THE 1984 "COUNTRY OF ORIGIN" REGULATIONS FOR TEXTILE IMPORTS:
ILLEGAL ADMINISTRATIVE ACTION UNDER DOMESTIC AND INTERNATIONAL LAW?

I. INTRODUCTION

President Reagan called for more stringent customs regulations for textiles and textile products in May, 1984 to stem the flow of such products into the United States. The Administration claimed that the influx of textile products from the developing countries into the United States increased twenty-five percent in 1983 and forty-one percent in the first part of 1984. The President attributed part of the increase of these imports to the circumvention of current customs regulations by major exporting nations. He planned to prevent such evasion by toughening the classifications which identify the national origin of textile imports.

Pursuant to the President's request, the Department of Treasury published interim regulations in August, 1984, to redefine the customs classifications for textile products. The new measures were to take effect on September 7, 1984 after a period of public in-

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1 Exec. Order No. 12,475, 49 Fed. Reg. 19,955 (1984). This order directs the Department of Treasury to institute measures within 120 days of the May 11, 1984 effective date of the Executive Order.

2 Affidavit of Walter C. Lenahan, Deputy Assistant Secretary for Textiles and Apparel, International Trade Administration, United States Department of Commerce and Chairman of the Committee for the Implementation of Textile Agreements (CITA), at 4, 5. This quote was cited in Mast Industries, Inc. v. Regan, 596 F. Supp. 1567, 1571 n.4 (Ct. Int'l Trade, 1984). About 27% of the total export of manufactured products from the non-oil developing countries consists of textile exports. Of the total amount of manufactured products which the developing countries export, 29% enter the developed countries. Das, The Gatt Multi-Fibre Arrangement, 17 J. WORLD TRADE L. 95 (1983).

3 See supra note 1, at 19,955.

4 The President's order came partly as a result of the November, 1983 "Lenahan Report." A special interagency task force chaired by Walter C. Lenahan drafted a report to the President recommending changes in a number of Customs Service procedures. President Reagan Expects to Implement Part of "Lenahan Report" Recommendations Soon, 9 U.S. IMPORT WEEKLY (BNA) No. 31, at 968 (May 9, 1984).


6 Id. at 31,248.
spection. Ultimately, the Administration yielded to mounting pressure from domestic retailers and major exporting countries to postpone the enforcement of these new import classifications until October 31, 1984, for certain classes of goods. The Customs Service adhered to the deadline and the regulations are now in effect.

The interim measures specifically utilize a “country of origin” classification system to determine whether textile products are subject to any of the international treaties establishing quota limits. Under the new regulations, a nation will qualify as the “country of origin” if an article “is wholly the growth, product, or manufacture of that foreign territory or country or insular possession.”

The previous regulations gave little guidance to importers as to how the Customs Service would determine an imported product’s origin. The new more specific definition will greatly alter the filling of the major manufacturing countries’ quota limits and will ultimately reduce the number of textile products imported into the United States.

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7 A group of twenty retail companies, including Sears-Roebuck, K-Mart Corp., J.C. Penny, Inc., Associated Dry Goods Corp., and Tandy Corp., and eight national retail trade associations joined to form the Retail Industry Trade Act Coalition (RITAC). RITAC’s goal was to challenge the validity of the Administration’s calls on textile products. Retail Coalition Formed To Promote Fewer Trade in Textiles and Apparel, 1 Int’l Trade Reporter (BNA) No. 2, at 52 (July 11, 1984). The Court of International Trade dismissed RITAC’s challenge to the interim measures in a case decided in conjunction with the Mast Industries decision.

8 A group of Third World nations formed an umbrella group in Geneva to move current textile agreements back toward the free trade ideals of GATT. This group consists of Colombia, Macao, South Korea, China, Mexico, Hong Kong, India, and Pakistan. Third World Textile Producers Bank Together to Protect Their Trade Move Back Under GATT, 1 Int’l Trade Reporter (BNA) No. 6, at 148 (Aug. 8, 1984). Hong Kong has gone further in pressuring the United States to lift the new import regulations. The Hong Kong Knitwear Association called for a voluntary boycott of American cigarettes. This action involved a 47 million dollar business for the United States. Customs Service Announces Partial Delay in Implementing Country-of-Origin Rules, 1 Int’l Trade Reporter (BNA) No. 9, at 228 (Aug. 29, 1984).

9 On August 23, 1984, the Customs Service announced that the enforcement of the new regulations would be postponed until October 31, 1984, for textile products contracted for prior to the August third announcement. Customs Regulations; Amendments Relating to Textiles and Textiles Products; Exception to Effective Date, 49 Fed. Reg. 34,199 (1984) (to be codified at 19 C.F.R. Parts 6, 12, 18, 19, 141, 143, 144 and 146). The publication states the postponement was to alleviate hardships for persons who had contracted for merchandise before the interim measures.

10 Customs Regulations Amendments, supra note 5.

11 Id. at 31,248 (to be codified at 19 C.F.R. § 12.130(a)).

12 The previous regulations were codified at 19 C.F.R. § 12.

13 The Washington-based National Retail Merchants Association (NRMA) claimed that the new regulations would affect at least $500 million worth of textile products. In particu-
When an article originates in whole or in part in another foreign country, the text of the new regulations set forth two criteria for the exporting country to be classified as the "country of origin." First, an article must have undergone a substantial manufacturing process in the exporting nation as compared to the processing undertaken in the original foreign country. Second, if such a manufacturing operation is found, the product must have undergone a transformation so substantial that a new and different article has resulted. The interim measures impose documentation requirements for the purpose of determining whether the "country of origin" classifications of a textile product complies with the above tests.
The new regulations impose other obligations on importers of textile products. First, importers must supply Customs officials with sufficient evidence of the value and quantity of goods which are transported in-bond. Also, special entry and visa requirements will be enforced for separate shipments of textiles and textile products to one individual from the same source on the same day. Finally, when importers withdraw textile products from bonded warehouses for consumption, they must not have "manipulated" the goods after importation to frustrate or circumvent the customs process.

The President claimed the basis of his authority for these new regulations was section 204 of the Agricultural Act of 1956. Sec-
tion 204 is a broad delegation by Congress enabling the President to negotiate international agreements\(^2\) to limit the importation of agricultural products into the United States. The section also authorizes the President to issue regulations in order to "carry out" current international agreements.\(^3\) The Reagan Administration claimed that the new regulations were the type authorized by section 204 to implement the Multi-Fibre Arrangement (MFA)\(^2\) and other bilateral textile agreements.\(^2\)

In formulating the new customs regulations under section 204, the Reagan Administration had to consider the guidelines for rule-making set forth in the Administrative Procedure Act (APA).\(^2\) The APA requires a prior notice and comment session for the public\(^2\) when the Administration implements new rules. The President failed to provide such formalities\(^2\) but asserted that the new regulations were a "foreign affairs function"\(^3\) of the Administration and, thus, were exempt from public scrutiny by the APA.

This Note discusses the legality of the President's "country of origin" regulations within section 204 of the Agricultural Act of 1956, the MFA, and the APA. It examines the nature and the extent of the authority emanating from each of these legal bases to the President. It also questions the legality of the President's actions as well as the foundations upon which these actions were based.

II. BACKGROUND

A. President's Authority in International Trade: Section 204 of the Agricultural Act of 1956

The United States Constitution initially vests each branch of

\(\overset{18}{23}\) For example, see the Multi-Fibre Arrangement, Dec. 20, 1973, 25 U.S.T. 1002, T.I.A.S. No. 7840 [hereinafter cited as MFA].
\(\overset{24}{3}\) Section 204, supra note 22.
\(\overset{25}{4}\) MFA, supra note 23.
\(\overset{26}{5}\) The United States has negotiated 28 bilateral restraint agreements under the MFA and eight similar agreements with non-MFA signatories. Customs Regulations Amendments, supra note 5, at 31,248. For examples of these agreements, see infra note 73.
\(\overset{28}{7}\) See infra notes 100-04.
\(\overset{29}{8}\) The Court of International Trade ruled that the Administration failed to provide appropriate notice and comment sessions in Mast Industries, Inc. v. Regan, 596 F. Supp. 1567 (Ct. of Int'l Trade 1984).
\(\overset{30}{9}\) Customs Regulations Amendments, supra note 5, at 31,251. The "foreign affairs function" under § 553(a)(1) of the APA works as an exemption to normal APA notice procedures. See Mast Industries, 596 F. Supp. at 1583.
government with a unique scope of authority. In addition to Congress' legislative power, the Constitution establishes Congress' authority in the field of international trade. It directs Congress to "lay and collect Taxes, Duties, Imposts, and Excises" and to "regulate Commerce with foreign Nations." Although the Constitution does not give the President an inherent power over international trade, the President possesses several important sources of influence in the trade arena.

First, the Constitution authorizes the President to make treaties pursuant to a two-thirds approval by the United States Senate. Standard practice in the Executive Branch also allows the President to enter into "executive agreements" with foreign nations. In addition, by the very nature of the Presidency, he has the authority to act in foreign affairs. Finally, Congress can delegate its

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31 "The executive power shall be vested in a President of the United States of America." U.S. Const. art. I, § 2, cl. 1; "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1, cl. 1; "The judicial power of the United States, shall be vested in one Supreme Court, and in . . . inferior courts." U.S. Const. art. III, § 1, cl. 1.

32 U.S. Const. art. I, § 8, cl. 1.

33 U.S. Const. art. I, § 8, cl. 3.

34 The court in United States v. Yoshida International Inc., 526 F.2d 560, 572 (C.C.P.A. 1975), ruled that "(i)t is . . . clear that no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency." (emphasis in the original).

35 U.S. Const. art. II, § 2, cl. 2.

36 Although the Constitution does not explicitly give this power to the President, the Supreme Court has confirmed the President's execution of such executive agreements. See B. Altman & Co. v. United States, 224 U.S. 583 (1912) (Reciprocal commercial agreement between the President and France was a valid agreement and met the requirements of a "treaty" under § 3 of the Tariff Act of 1897); United States v. Belmont, 301 U.S. 324 (1937) (President's negotiations with the Soviet Union were within the authority of the President without advice and consent of the Senate as in the case of a treaty under the Constitution). To define the difference between an executive agreement and a treaty, the Department of State wrote in 1964:

The basic distinction between executive agreements which can be concluded by the President under his constitutional authority and those which require Congressional consent or approval lies in whether the subject matter and its treatment fall wholly within the authority of the President as Commander-in-Chief of the armed forces and Chief Executive in the conduct of foreign relations, or whether they fall partly within the powers delegated to Congress by the Constitution. The vast majority of executive agreements are in fact made pursuant to legislation enacted by Congress.


37 United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936). The court, in recognizing the President's authority under a joint resolution delegated from Congress, also considered the President in his absolute role as the sole organ of the federal government in the field of international relations. This role is not based on a Congressional delegation but is exercised within the boundaries of the Constitution.
constitutionally given legislative authority in the international trade area to the Executive Branch. Section 204 of the Agricultural Act is an example of a Congressional delegation of power to the President. A brief survey of previous court actions on Congressional delegations is necessary to analyze properly the constitutionality of section 204.

The late nineteenth century and the early twentieth century decisions of the Supreme Court adopted the delegation doctrine, a principle prohibiting Congress from delegating legislative power to the President. The Supreme Court made its only invalidations during this period in *Panama Refining Co. v. Ryan* and *Schechter Poultry Co. v. United States.* The Court ruled in *Schechter Poultry Co.* that the Congressional standard of "fair competition" failed to provide the President with sufficient guidelines and the delegation was, thus, an unconstitutional delegation of legislative power.

In the years following *Ryan* and *Schechter Poultry Co.*, the courts considerably relaxed their strict review of Congressional delegations. Standards such as "fair and equitable" and "so far as practicable" were held to be acceptable administrative guidelines. In *Amalgamated Meat Cutters v. Connally,* the President under

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39 Typical of this attitude was the Supreme Court's decision in *Field v. Clark,* 143 U.S. 649, 692 (1892). It stated "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

40 293 U.S. 388 (1935). In this case, Congress empowered the President under the National Industrial Recovery Act (NIRA) to prohibit the transportation in interstate commerce of certain types of petroleum. The Court set forth specific factors it would consider in determining the constitutionality of such a delegation: i) whether Congress has declared a policy for the delegatee to follow; ii) whether Congress has set up standards to guide and limit the Presidential action; and iii) whether Congress has required a finding by the President before exercising the delegated power. The court ultimately held that the section of the NIRA at issue failed to provide sufficient standards limiting the President in his actions under the Act.

41 295 U.S. 495 (1935).

42 Justice Cardozo, who found sufficient standards in his *Ryan* dissent, considered the lack of standards in *Schechter Poultry Co.* as "delegation running riot." Id. at 553.


44 337 F. Supp. 737 (1971). Although the power delegated here was very similar to that in *Yakus,* note that the President was not acting in a war-time setting.
the Economic Stabilization Act of 1970 imposed a ninety day price and wage freeze. Even though Congress gave no guidelines specifying when the President should act, the court upheld the delegation. This decision essentially discarded any requirement of limiting standards in further delegations to the President.  

The past decade has witnessed a trend toward the revitalization of the delegation doctrine. The court in *National Cable Television Association v. United States* implied that "the requirements of *Schechter*" were still obstacles to overcome. Most notable is Justice Rhenquist's concurrence in *Industrial Union Department v. American Petroleum Institute* arguing that a section under the Occupational Safety and Health Act was an unconstitutional delegation of legislative power. Rhenquist asserted that the language of the section "gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line."  

The courts generally have upheld Congressional delegations of authority to the President in the area of international trade as constitutional. The court in *Star-Kist Foods, Inc. v. United States* adopted a two-prong test to determine the validity of the President's power under the Trade Agreements Act of 1934. First, Congress had to state a policy or an objective for the President to execute, and then it had to establish a standard or intelligible principle that clarified when action was proper. The court found that the Act passed the rigors of this test and affirmed the President.

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*5 Professor Schwartz, in examining the *Amalgamated Meat Cutters* decision, stated that "[u]nder the court's approach, the requirement of a standard has become a vestigial euphemism, virtually shorn of practical meaning." B. SCHWARTZ, ADMINISTRATIVE LAW § 2.8, at 48 (1984).


*47* 448 U.S. 607 (1980).

*49* When toxic substances are concerned, § 6(b)(5) of OSHA directs the Secretary to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." When the Secretary determines that toxic material is a carcinogen, § 6(b)(5) requires him "to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the regulated industries." *Id.* at 607.

*49* *Id.* at 675.

*49* 275 F.2d 472, 480 (C.C.P.A. 1959).

*51* The court borrowed this "intelligible principle" concept from *Hampton & Co. v. United States*, 276 U.S. 394 (1928). In determining the constitutionality of the Tariff Act of 1922, the Supreme Court ruled in that case that if "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.
dent's reduction of duties on tuna pursuant to its authority.\textsuperscript{52}

Under section 204 of the Agricultural Act,\textsuperscript{53} Congress provides the President with two means by which he can formulate United States trade policy. First, "whenever he determines such measures appropriate," the President may negotiate multilateral and bilateral textile agreements. Such agreements limit the importation of textiles and textile products into the United States which threaten domestic markets. Second, section 204 directs the President to enforce the textile agreements by promulgating regulations governing the entry or withdrawal of imports in the customs process.\textsuperscript{54}

The President acted under the second part of section 204 when he instituted the new regulations. The legislative history of the section\textsuperscript{55} sets forth the method which the President should follow when he institutes regulations under this part of the section. First, the President is to enter into negotiations with the exporting countries which he has reason to believe are damaging United States markets. Only when these negotiations fail to resolve a dispute should the President utilize the section's authority to impose measures such as the present "country of origin" rules.\textsuperscript{56}

As originally enacted, section 204 of the Agricultural Act of 1956\textsuperscript{57} gave the President authority to regulate imports only from countries which were parties to agreements concluded under the authority of the section. In 1962, Congress broadened the President's authority under section 204 to include control over goods from countries not parties to the textile agreements negotiated

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\textsuperscript{52} See Consumers Union of the United States, Inc. v. Kissinger, 506 F.2d 136 (1974). In that case, the court further delineated the President's authority in the field of international trade. It stated that the President, without a proper delegation from Congress, may not alter tariffs, issue commands, delay entry of goods into the country, or impose mandatory import quotas.

\textsuperscript{53} Section 204, supra note 22 and accompanying text.

\textsuperscript{54} Id.


\textsuperscript{56} Id.

\textsuperscript{57} The entire text of the original bill was as follows:

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 warehouse of any such commodity, product, textiles or textile products to carry out any such agreement.

Congress enacted this amendment to curtail the influx of foreign goods during the Kennedy Administration. The President's amended authority under section 204 was a crucial issue in American Association of Exporters and Importers v. United States (AAEI). In this case, the President instituted quantitative restraints and requested consultations with respect to textile imports from China, a non-signatory to the MFA. The plaintiff trade association claimed, first, that the Congressional delegation of power under section 204 was unconstitutional, and, second, that the CITA actions pursuant to section 204 were ultra vires. The court ruled that since foreign and domestic policy considerations overlapped, a delegation as broad as section 204 is not unique and does not violate the delegation doctrine. Furthermore, the court stated that, when executing United States trade policy, the President need only point to the proper authorizing provisions and take action rationally related to that provision's objective.

The court's decision served as controlling precedent in the first challenge to the legality of the President's 1984 "country of origin" regulations. As in AAEI, American retailers in Mast Industries v. Regan contended that section 204 was an unconstitutional dele-

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61 China and the United States negotiated a bilateral textile treaty under section 204 which lapsed on December 31, 1982. Agreement Relating to Trade in Cotton, Wool and Manmade Fiber Textiles and Textile Products, Sept. 17, 1980, United States-China, 32 U.S.T. 2071, T.I.A.S. No. 9820. The two countries, after great efforts to extend the treaty, reinstated the treaty on August 19, 1983. CITA instituted the disputed quantitative restraints pursuant to section 204 and in compliance with article eight of the MFA.

62 The President implements his import policies through the Committee for the Implementation of Textile Agreements (CITA). President Nixon, in 1972, established this body to restrain the actual entry of goods which were in violation of customs regulations. Exec. Order No. 11,651, 37 Fed. Reg. 4699 (1972). The current chairman of CITA, Walter Lenahan, acts through the Commissioner of Customs when confiscating the affected goods.

63 See supra note 39.

64 The court stated that the MFA's goal of orderly world trade in textile products was frustrated by the sudden influx of Chinese textile imports. CITA's actions, therefore, were justified under the direction of section 204 "to carry out" the MFA. The court also ruled that the plaintiff trade association could not question CITA's findings of a market disruption for they were beyond judicial scrutiny. American Association of Exporters and Importers v. United States, 583 F. Supp. 591 (Ct. Int'l Trade 1984).

gation of legislative authority to the President. The plaintiffs also claimed that the customs regulations violated the MFA’s consultations provisions and, thus, did not “carry out” the agreement.

The *Mast Industries* court ruled that section 204, as construed in *AAEI*, met the requirements set forth in *Star-Kist Foods, Inc. v. United States* for a valid transfer of authority to the President. The court also interpreted the “common purpose” of section 204, the MFA, and the bilaterals as the limitation on imports of textiles and textile products. Since the President’s actions fell within this “common purpose,” the court found the regulations were legitimately founded.

**B. The Applicability of International Textile Agreements**

When the Administration alters existing United States textile customs policy, it must abide by the Multi-Fibre Arrangement and the bilateral agreements concluded under the MFA. The Executive Branch negotiated the MFA under the authority of section 204 and within the framework of the General Agreement on Trade and Tariffs (GATT). GATT provides for side agreements, such as the MFA, to address specific areas within the international trade law arena.

The stated objective of the MFA is the expansion of world trade through an orderly handling of disputes between its members. In an effort to avoid conflict, article four of the MFA encourages its members to conclude bilateral treaties directed toward the reduction of market disruptions. Using this provision, the United States has negotiated some twenty-eight bilateral textile treaties.

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66 See *infra* note 74 and accompanying text.
67 *Star-Kist Foods*, 275 F.2d at 480.
70 GATT emerged from World War Two to be the central international trade organization. It has served as a sponsor for a series of major tariff and trade negotiations as well as a forum for discussion and consultation on international trade policy. The GATT Agreement encompasses the text of the 38 “General Articles,” detailed commitments on tariffs composing the “Tariff Schedules,” and a large number of amendments, protocols, and side agreements. See generally J. Jackson, *Legal Problems of International Economic Relations* 396-440 (1977) for an overview of the GATT Agreement.
71 MFA, *supra* note 23, art. 1, para. 2.
72 *Id.* art. 4.
The orderly handling of disputes under the MFA is also achieved by the consultative mechanism set forth in article three.\(^7\) A country which determines that another country is disrupting its domestic textile markets\(^7\) must first request consultations with the offending country to seek resolution of the dispute. Then, the two nations are under an obligation to try to negotiate a solution. If no mutually acceptable solution is forthcoming, then and only then can the requesting member unilaterally impose restraints against the exporting country.\(^7\) In certain emergency situations, the aggrieved nation may immediately institute restraint measures. The member must, however, concurrently seek consultations with the offending country.\(^7\) The MFA establishes quantitative specifications to which the imposing nations under either situation must adhere.\(^7\)

\(^7\) MFA, supra note 23, art. 3, para. 2. The consultative mechanism provides:

If, in the opinion of any participating importing country, its market in terms of the definition of market disruption in Annex A is being disrupted by imports of a certain textile product not already subject to restraint, it shall seek consultations with the participating exporting country or countries concerned with a view to removing such disruption . . . The importing country's request for consultations shall be accompanied by a detailed factual statement of the reasons and justifications for the request, including the latest data concerning elements of market disruption.

\(^{75}\) MFA, supra note 23, art. 3, para. 5. The following factors are listed as those which constitute a market disruption:

(i) a sharp and substantial increase or imminent increase of imports of particular products from particular sources. Such an imminent increase shall be a measurable one and shall not be determined to exist on the basis of allegation, conjecture, or mere possibility arising, for example, from the existence of production capacity in exporting countries.

(ii) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country. Such prices shall be compared both with the price for the domestic product at comparable stage of of commercial transaction, and with the prices which normally prevail for such products sold in the ordinary course of trade and under open market conditions by other exporting countries in the importing country.

\(^{76}\) Id. art. 3, para. 6.

\(^{77}\) Id. art. 3, para. 6.

\(^{78}\) Annex B sets forth these quantitative specifications concerning the following: a) the base level - the annual level of export restraints on the product; b) the growth rate - the increase of an import restriction if it is in effect for more than one year; c) and the flexibility
The President failed to use the MFA's consultative mechanism when he imposed the new "country of origin" rules. He also neglected to lodge a complaint with the TSB charging a violation of the new circumvention provisions in the MFA's Protocol of 1981. The circumvention provisions direct administrative action to adjust negotiated quotas when products find their way through an intermediary nation. In order to implement this procedure, products must carry evidence regarding their "true" country of origin.

C. Status of Textile Customs Classifications Prior To President Reagan's 1984 Actions

The classifications for "country of origin" in the United States have evolved from two major decisions. The Customs Administration issued a 1980 ruling to clarify its policies for textile importers which held that the assembly of a garment in one country from parts produced in another country constitutes a substantial transformation of the article. The country where the assembly of the parts takes place is the "country of origin" for quota purposes.

Two years later, the Court of International Trade in Cardinal Glove Co. v. United States reiterated the Customs Administration's ruling on "country of origin" classifications. In this case, front and back glove panels were woven and cut in Hong Kong and then shipped for assembly to Haiti. The court ruled that the assembly in Haiti substantially transformed the gloves into a product clearly distinguishable from the component strips. The United States was, therefore, to apply the quota requirements against Haiti rather than Hong Kong.

- the adjustment of the restraint levels between the products and the years that the restrictions are in effect. Id.
- No definition is given for the phrase "country of origin" in the Protocol of 1981. It only provides that where no mutually acceptable solution is reached between members, any participant may refer the matter to the TSB. Id.
- Id. at 741. The ruling held that the country where merchandise first becomes susceptible to its final tariff classifications is only a factor for consideration and not determinative in ascertaining the "country of origin."
- A similar case, Uniroyal, Inc. v. United States, 3 Ct. Int'l Trade 220, 542 F. Supp. 1026 (Ct. Int'l Trade, 1982), was decided by the same court one month before the Cardinal Glove case. In Uniroyal, the court ruled that the attachment of a rubber outsole to a shoe upper did not constitute a substantial transformation of the article. This determination was used to identify the ultimate purchaser for purposes of complying with the marking procedures
One frequent issue in customs disputes is whether a market disruption has actually transpired. The court in *Associated Dry Goods v. United States* held that a country must be able to prove with specificity that the threat of a market disruption actually occurred. The Administration had issued import restrictions on wool sweaters from China after the United States had sought consultations under the United States-Chinese bilateral treaty on textiles.

With Annex A of the MFA as the standard, the court ruled that insufficient proof existed to support the finding of a market disruption in the domestic textile market.

A major shift in recent United States customs policy occurred in December of 1983 when CITA instituted new limits on non-quota textile products from certain major exporting countries. The reaction to the new quota calls was immediately negative. China, who had just joined the MFA, accused the United States of violating articles one and three of the treaty. Hong Kong made similar claims against the United States and succeeded in forcing the United States to withdraw its call of a certain category of Hong Kong textiles.

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See supra note 61 and accompanying text.

See supra note 73 and accompanying text. Section 8(a) of the then current textile agreement did not define "market disruption" but the parties in the case agreed to abide by paragraphs 1 and 2 of the MFA's Annex A.

The court found that the United States had failed to fulfill the second requirement of Annex A, that of comparing domestic merchandise with "similar goods of comparable quality." Criticism of the United States' procedure in establishing market disruptions has recently come from within the government itself. A General Accounting Office (GAO) report, "Implementation of Trade Restrictions for Textiles and Apparel," argued that the data the Administration uses to determine market disruptions is often outdated. CITA uses production, employment, market share, and import volume statistics as its basis of finding injury to domestic markets. The GAO report revealed that the Administration would determine the state of an industry through the use of old domestic production figures with new import statistics. Such analysis could lead, the report suggests, to a misreading of the actual market situation. GAO Report Says Textile Restrictions System 'Generally Adequate', Not Data, 9 U.S. IMPORT WEEKLY (BNA) No. 8, at 316 (Nov. 23, 1983).

48 Fed. Reg. 5589 (1983). The government, for the first time, established specific percentages for triggering calls on non-quota apparel imports. The countries affected were India, Hungary, Pakistan, the Philippines, Mexico, South Korea, and Taiwan.

EC, Developing Countries Criticize Recent U.S. Efforts to Tighten Textile Restrictions, 9 U.S. IMPORT WEEKLY (BNA) No. 16, at 570 (Jan. 25 1984).

Hong Kong achieved this outcome by threatening to take the United States before the Textile Surveillance Board. Hong Kong to Complain to GATT Textiles Board About Two U.S. Calls on Imports, 9 U.S. IMPORT WEEKLY (BNA) No. 27, at 875 (Apr. 11, 1984). The United States two months later instituted two additional calls on categories 637, swimsuits...
Criticism of the new textile policy also came from outside the major manufacturing countries. The European Community members feared the inundation of their markets by textile products not allowed to enter the United States.\(^9\) The newer and smaller exporting countries claimed that the new calls were overly harsh on them and, thus, violated the MFA's goal of preferential treatment for developing countries.\(^9\) They based their claims on the reality that the smaller exporting nations were often the last to export and usually would trigger the call in a product category.\(^9\)

The United States continued tightening quantitative restrictions under existing bilateral treaties during the Summer of 1984.\(^9\) The qualitative changes of the President's new custom's classifications followed in the Fall as a new type of obstacle to the importer. American retailers and importers were suddenly faced with new requirements which significantly altered their business procedures.\(^9\)

D. Procedural Guidelines Necessary for New Customs Regulations

When instituting new regulations, the Customs Service must comply with the requirements of the Administrative Procedure Act (APA).\(^9\) The APA is a body of procedural guidelines which sets

and wash suits, and 652, man-made fibers underwear, against Hong Kong. This time Hong Kong brought formal action before the TSB. In its first decision directing a country to reverse a call against another country, the TSB ordered the United States to lift its call on category 637. *GATT Textiles Board Rules* U.S. Violated MFA Provision in Limiting Hong Kong Shipments, 9 U.S. IMPORT WEEKLY (BNA) No. 37, at 1035 (May 23, 1984).

\(^{93}\) *EC, Developing Countries Criticize Recent U.S. Efforts to Tighten Textile Restrictions*, 9 U.S. IMPORT WEEKLY (BNA) No. 16, at 570 (Jan. 25, 1984).

\(^{93}\) MFA, *supra* note 23, art. 1, para. 3. A principal aim of the MFA is to further the economic and social development of the developing countries.

\(^{4}\) Clinton Stack of the International Business and Economic Corp. explained that this unfavorable effect on developing countries is due to a basic flaw in the restrictions. The measures only refer to the total growth of imports in a category without making reference to the source of those imports. The restrictions, therefore, do not differentiate between the less-developed countries and the more affluent ones. *EC, Developing Countries Criticize Recent U.S. Efforts to Tighten Textile Restrictions*, 9 U.S. IMPORT WEEKLY (BNA) No. 16, at 571 (Jan. 25, 1984).

\(^{95}\) The United States requested consultations with various nations in May and June, 1984. These resulted in further restrictions on imports from South Korea, Pakistan, and Malaysia. Public Releases from United States Department of State, June 20, 1984.


\(^{97}\) *APA, supra* note 27.
forth specific steps an agency such as the Customs Service must follow in promulgating new regulations. Under section 553 of the APA, a federal administrative agency must complete two major requirements when attempting to institute new regulations. First, it must publish a general notice of the proposed rules in the Federal Register. The public notice is to include: a) a statement of the time, place, and nature of public rule-making procedures; b) reference to the legal authority under which the rule is proposed; and c) either the terms or the substance of the proposed rule or a description of the subjects and issues involved.\textsuperscript{98}

The section also calls for a period of public comment allowing interested persons meaningful participation in the rulemaking process.\textsuperscript{99} Interested parties must first submit their data or arguments with or without opportunity for an oral presentation to the agency. After the consideration of relevant facts submitted, the agency is to "incorporate in the rules adopted a concise general statement of their basis and purpose."\textsuperscript{100} In order for an agency properly to abide by the above procedures, section 553 requires a thirty day period between the Federal Register publication and the effective date of the new rules.\textsuperscript{101}

The court in \textit{Mast Industries} found that the Administration had not complied with the general notice provisions of section 553 because the August third Federal Register publication of the Customs classifications failed to state the time and place of the public rulemaking proceedings.\textsuperscript{102} Nonetheless, the court upheld the regulations by finding that they fell within an exception to rulemaking notice requirements under section 553 of the APA.\textsuperscript{103}

Section 553 exempts an agency from the rigors of its guidelines to the extent a military or foreign affairs function of the United

\textsuperscript{98} \textit{Id.} \textcircled{553}(b).

\textsuperscript{99} \textit{Id.} \textcircled{553}(c). \textit{See} \textit{Texaco, Inc. v. Federal Power Commission}, 412 F.2d 740 (3rd Cir. 1969) (Section 553 was enacted to provide the public an opportunity to participate in the rule-making process and to educate the agency promulgating the rules with the potential results of its actions); \textit{NLRB v. Wyman-Gordon, Co.}, 394 U.S. 759 (1969) (The rule-making provisions of the Administrative Procedure Act were designed for fairness and mature consideration of rules of general applicability).

\textsuperscript{100} \textit{APA, supra} note 27, at \textcircled{553}(c).

\textsuperscript{101} \textit{APA, supra} note 27, at \textcircled{553}(d). \textit{See} \textit{Rowell v. Andrus}, 631 F.2d 699 (10th Cir., 1980) (The 30 day time gap is to give affected persons reasonable time to prepare for the effective date of a rule or to take other action which the rules may prompt).

\textsuperscript{102} \textit{Mast Industries}, 596 F. Supp. at 1579. The court stated that it refused to construe the Executive Order of May 11, 1984 as sufficient notice that the Customs Service would conduct public proceedings on the proposed regulations. \textit{Id} at 1578-79.

\textsuperscript{103} \textit{Id.} at 1583.
States is involved. The legislative history of the section reveals Congress' intended use for the exception. Governmental actions which "would clearly provoke definitely undesirable international consequences" warrant the use of the "foreign affairs function" under the APA. Administrative rulemaking is not exempt from the general notice provisions unless the rules "clearly and directly" relate to a foreign affairs function.

Judicial interpretation of the exemption has come most often in the field of immigration and naturalization. The court in *Yassini v. Crosland* upheld Presidential action directing the Attorney General to take steps to deport Iranian nationals who remained in the United States in violation of the terms of their entry visas. The action by the Administration came soon after the Iranian takeover of the United States Embassy in Tehran and was, thus, a sensitive foreign policy issue. In contrast, the court in *Jean v. Nelson* ruled that the Immigration and Naturalization Service had erred in not abiding by APA procedures with its decision not to parole Haitian refugees arriving in the United States. After establishing the absence of a "definitely undesirable international consequence," the court ruled that this situation did not warrant the use of the "foreign affairs function" exemption.

The court in *Consumer's Union of the United States v. CITA* ruled on the application of the "foreign affairs" exception of the APA to customs regulations. In this case, CITA had unilaterally imposed import restrictions in violation of the MFA. Without supplying any reasoning, the court upheld CITA's actions by dismissing plaintiff's contention that the restrictions did not involve a "foreign affairs" function of the Administration.

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104 APA, supra note 27, at § 553(a)(1).
107 It is difficult to specifically state which administrative actions fall within this exemption, but Bonfield, *Military and Foreign Affairs Rulemaking Under the APA*, 71 MICH. L. REV. 221 (1972), surveys many of its uses. In addition to the immigration and naturalization areas, the exemption has been used in rules concerning the State Department's strategic foreign policy formulation and the blocking of assets to nations under United States embargoes. Id. at 261-64.
108 618 F.2d 1356 (9th Cir. 1980).
109 711 F.2d 1455 (11th Cir. 1983).
110 Id. at 1477.
112 See Recent Development, 8 GA. J. INT'L & COMP. L. 482, 487 (1978). In discussing the
In litigation over the "country of origin" classifications, the court in *Mast Industries* found that the Administration was justified in utilizing the APA exemption. The court looked to the legislative history of the "foreign affairs function" which required an action to be "clearly and directly" involved in a foreign affairs function of the government. Any action by the President to alter or even violate an international agreement, the court concluded, was "clearly and directly" a "foreign affairs function" of the Administration. 113

The plaintiffs in *Mast Industries* also claimed that the new regulations violated section 706 of the APA. Section 706 directs a court to set aside an agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The new classifications, the plaintiffs contended, did not correspond with the legal precedent establishing quota classifications and with the effective international agreements. The court ruled that the "law" under section 706 did not include the MFA since the plaintiffs possessed no justiciable rights under the agreement. 114 The court further ruled that the case precedent did not prohibit the President from instituting such measures and was, thus, not in conflict with the "law." 115

III. ANALYSIS

Congress authorizes the President to implement trade restraints under section 204 "whenever he determines such action is appropriate." 116 To determine the constitutionality of this delegation, one must check the compliance of section 204 with the test espoused in *Star-Kist Foods, Inc. v. United States.* 117 The court in

Consumers Union decision, the author analyzes the contradictory nature of the President's authority under section 204:

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. 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.

*Id.* at 487.


116 *Section 204, supra* note 22.

117 Under the analysis in *Star-Kist Foods*, Congress must 1) state a policy or objective for
Mast Industries acknowledged the rigors of this test and sought to analyze the section according to its elements. It found the section’s goal of limiting imports of textiles and agricultural commodities into the United States as satisfying the policy requirement of Star-Kist Foods. The court never addressed the existence of the “intelligible principle” element of the Star-Kist Foods analysis.

The text of section 204 fails to expressly provide such an “intelligible principle” for the President’s adherence. This broad grant of authority from Congress does not require the President to first make a finding before exercising the delegated power and does not provide standards to guide and limit Presidential action. Although Congress calls for the President to enter into negotiations before the promulgation of any regulations under the section, any such direction only serves as a recommendation. Congress did not provide explicit guidelines in the text and, thus, the President is not statutorily bound by any congressional limitations.

A result of this overly broad delegation of power to the President is evident in the court’s decision of the Mast Industries case. The goal of section 204, as expressed by the Mast Industries court, is the limitation of textile imports into the United States. This objective is evident from the wording of the bill. The court, however, stated that the MFA shares the same restrictive aim as does section 204. Since the MFA emanated from the President’s authority under the section, one would expect the agreement to share the same goal. The negotiated text of the MFA provides otherwise. The theme running throughout the agreement is one of liberalization of world trade rather than restriction.

the President to execute, and 2) establish a standard or intelligible principle that clarifies when action is appropriate. Star-Kist Foods, 275 F.2d at 480.

Mast Industries, 596 F. Supp. at 1574.

The court cites to American Association of Exporters and Importers v. United States, 7 Ct. Int’l Trade, 583 F. Supp. 591, 598 (1984), and finds the first requirement in the Star-Kist Foods test met. The court in AAEI, however, was not using the Star-Kist Foods analysis. Its decision stating that both parts of section 204 are completely free of procedural requirements would actually be in direct conflict with the second element of the test.

See supra note 55.

Mast Industries, 596 F. Supp. at 1575.

Section 204, supra note 22.

Mast Industries, 596 F. Supp. at 1575.

MFA, supra note 23, art.1, para. 2, describes the agreement’s objective as “the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textiles.” Although much of the MFA deals with procedures to limit trade in textiles in certain instances, the ultimate effect of orderly periodic restraints is the prevention of widespread trade retaliation among the member nations.
An anomaly, therefore, exists. The same authorizing legislation has produced two legal enactments whose aims conflict. This result is easy to understand if one considers the statutory language of the section. By not providing an objective test to identify when he should act, Congress gives the President unbridled and unfettered discretion to implement import limitations under section 204. With a trend toward the revitalization of the delegation doctrine, section 204 may deserve constitutional scrutiny.

Even if the delegation under section 204 is constitutional, the President's new regulations pursuant to its authority were ultra vires. He failed to abide by the sparse guidelines supplied by the legislative history of the section when he enacted the new customs classifications. President Reagan, thus, exceeded the scope of delegated authority by failing to first attempt negotiations with the appropriate countries.

Applying the legal basis of the MFA and the bilaterals to the President's interim measures demonstrates that the negotiated objectives and safeguards of the international agreements are not met. The President should have once again initiated consultations with the appropriate countries under article three of the MFA upon the threat of a significant market disruption. The only instance in which the President could have instituted these rules immediately would have been under the emergency provisions of the MFA. Even under such a situation, the MFA obliges the affected country to seek consultations concurrent with the unilateral actions. The President's actions disregarded both of these procedures of the MFA when he promulgated the new regulations.

The Reagan Administration has recently been working within the procedural framework of the MFA's bilateral textile treaties. The Administration was simultaneously seeking consultations with a number of MFA members concerning particular product categories when it instituted the new measures. The President also should have conducted such consultations before or during the introduction of the new customs classifications.

The preferential treatment of the less developed countries, another objective of the MFA, also conflicts with the new regula-

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125 See supra note 55.
126 See supra note 76.
127 See supra note 95.
128 See supra note 93. The European Economic Community has addressed the issue of origin of products with respect to developing countries in a number of Yaoundé and Lomé agreements. 4 L. SOHN, BASIC DOCUMENTS OF AFRICAN REGIONAL ORGANIZATIONS 1570, 1696,
tions. The institution of the regulations may jeopardize the manufacturing processes which are currently performed in these nations and may in turn greatly affect the economic and political well-being of the countries. A united organization of the developing countries to combat the President's measures indicates that this goal of preferential treatment may be in danger.129

The circumvention provisions negotiated by the MFA members in the Protocol of 1981 anticipate the President's concern over quota manipulation.130 Although the Protocol did not provide a sufficiently specific definition of the phrase "true country of origin," the President could have first challenged countries such as Hong Kong and China before GATT's surveillance body. Such action would have aided in defining the provisions while allowing the United States to obey its treaty obligations.

The new classifications also contradict the existing case law precedent interpreting the effective international textile agreements. The court in Cardinal Glove131 ruled that under the wording of the effective bilateral treaty with Hong Kong, the last country from which the imported products were shipped is the country used in the application of United States customs law. The new definitions for "country of origin"132 and "substantial transformation"133 would be in conflict with the terms negotiated in that treaty.

The President's measures reverse the published position that the United States Customs Service134 issued for the benefit of domestic importers. Its ruling that the assembly of garments constitutes a substantial transformation joins with the Cardinal Glove definition


129 See supra note 8 and accompanying text. The group of Third World nations opposing the new regulations condemned them as measures "discriminatory and designed to harass and restrain legitimate trade for domestic political reasons." They further complained that the regulations would have a "devastating effect" on their trade practices. Third World Textile Producers Protest U.S. Origin Rules, Countervailing Duty Petitions, 1 INT'L TRADE REPORTER (BNA) No. 7, at 180 (Aug. 15, 1984). Hong Kong industry groups claimed that the regulations will severely hurt many resourceless trading economies like Hong Kong who have few products wholly of their own to produce. Hong Kong Officials, Business Executives Complain About New U.S. Textile Regulations, 1 INT'L TRADE REPORTER (BNA) No. 8, at 207 (Aug. 22, 1984).

130 See supra notes 79, 80.


132 See supra note 17.

133 See supra notes 15, 16 and accompanying text.

as legal precedent. The President's action violates this precedent. American importers and the major exporting countries have relied on case law such as *Cardinal Glove* and the Customs' ruling for guidance in their trade practices. The *Mast Industries* court was correct in maintaining that the *Cardinal Glove* decision did not specifically prohibit new customs rules under section 204 of the Agricultural Act. *Cardinal Glove*, however, did provide the judicial basis which importers and exporting nations have followed in applying "country of origin" classifications. The *Cardinal Glove* case and the Customs Service ruling should serve, therefore, as the established "law" under section 706 of the APA.

The use of the foreign affairs exception of the APA in the promulgation of the interim measures tends to provide the President with a sweeping power at the expense of the public sector. The legislative intent behind the exception suggests that normal rule-making procedure should exclude actions which would "clearly provoke definitely undesirable international consequences." The granting of the exception in *Mast Industries* whenever the President violates an international agreement encourages the breach of such agreements for domestic purposes without necessarily provoking dire international consequences. The President will have a convenient method by which he can escape public scrutiny for policies which may be unpopular. Congress mandated public participation in rulemaking to serve as a check on the Administration; the new classifications have escaped this legislative safeguard.

IV. CONCLUSION

Many groups have accused the President of courting the United States textile industry for support during an election year. Such

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133 Michael Cartland, a representative for Hong Kong affairs at the British diplomatic mission in Geneva, stated that "[t]he practices which are changed by the new country-of-origin regulations are practices that had been administratively and juridically recognized for many years in the United States, and which indeed are internationally accepted." *Third World Textile Producers Protest U.S. Origin Rules, Countervailing Duties Petitions, 1 INT'L TRADE REPORTER* (BNA) No. 7, at 180 (Aug. 15, 1984). United States trade lawyers point out that the government is trying to put an end to a legitimate trading practice. They claim that shipping partially finished articles from one nation for completion in another nation is a normal way of doing business in the textile industry as well as in other consumer goods areas. *Id.* at 179.

136 See supra note 105.

137 Ambassador Jaramillo from Colombia stated that "[w]hat we are seeing now is protectionist pressures in the United States increasing as the election campaign goes on." *Third World Textile Producers Protest U.S. Origin Rules, Countervailing Duties Petitions, 1*
motivation may explain the rapid promulgation of the regulations outside the scope of pertinent international agreements and standard administrative procedure. The Administration first should have initiated consultations with the textile producing countries to arrive at a mutually acceptable level of imports. Also, it should have looked more closely at the effects which would result under a change of import regulations.

The new regulations also call into question the scope of the authority granted in section 204 of the Agricultural Act of 1956. The President's power under the section must be regulated in one of two ways. Either Congress must modify section 204 to restrict the promulgation of conflicting enactments, or the courts must construe the section in such a way as to prevent disharmony. The President must work within the existing framework of rule-making if the current textile agreements are to sustain any semblance of organized trade in textile products. These international agreements have sought over the past decade to liberalize world trade in textiles; the President's new customs regulations severely undermine the realization of this goal.

David Stepp