To Judge Between Nations: Post Cold War Transformations in National Security and Separations of Powers - Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World

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To Judge Between the Nations: Post Cold War Transformations in National Security and Separation of Powers—Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World

By Antonio F. Perez

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† Isaiah 2:4.

Assistant Professor, Columbus School of Law, The Catholic University of America; J.D. 1985, Columbia University; A.B. 1982, Harvard College. While this Article relates to matters I worked on while at the Office of the Legal Adviser, Department of State, it does not contain any classified information. Neither does it represent the views of the Department of State or any other agency of the U.S. Government. Many thanks go to the students of my International Economic Law class, spring 1996, at the Columbus School of Law for their reactions to some of the ideas presented here, to Frank Morgan (The Catholic University of America, Member of the Class of 1998) for his superb research assistance, to Paul Stephan and Barry Kellman for helpful comments on an earlier draft, and to the generosity of the Catholic University of America for research funding that made this Article possible. Needless to say, its errors are my responsibility alone.
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I. Introduction

In the transitional period following the end of the Cold War, two U.S. administrations have grappled with the problem of excess weapons usable nuclear material in the republics of the former Soviet Union. These surplus materials, including plutonium and highly-enriched uranium (HEU), originated from the dismantling of Russian nuclear warheads pursuant to the Strategic Arms Reduction Treaty. HEU, unlike plutonium,¹ seemed to be disposable in a way that could

¹. Plutonium, by contrast, is not currently used as a source of fuel for U.S. power reactors. For an analysis of the possible use of plutonium derived from nuclear weapons to produce a reactor fuel mixture in mixed plutonium or uranium oxides (or MOX), see Victor Gilinsky, Russian Swords into American Plowshares, in CONTROLLING THE INTERNATIONAL TRANSFER OF WEAPONRY AND RELATED TECHNOLOGY 157, 165-70 (David Carlton et al. eds., 1995) (arguing that given the current economics of the nuclear fuel industry, particularly the surfeit of uranium stocks, plutonium storage is the cheapest option for disposition of excess plutonium). See also DAVID ALBRIGHT ET AL., WORLD INVENTORY OF PLUTONIUM AND HIGHLY ENRICHED URANIUM, 1992 215-16 (1993) (calling for reconsideration of existing European, Japanese, and Russian programs for the commercial use of plutonium). But see Howard Schneider, Canada Proposes Plan to Beat Excess
take advantage of the costs of its production. Yet, despite their best
efforts, both administrations have seemed paralyzed or inconsistent in
their attempts to purchase large quantities of HEU from Russia for
transformation into nuclear fuel for use in commercial nuclear power
reactors.

Some have argued that delayed implementation of the U.S.-Rus-
sia HEU Agreement\(^2\) constitutes a governmental failure at the highest
levels to balance national security interests in nuclear nonproliferation
against economic interests in protecting U.S. producers of natural ura-
nium and related uranium enrichment services.\(^3\) That view ignores,
however, the national security dimension of the Executive Branch's
effort to assure that the purchase of Russian uranium would not un-
dercut the implementation of the U.S. uranium antidumping policy or
the privatization of the U.S. enrichment enterprise. The Executive
Branch did, indeed, pursue a strategy that maximizes national secur-
ity, broadly conceived. Yet, it produced a neo-mercantilist strategy
that sought to maximize unilateral gains for the United States.

As this Article will argue, however, where the relevant national
security interests involved economic considerations, congressional,
rather than executive, management of the privatization process of the

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\(^{2}\) Agreement Between the Government of the United States of America and the
Government of the Russian Federation Concerning the Disposition of Highly Enriched
Disposition of HEU].

\(^{3}\) See generally Richard A. Falkenrath, The HEU Deal, in AVOIDING NUCLEAR AN-
ARCHY: CONTAINING THE THREAT OF LOOSE RUSSIAN NUCLEAR WEAPONS AND FISSION
MATERIAL 229 (CSIA Studies in Int'l Sec. No. 12, 1996). Falkenrath attributes the failure,
in part, to "a determined effort by officials in the Department of Energy [who would later
become USEC's management] to use the HEU deal to enhance the competitiveness of the
U.S. enrichment operation." Id. at 231. Falkenrath also attributes the failure to "an inade-
quate analysis of the commercial implications of the HEU deal by the Bush administra-
tion's national security team." Id. He has been quoted as describing the Executive
Branch's efforts as "a quagmire of incompetent implementation." William J. Broad, Ex-
Perts See Peril for U.S. Pact to Buy Up Russian Bomb Fuel, N.Y. TIMES, June 12, 1995, at
A1, A6. Yet, as this Article will argue, neither the conflict of interest theory nor the eco-
nomic ignorance rationale effectively address the policy judgments made by Congress in
the Energy Policy Act of 1992 concerning the importance of ensuring a competitive USEC.
See infra text accompanying notes 60-68.
U.S. enrichment enterprise produced a more rational accommodation of competing U.S. national security interests. Congressional efforts addressed: Russia’s interest in additional uranium importation, as the price for facilitating fulfillment of U.S. nonproliferation objectives in the HEU purchase program; U.S. trade interests in protecting domestic uranium producers and enrichment service providers; and U.S. competitiveness interests in a privatized national uranium enrichment capability. The particular virtue of the congressional approach was that it adopted a strategy that was much less aggressive than the one adopted by the Executive Branch for incorporating the national security dimension of trade.

That Congress adopted a less aggressive strategy than the Executive Branch is, of course, contrary to conventional wisdom that Congress is less likely than the Executive Branch to pursue internationalist polices, but it can be explained through a public choice analysis of policymaking in the strategic goods context. In particular, the transfer of strategic trade decision-making authority to Congress, this Article will argue, is connected not only to a decreased U.S. demand for offensive strategies, but also to the increased supply of international institutions in international economic policymaking even in the areas that bear upon national security.

Part II describes the merging streams of U.S. interests in nonproliferation through the HEU Agreement, the avoidance of foreign economic predation through the antidumping proceeding against uranium imports from the former Soviet Union, and the preservation of U.S. competitiveness through the successful privatization of the uranium enrichment enterprise. Part III, drawing upon national security studies on international cooperation and the work of economists in strategic trade theory, reconsiders the apparent conflict between trade and national security interests. It was this conflict that, according to some, accounted for the delays in implementing the purchase of Russian HEU. Part III argues that strategic trade interests, such as those implicated in the HEU Agreement, are considered part of the national security calculus by domestic policymakers. Part III further argues that optimizing the economic dimension of national security entails a strategic choice of whether to rely on unilateral exercise of power or defensive strategies utilizing international institutions and rules.

4. See infra text accompanying notes 11-66.
5. See infra text accompanying notes 67-114.
Treating the production of national security, redefined to include trade as well as nonproliferation interests, as a domestic policymaking issue, Part IV evaluates the competing perspectives on whether the political process overproduces or underproduces this good. On the one hand, the public goods argument supports government intervention to produce the economic power dimension of national security; and, on the other, the public choice argument suggests that such intervention usually inures to private, rather than the overall public, interests. Part III argues that, because the national security dimension of strategic goods is maximized through increased international market power for domestic producer interests, and public choice theory predicts that legislative processes will favor domestic producers, the legislative process will likely facilitate an adequate level of market power for domestic producers in strategic sectors. By contrast, an argument based on public goods theory for additional production of national security would seem to result in overproduction of national security, especially if advanced by an executive branch already biased in favor of excessive production of national security.

Part IV tests these hypotheses against the pattern of executive branch and congressional management of the privatization of the U.S. uranium enrichment enterprise in relation to the uranium antidumping case and the HEU Agreement. It argues that—in contrast to the Executive Branch's strategy, which initially appeared to facilitate more aggressively predatory strategies in international economic competition—Congress’s approach favored a longer term strategy of as-

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6. It should be noted that this Article addresses the differences between the kinds of policies Congress and the Executive Branch select for the production of market power as a positive national security externality, rather than whether and for what purposes Congress or the Executive Branch is more likely to employ such market power once it is created. For example, Congress recently was the driving engine behind a secondary boycott targeted against Cuba, while the President deferred imposition of the boycott's most draconian measures. See Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-133 (1996) (Title III, subject to presidential waiver authority, authorizes suits in U.S. courts by U.S. nationals, whose property had been taken from them while they were still Cuban nationals, against any person, including a citizen of a third country, who is "trafficking" in any such property); see also Charles Krauthammer, Clintonism: Split, Waffle and Wait, Wash. Post, July 19, 1996, at A27 (defending President Clinton's decision on July 16, 1996 to exercise the waiver authority and describing the secondary boycott as an exercise of market power by the United States that should be reserved only for significant national security concerns). The waiver has since been renewed, in part because the Executive Branch leveraged the threat of sanctions into a European decision to make human rights developments in Cuba a criterion in future EU-Cuba trade relations. See Thomas Lippman, Clinton Suspends Provision of Law that Targets Cuba, Wash. Post, Jan. 4, 1997, at A1.
suring that the United States would have a presence in a strategically significant industry, without seeking to exploit shorter term advantages through predatory economic strategies.7

Because, as shown in Part V, international institutions played a role, albeit muted, in the transfer of decision-making authority for reconciling conflicting trade and security policies to Congress,8 Part VI considers whether existing international institutions are adequate to curb predatory policies by the United States in the management of strategic trade. It argues that, despite NAFTA’s, and possibly GATT’s, effect in constraining predatory policies favored by the Executive Branch in the uranium case, international law rules are currently inadequate to provide assurance that the Executive Branch’s tendency towards predation will not be deterred. This weakness in NAFTA and GATT further strengthens the case for abstention by the Executive Branch in domestic policymaking on strategic goods and for congressional participation in national security decision-making on strategic trade issues. As international institutional constraints are unlikely to reduce the risk of international rent-seeking by a determined predator, this Article argues for the development of an authoritative interpretation narrowing the potential scope of the NAFTA and GATT national security exceptions to discourage executive branch policymaking in the production of strategic goods.9 Part VII summarizes and offers conclusions.10

II. Swords or Plowshares—Post-Cold War Transitions in Security, Trade, and Industrial Organizations

U.S. interests relating to Russian uranium production can be separated out into three strands: first, an interest in minimizing proliferation of nuclear weapons;11 second, a trade interest in assuring that U.S. producers of uranium are not injured by unfair foreign competition;12 and, third, an interest in the successful privatization of the U.S. Government-owned U.S. Enrichment Corporation (USEC), entailing subsidiary interests in assuring USEC’s ability to compete in the inter-

7. See infra text accompanying notes 115–52.
8. See infra text accompanying notes 153–201.
national marketplace (and, correlative, maximizing U.S. taxpayer return from the sale of the firm). 13

A. The HEU Purchase Agreement

At the end of the Cold War, the United States was presented with a new kind of threat. Instead of Soviet warheads aimed at American cities, it was the specter of loose nuclear material derived from the dismantling of former Soviet warheads that haunted American policymakers. 14 Problems in the accounting and control of this material created the risk that it might be smuggled out of the former Soviet states and fall into the hands of rogue states or terrorists. 15 Consequently,

13. See infra text accompanying notes 56–66.
President Bush leaped, perhaps without looking closely enough at how the U.S. trade law might complicate implementation, at the prospect of purchasing from Russia large quantities of fissile HEU removed from nuclear warheads dismantled under the Strategic Arms Reduction Treaty (START I).

The purchase proposal acquired impetus with "the collapse of the Soviet Union in December 1991, which caused a serious degradation in the Soviet nuclear custodial system, heightening the risk of nuclear leakage." It seemed to lay out the enticing possibility of fulfilling the Biblical dream of converting swords into plowshares through international governance: "He shall judge between the nations, and shall decide for many peoples; and they shall beat their swords into

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16. See infra text accompanying notes 31-55.
17. Fissile material refers to material that can be used to produce a chain reaction and under certain conditions a nuclear explosion. See Richard L. Williamson, Jr., Law and the H-Bomb: Strengthening the Nonproliferation Regime To Impede Advanced Proliferation, 28 CORNELL INT'L L.J. 71, 77-78 (1995). HEU refers to a mass of uranium whose isotopic composition has been altered through physical means to increase the percentage of U235, the fissile isotope of uranium, above its naturally-occurring level. Id. at 78-79. Weapons-useable fissile material includes plutonium and uranium enriched no less than 20% in U235, although only certain forms of plutonium and uranium enriched more than 90% in U235 are considered weapons-optimal. Id. at 81 n.30. Nonetheless, the international community's legal regime for the management of peaceful nuclear activities and U.S. law give special significance to the 20% threshold. See, e.g., Nuclear Proliferation Assessment Statement, in Message from the President of the United States Transmitting the Text of a Proposed Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between the United States of America and the European Atomic Energy Community (EURATOM), with Accompanying Agreed Minute, Annexes, and Other Attachments, Pursuant to 42 U.S.C. § 2153 (b), (d), H.R. Doc. No. 104-138 art. 21.7 (1995) (Article 21.7 defines highly enriched uranium (HEU) as "uranium enriched to more than twenty percent in isotope 235 (and/or uranium 233)" and low enriched uranium (LEU) as "uranium enriched to twenty percent or less") [hereinafter US-EURATOM Agreement]; Williamson, supra, at 81 n.30 ("It is infeasible to make deliverable nuclear devices if the U235 percentage is below 20%.").
19. See Falkenrath, supra note 3, at 231. According to an October 24, 1991 editorial in the New York Times, "the United States should buy this excess HEU from the Soviet Union, blend it with natural uranium to produce a mixture suitable for use in power-generating reactors, and resell it to utilities." Id.
plowshares, and their spears into pruning hooks." HEU can easily be converted into low-enriched uranium (LEU) that could run civil nuclear power reactors.

The process of de-enrichment, or converting HEU into LEU, is substantially less expensive than any known enrichment processes, particularly the gaseous diffusion process used in the United States. Of course, some of the stored value of uranium enriched by the former Soviet Union to the level necessary for weapons use would be lost. Russia would, however, receive substantial compensation both for the value of the energy used to enrich natural uranium to the reactor-grade level at which it would be transferred (separative work units or SWU-component), and for the value of the natural uranium that would have been used in producing the enriched uranium transferred (uranium "feed" component). Russia's need for immediate infusions of hard currency offered significant incentives for compromise with the United States. This led to an initial agreement on August 12,

21. Light-water reactors, the civil nuclear power production reactors used in the United States, employ a fuel mixture of uranium enriched to between three and five percent U235. See Falkenrath, supra note 3, at 236-37 n.8.
22. See id. at 237 ("The commercial viability of the HEU deal is closely tied to the economics of the front end of the nuclear fuel cycle, particularly the enrichment of natural uranium. Enrichment in a gaseous diffusion plant is an expensive process, requiring large amounts of electricity."). Gaseous diffusion facilities run uranium hexafluoride (UF6) gas through gas-permeable membranes with the effect of separating uranium isotopes into a U235-enriched stream and a U235-depleted stream in large-scale facilities. See Williamson, supra note 17, at 79 n.20. Gaseous diffusion's main competitor in the commercial nuclear reactor sector is centrifuge enrichment, a technology employed principally by URENCO, a consortium of British, Dutch, and German firms, in which centrifuges spinning at high speeds separate uranium isotopes by weight into enriched and depleted streams. Id. at 79 n.22. While there are a variety of other enrichment processes, such as calutrons, see id. at 79-80 n.24 (electromagnetic separation was the first process employed by the United States and the process used by Iraq before the Gulf War), and nozzle processes, see id. at 79-80 n.25 (developed but never employed by Germany), the likeliest next competitor in the commercial enrichment process is the laser isotope separation process or AVLIS, see id. at 79-80 n. 26 (likely to be extremely efficient). The United States seems to have made the decision to develop AVLIS as its next generation enrichment technology. See infra text accompanying notes 174.
23. The uranium enrichment process typically involves two inputs: the enrichment plant's contribution of separative work units (SWU), and natural uranium "feed" material. Increased use of SWU lowers requirements for use of feed material, just as increased use of feed material permits economizing on the use of SWU. Various combinations of SWU and feed material will yield a given small volume of enriched uranium product (EUP) at a specific level of enrichment in U235 or assay, and a given larger volume of uranium depleted in U235 (DU) at a specific level of enrichment, or tails, assay. Thus, LEU blended down from Russian HEU, in effect, displaces both SWU and feed inputs, requiring compensation for each component at separate prices. See Falkenrath, supra note 3, at 238-41.
1992 for the United States to purchase 500 metric tons of Russian HEU derived from dismantled weapons\textsuperscript{24} and on February 18, 1993 to a final agreement (the "HEU Agreement") under which the two states bound themselves under international law to negotiate a contract for purchase.\textsuperscript{25}

This contract (the "HEU Contract") between the United States Enrichment Corporation (USEC) and the Russian Ministry of Atomic Energy (MINATOM), as executive agents for their respective governments, was not signed until January 14, 1994.\textsuperscript{26} The year-long delay in negotiating the HEU Contract flowed in part from complications with the completion of arrangements for the transfer of former Soviet nuclear weapons from Ukraine to Russia to permit START II's entry into force. In effect, the United States was able to link USEC's advance payments to Russia under the HEU Contract to Russia's agreement to provide nuclear fuel to Ukraine,\textsuperscript{27} which in turn persuaded

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} Id. at 255.
\item \textsuperscript{25} Agreement Between U.S.-Russ. Concerning the Disposition of HEU, supra note 2. Article V(10) provided that prior to the conclusion of an implementing contract, the Parties would establish "transparency measures" to ensure that the HEU transferred to the United States would be derived from dismantled warheads. Id. This requirement was implemented through an international agreement. See Protocol Between the United States and Russia on Highly Enriched Uranium (HEU) in Furtherance of the Memorandum of Understanding of September 1, 1993, Mar. 18, 1994, U.S.-Russ., State Dep't No. 94-105, available in 1994 WL 175566; Memorandum of Understanding Between the Government of the United States of America and the Government of the Russian Federation Relating to Transparency and Additional Arrangements Concerning the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, Sept. 1, 1993, U.S.-Russ., State Dep't No. 93-176, available in 1993 WL 444606 [hereinafter HEU Agreement].
\item \textsuperscript{26} Article II of the HEU Agreement provided that the "Parties, through their Executive Agents, shall within six months from the entry into force of [the HEU Agreement] seek to enter into an initial implementing contract. . . ." HEU Agreement, supra note 25, art. II, at 1. The contract between USEC and MINATOM has not been made public. However, USEC officers have testified to Congress that the contract gives USEC the right to purchase, as contemplated in the HEU Agreement, up to 500 metric tons over 20 years (up to 10 metric tons annually in each of the first five years and up to 30 metric tons per year thereafter) of Russian HEU (blended down in Russia to 4.4% LEU and shipped to the United States as UF6) at a price of $780 per kilogram of UF6. See Falkenrath, supra note 3, at 262.
\item \textsuperscript{27} See Annex to Trilateral Statement, issued in Moscow on January 14, 1994, by Presidents Clinton of the United States, Yeltsin of the Russian Federation, and Kravchuk of Ukraine, 5 DEP'T OF STATE DISPATCH 19-20 (Supp. 1, 1994). The Annex provides that: In the case of Ukraine, as warheads are transferred to Russia for dismantling, Ukraine will receive in compensation fuel assemblies for its nuclear power stations. . . . To help begin this process, USEC will advance to Russia $60 million to help cover expenses for the initial production of fuel assemblies for Ukraine.
\end{itemize}
\end{footnotesize}
Ukraine to become a non-nuclear weapon state and adhere to the Treaty on the Nonproliferation of Nuclear Weapons. The HEU Agreement was also nearly derailed by complications flowing from U.S. trade law, which made it impossible for USEC to resell the feed component of Russian HEU in the United States. Therefore, USEC will recover the $60 million advance payment with funds that would otherwise be paid to Russia under the HEU contract.

Id. at 761; see also Mark Zaid, Reports of ASIL Programs: NSC Official Discusses Non-Proliferation Issues, ASIL Newsletter, June 1994 (unnamed NSC officer noting the simultaneous conclusion of the HEU Contract and trilateral statement and describing the advance payment as revenue-neutral to the U.S. taxpayer). The Clinton Administration appears to have employed this same strategy when on June 30, 1995, Vice-President Gore agreed with Russian Prime Minister Chernomyrdin that USEC would advance MINATOM an additional $100 million to facilitate continued implementation of Russian fuel assembly deliveries to Ukraine. See Falkenrath, supra note 3, at 275 & n.84 (noting that MINATOM “by mid-1995 had halted the delivery of reactor fuel to Ukraine”).

28. Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT]. The NPT divides parties into two classes: nuclear weapons states, and non-nuclear weapons states. Id. arts. I and II. It limits the category of nuclear-weapon states, however, to those states that had detonated a nuclear device before January 1, 1967. Id. art. IX(3), at 492-93. The Russian Federation’s Duma had made Ukraine’s accession to the NPT as a non-nuclear weapon state a condition of Russia’s bringing into force START I. See Start Approval Urged, U.S. Dep’t of St. Dispatch 345 (1993). Because Ukraine did not exist as a state on January 1, 1967, and because the Russian Federation appeared to succeed the Soviet Union as a nuclear weapons state party to the NPT, Ukraine’s status as a potential non-nuclear weapon state party to the NPT was complicated by the presence on its territory of former Soviet weapons, albeit under Russian control. Ukraine’s accession to the NPT as a non-nuclear weapons state, a major goal of U.S. policy, was thus simplified by the transfer of these weapons to the nuclear-weapons state successor of the former Soviet Union, the Russian Federation. See Statement by Secretary of State Warren Christopher, U.S. Dep’t of St. Dispatch 65 (1995).

29. See infra text accompanying notes 31-66. On a smaller scale, similar problems complicated the U.S. purchase of 600 kilogram of Kazakh HEU in November 1994, in a quasi-covert operation code named Project Sapphire. In that case, the White House announcement that the Kazakh HEU “would be transferred to a commercial facility within six to nine months, where the material would be blended down for use in commercial nuclear reactors,” prompted the Department of Commerce (DOC) to inform the Department of Energy (DOE) that “any direct or indirect release of the uranium into the U.S. market associated with the Kazakh HEU will be contrary to the letter and intent of the uranium suspension agreements.” See Michael Knapik, Spot Uranium Price in U.S. Moves Up Slightly; USEC Calls for Shutting Down Bypass Option, Nuclear Fuel, Dec. 19, 1994, at 1, available in 1994 WL 6797562. Ultimately, the Kazakh HEU was exempted from the scope of the antidumping regime, subject to limitations relating to use of the feed component identical to those that were applied to Russian HEU. See Agreement Suspending the Antidumping Investigation on Uranium From Kazakhstan, 60 Fed. Reg. 13,699-701 (1995) (DOC Public Notice A-834-802), available in 1995 WL 103402 (amending Kazakh Suspension Agreement making it subject to the condition that “any utility-owned uranium products delivered pursuant to enrichment contracts affected by the purchase of HEU or HEU products will not be resold in the United States, either as natural uranium or as [LEU] produced in excess of the contractually-specified amount.”).
insisted on deferring payment to Russia for the feed component of the HEU until it had itself derived some economic value from the feed component by reselling it, using it as overfeed in USEC’s own enrichment production, or waiting until the completion of the contract.30

B. The Uranium Antidumping Case

At approximately the same time Thomas Neff fathered the idea of the U.S. purchase of Russian HEU for disposition in the civilian economy, the seeds of its frustration were already being sown. On November 8, 1991, a group of 13 U.S. uranium producers and the Oil, Chemical and Atomic Workers Union (OCAW), filed a petition with the Department of Commerce (DOC) asserting that the Soviet Union was dumping uranium into the U.S. market.31 In effect, the petition argued that the Soviet Union was selling uranium in the U.S. market for less than its cost of production,32 thereby unfairly driving U.S. producers out of the market.33 The petitioners’ focus was both on the Soviet Union’s pricing policies and on Soviet excess capacity that was

30. See Falkenrath, supra note 3, at 240 (noting that, because the displaced feed material, in effect, appeared as an additional inventory asset for USEC, advance payment to Russia would amount to a loan if USEC were unable to sell or use this inventory). Falkenrath observes that the creator of the HEU deal, Thomas Neff, had initially assumed that the displaced feed component of Russian HEU would be used by USEC as overfeed to reduce USEC’s SWU requirements. Id. at 241 (citing Thomas L. Neff, Integrating Uranium from Weapons into the Civil Fuel Cycle, 3 SCI. AND GLOBAL SEC. 215-22 (1993)).

31. See Uranium Producers’ Alliance Files Dumping Charges Against Soviets, INSIDE ENERGY, Nov. 18, 1991, at 8, available in 1991 WL 2435585 (reporting that: “In an executive summary of the filing, the coalition said U.S. imports of Soviet uranium increased from less than 200,000 pounds in 1988 to more than 500,000 pounds in 1989. In 1990, imports from the Soviet Union reached more than 6 million pounds and were placed at more than 5.5 million pounds by August of this year. Between 1988 and 1990, the Soviets increased their share of the U.S. market from 0.75% to 17.33% . . . ”).

32. The first element of an antidumping claim is that foreign merchandise is being sold in the United States at “less than fair value.” 19 U.S.C. § 1673 (Supp. 1996). Ordinarily, this component is determined by looking to the exporter’s home market prices. 19 U.S.C. § 1677b(a) (Supp. 1996).

By contrast, in the case of imports from nonmarket economies, as was Russia was considered in this, home market price could be manipulated by state subsidies; accordingly, “fair value” of imports from nonmarket economies looks directly to cost of production. 19 U.S.C. § 1677b(c) (Supp. 1996).

33. The second element of an antidumping claim is “material injury” to a U.S. industry producing a “like” imported merchandise. 19 U.S.C. § 1673 (Supp. 1996). In this case, the material injury, if any, was as much to foreign concerns as to U.S.-owned firms, since eight of the thirteen petitioning uranium producers were wholly or partially owned by foreign firms. See Jeffrey Bialos et al., Trading with Central and Eastern Europe: The Application of the U.S. Unfair Trade Laws to Economies in Transition, INT’L L. PRACTICUM, Autumn 1994, at 69, 77 n.83.
newly targeted for Western export rather than defense production. Such excess capacity would have a suppressive effect on uranium prices worldwide.\(^3\)\(^4\) Despite the intervening collapse of the Soviet Union\(^3\)\(^5\) and litigation concerning the broad scope of the proceeding to apply to uranium in all its forms,\(^3\)\(^6\) the petitioners by October 1992 were on the verge of prevailing.\(^3\)\(^7\) At that point, the DOC negotiated and concluded an agreement with Russia (the Suspension Agree-

34. The petitioners asserted: "In the uranium market today, purchasers generally believe that prices will remain low or decline even further. This belief is supported by the knowledge that the Soviet Union has enormous excess production capacity which it has publicly and explicitly targeted for export to the West at rock bottom prices." See Michael Knapik & Wilson Dizard III, Producers, Union File Antidumping Case Against Imports of Soviet Uranium, NUCLEAR FUEL, Nov. 25, 1991, at 1, available in 1991 WL 2444194 (quoting petitioners’ complaint).

35. On December 25, 1991, the Soviet Union ceased to exist, but the DOC continued its investigation against each of the states recognized by the United States. See Techsnabexport, Ltd. v. United States, 892 F. Supp. 469, 473-74 (Ct. Int’l Trade 1992) (noting that U.S. agencies’ focus is on particular factories where merchandise exported to the United States was produced, rather than political boundaries within which these factories are located). The U.S. Court of International Trade subsequently approved the decision on September 25, 1992. \(\text{Id.}\)

36. Article III of the Suspension Agreement provided that "uranium enriched in U235 or compounds of uranium enriched in U235 in the Russian Federation are covered by this Agreement, regardless of their subsequent modification or blending... [HEU] is within the scope of this investigation, and HEU is covered by this Agreement." See Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation, 57 Fed. Reg. 49,220, 49,235 (1992) (DOC Public Notice A-100-002), available in 1992 WL 312125 [hereinafter Suspension Agreement]. Suspension agreements with Kazakhstan, Kyrgyzstan, Tajikstan, Ukraine, and Uzbekistan were concluded as well. \(\text{Id.}\) For subsequent history of these suspension agreements, see Bialos et al., supra note 33, at 76 n.73.

ment), under which Russia agreed not to export any uranium to the United States unless the U.S. uranium price reached specified levels, and only certain quantities thereafter depending on price levels. The Suspension Agreement also gave Russia a short-term infusion of hard currency by permitting a substantial one-time sale to the Department of Energy (DOE) outside of the Suspension Agreement limits.

During 1993, however, uranium prices failed to reach the price required to permit Russian importation, while U.S. uranium producers continued to suffer the effects of the collapse of the uranium market. The DOC therefore agreed to amend the Suspension Agreement (Amended Suspension Agreement) effective March 11, 1994. In a radical shift in U.S. trade law, the Amended Suspension Agreement provided for a program of “matched” sales under which the DOC would approve specific contracts for the importation of Russian uranium or SWU on two conditions. First, the Russian uranium or SWU had to be jointly supplied with an equal quantity of U.S. uranium or SWU, subject to certain numerical limitations.

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38. Section IV of the Suspension Agreement sets forth complex rules for determining the applicable quota schedule in terms of U.S. market price, based on a weighted average of long-term and spot market prices. Suspension Agreement, supra note 36, at 49,236, art. IV. Under the schedule, Russia's quota would be zero until the U.S. price reached $13 per pound U3O8. See id. at 49,241, app. A.

39. Section IV.L of the Suspension Agreement provides that:
Because the Russian Federation has no long-term pre-existing contracts under which deliveries begin before 1994 and because the [DOE] can consume EUP [enriched uranium product] in a market-neutral manner which releases no feed into the U.S. market that could lead to the suppression or undercutting of price levels of U.S. uranium products, the Russian Federation will be granted a one-time only opportunity to sell to DOE, its contractors, assigns, or U.S. private parties acting in association with DOE or the U.S. Enrichment Corporation, an amount of 4.1 million pounds of U3O8 [uranium oxide, which is the precursor in the gaseous diffusion enrichment process to UF6] equivalent for delivery during the period form the effective date of this Agreement to December 31, 1994.

40. See Bialos et al., supra note 33, at 76.

41. Amendment to the Agreement Suspending the Antidumping Investigation on Ukraine From the Russian Federation, 59 Fed. Reg. 15,373 (1994) (DOC Public Notice A-821-802), available in 1994 WL 107377 (“The parties signed the Amendment recognizing that the Agreement to date had not generated the anticipated increase in the price of U.S.-origin natural uranium that would have permitted renewed sales of Russian uranium under the price-tied quota mechanism nor increased sales of U.S.-origin natural uranium or employment in the U.S. uranium industry.”) [hereinafter Amended Suspension Agreement].

42. See id. at 15,374, annex 1.

43. See Bialos et al., supra note 33, at 76.

44. Specifically, the Amended Suspension Agreement permits what it describes as “joint sales” or “matched sales” of uranium, either in the form of U3O8 or UF6, and SWU.
ond, the price for the Russian-origin uranium had to be less than the price for the U.S.-supplied component of the sale.45

In retrospect, it seems likely that the Russian Federation delayed in concluding the HEU Contract to force the United States to soften its implementation of the antidumping regime through the Amended Suspension Agreement.46 Russia thus linked its trade interests in exporting natural uranium to the United States with its national security interest in reducing its stockpile of weaponsusable nuclear material. This arguably drove the United States to subordinate its trade interests to its nuclear nonproliferation objectives. The matched sales program finally gave Russia additional access to the U.S. market, but the price was a transfer of economic rent from Russian to U.S. producers, rather than to U.S. consumers or taxpayers.47

Amended Suspension Agreement, supra note 41, at 15,374 (Public Notice) and at 15,375 (Amended Suspension Agreement, section IV). Section IV of the Amended Suspension Agreement provides that “[t]o qualify as a matched import . . . ‘Russian-origin’ natural uranium (i.e., U3O8 or UF6) or SWU must be matched with an equal portion of ‘newly-produced’ U.S.-origin natural uranium . . . or SWU . . . .” Id. at 15,374. Section IV defines “Russian-origin” as “natural uranium . . . or SWU which is produced in Russia, and which is exported from Russia for the first time after the effective date of this Amendment.” Id. It defines “newly-produced natural uranium in the form of U3O8” as “uranium produced, on or after the effective date of this Amendment, by conventional mining,” and “newly-produced natural uranium in the form of UF6” as “UF6 containing newly-produced U3O8 . . . .” Id. at 15,375 (section III.K). Similarly, “U.S. origin natural uranium must be mined in the United States, and the U.S.-produced SWU must be or have been performed in the United States, subsequent to the effective date of this Amendment and must be delivered pursuant to a new contract, or a new extension or modification of a contract, to supply the needs of an end-user which are uncommitted as of the date of the Amendment.” Id. section IV.A.

45. Section IV.A provides for annual limits for uranium imports throughout the life of the Suspension Agreement but provides for matched SWU imports only for the first two years of the Amendment. Id. Section IV.C states: “The unit price paid to the U.S. producer for the U.S. component for each sale involving matched imports must be greater than the unit price paid by the end-user for consumption in the United States.” Id. at 15,376.

46. See Elizabeth Martin, A Conversation with Viktor Mikhailov, NUKEM MARKET REPORT, Oct. 1993, at 25 (quoting MINATOM official’s assertion that “[i]f the [anti-dumping] issue is resolved, we will sign the [HEU] agreement . . . .”); see also Falkenrath, supra note 3, at 259 & n.52. The Amended Suspension Agreement was initialed on December 15, 1993. See Amended Suspension Agreement, supra note 41, at 15,374. The HEU Contract was initialed on the same date. See Falkenrath, supra note 3, at 262.

47. The Amended Suspension Agreement provides that the U.S. partner in the matched sale must consent in advance to the matching of its uranium or SWU to Russian-origin uranium or SWU. See Amended Suspension Agreement, supra note 41, at 15,375. Section IV.B provides that:

In the case of SWU, prior to the presentation of the matched sale to the Department for confirmation, the U.S. producer must be informed of all material terms
What ultimately blocked implementation of the matched sales program, however, was that it also may have involved collusion between the U.S. and Russian producers at the expense of foreign natural uranium producers and enrichment service providers. Previously, through an exception for the import of Russian-origin uranium enriched in a third country, the Suspension Agreement had encouraged Russian sales to European enrichers, thereby giving European competitors a cost advantage over U.S. producers. The matched sales of the matched sale to the end-user and must consent to the matching of its SWU in that sale with the imported Russian SWU.

Id. Section IV.C provides that:
In the case of natural uranium, if the U.S. producer is not the contracting party with the end-user, then, prior to the presentation of the matched sale to the Department for confirmation, the U.S. producer must consent to the matching of its uranium in that sale with the imported Russian uranium.

Id. Because the Amended Suspension Agreement provided for a higher price for the U.S.-origin component of every matched sale and gave the U.S. producers a veto on Russian access, U.S. producers were strongly positioned to ensure substantial redistribution of the total price in their favor. See Falkenrath, supra note 3, at 269 n.71 (noting "rent transfer" from Russian to U.S. producers).

The matched sales program also conferred power on the DOC to approve or disapprove specific proposals for matched sales. See Amended Suspension Agreement, supra note 41, at 15,376 (section IV.E) (setting forth criteria for confirmation including, in addition to receipt of certification of the U.S. producer's consent to matching, information on the contract price, quantity, time of delivery information, as well as providing for the DOC's right to "any other information that [DOC], after consultation with MINATOM, determines necessary to confirm that the requirements of this Amendment have been met"). Thus, the DOC was positioned, much like a cartel ringmaster, to ensure that matched sales unfairly favored U.S. producers. Cf. Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 YALE L.J. 209 (1986) (describing Cartel Ringmaster as a technique whereby a horizontal price-fixing agreement is induced by a third party to raise its rivals costs) [hereinafter Krattenmaker & Salop, Anticompetitive Exclusion].

48. The Suspension Agreement's exemption of Russian-origin HEU enriched in a third country had, in effect, driven Russian natural uranium into Europe for enrichment there, and ultimately led to access to the U.S. market in what became known in the trade as "bypass" sales. See Falkenrath, supra note 3, at 260; but see Spetran! Explains Nuclear Fuel Trade, Antidumping Policy on Russian Uranium, NUCLEAR FUEL, Oct. 10, 1994, at 6, available in 1994 WL 2223755 (transcript of remarks by the DOC Deputy Assistant Secretary denying the existence of a mechanism for bypassing the Suspension Agreement since anti-circumvention rules allow the DOC to prevent import in the case of transactions, such as "a partial enrichment transaction overseas," designed solely to circumvent and not for sound economic reasons). Access to low-cost Russian uranium gave USEC's European competitors in effect a supply cost advantage, which compelled USEC to reduce its prices. See Knapiik, Spot Uranium Price in U.S. Moves Up Slightly; USEC Calls for Shutting Down the Bypass Option, supra note 29, at 1, available in 1994 WL 6797562. The article reports USEC President William Timbers comments in a December 13, 1994 letter to Commerce Secretary Ron Brown that:

[the ability of U.S. utilities to buy [Russian] uranium and have it enriched in Europe ... generally translates into a saving of $10 or more per SWU . . . .
program now gave U.S. producers a competitive advantage over other foreign market producers of uranium by giving the U.S. producers access to lower-priced Russian-origin uranium. This encouraged U.S. purchasers to prefer the lower-cost, matched U.S.-Russian sales over other imports, drawing antitrust scrutiny from the U.S. Department of Justice. Moreover, because the matched sales program potentially violated the national treatment standard of GATT and NAFTA,

European competitors [URENCO and COGEMA] have won contracts in excess of $250 million in revenue in which use of the bypass has been a significant factor. In addition, negotiations representing potential revenues of more than $600 million are now under way in competition with European enrichers, all of which are at risk of possible loss to bypass sales.

49. Deputy Assistant Attorney General Diane Wood wrote to the Department of Commerce, articulating antitrust concerns about the matched sales program, in particular the risk that the program would facilitate collusive bidding by natural uranium and SWU suppliers to U.S. consumers. See Bialos et al., supra note 33, at 78 & n.94; (citing Peter Passell, A Deal With Russia On Uranium Draws Protest From U.S. Industry, N.Y. TIMES, June 8, 1994, at A-1 and D-5). Technically, in accordance with the then applicable DOJ antitrust guidelines an “agreement among foreign competitors to restrict output or raise price in response to an antidumping agreement is exempt from the application of the U.S. antitrust law only to the extent that the agreement is reached and carried out in accordance with the suspension agreement provisions of the antidumping law.” U.S. DEP’T OF JUST., ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATION, NOV. 10, 1953 (reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,109 (Nov. 17, 1989); 5 Antitrust & Trade Reg. Rep., (BNA) Spec. Supp., Case 17 (Nov. 17, 1988); but see Bialos et al., supra note 33, at 78 (asserting that “it is arguable that the suspension agreement falls outside the parameters of the suspension provisions of the antidumping law and, therefore, is not exempt from antitrust liability on that basis”).

50. NAFTA provides that the GATT national treatment obligations relating to “any prohibition or restriction on the importation of any good” are “incorporated into and made a part of” NAFTA. See North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 309(1), 107 Stat. 2057, 32 I.L.M. 612 [hereinafter NAFTA]. The GATT national treatment obligation stipulates that:

The products of the territory of any contracting party imported in to the territory of any contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 1867, art. III(4) [hereinafter GATT]. In substance, Canada’s argument was that the “amendment provides to U.S. producers a term or condition of sale for uranium not available to other NAFTA producers of uranium otherwise similarly situated (i.e., it deprives producers of national treatment within the United States).” See Bialos et al., supra note 33, at 78 n.101; see also Dumping: Canada Seeks NAFTA Consultations on U.S.-Russ. Uranium Agreement, 11 Int’l Trade Rep. (BNA) 13 (Mar. 30, 1994) (reporting that in his March 18, 1994 letter to USTR Representative Kantor, Canadian International Trade Minister MacLaren “expressed the view that the amendment is inconsistent with national treatment obligations of the United States under both NAFTA and GATT”); Canada: Canada May Ask for Consultations on Uranium Dispute with United States, 11 Int’l Trade Rep. (BNA) 11 (Mar. 16,
Canada challenged the Amended Suspension Agreement, ultimately persuading the United States to provide assurances that it would not be implemented to deprive Canada of competitive opportunities. The United States did not, at least publicly, seek to defend its policies in terms of the NAFTA and GATT exceptions relating to "the essential security interests" of the United States. The only remaining vehicle for arranging U.S. purchase of Russian uranium became purchase by USEC of Russian HEU as overfeed, bringing the HEU Agreement back to square one and thereby aborting the possibility of

1994) (reporting Canadian official's argument that "the agreement provides an incentive to the user to purchase U.S. uranium and distorts the competitive basis for Canadian sales in the U.S. market").

51. See Canada Seeks NAFTA Consultation on U.S.-Russian Uranium Agreement, 11 Int'l Trade Rep. (BNA) 13 (Mar. 30, 1994); Michael Knapik, Russians Said to Want Higher U.S. Prices; USEC Concludes Deal with Nuclear Electric, NUCLEAR FUEL, Apr. 11, 1994, at 1, available in 1994 WL 2223542 (noting that Australia declined at this stage to challenge the agreement under the GATT because some in the uranium mining industry considered a GATT challenge "premature until the effect of the suspension agreement is known"). One EU official stated that, as producers of enriched uranium as opposed to natural uranium, their "situation is a bit different" from that of Australia and Canada. Id. It may be that EU officials believed that the United States would be more likely to prevail in a challenge based solely on the GATT than under Canada's NAFTA-based challenge. See infra note 209 (discussing differences between GATT and NAFTA national security exceptions).

52. It appears the "State Department has provided the Canadian government with assurances that 'the natural uranium component imported under the [Russian HEU contract] is subject to the restrictions of Section IV.M of the suspension agreement.' On the basis of these assurances, the Canadian government agreed to suspend its NAFTA consultations on uranium without prejudice to its right to reactivate them should circumstances warrant." See GAO REPORT TO CONGRESSIONAL COMMITTEES: URANIUM ENRICHMENT - PROCESS TO PRIVATIZE THE U.S. ENRICHMENT CORPORATION NEEDS TO BE STRENGTHENED, GAO/RCED 95-245, at n.30, available in 1995 WL 596931 [hereinafter GAO REPORT]; see also Michael Knapik, Analysis Expect Rise in Spot U Price, NUCLEAR FUEL, Feb. 27, 1995, at 18, available in 1995 WL 7929456 (reporting exchange of letters between Canadian Ambassador Cretien and Undersecretary of State Davis).

53. See infra text accompanying notes 201-36 for a discussion of GATT and NAFTA security exceptions.

54. The original Suspension Agreement specifically exempted Russian HEU sales to the DOE or its successors under the HEU Agreement. See Suspension Agreement, supra note 36, at 49,237 (section IV.M.1). It also barred, however, the resale of the feed component. Id. at 49,238 (section IV.M.2(2)) (imposing the condition that "any utility-owned uranium products delivered pursuant to enrichment contracts affected by purchase of HEU or HEU products are not resold in the United States, either as natural uranium or as LEU produced in excess of the contractually-specified amount"); see also Falkenrath, supra note 3, at 254 (describing this formula as a DOC attempt to "strike a compromise between the national security interests served by the HEU deal and the commercial interests of the U.S. uranium industry."). The Amended Suspension Agreement thus left USEC with the sole option, as Thomas Neff originally foresaw, of overfeeding the displaced feed component of Russian HEU into USEC's own enrichment operations. Id. at 255.
using the matched sales program to implement the HEU Contract.  

In sum, just as the HEU Agreement could not be implemented without addressing the implications of the Suspension Agreement, neither could the Suspension Agreement be implemented without considering its impact on implementation of the HEU Contract.

C. The U.S. Enrichment Corporation—National Security-Based Privatization

Because USEC was intimately involved in both the HEU Contract and the Suspension Agreement, the interests implicated by its privatization were equally linked to the implementation of the trade protection and nonproliferation policies. During most of the Cold War, the U.S. Government’s gaseous diffusion, enrichment-services capability effectively monopolized the worldwide uranium market. Through the 1970s and 1980s, however, the United States lost this monopoly, particularly to European enrichment operations using the technologically more advanced centrifuge method. This led to con-

55. There is some debate about the precise effect of exchange of letters. See Falkenrath, supra note 3, at 271 & n.77 (noting that, while “the U.S. State Department and USEC take a different view, Canada regards the Davis letter as an official assurance that the U.S. will allow no more Russian-origin uranium—including the feed component of the Russian HEU—to be released on the U.S. market beyond that which is already allowed by the matched sales quota.”). Nonetheless, despite its own questions about the meaning of Section IV.M of the Suspension Agreement, USEC subsequently acknowledged to GAO that it recognized that the agency responsible for its authoritative interpretation, the DOC, “has interpreted the provision as prohibiting the corporation from reselling the Russian natural uranium in the United States.” GAO REPORT, supra note 52, at n.29. The letters appear to be politically-binding only, as they have not been reported to Congress under the Case Act as an international agreement. Telephone Conference with John Zylman, Department of State, IJT (June 28, 1996). The national security significance of the matter is emphasized by the fact that it is rather unusual, if not unprecedented, for the Undersecretary of State responsible for national security issues, rather than the Undersecretary of State responsible for economic affairs, to conclude a settlement of a trade dispute.

56. At the time of the petition, DOE supplied approximately 90% of U.S., and 46% of worldwide, demand for uranium enrichment services. See Falkenrath, supra note 3, at 250 & n.30 (citing Maybe Good News for U.S. Producers, Maybe Not, NUKE MARKET REPORT, May 1992, at 14).

57. Congressman Schaeffer put the point crisply:

The Federal Government has been in the uranium enrichment business since the 1950’s. For most of the time since then, the United States held a virtual monopoly on the production and sale of enriched uranium.

Only since the 1980’s have new competitors, most notably the British, French and Russians entered the market. In this short amount of time, however, the U.S. share of the worldwide uranium market has dropped from its near monopoly to about 50 percent. The United States is the world’s highest-cost supplier of enrichment services. This is not an unexpected result, since the Federal Government runs the uranium enrichment business.
gressional consideration of privatizing DOE’s enrichment operations in an effort to make them more competitive internationally.\textsuperscript{58} Such privatization would benefit the United States not only for commercial reasons,\textsuperscript{59} but also because of the strategic implications of U.S. enrich-

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The antidumping case proceeded on the assumption that Russian centrifuge technology would be at least as threatening to U.S. gaseous diffusion technology as European centrifuge technology. URENCO cost data was used as a surrogate for calculating fair market value, because the DOC took the position that the exporters’ failure to provide cost data made comparisons with URENCO’s centrifuge technology appropriate under best information available analysis. See \textit{Final Determination of Sales at Less than Fair Value} from Ukraine and Tajikistan, \textit{supra} note 47, at 36,640, 36,650-51 (DOC Position on Comment 22). In its summary of the views of interested parties, however, DOC even suggested Russia might be an even greater threat, reporting:

Tenex states that the Department’s EUP factors of production fail to account for the advanced centrifuge technology employed at enrichment plants in the former USSR. Although petitioners argue that the supposedly advanced URENCO technology makes the URENCO plants more productive than Soviet plants, which in turn leads to higher depreciation and finance charges for Soviet enrichment, their claims are unsupported, absurd and have been rejected by the Department in its preliminary [fair market value] calculation. Actually, the Soviet technology enjoys technological and productivity advantages over URENCO centrifuges, suggesting that depreciation and finance charges should be reduced, not increased, from those estimated for the URENCO plant.

\textit{Id.}

On the other hand, it may be that Russian cost advantages were derived from an indirect subsidy through the Russian Federation’s willingness to tolerate inferior safety in a nuclear industry that gave the world Chernobyl. See Mark Hibbs, \textit{Antidumping Case Europe Will Resist Pressure to Follow U.S. Antidumping Suit, NUCLEAR FUEL, May 25, 1992, at 5, available in 1992 WL 2461115 (“Western industry does not know what environmental, labor and investment costs are faced by CIS producers.”)\textsuperscript{1}}. Another factor pushing up Russia’s true costs—perhaps involving a direct subsidy through what is termed “upstream” dumping—might be, according to “one European official,” that “the cost of electricity faced by URENCO is three times more than Russian enrichers pay for power.” \textit{Id.; see also Cong. Budget Off., How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy at xi (1994) [hereinafter CBO STUDY] (below cost pricing of inputs for export products). Compare Falkenrath, \textit{supra} note 3, at 243 n.18 (describing implicit subsidies, including low-cost power, U.S. government conferred upon USEC).}

\textsuperscript{58} As Senator Ford of Kentucky argued, “[W]e must enact these provisions into law in order to keep this business viable. The enterprise now operates in a tangle of bureaucratic red tape as if it is a monopoly—except that it isn’t a monopoly, and hasn’t been a monopoly for 20 years.” See 137 CONG. REC. S. 10066-67 (daily ed. July 16, 1991), reprinted in \textit{Legislative History of Energy Policy Act of 1992} 1305 (1994).

\textsuperscript{59} Senator Ford added:

Our balance of payments would suffer. Perhaps more importantly, we would not have the billions of dollars needed to dismantle and clean up the existing enrichment plants.
ment's commercial viability for U.S. energy independence, a factor of increasing salience in light of 1991 Gulf War over Iraq’s invasion of Kuwait.

The U.S. Government had direct commercial and national security interests in Russia's uranium marketing practices, particularly with respect to the worldwide uranium market and Russia's general post-Cold War nuclear export strategy. Thus, well before the antidumping petition was filed, it was reported that DOE itself was pressuring the DOC to initiate an investigation. Not surprisingly, DOE's interven-

The revenues from the enrichment enterprise will provide a steady source of income that will pay for these cleanup costs. If the business is healthy, the costs of the cleanup will come from revenues. If the business fails, the costs of cleanup will have to come out of the taxpayers' pockets.

60. Senator Ford emphasized: “The consequences of the business failing are serious. We would become dependent on foreign suppliers.” Id. See also House Hearings of Feb. 24, 1995, supra note 57, at 10 (statement of William Timbers) (“America was beginning to lose a critical sector in its domestic energy industry to foreign competitors. The U.S. share of the world market collapsed from 100% to below 50%. The threat of U.S. electric utilities becoming dependent on foreign sources for yet another vital energy service was becoming very real.” Id.).

61. See Senator J. Bennet Johnston, LEGISLATIVE HISTORY OF THE ENERGY POLICY ACT OF 1992, supra note 58, at iii (“Observing the buildup of Operation Desert Shield through October and November 1990, I concluded that the specter of a full-scale war to protect our access to the oil supplies of the Middle East might finally prove to be the catalyst that could unite America behind a rational and effective energy policy.”).

62. See Victor Gilinsky, Russian Swords Into American Plowshares, in CONTROLLING THE INTERNATIONAL TRANSFER OF WEAPONRY AND RELATED TECHNOLOGY 157, 160 (David Carlton et al. eds., 1995) (“[USEC] supplies about 40 percent of the world's enriched uranium. It has every interest in a stable market. At the relevant time, in late 1991, there were already signs of ‘dumping’ (sale at prices below reasonable cost) of uranium by former Soviet republics, so further dumping of enriched uranium was a real and worrying prospect.”). Russia's export strategy extends to nuclear reactors as well. See Colin Woodward, Fighting for the Scraps, 52 BULLETIN OF THE ATOMIC SCIENCES 56, 59 (1996) (noting that “a recent study by the Center for Strategic and International Studies warns that MINATOM is emerging as an aggressive exporter, citing Russian activities in Iran, Cuba and India. Belarus may choose Russia's Soviet-style reactors because they are less expensive than Canada's CANDU-6. Meanwhile, there are concerns that MINATOM will successfully market its plants in China.”). When, for example, Western states through the European Bank for Reconstruction and Development (EBRD) declined to finance the completion of a Russian-model VVER-440 nuclear reactor at Mochovej, Slovakia, for environmental and safety reasons, “Russia and a consortium of Czech banks [offered] to help complete Mochovej at a fraction of the cost.” Id. The combined effect of these activities was surely to strengthen Russia's strategic position in Central and Eastern Europe, as well as its leverage with rogue states, such as Iran, and nuclear threshold states, such as India. See infra text accompanying notes 107-14 (for national security significance of supply relationships).

tion was perceived as an effort to preserve its monopoly position in the United States.\textsuperscript{64} Similarly, whether DOE's uranium enrichment enterprise would be privatized as a normal competitor or as an instrument of national security policy endowed with market power would have implications not only for the transaction value of privatization to the U.S. taxpayer\textsuperscript{65} but also for implementation of the HEU Agreement.

At first glance, it would seem that the USEC privatization agenda, as well as the uranium anti-dumping case, should be subordinated to the national security interest in nonproliferation: that is, the effective implementation of the HEU Agreement.\textsuperscript{66} This conclusion holds if one accepts the false dichotomy between trade and national security for evaluating the competing U.S. interests, thereby treating trade interests as automatically of a lesser order of magnitude than interests defined as national security interests. A broader conception of national security to account fully for the national security interest in market power, which this Article will now develop, might in theory yield a different calculus.

\textsuperscript{2436272} (stating: "DOE officials involved with the uranium enrichment enterprise and their allies in Congress have long complained that the Soviets' selling of low-priced separative work units is harming the department's program, and have been trying to prove that the Soviets are selling SWUs below their cost of producing them, or dumping.").

There was also Congressional pressure on DOC, in the draft National Energy Policy Act that would privatize DOE's enrichment operation, to initiate an investigation. \textit{Id.} (reporting that "Senate Energy Committee ranking Republican Malcolm Wallop of Wyoming attached an amendment to the panel's national energy strategy bill... that would require DOE to investigate whether foreign suppliers are dumping uranium in the U.S. market" and "require an International Trade Commission probe of sales practices of foreign suppliers.").

\textsuperscript{64} Frank Fahrenkopf, former Republican Party National Chairman and counsel to the respondents in the uranium proceeding, observed that DOE involvement in the case is "especially ironic" since "[t]he DOE has a monopoly on U.S. uranium enrichment services, and... has historically, through its action and inaction, directly controlled the domestic mining and milling industry... DOE actually supports this petition, we believe, in a futile attempt to preserve their monopoly, a monopoly which, of course, results in higher costs to U.S. energy consumers." \textit{See} Dizard, \textit{supra} note 57, at 1.

\textsuperscript{65} It could be argued that privatizing USEC as a monopoly would also increase the value capital markets place on the firm and would thereby maximize the likely taxpayer return from privatization. On the other hand, setting aside the question of positive national defense externalities flowing from USEC's market power internationally, whatever increased returns taxpayers might gain from privatization of a monopoly might be outweighed by taxpayers' losses as consumers from supracompetitive prices for electricity generated by utilities purchasing uranium enrichment services.

\textsuperscript{66} \textit{See generally} Falkenrath, \textit{supra} note 3.
To Judge Between the Nations

III. The New National Security—False Conflicts Between Trade and National Security

Briefly, the production of market power is a national security good that, like any other good, will reflect supply and demand parameters. One might think of the demand for market power as a function of perceptions about the international environment. The supply of market power could be treated as a function of the cost of predatory strategies that produce market power, compared to the cost of their next best substitute, international institutions. A rational national security maximizer would face a strategic choice in selecting a balance of unilateral and multilateral means for increasing trade-related national security. Each of these propositions needs to be elaborated. The central idea is that security includes advantages that can derive from market power, and the acquisition of such power can entail the self-conscious use of government regulatory authority and other assets to disturb market outcome, i.e. rent-seeking behavior.67

A. National Power and the Demand for International Rent-Seeking Opportunities

In assessing the balance struck between the trade and non-proliferation interests in the implementation of the HEU Agreement the threshold question is whether market power is a form of national security sought by states. In practice, the economic sources of national power have played a large role in U.S. defense policy,68 as has the need to address the balance between means and ends in the conduct of U.S. defense and foreign policy.69 In recent years, historians

67. The concept of rent-seeking, broadly understood, captures this idea. See Kenneth G. Elzinga, Antitrust Policy and Trade Policy: An Economist's Perspective, 56 Antitrust L.J. 439, 439 (1987) ("A crude definition of rent-seeking is using the power of the state to increase one person's wealth at the expense of another's."). Accordingly, this Article will use this vocabulary to criticize implementation of the HEU Agreement. See Amended Suspension Agreement, supra note 41, 59 Fed. Reg. at 15,375.


have given greater attention both to the role played by economic competition in laying the groundwork for political and military supremacy, and in particular to the role of relative economic rates of growth.\textsuperscript{70} This view takes international economic competition as a precursor to, and perhaps surrogate for, military rivalry. It draws from the received understanding that competition for resources fueled imperialist wars on the periphery of the world economy in the nineteenth century,\textsuperscript{71} as well as from the insight that economic dependency yields political power.\textsuperscript{72} The adversarial approach to economic relationships has also recently matured through the application of the theory of relation-specific assets in private contractual arrangements,\textsuperscript{73} which explains how opportunistic behavior is facilitated.\textsuperscript{74} Theories relating to con-

\textsuperscript{70} See, e.g., Paul Kennedy, The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000 (1987) (employing the concept of “imperial overstretch” to argue that U.S. political and military hegemony in the next century is threatened by the increasing gap between U.S. imperial commitments and the relative decline of its share of world economic output); see also Joseph J. Romm, Defining National Security: The Nonmilitary Aspect 1 (1993) (“Military security has not vanished as a key element of national security, but it has certainly declined in importance relative to the issues of economic, energy, and environmental security.”); Lester Thurow, Head to Head: The Coming Economic Battle Among Japan, Europe, and America (1992) (discussing international economic competition); Sean F. Kanuck, Recent Development: Information Warfare: New Challenges for Public International Law, 37 Harv. Int’l L.J. 272 (1996) (discussing the relationship between the new information infrastructures connecting national and transnational economic activity and national security).

\textsuperscript{71} See, e.g., J.A. Hobson, Imperialism (1965); Vladimir I. Lenin, Imperialism: The Highest Stage of Capitalism, in The Lenin Anthology 204-74 (Robert C. Tucker ed., 1975) (explaining competition among European powers for spheres of influence worldwide as flowing from monopoly capitalism); Fritz Fischer, Germany’s Aims in the First World War 247-80 (1961) (describing German war policy as the continuation of objectives of economic domination of Eastern Europe that preceded and survived the specific conflict with France that gave rise to the First World War).

\textsuperscript{72} See Albert O. Hirschman, National Power and the Structure of Foreign Trade 34-40 (1945) (arguing that Germany pursued foreign trade strategies during the period leading to the Second World War to maximize the dependency of foreign states on German exports and on access to the German markets) [hereinafter National Power].

\textsuperscript{73} See Oliver E. Williamson, The Economic Institutions of Capitalism 53 (1985) (“Transactions that are supported by investments in durable, transaction-specific assets experience lock-in effects, on which account autonomous trading will commonly be supplanted by unified ownership (vertical integration).”). Although Williamson describes this process in the superficially value-neutral language of transaction cost economics, it seems clear that, under his model, relations of contractual equality are transformed into hierarchical modes of economic and social organization. \textit{Id.}

\textsuperscript{74} See Anthony Kronman, Contract Law and the State of Nature, 1 Yale J.L. Econ. Org. 5, 12-24 (1985) (describing various methods to overcome contractual insecurity). Kronman argues that hostage-taking gives the hostage taker no real contractual security, because the hostage giver knows the hostage is itself of no value to the hostage taker, \textit{Id.} at
tractual opportunism have been employed to understand similar relationships between national economies and corresponding opportunistic behavior by competing states. Yet the theoretical foundations for this emerging conventional wisdom fly in the face of the modern economic theory of comparative advantage, which posits that nations are not really in competition with one another in economic matters.

One way of understanding the debate between these two views is in terms of modern game theory, which might serve to highlight the circumstances under which trade competition might usefully be stud-

12-15, and that collateral gives the collateral-giver no real contractual security, because the collateral-taker can take the collateral as a substitute for performance without suffering a cost for its own nonperformance. Id. at 15-18. Thus, he seems to favor "hands-tying," such as a relation-specific investment, under which the party whose hands are tied automatically suffers a loss conditioned on its own nonperformance and thus is efficiently deterred from breach without giving the other party the power to opportunistically gain from breach. Id. at 18-20. Union, of course, is the only possible solution for the case where more than mere transactional insecurity is at stake and a party abandons "an earlier commitment when he thinks it is in his own self-interest to do so." Id. at 20. Hands-tying thus cannot eliminate opportunistic behavior, and its only solution, union, may well amount to absorption.

75. See Beth V. Yarbrough & Robert M. Yarbrough, Cooperation and Governance in International Trade: The Strategic Organizational Approach 56 (1992) (pointing to the possibility of "investment in relation-specific assets for trade that can be held up by an opportunistic trading partner"); David A. Lake, Anarchy, Hierarchy, and the Variety of International Relations, 50 Int'l Org. 1, 14 (1996) ("the more specific the asset, the greater the state's opportunity costs and thus the greater the costs inflicted by the partner's opportunistic behavior"). Lake has employed this transaction costs model of relational contracting to explain the preference of the United States for alliance-based security and the former Soviet Union for empire—that is, between indirect and direct control mechanisms, or between anarchy and hierarchy—through an analogy with a firm's choice between contract and integration in structuring its relationship with another firm in the joint production of a product. Id. at 2 (theorizing that "the state is a firm producing security"); cf. Kronman, supra note 74, at 20 (explaining "union" as a method of reducing contractual insecurity). The equilibrium solution of treaty versus union, according to Lake, is an intersection of curves expressing the costs of governance, which increases with increasing hierarchy, and the costs of opportunism (that is, the costs to the dominant state in a bilateral relationship that the other state will act in a way that undermines the joint defense effort), which decrease with increasing hierarchy. See Lake, supra, at 16 (employing a graphical model). A dominant state might decrease the costs flowing to it from opportunistic conduct by the dominated state and, mutatis mutandis, increase the costs to the dominated state of opportunistic conduct by the dominating state by restructuring its trading and investment patterns so as to increase the degree to which the value of assets of the dominated state depend on its relationship with the dominated state and decreasing the degree to which the value of assets of the dominating state depend on its relationship with the dominated state. See generally HirsChman, National Power, supra note 72.

76. See, e.g., Paul Krugman, Pop Internationalism (1996) (series of essays which argue, inter alia, that states gain from trade regardless of whether one trader gains more than the other); Paul Krugman, Competitiveness: A Dangerous Obsession, 73 Foreign Aff. 28-44 (1994).
ied, in a variant of Clausewitz's unforgettable expression, as power politics by other means.\textsuperscript{77} The central insight in game theory is that noncooperative behavior can be explained by evaluating the incentives players face based on uncertainty about how other players in a game will act.\textsuperscript{78} In assessing whether economic relationships should be

\textsuperscript{77} See Karl Von Clausewitz, On War xxix (O.J. Matthijs Jolles trans., 1943).

\textsuperscript{78} See generally Thomas Schelling, The Strategy of Conflict (1960); for a recent application of game theory to a range of legal problems, see Douglas G. Baird et al., Game Theory and the Law (1994) [hereinafter Baird et al., Game Theory]. As Kenneth Abbott argues, game theory yields a distinction between regimes that relatively favor defection and regimes that relatively favor cooperation—that is, between those characterized by "offensive" defection, under which expected payoffs induce a player to seek an outcome that is best for itself through driving the other player to its worst outcome; and those characterized by "defensive" defection, under which expected payoffs induce the defecting player only to seek to avoid its own worst outcome. See Kenneth W. Abbott, "Trust But Verify": The Production of Information in Arms Control Treaties and Other International Agreement, 26 Cornell Int'l L.J. 1, 8 (1993). The distinction here seems akin to the one Kronman draws between motives for defection that flow from the fear that the other side will breach first and those that flow from a unilateral judgment that gains can be secured at least in part by a beggar-thy-neighbor strategy. Kronman, supra note 74, at 20.


A related, and perhaps even more important, factor in discounting payoffs may well be whether the game is perceived to be a single- or iterative-play, since in the latter case experimental evidence supports the conclusion that strategies can be developed that induce long-term cooperation despite overwhelming incentives to defect. See Robert Axelrod, The Evolution of Cooperation 27-54 (1984) (describing the superiority on average of the tit-for-tat strategy, under which a player initially cooperates and thereafter rewards cooperation with cooperation and defection with defection). On the other hand, because enforcement mechanisms diminish uncertainty, it is now widely argued that international regimes can play a role in changing these perceptions by raising the costs of defection and raising the gains from cooperation. See Oye, supra, at 11; see generally International Regimes (Stephen D. Krasner ed., 1983). International regimes are not panaceas, however, and the prospects for cooperation emerging from international anarchy are thought to depend on the number of actors involved, their mutuality of interest, and their perception of the relevant time horizon. See Robert Axelrod & Robert O. Keohane, Achieving Cooperation Under Anarchy: Strategies and Institutions, in Cooperation Under Anarchy, supra, 226, 253. Game theory, according to Axelrod and Keohane, employs an "upward-looking" methodology, under which the behavior of individual actors is modeled. Id. at 252. Keohane has argued that this methodology can be combined with a "downward-looking" approach focusing on "public goods and market failure to develop a functional theory of international regimes." Id. at 23 n. 45 (citing Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984) (advancing a public goods justification for hegemony)). Cf. Lea Brilmayer, American Hegemony (1994) (developing and analyzing the limits of a public goods theory justifying the power the U.S. exercises in the international system). Thus, game theory's key insight is that perception of payoffs and game structure are the determinants of strategic choice.
treated as national security problems, a critical debate in the new game-theoretic approach to the study of international regimes is whether the payoffs and game structure of economic regimes are comparable to those of security regimes.\textsuperscript{79} It is usually argued that security regimes suffer from greater barriers to cooperation, largely because of the inability to distinguish between offensive and defensive motivations in security regimes and the high costs of cooperation in the face of defection even if the other party defects only for defensive reasons.\textsuperscript{80} But this is entirely an empirical observation, which various factors could affect. For example, the precise value of payoffs can be interpreted in two ways, either in absolute terms or in relative terms. Thus, a perception that relative gains matter may well increase payoff

\textsuperscript{79} See Charles Lipson, \textit{International Cooperation in Economic and Security Affairs}, 37 World Pol. 1, 2 (1984) (attempting to "construct a theoretically principled account of why significantly different institutional arrangements are associated with international economic and security issues") (emphasis in original) [hereinafter Lipson, International Cooperation]. Lipson nonetheless recognizes that there may be a strong connection between national military power and economic power. See Charles Lipson, \textit{The Transformation of Trade: Sources and Effects of Regime Change}, in \textit{International Regimes}, supra note 78, at 233, 270.

Others, by contrast, believe that even full compliance with GATT during the post-war period would have facilitated the exercise of political power drawn from relation-specific assets. See Yarbrough & Yarbrough, supra note 75. Accordingly, some commentators have focused on the role of certain GATT exceptions, principally the escape clause in avoiding opportunism. See Alan O. Sykes, \textit{Protectionism as A “Safeguard”: A Positive Analysis of the GATT Escape Clause” with Normative Speculations}, 58 U. Chi. L. Rev. 255, 273 (1991) (arguing that the escape clause is explainable under public choice theory, because "greater protection would arise ex post through direct legislation to protect the injured industry") [hereinafter Sykes, Escape Clause]. Similarly, efficient breach of international agreements could lessen the threat of opportunism in economic affairs. See Richard Morrison, \textit{Efficient Breach of International Agreements}, 23 Denv. J. Int’l L. & Pol’y 1 (1994).

\textsuperscript{80} See Robert Jervis, \textit{Security Regimes}, in \textit{International Regimes}, supra note 78, 173, 174-76. As Charles Lipson argues, "The luxury of time is especially important." Lipson, \textit{International Cooperation}, supra note 79, at 17. In game-theoretic terms, he argues that the key issues are "how much future payoffs are discounted" and "the relative costliness of the sucker's payoff in any single game, compared to rewards for mutual cooperation and the temptations to defect." Id. at 7. Yet Lipson adds: "The crucial differences appear to lie in the costs of betrayal, the difficulties of monitoring, and the tendency to comprehend security issues as strictly competitive struggles." Id. at 18 (emphasis added). Thus, like Axelrod and Keohane, who emphasize the importance of perception, see Axelrod & Keohane, supra note 78, at 247-48, Lipson ultimately focuses on the psychological component to world politics. Cf. Alexander Wendt, \textit{Constructing International Politics}, International Security, Summer 1995, at 71, 81 (advancing a constructivist approach to international relations theory under which, in contrast to the realist focus on barriers to international cooperation, the question is "how processes of interaction produce and reproduce the social structures—cooperative or conflictual—that shape actors' identities and interests and the significance of their material contexts").
ratios in favor of defection and thus undermine prospects for cooperation.\textsuperscript{81} There seems to be some empirical support that relative gains do matter significantly to states even on economic issues.\textsuperscript{82} In addition, time horizon—the so-called "shadow of the future"—can play a major role in the perception of payoffs, for a long time horizon may permit the discounting of gains from future defection or the losses from future cooperation in the face of defection.\textsuperscript{83} Thus, if time horizons are compressed so that the economic relations are perceived under the single-play game model, diminished cooperation can be expected even in economic games.\textsuperscript{84} Even if economic relationships could be viewed as iterative games with long time horizons, a focus on relative gains could so dramatically change perceived future losses in

\textsuperscript{81} Compare Joseph M. Grieco, \textit{Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism}, 42 Int'l Org. 485, 487 (1988) ("Neoliberal[s] . . . argues that states seek to maximize their individual absolute gains and are indifferent to the gains achieved by others. . . . Realists understand that states seek absolute gains and worry about compliance. However, realists find that states are positional, not atomistic, in character, and therefore realists argue that, in addition to concerns about cheating, states in cooperative arrangements also worry that their partners might gain more from cooperation than they do.") with Duncan Snidal, \textit{International Cooperation Among Relative Gains Maximizers}, 35 Int'l Stud. Q. 387, 388 (1991) ("Relative gains considerations are shown to matter only for issues involving small numbers of states. The impact of relative gains drops off quickly with more than two states and is virtually irrelevant for issues involving a large number of actors. In addition, the transition to cooperation is not appreciably more difficult under relative gains than under absolute gains."). Snidal observes that the superficial plausibility of the relative gains hypothesis makes it a central part of the "new mercantilism," under which "the contemporary international economy provides incentives for states to interfere with free trade in order to capture market share and thereby a lasting advantage in key industries." \textit{Id.} at 389 (citing Robert Gilpin, \textit{U.S. Power and the Multinational Corporation} (1975), and Paul Krugman, \textit{Strategic Trade Policy and the New International Economics} (1986)).


\textsuperscript{83} See generally Baird, et al., \textit{Game Theory}, supra note 78.

\textsuperscript{84} See Lipson, \textit{International Cooperation}, supra note 79, at 17 n.49 (conceding that there are exceptions in economic affairs where time horizons are short, and giving the U.S. suspension of gold convertibility on August 1, 1971 as an example). The phenomenon is known in game theory as the problem of unraveling, because "the sequence of transactions unravels from the last one back to the first. . . . In order to avoid the unraveling problem, the last period must not be known in advance. . . ." Beth Yarbrough and Robert M. Yarbrough, \textit{Reciprocity, Bilateralism, and Economic 'Hostages': Self-Enforcing Agreements in International Trade}, 30 Int'l Stud. Q. 7, 13 (1986); see generally Baird et al., \textit{Game Theory}, supra note 78. Thus, dividing a transaction into an indeterminate number of single-play games has the effect of making it more difficult to calculate the end point of the game and thus diminishes the risk of unraveling.
relation to future gains that no plausible discounting of future payoffs could make the risk of future losses seem like anything less than a present catastrophe. In that case, too, economic relations might be better modeled as security games, thus strengthening the argument for considering trade as a national security issue.

Game theory thus provides a basis for treating analysis of cooperative and noncooperative trade policies as species of cooperative and noncooperative strategy in national security regimes. It does not, however, specify what trade strategies might be seen as offensive or defensive defections or how to distinguish the two. To develop a model for defining defection in trade, one might turn to national security analysts, who have argued that, given the opportunities and incentives for opportunistic behavior in economic competition for national power, aggressive state behavior in international economic relations can also be understood from the standpoint of the theory of market power. This model predicts that players will believe that they can improve their situations relative to others by acquiring and

85. Oye observes that, even in iterated games, "the magnitude of differences among payoffs within a given class of games can be an important determinant of cooperation." Oye, supra note 78, at 9 (emphasis in original). Oye continues:

The more substantial the gains from mutual cooperation . . . and the less substantial the gains from unilateral defection . . . , the greater the likelihood of cooperation. In iterated situations, the magnitude of the difference between [mutual cooperation and mutual defection] and [unilateral defection] in present and future rounds of play affects the likelihood of cooperation in the present.

Id.

86. See, e.g., Joanne Gowa, Allies, Adversaries, and International Trade 6 (1994) ("power politics is the inexorable element of any agreement to open international markets, because of the security externalities that trade produces"). Theodore Moran characterizes Gowa's argument as follows:

Building on a rational-choice theory of alliance formation, [Gowa] shows that tariff games between allies differ systematically from those played between actual or potential adversaries . . . . A utility-maximizing state in a potentially hostile environment will internalize not only private but also social returns in calculating the payoff from trade with allies and adversaries. Power considerations predict, therefore, that trade liberalization will take place highly selectively, to the extent that states can manipulate imperfections in international markets—with greater openness toward allies and lesser openness toward those with whom political relationships are more problematic.

Theodore H. Moran, Grand Strategy: the Pursuit of Power and the Pursuit of Plenty, 50 INT'L Org. 175, 181-82 (1996) (reviewing Gowa, supra) [hereinafter Moran, Grand Strategy]. Moran argues that Gowa's approach, if anything, understates the case, since "avoiding excessive dependence on potential adversaries (a motive Gowa says she avoids since it has been dealt with by other writers) offers a strong complementary rationale for selective liberalization." Id. at 184.
then exercising market power—either to exploit advantages for themselves, or to deny others the same opportunity.

Clearly, payoffs from market power will vary by sector. Accordingly, national economic strategy theorists might borrow a criterion from the new theory of strategic trade—which purports to modify the neoclassical theory of comparative advantage under which tariffs are counterproductive—to postulate that when a state has market power in a particular product market it can change relative prices and thus its terms of trade vis-à-vis others by employing a so-called “optimal tariff.”

The theory defines as “strategic” those sectors of the economy where economic rents are available or positive externalities are produced, that is, respectively, where “labor and capital either directly receive a higher return than they could elsewhere or generate special benefits for the rest of the economy.” Increased national security represents one such kind of special benefit, or positive externality, that justifies a strategic trade policy.

87. Duncan Snidal describes a commonly used “analogy between states in the international political system and firms in an oligopolistic market (and, implicitly, the game-theoretic structure of the market).” Snidal, supra note 78, 25, 31. Snidal notes that use of the analogy rests on “a number of postulated empirical correspondences, including:

- economic marketplace—international system
- firm—nation-state
- firms maximize profits—states maximize survival
- oligopolists —great powers
- market concentration—concentration of power
- price wars—military wars

Id. at 31-32.


89. Compare ALAN V. DEARDORFF & ROBERT M. STERN, CURRENT ISSUES IN U.S. TRADE POLICIES: AN OVERVIEW, U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY 37-38 (Robert Stern ed., 1987) (arguing that, “like other forms of exploitative intervention . . . the optimal tariff argument is likely to find countries in the classic position of the Prisoners’ Dilemma. That is, each country has available a policy that will benefit itself at the expense of others, but, if all countries simultaneously pursue that policy, all are likely to lose . . .”) with Paul R. Krugman, Is Free Trade Passé?, J. ECON. PERSP., Fall 1987, at 131-44 (showing in game-theoretic payoff matrix that the credible threat of a subsidy for a domestic producer can deter future entry by a foreign competitor so that “a government, by supporting its firms in international competition, can raise national welfare at another country’s expense.”).

90. See Paul R. Krugman, New Thinking about Trade Policy, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 15 (Paul R. Krugman ed., 1986). Krugman points to “economies of scale, advantages of experience, and innovation” as indicators of why it might be possible to “earn significantly higher returns in some industries than in others.” Id. Cf. infra note 169 (discussing scale economies and positive externalities in uranium enrichment services).
B. International Structure and Supply of Rent-Seeking Opportunities

As Part V of this Article will later demonstrate, both the Executive Branch and the Congress perceived the positive national security externalities of market power in the uranium enrichment sector to be significant.\(^1\) Part IV will demonstrate, however, that the Executive Branch is institutionally biased towards demanding more national security than the Congress, even though Congress' demand may be more than adequate.\(^2\) Setting aside these inter-branch differences and assuming a unitary demand for national security, however, any explanation of the U.S. policymaking process would need to consider the supply of opportunities for maximizing U.S. market power and denying other states market power in the uranium enrichment sector.

It seems plausible to suppose that international institutional structure would play a critical role in the incentives for states to adopt policies designed to create market power. This is because it is likely that exercise of market power is facilitated by the prevalence of bilateral relationships in the interaction of weaker states with a more powerful state, as individually weak states are unable to impose significant costs on strong states in response to the strong states' exercise of market power.\(^3\) Thus, the multilateral approach to international trade negotiations codified in the General Agreement on Tariffs and Trade (GATT) after the Second World War may well be understood as an effort to reduce opportunities for the bilateral exercise of market power by great powers.\(^4\) Albert Hirschman, drawing lessons from German economic imperialism before the Second World War and in

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\(^1\) See infra text accompanying notes 153-201.

\(^2\) See infra text accompanying notes 115-52.

\(^3\) See John Conybeare, Trade Wars: A Comparative Study of Anglo-Hanse, Franco-Italian, and Hawley-Smoot Conflicts, in Cooperation Under Anarchy, supra note 78, at 147, 162 ("The strong power then moved quickly to increase the costs of mutual defection for the small power, mainly by punitive tariff surcharges.") [hereinafter Conybeare, Trade Wars].

\(^4\) GATT, 61 Stat. at A3, 55 U.N.T.S at 1867. Most-Favored-Nation (MFN) treatment emerged out of bilateral treaty practice in the 19th century, first in the Cobden-Chevalier treaty of 1860. See Lipson, International Cooperation, supra note 79, at 241-42. It was employed by the United States before the imposition of the Smoot-Hawley tariff to free ride on tariff advantages U.S. treaty partners had given third parties, with "the predictable result . . . that American tariffs remained high while the U.S. benefited from tariff reductions by the rest of the world." See Conybeare, Trade Wars, supra note 93, at 164-65 ("This situation was possible in part because of the publicness of MFN systems and in part because of the economic power of the United States.") Rival powers responded to U.S. abuse of its market power in closing its market through high tariffs and free riding on others' open markets by insisting on "conditional" MFN, whereby "benefits would be ex-
anticipation of the Bretton Woods conference that would create the International Monetary Fund and the World Bank, asked: "should we rather endeavor to build a new framework of international relations in which this use of foreign trade for purposes of national power would encounter more difficulties than hitherto?"95

How far the GATT system succeeded in institutionalizing economic cooperation through multilateral decision-making is an open question, however. Admittedly, the GATT system itself never completely eradicated bilateralism and the advantages it gives to more powerful states.96 Moreover, the multilateral characteristics of the GATT negotiating system dissipated over time; in particular, the rise of non-public side agreements, such as voluntary restraint agreements, signaled the weakening of the system.97
On the other hand, the recent revival of multilateralism in the GATT through the new dispute settlement mechanism of the World Trade Organization (WTO), together with new rules against voluntary restraint agreements, might suggest a strengthened world trade system capable of authoritatively resolving disputes. And just as international institutionalization in the early post-war period has been explained in terms of the rise of American hegemony, one might explain the emergence of more effective international institutions as the corollary of the revival of American hegemony after the end of the Cold War. Such explanations are based on the premise that international free trade is a public good that can be supplied effectively only by an international hegemon.

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98. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Final Act, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, arts. 16.4, 17.14, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUNDD vol. 1 (1994), 33 I.L.M. 1125, 1226 (providing, contrary to earlier GATT practice, for the automatic adoption of Panel and new Appellate Body Reports absent consensus of the WTO to the contrary) [hereinafter WTO Dispute Settlement Understanding]; see also Agreement on Safeguards, Apr. 15, 1994, art. 11, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Results of the Uruguay Round of Multilateral Trade Negotiations 315 (GATT Secretariat ed. 1994) (providing for prohibition or phasing-out governmental VRAs and restraints on equivalent nongovernmental measures) [hereinafter Agreement on Safeguards].

99. See KEOHANE, supra note 97, at 135-82 (explaining the emergence of major international institutions resulting from the United States interest in stabilizing key features of the international order).

100. Arguably, hegemonic systems are more stable than international cooperation in securing gains for the same reasons that monopoly is more stable than oligopoly. See Lipson, International Cooperation, supra note 79, at 20 n.59 ("The reason is that a hegemon alone may find it worthwhile to supply the collective good, bypassing the difficulties of forming and sustaining a group of joint providers."). Cf. PHILIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 279 (4th ed. 1983) ("Larger numbers increase the likelihood of disagreements, the variety of differentiated products, the difficulty of detecting cheating by an individual firm and of enforcing a coordinated response, and the temptation to pursue an independent profit-maximizing course in the hope of increasing their market share under the price umbrella of the coordinating group.").

Arguably, however, coordination problems among a group of hegemonic powers may well lead to consolidation or union under the banner of a single monopolist. Cf. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 286 (4th ed. 1992) ("Despite the instability of cartels, non-enforcement of cartel agreements is unlikely to be an adequate remedy. By reducing the efficacy of price fixing by contract, it creates an incentive for the members of the cartel to consolidate into a single firm. The monopoly price can then be enforced without reliance on contracts.") However, in addition to the moral grounds for skepticism
Yet, like Mark Twain’s death, reports of the death of bilateralism may well be greatly exaggerated. Despite appearances, it seems doubtful that American hegemony actually has made a comeback—even if it ever actually declined—thus undercutting one explanation for an apparent renewal of multilateralism. Nonetheless, it might be that international free trade can be produced without hegemony, because it is not a public good but rather a case of joint production. If so, free trade would be less likely to be underproduced by the global economy than would a public good. It may also be that the interna-

of a public goods argument for hegemony, see Lea Brilmayer, American Hegemony 11 (1994), it may be that “collective goods are rare internationally and certainly do not include all cases of cooperation for joint benefit (since, in many cases, non-cooperators can be excluded).” See Lipson, International Cooperation, supra note 79, at 20 n.59 (1984); John Conybeare, Public Goods, Prisoners’ Dilemmas and the International Political Economy, Int’l Stud. Q., Mar. 1984, at 5, 20 (arguing that international free trade is not a public goods game with payoffs favoring cooperation but rather a Prisoners’ Dilemma game in which a hegemon, contrary to the predictions of hegemonic stability theory, does not have a first-best policy of supporting international free trade) [hereinafter Conybeare, Public Goods]; and Joanne Gowa, Rational Hegemons, Excludable Groups, and Small Groups: An Epitaph for Hegemonic Stability Theory?, 41 World Pol. 307, 323 (1989) (hegemonic stability theory, in predicting free trade, fails to account for the fact that “national power is engaged in free trade agreements because such agreements inevitably produce security externalities” that “arise from its inevitable jointness in production,” so that “free trade can disrupt the pre-existing balance of power among the contracting states”) [hereinafter Gowa, Rational Hegemons]. See also infra text accompanying notes 127-35 (discussing excludability from national defense connecting with public good theory argument for production of national security).

101. See, e.g., Richard Rosecrance, The Rise of the Virtual State, 75 Foreign Aff. 45 (1996) (“Developed states are putting aside military, political, and territorial ambitions as they struggle not for cultural dominance but for a greater share of world output. Countries are not uniting as civilizations and girding for conflict with one another. Instead, they are downsizing—in function if not in geographic form. Today and for the foreseeable future, the only international civilization worthy of the name is the governing economic culture of the world market.”). Although Rosecrance’s views are not new it may be that he is the author of an idea whose time has finally come. See generally Richard Rosecrance, The Rise of the Trading State: Commerce and Conquest in the Modern World (1986).

102. See Bruce Russett, The Mysterious Case of Vanishing Hegemony; or, Is Mark Twain Really Dead?, 39 Int’l Org. 207, 208-14 (1985) (questioning the conclusion that U.S. hegemony has declined as based on insufficient analysis of the post-World War II baseline for power and the relevant constituents or indicators of national power).

103. Whether free trade is a public good is not beyond dispute. Some consider it an example of “team production,” which the economic theory of organization explains as a case where “the group can produce more than the sum of the outputs of the individual members.” See Beth Yarbrough & Robert M. Yarbrough, Free Trade, Hegemony, and the Theory of Agency, 38 Kyklos 348, 350 (1985). There seem to be two objections to considering international free trade a public good: first, it is not clear that “trade liberalization embodies the two essential characteristics of public goods, in other words non-rivalry in consumption and non-excludability”; second, the hegemon who would provide the public
tional regime favoring free trade that was created by hegemony can survive hegemony's demise through the institutionalization of the hegemon's alleged preference for free trade. But, finally, and most ominously, it may even be that a hegemon is necessary, the United States can no longer play that role, and the resurgence of multilateralism under the GATT is at best a mirage. The rise of regional trad-

good may have a first-best policy in which it "is much more likely than a small country to gain from trade restrictions." Id. at 349; see also Deardorff & Stern, supra note 89, at 21-22 (optimal tariff theory); see also Conybeare, Public Goods, supra note 100, at 6 (the benefits of free trade are excludable, since countries may, individually or collectively, penalize a country that attempts to impose a nationally advantageous tariff at the expense of the international community); cf. Gowa, Rational Hegemons, supra note 100, at 315 (arguing that free trade may be excludable but noting that, "[i]f, however, the policing of a cooperative agreement is costly, enforcement itself becomes a public good") (citation omitted). If international free trade is not, in economic terms, a public good, then it would seem that free trade would not require a hegemonic provider and the hegemon would not necessarily provide it. See Yarbrough & Yarbrough, supra at 349.

104. See Keohane, supra note 97, at 215 (the theory of hegemonic stability "is inadequate because of its failure to take into account the role of international institutions, such as international economic regimes, in fostering and shaping patterns of cooperation. More cooperation has persisted than the theory of hegemonic stability would predict"). Keohane adds: "The theory of hegemonic stability predicts substantial erosion of the trade regime. . . . Trade wars have not taken place, despite economic distress. On the contrary, what we see are intensive efforts at cooperation." Id. at 213.

105. The United States and Japan continue to address many of their trade disputes, particularly in key sectors, through bilateral, rather than plurilateral, negotiations. See, e.g., Automotive Agreement and Supporting Documents, Aug. 23, 1995, U.S.-Japan, reprinted in 34 I.L.M. 1482 (from the text provided by the Office of the U.S. Trade Representative); but see Paul Blustein, U.S. Shelving Threat of Sanctions on Japan: Kodak Case to be Taken to the WTO Instead, Wash. Post, June 12, 1996, at F1 (reporting that United States has decided to take its complaint against Japan—namely, concerning Japan's domestic policy of under-enforcing anti-competition law and instead favoring vertical restrictions in supplier-distributor arrangements in the camera market—to the WTO rather than make it the subject of unilateral trade sanctions under Section 301 of the U.S. Trade Act). The Kodak case is particularly noteworthy because "Kodak has long opposed taking the WTO route, on the grounds that the organization's rules probably don't cover such complex practices, and its officials have publicly urged the trade representative's office to wrest concessions from the Japanese by brandishing Section 301 of U.S. trade law," although Kodak "has recently discovered new evidence of the Japanese government in limiting imported film . . . that . . . could make a WTO case more compelling." See Blustein, supra, at F7. The strength of the U.S. commitment to dispute resolution remains in doubt, however. Compare American Trade Policy: War Cancelled, Economist, June 22, 1996, at 72-73 (questioning genuineness of U.S. commitment to WTO dispute resolution mechanism), with Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. Int'l L.J. 301, 316 (1990) (observing that post-Cold War amendments to the Trade Act suggest "the United States will respect the outcome of dispute resolution if it concludes within an eighteen month period") [hereinafter Sykes, Mandatory Retaliation]; and Articles 12.9, 16.4, 17.5, and 17.14 of the WTO Dispute Settlement Understanding, supra note 98 (providing that: "In no case should the period from the establishment of the panel to the circulation of the report to the
ing blocs, covering an ever larger percentage of world trade, might well suggest that the bilateral rent-seeking model is a better picture of world trade, notwithstanding the new WTO.\textsuperscript{106}

\textbf{C. Strategic Choice}

If multilateralism’s revival is genuine, it might be that the current international distribution of power and institutional arrangements governing trade are likely to produce an optimal amount of free trade. Yet, certain sectors of the global economy that are closely tied to the production of strategically-significant goods and services may still be better understood through power-maximizing models.\textsuperscript{107} Thus, strategic choice cannot be avoided even assuming the triumph in general of multilateralism.

As analysts of strategic trade theory have observed, it is possible to identify appropriate sectors as targets for such policies.\textsuperscript{108} One suggested targeting criterion might be whether the sector at issue involves

\begin{itemize}
\item Members exceed nine months”;
\item “[w]ithin 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a [Dispute Settlement Body] meeting unless a party to the dispute formally notifies the [Dispute Settlement Body] of its decision to appeal . . . ;” that “In no case shall the [Appellate Body] proceedings exceed 90 days”; and, finally, that “[a]n Appellate Body report shall be adopted by the [Dispute Settlement Body] and unconditionally accepted by the parties to the dispute unless the [Dispute Settlement Body] decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.”).
\item See, e.g., NAFTA, supra note 50, 107 Stat. at 2057, 32 I.L.M. at 612; see Paul R. Krugman, \textit{Is Bilateralism Bad?}, in \textit{International Trade and Trade Policy} 9 (Elhanan Helpman & Assaf Razia eds., 1991) (arguing that regional trade arrangements may exploit their market power positions in various sectors to employ optimal tariff strategy); see also Moran, \textit{Grand Strategy}, supra note 86, at 197 (describing rules of origin provisions of regional trading blocs as indicative of neo-mercantilist grand strategy).
\item See Gowa, \textit{Allies, Adversaries, and International Trade}, supra note 86, at 29 (“[D]ebates about hegemonic theory have neglected what may be the most durable barrier to free trade among the constituent powers of any given international political system: that is, the primacy of concerns about security that characterize life in an anarchic world.”) \textsuperscript{quote} in Moran, \textit{Grand Strategy}, supra note 86, at 183; see also Gowa, \textit{Rational Hegemons}, supra note 100, at 323 (“the anarchic international system . . . makes two facts common knowledge among states: (1) each seeks to exploit the wealth of others to enhance its own power, and (2) trade is instrumental to this end”) \textsuperscript{quote}.
\item See Barbara J. Spencer, \textit{What Should Trade Policy Target?}, in \textit{Strategic Trade Policy and the New International Economics} 69-89 (1986) (discussing criteria for selecting which industries to assist through rent-seeking subsidies) \textsuperscript{hereinafter Strategic Trade Policy}.\end{itemize}
free trade with allies or adversaries,\textsuperscript{109} so that market power strategies could be calculated to strengthen allies and weaken adversaries. That approach, however, would seem to attend inadequately to the impermanence of such relationships.\textsuperscript{110} The acquisition of market power in strategic sectors with positive national defense externalities, rather than only against particular adversaries, is arguably a more persuasive national power enhancing strategy.\textsuperscript{111}

It should be noted, however, that there is no one “right” power-maximizing strategy.\textsuperscript{112} Thus, “the question for grand strategy as it pertains to high-tech industries is whether to permit consolidation and exploitation of national quasi-monopolies or to deliberately encourage diffusion of monopoly power across borders.”\textsuperscript{113} Ultimately,

\begin{itemize}
\item \textsuperscript{109} See Gowa, Allies, Adversaries, and International Trade, supra note 86, at 6 (“Trade with an adversary produces a security diseconomy; trade with an ally produces a positive externality. In either case, agreements to open international markets create a divergence between the private and social costs of trade.”).
\item \textsuperscript{110} See Henry John Temple, Viscount Palmerston, “We have no eternal allies and we have no perpetual enemies. Our interests are eternal and perpetual, and these interests it is our duty to follow.” Speech on the Polish Question in the House of Commons (1845), reprinted in Bartlett’s Familiar Quotations 454 ¶ 12 (15th ed. 1980).
\item \textsuperscript{111} As Moran argues:

[\text{In the case of high-technology strategic trade industries whose economies of scale are greater than national markets, some countries (or regions) are likely to be left without players of their own, at the mercy of external monopolists. The potential threat this poses to national security, and the potential vulnerability it carries for foreign manipulation, may be much more significant than whatever economic rents might or might not be captured by one nation or another. The rationale of public intervention to field a national presence in key high-tech strategic trade sectors appears compelling; sins of omission may be as damaging as sins of commission.}]

\item Moran, Grand Strategy, supra note 86, at 193. Rather, “nations can take one of two distinct paths for grand strategy; the two involve profoundly different approaches to national sovereignty and national identity . . . . They might be characterized as a path toward a late-twentieth century neo-mercantilism or, in contrast, a path that most accurately might be called transnational integration.” Id.; see also Moran, American Economic Policy and National Security 72-81 (1993) [hereinafter Moran, American Economic Policy].
\item Moran, Grand Strategy, supra note 86, at 193. A “transnational integrative” approach would need to limit the threat of market power in strategic sectors by assuring appropriately deconcentrated global market structures. See id. at 196 (citing Moran, American Economic Policy, supra note 112, at 46, 52-54 (employing four firm concentration ratios and the Herfindahl-Hirshman Index, “drawing on antitrust theory”). Moran’s effort to draw “on antitrust theory” to develop indexes of market power for national security analysis, in a magnificent irony, returns full circle to Albert Hirschman’s early work in developing the basis for what later became the Herfindahl-Hirschman Index as a tool for national security analysis that measured “concentration upon markets and supply sources of the foreign trade of small or weak nations” and thus their susceptibility to
the "right" policy mix must be determined on the basis of empirical judgments about the international environment.\textsuperscript{114} In short, national power could be maximized in the long run either by securing international market power or, more modestly, simply by denying international market power to other states.

National policymakers' formulation of a national security policy in the area of strategic trade will depend not only on their rational judgments about the international environment, but also on how their domestic constitutional structures affect the formulation and implementation of national economic policy. Thus, to assess whether a proper balance has been achieved between national security interests in market power and national security interests in nonproliferation, analysts will need to determine whether domestic institutions are likely to produce strategies that seek national power through bilateral exercise of market power rather than through reliance on international institutions to achieve security. In short, as elaborated by Part IV, evaluating the policy mixes pursued by the Executive Branch and Congress requires assessing their respective biases.

\section*{IV. Domestic Implementation of a National Security Conception of International Economic Relations}

If international market power is a type of national security, as argued in Part III, one might argue that, because of the public goods character of national security, which would lead to its underproduction, government policymaking should overcompensate to favor its production. This argument would prove too much, however, for it would be based on an incomplete view of the public goods character of national defense. Part IV.A will therefore elaborate the quasi-public goods character of national defense and show that government intervention to compensate for the putative underproduction of trade-related security may not be necessary in order to produce the optimal amount of national security. In brief, the argument of Part IV.A is

\textsuperscript{114} Which choice national leaders will make depends on their judgment of the nature of their international environments as "Hobbesian" or "Lockean" worlds, in sum their "calculation of whether greater potential threats to their domestic well-being come from binding or loosening their own hands and the hands of others in the international system." Moran, \textit{Grand Strategy}, supra note 86, at 192-93; \textit{Cf.} Jackson, \textit{Restructuring the GATT}, supra note 95, at 49-55 (arguing for a "rule-oriented," rather than a "power-oriented," approach to the management of international trade and the development of a GATT "constitution").
that both trade-related national security and traditional politico-military security create positive externalities. Accordingly, the mere categorization of an activity as trade-related, such as USEC privatization and the anti-dumping case, or politico-military, such as nuclear non-proliferation, does not indicate the magnitude of these positive externalities. Because of the operation of political markets, however, one could surmise that pressure from the economic interests supporting potentially competing forms of national security will stimulate policymakers to evaluate and trade off different security programs. The centrality of the political process in the production level of the various national security goods thus makes the domestic political structure a critical factor in assessing whether production decisions might be biased in favor of particular kinds of security.

Part IV.B argues that the Executive Branch is likely to pursue excessive rent-seeking strategies, particularly through bilateral agreements such as the HEU Agreement. Finally, Part IV.C argues that the legislative process is probably more likely than executive branch policymaking to assure production of positive national defense externalities without generating excessive rent-seeking behavior. These theoretical predictions are then assessed in Part V in a comparative analysis of how the Executive Branch and Congress processed the policy conflicts discussed in Part II.

A. Public Goods vs. Public Choice—The Paradigmatic Case of National Defense

Doubts about the efficacy of the market will ordinarily be framed as a “public goods” argument; doubts about the efficacy of the political process will usually be framed as a “public choice” argument.115


Many instances of government-imposed regulation might be justified as an effort to provide a public good, although they also may have as an effect a reduction in competition among producers of other private goods. There are no a priori grounds for determining which explanation best fits any given regulation; characterization usually involves constructing a contestable narrative as to what happened and what mattered. The dualism of public goods and public choice accounts means, on the one hand, that proponents of public choice theory (which purports to describe and predict government actions without passing judgment on them) must confront the public goods explanation and provide convincing reasons why that alternative analysis does not adequately account for the measures taken, and, on the other hand, critics of public choice theory must be prepared to
Both public goods theory and public choice theory focus on market failure: public goods theory focuses on the failure of the private market to produce goods and services, and public choice theory focuses on failure of the public market—that is, the political process—to produce government intervention in the economy. The public goods argument essentially supposes that the market economy will not produce an optimal level of the good in question, because the optimal level would reflect a demand for benefits from which a private market justify the anticompetitive effects of particular regulatory measures associated with the provision of public goods.

Id. at 750.

116. The idea of public goods was formalized by A.C. Pigou and developed by Paul Samuelson. See A.C. Pigou, The Economics of Welfare 183-84 (4th ed. 1932); Paul Samuelson, Economics: An Introductory Analysis 159 (6th ed. 1964); critiqued in Ronald H. Coase, The Lighthouse in Economics, in The Firm, The Market, and the Law 187, 189-91 (1988), reprinted in Ronald H. Coase, The Lighthouse in Economics, 17 J.L. & Econ. 357 (1974) [hereinafter Coase, Lighthouse]. A "public good" is simply a good that satisfies two conditions. First, it is nonrivalrous in that consumption by one person does not impair another's consumption. Second, it is nonexcludable in that once the good is produced consumers cannot effectively be barred from enjoying the benefits of its production. See Tyler Cowen, Public Goods and Externalities: Old and New Perspectives, in The Theory of Market Failure: A Critical Examination 3 (Tyler Cowen ed., 1988); cf. Yarbrough & Yarbrough, supra note 103, at 350; Deardorff & Stearn, supra note 103, at 21-22; Conybeare, Public Goods, supra note 100, at 6. Accordingly, nonexcluded beneficiaries will "free ride" on the efforts of others that lead to the production of the public good. The market will then underproduce the public good, because true consumer preferences are not reflected in the actual demand curve. In other words, a public good yields positive externalities, or increases in consumer welfare, that are not included in marginal revenue curves of producers. Id.; see also Stephan, Barbarians, supra note 115, at 750.

117. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice—A Critical Introduction 7 (1991) ("When we speak of the relationship between public law and public choice, then, we are really talking about several fields of law in which the role of legislatures is crucial . . ."). Public choice "takes from classical theory [of monopoly] the concept of rent-seeking through restrictions on production, and uses it to account for governmental behavior." Stephan, Barbarians, supra note 115, at 747 (drawing from James Buchanan & Gordon Tullock, The Calculus of Consent: The Logical Foundations of Constitutional Democracy (1962), and Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965)). It argues that "discrete and insular [producer] groups . . . can act collectively more effectively than can the general public. Such a group can generate and disseminate information among its members more efficiently, and generally can organize itself at a lower cost than can a similarly sized group of persons with diverse interests." Id. Accordingly, the political market will be biased in favor of producer groups, giving a persuasive account for the perceived bias of trade law in favor of producer groups through apparently economically inefficient antidumping and countervailing duty laws. See id. at 754 (describing public choice theory as a "field developed in part to provide an explanation for . . . the resilience of protectionism in international trade"); but see Sykes, Escape Clause, supra note 79, at 259 (advancing a public choice argument for the GATT escape clause in terms of its facilitating ex ante increased trade liberalization).
actor could not realize gains. Meanwhile, the public choice argument assumes that the political market will produce a greater than optimal level of government regulation (in effect government-subsidized production) of a good, because producers can more effectively influence the political process to a degree disproportionate to their share of voting rights.

The public goods and public choice characterizations may present a false dichotomy, however, since recent evidence suggests that market solutions can be found to overcome the apparent public characteristics of so-called public goods. If the market can finds ways to overcome public goods problems of lighthouses and other such para-

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118. See Pigou, The Economics of Welfare, supra note 116, at 183-84; Samuelson, Economics: An Introductory Analysis 159, critiqued in Coase, Lighthouse, supra note 116, at 357.


120. Lighthouses, for the benefits they confer on seafarers, and apple-farming, for the benefits apple-farmers confer on bee-keepers, are considered the two classical examples of public goods. The lighthouse example seems first to have been suggested by Henry Sidgwick:

\[\text{[T]here is a large and varied class of cases in which the supposition [that an individual can always obtain through free exchange adequate remuneration for the services he renders] would be manifestly erroneous. In the first place, there are some utilities which, from their nature, are practically incapable of being appropriated by those who produce them or would be willing to purchase them. For instance, it may easily happen that the benefits of a well-placed lighthouse must be largely enjoyed by ships on which no toll could be conveniently imposed.}\]

See Henry Sidgwick, The Principles of Political Economy 406 (3d ed. 1901) (quoted in Coase, Lighthouse, supra note 116, at 188). The bee-keeping example seems first to have been suggested by J.E. Meade:

Suppose that in a given region there is a certain amount of apple-growing and a certain amount of bee-keeping and that the bees feed on the apple blossom. If the apple-farmers apply 10% more labor, land and capital to apple-farming, they will increase the output of apples by 10%; but they will also provide more food for the bees. On the other hand, the bee-keepers will not increase the output of honey by 10% unless at the same time the apple-farmers also increase their output and so the food of the bees by 10% . . . . We call this a case of an unpaid factor, because the situation is due simply and solely to the fact that the apple-farmer cannot charge the beekeeper for the bees' food.


The bee-keeping example illustrates the potential breadth of the public goods concept, if it is understood to provide a justification for publicly subsidized production of any good which becomes a factor in the production of another good on non-excludability grounds. The theoretically-constructed prices for such unpaid factors might give the appearance of systemic “market” failure in a market economy. As a matter of economic theory:
digmatic cases, it may be worth considering whether market solutions are available for the production of certain aspects of national defense. Toward this end, it may be useful to consider national defense as a set of goods and services, rather than a single monolithic product, and assess the degree to which the public goods characterization seems apposite.

Toward this end, it may be useful to consider national defense as a set of goods and services, rather than a single monolithic product, and assess the degree to which the public goods characterization seems apposite.

Treating a standing national military as a monolithic product, the public goods argument seems on the surface straightforward. Citizens cannot be excluded from the obvious benefits of having a military force, such as deterrence of invasion and destruction of property or loss of life, except perhaps through their expulsion from the territorial boundaries the standing army will protect. It might be possible, however, to exclude a class from the benefits of national security if we reconsider the exclusion from the standpoint of what services will be provided—in other words, by determining whether the good will be

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It is easy to show that if apple blossoms have a positive effect on honey production . . . any Pareto-efficient solution . . . will associate with apple blossoms a positive Lagrangean shadow-price. If, then, apple producers are unable to protect their equity in apple-nectar and markets do not impute blossoms their correct shadow value, profit-maximizing decisions will fail correctly to allocate resources . . . at the margin.


Recent scholarship calls into question the theory underlying these examples because evidence indicates that the examples are invalid. See Coase, Lighthouse, supra note 116, at 195-213 (demonstrating empirically, based on a study of the British lighthouse system, that lighthouse owners can recoup most of the benefits of a lighthouse by charging ship-owners port access fees, since the set of port users largely intersects the set of beneficiaries of neighboring lighthouses); see also Cheung, The Fable of the Bees, supra, at 281-304 (showing empirically that apple-farmers and bee-keepers do contractually find ways to compensate apple-farmers for the positive externalities of apple-farming with respect to honey production). The falsifiability of a theory by way of counter-example is, of course, a central test of scientific method, particularly one purporting to call for diminished private freedom and increased government intervention. See Karl R. Popper, 2 The Open Society and Its Enemies: The High Tide of Prophecy: Hegel, Marx and the Aftermath 13 (1902) (“In so far as scientific statements refer to the world of experience, they must be refutable; and, in so far as they are irrefutable, they do not refer to the world of experience.”).

121. Even this argument has not gone unchallenged. One author writes: “[c]ontrary to public goods theory, even in the key case of defense from external attack, exclusion is not impossible and the marginal cost of serving additional persons generally is not zero. There is no a priori case for equal access to defense . . . .” Kenneth D. Goldin, Equal Access v. Selective Access; A Critique of Public Goods Theory, in The Theory of Market Failure, supra note 116, at 80 (hereinafter Goldin, Selective Access).
produced at all. A standing military has potential benefits other than deterring invasion, such as the deterrence of attacks against nationals overseas. Thus, if the military is not employed to protect nationals overseas, but only to provide territorial defense, then one group of consumers can be excluded from the consumption of national defense. Likewise, if the military is not employed to defend national commercial interests overseas, holders are, in effect, excluded from consumption. Moreover, if the military is not used to protect access to cheap foreign raw materials, then all consumers of that raw material are, ceteris paribus, excluded from consumption.

122. Kenneth D. Goldin speculates that, "even with a communal army, selective exclusion is possible from some aspects of its defenses. It may not be possible to exclude anyone from 'protection against massive nuclear attack.' But this is not the only service rendered." Id. at 69, 79. Goldin concedes that no one can be excluded from "massive" nuclear attack. Even accepting this concession, Anti-Ballistic Missile point defense systems, which are permitted in small numbers by the current ABM Treaty although not currently deployed by the United States, could have the effect of excluding citizens from a particular national defense service. See Treaty on the Limitation of Anti-ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435. Much of the current controversy concerning theater ballistic missile defense could be viewed as a debate about whether it is cost-effective to expand national defense services to include protection from the threat of a single or small number of nuclear warheads launched by a rogue state or sub-national terrorist. See John Pike, Taking Aim at the ABM Treaty: THAAD and U.S. Security, ARMS CONTROL TODAY, May 1995, at 3, 4 (dismissing the risk of third world threats).

123. While problematic under international law as an exercise of the "inherent right of self-defense" under Article 51 of the U.N. Charter, the U.S. air attack on Libya in April 1986 reflected an effort to protect American nationals from Libyan attacks outside the territorial jurisdiction of the United States. See U.N. CHARTER, art. 51, discussed in LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 922 (3d ed. 1993) [hereinafter HENKIN, CASES AND MATERIALS] (noting that the "President's statement justified the action as being in response, in particular, to a bombing of a Berlin nightclub frequented by U.S. servicemen in which one was killed and many wounded" and that the attack was a "mission fully consistent with Article 51 of the U.N. Charter") (citations omitted); but cf. Goldin, Selective Access, supra note 121, at 79 ("A military force also protects people from theft of property and kidnapping by foreigners. Exclusion from this service is relatively easy: The military force simply makes no attempt to stop theft or kidnapping of named persons.").

124. See generally CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985). In addition, covert military intervention by the United States has played a role in preventing the installation of governments likely to expropriate property of American nationals. See, e.g., STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT (1982) (describing the covert U.S. intervention in Guatemala in 1954 to facilitate the overthrow of the Arbenz government and thereby protect American-owned United Fruit's holdings in that country); but cf. Goldin, Selective Access, supra note 121, at 79-80 ("Americans with substantial property abroad or at sea might well prefer to provide their own anti-theft defenses, rather than pay for a communal army which cannot be counted on to protect their property.").

125. The United States arguably used military force during the Gulf War of 1991 to assure itself access to Mideast oil at prices lower than would have been available if Saddam
Unpacking national defense as a set of goods and services thus invites the question whether the production of strategically-important goods might be included among that set. Part III has argued that a state's ability to produce key goods for its own consumption and supply other states will have the effect of increasing the state's relative power. This additional state power unquestionably can be deployed to increase the welfare of participants in the political community, much as a standing army can be used in various ways. At the same time, if access can be limited to beneficiaries so that free riding is minimized, then it might be possible to produce so-called public goods through the private economy. Optimal pricing may, however, involve price discrimination, in which event it may be that a

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Hussein had achieved market power in the international oil market through the acquisition of Kuwaiti oil fields. Secretary of State Baker, in fact, claimed that the principal justification for a U.S. action was American "jobs," presumably on the theory that increased oil prices would raise costs for Western economies, producing a recession of global demand, and thereby leading to increased American unemployment. See David Hoffman, Baker Calls Iraqi Threat to "Economic" Lifeline, WASH. POST, Nov. 14, 1990, at A25; see generally DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER (1991) (describing the increasing strategic interest of western powers in Middle East oil over the course of the century).

126. See supra text accompanying notes 68-90 (discussing strategies for enhancing national power based on inducing relation-specific investments by other states).

127. See Harold Demsetz, The Private Production of Public Goods, in THE THEORY OF MARKET FAILURE, supra note 116, at 111 (concluding that, "given the ability to exclude non-purchasers, private producers can produce public goods efficiently") [hereinafter Demsetz, Private Production]. Demsetz notes, however, that the "technology of modern weaponry may, in fact, make it difficult to exclude non-purchasers from benefiting from national defense purchases, and national defense might be termed an 'approximate collective good . . .'." Id. at 113. Demsetz sees the cost of exclusion as the key variable in determining whether a good can be efficiently produced by the private market rather than through government intervention. Id. at 126; see also Harold Demsetz, The Exchange and Enforcement of Property Rights, in THE THEORY OF MARKET FAILURE, supra note 116, at 127, 135 [hereinafter Demsetz, The Exchange and Enforcement of Property Rights] ("The cost of excluding those who have not contracted for benefits from the enjoyment of some of these benefits is so high that a general attitude of letting others bear the cost of defense can be expected.").

128. See Demsetz, Private Production, supra note 127, at 122 ("There is no single price that can satisfy all equilibrium requirements under the conditions that have been posited, that is, under the condition that differences in demand prices can be identified at relatively low cost."). Demsetz argues that: 

[The] problem of identifying and separating submarkets, given the ability to exclude non-purchasers, is not any different or any more severe for the public goods than it is for the production of private goods. A monopolist who produces private goods and seeks to price discriminate must be able to identify and separate his markets; undoubtedly, he must cope with the problem of those who seek to mislead the monopolist into thinking their demands are more elastic than they truly are [that is, that they would substitute to another good if the monopolist raised its price]. But devices for doing this are available.
monopolist or group of oligopolists would be better positioned to ensure optimal pricing. As Harold Demsetz has argued, "an omniscient and efficiency-minded government could do no better." Thus, even if from a national perspective there are positive national security externalities flowing from market power in strategic sectors, it is unclear that public goods reasoning warrants government intervention to increase the production of this good.

In sum, while even libertarians agree that the national defense is one area where the state must play a central role, this starting point only begs a series of questions: How much defense is enough? What constitutes defense? How do we determine whether goods that are important to the national defense should be supplied by the market or by the state? Would it be necessary for the government to take action to assure the optimal production of strategic goods, or do oligopolists already achieve the same results through rent-seeking behavior in the political process? One might also want the political process to address the distributive implications of national security-enhancing policies. But one thing is clear: one might be able to rely on the superior influence of producer groups in the political process to correct for the putative underproduction of trade-related national security positive externalities. This Article now turns, however, to whether domestic institutional considerations suggest that this corrective mechanism might also overcompensate for the possible underproduction of trade-related national security.

B. Separation of Powers in the National Security State—Bias Toward Rent-Seeking in the Executive Branch

A domestic politics explanation for the degree to which a state adopts a security-based approach to international trade policy views

Id. at 123 (emphasis in original).

129. See Posner, supra note 100, at 281 ("If the monopolist can prevent arbitrage, he is likely to fix different prices to different purchasers depending not on the costs of selling to them, which are the same, but on the elasticity of their demands for his product. This is price discrimination.").

130. Demsetz, Private Production, supra note 127, at 123.

131. See, e.g., Robert Nozick, Anarchy, State, and Utopia 113 (1974) (justifying the state as "the dominant protective association within a territory").

132. Government intervention to produce an optimal level of security might also be justified on grounds other than efficiency, such as the effect national security-enhancing policies play in the reduction of liberty or considerations of justice in the distribution of national security benefits. Compare John Rawls, A Theory of Justice passim (1971) (setting forth as basic principles for the just state that it maximize, first, the basic liberties of its citizens and, second, the position of the least advantaged in society).
public policy as "the output of what actors in the society want, . . . of process defined by institutions, or . . . of both variables" in which "preferences shape institutions and institutions shape preferences . . . ." Hypotheses about how "institutions shape preferences" can be drawn from historical evidence. Significantly, recent scholarship suggests the early modern state adopted policies favoring domestic oligopolization as an instrument for amassing external influence as Executive power increased. More recently, the increased demand for national security issues during the Cold War also was widely associated with a shift in power from the legislative to the executive branches, particularly in executive branch management of government expenditures, domestic prices, and tariff and exchange rates. Although the checks and balances in the U.S. Constitutional system addressed the need to avoid excessive assertions of executive supremacy, the national security state reposed significant authority

133. See Peter Alexis Gourevitch, Squaring the Circle: The Domestic Sources of International Cooperation, 50 Int'l Org. 349, 350-51 (1996) (setting out a framework for the study of the domestic sources of international cooperation and, by parity of reason, international competition).

134. Some historical evidence suggests that domestic monopolization can facilitate the production of resources that strengthen the state internationally. See Robert B. Ekelund, Jr. & Robert D. Tollison, Mercantilism as a Rent-Seeking Society: Economic Regulation in Historical Perspective 25 (1981) ("In sum, then, we posit that the pursuit of special favor by individuals was the driving force behind the flourishing rent-seeking, activities over the mercantile era. . . . The ascension of mercantilism in the early part of the era is easily explained by the institutional setting facing the participants in the process of monopolization.") (emphasis added) [hereinafter Mercantilism]; cf. Gowa, Allies, Adversaries, and International Trade, supra note 86, at 6; and Moran, Grand Strategy, supra note 86, at 181-82 (outlining a theoretical explanation in the context of criticizing hegemonic stability theory's account of free trade as a public good).

135. See generally Harold Koh, The National Security Constitution (1990); Arthur M. Schlesinger, Jr., The Imperial Presidency (1974). Schlesinger, in fact, relying on British historian Hugh Trevor-Roper, drew a fascinating parallel between President Nixon's use of national security rationales to expand the domestic power of the presidency and efforts by the Stuart kings of England to assert powers of taxation and revenue-raising through grants of monopolies in order to finance their wars, leading ultimately to the English Civil War and a brief interregnum. Id. at 266 (discussing the "ship money" controversy under Charles I); see also Hugh Trevor-Roper, Nixon—America's Charles I?, Spectator, Aug. 11, 1973 ("Like Charles I, [Nixon] found means to raise money and make war without the consent of the 'political nation.' ") (quoted in Schlesinger, supra, at 267). Ekelund and Tollison indeed point to the decline of the monarchy in 17th century England as the institutional change which had the effect of reducing the possibilities for rent-seeking behavior—that is, the acquisition of legally enforced monopolies—in Restoration England. See Mercantilism, supra note 134, at 65-73.

136. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1953) (expressing concern that national security argument by President could be extended to subvert constitutional system of checks and balances if it were to be used to allow the President to seize domestically held property) with Dames & Moore v. Regan, 453 U.S. 

134.
in the President, particularly in strategically significant commercial questions, largely because many decisions could be made only based on information not widely distributed to the public.\textsuperscript{137} Because of the concentration of information in channels that were likely to receive less public scrutiny, public choice theory predicts that decision-making by the Executive Branch in national security issues is strongly susceptible to rent-seeking behavior, such as that created by firms involved in defense procurement.\textsuperscript{138}

Arguably, the same reasoning applies to national security related agreements, such as the NPT, supplier export guidelines, or even the HEU Agreement, suggesting that the United States supported these arrangements in part to seek gains for U.S. producers. It has been argued that executive branch international lawmaking is generally susceptible to rent-seeking behavior.\textsuperscript{139} The strength of this argument may turn on whether executive branch international lawmaking is achieved through transparent procedures.

At one extreme, it would appear that multilateral agreements negotiated in transparent settings and with substantial opportunity for congressional participation seem no more likely to be susceptible to rent-seeking behavior than legislative action on domestic issues under similar conditions of publicity.\textsuperscript{140} This is not to say that states would

\begin{footnotes}
\textsuperscript{654, 672-75} (1981) (relying on congressional acquiescence as authorization for assertion of constitutional authority by the President to bar adjudication in a domestic forum of contract claims arising from international transactions).

\textsuperscript{137} See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111-13 (1948) (interpreting the Federal Aviation Act not to require judicial review of the award ultimately subject to Presidential review of an international air route by the then Civil Aeronautics Board in part because presidential review might entail consideration of information that would not be appropriate for judicial review).

\textsuperscript{138} See MERCANTILISM, supra note 134, at 25; Stephan, Barbarians, supra note 115, at 757 (an approach to legislative interpretation that “frees the Executive from strict adherence to statutory restraints constitutes a delegation of lawmaking power that carries with it no guarantee that executive action will not pander to special interests to the detriment of the general welfare”).

\textsuperscript{139} Stephan adds that unilateral executive action in international affairs is subject to the same risks of rent-seeking behavior as executive decision-making in the regulation of the economy. Stephan, Barbarians, supra note 115, at 758 (“where a measure constitutes the unilateral exercise of executive power, the barriers to rent-seeking are too low”). For a general critique of rent-seeking behavior in international lawmaking, see Paul Stephan, Accountability and International Lawmaking: Rules, Rents and Legitimacy, 17 NW. J. INT’L L. & Bus. 901 (1997).

\textsuperscript{140} Certain congressional-executive agreements in which the Congress has delegated authority to the Executive Branch to make international agreements in a multilateral context without significant congressional supervision at the ratification stage might require and permit judicial scrutiny to avoid rent-creating domestic effects. See, e.g., Trade Act of 1974, §§ 102, 151, 19 U.S.C. §§ 2112, 2191 (1974) (so-called “Fast-Track” procedures under
not use multilateral agreements if they could to facilitate rent-seeking. Arguably, informal multilateral processes managed solely by the Executive Branch might be subject to insufficient publicity to overcome the risk of rent-seeking behavior notwithstanding the participation of large numbers of state actors. On the other hand, if the “compliance pull” of formal international law is still less compelling than that of domestic rules, given the continuing absence of a common global community, it would seem a dubious rent-seeking strategy for procedures to invest in manipulating the compliance pull of informal international norms. That said, even informal interna-

which implementing legislation for trade agreements cannot be amended from the text submitted by the Executive Branch based on the final text of the applicable international agreement).

141. Posner suggests that oligopolists’ “demand for legislative protection may be less than that of an otherwise similar but more numerous set of competitors.” Posner, supra note 100, at 525.

142. But cf. Stephan, Barbarians, supra note 115, at 758 (noting that much international cooperation takes place outside the framework of explicit agreements and occurs rather as “patterned cooperation, epitomized by the tit-for-tat game,” but arguing that “there exists no obvious reason why cooperation of this sort would more likely reflect interest group rent-seeking than cooperation based on express agreements”).

143. See generally Thomas Franck, The Power of Legitimacy Among Nations (1990) (discussing the relevance of international law in terms of its likelihood of inducing compliance).

144. In the international sphere, at this stage at least, Posner’s “more numerous set of competitors,” Posner, supra note 100, at 525, may not be able to secure rents from an international legislative body because, as yet, no international legislative body exists for the management of economic affairs, although some General Assembly resolutions might be understood as efforts to take advantage of monopoly power. See United Nations Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (1963) (adopted by 87 votes to 2, with 12 abstentions) (purporting to authorize host states to render only “appropriate compensation, in accordance with the rules in force in the State” expropriating foreign property rather than prompt, adequate and effective compensation as required by customary law); cf. David W. Leebron, A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation, 60 U. Cin. L. Rev. 305, 342 (1991) (discussing the threat of efforts to secure quasi-rents in bilateral investment relationships). It remains to be seen whether the new World Trade Organization will move in that direction. See Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 Am. J. Int’l L. 193, 195 (1996) (concerning the need for a constitutional approach to the study of the new trade regime). Moreover, the requirement for virtual universality of acceptance in customary international law also lessens the risk that large numbers of competitors can pursue rents through customary lawmaking. See Statute of the International Court of Justice, art. 38 (1)(b), June 26, 1945, 59 Stat. 1031, 3 Bevans 1153, 1179 (defining custom as “evidence of a general practice, accepted as law”). Nor would multilateral agreements seem to permit rent-seeking by competitors, since involvement by a large number of states would increase the likelihood of more publicity in the negotiating process. But cf. Stephan, Barbarians, supra note 115, at 757 & n.18 (alluding to the “possibility that proponents of international lawmaking, in
national agreements should be scrutinized for the possibility that they reflect rent-seeking behavior, especially in cases (such as recent international efforts to establish supplies guidelines for nonproliferation reasons) where the international norms they establish are relied upon as a basis for domestic legislation that might have trade-restrictive effects. Even efforts at international coordination that seem perfectly

145. See, e.g., Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Techniques, White House Press Statement, 748 PLI/Comm 717, 829, Dec. 9, 1996 (reporting on the October 1, 1996, the agreement of 33 states meeting in Vienna on July 11-12, 1996 to implement the Wassenaar Arrangement). The so-called “Wassenaar arrangement,” instituting a successor regime to the lapsed COCOM controls on strategic trade to the former Eastern Bloc, was concluded as a nonbinding international agreement but was delayed in negotiation largely because U.S. efforts to secure a new regime were perceived by most major exporters of strategic goods as an attempt to deny them major new export markets and thereby preserve U.S. leadership in strategic sectors. Brahma Chellaney, Bad Backfire from the New Co-com, ASIAN WALL ST. J, Feb. 19, 1996, available in 1996 WL-WSJA 3227450. Since the end of the Cold War, the United States seems to have pursued a more aggressive strategy in achieving dominance in international arms trade, for example, with U.S. purchases from NATO’s European members declining while the United States has been able to increase its arms sales to those same countries. The Arms Trade: Missile Wars, ECONOMIST, May 25, 1996, at 72. It has simultaneously pressured others not to export to countries, such as Iran, which the United States believed represented a strategic threat, and other countries were positioned to become major exporters. See Lynn Davis, Address by Under Secretary of State for Arms Control and International Security Affairs, Carnegie Endowment for International Peace (Jan. 23, 1996), <gopher://gopher.state.gov:7000/ftp%3ADOSFan%3AGopher%3A05%20%20Global%20Affairs%3AArms%20Control%20%20Issues%3A01%20%20Releases%3A%20-%20Statements%3A%20A960123%20Wassenaar%20%20Arrangement> (“The United States has sought and obtained commitments through sensitive, high-level negotiations that produced bilateral agreements with Russia and other prospective members [of the Wassenaar Arrangement] to close down their arms sales to Iran and forego any new contracts involving arms and arms-related technologies.”); but cf. Thomas E. McNamara, Rethinking Proliferation in the Post-Cold War Era: The Challenge of Technology, 6 U.S. DEP’T OF ST. DISPATCH 925, 931 (Dec. 1995) (Address to the Wilton Park Special Conference, London, U.K., by Assistant Secretary for Politico-Military Affairs, stating: “The U.S. offered to facilitate Russian access to the international commercial space-launch market—which did not involve any transfer of sensitive technology—if Russia committed to abide by the [Missile Technology Control Regime] guidelines.”).
justifiable from a public goods perspective might have a hidden public
choice dimension.\textsuperscript{146}

By contrast, at another extreme, it would appear that bilateral or
plurilateral agreements increase the risk of rent-seeking in interna-
tional lawmaking by the Executive Branch because they facilitate pri-
vate understandings concerning international issues.\textsuperscript{147} The chief
reason is that large numbers of actors increase the costs of coordina-
tion and the likelihood that controlling access to information neces-
sary to secure rents will surface under scrutiny. Accordingly,
agreements involving small numbers of states may be more likely to
reflect organized producer interests rather than overall welfare.\textsuperscript{148}

In sum, while a general case against any executive branch interna-
tional lawmaking remains to be made based on public choice reason-
ing, it does seem plausible that the bilateral HEU Agreement was
susceptible to rent-seeking behavior, given the complexity of the sub-
ject matter, limited publicity of its terms, and small number of actors
involved in its initial negotiation. This prediction will be assessed in
Part V.A's detailed review of executive branch policymaking in the
implementation of the HEU Agreement.

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\textsuperscript{146} Restrictions on the dissemination of goods or technology relevant to the prolifera-
tion of weapons of mass destruction can be thought of as restrictions on output reflecting
rent-seeking. Nonetheless, superficially there seems to be no doubt they would be justified
from an aggregate welfare standpoint given the danger that such weapons might be used
against the exporting country. \textit{See}, \textit{e.g.}, Atomic Energy Act of 1954, ch. 1073, 68 Stat. 940,
42 U.S.C. § 2153 (b), (d) (1994) (provided for 90 continuous legislative days congressional
review prior to entry into force of agreements for peaceful nuclear cooperation, which
under the AEA permit certain kinds of nuclear trade, subject only to enactment of con-
gressional joint resolution of disapproval not vetoed by the President). However, recent
agreements for peaceful nuclear cooperation under this statutory regime have involved
such complex provisions for management of nuclear trade, including the assertion a variety
of end-use and end-user restrictions, that their explanation may require several hundred
pages of attachments to the President's Letter of Transmittal to the Congress. \textit{See}, \textit{e.g.},
Message from the President of the United States Transmitting the Text of a Proposed
Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between the United
States of America and the European Atomic Energy Community (EURATOM) with Ac-
company Agreed Minute, Annexes, and Other Attachments, Pursuant to 42 U.S.C. § 215
(b), (d), H.R. Doc. No. 138, 104th Cong., 1-246 (1995). It would seem desirable to review
these agreements to determine how much they reflect legitimate national security concerns
and how much they facilitate the exercise of market power by U.S. firms involved in the
nuclear industry. \textit{See infra} note 170 (discussing the relation between the EURATOM
Agreement and the US-RF HEU Agreement).

\textsuperscript{147} \textit{See} Case-Zablocki Act, 1 U.S.C. § 112 (b) (1994) (requiring notification to Con-
gress of agreements binding under international law concluded by the Executive Branch).

\textsuperscript{148} \textit{See} Posen, \textit{supra} note 100, at 525 ("the fewer competitors there are in a market,
the easier they will find it to organize a private cartel that is unlikely to be detected"); \textit{see also} Oye, \textit{supra} note 78, at 9-11 (discussing ways to change payoff structure).
C. Separation of Powers in the Post-National Security State—Production of Positive National Security Externalities in the Legislative Process

If, as suggested by Part IV.B, executive branch international law-making in the HEU Agreement is likely to overproduce international rent-seeking policies, one might look to the alternative policymaking institution to compensate. But the legislative branch also, under the public choice theory described in Parts IV.A and IV.B, might tend to overproduce policies, such as efforts to increase market power, that favor producer interests. Yet, policies produced by the legislative branch in this area may well be optimal because the imperfection in the political process favoring producer interests may well be balanced by imperfection in the legislative process that favors consumer interests, making legislatively-produced policies on the whole more reliable than policies produced by the Executive Branch.

Recall that market theory ordinarily posits welfare maximization through free trade because exchanges yield gains in utility. But a perfect political market—that is, a democracy of one person, one vote, in which each person's preferences are given equal weight, each person participates equally, and which therefore yields political outcomes that reflect the majority's views—would not account for the possibility of disproportionate gains or losses. It may be that the costs to political losers exceed the benefits to political winners because the political winner's gains may be smaller per person than each political

149. This proposition is repeatedly brought to the attention of legislators. See, e.g., CBO Study, supra note 57, at 11 (discussing Fundamental Welfare Theorem of economic theory that "a free market without governmental interventions will provide the most efficient and productive results possible").

150. The U.S. Constitution only recently has been interpreted along these lines for the purposes of legislative representation. See, e.g., Reynolds v. Sims, 377 U.S. 533, 568 (1964) (adopting the one-person, one-vote principles as the authoritative meaning of the Equal Protection Clause of the Fourteenth Amendment in districting cases); Bush v. Vera, 116 S. Ct. 1941, 1955 (1996); Miller v. Johnson, 115 S. Ct. 2475, 2468 (1995) (rejecting arguments that majoritarian democracy precludes minority group representation of their preferences); see Laurence Tribe, American Constitutional Law (2d ed. 1988) (discussing the equal protection model of U.S. constitutional law); but see Lani Guinier, The Representation of Minority Interests: The Question of Single-Member Districts, 14 Cardozo L. Rev. 1135 (1993) (arguing that strong minority group preferences should be given weight in the political process perhaps by adopting cumulative voting procedures under which voters with strong preference for a minority candidate or minority viewpoint could express their views by assigning their votes to a particular candidate or viewpoint while voters with less intense preferences would disperse their votes, resulting in an allocation of votes better reflecting voters' preferences). The Executive, by contrast, is not elected on the basis of the same one-person one-vote scheme. See U.S. Const. amend. XII.
loser’s losses. Thus, it may be a welfare-maximizing result from the national perspective when, even if a free and open trading system is advantageous to the majority of citizens in a particular country, producers of strategic goods will have interests that so significantly diverge from the nation’s general interest in global free trade that they will be encouraged to organize so that the state will not cooperate fully in the creation of a free trade regime, at least with respect to the relevant sector.

This result might even be acceptable to consumers who would favor less free trade if they could be compensated by producers for gains foregone through a loss of free trade. Ironically, it seems that the very imperfection of the legislative political market under the current constitutional law opens the door to the possibility that rent-seeking by producer groups will not excessively bias legislative policymaking.

Part V.A of this Article will now assess executive branch and congressional management of the national defense intersection with the private economy in the privatization of the U.S. enterprise for uranium enrichment services. Briefly, the case substantiates the hypothe-


Aside from problems of monopoly in government or of errors in calculation, in a one-man, one-vote democracy, where voters are not for sale, the polling place will generate information that is based on majoritarian principles rather than on maximum benefit principles. Thus, suppose some citizens prefer a stronger national defense but that a majority prefer a weaker national defense. Left to a vote, the weaker defense will be our chosen policy even though the minority is willing to pay more than the additional cost required to bring defense up to the level they desire (and so, if possible, they may hire private police services).

Demsetz, The Exchange and Enforcement of Property Rights, supra note 127, at 140.

Notice that Demsetz’s hypothetical assumes a world of inalienable voting rights, so that votes cannot be transferred to their highest and best uses. The assumption, in the characterization of the political market, corresponds to the assumption Ronald Coase employs to show that transaction costs, if high enough to prevent a Pareto-efficient exchange of rights to impose costs, preclude socially efficient transfers that are necessary to maximize social welfare. See Coase, Notes on the Problem of Social Cost, supra, at 175-76. Notice also that Demsetz treats “monopoly in government” as a caveat to his argument. Demsetz, The Exchange and Enforcement of Property Rights, supra note 127, at 140. Public choice theory, in fact, observes that political market outcomes are “imperfect” precisely on the ground that certain voter groups can organize more effectively in the political process to secure, like monopolists in the economic market, outcomes that are not socially optimal. See supra text accompanying notes 126-130.

152. See, e.g., Conybeare, Trade Wars, supra note 93, at 156 (“changing domestic rent-seeking coalitions complicated negotiations . . . . [For example,] some members of the King’s Council . . . were not above financing pirate attacks on Hanse ships when their private gains outweighed their interests as consumers of Hanse imports ”).
sis that executive branch management can result in excessive rent-seeking. Where a public choice analysis already predicts a high level of rent-seeking for producer groups in executive branch decision-making, a neo-mercantilist strategy of seeking the public good of national security-enhancing market power would plainly be overkill. Part V.B supports the prediction that congressional management can be fully consistent with the production of an adequate level of national security externalities derived from strategic goods.

V. Executive Versus Legislative Balancing of Traditional National Security, Trade Interests, and Competition-Based National Security Interests in the USEC Privatization Process

To recap, the standard criticism of the Executive Branch’s implementation of the HEU Agreement has been that, in turning over implementation to USEC, the Executive Branch permitted the private interest of producers of uranium enrichment services to supersede the public interest in the transfer of excess nuclear material out of the former Soviet Union.153 But if, as argued here, USEC’s privatization in a manner that assures it competitive advantages is an important element of U.S. national power, then the validity of this naive criticism of executive branch implementation, which seems to be widely

153. See generally Falkenrath, supra note 3. The Director of MIT’s Defense Technology Conversion Center goes so far as to claim that:

what started as a coordinated effort to ensure safe and economical nuclear arms reductions became a conflict of private interests . . . . The reason is that U.S. officials delegated implementation of the deal to a government group—[USEC]—that Congress then turned into a for-profit enterprise. And behaving just like any for-profit enterprise would, USEC tried to lower the price to be paid to Russia for uranium, basically reneging on the original terms of the agreement. The Russians, understandably, felt stung and refused, stalling the deal yet another year.

See Clark C. Abt, Confronting the New Nuclear Threat, TECH. REV., July 1996, at 69-70 (reviewing Avoiding Nuclear Anarchy, supra note 3). Privatization, like any legislative act, can be approached from the public choice perspective. See, e.g., Paul B. Stephan, III, Toward a Positive Theory of Privatization—Lessons from Soviet-Type Economies, 16 INT’L REV. L. & ECON. 173, 174-76 (1996) (advancing two models for explaining privatization: one, the welfare hypothesis, under which elites foresee that economic competitiveness requires privatization; the other, the cartel hypothesis, under which elites seek to continue to maximize their gains from control of productive resources through privatization. Thus, one might argue that the privatization decision, like any other government decision, is prone to maximize private, rather than public, interests.).
shared in the national security community, would require an empirical
demonstration based on the widest possible fact-finding.154

Enhancing USEC's capacity to secure monopoly rents interna-
tionally—at the expense of the Russian Federation and in coordina-
tion with the Russian Federation, at the expense of third parties—
may, in fact, have constituted a national security-maximizing strategy.
On the other hand, assessing whether the Executive Branch's strategy
went too far in the other direction is a more difficult question. Will
the strategy of maximizing national power through trade that is likely
to be pursued by the Executive Branch—neo-mercantilist rent-seek-
ing, if you will—lead to excessive international predation by the
United States?155 Would congressional management of policymaking
be better able to balance the pursuit of low-cost, rent-seeking oppor-
tunities against domestic interests in global trade expansion and paro-
chial producer interests?156 Although specific cases will need to be
analyzed on their particular facts,157 theoretical analysis can be used
to generate presumptions. Accordingly, Part IV considered theoretical
grounds for predicting the relative tendencies of the two political

154. Abt, for example, relying on the false public and private goods dichotomy, argues
that:

> privatization makes sense for consumer goods, but weapons of mass destruction
call for a different approach. It is not in the interests of U.S. national security to
drastically reduce government subsidies to the Russian nuclear complex, privatize
it, and attempt to make it profitable while also trying to persuade the country not
to market its nuclear technology and fissile materials worldwide.

Nor is such heedless privatization wise when it occurs on our own soil . . . .
Abt, supra note 153, at 69.

155. As Theodore Moran argues:

> along the sophisticated neomercantilist path, national strategists would have to
adopt unilateral and arbitrary measures to fortify the predominance of U.S. firms
and production sites in key industries (imposed import quotas, blocked acquisi-
tions, exclusive technology-development programs, dictated standards for subsi-
dies and dumping) that would ultimately depend on the threat of denying access
to the American market to be accepted. This approach would deliberately run
risks of generating political divisiveness in the international arena, including mir-
ror-image reaction and possible mutual retaliation to bolster the relative position
of American firms and workers. In short, this approach would constitute the non-
military equivalent of coercive diplomacy.

Moran, American Economic Policy, supra note 112, at 78-79.

156. A strategy that moved “toward a more transnationally-integrated international
system,” Moran cautions, “would require national strategists to keep the United States in a
system-maintenance role, bearing a disproportionate share of the burdens, tolerating a cer-
tain amount of free-riding by others, taking the long-term view as the major powers strug-
gled toward common multilateral rules on trade, investment, technology development,
subsidies and dumping, and transborder corporate alliances.” Id. at 79.

157. Cf. Stephan, Barbarians, supra note 115, at 764 (describing whether public goods
or public choice arguments are more persuasive as, ultimately, empirical questions).
branches of the U.S. government and suggested, as a rule of thumb, that public choice arguments against government intervention should be given greater attention when a national security policy is determined by the Executive Branch.

An additional implication that will be addressed in Part VI of this Article is whether there is a need for increased international institutionalization to avoid excessive predation. To test the theoretical predictions made in Part IV and provide a backdrop for assessing the question of international institutionalization for trade and national security that will be considered in Part VI, this Article will now analyze the conflicting positions taken by the Executive Branch and Congress on USEC's privatization. In the process, it will demonstrate that the two positions represent different strategies for the production of national power in strategic goods: the Executive Branch, in an approach it defended on grounds drawing from the public goods argument, nonetheless pursued international rent-seeking opportunities for USEC; and the Congress, by contrast, advanced policies that were less mercantilistic than those sought by the Executive Branch.

A. Public Goods and Strategic Trade Privatization Under the Executive Branch

U.S. trade-related national security interests in the HEU Agreement had both defensive and offensive dimensions. It was argued early on that DOE’s purchase of Russian HEU could be justified on commercial grounds as a preemptive strike against potential dumping or predatory pricing by Russia.158 Even congressional sponsors of privatization cautioned the Executive Branch that the HEU Agreement would need to be implemented with an eye to its effect on the privatization of the U.S. enrichment capability.159 But access to low-cost Russian uranium and SWU also potentially gave the United

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158. See Gilinsky, supra note 1, at 160 (citing Neff, as arguing that “if the United States did not buy the highly enriched uranium in one overall deal, the Russians might dump it on the world nuclear fuel market, with a resultant drop in prices.”).

159. On August 3, 1992, Senator J. Bennett Johnston (D-La.), chairman of the Senate Energy Committee and the Senator most responsible for the privatization effort, wrote to President Bush that: “uncontrolled release of reactor-grade uranium derived from dismantled Russian weapons, whether by the Russians themselves or a third party would destabilize the world uranium market and lead to a collapse of the United States’ enrichment enterprise and domestic uranium industry.” Quoted in Gilinsky, id. Senator Johnston’s interest was not limited to USEC’s success, since in his home state of Louisiana, Louisiana Energy Services (LES), a joint venture including URENCO, since 1959 had been seeking government approval to become the first privately-owned U.S. enrichment operation. See Favoritism Charged at Site Pick, BATON ROUGE ADVOCATE, Mar. 17, 1995.
States the ability to adopt predatory pricing strategies internationally.\textsuperscript{160}

Congress, however, was unwilling to finance solely for national security reasons the direct purchase of Russian HEU.\textsuperscript{161} Rather, in the context of a re-election campaign where his attention to issues of domestic prosperity was repeatedly challenged, President Bush publicly justified the HEU Agreement as a “foreign policy measure that can promote our domestic economic well-being.”\textsuperscript{162} This is not to say that the President consciously pursued a grand strategy of neo-mercantilism. But in adopting the Energy Policy Act of 1992, which specifically endorsed the Executive Branch’s decision to make USEC the U.S. Executive Agent for implementing the HEU Agreement,\textsuperscript{163} Con-

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\textsuperscript{160} See Wilson Dizard III, \textit{Antidumping Case Petitioners Seek Dumping Duties on HEU; Kyrgyzstan Joins Trade Court Case}, \textit{Nuclear Fuel}, July 6, 1992, at 3, available in 1992 WL 2461047 (quoting petitioners’ argument that “DOE could augment or supplant its enrichment of uranium by blending down HEU which would result in significantly lower operating costs,” and that “this HEU is the equivalent of more than 30 years of U.S. production of uranium concentrate”); see also Wilson Dizard III, \textit{Antidumping Case DOE Said to be Trying New Approach to Paying for Russian LEU}, \textit{Nuclear Fuel}, Dec. 7, 1992, at 3, available in 1992 WL 2460813 (reporting Russian charge that the U.S. “offered so little for the Russian material that the LEU deal would amount to government-sponsored dumping of Moscow’s SWU in America”).

\textsuperscript{161} Former NRC Commissioner Gilinsky has argued:
A particularly important aspect of the US-Russian deal as a way of transferring funds to Russia was that it was budget-neutral. That is, the money for the HEU would be paid by the Enrichment Corporation’s customers. Instead of paying for electricity to run the enrichment complex, the Corporation would buy enriched uranium at equivalent cost from Russia. The funds to pay the Russians would not have to be appropriated by the Congress. This made the whole arrangement much more appealing to the Congress, which would not have to vote funds for the Russians when there were so many other domestic claims upon them.

\textit{See} Gilinsky, \textit{supra} note 1, at 160-61.

\textsuperscript{162} The President also stated: “At home, this agreement will secure long-term supplies of less expensive fuel for U.S. customers, with no adverse impact on American jobs. Thus, this Russian-American agreement illustrates how foreign policy accomplishments can promote our domestic economic well-being while making the world a safer place.” Gilinsky, \textit{supra} note 1, at 161 (quoting Executive Statement of August 31, 1992).

\textsuperscript{163} There is some lingering doubt whether the Energy Policy Act required USEC’s designation as executive agent. See \textit{Energy Policy Act of 1992}, Pub. L. No. 102-486, § 1408(a), 42 U.S.C. § 2297e-7(a) (1992) (“The Corporation is authorized to negotiate the purchase of all highly enriched uranium made available by any State of the former Soviet Union under a government-to-government agreement or shall assume the obligations of [DOE] under any contractual agreement that has been reached with any such State or any private entity before the transition date . . . [i.e., July 1, 1993, when USEC was scheduled to be established as a government-owned corporation].” \textit{Id.}) [hereinafter the “EP Act”]; see Falkenrath, \textit{supra} note 3, at 232-33 n.4 (arguing that Section 2297e-7(c) is ambiguous on
gress seemingly ratified the Executive Branch's public position. By delegating to the Executive Branch responsibility for setting the terms for USEC's privatization, the Congress made the President USEC's ultimate master in developing a U.S. negotiating position, thus em-

this point); section 1401(a) of the EP Act, by contrast, indisputably made USEC the exclusive marketing agent for the United States. See Pub. L. No. 102-486, § 1401(a), 42 U.S.C. § 2297c(a), ("The Corporation shall act as the exclusive marketing agent on behalf of the United State Government for entering into contracts for providing enriched uranium (including low-enriched uranium derived from highly enriched uranium) and uranium enrichment and related services. [DOE] may not market enriched uranium (including low-enriched uranium derived from highly enriched uranium), or uranium enrichment and related services, after the transition date.").

In any event, the Department of State, in hearings on USEC's privatization, seemed to have assumed that USEC was, under the EP Act, the only lawful Executive Agent for the United States. In response to Congressman Schaeffer's request for its position on the effect of USEC's privatization on its role in the HEU Deal, the Department of State asked for additional legal flexibility in the proposed legislation governing USEC's privatization:

We expect that USEC will continue to be the executive agent to implement the HEU contract following privatization, and have no plans to reconsider this question. We see no basis, however, for legislation granting USEC exclusive rights to market enriched uranium from the new states that emerged from the breakup of the Soviet Union once USEC becomes a private company. The February 1993 agreement between the United States government and the government of the Russian Federation allows either government to change the executive agent upon 30 days notice. We believe that if in the future, for any reason, USEC proves unable to fully implement the HEU contract, the United States government should not be prohibited by law from considering other possibilities for the executive agent to purchase and market uranium products under the HEU contract.


164. Privatization under the EP Act could take place at the discretion of the Executive Branch. Section 1501(a) provided that "within two years of the transition date, the Corporation shall prepare a strategic plan for transferring ownership of the Corporation to private investors." Section 1502(a) provided that the USEC "may implement the privatization plan if [USEC] determines, in consultation with appropriate agencies of the United States, that privatization will" meet certain substantive conditions, namely that it: "(1) result in a return to the United States at least equal to the net present value of [USEC]; (2) not result in [USEC's] being owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government"; (3) not be inimicable to the health and safety of the public or the common defense and security"; and (4) provide reasonable assurance that adequate enrichment capacity will remain available to meet the domestic electricity utility industry." Section 1502(b), however, explicitly provided that "[USEC] may not implement the privatization plan without the approval of the President," thus giving the President veto power on privatization and a sword of Damocles hanging over USEC's head.

165. The President exercised his indirect power to induce USEC on at least two occasions to make advance payments to MINATOM in order to achieve U.S. disarmament objectives in Ukraine. See Annex to Trilateral Statement, supra note 27; but see Falkenrath, supra note 3, at 257 (noting that after July 1, 1993, the Executive Branch lost all "formal" authority over USEC's operations). USEC officials repeatedly argued that USEC should not be required to pay a "national security premium" for Russian HEU, which might impair USEC's successful privatization by requiring it to take on inventory that it would be unable to sell, thus raising its costs of production. See GAO REPORT,
powering the Executive Branch as an institution to pursue rent-seeking strategies.

In exercising this delegation of authority, the Executive Branch managed the antidumping issue and HEU purchase in order to maximize USEC's competitive posture in the run up to privatization. Initially, USEC declined to purchase Russian HEU until it was able to obtain prices beneath its own cost of production. The matched sales program under the Amended Suspension Agreement ultimately enhanced USEC's market power in the U.S. market, as did the HEU Agreement itself in deterring Russia's independent entry into the U.S. enrichment market. Matched sales, arguably, also raised

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supra note 52, at n.34 ("In the past, USEC officials have stated that the corporation should be compensated for what it termed the 'national security premium,' or the difference between its marginal price and the price it pays for enrichment services under the implementing contract."). But in negotiations with Congress on privatization, USEC declined to advance this argument. Id. ("USEC officials strongly state that this is no longer their position and that they are not currently advocating that the government reimburse the corporation for the difference between its marginal cost and the contract price.").

166. Because, under long-term leases held and managed by DOE for USEC's benefit, USEC receives power at cost, see GAO REPORT, supra note 52, at n.4, it is argued that the U.S. Government has subsidized USEC's production and thereby undercut any incentives it might have to purchase Russian HEU. See Falkenrath, supra note 3, at 243 n.18, 280-82 & n.86 (citing studies by Thomas Neff and Mozelle Thompson) (citations omitted). But this argument fails to take into account that Russian SWU production may receive a similar subsidy. See Hibbs, Antidumping Case Europe Will Resist Pressure to Follow U.S. Antidumping Suit, supra note 57, at 5, available in 1992 WL 2461115 ("one European utility official said that the cost of electricity faced by URENCO is three times more than Russian enrichers pay for power"). It also fails to account for the disproportionately high environmental clean-up costs USEC would face in the United States. Compare supra note 57; Michael Knapik & Wilson Dizard III, U.S. Weapons May be Given to USE to Aid Economics of Russian Deal, NUCLEAR FUEL, May 24, 1993, at 1, available in 1993 WL 2421846 (reporting explanation of U.S. government official that the reason overfeeding was uneconomical was that because "USEC becomes responsible for the management and disposal of tails produced after" it becomes a government-owned corporation on July 1, 1993).

167. It was reported that the matched sales agreement, "according to a number of analysts, also increases the leverage of USEC in the market. It also provides an opportunity for U.S. producers to sell uranium to USEC. This would allow USEC and the Russians to conclude matched uranium product deals without fear of criticism from U.S. mining interests." Michael Knapik, Special DOC, MINATOM Sign Amended Agreement Providing for 'Matched' USWU Sales, NUCLEAR FUEL, Mar. 15, 1994, at 1, available in 1994 WL 2223571.

168. As the General Accounting Office (GAO) observed in a report to Congress on options for USEC's privatization, the HEU Agreement might be seen as vertical integration between USEC and the Russian enrichment enterprise, Tenex. GAO stated:

USEC recognizes the economic value of being the executive agent under the HEU agreement. The global uranium enrichment industry has four major producers: USEC, Tenex, Eurodif (a French-Belgian-Spanish-Italian-Iranian consortium), and URENCO (a British-Dutch-German consortium). According to USEC, the market for enrichment services has become highly competitive be-
the costs for USEC’s rival European SWU producers,\(^{169}\) paving the way for an export strategy for USEC to “dump” lower-cost Russian SWU in Europe as part of a predatory campaign.\(^ {170}\) The European market may have presented an inviting target to predatory U.S. strate-

cause the nuclear power industry has been growing slowly while the world’s uranium enrichment capacity has been expanding. The implementing contract enables USEC to control a large volume of material while, at the same time, giving Tenex the opportunity to take advantage of USEC’s marketing ability. Without this opportunity, Tenex might be tempted to compete directly with the corporation by developing its own marketing ability. See \textit{GAO REPORT}, supra note 52, at text accompanying note 34 of the GAO Report.

\(^ {169}\) USEC’s option to purchase such large quantities of uranium might have the effect of tying up enough worldwide supply to drive up the price of remaining supplies of uranium, thereby raising European SWU producers’ costs. \textit{See generally} Krattenmaker & Salop, \textit{supra} note 47, at 236-39 (discussing antitrust “bottleneck” or “essential facilities” doctrine and the “supply squeeze” or “quantitative foreclosure” strategies). Indeed, USEC’s acquisition of the option to purchase Russian HEU may amount to the strategic acquisition of excess capacity, with the effect of deterring potential competition in uranium enrichment services market. \textit{See generally} Oliver Williamson, \textit{Predatory Pricing: A Strategic and Welfare Analysis}, 87 \textit{Yale} L.J. 284 (1977) (arguing that a predator might build a plant at a larger than optimal size for maximizing short-run profits in order to deter entry by maintaining excess capacity that would allow the predator to increase output, thereby lowering market prices to the point that a new entrant operating at an efficient scale of production would fail, while still pricing above its marginal cost).

\(^ {170}\) On December 31, 1995, statutory authority for U.S. nuclear exports to the EC lapsed with the expiration of the U.S. Agreement for Peaceful Nuclear Cooperation with the European Atomic Energy Community (EURATOM). \textit{See U.S.-EURATOM Agreement, supra note 17, at 91. Under the Atomic Energy Act of 1954, as amended, the successor agreement required 90 days advance congressional consideration before the President was statutorily-authorized to bring it into force. See Atomic Energy Act of 1954, §123(b), (d), 65 Stat. 940, 42 U.S.C. § 2153 (b), (d) (1994). In testimony to the Senate Committee on Governmental Affairs during that waiting period, the chief American architect of the agreement, Fred McGoldrick, argued:}

\begin{quote}
The new agreement with EURATOM is also important for implementing the agreement between Russia and the United States to purchase low enriched uranium from 500 tonnes of high enriched uranium from dismantled Russian nuclear weapons. As the U.S. government agent for executing this agreement, USEC will need the European market to sell this material.
\end{quote}

gies, given Europe's high energy costs and the absence of barriers in EC law to low-cost imports.\textsuperscript{171}

In sum, the Executive Branch's neo-mercantilist policies reflected efforts to maximize the public good of national security gains through exploitation of low-cost Russian goods and services. The secretive-ness of the policymaking process and the absence of explicit congressional authorization laid the groundwork for rent-seeking predicted by public choice theory that resulted in an exceptional example of U.S. predation. Meanwhile, congressional opposition swelled to the apparent Executive Branch policy of strategic use of Russian resources to pursue monopolistic gains for USEC in world uranium markets. U.S. worker interests, as well as domestic producers in competition with USEC, would be harmed by turning USEC into a colos-sus that relied on Russian, rather than U.S., goods and labor to compete internationally.\textsuperscript{172}

\textsuperscript{171} See, e.g., Commission Decision 93/428 on a Procedure for the Application of the Second Paragraph of Article 53 of the EAEC Treaty, 1993 O.J. (L 197) 54, 55. The Commission of the European Communities [the Commission] decided that the European Atomic Energy Community [EAEC] Treaty did not obligate the European Supply Agency [ESA] to require European consumers to purchase excess Portuguese capacity because: the applicable rules authorize Community users to negotiate with the producers of their choice. Neither the EAEC nor the Secondary Legislation provide for 'Community preference,' and the Agency is therefore not required to order Community users to obtain supplies from Community producers before they can conclude supply contracts with non-Community suppliers.

\textsuperscript{172} Senator Wendell Ford, Democrat from Kentucky, noted that:

under the HEU Contract USEC will make the sales, but [blending] will be done in Russia rather instead [sic] of at [USEC's Paducah plant] in Kentucky or at [USEC's Portsmouth plant] in Ohio. [Congress] set up [USEC] to protect American jobs and America's energy security. ... We did not set it up to be just a broker. We expect [USEC] to remain a producer. We did not set it up to finance foreign policy initiatives, or to solve budget woes of other domestic programs. We expect [USEC] to maintain and enrich this nation's enrichment capabilities.

See Pamela Newman, Republicans Slam Clinton Nuclear Budget Proposal, 22 ENERGY DAILY KING COMMUNICATIONS GROUP (1994), available in 1994 WL 2489737 (quoting remarks at Senate Energy and Natural Resources Committee Hearing on confirmation of USEC Board of Directors). In hearings on USEC's privatization, Congressman Schaeffer added: "Congress should not support any proposal which would give the new Corporation a competitive advantage over other private businesses at taxpayer expense." See House Hearing on Feb. 24, 1995, supra note 57, at 2. Opposition to Executive Branch waiver authority was intense, given the perception that such authority would serve as a precedent for a general weakening of trade law. See Wilson Dizard III, Enrichment: Administration Seen Stalling, Then Backing Off Waiver in USEC Sale Bill, NUCLEAR FUEL, Jan. 29, 1996, at 2, available in 1996 WL 8610878 (reporting that "Staffs of the Ways & Means and Finance committees have been receiving numerous telephone calls from attorneys in the trade law community opposing the waiver authority measure.").
B. Public Choice and Strategic Trade Privatization Under Congress

Although additional congressional action was not necessary for USEC's privatization, Congress asserted itself and ultimately overturned Executive policymaking without abandoning the strategic dimensions of USEC's privatization. Assured that USEC had within its grasp next-generation technology that would make it an effective international competitor, Congress pursued a privatization strategy designed to reduce USEC's ability to extract economic rents internationally in the short-term yet ensure that it would be an effective market competitor in the long-term.

Two factors seemed to play a role in initiating Congressional activism. By spring 1995, congressional leadership was finally forced to confront the effect of predatory pricing on U.S. uranium producers by

173. Congress reserved for itself only the right to be notified of USEC's intent to proceed with privatization, and assured itself the right to receive the Comptroller General's assessment of certain financial implications of the privatization plan within 30 days of receiving that notice. See the EP Act, supra note 163, § 1502(c). There may have been technical details that required minimal congressional intervention, given gaps and ambiguities in the EP Act. USEC President William Timbers stated:

Although no new major legislation is required for privatization, technical legislative changes are needed. These changes include clarifications and other changes to existing law that would enhance the value of the Corporation thereby maximizing the return to the government—and the American taxpayer. Private investors likely will place an increased value on USEC if the future relationship between USEC and the government is defined as clearly as possible. To the extent that technical and other amendments to the law can achieve this, USEC's value should be enhanced. In addition, such changes increase the likelihood that USEC will continue in the private sector as a profitable domestic supplier of uranium enrichment services and a cornerstone of the nuclear industry.

See Prepared Statement of William H. Timbers, Jr., President and Chief Executive Officer, United States Enrichment Corporation, House Hearings of Feb. 24, 1995, supra note 57, at 12; see also Testimony of Representative Scott Klug, id. at 5 (referring specifically to the following technical changes: “We must authorize the sale of USEC as a private entity under federal and state corporation laws. We must repeal laws exempting USEC from State and local taxes or otherwise treating it as a federal agency. We must protect private investors from liabilities for operations of USEC while it was still under the control of the federal government. And we must ensure the rights and obligations of parties to contracts with DOE and USEC, that they will not be terminated or affected by privatization.”).

174. USEC President William Timbers told Congress: “The Corporation believes that a new enrichment method called Atomic Vapor Laser Isotope Separation or AVLIS is a U.S. technology that can lower productions costs for uranium enrichment. It gives the Corporation a measurable competitive advantage for the future. We are in the feasibility and predeployment stage regarding AVLIS.” House Hearing of Feb. 24, 1995, supra note 57, at 12.
sellers of excess HEU derived from weapons. At the same time, implementation of the HEU Agreement had been stalled in light of the U.S. agreement not to implement the matched sales program in a manner inconsistent with Canada’s rights under NAFTA and GATT. Accordingly, Senator Domenici proposed permitting purchase of Russian uranium for future introduction in the U.S. market, with the objective of effecting immediately some compensation to Russia for the uranium feed component of LEU transferred under the HEU Agreement. This was done through a discounted price associated with sales in a futures market, delaying the impact of that additional supply on the U.S. market, but still giving USEC the opportunity to realize some, albeit diminished, monopoly rents.

175. In characterizing the problem as one posing the risk of predatory pricing, Senator Domenici noted that:

[LEU] derived from [HEU], regardless of its country of origin, has suddenly become available in large quantities and, for the most part, in order to be sold in the commercial market, is being offered at prices significantly below its total production costs. Material once required regardless of cost, is now available to be sold at the marginal cost of blending it down—significantly below the production costs of even the most efficient producers in operation today. See 141 Cong. Rec. S. 6082-04, S. 6106 (May 3, 1995) (Statement of Senator Domenici on Introducing USEC Privatization Act) [hereinafter Domenici Statement]. It is noteworthy that he employed language virtually identical to that used little over a month later by the representative of the U.S. Uranium Producers Association in congressional testimony on the Domenici bill. Compare Alberts Testimony, supra note 170. Clearly, the two were speaking from the same script.

176. In introducing his proposed solution, after noting the Amended Suspension Agreement’s impact on preventing importation of LEU derived from HEU under the HEU Agreement, Domenici said:

In addition, the Department of State has recently reached an understanding with Canada on the implementation of the Suspension Agreement particularly as it pertains to the natural uranium component of the low-enriched uranium derived from highly-enriched uranium. That understanding stipulates that such material could be used only in the operation of the U.S. Enrichment Corporation [e.g. for overfeeding purposes], for sale in accordance with Section IV.M of the Suspension Agreement [e.g. outside the United States], or it could be returned to Russia. Those commitments place severe restrictions on the ability of the United States to implement the [HEU Agreement] . . . . While USEC may sell the separative work units into the commercial market, the Suspension agreement and the understanding with Canada prevent USEC from selling the vast majority of the natural uranium derived from the agreement. While USEC is technically obligated to pay the Russians for the natural component only when it is sold or 2013 [the expiration of the HEU Agreement], whichever comes first, Russia has made it clear that failure to pay for the natural uranium upon delivery jeopardizes the entire HEU agreement—clearly a detriment to United States national security interests.

Domenici Statement, supra note 175, at S. 6106. See also infra Part VI.

177. Domenici Statement, supra note 175, at S. 6106.

178. Senator Domenici stated:
Senator Domenici sought to harmonize the multiple U.S. interests at stake:

In addition to the benefits to the Russians, the United States gains because the Suspension Agreement and commitments made to Canada would stand. The USEC privatization is able to proceed without the uncertainty of a potential $4 billion obligation [namely, the duty to pay Russia at a later date for the natural uranium component of the LEU], and because the Suspension Agreement continues in its current form, the United States industry is allowed to continue to operate according to market conditions.179

The congressional policy thus reflected recognition that the issue for decision was not a choice between trade and national security interests but, rather, a choice as to how to maximize trade and national security interests.

An approach maximizing both nonproliferation concerns and trade concerns entailed tradeoffs that would reduce the potential national security gains from USEC's privatization, gains which Congress needed to downplay. Thus, Domenici presented USEC's contingent liability of payment for Russian natural uranium as a burden that might complicate USEC's privatization, since a firm, such as a privatized and non-monopolistic USEC, would need to minimize risk to ensure the confidence of the financial markets where privatization would ultimately be tested.180 What Senator Domenici did not add was that, in removing USEC's de facto monopoly on the importation of Russian natural uranium under the HEU Agreement, his proposal would dramatically undercut USEC's ability to employ predatory

This legislation proposes an innovative remedy to this situation. Simply put, natural uranium displaced by low-enriched uranium imported under the HEU Agreement would be deemed to be of Russian origin and . . . be subject to the Suspension Agreement and the understanding with Canada [except] that it could be sold for commercial end use in the United States starting in 2002 according to a schedule defined in the legislation.

Under this proposal, the Russians would be able to sell natural uranium derived from the HEU Agreement for future deliveries, in effect establishing a futures market. The price the Russians would be able to derive for the material sold now as futures would be dependent upon the conditions of commercial agreements between the Russians and any private investment entity, and would vary depending on predicted prices in the year 2002 and beyond.

Id. at S. 6106-07. See also Falkenrath, supra note 3, at 287-89 (commenting favorably on the proposal).

179. Domenici Statement, supra note 175, at S. 6107.

180. See GAO Report, supra note 52, at apps. II and III (discussing the multiple factors at stake in arriving at a reasonable assessment of USEC's net present value and, therefore, the likely proceeds from privatization for the U.S. Government).
pricing strategies both domestically and internationally. Recognizing that the planned introduction into the market through USEC of the United States' own HEU stocks derived from the dismantling of the United States' own excess nuclear warheads could have the same effects as the HEU Agreement, Senator Domenici also proposed restrictions that would ensure that such transfers to USEC would not afford it excessive market power. The bill even removed USEC's monopoly as the distributor for the U.S. Government of enriched uranium and uranium enrichment services. Finally, unlike the original EP Act, which effectively exempted USEC from U.S. antitrust law, the Domenici approach mandated full compliance with U.S.

181. See supra notes 168-70 (discussing the effect of low-cost Russian supplies on USEC's competitive position).

182. Senator Domenici stated:

The United States also has significant, undetermined inventories of excess highly-enriched uranium and low-enriched uranium. This legislation establishes a series of requirements that must be met before material may enter the civilian market. Prior to the privatization date, [DOE] may agree to transfer up to 4 million separative work units and 7,000 metric tons of natural uranium to USEC. However, that material may be delivered for commercial end use only according to a defined disposition schedule. Additional material, transferred to USEC from [DOE] following privatization may also enter the commercial market. However, prior to any such sale, [DOE] must conduct a full rulemaking to determine that the sale of the material will not have an adverse impact on the domestic mining or enrichment industry.

Domenici Statement, supra note 175, at S. 6107. Rulemaking proceedings would enable consumer groups to argue that excess HEU and LEU transfers would give USEC market power in the United States that could be used to the detriment of U.S. consumers. Without market power in the U.S. market, USEC's ability to finance predatory pricing strategies internationally would be undercut. See supra notes 137-46 (discussing the role of publicity under public choice theory in undercutting neo-mercantilism).

183. Section 1401(a) of the EP Act of 1992 had provided that:

The Corporation shall act as the exclusive marketing agent on behalf of the United States Government for entering into contracts for providing enriched uranium (including law-enriched uranium derived from highly enriched uranium) and uranium enrichment and related services. [DOE] may not market enriched uranium (including low-enriched uranium derived from highly enriched uranium), or uranium enrichment and related services, after the transition date.


184. It appears Congress initially wished to leave open the door to predatory rent-seeking for national security reasons by USEC only slightly. The EP Act formulation governing the applicability of U.S. antitrust law was less than categorical, providing only that "The Corporation shall conduct its activities in a manner consistent with the policies expressed in the antitrust law, except as required by the public interest . . . ." Section 1605(a) of the Atomic Energy Act of 1954, as amended by EP Act of 1992. The meaning of the
antitrust laws in the future and left open the possibility that even future matched sales might be subject to antitrust challenge. In sum, Senator Domenici's proposal dramatically reduced the likelihood that USEC could become an instrument for a neo-mercantilist strategy by the United States.

The Executive Branch reacted negatively to the new Congressional approach. Instead of accepting the congressional synthesis of trade and nonproliferation interests, the Executive continued to pursue maximizing USEC's access to low-cost Russian supplies, advancing with USEC's approval a proposal for a waiver of the antidumping "public interest" exception is less than clear. Legislative history suggests, however, that Congress fully understood that national security grounds might argue for a relaxation, but only in extreme instances, of limits imposed by U.S. antitrust law on collusion with, or predation against, competitors. In explaining comparable earlier language, the Senate Committee on Energy and Natural Resources stated:

New AEA Section 1605 requires the USEC to conduct its activities consistent with the antitrust laws, although as a Federal agency the USEC is not subject to them. The Committee believes that it would be inappropriate to make the USEC and its officers and employees subject to the antitrust laws because the Corporation remains part of the Federal Government. The Committee intends, however, that the USEC avoid any collusive behavior with foreign competitors or any anticompetitive practices. The Committee believes that the instances in which the common defense and security or other aspect of the public interest outweigh the aspects of the public interest protected by antitrust policies will be rare, but in such instances the Corporation should act as the overall public interest requires.

See S. Rep. No. 102-72 (1991), accompanying S.1220. The Executive Branch may have used this crack to open fully the door to using USEC for international rent-seeking.

185. See H.R. Rep. No. 104-537, § 5 (1996), available in LEXIS, Legis Library, Cmtrpt File ("For purposes of the antitrust laws, the performance by the private corporation of a 'matched import' contract under the Suspension Agreement shall be considered to have occurred prior to the privatization date, if at the time of privatization, such contract had been agreed to by the parties in all material terms and confirmed by the Secretary of Commerce under the Suspension Agreement.").

Testifying on June 13, 1995, a leader of a worldwide uranium trade organization had noted that S. 755 [the initial Domenici proposal] would give USEC antitrust immunity for actions, namely matched sales, undertaken while it was still a government corporation, and argued: "we believe that, while the legislation is not intended to provide antitrust protection to USEC for actions taken after privatization, the Committee should take this opportunity to clarify the antitrust concerns for all market participants." See Prepared Statement by Joe Colvin, Executive Vice President, Nuclear Energy Institute, Before the Committee on Energy and Natural Resources United States Senate (Federal News Service), available in 1995 WL 10387397. See also Report of the General Accounting Office to the Honorable Scott Klug: Budget Issues—Privatization/Divestiture Practices In Other Nations, Dec. 15, 1995 GAO/AIMD 96-23 (Federal Document Clearing House), text at n.3, available in 1995 WL 757706 (reporting that in other countries, "[r]estructuring also included breaking up monopolies prior to their sale"). It should be noted that the effect of applying U.S. antitrust laws to USEC was only to prevent activities by USEC having an anticompetitive effect in the U.S. market, since nothing in the U.S. antitrust laws prevents U.S. persons from harming consumers overseas. CBO Study, supra note 57, at 10.
Indeed, USEC and MINATOM, in the context of discussing joint ventures, which would enhance USEC's market power by allowing it to sell below other producers' costs both in the United States and elsewhere, seemed to collude to support the Executive Branch waiver proposal over the competing congressional plan. The Executive Branch even sought to condition its support for the congressional revision of the terms for USEC's privatization.

186. In the official records of USEC and MINATOM's meetings in Moscow on June 13-15, it was noted that:

Under current U.S. policy, USEC cannot dispose of the feed material in the U.S.

A discussion ensued regarding efforts to enact legislation permitting the sale of the feed component in the U.S. without penalty. The Administration legislative proposal, if passed, would facilitate sales of feed materials to U.S. consumers by USEC, allowing USEC to promptly pay Tenex for feed delivered. USEC is supportive of this proposal because it would resolve the feed payment issue. MINATOM/Tenex/UEIEP appreciate USEC's efforts and are supportive of any proposal which will result in full and prompt payment for the natural feed component.

If because of a change in law USEC is permitted to sell feed materials without restriction in the United States, USEC will pay for all feed material delivered to it prior to the enactment of the enabling law for which it has not paid.


187. Id. Point 4 of the June 1995 Protocol states: "In a meeting with [MINATOM] Minister Mikhailov on June 14, both parties expressed a desire to seriously explore joint venture possibilities." Id. at 9

188. See supra notes 168-69.

189. On June 14, 1995 MINATOM Minister Shishkin wrote to USEC Vice President Rifakes:

We were previously made aware of the Domenici Senate proposal which provided for some relief, but does not fully solve the payment problem. Yesterday you told us about an administration proposal supported by USEC that, if passed, would result in payment by USEC of the total value of the LEU when received. We appreciate your efforts in this regard. While how this is accomplished is a matter internal to the United State, we support any effort that results in the fulfillment of our payment objectives.

We have always anticipated payment in full for enriched uranium accepted into the United States. Anything less is clearly unacceptable to us. We support your efforts to resolve this vital issue.

Record of Moscow Talks Bared, supra note 186, at 9 (citing June 1995 Protocol).

190. See USEC Privatization Stuck in Limbo until Compromise on Russian Waiver Reached, ENERGY REP., Mar. 4, 1996, available in 1996 WL 8375627 ("White House officials claim that if the so-called antidumping suspension agreement falls through, the United States will impose large tariffs on the HEU and risk the deal's economics"); see also Wilson Dizard III & Michael Knapik, New Solution to Waiver Issue Proposed; USEC to Pick CAMECO, GE for AVLIS Work, NUCLEAR FUEL, Mar. 25, 1996, at 1, available in 1996 WL 8610975 ("The Clinton Administration for months has backed a provision granting the president authority to waive the antidumping laws as they might affect the HEU
In spring 1996, a compromise proposal appeared under which the revenues from USEC's privatization would be used to pay antidumping duties on the uranium component of the Russian HEU, with the effect of permitting the uranium feed component's immediate introduction in the U.S. market.\footnote{See USEC Privatization Stuck in Limbo Until Compromise on Russian Waiver Reached, supra note 190; Dizard & Knapik, supra note 190, at 1.} A few days later, Graham Allison, professor of government at Harvard and former Clinton administration assistant secretary of defense, suggested that the impasse be resolved with the immediate purchase of all available Russian HEU for storage in the United States.\footnote{See International: USEC Head Says U.S. Purchase of All Russian HEU Not Likely, NUCLEAR WASTE NEWS Apr. 11, 1996, available in 1996 WL 8090607.} USEC's president, William Timbers, countered that the "Russians want the blending down of the HEU to be done in their country ...." Timbers added: a "commercial contract is the best way to deal with the Russian HEU . . . . [since] USEC can assure the fissile material is removed from Russia, and also ensure the world uranium market does not become glutted because of it."\footnote{Id.\footnote{See Thomas W. Lippman, Plan for Fuel from Russian Bombs Snarled U.S. Law Protecting Uranium Miners Complicates Deal, PITTSBURGH-POST GAZETTE, June 27, 1995, at A4, available in 1995 WL 3390449 ("USEC cannot simply give the Russians the money up front because it would be stuck with uranium for which there is no current market and such a burden on its balance sheet would preclude privatization.").} Either proposal would have satisfied USEC's interest in not paying for goods it could not market, which would undermine its privatization.\footnote{See USEC Privatization Act, Section 3101 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 42 U.S.C. § 2011 note 2296b-7; see also Wilson Dizard III, USEC Privatization Bill Now Is Law; DOE Calls Meeting on GDP Safety, NUCLEAR FUEL, May 6, 1996, at 1, available in 1996 WL 8611281 ("The law also provides for deal. Opposition to the proposed waiver authority in Congress has however, become overwhelmingly strong in recent weeks.").} But the first would have shifted to the taxpayer the cost of paying for any national security gains derived from assisting USEC in becoming a monopolist, and the second would have precluded the use of the material to secure market power for the United States.

In the end, Congress rejected both the presidential waiver and the proposal for a national security purchase in which antidumping duties would be funded from the proceeds of USEC's privatization. Instead, it enacted the USEC Privatization Act, which provided for the introduction of the Russian HEU uranium feed component into the U.S. market beginning in 1998 and permitted Russia immediately to sell uranium that could be imported at a later date, though undoubtedly for discounted prices.\footnote{Id. \footnote{See USEC Privatization Act, Section 3101 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 42 U.S.C. § 2011 note 2296b-7; see also Wilson Dizard III, USEC Privatization Bill Now Is Law; DOE Calls Meeting on GDP Safety, NUCLEAR FUEL, May 6, 1996, at 1, available in 1996 WL 8611281 ("The law also provides for deal. Opposition to the proposed waiver authority in Congress has however, become overwhelmingly strong in recent weeks.").}} Thus, after a year's delay exac-
bated by a budget impasse that had nothing to do with the substance of the bill,\textsuperscript{196} the initial congressional plan that balanced a wide range of U.S. interests prevailed,\textsuperscript{197} even garnering executive branch recognition that U.S. national security interests had not been compromised.\textsuperscript{198}

The differing approaches taken by the Executive Branch and Congress in the case of USEC's privatization thus seem consistent with the predictions of public choice theory described in Part IV of MINATOM to choose whether to sell the uranium component through the matched sales provision of the antidumping suspension agreement, or for overfeeding enrichment plants in the United States. The law provides MINATOM the option of directing USEC as the U.S. executive agent of the HEU deal to engage an independent entity to auction off the uranium component for future use in U.S. reactors.

\textsuperscript{196} See 142 CONG. REC. S. 5391-92 (daily ed. May 20, 1996). Sen. Murkowski stated:

\begin{quote}
The USEC privatization bill was included in the reconciliation package which was vetoed for reasons having nothing to do with the USEC language. The USEC privatization bill was then presented as a stand-alone bill that was placed on the Senate calendar, and the language emerging from our consensus was finally included in the Omnibus Appropriations bill that was recently signed by the President and enacted into law.
\end{quote}

\textit{Id.}

\textsuperscript{197} Senator Murkowski aptly described the Congressional effort as follows:

\begin{quote}
[The U.S. uranium enrichment] enterprise suffered under the yoke of government control, and it has steadily lost market share to competitors around the world. As the result, the maintenance of a secure, economical domestic enrichment capability was at stake. . . . We had conflicts between the desire to implement a Russian enriched uranium purchase agreement and the legitimate interests of enrichment plant workers and uranium producers. We had conflicts between plant workers and plant management. We had conflicts between USEC and other entities that desired to get into the enrichment business. We had tough issues to resolve that impacted every player in the front end of the nuclear fuel cycle, including uranium producers, converters, enrichers, fuel fabricators, and utilities. To complicate the picture, we had to address all these thorny issues in a manner that would maximize USEC's value without inhibiting competition in the enrichment market.
\end{quote}

\textit{Id.} at S. 5391-92.

\textsuperscript{198} Two days before the USEC Privatization Act was approved by the President, Lynn Davis, Undersecretary of State for Arms Control and International Security Affairs, in effect conceded that waiver of U.S. antidumping had not been necessary after all to implement the HEU Agreement, stating:

\begin{quote}
In Moscow last week, we achieved Russia's final approval of transparency measures that will give us confidence that the material provided under this contract originated from dismantled Russian nuclear weapons. Let me note that implementing this HEU contract has been highly complex, involving financial and trade law considerations, as well as sensitive national security issues. The deal is now on track and functioning, to the benefit of both the United States and Russia.
\end{quote}

To Judge Between the Nations

Yet the issue was not decided entirely by domestic separations of powers and political considerations, although the capture of the 104th Congress by the Republican party undoubtedly also played a role in the willingness of the Congress to assert itself on foreign policy issues.\(^{199}\) The case also demonstrates that the transfer of management of the issue from the Executive Branch to Congress was facilitated by the influence of international law in blocking the Executive Branch’s preferred neo-mercantilist policies.\(^{200}\)

Indeed, confirmation of the theoretical predictions made in Part IV about the relative tendencies of the two branches suggests that, if the Executive Branch is to manage strategic trade issues, international institutions will need to play a moderating role if the Executive Branch is to achieve results comparable to those achieved by Congress. Admittedly it seems that, in the case of USEC’s privatization, international law considerations did not persuade the Executive Branch to adopt a cooperative approach from the very beginning. That international institutions frustrated an offensive policy yet did not compel a defensive policy is consistent, however, with the ambiguous status of the new international institutions. Even though the international legal system is experiencing a period of intensified constitutional activity, it is still unclear, as Part III argued, whether these recent efforts signify a permanent increase in the cost of offensive rent-seeking or reduction in the incentives for defensive rent-seeking that will radically restructure domestic decision-making on national security issues.\(^{201}\) Accordingly, the role described in Part V played by international institutions in the domestic U.S. decision-making process invites an inquiry, albeit preliminary, into the relationship between international trade law institutions and domestic processing of national security issues.

Part VI first analyzes how the treatment of the specific national security claim posed by the HEU Deal benefited from the special treatment under NAFTA that impeded excessive rent-seeking by the Executive Branch and served separation of powers functions by channeling the management of the uranium issue to the Congress. Given the key role played by the NAFTA security exception in the manage-

\(^{199}\) USEC could not, for example, escape targeting as a source of revenue under the proposed Contract with America Tax Relief Act. See 141 CONG. REC. H. 4213-92, 4247-48 (daily ed. Apr. 5, 1995) (debate concerning committee jurisdiction over tax provisions of USEC Privatization Act).

\(^{200}\) See Lippman, supra note 194, at A4.

\(^{201}\) See supra text accompanying notes 69–114.
ment of the nonproliferation/trade policy debate, this Article advances a tentative proposal for exploring the interpretation of the GATT/WTO security exceptions as justiciable so as to induce greater transparency in the domestic decision-making process for the production of trade-related national security externalities.

VI. International Constraints on Domestic Balancing—The NAFTA and GATT National Security Exceptions

Theoreticians insist that a critical variable for assessing how domestic institutions structure policymaking in national security issues is whether management of an issue, which is important to a domestic constituency, has been institutionalized internationally: "[I]nstitutions themselves spawn their own constituencies, who each have a stake in the perpetuation and growth of the system." A complete account of the constitutional elements that affect policy formulation must assess both the domestic and the international institutional structures. Thus, an exploration of the role of domestic institutional structure in this policy production process necessitates consideration of the role of international institutions.

This Article now argues that, in the case of the HEU Agreement, practice corroborates the theoretical prediction of the relevance of international institutions in domestic policymaking. In the initial implementation of U.S. antidumping law and the HEU Agreement and in

202. See Gourevitch, supra note 133, at 364; see also Anne-Marie Burley & Walter Mattli, Europe Before the Court: A Political Theory of Legal Integration, 47 INT'L ORG. 41-76 (1993).

203. In the case of trade relationships between the United States and Japan, for example, in contrast to the high level of international institutionalization of the management of trade issues in the European Union, policy preferences seem mediated primarily by domestic constitutional structures. See Gourevitch, supra note 133, at 368-71. Gourevitch argues that increased cooperation between the United States and Japan would require the United States to "reduce consumption and increase savings by instituting such measures as higher taxes, less government spending, tax incentives to save rather than consume, and restrictive monetary policy," while Japan would need to "relax various trade restrictions (cartelization of retail distribution, extensive regulatory barriers, and ownership and investment rules), lower interest rates, increase spending, and cut taxes." However, "each of these actions provokes opposition from the domestic beneficiaries of the status quo." Id. at 369. Gourevitch notes that the domestic institutionalist would explain the failure of policy harmonization, in the case of Japan on, among other things, its system of administrative guidance, which reduces transparency and facilitates exclusionary practices, and its formerly multimember electoral system, which favors specialized interests opposed to free trade, and, in the case of the United States, on the relatively unstructured United States political process, which allows protectionist groups to have a strong voice in Congress, and Congress' recent denial of so-called "Fast Track" authority to the President (undercutting prospects for free trade agreements). Id. at 369.
privatizing USEC, executive branch policymaking in the initial stages was inadequately constrained by GATT due to the absence of compulsory dispute resolution and the possibility of invoking the relevant national security exceptions. Once the NAFTA and WTO compulsory dispute resolution procedures became effective, however, the likelihood of legal review of U.S. policies increased, arguably encouraging the United States, and especially the Congress, to adopt somewhat less predatory international trade policies with respect to USEC's privatization, the HEU Agreement and the Antidumping Suspension Agreement. More important in explaining the shift in the U.S. position, however, was the possibility that the non-self-judging security exception rather than the general self-judging exception, under NAFTA might apply. Also, arguably, because the lack of clarity in the meaning of the GATT and, to a lesser extent, NAFTA national security exceptions, predatory strategies were not sufficiently constrained by law to deter continuing efforts by the Executive Branch (described in Part V) to secure market power. This was the case even after the dispute with Canada was provisionally settled, because congressional intervention ultimately was necessary to secure a settlement balancing national security and trade interests. This outcome suggests, therefore, that the current NAFTA and GATT national security exceptions in the future will play increasingly more important roles in resolving domestic policy disputes. Accordingly, this Article concludes with a preliminary argument for interpreting the GATT national security exception in a way that would complement the revised constitutional character of the new WTO and better serve U.S. domestic policymaking interests of optimizing rent-seeking behavior in the production of national security goods.

A. NAFTA's Special International Constraints on Rent-Seeking Behavior

The analysis of legal constraints on economic security policymaking occurs within the context of a body of international economic law that is nowhere near as developed and complete as some might think. Although the chief vehicle for international rent-seeking is the exercise of market power, there seems to be relatively little international institutionalization of an international competition law\textsuperscript{204} with the

\textsuperscript{204} See Compare American Trade Policy: War Cancelled, supra note 105, at 72 (noting that Kodak chairman George Fisher testified before a congressional committee that "the Japanese government's toleration . . . of systematic anti-competitive activities that block market access for American and other imported products simply is not covered by WTO
possible exception of an emerging regime under NAFTA. On the other hand, there may be somewhat more international institutionalization for processing issues governing the use of trade-based measures, such as dumping or subsidies, to maximize monopoly rents in international trade. In theory, the use of antidumping or countervailing duties is also limited under GATT by the WTO Dispute Settlement Understanding, creating the appearance of rule-based limits on rent-seeking behavior by states for national security reasons. Even there, however, the degree of institutionalization seems incomplete, thus leaving substantial room for predatory behavior.

Yet, any legal justification for national security-related use of antidumping or countervailing duties to support USEC's market power and effective privatization should be framed explicitly in terms of the

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205. NAFTA contains the beginnings of a competition regime. See NAFTA, supra note 50, ch. 15 (Competition Policy, Monopolies and State Enterprises). Although it does not articulate criteria for defining anticompetitive activities, it contains the key obligation that when a party creates a monopoly as a matter of state policy, it will “endeavor to introduce . . . such conditions on the operation of the monopoly as will minimize or eliminate any nullification or impairment of benefits . . . .” Id. art. 1502(2)(b). The NAFTA recognizes the provisional nature of the effort by providing for a working group report within five years on “relevant issues concerning the relationship between competition laws and policies and trade in the free trade area.” Id. art. 1504. It is not clear that study of the relationship between competition laws and the security exceptions would be addressed by that report.

206. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (Antidumping Code) and Agreement on Subsidies and Countervailing Measures, WTO Dispute Settlement Understanding, supra note 98, annex IA.

207. See WTO Dispute Settlement Understanding arts. 16.4, 17.14; see also Agreement on Safeguards, art. 11, supra note 98.

208. See, e.g., Moran, Grand Strategy, supra note 86, at 193 n.40 (arguing that the WTO Antidumping Code, as applied to strategic trade, permits substantial protectionism). Moran points out that producers ordinarily sell at marginal cost and that, for high-technology goods, marginal costs of production do not flatten out until well into a production run. Id. He therefore argues that the Antidumping Code’s requirement that the foreign producer cost calculations, which serve as the basis for imposing antidumping duties on imports, reflect costs at “the end of the start-up period,” inflates the statutory baseline for assessing whether a foreign producer is selling below cost. Id. Accordingly, he argues that, in “high-tech industries . . . antidumping measures based on average cost . . . without adequate recoupment of start-up expenses, are strongly exclusionary.” Id. In implementing a transnational integrative approach to national security, see supra note 113, Moran argues that, in addition to “whether the new agenda of trade negotiations on competition policy, labor, and the environment heightens or diminishes the exclusionary measures available to particular regions,” the new WTO should be amended, inter alia, “to change the test for antidumping.” Id. at 195.
security exceptions rather than the anti-dumping regime. The persistent, pretextual use of these indirect tools for national security reasons would seem to undermine the appearance, if not the reality, of restraint. National security concerns are channeled to general national security exceptions under GATT\textsuperscript{209} and NAFTA\textsuperscript{210} applicable only in

\textsuperscript{209.} GATT Article XXI provides for three distinct security exceptions:

\begin{quote}
Nothing in this Agreement shall be construed
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its own security interests;
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relation; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
\end{quote}

GATT art. XXI. Exceptions (a) and (b) seem relevant to rent-seeking behavior for strategic purposes. Exception (c) contemplates, at a minimum, actions required under Articles 25 and 103 of the U.N. Charter, in which a state is bound to implement "the decisions" of the Security Council under Chapter VII of the Charter. There has not yet been a mandatory, Chapter VII decision on this subject, however, relating to the danger of loose nuclear materials in the former Soviet Union, much less nuclear materials generally, which drives the U.S. nonproliferation interest in the HEU Agreement. However, given the general duty under Article 2(5) of the Charter to "give the United Nations every assistance in any action it takes in accordance with the present Charter," exception (c) may also extend to other actions by the Security Council, or even General Assembly, in an area within its competence. See Louis B. Sohn, Rights in Conflict: The United Nations and South Africa 69 (1994) (arguing that General Assembly resolutions may be given effect under Article 25). Even if this were so, however, it would still be quite a stretch to argue that Security Council and General Assembly statements concerning the general risks of nuclear proliferation would provide a basis for invoking Article XXI(c) in a case where a state unilaterally determined steps it would take to implement a goal articulated by the United Nations. See, e.g., Security Council Summit Statement, Note By the President of the Security Council, U.N. Doc. S/23500, at 4 (1992), reprinted in 31 LLM. 758, 761.

\textsuperscript{210.} NAFTA Article 2102 contains provisions similar to GATT Article XXI except that NAFTA Article 2102(1)(b)(iii) replaces GATT Article XXI(b)(i)'s language "relating to fissionable materials" with an exception for actions "relating to the implementation of national policies or international agreements respecting the nonproliferation of nuclear weapons or other nuclear explosive devices." Arguably, the NAFTA exception includes not only export control regimes mandated by treaties, such as the NPT, but also supplier guidelines not expressly required by the NPT but consistent with its larger purposes. See, e.g., The Physical Protection of Nuclear Material, IAEA Doc. INFCIRC/254 (June 1977) (including restraints with respect to technology transfer, notwithstanding absence of limits on technology transfer in the NPT, except possibly regarding the nuclear weapon state's obligation not to assist another state in the acquisition of nuclear weapons). NAFTA also contains a separate security exception covering only the energy sector. See NAFTA, supra note 50, art. 607 (discussed infra notes 219-21).
cases involving a state’s “essential security interests.” Thus, if GATT and NAFTA are to serve as effective institutional constraints on domestic policymaking in the national security area, the boundaries for invoking their national security exceptions need to be delineated. Otherwise, the national security exceptions would be as much subject to pretextual use for offensive strategic trade policies, as well as unnecessary defensive policies and protectionism, as the antidumping and countervailing duties exceptions are susceptible to excessive protectionism.

Arguably, just as GATT could be understood to tolerate a certain degree of protectionism, WTO and NAFTA would rationally tolerate a politically optimal level of national security. The security exceptions to international economic treaty law might be understood, then, as efforts to encourage only optimal levels of national security in strategic trade. Mining the text of the original GATT exception, for example, one finds acknowledgment of national security-based policies for strategic trade. GATT Articles XX(b)(i) and (ii) focus, respectively, on “fissionable materials or the materials from which they are derived” and action “for the purpose of supplying a military establishment.” The precise scope of each exception and the interrelationships between them is not altogether clear from the text, however. Article XX(b)(i), under the interpretive convention of *lex specialis*, would seem to be most relevant to the specific case of the international trade in uranium. That provision would also seem to be broader than Article XX(b)(ii), since the latter on its face requires an inquiry into the “purpose” of the action which a state seeks to defend against GATT challenge, while the former is applicable whenever the action “relates” to “fissionable materials.” Yet, the question of “purpose” is addressed elsewhere in the text in a way that makes that ele-

211. *See* GATT art. XXI; NAFTA, *supra* note 50, art. 2102.

212. National Security tests have been seen by most commentators as especially susceptible to manipulation. *See*, e.g., Sykes, *Mandatory Retaliation, supra* note 105, at 316.

213. Based on public choice theory, it has been argued that the GATT contemplated a politically optimal level of protectionism, meaning that the right to engage in a certain level of protectionism during implementation of a trade agreement would give states the confidence necessary to make trade concessions at the negotiation stage. *See* Sykes, *Mandatory Retaliation, supra* note 105, at 316.

214. *See supra* note 209.


216. Uranium is the so-called “source” material from which fissionable U235 is separated, *see supra* note 23, and thus is “material from which” a fissionable material “is derived” for purposes of GATT Article XX(b)(i).
ment of Article XX(b)(ii) a chimera. Article XX(b)'s mythological qualities flow from the possibility that Article XX's preambular language concerning its scope. That is, "any action" by a state "which it considers necessary for the protection of its essential security interests"—means literally what it says.\footnote{But cf. Antonio F. Perez, Survival of Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards, 34 VA. J. INT'L L. 749, 774-96 (1994) (arguing that similar language in the NPT should, in the light of its unique context and purpose, together with subsequent practice and negotiating history, be construed in accordance with its literal meaning).} NAFTA also arguably regulates most strategic trade with a similarly self-judging security exception.\footnote{See NAFTA, supra note 50, art. 2102.}

In the case of the HEU Agreement, the apparent weakness of the general security interests exception did not control the situation. NAFTA contains a special, non-self-judging security exception governing trade in energy "goods."\footnote{Article 2102 of NAFTA is expressly made subject to Article 607. See NAFTA, supra note 50, art. 2102. Article 607 provides that, as between the United States and Canada, but not Mexico: no Party may adopt or maintain a measure restricting imports of an energy or basic petrochemical good from, or exports of an energy or basic petrochemical good to, another Party under Article XXI of the GATT or under Article 2102 (National Security), except to the extent necessary to: (a) supply a military establishment of a Party or enable fulfillment of a critical defense contract of a Party; (b) respond to a situation of armed conflict involving the Party taking the measure; (c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or (d) respond to direct threats of disruption in the supply of nuclear materials for defense purposes. Id. art. 607. The Article 607 formulation thus narrows the grounds for which the exception may be invoked. See Anne Marie Godin, Canada's International Obligations to Provide Energy Under the EIP, GATT, and NAFTA, 1 GREATER N. CENT. NAT. RESOURCES J. 71, 98 (1996). The requirement of "necessity" remains. But the chief difference between Articles 607 and 2102 is that the former does not employ the self-judging, "it considers," language found in the latter. Id.} One might consider the U.S.-Canada dispute relating to strategic trade in uranium and uranium enrichment services as an experiment in the effect of changing the security exception to be non-self-judging. Canada had the right under NAFTA to pursue GATT dispute resolution, which would encompass NAFTA as well as GATT violations that formed the basis of Canada's objections.\footnote{NAFTA Article 2005(1) permits "any matter arising under both" NAFTA and GATT to "be settled in either forum at the discretion of the complaining party." Thus, in the case of Canada's challenge to the U.S. matched sales program, although Canada initially invoked its right to "consultations" under NAFTA Article 2006, rather than GATT, if it were to resurrect its claim, the substance of Canada's argument—which is based on the
program through the NAFTA procedures, Canada took account of the fact that NAFTA might be more likely than GATT to apply a NAFTA principle, the non-self-judging security exception for the energy sector, that had no apparent counterpart in GATT.

Admittedly, Canada's evaluation of its dispute resolution strategy would certainly have been more complicated and qualified than that. For example, there may be doubts about the applicability of the non-self-judging NAFTA security exception in the matched sales program, which involved not only energy "goods" but also energy services.221 And if the non-self-judging exception were inapplicable,

national treatment concept of the GATT, see supra note 50—would entitle it to a WTO dispute settlement forum. NAFTA, supra note 50, art. 60.

221. It is not clear, for example, whether the exception would have been fully applicable to the U.S.-Russia matched sales program challenged by Canada on national treatment grounds. The matched sales program extended not only to matched sales of displaced natural uranium feed but also of SWU. See supra note 44. Because uranium is the basic energy input in a nuclear power reactor, one might reasonably argue that displaced natural uranium feed, which is treated as a constructive import of natural uranium upon the importation of smaller quantities of LEU, is an "energy good" for purposes of NAFTA Article 607. But the larger component of value in the importation of LEU under the HEU Agreement and Contract is SWU, which arguably represents the provision of a service. See supra note 23. Article 607's reference to an "energy good" may then be inapplicable to the SWU component. A similar characterization issue arises in the U.S. law of contract under the Uniform Commercial Code (U.C.C.), Article 2, which applies to the sale of goods only, causing considerable uncertainty in cases of the mixed provision of goods and services. See, e.g., Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976) (trial and appellate courts disagree on whether construction of a water tank was provision of a service or delivery of a good). If the services dimension of the matched sales program predominated, arguably the whole measure would be governed by Article 2102. Cf. Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (leading American case distinguishing sales from services for U.C.C. Article 2 purposes by employing a "predominant factor" test). Moreover, adjudication of the SWU component, to the extent it was separable from the matched sales program as a whole, might have been subject instead to the Article 2102 security exception.

Because Article 2102 tracks the GATT formulation, Canada would need to address the question whether Article 2102's language is self-judging. One might possibly argue that if the GATT exception could be construed to be non-self-judging, see infra text accompanying notes 231-236, then Article 2102's virtually identical language might be similarly construed. However, because NAFTA contained the parallel Section 607 exception that lacked the self-judging language of Article 2102, the NAFTA text would tend to undercut any argument that Article 2102 was not self-judging. Moreover, the U.S. Congress expressly took the view that the Article 2102 "national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith." See North American Free Trade Implementation Act, ch. 21 (exceptions), Pub. L. 103-182, 107 Stat. 1057 (1993), available in 1993 WL 561204. For a critique of the limits of good faith as a control device in auto-interpretation, see Perez, supra note 217, at 778-82.

Yet the services dimension of the problem would have encouraged Canada to rely on NAFTA, given GATT's inapplicability to services before WTO entered into force. While
Canada would be faced with the clearly self-judging general exception under NAFTA. Also, at least with respect to Canada’s GATT claim, the United States might have been able to invoke GATT Article XX(b) even under the NAFTA dispute resolution without risk of review. It is also conceivable that, if Canada’s NAFTA claim were substantively grounded only on its GATT rights, even Canada’s NAFTA claim would be subject to the limitations governing its GATT rights, including the same self-judging security exception as might be available to the United States under NAFTA. Most important, it is difficult to rule out the possibility that Canada chose to utilize the NAFTA rather than the GATT procedures simply because, as of 1994 when the dispute arose, only the compulsory dispute settlement procedures of NAFTA were available to it while the new Dispute Settlement Understanding of the WTO had not yet entered into force and the old GATT system would permit the United States to block action. Nonetheless, it seems plausible to argue that the tightened NAFTA security exception for energy sector claims played a part in Canada’s dispute resolution strategy.

It seems to follow, then, that a global non-self-judging security exception under the WTO would also restrain international predation.

\footnote{The SWU component of the matched sales program could have been addressed through the GATT, NAFTA clearly provided a foundation for a Canadian national treatment claim in relation to services. Compare NAFTA, supra note 50, art. 1202(1) (“Each party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers.”), with GATT art. XVII (providing that it is only “[i]n the sectors inscribed in its Schedule,” in which, pursuant to Article XXI(1)(b) members indicate “conditions and qualifications on national treatment,” must a member “accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than it accords to its own like services and service suppliers.”).}

\footnote{This argument would need to hurdle the barrier that there are textual differences even between GATT Article XXI and NAFTA Article 2102, the two general security exceptions. But, for these purposes, the differences between the GATT “fissile materials” exception and the NAFTA “nonproliferation” exception, especially as applied to nuclear nonproliferation, would seem to be immaterial, since the principal difference between the two seems to relate to the emergence of new non-nuclear weapons of mass destruction. See, e.g., Williamson, supra note 17, at 147-50 (discussing the informal restraints on the export of missiles under the Missile Technology Control Regime (MTCR) that are related to nuclear nonproliferation).}

\footnote{See NAFTA, supra note 50, arts. 2108-09 (requiring implementation of panel reports and, in the alternative, suspension of benefits).}

Accordingly, the next section of this Article considers the possibility that Canada might have a similar opportunity to employ GATT now that the WTO has entered into force. In brief, it suggests a possible legal argument for interpreting the security exceptions available under the WTO as non-self-judging.

B. The Transformation of the GATT National Security Exception into Law

The national security exception is new in the WTO in the straightforward sense that it is included in the new multilateral trade agreements. But its language has not changed from the old GATT. The language of Article XXI seems to expressly confer upon the Contracting Party the power to make a unilateral determination that cannot be questioned, since it applies to what “it considers” to be its “essential security interests.” Moreover, to the extent negotiating history, subsequent agreements, and (setting aside the discrepant U.S.-Nicaragua case discussed below) subsequent practice shed

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225. Formulations identical to GATT Article XXI are also found in GATT Article XIV Bis & TRIPs Article 73.

226. GATT art. XXI.


1. Subject to the exception in Article XXI: a contracting parties should be informed to the fullest extent possible of trade measure taken under Article XXI.
2. When action is taken under Article XXI, all contracting parties affected by such actions retain their full rights under the General Agreement.
3. The Council may be requested to give further consideration to this matter in due course.

Id. The language seems to confirm the self-judging character of Article XXI: operative paragraph 1 is only precatory; operative paragraph 2 reaffirms only whatever rights parties may have under the GATT without specifying what those rights, if any, might be; and operative paragraph 3 indicates the possibility of further action by the GATT Council, thus confirming that there may be a need for further action. But see Michael J. Hahn, Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception, 12 Mich. J. of Int’L L. 558, 575 (1991) (reading these clauses to support a non-self-judging interpretation of Article XXI).

229. See, e.g., Request of the Government of Czechoslovakia for a Decision Under art. XXIII, June 8, 1949, GATT Doc. GATT/C.P.3/SR.22, at 7, available in LEXIS, Exec Library, GATT File (statement of U.K. representative Mr. Shackie) [hereinafter Czechoslovakia Request]. This statement has been relied on by authoritative commentary on the GATT to manifest the self-judging character of Article XXI. See Jackson, et al., Legal Problems of International Economic Relations, supra note 96, at 984.
light on the meaning of article XXI, the better view is probably that
the exception was self-judging. One might argue, however, that the
new GATT under the WTO has a meaning different from the old
GATT, because the new WTO represents a constitutionalization of
the GATT system as a forum for the management of international
trade and new international legislation,230 which flowed in part from
dissatisfaction with the abusive use of economic sanctions by major
powers during the Cold War.231 This dissatisfaction stemmed in par-
ticular from the U.S. sanctions against Nicaragua considered by a
GATT panel in the United States-Trade Measures Affecting Nicara-
agua case (the “Nicaragua Trade Measures case”),232 where, at the
United States’ insistence, the terms of reference for the Panel con-
vened to address Nicaragua’s claims explicitly precluded consideration
of the motivation or validity of the United States invocation of Article
XXI.233

The Panel’s mandate thus reflected the limitations of the proce-
dural framework of GATT Article XXIII, which grew out of a non-
judicial model of GATT dispute resolution as a negotiating forum for
the satisfactory resolution of disputes.234 However, the new Dispute
Settlement Understanding of the WTO, which conceives of the dis-
pute settlement system as “a central element in providing security and
predictability to the multilateral trading system,” 235 entrenches a
more adjudicative model as the framework for WTO dispute resolu-
tion. Because each nation could block consensus on adoption of a
panel report under the old GATT system, its concurrence on terms of

230. See Jackson et al., legal problems of international economic rela-
tions, supra note 96, at 301-04 (discussing the fruition of the FOGS, or Future of the
GATT System, in the new Trade Policy Review Mechanism (TPRM) for international sur-
veillance of national policy, and the creation of the WTO as a new international organiza-
tion, which would “promote a sense of legal and practice continuity with the GATT”).
Professor Jackson has suggested that the new institutional structure “offers more flexibility
for future inclusion of new negotiated rules or measures which can assist nations to face
the constantly emerging problems of world economics. For example, already mentioned
for such attention are . . . competition policies.” Uruguay Round Legislation: Hearings
Before the Senate Finance Comm., 103d Cong. 2d Sess. 195 (Mar. 23, 1994) (testimony of
John H. Jackson, Hessel E. Yntema Professor of Law University of Michigan).
231. See 1982 Decision, supra note 228, at ¶ 3.
232. See United States—Trade Measures Affecting Nicaragua, Report by the Panel
Measures].
7; see also Nicaragua Trade Measures, supra note 232, at para. 1.3.
234. See generally Jackson, restructuring the GATT, supra note 95, at 163-89
(tracing evolution of GATT dispute resolution procedures as a move from politics to law).
235. WTO Dispute Settlement Understanding, supra note 98, art. 3(2).
reference for a panel was essential. With the new requirement for consensus to block adoption, the new adjudicative system also eliminates blocking power with respect to terms of reference. Thus, the central premise for the Panel Report's reasoning in the Nicaragua Trade Measures case no longer remains: WTO dispute settlement bodies, unlike GATT panels, are no longer colleges of arbitrators applying only the legal rules, and sometimes only problematical versions of the legal rules, the parties to the dispute agree for them to apply. Consequently, this change might well have implications for the substantive interpretation of the essential security interests exception.

If NAFTA's impact on rent-seeking behavior in the national security decision-making process is a useful precedent, it might well be fruitful to pursue an interpretation of the GATT essential security interests exceptions as a vehicle for reducing incentives for rent-seeking behavior in U.S. national security decision-making.

VII. Summary and Conclusions

This Article has argued that optimal national security policymaking gives attention to industrial structure and its consequent market power in sectors that are significant for national security. This approach is consistent with the increasing perception that economic competition will supplant military competition as the chief barometer of national power. Together with the reduced perception of direct military threats from other great powers, the strategic economic perspective drives policymakers toward giving priority in U.S. national security decision-making to long-term economic considerations, overturning the Cold War pattern in which the U.S. exchanged markets and resources for short-term political or military gains.

Traditionally, it has been argued that politico-military considerations can be more effectively managed with the secrecy and dispatch that can be achieved only in the Executive Branch. Indeed, it has been thought under a public goods perspective, that legislative dominance of national security will lead to distorted policymaking and underproduction of national security. Under this reasoning, it might be suggested that national security will be optimally produced in the domestic political process only when primary authority for its production

236. See Jackson, et al., Legal Problems of International Economic Relations, supra note 96, at 342-43 (discussing the move in violation and nonviolation nullification or impairment cases from positive consensus for adoption of Panel Report to adoption absent consensus).

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is reposed in the Executive Branch. This is so, it is argued, because the body most insulated from the give and take of normal politics will be best positioned to assess the optimal level of a public good (such as those features of the economy that have national security significance) that would not be produced at its socially optimal level in a fully competitive political system.

As this Article has argued, however, as demonstrated in the Executive Branch's and Congress's conflicting strategies for USEC privatization in relation to the purchase of Russian uranium from dismantled nuclear weapons, the Executive Branch's approach toward strategic economic policy may well be biased toward monopolistic or rent-seeking strategies. Congress's approach, by contrast, is more likely to optimize national security-related strategic goods production. The monopolistic or rent-seeking approach is more likely to be perceived internationally as posing a threat to other countries, thus engendering reciprocal strategies by other states. Congress, by contrast, may well produce a more optimal level of national security because its decision-making is likely to be relatively more transparent and, as the Russian HEU case suggests, more likely to balance explicitly the various dimensions of national security that are involved in particular situations.

Yet it is probably fair to say that, although Congress did a better job than the Executive Branch in balancing the competing interests in the purchase of Russian uranium, much is still left to be desired. An adequate effort would have entailed articulating the national security rationale for preserving a U.S. uranium mining capability, notwithstanding significant foreign ownership, as the justification for antidumping duties and for assuring U.S. dominance of the uranium enrichment industry as the justification for U.S. Government subsidies for the U.S. Enrichment Corporation. These national security rationales would then need to be balanced against the short-term gains of assuring that excess Russian nuclear materials are not transferred to revolutionary states, such as Iran, Iraq and Libya. Ideally, the Executive Branch would make explicit its argument for the national security optimality of the purchase of the Russian uranium and not try to bury the costs of the purchase in USEC's operating costs.

As the role of NAFTA suggests, an international law requirement that the United States defend its use of trade-based strategies to further national security policies under a justiciable national security exception may well direct the domestic policymaking process into a more explicit recognition of all the costs and benefits of any particular
national security strategy, increasing transparency and thus reducing rent-seeking in the national security decision-making process. In the end, it may yet be true that even in national security, clarity and candor is best. That is in fact what Solomon achieved in an inspired though risky act of judicial statesmanship in adjudicating the claim of the two women. Solomon forced opportunism to reveal itself. To judge between the nations, no less will do.

238. "And the king said, 'Divide the living child in two, and give half to the one, and half to the other.' The woman whose son was alive said to the king, because her heart yearned for her son, 'Oh, my lord, give her the living child, and by no means slay it.' But the other said, 'It shall be neither mine nor yours; divide it.' The king answered and said, 'Give the living child to the first woman, and by no means slay it; she is its mother.'" 1 Kings 3:26-28.

239. "And the Lord gave Solomon wisdom, as he promised him; and there was peace between Hiram and Solomon; and the two of them made a treaty." 1 Kings 5:12.