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Kocan, David R.

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A FAILURE TO CONSIDER: WHY LAWMAKERS CREATE RISK BY IGNORING INTERNATIONAL TRADE OBLIGATIONS

*David R. Kocan**

The U.S. Congress frequently passes laws facially unrelated to trade that significantly impact U.S. trade relations. These impacts are often harmful, significant, and long-lasting. Despite this fact, these bills rarely receive adequate consideration regarding how they will impact trade. Without this consideration, Congress cannot properly conduct the benefit-cost analysis necessary to pass effective laws. Failure to consider a law's unintended consequences almost guarantees poor outcomes. To remedy this problem, the U.S. Congress committee structure could be amended so that laws that impact trade are considered appropriately. However, the domestic focus of Congressional politics leaves the Legislature in a poor position to enforce stable trade policy. Thus, a Presidential Executive Order requiring agencies to consider the trade implications of rules is ultimately necessary.

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* Visiting Assistant Professor of Law, Case Western Reserve University School of Law; Managing Director, The Canada-US Law Institute.

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I. INTRODUCTION

In the early 2000s, shocking videos of cows shaking uncontrollably hit the airwaves. To the public’s horror, doctors soon discovered that humans could be infected with the deadly, irreversible disease affecting the cows by consuming infected beef. This disease was spongiform encephalopathy, commonly known as Mad Cow Disease, and the public reaction was frenzied. Despite very few actual instances world-wide of the virus in cows, trade in beef dropped dramatically—by an estimated 10% world-wide—with some countries suffering declines as high as 50%.¹ And while no infections had been detected in the U.S., Congress, responding to constituent pressure, acted swiftly in adding a Country of Origin Labeling (COOL) requirement to the 2002 Farm Security and Rural Investment Act (“Farm Act”).²

Facially, the provision addressed an agricultural health issue. In reality, the requirement’s most significant impact was to hinder trade. Accordingly, following the provision’s enactment, Canada and fifteen other countries filed disputes against the U.S. at the World Trade Organization (WTO) alleging, among other things, that the requirement violated the national treatment principle. Ultimately, while the bill did little to improve public health, it did much to harm U.S. trade relations.³

The likely impact of this provision on trade was foreseeable. As mentioned, the beef trade with countries found to have instances of Mad Cow Disease plummeted almost overnight. Despite this fact, lawmakers never seriously considered the bill’s trade implications.⁴

1. See generally Press Release, European Commission, Outcome of the Agriculture Council, 29 Jan. 2001, BSE and the Beef Market (Jan. 30, 2001) [hereinafter Press Release], available at http://europa.eu/rapid/press-release_MEMO-01-24_en.htm. See also Kathryn Tolbert, *Second ‘Mad Cow’ Case Found in Japan: Government Attempts To Reassure Public*, WASH. POST A42 (Nov. 22, 2001).

2. The Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 116 Stat. 134 (2002).

3. See John VanSickle et al., *Country of Origin Labeling: A Legal and Economic Analysis*, INT’L AGRIC. TRADE AND POL’Y CTR. 20 (2003), <http://edis.ifas.ufl.edu/pdffiles/FE/FE38400.pdf>.

4. BILL SUMMARY AND STATUS, H.R. 2646 (2001-2002), <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02646:@@C> (last visited Oct. 27, 2013) [hereinafter BILL SUMMARY].

But this Article is not about Mad Cow Disease. This Article is about the many laws, like the Farm Act, that seriously implicate trade but are never adequately vetted for their trade implications. The impact that these bills may have on trade relations should be seriously considered. U.S. commercial relations with foreign countries, valued in the trillions of dollars, often hinge on the effective implementation of trade rules.⁵ Ultimately, Congress may decide that a bill's benefits outweigh any potential violations of trade rules and harm to trade relations. Nevertheless, the odds of passing harmful legislation are much greater if Congress moves uninformed of laws' major unintended consequences in trade.

This Article analyzes several domestic and international solutions to this problem and ultimately concludes that working through Presidential Executive Order is the best approach. Section II outlines how U.S. trade law and policy are formulated and contrasts this process with that of the typical legislative and regulatory processes, which involve many entities that are not facially trade related but that might nonetheless impact trade. Section III will analyze three examples of how this dynamic plays out, looking to the Country of Origin Labeling provision of the Farm Act; the ban on Clove Cigarettes; and the Western Hemisphere Travel Initiative's passport requirements. Section IV will provide and analyze theories that might offer explanations as to why the trade implications of legislation and regulations are often overlooked. Finally, Section V will analyze several solutions at the congressional, WTO, and Executive Branch levels. This section will first analyze possible amendments to congressional House Rules. It will then turn to possible amendments to WTO rules. Finally, it will analyze two different options regarding Presidential Executive Orders. In the final analysis, this Article concludes that the best approach involves working through Executive Order because it is most likely to be adopted into law and subsequently used by lawmakers. In the end, this Article recommends issuing Executive Orders that will both enhance executive branch agencies' jurisdiction over trade matters and add trade considerations to the existing benefit-cost calculations used by agencies in promulgating regulations.

II. HOW U.S. TRADE POLICY IS MADE

Executive branch agencies⁶ and congressional committees jointly create trade policy. In the legislative and rulemaking systems there are agencies and committees that have specific jurisdiction over trade. Yet the evolving practice within the Legislative and Executive Branches has been to decentralize trade policymaking by overlapping trade jurisdic-

5. See INT'L TRADE ADMIN., U.S. EXPORTS FACT SHEET: DECEMBER 2008 EXPORT STATISTICS (Feb. 11, 2009), available at http://www.trade.gov/press/press_releases/2009/export-factsheet_021109.pdf.

6. There exist both independent agencies with legislative authority and executive agencies with executive type authority. "Administrative agency," as used in this article, refers to both independent and executive agencies.

tion across various non-trade committees and agencies with the authority to make policy decisions that substantially affect trade.⁷ This section will first outline those entities that are specifically tasked with deciding trade issues.

A. *The Legislative Branch*

The congressional trade policy function rests within the committee system.⁸ In the House of Representatives, the House Rules delegate authority over trade to the Ways and Means Committee's Subcommittee on Trade.⁹ This Committee – commonly viewed as the most powerful in the House – focuses on appropriations and revenues.¹⁰ The Ways and Means Committee's Subcommittee on Trade has jurisdiction over customs, imports, trade-related problems with market access, trade competitiveness, and export policy and promotion.¹¹ In the Senate, three committees share trade authority: the Committees on Finance; Foreign Relations; and Banking, Housing, and Urban Affairs.¹²

Each chamber's rules determine how the leader or Speaker should assign bills to committees. The House's rules first list all the standing committees¹³ and their general jurisdictions;¹⁴ the Speaker must refer a bill to each committee with jurisdiction over the bill to the "maximum extent feasible."¹⁵ The rules grant the Speaker the ability to assign bills to multiple committees.¹⁶ A similar process exists in the Senate, whereby a presiding officer assigns incoming bills to committees based on jurisdiction.¹⁷ Like the House, the Senate Rules envision the possibility of assignment to multiple committees.¹⁸

7. See STEPHEN D. COHEN, ET AL., *FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY* (2d ed. 2003).

8. DAVID HANSON, *LIMITS TO FREE TRADE: NON-TARIFF BARRIERS IN THE EUROPEAN UNION, JAPAN AND THE UNITED STATES* 53 (2010).

9. HOUSE RULE X, H.R. Doc. No. 112-162 (2013), available at <http://clerk.house.gov/legislative/house-rules.pdf>.

10. JOHN B. GILMOUR, *THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS* 503 (Eric Schickler & Frances E. Lee eds., 2011).

11. *Id.*; CARL ALBERT & DANNEY GOBLE, *LITTLE GIANT: THE LIFE AND TIMES OF SPEAKER CARL ALBERT* 266 (1990); Committee on Ways and Means: Subcommittees, <http://waysandmeans.house.gov/subcommittees/Default.aspx/trade> (last visited Mar. 20, 2010).

12. Senate Rule XXV (2011), available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXV>.

13. GILMOUR, *supra* note 10.

14. *Id.*

15. HOUSE RULE XII(A-B), H.R. Doc. No. 111-162 (2013).

16. *Id.* at Rule XII.2(c)(1).

17. S. Rule XVII.1 (2011), available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXVII>.

18. S. Rule XVII.3 (2013), available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXVII>.

B. *The Executive Branch*

Since the Reciprocal Trade Agreements Act of 1934, Congress has delegated significant authority to the Executive Branch to administer trade policy.¹⁹ While many entities within the Executive Branch are involved in this process, the three primary entities are the U.S. Trade Representative, the Department of Commerce, and the International Trade Commission.²⁰ In addition to these three entities, there are also a number of interagency coordinating groups that collectively play a meaningful role. This section analyzes these agencies and the roles they play in trade law.

The most well-known player in U.S. trade law is the U.S. Trade Representative, commonly referred to as the USTR. Established in 1979, the USTR's mission is to develop and coordinate U.S. international trade, commodity, and direct investment policies and to oversee trade negotiations with other nations.²¹ The head of the USTR is a Cabinet level appointee who serves as the principal trade advisor, negotiator, and spokesperson on trade issues to the President (the U.S. Trade Representative).²²

The Department of Commerce also plays a significant part in U.S. trade policy.²³ Unlike the USTR's broad, economy-wide approach, Commerce tends to target narrow—often industry specific—aspects of trade²⁴. In particular, it administers anti-dumping and countervailing duty laws.²⁵

19. HANSON, *supra* note 8, at 114. See also DAVID HANSON, LIMITS TO FREE TRADE: NON-TARIFF BARRIERS IN THE EUROPEAN UNION, JAPAN AND THE UNITED STATES 55 (2010).

20. HANSON, *supra* note 8, at 114.

21. Trade Agreements Act of 1979, 19 U.S.C. §§ 2501–2581 (2012); JAE W. CHUNG, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE: U.S. TRADE LAW, POLICY, AND SOCIAL COST 103-04 (2006); *Mission of the USTR*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/mission> (last visited Jan. 25, 2010). The Special Trade Representative, established in 1962, was the predecessor to the U.S. Trade Representative. The Kennedy Administration created the Representative to implement trade policies and negotiate agreements.

22. CHUNG, *supra* note 22, at 104.

23. See *id.* at 118.

24. *Id.*; see also *Commerce Preliminarily Finds Dumping of Certain Steel Grating from the People's Republic of China*, DEP'T OF COMMERCE (Dec. 29, 2009), http://trade.gov/press/press_releases/2009/SteelGratingADPrelimFS122909.pdf, (“the [DOC] announced its preliminary determination in the antidumping duty (AD) investigation on imports of certain steel grating . . . from the People's Republic of China”); U.S. DEPARTMENT OF COMMERCE, INT' TRADE ADMIN., FACT SHEET: COMMERCE INITIATES ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS OF CERTAIN MAGNESIA CARBON BRICKS FROM MEXICO (AD) AND THE PEOPLE'S REPUBLIC OF CHINA (AD/CVD) (Aug. 19, 2009), available at <http://ia.ita.doc.gov/download/factsheets/factsheet-mexico-prc-mcb-init-081909.pdf>, (“[T]he [DOC] . . . initiate[d] antidumping . . . and countervailing duty . . . investigations on imports of certain magnesia carbon bricks from Mexico (AD) and the People's Republic of China (China).”).

25. “Dumping” involves a country's sale of exports at a price below cost in an effort to undermine competition in the import country. Countervailing duties are duties on trade imports enacted to counteract another country's unfair subsidy. *Supra* note 8, at 118.

In this role, the Department of Commerce examines complaints filed by private U.S. companies alleging that foreign competitors have engaged in unfair business practices.²⁶ For example, it is against international trade law for a foreign government to subsidize a domestic company so that it can sell goods in the U.S. market at a price below cost, thereby eliminating competition.²⁷ The Department of Commerce also monitors foreign governments for compliance with the hundreds of active trade agreements.²⁸

The Department of Commerce has three very different roles regarding exports. First, the Department of Commerce supports U.S. exports by advising domestic businesses. This primarily comes in the form of providing marketing data and advice from overseas attachés but also consists of administering special programs designed to enhance U.S. high-tech export competitiveness. Second, the Department of Commerce advises the Executive branch on the state of the domestic manufacturing and service sectors. As part of this mission, the Department of Commerce provides information on the domestic effects of import competition. Third, the Department of Commerce is a major player in administering U.S. export control laws by closely regulating the exportation of sensitive materials such as high-tech or military goods.²⁹

Finally, while the International Trade Commission (ITC) has no formal role in policymaking, its congressionally-mandated duty to investigate unfair trade practices strongly affects how trade policy is executed.³⁰ The ITC's primary role in investigating complaints³¹ is to determine whether there was actual harm to U.S. businesses.³² If a majority of commissioners determines that U.S. business suffered injury or there is the potential for injury, the ITC may recommend that the President take retaliatory trade measures, such as new import barriers via higher tariffs or quotas.³³ The ITC also investigates whether certain imports violate U.S. intellectual property rights.³⁴ Where a violation is found, the ITC may bar the goods from entering the U.S. market.³⁵ The ITC also

26. *Id.*

27. *Id.* The Department of Commerce will examine the complaint, decide if an unfair practice exists, and if it does, apply a duty that would make up for the unfair trade practice.

28. *Id.*; *About TANC*, TRADE COMPLIANCE CTR., <http://tcc.export.gov/> (last visited Jan. 18, 2010) ("The Trade Compliance Center . . . in the U.S. [DOC's] International Trade Administration, is the U.S. Government's focal point for monitoring foreign compliance with trade agreements).

29. HANSON, *supra* note 8, at 118.

30. *Id.*

31. Harry First, *The Intersection of Trade and Antitrust Remedies*, 12 ANTITRUST 16 (1997); 19 U.S.C. § 2251. The ITC analyzes complaints under the escape clause, antidumping laws, and other duty statutes.

32. Jarrod M. Goldfeder, *2008 International Trade Decisions of the Federal Circuit*, 58 AM. U. L. REV. 975, 976 (2009); 19 U.S.C. §§ 1673a-1673d (2006).

33. HANSON, *supra* note 8, at 119.

34. *Id.*

35. *Id.* at 120, Section 337.

conducts annual studies on the impacts of current trade barriers and the health of various industries.³⁶

Lastly, interagency coordinating groups play a significant role in trade policy formation by shaping consensus and advancing policy objectives between government agencies. The Trade Policy Staff Committee and the Trade Policy Review Group are examples of such groups.³⁷ Chaired by the USTR, these groups are comprised of nineteen agencies and offices, and exist at the sub-cabinet level.³⁸ The Trade Policy Staff Committee is an operating group comprised of senior civil service members.³⁹ The Trade Policy Staff Committee has over ninety supporting subcommittees that specialize in specific issues and often operate as task forces.⁴⁰ Whereas the Trade Policy Staff Committee handles general issues, the Trade Policy Review Group is located at a higher level and is more specialized. The Trade Policy Review Group handles any issues that the Trade Policy Staff Committee cannot resolve and issues that the Trade Policy Review Group deems as having serious policy implications.⁴¹

The Trade Promotion Coordinating Committee is one of the few entities that focus on exports. Comprised of over twenty agencies, the Committee is an interagency task force that coordinates and develops government-wide export promotion plans.⁴² This Committee is chaired by the Secretary of Commerce and Under Secretary of Commerce for International Trade.⁴³ The Coordinating Committee primarily assists U.S. companies in four ways: (i) assisting constituents in finding agencies that will help them with export needs;⁴⁴ (ii) marketing all government assistance related to export promotion;⁴⁵ (iii) working together with the various agencies to provide services to U.S. companies;⁴⁶ and (iv) integrating and centralizing agency information so U.S. companies can easily obtain important export-related information.⁴⁷

III. POLICIES IMPACTING TRADE THAT HAVE BYPASSED TRADE AUTHORITIES

While the delegation of trade authority to certain policymakers is clear, laws that significantly impact trade are often passed over without any meaningful consideration in the context of trade. This occurs despite

36. *Id.*

37. *Id.* at 53.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *FAQ: Trade Promotion Coordinating Committee (TPCC)*, EXPORT.GOV http://www.export.gov/faq/eg_main_017489.asp (last updated Oct. 5, 2012, 11:21 AM).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

the fact that provisions exist that could allow trade authorities to have concurrent or supplemental involvement in the legislative process. The following section details three examples where this was the case: Congress' Country of Origin Labeling provision; the Food and Drug Administration's Clove Cigarettes ban; and Congress' Western Hemisphere Travel Initiative.

A. *Country of Origin Labeling*

By the mid-2000s, the American public felt that the "global meat system [was] broken."⁴⁸ Driving this sentiment, in part, was the occurrence of a series of outbreaks of bovine spongiform encephalopathy, commonly known as Mad Cow Disease, found in cattle across the world. Countries where the disease was found noticed an almost immediate dip in their beef exports. Experts estimated that worldwide trade in beef fell as much as 10% in 2001, with supermarket sales in some countries dropping from 40% to 70%.⁴⁹

The U.S. market was not immune from this frenzy. The start of U.S. beef woes is often associated with a 1996 episode of the Oprah Winfrey Show where guest Howard Lyman, a former cattle rancher turned vegetarian and Humane Society activist, claimed that Mad Cow Disease could make AIDS look like the common cold. This claim, along with Oprah's vow to "never eat a burger again," resulted in a lawsuit issued by a group of livestock owners.⁵⁰

Congress' implementation of Country of Origin Labeling began well before the first case of the disease was identified in the U.S. (the first U.S. case occurred in December 2003).⁵¹ Congress introduced Country of Origin Labeling (COOL) in the Farm Security and Rural Investment Act of 2002.⁵² This provision mandated that the USDA make rules that would require retailers to inform customers of the country of origin of beef, lamb, pork, fish, and certain agricultural commodities like peanuts.⁵³ The USDA's final rule went into effect on March 16, 2009.⁵⁴

In hindsight, the actual threat of Mad Cow disease was somewhat negligible. According to the Centers for Disease Control and Prevention

48. Verlyn Klinkenborg, *Coming to Terms with the Problem of Global Meat*, N.Y. TIMES, Jan. 10, 2004, <http://www.nytimes.com/2004/01/10/opinion/editorial-observer-coming-to-terms-with-the-problem-of-global-meat.html> (last visited Feb. 17, 2014).

49. See Press Release, *supra* note 1; Tolbert, *supra* note 1, at A42.

50. Reilly Capps, *Ex-Cattleman's Warning Was No Bum Steer; Rancher Raised Flag on Mad Cow Long Ago*, WASH. POST, Jan. 2, 2004, at C01.

51. Sheryl Gay Stolberg, *Mad Cow Case Heightens Debate on Food Labeling*, N.Y. TIMES, Jan. 8, 2004, <http://www.nytimes.com/2004/01/08/national/nationalspecial2/08BEEF.html> (last visited Feb. 17, 2014).

52. The Farm Security and Rural Investment Act of 2002, *supra* note 2.

53. *Id.*

54. *Agricultural Marketing Service, Country of Origin Labeling*, U.S. DEP'T OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/COOL> (last visited Mar. 20, 2010).

(CDC), from 1993 to 2012, only four Americans died from the disease.⁵⁵ Moreover, starting in 2003, the U.S. Department of Agriculture began randomly sampling for the disease. From that time to 2012, the Department came across a mere six instances of the disease in cattle, at least one of which was attributed to a natural and unavoidable genetic mutation.⁵⁶ Even prior fears about the disease's potential for transmission to humans proved overblown, based on later CDC studies.⁵⁷

While there is no evidence that COOL prevented any deaths, the bill's harm to trade was substantial. For one, compliance was particularly costly. As meatpackers explained, the similarities between cattle and beef products from different origin countries made comingling a customary practice.⁵⁸ Segregating cattle and beef based on their country of origin would require drastic restructuring given the difficulty of distinguishing individual cattle and separating them based on the numerous possible countries of origin. Moreover, there were costs associated with mandatory record keeping requirements.⁵⁹ An Agricultural Marketing Service study published in the Federal Register estimated that these costs could total \$1.968 billion in the first year alone.⁶⁰ Other studies advanced by the law's proponents argued that the study's figures were excessively high, citing a University of Florida study that estimated the first year record-keeping costs as between \$70 million and \$193 million.⁶¹

Country of Origin Labeling also exposed the U.S. to legal liability. On December 17, 2008, Mexico initiated WTO consultations with the U.S., alleging that these provisions violated several international obligations.⁶² On December 30, 2008, Canada requested to join these consultations.⁶³ On June 19, 2012, after several appeals, the WTO Appellate Body found that the U.S. acted inconsistently with its international trade obli-

55. *BSE (Bovine Spongiform Encephalopathy, or Mad Cow Disease)*, CDC, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ncidod/dvrd/bse/> (Feb. 21, 2013) [hereinafter CTRS. FOR DISEASE CONTROL AND PREVENTION].

56. Ian Sample, *Mad Cow Disease Case in US was a "One-Off" Caused by a Mutation*, GUARDIAN, Apr. 25, 2012, <http://www.guardian.co.uk/science/2012/apr/25/mad-cow-disease-us-mutation> (last visited February 17, 2014).

57. Ctr. for Disease Control and Prevention, *About vCJD*, <http://www.cdc.gov/ncidod/dvrd/vcjd/index.htm> (last visited Nov. 30, 2012) (noting that the "the risk is low for [infection of] vCJD, even after consumption of contaminated product"); see also CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 55.

58. See Scott Kilman, *Grocers, Meatpackers Fight Law to Label Origin of Food Products*, WALL ST. J., June 26, 2003, at B1, available at <http://online.wsj.com/news/articles/SB105658364263990500>.

59. *Id.*

60. Country-of-Origin Labeling for Foods, Congressional Research Services, Order Code 97-508 ENR (Sept. 26, 2003) available at http://assets.opencrs.com/rpts/97-508_20030926.pdf.

61. VanSickle, *supra* note 3.

62. *Dispute Settlement: DS384 United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm (last updated Sept. 25, 2013).

63. *Id.*

gations.⁶⁴ In particular, the Appellate Body held that the disproportionate harm that the record-keeping measure had on upstream producers and processors could not be attributed to the regulation's stated goal of protecting consumers. This was particularly true given that the little information ultimately conveyed to consumers at the retail level was hard to understand and often inaccurate. Further buttressing this conclusion was the fact that the law exempted a large portion of the U.S. meat circulating in the market.

Although the legal liability and trade consequences of COOL were clearly foreseeable, the legislation's legality and impact received little consideration at the legislative and regulatory levels. The Speaker of the House referred the bill to the House Agriculture and International Relations Committees.⁶⁵ The bill was not assigned, even secondarily, to the Ways and Means Committee and its Subcommittee on Trade. The House Agriculture Committee held more than ten hearings across the country and five in Washington, D.C. concerning the implementation of the Farm Bill.⁶⁶ Not one hearing discussed the trade implications of COOL.

Prior to the Farm Act, the legal and economic implications of COOL were raised in a congressional hearing, but in a dismissive manner and without analysis.⁶⁷ The two non-trade experts at the hearing, a member of the U.S. House of Representatives and the Secretary of Agriculture, stated that a country could adopt a labeling law without violating trade laws if the labeling law was not "overly burdensome."⁶⁸ The trade expert at the hearing, the U.S. Trade Representative, was less committal, stating only that the issue had not been raised at the World Trade Organization.⁶⁹ The record is silent as to whether the USTR ever made an assessment on the provision's actual legality. Meanwhile, the House Ways and Means' Subcommittee on Trade did not follow up on an industry request to consider COOL's impact on trade during a July 17, 2001 hearing on the World Trade Organization.⁷⁰ This illustrates how problematic legislative solutions to this problem can be, since even when the legislature was made aware that substantial trade risks might exist, it did not explore those possibilities further.

Only after COOL was passed into law and the date of its enforcement drew nearer did Congress start to consider its trade implications.⁷¹ But even then these considerations fell short. In a June 26,

64. *Id.*

65. BILL SUMMARY, *supra* note 4.

66. H.R. REP. NO. 107-796, at 13 (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_reports&docid=f:hr796.pdf.

67. *The Admin. Preparations for the 1999 World Trade Org. Ministerial: Hearing before the H. Comm. on Agric.*, 106th Cong. (1999) (statement of Rep. Larry Combest, Chairman, H. Comm. on Agriculture).

68. *Id.*

69. *Id.*

70. *U.S. Representative Larry Combest (R-TX) Holds Hearing on World Trade Organization*, 106th Cong. (Oct. 20, 1999).

71. *Id.*

2003 hearing, the House Agriculture Committee asked about COOL's impact on trade.⁷² Representative Nick Smith (R-MI) asked the panel whether COOL might start a "trade war" to the disadvantage of the U.S., to which several witnesses answered in the affirmative.⁷³ Despite these concerns, the record does not illustrate any follow up or further analysis of these responses.

The USDA was similarly dismissive of the provision's legality and trade implications during the notice and comment period before it finalized its proposed regulations pursuant to the legislation.⁷⁴ Several people voiced concern that the provision would violate numerous U.S. trade obligations.⁷⁵ In a cursory response, the USDA indicated that it had considered the implications on U.S. trade throughout the rulemaking process.⁷⁶ But the USDA never indicated how it determined that the rules were legal. Moreover, the USDA never explained whether it consulted any trade authorities in reaching those conclusions. In fact, the only mention of such engagement was with its own Foreign Agricultural Service, and even then only to "educate U.S. trading partners on the [provision's] requirements."⁷⁷

B. *Clove Cigarettes*

On September 22, 2009, the U.S. Food and Drug Administration (FDA) banned the sale of clove cigarettes in the U.S. The FDA's ban was grounded in solid health rationales, but by banning a single product (clove cigarettes), produced almost entirely in a single country (Indonesia), the Agency exposed the United States to a strong and foreseeable World Trade Organization complaint filed by Indonesia. Considering the strength of Indonesia's complaint, one might assume that the FDA would have considered the possible trade repercussions of such a ban. However, the agency engaged in no such considerations.

The FDA banned clove cigarettes pursuant to the Family Smoking Prevention and Tobacco Control Act.⁷⁸ The Act, which became law

72. *Mandatory Country of Origin Labeling: Hearing Before the H. Comm. on Agriculture*, 108th Cong. (June 26, 2003).

73. *Id.* at 95.

74. MANDATORY COUNTRY OF ORIGIN LABELING OF BEEF, PORK, LAMB, CHICKEN, GOAT MEAT, WILD AND FARM-RAISED FISH AND SHELLFISH, PERISHABLE AGRICULTURAL COMMODITIES, PEANUTS, PECANS, GINSENG, AND MACADAMIA NUTS, 74 Fed. Reg. 2678-79 (Jan. 15, 2009) (to be codified at 7 C.F.R. Parts 60, 65).

75. *Id.*

76. *Id.*

77. *Id.*

78. See Gardiner Harris, *Flavors Banned From Cigarettes to Deter Youths*, N.Y. TIMES (Sept. 22, 2009), at A1, <http://www.nytimes.com/2009/09/23/health/policy/23fda.html?scp=1&sq=fda%20clove&st=cse>; Rita Rubin, *FDA: Sweet-flavored, clove cigarettes can't be sold*, USA TODAY, Sept. 22, 2009, http://www.usatoday.com/news/health/2009-09-22-flavored-clove-cigarettes_N.htm (last visited Feb. 17, 2014); Family Smoking Prevention and Tobacco Control Act, Section 907(a)(1)(A), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1256enr.txt.pdf

in June of 2009, focused entirely on limiting the negative health effects of smoking.⁷⁹ A very large portion of the Act focused specifically on preventing smoking among youth.⁸⁰ To that end, banning the sale of clove cigarettes made sense since studies showed overwhelmingly that youth smokers were attracted to flavored cigarettes.⁸¹ Not surprisingly, some studies showed tobacco companies intentionally used sweet flavors to attract youth smokers.⁸²

While there is ample evidence that Congress rightfully considered the impact that the law would have on curbing youth smoking, there is little evidence that Congress considered the impact the law might have on the United States' trade obligations. The Subcommittee on Health first considered the bill in 2009.⁸³ While the subcommittee held two hearings on flavored cigarettes, no trade experts were present.⁸⁴ While international trade concerns were raised during the hearing, they were only mentioned in passing, specifically in the context of discussing that the FDA should try to minimize impacts on trade, but only if doing so was consistent with public health concerns.⁸⁵ Besides this passing reference, international trade was not mentioned and trade obligations were never raised. After these hearings, the bill went to the Subcommittee on Health and was then discharged by the full Committee.⁸⁶

Less than a year later, Indonesia filed a Request for Consultation with the United States at the World Trade Organization.⁸⁷ Indonesia

("Beginning 3 months after the date of enactment . . . a cigarette or any of its component parts . . . shall not contain . . . an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee.").

79. U.S. FOOD & DRUG ADMIN., *Overview of the Family Smoking Prevention and Tobacco Control Act: Consumer Fact Sheet*, <http://www.fda.gov/tobaccoproducts/guidancecomplianceinformation/ucm246129.htm> (last updated Oct. 22, 2013).

80. *Id.*

81. *Id.*; See Sarah M. Klein et al., *Use of Flavored Cigarettes Among Older Adolescent and Adult Smokers: United States, 2004-2005*, 10 NICOTINE & TOBACCO RES. 1209, 1209-14 (2008).

82. Marketing Innovations Inc., *Brown & Williamson Tobacco Corporation: Project Report*, MEMORANDUM TO BROWN & WILLIAMSON, Bates No. 170042014 (1972); see also R.J. Reynolds Inter-office Memorandum, (May 9, 1974), (Bates No. 511244297-4298) available at <http://legacy.library.ucsf.edu/tid/jtd53d00>; see also Report from R.M. Manko Assoc. to Lorillard Tobacco Co. (Aug. 1978), available at <http://tobaccodocuments.org/lor/85093450-3480.html?pattern=85093450-3480#images>.

83. H.R. Rep. No. 111-528, at 4 (2009), available at <http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt58/pdf/CRPT-111hrpt58-pt1.pdf>.

84. See *id.*; *The Family Smoking Prevention and Tobacco Control Act: Hearing on H.R. 1108 Before the Subcomm. on Health of the Comm. on Energy & Commerce*, Serial No. 110-69 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:44708.pdf.

85. *Id.* at 120.

86. H.R. Rep. No. 111-58, pt. 1, at 5 (2009), available at http://thomas.loc.gov/cgi-bin/cpquery/?&sid=TSOPv7gj&refer=&r_n=hr058p1.111&db_id=111&item=&&w_p=clove&attr=603&&dbname=cp111&w_p=clove&&sel=TOC_12547&.

87. *Dispute Settlement DS406 United States-Measures Affecting the Production*

claimed that the Family Smoking Prevention and Tobacco Control Act was inconsistent with several international trade obligations of the U.S.⁸⁸ Indonesia's strongest claim was that the Act violated the national treatment principle, which requires a country to treat local and foreign products the same.⁸⁹ In this case, Indonesia argued that the United States' ban on clove cigarettes was impermissible because the FDA did not also ban other flavored cigarettes, like menthol. Moreover, the ban focused on cigarettes produced entirely outside the U.S. Meanwhile, other flavored cigarettes produced within the U.S. were not targeted.⁹⁰

Both the WTO panel and the Appellate Body found in favor of Indonesia. The Appellate Body held that the United States' ban violated the national treatment principle found in Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).⁹¹ First, the Appellate Body found that clove and menthol cigarettes are "like products" in the competitive sense.⁹² Both have the same end uses—to satisfy a nicotine addiction and to create a pleasurable experience from the taste and smoke of the product.⁹³ Moreover, the Appellate Body found that menthol and clove cigarettes are substitutable products, despite the fact that only a subsection of consumers would substitute one for the other. Both products mask the harsh taste of tobacco in order to facilitate smoking.⁹⁴ While studies showed that different types of consumers smoked menthol as opposed to clove cigarettes, the Appellate Body held that likeness could exist if even a subsection of a population of consumers would substitute one product for another.⁹⁵ Since a significant subsection of a

and Sale of Clove Cigarettes, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm (last updated Aug. 23, 2013). In the WTO grievance process, a Request for Consultation typically serves as the first step in which parties endeavor to come to a solution on their own. If a solution cannot be reached within 60 days of the consultation request, the complaining party may request that a formal panel be formed. ANDREW T. GUZMAN AND JOOST H.B. PAUWELYN, *INT'L TRADE L.* 119-20 (2009).

88. *Dispute Settlement*, *supra* note 87; General Agreement on Tariffs and Trade ("GATT"), art. III: 4 (1947), Agreement on Technical Barriers to Trade ("TBT"), art. 2 (1994), Agreement on the Application of Sanitary and Phytosanitary Measures (1994). (The text of Article III of the 1947 General Agreement on Tariffs and Trade was incorporated into the 1994 GATT.)

89. *Principles of the Trading System*, WORLD TRADE ORG., http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_e.htm (last visited Feb. 17, 2014).

90. *Dispute DS406: United States-Measures Affecting the Production and Sale of Clove Cigarettes*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm (last visited Feb. 17, 2014).

91. Report of the Appellate Body, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R ¶ 4 (Apr. 4, 2012) [hereinafter *Sale of Clove Cigarettes*], available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-Html.aspx?Id=89269&BoxNumber=3&DocumentPartNumber=1&-Language=E&Window=L&PreviewContext=DP&FullTextSearch=#KV_GENERATED_FILE_000187.htm.

92. *Id.* at 58-60.

93. *Id.*

94. *Id.* at 51.

95. *Id.* at 58-60.

consumer population—youth cigarette smokers—would likely substitute the banned clove cigarettes for menthol ones, the law hindered competitive opportunities for producers and sellers of clove cigarettes enough to support a finding of likeness.⁹⁶

As a result, the Appellate Body held that if the United States wanted to ban cigarettes to curb youth smoking it had to do so in a way that included menthol cigarettes and any other “like” cigarette products.⁹⁷ Since the United States had failed to do so, the law violated WTO rules. While the WTO cannot award remedies, it can grant the right to take countermeasures equal to the amount of trade lost. In this case, Indonesia was allowed to retaliate up to \$16 million each year.⁹⁸

C. *Western Hemisphere Travel Initiative (WHTI)*

After September 11, 2001, domestic security became a primary concern for U.S. policymakers.⁹⁹ A major focus was gaps in information gathering and sharing by U.S. agencies. Congress responded with the 2004 Intelligence Reform and Terrorism Protection Act (2004 Act). As the new act took form, the 5,522 mile U.S.-Canada border, one of the “longest undefended borders” in the world, became a central domestic security concern.¹⁰⁰ The Western Hemisphere Travel Initiative (Travel Initiative) was included in the 2004 Act to strengthen security at the U.S.-Canada border.¹⁰¹ The Travel Initiative requires all travelers coming from Canada into the United States to show a passport at the border.¹⁰² Before that time, the Departments of State and Homeland Security could—and did—waive this requirement at their discretion.¹⁰³

Congress developed the Travel Initiative relying solely on voluminous security studies; it paid little attention to its economic impacts. The Senate Committee on Government Affairs drafted the legislation, relying heavily on the 9/11 Commission’s recommendations.¹⁰⁴ Over a twenty-month period, the Committee conducted nineteen days of hearings, interviewed one hundred and sixty witnesses, and reviewed over 2.5

96. *Id.*

97. *Id.*

98. See Tom Miles & Doug Palmer, *WTO Dents U.S. Ban on Clove Cigarettes*, REUTERS, Apr. 4, 2012, <http://www.reuters.com/article/2012/04/04/us-wto-usa-indonesia-idUSBRE8330Y720120404> (last visited Feb. 17, 2014).

99. Marc Philip Hedrich, *Section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004: Balancing the Western Hemisphere Travel Initiative with International Tourism and Homeland Security*, 28 NW. J. INT’L L. & BUS. 341 (2008).

100. *Id.* at 341-42.

101. INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) [hereinafter *Intelligence Reform*].

102. *Id.*; 8 U.S.C. §1185.

103. *Intelligence Reform*, *supra* note 101.

104. 150 CONG. REC. S9700 (daily ed. Sept. 27, 2004) (statement of Sen. Collins).

million documents.¹⁰⁵ The scope of these hearings was almost exclusively on security concerns.¹⁰⁶

Once the Act became law, the State Department sought notice and comment.¹⁰⁷ Among the comments, thirty-eight expressed concerns about the negative impact on tourism between the U.S., Canada, and Mexico.¹⁰⁸ The State Department was dismissive,¹⁰⁹ explaining that the benefits to national security were “virtually impossible to quantify in monetary terms.”¹¹⁰ Despite the inability to quantify the value of national security, the State Department concluded that the Initiative would create gains in domestic consumption that would offset losses to tourism.¹¹¹

Not only did the State Department fail to demonstrate how it came to this conclusion, but it also failed to address other potential losses that would arise under the new rule. For instance, the State Department erroneously justified disruptions in tourist flows by claiming that even though cross-border tourism might decline, the overall impact would be small since more people would simply choose to vacation domestically. But the State Department ignored the comparative advantage that international tourism offers: people often vacation as a means of getting away from their surroundings. To this end, international tourism has a significant advantage over domestic tourism.¹¹² Moreover, the State Department did not address whether the added costs and burdens for travelers to obtain a passport might shift the traveler’s focus to farther, more exotic destinations. It does not appear that the State Department analyzed the extent to which tourism between Canada and the U.S. relied on its simplicity.

Studies conducted in 2006 in Canada and the United States suggested that the new rule would have a significant economic impact on both countries. The U.S. Customs and Border Protection Office conducted an impact assessment that showed that at least 14 million people would be impacted by the new passport rule,¹¹³ with an added cost of roughly

105. *Id.*

106. See Hearings, 108th Congress, Senate Committee on Homeland Security & Governmental Affairs, <http://www.hsgac.senate.gov/hearings?c=108>.

107. DOCUMENTS REQUIRED FOR TRAVEL WITHIN THE WESTERN HEMISPHERE, 70 Fed. Reg. 52,037 (Sept. 1, 2005).

108. DOCUMENTS REQUIRED FOR TRAVELERS ARRIVING IN THE UNITED STATES AT AIR AND SEA PORTS-OF-ENTRY FROM WITHIN THE WESTERN HEMISPHERE, 71 Fed. Reg. 68,412 (Nov. 24, 2006).

109. See DOCUMENTS REQUIRED FOR TRAVELERS ARRIVING IN THE UNITED STATES AT AIR AND SEA PORTS-OF-ENTRY FROM WITHIN THE WESTERN HEMISPHERE, 71 FED. REG. 46155 (Aug. 11, 2006) (to be codified at 8 C.F.R. Parts 212, 235, 22 C.F.R. Parts 41, 53).

110. *Id.*

111. *Id.*

112. In economic theory, comparative advantage is considered a driver of trade and refers to the ability of a seller of a good or service to produce its product at a lower price -- or, at the same price, but with higher quality -- than the buyer would be able to do on his own.

113. U.S. CUSTOMS & BORDER PROTECTION, THE W. HEMISPHERE TRAVEL INITIATIVE IMPLEMENTED IN THE AIR ENVIRONMENT, REGULATORY ASSESSMENT FOR THE FINAL RULE: DOCUMENTS REQUIRED FOR TRAVEL WITHIN THE W. HEMISPHERE, i (Nov. 2006).

\$600 million to travelers.¹¹⁴ A similar 2005 Canadian Tourism Commission report estimated that the rule would impact 14.1 million tourists and \$3.6 billion in tourism revenue.¹¹⁵ Professor Donald Abelson from the University of Western Ontario noted in a 2007 panel discussion that the WHTI would cause losses of \$3.5 billion to Canada and \$2 billion to the U.S. in tourism alone between 2005 and 2010 due to potential slowing of the nearly \$1.5 billion in daily trade that crosses the border.¹¹⁶ While these figures would drop the second year, other costs would remain, like those associated with passport renewals or border enforcement. Moreover, how the new rule would impact trade at the border by slowing traffic flows was not included in the report.

Economic impacts were realized shortly after the law's passage. From 2006 to 2007, the number of overnight trips from the United States to Canada dropped by 4%, with a 3.7% drop in revenues from \$5.7 to \$5.5 billion.¹¹⁷ An even larger drop occurred from 2007 to 2008, with a 7.5% drop in overnight trips and a 9% drop in revenues, from \$5.5 to \$5 billion.¹¹⁸ By November 2009, the Ministry of Tourism estimated that the total number of international border crossings from the U.S. was 12,220,810, down 12.3% from the prior year.¹¹⁹ That same year, travel from Canada to the U.S. was down 11%.¹²⁰ While it is difficult to point to any specific law as the cause of the drop in numbers, similar declines occurred after past attempts to tighten the Canada-U.S. border. For instance, the goals of the 2001 Smart Borders Initiative were very similar those of the WHTI. Leading up to and immediately after this Initiative's passage, the city of Windsor—a border city that relies heavily on its ease of access for Michigan tourists—saw its business from the United States drop from \$10.86 million to \$4.27 million between 1999 and 2004.¹²¹ This is consistent with a 2008 Brookings Institute report that found that

114. *Id.*

115. ONTARIO MINISTRY OF TOURISM, *THE IMPACT OF THE WESTERN HEMISPHERE TRAVEL INITIATIVE ON TRAVEL TO/FROM ONTARIO* 7, 14 (2005), available at http://www.mtc.gov.on.ca/en/research/impact_studies/The%20Impact%20of%20the%20Western%20Hemisphere%20Travel%20Initiative%20on%20Tr.pdf.

116. *People, Security and Borders: The Impact of the Western Hemisphere Travel Initiative on North America*, THE WILSON CENTER, <http://www.wilsoncenter.org/event/people-security-and-borders-the-impact-the-western-hemisphere-travel-initiative-north-america> (last updated: May 30, 2007).

117. *Tourism Snapshot Year-In-Review 2007 Facts & Figures*, CAN. TOURISM COMM'N, <http://en-corporate.canada.travel/markets/where-we-market-canada/us> (last visited Feb. 17, 2014).

118. *Id.*

119. Ontario Ministry of Tourism, *Current Performance Indicators for Ontario's Tourism Industry*, <https://web.archive.org/web/20100726045800/http://www.tourism.gov.on.ca/english/research/performance/index.html> (last visited Jan. 2, 2014).

120. *Id.*

121. Edward McClelland, *So Long, Canada*, SALON.COM (May 1, 2008), http://www.salon.com/news/feature/2008/05/01/canadian_border/index.html (noting that the number of visitors fell from 75 million in 1999 to 3.76 million in 2004).

security delays at the border cost an average of \$11.5 billion annually between 2000 and 2004.¹²²

In isolation, these figures may seem insignificant. After all, in 2006 Canada's Gross Domestic Product was \$1.2 trillion.¹²³ But U.S.-Canadian tourism occurs largely within just a few cities along the border. For instance, in 2006 the total number of foreign tourists traveling to Ontario alone was roughly 17.4 million.¹²⁴ In 2008, tourism accounted for \$30.3 billion, 2% of Canada's total GDP.¹²⁵ A 2005 report conducted by the Conference Board of Canada concluded that WHTI would result in a reduction of an estimated 7.7 million inbound person-trips to Canada and nearly \$1.76 billion in tourism export receipts between 2005 and 2008.¹²⁶ Notably, the study estimated that most of the losses would fall on border provinces such as Ontario, with an estimated 13% reduction in tourism revenues.¹²⁷ All other provinces would experience 3% or less reduction in tourism revenues.¹²⁸

Additionally, not all Canadians and Americans possess the requisite identification. The 2005 Canadian Tourism Commission study found that 41% of Canadians over eighteen years old have a passport, while only 34% of U.S. residents over eighteen have a passport.¹²⁹ With the average American and Canadian passports costing close to \$100, studies show that the costs of obtaining passports will deter individuals from traveling between the U.S. and Canada.¹³⁰ According to a 2006 Zogby International

122. JOHN AUSTIN, ELAINE DEZENSKI, & BRITANY AFFOLTER-CAINE, THE BROOKINGS INST., *THE VITAL CONNECTION: RECLAIMING GREAT LAKES ECONOMIC LEADERSHIP IN THE BI-NATIONAL US-CANADIAN REGION* (Mar. 2008), available at http://www.brookings.edu/~media/Files/rc/reports/2008/0324_greatlakes_canada_austin/greatlakes_canada.pdf.

123. International Monetary Fund, *Report for Selected Countries and Subjects: Canada Gross Domestic Product* (2012), http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/weorept.aspx?pr.x=66&pr.y=11&sy=2005&ey=2009&scsm=-1&ssd=1&sort=country&ds=.&br=1&c=156&s=NGDP_R&grp=0&a=.

124. *Inbound Visits and Spending*, STATISTICS CAN. http://www.mtc.gov.on.ca/en/research/historicalstats/1_Inbound_Total_visits_Ontario.shtml (last visited Oct. 24, 2013).

125. *Tourism Snapshot—Year-in-review—2008 Facts and figures*, CANADIAN TOURISM COMM'N (2009), http://en-corporate.canada.travel/sites/default/files/pdf/Research/Stats-figures/Year-in-review-facts-figures/Tourism%20Snapshot%20-%20Year%20in%20review/snapshot_YearInReview_2008_eng.pdf (last visited Feb. 22, 2014).

126. SHEENA STARKY, LIBRARY OF PARLIAMENT, *THE WESTERN HEMISPHERE TRAVEL INITIATIVE: BALANCING SECURITY AND ECONOMIC INTERESTS 6*, available at <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0609-e.pdf>.

127. *Id.*

128. *Id.*

129. CANADIAN TOURISM COMMISSION, *THE POTENTIAL IMPACT OF A WESTERN HEMISPHERE TRAVEL INITIATIVE PASSPORT REQUIREMENT ON CANADA'S TOURISM INDUSTRY*, RESEARCH REPORT (2005), available at <http://publications.gc.ca/site/eng/275831/publication.html>.

130. See ONTARIO MINISTRY OF TOURISM, *THE IMPACT OF THE WESTERN HEMISPHERE TRAVEL INITIATIVE ON TRAVEL TO/FROM ONTARIO 7, 14* (2005), available at <http://www>.

Poll, 34.5% of American non-passport holders and 29.2% of Canadian non-passport holders said they were less likely to cross the shared border if they needed a passport or other secure document to do so.¹³¹ Of those surveyed, 7% of Americans and 19% of Canadians indicated that they would be “very unlikely” to purchase a border identification card that would enable them to cross the U.S.-Canadian Border.¹³²

To date, the WHTI has not been challenged legally. The law relies on vague national security exemptions provided within the North American Free Trade Agreement (NAFTA) and WTO. While WHTI's justification within these exemptions might be questionable, countries tend to be deferential to those invoking security exemptions in passing laws.¹³³ To be fair, a country should have the ability to use these exemptions to protect itself during emergencies. However, this does not mean that such exemptions should be invoked without consideration of costs, especially when it pits a country against its trade obligations. The WHTI is problematic in that it contradicts the national treatment principle, which forbids a country from treating a trading partner with terms that are less favorable than those its own citizens enjoy.¹³⁴ The WHTI is also inconsistent with NAFTA's overall purpose of encouraging easy short-term trips across the border in order to encourage cross-border business and tourism.¹³⁵ Thus, while having national security exemptions is important, it is essential to consider the indirect consequences that result from invoking such exemptions. When the consequences are foreseeable, quantifiable, and can be considered with the time available, lawmakers should at least evaluate the effects invoking national security exemptions prior to invoking them. Ultimately, lawmakers may reach the same result, but at least their decisions would be better informed.

mtc.gov.on.ca/en/research/impact_studies/The%20Impact%20of%20the%20Western%20Hemisphere%20Travel%20Initiative%20on%20Tr.pdf.

131. STARKY, *supra* note 126, at app. B.

132. *Id.*

133. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., 32 I.L.M. 612, art. 1603 (1993) (providing for temporary entry of business travelers so long as they comply with applicable measures for national security).

134. *Id.* at arts. 1202, 1203.

135. *Id.* at arts. 1601, 1603. Two recent examples are Niagara Falls, New York coming dangerously close to losing its city status and Buffalo, New York losing its Canadian Consulate. *See* Daniel Robison, *Niagara Falls In Danger Of Losing City Status, Aid*, NPR (Oct. 25, 2012), <http://www.npr.org/2012/10/25/163653935/niagara-falls-in-danger-of-losing-city-status-aid>; Allissa Kline, *Canadian Consulate Employees Get Closing Notice*, BUFFALO BUS. FIRST (May 29, 2012), <http://www.bizjournals.com/buffalo/news/2012/05/29/canadian-consulate-employees-get.html>.

IV. WHY TRADE IS IGNORED

A. *Too Many Cooks?*

One possible explanation for this problem is the vast number of individuals who pass laws that significantly impact trade but who have no trade expertise or authority.

Numerous congressional committees other than the House Ways and Means Committee consider laws that impact trade. The House Rules are silent about concurrent committee assignments. As a result, when the chair receives a bill, he looks at the subject on its face and sends it to the most relevant committee. This binary process directs bills containing subsidiary trade issues away from the trade experts.¹³⁶ It is therefore not uncommon for the Agricultural Committee, House Foreign Affairs Committee, Committee on Governmental Affairs, and House Committee on Homeland Security to review bills that dramatically impact U.S. trade obligations.¹³⁷

It would be misguided to think that the Executive Branch is immune from this problem. The U.S. Trade Representative (USTR) is tasked with representing the U.S. in its trade relations and is on equal footing with other Executive Branch agencies. But the department's ambiguous chains of command and limited staff have prevented it from taking a leadership role on these matters. Moreover, it has no direct authority over many major programs affecting U.S. trade policy. Lastly, the U.S. Trade Representative reports both to the President and Congress.¹³⁸ Adopting clear policy positions and providing comment is difficult when no single entity is setting your agenda and disagreements between those two entities arise frequently.

Several White House councils are also indirectly involved with trade policymaking. For instance, the National Economic Council administers trade policy as a cabinet-level coordinating group.¹³⁹ It is the National Economic Council's primary goal—coordinating international

136. INT'L TRADE ADMIN., *supra* note 5, at 121 For example, the Country-of-Origin Labeling bill, discussed *infra*, requires agricultural products to be labeled with their country of origin, yet it was sent to the Committee on Agriculture.

137. HOUSE RULE X, *supra* note 9 (The Agriculture Committee has jurisdiction over “[a]griculture generally” and other specific agriculture issues; the House Committee on Foreign Affairs has jurisdiction over, *inter alia*, “[e]xport controls, including nonproliferation of nuclear technology and nuclear hardware, . . . [t]rading with the enemy . . . and [i]nternational economic policy”; and the House Committee on Homeland Security over, among others, “customs administration”).

138. The U.S. Trade Representative only has a staff of roughly one-hundred and fifty people. HANSON, *supra* note 8, at 116.

139. *Id.* First created by Richard Nixon, the office has undergone many name changes. Under President Clinton, the group took on its current name, the National Economic Council (NEC), through Executive Order 12835 in 1993. The National Economic Council is chaired by the President and has four goals: (i) to coordinate domestic and international economic policy; (ii) to give economic advice to the President; (iii) to ensure policy decisions are in line with the President's goals; and (iv) to monitor the implementation of the President's economic plan and agenda. *Id.*

economic policy—that has the most impact on trade.¹⁴⁰ A second economics body, the Council of Economic Advisers, bears responsibility for offering the President objective economic advice on domestic and international economic policy.¹⁴¹

The National Security Council (NSC) is also involved with trade policymaking. While the National Security Council mainly coordinates international political and military policy, it also has a professional staff in charge of economic affairs.¹⁴² This staff only works on economic issues that have an impact on national security.¹⁴³ As a result, the Council has had a checkered past in its involvement with economic issues.¹⁴⁴ Accordingly, other agencies like the Department of the Treasury and the Federal Reserve have not taken the NSC seriously on economic issues. Additionally, because both the NSC and the White House Economic Policy Coordinating Group have overlapping jurisdiction on trade issues, conflicts between the two are common.¹⁴⁵

The Department of the Treasury has a powerful, albeit indirect, role in international trade policy. While its duty is to determine which trade policies would be best for the domestic economy,¹⁴⁶ it routinely works on strategic international trade policy.¹⁴⁷ Because imports impact inflation, the Department of the Treasury tends to favor maximum international competition.¹⁴⁸ The Department of the Treasury also considers the impact

140. For example, in one National Economic Council session, the Council held a discussion with industry leaders over job creation and concluded that one way to increase jobs was through export and custom reform. NATIONAL ECONOMIC COUNCIL, WHITE HOUSE FORUM ON JOBS AND ECONOMIC GROWTH 31-34 (Dec. 3, 2009).

141. *About CEA*, COUNCIL OF ECONOMIC ADVISERS, <http://www.whitehouse.gov/administration/eop/cea/about> (last visited Jan. 10, 2010). Congress established the CEA in the Employment Act of 1946. *Id.*

142. *Id.*

143. *See National Security Council*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/administration/eop/nsc/> (last visited Jan. 25, 2010).

144. EVAN H. POTTER, *ECONOMIC INTELLIGENCE AND NATIONAL SECURITY* 84 (Evan H. Potter ed., 1998).

145. *Id.*

146. *Supra* note 8, at 117.

147. *See, e.g.*, U.S. Department of the Treasury, *Press Center: Deputy Treasury Secretary Wolin to Visit Saudi Arabia, United Arab Emirates, Kuwait* (Jan. 25, 2010), <http://www.treasury.gov/press-center/press-releases/Pages/tg512.aspx> (describing a meeting with Middle Eastern countries to discuss development abroad); *Acting Assistant Secretary Baukol's Speech at the 2009 Globes Israel Business Conference*, U.S. DEP'T OF THE TREASURY (Dec. 14, 2009), [hereinafter *Acting Assistant Secretary Baukol's Speech*], <http://www.treasury.gov/press-center/press-releases/Pages/tg447.aspx> (transcribing Assistant Secretary Baukol's speech in which he states that Treasury "worked with the major economies of the world on a coordinated program of macroeconomic stimulus and financial stabilization.").

148. *Id.* (Assistant Secretary Baukol noted that "Israel must continue to promote competitiveness" and its exports in order to protect itself against emerging East-Asian economies.). *See also* *Advocates for Competition*, 41 U.S.C. § 1705 (2011) (requiring the Department of Treasury to designate an officer or employee to "serve as the advocate for competition").

of trade on national security and economic issues like the value of the dollar, which has a direct impact on U.S. trade balances.¹⁴⁹

In its role as the premier foreign policy agency in the U.S., the Department of State examines many facets of U.S. trade policy to see how they might affect U.S. interests abroad.¹⁵⁰ The Department of State has increasingly viewed trade issues as a significant part of its “national security” objective.¹⁵¹ The Department of State often has a very broad interest in trade because the strength of the U.S. domestic economy affects America’s power and influence worldwide.¹⁵² Regional bureaus within the Department of State and the Bureau of Economic, Energy, and Business Affairs monitor trade related policies.¹⁵³ Among other things, this latter Bureau is tasked with resolving trade and investment disputes.¹⁵⁴ The Under Secretary for the Bureau of Economic, Energy, and Business Affairs is responsible for coordinating with the USTR.¹⁵⁵ Also, while the Department of State was stripped of its chief negotiator status on trade, it maintains this status with respect to international aviation and maritime issues and is one of the major departments charged with export control.¹⁵⁶ Moreover, the Department of State’s central role in determining sanctions places it within the purview of trade issues.

The USDA addresses trade actions that affect the import or export of agriculture commodities.¹⁵⁷ Congress has vested the USDA with broad powers to administer farm programs. Thus, the Department assumes leadership roles in agriculturally-related trade policy and sets U.S. agricultural negotiating agendas in international trade talks.¹⁵⁸ In performing this role, the USDA has two opposing constituents: import-sensitive farmers (e.g., dairy, meat, sugar, and peanuts) and highly efficient and

149. HANSON, *supra* note 8, at 117.

150. *Id.*

151. See HILLARY CLINTON, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL AND DEVELOPMENT REVIEW, 1, 41 (2010) (noting that “trade” elevation is a specific objective of the Department).

152. *See id.*

153. *See id.*; Bureau of Economic, Energy, and Business Affairs, DEP’T OF STATE, <http://www.state.gov/e/eeb/index.htm> (last visited Jan. 20, 2010).

154. Bureau of Economic, Energy and Business Affairs, WASH. POST, http://www.washingtonpost.com/politics/bureau-of-economic-energy-and-business-affairs/gIQAoBnH5O_topic.html.

155. CLINTON, *supra* note 151, at 40.

156. HANSON, *supra* note 8, at 117. The Department primarily focuses on the export of defense technologies. UNITED STATES GENERAL ACCOUNTING OFFICE, EXPORT CONTROLS: PROCESSES FOR DETERMINING PROPER CONTROL OF DEFENSE-RELATED ITEMS NEEDS IMPROVEMENT 1 (Sept. 2002) [hereinafter *Export Controls*]; “Defense Items” is defined in the Arms Export Control Act. *Id.* at 3.

157. *See* Marketing and Trade, Trade Policies and Procedures, U.S. DEP’T OF AGRIC., http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?navid=TRADE_POLICIES&parentnav=MARKETING_TRADE&navtype=RT (last visited Jan. 18, 2010) (outlining the Department’s varying involvement with trade issues).

158. *Id.*

successful export-oriented farmers (e.g., soybeans, corn, and wheat).¹⁵⁹ Finally, the USDA monitors agricultural import quotas, administers government-funded programs that aim to finance exports, and runs the Foreign Agriculture Service.¹⁶⁰

The Department of Labor's primary concern is how trade policy impacts jobs.¹⁶¹ The Department of Labor administers the adjustment assistance program, whereby the Department of Labor issues money and retrains those who have lost jobs from changes in imports.¹⁶²

Many other departments and agencies are more narrowly involved in trade policymaking. For example, the Department of Energy considers the effects of dependency on foreign energy supplies, such as imported petroleum.¹⁶³ The Department of Defense primarily works on trade issues that affect national security, such as in the exportation of dual-use goods.¹⁶⁴ The Department of Transportation assists in international shipping and civil aviation negotiations.¹⁶⁵ Antitrust matters related to trade often involve the Department of Justice.¹⁶⁶ The advent of environmental law has brought the Environmental Protection Agency into trade policymaking, as it provides interagency advice and staffs U.S. trade delegations to international discussions on issues that affect the environment.¹⁶⁷ The Export-Import Bank operates a multi-billion dollar program to subsidize U.S. industries in order to promote exports.¹⁶⁸ Even agencies presumably having no interest in trade often take on trade related matters.¹⁶⁹

Certainly, U.S. trade policy is challenged by the mere number of policymakers who have no trade authority or subject matter jurisdiction who can nonetheless pass laws and regulations that dramatically impact trade. But quantity is only part of the problem. Whether there are one or one-hundred policymakers involved, the question at the end of the day is whether they are being coordinated. As the next section illustrates, not only are there many policymakers involved, but there also seems to be no centralized coordinating authority setting policy objectives.

159. *See id.*

160. *See id.*

161. *Id.*; *see also ILAB Mission Statement*, U.S. DEP'T OF LABOR <http://www.dol.gov/ilab/mission.htm> (last visited Jan. 24, 2010) [hereinafter *ILAB Mission Statement*].

162. *ILAB Mission Statement*, *supra* note 161.

163. *See* Katherine Fredriksen, *Statement Before the Senate Energy and Resources Committee* (Feb. 26, 2008), http://www.congressional.energy.gov/documents/February_26_-_SEN_R_Fredriksen.pdf (last visited Jan. 18, 2010) (discussing the role the Department of Energy plays within the Strategic Petroleum Reserve).

164. *Id.*

165. *Id.*

166. *Id.* at 119.

167. *Id.*

168. *Id.*

169. *Id.* For example, the Federal Communications Commission decided in the mid-1990s to use a high-definition standard for televisions based out of the U.S., instead of Japan, and thereby cut off billions of dollars worth of potential Japanese imports.

1. The Political Problems in Trade

International trade policy is interwoven with domestic policy, making trade policy an inherently political issue.¹⁷⁰ Often times, domestically-oriented laws on issues like labor rights, the environment, and product safety impact international markets.¹⁷¹ The promulgation of international trade law represents an attempt to reduce transactional costs by countering certain domestic interests with legally binding international treaties. There are numerous theories on the interactions between domestic and international legal systems. Two of the most common analyze the committee structure and interest groups.¹⁷² This section will analyze several theories and explain why it is necessary to combine parts of these theories in order to fully understand how congressional structure impacts legislative decisions.

B. *The Congressional Committee Structure*

There are numerous theories that attempt to explain how Congress' structure impacts legislative decisions. Over a period of 200 years, Congress has concentrated its authority in the form of committees, starting with no committees, moving towards ad hoc committees, and ultimately forming standing committees.¹⁷³ Starting in the 1930s, Congress took major steps towards decentralizing the legislative process in trade.¹⁷⁴ This might explain why trade provisions often appear within larger non-trade-related laws, rather than in a separate trade bill. This does not explain, however, why the Legislature has failed to place significant weight on the trade implications of these larger bills; the location of trade issues within larger pieces of legislation should not diminish their importance.

The Informational Theory, developed by Keith Krehbiel, assumes that while committees are better informed about specific policies, the floor ultimately maintains control over the committee's decisions.¹⁷⁵

170. PHILIP A. MUNDO, NATIONAL POLITICS IN A GLOBAL ECONOMY 3 (Georgetown Univ. Press, 1999).

171. *Id.*

172. Another popular line of thinking analyzes how Congress delegates authority to administrative agencies to avoid accountability. David A. Herman, *To Delegate or Not to Delegate—That is the Presumption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157, 1190-91 (1997). The theory assumes that if the public is dissatisfied with an agency's rule, they blame the agency, not Congress. Congress can then call the agency to testify in an effort to publicly condemn the action and gain political points. The incentives that compel a bill to be sent to a specific committee are similar to those that compel a law to be sent to a particular agency. As such, a bill sent to the Committee on Agriculture is likely to be directed to the Department of Agriculture. With this in mind, this Article will focus on the committee assignment decision.

173. ROBERT A. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY, 1929-1976, 37-38 (Univ. of Cal. Press 1980).

174. I.M. DESTLER, AMERICAN TRADE POLITICS, 14, 68 (4th ed. 2005). See also Klaas J. Beniers & Otto H. Swank, *On the Composition of Committees*, 20 J.L. ECON. & ORG. 353, 357 (2004).

175. KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (Univ. of

Consequently, information coming from the committee will reflect the average interests of the floor.¹⁷⁶ When the committee's views vary from the floor's views, the committee has an incentive to guard information in order to advance its policy objectives.¹⁷⁷ To avoid this, the floor is very reluctant to relinquish power to the committee in the form of closed rules.¹⁷⁸ While Informational Theory identifies how competing interests within Congress can dictate a bill's procedural history and whether the expertise of a committee is followed, it does not explain why certain bills are sent to one committee without the consideration of others. The Majority-Party Cartel theory provides some answers to this question.

The Majority-Party Cartel theory posits that committees are a tool for party leaders to gain control over members in an environment that gravitates towards weak party discipline.¹⁷⁹ Majority-Party Cartel theory states that party leaders distribute and withdraw power through the committee system as a means to control other members.¹⁸⁰ This theory advances three findings. First, committee appointments are used as a reward and thus committees themselves must have power.¹⁸¹ Second, the majority caucus's tight control over committees explains the alignment in preference between the majority-party members within a committee and the majority members of the caucus.¹⁸² Third, the committee process allows leadership to create a process for considering bills that maximizes the possibility that leadership preferences will pass.¹⁸³ This theory is helpful because it suggests that bills are assigned not only by subject matter but also in line with a system of rewards established by the majority party. If this theory is true, then the Speaker has an incentive to maintain value in committee assignments. It would undercut the Speaker's system of rewards to include multiple committees in a bill's consideration because that would dilute a committee's value.

C. *The Impact of Constituents*

Congressional structure cannot fully explain why laws affecting trade are not always given adequate consideration for their impacts. At the end of the day, congressional members are very concerned about appeasing constituents that will help them gain reelection.¹⁸⁴ To understand why Congress acts the way it does, one must understand that the primary

Mich. Press 1992).

176. DESTLER, *supra* note 174.

177. *Id.*

178. Under a closed rule, a committee submits a bill to the floor for a vote without the ability to add amendments. *Id.*

179. *Id.* at 194.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 194-95.

184. See BRUCE BUENO DE MESQUITA & ALASTAIR SMITH, *THE DICTATOR'S HANDBOOK: WHY BAD BEHAVIOR IS ALMOST ALWAYS GOOD POLITICS* (PublicAffairs 2011).

concern of members is getting reelected, requiring the aid of constituents in fundraising and other reelection efforts.

The Bicameral Rival Theory focuses on the cynical implications of policymaking—that the committee system maximizes a member’s ability to receive contributions from lobbyists.¹⁸⁵ The committee system increases campaign contributions by creating hurdles in the legislative process that make it more difficult for outsiders to maneuver a bill through Congress.¹⁸⁶ For a bill to pass a hurdle, outsiders must “pay to play.”¹⁸⁷ Hurdles include: (1) a committee’s legislative veto power; (2) refusals by committee chairs to hold necessary hearings for bills; (3) scheduling by the Speaker or a Rules Committee that can lead to the death of a bill; and (4) a rule requiring a super majority to pass a bill.¹⁸⁸ These hurdles may explain why legislative leaders do not hold final votes until after major fundraisers—doing so allows politicians to leverage their vote in exchange for contributions from donors that have an interest in the vote’s outcome.¹⁸⁹ This also explains why committees can only stop legislation (and cannot implement legislation) and why Congress may at various points veto a bill.¹⁹⁰

If the Bicameral Rival Theory was correct, House members would have an incentive to maximize the roadblocks a bill may face by fragmenting the legislative process. However, even if this theory is correct, it fails to fully explain why Congress has settled on the current number of “hurdles” within the system. Some other forces that push back on Congress’ attempt to develop political hurdles must exist; otherwise Congress would have very little incentive to actually pass legislation.¹⁹¹ Moreover, this theory ignores other possible explanations of the committee structure—such as greater efficiency or organization—that other theories advance.

185. *Id.* at 196.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. This idea applies generally to the legislative process. To some, it may seem outdated under the assumption that Congress is no longer incentivized to pass legislation, as exemplified by the 2013 Congressional gridlock concerning the debt ceiling. Yet, such a conclusion is shortsighted. There exist numerous examples throughout U.S. history where seemingly unsolvable legislative gridlock was followed by resolution. See Paul Solman, *Lessons from the Political Gridlock of 1842*, PBS (Feb. 28 2013), <http://www.pbs.org/newshour/making-sense/lessons-from-the-political-gri/> (last visited March 1, 2014). That Congress invariably comes to resolve such impasses indicates a strong incentive to pass legislation. Turning back to the 2013 debt ceiling debates, once constituents expressed opposition to the lack of any movement on key pieces of legislation, the House reversed course. See Jonathan Weisman and Ashley Parker, *House Approves Higher Debt Limit Without Condition*, N.Y. TIMES, Feb. 12, 2014, http://www.nytimes.com/2014/02/12/us/politics/boehner-to-bring-debt-ceiling-to-vote-without-policy-attachments.html?_r=0 (last visited March 1, 2014).

In addition to the theoretical reasons behind a decentralized committee system, several practical reasons have been posited to explain Congress' move toward decentralization since the 1970s. Author I.M. Destler posits that decentralization was a specific objective of the post-Watergate Congress.¹⁹² The purpose of this move was to open the policymaking process to provide more seats at the table and overturn the closed system that benefited "special interests."¹⁹³ While the prior closed system did benefit special interests, it also insulated members from outside influences.¹⁹⁴

While Destler's theory offers a great explanation as to what caused further decentralization after Watergate, it falls short in three ways. First, it fails to explain the decentralization that occurred before the Watergate scandal. Second, Destler's theory does not explain why the system remains decentralized. Third, his theory does not take into account other factors that may have led to decentralization. However, Destler's theory does, along with the Majority-Cartel Theory, explain why committees are purposely kept subservient to the Majority Leader. This accounts for the weak nature of committees and subcommittees. Moreover, the Post-Watergate theory explains why decentralization accelerated during the 1970s.

Members of Congress are also concerned with satisfying the core base of their constituencies that they need to win reelection. This group is sometimes referred to as the winning coalition.¹⁹⁵ But new theories suggest that politicians will attempt to satisfy this group even if it is to the detriment of the majority of citizens or the country as a whole.¹⁹⁶ If this is true, then competing coalitions will exist for every congressional decision and the winner will often depend on whether they can help a legislator gain reelection. International trade policies pit domestic constituents against foreigners who have no constituent base.¹⁹⁷ Sometimes these interests align; other times they do not. Domestic constituents' interests are represented by their vote. Foreign constituents are represented by the strength of trade treaties, their own ability to organize and lobby, and any domestic parties that share their concerns.¹⁹⁸ In the examples previously mentioned, one can see why certain domestic groups prevail over their foreign counterparts. In the example of Country of Origin Labeling, there exists a very large, powerful constituency—domestic farmers who benefit from disadvantaging foreign producers and also consumer safety groups. Conversely, the influence of foreign constituents is quite

192. DESTLER, *supra* note 174, at 68.

193. *Id.*

194. *Id.* at 69.

195. See DE MESQUITA & SMITH, *SUPRA* note 184, at 4; SHARYN O'HALLORAN, POLITICS, PROCESS, AND AMERICAN TRADE POLICY 27 (1994).

196. See DE MESQUITA & SMITH, *SUPRA* note 184.

197. PASTOR, *supra* 173, at 43.

198. *Id.* at 45. For instance, Chinese manufacturers would be aligned with U.S. companies who outsource production to reduce costs.

low due to weak treaty obligations and the fact that foreign farmers have no influence in Congress. Thus, it makes sense that Congress would pass Country of Origin Labeling even while there was little evidence to suggest it was necessary.

As this section might suggest, no one theory adequately explains why Congress passes laws that negatively affect trade without taking the impacts into account. Rather, each theory offers some explanation as to what influences a congressional member's decisions. In an effort to consolidate power through favors, the Speaker of the House has an incentive to send a bill to *one* committee for consideration. Since the purpose of this is to consolidate decision making in order to create value in committee assignments, involving more than one committee would dilute the Speaker's objectives. Congress' consideration of bills that put two interest groups at loggerheads inevitably forces legislators to favor one outcome. In this situation, Congress will be inclined to choose the constituency that favors or can positively impact their reelection. This is true even if the decision is at the expense of the nation, or, secondarily, a member's core constituents' long-term interests.

V. BRINGING TRADE TO THE TABLE BY EXECUTIVE ORDER

As the preceding sections illustrate, neither Congress nor Executive Branch agencies are considering the trade implications of the laws and rules that they enact. To solve this problem, we must look to the three sources that influence trade law in the U.S.—Congress, the President, and the World Trade Organization (WTO). This section analyzes three different approaches based on suggested changes to each of these three levels of policy. First, this section analyzes a legislative approach that would amend U.S. congressional House Rules. Next, the section analyzes whether an amendment to the World Trade Organization's rules is appropriate. Third, this section will analyze a possible Executive Order issued by the U.S. President. As this section illustrates, options theoretically exist at all three levels. However, as a practical matter, the best approach is for the President to issue an Executive Order.

A. *Amending the House Rules*

As discussed in Section IV, House leadership exercises control over members by exploiting the committee system and accordingly decentralizes the lawmaking process. The Speaker is able to do this because the House Rules grant the Speaker complete discretion on whether to assign bills that have significant impacts on trade to the Subcommittee on Trade. Moreover, political deal-making pressures House leadership to ignore the subject matter of bills in order to strike deals. Therefore, amending the House Rules is an important step toward ensuring that Congress properly vets trade issues within non-trade bills. As discussed in Section

II(A), the House Ways and Means Committee and its Subcommittee on Trade already have jurisdiction over trade issues. Thus, the House Rules need to be amended to require House leadership to give the House Ways and Means Committee and the Subcommittee on Trade final authority over trade issues.

House Rule XII addresses how the House Speaker assigns committee bills based on the jurisdictions outlined in Rule X.¹⁹⁹ Rules X and XII address jurisdiction in a mutually exclusive manner by only granting the Speaker the discretion, not obligation, to subdivide bills by issue. Therefore, Rule XII should be amended to encourage the Speaker to assign trade issues to the House Ways and Means Committee. The following should be inserted after Rule XII(2)(c)(1): “shall refer the matter to additional committees when the bill would cause significant and foreseeable implications outside the subject matter jurisdiction of the committee for which it is being first assigned.” This amendment is an adaptation of Rule XII(2)(c)(3) which states: “may refer portions of the matter reflecting different subjects and jurisdictions to one or more additional committees.” Finally, the House Ways and Means Committee currently has within its jurisdiction “Reciprocal trade agreements.” It does not, however, have jurisdiction over laws that generally affect trade policy. To remedy this problem, the following should be added to the list of issues that the Committee covers: “Trade issues generally.” By adding this language, the Committee’s Subcommittee on Trade will receive jurisdiction over these types of trade issues.

While these amendments are an important step to ensuring that trade issues are properly vetted by the House Ways and Means Committee and its Subcommittee on Trade, two aspects of the legislative process could undermine this effort. First, as mentioned in Section II(A), the Constitution vests in Congress the power to set its own rules. Therefore, even if Congress adopts these rules, nothing prevents future sessions from altering them. Second, as mentioned in Section II(A), the Speaker of the House ultimately determines how and when to implement House rules. Thus, even with these rules, there is always the chance that the Speaker will not follow them or will chose to interpret them in a way that prevents the House Ways and Means Committee from reviewing trade issues. As a result, while such amendments would be helpful, additional changes are required if any meaningful effect is to be felt.

B. *Amending World Trade Organization Rules*

As described in Section IV, political pressures and deal-making are significant factors in decentralizing the manner in which trade issues are increasingly considered. Given the political nature of lawmaking, it is important to achieve a counterbalance that will keep domestic political

199. HOUSE RULE X, H.R. Doc. No. 111-162 (2013), available at <http://clerk.house.gov/legislative/house-rules.pdf>.

influences on trade matters in check. Amending the WTO framework would provide this important balance. There is currently no provision within the WTO framework that requires a country to vet domestic laws that substantially affect trade through trade committees and agencies. Any amendment to the WTO that creates new WTO enforcement authority would run contrary to the WTO's inherent lack of enforcement authority.²⁰⁰ However, WTO members could still amend WTO provisions to pressure countries to concentrate trade policy consideration, whether within trade agreements or other domestic law, with Members' trade authorities. One way this might be done is by amending the Trade Policy Review Mechanism.²⁰¹

The Trade Policy Review Mechanism creates a body that periodically reviews the impact of a Party's trade practices on the WTO trading system.²⁰² Annex 3(B), entitled "Domestic Transparency," explains that the purpose of the body is to ensure domestic transparency in trade policymaking.²⁰³ However, the Trade Policy Review Mechanism's duties end with the issuance of reports on general trade practices and trade agreements.²⁰⁴ Thus, WTO Members must amend Annex 3 to give the body created by the Trade Policy Review Mechanism authority to evaluate whether local laws that have substantial impacts on trade were properly considered by domestic trade authorities.

To resolve the current lack of authority to analyze domestic laws within the Trade Policy Review Mechanism, the Mechanism's objectives should be amended. Annex 3(A)(i) first outlines the Trade Policy Review Mechanism's objectives: "Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system." This section narrowly defines the scope of review to cover only trade agreements. Thus, this section should be amended as follows: "Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies, trade practices, and domestic laws that substantially effect trade for their impact on the functioning of the multilateral trading system." Similarly, Annex 3(A)(ii) reiterates what laws the Trade Policy Review Mechanism will review:²⁰⁵ "the function of

200. Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 225 (2008) (noting that the WTO has no authority to independently enforce its provisions. Instead, it is more akin to an arbiter.).

201. WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW MECHANISM, annex 3(A)(ii).

202. *Id.* at 3(C)(ii).

203. *Id.* at 3(B).

204. *Id.* at 3(D); see also Press Release, World Trade Organization, Continued Openness is Key at a Time of Economic Uncertainty (June 9, 2008), available at http://www.wto.org/english/tratop_e/tp_r_e/tp300_e.htm.

205. AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, annex 3(A)(ii) (Apr. 15, 1994).

the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system." In the same vein, this section should be amended to include certain domestic laws. Thus, this section should read as follows: "the function of the review mechanism is to examine the impact of a Member's trade policies, trade practices, and domestic laws that substantially effect trade on the multilateral trading system."

C. *Executive Orders*

1. Consult the USTR

As discussed in Section II(B), many non-trade entities within the Executive Branch often address issues that have substantial effects on trade. As a result, administrative agencies often pass rules and regulations that have enormous impacts on trade without seriously considering trade issues.²⁰⁶ Administrative agencies have faced similar problems in the past, the solution to which has been a presidential Executive Order. The President may issue Executive Orders that guide the rulemaking process.²⁰⁷

The President should issue a similar Executive Order that requires any executive agency that issues a rule that has a substantial impact on international trade to consult the U.S. Trade Representative. Such a mandate would ensure that trade experts weigh in on trade issues found within new rules. This would not result in congressional resistance because it does not conflict with Congress' preference to delegate authority to administrative agencies. Moreover, Congress would actually find it easier to play a "good cop" role because it would have one individual to turn to on trade issues: the U.S. Trade Representative. Finally, this centralization of authority in the U.S. Trade Representative would actually increase political accountability because the U.S. Trade Representative would become more in tune with the will of Congress, which is itself directly accountable to constituents.

2. Benefit-Cost Analysis

Another option to encourage trade consideration might be to issue a Presidential Executive Order requiring agencies to consider a rule's trade implications via benefit-cost analysis.²⁰⁸ The most feasible approach would be to add this requirement on top of Executive Orders 13563 and 12866. These Executive Orders set guidelines for regulatory analysis, with

206. See discussion *infra* Section II (B) (outlining the numerous legislative committees and administrative agencies that create non-trade policy that has substantial effects on trade.).

207. See 7 C.F.R. § 1b.2 (2012); EXEC. ORDER No. 12,114, 44 Fed. Reg. 1,957 (Jan. 4, 1979).

208. Note that such an Executive Order would apply only to executive agencies, and not independent agencies.

the primary focus on benefit-cost analysis.²⁰⁹ They require agencies to use the best techniques available to quantify the present and future benefits of a regulation.²¹⁰ They also allow agencies to consider other non-quantifiable values, such as “equity, human dignity, fairness, and distributive impacts.”²¹¹ Notably, these orders do not require agencies to use these findings in their rulemaking process. Rather, the idea is that if agencies gather and review this information and make it public they will ultimately make more informed decisions.²¹²

Many scholars have noted the effectiveness of regulatory analysis. In his essay *Empirically Informed Regulation*, Cass R. Sunstein notes nine examples of regulatory analyses that have led to more effective regulations at reduced costs.²¹³ Several of his examples involve agencies that focused on improving trade for both American companies and their foreign partners.²¹⁴

Regulatory analysis also has its critics. Many note that some statutes actually prohibit benefit-cost analysis.²¹⁵ In these instances, Executive Order 12866 would not be triggered, as its mandate applies only “to the extent permitted by law.”²¹⁶ Moreover, regulatory analysis has no clear audience, except perhaps the President. As a result, an agency’s mandate and its constituents will typically influence policymaking far more than the results of a benefit-cost analysis. When the costs are not aligned with the agency’s constituents, the agency will have no incentive to change course.²¹⁷ This seems to be particularly problematic when agency rules involve issues like national security, often exempt from standard rulemaking procedures. Additionally, benefit-cost analyses are often conducted after an agency has already made a decision. Although it is not entirely clear why agencies conduct post-hoc analyses, one explanation

209. Exec. Order No. 12,866, 3 C.F.R. § 638 (Oct. 4, 1993) [hereinafter *Exec. Order No. 12,866*].

210. *Id.*

211. *Id.*

212. Cass R. Sunstein, *Empirically Informed Regulation*, U. CHI. L. REV. 1349, 1388 (2011).

213. *Id.* at 1389-91. Of these, the retrospective analysis conducted by the Departments of State and Commerce is noteworthy.

214. *See id.* at 1391; DEPARTMENT OF COMMERCE, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES (Aug. 18, 2011), available at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/departmentofcommerceregulatoryreformplanaugust2011a.pdf>.

215. Susan E. Dudley, Lecture at Case Western Reserve School of Law: Ensuring Accountable Government Regulation: Lessons Learned, Challenges Ahead (Sept. 24, 2009), available at <http://law.case.edu/lectures/webcast.aspx?dt=20090924>; see also Sally Katzen, *Why Congress Should Not Codify Cost-Benefit Analysis Requirements*, REG BLOG (June 7, 2011), <https://www.law.upenn.edu/blogs/regblog/2011/06/why-congress-should-not-codify-requirements-for-economic-analysis-of-new-regulations.html>. For an example, *See Whitman v. Am. Trucking Ass’n., Inc.* 531 U.S. 457 (2001) (ruling that Section 109(b) prevents the EPA from considering costs).

216. *Exec. Order No. 12,866, supra* note 209.

217. Dudley, *supra* note 215.

for this tendency might be that agencies are cherry picking the costs and benefits that best justify their predetermined decisions.

While these criticisms are valid, they do not outweigh the benefits of continuing to use benefit-cost analysis. First, while it is true that some agencies are not permitted to consider costs, those that can have developed a successful track record.²¹⁸ Moreover, the reality that an Executive Order would not cover all agencies due to the fact that some agencies are legally prohibited from considering costs is not enough to ignore the Executive Order as an option. For one, it can still be effective for the rulemaking it would cover, which would capture the vast majority of rulemaking conducted. In addition, even in the rare instances where Congress passes a law that restricts an agency's ability to conduct a benefit-cost analysis, at least it does so intentionally, with recognition that costs exist, and a justification in the legislative history as to why the benefits so greatly outweigh the costs. Additionally, it is not clear that this lack of universal coverage has harmed previous benefit-cost analyses in the last thirty years.²¹⁹

Second, the narrow audience of agencies—namely, the President—also cuts in favor of a benefit-cost analysis for trade law. Trade law falls within the realm of international relations, which is primarily within the purview of the President. So while benefit-cost analyses will involve different interests depending on the subject matter, these analyses will most often involve the President's interests. Since the President issues Executive Orders, he can determine whether agencies are properly balancing trade implications against other issues.

Third, even if some agencies conduct benefit-cost analyses as a formality, going through the process is still valuable because it creates an important public record. While any agency may conduct the analysis as a formality today, say because public sentiment is favorable to a rule (regardless of its costs), the same may not be true tomorrow. When sentiment shifts, the public will turn to these records in voicing opposition. When that happens, Congress can use these records to apply pressure on the agency through its subpoena power or by adjusting appropriations.

Fourth and last, it is relatively straightforward to foresee whether a rule would have trade implications that would require consideration. The standard could be focused on whether it is reasonably foreseeable that a regulation would substantially impact imports or exports.

VI. CONCLUSION

Every year legislatures pass laws, rules, and regulations that have serious trade implications. While international trade agreements are reviewed for their trade implications, substantive domestic statutes and regulations are often times not. As a result, many laws, such as the

218. See Katzen, *supra* note 215.

219. *Id.*

Country of Origin Labeling law, the FDA's ban on clove cigarettes, and the Western Hemisphere Travel Initiative, place the United States in a situation where it is likely to confront economic loss and/or legal liability at the World Trade Organization (WTO). The problem highlighted in these examples is not that lawmakers chose inappropriate measures, but that lawmakers never weigh these measures against the costs they incur in the trade arena.

The reason for this tendency is that Congress and U.S. Executive Branch agencies adopt statutes, rules, and regulations in isolation, based on the broad subject matter of the law. For example, because Country of Origin Labeling was primarily seen as an agricultural law, only the House Committee on Agriculture considered the law. The House Ways and Means Committee Subcommittee on Trade (in addition to other trade experts) provided little input. Later, as trade experts predicted, this law led to complaints against the U.S. at the WTO. These kinds of laws have lasting economic impacts on international trade and can also leave the U.S. open to legal consequences.

To remedy this problem this Article has proposed several solutions. First, congressional House Rules can be amended so that trade issues receive greater consideration. Second, WTO rules can be amended so that countries are increasingly evaluated for their compliance with WTO law. Third, the U.S. President can enhance Executive Branch agency jurisdiction via Executive Order. Fourth, the President can amend existing Executive Orders that require agencies to conduct benefit-cost analyses to place greater weight on trade costs. As this Article explained, none of these options is perfect. However, those involving Executive Orders do the most to address this problem as they stand the greatest chance of being adopted and implemented.

Ultimately, Congress and the Executive may, at times, turn their backs on U.S. trade obligations. Often these decisions may be wise. But such decisions cannot be wise when adopted with disregard to their consequences.

