948).

[24] Section 204 provides that the President may act to restrain imports "whenever he deems such action appropriate." *See* note 4 *supra*. This type of wording is generally held to add little to the meaning of a statute. "Nothing should hinge upon the presence or absence of such vague phrases as 'public interest' or 'just and reasonable.' The substance is the same whether Congress says 'deal with the problem' or says 'deal with the problem in the public interest'." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.04, at 87 (1958).

[25] *See* 102 CONG. REC. 7436 (1956) (remarks of Rep. Roberts):

> [U]nfortunately, the economic stability of this industry is being seriously jeopardized by the tremendous increase in cotton textiles, largely from Japan, which resulted from the 1955 tariff cuts. If action is not taken soon to give some relief to our own textile industry, we may soon find that through excessively low tariffs and lack of prudence we will have rendered useless our own textile industry . . . . [T]he textile industry alone cannot withstand the present deluge of cheap Japanese textiles now inundating the American market.

See also 102 CONG. REC. 7447 (1956) (remarks of Rep. Deane): ". . . I am hearing from millowners and operators in all sections of my district that the present rate of textile imports into this country from Japan is having a very disastrous effect on our textile industry . . . ."

[26] The House Report on section 204 (then listed as section 303) put the matter plainly:

> This section is desirable in view of Section 302 (section 203 in the enacted bill), which directs the disposal of stocks of agricultural commodities held by the Commodity Credit Corporation, and of the general policies of the Department of Agri-

ing the country as under-priced textile products and thereby undermining the very purpose of the Agricultural Act.

Construction of the scope of the authority granted the President under section 204 is therefore inhibited by its somewhat contradictory character—no restriction is placed upon the circumstances under which the President can act to restrain imports, but no potential circumstance for action beyond the threat of domestic market disruption, is suggested in the legislative history. If analysis of the legislative history behind section 204 reveals a congressional purpose of preventing domestic market disruption, it would seem that a showing of market disruption should be required to trigger executive action under section 204, despite the absence of clear language in the statute imposing such a requirement.[27] If, on the other hand, administration of the quota program logically requires the President to consider extrinsic foreign policy factors, then the broad discretionary language of section 204 could be interpreted as a congressional invocation of the President's own power to conduct foreign relations. In this circumstance, imposition of any standard for executive action would be inappropriate.[28]

Compounding this problem is the fact that executive agencies such as the Committee are subject to procedural requirements beyond those established by the enabling legislation.[29] Sections 3 and 4 of the APA require that prior to informal rulemaking, federal agencies must publish intended rules and provide the general public an opportunity to comment.[30] Agency

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culture under which surplus agricultural commodities are made available in world markets at competitive prices which are generally below domestic price levels. Unless there is some limitation on imports of products manufactured abroad from our surpluses, the sales program may well defeat its own purpose of expanding the total market for our agricultural products.

H.R. REP. No. 1986, 84th Cong., 2d Sess. 43, *reprinted in* [1956] U.S. CODE CONG. & AD. NEWS 2257.

See also the remarks of Rep. Roberts on section 204: ". . . it is the intent of Congress that the textile industry of the United States should not have its very life jeopardized by a deluge of foreign goods manufactured from our own agricultural products sold in the world market at competitive prices which are generally below domestic price levels." 102 CONG. REC. 7437 (1956).

[27] *See* note 21 *supra*.

[28] *See* South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622 (Ct. Cl. 1964). If the President, through his power to conduct foreign relations, lawfully possesses complete discretion to determine policy in pursuance of a congressional delegation of authority, it is presumed that he acts consistently with the legislative purpose. Martin v. Mott, 25 U.S. 19 (12 Wheat.) (1827).

[29] Section 2(a) of the APA defines agencies subject to its provisions as all federal authorities, with the exception of Congress, the courts, territorial governments, the District of Columbia government, and authorities acting under certain specified statutes concerning military and intelligence activities. 5 U.S.C. § 551(1) (1970). The Committee did not dispute that it was an "agency" within the meaning of the statute.

[30] *See* note 8 *supra*.

actions, however, which involve "foreign affairs functions of the United States" are specifically exempted from these requirements.[31] The determination of whether an agency action falls within this exempted category has proceeded on a case-by-case basis. Agency procedures are exempted if prior announcement would inhibit or otherwise complicate the decision-making process, particularly if the agency action involves consultations with foreign governments.[32] The failure of the Executive, when acting under section 204, to provide public notice and opportunity to contest has not yet been challenged. While the Executive has promulgated rules under section 204 without adhering to APA procedures, in actual practice the Committee has provided for public comment prior to imposing restraints.[33]

Even assuming the above issues were capable of resolution, much uncertainty still exists as to the proper forum for review of executive actions taken pursuant to congressional delegation of authority to regulate imports. The United States Customs Court possesses

> exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involve(s) . . . (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws.[34]

The Customs Court, as a general rule, will not review actions challenging such decisions until the challenge has been reviewed and denied by the appropriate officer.[35] The right to protest these decisions is available only to importers or American manufacturers, producers or wholesalers bringing textiles into the United States.[36] In reviewing the challenges before it, the Customs Court is not empowered to provide injunctive or declaratory relief.[37]

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[31] 5 U.S.C. § 553 (a)(1) (1976).

[32] The phrase "foreign affairs functions" used here . . . is not to be loosely interpreted to mean any function extending beyond the borders of the United States, but only those "affairs" which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences.

S. REP. No. 752, 79th Cong., 1st Sess. 13 (1945); *see also,* H.R. REP. No. 1980, 79th Cong., 2d Sess. 23, *reprinted in* [1946] U.S. CODE CONG. SVC. 1195. An example of executive "foreign affairs" activity held not to fall within the exemption is found in Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), where deportation proceedings of the State Department and the Immigration and Naturalization Services were noted as subject to sections 3 and 4 of the APA.

[33] 39 Fed. Reg. 13307 (1974). The Committee's announcements inviting public comment included a disclaimer of any intention to abandon its exemption under 5 U.S.C. § 553(a)(1).

[34] 28 U.S.C. § 1582 (1970).

[35] *Id.*

[36] 19 U.S.C. §§ 1514, 1516 (1970).

[37] "[I]t has long been held . . . that this court is a court of limited and special jurisdiction

Several statutory grounds exist for district court jurisdiction over actions of parties aggrieved by congressional trade regulation,[38] but only in the absence of Customs Court jurisdiction.[39] While the APA provides an independent ground for district court jurisdiction over complaints arising from federal agency rule-making,[40] an exception is made for discretionary agency activities.[41]

The district court initially declared that its jurisdiction over Consumers Union's actions was proper.[42] In rejecting the Committee's contention of exclusive Customs Court jurisdiction, the court noted that while the physical exclusion of goods at a United States port, a matter exclusively reviewable by the Customs Court, was a consequence of the Committee's enactment of import quotas under section 204, the thrust of Consumers Union's suit was a challenge to "the authority of the President of the United States to enter into voluntary agreements with foreign nations, the *effect* of which

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and without equitable jurisdiction." Cummins-Collins v. United States, 20 Cust. Ct. 93, 97 (1948).

[38] In the case at bar, the applicable statutes are 28 U.S.C. § 1331 (1970) (general jurisdiction over the District of Columbia); 28 U.S.C. § 1337 (1970) (jurisdiction over action arising from an Act of Congress regulating commerce); and 28 U.S.C. § 1361 (1970) (mandamus jurisdiction).

[39] 27 U.S.C. § 1340 (1970). The key issue here is whether the Customs Court must have *actual* authority to assume jurisdiction over an action before district court jurisdiction is divested. The Committee argued that *potential* Customs Court jurisdiction—jurisdiction over a category of litigation within which the present action could be placed—was sufficient to deprive the district court of its authority to hear the case. Under this standard, Consumers Union's inability to file a customs protest and the Customs Court's lack of power to grant equitable relief would not eliminate the bar to district court jurisdiction. The Committee reasoned that because an identical challenge to the Committee's activities brought by an importer for money damages, would lie within the Customs Court's purview, the Customs Court gains exclusive jurisdiction over all such actions no matter who the complainant. Just last November, however, the Second Circuit held that, where practically speaking, the Customs Court lacked the power to hear a case, district court jurisdiction was created. In Sneaker Circus, Inc. v. Carter, 46 U.S.L.W. 2278 (1977), a footwear retailer challenged the validity of "Voluntary Restraint Agreements" negotiated with Korean and Taiwanese exporters under the Trade Act of 1974. The court noted that because the foreign exporters were exposed to mechanisms to enforce the agreements through civil and criminal sanctions in their own countries, it was unlikely than an occasion would arise for domestic customs protests. Since such protests were a prerequisite to Customs Court jurisdiction, the Second Circuit permitted the district court to hear the case even though technically the Customs Court had subject matter jurisdiction over the action. Under the *Sneaker Circus* rationale, Consumers Union (whose opportunity to obtain review by the Customs Court is not currently possible) should be able to bring its action before the district court.

[40] 5 U.S.C. § 702 (1970).

[41] 5 U.S.C. § 701(a)(2) (1970).

[42] Judge Gasch based district court jurisdiction upon 28 U.S.C. § 1331 (1970), 28 U.S.C. § 1337 (1970) and 28 U.S.C. § 1361 (1970). *See* note 38 *supra*. The court did not discuss Consumers Union's alternative ground for jurisdiction, *i.e.*, jurisdiction over federal agency rulemaking determinations under the APA. *See* note 40 *supra*.

is to limit their exports to the United States" (our emphasis).[43] The court further noted that because the Executive action taken here involved both negotiations with foreign governments and the regulation of commerce with foreign nations, it could not be insulated from judicial review simply by characterizing the Act as dealing only with foreign affairs.[44] On the other hand, the court regarded this involvement of the President's power to conduct foreign relations (following from section 204's express authorization of negotiations with foreign governments), as virtually dispositive of the case on the merits. An unusually broad delegation of authority is permissible where the President's inherent powers are to be utilized.[45] Since section 204 on its face places no restriction on the President's right to determine the appropriateness of textile import quotas, the court seemed to be implying that the Committee possessed unfettered discretion to impose such quotas.[46]

The court did not examine the legislative history of section 204 for ex-

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[43] The court treated the jurisdictional issue here as identical to that presented in Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), in which the present plaintiff challenged the legality of "voluntary" agreements negotiated by the Secretary of State with representatives of the Japanese steel industry limiting steel exports to the United States. The analogy is questionable, since the basis for the court's refusal to grant relief in *Kissinger* was a determination that the agreements at issue were not binding under domestic law.

[44] The court remarked that "not every statute that deals however remotely with foreign relations may qualify for such broad delegation. It is necessary to determine whether the delegations involve the President's foreign affairs authority." Consumers Union v. C.I.T.A., *supra* note 13, at 8-9. Thus, it was recognized that broad delegation depended upon analysis of those executive functions actually brought into play during implementation of a given statute. But the court's determination that complete executive discretion was permissible was not grounded upon any such analysis.

[45] This principle, though well-settled, has produced no little confusion on application. It originated in Justice Sutherland's unprecedented suggestion in United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936), that the President possessed inherent, extra-constitutional authority over all foreign relations matters in his capacity as repository of national sovereignty. Although later courts have shrunk from approving this potentially volatile doctrine in full, *see* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (invalidating an executive agreement with Canada which directly contravened an act of Congress), something remains of the notion that the President enjoys an unusual degree of discretion in foreign affairs. Defendant here has advanced a modified version of the original *Curtiss-Wright* doctrine, to wit, that when Congress delegates authority over foreign commerce, that authority "merges" with the President's inherent powers and serves to insulate subsequent executive actions from judicial review. Brief for Appellee, *supra* note 9, at 17-23. Defendant's position points to the primary difficulty with the law in this area: unless the President possesses concurrent power to regulate foreign commerce, it is hard to understand why a presumption of discretion should apply to functions beyond those expressly assigned to the President by the Constitution. For a persuasive and highly critical analysis of the *Curtiss-Wright* doctrine, *see* Berger, *Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

[46] The court cited the *Curtiss-Wright* line of cases for its crucial conclusion that the use of "foreign relations" powers to regulate imports, though subject to delegation from Congress, could be entirely discretionary. *See* note 45 *supra*.

pressions of congressional policy from which a domestic market disruption standard might be inferred. In accordance with its apparent feeling that only an express statutory standard could operate to limit the Committee's discretionary powers, the court did find it significant that Congress had an opportunity to impose procedural requirements on the Executive's textile import quota program in 1962 when section 204 was amended and failed to do so.[47] In further support of its position the court cited the dissent of Judge Leventhal in *Consumers Union v. Kissinger*.[48] It was the district court's opinion that in *Kissinger* Judge Leventhal, a well-known critic of unrestrained executive regulation of foreign commerce, had conceded that section 204 was unique in the breadth of authority it delegated.[49]

In response to Consumers Union's argument that failure to grant relief in this case could result in the Committee abusing its discretionary authority for political ends, the court suggested that under the international dispute settlement mechanisms created by the Multi-Fiber Agreement any such abuses would not go unremedied.[50] The court concluded by ruling, without extended comment, that executive actions involving the Presi-

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[47] The 1962 amendment authorized the President to enter into multi-lateral as well as bilateral agreements. There are some indications in the 1962 legislative history that Congress considered a "domestic market disruption" standard implicit to executive exercise of section 204 authority. A substitute amendment to section 204 offered by Senator Humphrey would have replaced the wording "whenever he [the President] determines such action appropriate" with "when in his judgment such imports seriously affect domestic producers." The Humphrey amendment passed the Senate but was deleted in conference. Debate on the amendment, however, did not touch upon the "seriously affect domestic producers" language, but centered entirely upon the additional substitution of "shall" for "may" in the first sentence of section 204. *See* 108 CONG. REC. 8654 (1962). It is quite apparent from a reading of these debates that Congress did not imagine that the President would act under section 204 in the absence of domestic market disruption (an assumption which was probably justified at that time, given President Kennedy's well-known "free trade" propensities), but rather feared that he would *fail* to act *despite* a well-established threat to domestic markets. *See also* note 62 *infra*.

[48] 506 F.2d 136, 146 (1974) (Leventhal, J., dissenting).

[49] Consumers Union v. C.I.T.A., *supra* note 13, at 12. *See also* Consumers Union v. Kissinger, 506 F.2d 136, 146 (1974) (Leventhal, J., dissenting). In examining the various delegations of congressional authority to regulate foreign commerce, Judge Leventhal noted that section 204 was the only delegation not accompanied by "mandatory procedural prerequisites." It should be noted that Judge Leventhal was attempting to demonstrate that Congress, in enacting the Trade Expansion Act of 1962, intended that the detailed procedural requirements of the Act would apply to all executive actions regulating foreign commerce not covered by prior legislation—especially the "Voluntary Restraint Agreements" at issue in *Kissinger*. Thus, it would appear reasonable to assume that, in the passage cited by the court, Judge Leventhal was referring to the absence of express, mandatory procedural requirements such as those set out in the Trade Expansion Act.

[50] The Multi-Fiber Agreement sets up a Textiles Committee (article 10) and a Textile Surveillance Body (article 11) to adjudicate disputes between contracting nations. 25 U.S.T. 1001 at 1012-15 (1974). Unfortunately, only governments, not individuals, can carry protests to these two bodies.

dent's foreign relations powers come squarely within the "foreign affairs" exemption of the APA.

The holding of the court of appeals, limited as it was to the question of jurisdiction, added little to an analysis of the numerous issues raised at the district court level. In an extremely brief opinion,[51] the court ruled simply that any challenge to the exclusion of goods from entry at United States ports falls within the exclusive jurisdiction of the Customs Court.[52] Since import quotas effect such exclusion, they are "part of the customs law." While the court of appeals did cite *Yoshida International, Inc. v. United States*[53] and *Western Dairy Products, Inc. v. United States*[54] as supportive

[51] Much of the Court's opinion was devoted to dicta in which the court expressed "serious doubts as to the standing of the Consumers Union to sue." 561 F.2d at 874. In its complaint, Consumers Union alleged that the Committee's administration of textile import quotas injured Consumers Union and its members "in their capacity as consumers." Complaint, *supra* note 6, at 8. The district court, in ruling favorably for Consumers Union on the standing issue focused upon the organization's annual purchase of $15,000 in textile products for testing purposes. The court of appeals limiting its review of standing to this element of Consumers Union's case, expressed doubt that import quotas really affected Consumers Union's product testing program—especially since an exemption from the restrictions might have been allowed by the Committee upon application. 561 F.2d at 874. Neither court discussed Consumers Union's second ground for standing: its membership's status as consumers of textile products. The Committee, in its brief before the court of appeals, asserted that Consumers Union had not distinguished its injury from that of the general public. Brief for the Appellee, *supra* note 9, at 14-16. The Committee's position amounts to a claim that consumer organizations can never achieve standing based simply upon injury to consumers. The "differentiation of injury from the general public" criterion propounded by the Committee is not a mandatory prerequisite for standing, but rather a factor to be considered in determining whether the necessary "injury in fact" has been suffered by the plaintiff. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). It is true that if the injury complained of is so generalized as to be unascertainable, there is no "injury in fact." In the present case, however, Consumers Union alleges an injury that can no longer be seriously doubted, *i.e.*, the effect of import quotas upon consumers. Once "injury in fact" is established, the fact that Consumers Union's injuries "are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." Sierra Club v. Morton, 405 U.S. 727 (1972). In addition, the case for Consumers Union's standing is buttressed by the fact that both the district and appellate courts for the District of Columbia have found standing to seek relief from import quotas where Consumers Union was alleging injuries to consumers similar to those alleged in the instant case. Consumers Union of the United States v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd in part and rev'd in part on other grounds sub nom,* Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974); Consumers Union v. Sawhill, 393 F. Supp. 639 (D.D.C. 1975).

[52] 561 F.2d at 874.

[53] 378 F. Supp. 1155 (E.D. Pa. 1974), *rev'd on other grounds,* 526 F.2d 560 (C.C.P.A. 1975). *Yoshida* involved a challenge to the validity of the 10% import surcharge imposed by President Nixon in 1971. The President acted under the authority of the Trade Agreements Act of 1934, ch. 474, 19 U.S.C. § 1351 (1970), which amended the Tariff Act of 1930 to allow the President to suspend tariff reductions, returning tariffs to an earlier level. Plaintiff in *Yoshida* contended, successfully, that the Trade Agreements Act did not permit the President to establish an arbitrary tariff level between the suspended rate and the earlier rate. *Yoshida* is questionable authority for exclusive Customs Court jurisdiction in the present case because:

of the court's position, it did not note the particular relevance of either case.

The court did deem it important to distinguish *Consumers Union v. Kissinger*,[55] a case in which the District of Columbia District Court assumed jurisdiction over an action challenging the legality of "Voluntary Restraint Agreements" negotiated by the Secretary of State with Japanese steel exporters. The appellate court argued that since the trade agreements under attack in *Kissinger* were construed by that court as "not legally binding" and thus not subject to implementation by the Customs Service, there was no occasion for the protest prerequisite to Customs Court jurisdiction.[56] Because the case could not be raised before the Customs Court, district court jurisdiction was proper. However, in concluding, in the instant case, that exclusive jurisdiction over the action lay with the Customs Court, the appellate court made no mention of Consumers Union's alternative contention that Customs Court jurisdiction was precluded by both the inability of consumer groups to file a protest with an appropriate customs official and the Customs Court's own lack of authority to grant equitable relief.

The district court's ruling on the merits, if ultimately sustained, would establish section 204 as an unparalleled delegation of Congress' authority to regulate foreign commerce.[57] Deliberate judicial restraint in the face of an unclear, contingency-laden statute might justify such a result, but the court seemed to develop its decision as though the statute were unambiguous.

The court properly eschewed the mystification of presidential foreign relations authority as advocated by the Committee in support of its motion for judgment on the pleadings.[58] Yet the court's determination that unless Congress unmistakably limits its discretionary authority the Executive may exercise unfettered discretion when acting pursuant to congressional

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(1) it involved a tariff surcharge rather than import quotas, and (2) the President's authority in *Yoshida* was derived from the Tariff Act of 1930, which explicitly provides for Customs Court review.

[54] 373 F. Supp. 568 (Cust. Ct. 1974), *aff'd*, 510 F.2d 376 (C.C.P.A. 1975). Plaintiff in *Western Dairies* protested an action by the Customs Service placing an imported item within a category restrained through a presidential proclamation. The relevance of *Western Dairies* to the present case is doubtful; plaintiff there did not challenge the President's authority to restrain the imports in question, but rather alleged that the customs service had mistakenly classified an item as within the restricted category.

[55] 506 F.2d 135 (D.C. Cir. 1974).

[56] *See* Note, note 20 *supra*.

[57] Comparison of the proposed interpretation of section 204 with the procedural provisions of the Trade Act of 1974 is instructive. Sections 201-203 of that Act, 19 U.S.C. §§ 2251-2253 (Supp. IV 1974), require a prior finding by the International Trade Commission that "increased imports have been a substantial cause of serious injury or a threat thereof with respect to an industry" before the President can act to restrict imports.

[58] *See* note 45 *supra*.

delegation of authority in any sphere related to foreign affairs, ultimately relies on the same sort of mystification. There seems to be no reason to fear that the "domestic market disruption" standard sought by Consumers Union would in any way affect the Committee's exercise of foreign relations activities. The finding of "domestic market disruption" would operate as a threshold determination, one made prior to the initiation of negotiations or the imposition of binding import restraints, that some rational justification for proposed quotas exists in view of domestic economic circumstances.[59] Subsequent consideration of international political or economic factors by the Committee, to determine the appropriate timing or precise extent of restraints to be imposed, would not be inhibited. Should emergency quotas become necessary to protect national security or to relieve a severe balance of payments deficit, other statutory grants of authority are already available.[60]

Moreover, the court was free to fashion a remedy so limited as to preclude entirely any interference with "foreign relations" considerations. The required finding could have been restricted to a simple yes-or-no determination of market disruption by the Committee. But the court apparently felt that any series of executive actions which included negotiations with foreign nations or the weighing of factors extrinsic to domestic impact, fell within the category of "foreign relations" activities and carried with it a presumption of extraordinary executive discretion. This notion is acceptable if some concurrent, inherent executive power to regulate foreign commerce is triggered whenever foreign relations activities occur. But in rejecting the Committee's motion for judgment on the pleadings, the court specifically denied that executive action pursuant to a congressional delegation of authority could ever be characterized as proceeding from the President's inherent powers in the "foreign relations" sphere.[61]

When Congress enacted section 204, it was clearly concerned with the threat of "cheap Japanese imports" disrupting domestic textile markets.[62] In its cursory treatment of the legislative history behind section 204 the only evidence the district court could find to confirm its analysis of section 204 was a remark by Senator Cotton, who was supporting a 1962 amendment to section 204, that the President's power is "unbridled."[63] But Cotton, who like most Senators could not foresee the day when Presidents might be more protectionist than Congress, was referring to the President's

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[59] Complaint, *supra* note 6, at 9-10.

[60] Under the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1970), the President can restrain imports threatening the national security. The Trade Act of 1974 provided the President the means to impose an import surcharge where imports contribute to a serious balance of payments deficit. 19 U.S.C. § 2132(a) (Supp. IV, 1974).

[61] *See* note 12 *supra*.

[62] *See* 102 CONG. REC. 7436 (1956). *See* note 25 *supra*.

[63] 102 CONG. REC. 8522 (1962).

power to *refrain* from acting under section 204, despite compelling domestic need.[64] The court's implication that Congress, in its wisdom, desired that the President be free to impose costly and cumbersome import quotas for "foreign policy" purposes is unfounded in the legislative history of section 204.

The district court was correct in finding that Executive actions which qualified for the "foreign affairs" exemption from the APA were generally coextensive with those proceeding from the President's foreign relations powers. As indicated earlier, a functional analysis of the Committee's procedures reveals that the requirement of a prior finding of "domestic market disruption" would not inhibit or unduly burden the activities of the Executive. Furthermore, the APA allows suspension of its publication requirements when there is some special need for secrecy or hasty decision-making.[65]

Turning to the opinion of the court of appeals, its advice that ". . . if anyone wishes to challenge the Committee's action, he can do so as other challenges of that nature are made, i.e., as an importer or as an American manufacturer, producer or wholesaler, bringing textiles into the United States,"[66] is of little solace to a consumer group. This limitation effectively denies consumers any forum to challenge the administration of import quota programs, even though such programs cost consumers millions of dollars each year in higher prices.[67]

Admittedly Congress would be well-advised to amend the Tariff Act of 1930 to allow consumer groups to protest customs determinations; but this deficiency in the customs law should not preclude assumption of jurisdic-

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[64] This interpretation is supported by examining the remarks made by Senator Cotton immediately following the sentence quoted by the court:

> I cannot forecast what interpretation may be given the provisions of this bill or the law it amends by the President's legal advisors, or should the occasion arise, by the courts. However, it seems to me from reading this section of the law, that the President in securing a reduction of imports in one category could, in the same agreement, and as a consideration for the concession, relax import restrictions in other categories.
>
> Let me say frankly that I find this aspect of the bill disquieting.

102 CONG. REC. 8522 (1962).

Cotton, a fervent supporter of textile import quotas, apparently feared that President Kennedy might, during international negotiations, trade off textile restrictions for agricultural quotas (the latter also under the President's control through section 204). Cotton's fears were probably motivated by two substitute amendments to section 204 offered by Senators Mundt and Humphrey which would have encouraged the President to obtain restrictions on certain agricultural products.

[65] 5 U.S.C. § 553(d) (1970).

[66] 561 F.2d 874.

[67] The General Accounting Office estimates that textile import quotas cost consumers $356,000,000 in higher prices during 1972 alone. GENERAL ACCOUNTING OFFICE, ECONOMIC AND FOREIGN POLICY EFFECTS OF VOLUNTARY RESTRAINT AGREEMENTS ON TEXTILES AND STEEL, 26 (Mar. 24, 1974).

tion by a court where, as here, no other forum is available.

Moreover, the conclusion of the court of appeals that this action comes within the exclusive subject matter jurisdiction of the Customs Court is highly questionable. Were Consumers Union challenging a substantive determination by the Committee that imports from a given country should be restricted, the action would clearly relate to the exclusion of goods by the Customs Service and jurisdiction would reside with the Customs Court alone. But here Consumers Union was alleging that the Committee had exceeded its authority by failing to adopt procedures before any substantive determination to negotiate or impose import quotas was made.

Finally, no precedent is available for placing within the exclusive jurisdiction of the Customs Court an action alleging violations occurring prior to any exclusion of goods, and which seeks relief beyond the powers of the Customs Court by a group which cannot protest determinations of the Customs Service. The decision by the court of appeals constitutes a refusal to exercise the court's mandated responsibility of judicial review.

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