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INTERNATIONAL TRADE POLICY IN AN EVOLVING WORLD: U.S. v. CHINA AND THE POSSIBLE IMPLICATIONS

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A mia madre,

sei nell'anima, e li ti lascio per sempre, perché non te ne sei mai andata,
per venas meas curris, eterna.

A mio padre,

per non aver mai smesso di cercare la luce in fondo al tunnel e per aver sempre creduto in me.

A me stesso,

per tutte le volte in cui non ti sei sentito abbastanza,

sei sempre stato ben oltre quell'abbastanza.

“Fortis fortuna adiuvat”.

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INTRODUCTION

In the age of globalisation, where the world is so interconnected, and where economical decisions have echoes everywhere, international trade becomes the key tool to understand the evolution of international geopolitics and economy.

In the most recent years, we have been daily bombed with news concerning the impositions of new tariffs: the United States of America started an international trade war against Chinese products, blamed for being the reason of a huge Chinese balance of payments surplus.

Chinese' low-cost labour and hyperproduction overflooded the market with a cheap variety of products, changing the dynamics of global economy: China cannot no longer be considered a main production hub, but it has evolved into one of the fastest growing economical superpowers, not only in terms of their GDP, but also in terms of investments, defence and international power.

We could say that finally the Pandora's box was open, and when we analyse history, trying to understand the reasons and the evolution, we can easily understand why those who believed that China would have remained only the low-cost production hub of the world were wrong.

China's opening towards the western capitalism, mainly thanks to the entrance of the country in the WTO's system the 11th of December of 2001 gave them the advantages of a deeply integrated set of rules promoting liberalisation of trade, allowing China to use their main technical advantage to conquer international markets.

The consequences of all that happened then are the base from which I have decided to start my analysis, because I firmly believe that, in order to understand what is going on in this pivotal period of change in the history of economy, we must first start addressing some of the legal issues going on: starting from the Challenging against U.S. new tariffs' imposition in front of WTO's panels, completing the analysis through U.S. internal judicial war on the powers of the President to impose those tariffs, culminated in the case V.O.S. v. Trump, a case that the Supreme Court is called to decide the soonest possible.

Finally, my strongest belief is that legal outcomes, especially when dealing with international trade, are deeply driven by economical decisions, but I also believe that only through conducting a complete legal analysis of the leading cases involved on this topic we can have the greatest picture of where global economy is going.

PARAGRAPH 1- A SHORT HISTORICAL BACKGROUND ON TARIFFS

Raising value for their own treasuries and regulating commerce (through imports and exports) has always been, from ancient times until the modern ones, one if not the most important prerogative of big empires than and states later. Today's everyday life is bombed with information about tariffs and international trade, due to the economical and geopolitical situation that we are experiencing, but understanding the present starts from analysing the past.

Already in the Bronze Age (3rd–2nd millennium BCE), records from the Old Assyrian colony at Kanesh in Anatolia note that local rulers charged duties on caravans carrying metals and textiles. At Piraeus, Athens collected a 2% duty on vital imports, including grain, in order to support public needs. In the 3rd century BCE, Han's dynasty China rulers leveraged military power to maintain the Silk Road for trade. In 30 BCE, Rome took over Egypt primarily to ensure a stable grain supply[1]. In the Roman Empire, internal provincial commerce was typically taxed at about 1–5%, whereas luxury goods imported from Asia or other external areas paid far higher rates (between 12–25%), making silk and spices extremely expensive for the average Roman[2].

Medieval period marked the "Systematisation" of tariffs across Europe, especially due to the flourishing conditions of the period going from 12th to 15th century. As a consequence, monarchs and feudal lords used to impose tariffs on cities' gates and on trading routes.

Mercantilism was the dominant economic doctrine in Europe from the 1500s through the 1700s: It was based on strengthening the nation-states by increasing their wealth (measured in gold) and power, especially against rivals.

During the 16th–18th centuries, mercantilist states viewed tariffs as central tools to affirm their national power. They sought to secure a favourable balance of trade, discouraging imports and stimulating exports so gold flowed in rather than out. Tariffs also protected domestic industries, especially those seen as strategic, while providing

[1] "Paradigm lost? US Trade Policy as an Instrument of Foreign Policy", Alan Wm. Wolff (1), American University, Washington DC, February 05, 2018, available at https://www.wto.org/english/news_e/news18_e/ddgra_09feb18_e.htm

[2] "History of tariffs: From ancient times to the modern day", Carter Hoffman, June 02, 2025, available at https://tradetreasurypayments.com/posts/history-of-tariffs-from-ancient-times-to-the-modern-day

an important source of state revenue to fund wars, administration, and expansion. Beyond taxation, tariffs were embedded in a broader framework of control and regulation—together with quotas, prohibitions, monopolies, and navigation laws—to manage trade flows. Rates typically varied by commodity, with higher duties on finished goods to shield local producers and lighter ones on raw materials needed for production. Finally, tariffs always served as foreign policy instruments, wielded in rivalry with other European powers, in colonial competition, and to strengthen naval and strategic security across trading routes.

One of the champions of the mercantilist view, together with Italian philosopher and economist Antonio Serra, was Jean-Baptiste Colbert (1619-1683[3]), a French statesman who served as the Minister of Finances under King Louis XIV, whose reforms, aimed at increasing France's revenues and reducing national debt left a lasting mark on France's economy while serving the ambitions of absolute monarchy.

A clear example of laws aimed at protectionism were the "*Navigation Acts*", passed in England (mainly during the 17th and 18th centuries) and meant to make sure that trade to and from England was carried on English ships. This would build up England's merchant fleet, which could also serve as a reserve of ships for the navy in times of war. Over time, these laws restricted foreign ships (especially Dutch vessels) from carrying goods to or from England and its colonies. This gave English merchants and shipowners a monopoly over much of England's trade.

In a wider context, the Acts became a mercantilist policy to secure trade protectionism, shielding English commerce and shipping from foreign competition and ensuring that wealth from colonial trade stayed within the English economy[4].

By the mid-18th century, some intellectuals began to challenge the assumptions of mercantilism. 1776 was an historical year due to Adam Smith's "*Wealth of Nations*", which delivered a systematic critique of tariffs and trade restrictions, contending that high duties merely raised prices for consumers and hindered industry, whereas open

[3] His biography is Available at https://www.treccani.it/enciclopedia/jean-baptiste-colbert_(Dizionario-di-Economia-e-Finanza)/
[4] Information available at https://www.britannica.com/event/Navigation-Acts

exchange (free exportation and free importation) enabled each nation to prosper by producing what it did best[5].

This marked a profound shift in economic thought: free trade was seen as an advancing element for the foundation of national prosperity, rather than protectionism. The case was strengthened in 1817 by David Ricardo, whose theory of comparative advantage showed that even countries more efficient in all areas could gain from trade by specialising in their relatively most productive sectors and importing other goods.

Ricardo illustrated his theory of comparative advantage with an example involving the United States and Britain. He noted that the United States was more efficient than Britain at producing both wheat and cloth—holding what is called an absolute advantage in both goods. However, its superiority was greater in wheat than in cloth. From this, Ricardo reasoned that what matters for trade is not absolute productivity but relative efficiency. A nation maximises its gains by specialising in the good where its advantage is greatest and trading for the rest.

Applied to this case, the United States would specialise in wheat, where its comparative advantage was strongest, and export it. Britain, despite being less efficient overall, would focus on cloth, since that was the area of its comparative disadvantage for the U.S. but relative strength for Britain. As a result, both nations would benefit from exchange: the U.S. by exporting wheat and importing cloth, and Britain by doing the opposite[6].

Following the ideas of Smith and Ricardo, the late 18th and 19th centuries brought intense debates and shifts in tariff policy, with different nuances across countries. Clear examples are 1815 Great Britain's Corn Laws, imposing a series of tariffs and other types of trade restrictions on imported grain, aimed at protecting British grain producers from cheaper alternatives entering the market from overseas.

While these measures were seen in a good way by domestic producers and landowners (who profited heavily from higher prices and a lack of competition), the laws were terrible for the broader population, who faced higher prices (especially on basic goods

[5] "History of tariffs: From ancient times to the modern day", Carter Hoffman, June 02, 2025, available at https://tradetreasurypayments.com/posts/history-of-tariffs-from-ancient-times-to-the-modern-day

[6] LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATION CASES. MATERIALS AND TEXT, Seventh Edition, John H. Jackson, William J. Gavey, Alan 0. Sykes, Jr., American casebook series, West Academic Publishing, pg. 11

like bread). After strong political battles and protests, Parliament repealed the protectionist law in 1846, committing the country to free trade., with an outcoming effect equivalent to free trade in grain, marking Britain's adhesion to free trade principles.

Nevertheless, history proved and is still proving nowadays that, when countries want to favour and develop their industries, they tend to use protectionism as a key-tool (creating in a way a sort of historical involution from free trade). It was not a case that after U.S. Civil War (1861-65), higher tariffs were used to protect steel and manufacturing sectors (similarly to what we are experiencing nowadays).

"The infant industry argument", initiated in 1791 by Alexander Hamilton and then refined by Friedrich List was used as a motto for sheltering U.S. industries and letting them grow rapidly. The theory claimed that young industries, lacking the experience and size to compete effectively against established competitors abroad and with a high vulnerability to sudden market changes needed temporary tariff protection until they matured[7].

At the same time, Chancellor Bismarck's Germany abandoned freer-trade and imposed iron and grain tariffs in 1879 to protect German industry and agriculture following its unification, happened in 1871.

Imperial Power played a huge role in the global "free trade" wave of the 19th century, so many colonies were forced into free trade or low tariffs (benefitting the coloniser).

At the beginning of the 20th century, tariff barriers across the world were still high, with major powers shielding their strategic industries. The United States, for instance, maintained average duties of about 40% on manufactured goods into the 1920s.

The Great Depression of the 1930s brought international trade relations to their lowest point. Countries raised tariffs aggressively, fuelling a cycle of protectionism. The most notorious measure was the U.S. *Smoot-Hawley Tariff Act* of 1930, which boosted import duties on more than 10,000 goods, lifting average U.S. tariffs on dutiable imports to roughly 60%. Intended to shelter American farmers and manufacturers, it provoked retaliation: as a consequence, Canada redirected much of its commerce

[7] Infant Industry Argument, available at https://corporatefinanceinstitute.com/resources/economics/infant-industry-argument/

toward the British Empire, while other partners such as Britain imposed counter-measures of their own[8].

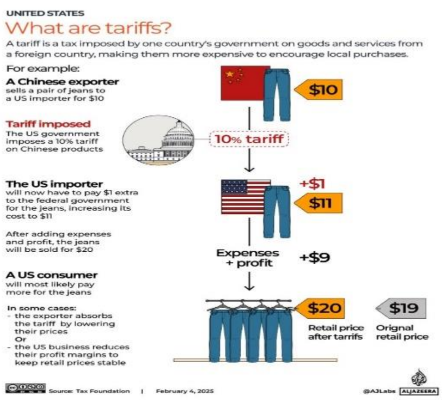
[8] "History of tariffs: From ancient times to the modern day", Carter Hoffman, June 02, 2025, available at https://tradetreasurypayments.com/posts/history-of-tariffs-from-ancient-times-to-the-modern-day

PARAGRAPH 2- WHAT IS A TARIFF AND HOW IT WORKS

A tariff is a tax on imported goods, charged as a percentage of their value. The rate depends on the product and its country of origin. Tariffs are mainly used to protect domestic industries by reducing foreign cost advantages, such as cheaper labour, weaker standards, or government subsidies.

The “exporter” is the person whose business’ goal is selling products abroad, while the “importer of record” is the subject in charge of paying the tariff when the goods enter the country. It is extremely important, for better understanding today’s economy, that the cost of tariffs often passes along the supply chain, ultimately impacting businesses or consumers, depending on market (and now more than ever, political) dynamics.

All these developments can push consumers and businesses towards domestic products as well as creating many worries to foreign exporters, and this is, especially in this era of international trade more than ever, the reason why tariffs are used (especially from the biggest importing markets, such as the U.S.) as the key deterrent for economic and commercial purposes against other countries: higher tariffs could also trigger retaliatory measures from the other countries, with the possible outcome of triggering a trade war.



CHAPTER 1- THE WORLD TRADE ORGANISATION

PARAGRAPH 1- THE CREATION OF WTO

"*The truth is universally recognized that trade between nations is the greatest peace-maker and civilizer within human experience*" stated Roosevelt's secretary of state and Nobel Peace Prize winner Cordell Hull in 1934[9], paraphrasing what Stuart Mill had expressed in *"Principles of Political Economy with Some of their Applications to Social Philosophy" (1848)*[10].

A key aim of international economic policy has always been to prevent war. History shows that economic strategies and international relations are closely linked, with certain policies either promoting peace or contributing to conflict. This connection was especially evident after two World Wars, where economic conditions and policies played a major role.

The foundations of the modern trade system were largely shaped by the United States and the United Kingdom. Although Washington faced challenges similar to those it had encountered after World War I, the Roosevelt and Truman administrations managed them more effectively. Even during the war, U.S. officials coordinated across agencies, with private actors and British counterparts, to anticipate post-war economic issues and design responses. Starting from the reciprocal trade agreements the United States had pursued since 1934, negotiators from both countries gave rise to a common vision for an international body aimed at advancing trade liberalization.

The two pillars used as starting point to forge the forthcoming system were the *Atlantic Charter* of 1941[11] and *The Master Lend Lease Agreement* of 1942[12], whose

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[9] This is how Cordell Hull articulated this principle of U.S. policy 80 years ago on February 6, 1938: *"Our nation, and every nation, can enjoy sustained prosperity only in a world which is at peace; a peaceful world is possible only when there exists for it a solid economic foundation, an indispensable part of which is active and mutually beneficial trade among the nations."*

[10] Stuart Mill asserted that: *"It is commerce which is rapidly rendering war obsolete, by strengthening and multiplying the personal interests which are in natural opposition to it. And it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions and the character of the human race."*

[11] The fourth point in Atlantic Charter of 1941 provided that the signatories would *"endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity."*

[12] Article VII provided that the two countries would pursue an agreement "*open to participation by all other countries of like mind ... [for] the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers."*

commitments led to a troika of economic and political conferences with the rest of the allied countries: the Bretton Woods Conference (July 1944) created the International Monetary Fund (IMF) and the World Bank, the Dumbarton Oaks Conference (August-October 1944), which originated the United Nations Organization and the Havana Conference (November 1947-March 1948), which shaped the Havana Charter for an International Trade Organization (ITO).

The General Agreement on Tariffs and Trade (GATT), concluded in 1947 with 23 original contracting parties, marked the first multilateral attempt to provide a framework for the reduction of tariffs and the regulation of international trade. The First (Geneva) Round of negotiations resulted in substantial tariff reductions and laid the foundation for subsequent rounds. The momentum continued with the Second (Annecy) Round in 1949, which not only secured additional tariff cuts and facilitated the accession of ten new members, but also expanded the scope of international cooperation by adopting the Florence Agreement on cultural goods, negotiated jointly with UNESCO.

Despite these advances, institutional consolidation proved elusive. In 1950, President Truman withdrew the Havana Charter from U.S. congressional approval, thereby preventing the creation of the International Trade Organization (ITO) that was originally envisioned to complement GATT. Consequently, GATT remained a provisional arrangement rather than a fully institutionalized organization. Nevertheless, negotiations proceeded with the Third (Torquay) Round. A renewed attempt to establish a broader Organization for Trade Cooperation in 1954 collapsed when the U.S. Congress objected, underscoring the domestic political constraints that shaped American trade policy. The Fourth (Geneva) Round of 1956, while advancing tariff negotiations, did little to resolve these structural uncertainties.

The Fifth (Dillon) Round (1960–1962) reflected the shifting dynamics of the international trading system, particularly in response to the formation of the European Economic Community (EEC) and its Common External Tariff. This period highlighted how regional integration directly influenced multilateral negotiations. Parallel to these developments, the establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964 created a rival institutional forum, explicitly designed to address the concerns of developing countries and to challenge GATT's focus on industrialized economies.

The Sixth (Kennedy) Round (1964–1967) marked an important step toward expanding GATT's agenda beyond tariffs by introducing significant non-tariff agreements, particularly in the areas of anti-dumping and customs valuation. However, U.S. failure to ratify these provisions reflected ongoing domestic resistance to deeper trade commitments. The Seventh (Tokyo) Round (1973–1979) further consolidated this shift, producing a complex package of tariff reductions alongside a series of non-tariff codes. This development foreshadowed the gradual broadening of GATT's regulatory scope from tariff liberalization to a more comprehensive framework addressing diverse trade barriers.

In institutional terms, the U.S. Congress's adoption of "fast-track" authority in 1974 was pivotal, as it created a mechanism for ensuring that future trade agreements would be negotiated and ratified as an indivisible whole. This principle anticipated the "single undertaking" approach that would later define the Uruguay Round. Similarly, the establishment of the Consultative Group of 18 (later expanded to 22) between 1975 and 1985 functioned as a quasi-executive board for GATT, signalling a trend toward greater centralization of decision-making within the system.

Despite these institutional innovations, efforts to launch a new round in 1982 collapsed, as the United States failed to persuade its trading partners to expand negotiations to new frontiers such as services, investment, and intellectual property rights. This reflected a widening gap between the traditional GATT agenda and the emerging realities of global commerce. Ultimately, however, after years of diplomatic persuasion and preparatory work, the Uruguay Round was launched in 1986. This round would prove transformative, not only because of the scale of its agenda, but also because it paved the way for the creation of the World Trade Organization (WTO), thereby resolving the institutional precariousness that had characterized GATT since 1947[13].

The Uruguay Round of trade talks began in September 1986 at Punta del Este. Two years later, ministers met in Montreal for a mid-term review, which produced an initial set of agreements on trade rules and institutions.

[13] Uruguay Round negotiations on the Functioning of the GATT System, from the *Punta del Este Ministerial Declaration*, 20 September 1986. Point II of Letter A (Objectives) provided that "*Negotiations shall aim to: […] (ii) strengthen the role of GATT, improve the multilateral trading system based on the principles and rules of the GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines.*"

In 1990 the European Union, inspired by Canadian ideas, suggested creating a Multilateral Trade Organization (MTO). Hopes to end the round at the Brussels meeting in December collapsed when negotiations broke down. Still, progress was made: in December 1991 the "Dunkel Draft" laid out a full package of agreements, including a charter for the proposed MTO.

A major breakthrough came in November 1992, when the United States and the European Union settled a long dispute over agriculture at Blair House in Washington, D.C. The following year, the Quad countries (Canada, the EU, Japan and the U.S.) reached a market access deal during the G7 summit in Tokyo, and by the end of 1993 most issues were resolved.

Finally, in April 1994, the Uruguay Round concluded with the Marrakesh Agreement in Morocco[14]. This landmark deal put together all the results into a single package and set the stage for the creation of the World Trade Organization. The Uruguay Round agreements came into effect on 1 January 1995, the first day of the WTO period.

[14] "The creation of the multilateral trading system", available at part I. "The foundations of the WTO" at https://www.wto.org/english/res_e/publications_e/historyandfuturewto_e.htm

SUBPARAGRAPH 1.1-THE ROLE OF WTO FOR THE PROMOTION OF MULTILATERALISM AND ITS FUNCIONING

The World Trade Organization (WTO) stands at the heart of contemporary international economic law, functioning as the principal institution promoting the multilateral, rules-based trading order. Created in 1995 as the institutional successor to the GATT, the WTO's core purpose is to promote global trade liberalization through cooperation rather than unilateralism. It does this by offering its 164 members a structured venue to negotiate trade rules, by maintaining a body of binding legal disciplines, and by operating systems that monitor compliance and enforce obligations. In effect, the WTO embodies the multilateral idea: policy decisions are taken collectively, typically by consensus, and foundational principles such as most-favoured-nation (MFN) treatment require members to extend any trade concession granted to one state to all others, guarding against discriminatory or preferential bilateralism[15].

The organization thus aspires to replace power-driven bargaining with predictable, universally applied rules. John H. Jackson, one of the chief architects of postwar trade law, famously emphasized that the WTO's mission was to "*create and maintain a strong multilateral trading system*" built on "*a vibrant, rules-based institution – an international organization and a judicialized dispute settlement system*"[16].

In practice, the WTO's functions can be grouped into three central pillars: (1) its role as a negotiation forum and rule-making body, (2) its responsibility for supervising the implementation and transparency of national trade policies, and (3) its operation of a structured dispute settlement system that enables members to challenge violations of agreed rules[17].

At the core of the WTO's multilateral system are several principles and institutional practices that aim to universalize trade rules and prevent fragmentation.

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[15]ICC (2025), Why the most-favoured nation principle matters for business, www.iccwbo.org/newspublications/policies-reports/why-the-most-favoured-nation-principle-matters-for-business/

[16]John H. Jackson-WTO Institution Builder, Ottawa Faculty of Law Working Paper No. 2017, Posted: 31 Jul 2017, by Debra P. Steger

[17]Reforming the World Trade Organization Prospects for transatlantic cooperation and the global trade system, Marianne Schneider-Petsinger, Research Paper US and the Americas Programme, September 2020, at page 4

First, multilateralism is made through strict non-discrimination rules, especially the Most-Favoured-Nation (MFN) obligation: MFN, described as "a cornerstone of the WTO", requires that any trade advantage offered to one member be immediately extended to all[18]. Together with the national-treatment rule, MFN ensures that members cannot create exclusive circles of preferential treatment that would undermine the universality of the system. These principles make the WTO fundamentally different from power-based or bilateral approaches, promoting instead a unified global regime grounded in fairness and predictability.

Second, the WTO's consensus-driven decision-making reinforces its inclusive and universal character. Formally, every member (large or small) has a voice, and agreements only move forward when all members assent[19]. The Uruguay Round's "single undertaking" model, where countries accepted all agreements as a package, was designed to prevent selective participation and guarantee that developing nations were integrated into the full rulebook. Although consensus promotes legitimacy, it also slows progress: the Doha Round's long impasse illustrates how a single dissenting member can stall negotiations.

Still, the philosophical commitment is clear: multilateral, universal deals must take precedence over a world dominated by bilateral preferences, especially in hard times as nowadays: as Jagdish Bhagwati warned, the global trend toward bilateralism risks creating a mixture of conflicting rules, a "deadly threat to the multilateral trading system"[20].

Third, the scope of WTO commitments has expanded significantly beyond the original GATT framework. The inclusion of services (GATS), intellectual property (TRIPS), and strengthened disciplines on subsidies, standards, and sanitary measures reflects the increasingly interconnected nature of global commerce. By placing these diverse areas under one multilateral umbrella, the WTO reinforces the idea of a single, coherent trading system rather than a mosaic of issue-specific agreements.

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[18]Id. at 100

[19]In Search of Consensus on WTO Consensus Decision-Making, Peter Van den Bossche, WTI WORKING PAPER SERIES WTI working paper no. 7/2025

[20]Multilateralism — The World's Viewpoint, April 8, 2004, By The Globalist, https://www.theglobalist.com/multilateralism-the-worlds-viewpoint

At the same time, this broadened mandate has sparked debate: while proponents see it as necessary modernization, critics argue that some obligations, such as demanding IP protections, can disproportionately burden developing economies.

This tension between universality and development sensitivity continues to shape scholarly and political debates.

In sum, the WTO advances multilateralism through non-discrimination, consensus-based governance, and an integrated rulebook that extends across modern trade issues. These mechanisms together aim to maintain a fair, predictable, and universally applicable trading framework, while at the same time revealing the practical and political limits of pursuing global consensus in a diverse international system.

A central mission of the WTO is to function as a permanent venue where member governments negotiate new trade rules and refine existing ones: this negotiating role lies at the heart of the WTO's commitment to progressive, rules-based trade liberalization. Unlike bilateral bargaining, which limits concessions to two parties, the WTO's traditional model of multilateral "rounds" brings all members to the table at once, enabling broad cross-sector bargains and the classic principle that "nothing is agreed until everything is agreed" This approach encourages comprehensive trade packages that reflect the full diversity of members' interests.

WTO deals are reached by consensus and, once adopted, bind all members[21]. This universal application is crucial: it spreads the benefits of liberalization broadly and guards against unilateral backsliding. Binding tariff schedules, services commitments, and detailed rule-based agreements give businesses and governments predictability and stability, two ingredients essential for long-term trade and investment planning. The negotiation process is supported by an extensive institutional infrastructure that facilitate technical discussions and ongoing cooperation between ministerial conferences.

In effect, WTO rule-making is a continuous, evolving process, designed to update global trade governance in response to emerging issues such as digital trade, sustainability standards, and new industrial policies.

[21]Marrakesh Agreement Establishing the World Trade Organization art. IX, para. 1, Apr. 15, 1994, 1867 U.N.T.S. 154 (entered into force Jan. 1, 1995)

The slowdown of WTO-wide negotiations (most notably the protracted Doha Round) has coincided with a sharp rise in regional and bilateral trade agreements (for example, USMCA, RCEP, CPTPP, EU FTAs): although these accords can complement the multilateral system, they also reflect a gravitational pull toward agreements among like-minded and common interest partners, raising concerns that the WTO's centrality could erode over time.

Critics warn that a proliferation of preferential agreements risks fragmentating the global trading system into overlapping, inconsistent regimes, especially in a period of international trade settling. Ernesto Zedillo, former Mexican President warned that "The multilateral trading system could become the battle ground for unsettled geopolitical disputes, with disastrous consequences"[22].

Despite these challenges, the WTO remains the backbone of global trade governance. It acts as a transparency hub for regional agreements and continues to enforce foundational multilateral disciplines (especially MFN) which still govern the overwhelming majority of world commerce.

Indeed, more than 80% of global merchandise trade continues to flow under MFN-based WTO commitments[23]. This empirical fact underscores that, even amid the rise of regionalism, the WTO's multilateral framework remains the indispensable cornerstone of the international trading system.

In addition, the most lauded function of the WTO is its dispute settlement mechanism. The WTO's Dispute Settlement Understanding (DSU) created a binding, quasi-judicial process through which members can resolve trade conflicts under agreed rules, rather than through unilateral action or power-based diplomacy. This system represents a strengthening of multilateral enforcement compared to the GATT era, and it is frequently cited as a hallmark of the rule-of-law approach in global trade governance.

As the WTO itself has noted, "dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy." Without a means to adjudicate disagreements, "the rules-based system

[22]Id. at 105
[23]Id. at 100

would be less effective because the rules could not be enforced[24]. This statement highlights that a collective commitment is only as good as the mechanism to uphold it.

The WTO dispute process allows any member (including the smallest economies) to challenge potential violations of agreements by any other member, before an impartial panel of experts and (if appealed) the standing Appellate Body. The outcomes are binding: if a member's measure is found WTO-inconsistent and not brought into compliance within a reasonable time, the complainant can ultimately be authorized to impose trade sanctions[25].

This credible threat of enforcement undercuts the ability of powerful countries to simply ignore the rules or bully weaker ones, thus buttressing the multilateral character of the obligations. In a notable shift from the GATT era, the WTO's adoption of "negative consensus" decision-making for dispute reports meant that a losing party can no longer block adoption of a ruling (decisions become binding unless every member, including the complainant, objects, which never happens in practice). This innovation ensured that legal rulings could not be vetoed by the violator, a transformation that greatly strengthened rule enforcement globally.

The WTO dispute system has been praised for underscoring the rule of law in international trade relations[26]. It provides due process: written legal submissions, hearings, reasoned decisions based on evidence and WTO law, and the possibility of appellate review for errors of law.

The existence of a two-tier adjudicatory system (panels and the Appellate Body) gave confidence that interpretations of the often-complex WTO agreements would be considered carefully and consistently. Over 25 years, members brought hundreds of cases, indicating both the system's utility and the depth of economic interests at stake. Importantly, developing countries have been active participants.

[24]WTO-Analysis of Issues with the Dispute Settlement Mechanism**,** Dharmapuri Selvakumar Madhumitha, Tamil Nadu National Law University, Tiruchirappalli, India, Beijing Law Review, Vol.11 No.4, December 2020, available at https://www.scirp.org/journal/
[25]*Understanding on Rules and Procedures Governing the Settlement of Disputes* art. 21.5–.6, art. 22.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401
[26]Id. at 109

Developing economies have actively and successfully used the dispute settlement system to defend their commercial interests, prevailing in disputes even against major trading powers in many instances[27]: such outcomes were almost unthinkable in a purely power-driven system and illustrate how multilateral adjudication can mitigate power imbalances.

By providing a peaceful settlement mechanism, the WTO dispute process also reduces the likelihood of trade wars. Members have agreed not to unilaterally determine violations or retaliate[28]; instead, they must pursue complaints through the multilateral system, disciplining unilateralism and reinforcing collective responsibility.

In recent years, however, the dispute settlement system has encountered serious challenges, raising concerns about the future of multilateral enforcement. The most acute issue has been the paralysis of the WTO Appellate Body since 2019.

The United States (under both the Trump administration and continuing into the Biden administration) blocked new appointments to the seven-member Appellate Body over grievances about its alleged judicial overreach and procedural delays and, as a result, the Appellate Body lost the quorum needed to hear appeals, effectively disabling the final appeal stage[29]: this has meant that if a party appeals a panel ruling into the void, the case cannot be resolved, undermining the binding nature of the system.

Many WTO members have decried this situation, warning that it undercuts trust in the rules-based system and could stop decades of progress. Indeed, WTO members themselves, started from the point that the impartiality and independence of the Appellate Body is crucial to the credibility of the entire multilateral trading system. The Appellate Body crisis is thus seen as a grave threat to multilateralism: without a functioning dispute mechanism, there is a risk of reversion to power-centric behaviour and even trade wars, as countries may feel free to ignore rules or take justice into their own hands, situations that we are experiencing nowadays.

[27]Developing Countries Can Help Restore the WTO's Dispute Settlement System, Anabel González (PIIE) and Euijin Jung (PIIE), Policy Brief 20-1, January 2020, available at https://www.piie.com/publications/policy-briefs/developing-countries-can-help-restore-wtos-dispute-settlement-system

[28]Id. at 110, art.23

[29]Reforming the World Trade Organization Prospects for transatlantic cooperation and the global trade system, Marianne Schneider-Petsinger, Research Paper US and the Americas Programme, September 2020, from page 13

The crisis also underscores an underlying debate about the balance between law and sovereignty. The U.S. (particularly under Trump) argued that the WTO dispute mechanism had overstepped, creating new obligations not agreed by members and constraining U.S. ability to counter practices (notably China's) that it views as unfair. Whether or not those critiques have merit, they point to a tension in a multilateral legal system: members ceding some sovereignty to adjudicators versus the desire to retain national control.

In sum, the WTO dispute settlement mechanism has been a powerful engine for upholding multilateral trade rules, but the current challenges invite questions about whether that commitment will hold.

PARAGRAPH 2-WTO AS A JURIDICAL SUBJECT UNDER INTERNATIONAL LAW

As a true international organization, the WTO comprises an integrated and distinctive legal order formed by: 1) the production of a body of legal rules;

2) it makes up a system of legal rules governing international trade;

3) it governs a community, composed by the member states.

The WTO is both a forum for cooperation among sovereign states and an integration organization with a unique dispute settlement system, which differentiates it from traditional international bodies. It functions as a distinct legal order within international law, with its own rules and enforcement mechanisms. However, while specific, this legal order is not isolated from the broader international system and therefore, of course, it respects the principles of international law (such as the sovereign equality of states, good faith, international cooperation, the rules of interpretation of conventions)[30].

Legal personality is the starting point for an international organisation as the WTO to fully operate, holding rights and obligations and having the power to constitute legal relationships not only with States or NGOs, but also with juridical subjects internal to the states where WTO operates.

Article VIII (Status of the WTO), paragraph 1 of the WTO Agreement establishes the legal personality for the organisation[31]. This provision refers, albeit implicitly, both to international legal personality and to internal legal personality. With regard to the first, the Organization enjoys, therefore, a position of international law, recognized in general international law, which implies that States are under the obligation to recognize it on the basis of that very norm. With regard to the second, it concerns a form of legal personality that the Member States have decided to attribute conventionally to the Organization for their own internal purposes (in this way third States remain free, within the limits of their own legal systems, to confer or not upon

[30] *The Place of the WTO and its Law in the International Legal Order*, Pascal Lamy, The European Journal of International Law Vol. 17, no.5, EJIL 2007

[31] Art. VIII, paragraph 1 of WTO Agreement establishes that *"The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions."*

the Organization legal personality in their respective domestic orders, insofar as it is not functionally linked to its international personality).

Another key feature that the WTO possesses in order to fully operate and being integrated in the international legal order is represented by the general capacity to conclude international treaties, represented by *Art. V, paragraph 1 of the WTO Agreement* granting WTO the competence to establish relations with other international organizations. In order to do so, it assigns the General Council (the central governing body) the authority to adopt the necessary arrangements for cooperation with other intergovernmental entities[32], as well as NGOs whose activities are related with those of the WTO[33].

During the years of activity, the WTO has concluded specific agreements with various global institutions to coordinate activities, some of them are represented by the one with the United Nations of 1995, in order to align with the UN system, the one with the International Monetary Fund (IMF) of 1996, particularly relevant for balance of payments issues, the one with the World Bank of 1996 to coordinate development and trade policies, the one with World Intellectual Property Organization (WIPO) of 1995 on intellectual property matters and, finally, the agreement with International Telecommunication Union (2000), focused on issues relating to telecommunications and trade.

These agreements are crucial because not only they provide a starting framework for collaboration, which may include information-sharing, joint studies, and reciprocal participation in institutional activities, but also because they ensure coherence in international law and reinforce the WTO's status as a subject of international law, capable of entering into binding agreements.

The need to ensure autonomy and independence of international organizations from national jurisdictions is the ratio of privileges and immunities, which are not a personal benefit but a guarantee for the proper performance of institutional functions.

[32] Article V (Relations with Other Organizations), paragraph 1 states that:" *The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO."*
[33] Article V, paragraph 2 specifies that: *"The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."*

WTO Agreement, art. VIII, paragraph 2[34] obliges members to grant the WTO the privileges and immunities necessary for the exercise of its functions. The general principle is left open, but it is complemented by specific agreements such as the *Headquarters Agreement* with Switzerland.

Since the WTO operates from Geneva, its legal regime is primarily governed by this Agreement which incorporates, in large part, the 1947 *UN Convention on the privileges and immunities of Specialized Agencies*, granting the inviolability of premises, archives, and property, fiscal and customs exemptions, freedom of communication and transmission of documents and, above all, immunity from jurisdiction (civil and administrative).

Under *Section 4 of the 1947 Convention*[35], echoed by *Art. 8 of the Headquarters Agreement*[36], WTO enjoys immunity "from every form of legal process", unless it expressly waives it. However, unlike the Convention, the Headquarters Agreement allows the WTO to waive its immunity from execution, which introduces flexibility. In addition, the Headquarters Agreement (Art. 46)[37] obliges the WTO to respect Swiss security concerns, providing for consultation with Swiss authorities.

WTO officials and experts also enjoy protections comparable to those of diplomats, especially functional immunity for acts performed in their official capacity. *Art. 17 of the Headquarters Agreement*[38] grants permanent missions' members privileges and immunities under customary law, the *1961 Vienna Convention* (by analogy) and *Article 5*[39] imposes on Switzerland a duty of protection on WTO officers, reinforcing their independence and security.

[34] See *WTO Agreement, art. VIII, paragraph 2*
[35] See section 4 of the 1947 *UN Convention on the privileges and immunities of Specialized Agencies*
[36] See art.8 of *the Headquarters Agreement between WTO and the Swiss Confederation (1995)*
[37] See art.46 of *the Headquarters Agreement between WTO and the Swiss Confederation (1995)*
[38] See art.17 of *the Headquarters Agreement between WTO and the Swiss Confederation (1995)*
[39] See art.5 of *the Headquarters Agreement between WTO and the Swiss Confederation (1995)*

PARAGRAPH 3-THE ISTITUTIONAL STRUCTURE OF WTO: INTRODUCTION

The institutional design of the WTO is best understood through the functions described in *Article III of the WTO Agreement*. First, the organization serves an implementation role (para. 1), ensuring that trade agreements are carried out effectively. Second, it acts as a negotiating forum (para. 2), providing a space for members to discuss and adopt new trade rules. Third, it performs a dispute settlement function (para. 3), resolving conflicts that arise under its agreements. Fourth, it has a monitoring function (para. 4), overseeing members' trade policies to secure transparency and compliance. Finally, the WTO fulfils a cooperation function (para. 5), engaging with other intergovernmental organizations to coordinate in areas of shared concern.

Its bodies can be further classified into three categories according to their competences:

1. Principal Organs with General Competence, they operate across all matters related to multilateral trade and they include:

Ministerial Conference, acting as supreme decision-making body.

General Council, acts on behalf of the Ministerial Conference between sessions.

Secretariat, which provides administrative and technical support.

Dispute Settlement Body (DSB), responsible for administering the DSU.

Appellate Body (suspended since 2019, but originally created under *DSU Art. 17*).

Trade Policy Review Body (TPRB), responsible for overseeing members' trade policies.

2. Subsidiary Permanent Bodies are established within the WTO structure and exercise specific competences under the supervision of principal organs. They can be grouped into three categories:

a) Councils with sector-specific competences:

Council for Trade in Goods,

Council for Trade in Services and

Council for TRIPS (intellectual property).

b) Committees and working groups with limited but significant mandates:

Committee on Trade and Development,

Committee on Balance-of-Payments Restrictions,

Committee on Regional Trade Agreements.

c) Administrative and budgetary committees, such as:

Committee on Budget, Finance and Administration,

Committee on Trade and Environment.

3. Ad Hoc Subsidiary Bodies, they are temporary and created to address specific issues, examples include:

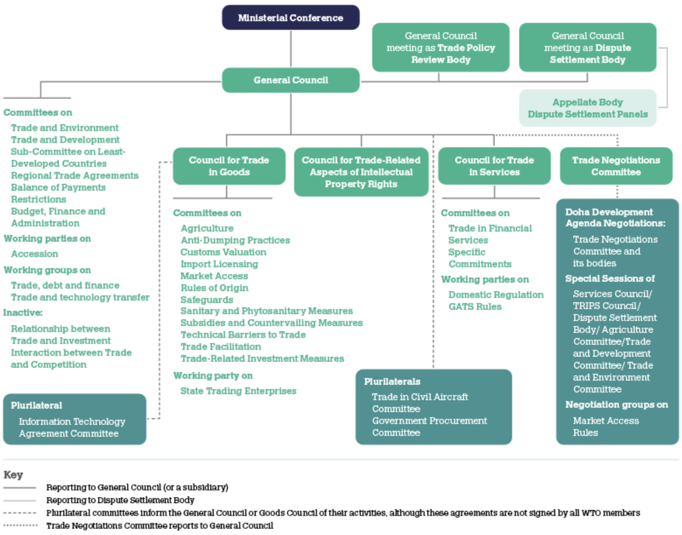
Working groups on accession of new Members,

Panels established under the DSU for dispute resolution and

Technical expert groups provided for in certain agreements.

Within the institutional structure, a distinction can be made between organs of individuals (such as the Secretariat or panels/Appellate Body members), acting independently and based on their personal expertise and organs of states (Ministerial Conference, General Council, Councils), composed of representatives of members, they express collective will.

This dualism is useful for better explaining why the WTO is often described as a “horizontal organization”: its decision-making mechanism reflects a balance between the intergovernmental will of Members and the independent, technical contributions of individuals.



(WTO organisation chart, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm#:~:text=The%20WTO's%20top%2Dlevel%20decision,A%20unique%20contribution)

SUBPARAGRAPH 3.1-MINISTERIAL CONFERENCE

The Ministerial Conference is the supreme body of the WTO[40], It meets at least once every two years or more frequently in special sessions (on request of the General Council or of a majority of Members). Its particularity is that it is composed of government representatives at ministerial level, which gives this organ a strong political character.

Under GATT, decision-making often lacked full ministerial engagement; thus, the WTO was designed to ensure systematic participation at ministerial rank, so one of the objectives of the Uruguay Round was to strengthen the political involvement of governments in multilateral trade negotiations, enhancing the legitimacy of decisions and ensuring that WTO law is effectively implemented within domestic systems[41].

The Ministerial Conference determines the overall guidelines for WTO activity, including the launch of new rounds of negotiations.

According to *Art. IV, paragraph 1 of WTO Agreement*, the Conference performs the functions of the WTO and takes all actions necessary for the proper functioning of the multilateral trading system, therefore playing a central policy-directing role in the

[40] WTO Agreement, Art. IV, paragraph 1
[41] Diritto dell'organizzazione mondiale del commercio, P. Picone, A. Ligustro, Cedam, 2002, pg. 37-38

Organization. Its competences are general and include supervising the implementation of the WTO Agreements, providing guidance for the development of international trade and addressing systemic or institutional issues.

Its decisions are political in nature, as they are adopted by consensus[42], enhancing legitimacy but also creating blockages when unanimity cannot be reached and, therefore, consensus could become an obstacle to WTO's capacity to act as a driving force of trade liberalization. That was the reason why it was also established that, when consensus can't be reached, matters at issue shall be decided by voting, except as otherwise provided[43].

History is our greatest teacher, as it shows us that Ministerial Conferences have often faced difficulties (especially Seattle 1999 or Cancun 2003) due to divergences among members, especially on hot topics such as trade liberalization, development, and regulation of social or environmental standards.

SUBPARAGRAPH 3.2-THE GENERAL COUNCIL

The General Council is expressly established in *Article IV, paragraph 2 of WTO Agreement*, its position reflects a compromise: members wanted both a political authority at ministerial level (the Conference) and a Geneva-based permanent body to guarantee day-to-day governance.

It is composed of representatives of all WTO Members (ambassadors or permanent representatives accredited to the WTO in Geneva), giving General Council a continuous, diplomatic character. Each Member has one vote[44], ensuring the equality of member States, whether large or small economies.

The General Council is always referred as the "alter ego" of the Ministerial Conference, ensuring the institutional continuity of the WTO by performing the functions of the Ministerial Conference in the intervals between its sessions[45]: this gives it a general residual competence, because anything the Ministerial Conference can do, the General Council can do in its absence.

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[42] WTO Agreement, art. IX
[43] WTO Agreement, art. IX
[44] WTO Agreement, art. IX, paragraph 1
[45] WTO Agreement, art. IV, paragraph 2

Second, it supervises the implementation of the WTO Agreement and coordinates the activities of subsidiary bodies.

The "same body" meets in different "configurations" depending on the function, maximising institutional economy. The General Council also convenes as Dispute Settlement Body (DSB)[46], administering the DSU, establishing panels, adopting panel/Appellate Body reports, monitoring compliance, and authorizing countermeasures[47] and it can also act as Trade Policy Review Body (TPRB), overseeing members' trade policies under the Trade Policy Review Mechanism (TPRM)[48].

Third, the General Council oversees the three specialized Councils, acting as a supervisory authority over sectoral councils such as the Council for Trade in Goods (based on GATT discipline), the Council for Trade in Services (based on GATS discipline) and Council for TRIPS (related to intellectual property)[49].

These councils report to the General Council, ensuring coordination across WTO law's three pillars, reason why the General Council is considered the coordination hub of the entire WTO system.

Beyond supervision, the General Council has law-making competences, such as Interpretating WTO provisions: it may adopt, on behalf of the Ministerial Conference, with a three-fourths majority of the members, "authoritative interpretations" of WTO Agreements.

The General Council cannot adopt amendments (reserved to Ministerial Conference), but it plays a key role in managing and transmitting proposals, coordinating Member discussions, and ensuring procedural compliance[50].

It also has delegated regulatory functions for the adoption of decisions, rules, and procedures necessary for WTO functioning, such as establishment of working groups on investment, competition, transparency in government procurement[51].

[46] WTO Agreement, art. IV, paragraph 3
[47] See WTO Dispute Settlement Understanding (DSU), Art. 2(Administration)
[48] WTO Agreement, art. IV, paragraph 4
[49] WTO Agreement, art. IV, paragraph 5
[50] WTO Agreement, art. X
[51] WTO Agreement, art. IV, paragraph 2 specifies that "[…] The General Council shall also carry out the functions assigned to it by this Agreement. […]"

Finally, it adopts the annual budget and oversees the WTO's financial administration, including contributions by Members[52].

General council's dual Institutional Character as both an intergovernmental organ (where states are represented by diplomats) and as a permanent institutional body (meets regularly, not episodically) makes it the central node of WTO governance and , for this reason, almost every major WTO decision outside of ministerial sessions is taken at the General Council, also due to its ability to meet frequently, allowing it to react to emerging trade disputes and crises (as happened during COVID-19 pandemic period).

Last but not least, it represents a diplomatic arena because it gathers permanent representatives, making it also a constant negotiation and lobbying forum, shaping the informal diplomacy of world trade.

SUBPARAGRAPH 3.3-THE COUNCIL FOR TRADE IN GOODS

The Council for Trade in Goods (CTG) is a key institutional body of the World Trade Organization, established in 1995 as part of the WTO's framework. As the other two sectoral councils, it reports to the WTO General Council[53]. The CTG serves as the central forum within the WTO for members to manage and discuss issues related to trade in goods, excluding any pre-1995 GATT context.

Under the WTO Agreement[54], the CTG is explicitly charged with overseeing the functioning of the multilateral trade agreements in goods, meaning the CTG collectively implements and monitors all agreements in Annex 1A (GATT 1994, Agriculture, SPS, TBT, Anti-Dumping, etc.) through its own work and that of its subsidiary committees[55]. It serves as *"the central oversight body in the WTO for all agreements related to trade in goods and the forum for discussing issues and decisions that may ultimately require the attention of the General Council"*[56].

[52] WTO Agreement, Art. VII
[53] Information available at wto.org
[54] The CTG's legal foundation is Article IV, paragraph 5 of WTO Agreement
[55] Information available at wto.org
[56] Information available at ustr.gov, pg. 97 of the document

The CTG is composed of all WTO member governments, typically represented by their Geneva-based ambassadors or trade delegates, and it reports to the WTO General Council on matters within its competence[57].

A major part of the CTG's structure is handled by subsidiary committees and similar bodies that deal with specific agreements or topics in goods trade: the CTG currently oversees 14 subordinate bodies, including standing committees established by various WTO goods agreements and one permanent working party (each of these bodies comprises all interested WTO members and focuses on a defined area of policy). The role of the CTG is to coordinate and supervise these committees, ensuring that the various specialized committees do not operate in isolation.

Subsidiary Bodies under the WTO Council for Trade in Goods are:

Committee on Agriculture	Oversees the Agreement on Agriculture.
Committee on Market Access	Monitors tariff schedules and market-access commitments under GATT 1994.
Committee on Sanitary and Phytosanitary Measures (SPS)	Oversees the SPS Agreement.
Committee on Technical Barriers to Trade (TBT)	Oversees the TBT Agreement (such as product standards, technical regulations, and conformity assessment procedures).
Committee on Subsidies and Countervailing Measures (SCM)	Supervises the SCM Agreement.
Committee on Anti-Dumping Practices	Supervises the implementation of the Agreement on Anti-Dumping (ADA).

[57] See WTO Agreement art. IV, paragraph 2 and 5

Committee on Agriculture	Oversees the Agreement on Agriculture.
Committee on Safeguards	Oversees the Agreement on Safeguards (rules for emergency import restrictions).
Committee on Customs Valuation	Monitors the Customs Valuation Agreement (uniform rules for valuing customs purposes under GATT Article VII).
Committee on Rules of Origin	Oversees the Agreement on Rules of origin.
Committee on Import Licensing	Oversees the Agreement on Import Licensing Procedures (granting transparency and fairness in import license systems).
Committee on Trade-Related Investment Measures (TRIMs)	Monitors the TRIMs Agreement (disciplines on investment measures that affect trade in goods).
Committee on Trade Facilitation	Oversees the Trade Facilitation Agreement (TFA), established in 2017 (implementation of measures to expedite customs procedures and reduce trade costs).
Working Party on State Trading Enterprises	Monitors compliance with GATT Article XVII (state trading).
Committee of Participants on the Expansion of Trade in IT Products	Plurilateral body (under CTG's purview) overseeing the 1996 Information Technology Agreement aimed at eliminating tariffs on IT products by participants (it is not formally part of Annex 1A).

Article IV, paragraph 7 of WTO Agreement clarifies that all subsidiary bodies established under the WTO report to their sectoral council, unless otherwise provided. Accordingly, the 14 committees established by goods agreements legally owe their accountability to the CTG, which in turn reports to the General Council.

The Goods Council sits at the third tier of WTO governance, beneath the top-level Ministerial Conference and the intermediate General Council: this structural position – below the General Council but above specialized committees – enables the Goods Council to coordinate detailed technical work while also connecting it to broader WTO decision-making. Decisions in the CTG are generally made by consensus[58], in line with standard WTO practice[59].Under WTO Agreement, waivers of obligations must be approved by the Ministerial Conference by three fourths of the Members unless otherwise provided, but requests concerning trade in goods agreements shall first be submitted to the Council for Trade in Goods[60]. This explains why the CTG examines waiver requests before passing them upward.

The Council's operational dynamic is member-driven: any member can propose agenda items or raise concerns, and the CTG Chair plays a facilitative role (for example organizing discussions or seeking consensus). Importantly, the CTG has the authority to formally approve decisions or recommendations forwarded by its committees, or to transmit them upward for adoption at higher levels when required[61].

In the last decade, the CTG has frequently been a forum where WTO members brought specific trade concerns about each other's measures. While formal legal disputes are handled by the Dispute Settlement Body, the CTG provides a political/diplomatic setting to flag issues, seek clarifications, and press for resolution without litigation. The number of such concerns has grown as of today: in a single CTG meeting in April 2025, members raised or revisited 35 trade concerns on a wide type of measures, from import licensing and quotas to environmental regulations and subsidy schemes [62].

[58] Article IX, paragraph 1 of the WTO Agreement states that decisions are taken by consensus, unless otherwise provided
[59] Information available at wto.org
[60] See Article IX, paragraphs 3(b) and 4 of WTO Agreement
[61] Information available at ustr.gov, pg.97 of the document
[62] Information available at wto.org

SUBPARAGRAPH 3.4-THE COUNCIL FOR TRADE IN SERVICES (CTS)

The World Trade Organization's Council for Trade in Services (the GATS Council) is the central institutional body overseeing international trade in services under the WTO framework. Uruguay Round (1986–1994) negotiations brought services into the multilateral trading system, culminating with the General Agreement on Trade in Services (GATS), a landmark achievement that entered into force in 1995 as part of the WTO Agreement[63]. *Article IV, paragraph 5 of the WTO Agreement* provides that *"the Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services"*[64], establishing the Council as the primary WTO body for services trade governance. In essence, since 1995 the Council has served as the dedicated forum within the WTO to implement GATS commitments, monitor compliance, and negotiate new rules affecting trade in services. The CTS performs an essential role in facilitating progressive liberalization in the services sector, which represents one of the most important and strategically significant parts of international trade. Its functions, as delineated in the GATS and interpreted through WTO practice are aimed at maintaining coherence in Members' policies and commitments.

In accordance with *Articles III, paragraph 3 and 5 of the GATS*[65], the CTS receives notifications from Members concerning any new, amended, or existing laws, regulations, or administrative guidelines that significantly affect trade in services, as well as counter-notifications of measures that other Members believe may impact the operation of the Agreement. These procedural mechanisms ensure continuous transparency and accountability among Members.

The Council's responsibilities are further elaborated throughout various GATS provisions. It is mandated under *Article V, paragraph 7*[66] to receive notifications of new, expanded, or substantially modified economic integration agreements in the services sector, along with periodic reports on their implementation, and under Article V bis to receive notifications of labour market integration agreements. In its regulatory capacity, the CTS is empowered by *Article VI, paragraph 4* to develop disciplines on

[63] The Genesis of the GATS (General Agreement on Trade in Services), Juan A. Marchetti, Petros C. Mavroidis, *European Journal of International Law*, Volume 22, Issue 3, 01 August 2011, Pages 689–721 available at: https://academic.oup.com/ejil/article/22/3/689/388177

[64] See art. IV, paragraph 5 of WTO Agreement

[65] General Agreement on Trade in Services (GATS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art. III paragraph 3 and 5

[66] Id. Art. V, paragraph 7

qualification requirements, licensing procedures, and technical standards, often through the establishment of subsidiary bodies or expert working groups.

The Council also plays a pivotal role in the supervision of recognition measures under *Article VII, paragraph 4*[67], and in overseeing the activities of monopoly and exclusive service suppliers by requesting information and receiving notifications as provided in *Articles VIII, paragraphs 3, 4 and 5*[68]. Through these mechanisms, the CTS ensures that the granting of exclusive rights or monopolies remains consistent with Members' market access and national treatment commitments. Additionally, under *Article XIV bis*[69], the CTS must be informed to the fullest extent possible of measures adopted for reasons of national security, as well as their termination, in order to monitor their compatibility with the multilateral framework.

The Council also undertakes important functions in connection with negotiations and assessments of trade in services. Pursuant to *Article XIX, paragraph 3*[70], it is required to carry out evaluations of trade in services to provide the analytical basis for establishing guidelines and procedures for each new round of negotiations on specific commitments. In this sense, the CTS acts not merely as a supervisory body but as a forum for policy coordination and negotiation preparation.

In terms of commitments, the CTS receives notifications concerning the implementation, modification, or withdrawal of specific commitments under *Article XXI, paragraph 1*[71] and is tasked with establishing procedures for the rectification or modification of schedules under *Article XXI, paragraph 5*[72], ensuring transparency and legal certainty in Members' schedules of commitments.

The CTS also serves as a forum for consultations and dispute avoidance, as foreseen in *Article XXII, paragraph 2*[73], under which it may consult with Members upon request or refer to arbitration any disagreement as to whether a measure falls within the scope of an international tax agreement concerning the avoidance of double taxation.

[67] Id. Art. VII, paragraph 4
[68] Id. Art. VIII, paragraphs 3, 4 and 5
[69] Id. Art. *XIV bis*
[70] Id. Art. XIX, paragraph 3
[71] Id. Art. XXI, paragraph 1
[72] Id. Art. XXI, paragraph 5
[73] Id. Art. XXII, paragraph 2

Furthermore, in accordance with *Article XXIV, paragraph 1*[74], the Council may establish subsidiary bodies to facilitate the operation of the GATS and to fulfil its objectives in an effective way.

The CTS also performs critical oversight functions in reviewing and monitoring exemptions to the Most-Favoured-Nation (MFN) principle. Under *Paragraph 3 of the Annex on Article II Exemptions*[75], it must review all such exemptions lasting more than five years, while *Paragraph 7*[76] of the same Annex requires the Council to receive notifications confirming whether terminated exemptions have been brought into conformity with *Article II, paragraph 1*. The Council's responsibilities also extend to specialized areas, such as the air transport sector, where it is mandated under *Paragraph 5 of the Annex on Air Transport Services*[77] to review developments at least every five years and monitor the operation of the Annex. Through these various procedural, supervisory, and consultative functions, the CTS acts as a mechanism for ensuring both transparency and accountability in Members' trade policies concerning services.

In line with the institutional reporting obligations established under the WTO framework, the Council for Trade in Services submits an annual report to the General Council. This reporting duty ensures that the General Council and, by extension, the Ministerial Conference remain informed of developments in services trade governance.

The procedural framework governing the CTS was approved by the General Council on 15 November 1995, adopting the *General Council's Rules of Procedure* mutatis mutandis, with modifications adapted to the specific functions performed by the CTS. These rules regulate the convening of meetings, decision-making processes, documentation requirements, and the preparation of reports, thereby institutionalizing procedural consistency across the WTO's subsidiary bodies. In essence, the Council for Trade in Services constitutes a cornerstone of the WTO's institutional architecture, representing the multilateral commitment to transparency, cooperation, and progressive liberalization in the field of services. It operates as both a deliberative and technical forum where Members exchange information, address regulatory challenges,

[74] Id. Art. XXIV, paragraph 1
[75] Id. Annex on Article II Exemptions, paragraph 3
[76] Id. Annex on Article II Exemptions, paragraph 7
[77] Id. Annex on Air Transport Services, paragraph 5

and negotiate further commitments, ensuring in this way that the objectives of the GATS are progressively realized.

The Council for Trade in Services (CTS), pursuant to *Article IV:6 of the WTO Agreement*[78] has established several subsidiary bodies to assist it in performing its functions under the General Agreement on Trade in Services (GATS). These include: the Committee on Trade in Financial Services, the Committee on Specific Commitments, the Working Party on Domestic Regulation, the Working Party on GATS Rules, and the Working Party on Professional Services. Each of these bodies operates under the authority of the CTS, reporting to it on an annual basis and functioning in accordance with the Rules of Procedure adopted by the General Council for meetings of the CTS.

The Committee on Trade in Financial Services was established by the CTS at its meeting of 1 March 1995 through the adoption of the *Decision on Institutional Arrangements for the General Agreement on Trade in Services*[79], which provided that the Committee "shall carry out responsibilities as assigned to it by the Council and afford Members the opportunity to consult on any matters relating to trade in services in the sector concerned."[80] According to its terms of reference, the Committee's responsibilities include: (a) maintaining continuous review and surveillance of the application of the GATS with respect to financial services; (b) formulating proposals or recommendations for the CTS on any matter concerning trade in the financial sector; (c) where relevant, considering proposals for amendment of any sectoral annex pertaining to financial services and making appropriate recommendations; (d) providing a technical forum for Members to conduct discussions, exchange information, and examine regulatory or prudential issues affecting trade in financial services; (e) providing technical assistance to developing country Members and facilitating discussions regarding the implementation of obligations under the GATS Annex on Financial Services; and (f) cooperating with other WTO subsidiary bodies or international organizations active in this sector[81].

[78] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. IV, paragraph 6.
[79] Council for Trade in Services, Decision on Institutional Arrangements for the General Agreement on Trade in Services, WTO Doc. S/C/M/1 (Mar. 1, 1995)
[80] Id. paragraph 3
[81] Id. ¶¶ (a)–(f).

The Committee follows the Rules of Procedure applicable to CTS meetings and submits annual reports on its activities to the CTS. Its work is closely linked to the interpretation and implementation of *Articles II* and *XIX of the GATS*"[82], which regulate most-favoured-nation treatment and progressive liberalization in financial services.

The Committee on Specific Commitments was established by the CTS at its meeting of 4 October 1995 and formalized by the Decision of 22 November 1995 adopting its Terms of Reference[83]. The Committee oversees all services sectors not covered by sectoral bodies, with a mandate to: (a) supervise the implementation of specific commitments across all modes of supply, including those concerning the movement of natural persons, as reflected in Members' Schedules of Commitments; (b) examine, upon Members' request, the accuracy and coherence of schedules of specific commitments and lists of exemptions from *Article II* of the GATS, ensuring technical precision and consistency; and (c) oversee the application of procedures for the modification of schedules under *Article XXI of the GATS*. The Committee may also address cross-sectoral issues of a horizontal nature and is empowered to submit proposals and recommendations to the CTS. It operates under the same procedural rules as the CTS and submits annual activity reports. Its activities are closely related to the implementation of *Article XX of the GATS*, which governs the scheduling of commitments.

The Working Party on Domestic Regulation was created by a CTS Decision adopted on 26 April 1999[84]. This Working Party operates pursuant to *Article VI, paragraph 4 of the GATS*, which requires Members to develop disciplines to ensure that qualification requirements, technical standards, and licensing procedures do not constitute unnecessary barriers to trade in services. Its terms of reference specify that it is responsible for elaborating general and sector-specific disciplines governing domestic regulatory measures, including those related to professional services, as envisaged in paragraph 2 of the *Decision on Disciplines Relating to the Accountancy Sector*[85]. The Working Party prepares also recommendations for the CTS no later than

[82] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Art. II and XIX.
[83] Council for Trade in Services, Decision on the Terms of Reference for the Committee on Specific Commitments, WTO Doc. S/C/M/7 (Nov. 22, 1995)
[84] Council for Trade in Services, Decision on Domestic Regulation, WTO Doc. S/C/M/35 and Corr.1 (Apr. 26, 1999)
[85] WTO, Decision on Disciplines Relating to the Accountancy Sector, WTO Doc. S/L/63 (Dec. 14, 1998)

the conclusion of the ongoing round of services negotiations[86]. It operates under the CTS's Rules of Procedure and provides annual reports to the Council on its work. Its activities have been particularly relevant to the development of disciplines under *Articles VI* and *XXIV of the GATS*, which address domestic regulation and institutional implementation.

The Working Party on GATS Rules was established by the CTS on 30 March 1995 to conduct negotiations concerning three specific areas: safeguards, government procurement, and subsidies in services[87]. Its mandate derives from *Articles X*, *XII*, and *XV of the GATS*, which collectively call for the development of multilateral disciplines in these fields. The Working Party's terms of reference instruct it to conduct negotiations on the three subjects, which are safeguards, government procurement, and subsidies, thus providing the institutional framework for rule-making in these areas. It functions under the same Rules of Procedure as the CTS, reports annually to the Council on its progress, and plays a central role in expanding the substantive law of the GATS beyond its initial scope through negotiations and technical analysis.

Finally, the Working Party on Professional Services (established concurrently with the CTS's creation) was responsible for developing multilateral disciplines on professional services sectors, particularly in connection with the accountancy profession[88]. However, following the establishment of the Working Party on Domestic Regulation, the Working Party on Professional Services was dissolved, and its functions were fully integrated into the new body[89].

Collectively, these subsidiary bodies enable the CTS to fulfil its oversight, negotiation, and regulatory coordination functions across the range of services sectors. Each operates under the WTO's principle of institutional coherence and reports hierarchically to the CTS, which in turn reports to the General Council. Through their activities, these bodies ensure that the liberalization and regulation of services trade under the GATS proceed in a transparent, technically sound, and progressively integrated manner within the multilateral trading system.

[86] Id. paragraph 4
[87] Council for Trade in Services, Decision on the Working Party on GATS Rules, WTO Doc. S/C/M/2, item D (Mar. 30, 1995).
[88] Council for Trade in Services, Decision Establishing the Working Party on Professional Services, WTO Doc. S/C/M/1 (Mar. 1, 1995)
[89] Id. Corr.1; see also S/L/70, ¶ 1 (1999) (recording the cessation of the Working Party on Professional Services)

SUBPARAGRAPH 3.5- THE COUNCIL FOR THE TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) is the WTO body responsible for overseeing the implementation and functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the so called "TRIPS Agreement"), as mandated in *Article IV:5 of the WTO Agreement*[90].

The Council for TRIPS controls Members' compliance with the obligations contained in the TRIPS Agreement and serves as the central institutional centre for intellectual property (IP) matters within WTO trading system.

Its functions are explicitly defined by the TRIPS Agreement and WTO practice. The Council's duty is to:

(a) receive notifications regarding the application of the Rome Convention or the Berne Convention under *Articles 1.3* and *3.1 of the TRIPS Agreement*[91];

(b) receive notifications of international intellectual property agreements existing prior to the WTO Agreement pursuant to *Article 4(d)*[92];

(c) conduct negotiations concerning a multilateral system for the notification and registration of geographical indications for wines and spirits, keeping under review the implementation of the provisions in Section 3 (Geographical Indications), and taking action as required to facilitate the objectives of *Articles 23.4* and *24.2*[93];

(d) receive notifications of laws and regulations relating to the TRIPS Agreement that have been enacted or made effective by Members in accordance with *Article 63.2*[94];

(e) examine the scope and modalities of non-violation and situation complaints under the TRIPS Agreement and submitting appropriate recommendations to the Ministerial Conference, as provided in *Article 64.3*[95];

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[90] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. IV, paragraph 5.

[91] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Arts. 1.3 and 3.1

[92] Id. Art. 4(d)

[93] Id. Arts. 23.4 and 24.2

[94] Id. Art. 63.2

[95] Id. Art. 64.3

(f) grant extensions of the implementation period for least-developed country (LDC) Members, pursuant to *Article 66.1*[96];

(g) monitor the overall operation of the Agreement and Members' compliance thereunder, and establishing cooperation mechanisms with the World Intellectual Property Organization (WIPO) in accordance with *Article 68*[97];

(h) review the implementation of the TRIPS Agreement on a periodic basis and refer to the Ministerial Conference any proposed amendments under *Article 71*[98];

(i) receive notifications from Members making use of the Special Compulsory Licensing System under *paragraphs 2(a)* and *2(c) of the Annex to the TRIPS Agreement*[99];
(j) review annually the functioning of the Special Compulsory Licensing System and reporting its operation to the General Council pursuant to *paragraph 7 of the Annex to the TRIPS Agreement*[100].

The Council for TRIPS also bears procedural responsibilities of institutional accountability. It reports annually to the General Council and Its Rules of Procedure were approved by the General Council at its meeting of 15 November 1995, following the model of the General Council's Rules of Procedure applied with all the needed modifications to adapt to the specific subject matters related to intellectual property[101].

Unlike the Councils for Trade in Goods and for Trade in Services, the Council for TRIPS has not, to date, established any subsidiary bodies under *Article IV:6 of the WTO Agreement*.

This institutional design reflects the TRIPS Council's cross-sectoral scope, focusing on copyright, patents, trademarks, geographical indications, industrial designs, and enforcement measures, all under one comprehensive supervisory entity.

Through its combined monitoring, consultation, and negotiation functions, the Council for TRIPS ensures that the *TRIPS Agreement* remains an evolving, enforceable, and cooperative component of the WTO system. It represents the institutional link between

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96 Id. Art. 66.1
97 Id. Art. 68
98 Id. Art. 71
99 Id. Annex to the TRIPS Agreement, paragraphs 2(a) and 2(c)
100 Id. Annex to the TRIPS Agreement, paragraph 7
101 General Council, Rules of Procedure for the Council for TRIPS, WTO Doc. S/L/15 (Nov. 15, 1995)

trade and intellectual property, providing also a structured platform for a better coordination with WIPO and other specialized agencies.

SUBPARAGRAPH 3.6-TRADE NEGOTIATIONS COMMITTEE

The Trade Negotiations Committee (TNC) supervises the overall conduct of WTO negotiations under the authority of the General Council, as established by the Doha Ministerial Declaration[102]. The TNC is mandated to oversee, coordinate, and supervise all multilateral trade negotiations and to establish appropriate negotiating mechanisms as required[103]. It was constituted at its first meeting on 28 January and 1 February 2002, following proposals by the Chairman of the General Council, who also appointed the WTO Director-General to chair the TNC ex officio until the completion of the Doha Round[104].

At that meeting, Members agreed on a negotiating structure comprising a number of groups and bodies to organize and implement the Doha Work Programme[105]. Each negotiating body was made responsible for one or more topics listed in the Programme, ensuring coordinated progress across negotiating areas[106]. For this scope, the TNC established the following Special Sessions and Negotiating Groups to carry out work under the Doha mandate:

– Special Session of the Committee on Agriculture[107];
– Special Session of the Council for Trade in Services[108];
– Negotiating Group on Market Access[109];
– Special Session of the Council for TRIPS[110];
– Negotiating Group on Rules[111];
– Special Session of the Dispute Settlement Body[112];

[102] World Trade Organization, *Doha Ministerial Declaration*, WTO Doc. WT/MIN (01)/DEC/1, ¶¶ 38–39 (Nov. 14, 2001)
[103] Id. paragraph 46
[104] Trade Negotiations Committee, *First Meeting of the TNC*, WTO Doc. TN/C/M/1 (Jan. 28 & Feb. 1, 2002)
[105] Id. paragraph 94
[106] *WTO Analytical Index, WTO Agreement – Art. IV (Practice)*, paragraphs 93 and 94 (2021)
[107] Committee on Agriculture, *Special Session under the Doha Mandate*, WTO Doc. TN/AG/1 (2002)
[108] Council for Trade in Services, *Special Session under the Doha Mandate*, WTO Doc. TN/S/1 (2002)
[109] Negotiating Group on Market Access, *Terms of Reference*, WTO Doc. TN/MA/S/1 (2002)
[110] Council for TRIPS, *Special Session under the Doha Mandate*, WTO Doc. TN/IP/1 (2002)
[111] Negotiating Group on Rules, *Special Session under the Doha Mandate*, WTO Doc. TN/RL/1 (2002)
[112] Dispute Settlement Body, *Special Session under the Doha Mandate*, WTO Doc. TN/DS/1 (2002)

– Special Session of the Committee on Trade and Environment[113]; and
– Special Session of the Committee on Trade and Development[114].

Through these structures, the TNC ensures supervision and coordination of the important role of Doha Development Agenda under the General Council's authority.

[113] Committee on Trade and Environment, *Special Session under the Doha Mandate*, WTO Doc. TN/TE/1 (2002)
[114] Committee on Trade and Development, *Special Session under the Doha Mandate*, WTO Doc. TN/CTD/1 (2002)

CHAPTER 2-THE CHALLENGING OF U.S. TARIFFS IN FRONT OF THE WTO

PARAGRAPH 1- UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS (WT/DS544/R)

This case represents the key and most important case concerning China's challenge to the U.S. steel and aluminium tariffs that President Trump imposed in 2018 under *Section 232 of the Trade Expansion Act of 1962*: that statute allows the President to restrict imports (including by raising tariffs) when the Secretary of Commerce determines that the volume or circumstances of those imports "threaten to impair" national security[115]. The case addresses whether the U.S. Section 232 steel and aluminium tariffs could be justified as national security measures under GATT Article XXI despite breaching core WTO obligations. The Panel concluded that the tariffs violated the GATT and that the U.S. failed to show a qualifying national security emergency, so Article XXI did not excuse the measures.

Following a Commerce report warning that rising steel and aluminium imports were undermining the domestic industrial base necessary for U.S. defence needs, U.S. President imposed duties of 25% on steel and 10% on aluminium in March 2018, invoking national security considerations[116]. Although applied on a global basis, the measures were riddled with exemptions: several allies (such as Canada, Mexico, Australia, Brazil, South Korea, and Argentina) negotiated quota or exclusion arrangements, and the duty on Turkish steel was even doubled to 50% for a period, illustrating the discretionary and politically charged nature of the program. In 2020, the United States extended these duties to certain downstream "derivative" steel and aluminium products at the same rates.

China brought its WTO complaint in April 2018, alleging that the Section 232 tariffs breached key GATT obligations: the challenged measures in DS544 thus encompassed the additional duties, their later modifications, and the exemption/quota deals that favoured particular trading partners. Importantly, the United States never notified these actions as "safeguards" under WTO rules; instead, it insisted they were national security measures falling within GATT Article XXI. China's case proceeded alongside

[115]Section 232 of the Trade Expansion Act: What It Is and How It Works, by Adam Hayes, Updated February 06, 2025, available at https://www.investopedia.com/terms/s/section-232-trade-expansion-act.asp#
[116]Id. at 115

nearly identical complaints by the EU, Canada, Mexico, Norway, Russia, and others. A single group of panelists was appointed to hear all of these disputes for efficiency. The panel report in the China proceeding *US–Steel and Aluminium Products, WT/DS544/R* was issued on 9 December 2022[117].

China's complaint before the WTO focused on two main sets of violations: breaches of core GATT disciplines and circumvention of the WTO's safeguards regime.

To begin, China argued that the United States had violated *GATT Article II:1(a)–(b)*, which requires each Member to respect its bound tariff commitments. The new 25% steel and 10% aluminium duties were far above the U.S. bound rates (many of which were set at or close to zero), so the imports no longer received the treatment guaranteed in the U.S. Schedule. The United States did not seriously dispute this, effectively acknowledging that the measures, on their face, exceeded its bindings and therefore constituted an Article II breach.

China also claimed that the array of country-specific exemptions ran afoul of *GATT Article I:1 (MFN)* because, by granting favourable access (whether quota-based arrangements or outright exclusions) to partners such as Brazil, South Korea, Argentina, and Australia, while applying the full tariff to China and many others, the United States was conferring an "advantage" that was not extended "immediately and unconditionally" to all WTO Members. In China's view, this differential treatment was a textbook MFN inconsistency.

China's third line of attack was that the *Section 232*[118] tariffs operated, in substance, like safeguard measures and thus had to comply with the *Agreement on Safeguards*[119].

China noted that the U.S. Commerce Department's reports on steel and aluminium, referencing rising imports, depressed capacity utilization, mill closures, and job losses, mirrored the kinds of findings normally associated with *Article XIX safeguard investigations*. Yet Washington never invoked *Article XIX* nor followed the procedures and conditions of the Safeguards Agreement.

[117] Panel Report, United States – Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS544/R (adopted Dec. 9, 2022)
[118] *Trade Expansion Act of 1962* § 232, Pub. L. No. 87-794, 76 Stat. 872, at 877 (1962) (codified as amended at 19 U.S.C. § 1862)
[119] Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154

Relying on *Article 11.1(c)* of that Agreement, which bars Members from taking safeguard-type actions outside the WTO safeguards framework, China contended that the United States had effectively imposed a safeguard while pulling aside all of the procedural obligations that would have been affected (most notably Members rights to consultations, compensation, or retaliation).

In China's view, the United States used the language of "national security" to shield what was essentially a safeguard, thereby depriving China of its ability to exercise WTO rebalancing rights[120].

The United States rejected China's premise that the Section 232 tariffs were "safeguards": from the U.S. perspective, these duties were national security measures justified under *GATT Article XXI*, not emergency industry-protection actions under *Article XIX*. Because the measures were taken under Section 232 and framed squarely as national security actions, Washington argued that the Safeguards Agreement simply did not apply.

The U.S. relied heavily on *Safeguards Agreement Article 11.1(c)*, which expressly states that the Agreement "does not apply" to measures adopted pursuant to GATT provisions other than *Article XIX*. Since the United States maintained the tariffs were taken "pursuant to" *Article XXI*, it claimed China's attempt to recharacterize them as disguised safeguards was legally incorrect[121].

Washington further emphasized that Section 232 actions targeted risks associated with global overcapacity and potential defence vulnerabilities, not classic safeguard concerns such as import surges, again distancing the measures from the safeguard's regime[122]

The core of the U.S. defence lay in the self-judging nature of *Article XXI(b)(iii)*: the United States argued that the phrase "which it considers necessary" makes national-security determinations the exclusive prerogative of the invoking Member.

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[120] By Mona Paulsen in Exceptions, National Security, Trade and Security,17 Aug 2023 The thin line between "consistent with" GATT Article XXI and "pursuant to" GATT Article XXI, available at https://ielp.worldtradelaw.net/2023/08/the-thin-line-between-consistent-with-gatt-article-xxi-and-pursuant-to-gatt-article-xxi

[121]Id. at 120

[122]Playing on the wrong side - United States' Section 232 measures held inconsistent with WTO law, Jayant Raghu Ram, December 30 2022, available at https://www.lexology.com/library

Under this theory, WTO panels lack jurisdiction to scrutinize why or how a government invokes security interests; *Article XXI* decisions are political judgments, not justiciable trade disputes[123].

On substance, the United States pointed to the Commerce Department's findings that heavy reliance on steel and aluminium imports, combined with pervasive global excess capacity, threatened the industrial base essential to U.S. defence and critical infrastructure and that, as a consequence, such conditions qualified as an *"emergency in international relations"* under GATT *Article XXI(b)(iii)*, even absent armed conflict. Because national security concerns are inherently context-specific, the U.S. maintained that each Member must retain broad discretion to determine what qualifies as a security emergency and what measures are necessary to address it.

SUBPARAGRAPH 1.1- SECTION 232 OF THE TRADE EXPANSION ACT OF 1962: HOW DOES IT WORK?

Section 232 of the Trade Expansion Act of 1962 (codified at 19 U.S.C. § 1862, as amended) is a U.S. law empowering the President to impose trade restrictions for the purpose of protecting national security. Unlike other trade statutes that target unfair trade practices or import surges, Section 232 is focused on whether imports *"threaten to impair the national security"*[124].

The statute establishes a defined procedural framework that can be summarized in 6 points:

1. **Investigation Request/Initiation:** an investigation is initiated by the Commerce Department upon request of an agency head or interested party (or self-initiated by the Department of Commerce) to examine the national security impact of specific imports.
2. **Investigation and Consultation:** the Commerce Dept. (through the Bureau of Industry and Security) consults with Defence and other agencies, gathers information, holds public hearings or solicits comments if appropriate, and

[123] Id. at 122

[124] *Trade Expansion Act of 1962* § 232, Pub. L. No. 87-794, 76 Stat. 872, at 877 (1962) (codified as amended at 19 U.S.C. § 1862)

analyses the import's effects on national security (considering factors like domestic production, defence requirements, economic welfare, etc.).

3. **Commerce Report (270 days):** within 270 days, the Secretary of Commerce must submit a report to the President with findings. The report advises whether the product is imported in such a way that it threatens to impair U.S. national security, and includes the reasoning and any recommendations. An unclassified summary of this report is published publicly.
4. **Presidential Decision (90 days):** within 90 days of receiving an affirmative report, the President decides whether to concur with the finding of threat and, if so, what action to take to "adjust" imports to eliminate the threat. If the President does not concur, or if Commerce's finding was negative, the process terminates with no action.
5. **Presidential Action (15 days):** if the President concurs and chooses to act, he must implement the import-adjusting action within 15 days of the decision. This typically takes the form of a Presidential Proclamation imposing the tariffs or other measures.
6. **Notification to Congress (30 days):** within 30 days of the decision, the President must send Congress a written statement explaining the action taken or explaining the reasons for not taking action. The President's proclamation or executive order is also published in the Federal Register for public notice.

From the moment Congress enacted Section 232, its unusually broad delegation of authority to the President triggered concerns about constitutional limits set by the nondelegation doctrine. After all, Section 232 lets the President alter tariff levels (which is a core legislative function) based on national security findings. It did not take long for the issue to arrive at the Supreme Court.

That opportunity came in *Federal Energy Administration v. Algonquin SNG, Inc.*[125], the first case in which the Court confronted the scope of Section 232: the dispute arose after President Ford relied on Section 232 to impose an oil import licensing fee, layered on top of existing quotas.

[125]*Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976)

The challengers insisted that Section 232 did not stretch far enough to allow license fees at all; and, more importantly, they warned that if the statute did authorize such expansive action, it would effectively hand over Congress's tariff-setting power to the President in violation of the nondelegation doctrine[126].

The Supreme Court rejected that challenge outright. Leaning on the traditional intelligible principle test articulated in *J.W. Hampton, Jr. & Co. v. United States*, the Court concluded that Section 232 provides adequate guidance to the President. It emphasized that the statute requires a formal investigation by the Secretary of Commerce, a finding of national security threat, and consideration of several specific statutory factors before the President may act. Those procedural and substantive guardrails, the Court explained, were enough to keep the delegation within constitutional bounds. Speaking for a unanimous bench, Justice Thurgood Marshall made the conclusion unmistakably clear: "Even if § 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack."[127]

The Court also underscored a broader principle: Congress cannot feasibly legislate every detail of how to address national security risks. In Marshall's words: "(n)ecessity ... fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules"[128], recognizing that some flexibility is inherent in delegations involving external threats.

With Algonquin, the Court effectively insulated Section 232 from further nondelegation challenges for decades. By holding that the statute articulated clear conditions and limits (however broad), Algonquin preserved the President's ability to use Section 232 aggressively, so long as the required national security findings and statutory factors were observed.

Nevertheless, the Trump Administration's 2018 steel and aluminium tariffs revived long-dormant constitutional concerns around Section 232: after the President invoked the statute to impose 25% duties on steel and 10% on aluminium, the American

[126]The CIT Opinion in the Section 232 Constitutionality Case, By Simon Lester in Domestic Trade Powers — 25 Mar 2019, available at https://ielp.worldtradelaw.net/2019/03/the-cit-opinion-in-section232/

[127]Id. at 126, about the ruling of the case *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976)

[128]Id. at 127

Institute for International Steel (AIIS) challenged Section 232 in the Court of International Trade (CIT).

Their argument was straightforward: Section 232 hands the President essentially unlimited discretion over tariff policy under the banner of "national security," letting the Executive both identify the threat and craft the remedy with almost no statutory guardrails. In their view, this amounted to an unconstitutional delegation of Congress's core power to regulate foreign commerce[129].

The CIT, however, concluded that its hands were tied. In American Institute for International Steel v. United States, the panel held that the Supreme Court's 1976 decision in *Algonquin* already resolved the nondelegation question. Despite acknowledging that Algonquin's statutory holding was limited to license fees, the CIT emphasized that the Supreme Court had necessarily rejected a broader nondelegation attack on Section 232[130].

Later cases questioning judicial review of presidential national-security determinations (such as *Franklin v. Massachusetts* and *Dalton v. Specter*) did not, in the CIT's view, overrule Algonquin or free lower courts from its constitutional holding.

Yet the panel was not unanimous in tone. Judge Gary Katzmann wrote a notable dubitante opinion, agreeing that Algonquin compelled the outcome but openly wondering whether its logic could survive modern practice. After observing how broadly Section 232 had been used, Katzmann confessed "grave doubts" about whether such an unbounded delegation could truly be squared with the nondelegation doctrine.

His pointed question *"If the delegation permitted by Section 232, as now revealed, does not constitute excessive delegation… what would?"* was essentially an invitation for the Supreme Court to revisit its 1976 reasoning[131].

AIIS sought exactly that, petitioning the Supreme Court to overrule Algonquin, but the Court declined certiorari in 2020. Meanwhile, because of procedural routes available for three-judge CIT cases, the controversy also reached the Federal Circuit, which

[129]See case American Institute for International Steel v. United States, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019)
[130]Id. at 129
[131]Id. at 129, Judge Gary Katzmann's opinion

likewise affirmed. In *American Inst. for Int'l Steel, Inc. v. United States (Fed. Cir. 2020)*, the appellate panel reiterated that Algonquin's nondelegation holding was binding and not dicta.

Plaintiffs' attempts to distinguish tariff measures from license fees were dismissed, because both were "monetary exactions," and Algonquin did not turn on the specific form of the remedy. With that, the Federal Circuit stressed that any reconsideration of Section 232's constitutionality was for the Supreme Court alone[132].

As of today, *Algonquin* remains authoritative, and Section 232 continues to be treated as a constitutionally valid delegation, even as its modern application has revived questions about whether Congress ceded too much of its Article I trade authority to the Executive.

Although courts have repeatedly declined to invalidate Section 232 on its face, they have been forced to confront the statute's outer boundaries and particularly whether its procedural requirements and national-security findings are judicially enforceable.

Two themes emerge from recent litigation: (1) uncertainty over whether the President must strictly follow Section 232's timing rules, and (2) the extremely limited scope of judicial review over the President's national-security determinations.

Section 232 establishes a clear sequence: Commerce must complete its report within 270 days, the President must decide within 90 days, and any action must be implemented within 15 days. After the Trump Administration imposed the initial 2018 steel and aluminium tariffs, it continued to adjust them months (and even years) later, prompting importers to argue that these later actions were ultra vires.

The best-known challenge was *Transpacific Steel LLC v. United States*. The CIT initially accepted the argument that the President's later modifications (especially the Turkey-only increase from 25% to 50%) fell outside the statutory window. The court struck down the measure, holding that the President had acted after the deadlines had expired and without a new Commerce investigation. The CIT went further: it questioned

[132]See case American Inst. for Int'l Steel, Inc. v. United States, 806 F. App'x 982 (Fed. Cir. 2020)

whether singling out Turkey had any plausible national-security basis, and even found an equal protection violation because the disparate treatment was irrational[133].

But this judicial pushback did not last. The Federal Circuit reversed, adopting a far more flexible reading of Section 232: it held that the President may "modify" existing actions long after the initial 90-day period so long as his original determination was timely. The court also rejected the equal-protection ruling, finding a rational justification for distinguishing Turkey. Importers then asked the Supreme Court to intervene, warning that the Federal Circuit's reading drained Section 232 of the limits that had justified its constitutionality under *Algonquin*[134]. The Supreme Court declined review in 2022, leaving the broad interpretation intact.

The result is that, in practice, Section 232's statutory deadlines provide little judicially enforceable constraint. So long as an initial national-security determination is made, subsequent adjustments can continue indefinitely unless Congress steps in.

A second line of cases, most notably *Universal Steel Products, Inc. v. United States*, shows how narrow the courts' review of national-security determinations has been. The CIT held that Commerce's Section 232 report is not reviewable under the APA (Administrative Procedure Act) and that the President's substantive judgment about what threatens to "impair" national security lies almost entirely beyond judicial scrutiny[135]. Courts have repeatedly invoked longstanding doctrines treating such determinations as political questions or matters textually committed to the Executive.

Although the CIT acknowledged that actions "plainly unrelated to national security" might theoretically be invalid, it emphasized how difficult it is to draw that line. Courts cannot examine motives, and Section 232 grants broad discretion, making almost any asserted connection to national security sufficient.

In practice, once Commerce has issued a report and the President has declared a national-security rationale, courts almost never second-guess it. As one analysis put it,

[133]See case *Transpacific Steel LLC v. United States*, 474 F. Supp. 3d 1332 (Ct. Int'l Trade 2020)

[134] Id. at 133, all documents available at the website https://www.scotusblog.com/cases/case-files/transpacific-steel-llc-v-united-states

[135]CIT Rejects Broad Challenge to Section 232 Duties on Steel and Aluminium Imports, But Challenges to Denied Exclusions Have More Success, Eric C. Emerson, Stephanie W. Wang, February 17, 2021, available at https://www.steptoe.com/en/news-publications/global-trade-and-investment-law-blog/cit-rejects-broad-challenge-to-section-232-duties-on-steel-and-aluminum-imports-but-challenges-to-denied-exclusions-have-more-success.html

Section 232 sits in a "grey area" where the Executive can approach Congress's constitutional domain without triggering judicial correction[136].

SUBPARAGRAPH 1.2-CHINA'S COUNTERARGUMENTS IN *UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS (WT/DS544/R)* AND WTO PANEL'S REASONING

China firmly rejected the U.S. claim that Article XXI is a limitless, self-judging exception. If Members could invoke "national security" without scrutiny, China warned, WTO rules would become meaningless and protectionism would flourish[137].

China stressed that Article XXI(b) is textually constrained: it applies only in war or other emergency in international relations, conditions that must be objectively verifiable. Economic issues like excess capacity do not meet that threshold. The drafting history, including U.S. statements from 1947, reinforced that the clause was never meant to authorize ordinary industrial protection.

China also argued Article XXI is not fully self-judging. Following *Russia – Traffic in Transit*, panels may assess whether the required emergency exists, even if Members decide what measures they consider necessary. A mere reference to "security," in China's view, cannot shield a measure from WTO review.

Finally, China insisted that a Member's domestic law, including Section 232, cannot excuse breaches of WTO obligations. Accepting the U.S. position would allow any country to impose virtually any tariff under the banner of security, collapsing predictability and undermining the multilateral system.

After an unusually long process, delayed in part by the global disruptions caused by COVID-19 pandemic, the WTO issued its panel report in *US–Steel and Aluminium Products (China)* in December 2022. The panel ultimately sided with China on the core legal questions, holding that the U.S. measures breached GATT obligations and could not be justified under Article XXI.

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[136]The CIT Opinion in the Section 232 Constitutionality Case, By Simon Lester in Domestic Trade Powers — 25 Mar 2019, available at https://ielp.worldtradelaw.net/2019/03/the-cit-opinion-in-section232/

[137]THE 2022 U.S. STEEL/ALUMINUM TARIFF RULING: A LEGAL RECKONING FOR THE UNITED STATES AND THE WTO OVER THE NATIONAL SECURITY EXCEPTION IN INTERNATIONAL LAW, KLINT W. ALEXANDER, available at https://aulawreview.org/blog/

One of the first issues the panel addressed was whether the U.S. tariffs qualified as "safeguard measures" subject to the WTO Safeguards Agreement: on this point, the panel agreed with Washington that these duties were not safeguards. Instead, they were measures adopted "pursuant to" *GATT Article XXI*, the security exceptions clause.

The panel relied on *Article 11.1(c) of the Safeguards Agreement*, which states that the Agreement does not apply to actions taken under GATT provisions "other than" Article XIX. To decide whether the United States actually acted under Article XXI or Article XIX of GATT, the panel started with addressing the question presented by the parties concerning the applicability of Article XIX and the Agreement on Safeguards to the measures at issue[138].

The panel started addressing the issue referring to *Article 3.2 of the DSU* and the customary rules of interpretation of public international law, and especially the rule of interpretation set out in *Article 31(1) of the Vienna Convention*, then they went on with an extensive linguistic analysis (in English, French and Spanish) of the terms "pursuant to" in Article 11.1(c), "conforms" and "in accordance with" in Articles 11.1(a) and 11.1(b)[139].

They found out that*:" [...] these considerations indicate that the terms "pursuant to" in Article 11.1(c) of the Agreement on Safeguards do not require consistency with provisions of the GATT 1994 other than Article XIX for a measure to fall under that paragraph. The text of Article 11.1(c) does not make any explicit reference to a requirement of conformity with the provisions of GATT 1994 in English or French in contrast to other provisions of the Agreement on Safeguards, including those that provide immediate context for Article 11.1(c)."*[140]

Once proven that the Safeguards Agreement does not apply to actions taken under GATT provisions other than Article XIX, China's allegations of procedural breaches under that Agreement became irrelevant: if the duties were not safeguards, there was no obligation for the United States to comply with safeguard-specific requirements such as advance notification, injury findings, or time limitations.

[138] Panel Report, United States – Certain Measures on Steel and Aluminium Products, WTO Doc. WT/DS544/R (adopted Dec. 9, 2022), at page 56, par. 7.67

[139] Id. at 138, from page 58, from par. 7.73 to par. 7.76

[140] Id. at 138, at page 60, at par. 7.77

To decide whether the United States actually acted under Article XXI, the panel examined how the measures were designed, justified, and implemented. This meant looking beyond labels and reviewing the content of the Commerce Department's Section 232 reports, the Presidential Proclamations, and the U.S. government's own explanations before the WTO[141].

That review left little doubt: national security concerns were consistently presented as the heart of the policy. The Commerce reports linked factors such as low-capacity utilization, plant closures, and job losses to threats to the U.S. defence industrial base. Section 232 itself directs the Executive to consider the weakening of the internal economy in assessing national security risks, and the U.S. repeatedly told WTO bodies that these measures were rooted in security, not ordinary economic protection[142].

The second step was the interpretation of Article XXI(b) of the GATT 1994 in accordance with Article 3.2 of the DSU: the heart of the panel's report lies in its interpretation Article XXI(b)(iii), the provision the United States invoked to justify the Section 232 tariffs.

Building on the reasoning first articulated in *Russia – Traffic in Transit*, the panel reaffirmed that Article XXI is reviewable by WTO adjudicators, even if Members retain discretion in assessing what actions they consider "necessary" for security[143].

In doing so, the panel squarely rejected the United States' argument that Article XXI is entirely self-judging and beyond WTO scrutiny. As the panel emphasized, Article XXI may permit Members to determine the necessity of their chosen measures, but this does not detract from the requirement that such action be taken in consonance with the conditions and circumstances listed in subparagraphs (i)–(iii).

That is, the presence of a qualifying "war or other emergency in international relations" is an objective condition, and a member cannot unilaterally manufacture such a circumstance simply by asserting it. The panel therefore declined to accept the U.S. position that the phrase *"which it considers necessary"* shields the entire provision from review. Instead, it held that the clause gives Members room to judge necessity

[141]Id. at 138, from page 63, par. 7.7.3
[142] Id. at 141
[143] Id. at 138, at page 77, see note n.479

once the triggering situation (war or emergency) is shown to exist, but does not allow them to self-define that triggering situation[144].

This approach preserved the WTO's ability to examine whether a member actually faces the type of crisis the drafters intended Article XXI to cover. Drawing on negotiating history and earlier jurisprudence, the panel stressed that treating Article XXI as a fully self-judging exception would threaten the rules-based system, turning it into a permission slip for disguised protectionism, something the original negotiators explicitly sought to avoid.

After establishing that the WTO could review whether an emergency existed, the panel set out to interpret the meaning of *"other emergency in international relations"*. It accepted the understanding from earlier rulings that this phrase refers to situations of a certain gravity or severity, and international tensions that are of a critical or serious nature in terms of their impact on international relations.

Given that "war" appears alongside the term, the panel concluded that "emergency" signals a crisis of comparable seriousness, typically a political or military confrontation between states, an armed conflict, or a breakdown in diplomatic relations[145].

On that view, domestic economic challenges do not qualify. The panel expressly stated that neither global steel overcapacity nor the long-standing economic pressures facing U.S. steelmakers rose to the gravity and severity associated with emergencies contemplated in Article XXI(b)(iii)[146].

The Commerce Department's Section 232 reports, the panel noted, focused on internal economic issues and concerns about long-term industrial health, not on any acute foreign relations crisis. For that reason, simply branding the issue as "national security" from a domestic policy perspective could not transform it into an "emergency in international relations" under WTO law.

Applying this interpretation to the United States' measures, the panel found no evidence of a relevant emergency: the United States was not engaged in war, nor was it facing a sudden diplomatic or military crisis with another state. The concerns cited,

[144] Id. at 138, from page 77, par. 7.8.3
[145] Id. at 138, at page 80, par. 7.139
[146] Id. at 138, at page 79, par. 7.137

especially global excess capacity largely attributed to China's industrial policies amounted to persistent economic tensions rather than an "emergency" as envisioned by Article XXI.

As the report concluded, "*The analysis and conclusions of the USDOC in the Steel and Aluminium Reports do not purport to identify or address the existence of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994."*[147]

The panel also emphasized that Members must articulate their essential security interests in good faith. It did not dispute that a state may treat the health of its steel industry as part of its essential security interests. But even assuming that premise, the circumstances the United States described (in this case a chronic economic imbalance) did not meet the threshold that would justify reliance on Article XXI. This finding mirrored the earlier *Russia–Transit* ruling[148], where the panel stressed that "emergency in international relations" concerns relations "between" states, not ongoing internal or purely economic difficulties.

In short, the panel concluded that while Members retain substantial autonomy in choosing measures they consider necessary for security, that autonomy only operates after a genuine international emergency has been objectively established, and in the U.S. case, such a situation simply did not exist.

Once the panel rejected the U.S. appeal to Article XXI, the legal outcome became straightforward: the Section 232 tariffs violated fundamental GATT obligations. The 25% steel and 10% aluminium duties exceeded U.S. bound rates, leading the panel to find clear breaches of GATT Articles II:1(a) and II:1(b). The short-lived 50% duty on Turkish steel was treated the same way.

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[147] Id. at 138, at page 81, par. 7.143: *"The determinations of US domestic authorities under Section 232 relate to a different legal standard and basis under US municipal law than the provisions of the covered agreements within the Panel's mandate under the DSU. Accordingly, the factors relied upon by the USDOC and conclusions in the Steel and Aluminium Reports are distinct from, and cannot be directly transposed to, the terms of Article XXI(b)(iii) of the GATT 1994 and the objective assessment required under Article 11 of the DSU. Therefore, the factors treated cumulatively by US domestic authorities under Section 232 may not be regarded as having commensurate relevance or weight in the Panel's objective assessment as to whether the measures were taken "in time of war or other emergency in international relations" under Article XXI(b)(iii) of the GATT 1994."*

[148] See ruling Russia – Measures Concerning Traffic in Transit, WTO Panel Report, WT/DS512/R (adopted Apr. 26, 2019)

The exemptions and quota arrangements granted to certain partners (Australia, Brazil, South Korea, Argentina, and later Canada and Mexico for derivative products) amounted to selective advantages, and thus conflicted with the Most-Favoured-Nation requirement in Article I:1.

The panel declined to address China's GATT Article X claim, noting that the core violations under Articles I and II were already decisive. It concluded that these inconsistencies are not justified under Article XXI(b)(iii) and recommended U.S. compliance.

The broader significance of this case and the parallel rulings was equally clear: as one analysis put it, the decisions "quash[ed] the idea that a WTO member had unfettered discretion to invoke the national security exception whenever it suits its interests"[149]. While Members retain the authority to define their own essential security interests, the panel emphasized that a member's subjective assessment is still reviewable to ensure it fits within Article XXI's objective limits.

SUBPARAGRAPH 1.3-THE CONSEQUENCES OF THIS RULING AND THEIR ECONOMIC IMPACT

The panel's ruling strengthened China's legal position but did little to change the real-world tariff landscape. By the time the WTO report came out in late 2022, the Section 232 duties had already helped ignite a full-scale U.S.–China trade confrontation. China had retaliated with its own tariffs in 2018, and although the two countries reached the 2020 "Phase One" agreement, most of the duties imposed during the dispute remained intact.

Legally, the panel's findings entitled China to pursue authorized retaliation if the United States failed to bring its measures into compliance. But that avenue stalled immediately: Washington filed an appeal to the WTO Appellate Body, knowing the institution could not hear the case due to the U.S.-created paralysis in appointments. With the appeal into the void, the report cannot be adopted, and the United States has

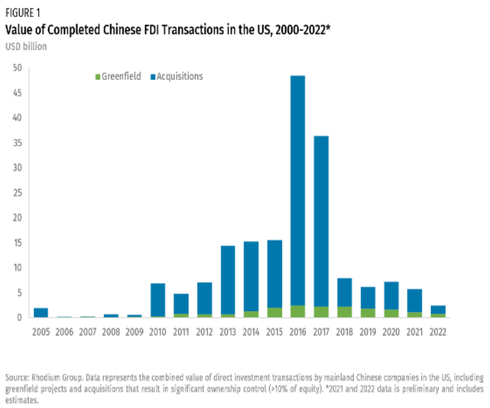
[149] The 2022 U.S. Steel/Aluminium Tariff Ruling: A Legal Reckoning for the United States and the WTO over the National Security Exception in International Law, Klint W. Alexander, 72 Am. U. L. Rev. 1137 (2023), in the Abstract, available at https://aulawreview.org/blog

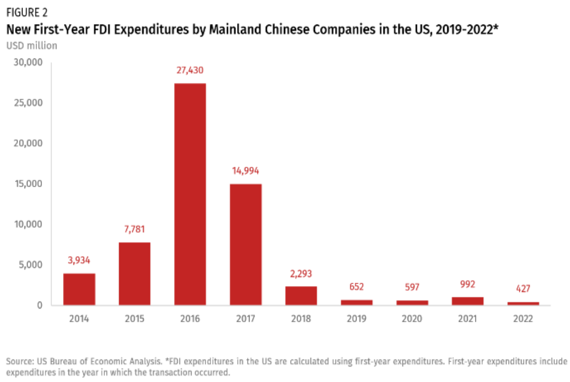
openly rejected the panel’s reasoning, insisting that Article XXI national-security actions are beyond WTO review.

The practical result is that the Section 232 tariffs on Chinese steel and aluminium continue to apply, despite the panel’s decision. The episode has therefore taken on a political rather than legal character. China has a favourable ruling it cannot enforce; the United States refuses to accept WTO oversight over its national security decisions. The entire sequence has deepened U.S.–China trade tensions, reinforced U.S. scepticism toward multilateral constraints, and fuelled China’s sense that American unilateralism is undermining good-faith trade commitments.

Chinese foreign direct investment in the United States has fallen sharply after the broader U.S.–China trade confrontation triggered by the Section 232 tariffs. Heightened trade barriers, stricter investment screening, and deteriorating political relations have all contributed to a far less welcoming environment for Chinese firms.

Chinese investment in the U.S. surged to its high-water mark of $46 billion in 2016, but by 2022 had dropped to under $5 billion. Between 2019–2022, annual Chinese FDI averaged only $0.67 billion, a dramatic collapse from the mid-2010s boom[150].





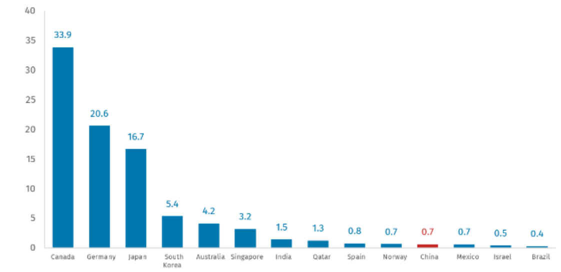
Once one of America’s top five sources of inbound investment, China has now slipped into a second-tier position; by 2022 it was outpaced by smaller economies such as Norway, Spain, and Qatar[151]. The type of investment has shifted as well, from important acquisitions to smaller expansions and incremental projects.

[150] Vanishing Act: The Shrinking Footprint of Chinese Companies in the US, Thilo Hanemann, Armand Meyer and Danielle Goh, September 7, 2023, available at https://rhg.com/research/vanishing-act-the-shrinking-footprint-of-chinese-companies-in-the-us/ (figures 1 and 2)

[151] Id. at 150, at figure 3

FIGURE 3

Average Annual New FDI Expenditures in the US (2019-2022), Selected Countries*



Source: US Bureau of Economic Analysis. *FDI expenditures in the US are calculated using first-year expenditures. First-year expenditures include expenditures in the year in which the transaction occurred.

Several forces drove this decline. Beijing has imposed tighter capital controls since 2017, curbing the outbound M&A wave that had fuelled the earlier surge.

Washington, for its part, expanded its national-security screening through CFIUS and the 2018 FIRRMA (Foreign Investment Risk Review Modernisation Act) reforms, resulting in greater scrutiny, especially in technology sectors, and sometimes outright blocks or forced divestitures[152].

This regulatory tightening was accompanied by a harsher political climate: the trade war, sanctions on Chinese firms, and new industrial legislation like the CHIPS Act and IRA (Inflation Reduction Act), both of which limit Chinese participation. As a consequence, Chinese companies' U.S. assets, revenues, and employment have been shrinking, reflecting divestitures and retrenchment.

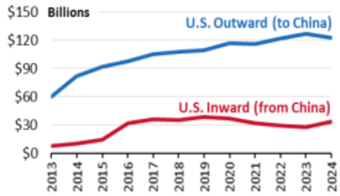
In 2024, China remained one of America's major trading partners. Total goods trade between the two countries reached $582.5 billion, making China the fourth-largest U.S. goods trading partner. China was also the fourth-largest market for U.S. exports at $144.2 billion, and the third-largest source of U.S. imports at $439.6 billion. Compared with 2023, U.S. exports to China fell by 2.9%, while imports from China rose by 2.7%, causing the U.S. trade deficit with China to grow by roughly $16 billion. In services, the relationship was smaller but still important: in 2024, China made up 4.8% of U.S. services exports ($55 billion) and 2.6% of U.S. services imports ($21.9 billion). Travel, technology and IP licensing, and transport were the top U.S. service exports[153].

[152] Id. at 150

[153] Congressional research service (CRS), U.S.-China trade relations, updated September 9, 2025, available at https://www.congress.gov/crs-product/IF11284

U.S.-China Goods Trade (2001-2024)

U.S.-China Services Trade (2001-2024)



U.S.-China FDI Position (2013-2024)

U.S. companies also continued to generate significant revenue inside China. In 2023, sales by majority U.S.-owned affiliates in China totalled $475.2 billion, while in 2022 (the most recent data available), majority PRC-owned affiliates in the United States recorded $78.6 billion in sales. Investment ties remained uneven: in 2024, U.S. foreign direct investment (FDI) stock in China stood at $122.9 billion, whereas China's FDI stock in the United States was $34.0 billion, equal to 0.6% of total FDI stock in the U.S. China, by contrast, accounted for 1.8% of U.S. FDI stock abroad. Private equity flows saw an even sharper shift. U.S. private equity investments in China dropped from $140 billion in 2019 to under $1 billion by 2024, and by 2025 China's PE market had become almost entirely dependent on domestic capital[154].

Financial holdings also reflected deep but imbalanced ties. As of June 2025, U.S. investors held $359.1 billion in Chinese (mainland + Hong Kong) securities, while Chinese investors held $1.8 trillion in U.S. securities. China was also the second-largest foreign holder of U.S. Treasury securities, with $999 billion, just behind Japan at $1.1 trillion (excluding Chinese offshore holdings)[155].

In short, as the trade war and geopolitical frictions intensified, Chinese firms pulled back from the United States, turning either to other regions or focusing more on domestic investment, while U.S. policies made the American market increasingly difficult for them to enter.

[154] Id. at 153
[155] Id. at 153

PARAGRAPH 2- UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS (DS562)

In 2018, the United States introduced a safeguard measure on crystalline silicon photovoltaic (CSPV) cells and modules after determining that a surge in imported solar products was harming U.S. manufacturers.

The case examines whether the U.S. safeguard measures on crystalline silicon photovoltaic (solar) products complied with GATT Article XIX and the Agreement on Safeguards, focusing on "unforeseen developments," causation, and non-attribution. The Panel found that the United States failed to properly justify key elements of the safeguard investigation, concluding that the measures were inconsistent with WTO safeguard rules.

The action stemmed from petitions filed by two domestic producers, Suniva, Inc. and SolarWorld Americas, Inc., who sought relief under Section 201 of U.S. trade law, claiming that rising import volumes were causing serious injury.

The U.S. International Trade Commission (USITC) investigated the matter and, in November 2017, unanimously concluded that CSPV imports had increased to such an extent that they were a substantial cause of serious injury to the domestic industry. A supplemental USITC report in December 2017 further determined that these import increases were the result of "unforeseen developments," satisfying a core WTO requirement for safeguard actions. Acting on the Commission's recommendations, President Trump imposed a safeguard measure effective February 7, 2018, consisting of a tariff-rate quota for solar cells and additional tariffs on solar modules for four years. The measure began with a 30% tariff on modules above the 2.5-gigawatt quota for cells, with the rate scheduled to decline each year[156].

China brought a WTO case challenging the measure: in July 2019, it requested the establishment of a panel, arguing that the U.S. safeguard breached GATT Article XIX:1(a) and several provisions of the WTO Agreement on Safeguards.

China advanced four main claims: (1) the United States had not shown, before adopting the safeguard, that increased imports stemmed from "unforeseen

[156]WTO Panel Rejects China's Solar Safeguard Challenge, September 02, 2021, available at the website https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/september/wto-panel-rejects-chinas-solar-safeguard-challenge#

developments" or from the "effect of obligations incurred" under the GATT; (2) the USITC failed to establish the mandatory causal link between increased imports and serious injury; (3) the USITC did not comply with the "non-attribution" rule requiring it to separate injury caused by other factors from injury caused by imports; and (4) the investigation denied due process because the Commission delayed and inadequately summarized confidential information, allegedly violating Article 3 of the Safeguards Agreement[157]. The United States defended its actions as fully consistent with WTO rules and argued that China's objections lacked merit.

A WTO panel (DS562) was appointed to hear the dispute, and on September 2, 2021, it issued a report rejecting all of China's claims and upholding the U.S. safeguard in full[158].

This outcome was especially notable and extremely different from the one analysed in Paragraph 1 of this chapter because it was the first time a global safeguard had survived WTO panel scrutiny without any findings of violation.

As a consequence, China appealed in September 2021, but due to the paralysis of the WTO Appellate Body, the appeal remains pending and the report has not been adopted. Even so, the panel's analysis has carried practical weight: the United States allowed the original safeguard to expire in February 2022 and then, citing the panel's favourable findings, extended the solar tariffs for four more years (through 2026), with certain adjustments to support domestic clean-energy production[159].

SUBPARAGRAPH 2.1-U.S. LEGAL ARGUMENTS

In defending its safeguard measure, the United States argued that the action fully complied with all WTO requirements: from the U.S. perspective, China had simply misunderstood what GATT Article XIX and the Agreement on Safeguards actually demand.

The U.S. stressed that nothing in the Safeguards Agreement obliges a domestic authority's published report to spell out, in explicit terms, how the conditions in GATT

[157] Panel Report, United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, WTO Doc. WT/DS562/R (adopted 2 Sept. 2021)
[158] Id. at 157
[159] Id. at 157

Article XIX:1(a)[160], such as *"unforeseen developments"* and *"obligations incurred"*, are met because, according to the U.S., WTO law allows a member to clarify or supplement the investigative record during dispute settlement to demonstrate compliance with those conditions.

The United States maintained that, even if an explicit demonstration were required, the USITC had provided exactly that: in its November 2017 investigation report and the supplemental report issued the following month, the Commission had, in the U.S. view, clearly satisfied both the *"unforeseen developments"* and *"obligations incurred"* elements of Article XIX:1(a).

The U.S. also defended the USITC's substantive injury analysis. It argued that the Commission had properly shown a causal link between increased imports and serious injury, as Safeguards Agreement Article 4.2 requires, and had thoroughly evaluated whether other factors (not import competition) were contributing to the harm.

The U.S. emphasized that the USITC's reasoning was detailed, evidence-based, and consistent with the Safeguards Agreement's procedural obligations, including the requirement in Article 3.1 to publish a report containing "*findings and reasoned conclusions."*

In short, the United States portrayed the safeguard as a legally sound response to a damaging import surge, fully aligned with both the letter and spirit of WTO safeguard rules.

The safeguard was motivated first and foremost by economic pressure on the U.S. solar manufacturing sector: by 2017, imports of low-priced CSPV products (primarily from China and from Chinese-owned producers operating in third countries) had surged to the point of overwhelming domestic manufacturers.

Prices for solar panels collapsed, several U.S. producers suffered major financial losses, and companies like Suniva and SolarWorld warned that without immediate

[160] Article XIX:1(a) of the GATT 1994 provides: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

relief, the U.S. industry would effectively disappear. The U.S. government shared this concern.

During the safeguard investigation, the USITC concluded that Chinese industrial policies and global overcapacity had produced a flood of artificially cheap solar products that destabilized the U.S. market. The tariffs were therefore intended to give domestic producers a temporary period of stability, meaning time to reorganize, invest, modernize, and eventually compete again. The stated purpose of the safeguard was to "support the domestic solar industry's efforts to adjust to import competition" stemming from excess global capacity, largely connected to China[161].

Economically, the measure aimed to raise prices just enough to encourage domestic investment, even if that meant slightly higher short-term costs for installers and downstream users.

Political considerations also played a significant role. The safeguard was one of the Trump Administration's early moves to signal a tougher stance toward China and to prioritize U.S. manufacturing. It paired with another safeguard on washing machines and formed part of a broader narrative about countering what U.S. officials described as China's "non-market practices," including state subsidies and industrial planning that contributed to global overproduction[162].

The measure allowed the Administration to frame itself as defending American jobs in a sector considered strategically important for the clean-energy transition. Importantly, this political framing did not disappear with the change of administration. The Biden Administration later adopted similar language and policy goals, emphasizing the need to secure renewable-energy supply chains.

U.S. Trade Representative Katherine Tai welcomed the WTO panel's ruling and linked the safeguard to plans for "historic infrastructure investments that unlock the full potential of solar power and create good-paying jobs"[163]. Thus, beyond the legal and economic rationale, the safeguard also reflected a broader political project: confronting

[161]WTO Panel Rejects China's Solar Safeguard Challenge, September 02, 2021, available at the website https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/september/wto-panel-rejects-chinas-solar-safeguard-challenge#
[162]Id. at 161
[163]Id. at 161

China's industrial strategy while bolstering domestic capacity in a strategically vital, future-oriented industry.

In carrying out the safeguard, the U.S. had to interpret and satisfy the legal standards set out in GATT Article XIX:1(a) and the WTO Agreement on Safeguards: three elements were central: *unforeseen developments*, the *effect of obligations incurred*, and the *causal link* between rising imports and serious injury[164].

With respect to "*unforeseen developments"*, Article XIX requires that the increase in imports must result from circumstances that negotiators could not reasonably have predicted at the time the relevant trade commitments were made. The United States argued that this condition was met in the CSPV case.

In its supplemental report, the USITC identified a set of unexpected developments that produced the flood of solar imports. Among them were China's heavy state intervention in solar manufacturing, rapid subsidized capacity expansion, and the creation of enormous output far beyond China's internal demand, surpluses that were then exported to markets like the United States. The USITC also highlighted something else that negotiators could not have foreseen: the way Chinese producers would react to U.S. AD/CVD (Anti-dumping and countervailing) duties. According to the investigation, manufacturers shifted production to third countries (such as Malaysia, Thailand, Vietnam, and Korea) in order to sidestep existing U.S. trade remedies. This meant the import surge continued even after those duties were imposed, but now through alternative production channels.

The United States stressed that none of this chain of events (China's policy-driven overcapacity, the global dumping of excess output, or the sophisticated circumvention of earlier trade barriers) was foreseeable when the United States undertook its WTO obligations. On that basis, the USITC concluded these circumstances met the "unforeseen developments" criterion under Article XIX:1(a)[165].

In effect, the U.S. interpreted the requirement broadly enough to capture the evolving global dynamics of the solar industry and the adaptive behaviours of producers, while still grounding its explanation in the treaty text. By documenting these developments

[164] Panel Report, United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, WTO Doc. WT/DS562/R (adopted 2 Sept. 2021), from page 16, par. 7.2
[165] Panel Report, United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, WTO Doc. WT/DS562/R (adopted 2 Sept. 2021), from page 19, par. 7.2.3.1

in detail, the United States sought to demonstrate that this prerequisite for a lawful safeguard measure was fully satisfied.

What is more, under Article XIX:1(a), a safeguard is permitted only if the spike in imports stems not just from unforeseen developments, but also from the "*effect of obligations incurred*" by the Member. The United States treated this requirement as a factual inquiry: did its own WTO commitments leave it exposed to the surge in solar imports?

In its supplemental report, the USITC answered yes. It noted that the CSPV products at issue were classified under a tariff line in the U.S. Harmonized Tariff Schedule that the United States had bound at zero (duty-free treatment) under its WTO commitments. That binding had been in place since at least 1987. Because of this concession, the United States could not raise its tariffs on these products without violating its WTO obligations[166].

In the U.S. view, that zero binding is exactly the type of "obligation incurred" contemplated by Article XIX: it allowed imports to flow in without tariff protection, thereby contributing to the rapid increase.

The United States also disputed China's argument that the existence of trade remedies (like AD/CVD duties or the availability of safeguards) somehow prevented the obligations clause from being satisfied: instead, the U.S. emphasized that the relevant question is whether its WTO commitments (here, the duty-free tariff binding) limited its ability to restrict imports. Since the bound rate unequivocally tied the United States' hands, the condition was, in the U.S. perspective, fully met.

The panel then turned to the core issue of whether the United States had properly shown a causal link between rising imports and the serious injury suffered by the domestic industry, an assessment required by Articles 2.1 and 4.2 of the Safeguards Agreement[167]. This was the most intricate part of the case, given the sheer volume of injury data and the presence of several alternative causal factors.

The panel began by restating the WTO legal test: authorities must present a reasoned explanation demonstrating that increased imports are causing serious injury, and they

[166] Id. at 165, from page 26, par. 7.2.3.3
[167] Id. at 165, at page 32, par. 7.3.2

must also separate out the effects of other injury factors so that no injury stemming from those factors is attributed to imports.

The panel recalled prior Appellate Body guidance confirming that while national authorities have flexibility in their analytical methods, they must review all relevant injury indicators and clearly establish the causal link even in the presence of competing causes.

After reviewing the USITC's findings, the panel concluded that the United States had satisfied these requirements. The USITC had documented a clear coincidence between the surge in imports and the deterioration of the industry's performance (declining prices, falling market share, and financial losses) and it addressed instances where certain indicators improved by explaining why those improvements did not offset the broader negative trends tied to import pressure[168].

China argued that the USITC's reasoning was insufficient because some domestic indicators were improving and because other factors (such as business decisions by U.S. producers or shifts in government incentives) might better explain the injury.

But the panel systematically evaluated each of China's objections and determined that the USITC had in fact considered and reasonably dismissed them: for example, although China claimed domestic producers' alleged strategic mistakes, not imports, caused the injury, the panel recognized that the USITC had reviewed these allegations and found the evidence did not support them.

Domestic producers were participating in key market segments, and issues like product quality were not serious enough to break the causal chain. Likewise, the panel accepted the USITC's explanation that some improving factors (like higher R&D or asset values) did not negate the broader picture of depressed profitability and capacity utilization driven by import competition.

Throughout its discussion, the panel emphasized that its task was not to re-decide the case but to ensure that the USITC had addressed all relevant evidence and offered a coherent, fact-based explanation. After completing its review, the panel held that China had not shown any flaw in the U.S. causation analysis. As a consequence, the panel stated that China had failed to establish that the USITC erred in respect of its analysis

[168] Id. at 165, at page 33, from par. 7.3.3

of the relationship between increased imports and the injury factors and rejected China's overall claim that the United States failed to evaluate whether increased imports were a cause of serious injury in accordance with Articles 2.1, 3.1, and 4.2(b) of the Agreement on Safeguards[169].

The panel also examined whether the United States complied with the non-attribution requirement in Article 4.2(b) of the Safeguards Agreement, namely, ensuring that injury caused by factors other than increased imports was not mistakenly assigned to imports[170].

China argued that the USITC had overlooked or inadequately analysed several alternative causes of injury, including falling input costs, shifts in government incentive programs, and alleged strategic or managerial errors by domestic producers.

The panel, however, reviewed each of these alleged "other factors" in detail and concluded that the USITC had in fact considered them appropriately. In several instances, the USITC determined that these factors either did not injure the domestic industry or did not diminish the injury caused by import competition. A clear example concerned declining polysilicon prices: while the USITC acknowledged that lower input costs could influence module prices, it also explained that domestic producers still could not operate profitably because imports were consistently undercutting their prices[171]. Thus, even accounting for falling production costs, import under-pricing remained the central force behind depressed domestic prices. The panel found this reasoning adequate and grounded in the evidentiary record.

After assessing all of China's non-attribution challenges, the panel reached a firm conclusion, rejecting China's claims that the USITC acted inconsistently with Article 4.2(b) by failing to satisfy the non-attribution requirement in respect of the injury caused by these other factors.

Because China had not shown that any alternative factor was mishandled, the panel observed that it did not need to resolve the parties' broader legal debate about how

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169 Id. at 165, at page 62, par. 7.3.3.4
170 Id. at 165, at page 63, par. 7.4.2
171 Id. at 165, at page 81, par. 7.4.3.3.2

strictly non-attribution must be demonstrated or whether the USITC's "substantial cause" approach inherently met that standard.

Last but not least, China also argued that the United States violated the procedural and transparency requirements in Article 3 of the Safeguards Agreement. According to China, the USITC did not provide timely or adequate non-confidential summaries of confidential information, which allegedly undermined the ability of interested parties to participate effectively in the investigation.

The panel reviewed both the timing and substance of the USITC's disclosures. While it acknowledged that some non-confidential summaries were released relatively late in the process, closer to the publication of the final report, it ultimately found no evidence that this delay impaired any party's procedural rights.

The panel stressed that Article 3.1 requires reasonable public notice and a published report with findings and conclusions, while Article 3.2 requires protection of confidential information coupled with non-confidential summaries when feasible. In the panel's view, the United States met these obligations. The USITC issued a comprehensive public report containing its findings and reasoning, and it handled confidential data appropriately while eventually providing non-confidential summaries[172].

Finding no procedural shortcomings that rose to the level of a WTO violation, the panel rejected China's due process claim. And because all of China's substantive and procedural challenges failed, the panel, consistent with DSU Article 19.1, made no recommendation, since there was no inconsistency requiring correction.

Overall, the WTO panel's assessment was strongly favourable to the United States: It directly quoted and relied on the USITC's findings, indicating confidence that the U.S. investigation was conducted in line with WTO criteria; the panel often phrased its conclusions in terms of China failing to meet its burden of proof.

It is worth noting that the panel's approach in this case displayed a cautious deference to the factual determinations of the domestic authority (the USITC), so the panel avoided second-guessing the weight of evidence, focusing instead on whether the USITC's explanations were reasonable and adequately documented.

[172] Id. at 165, at page 89, from par. 7.5

The WTO panel's ruling in the US–CSPV safeguard case has significant implications for both global trade patterns and WTO safeguard jurisprudence.

Practically, the decision allowed the United States to keep its safeguard tariffs in place without any WTO-authorized retaliation. Because the panel upheld the measure, the U.S. tariffs (starting at 30% and falling to 15% over the four-year term) remained in force until their scheduled expiration in February 2022[173].

These tariffs quickly reshaped U.S. solar import flows: shipments of CSPV products from China, as well as from Chinese-owned factories in Southeast Asia, declined sharply as exporters faced an added duty that made the U.S. market less attractive. Some production shifted to suppliers in Malaysia, Vietnam, and Thailand, but even those imports were subject to the global safeguard tariffs, which reduced overall import volumes.

Domestic producers in the United States enjoyed a short period of relief: the higher tariff-induced price floor helped U.S. manufacturers increase output and employment in 2018–2019. But downstream solar installers saw panel prices rise, slowing installation growth compared to the earlier boom fuelled by low-cost imports.

The panel's ruling also carried a broader message, really important as of today: a properly justified safeguard can still withstand WTO scrutiny. This is notable because, for years, WTO Members hesitated to use safeguards after earlier Appellate Body rulings struck down many measures on technical grounds.

By validating the U.S. action, the panel signalled that safeguards remain a viable legal tool when governments face a genuine import surge, situation that is very common as of today, due to the massive presence of cheaper similar Chinese products.

This could encourage more governments to consider safeguards rather than relying on other protectionist measures. In industries like solar energy, where Chinese exports have dominated, countries may read this case as confirmation that WTO-consistent safeguards are still an option. The ruling could also influence other sectors experiencing similar pressures, such as steel, aluminium, or certain consumer goods.

[173] WTO Panel Rejects China's Solar Safeguard Challenge, September 02, 2021, available at the website https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/september/wto-panel-rejects-chinas-solar-safeguard-challenge#

The decision has already shaped solar trade patterns. The U.S. safeguard contributed to a shift in Chinese exports toward other global markets and encouraged continued investment by Chinese firms in production bases abroad to navigate trade restrictions. And because the United States extended the safeguard through 2026, at a tariff rate reduced to about 14–15% and with a larger quota for duty-free cells[174], its effects on trade flows will continue. During this extension, some products (such as bifacial panels) were exempted, further influencing supply-chain strategies.

The panel's ruling also has clear implications for the solar sector and global climate policy: by allowing the United States to maintain safeguard tariffs, it effectively endorsed a temporary trade-off between open access to cheap green technologies and protection of domestic clean-energy manufacturing. This outcome may encourage other countries to adopt similar safeguards or industrial policies to strengthen their renewable-energy industries without immediately conflicting with WTO rules.

But the ruling also highlights a risk: if many governments follow this path, the global solar market could become more fragmented, potentially slowing the spread of low-cost solar technology. In short, the decision underscores a central tension in climate-related trade policy, balancing domestic green-industry development with the need for rapid, global diffusion of clean technologies.

Taken together, the panel's ruling has allowed the United States to maintain a partially insulated solar market for several years, reinforcing a trend toward managed trade in a sector that had been one of the most globally integrated industries of the past decade.

[174] See President Biden Extends Safeguard Measure on Solar Products for Four Years, Doubles Tariff-Rate Quota for Solar Cells, 09 February 2022, available on the website https://www.whitecase.com/insight-alert/president-biden-extends-safeguard-measure-solar-products-four-years-doubles-tariff#

CHAPTER 3-UNITED STATES CONSTITUTION AND THE REGULATION OF INTERNATIONAL ECONOMIC RELATIONS

INTRODUCTION

The Constitution of the United States delineates the structural distribution of powers within the U.S. federal government and establishes the basic foundation for the regulation of economic and international affairs.

Article I, Section 8 assigns to Congress the power to levy and collect taxes, duties, imposts, and excises in order to pay debts and provide for the common defence and general welfare of the United States. It further mandates that such duties and excises remain uniform throughout the Union, ensuring economic consistency among the several States[175]. Congress is also empowered to borrow money on the credit of the United States and, crucially, to regulate commerce with foreign nations, among the States, and with the Indian tribes, which underscores its central role in both domestic and international trade governance[176]. Finally, the Necessary and Proper Clause authorizes Congress to enact all laws required to execute its enumerated powers, in this way granting its functional flexibility in implementing constitutional mandates[177].

Article I, Section 10 limits state sovereignty in matters of international and economic significance. States are expressly prohibited from entering into treaties, alliances, or confederations, as well as from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts[178]. This clause reflects the intention to preserve federal supremacy in monetary and foreign policy. States may not, without congressional consent, impose duties or imposts on imports or exports except as necessary for executing inspection laws, and any net proceeds from such duties must be directed to the United States Treasury under congressional oversight[179]. Moreover, states are forbidden to levy tonnage duties, maintain troops or warships in

[175]U.S. Const. art. I, § 8, cl. 1
[176] U.S. Const. art. I, § 8, cl. 3
[177] U.S. Const. art. I, § 8, cl. 18
[178] U.S. Const. art. I, § 10, cl. 1
[179] U.S. Const. art. I, § 10, cl. 2

peacetime, or engage in war unless actually invaded or threatened with imminent danger[180].

Article II, Section 1 vests the executive power in a President of the United States, elected for a four-year term[181]. *Section 2* designates the President as Commander in Chief of the Army and Navy, as well as of the militia of the several States, integrating civil authority with military command[182]. The President, with the advice and consent of the Senate, holds the power to make treaties—requiring a two-thirds concurrence of Senators present—and to appoint ambassadors, public ministers, consuls, judges of the Supreme Court, and other officers of the United States[183]. *Section 3* further establishes the President's diplomatic function, providing that he shall receive ambassadors and other public ministers and ensure that the laws are faithfully executed[184].

Article III, Section 2 extends the judicial power to all cases arising under the Constitution, federal laws, and treaties made under their authority, thereby encompassing both law and equity[185]. The Supreme Court possesses original jurisdiction in cases affecting ambassadors, other public ministers and consuls, and in controversies where a State is a party; in all other cases, it exercises appellate jurisdiction, both as to law and fact, subject to congressional regulation[186].

Finally, *Article VI* affirms the supremacy of the Constitution, federal laws, and treaties made under the authority of the United States. It explicitly declares them to be the supreme law of the land, binding upon state judges notwithstanding any conflicting provisions in state constitutions or laws[187]. This clause establishes the hierarchical primacy of federal law within the American legal order, ensuring national coherence and the uniform application of constitutional principles.

The allocation of the treaty power was hotly debated at the Constitutional Convention and in the ratification process. Early proposals ranged from giving treaty-making power to the Senate alone to entrusting it solely in the hands of the President[188]. The

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[180] U.S. Const. art. I, § 10, cl. 3
[181] U.S. Const. art. II, § 1
[182] U.S. Const. art. II, § 2, cl. 1
[183] U.S. Const. art. II, § 2, cl. 2
[184] U.S. Const. art. II, § 3
[185] U.S. Const. art. III, § 2, cl. 1
[186] U.S. Const. art. III, § 2, cl. 2
[187] U.S. Const. art. VI, cl. 2
[188] During the Constitutional Convention, some delegates urged lodging the entire treaty power in the Senate, given its intended role representing states in foreign affairs, while others argued for exclusive

eventual compromise was to split the function: the President would negotiate and form treaties, but require a supermajority of the Senate to consent before the treaty could bind the United States. *The Federalist Papers* explain the logic of this design. Alexander Hamilton in *Federalist No. 75* famously wrote that *"the particular nature of the power of making treaties indicates a peculiar propriety in the union"* of the Executive with a part of the Legislative power[189]. Treaties, Hamilton observed, do not fit perfectly into the traditional categories of power: *"The power of making treaties is, plainly, neither the exclusively legislative nor exclusively executive"*[190]. Hamilton and fellow Framer John Jay thus argued that treaty-making is a sui generis power: the President's leadership in negotiation is tempered by the Senate's check to protect the nation's interests and ensure the right legitimacy[191]. Conversely, including the larger House of Representatives was deemed impracticable. As Hamilton noted, the House's "fluctuating and multitudinous composition" made it ill-suited for sensitive negotiations requiring continuity and confidentiality[192], and that was the reason why the Constitution assigns no formal role to the House in making treaties.

James Madison highlighted another reason for consolidating treaty and trade powers at the federal level, recognizing that the Union needed exclusive control over foreign commerce to negotiate effectively with other nations (because if each state could impose its own import restrictions or violate U.S. treaty promises, the nation would have little credibility under the Articles of Confederation). In *Federalist No. 42*, Madison faced this problem. In that part, Madison referred to the Articles of Confederation's provision (Art. IX) which allowed Congress to make treaties but

executive control or involvement of the House. The matter was debated extensively in August 1787. See 2 *The Records of the Federal Convention of 1787*, at 392–93, Max Farrand ed., 1911 (where Madison advocated presidential participation in treaty-making because the Senate alone represented state governments, not the people); *id.* at 538–50 (where James Wilson's motion to require approval of both houses for treaties was overwhelmingly rejected). The final compromise (meaning Executive and Senate) was adopted by a vote of 9–2 in the Convention. See also David Gray Adler, *The Constitution and the Termination of Treaties*, 187 Mil. L. Rev. 20, 30–31 (2005), which summarizes Convention debates on treaty-making

[189] *The Federalist No. 75*, at 450, Hamilton. Hamilton's discussion in Federalist 75 is one of the clearest expositions of the reason why treaty power was allocated in a "joint" manner. He rejects the idea that treaties are purely executive (because for him "this is evidently an arbitrary disposition") and also that they are purely legislative, concluding that the power is sui generis. See also *The Federalist No. 64*, at 391–92 (John Jay) (Clinton Rossiter ed., 1961) (arguing that the Constitution gives the U.S. the combined advantages of being both an executive-driven negotiation and a deliberative Senate check)

[190] See *The Federalist No. 75*, at 450–51, Alexander Hamilton, Clinton Rossiter ed., 1961 (explaining the rationale of a joint treaty power and noting the two-thirds Senate requirement guards against "improper acts" that might be favoured by a mere majority)

[191] *Id.* at 450–52; *The Federalist No. 64*, at 392, Jay (endorsing an executive lead with senatorial counsel)

[192] *The Federalist No. 75*, at 452, Hamilton (arguing the House's constantly changing membership would make it inadequate for treaty-making)

included an “exception” permitting states to impose their own imposts and prohibitions on trade, effectively letting state laws trump treaties in some cases. The Constitution removed this by explicitly forbidding states from impairing treaties and by making treaties supreme over state law. [193].

As a consequence, the new Constitution’s prohibitions on state interference, coupled with the Supremacy Clause, would ensure that once the federal government made a treaty or enacted a trade law, it would bind all the states.

Notwithstanding the strong integration of powers in the treaty-making process, the Founders maintained a general separation between making international commitments and executing or funding them. The President and Senate alone can conclude a treaty, but only Congress can pass laws and appropriate funds. Early commentators emphasized that this structure implicitly invites both branches to play distinct roles even after a treaty is made. For example, if a treaty’s provisions touch subjects “submitted by the constitution to the power of Congress” (such as setting tariffs), the treaty by itself does not appropriate money or amend statutes.

The first clash over these allocations came with the 1794 Jay Treaty between the U.S. and Great Britain. In that occasion, President George Washington negotiated the treaty and obtained the Senate’s consent, but the treaty’s commitments (which included paying pre-Revolution debts and establishing arbitration commissions on commercial disputes) required allocations of money. When the treaty reached the implementation stage in 1796, the House of Representatives, led by Congressman James Madison, hesitated. Madison argued that when a treaty stipulation “embraced legislative objects” under Congress’s authority, it *“must depend for its execution…on a law to be passed by Congress”*, and the House had a constitutional right and duty to deliberate on whether to enact such a law[194].

In short, the House asserted it was not bound to allocate funds or change laws just because a treaty said so. This situation gave the opponents of the treaty in the House

[193] Madison, *Federalist No. 42*, at 279–80, press-pubs.uchicago.edu. In this regard, See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (a casa in which a Virginia law conflicting with the Treaty of Paris 1783 was invalidated on grounds that the treaty was supreme law under the new Constitution)

[194] Joseph Story, Commentaries on the Constitution of the United States § 1835, 1833 (quoting the House of Representatives’ resolution of April 1796), available on press-pubs.uchicago.edu. The resolution asserted that the House did not claim a role in treaty *making*, but when a treaty stipulates regulations on any of the subjects submitted to the power of Congress, its execution depends on congressional legislation, and the House has the right to decide on the expediency of such legislation: this essentially became the House’s official stance.

the opportunity to demand President Washington to turn over his negotiation correspondence, implying they might refuse implementation. Washington refused, maintaining that the House had no say in the treaty-making and was owed no such documents[195]. This clash raised a fundamental question: Did a treaty ratified by the President and Senate automatically obligate Congress to execute it via legislation?

After vigorous debate, the House narrowly voted to allocate the funds for Jay's Treaty, averting a potential breach of the treaty[196]. But it also passed a resolution pointedly declaring that when a treaty stipulates regulations on any of the subjects submitted to the power of Congress, it must depend for its execution on a law or laws to be passed by Congress, and that the House would decide, case by case, whether to pass such laws[197].

To sum up, the House expressly reserved the prerogative to refuse to implement treaty provisions touching its legislative competence. This resolution encapsulated a Madisonian view, so that the treaty power could not be used as a way to bypass Article I on powers of Congress.

In this concrete case, implementing legislation is needed, which must pass from both House and Senate and be signed by the President (or repassed over a veto)[198]. In this way, the Constitution creates a built-in check: the Executive cannot unilaterally bind the country's domestic law by treaty without legislative concurrence (beyond the Senate's consent). At the same time, Congress (and especially the House) cannot

[195] President Washington's *Message to the House of March 30, 1796* strongly refused the House's request for Jay Treaty papers, stating that the House has no constitutional role in ratifying treaties and therefore no entitlement to demand negotiation documents. See 1 American State Papers: Foreign Relations 586–87, Walter Lowrie & Matthew St. Clair Clarke eds., 1833; Teaching American History, Washington's Message to the House of Representatives (Mar. 30, 1796) available at https://avalon.law.yale.edu/18th_century/gw003.asp#:~:text=George%20Washington%20%3A%20Message%20to,not%20needed%20for%20treaty

[196] The House vote to appropriate funds for the Jay Treaty implementation was 51–48 in favour, on April 30, 1796. See House Hist. Highlights, *The House Appropriated Funds for Jay's Treaty*, available at https://history.house.gov/Historical-Highlights/1700s/The-House-appropriated-funds-for-Jay-s-Treaty/#:~:text=Treaty%2C%20angering%20many%20in%20the,By

[197] House of Representatives Resolution (Apr. 7, 1796), in 5 *Annals of Cong.* 771–72 (1796), available at https://press-pubs.uchicago.edu/founders/documents/a6_2s42.html#:~:text=representatives%20adopted%20a%20resolution%20declaring%2C,conducive%20to%20the%20public%20good

[198] *Id at 196.* Story recounts the arguments from the Jay Treaty debate: one side believed the treaty power could cover all subjects (including commerce and spending), and so once a treaty was ratified the nation was obliged to carry it out in full, with Congress's role merely ministerial, while the other side contended that the treaty power could not invade Congress's exclusive powers, and if it attempted to (by including, for example, a tariff provision), that part of the treaty would not bind without House approval

directly negotiate or ratify treaties, but it can influence foreign economic policy through its powers over commerce, spending, and passing implementing laws.

In the century after the Founding, the United States entered many commercial treaties (especially reciprocity treaties on trade and navigation) under the Article II process. However, the rigidity of the treaty process (especially the exclusion of the House) proved burdensome for setting tariff policy, which directly involves revenue and thus constitutionally implicates the House's prerogative: as a consequence, Congress found a way through delegation. In the Tariff Act of 1890, Congress authorized the President to negotiate reciprocal trade agreements by which other nations would lower tariffs on U.S. goods in exchange for the President's lowering of certain U.S. tariffs by proclamation. This effectively allowed the Executive to modify tariff rates without a new statute each time, within limits set by Congress. Some questioned whether this violated the nondelegation doctrine or conflicted with the Senate's treaty role. The Supreme Court answered in case *Field v. Clark* (1892), upholding the delegation: it reasoned that Congress had laid down sufficient policy (the tariff ranges) and only *"vested in the President a power to act upon the happening of certain events",* namely, a foreign country's reciprocal concessions[199]. *Field* upheld Section 3 of the McKinley Tariff Act of 1890, which authorized the President to suspend certain tariff concessions for countries that imposed "unequal and unreasonable" tariffs on U.S. goods, effectively empowering him to retaliate: the Court found no unconstitutional delegation, as Congress had laid out the conditions and policy[200], acknowledging that foreign commerce might require flexibility. This principle was a milestone and opened the way for later broad delegations in trade, such as Section 5 of the 1934 Reciprocal Trade Agreements Act[201], giving the President authority to cut tariffs up to 50% in exchange for foreign tariff cuts, which, though much broader, were not struck down.

Field v. Clark thus confirmed that Congress could give the President substantial margin in conducting trade negotiations under Congress's commerce and tariff powers. As a consequence, Congress and the Executive began developing a new model: congressional-executive agreements approved by a simple majority of both houses (or

[199] 143 U.S. 649 (1892)
[200] *Id.* at 693–94
[201] Reciprocal Trade Agreements Act of 1934, ch. 474, § 5, 48 Stat. 943, 945 (1934)

implemented via prior statutory delegation) as an alternative to treaties for trade matters.

The use of statutory agreements in foreign economic relations accelerated during the 20th century. A landmark was the Reciprocal Trade Agreements Act of 1934, in which Congress delegated to President Franklin D. Roosevelt broad authority to negotiate bilateral tariff-reduction agreements and proclaimed the new tariff rates without any further congressional action[202]. This mechanism fully bypassed the Senate treaty process; the House-supported approach was driven by both a policy intent of spurring exports during the Depression and pure constitutional pragmatism (in the way of engaging the House in trade policy, which by nature affects revenue).

A pattern of Executive-led trade negotiations under general congressional authorization was established, with all the trade agreements concluded under the 1934 Act and its extensions.

After World War II, this pattern evolved into even more significant agreements being concluded outside the Article II treaty framework. The 1947 General Agreement on Tariffs and Trade (GATT) was implemented in the U.S. via the President's existing tariff authorities and a joint congressional approval, not by the Senate's 2/3 ratification[203].

Decades later, agreements creating the World Trade Organization and the North American Free Trade Agreement (NAFTA) were each submitted to Congress as implementing legislation passed by a simple majority of both chambers, rather than as Article II treaties[204].

By the late 20th century, a clear constitutional practice had crystallized: most international economic agreements were concluded as congressional-executive agreements. This procedural shift in U.S. constitutional history had two major implications from a constitutional standing point:

[202] Pub. L. No. 73-316, 48 Stat. 943 (1934) (codified as amended in scattered sections of 19 U.S.C.)
[203] The GATT 1947 was initially implemented via an Executive Agreement under authority of the RTAA (which Congress renewed in 1945). President Truman submitted GATT to the Senate as a treaty in 1947, but due to strong opposition, it was never approved as a treaty. Instead, the U.S. participated in GATT provisionally under executive authority.
[204] North American Free Trade Agreement, U.S.-Can.-Mex., signed Dec. 17, 1992, approved in NAFTA Implementation Act. The vote was 234–200 in the House and 61–38 in the Senate.

1) it ensured the House of Representatives, and not just the Senate, had a voice in important economic agreements, addressing the democratic deficit of the Treaty Clause;

2) it lowered the voting threshold to a simple majority, avoiding the Treaty Clause's "supermajority handcuff" that had long disturbed agreements (the most notorious and clearest example is the Versailles Treaty in 1919).

Professor Louis Henkin famously observed that the congressional-executive agreement "is now widely accepted as a complete alternative to a treaty" – any agreement within the combined constitutional powers of President and Congress can be accomplished by ordinary legislation with presidential signature, rather than by treaty[205]. Trade agreements fall squarely in this category, since Congress's Article I powers over commerce and tariffs, coupled with the President's Article II foreign-relations powers, provide ample constitutional basis.

The Restatement (Third) of U.S. Foreign Relations Law (1987) likewise confirms that Congress and the President may by statute "authorize the making of an international agreement on any subject within the competence of Congress and of the President," and that such agreements have the same domestic status as treaties, so long as they do not violate the Constitution[206]. The *Restatement* points out that from 1939–1989, over 90% of international agreements entered by the U.S. were not Article II treaties[207]; It also notes that certain specific agreements (such as trade ones) are routinely done by congressional-executive form.

The choice between the treaty route and the legislative-executive route is now often driven by politics and practicality rather than strict law. In the trade reality, the legislative route has predominated and the reason is constitutional, because trade agreements frequently involve revenue changes, which implicate the Article I requirement for which the House is indispensable. Submitting such an agreement as an Article II treaty (Senate-only) could arguably evade the House's constitutional role in revenue legislation. On the other side, using an implementing act obtains the House's constitutionally mandated participation. Many scholars have concluded that this is not a "constitutional infirmity" but a sensible application of the Constitution's

[205] See Louis Henkin, *Foreign Affairs and the U.S. Constitution* at 217 (2d ed. 1996)
[206] See *Restatement (Third) of Foreign Relations Law* § 303
[207] Information available at congress.gov

flexibility because the Constitution does not care whether an international agreement is called a 'treaty' or an 'agreement' so long as the requisite domestic approval is obtained[208].

To further address the credibility gap in trade negotiations, Congress and the President developed Trade Promotion Authority (TPA), commonly known as "fast-track" procedure. Enacted in the Trade Act of 1974, TPA is essentially an advanced pact between Congress and the President: Congress delegates negotiating objectives and authority for a set time, and in return, Congress agrees to subject the eventual trade agreement implementing bill to an expedited, no-amendment, up-or-down vote in both chambers[209]. This legislative undertaking is a useful tool that reassures foreign partners that the President's deal will not be blocked in Congress (in this way mitigating the classic fear that the U.S. negotiator cannot deliver effectively).

Under TPA, as long as the Executive keeps Congress closely informed and the deal stays within prescribed objectives, Congress commits itself to a streamlined approval process.

From a constitutional standing point, fast-track procedure is grounded in Congress's power to make its own internal rules and in its authority to pre-authorize Executive actions.

While one Congress cannot irrevocably bind a future Congress's vote, in practice the political expectations under TPA are strong enough that trade deals negotiated under TPA (an example is the recent USMCA in 2020) have reliably received an up-or-down vote without amendment. Thus, TPA represents a political compromise resolution to the inter-branch coordination problem: it preserves Congress's ultimate vote while strengthening the Executive's negotiating hand. From a separation-of-powers standing point, fast-track catalyses the two branches working in tandem to exercise their constitutional powers.

Modern practice in international economic law relies heavily on this kind of political collaboration.

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[208] See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 Harv. L. Rev. 799, 861–62 (1995), at 861

[209] Trade Act of 1974, Pub. L. 93-618, §§ 151–154, 88 Stat. 1978, 2001–06 (codified as amended at 19 U.S.C. §§ 2191–2194). This established the modern "fast-track" procedures.

PARAGRAPH 1- UNITED STATES V. CURTISS-WRIGHT EXPORT CORP. (Supreme Court of The United States, 1936. 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255)

The case establishes that the federal government, and especially the President, has broad, inherent authority in foreign affairs that is not limited to powers expressly enumerated in the Constitution. The Supreme Court upheld Congress's delegation of discretion to the President to impose an arms embargo, emphasizing that in external relations the President is the "sole organ" of the nation and that such delegation was constitutional; the judgment dismissing the indictment was therefore reversed.

During the Chaco War between Bolivia and Paraguay, Congress passed a Joint Resolution on May 28, 1934, authorizing the President to prohibit arms sales to those countries if he found that such an embargo might help reestablish peace.

President Franklin D. Roosevelt, after many consultations, issued a proclamation on the same day imposing an arms embargo on Bolivia and Paraguay pursuant to this authority. Despite the embargo, the Curtiss-Wright Export Corporation (an arms manufacturer) and its officers allegedly conspired to sell fifteen machine guns to Bolivia. They were indicted in the U.S. District Court for the Southern District of New York for violating the Joint Resolution and the President's proclamation.

The defendants moved to dismiss, arguing that the Joint Resolution was an unconstitutional delegation of legislative power to the President, that the President had not met the Resolution's preconditions, and that the 1935 revocation of the embargo had extinguished any liability. The district court sustained the demurrer on the first ground (for invalid delegation) and dismissed the indictment, while rejecting the other defence arguments. The United States appealed directly to the Supreme Court under the Criminal Appeals Act, since the indictment had been based on constitutional grounds.

The primary Issue was whether Congress's joint resolution (which delegated to the President the discretion to impose or lift an arms embargo on the Chaco War belligerents) constituted an unconstitutional delegation of Congress's lawmaking power in violation of the non-delegation doctrine, or whether this delegation was permissible due to the President's inherent powers in the sector of foreign affairs.

Secondary issues were whether the President's proclamation failed to satisfy the resolution's conditions (finding that an embargo may promote peace after consultation with other governments), and whether the revocation of the embargo in 1935 terminated any offenses committed during its operation. (these secondary issues mentioned were raised by the defence but were not the basis of the lower court's ruling).

Under Article I of the U.S. Constitution, Congress generally cannot delegate its legislative power to the executive without providing an intelligible principle or standards to guide that power. This nondelegation doctrine is a cornerstone of separation of powers, as affirmed in notorious cases like *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States* (both dated back in 1935), which invalidated broad delegations in domestic affairs.

However, in foreign affairs, the Supreme Court in Curtiss-Wright recognized a crucial distinction: the federal government's powers over external relations are inherently different in origin and nature from its powers over internal matters[210].

The Constitution's usual limitation that the Federal Government may exercise only those powers expressly enumerated or necessarily implied "is categorically true only in respect of our internal affairs"[211].

By contrast, powers concerning foreign affairs do not depend solely on affirmative grants in the Constitution, because sovereignty in external matters was passed to the United States as a whole from Great Britain as an incident of the process of independence. As Justice Sutherland explained, *"The investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution",* for example , *"the powers to declare and wage war, to conclude peace, to make treaties, and to maintain diplomatic relations"* would have vested in the national government *"even if they had never been mentioned in the Constitution,"* simply as "necessary concomitants of nationality"[212].

What is more, the Constitution allocates primary responsibility for foreign relations to the political branches (to the President as the nation's chief foreign policy

[210] Information available at supreme.justia.com
[211] *UNITED STATES V. CURTISS-WRIGHT EXPORT CORP., Supreme Court of The United States, 1936. 299 U.S.* at 315–16
[212] Id at 211, at 318

representative). As a consequence, article II empowers the President to negotiate treaties (with Senate consent) and send or receive ambassadors, among other external powers, reflecting the President's special competence in foreign affairs.

The main constitutional consequence is that the President possesses inherent, plenary authority in external affairs as the "*sole organ*" of the nation in its dealings with other countries: this principle (which was historically articulated by John Marshall in 1800) holds that *"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations"*[213].

Congress may, in this way, confer a greater degree of discretion to the President in foreign policy matters than would be permissible in the domestic sphere. Any such delegation, however, still must comply with other constitutional limitations.

To sum up, the nondelegation doctrine's strict conditions are less strict when Congress legislates in international affairs, due to the President's constitutional role and the practical realities of foreign policymaking.

Justice George Sutherland, writing for a 7-1 majority, applied the above principles to uphold the Joint Resolution as a valid delegation.

First and foremost, the Court emphasized the fundamental difference between domestic and foreign powers. In the reality of internal affairs, the federal government's authority is limited to powers enumerated in the Constitution (with all the possible implications) and those powers originally belonged to the states before the Constitution was adopted.

But the states never held any international powers as independent sovereigns: when the colonies declared independence from Britain, external sovereignty *"passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America"*[214].

The point is that the Union existed and exercised foreign affairs powers even before the Constitution (under the Continental Congress and Articles of Confederation), and the Constitution was intended in part to make the Union more perfect, and not to retract its sovereign external powers except as expressly qualified. The result of this historical

[213] Id at 211, Marshall, quoted at 319
[214] Id at 211, at 316

background is that foreign affairs power is an inherent attribute of national sovereignty that the United States government enjoys in full.

The Court underscored that *"as a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations"*[215].

Given this situation, Justice Sutherland reasoned that the President holds a unique position in foreign affairs: he can engage in diplomacy and speak as the single voice of the nation in international dealings.

While Congress has important foreign relations powers (and among them regulating foreign commerce and declaring war), the President alone negotiates treaties and conducts diplomacy (roles in which Congress itself is powerless to invade).

The Court noted that the President is *"most competent to determine when, how, and upon what subjects' negotiation may be urged with the greatest prospect of success,"* and that the "*nature of transactions with foreign nations… requires caution and unity of design*"[216].

This concentration of foreign relations power in the executive is reinforced by practical considerations, because the President has always superior access to confidential information and expertise about international conditions: as Sutherland explained, the President *"has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information… and his agents in the form of diplomatic, consular and other officials"*[217].

Sensitive negotiations often require secrecy and quick action, which are not adequate to the slow, public processes of Congress. Indeed, the Court remembered how President George Washington refused to divulge negotiation documents to the House of Representatives in 1796, stating that *"the nature of foreign negotiations requires caution, and their success must often depend on secrecy "and that "[…]The necessity*

[215] Id at 211, at 318
[216] Id at 211, at 319
[217] Id at 211, at 320

of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate[...]"[218].

Because of these historical and practical realities, the Court held that Congress may appropriately delegate a higher degree of discretion to the President in external matters.

In addition, Justice Sutherland stated it was important to take into consideration that the case involved not only a power delegated by Congress, *"but [that power] plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress"*[219] . In other words, the President was acting at the apex of his own constitutional authority in foreign affairs, and the delegation from Congress only amplified that authority.

Nevertheless, the Court cautioned that if it rigidly applied, the domestic nondelegation rule here, it could harm the conduct of foreign policy: *"if, in the maintenance of our international relations, embarrassment – perhaps serious embarrassment – is to be avoided and success for our aims achieved, congressional legislation... must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"*[220].

In the examined situation, since the embargo statute aimed exclusively at a foreign situation (the Chaco War), it fell within this special domain. The Joint Resolution essentially left the decision whether and when to impose the embargo to the President's judgment of its diplomatic utility (a judgment the President is uniquely qualified to make).

Sutherland defended this flexibility, noting that requiring Congress to set detailed standards in this field would be unwise: in fact, the quote *"We should hesitate long before limiting or embarrassing such powers"*[221] is used to refer to *"the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."*[222]

[218] Id at 217
[219] Id at 211, at the beginning of 320
[220] Id at 211, at 320
[221] Id at 211, at 322, quoting the case *Mackenzie v. Hare*
[222] Id at 220

Crucially, the Court found important historical precedent for delegations of this type: *"The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day."*[223] In short, American history demonstrated a well and wide accepted tradition of Congress delegating significant authority to the President in international matters, far beyond what would be allowed domestically. Given this tradition, the Court viewed the Resolution as a permissible collaboration between Congress and the President in foreign policy, combining a congressional policy (to forbid arms sales in the case it would promote peace) with Executive judgment and implementation.

After establishing the foregoing principles, the Supreme Court readily disposed of the defendants' remaining arguments. It held that President Roosevelt had in fact made all the necessary findings (that an embargo might aid peace, and that he had consulted other governments) in his proclamation's text, so the Resolution's conditions were clearly satisfied[224].

The Court also ruled that the President's 1935 proclamation terminating the embargo did not absolve violations that occurred while it was in force, because the Joint Resolution's repeal did not retroactively immunize past violations, absent contrary legislative intent[225].

The Joint Resolution of May 28, 1934 was not an unconstitutional delegation of legislative power in violation of Article I.

The President's proclamation banning arms sales to Bolivia and Paraguay, issued pursuant to Congress's authorization, was therefore a valid exercise of joint executive-legislative power in external relations, so the indictment against Curtiss-Wright could proceed, since the enabling law was upheld

The Supreme Court decided to reverse the district court's judgment, upholding the Joint Resolution as constitutional, holding that, in the context of foreign affairs, Congress's delegation of discretion to the President did not violate the nondelegation doctrine Justice Sutherland's opinion thus established that Congress may confer broad

[223] Id at 211, at 322
[224] Id at 211, at 330-331
[225] Id at 211, at 333

authority on the President in matters of foreign policy without supplying the kind of detailed standards that would be required domestically, due to the President's independent constitutional role in that field.

Justice James C. McReynolds was the sole dissenter, but he did not write a full dissenting opinion, even though he believed the District Court was correct that the Joint Resolution amounted to an unlawful delegation of Congress's legislative power[226].

[226] Id at 211, at the end of 333

PARAGRAPH 2- THE IMPORTANCE OF THE YOUNGSTOWN CLASSIFICATIONS FOR THE CATEGORISATION OF PRESIDENTIAL POWERS

In 1952, at the height of the Korean War, President Harry S. Truman issued Executive Order 10340, directing the federal government to seize and operate most of the nation's steel mills in order to prevent an imminent steelworkers' strike. Negotiations between the United Steelworkers and major steel companies had collapsed, and the President feared that a shutdown in steel production, vital for weapons and military equipment, would jeopardize the war effort.

Instead of using existing statutory tools such as the Taft-Hartley Act, the Defence Production Act, or the Selective Service Act, Truman invoked what he claimed were inherent executive powers to take control of the steel industry, so his Secretary of Commerce, Charles Sawyer, implemented the order by instructing steel executives to keep the mills running under federal direction. Truman notified Congress of the seizure, but Congress declined to authorize or block his action[227].

The steel companies, including Youngstown Sheet & Tube Co., complied under protest and filed suit in federal court, arguing that the President had acted without constitutional or statutory authority. A district judge agreed there was likely no legal basis for the seizure and issued a preliminary injunction against the government. Given the national stakes, the case went swiftly to the Supreme Court, which heard argument in May and issued its decision on June 2, 1952. This historic confrontation over executive power came to be known as "the Steel Seizure Case".

The steel manufacturers argued that President Truman's order was nothing short of legislating, an authority the Constitution gives only to Congress. Because no statute empowered the President to seize privately owned steel mills to manage a labour dispute, and because the Constitution contains no such grant of power, the companies maintained that the seizure violated the separation of powers[228]. They emphasized that Congress had expressly considered and rejected giving the President seizure authority

[227]See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)
[228]See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), available at https://www.law.cornell.edu/supremecourt/text/

during the debates over the Taft-Hartley Act in 1947, a choice that clearly signalled Congress's decision to withhold that power.

The companies also raised a Fifth Amendment concern, arguing that taking control of their mills without statutory authorization or proper condemnation procedures amounted to an unconstitutional taking of property without just compensation.

The government countered that the President possessed inherent executive authority to intervene during a national emergency to protect the country: relying on Article II, the administration argued that the combined force of the President's "executive Power," his Take Care obligation, and his role as Commander in Chief gave him sufficient constitutional footing to act when steel production (which was crucial to the Korean War effort) was threatened[229]. The Justice Department framed the seizure as an emergency measure necessary to maintain military readiness and public order, falling within what it called the "aggregate" of the President's constitutional powers[230].

Although not always directly controlling, the government also invoked historical instances of presidential industrial seizures and broad language from foreign-affairs cases such as *United States v. Curtiss-Wright Export Corp.* (1936) to suggest that the Executive enjoys wide latitude during crises. Finally, the administration insisted that because Congress had not expressly prohibited this type of action, and could always step in after the fact, the President was justified in acting swiftly to safeguard national security[231].

In a 6–3 ruling, the Supreme Court held that President Truman's seizure of the steel mills was unconstitutional. The Court concluded that neither the Constitution nor any statute authorized the President to take over private industry in this way, making the order an impermissible exercise of executive power. The seizure was invalidated, and control of the mills was returned to their owners[232]. Although every Justice wrote separately, Justice Hugo Black's majority opinion and Justice Robert Jackson's concurrence have become the most influential.

Justice Black adopted a strict separation-of-powers approach in his majority opinion. He wrote that "*The President's power, if any, to issue the order must stem either from*

[229]Id. at 228
[230]Id. at 228
[231]Id. at 227
[232]Id. at 227, at page 1

an act of Congress or from the Constitution itself"[233]. Because no statute authorized a seizure to resolve a labour dispute and no constitutional clause gave the President such authority, the order had no legal footing.

His opinion stressed that the President is not permitted to make law: "*In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker*"[234]. Allowing the seizure would, in his view, effectively transfer Congress's lawmaking power to the Executive, something the Constitution "entrusted to Congress alone… in both good and bad times". Black thus drew a bright line: even wartime pressures cannot create executive authority where Congress has not granted it.

The other five Justices in the majority agreed the seizure was unlawful but emphasized different reasons:

Justice Frankfurter focused on legislative history and historical practice: he noted Congress had explicitly rejected seizure authority when passing the Taft-Hartley Act, demonstrating a conscious choice not to give the President this power[235]. His famous line, courts must consider the "*gloss which life has written*" on the Constitution, captured his view that longstanding practice can illuminate the limits of executive power[236].

Justice Douglas stressed that emergencies cannot generate power: if such seizure authority is necessary, Congress can pass an emergency law, but the President cannot invent one[237].

Justice Clark reasoned that Congress had already supplied statutory mechanisms for handling labour crises (such as under the Defence Production Act and the Selective

[233]Id. at 227, at page 6
[234]Id. at 233
[235]Historical Gloss: A Primer**,** Responding to Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411 (2012)**,** Alison L. LaCroix, available at https://harvardlawreview.org/forum/vol-126/historical-gloss-a-primer/
[236]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), at page 23
[237]Id. at 236, at page 17: "But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act."

Service Act). Because Congress had legislated in this area, the President could not bypass those tools[238].

Justice Burton similarly pointed out that Taft-Hartley intentionally omitted seizure authority, reinforcing that the President lacked power to take it upon himself[239].

Despite approaching the problem from different angles, text, structure, history, or statutory alternatives, the result was always the same: all of the concurring Justices agreed Truman had exceeded constitutionally permissible limits.

Chief Justice Vinson led the dissent, joined by Justices Reed and Minton, argued that the President should have greater flexibility during national emergencies. The dissent viewed the Korean War as a crisis that implicitly empowered Truman to act until Congress explicitly intervened[240]. Vinson described the seizure as a temporary wartime measure needed to keep steel production stable and therefore within the combined force of the President's Article II powers. Congress remained free, he argued, to forbid the action, yet until it did so, the judiciary should not curtail the President's ability to respond to urgent threats. He warned that an overly rigid approach risked "Executive weakness" in moments of national danger[241].

Ultimately, the majority rejected this emergency-based theory of implied power. Youngstown stands as a definitive statement that even in crises, the President must act pursuant to congressional authorization or an identifiable constitutional grant of authority.

[238]Id. at 236, at page 15: "[…] a unanimous Court held that the President's instructions had been issued without authority and that they could not "legalize an act which without those instructions would have been a plain trespass." (Justice Clark, reasoning on the case Little v. Barreme)
[239]Id. at 236, at page 14: ""Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within **881 such time as he shall prescribe." (Justice Barton, quoting the Taft-Hartley Act)
[240]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), from page 29 (Justice Vinson dissent, joined by Justices Reed and Minton)
[241]Id. at 240

SUBPARAGRAPH 2.1-JUSTICE JACKSON'S CONCURRENCE

Justice Jackson's opinion has become the landmark framework for evaluating presidential power. He famously observed that "*Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress*.[242]"

As a consequence, he articulated the now-canonical three "Youngstown categories", which assess executive authority based on Congress's position: supportive, silent, or opposed. Jackson placed Truman's action in Category 3, where the President acts against Congress's implied will, and where presidential power is at its "lowest ebb.", with the result that under this framework, the seizure could not stand.

Justice Jackson begins his framework with the scenario in which presidential power is at its constitutional peak: when the Executive acts with Congress's express or implied blessing, that is "category 1". As he put it, "*When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate*."[243]

In this category, the President operates with the combined force of his own Article II powers and Congress's Article I authority. Because the two political branches are acting in concert, Jackson emphasized that the Executive in this posture **"***personif[ies] the federal sovereignty"*[244]. The result is a legal environment highly deferential to the President's chosen course of action.

Any challenge to presidential action in Category 1 therefore faces steep odds. Jackson explained that if, even under this combined authority, a presidential measure was struck down, it would signify that the federal government as a whole lacked power to undertake the action, because both the Executive and Congress had jointly endorsed it. This makes Category 1 the safest constitutional territory for executive action.

Thus, courts generally approach Category 1 cases with what Jackson called the "*strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.*"[245]

[242]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), at page 9
[243]Id. at 242, category 1
[244]Id. at 242, category 1
[245]Id. at 242, category 1

As a consequence, when the President acts pursuant to statutory authorization (whether explicit or reasonably implied), judicial scrutiny is at its most deferential, and opponents must carry a substantial burden to demonstrate illegality.

Justice Jackson's second category (The "Zone of Twilight", Congressional Silence or Ambiguity) addresses the uncertain middle ground, represented by situations in which Congress has not clearly weighed in on the President's authority.

As Jackson famously put it, *"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."*[246]

This "zone of twilight" arises when Congress has neither endorsed nor prohibited the particular executive action at issue. In such circumstances the President must fall back on whatever inherent constitutional powers he possesses, while Congress's authority over the matter may be overlapping, dormant, or undefined. The absence of congressional direction creates a fluid constitutional space.

Jackson emphasized that in this middle territory, *"congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."*[247] In practical terms, a President may be able to act, not because Congress affirmatively granted power, but because Congress has not acted to stop him. Silence, in some contexts, may amount to tacit acceptance.

Crucially, Jackson underscored the contextual nature of this category. Outcomes in Category 2 cases depend on the practical realities of the moment: *"any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."*[248] Thus, courts evaluating Category 2 disputes do not apply rigid formulas. Instead, they examine the nature of the crisis, the scope of the President's independent constitutional authority, historical practice, patterns of congressional acquiescence, and the broader functional dynamics between the branches.

[246] Id. at 242, category 2
[247] Id. at 242, category 2
[248] Id. at 242, category 2

Category 2 is therefore inherently ambiguous. It is the domain where institutional silence, political judgment, and constitutional structure intersect, and where courts often must interpret subtle or hidden clues about Congress's intent or, alternatively, recognize that the matter is best resolved by the political branches themselves.

Justice Jackson's third category (Category 3, representing the "Lowest Ebb", meaning President vs. Congress) captures the moment when presidential power is at its weakest, when the Executive acts in direct conflict with Congress.

As Jackson explained, *"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."*[249]

This is the constitutional posture in which the President stands against the legislature. If Congress has enacted a statute prohibiting the President's course of action, or if its intent is otherwise unmistakably contrary, the President's authority narrows dramatically. In such a case, the only remaining source of power is whatever the Constitution independently grants the President, and even if that power is diminished by Congress's own enumerated powers in the same field.

Jackson stressed that a court may uphold a presidential act in Category 3 only if the President possesses an exclusive constitutional authority so strong that it effectively *"disabl[es] the Congress from acting upon the subject."*[250] In other words, the President can overcome Congress only where the subject matter is constitutionally entrusted to the Executive alone, and Congress has no legitimate role to play.

Jackson also cautioned that any such claim to exclusive power **"***must be scrutinized with caution"*, since the balance of the entire constitutional system is implicated[251]. Allowing the President to prevail in this situation would mean that executive authority can override Congress's expressed will, something permissible only when the Constitution unmistakably gives the power only to the Executive.

[249]Id. at 242, category 3
[250]Id. at 242, category 3
[251]Id. at 242, category 3

Because of this, Category 3 inevitably invites the most searching form of judicial review. Courts examining actions in this situation must be vigilant, as upholding a President here would effectively sanction executive supremacy over Congress.

As a practical matter, Presidents almost always lose in Category 3, just as Truman did in *Youngstown*. Only in those rare contexts involving a core, exclusive presidential prerogative (for instance, a narrow slice of foreign affairs or diplomatic recognition powers that arguably lie beyond Congress's regulatory reach) might the Executive have a chance to prevail.

Scholars have long emphasized that Jackson's Youngstown framework preserves the constitutional balance between Congress and the President by making executive power depend on Congress's support or opposition. This structure encourages Presidents to seek legislative authorization (to gain maximum power under Category 1) and warns that acting against Congress (Category 3) will face strict judicial scrutiny. In doing so, the framework empowers Congress and discourages unilateral executive action. In this way, Jackson's broader goal, as scholars like Laurence Tribe observed, was to maintain the constitutional equilibrium and prevent excessive presidential power while still enabling effective governance through cooperation between the branches.

An historical and always actual case like this could also be invoked in critique judicial situations where the balance of power is threatened by the hypertrophy of the executive, see for example the case VOS v. Trump, which is in the hands of the Supreme Court right these days, showing once again the importance and the breadth of this ruling.

Many scholars view Justice Jackson's three-part Youngstown analysis as a brilliant example of judicial craftsmanship. They point out that his framework manages to honour constitutional text and historical practice, especially the distribution of legislative powers and the constraints recognized through the Necessary and Proper Clause, while still avoiding the rigid formalism that could choke the government's ability to adapt to unfamiliar crises.

Leading voices in constitutional law, including those writing in the Hart & Wechsler tradition, have praised Jackson's approach for mixing structural analysis with practical sensibility. Similarly, Professor David Cole, in a well-known review of Harold Koh's 1990 book, contrasted Youngstown's understanding of shared power with the far more sweeping notion of inherent presidential authority suggested in *Curtiss-Wright*[252]. In Cole's view, Youngstown (particularly Jackson's tripartite scheme) helped restore a functional balance between the branches by rejecting the idea of boundless executive power and reaffirming Congress's central role in maintaining constitutional equilibrium.

Scholars have long noted that the most elusive (we could call it the Achilles 'heel) part of Jackson's framework is Category 2, the so-called *"zone of twilight"* for the simple reason that, although Jackson recognized that congressional silence might "enable, if not invite"[253] independent executive action, he never clearly defined the legal consequences of that silence and, as a consequence, this ambiguity has prompted extensive academic debate.

One of the most prominent critics, Professor Laurence H. Tribe, has argued that Jackson's triptych is "deeply ambiguous on the key question of what to make of congressional silence."[254] Jackson initially suggests that the President in Category 2 "can only rely upon his own independent powers," which implies that the default rule in cases of silence is no additional authority. Yet almost immediately he indicates that inaction by Congress could "invite" presidential measures, suggesting instead that silence might be read as permissive[255].

Tribe contends that these two signals pull in opposite directions and that *Youngstown* "offers no meaningful baseline" for distinguishing when silence should be treated as authorization and when it should be viewed as withholding permission[256].

In both his 1982 essay "Toward a Syntax of the Unsaid" and later writing in the Yale Law Journal Forum, Tribe stresses that resolving Category 2 conflicts requires courts to develop presumptions about congressional silence, presumptions that Jackson himself never articulated.

Should silence be read to mean that the President may act unless Congress has prohibited it? Or should it be read to mean that the President must remain inactive

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[252]David Cole, *Review of Harold Hongju Koh, The National Security Constitution*, 104 HARV. L. REV. 670 (1990)

[253]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), see Justice Jackson's concurring opinion

[254]Transcending the *Youngstown* Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine, 18 July 2016, Laurence H. Tribe, available at the website https://yalelawjournal.org/

[255]Id. at 254

[256]Id. at 254

unless Congress has authorized him? Jackson's opinion leaves those normative choices unresolved, forcing courts to construct their own interpretive rules, hard task for the coming rulings on these hot topics.

In practice, this has produced uneven results. Courts sometimes treat silence as tacit approval, effectively pushing the case toward Category 1. At other times, they treat silence as simply the absence of authority, keeping the dispute squarely within the twilight zone.

Because *Youngstown* provides no definitive standard, critics argue the framework gives judges (and the executive) considerable room to manoeuvre in the very cases where clarity is most needed. As Tribe observes, this indeterminacy means the tripartite scheme provides precious little guidance in some of the hardest separation-of-powers cases, especially those involving executive initiatives unsupported (but not explicitly forbidden) by Congress[257].

In the end, what really matters is understanding if and why "the zone of twilight" is desired, and the answer to the reason of this choice is one of the oldest in history, lying at the intersection between politics and juridical world.

Scholars have proposed one way to navigate the uncertainty of Jackson's Category 2 and to discern Congress's "implied will" in Category 3 through the method of historical gloss, a concept first emphasized by Justice Frankfurter in his Youngstown concurrence and later developed extensively in the literature.

Professors Curtis A. Bradley and Trevor W. Morrison, in their influential article Historical Gloss and the Separation of Powers[258], expand on Frankfurter's insight that a consistent and openly practiced pattern of executive action, carried out over time and with Congress's knowledge, can become a meaningful interpretive guide to the separation of powers: their argument is that such entrenched historical practice reveals how Congress and the Executive have actually operated in tandem, and thus helps courts understand when congressional silence reflects tacit approval rather than disengagement.

[257]Id. at 254
[258]Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411 (2012)

Applied to Youngstown, this gloss analysis helps clarify why Truman's steel seizure could not be justified. In earlier decades, there had indeed been presidential seizures of industrial facilities, but these were typically grounded in explicit statutory authority, such as the *Smith-Connally Act* during World War II, and were understood as temporary wartime measures.

In his concurrence, Frankfurter meticulously traced these episodes and emphasized a decisive point: during the 1947 debate over the Taft-Hartley Act, Congress had expressly considered and rejected giving the President general seizure power in labour disputes. Because Congress had clearly withheld this authority, and because later practice showed no sustained pattern of acquiescence, the historical record cut against Truman[259]. In Frankfurter's assessment, this history placed the steel seizure squarely in Jackson's Category 3, where presidential power is weakest and incompatible with Congress's implied will.

Scholars often describe Justice Jackson's concurrence as the classic functional counterpoint to Justice Black's formalist view of executive power. Whereas Black insisted on sharp constitutional boundaries (Congress makes the laws, the President enforces them, and the two roles must remain distinct), Jackson acknowledged that real-world governance is far less tidy: he understood that the branches sometimes overlap, that uncertainty often exists at the margins, and that constitutional power can operate in shared or "twilight" spaces where neither branch has exclusive control.

[259]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), see Justice Frankfurter's concurring opinion

PARAGRAPH 3-CONSUMER UNION OF U.S., INC. v. KISSINGER (**United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975))**

The case concerns whether the President could lawfully negotiate voluntary steel import restraint agreements with foreign producers without following statutory procedures laid down by Congress for regulating imports. The D.C. Circuit held that these voluntary undertakings did not amount to binding regulation of foreign commerce, and therefore did not violate the Constitution or the Trade Expansion Act, affirming the Executive's action while vacating any suggestion of antitrust immunity.

In the 1960s, U.S. steel imports rose dramatically (more than tenfold between 1958 and 1968, skyrocketing from about 1.16 million to 17.96 million net tons): this surge threatened the domestic steel industry, a sector considered vital to both national security and the overall economy[260].

Officials from major foreign steel-producing countries (particularly Japan and members of the European Communities) grew increasingly worried, concerned that Congress might respond by imposing mandatory import quotas. Their fears were well-founded because in 1968, Congress introduced several bills, backed by strong support, that would have required strict limits on steel imports.

The Executive branch, under Presidents Johnson and later Nixon, viewed the problem as a temporary one that could be managed through short-term measures rather than through rigid, formal trade restrictions: for this reason, it resisted imposing unilateral quotas or entering into formal trade agreements, as such moves risked retaliation under GATT and strained diplomatic relations. Instead, the State Department chose a diplomatic route to avoid congressional quotas: after consulting domestic stakeholders (including U.S. steel companies, labour unions, and members of Congress), the State Department negotiated an arrangement with foreign steel associations in mid-1968 and, by December of that year, steel producers' associations from Japan and Europe sent letters to the U.S. Secretary of State voluntarily agreeing to limit their steel exports to the United States for 1969–1971, according to specified annual tonnage levels. President Johnson welcomed these "voluntary import restraint" agreements as a way

[260] United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), facts of the case and procedural history

to ease the domestic industry’s difficulties without relying on formal import restrictions[261].

The program was deemed a success, and by late 1970 both domestic producers and labour organizations urged that it be extended.

Responding to these requests, President Nixon instructed the State Department to seek renewed commitments and, after nearly a year of negotiations, Deputy Undersecretary Nathaniel Samuels obtained new letters in early May 1972 from the Japan Iron & Steel Exporters’ Association and European steel producers (including British Steel).

These 1972 letters pledged a three-year restraint on steel exports through 1974, setting detailed quantitative limits on total tonnage and on specific categories of specialty steels; they also provided for future consultations and were expressly “based upon the following assumptions”: (1) that no foreign producer would be placed at a competitive disadvantage relative to others, (2) that the U.S. government would refrain from unilateral action such as new import restrictions or tariff increases so long as the voluntary limits remained in effect, and (3) that the arrangement would not violate any U.S. law. The White House hailed the program as a “welcome development” achieved through diplomatic negotiation[262].

Unluckily, not everyone agreed and, as a consequence, the Consumers Union of the United States, joined by another consumer organization, opposed the voluntary import restraints, arguing that they harmed consumers by raising steel prices and creating shortages.

In 1972, they filed suit in the U.S. District Court for the District of Columbia against Secretary of State Henry Kissinger (who had then succeeded prior Secretary William Rogers during the litigation), other U.S. officials, and also various foreign and domestic steel producers involved in the arrangement.

Their original complaint raised two claims. First, it alleged that the 1972 steel agreements violated § 1 of the Sherman Antitrust Act as an unlawful combination in restraint of trade[263].

[261] Id. at 260
[262] Id. at 260
[263] United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), II part

Second, it argued that State Department officials had acted ultra vires and unconstitutionally by negotiating the import restraints without congressional authorization (without following the procedures established in the Trade Expansion Act of 1962)[264].

The plaintiffs sought a declaration that the 1972 letters of intent violated the Sherman Act and an injunction prohibiting all defendants from implementing the agreed-upon import reductions. On the ultra vires claim, they sought a declaration that the State Department lacked authority to "facilitate, bring about and negotiate" these import limitations without complying with the Trade Expansion Act (§ 301 and § 352) and an injunction preventing further implementation[265].

Before trial, Consumers Union voluntarily dismissed the antitrust claim to simplify the case or avoid the complex defences it would raise. The case then proceeded solely on the constitutional and statutory claim, and an amended complaint was filed focusing on that issue. The parties submitted an agreed statement of facts and cross-motions for summary judgment.

In January 1973, District Judge William B. Jones (who replaced the name of former Secretary Rogers with Kissinger when the latter assumed office) issued a "Memorandum Opinion, Declaration and Order," published as *Consumers Union v. Rogers*[266] where the Court declined to issue an injunction, noting that injunctive relief was unwarranted under the circumstances, but it made two key declaratory rulings:

1. "The Executive has no authority under the Constitution or acts of Congress to exempt the Voluntary Restraint Arrangements on steel from the antitrust laws and ... such arrangements are not exempt."[267]

2. "The Executive is not pre-empted and may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as these undertakings do not violate legislation regulating foreign commerce, such as the Sherman Act, and ... there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962."[268]

[264] Id. at 263
[265] Id. at 263
[266] *Consumers Union v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973)
[267] Id. at 266
[268] Id. at 266

In a footnote, Judge Jones noted that although the Sherman Act issue was no longer formally before the court, "very serious questions can and should be raised as to the legality of the steel arrangements under the Sherman Act." He effectively warned that the voluntary restraint program might well run afoul of antitrust law[269].

Both sides appealed, resulting in consolidated cross-appeals before the D.C. Circuit. The government and steel industry appellants (both foreign and domestic) challenged the district court's first declaration about the antitrust issue, arguing that it amounted to an improper advisory opinion that cast doubt on the agreements' legality[270].

Consumers Union, meanwhile, appealed the second declaration, contending that the Executive's actions were unconstitutional and contrary to the Trade Expansion Act[271].

The Court of Appeal (composed of Circuit Judges McGowan and Leventhal, with Senior Judge Danaher joining the panel) heard oral argument on May 31, 1973, and issued its decision on October 11, 1974: Judge McGowan wrote the majority opinion, Judge Danaher concurred, and Judge Leventhal dissented.

The case posed fundamental questions about the separation of powers in foreign economic policy: whether the Executive branch's negotiation of voluntary agreements with foreign steel producers to restrict imports – absent explicit congressional authorization – constituted an impermissible regulation of foreign commerce reserved to Congress under Article I, §8, cl. 3 (the Foreign Commerce Clause) or was in conflict with Congress's enactments (particularly the Trade Expansion Act of 1962, 19 U.S.C. § 1801 *et seq.*). In practice, the question was if the President had inherent or independent authority in the field of foreign affairs to orchestrate such "voluntary restraint" arrangements, or had Congress, by legislating a comprehensive scheme for trade and import restrictions, occupied the field and foreclosed the Executive from acting unilaterally.

Subsidiary issues included whether the informal, non-binding nature of the steel agreements took them outside the scope of what counts as "regulation" of foreign

[269] Id. at 266
[270] United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), part II
[271] United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), part II and III

commerce, and to what extent the President's well-recognized foreign affairs powers can justify actions affecting foreign trade absent congressional sanction.

Article I of the U.S. Constitution assigns to Congress the power *"to regulate commerce with foreign Nations"*[272]. Correspondingly, Article II confers no express economic policymaking power on the President, but the President is the primary organ of the nation's foreign affairs and diplomacy[273]. It was long established (in cases like *United States v. Curtiss-Wright Export Corp*) that the President possesses a broad inherent authority to conduct foreign relations, originated from national sovereignty and the President's role as the "sole organ" of international dealings[274].

However, when the President's unilateral actions conflict with the express or implied will of Congress, the President's power is at its "lowest ebb" and can rely only on his own constitutional authority minus any authority Congress holds over the matter (Justice Jackson's famous Youngstown Category 3 analysis)[275]. Thus, in the area of foreign commerce, Congress's plenary Article I power would generally be essential, and any presidential initiative incompatible with Congress's enacted policy or intent would be highly suspect.

Conversely, if Congress has not spoken or has acquiesced, the President might act in a "zone of twilight" (under case Youngstown, Category 2) or pursuant to his own powers (Category 1 of Youngstown, if Congress implicitly approves)[276].

At the time of this case, Congress had in place a comprehensive statutory scheme governing trade policy and import restrictions: the Trade Expansion Act of 1962 (so called "TEA") delegated certain trade-negotiation authorities to the President, but with carefully prescribed procedures and limits[277].

Title II of the TEA authorized the President to negotiate tariff reductions or other trade agreements to expand foreign markets, and even to adjust tariffs or import restrictions to carry out those agreements (but only within a limited period and subject to extensive

[272] Art. I, §8, cl. 3
[273] U.S. Const., art. II
[274] See case *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)
[275] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)
[276] Id. at 275
[277] Information available at law.justia.com

procedural safeguards, such as public hearings and advice from the Tariff Commission)[278].

What is more, Title III recognized that trade agreements could hurt domestic industries and established "escape clause" and adjustment mechanisms: under §301[279] and §351[280], after investigation and formal finding of injury by the Tariff Commission (after having held public hearings), the President may impose or increase tariffs or other import restrictions to remedy serious injury.

Alternatively, under §352, the President may negotiate formal agreements with foreign governments to limit exports of the injurious article to the U.S., and then issue regulations to enforce those import limits at the border[281]. Another provision, §232 of the TEA[282], commonly called the "national security" clause, gave powers to the President to "adjust imports" (including the imposition of quotas) to protect national security, but only after a finding by the designated official (personified in the Director of the Office of Emergency Planning) that imports threaten to impair national security, and the President's final concurrence in that finding.

§232 is one of the largest grants of discretion, allowing import restrictions if imports *"threaten to impair"* national security by *"weakening the internal economy"*, among other factors[283].

Essentially, none of these statutes authorized the President to impose binding import quotas or embargoes unilaterally without following the prescribed investigation and finding procedures, and none explicitly authorized informal arrangements with private foreign producers.

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278 Trade Expansion Act of 1962, tit. II, Pub. L. No. 87-794, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. §§ 1821–1831)
279 *Trade Expansion Act of 1962* § 301, Pub. L. No. 87-794, 76 Stat. 872, at 902 (1962) (codified as amended at 19 U.S.C. § 1901)
280 *Trade Expansion Act of 1962* § 351, Pub. L. No. 87-794, 76 Stat. 872, at 905 (1962)
281 T*rade Expansion Act of 1962* § 352, Pub. L. No. 87-794, 76 Stat. 872, at 905 (1962)
282 *Trade Expansion Act of 1962* § 232, Pub. L. No. 87-794, 76 Stat. 872, at 877 (1962) (codified as amended at 19 U.S.C. § 1862)
283 Id at 282

The presumption is that, absent a statutory delegation, the President cannot unilaterally alter tariff rates, order customs officials to block imports, or impose mandatory quotas on imports because those are legislative acts under Congress's commerce power[284].

As the D.C. Circuit noted, Congress's delegations in the TEA demonstrate that *"Without such a delegation, the President could not increase or decrease tariffs, issue commands to the customs service to refuse or delay entry of goods into the country, or impose mandatory import quotas."*, and any use of the delegated power must conform to the statutory procedures[285].

In other words, Congress "*retains ultimate authority over trade policy*" and can circumscribe the President's actions in this field[286].

The legal question is whether the President's 1968 and 1972 voluntary steel agreements fell outside the scope of Congress's occupied field (because they were not legally binding or enforceable), or whether they amounted in substance to an import restriction policy that should have conformed to the Trade Expansion Act's requirements.

The D.C. Circuit majority (Judge McGowan joined by Senior Judge Danaher) largely agreed with the district court's main conclusions.

It ruled that nothing in the Constitution or in the U.S. trade laws (specifically Title 19, which includes the Trade Expansion Act of 1962) prevented the Executive Branch from arranging voluntary limits on steel imports[287].

In essence, the court upheld the President's authority to secure non-binding promises from foreign companies to restrict exports to the United States, as long as those commitments didn't break any U.S. laws.

However, the court also struck down the lower court's extra statement suggesting that the steel restraint program wasn't exempt from the Sherman Antitrust Act, since that issue was no longer part of the case after the plaintiffs had dropped their antitrust

[284] United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), IV part
[285] Id. at 284
[286] DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY, 2 (2017) ("Clashing Over Commerce"), available at supremecourt.gov, paragraph 27, pg. 15
[287] United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), IV part

claim[288]. The appellate court, therefore, focused only on the separation-of-powers question.

Judge McGowan framed the key issue in a simple way: was the Executive's role in obtaining these voluntary restraint letters essentially a regulation of foreign commerce, something reserved for Congress under the Constitution's Commerce Clause or the Trade Expansion Act? Well, the court said no[289], reasoning that what the President did didn't amount to a formal regulation, so it wasn't the kind of binding trade measure, (like a quota or tariff) that only Congress could authorize, but instead, these were voluntary, diplomatic understandings, not enforceable laws.

The majority emphasized that there's a real difference between mandatory, legally binding trade restrictions (which require congressional approval) and informal, non-binding arrangements achieved through negotiation or diplomacy, because the latter, as Judge McGowan explained, fall within the President's traditional foreign affairs powers (his ability to use persuasion to influence outcomes) abroad without crossing into Congress's legislative field.

Judge McGowan's opinion emphasized the voluntary and non-binding nature of the steel undertakings: the foreign steel associations' letters were essentially "statements of intent" on their part, not contracts or treaties enforceable in any court[290].

The arrangements carried no direct legal sanctions if the foreign producers exceeded the suggested limits: *"The steel import restraints do not purport to be enforceable, either as contracts or as governmental actions with the force of law; and the Executive has no sanctions to invoke in order to compel observance by the foreign producers of their self-denying representations."*[291]. In fact, any foreign company that violated its quota would face at most diplomatic disapproval or the heightened risk that the U.S. might respond with formal trade barriers, but no immediate legal penalty.

Likewise, the President was not legally obligated by the letters. The court pointed out that nothing stopped him from later turning to the same statutory import restrictions

[288]Id. at 287, III part
[289]Id. at 287, II part
[290] Id. at 287, IV part
[291] Id. at 290

he had initially chosen not to use, if conditions changed or if the voluntary program proved unsuccessful[292].

The opinion pointed out that the letters merely created an expectation of consultation and, in fact, the foreign signatories *"not unreasonably"* expected that the U.S. Government would consult with them and not use sudden unilateral import controls, but *"the President is not bound in any way to refrain from taking such steps if he later deems them to be in the national interest"*, nor is Congress inhibited from legislating as it sees fit in the concrete case[293].

In short, the voluntary restraints were nonjusticiable, political understandings with *"precatory"* nature: that is the reason why the court wrote: *"The formality and specificity with which the undertakings are expressed does not alter their essentially precatory nature insofar as the Executive Branch is concerned. In effect the President has said that he will not initiate steps to limit steel imports by law if the volume of such imports remains within tolerable bounds."*[294].

Communicating those tolerable levels simply *"enables the foreign producers to conform their actions"* and avoid guessing at U.S. intentions[295].

We could easily say that the approach used was the typical carrot-and-stick approach, but without any binding stick in place (as long as the foreigners voluntarily complied, formal trade measures would not be necessary): this ruling tracked the way for better understanding the reality of U.S. international trade policy of nowadays.

Because the restraint letters lacked domestic legal force, the majority found no conflict with Congress's will.

Judge McGowan masterfully acknowledged that Congress likely occupied the field of enforceable import restrictions, and that is the reason why the opinion observed that: "*There is no potential for conflict, however, between exclusive congressional regulation of foreign commerce-- regulation enforced ultimately by halting violative*

[292] Id. at 290
[293] Id. at 290
[294] Id. at 290
[295] Id. at 290

importations at the border-- and assurances of voluntary restraint given to the Executive."[296]

However, the court held that the steel agreements did not invade that occupied field because they were not enforceable import restrictions at all: *"Congress acts by making laws binding, if valid, on their objects and the President, whose duty it is faithfully to execute the laws."*[297]; as the court explained; by contrast, the Executive's voluntary arrangement was not a law but an informal policy and therefore, *"The question of congressional pre-emption is simply not pertinent to executive action of this sort."*[298]

There was no potential ground for conflict between Congress's exclusive power to regulate foreign commerce through binding laws and *"assurances of voluntary restraint given to the Executive"*[299] by private foreign actors.

In their legal reasoning, the majority refused to consider these voluntary undertakings as instruments with a fully legally binding effect when all parties understood them to be nonbinding and when even past deviations from the limits had been handled in a cooperative way rather than by legal enforcement.

In other words, treating the voluntary quota as if it were a de facto mandatory quota (as urged by the plaintiffs) would lead to a dangerous exaltation of form over substance in the court's view, where the substance was that no U.S. law or formal agreement had been enacted, and Congress remained free to legislatively modify the policy at any time.

What is more, Judge Danaher's concurring opinion, fully joining McGowan but offering additional perspective, highlighted how the Executive's initiative was a prudent response to a crisis that could have provoked stricter congressional intervention: he stressed on the cooperative flexibility of the approach and called it appropriately "jawboning" (implying it was merely persuasive diplomacy, and therefore not lawmaking) [300].

Danaher emphasized that none of the feared executive abuses invoked by the dissent (for example cutting foreign aid to punish noncompliance, or ordering customs

[296]Id. at 290
[297]Id. at 290
[298]Id. at 290
[299]See supra note 296
[300]Id. at 290, DANAHER, Senior Circuit Judge (concurring)

officials to turn away shipments in breach of the quotas) had actually occurred and, as a consequence of that, the program had operated *"happily without incident"* for three years and was extended with general support before being challenged[301].

The concurrence also pointed out that before finalizing the 1968 deal, State Department officials consulted members of Congress, domestic steel interests, and unions to ensure broad consensus[302], suggesting the Executive was not acting in a vacuum or in defiance of Congress, but with some tacit legislative acquiescence: all of these points strengthened the majority's view that the President's actions were a legitimate, de facto successful use of diplomatic influence well far from any unconstitutional deviation of legislative power.

In the end, the court held that the President's orchestration of the voluntary steel import restraints did not violate Article I's allocation of foreign commerce power to Congress, nor did it violate the Trade Expansion Act.

In the closing lines of the opinion, Judge McGowan summarized: *"the State Department defendants were not precluded from following the course they did by anything in the Constitution or Title 19 of the U.S. Code."*[303]

As a consequence, the order of the District Court, as modified, was affirmed: the declaratory judgment was narrowed to that proposition, and the suggestion that the agreements lacked antitrust immunity was set aside as moot.

In my opinion, this judicial outcome was a forerunner of what would have happened more than 50 years later, in modern times, where the decisional epicentre of every decision concerning tariffs is the President of the United States, and the instruments used in this international trade's geopolitical diplomacy tend to be more and more represented by political deterrence, in this way helping to reinforce the figure of the President in this field.

Nevertheless, it is also good to reflect on the Circuit Judge Harold Leventhal's dissenting opinion, warning that the court's decision opened a path for executive circumvention of Congress's will in the foreign trade area.

[301]Id. at 300
[302]Id. at 300
[303]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), end of the ruling

In his opinion, the 1968 and 1972 steel import undertakings were not harmless diplomatic gestures but rather de facto import quota agreements that conflicted with a comprehensive congressional scheme: he would have declared the President's actions ultra vires because they effectively imposed import restraints *"in a manner lying outside"* the process Congress had established by law[304].

Leventhal began by acknowledging Congress's "plenary authority over the regulation of foreign commerce", which over the prior forty years had produced a "comprehensive scheme occupying the field of import restraints."[305]

In his view, when Congress has legislated in such a thorough way, any executive attempt to manage imports independently must be consistent with that legislative scheme, arguing that the President's actions were *"inconsistent, by fair implication,"* with Congress's program[306].

It is very important to note that Judge Leventhal did not accuse the President of defying an explicit statutory prohibition but rather, he observed, Congress had actually given the President broad latitude under the statutes (so broad that the President likely could have achieved similar steel import restrictions lawfully by making the requisite findings under, say, the national security clause)[307].

The big centre of the problem, however, was that Congress had made the exercise of such authority contingent on certain procedures (such as public hearings, findings of injury or security threat) which the President did not follow: *"The President has concededly not followed that procedure, and this course cannot stand consistently with the statutory pattern",* he declared[308].

The Executive, in Leventhal's view, deliberately bypassed the procedural safeguards and right of comment by affected interests that Congress prescribed as the due price for restricting imports[309].

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[304]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, II part
[305]Id. at 304, at beginning of the dissenting opinion
[306]Id. at 305
[307]Id. at 305
[308]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, 2nd paragraph
[309]Id at 308

Judge Leventhal emphasized the fundamental principle that the Executive cannot circumvent congressionally mandated procedures.

Even if the immediate economic issue had diminished by the year 1974 (due to contingent factors such as changes in currency rates, oil prices, etc.), *"there has been no dilution of the principle that the Executive cannot circumvent procedures delineated by Congress"*, he pointed: that principle remains *"paramount even though it may sometimes lead judges to results that are dubious pragmatically."*[310]

The main divergence between Leventhal and the majority was also the point of departure: how to characterize the steel "voluntary restraint" letters?

The dissent provocatively accused the majority of euphemizing them as *"bland vanilla"* promises[311], arguing that, in reality, *"These undertakings by the President and foreign steel producers were carefully structured in considerable detail, obviously after detailed consultation with American steel interests, without exposure to the kind of input by purchasers that would have been provided if the Congressional procedures had been followed."*, accusing a lack transparency that Congress's process would have provided[312].

The resulting commitments, he noted, *"are bilateral and establish obligations. Their bite persists notwithstanding the majority's effort to coat them bland vanilla."*[313]: in Leventhal's eyes, these were in practice "solemn negotiated bilateral understandings"[314] in which the U.S. Government was an active participant and guarantor.

"Does one accompany a unilateral declaration of intent with an offer to 'consult' about what he has declared?"[315], of course not, he implied, stressing that the consultation clauses evidenced a mutual understanding.

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[310]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, 3rd paragraph
[311]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, 4th paragraph

[312]Id. at 311
[313]Id. at 311, and he continued: *"The majority tolerates executive detours around the limits staked by Congress in the field it has occupied. Its concept that a different route is available for executive arrangements discerned as not intended for judicial enforcement is, in my view, unsound."*
[314]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, part II, 8th paragraph
[315]Id. at 314, 12th paragraph

The dissent noted, for example, that each letter explicitly acknowledged reciprocal expectations, because the foreign producers expect the U.S. Government to also consult with them and to refrain from new unilateral import restrictions or tariff hikes: such language, together with White House's public engagement in the deal, made it implausible to say the U.S. had made no commitment at all.

There were effectively U.S. promises in return for the export limits: the foreign producers only agreed to restrain exports because they received assurances from the Executive Branch that any disadvantages would be shared equally among foreign suppliers, that no further measures (as, for example, quotas or duties) would be taken against them, and that the arrangement would not violate U.S. law[316].

Furthermore, the letters set out specific quantitative limits (even broken down by product categories and growth rates) with a high degree of precision which, in Leventhal's opinion, indicated formal bargaining and agreement, not a mere gentleman's understanding[317].

Leventhal's biggest concern was the economic impact of the Executive's deal: he observed that even absent formal enforcement, the agreements successfully restrained imports (which is of course the same outcome Congress's laws would have achieved, but without Congress's oversight).

"Presidents may engage in many activities that have a perceivable economic impact upon the volume of commodities imported."[318], he wrote: on one side there are innocuous actions like general exhortations to buy American , which represent a similar situation as the one we are living today, when the main slogan and main purpose of U.S. Executive is to "Make America great again!", pushing foreign investors to come producing in the U.S. and making U.S. products more appealing through the imposition of tariffs on the imported ones.

On the opposite side there are direct commands such as a Presidential proclamation halting imports, representing clearly a de jure quota or embargo, unlawful without Congress' action[319].

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[316]Id. at 314, 10th paragraph
[317]Id. at 314, 11th paragraph
[318]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, part II, 7th paragraph
[319]Id. at 318

In between, Leventhal placed these steel restraint agreements closer to the forbidden pole: *"Here, the undertakings have an economic effect that parallels that of import quotas proclaimed by the President."*[320].

In practical terms, the effect of the voluntary scheme was almost indistinguishable from a quota in limiting foreign supply: the dissent took the example of Japan, accidentally exceeding its 1969 steel quota under the earlier agreement, triggering the "remedy", which was to reduce its 1970 quota by the excess amount, showing an enforcement mechanism in practice, albeit informal[321].

This "compensatory adjustment" demonstrated that the Executive did have leverage, because the threat of future measures or the potential loss of trust was enough to keep foreign firms in line and thus, economically, the restraint letters were effective in inhibiting market behaviour just like a law (the effect was that foreign producers withheld steel they otherwise would have exported in the U.S., presumably raising domestic prices to the benefit of U.S. steel companies and detriment of consumers).

As a consequence, Leventhal found it dishonest to treat such impactful arrangements as beyond Congress's concern simply because they weren't embodied in a formal proclamation: *"Even if judicial enforcement was not contemplated by the parties, the arrangements still embody a restraint,"* he wrote[322].

The dissent viewed the Executive's steel agreements as de facto international agreements imposing real trade restraints, even because many international agreements rely only on good-faith performance rather than court enforcement, but *"That does not make them any the less solemn agreements, that are both intended to affect the conduct of the parties and likely to have that result."*[323].

Leventhal argued that these arrangements undermined Congress's scheme, because Congress itself had established specific procedures to weigh the economic and public interest costs of restricting imports (procedures including hearings, findings, time

[320]Id. at 318
[321]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, part II, 15th paragraph
[322]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, part II, 18th paragraph
[323]Id. at 322

limits, etc.) and so, by negotiating quotas with this technique, the Executive short-circuited that process.

The dissent quoted legislative history and prior statutes to assert that Congress understood any presidential power to set import policy to *"derive from statutory authorization by Congress."*[324]: he cited the creation of the U.S. Trade Representative in 1962as an example, which showed Congress's intent to reclaim some trade negotiating authority from the State Department.

He concluded that such undertakings were inconsistent with Congress's framework and thus invalid because, in terms of legal standards *"the executive cannot, through its communications, manage foreign commerce in a manner lying outside a comprehensive, regulatory scheme Congress has enacted pursuant to its Article I, § 8 power."*[325].

He also included Justice Jackson's "Youngstown" framework to categorize this situation as one where the President was acting against the implied will of Congress lacking legitimate power[326].

In his view, the majority's approval of the President's course *"tolerates executive detours around the limits staked by Congress"*[327], creating a dangerous precedent where formal obedience to statutes can be avoided by simply opting for informal arrangements that achieve the same result.

Despite the strong and well-motivated dissenting opinion led by Judge Leventhal, The D.C. Circuit's final judgment in this case affirmed that the President's role as the nation's chief diplomat allowed him to solicit and accept voluntary foreign restraints on trade without violating the Constitution or the Trade Expansion Act, so long as those restraints had no domestic legal force.

The Executive's actions were upheld not because in this instance he did not exercise coercive power at all, because he merely persuaded foreign producers to act.

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[324]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, part II, 3rd paragraph
[325]Id. at 324
[326]Id. at 324
[327]United States Court of Appeals, District of Columbia, 1974. 506 F.2d 136, cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed 2d 673 (1975), Leventhal's dissenting opinion, I part, 4th paragraph

Since no law was made or changed and Congress's prerogatives remained intact, the court found no constitutional or statutory infringement because the Congress could legislate binding quotas if desired at any time and, in any case, the President remained subject to Congress's ultimate authority in trade.

The antitrust aspect of the lawsuit was moot, and the appellate court vacated the district court's commentary on it, thus expressing no opinion on whether the voluntary steel quota scheme might violate antitrust laws.

Consumers Union v. Kissinger is an important case for the intersection of foreign affairs with domestic commerce powers. It illuminates the thin line between permissible executive influence and impermissible executive regulation.

The final decision stands for the proposition that the President may use the tools of diplomacy and negotiation to achieve policy outcomes in foreign economic relations so long as those outcomes are implemented through non-binding, voluntary measures rather than through enforceable mandates.

However, the case also sounded cautionary notes (especially through Judge Leventhal's dissent) about the potential for abuse: in other words, the core of Congress's power over foreign commerce remains inviolable, because any binding change to import status (such as the impositions of tariffs, embargoes and quotas) requires congressional action or authorization.

The President's power is greatest at persuasion but he doesn't have to cross into actual prescription (even indirectly, via executive orders or binding agreements), because he would likely violate the separation of powers, a holy principle of every constitutionally-developed country.

The decision also contributes to the ongoing jurisprudential dialogue about the "Youngstown framework"[328] in foreign affairs, because It suggests that the courts will distinguish between soft power and hard power: the judiciary may allow the President considerable leeway in Youngstown Category 1 or 2 (when Congress is silent or generally supportive) to use informal agreements, but will step in if the President enters

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[328] See case *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (Jackson, J., concurring) (1952)

into Category 3 (acting against Congress's will by, say, flouting procedures or creating binding obligations).

In *Consumers Union*, the majority effectively saw the President as acting in a grey area that did not trigger Category 3 scrutiny, even though the dissent believed Congress's "implied will" had been contravened. This tension prefigures later debates on the President's ability to enter executive agreements without Congress.

For what concerns the doctrinal development, the case demonstrates how courts balance the everlasting battle between formalism and functionalism in constitutional separation-of-powers analysis. The majority took a formalistic line, since no formal law or enforceable regulation was issued by the President, formally no power was usurped while the dissent took a functional approach, looking to the real-world effect and the statutory purpose to conclude that Congress's intent was subverted.

Ultimately, the case underscores an important policy concern. On one hand, granting the President flexibility to act quickly in foreign trade matters can be valuable, allowing the Executive to respond quickly to international crises or negotiations.

On the other hand, that same flexibility risks letting the President bypass the statutory checks and balances that Congress is meant to provide.

In response to such concerns, Congress has at times tried to reassert its oversight role, for example through the Case-Zablocki Act of 1972, which requires the Executive to report most international agreements to Congress (even if some categories keep remaining exempt).

In the trade sphere, Congress has done so through mechanisms like Trade Promotion Authority and by placing clearer limits on the President's power to impose tariffs, but still, the key principle that emerged from *Consumers Union* keeps enduring: purely voluntary and non-binding executive agreements fall within the President's inherent foreign affairs authority and do not violate the separation of powers. Yet, as the dissent cautioned, if such voluntary arrangements begin to take on coercive or binding effects, they risk intruding on Congress's constitutional domain.

CHAPTER 4-IEEPA (INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT): HISTORY AND LEGACY

PARAGRAPH 1-STARTING FROM THE BEGINNING

The International Emergency Economic Powers Act (IEEPA), passed in 1977, stands as one of the most important laws governing U.S. sanctions and presidential emergency powers. The Act gives the President broad authority to control economic transactions once a national emergency is declared in response to an "unusual and extraordinary threat" originating outside the United States [329].

Originally, IEEPA was part of a broader post-Watergate effort by Congress to limit unchecked executive power. Ironically, over time it has become one of the President's most powerful tools for conducting foreign policy, especially through economic sanctions.

Exploring how IEEPA developed from its origins in 1977 to today and looking at the political and legal context that led to its creation, the major amendments that have refined it, how successive presidents have used it to address international crises, the mechanisms of congressional oversight, and the key court decisions that have shaped its meaning and scope will help better understanding the juridical dispute that will be decided by the Supreme Court, and eventually trying to predict what will come out after.

To understand why IEEPA was created, it's essential to look back at the history of earlier emergency powers: its main predecessor, the Trading with the Enemy Act of 1917 (TWEA), was passed during World War I to give the President authority to regulate transactions with enemy nations. Then, in 1933, during the Great Depression, Congress expanded TWEA dramatically, allowing presidents to exercise emergency economic powers even in peacetime, treating severe economic crises almost like wartime emergencies[330].

From that point onward, presidents used TWEA to assume broad control over both domestic and international financial activities, from freezing foreign assets and

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[329] *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, Christopher A. Casey, Ian F. Fergusson, Dianne E. Rennack, Jennifer. Elsea, March 20, 2019, Congressional Research Service, available at www.crs.gov , citing 50 U.S.C. § 1701, summary, 1st par.
[330] Id. at 329, 2nd par.

restricting trade to, at times, imposing tariffs. For example, President Nixon used TWEA in 1971 to impose temporary import surcharges as part of his economic stabilization measures[331] .By the early 1970s, the U.S. had technically been under continuous states of emergency for over four decades, as successive presidents invoked TWEA during the Cold War. This long-standing pattern raised growing concern in Congress that presidential emergency powers had become excessive and unchecked.

In response, Congress launched investigations throughout the 1970s, uncovering what it described as "widespread abuse" of TWEA powers that went well beyond genuine emergencies[332]. The findings sparked a major reform effort, culminating in two landmark statutes: the National Emergencies Act (NEA) of 1976 and the International Emergency Economic Powers Act (IEEPA) of 1977.

The NEA formally terminated all existing emergencies and established strict procedural safeguards: any future national emergency would require a formal presidential declaration, specific identification of the statutory authorities invoked, regular reporting to Congress, and annual renewal, or otherwise it would automatically expire.

A year later, Congress enacted IEEPA as Title II of Pub. L. 95-223 on December 28, 1977, replacing TWEA's peacetime powers with a more precise, limited framework. At the same time, TWEA was amended to restrict its application solely to wartime situations, restoring it to its original purpose[333].

Under this new structure, IEEPA gave the President a defined set of powers that could be activated only after a national emergency was declared under the NEA. These powers (now found in 50 U.S.C. § 1702) allow the President to investigate, regulate, or prohibit a broad range of foreign-related economic transactions, including foreign exchange operations, banking transfers, imports and exports, and transfers of property[334].

[331]*The International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and Tariffs: Historical Background and Key Issues*, Casey, Christopher A., 04/07/2025, available at congress.gov
[332]Id. at 329, 2nd par.
[333]Id. at 329, 3rd par.
[334]*International Emergency Economic Powers Act*, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§1701–1708)

Still, Congress drew clear boundaries: unlike TWEA, IEEPA did not allow the outright seizure ("vesting") of foreign assets, which had been a wartime measure, nor did it permit the President to regulate purely domestic transactions with no foreign link[335]. To protect individual freedoms, the law also explicitly exempted personal communications (such as letters, telephone calls, and other non-commercial exchanges) from presidential control[336]. This safeguard reflected Congress's intention to protect civil liberties and prevent restrictions on informational or cultural exchanges.

In essence, IEEPA was carefully designed to strike a balance: it provided the President with strong tools to counter external threats through economic measures while also limiting the broad peacetime powers that had grown unchecked under TWEA.

President Jimmy Carter was the first to put the International Emergency Economic Powers Act (IEEPA) into action. In November 1979, after the Iranian hostage crisis erupted, he declared a national emergency and invoked IEEPA to freeze all Iranian government assets held in the United States. This big and unprecedented step (using Iran's own financial holdings as leverage) showed just how powerful the new law could be if triggered.

Carter's actions also set the stage for one of the most important court cases interpreting IEEPA: *Dames & Moore v. Regan*, 453 U.S. 654 (1981): in that case, the Supreme Court upheld the President's use of IEEPA, which not only froze Iranian assets but also suspended pending legal claims against Iran through an international agreement. The Court reasoned that Congress, by enacting IEEPA, had explicitly authorized such emergency economic measures. It held that the President had acted within both his statutory and constitutional authority to resolve the Iran crisis. The decision in *Dames & Moore* gave strong early judicial approval to broad presidential discretion under IEEPA, emphasizing that when the President acts "pursuant to congressional authorization," the courts will generally defer to those actions[337].

During the 1980s, IEEPA became a regular instrument of U.S. foreign policy: President Ronald Reagan used it repeatedly, from the imposition of sanctions on Libya in 1986,

[335]Legality of Certain Nonmilitary Actions Against Iran, April 16, 1980, available at justice.gov, in the headnotes, par.4
[336]*The International Emergency Economic Powers Act: Origins, Evolution, and Use*, Christopher A. Casey, Ian F. Fergusson, Dianne E. Rennack, Jennifer. Elsea, March 20, 2019, Congressional Research Service, available at www.crs.gov , citing 50 U.S.C. § 1701, pg. 12,
[337]See case *Dames & Moore v. Regan*, 453 U.S. 654 (1981), at 674–75

freezing libyan assets and banning trade in response to state-sponsored terrorism, to the embargo of Nicaragua in 1985 amid escalating tensions with the Sandinista government. These moves resembled the Cold War era uses of TWEA, but now operated within the more structured dual framework of the NEA/IEEPA system.

The courts, for their part, continued to avoid interfering with the Executive's national-security decisions under IEEPA. In *Regan v. Wald*, 468 U.S. 222 (1984), the Supreme Court upheld restrictions on travel to Cuba that had been issued under TWEA authority still in force before IEEPA took effect. The Court once again affirmed the principle of judicial deference in matters involving presidential control over foreign economic policy, noting that presidents are entitled to "wide latitude in their conduct of foreign affairs," especially when acting under a clear delegation of authority such as IEEPA[338].

Overall, this period cemented IEEPA's role as a cornerstone of U.S. foreign-policy enforcement, and established a consistent judicial pattern: so long as the President acts within the bounds of IEEPA, the courts will almost always defer to executive judgment on national security and sanctions matters[339].

During the same period, Congress's oversight role under the National Emergencies Act (NEA) faced major challenges: originally, the NEA allowed Congress to end a national emergency through a legislative veto, meaning that both chambers could pass a concurrent resolution to terminate an emergency without needing the President's signature. However, this mechanism was effectively dismantled in *INS v. Chadha*, 462 U.S. 919 (1983), when the Supreme Court struck down the legislative veto as unconstitutional, ruling that it violated the separation of powers by bypassing the President's role in the legislative process[340].

In response to *Chadha*, Congress amended the NEA in 1985, replacing the concurrent resolution procedure with a joint resolution, which, like any law, must be signed by the President or passed over a presidential veto. This might have seemed like a minor procedural fix, but in reality, it significantly increased the difficulty of ending a national emergency once declared. In practice, it gave the President the upper hand,

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[338] See *Regan v. Wald*, 468 U.S. 222 (1984)
[339] Peter E. Harrell, *The Limits of IEEPA*, 48 Fordham Int'l L.J. 1043 (2025)
[340] See *INS v. Chadha*, 462 U.S. 919 (1983)

since any attempt by Congress to terminate an emergency could simply be vetoed, requiring a two-thirds majority in both houses to override.

The effect was profound, and the proof was that since 1977, Congress has never successfully terminated an emergency declared under IEEPA through its own action. Instead, the renewal of national emergencies became a routine part of executive practice, with presidents extending them annually, nearly automatically, regardless of whether the original crisis still existed. Many of these emergencies have remained in effect for years or even decades, ending only when the President chose to lift them.

As a consequence, what Congress had initially envisioned as a narrow, exceptional power to be used sparingly in true emergencies evolved into a regular instrument of foreign policy and the oversight tools designed to check presidential authority proved too weak to restrain long-term executive reliance on IEEPA.

While the core structure of the International Emergency Economic Powers Act (IEEPA) has stayed intact, Congress has refined the statute multiple times to address new challenges and concerns. Between 1988 and 2007, eight major amendments reshaped its scope and enforcement, striking a balance between protecting civil liberties, strengthening penalties, and adapting to new security realities.

The Berman Amendments (1988 & 1994)-In the late 1980s, Congress responded to First Amendment concerns that U.S. sanctions could unduly restrict the free flow of ideas. Through the Omnibus Trade and Competitiveness Act of 1988[341], Congress added what became known as the "Berman Amendment", expressly prohibiting IEEPA from being used to regulate informational materials such as "publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials"[342].

In 1994, Congress expanded this protection through the Free Trade in Ideas Act, updating the exemption to include electronic media (such as CDs, data feeds, and news transmissions), with the scope of ensuring that digital communications were equally protected[343].

[341]Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418)
[342]*Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, § 525, 102 Stat. 1107, 1371 (codified as amended at 50 U.S.C. § 1702(b)(3))
[343]See the Free Trade in Ideas Act (part of Pub. L. 103-236)

Together, these amendments codified the principle that U.S. sanctions cannot block the exchange of informational or expressive content, even with sanctioned countries. This policy reflected America's commitment to informational openness and freedom of expression, even during times of conflict.

The Berman Amendments have since played a key role in modern court cases, including challenges to executive bans on social-media platforms in 2020–21.

Courts have repeatedly relied on them to hold that IEEPA does not authorize prohibitions on personal communications or informational exchanges, reaffirming the statute's built-in safeguards for speech and communication.

Penalty Enhancements (1990s–2007)-When first enacted, IEEPA's penalties for violations (such as breaching sanctions) were relatively limited: over time, Congress recognized that these modest penalties were insufficient to deter complex sanctions evasion schemes involving corporations and banks, and therefore strengthened enforcement through a series of amendments.

In 1992, Congress passed laws that raised both civil and criminal penalties tenfold, though a same-day appropriations act partially rolled them back, creating confusion over the applicable amounts. A more definitive change came with the National Defence Authorization Act for FY1997[344], which made attempted violations and conspiracies punishable, closing a loophole that had allowed those who merely tried to evade sanctions to escape liability[345].

After September 11, 2001's Twin Towers attack, Congress's focus shifted to terrorist financing, leading to another round of penalty increases. The USA PATRIOT Act reauthorization in 2006[346] raised the civil fine limit to $50,000 per violation and the criminal fine to $250,000, while explicitly reaffirming that conspiracies to violate IEEPA would be punished as severely as direct violations[347].

The culmination of these reforms came with the International Emergency Economic Powers Enhancement Act of 2007 (Pub. L. 110-96), enacted on October 16, 2007. This

[344]See the National Defence Authorization Act for FY1997 (Pub. L. 104-201)
[345]National Defence Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1422(b), 110 Stat. 2725 (1996)
[346]USA PATRIOT Act reauthorization in 2006 (Pub. L. 109-177)
[347]USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 402(2), 120 Stat. 192 (2006)

law dramatically increased penalties: civil fines rose to $250,000 or twice the value of the underlying transaction, and criminal penalties to $1,000,000 and up to 20 years in prison; it also reaffirmed that attempts and conspiracies are fully punishable[348].

These changes reflected a bipartisan determination to give U.S. sanctions meaningful force, ensuring that banks, exporters, and individuals who violate them face serious legal and financial consequences.

Post-9/11 Expansion (2001)-One of the most consequential amendments came after the terrorist attacks of September 11, 2001: IEEPA had forbidden the President from "vesting" or permanently confiscating foreign property, a measure reserved for declared wars under the Trading with the Enemy Act (TWEA).

During the 1990s, IEEPA became a central tool for addressing global security crises and enforcing U.S. foreign policy.

Presidents George H.W. Bush and Bill Clinton both relied heavily on IEEPA to impose comprehensive sanctions on so-called "rogue regimes", such as Iraq (following its 1990 invasion of Kuwait) and Serbia (during the Balkan conflicts).

IEEPA was also increasingly used to target non-state threats, including drug traffickers and terrorist organizations marking a significant expansion of its reach and purpose.

A key milestone came in 1995, when President Clinton issued Executive Order 12947[349], which froze the assets of terrorist groups such as Hamas and Hezbollah. This was one of the first major uses of IEEPA against non-state terrorist actors, and it paved the groundwork for a broader strategy of using financial sanctions to disrupt terrorism networks before they could even operate.

After the September 11, 2001 attacks, President George W. Bush dramatically extended this approach. Through Executive Order 13224[350], he declared a national emergency based on the threat of global terrorism and used IEEPA to freeze the assets of dozens of individuals, charities, and organizations suspected of supporting terrorist activities worldwide: this order effectively launched the modern global

[348]*International Emergency Economic Powers Enhancement Act*, Pub. L. No. 110-96, § 2, 121 Stat. 1011 (2007) (codified as amended at 50 U.S.C. § 1705)
[349]Exec. Order No. 12,947, *Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process*, 60 Fed. Reg. 5079 (Jan. 23, 1995)
[350]Exec. Order No. 13,224, *Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*, 66 Fed. Reg. 49,079 (Sept. 24, 2001)

counterterrorism financing regime, demonstrating IEEPA's ability to reach across borders and attack transnational networks through economic isolation.

Section 106 of the USA PATRIOT Act of 2001 amended IEEPA to restore the President's authority to confiscate foreign assets in narrowly defined circumstances[351].

Under the new rule, if the United States is attacked or engaged in armed hostilities, the President may seize property belonging to any foreign person, organization, or government involved in the conflict, provided a national emergency has been declared[352].

This amendment effectively reintroduced a wartime-style power into IEEPA, tailored to the "war on terror" context that was spreading around. The change marked a significant expansion of presidential authority under the Act and was used in 2003 to confiscate certain Iraqi regime assets during the Iraq War.

Through these amendments, Congress continually recalibrated IEEPA, responding to the evolving balance between security, liberty, and enforcement needs: some reforms expanded presidential power (such as the 2001 post-9/11 amendment), while others curbed it or clarified its limits (such as the Berman Amendments protecting informational exchange).

By 2007, IEEPA had evolved into a far more robust and precise legal framework, one that combined stronger enforcement tools with explicit civil-liberty protections.

A consideration is now useful to do: the 9/11 events triggered a strong trend towards the amplification and centralization of powers in the hands of the President, a trend that turned out being very ambiguous for international trade policy's equilibrium of powers of nowadays.

Following this model, subsequent administrations used IEEPA to tackle new and evolving security challenges. For example:

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[351]*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 106, 115 Stat. 272, 277 (2001) (codified as amended at 50 U.S.C. § 1702(a)(1)(C))

[352]Id. at 348

1) In 2005, Executive Order 13382 targeted proliferators of weapons of mass destruction[353], cutting off their access to the international financial system.

2) In 2015, Executive Order 13694 addressed the rising threat of malicious cyberattacks[354], enabling the U.S. to sanction individuals and entities responsible for major cyber intrusions.

3) In 2017, Executive Order 13818, issued under the Global Magnitsky Act, sanctioned foreign officials involved in corruption or human rights abuses[355], further broadening IEEPA's human-rights enforcement dimension.

In more recent years, Presidents Obama, Trump, and Biden have each relied on IEEPA as a flexible framework for responding to emerging, nontraditional threats — from cyber operations and election interference to foreign disinformation campaigns and state-backed hacking groups, which had become a strong concern in the U.S.

Overall, it can be noted how IEEPA evolved from a Cold War–era sanctions law into a dynamic national security instrument, capable of addressing state and non-state threats alike through the strategic use of economic power and global financial influence of the United States all around the world.

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[353]Exec. Order No. 13,382, *Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters*, 70 Fed. Reg. 38,567 (June 28, 2005)
[354]Exec. Order No. 13,694, *Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities*, 80 Fed. Reg. 18,077 (Apr. 1, 2015)
[355]Exec. Order No. 13,818, *Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption*, 82 Fed. Reg. 60,839 (Dec. 20, 2017)

PARAGRAPH 2-DEVELOPMENT AND CRITICS

IEEPA also raises important separation-of-powers questions, reaching into the delicate balance between Congress and the President.

Under Article I of the U.S. Constitution, Congress holds the power to regulate foreign commerce, while Article II gives the President broad authority in foreign affairs and national security: IEEPA sits precisely at this crossroads, embodying both legislative delegation and executive discretion.

In assessing the constitutionality of presidential actions under IEEPA, courts and scholars often turn to the framework established in *Youngstown Sheet & Tube Co. v. Sawyer* (1952). That decision, authored by Justice Robert Jackson, set out a three-part test for evaluating presidential power in relation to Congress's will[356].

Under Category 1, the President acts with express or implied authorization from Congress, so his authority is at its maximum, combining both his own constitutional powers and those delegated by statute.

IEEPA represents a textbook example of a Category 1 situation. By enacting it, Congress explicitly delegated emergency economic powers to the President, including the ability to freeze property, restrict transactions, and block assets in response to external threats. As long as the President operates within the limits of the statute and complies with its procedural safeguards (such as declaring a national emergency under the National Emergency Act), his actions are considered to rest on the strongest possible constitutional footing.

In this sense, IEEPA illustrates how Congress can authorize extraordinary executive measures within a legal framework that respects the constitutional division of powers, ensuring at the same time that emergency actions, while far-reaching, remain grounded in legislative approval and subject to oversight.

By design, the International Emergency Economic Powers Act (IEEPA) equips the President with powerful economic weapons to address national and international crises.

[356]See case Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

At the same time, the same strengths that make it effective also create an ongoing risk of executive overreach.

Two structural features of the law make this risk especially pronounced:

1) the ease with which a national emergency can be declared, and
2) the difficulty of ending one once it has been invoked.

Under the National Emergencies Act (NEA), declaring an emergency is a simple, unilateral act: the President needs only to sign a formal proclamation and notify Congress.

What is more, the judiciary has shown extreme reluctance to intervene: no court has ever overturned or enjoined a presidential declaration of national emergency under the NEA on its merits[357]. Challenges asserting that a situation does not truly amount to an "unusual and extraordinary threat" have typically been dismissed as non-justiciable political questions, or have become moot before courts reached a final ruling[358].

The result is that once declared, emergencies (together with IEEPA powers that flow from them) can continue indefinitely, so long as the President renews them each year.

When it comes to Congress's role, the post *Chadha* ruling reality has left its check on presidential use of IEEPA significantly weakened, politically constrained, if not legally eliminated.

After *INS v. Chadha* (1983) invalidated the legislative veto, terminating a national emergency now requires passing a joint resolution, which must either be signed by the President or overcome a presidential veto: in practice, that is a very high hurdle, because no Congress has ever managed to pass such a resolution over a veto, even when IEEPA declarations have sparked controversy.

In effect, Congress's oversight power has become more symbolic than substantive. While the NEA (National Emergency Act) formally allows lawmakers to end an emergency, doing so would require bipartisan supermajorities, something rarely achievable in the polarized context of foreign policy. The result is that IEEPA

[357]Brennan Centre for Justice, "Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act" (Andrew Boyle, June 10, 2021) notes that no court has reviewed the merits of a national emergency declaration and analyses potential "major questions" doctrine issues
[358]Id. at 357

emergencies, once declared, almost always persist, very often renewed annually by the President with little resistance or debate[359].

The combined effect obtained is striking, because once a President declares a national emergency and invokes IEEPA, both Congress and the courts tend to defer or abstain, leaving the President's determination effectively unreviewed. These dynamic places a heavy burden on executive self-restraint and good faith, and has led many scholars and policymakers to argue that IEEPA is overdue for reform. Proposals often call for stronger procedural checks, clearer definitions of what constitutes a qualifying threat, and automatic sunset provisions to restore a more balanced relationship between the branches of government[360].

The administration of President Donald Trump brought these longstanding tensions into sharp relief, testing the boundaries of IEEPA in several unprecedented ways.

One major example came in 2019, when President Trump threatened to impose sweeping tariffs on all Mexican imports unless Mexico strengthened its efforts to contrast migration. The White House legal rationale relied on IEEPA, asserting that migrant flows and cross-border drug trafficking posed an "unusual and extraordinary threat" to U.S. national security and the economy[361]. Although the tariffs were never implemented due to a last-minute agreement, the episode pushed IEEPA far beyond its traditional sanctions' role, from blocking property and transactions to potentially imposing general import tariffs, hot topic discussed nowadays.

Another controversial use came in 2020, when the Trump administration invoked IEEPA to ban the Chinese-owned apps TikTok and WeChat, citing espionage and data security concerns.

The orders were issued under a national emergency related to communications technology, but they were far broader than typical sanctions, potentially restricting the personal communications of millions of Americans.

[359]Harvard Law Review Blog, "Using IEEPA to Limit Personal Remittances" (Daniel F. Wasserman, Apr. 15, 2025)
[360]Id. at 359
[361]See Exec. Office of the President, *Letter to Congress on the Imposition of Tariffs on Mexico Under the International Emergency Economic Powers Act* (May 30, 2019), available at https://trumpwhitehouse.archives.gov/briefings-statements/ , also Statement on Steps to Address the Crisis at the Southern Border, 2019 Daily Comp. Pres. Doc. No. DCPD-201900361 (May 30, 2019)

As a consequence, Federal courts quickly blocked the bans, pointing to IEEPA's statutory carve-outs that expressly forbid the President from regulating "personal communications" or the exchange of "informational materials"[362]. These exceptions, codified in 50 U.S.C. § 1702(b), originating from the Berman Amendments, were designed to protect books, films, news, and, by extension, internet-based communications.

Overall, TikTok cases reaffirmed that IEEPA's reach, while vast, is not unlimited, and that Congress has drawn clear red lines when it comes to freedom of expression and information.

A third instance of controversy was Trump's 2020 sanctions against officials of the International Criminal Court (ICC).

The move, unique in its kind, targeted personnel of an international judicial body in retaliation for ICC investigations of U.S. personnel. The result was that the decision drew broad international criticism, including from U.S. allies, and was widely viewed as a politically motivated misuse of IEEPA.

Although President Biden revoked the ICC sanctions in 2021, the episode underscored how the statute's wide spectrum, targeting in this case an authority, can enable actions with serious diplomatic and normative consequences. It also renewed debate over whether Congress should more narrowly define who may be sanctioned, limiting IEEPA's use to entities with clear links to hostile governments or terrorism, rather than international institutions, such as the ICC.

In recent years, a bipartisan consensus has emerged among lawmakers, legal scholars, and policy organizations on the need to modernize and reform IEEPA.

The aim is not to weaken the law's effectiveness, but to contrast the potential for abuse while reaffirming constitutional checks and humanitarian safeguards. Reform should start from two main ideas and pursue two main goals:

1) strengthen Congress's role in overseeing the scope and duration of emergencies, and

[362]Harvard Law Review Blog, "Using IEEPA to Limit Personal Remittances" (Daniel F. Wasserman, Apr. 15, 2025); see also *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92 (D.D.C. 2020) and *U.S. WeChat Users Alliance v. Trump*, No. 3:20-cv-05910-LB, slip op. at ¶ *6* (N.D. Cal. Sept. 19, 2020) (Beeler, M.J.)

2) protect individual rights and humanitarian interests affected by sanctions.

One of the most widely supported reforms would reverse the current default under the National Emergencies Act. Today, once a President declares an emergency, it automatically continues unless Congress acts to end it, something that is politically very difficult.

This is the reason why reformers propose flipping this system so that Congress must affirmatively approve an IEEPA emergency within a fixed time, or else it automatically expires.

Bills such as Sen. Mike Lee's *Article One Act* have adopted this approach[363]. The Brennan Centre recommends a 90-day approval window, giving Congress time to consider the emergency without being overwhelmed by constant votes. To ensure accountability, the approval resolution should be "privileged", meaning it must receive a guaranteed, fast-tracked vote that cannot be indefinitely delayed[364].

This change would restore the check once provided by the legislative veto, but in a constitutionally valid form. It would also force Congress to take responsibility for ongoing sanctions programs, helping to distinguish those that serve genuine national interests from those that persist for the inertia or political convenience.

Another major idea is to impose automatic sunset provisions on IEEPA emergencies and sanctions regimes: under this model, each emergency would expire after a set period, unless Congress reauthorizes it by law.

Alternatively, Congress could hold bundled reauthorization votes, voting periodically on a package of all ongoing IEEPA sanctions to simplify the process. This would prevent outdated sanctions from continuing indefinitely without review and compel the Executive Branch to justify each program's continuation[365].

Such reauthorization measures would prevent sanctions from running on bureaucratic autopilot and help realign IEEPA with its original intent, a tool for extraordinary situations rather than a perpetual policy instrument.

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[363] S. 764, 116th Cong. §§ 2–3 (2019)

[364] Andrew Boyle, *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act* 20 (Brennan Ctr. for Justice June 10, 2021), page 20 of the document

[365] Id. at 364, page 21 of the document

In order to solve this problem, some scholars have suggested narrowing IEEPA's "unusual and extraordinary threat" language, which is broad and subjective.

However, others caution that tightening this definition could make it harder to respond to genuine crises.

Andrew Boyle recommends a procedural, rather than substantive, fix: rather than redefining "emergency," require congressional approval and regular review.

Another creative idea is to decouple IEEPA from the NEA framework altogether, treating it as a standalone foreign-policy authority rather than an "emergency" statute[366]. This would prevent IEEPA from perpetuating a permanent state of emergency, while maintaining flexibility for sanctions. However, doing so might also remove useful constraints such as the NEA's annual renewal and reporting requirements. Nevertheless, this trade-off would need careful drafting.

Reformers have also proposed new due process and judicial safeguards for U.S. persons affected by sanctions[367]: one major recommendation is to require judicial warrants for the freezing of Americans' assets after an initial short-term block.

For example, the government could freeze assets immediately for 48 hours, but then be required to obtain a warrant from the Foreign Intelligence Surveillance Court (FISC) or a similar tribunal, showing probable cause that the individual is acting on behalf of a foreign threat: this approach would mirror criminal seizure warrant procedures, ensuring judicial review without compromising national security.

Congress could limit IEEPA's use against U.S. persons, including individuals, companies, and entities majority-owned by Americans, to cases involving proven criminal conduct. In practice, this would mean that sanctions could apply only after a criminal conviction for the underlying offense, with assets temporarily frozen during prosecution to prevent flight. Such a reform would introduce a clear evidentiary

[366]Gene Healy, Emergency Powers Reform, in *Cato Handbook for Policymakers* (9th ed. 2022), quoting Andrew Doyle's reasoning in *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act* 20 (Brennan Ctr. for Justice June 10, 2021)

[367]Brennan Ctr., *Reining in the President's Sanctions Powers*, Apr. 2021, A. Doyle, referring to *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act* 20 (Brennan Ctr. for Justice June 10, 2021), from page 22 of the document

standard and due-process safeguard, aligning the severity of IEEPA penalties with the protections of the criminal justice system[368].

To align IEEPA enforcement with Fourth Amendment standards, the statute should be revised to explicitly recognize that freezing assets constitutes a "seizure" and to require a judicial warrant whenever the assets belong to individuals or entities protected by the Fourth Amendment.

While concerns about asset flight are valid, the court in *Al Haramain* showed a workable compromise: the government could temporarily freeze assets while seeking a warrant, ensuring that funds remain secure without violating constitutional rights. If the court later denies the warrant, the freeze would be immediately lifted[369].

For this approach to withstand constitutional scrutiny, any temporary seizure must be brief: this would mean speeding up the system, meaning OFAC regulations should be updated to require that financial institutions report a freeze within 24 hours (rather than the current 10-day period) in cases involving persons with constitutional protections. Once notified, OFAC would promptly seek warrants from the appropriate federal courts, balancing effective enforcement with constitutional due process[370].

Other proposals call for stronger procedural protections, such as:

- Requiring the government to provide a statement of reasons for designating a person or entity;
- imposing deadlines for periodic evidence review or delisting when grounds expire; and
- shifting the burden to the government to justify continued freezes after a fixed period.

These reforms would help close the gap between criminal due process (which of course demands proof beyond a reasonable doubt) and sanctions designations, which can effectively punish Americans for years without trial.

[368]Andrew Boyle, *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act* 20 (Brennan Ctr. for Justice June 10, 2021), page 22 of the document

[369]See case Al-Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 10-35032, slip op. at *18072–73* (9th Cir. Sept. 23, 2011)

[370]Id. at 368

To address concerns about free expression and humanitarian harm, Congress could expand or clarify IEEPA's statutory exemptions.

For instance, it could codify that journalism, publishing, educational, or religious activities cannot be restricted unless there is direct evidence of illegality or terrorism. Similarly, humanitarian carve-outs could be broadened to cover essential goods and services, such as food, medicine, and internet communications.

The Trade Sanctions Reform and Export Enhancement Act of 2000 already prohibits most unilateral sanctions on agricultural and medical exports unless specially certified[371]. Staying on this topic, Rep. Ilhan Omar's "Congressional Oversight of Sanctions Act (COSA)" proposes expanded humanitarian licenses and mandatory deadlines for OFAC to act on license requests[372].

Requiring timely review and reporting of denied applications would make sanctions administration more transparent and accountable, ensuring that humanitarian actors and civilians are not unjustly harmed.

A consistent criticism of IEEPA's implementation is the opacity of OFAC's licensing and enforcement process. Scholars such as Peter Harrell (former State Department sanctions official) have argued that OFAC should publish clearer standards for granting or denying licenses and release more detailed data on sanctions outcomes[373].

Currently, only aggregate figures are reported to Congress, and these reports are often difficult to access. The government publicly disclose statistics on license approvals, denials, and processing times, as well as annual evaluations of each sanctions program's effectiveness; It could also require that each emergency renewal report include measurable policy objectives and outcomes, reducing the risk of "mission creep" or indefinite sanctions with no clear end goal.

Finally, to reinforce the statute's foreign focus, Congress might clarify that IEEPA cannot target purely domestic activities without a clear foreign nexus. Defining what constitutes a "substantial part" of foreign involvement — for example, requiring a

[371]Office of Foreign Assets Control (OFAC), *Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) Program Information*, U.S. Dep't of the Treasury
[372]H.R. 5879, 116th Cong. (2019-2020)
[373]Andrew Boyle, *Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act* 20 (Brennan Ctr. for Justice June 10, 2021), page 19 of the document

formal finding of foreign control or financing — could prevent attempts to stretch the law into domestic regulation[374].

Each of these reforms seeks to establish a balance between maintaining the President's flexibility to act quickly in genuine crises and ensuring accountability under the rule of law.

Critics of reform warn that too many procedural hurdles could delay responses or signal disunity to adversaries but yet, as proponents note, measures like fast-tracked 90-day approval, post-hoc judicial review, and automatic sunsets are moderate and practical checks, not barriers.

They would preserve IEEPA's power to act decisively while ensuring that long-term or controversial uses of the statute enjoy democratic legitimacy and judicial oversight. In short, these reforms aim to recalibrate the balance between security and accountability, ensuring that America's most powerful economic tool remains effective, lawful, and firmly based in constitutional principles.

[374]Id. at 373, pages 12 and 13

PARAGRAPH 3- THE LAWSUIT THAT IS MAKING EVERYONE TREMBLE: V.O.S. SELECTIONS, INC. v. Donald J. TRUMP

This landmark case examines whether President Trump could use IEEPA to impose sweeping, worldwide tariffs justified by declared national emergencies. The Federal Circuit held that IEEPA does not clearly authorize tariff-imposing power, invoking the major questions doctrine and reaffirming that tariffs are a core congressional function; it therefore concluded that the challenged tariffs exceeded presidential authority, while remanding on the scope of injunctive relief.

In early 2025, shortly after returning to office, President Donald J. Trump rolled out two sets of import duties under the IEEPA where he declared several national emergencies, citing the cross-border opioid crisis involving Mexico, Canada, and China, as well as the United States' persistent trade deficit, and invoked IEEPA as his legal authority.

The first measure, called the "Trafficking Tariffs", imposed a 25% duty on imports from Mexico and Canada and a 10% duty on imports from China, with the declared intent to pressure those countries to contrast the flow of illegal opioids. The second, the "Reciprocal Tariffs," applied a baseline 10% tariff on imports from nearly all other countries, with the possibility of country-specific rates up to 50%, justified by the administration as a response to "unfair" trade imbalances[375].

These tariffs quickly prompted lawsuits from a coalition of small import-dependent businesses, led by V.O.S. Selections, Inc., and twelve states including Oregon and New York, who sued in the U.S. Court of International Trade (CIT). They sought to block the tariffs, arguing that the President had exceeded his authority under IEEPA and encroached on Congress's exclusive power over taxation and tariffs[376].

On May 28, 2025, a three-judge panel of the CIT consolidated the cases and fast-tracked them given the tariffs' sweeping effects. In a landmark opinion[377], the court

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[375]Jeff Stein, *Trump's Canada-Mexico-China Tariffs: Fentanyl, Trade and Emergency Powers*, Bloomberg (Mar. 4, 2025), www.bloomberg.com
[376]Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling, Holland & Knight Alert, September 9, 2025, available at www.hklaw.com
[377]See opinion 772 F. Supp. 3d 1350 of the CIT

granted summary judgment for the plaintiffs, ruling that the tariffs were ultra vires—beyond what IEEPA permits[378].

The court reasoned that tariffs are, by nature, taxes, and that the Constitution explicitly assigns taxing power to Congress, not the Executive. It found no indication that Congress intended IEEPA's general authority to "regulate" imports to include the power to impose broad, indefinite tariffs, especially those resembling across-the-board trade policy[379].

The judges also warned that accepting Trump's reading of IEEPA would effectively "eviscerate" the statutory framework Congress had established to govern U.S. trade law[380].

The opinion further observed that Trump's justifications, and particularly the claim that the trade deficit constituted an "unusual and extraordinary threat", appeared to be a "transparent pretext" for economic policy changes rather than a genuine emergency[381].

Finding clear illegality, the CIT issued a nationwide permanent injunction blocking enforcement of the tariffs against all importers. Although intended to provide complete relief given the tariffs' global reach, this universal injunction raised questions about the proper scope of judicial remedies. The Justice Department immediately appealed.

The appeal went directly to the U.S. Court of Appeals for the Federal Circuit, which took the rare step of hearing the case en banc from the outset (a situation in which a case is heard by the entire appellate court from the beginning, rather than a panel of judges), reflecting its importance. Proceedings were expedited: oral argument took place in July 2025, just two months after the CIT ruling[382].

In a 7–4 decision, on August 29, 2025, the Federal Circuit largely affirmed the CIT's judgment: the majority held that IEEPA's power to "regulate" imports does not extend

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[378]Id. at 376
[379]*Conflating Taxes with Tariffs: Clear Error in the Federal Circuit's Tariff Opinion*, by Chad Squitieri, September 2, 2025, Yale Journal on regulation, citing *V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025),* page 9 of the ruling
[380]The IEEPA Tariffs Are Based on Pretext, Stratos Pahis, Friday, October 17, 2025, 3:00 PM, available at lawfaremedia.org
[381]Id. at 380
[382]Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling, Holland & Knight Alert, September 9, 2025, available at www.hklaw.com

to imposing sweeping, indefinite tariffs on virtually all trading partners[383]. The court emphasized that such an interpretation would blur the line between emergency powers and ordinary trade regulation, a domain reserved for Congress.

Judge Taranto dissented, joined by Chief Judge Moore and Judges Prost and Chen, arguing that IEEPA's broad language could be read to support the President's actions in response to declared emergencies. Judge Cunningham, concurring, added "additional views" joined by Judges Lourie, Reyna, and Stark, highlighting the case's tension between deference to executive discretion in foreign affairs and modern limits under the "major questions" doctrine[384].

While affirming the merits, the court vacated the universal injunction, holding that relief should be limited to the plaintiffs, and remanded the case for reconsideration of remedy. The appellate mandate was stayed until October 14, 2025, to allow time for Supreme Court review[385].

Before the stay expired, the Justice Department petitioned for certiorari, and on September 9, 2025, the U.S. Supreme Court granted review in *Trump v. V.O.S. Selections, Inc.*[386]: the Court also consolidated the case with a related D.C. District Court challenge, *Learning Resources, Inc. v. Trump*, which had also enjoined the tariffs[387].

In an unusual procedural move, the Supreme Court accepted the D.C. case before appellate judgment to ensure consistent and timely resolution. Oral argument was scheduled for early November 2025, underscoring the issue's urgency, with all the due billionaire implications of the case.

The Court agreed to consider two key questions:

1) Whether IEEPA authorizes the President to impose the challenged tariffs; and

[383]*V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025)*
[384]Id. at 383
[385]Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling, Holland & Knight Alert, September 9, 2025, available at www.hklaw.com
[386]*Trump v. V.O.S. Selections, Inc.* (No. 25-314)
[387]Court Decisions Regarding Tariffs Imposed Under the International Emergency Economic Powers Act (IEEPA),
Zirpoli, Christopher T., 09/15/2025, available at congress.gov

2) If so, whether such a reading of IEEPA would violate the Constitution's nondelegation principle[388].

By framing the case this way, the Justices signalled that they viewed it as a potentially landmark test of the limits of executive economic power during national emergencies. If the Court finds that IEEPA allows such sweeping trade measures, it will have to confront the constitutional question of whether Congress can delegate that much control over tariffs to the President.

In short, the case has become a major constitutional and statutory challenge, one that will likely redefine the balance of power between Congress and the President in the use of emergency economic authority.

Plaintiffs' central argument was that the International Emergency Economic Powers Act (IEEPA) does not give the President the authority to impose tariffs[389].

They pointed out that the statute's reference to "regulating imports" cannot reasonably be read to include the power to levy duties, which are taxes, something the Constitution explicitly places under Congress's control[390]. The plaintiffs emphasized that IEEPA contains no mention of "tariffs" or "duties," and that Congress in 1977 had focused on freezing assets and economic sanctions, not rewriting tax policy[391].

They further argued that Congress has long handled tariff authority through specific trade statutes, such as Section 232 and Section 301, both of which include strict procedures and limits. As a consequence, reading IEEPA as an open-ended tariff power, would defy logic and effectively allow the Executive to override these carefully designed frameworks.

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[388] *V.O.S. Selections, Inc. v. Trump,* petition for a Writ of Certiorari, available at supremecourt.gov

[389] *V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025),* at page 12: "IEEPA provides that, after declaring a national emergency pursuant to the NEA, the President may "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any ... importation or exportation of ... any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B). Notably, IEEPA does not use the words "tariffs" or "duties," nor any similar terms like "customs," "taxes," or "imposts." IEEPA also does not have a residual clause granting the President powers beyond those which are explicitly listed."

[390] Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling, Holland & Knight Alert, September 9, 2025, available at www.hklaw.com, commenting *V.O.S. Selections, Inc. v. Trump, United States Court of Appeals, Federal Circuit*

[391] Id. at 280

Citing the *Yoshida* decision[392] and the 1977 reforms that created IEEPA and the National Emergencies Act, they maintained that Congress had deliberately restricted presidential control over trade measures, not expanded it[393].

The plaintiffs also noted that for nearly half a century, no president had ever tried to use IEEPA to impose tariffs, which they said confirmed the statute's true and limited purpose.

As a fallback, the plaintiffs argued that if IEEPA were interpreted to allow the President to impose tariffs freely, it would amount to an unconstitutional delegation of Congress's taxing power[394]: giving the Executive unchecked authority to raise or lower import duties, would violate the nondelegation doctrine and the Constitution's separation of powers.

The court warned that the government's reading of IEEPA would effectively hand the President unlimited taxing authority, allowing him to impose any tariffs he wished simply by declaring an emergency[395]. The supposed statutory "boundaries" (that the threat be "unusual and extraordinary" and have a foreign source) offered no real limits on this power[396]. Under such an interpretation, the executive could raise any amount of revenue without congressional approval, erasing the traditional separation between taxing and executive authority.

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[392]Yoshida Int'l v. United States, 378 F. Supp. 1155, 1175–76 (Cust. Ct. 1974) (Yoshida I), rev'd, 526 F.2d 560 (CCPA 1975) (Yoshida II).

[393]*V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025),* at page 12: "IEEPA is the result of this legislative effort and is consistent with Congress's stated goal to revise and delimit the President's authority to regulate international economic transactions during wars or national emergencies."

[394]Id. at 393, page 24:" The Government's interpretation of IEEPA would render it an unconstitutional delegation. Because taxation authority constitutionally rests with Congress, any delegation of that authority to the President must at least set out an intelligible principle that includes both the general policy that the President must pursue and the boundaries of [its] delegated authority." (FCC v. Consumers' Rsch., U.S., 145 S. Ct. 2482, 2497, L.Ed.2d (2025) (alteration in original) (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105, 67 S.Ct. 133, 91 L.Ed. 103 (1946))

[395]Id. at 393, page 24: "The Government's interpretation of IEEPA would be a functionally limitless delegation of Congressional taxation authority."

[396]Id. at 393, page 24: "Whether or not this limit provides an intelligible principle for the other authorities in IEEPA, it provides no limit on the supposed power to tax. As soon as the President sees an unusual and extraordinary threat, the Government's interpretation of IEEPA would enable the President to set whatever tariff rates he wishes. The Government's interpretation would leave neither quantitative nor qualitative restrictions on how much money the executive branch could raise without Congressional authorization."

The opinion contrasted this with past delegations that the Supreme Court has upheld, such as Section 232 of the Trade Expansion Act, which includes specific findings, ceilings, and criteria the President must meet before acting[397]. By comparison, IEEPA provides no quantitative or qualitative constraints on tariff actions. As a consequence, even in foreign affairs, Congress must set meaningful boundaries when delegating its powers, especially over taxation, an area the framers reserved to the legislature.

They pointed out that even during the New Deal era, the Supreme Court in *Schechter Poultry*[398] and *Panama Refining*[399] struck down statutes that delegated too much discretion to the Executive without clear principles or limits. While modern courts have been more forgiving, the plaintiffs argued that taxation, and especially tariffs, is a uniquely legislative function. The framers had placed this power firmly in Congress to prevent unilateral executive control over national revenue. Thus, if IEEPA were read as broadly as the government claimed, it would raise serious constitutional concerns that could only be avoided by rejecting that interpretation.

The plaintiffs also invoked the "major questions doctrine", arguing that the tariffs' massive scope and economic impact required clear congressional authorization[400]. Imposing duties on virtually all global imports, worth hundreds of billions of dollars, was, they said, a decision of enormous "economic and political significance"[401]. Under cases such as *West Virginia v. EPA* and *Biden v. Nebraska*, courts should not allow such far-reaching executive action unless Congress's intent is unmistakably clear.

They stressed that allowing the President to unilaterally levy global tariffs would represent a transformative expansion of executive authority into the heart of

[397]Id. at 393, page 25: "Even the broadest tariff-related statute upheld by the Supreme Court imposed more meaningful limits than those imposed by IEEPA."
[398]*V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025),* at page 46: "The Supreme Court suggested that procedural requirements could not suffice in that way when it stated in Rock Royal that "procedural safeguards cannot validate an unconstitutional delegation" while noting that such safeguards "do furnish protection against an arbitrary use of properly delegated authority." 307 U.S. at 576, 59 S.Ct. 993 (citing with "cf." signal A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 533, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)).
[399]Referring to case *Panama Refining Co. v. Ryan, 293 U.S. 388, 415, 55 S.Ct. 241, 79 L.Ed. 446 (1935)*
[400]Id. at 393*,* at page 17:" When the major questions doctrine is implicated, the Government must point to "clear congressional authorization" for that asserted power." (Quoting Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014))
[401]Id. at 393: "The Supreme Court has explained that the doctrine applies in "cases in which the 'history and the breadth of the authority ... asserted" by the Government entails vast "economic and political significance." West Virginia v. EPA, 597 U.S. 697, 721, 142 S.Ct. 2587, 213 L.Ed.2d 896 (2022) (quoting FDA v. Brown & Williamson, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000))

Congress's domain (taxation and trade policy)[402]. The plaintiffs pointed out that IEEPA has never been used with this "magnitude" of powers and that in the past, it was typically used to fight terrorist organisation[403] (For example, after September 11, 2001 attacks, President George W. Bush invoked IEEPA to establish a process for designating terrorist organizations and affiliated individuals to prevent the deployment of American resources for their advantage[404]).

Historically, presidents have almost never used emergency economic powers to impose tariffs. In fact, under IEEPA's predecessor, such as the Trading with the Enemy Act (TWEA), this happened only once, and even then, the tariffs were narrow and temporary (*Yoshida II*, 526 F.2d 572). By contrast, using IEEPA to levy broad, global tariffs marks a major and unprecedented departure from past practice. As courts have noted, such a lack of historical precedent, combined with the sweeping power now claimed by the government, strongly suggests that Congress never intended the statute to be read so broadly[405].

The economic scale of these tariffs exceeded that of other major policies the Supreme Court had already struck down under this doctrine: quoting "The White House, Statement from the Off. of Commc'ns, fact: One, Big, Beautiful Bill Cuts Spending, Fuels Growth", the court showed that the United States imports over $4 trillion in goods each year, representing roughly 14% of the national economy. By its own estimates, the government projected that the Reciprocal Tariffs would raise between $2.3 and $3.3 trillion in revenue over the budget period, underscoring once again the immense economic impact and tax-like nature of the measure[406].

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[402]Id. at 393: "The tariffs at issue in this case implicate the concerns animating the major questions doctrine as they are both "unheralded" and "transformative."
[403]Id. at 393, pages 17 and 18: "Since IEEPA was promulgated almost fifty years ago, past presidents have invoked IEEPA frequently. But not once before has a President asserted his authority under IEEPA to impose tariffs on imports or adjust the rates thereof. Rather, presidents have typically invoked IEEPA to restrict financial transactions with specific countries or entities that the President has determined pose an acute threat to the country's interests."
[404] Quoting Executive Order No. 13224, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism, 66 Fed. Reg. 49,079, 49,079 (Sept. 23, 2001)
[405]Id. at 393, page 18:" This "lack of historical precedent," coupled with the breadth of authority that the [Government] now claims [] [may be] a "telling indication"" that the Government's reading of a statute is incorrect."
[406]Id. at 393, page 18, for this reason:" The Executive's use of tariffs qualifies as a decision of vast economic and political significance, so the Government must "point to clear congressional authorization" for its interpretation of IEEPA." West Virginia, 597 U.S. at 723, 142 S.Ct. 2587 (quoting Util. Air, 573 U.S. at 324, 134 S.Ct. 2427)

Even if “regulate importation” could theoretically be stretched to cover tariffs, the major questions cannot make that reading trustworthy without an explicit legislative statement[407].

The state plaintiffs reinforced these arguments by describing the economic harm the tariffs caused. They said the President’s actions were not a response to genuine emergencies but an abuse of emergency powers to achieve longstanding policy goals, such as reducing trade deficits and pressuring other countries on immigration and drug control[408].

The section “Congress Cabined the President’s Authority to Impose Tariffs in Response to Balance-of-Payments Deficits to Non-Emergency Legislation” of CIT ruling in V.O.S. Selections, Inc. v. United States[409] explains that Congress deliberately limited the President’s ability to impose tariffs for balance-of-payments problems through non-emergency statutes, rather than under broad emergency powers like IEEPA.

The court recounts that when President Nixon imposed a 10% import surcharge in 1971 during the Bretton Woods monetary crisis, he relied on emergency powers under the Trading with the Enemy Act (TWEA): in response, Congress later enacted Section 122 of the Trade Act of 1974 (19 U.S.C. § 2132), which specifically governs tariff actions taken to address balance-of-payments deficits. Section 122 of this act authorizes only temporary import surcharges or quotas, capped at 15% and lasting no more than 150 days, making clear once and for all that such actions fall under normal statutory trade mechanisms, not emergency authority[410].

Through the International Emergency Economic Powers Act (IEEPA), Congress intentionally removed tariff-related powers from the scope of emergency authority, signalling that future responses to trade or payment imbalances must adhere to the procedures and limits in Section 122. Legislative history confirms this intent: the House International Relations Committee stated that IEEPA was meant to avoid

[407]Id. at 393, page 18:” Additionally, as already discussed, tariffs are a core Congressional power. The “basic and consequential trade-offs” that are inherent in the President's decision to impose the Trafficking and Reciprocal Tariffs “are ones that Congress would likely have intended for itself.” (Nebraska, 600 U.S. at 506, 143 S.Ct. 2355 (quoting West Virginia, 597 U.S. at 730, 142 S.Ct. 2587))
[408]The IEEPA Tariffs Are Based on Pretext, Stratos Pahis, Friday, October 17, 2025, 3:00 PM, available at lawfaremedia.org
[409]See pages 21-22 of *V.O.S. Selections, Inc. v. United States, 772 F.Supp.3d 1350 (2025)*
[410]Id. at 409

becoming another "unlimited grant of authority" like TWEA and that routine, non-emergency trade powers should be handled in separate legislation[411].

Thus, the court concludes that IEEPA's general authorization to "regulate importation" does not empower the President to impose tariffs in response to trade or balance-of-payments deficits. Because the Worldwide and Reciprocal Tariffs were aimed at correcting trade imbalances, they fall within Section 122's domain and violate its procedural and substantive limits, rendering them ultra vires and contrary to law[412].

What is more, states like Oregon cited the impact on wine importers, while technology-heavy states pointed to rising costs on electronics and supply chain disruptions. Collectively, they argued that the tariffs damaged local economies, reduced tax revenues, and hurt businesses that depend on foreign imports.

On the other side, Trump Administration defended its tariff program as a lawful and deliberate use of the President's emergency powers under the International Emergency Economic Powers Act (IEEPA) and the Constitution's foreign affairs authority.

It argued that the statute's language authorizing the President to "regulate importation" should be read broadly enough to include imposing or adjusting tariffs, particularly when used to address foreign-policy or national-security threats: in the administration's view, a tariff is simply one tool among many (not different in principle from embargoes or quotas) for controlling imports in times of crisis.

While IEEPA does not explicitly mention tariffs, the government stressed that it likewise does not exclude any particular trade instrument, reflecting Congress's intention in 1977 to "embody [an] eyes-open congressional grant of broad emergency authority in this foreign-affairs realm"[413]. It asserted that IEEPA was designed to be flexible, allowing the President to select the most effective economic measures without being constrained by a rigid statutory list.

[411]Id. at 409, page 21: "In these ways, Section 122 removes the President's power to impose remedies in response to balance-of-payments deficits, and specifically trade deficits, from the broader powers granted to a president during a national emergency under IEEPA by establishing an explicit non-emergency statute with greater limitations."

[412]Id. at 409, page 22: "The President's assertion of tariff-making authority in the instant case, unbounded as it is by any limitation in duration or scope, exceeds any tariff authority delegated to the President under IEEPA. The Worldwide and Retaliatory tariffs are thus ultra vires contrary to law. "

[413]Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling, Holland & Knight Alert, September 9, 2025, available at www.hklaw.com, commenting the dissenting opinion of Judge Taranto in *V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025)*

In addition, a total of forty-three amicus briefs were submitted in the case before the oral hearing held the 5th of November in the Supreme Court, with six supporting Trump Administration's position.

Professor Chad Squitieri maintained that Congress may delegate tariff authority through its commerce power, asserting that both lower courts erred in classifying tariffs solely as taxes rather than as instruments of trade regulation[414].

He rejected the argument that tariffs lie outside IEEPA's reach because they are "taxes", arguing instead that tariffs have historically served both fiscal and regulatory purposes. Citing Chief Justice John Marshall's early observation that the power to regulate foreign commerce "may be exercised by means of tariffs" as well as by duties for revenue[415], he insisted that the plaintiffs and the lower court were creating an artificial division between "taxation" and "regulation" that the Constitution itself does not maintain.

Congress's powers to lay duties and to regulate commerce, he contended, are distinct but overlapping, and a delegation to "regulate imports" may permissibly include affecting tariff rates[416].

Turning to IEEPA's historical context, the government emphasized that it was enacted in the wake of the Vietnam War and during the Cold War, when Congress intended to give the President broad, adaptable powers to counter external economic and security threats. Lawmakers recognized that economic leverage, including trade measures, could be crucial tools in a crisis. Thus, the omission of the word "tariffs" was not meant to exclude them but to avoid tying the President's hands with overly detailed statutory language.

The American Centre for Law and Justice argued that Congress intentionally granted the President sweeping discretion under IEEPA, empowering him to "investigate, regulate, or prohibit" international economic activities during declared emergencies.

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[414]Argument Preview Trump v. V.O.S. Selections, Inc., By David Taylor on November 4, 2025, Fedcircuitblog, available at the website fedcircuitblog.com

[415]Conflating Taxes with Tariffs: Clear Error in the Federal Circuit's Tariff Opinion, by Chad Squitieri, September 2, 2025, Yale Journal of Regulation, available on the website yalejreg.com. For the entire document of the Amicus Curiae: Brief for Professor Chad Squitieri as Amicus Curiae in Support of Respondents in No. 24-1287 & Petitioners in No. 25-250, *Trump v. V.O.S. Selections, Inc.* & *Learning Resources, Inc. v. Trump*, Nos. 24-1287 & 25-250 (U.S. Sept. 23, 2025), available at the website supremecourt.gov

[416]Id. at 415

The organization emphasized that this broad delegation reflected Congress's understanding that global economic crises demand swift, centralized executive action[417].

A coalition consisting of U.S. Representatives Darrell Issa and Brian Mast, the America First Legal Foundation, and the Coalition for a Prosperous America similarly contended that IEEPA clearly authorizes the President to regulate importation, including through tariffs, and that this use of power does not implicate the major questions or nondelegation doctrines. They further argued that courts lack the authority to second-guess presidential determinations under IEEPA[418].

America's Future highlighted that several other federal tariff statutes explicitly grant the President similar powers, which courts have historically upheld with deference to executive judgment. The group framed Trump's tariff policy as a legitimate effort to correct economic imbalances that benefit elites at the expense of ordinary Americans[419].

Jill Homan argued that the plain meaning of "regulate importation" naturally encompasses tariffs, since tariffs have long served as a core tool of commercial regulation. She distinguished tariffs from taxes, reasoning that IEEPA's grant of authority over import regulation does not require explicit taxation language[420].

Lastly, the America First Policy Institute claimed that the courts had overlooked a crucial statute—Section 338 of the Tariff Act of 1930, which directly empowers the President to impose tariffs of up to 50% on any nation. The Institute urged the Court

[417]Brief for the American Centre for Law & Justice as Amicus Curiae in Support of Petitioners, *Trump v. V.O.S. Selections, Inc.* (consol. with *Learning Resources, Inc. v. Trump*), Nos. 24-1287 & 25-250 (U.S. Sept. 23, 2025), available at the website supremecourt.gov
[418]Brief for U.S. Representatives Darrell Issa & Brian Mast, America First Legal Found. & Coalition for a Prosperous America as Amici Curiae in Support of Respondents in No. 24-1287 & Petitioners in No. 25-250, *Trump v. V.O.S. Selections, Inc.* & *Learning Resources, Inc. v. Trump*, Nos. 24-1287 & 25-250 (U.S. Sept. 23, 2025), available at the website supremecourt.gov
[419]Brief for America's Future as Amicus Curiae in Support of Respondents in No. 24-1287 & Petitioners in No. 25-250, *Trump v. V.O.S. Selections, Inc.* & *Learning Resources, Inc. v. Trump*, Nos. 24-1287 & 25-250 (U.S. Sept. 23, 2025), available at the website supremecourt.gov
[420]Brief for Jill Homan as Amicus Curiae in Support of Petitioners, *Trump v. V.O.S. Selections, Inc.* (consol. with *Learning Resources, Inc. v. Trump*), Nos. 24-1287 & 25-250 (U.S. Sept. 23, 2025), available at the website supremecourt.gov

either to uphold the challenged tariffs outright or to vacate and remand for reconsideration in light of that statute[421].

As precedent, the administration cited *United States v. Yoshida International, Inc.*, where the courts upheld President Nixon's temporary import surcharge under TWEA as a legitimate use of emergency economic power[422]. The government argued that Congress, in later adopting similar "regulate importation" language in IEEPA while adding procedural safeguards through the National Emergencies Act (NEA), effectively signalled approval of such uses in true emergencies.

It also dismissed the plaintiffs' reliance on statutes like Sections 232, 301, and 122 of U.S. trade law, noting that those provisions govern ordinary, non-emergency situations, while IEEPA serves as a safety valve for extraordinary foreign crises. Therefore, the existence of those trade statutes did not, in the government's view, bar the President from invoking IEEPA when their procedures proved inadequate or too slow.

Mentioning the Supreme Court's ruling in *Federal Energy Administration v. Algonquin SNG, Inc.*, they supported a broad reading of presidential trade authority. In that case, the Court interpreted the phrase "adjust imports" in Section 232(b) of the Trade Expansion Act of 1962 as encompassing not only import quotas but also monetary measures such as license fees and duties[423]. Although the statute did not explicitly mention tariffs, the Court found that such actions naturally fit within the power to "adjust imports"[424].

The Justices reasoned that restricting the President to quotas alone would unreasonably limit his ability to respond to the very economic threats Section 232 was meant to address: by analogy, the same logic applies to IEEPA: excluding tariffs (which are a long-standing and common form of import regulation) would impose an artificial and

[421]Brief for America First Policy Inst. as Amicus Curiae in Support of Respondents in No. 24-1287 & Petitioners in No. 25-250, *Trump v. V.O.S. Selections, Inc.* & *Learning Resources, Inc. v. Trump*, Nos. 24-1287 & 25-250 (U.S. Sept. 23, 2025), available at the website supremecourt.gov
[422]Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling, Holland & Knight Alert, September 9, 2025, available at www.hklaw.com
[423]Citing *Federal Energy Administration v. Algonquin SNG, Inc.* (426 U.S. 548, 1976)
[424]Id. at 423

unintended constraint on the President's authority under the statute's broad language[425].

In its replies before the Federal Circuit, the Executive defended the legality of President Trump's tariffs under the International Emergency Economic Powers Act (IEEPA) by directly confronting the plaintiffs' constitutional challenges based on the major-questions and nondelegation doctrines[426].

The Government's position was clear: neither doctrine limits Congress's decision to vest broad emergency trade powers in the President, especially where the delegated authority concerns the nation's foreign affairs and security.

The Government's argument rests on both structural constitutional reasoning and a robust line of judicial precedent affirming that the foreign-affairs domain justifies broader delegations of power than the domestic sphere.

The Opening Brief situates IEEPA within a centuries-long legislative tradition in which Congress has empowered Presidents to manage import restrictions in response to external threats. Citing cases from *Marshall Field & Co. v. Clark*[427] to *J.W. Hampton, Jr. & Co. v. United States*[428], the Government underscores that courts have consistently upheld statutes delegating tariff-setting authority, provided that Congress articulated an "intelligible principle" guiding executive discretion[429].

Within this historical framework, IEEPA's authorization to "regulate importation" under 50 U.S.C. § 1702(a)(1)(B) reflects an established constitutional pattern of cooperation between Congress and the President in regulating foreign commerce during crises[430].

[425]*V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025)*, at page 37: "So too here: An exclusion of tariffs, a common tool of import regulation, would be an "artificial" prohibition not grounded in the natural scope of the language of IEEPA's section 203."
[426]See both Opening Brief for the Government Respondents on the Merits, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed June 23, 2025) and Reply Brief for Appellants, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed Aug. 11, 2025)
[427]Case *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)
[428]Case *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)
[429]Opening Brief for the Government Respondents on the Merits, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed June 23, 2025), pages 40-41
[430]Id. at 429

The Government further argued that the major-questions doctrine, as articulated in *West Virginia v. EPA*[431] and *Biden v. Nebraska*[432], does not apply to presidential action under IEEPA.

Unlike the administrative agencies scrutinized in those cases, the President acts not as a delegate of limited domestic authority but as a constitutional officer vested with independent powers over foreign affairs and national security. Thus, the "major questions" framework (which role is guarding against agency self-expansion) has no purchase when Congress directly empowers the President to confront international threats: as the Government succinctly put it, IEEPA is not a "dormant" statute being transformed into something novel, but a deliberate and explicit delegation crafted for precisely such emergencies[433].

The Executive's briefs also rejected the plaintiffs' contention that the scale of economic impact triggered a "major question": as the reply brief emphasizes, economic magnitude alone cannot transform a lawful exercise of statutory authority into a constitutional anomaly, and what matters is whether Congress clearly contemplated the exercise of the power asserted[434]. The text of IEEPA, authorizing the President to regulate imports in response to "unusual and extraordinary threats" from abroad, clearly does so (50 U.S.C. § 1701(a)).

Historical precedent reinforces this view: the Government cited *United States v. Yoshida International, Inc.*[435], where identical statutory language was upheld to justify import surcharges under the Trading with the Enemy Act, and *Federal Energy Administration v. Algonquin SNG, Inc.*[436], where the Supreme Court validated monetary exactions as a legitimate means of "adjusting imports." Congress's reenactment of that same phraseology in IEEPA thus confirmed, rather than limited, its intended breadth[437].

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[431]*See West Virginia v. EPA*, 597 U.S. 697 (2022)
[432]*See Biden v. Nebraska*, 600 U.S. 477 (2023)
[433]See both Opening Brief for the Government Respondents on the Merits, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed June 23, 2025), pages 40 and 41 and Reply Brief for Appellants, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed Aug. 11, 2025)
[434]Reply Brief for Appellants, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed Aug. 11, 2025), page 17
[435]See case *United States v. Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975)
[436]See case *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976)
[437]See Opening Brief for the Government Respondents on the Merits, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed June 23, 2025), page 24 and Reply Brief for Appellants, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed Aug. 11, 2025), page 4

The Government's treatment of the nondelegation doctrine is equally grounded in constitutional structure and judicial precedent: citing *J.W. Hampton, Jr. & Co.* and *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), the Government reaffirmed that a delegation is valid if Congress provides an intelligible principle, and IEEPA clearly meets this standard[438].

The statute confines presidential authority to declared national emergencies, defines the nature of qualifying threats, and subjects' executive action to oversight mechanisms through the National Emergencies Act and periodic congressional reporting requirements.

The Government's argument also draws heavily from *United States v. Curtiss-Wright Export Corp.*[439], emphasizing that delegations in the field of foreign relations are uniquely expansive: in that context, the President acts as the "sole organ" of the nation in external affairs and must be afforded "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"[440].

This functional rationale justifies the flexible and pre-emptive structure of IEEPA: it is designed to equip the President to respond swiftly to evolving foreign threats, precisely the context where judicial and legislative management would be least practicable.

To reinforce that point, the Government cited modern commentary from Justice Kavanaugh's concurrence in *FCC v. Consumers' Research* (2025), noting that the nondelegation doctrine has "played an even more limited role" in foreign-affairs and national-security contexts[441].

It also invoked the unbroken judicial consensus sustaining IEEPA delegations across circuits: *United States v. Shih*, 73 F.4th 1077 (9th Cir. 2023); *United States v. Amirnazmi*, 645 F.3d 564 (3d Cir. 2011); *United States v. Dhafir*, 461 F.3d 211 (2d Cir. 2006); and *United States v. Arch Trading Co.*, 987 F.2d 1087 (4th Cir. 1993) (*Reply Br.*

[438]Opening Brief for the Government Respondents on the Merits, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed June 23, 2025), pages 40 and 41 and appx 4
[439]*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)
[440]Reply Brief for Appellants, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed Aug. 11, 2025), page 19
[441]Id. at 440

at 21): each of these decisions confirms that IEEPA contains sufficient guidance and procedural safeguards to withstand constitutional scrutiny.

The Government also criticized the Court of International Trade's reliance on constitutional-avoidance reasoning, contending that the canon "cannot justify a textually implausible interpretation"[442]. The CIT's attempt to read IEEPA as authorizing "some tariffs but not others" lacked textual grounding and contradicted Congress's plain language. Furthermore, in the Opening Brief, the Government stressed that constitutional avoidance cannot override an unambiguous statutory delegation designed for emergencies[443].

Overall, the Government articulated a coherent constitutional vision: Congress may, and historically has, granted the President wide discretion in foreign economic regulation, so long as it specifies the context, purpose, and procedural checks: IEEPA's combination of substantive criteria ("unusual and extraordinary threats") and formal safeguards (declarations, reporting and termination procedures) provides precisely the "intelligible principle" that *Hampton* and its progeny demand so that neither the major-questions nor the nondelegation doctrine can be used to narrow the President's power to act where both constitutional design and congressional text authorize executive flexibility to protect national security and economy.

The administration also rejected claims that the President's emergency declarations were pretextual, arguing that the findings (such as foreign governments' economic policies, unfair trade practices, and cross-border drug trafficking) fit comfortably within IEEPA's definition of threats to the "national security, foreign policy, or economy of the United States". The determination of what constitutes an "unusual and extraordinary threat" is largely entrusted to presidential discretion, particularly when based on foreign affairs considerations: in fact, no court has ever reviewed the merits of such a declaration[444].

Finally, the administration forcefully opposed the universal injunction issued by the Court of International Trade (CIT): It maintained that, even if the tariffs were unlawful,

[442]Id. at 440, at page 19, citing *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018)
[443]Opening Brief for the Government Respondents on the Merits, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813 (Fed. Cir. filed June 23, 2025), page 25
[444]Harvard Law Review Blog, "Using IEEPA to Limit Personal Remittances" (Daniel F. Wasserman, Apr. 15, 2025)

the injunction should have been limited to the named plaintiffs rather than extended nationwide.

The government argued that the CIT's nationwide remedy exceeded its equitable powers, especially given its specialized jurisdiction, and pointed to the Supreme Court's disapproval of universal injunctions in *Trump v. CASA de Maryland*[445]: the administration warned that the injunction paralyzed executive flexibility and disrupted ongoing tariff collection, with serious international repercussions.

Indeed, the stays granted by both the CIT and the Federal Circuit pending appeal reflected recognition of the need to avoid sudden disruption to the nation's trade and fiscal operations.

In conclusion, the government portrayed its actions as a measured and legitimate exercise of emergency economic authority, consistent with IEEPA's purpose and constitutional design. It urged the courts to respect the breadth Congress intentionally provided in 1977 and to avoid judicial second-guessing of the President's foreign policy decisions, particularly in matters of national security, trade, and international diplomacy.

SUBPARAGRAPH 3.1-THE RULING

At the outset, the Federal Circuit affirmed that the Court of International Trade (CIT) had proper and exclusive jurisdiction over the case: the government had argued that certain claims, especially those brought by the state plaintiffs, might fall under the jurisdiction of federal district courts. However, the appellate court disagreed, explaining that the core issue of the lawsuits was the imposition and recovery of import duties, a matter squarely within the CIT's specialized trade jurisdiction under 28 U.S.C. § 1581(i)[446].

By confirming this, the Federal Circuit eliminated any procedural uncertainty and made clear that the dispute was rightly directed to the trade court, the forum best equipped to handle such challenges.

[445]See case *Trump v. CASA de Maryland*, 145 S. Ct. 2540 (2025)
[446]*V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025)*, at page 3

Both courts grounded their reasoning in a fundamental separation-of-powers principle: Congress cannot delegate its core legislative powers to the Executive. The Constitution makes this explicit—Congress "*shall have Power To lay and collect Taxes, Duties, Imposts and Excises*" and "*To regulate Commerce with foreign Nations*"[447].

The Court of International Trade (CIT) opened its opinion by invoking these clauses and Madison's warning in *The Federalist No. 48* that powers properly belonging to one department ought not to be directly and completely administered by another.

Quoting The Federalist No. 48, the court underscored that "Congress alone has access to the pockets of the people."[448] Because IEEPA contains no clear delegation of this taxing power, the court concluded that the statute cannot be read to authorize such an open-ended fiscal authority. Even if the government's interpretation were textually possible, the judges said, the court must avoid a reading that raises serious constitutional doubts, and particularly one that would blur the limits between executive emergency powers and Congress's exclusive control over taxation and spending.

The Federal Circuit's en banc majority agreed, rejecting an interpretation of IEEPA that would let the President "*impose any tariff rate on any country at any time, for virtually any reason*"[449]. Such a reading, it held, would allow the Executive to wield Congress's taxing and commerce powers, violating the separation of powers.

Both courts emphasized that the President can act only under powers Congress clearly delegates: the CIT reminded that the President "*has no common law prerogative to interdict commercial intercourse*" without statutory authority, a rule tracing back to Chief Justice John Marshall's 1812 opinion[450].

Although the Federal Circuit dissent (Judge Taranto, joined by Chief Judge Moore and Judges Prost and Chen) argued that Congress had intentionally given the President broad emergency discretion, the majority disagreed. It found no evidence in IEEPA's text or history of any intent to transfer Congress's entire tariff authority to the

[447]U.S. Const. art. I, § 8, cls. 1, 3.

[448]Id. at 446, at page 25
[449]V.O.S. Selections, Inc. v. United States, 772 F.Supp.3d 1350 (2025), at page 19
[450]Id. at 449, at page 27

Executive[451]. Allowing indefinite, global tariffs, the court warned, would raise serious constitutional concerns.

On procedure, both courts held that the President could not remain a named defendant, citing precedent that courts cannot issue injunctions directly against a sitting President. Still, the case proceeded against executive agencies and officials, ensuring that relief would bind the government.

Though titled V.O.S. Selections, Inc. v. Trump, the case focused on the legality of executive orders, not the President personally. In doing so, both courts respected presidential immunity while reaffirming the core principle that the Executive has no authority beyond what the law provides.

At the heart of both rulings lay the nondelegation doctrine—the constitutional principle that Congress cannot hand over its legislative power without providing clear guidance on how it should be used. Although the Supreme Court has struck down laws on nondelegation grounds only twice (both in 1935), the doctrine remains an essential tool for interpreting statutes.

The Court of International Trade (CIT) relied on this principle to interpret IEEPA, invoking Chief Justice Taft's classic rule that Congress must "*lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform*"[452]. The court reasoned that any valid reading of IEEPA had to include some limits on the President's authority over tariffs to satisfy this constitutional standard: a construction granting the President unfettered discretion to raise tariffs at will, the CIT warned, would fail the "intelligible principle test" and violate Article I. To avoid that outcome, the court read IEEPA narrowly, concluding that the statute's

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[451]Breaking News - Federal Circuit Affirms Court of International Trade's Invalidation of President Trump's Tariffs, By David Taylor on August 29, 2025, available at the website fedcircuitblog.com

[452]V.O.S. Selections, Inc. v. United States, 772 F.Supp.3d 1350 (2025), at page 10: "While "Congress ... may not transfer to another branch powers which are strictly and exclusively legislative ... Congress ... may confer substantial discretion ... to implement and enforce the laws." (citing Gundy v. United States, 588 U.S. 128, 135, 139 S.Ct. 2116, 204 L.Ed.2d 522 (2019)) Thus, courts have consistently upheld statutory delegations as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise that authority] is directed to conform." Mistretta v. United States, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928))
See also V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025), at page 46: "Indeed, "[t]o distinguish between the permissible and the impermissible in this sphere," the Supreme Court has "long asked whether Congress has set out an 'intelligible principle' to guide what it has given the agency to do."

phrase "*regulate importation*" in 50 U.S.C. § 1702 could not justify the sweeping Worldwide and Retaliatory Tariffs challenged in the case[453].

Citing *United States v. Yoshida Int'l, Inc.*, the CIT observed that earlier courts had upheld only limited and temporary surcharges under similar authority and had explicitly cautioned that broader tariff powers would raise serious constitutional issues[454]. As a consequence, the CIT declared that the case has arisen here, finding no meaningfully constraining limits in IEEPA and concluding that an unlimited delegation of tariff power would be unconstitutional[455].

The Federal Circuit's en banc majority agreed with this approach holding that IEEPA does not authorize the tariffs imposed by the Executive Orders, precisely because such an interpretation would render it an unconstitutional delegation[456].

Four judges (Lourie, Reyna, Stark, and Cunningham) went further, writing separately to stress that IEEPA should be read even more narrowly. In their view, IEEPA "does not authorize the President to impose any tariffs at all" without an explicit reference to "tariffs" or "duties" in the statute[457]. They offered three reasons:

1. The ordinary meaning of "*regulate*" in IEEPA does not clearly include tariff-making;

[453]Id. at 452, at page 27: "The Worldwide and Retaliatory Tariff Orders exceed any authority granted to the President by IEEPA to regulate importation by means of tariffs."
See also V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025), at pages 4 and 5: "Under the major questions doctrine, the grant of presidential authority under International Emergency Economic Powers Act (IEEPA) to "regulate importation" after declaration of national emergency did not contain clear congressional authorization for President to issue Executive Orders imposing trafficking tariffs and reciprocal tariffs of unlimited duration on nearly all goods from nearly every country in world following President's declaration of national emergencies relating to opioid crisis and trade deficits […]
[454]V.O.S. Selections, Inc. v. United States, 772 F.Supp.3d 1350 (2025), at page 18: (See Jennings v. Rodriguez) "When statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead ... adopt an alternative that avoids those problems."). The court in Yoshida II recognized that a case involving a claim to such unlimited authority might arise, observing that "whether a delegation of such breadth as to have authorized [the tariffs here] would be constitutionally embraced, is determined ... by the nature of the particular surcharge herein and its relationship to other statutes, as well as by *1371 its relationship to the particular emergency confronted."
[455]Id. at 454
[456]Breaking News - Federal Circuit Affirms Court of International Trade's Invalidation of President Trump's Tariffs, By David Taylor on August 29, 2025, Fedcircuitblog, available at the website fedcircuitblog.com
[457]V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025), at page 21

2. Reliance on TWEA and *Yoshida* was misplaced, as those precedents never approved open-ended tariff powers; and
3. As a consequence, the government's broad interpretation would effectively eliminate any *"intelligible principle"*, making the statute unconstitutional.

Thus, to preserve IEEPA's constitutionality, the majority rejected the government's expansive reading—a textbook example of using nondelegation as a canon of constitutional avoidance. As the court noted, judges must prefer a construction that imposes meaningful constraints on executive power rather than one that raises serious constitutional doubts.

The academic debate mirrors this judicial divide. Some scholars, such as those writing in the *Harvard Law Review*, argue that delegations in foreign economic policy (including tariff powers) should not receive special treatment because they rest on Article I, not Article II: under this view, the President has no independent authority to impose tariffs, so any delegation of that power must meet ordinary nondelegation standards[458]. The CIT's reasoning aligns with this more formalist approach, emphasizing that even in foreign affairs, Congress must provide clear, limiting principles.

Others, including scholars from Yale, take a more pragmatic view, suggesting that the nondelegation doctrine "*applies differently to different powers*," allowing broader discretion in foreign affairs because of the President's institutional competence in that sphere[459]: they often cite *Curtiss-Wright*'s famous assertion that diplomacy requires granting the President "*a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved*"[460].

Building on this, Professor Chad Squitieri has argued that IEEPA's delegation is consistent with the doctrine precisely because it operates at the intersection of foreign commerce and national security, where Congress and the President share overlapping constitutional authority[461]. Even Justice Gorsuch has recognized that delegations

[458]Nondelegation Unprincipled Foreign Affairs Exceptionalism, 134 Harv. L. Rev. 1132, Volume 134, Issue 3, January 2021, available at https://harvardlawreview.org/
[459]Tariffs as a Means of Regulating Commerce, by Chad Squitieri, June 23, 2025, available on the website https://www.yalejreg.com/
[460]Id. at 459
[461]Id. at 459

involving foreign affairs may warrant a more lenient approach, since "*many foreign affairs powers are constitutionally vested in the President under Article II*"[462].

Ultimately, the CIT and Federal Circuit majorities adopted the stricter view: IEEPA must be read as subject to the same constitutional limits as any other delegation of legislative power.

They concluded that Congress never supplied an intelligible principle for granting the President open-ended tariff authority, reaffirming the core tenet that Congress "is not permitted to abdicate or transfer to others the essential legislative functions with which it is vested[463].

By reading IEEPA narrowly rather than striking it down, the courts preserved the statute while reaffirming that the Constitution demands boundaries, even in times of crisis, a stance the Supreme Court now faces as it reviews the case.

Both courts paired their nondelegation analysis with the major questions doctrine (MQD), a principle reaffirmed in *West Virginia v. EPA* and *Biden v. Nebraska*, which holds that if an executive claims a power of "vast economic and political significance," Congress must speak clearly to authorize it: in essence, courts will not assume Congress handed over sweeping powers through vague or ancillary language.

The Court of International Trade (CIT) and the Federal Circuit both viewed President Trump's tariff actions as a textbook "major question." The imposition of nearly universal, potentially permanent tariffs amounted to a seismic shift in trade and tax policy.

As the CIT noted, no President in IEEPA's 50-year history had ever invoked it to impose tariffs: this absence of precedent, combined with the immense scope of authority claimed, strongly indicated that such power lay beyond IEEPA's intent[464].

Echoing *NFIB v. OSHA*, the court reasoned that if Congress meant to let the President "tax ordinary commerce from any country at any rate for virtually any reason," it

[462]Id. at 459
[463]V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025), at page 16, [16] and [17]
[464]The President's Authority to Impose Tariffs, Chad Squitieri, By JLPP/June 20, 2025, available at the website https://journals.law.harvard.edu/

would have said so explicitly, so remaking U.S. trade policy without a clear mandate triggered serious MQD concerns[465].

The Federal Circuit majority shared this view. While its reasoning centred on statutory text and legislative history, the opinion effectively required a clear statement in IEEPA to justify such an "unbounded" tariff program, and found none: as a consequence, as Chief Justice Roberts explained in *West Virginia*, a "lack of historical precedent" and the breadth of power claimed are reasons to "hesitate before concluding that Congress meant to grant that authority"[466]. Both courts hesitated, and ultimately refused, to infer such authority without a clear bold statement.

The CIT and Federal Circuit majority even rejected any foreign-affairs exception. They held that even in national security contexts, Congress must clearly authorize actions of such economic significance. As summarized by Peter Shane and Robert Litan of the Brookings Institution, Trump's orders represented a "classic MQD overreach": IEEPA's tariff authority was, at best, "murky" and certainly not "clear"[467].

No prior President had read the statute this way, and even Nixon's 1971 surcharge relied on other legal bases: by insisting on clarity, the courts reaffirmed that if Congress intends to grant such sweeping tariff power, it must say so, just as it has done in other trade laws like the Trade Act of 1974[468].

The broader scholarly debate mirrors this divide. Some, including *Harvard Law Review* commentators, argue that delegations in trade and foreign commerce should face the same scrutiny as domestic ones, since tariffs derive from Congress's Article I power, not the President's Article II authority[469]. Others, such as scholars at Yale, maintain that both the nondelegation and major questions doctrines should be more flexible in foreign-affairs contexts, where broader discretion is historically accepted[470].

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[465]Id. at 464

[466]See case West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022)

[467]Legal and economic aspects of the Supreme Court's upcoming tariff decisions, Peter M. Shane and Robert E. Litan, November 4, 2025, available at the website https://www.brookings.edu/articles/legal-and-economic-aspects-of-the-supreme-courts-upcoming-tariff-decisions

[468]The Conservative Legal Advocates Working to Kill Trump's Tariffs, By Cristian Farias, April 10, 2025, available at the website https://www.newyorker.com/news/the-lede/the-conservative-legal-advocates-working-to-kill-trumps-tariffs

[469]Nondelegation Unprincipled Foreign Affairs Exceptionalism, 134 Harv. L. Rev. 1132, Volume 134, Issue 3, January 2021, available at https://harvardlawreview.org/

[470]Tariffs as a Means of Regulating Commerce, by Chad Squitieri, June 23, 2025, available on the website https://www.yalejreg.com/

In the end, both the CIT and Federal Circuit applied MQD squarely: they concluded that Congress never clearly authorized the President to use IEEPA to impose global tariffs, and that claiming such a power without explicit statutory support was impermissible, due to the potential outcome it would lead.

Their rulings reflect a broader judicial trend: major economic policies, especially those transforming national trade frameworks, must rest on unmistakable congressional authorization, not executive interpretation during a self-declared emergency dictated by balance of payments' problems.

Beyond abstract constitutional theory, the V.O.S. Selections litigation drew clear, practical limits on the President's authority under IEEPA. Enacted in 1977 to give presidents flexibility in confronting genuine foreign threats, through tools such as asset freezes, trade embargoes, or other targeted sanctions, IEEPA was never meant to serve as a tool for general economic policymaking. Both the Court of International Trade (CIT) and the Federal Circuit (CAFC) emphasized that emergency powers cannot be used as a political shortcut for enacting sweeping domestic or trade reforms.

The CIT ruled that Trump's so-called "trafficking tariffs" violated IEEPA because they were not directly aimed at resolving the declared emergency: the emergency must be genuine, and the measures must deal with the concrete threat.

While the President cited drug trafficking and cross-border crime, the tariffs targeted major trading partners as leverage to force unrelated policy changes, like immigration enforcement. Under 50 U.S.C. § 1701(b), emergency powers "may be exercised only to deal with an unusual and extraordinary threat … and may not be exercised for any other purpose": in this way, using tariffs to negotiate broader economic or political outcomes went beyond that boundary.

As commentators noted, purely economic goals (like addressing trade deficits or raising revenue) cannot constitute IEEPA emergencies[471].

The Federal Circuit dissent urged deference to presidential judgment, but the majority instead read the statute to deal with clause as requiring a tight causal link between the

[471]The Conservative Legal Advocates Working to Kill Trump's Tariffs, By Cristian Farias, April 10, 2025, available at the website https://www.newyorker.com/news/the-lede/the-conservative-legal-advocates-working-to-kill-trumps-tariffs

threat declared and the measures imposed[472]. This approach, both statutory and constitutional, prevents presidents from invoking emergencies to justify unrelated or pretextual actions.

What is more, both courts expressed concern over the global scope and unlimited duration of the tariffs, because IEEPA had traditionally been used to sanction specific foreign actors, not to impose broad, indefinite tariffs on nearly all imports.

The CIT described the orders as "unbounded" powers that Congress never authorized: allowing such authority, it warned, would effectively let the President impose taxes, a power reserved to Congress under Article I[473]. It even cited the Uniformity Clause ("all Duties, Imposts and Excises shall be uniform throughout the United States") to underscore that tariffs are legislative in nature and must apply uniformly across the country[474]. Because the unlawful tariffs affected the entire national economy, the CIT issued a nationwide injunction.

The Federal Circuit agreed the tariffs were illegal but vacated the universal injunction, remanding for reconsideration of its scope[475]. Even so, both courts reinforced the same principle: IEEPA does not give the President perpetual economic lawmaking power.

If interpreted otherwise, it would invert the Constitution's design, placing the taxing and commerce-regulating power of Congress in executive hands.

Additionally, the courts looked to other trade statutes as evidence that Congress did not intend IEEPA to function as an all-purpose tariff instrument. Statutes like *Section 232 of the Trade Expansion Act of 1962* and *Section 301 of the Trade Act of 1974* explicitly authorize tariffs, but only under strict procedural and temporal limits.

For instance, the Trade Act caps balance-of-payments tariffs at 15% for no longer than 150 days, by contrast, IEEPA contains no such limits, signalling that Congress

[472]Breaking News - Federal Circuit Affirms Court of International Trade's Invalidation of President Trump's Tariffs, By David Taylor on August 29, 2025, Fedcircuitblog, available at the website https://fedcircuitblog.com/2025/08/29/breaking-news-federal-circuit-affirms-court-of-international-trades-invalidation-of-president-trumps-tariffs
[473]V.O.S. Selections, Inc. v. United States, 772 F.Supp.3d 1350 (2025), at page 18, [21]and [22]
[474]Id. at 473, at page 27
[475]See V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025)

designed it for targeted, temporary measures, not open-ended economic restructuring[476].

The Federal Circuit majority also drew on *United States v. Yoshida Int'l, Inc.*, a case arose under the Trading with the Enemy Act (IEEPA's predecessor), where the court upheld only a short-term surcharge while expressly rejecting "unbounded tariff authority"[477].

It reasoned that Congress's 1977 reforms sought to rein in, not expand, emergency powers, further proving that an unlimited reading of IEEPA would contradict legislative intent.

In short, Congress does not hide sweeping economic delegations in general emergency statutes, a point consistent with Justice Scalia's "no elephants in mouseholes" canon[478].

Finally, both rulings reaffirmed that the judiciary has a duty to enforce legal and constitutional limits on emergency powers. The government argued that determining the scope of a national emergency was a "political question" best left to the Executive. The courts rejected that position, citing Chief Justice John Marshall's 1812 opinion refusing to imply powers President Madison had not been granted during wartime: as the CIT wrote, quoting Marshall, "*we cannot, when called upon by the citizens of the country, refuse our opinion [on the law], however it may differ from that of very great authorities*"[479]. By striking down the tariff orders, both courts reaffirmed that judicial review extends even to national security contexts where constitutional boundaries are at stake. The principle was clear: the President's actions must rest on "meaningful limiting standards" in law, or they are invalid[480].

In sum, the V.O.S. Selections decisions underscore a constitutional balance long embedded in American law: IEEPA grants flexibility, not carte blanche. The President may respond swiftly to genuine foreign threats, but cannot invoke emergencies to

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[476]Legal and economic aspects of the Supreme Court's upcoming tariff decisions, Peter M. Shane and Robert E. Litan, November 4, 2025, available at the website https://www.brookings.edu/articles/legal-and-economic-aspects-of-the-supreme-courts-upcoming-tariff-decisions

[477]V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025), at page 11, commenting the outcome in Yoshida Int'l v. United States, 378 F. Supp. 1155, 1175–76 (Cust. Ct. 1974) (Yoshida I), rev'd, 526 F.2d 560 (CCPA 1975) (Yoshida II)

[478]Id. at 471

[479]V.O.S. Selections, Inc. v. United States, 772 F.Supp.3d 1350 (2025), at page 27

[480]Id. at 479, at page 19

bypass Congress, impose perpetual economic measures, or redefine national policy by executive's will.

SUBPARAGRAPH 3.2-THE DISSENTING OPINION (LED BY JUDGE TARANTO)

Judge Taranto's dissent, joined by Chief Judge Moore and Judges Prost and Chen, offered a sharply contrasting vision of IEEPA's scope. The dissent accused the majority of reading the statute too narrowly and undermining the Executive's long-recognized discretion in national emergencies. In their view, IEEPA "*embodies an eyes-open congressional grant of broad emergency authority*," intended to give the President wide latitude (including the power to impose tariffs) when confronting foreign crises[481].

The dissent reasoned that nothing in IEEPA's text excludes tariffs: the power to "*regulate importation*" naturally encompasses restrictions or conditions on imports, duties included: reading it as an unwritten limitation (not allowing tariffs) was, in their eyes, judicial overreach.

Congress's omission of the word "tariff" was not dispositive; what mattered was that it deliberately drafted IEEPA in sweeping terms, trusting presidential accountability to check misuse[482]. The majority's insistence on explicit mention of "duties," the dissent argued, was formalistic and ahistorical, since tariffs and embargoes have long been interchangeable tools of import regulation.

Looking to history, Judge Taranto emphasized that presidents had repeatedly used broad economic powers during foreign crises under the Trading with the Enemy Act (TWEA), without Congress restricting those measures afterward. Congress, when enacting IEEPA in 1977, understood this tradition and kept the same "*regulate importation*" language, merely adding oversight requirements through the National Emergencies Act (NEA).

The dissent viewed this continuity as proof that Congress accepted the use of duties as part of emergency economic regulation. They also invoked *United States v. Yoshida*

[481]V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025), at page 26

[482]Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling, Holland & Knight Alert, September 9, 2025, available at www.hklaw.com

Int'l, Inc. (1975), where Nixon's tariff surcharge was upheld under TWEA, noting that Congress never amended IEEPA to exclude tariffs afterward, representing it as a tacit endorsement of that precedent[483].

On the major questions doctrine, the dissent took a sceptical view: It argued that the doctrine should not apply rigidly to presidential actions in foreign affairs, where courts traditionally defer to executive discretion.

A key point of contention was whether MQD should apply equally to presidential actions in foreign affairs. The dissent argued that it should not, citing Justice Kavanaugh's view that the doctrine rarely governs national security or foreign relations because Congress expects the President to act broadly in those domains[484]. When enacting IEEPA in 1977, Congress intended to give the President a flexible set of tools for economic and diplomatic crises.

Judge Taranto warned that importing MQD from domestic agency cases like *West Virginia v. EPA* would "*unduly narrow the statute*" and hinder the President's ability to respond swiftly to crises[485]. In matters of national security and international trade, Congress often delegates power broadly, expecting the President to exercise judgment without detailed statutory micromanagement. Thus, the dissent saw IEEPA's open-ended language as intentional and constitutionally sound.

At the same time, Judge Taranto acknowledged the concern that the President's emergency declarations could become effectively unreviewable, agreeing that courts may intervene at the margins if a President's "unusual and extraordinary threat" finding is plainly implausible or in bad faith[486]. Citing *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), he emphasized that courts still interpret statutes to keep the Executive within lawful limits, even when deference is due[487]. But he found no abuse here: the threats invoked (cross-border drug trafficking and unfair foreign trade practices) fell comfortably within IEEPA's requirement of a foreign nexus.

[483]V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (2025), Judge Taranto's dissenting opinion, joined by Chief Judge Moore and Circuit Judges Prost and Chen

[484]Legal and economic aspects of the Supreme Court's upcoming tariff decisions, Peter M. Shane and Robert E. Litan, November 4, 2025, available at the website https://www.brookings.edu/articles/legal-and-economic-aspects-of-the-supreme-courts-upcoming-tariff-decisions

[485]Id. at 483, but see also the commentary at "Court of Appeals Strikes Down IEEPA Tariffs, Setting Stage for Supreme Court Ruling", Holland & Knight Alert, September 9, 2025, available at www.hklaw.com

[486]Id. at 482

[487]Id. at 482

Therefore, he concluded that the President acted within his statutory and constitutional authority, and the courts had no basis to strike down the tariffs.

In its essence, the dissent portrayed IEEPA as a deliberately broad foreign emergency statute that entrusts presidents with flexible tools to safeguard national interests. Taranto's opinion argued that Congress's choice of general language reflects confidence in executive responsibility, not an oversight to be corrected by the judiciary. The majority, in contrast, was faulted for imposing modern judicial doctrines (like MQD) onto a statute rooted in Cold War-era pragmatism.

Ultimately, the dissent viewed the case as a clash between two constitutional philosophies: one protecting Congress's Article I prerogatives and demanding explicit delegations, and the other preserving executive agility in foreign crises. For Judge Taranto and his colleagues, IEEPA belongs squarely to the latter tradition, reason why its breadth is intentional, its flexibility essential, and its limits political rather than judicial.

SUBPARAGRAPH 3.3-THE FUTURE PERSPECTIVE

No matter how it will be ruled, this case will mark a milestone in US history for three main reasons:

a) It will put the word "end" to the everlasting conflict between strict interpretation formalism and pragmatism for what concerns IEEPA, allowing the future operators, either governmental or private, to understand better what this statute allows to be done and what not.
b) It will clarify the constitutional problem of the powers of the Executive, vested in the person of the President of the US, marking the line that cannot be crossed, strengthening the positions of either the supporters of a strong Executive concentration of powers or those of the promoters of the balance of constitutional powers.
c) Third, it will be a decision worth billions and billions of United States Dollars, with a huge economic impact on the international trade markets, as well as the internal one.

Just to give a small picture of the situation, according to the Penn Wharton Budget Model, as of November 4, the United States has taken in roughly $225 billion in tariff revenue for 2025: about $140 billion of those total stems from the new IEEPA-based tariffs introduced this year, while the remainder comes from older tariff measures that were already active.

For what consumers are concerned, if you divide the $225 billion across the entire U.S. population, (around 347 million people) it works out to an average cost of roughly $650 per person. Focusing only on the tariffs imposed in 2025 under IEEPA, that average comes down to about $400 per individual[488].

These figures rise even more once we factor in the tariffs that are expected to be collected during the rest of the year. With those included, the estimated burden climbs to roughly $800 per person for total 2025 tariffs, and around $550 per person for the tariffs created specifically under IEEPA[489].

[488]Data available at the websites: https://budgetmodel.wharton.upenn.edu/ and https://budgetmodel.wharton.upenn.edu/
[489]Id. at 488

The key takeaway in this situation is that the so-called “tariff dividend” would end up being more than double what the typical American is paying in tariffs.

What is more, according to a recent analysis from the U.S. Bureau of Customs and Border Protection, if the courts strike down the tariffs, the federal government would be required to return at least $90 billion to the companies that paid them. At the same time, the Committee for a Responsible Federal Budget (a business-supported nonprofit) estimates that keeping the tariffs in place for the next decade would end up costing taxpayers roughly $2.2 trillion[490].

Another factor that cannot be hidden is the composition of the SCOTUS, composed now of 6 Conservative judges and 3 Democrats: whether this factor will make the difference is roughly uncertain, but we will find out really soon. We will see if the Supreme Court will avoid face to face conflicts with the current administration, if it will be indulgent towards the Executive or if it will avoid partisanship, especially after having second-guessed President Biden’s decisions in Biden v. Nebraska, where the Court invoked the MQD to invalidate Biden administration’s initiative[491].

During the arguments, Justice Brett Kavanaugh — himself a Trump appointee — noted that the 1977 statute the former president is relying on for tariff authority seemed designed hold back, rather than broaden, presidential power. He also pointed out that no prior administration, Democratic or Republican, had ever attempted to use that law as a basis for imposing tariffs.

Justice Amy Coney Barrett, Trump’s third nominee to the Court, pressed the government on a related point, asking Solicitor General D. John Sauer how Congress could reclaim its authority in this area if the administration’s view were accepted[492].

Sauer responded that the tariffs fall squarely within the president’s constitutional power over foreign commerce, arguing that this use of authority is entirely legitimate. Chief Justice John Roberts signalled some agreement with that position, and by the end of the 2½-hour session, the opening week of the Court’s 2025–26 term had concluded without a clear majority position emerging.

[490]Data available at the website https://www.cbp.gov/newsroom/stats/trade
[491]Legal and economic aspects of the Supreme Court’s upcoming tariff decisions, Peter M. Shane and Robert E. Litan, November 4, 2025, available at the website https://www.brookings.edu/articles/
[492]Conservative SCOTUS justices are wary of Trump’s tariffs, By Bob Egelko, Nov 5, 2025, available on the website https://www.sfchronicle.com/politics/article/supreme-court-tariffs-21138473.php

We need to consider that even if Trump ultimately loses at the Supreme Court, he may still have other legal tools at his disposal: Treasury has already signalled that the Administration could rely on these mechanisms to pursue similar goals without depending on IEEPA.

If the IEEPA tariffs are struck down, the President has several quick fallback options. The first one is Section 122 of the Trade Act of 1974, which would let him immediately bring back part (or even all) of the tariffs. That authority is limited: the president can raise duties only up to 15% and only for 150 days, unless Congress agrees to extend it[493]. Still, Section 122 is easy to trigger because it applies whenever a country runs a large balance-of-payments surplus with the United States or puts up unreasonable trade barriers (criteria that many trading partners meet).

Another route is Section 232 of the Trade Expansion Act of 1962, which allows the Commerce Department to investigate whether particular imports threaten national security. If the secretary of commerce concludes that they do (and given the breadth of the IEEPA tariffs, such findings would be easy to justify), the president can act[494]. Although the statute technically gives the president up to 270 days to respond to a positive finding (and another 90 days to choose a remedy), both agencies could move far faster if the administration wanted. Because the law does not define "national security," a president has considerable freedom to interpret it, and courts typically defer heavily to that judgment. For that reason, tariffs re-issued under Section 232 might survive judicial review even if the IEEPA-based ones do not[495].

A third possibility is Section 301 of the Trade Act of 1974[496], which empowers the U.S. Trade Representative to investigate and counter foreign trade practices considered unfair or discriminatory. Section 301 has been used by several presidents, including Trump himself when he imposed major tariffs on China and the EU during his first term. While the statute includes procedural steps such as consultations and public comment, an administration determined to move quickly could shorten the timeline. If

[493]See Section 122 of the Trade Act of 1974 (19 U.S.C. § 2132)
[494]See *Trade Expansion Act of 1962* § 232, Pub. L. No. 87-794, 76 Stat. 872, at 877 (1962)
[495]Id. at 491
[496]Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411 (2021))

the Supreme Court rejects the IEEPA theory, Section 301 could be deployed much more aggressively to achieve the same objectives[497].

[497]Warren Maruyama, Lyric Galvin, and William Alan Reinsch, "Making Tariffs Great Again: Does President Trump Have Legal Authority to Implement New Tariffs on U.S. Trading Partners and China?", CSIS, October 10, 2024, https://www.csis.org/

INTERNATIONAL TRADE POLICY: A COMPARISON BETWEEN U.S AND EUROPEAN UNION

The European Union has a Common Commercial Policy (CCP) that governs its external trade relations. Under EU law, trade policy (including tariffs on imports) is an exclusive competence of the Union. This means only the EU (and not individual member states) can legislate and take binding decisions on external trade matters.

Article 3 of the Treaty on the Functioning of the EU (TFEU)[498] lists the CCP as an area of exclusive Union competence. Article 207 TFEU[499] further provides that the common commercial policy must be based on uniform principles, covering changes in tariff rates, trade agreements, commercial aspects of intellectual property, foreign direct investment, export policy, and trade defence measures like anti-dumping and subsidies. In practice, this exclusive competence means the EU acts as one body in trade matters: the Union negotiates trade agreements and sets import tariffs on behalf of all 27 Member States. Member States cannot impose their own tariffs or trade measures on non-EU countries.

In the EU, trade policy is centralized at the supranational level as an exclusive EU competence: Member States pool their sovereignty, allowing the EU to speak with one voice. Decisions are made through EU institutions (Commission, Council, Parliament). In the US, trade is a federal matter but with powers divided between Congress and the President by the Constitution: Congress legislates tariffs and trade rules, while the President executes many trade functions under congressional delegation. This means the EU has a single unified trade policy apparatus, whereas the US operates a two-level system (legislative and executive) that must coordinate.

The authority to impose or modify tariffs on imported goods within the European Union also rests exclusively at the EU level, reflecting the existence of a Common External Tariff applicable across the entire customs union.

Under Article 31 TFEU[500], tariff duties are fixed by the Council acting on a proposal from the European Commission.

[498] See art. 3 of the TFEU
[499] See art. 207 of the TFEU
[500] See art. 31 of the TFEU

In the European Union, trade policy is a centralized competence exercised through a structured, multi-institutional process designed to ensure uniformity and Member State oversight.

The European Commission holds the exclusive right of initiative and plays a dual role as policy proposer and executive authority. It drafts trade legislation, administers trade instruments, conducts investigations (such as anti-dumping or safeguards), and acts as the sole negotiator in international trade negotiations on behalf of the Union. Throughout this process, the Commission remains bound by mandates and continuous supervision.

Decision-making authority ultimately lies with the Council of the European Union, which represents the Member States and authorizes negotiations, approves trade measures, and adopts trade legislation, generally by qualified majority, though unanimity may be required in particularly sensitive sectors.

Since the Lisbon Treaty, the European Parliament has become a full co-legislator in trade matters: most trade legislation is adopted through the ordinary legislative procedure, and Parliament's consent is required for the conclusion of international trade agreements. However, the Parliament does not intervene in day-to-day executive decisions, such as the adjustment of individual tariff lines or the adoption of specific trade defence measures.

EU trade agreements follow a treaty-based procedure anchored in Articles 207 and 218 TFEU[501]: the Council first grants the Commission a negotiating mandate, the Commission conducts negotiations while consulting Member States and informing Parliament, and the final agreement is concluded only after Council approval and, in most cases, parliamentary consent. Where agreements cover areas of shared competence, national ratification by Member States is also required. Implementation and technical updates are subsequently handled by the Commission through delegated or implementing acts, subject to judicial review by the EU courts.

By contrast, the United States trade policy system is characterized by a more pronounced concentration of operational power in the executive branch, rooted in congressional delegation. Constitutionally, the United States Congress retains

[501] See art. 218 TFEU

authority over tariffs and foreign commerce[502], but it has long delegated significant powers to the President of the United States through statute. Courts have upheld these delegations so long as Congress provides an "intelligible principle"[503] guiding executive action, enabling the President to act without new legislation in defined circumstances.

In trade agreements, Congress preserves a central role through Trade Promotion Authority, which sets negotiating objectives and consultation requirements while committing Congress to an expedited up-or-down vote on implementing legislation. The President, typically through the Office of the United States Trade Representative, leads negotiations, but no agreement altering U.S. law or tariff schedules can enter into force without congressional approval.

Beyond agreements, U.S. law grants the President extensive unilateral tariff powers under specific statutes, including national security measures, trade retaliation, safeguards, and emergency economic powers. While these actions often require prior investigations by executive agencies, most notably the United States International Trade Commission or the Department of Commerce, the final decision to impose or lift tariffs frequently rests with the President alone. Congress exercises oversight through hearings, reporting requirements, sunset clauses, and its ability to amend or revoke delegations, though such reversals are politically difficult in practice.

Nevertheless, U.S. law gives the President several statutory tools to impose tariffs or quotas without prior congressional approval, each designed for a specific policy purpose and grounded in a different legal framework.

Section 232 of the Trade Expansion Act of 1962 allows the President to restrict imports if the Department of Commerce finds that they threaten national security. Once such a finding is made, the President may "adjust imports," typically through tariffs or quotas. This authority was used to impose the steel and aluminium tariffs in 2018.

Under *Section 301 of the Trade Act of 1974*, the President may retaliate against foreign countries that violate trade agreements or engage in unjustifiable, unreasonable, or discriminatory practices harming U.S. commerce. This provision formed the legal

[502] U.S. Const. art. I, § 8, cl. 3.
[503] *V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. 2025)*

basis for tariffs on Chinese goods linked to intellectual property and technology transfer concerns.

Section 201 of the Trade Act of 1974, known as the safeguard mechanism, permits temporary import restrictions when a surge of imports causes serious injury to a domestic industry. The process requires an injury determination by the U.S. International Trade Commission, after which the President decides whether to apply the recommended safeguard measure.

Finally, the *International Emergency Economic Powers Act (IEEPA)* grants the President broad authority to regulate economic activity following a declared national emergency involving foreign threats. Although primarily used for sanctions and financial controls, its scope has raised debate over whether it could support tariff measures in exceptional cases.

Judicial review provides an additional, but limited, check. U.S. courts traditionally defer to the executive on trade matters, intervening only when statutory or constitutional boundaries are clearly exceeded. Administrative determinations in antidumping, countervailing duty, and safeguard cases are more routinely reviewed by specialized courts. In the EU, by contrast, trade measures adopted by the institutions are subject to annulment by the EU courts for legal defects, reinforcing a legality-based rather than political model of control.

Overall, while the EU system emphasizes collective decision-making, institutional balance, and procedural constraint, the U.S. framework affords the executive far greater discretionary capacity to act swiftly on trade matters within broadly defined statutory limits. This structural divergence explains why tariff and trade actions in the United States can be more immediate and personalized, whereas in the European Union they are typically slower, more technocratic, and institutionally mediated.

FINAL CONSIDERATIONS

At the end of the analysis one question comes out spontaneous: who really won the 2025 tariff war?

If the outcome is judged by data rather than political rhetoric, the answer is clear: it was not the United States.

The 2025 trade war was launched with an explicit objective. President Donald Trump promised to "rebalance" trade, revive U.S. manufacturing, and curb China's economic rise. Tariffs on Chinese goods climbed as high as 145%, before later being reduced to roughly 55%. The strategy aimed to suppress Chinese exports, reduce China's surplus, and restore American industrial strength.

What followed, however, diverged sharply from those goals: rather than retreat, Chinese exporters adapted. As has repeatedly happened in global trade, production and assembly lines were relocated. Manufacturing shifted to Vietnam, Thailand, Indonesia, and other ASEAN economies, allowing firms to bypass U.S. tariffs and lower their effective tariff exposure to about 20%. As a result, even though direct Chinese exports to the U.S. declined sharply, the overall impact on China remained limited. The reason was simple: the goods kept moving, only the labels changed.

Statistics on the import and export of goods by country (region)

Date	Country/Region	Import and export (billion dollars)		Export (billion dollars)		Import (US dollars)	
		Cumulative value of import and export	Year-on-year (%)	Cumulative value of export	Year-on-year (%)	Cumulative value of imports	Year-on-year (%)
October 2025	India	1276.27	11	1120.4	12.3	155.87	2.4
October 2025	Japan	2632.01	4.5	1294.76	3.3	1337.25	5.7
October 2025	South Korea	2693.97	0.4	1182.71	-1.6	1511.26	2
October 2025	Russia	1832.44	-9.5	820.69	-12.6	1011.75	-6.7
October 2025	South Africa	444.23	2	188.37	5	255.86	0
October 2025	Brazil	1539.77	-3.9	590.3	-3	949.48	-4.5
October 2025	Canada	748.88	-0.5	399.96	3.5	348.91	-4.7
October 2025	United States	4708.58	-16.6	3521.39	-17.8	1187.19	-12.6
October 2025	Australia	1675.23	-5	612.58	4.5	1062.65	-9.7
October 2025	Indonesia	1343.75	13.9	687.74	13.9	656.01	14
October 2025	United Kingdom	854.88	5.1	699.12	7.2	155.76	-3.6
October 2025	Germany	1736.9	3.5	972.24	9.7	764.66	-3.4
October 2025	France	687.49	4.1	396.98	7	290.51	0.3
October 2025	Italy	618.47	2.9	414.86	8.6	203.61	-7.1
October 2025	Saudi Arabia	895.29	0.9	440.45	9.1	454.83	-6.1
October 2025	Turkey	367.08	3	329.92	4	37.16	-5.1
October 2025	Argentina	184.78	39.7	120.27	64.5	64.51	9.1
October 2025	Mexico	907.68	-1.2	737.77	-2.8	169.91	6.3

Data source: General Administration of Customs of China

China redirected trade flows at scale: sharp contraction toward the United States (-17.8%) confirms a structural decoupling in direct bilateral trade, coupled with a strong expansion toward India, the Middle East, and Europe, showing China's ability to redirect exports toward alternative markets.

Meanwhile, major EU economies (Germany, France, Italy) continue to absorb growing volumes of Chinese goods, offsetting losses in the U.S. market[504].

[504] Data available at the official website of MOFCOM: https://data.mofcom.gov.cn/hwmy/imexCountry.shtml

The pattern supports the broader conclusion that U.S. tariffs reduced direct U.S. imports from China but did not materially suppress China's global export capacity but instead they accelerated trade diversification.

China's total exports reached a record $3.41 trillion, up 5.4%[505], while its trade surplus surged to over $1 trillion[506], the largest ever recorded globally.

In contrast, the United States saw few tangible gains. The U.S. trade deficit widened, and American farmers were among the hardest hit, prompting the White House to announce $12 billion in emergency support[507].

Nevertheless, according to the U.S. Bureau of Economic Analysis' third estimate, real GDP expanded at a 3.8 percent annualized rate in the second quarter of 2025, following a revised contraction of 0.6 percent in the first quarter[508].

The rebound in economic activity during the second quarter was driven mainly by lower imports, which mechanically raise GDP since they are subtracted in its calculation, alongside stronger consumer spending. These positive contributions, however, were partially counterbalanced by declines in both investment and exports, limiting the overall pace of growth.

Notably, the feared inflationary shock from tariffs never materialized. U.S. inflation remained stable, and the Federal Reserve even cut interest rates, leaving economists debating why tariff pressures failed to feed through to prices.

China, meanwhile, absorbed the shock and continued expanding its export footprint across Southeast Asia, Europe, Africa, and Latin America, maintaining competitiveness despite U.S. restrictions.

So, who won the trade war? Certainly not the United States.

China did not prevail because it outmanoeuvred Washington politically, but because the structure of today's global economy makes trade wars fundamentally ineffective.

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505 Data available at https://oec.world/en/profile/country/chn#bespoke-title-339
506 Data available at https://tradingeconomics.com/china/balance-of-trade
507 Trump Administration Announces $12 Billion Farmer Bridge Payments for American Farmers Impacted by Unfair Market Disruptions, December 8, 2025, available at https://www.usda.gov/about-usda/news/press-releases/2025/12/08/trump-administration-announces-12-billion-farmer-bridge-payments-american-farmers-impacted-unfair
508 Data available at the official website: https://www.bea.gov/data/gdp/gross-domestic-product#

While tariffs and sanctions could reshape trade in the 20th century, in 2025 they primarily accelerated the reconfiguration of supply chains.

The core lesson is clear: globalization proved stronger than geopolitics, and economic coercion struggled to succeed in a world that is too interconnected to be easily divided.

If we take a look at the historical evolution of productivity in the last 20 years, one message is clear: Asia is rising fast through heavy investment, technological leapfrogging, and integration into global value chains; Europe is falling behind and resource-dependent models are reaching their limits.

Over the last 20 years, global productivity has shifted decisively toward Asia. China is the standout case: between 2005 and 2025 its GDP per hour worked rose from $4.5 to $19.8, a 4.4-fold increase (340%), shrinking the productivity gap with advanced Western economies at unprecedented speed. Other Asian economies also saw strong gains, with India (+149%) and several East and Southeast Asian countries exceeding 70% growth[509].

By contrast, Europe has largely stagnated, with very weak productivity growth over the same period (UK +10%, France +14%, Norway +14%, Italy +1.8%), reflecting demographics, low investment, rigid labour markets, high energy costs, and heavy regulation. Ireland is the main European outlier, posting the world's highest productivity levels and 102% growth, partly driven by multinational activity[510].

Oil-based economies performed worst, with Saudi Arabia (-34%) and the UAE (-23%) showing negative productivity trends[511].

[509] Data available at https://www.visualcapitalist.com/ranked-productivity-of-the-worlds-largest-30-economies-2005-2025/
[510] Id. at 503
[511] Id. at 503

Also, International Labour Organisation's data speaks clearly: China has reached an outstanding +6% every year from 2010 to 2025, a unique result in terms of stable productivity growth.

Central in the analysis is also the newly released U.S. National Security Strategy[512], which represents the sharpest break in American grand strategy in more than thirty years. Rather than updating past approaches, it signals a fundamental reordering of priorities cantered on Europe, Russia, and China.

Europe is addressed in unusually blunt terms: Washington depicts European governments and the EU as undermining democracy and national sovereignty and portrays the continent as being in structural decline, weakened by migration policies, bureaucratic overreach, censorship, and poor governance. The document also makes clear that NATO enlargement has reached its limits, effectively closing the door to Ukraine's ambitions and confronting Brussels with an existential challenge.

Russia is treated in a strikingly different way. It is no longer framed as an adversary, competitor, or systemic threat. Instead, U.S. strategy prioritizes strategic stability, de-escalation, and a negotiated end to the war in Ukraine, largely to prevent further economic and political damage to Europe. This marks the first major U.S. strategic document in years that does not cast Russia as America's structural enemy, offering Moscow an unexpected moment of strategic relief.

China, by contrast, remains the central challenge. Asia is defined as the primary theatre of competition, and Taiwan is presented as the geopolitical hinge of the Indo-Pacific. While the strategy emphasizes deterrence and continued U.S. military superiority, it leaves open the possibility of a conditional, mutually beneficial relationship. Taken together, the message is clear: Russia is partially de-escalated, China is firmly targeted, and Europe is given a final wake-up call, without any guarantee that Washington will continue to provide unconditional strategic cover.

In the end, tariffs war, with both U.S. internal and WTO judicial disputes that I analysed mark only the first step of a bigger readjustment of world's geopolitical and economical equilibrium. The period we are living nowadays represents the beginning of an historical shift towards a new "dualistic equilibrium", a new cold war not made

[512] The White House, *National Security Strategy of the United States of America* (2025)

on weapons, but on economic influence, international trade flows and new commercial routes, dominated on one side by the U.S. and on the other by China.

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