The United States Proposal for a General Agreement on Trade in Services and its Preemption of Inconsistent State Law

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On October 23, 1989, the Office of the United States Trade Representative (USTR) submitted a proposed General Agreement on Trade in Services (GATS) to the ninety-five member General Agreement on Tariffs and Trade's (GATT) negotiating group on services. With this proposal, the United States took the first step toward establishing a multilateral framework of rules and regulations governing international trade in services. While the final form and scope of GATS is far from settled, the U.S. proposal is the starting point that many diplomats and business people have been anticipating. As the percentage of trade in services in relation to total trade steadily grows for the United States and other nations, so does the need for more uniform guidelines and standards of conduct.


2 General Agreement on Tariffs and Trade, as amended, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Vol. IV (Mar. 1969). Technically, the United States has not ratified GATT per se, but has given effect to its text through the Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5. The original GATT text can be found at 55 U.N.T.S. 194.


GATS would play a historic role alongside those international economic organizations that have come into existence since the end of World War II. Since their inception, these organizations have both eased economic tensions between nations and streamlined international trade and financial discourse. In particular, GATS would address serious service trade matters left unresolved since the political demise of the highly controversial International Trade Organization (ITO). Additionally, GATS would aid other international organizations in alleviating international economic tensions which have led to ruinous world-wide recessions, depressions, trade wars, and military conflicts in the past.

If an agreement on the USTR's GATS proposal is reached, however, its constitutionality may be challenged in U.S. courts. The question whether GATS preempts inconsistent state law would lie at the heart of such a challenge. As GATS purports to streamline international trade, it must necessarily erase domestic barriers to such trade. In order for GATS to preempt inconsistent state law, the scope of the agreement must be within the constitutional reach of Congress and the President.

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5 These organizations include, among others, the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and GATT. See infra notes 11-16 and accompanying text. The U.S. negotiators and drafters contend that GATS will be executed and enforced under the GATT network, and will not create a separate international economic organization. Interviews with Amy Porges, Associate General Counsel, Office of the United States Trade Representative (USTR), in Ann Arbor, Michigan and Washington, D.C. (Mar. 13, and Apr. 5, 1990). Therefore, the scope of GATT itself will be widened immensely by the new service sector responsibilities.


7 The term "barriers" refers broadly to impediments to trade, including, for example, the lack of uniformity in state laws regulating trade. Telephone Interview with Margaret Wigglesworth, Executive Director, Coalition for Service Industries (Nov. 2, 1990) [hereinafter Wigglesworth Interview]. Although the states have erected specific barriers, such as the vague statutory bans on international banking concerns operating in Arizona, Colorado, and Virginia, these obstacles are few and far between and relatively innocuous. Telephone Interview with William Hawley, Counsel for Government Affairs, Citibank, Inc. (Nov. 2, 1990) [hereinafter Hawley Interview].

8 There is no set constitutional or judicial formula spelling out the requirements for a treaty to preempt inconsistent state law. For a balanced, yet incomplete view, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1, reporter's n.5 (1987) [hereinafter RESTATEMENT]. The oft-repeated test of "intent to preempt" is not addressed in this Article. Courts have now turned to a result-oriented "occupied the field" approach, which is not applicable to GATS without schedules attached. This Article assumes an intent to preempt. Interview with Bonnie J.K. Richardson, Office of the USTR, in Washington, D.C. (Apr. 6, 1990) (stating that GATS would preempt state law explicitly if necessary) [hereinafter Richardson Interview].
This Article suggests that the U.S. proposal to harmonize world practices in trade in services can preempt state regulation of what has traditionally been defined as local commerce. Part I briefly explores the political-economic history leading up to the proposed GATS. Part II defines GATS, not as a constitutional "treaty," but as a legislative form of international agreement that will have the same effect over inconsistent state law as a treaty. While there are no set schedules or agreed upon annexes definitively identifying the precise service industries which will be affected by GATS, Part III briefly considers potential targets of GATS and finds them all to be within the federal government's regulatory reach. Part IV shows that U.S. courts have, by and large, held that the states are bound to similar international agreements. Whether the agreements are trade-based or procedure-based, multilateral or bilateral, U.S. courts have been inclined to rule on the side of national uniformity. Part V examines the private, state, and federal political forces affecting the future of GATS. This Article concludes that political obstacles, not legal questions, appear to be the greatest impediment to the successful completion of GATS.

I. The History of the Proposed GATS

During the latter stages of World War II, Allied leaders recognized that past economic and financial crises were partially to blame for the rise in fascist and "have-not" movements. Acting upon this recognition, these leaders set out to create a group of organizations and multilateral international agreements that would smooth out and defuse major economic and financial crises in the future. A core group of these international economic regulatory organizations and agreements became known as the Bretton Woods System. The most notable of the many institutions which trace their origins to the Bretton Woods Conference are

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9 This Article does not attempt to probe each individual target service sector for chinks in its Commerce Clause armor. It does, however, attempt to show that a broad Commerce Clause shadow falls over each service sector selected for review.

the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and GATT.

The IMF, the World Bank, and GATT have been the preeminent economic organizations in world trade since 1948. The international community also expected the ITO to play a major role in international economic affairs; indeed, it would have been dominant over GATT. When the U.S. Senate failed to approve the ITO Charter, however, GATT emerged as the leading institution for advancing the commercial ideals of World War II's capitalist victors. The IMF was created to repair the disintegrated world monetary system which had existed prior to the war, and the World Bank was designed to stimulate and support foreign investment. The original purpose of GATT, however, was merely to support the ITO in reversing pre-war protectionist and

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11 Id. For a thorough description and analysis of the IMF, see 1–3 The International Monetary Fund 1945–1965 (J. Horsefield ed., 1969).
13 Meier, supra note 10, at 236.
14 See ITO Charter, supra note 6. The ITO Charter was negotiated and drafted between 1946 and 1948. In early 1948, the ITO Charter was completed and the other signatories awaited the U.S. Senate's approval. The Charter was submitted to the Senate several times but was never approved. Richard N. Gardner, Sterling-Dollar Diplomacy 371–78 (1956). By the late 1940s, with a new Republican majority in the Senate, the aura of international cooperation which prevailed at the end of World War II had faded. Id. President Harry S Truman recognized the inevitable Senate rejection and announced that he would not resubmit the ITO Charter to the Senate. Dep't St. Release, Dec. 6, 1950, reprinted in 23 Dep't St. Bull., Dec. 1950, at 977. The ITO, for all practical purposes, was dead.
15 See Meier, supra note 10, at 237. The crown jewel of the Bretton Woods System is the IMF. Established in 1944, the IMF has promulgated a detailed code for international financial conduct. Under IMF rules and regulations, nations are no longer able to disguise their monetary policies to achieve commercial gains. International Monetary Fund Agreement, art. XX § 4, reprinted in Andreas F. Lowenfeld, The International Monetary System (1984). National currency exchange controls have been curtailed. Id. at art. VIII, § 2(a), art. XIX(i). Frantic monetary shifts to meet balance-of-payments shortages, which often led to domestic economic downturns, have been avoided. These balance-of-payments difficulties are now viewed as bilateral problems, not merely predicaments forced by the debtor nation. IMF policies transformed the world economy by putting an end to the random and unstable financial practices followed earlier this century. See generally Griffiths, supra note 4.
16 See Meier, supra note 10, at 237. The World Bank was established to contribute to a sustained high level of international investment. While the IMF is concerned with financial liquidity, the World Bank is devoted to the flow of long-term investment capital across national boundaries. See id. at 241. Initially devoted to the reconstruction of postwar Europe, the World Bank now provides assistance to developing countries. It emphasizes specific projects and supplementary private investment.
discriminatory trade practices that had spread during the Great Depression of the 1930s.¹⁷

Upon the death of the ITO, GATT signatories set out to revise the agreement, as ratified by the United States, to allow a more flexible and independent approach to international trade. The GATT Contracting Parties¹⁸ sought to include a small operating council—the Organization for Trade Cooperation (OTC)¹⁹—within GATT. As with the ITO, the Senate ultimately rejected the OTC. The Senate was not disposed to delegate its authority over U.S. foreign commercial policy to an international body.²⁰ The resulting absence of organizations such as the ITO and the OTC has left the international community reliant upon a GATT ill-prepared to meet the demands created by the growth of world trade in services.

Until recently, governments and international economic experts considered the service sectors of national economies largely unimportant and peripheral.²¹ Today, however, a majority of western economists consider the emerging service industries to represent the developed world's economic future.²² While the Bretton Woods System offers some stability in this evolving world economy, the stability it provides is not all-encompassing. Changes in financial and investment burdens may very well be met by the IMF and the World Bank. The shift in trade from goods to services, however, is not readily addressed by GATT. Indeed, while GATT has successfully tackled tariff barriers, it has a mixed record on other obstacles to trade.²³

The rise of service industries throughout the world economy has led to negotiations on trade in services at the Uruguay Round of GATT negotiations. Through its GATS proposal, the United States has been the strongest supporter of an agreement on trade in services. The proposal, for the most part, has been supported

¹⁷ Id. at 237.
¹⁸ The name “Interim Trade Committee” was changed to “Contracting Parties” to remove any connotations of a formal organization, thereby pacifying Senate reservations. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 120 (1969).
¹⁹ Id. at 51 & n.11.
²² See, e.g., Hoekman & Stern, supra note 4; KROMMENACKER, supra note 21.
²³ See generally Meier, supra note 10; JACKSON, supra note 18.
by developed countries such as Canada and Japan, and the European Community.

While GATT is essentially concerned with trade in hard, tangible goods, it has briefly addressed issues concerning trade in services. The never-ratified Havana Charter of the ITO, upon which GATT depended, provided that certain services would be recognized as substantial elements of international trade and that restrictive business practices affecting these services would be seen as having harmful results. In the 1970s, during the Tokyo Round of GATT negotiations, a number of side agreements dealt directly or indirectly with services. The never-ratified Havana Charter of the ITO, upon which GATT depended, provided that certain services would be recognized as substantial elements of international trade and that restrictive business practices affecting these services would be seen as having harmful results. In the 1970s, during the Tokyo Round of GATT negotiations, a number of side agreements dealt directly or indirectly with services. The Subsidies Code and the Customs Valuation Agreement both refer to the services sector. More specifically, the Agreement on Government Procurement, which applies to services incidental to the supply of products, provides that the signatories shall give early consideration to extending the agreement to cover service contracts. At present, however, GATT does not regulate trade in services in any significant manner.

In 1982, the United States proposed that GATT consider negotiating an agreement on trade in services as part of its work agenda. GATT in turn asked the Contracting Parties to provide information on trade in services and barriers thereto. The "proposal to consider" enhanced the prospects for a services proposal at the next negotiating round which began at Punta del Este,
Uruguay in 1986 and is currently underway. The first comprehensive initiative on trade in services was presented when the USTR submitted the GATS draft to the GATT Contracting Parties in Uruguay on October 23, 1989.

II. THE CONSTITUTIONAL AND EXTRA-CONSTITUTIONAL DEFINITION OF GATS

GATS will not be a treaty under the U.S. Constitution, although it will have the same effect as one. The procedures through which it will be concluded and implemented are not ones the Framers included in the Constitution. The traditional treaty ratification process is time-consuming and cumbersome, thus, the federal government has developed agreement implementation procedures not enumerated in the Constitution. GATS is an example of one of these alternative methods: the Subsequent Congressional Executive Agreement.

The drafting history concerning the Treaty Clause is sparse. In general, the Framers were eager to abandon the haphazard treaty-making process in place under the Articles of Confederation. The Treaty Clause addressed their concerns. The Treaty Clause gives the power to make treaties to the executive branch, but only with the advice and consent of two-thirds of the Senate. This process requires agreement between the President and the Senate, thereby assuring a check and balance of powers. While the executive branch carries the negotiating power, the end product of such negotiations does not become enforceable until the Senate concurs.

In addition to the Treaty Clause, other provisions of the Constitution address how treaties and agreements may be reached, as well as their legal effect within the United States. For example, the Constitution declares that individual states may not make agreements without prior congressional approval. Additionally, the Supremacy Clause places treaties on a legal level above state

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32 The Uruguay Round of negotiations was formally launched on Sept. 20, 1986. GATT Launches Uruguay Round as Consensus Reached on Services, Agricultural Trade, 3 Int'l Trade Rep. (BNA) No. 38, at 1150 (Sept. 24, 1986).

33 LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 129 & n.2 (1975). Under the Articles of Confederation, Congress alone appointed negotiators, wrote their instructions, and finally approved or disapproved of the finished product.

34 U.S. CONST. art. II, § 2, cl. 2.

35 U.S. CONST. art. I, § 10, cl. 3.
laws and constitutions. While the Constitution does mention other types of international agreements and compacts, it does not explicitly distinguish them from treaties. Together, these Clauses form the entire constitutional procedural format for enacting, enabling, and upholding treaties.

In the nineteenth century, the United States was quickly becoming a world economic, political, and military power, and therefore needed to make international compacts that would be honored and fulfilled. Political necessity led to constitutional creativity, and four treaty-like procedures emerged. Beyond the Treaty Clause, the federal government developed the use of the Treaty-Authorized Agreement, the Presidential Executive Agreement, and the Previous and Subsequent Congressional

56 U.S. Const. art. VI, cl. 2.
57 There may be an implicit denigration of “agreements” and “compacts,” as these terms appear not in the Treaty Clause, but in article I, section 10, clause 3 of the U.S. Constitution, which is devoted to the negation and limitation of state power.
58 Under a Treaty-Authorized Agreement, one treaty or international agreement gives either the executive or another body the power to enter into a similar international agreement. The primary treaty or agreement must have been ratified and consented to according to its own procedure. In other words, the primary treaty or agreement must be valid under the U.S. Constitution and U.S. law. The primary treaty or agreement must also still be in force; it cannot have been abrogated by the United States. Cf. Charleton v. Kelly, 229 U.S. 447 (1913) (extradition treaty still had domestic effect even though other party to treaty, Italy, had unilaterally abrogated). The secondary by-product agreement has the force of federal law under the Supremacy Clause. Wilson v. Girard, 354 U.S. 524 (1957). It is not, however, procedurally a constitutional treaty; the only authority necessary for the secondary agreement’s completion is the primary agreement. Id. at 529.
59 Under a Presidential Executive Agreement, sometimes known as an “inherent” or a “sole” Executive Agreement, the President enters into an agreement with a foreign power and binds the United States without any official senatorial or congressional approval. Restatement, supra note 8, at § 303, cmt. g. Theoretically, the President may do this under his authority as chief executive, head of state, or commander-in-chief of the armed forces. See United States v. Belmont, 301 U.S. 324, 330–31 (1937); cf. Restatement, supra note 8, at § 303(4). Based on this premise, however, the President may not bind the nation to any obligation that requires congressional approval. See, e.g., Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff’d on other grounds, 348 U.S. 526 (1955). Presidential Executive Agreements typically involve the disposition of armed forces in foreign lands and the recognition of governments. Restatement, supra note 8, at § 303, cmt. (8).
40 A Previous Congressional Executive Agreement is a compact negotiated by the executive with prior congressional consent. See, e.g., Restatement, supra note 8, at § 303(2). Both houses, not just the Senate, must pass resolutions authorizing these negotiations. Congress usually will spell out conditions upon which consent is given, thereby setting out parameters and boundaries for the executive’s negotiating team. Cf. Henkin, supra note 33, at 173–76.
41 Under a Subsequent Congressional Executive Agreement, Congress approves the negotiated final product without first granting consent to negotiators. Cf. Henkin, supra
Executive Agreements. These five procedures comprise the methods by which the federal government concludes agreements with other nations.

GATS, if ultimately realized, would constitute a Subsequent Congressional Executive Agreement. In 1988, Congress passed, and the President signed into law, the Omnibus Trade and Competitiveness Act (1988 Trade Act), to “enhance the competitiveness of American industry . . . .” Section 1102(a) of this act gives the President the authority to enter into international trade agreements before June 1, 1993, to help reduce tariff barriers. This authority bears directly on the Uruguay Round negotiations. Section 1102(b) of the 1988 Trade Act also gives the President authority to negotiate and enter into international trade agreements before June 1, 1993 to reduce non-tariff barriers. This arguably grants authority to the President to negotiate and conclude an agreement on trade in services.

Section 1103 of the 1988 Trade Act sets out the procedures for congressional implementation of any agreements entered into by the President under section 1102(b). While Section 1102(b) allows the President to bind the nation to a trade agreement under international law, the agreement will have no domestic legal effect until consented to or implemented by Congress. The grant of such limited Presidential authority appears to be deliberate. One Senator has referred to “the negotiating authority . . . in the Uruguay [sic] round” that this law gives, rather than the treaty-making power it might have conveyed. A Congressman has pointed out that sections 1102 and 1103 of the 1988 Trade Act give the President “ample authority” to negotiate away

note 33, at 173–76. Unlike a Previous Congressional Executive Agreement, this procedure sets no initial parameters nor does it authorize the negotiations.

46 The international agreement may become a binding international obligation by presidential action alone. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, art. 7, §§ 1(b), 2(a); arts. 12, 27, 8 I.L.M. 679 (1969); Ian R. Sinclair, The Vienna Convention on the Law of Treaties 29–35 (2d ed. 1984). Although the United States is not a signatory to the Vienna Convention, the State Department has observed that the convention “is already recognized as the authoritative guide to current treaty law and practice.” S. Exec. Doc. No. 1, 92d Cong., 1st Sess. 1 (1971).
trade barriers, but do not give the President unchecked power to conclude accords dismantling such barriers.

III. THE SCOPE OF GATS AND THE FEDERAL GOVERNMENT'S POWER TO PREEMPT

Although GATT provides a historic basis for GATS, and the 1988 Trade Act provides both the authority to negotiate the agreement and the procedure for giving it domestic effect, the agreement may still be subject to constitutional challenges. For while comporting with established constitutional or legislative procedure, an agreement may nevertheless reach beyond the subject matter relegated to the federal government. Generally, GATS will not. Through the Commerce Clause of the U.S. Constitution, the federal government possesses ample authority to regulate the domestic service sectors that are the subject of GATS. Furthermore, the Constitution does not speak directly to the states' power to intercede and regulate international trade. One potential limitation on the federal government in this area, the Tenth Amendment, while purportedly broad in its sweep, does not permit the states to undo preexisting federal regulation in place through the Commerce Clause. Thus, the states are relatively unprotected from the federal government's power to regulate international trade.

A. The Commerce Clause and its Reach into Proposed Subject Services

The chief constitutional source of authority to enforce GATS domestically is the Commerce Clause. The Commerce Clause is the vehicle that Congress used to shape domestic commercial policy in the 1930s and domestic social policy in the 1960s. It has also enabled Congress to regulate commerce with foreign nations,

50 See U.S. CONST. amends. IX, X.
51 Id. at art. I, § 8, cl. 3.
52 Some scholars and jurists differentiate between the Interstate Commerce Clause, the Foreign Commerce Clause, and the Indian Commerce Clause. In this Article, the term "Commerce Clause" will refer to the Commerce Clause as a whole.
Often the cornerstone of U.S. foreign policy. Under the Commerce Clause, Congress may structure tariff laws, as it has done through GATT and numerous bilateral tariff agreements worldwide. Despite the existence of such congressional powers by virtue of the Commerce Clause, there are limits. The Clause does not deny more to the states than it grants to Congress. Thus, what is not within the federal government's reach may be subject to state regulation. Indeed, one commentator has stated that "not all that Congress could reach today . . . is forever foreclosed to state regulation when Congress is silent" on the subject.

In interpreting the extent of Congress's reach early on, courts distinguished between national and local concerns. This analysis proved difficult, however, because few subjects are wholly national or wholly local. Later, Chief Justice Stone altered the early distinction by stating that "reconciliation of the conflicting claims of state and national power . . . [by] appraisal and accommodation of the competing demands of the state and national interests involved . . ." is the correct method by which to interpret the Commerce Clause and its reach.

Today, Justice Stone's view seems to coincide with judicial tests used in evaluating states' attempts to regulate foreign trade. These tests ask whether the state regulation places an "unreasonable" or "undue" burden on such trade. Additional judicial limitations applicable to interstate regulation of trade also apply when states attempt to regulate foreign trade. Justice Bradley described these limitations when he wrote: "[A] State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations." This statement implied that states had even less power to regulate international trade than interstate trade. Thus, in the foregoing fashion, courts limited the powers of the states to regulate international trade.

While courts limited states' power to regulate international trade, the power of the federal government in this field became

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53 Henkin, supra note 33, at 235.
54 Id.
55 Id.
broad. As the Supreme Court declared, "[w]hatever . . . Congress determines, either as to regulation [of commerce] or the liability for its infringement, [it] is exclusive of state authority."\(^{60}\) In other words, whenever Congress exercises its Commerce Clause power, all conflicting state laws must give way.\(^ {61}\) Congress, however, determines the extent of its regulation. Its exercise of Commerce Clause power might be whole or inchoate as it "may so circumscribe its regulation as to leave a part of the subject open to state action."\(^ {62}\) Moreover, Congress can delegate its power to administrative and other agencies, and presumably to international organizations. Such delegation, without more, precludes state action altogether,\(^ {63}\) although the extent of delegation depends on congressional intent.\(^ {64}\) The limits of congressional power have not yet been drawn, but the powers of the federal government under the Commerce Clause appear almost absolute. State regulations are limited to areas which are reasonable, of local nature, and not expressly or impliedly preempted by Congress.

Thus, in order for GATS to withstand a constitutional challenge, the targeted service sectors must be subject to federal regulation or preemption through the Commerce Clause. There are many theoretical and practical service sectors that GATS may target. Among the most likely are insurance, banking, securities trading and related services, shipping and transport, telecommunications, tourism, education, and professional services.\(^ {65}\) Consideration of whether these service sectors may be regulated by GATS through the federal government's Commerce Clause power follows.

1. Insurance

A striking example of an area where GATS would preempt local law is the insurance sector. For much of this nation's history, U.S. courts viewed the insurance industry as a local concern, as

\(^{60}\) Sherlock v. Alling, 93 U.S. 99, 104 (1876).


\(^{64}\) Id.; see also Guss v. Utah Labor Relations Bd., 353 U.S. 1, 8 (1957).

\(^{65}\) See Krommenacker, supra note 21, at 5.
it was affected with the public interest and was quasi-public in character. Because of the insurance industry’s local nature, the states, under their police powers, had the authority to prescribe terms and conditions upon which insurance companies could conduct business.

In 1944, however, in *United States v. South-Eastern Underwriters Ass’n*, the Supreme Court effectively reversed precedent and declared that the insurance industry fit squarely within the scope of the Commerce Clause. Thus, the insurance industry was no longer subject to regulation exclusively by the states. In response, Congress, exercising its Commerce Clause power, passed the McCarren-Ferguson Act. The McCarren-Ferguson Act returned the bulk of insurance industry regulation to the states by delegating to them the congressional authority recognized in *South-Eastern*. Since 1944, U.S. courts have allowed the states to regulate the insurance sector under this delegation.

Congress, however, has begun to take back some of what it had given to the states. The McCarren-Ferguson Act itself does not grant to the states complete control of the insurance industry. For example, the insurance industry is still subject to federal antitrust laws. Additionally, the Employee Retirement Insurance Security Act has partially preempted inconsistent state employee insurance laws. Thus, because the insurance industry is no longer solely the province of state police powers, the federal government may constitutionally redistribute regulatory authority, and may do so through GATS.

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67 Id.
68 Id.
69 322 U.S. 533, 545 (1944).
70 Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868). The Court held that the business of insurance should be considered interstate commerce for the purpose of avoiding a narrowing of the Commerce Clause. In *Paul*, the Court upheld a state law while in *United States v. South-Eastern Underwriters Ass’n*, the Court struck down an act of Congress.
71 322 U.S. at 546–53.
74 See, e.g., id. at 218 n.18; Cochran v. Paco, Inc., 606 F.2d 460, 462 (5th Cir. 1979); Lowe v. Aarco-Am, Inc., 536 F.2d 1160, 1161 (7th Cir. 1976).
75 See *Royal Drug*, 440 U.S. at 218 n.18.
2. Banking

The banking services sector would also be subject to GATS preemption. Like the insurance industry, courts have characterized banks and banking as quasi-public institutions and practices. They are seen as creatures of the state affected with the public interest. Again, stemming from this characterization, courts have held that banking is a proper subject of state regulation.

Banks, however, may also be creatures of foreign or federal governments. State banks are naturally subject to their own state's laws. Surprisingly, national and international banks are also subject to state laws, so long as the state laws do not impinge upon or frustrate federal policy.

The power of the federal government to incorporate banks has been implied from article I, section 8 of the Constitution, as there is no express constitutional grant. Interstate banking has also been held subject to regulation by Congress through the Commerce Clause. It is therefore logical and consistent for the federal government to regulate international banking activities through GATS.

3. Securities

Securities trading and related services also fall within the scope of the federal government's Commerce Clause power, and, therefore, may be preempted by GATS. Prior to the Great Depression

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81 See Branch v. United States, 12 Ct. Cl. 281, 286 (1876), aff’d, 100 U.S. 673 (1879).
85 Note that there are anomalous restrictions placed upon international banking concerns wishing to operate in Arizona, Colorado, and Virginia. Hawley Interview, supra note 7.
of the 1930s, individual states had free reign to regulate securities.\textsuperscript{86} The Great Depression, however, eroded confidence in the U.S. investment community, and the federal government stepped in and enacted the Securities Act of 1933\textsuperscript{87} and the Securities Exchange Act of 1934.\textsuperscript{88} By enacting this legislation, Congress entered the field of interstate securities and effectively preempted any inconsistent state law.\textsuperscript{89} Thereafter, securities were defined as subjects of interstate commerce and were thus subject to federal regulation.\textsuperscript{90}

Certain aspects of securities law are still governed by state law. Through "blue-sky" laws, states regulate and control traffic in securities wholly within their own borders and protect ordinary citizens from the kinds of fraud and deception not covered by the 1933 and 1934 Acts.\textsuperscript{91} Blue-sky laws have been upheld as a proper exercise of the state police power, and are thus constitutional.\textsuperscript{92} GATS will legitimately encompass interstate sales of securities, because such sales are within the regulatory power of the federal government. Individual state blue-sky laws, however, may indeed survive federal attempts at preemption, because they regulate only intrastate sales.\textsuperscript{93}

4. Transportation

The federal government may also preempt state regulation of the shipping and transport sectors through GATS. Since the seminal case of \textit{Gibbons v. Ogden}, water transport between states has been subject to federal regulation through the Commerce Clause.\textsuperscript{94} Over the years, federal regulation of shipping has greatly increased. Courts have held that the federal government


\textsuperscript{89} See Bogy v. United States, 96 F.2d 734, 737 (6th Cir.), cert. denied, 305 U.S. 608 (1938).

\textsuperscript{90} Oklahoma-Texas Trust v. SEC, 100 F.2d 888, 890–91 (10th Cir. 1939).


\textsuperscript{92} See, e.g., Edgar, 457 U.S. at 641; Underhill Associates v. Bradshaw, 674 F.2d 293 (4th Cir. 1982).


\textsuperscript{94} 22 U.S. (9 Wheat.) 1 (1824).
has the authority, through the Commerce Clause, to regulate lighthouses,95 lights upon vessels,96 port safety,97 tugs,98 pilotage,99 and admiralty salvage.100 The navigable waters of the United States are "deemed public property of the nation, and subject to all requisite legislation of Congress.”101 Thus, the federal government effectively controls the field of maritime transport, which is appropriately subject to regulation under GATS.

Congress has also heavily regulated air transport and freight. Under the Federal Aviation Act of 1958,102 Congress granted the Federal Aviation Administration exclusive responsibility for the safe and efficient management of the nation's airspace.103 Local and state governments are "vested only with the power to promulgate reasonable, non-arbitrary and non-disciplinary regulations."104 The federal government's power to regulate air space is as far reaching as its power to regulate navigable waters.105 Thus, it is difficult to imagine how the federal government could not bring U.S. air transport laws under the control of GATS.

The broad ground transport sector does not fit as easily under Congress's Commerce Clause powers. While railroads have long been under federal, rather than state regulatory control, courts have left regulation of automobiles to state control. In general, when a railroad voluntarily operates as a common carrier in interstate commerce, it is subject to federal regulation.106 Moreover, courts have also held that Congress may regulate purely intrastate phases of railroad businesses if necessary to properly regulate interstate commerce.107

96 See, e.g., The Hazel Kirke, 25 F. 601 (C.C.N.Y. 1885).
97 See, e.g., United States v. Certain Parcels of Land Situated in City of Valdez, 666 F.2d 1236 (9th Cir. 1982).
99 See, e.g., Davis v. M/V Ester S, 509 F.2d 1377 (5th Cir. 1975).
104 British Airways Bd. v. Port Auth. of New York, 558 F.2d 75, 84 (2d Cir. 1977); see also Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 403 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975) (there is a "prevailing federal interest in uniform air law regulation").
105 United States v. Helsley, 615 F.2d 784, 786 (9th Cir. 1979).
107 Wickard v. Filburn, 317 U.S. 111, 121 (1942); see also Virginian Ry. v. System Fed'n No. 40, 84 F.2d 641, 650 (4th Cir. 1936), aff'd, 300 U.S. 515 (1937).
With respect to automobiles, states may regulate, free from federal interference, the use and operation of motor vehicles on the public highways of the state\textsuperscript{108} by residents and nonresidents alike.\textsuperscript{109} States have broad powers to protect their citizens' physical and business safety, even by use of measures that adversely affect interstate commerce.\textsuperscript{110} Courts view interstate carriage as commerce, and thus subject to regulation under the Commerce Clause.\textsuperscript{111} Intrastate carriage, however, is viewed as beyond the scope of the Commerce Clause.\textsuperscript{112} Therefore, while all railroad activity may be within the scope of GATS, the states might retain some control over intrastate motor transport.

5. Telecommunications

The telecommunications sector encompasses many subsectors, including radio, television and cable broadcasting, telephones and telegraphs, and motion pictures. As these services often cross state lines, they have long been subject to federal regulation. In 1934, Congress passed the Communications Act to aid in the streamlining of "interstate and foreign commerce in wire and radio communications."\textsuperscript{113} Through the Communications Act and other statutes,\textsuperscript{114} the Federal Communications Commission (FCC) has acted as this nation's chief telecommunications watchdog.\textsuperscript{115} Moreover, the Supreme Court has held that the power of Congress and the FCC to regulate the telecommunications industry is constitutional. In \textit{Louisiana Public Service Comm'n v. FCC}, for example, the Supreme Court stated that the FCC, through the Communications Act, had the authority to preempt inconsistent state law under the Commerce Clause.\textsuperscript{116} Furthermore, the Court has held that where state law "squarely conflicts with the accom-


\textsuperscript{109} See Hendrick v. Maryland, 235 U.S. 610, 624 (1915).


\textsuperscript{112} Cf. Bibb, 359 U.S. at 524 (if intrastate carriage unduly burdens interstate commerce, however, Congress may regulate it).


\textsuperscript{114} E.g., Copyright Act, 17 U.S.C. § 101 (1988).


\textsuperscript{116} 476 U.S. 355, 369 (1986).
plishment and execution of the full purposes of federal law" in the telecommunications field, the state statute must yield. In light of the predominant federal role in telecommunications, GATS will completely preempt inconsistent state regulation of that sector.

6. Tourism

The tourism service sector may also be subject to GATS preemption, although there is little precedent upon which to base such a prediction. A great majority of the tourism trade is handled at the local level, and therefore, the states regulate the balance of tourism. Still, the federal government has stepped into the field, albeit tentatively. In 1961, Congress created the United States Travel and Tourism Administration and the Tourism Policy Council to "assure that the national interest in tourism is fully considered in federal decision-making." The Tourism Administration's primary purpose is limited—to inform and advertise rather than to set policy. The resulting lack of judicial, legislative, or administrative attention to the tourism industry makes the propriety of a GATS link to the tourism sector difficult to gauge. GATS, however, would necessarily affect foreign nationals visiting this country and vice versa. Therefore, it is logical that GATS could preempt inconsistent state laws in this area.

7. Education

Education has historically been the domain of the states, and thus, unless educational activities cross state lines, GATS would not preempt state regulation of education. As the Supreme Court has stated, "[n]o single tradition in public education is more

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122 See Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities.").
deeply rooted than local control over the operation of schools." This deeply rooted tradition of local control fades, however, when states attempt to regulate interstate and foreign educational services. One court has held foreign correspondence schools to be engaged in foreign commerce and, therefore, subject to Federal Trade Commission regulation. The Supreme Court has held the business of interstate correspondence education to be commerce and not amenable to state control. Furthermore, states have been precluded from taxing those portions of for-profit schools' receipts that come from interstate trade. Based on these experiences, it is fair to conclude that GATS covers only those educational functions extending beyond state boundaries, a conclusion entirely consistent with the purpose of GATS.

8. Professional Services

State governments have traditionally regulated professional services. Regulation of the legal profession, for instance, has long been the province of the states. As one court has stated, "[s]tate courts . . . possess exclusive authority to regulate admission to their respective state bars . . . ." When a state has excluded a nonresident from the bar, legal and constitutional questions have been raised. Courts, however, have analyzed most of these questions under the Privileges and Immunities Clause, not the Commerce Clause. Because constitutional questions concerning

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127 Cf. Maryland v. Wirtz, 392 U.S. 183, 198–99 (1968) (state educational institution whose activities reached beyond state boundaries subject to Department of Labor regulations).
GATS would be analyzed under the Commerce Clause, the ability of GATS to preempt state control in the legal profession would be limited.

This limitation on the reach of GATS also applies to other professions. Accountants are licensed and regulated by state governments, not the federal government.131 The same is true for professional engineers,132 physicians,133 and architects.134 GATS may reach these professions if the services they provide have interstate or foreign connections. Otherwise, the states will probably retain their control over these professional services.

B. The Tenth Amendment and its Protections

While courts have interpreted the Commerce Clause to grant the federal government broad regulatory powers, the Tenth Amendment's reservation of powers to the states may stand as another constitutional obstacle to GATS preemption of state law. The Supreme Court has read the Tenth Amendment to limit the federal reach through the Commerce Clause. Absent congressional entry into a field recognized under the Commerce Clause, the powers of the states to prescribe regulations within their borders are reserved by the Tenth Amendment.135

If a state, however, attempts to regulate an area already subject to congressional regulation under the Commerce Clause, the Tenth Amendment will not permit a state to usurp the prior federal action.136 Additionally, the Tenth Amendment does not limit congressional power to preempt or displace state regulation of private activities affecting interstate and foreign commerce.137 Furthermore, the Constitution entrusts matters pertaining to international relations solely to the federal government, and the

gesting, however, that if a state court regulates professional services in a manner that results in anti-trust violations, then no anti-trust liability would attach).

131 Mercer v. Hemmings, 170 So. 2d 33, 39 (Fla. 1964).
132 State ex rel. Wisconsin Registration Bd. of Architects and Professional Engineers v. T.V. Engineers of Kenosha, 141 N.W.2d 235, 237 (Wis. 1966).
Tenth Amendment does not change this. Indeed, courts have held the Tenth Amendment to be too vague and amorphous to limit federal authority over international commerce. Thus, the Tenth Amendment is unlikely to affect significantly preemption of inconsistent state law by GATS.

IV. AN EXPLORATION INTO JUDICIAL RECEPTION OF AGREEMENTS SIMILAR TO GATS

The preceding analysis demonstrates that U.S. courts have considered, and approved, broad federal powers to preempt state law through the Commerce Clause. This suggests that a challenge to GATS as beyond the scope of the federal government’s regulatory power would fail. United States courts have also considered the scope of the federal government’s treaty power. The reasoning of those decisions suggests that GATS will withstand challenges based on the grounds that it exceeds the federal government’s treaty making power.

Federal courts have a history of upholding commercial treaties and agreements as the supreme law of the land, thereby preempting state laws. In early decisions, courts routinely upheld treaties in the face of constitutional attacks from anti-federalists and state governments. State courts have also shown great reluctance to uphold state law that seems to conflict with federal treaties. Indeed, both federal and state courts have upheld most commercial agreements, including the agreements comprising the Bretton Woods System. GATT in particular has been upheld, if only sheepishly, and in the face of congressional opposition.

138 Zschernig v. Miller, 389 U.S. 429, 432 (1968). Similarly, the Ninth Amendment does not aid the states in limiting the Foreign Commerce Clause reach of Congress. The Ninth Amendment was drafted to cope with the problems created by the enumeration of specific rights in the first eight amendments. The framers feared that certain rights may have been omitted, and were concerned that vagaries of language might adversely affect other rights intended to be preserved. Schertz v. Waupaca County, 683 F. Supp. 1551, 1561 (E.D. Wis. 1988), aff’d, 876 F.2d 578 (7th Cir. 1989). The Ninth Amendment standing alone, however, does not contain constitutional guarantees of freedom or limit the power of the federal government. Metz v. McKinley, 583 F. Supp. 683, 688 n.4 (S.D. Ga.), aff’d, 747 F.2d 709 (11th Cir. 1984). The Ninth Amendment prevents the federal government from degrading or rejecting any rights not specifically enumerated in the Constitution. Schertz, 683 F. Supp. at 1561. These rights are personal rights between the federal government and the individual, and do not involve the states either alone or through the Fourteenth Amendment. Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551–53 (1833).

139 See, e.g., Jackson, supra note 20; Henkin, supra note 33.
A. *The Bretton Woods Agreement*

The Supreme Court has explicitly upheld the Bretton Woods Agreement. In *Kolovrat v. Oregon*, the Supreme Court held that the Bretton Woods Agreement preempted an Oregon testamentary law.\(^{140}\) In this case, two Oregon residents had died intestate, leaving as their statutory heirs siblings and cousins in Yugoslavia. As aliens, however, the Yugoslav next of kin could not take real or personal property by succession under Oregon law.\(^{141}\) Therefore, the property escheated to the state.\(^{142}\) The Oregon Supreme Court held that the Yugoslav heirs had failed to show that there existed "as a matter of law an unqualified and enforceable right to receive" the property under the Oregon statute.\(^{143}\) The court, therefore, allowed the property to pass to the state.\(^{144}\)

The U.S. Supreme Court reversed. Among other treaties cited, the Court noted that the Bretton Woods Agreement, to which both the United States and Yugoslavia were signatories, applied to the *Kolovrat* case. The Court found that the federal government had validly adopted the Bretton Woods Agreement and that it bore directly on the commercial property rights being litigated. In particular, the Court broadly read article IV, section 3 of the agreement as "forbid[ding] any participating country from exercising controls over international capital movements 'in a manner which will . . . unduly delay transfers of funds in settlement of commitments . . . .'"\(^{145}\) The Oregon law arguably "delayed transfers of funds," and therefore the Court held that it must yield to the federal treaty.\(^{146}\)

B. *The General Agreement on Tariffs and Trade*

The Supreme Court has not explicitly approved GATT itself. In fact, only timid, fleeting references to GATT have appeared


\(^{141}\) OR. REV. STAT. § 111.070 (1951), repealed by 1969 Or. Laws c. 591, § 305.

\(^{142}\) OR. REV. STAT. § 111.070(3) (1951), repealed by 1969 Or. Laws c. 591, § 305.

\(^{143}\) In re Stoich's Estate, 349 P.2d 255, 262 (Or. 1960).

\(^{144}\) Id. at 268.


\(^{146}\) Id. at 197–98 ("Oregon of course cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities."). *See also* Toll v. Moreno, 458 U.S. 1, 13–17 (1982) (preemptive effects of Bretton Woods Agreement invalidated state university's denial of in-state status to domiciled non-immigrant alien employees of World Bank and IMF).
in Supreme Court rulings. On the other hand, several state courts have ruled upon and upheld GATT as a legitimate constitutional agreement preempting inconsistent state law.

The leading state case validating GATT is *Territory v. Ho*. In *Ho*, the defendant, a vendor, allegedly offered to sell imported Australian eggs without posting a sign clearly identifying himself as a seller of non-domestic eggs, as required by a Hawaii statute. Hawaii then filed an information against the vendor for non-compliance. A Hawaii state court ruled in the vendor’s favor, citing violations of due process, unconstitutional delegations of power, and direct contravention of GATT.

The Supreme Court of Hawaii affirmed the result, but only on the grounds that GATT preempted the local law. The court acknowledged that the constitutionality of GATT had been “repeatedly questioned in and out of Congress.” The court, however, reasoned that under certain U.S. Supreme Court precedents and the Supremacy Clause, an “executive agreement, such as the General Agreement on Tariffs and Trade” was a treaty within the meaning of the Constitution and was, therefore valid. Thus, because GATT required national treatment in internationally traded goods, as the supreme law of the land, it preempted the Hawaii statute.

The New Jersey Supreme Court has also ruled upon the validity of GATT. In *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm’n*, the plaintiff manufacturer brought suit challenging the validity of New Jersey’s “Buy American Act” in conjunction with a water treatment plant. The plaintiff argued

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148 41 Haw. 565 (1957).
149 Id. at 566. Here, the court refers to Revised Laws of Hawaii § 1308.02 (1945), as amended by 1955 Haw. Sess. Laws Act 167, § 5 (1955).
150 41 Haw. at 566–67.
151 Id. at 567.
152 Id. Here, the court refers to the Trade Agreements Extension Act of June 21, 1955, ch. 169, § 2, 69 Stat. 162 (1955). The Act states that it “shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.” Id. at 163.
154 41 Haw. at 568–69.
155 Id.; see Jackson, supra note 18, at 111 & n.11, 287–88 (discussing State Department’s reaction to Ho decision).
156 381 A.2d 774 (N.J. 1977). The New Jersey Buy American Act, like its California
that the New Jersey act was inoperative because it was inconsistent with GATT. The trial court ruled the New Jersey act invalid,157 and the Appellate Division affirmed.158

The New Jersey Supreme Court agreed with the lower courts' analyses, calling GATT "a multilateral international agreement to which the United States is a party . . . ."159 The court also recognized the presidential authority to bind the United States to GATT,160 and considered GATT the legal equivalent of a treaty.161 Thus, the court concluded that GATT was "by virtue of the federal constitution, 'the supreme law of the land'" and that "[a] state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty."162 The New Jersey Supreme Court, however, found that GATT did not apply to the specific facts at hand.163 Thus, while it ultimately reversed the case, it did so on the facts, not the presumptions of law.164

C. The Warsaw Convention

United States courts have held that the Warsaw Convention on air transport,165 while narrower in scope than the Bretton Woods Agreement and GATT, also preempts state laws. The Warsaw Convention squarely touches upon commerce and upon air transport, subjects that GATS will likely cover. In Floyd v. Eastern predecessor, mandated that all state government entities attempt to procure their goods and services from U.S. companies and suppliers before turning to often cheaper foreign competitors.

160 Id.
161 Id. at 778.
162 Id. (footnote and citations omitted).
163 Id. at 782. The court found that government purification and not-for-profit distribution of water were not commercial acts within the scope of GATT.
Airlines, the Court of Appeals for the Eleventh Circuit held that the Warsaw Convention preempted inconsistent local laws. In Floyd, passengers on an Eastern Airlines flight from Miami to the Bahamas sued the airline to recover for intentional infliction of emotional distress. The passengers based their claim upon Florida common law and upon the Warsaw Convention, which had previously been held to create such a cause of action. The Eleventh Circuit explicitly held that the Warsaw Convention, as a valid U.S. treaty on point, preempted all inconsistent state laws. Rather than collecting an arguably unlimited damage award under Florida law, the plaintiffs were limited to the $75,000 maximum in compensatory damages permitted under the Warsaw Convention.

In Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, the Court of Appeals for the Fifth Circuit ruled that the Warsaw Convention preempted a cause of action under state law. The plaintiff shipper sued the defendant air carrier for damaged cargo. In brushing aside the plaintiff’s state law claims, the court declared that because the Warsaw Convention is a federal treaty under the constitution, it “creates the cause of action and is the exclusive remedy.” The court also noted that because the purpose of most multilateral treaties is to “secure uniformity,” any enforcement of inconsistent state law would necessarily undermine uniformity. Therefore, the state laws in question were preempted.

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167 Id. at 1466. A loss of power during the flight caused the emotional injury.
169 872 F.2d at 1470.
170 Id. at 1485.
171 737 F.2d 456, 459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985).
172 Id. at 458.
D. Certain Bilateral and Multilateral Trade and Specific Issue Agreements

United States courts have also found that certain bilateral trade agreements preempt state and local laws. One case involved a commercial and navigational treaty between the United States and Japan. In *Asakura v. City of Seattle*, a Japanese national living in Seattle was denied a license to operate a pawnshop within the city limits. A city ordinance made it unlawful for any person to operate a pawnshop without a license, and prohibited granting licenses to non-citizens. The Japanese national filed suit in state court, claiming that the local ordinance contradicted the treaty between the United States and Japan. The trial court held that the city ordinance did violate the treaty, and that the ordinance was unenforceable against Japanese citizens.

The Supreme Court of Washington disagreed. Its decision rested upon the language of the treaty itself, declaring that the treaty “guarantees only to the subject of Japan residing in the United States the right to ‘carry on trade’ upon the same terms as [U.S.] citizens.” Viewing pawnbroking as a privilege, and not a right, the court held that the treaty did not preempt the local ordinance, stating that “[t]he treaty does not secure to an alien the right to exercise a privilege.”

The U.S. Supreme Court reversed. The Court disregarded the Washington Supreme Court’s facile distinctions between a “right to ‘carry on trade’” and a “right to pawnbroke.” The Court agreed that Seattle could, without running afoul of the treaty, prohibit pawnbroking, but it would have to do so absolutely. The Court went on, however, to point out that the treaty spoke of national treatment for Japanese citizens, and the Seattle ordinance denied national treatment, thereby placing the trade


176 Id.
177 Id.
178 Id.
179 Id.
180 Id.
181 Id. at 342-43.
182 Id. at 342 ("Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise.").
treaty unquestionably on point. Thus, the treaty preempted the local law and controlled as the supreme law of the land.

Similar issues arose out of Puerto Rico’s 1936 enactment of legislation which, among other things, prohibited the use of trademarks on distilled spirits manufactured in Puerto Rico if the trademarks were used outside the island. The Bacardi Corporation sued the Treasurer of Puerto Rico to invalidate the statute on the grounds that the Pan American Trademark Convention preempted it. The trial court held the legislation invalid. The Court of Appeals for the First Circuit reversed, holding that the convention did not expressly preempt future Puerto Rican legislation. In turn, the Supreme Court reversed, essentially agreeing with the trial court.

The Court held that the Convention’s provisions did indeed preempt the Puerto Rican legislation. The Court found that the Trademark Convention was explicitly clear, mandating that trademarks could be used on a national basis. The Court held that because the treaty had been ratified and bore directly on the Puerto Rican legislation’s subject matter, it preempted the Puerto Rican statute.

E. Treaties on Property and Natural Resources

United States courts have upheld certain other types of treaties and compacts concerning property and national resources as well. These decisions may also shed light onto how GATS might be judicially received. One decision involved the 1850 Treaty of Commerce and Navigation between the United States and Austria, which gave Austrian nationals the right to inherit real property, provided such property was sold within two years. This treaty became the focus of Hughes v. Techt. In Hughes, an American citizen died intestate, leaving as his heirs two daughters, one an American citizen, and one a national of Austria by marriage.

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183 1936 P.R. Laws 115, permanently reenacted by 1937 P.R. Laws 149.
185 See Snacho v. Bacardi Corp. of America, 109 F.2d 57, 59 (1st Cir. 1940).
186 Id.
187 Bacardi Corp. of America v. Domenech, 311 U.S. 150 (1940).
188 Id. at 163–64.
189 Id. at 162.
The American heir sought to deny her sister one-half of the estate due her on alternative grounds—New York common law, which denied devises of land to aliens, and spontaneous abrogation of the treaty by World War I. The New York Supreme Court held that the Austrian national could take land as an heir at law under the treaty. The Appellate Division affirmed.\textsuperscript{192}

The New York Court of Appeals agreed.\textsuperscript{193} The court, per Justice Cardozo, stated that at common law, while aliens could take land by purchase, they could not take land by descent.\textsuperscript{194} The plaintiff, however, could take under the treaty, because it specifically provided lineal descent for Austrian nationals.\textsuperscript{195} The court held the convention to have been effective and valid on the date of the American citizen’s death, and thus, it automatically preempted state common law.\textsuperscript{196}

A similar situation arose out of an 1899 treaty between the United States and Great Britain which provided that each of the signatories’ nationals would be able to take real property as heirs or devisees.\textsuperscript{197} In 1961, in \textit{In re Estate of Wilson}, an English national devised real property in Nebraska to his widow. Upon her death in 1969, the property was to be split among their children, also English nationals. A Nebraska statute, however, prohibited non-resident aliens from acquiring title to real estate by devise or descent.\textsuperscript{198} The Nebraska Supreme Court held that the treaty controlled, not the state statute.\textsuperscript{199} The court reasoned that the treaty was effective and on point, therefore the children could take the real property as heirs and not have their inheritance escheat to the state.\textsuperscript{200} The treaty thus preempted the inconsistent state law.

\textsuperscript{192} Hughes v. Techt, 177 N.Y.S. 420 (1919).
\textsuperscript{194} \textit{Id.} at 186.
\textsuperscript{195} \textit{Id.} at 191.
\textsuperscript{196} \textit{Id.}
\textsuperscript{198} \textit{In re Estate of Wilson}, 237 N.W.2d 835, 836–37 (Neb. 1976).
\textsuperscript{199} \textit{Id.} at 837.
Finally, in the seminal case of Missouri v. Holland,201 the U.S. Supreme Court held a federal treaty was superior to, and thus preemptive of, inconsistent state law concerning wildlife. In Holland, the treaty, between the United States and Great Britain, proclaimed that certain migratory birds native to Canada and the United States were not to be hunted, captured, killed, or sold.202 A federal game warden sought to enforce the treaty against certain Missouri hunting and licensing laws that left the migratory birds in question unprotected. The Court concluded that because there was a valid treaty encompassing the subject matter upon which Missouri wished to legislate, any inconsistent state laws were necessarily preempted.203 The Court viewed the migratory birds as national resources and held that in order to protect national resources, "[i]t is not sufficient to rely upon the States."204

F. Executive Compacts on Takings and Nationalizations

United States courts have also held that presidential compacts touching upon banking and property rights are the supreme law of the land. Belmont v. United States,205 a case arising in the aftermath of the 1917 October Revolution, involved the new Soviet government's nationalization of the Petrograd Metal Works, among other businesses. The Soviet government assigned its bank accounts to the U.S. government through a compact with President Franklin D. Roosevelt.206 The U.S. government sought to recover the bank account. The Court of Appeals for the Second Circuit held that the United States could not recover the account, because the assignment was contrary to New York state policy.207 The Supreme Court disagreed and reversed. In reversing, the Court declared that "no state policy can prevail against the inter-

201 252 U.S. 416 (1920).
203 252 U.S. at 435.
204 Id.
205 85 F.2d 542 (2d Cir. 1936), rev'd, United States v. Belmont, 301 U.S. 324 (1937).
206 Exchange of letters between President Franklin D. Roosevelt and Soviet Foreign Minister Litvinov, Nov. 16, 1933, U.S.-U.S.S.R., 11 Bevans 1248, 1933 For. Rel. (II) 805, State Dep't Pub. 528 (commonly known as the Litvinov Assignments).
207 Belmont v. United States, 85 F.2d at 544.
national compact here involved." According to the Court, the compact was validly negotiated and entered into under the authority of the Executive; it was explicitly clear, and therefore was binding upon the states.

United States courts have also found that many other types of international agreements preempt state laws. For example, the Eighth Circuit has held that state governments may not generate or perpetrate boundary disputes and their appurtenant obstruction of international trade. Furthermore, local governments and agencies may not overlook or ignore international legal procedures mandated by treaty. International process, for example, cannot be served except as provided for in the Hague Convention. Finally, consuls and embassy administrators, in their representative capacities, must be given standing in state probate courts pursuant to their respective treaties.

In sum, the ability of state governments to affect rights, obligations and conduct regulated or referred to by treaty, compact, or international agreement is severely limited. This limitation on the states bodes well for the domestic integrity of GATS.

V. THE POLITICAL CLIMATE AND THE REALIZATION OF GATS

Although there appear to be few constitutional obstacles to enactment of GATS, many political hurdles remain. While the

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208 United States v. Belmont, 301 U.S. at 327.
209 Id. at 330–32; cf. United States v. Pink, 315 U.S. 203 (1942). In Pink, the Court stated: "When the decision of . . . local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, [the Court is] not foreclosed by the state court's determination . . . . Otherwise national authority could be frustrated by local rulings." 315 U.S. at 238.
210 See, e.g., Clark v. Pigeon River Improvement Slide & Boom Co., 52 F.2d 550, 556–57 (8th Cir. 1931); cf. Opinion of the Justices, 152 A.2d 173 (Me. 1959) (river pollution crossing boundary with Canada may be locally regulated).
212 See, e.g., In re Carizzo’s Estate, 211 N.Y.S.2d 475 (N.Y. Sup. Ct. 1961) (General Counsel of Italy held to have authority through treaty with United States to receive Italian national’s payment of funds in face of contrary New York statute); In re Ostrowski’s Estate, 290 N.Y.S. 174 (N.Y. Sup. Ct. 1936) (French Counsel held to have treaty authority to take for infant heir at law).
213 "[M]any wonder whether there are any limits other than those in congressional self
federal government may constitutionally relegate certain powers over commerce to a multilateral services agreement, it may encounter difficulty in convincing the states of the agreement's necessity. Congress and the executive branch may also have reservations about preemptsing state regulation of activities long held to be of local concern. Governors and state legislators may feel an affront by yet another federal foray into their sovereign domains. Furthermore, lobbies and special interest groups may feel that national or international uniformity may deprive them of certain privileges that they have come to enjoy and rely upon. These political factors may act to slow or derail GATS.

A. At the Federal Level

1. Congress

Congress is particularly susceptible to political pressure when making decisions on trade policies. As one author has stated, "political leverage on Capitol Hill will ultimately decide how many [m]embers vote [for] the implementing legislation." Special interests and lobbies have descended upon Washington to cajole legislators into viewing GATS in the most advantageous light. Indeed, members have reacted to pressure from certain interests that would be adversely affected by GATS. Overall, however, congressional concern appears to be based on problems that would be created by the reversal of federal statutes and regulations, not on problems caused by the preemption of state laws.

restraint reflecting the restraints of political forces." HENKIN, supra note 33, at 70. Passage of the Seventeenth Amendment in 1913 removed any remaining limits. With one stroke, the balance between state and federal powers toppled. Prior to the amendment's passage, the individual state governments elected their two senators, thereby ensuring a state voice in the federal government. U.S. CONST. art. I, § 3, cl. 1. Clause one of the Seventeenth Amendment withdrew the states' check on the federal government, and ever since, state governments have had to rely on persuasion and the few minor constitutional provisions preserving their sovereign police powers. See, e.g., U.S. CONST. amends. X, XI.

214 Bruce Stokes, GATT Going, 22 NAT'L J. 1150, 1151 (May 12, 1990).

215 Wigglesworth Interview, supra note 7.

216 See, e.g., S. Con. Res. 96, 101st Cong., 2d Sess., 136 CONG. REC. S1761-62 (daily ed. Feb. 27, 1990) ("urging" administration to refrain from submitting any GATS proposal to Congress that included civil air transport services); All Services Must be Included in GATS, EC Insists, FIN. TIMES, June 19, 1990, § 1, at 4.

2. The Executive Branch

Like Congress, the executive branch has considered the concerns of special interests. Indeed, in response to special interest pressure, the USTR has shown indications of retracting its proposal to completely preempt the telecommunications,\(^{218}\) transportation,\(^{219}\) securities,\(^{220}\) and banking sectors.\(^{221}\) More so than Congress, however, the USTR has paid attention to the interests of the states. On March 3, 1990 the USTR distributed a questionnaire to the fifty states asking their governors to answer a series of questions concerning state regulation of the banking, securities, and other industries.\(^{222}\) The USTR is compiling this information, along with other information and voluntary submissions by concerned parties, and will report it to the President.\(^{223}\) While the results are not yet public, preliminary indications from states which have replied show no significant opposition to GATS and its preemption of state law.\(^{224}\)

Not all states have fully replied, however.\(^{225}\) In anticipation of significant conflicts with state legislation such as New York's financial laws, Hawaii's tourism regulations, and Delaware's corporate statutes, the USTR has suggested that the United States may utilize article 22 of the proposed GATS. Article 22 permits a party to enter a state-specific reservation after ratification, thereby exempting such state law from GATS's preemptive ef-


\(^{222}\) Richardson Interview, supra note 8.

\(^{223}\) Investigation Notice, 55 Fed. Reg. 25,728 (1990) (entitled "Compilation and Identification of U.S. Measures that May Not Conform with Principles the United States is Seeking in the Uruguay Round"). At the time of this Article's publication, the USTR had not released this report.

\(^{224}\) Interview with Confidential Source A, (transcript on file with the Boston College International and Comparative Law Review); Letter from Margaret Spearman, Director, Office of State Development, State of Texas (Nov. 1, 1990) (disclosing Texas's answers to USTR questionnaire) (on file with the Boston College International and Comparative Law Review); Letter from Governor Joe Frank Harris, State of Georgia (Nov. 2, 1990) (disclosing Georgia's answers to USTR questionnaire) (on file with the Boston College International and Comparative Law Review).

\(^{225}\) Richardson Interview, supra note 8.
fects. The USTR intimated that the United States might put forth such a state-specific reservation prior to ratification of GATS. This suggestion, however, generated international political fallout. Thus, to avoid altogether the problem of preempting significant state laws, the USTR proposed that state laws be conformed to GATS. In this way, the states would maintain their enforcement powers while bowing to de facto federal legislation—the laws which the states enforce will be either federally or internationally drafted.

The Bush Administration's attitude toward the preemption problem is mixed, at best. While information gathering takes place, the executive branch lacks a clear policy toward the possible preemptive effects of GATS. One administration official characterizes the GATS debate as a "petty turf war" between the Commerce and Treasury Departments. Another official describes a USTR caught in the middle as completely "paralyzed." Additionally, White House Chief of Staff John Sununu opposes GATS preemption of state law. Thus USTR officials describe the executive branch's position on preemption as "unsure" and "deadlocked."

B. At the State Level

Curiously, the states also seem disinterested in the preemption issue. Whether this lack of interest is attributable to a genuine lack of concern about the diminution of state regulatory power or a resignation to the lack of real constitutional clout is uncertain. Whichever is true, the lack of alarm may signal acquiescence to the federal government's and the international community's desire to implement GATS.

226 Id. Article 22 does not, however, permit complete exemption from GATS's preemptive effects.
228 Richardson Interview, supra note 8.
229 Telephone Interview with Confidential Source B, (Sept. 14, 1990) (transcript on file with the Boston College International and Comparative Law Review).
231 Id. The Administration's indifference is said to apply to the Uruguay Round in general, but has also been specifically attributed to GATS.
232 See supra note 213.
1. The Governors

Wisconsin Governor Tommy G. Thompson has acknowledged that the "[s]tates operate within a national economic and foreign policy framework provided at the federal level," but has added that the "[g]overnors . . . are concerned" about the multilateral trade negotiations. According to Governor Thompson, "to ensure that state interests are not severely compromised, it will be important for states to determine priorities and consult closely with U.S. negotiators." Consultation about undetermined priorities, however, hardly sounds a clarion cry to battle against federal encroachment upon states rights.

The National Governors Association has done little more than repeat Governor Thompson's call for consultation. The association has affirmatively expressed its approval of the Uruguay Round negotiations on trade in services, while at the same time reminding the federal government that it should solicit state input:

Because of the special state regulatory role, it is imperative that the federal government continue to consult fully with state regulators on international rules affecting service industries and that state views be incorporated in the U.S. negotiating position. The federal government should work with states to develop mechanisms to keep Governors informed on and to solicit their input for any bilateral and multilateral negotiations on international trade in services.

The governors realize that they have no trump cards when they disagree with or merely question federal foreign trade policy. Indeed, the governors have little formal input into the GATS decision-making process. The governors can be heard through the USTR's Intergovernmental Policy Advisory Committee (IGPAC). IGPAC is a panel of thirty-five governors, mayors, state legislators, and other state and local officials that advises the

233 Tommy G. Thompson, Going Global: A Governor's Perspective, INTERGOV'TAL PERSP., Spring 1990, at 15.
234 Id. at 17.
235 Id.
237 Id.
238 Telephone Interview with Confidential Source D, (July 19, 1990) (transcript on file with the Boston College International and Comparative Law Review).
USTR on a range of trade concerns. It has declared its “vigorous support” for “GATT rules on trade in services.”

2. State Legislators

While state legislators also seek to contribute to the GATS decision-making process, few formal mechanisms are available for them to be heard. To date, only one state legislator sits on IGPAC. Moreover, IGPAC is effectively the sole avenue for expression of the state legislators’ views on GATS preemption. The National Conference of State Legislators has delayed issuing a policy statement on GATS preemption until the USTR releases the results of its state services survey. This delay essentially leaves the state legislators without a voice in the GATS process for the foreseeable future.

C. Lobbies and Special Interests

In addition to federal and state governments, special interests have also voiced concern about the preemptive effects of GATS. The U.S. service industry has been characterized as “the single most important driving force in launching this round of multilateral negotiations.” The service industry’s input is significant because it initially supported GATS broadly and possesses potent lobbying prowess.

While the individual service sectors do take stands on state law preemption, their stands often vary by industry, and sometimes by corporation. Moreover, most individual pressure groups have not considered the preemption question. The Coalition for Service Industries, a conglomeration of service industries banded together to aid in international economic discourse, has, however, considered and stated its position. The Coalition seeks a preemp-

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239 Statement of the USTR Intergovernmental Policy Advisory Committee on Trade (IGPAC), July 31, 1990, at 1, 2; Telephone Interview with Katelino Echevary, Office of the USTR (Aug. 9, 1990).
240 New Jersey Assemblyman Chuck Hardwick sits on the 35 member IGPAC panel. Statement of IGPAC, July 31, 1990, at 3.
242 The results of the questionnaires may never be released to the public. Richardson Interview, supra note 8.
243 GATT Going, supra note 214, at 1151.
tion-neutral GATS. Such an agreement would relieve states of their regulatory authority and bring about uniform legislation through sector-specific GATS provisions. The Coalition’s position seems to reflect the general view of many service industries.

Lobbies tend to range from neutral to receptive to state law preemption by GATS. Some lobbies see the upcoming promise of uniformity as beneficial to U.S. interests. Other lobbies see the outcome of the preemption debate as superfluous, because “everyone will either take a hit or walk away happy.” There are, however, some lobbies which see the possibility of state regulatory preemption as calamitous. In their words, “uniformity is [facially] good, [but] there should be an overriding purpose of shoring up state regulatory authority to preserve the myriad industries’ long-term integrities.” Other lobbyists have more bluntly stated their position: “We are not pushing preemption of state law.”

CONCLUSION

There appear to be few constitutional obstacles to enactment of GATS, although political hurdles remain. Analysis of cases decided under the Commerce Clause indicates that the federal government can preempt inconsistent state law regulating those service sectors GATS is likely to cover. Additionally, analysis of cases assessing the validity of treaties and agreements similar to GATS indicates that if GATS comports with necessary constitutional procedures, courts would uphold it as the supreme law of

244 Wigglesworth Interview, supra note 7. Accord, Telephone Interview with Kevin Cronin, Washington Counsel, National Association of Insurance Commissioners (Nov. 6, 1990) [hereinafter Cronin Interview] (most state regulation is “prudential,” and is therefore quasi-reserved under GATS proposal).

245 Cronin Interview, supra note 244.

246 E.g., Hawley Interview, supra note 7; Telephone Interview with Lisa Lamas, Associate Director of Governmental Affairs, American Express, Inc. (Nov. 2, 1990) [hereinafter Lamas Interview]; Telephone Interviews with Emily Brooks Rothrock, Associate Director, American International Group, Inc. (Apr. 6, and Oct. 25, 1990).

247 Wigglesworth Interview, supra note 7; Lamas Interview, supra note 246.

248 Telephone Interview with Confidential Source E, (date withheld by request) (transcript on file with the Boston College International and Comparative Law Review).

249 Telephone Interview with Confidential Source F, (date withheld by request) (transcript on file with the Boston College International and Comparative Law Review).

250 Telephone interview with Bradley Smith, Counsel on Legislative Affairs, International Insurance Council (Nov. 2, 1990).
the land. Thus, GATS can preempt inconsistent state law. Finally, political forces at the federal level appear to be at odds over the extent to which GATS should preempt state law. There is, however, little organized resistance to preemption at the state level. Thus, there is reason to believe that GATS can be enacted and enjoy full domestic effect in the United States.