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Note

Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response

William D. Araiza

Changes in world trade patterns have increased the importance of administrative classifications of goods imported into the United States. The post-1945 trade regime, characterized by multilateral reductions in trade barriers applied on a non-discriminatory basis, has been challenged by the emergence of discrete trading blocs¹ and by the rise of "managed trade," in which trade in a particular product is regulated by a system of bilateral quotas.² These phenomena have increased the differential tariff and quota treatment accorded imported goods based on administrative classifications of their type or country of origin.³

1. Examples of such trading blocs are the U.S.-Canada and U.S.-Israel free trade areas and the more tightly integrated European Community. See, e.g., Greenhouse, *The Growing Fear of Fortress Europe*, N.Y. Times, Oct. 23, 1988, § 3, at 1, col. 2 (reporting fears that tighter European integration after 1992 will be accompanied by greater protectionist stance toward U.S. and Japan); Kuttner, *Bloc That Trade*, THE NEW REPUBLIC, Apr. 17, 1989, at 16 (noting potential beneficial effects of move toward discrete trading blocs).

2. Examples of managed trade are the bilateral restraint agreements (agreements by which one nation limits its exports of a particular product to the other signatory) that the United States has negotiated with various steel exporting nations and the bilateral agreements pursuant to the Multifiber Arrangement in textiles. For an example of a bilateral restraint agreement, see *infra* note 32. For a discussion of the Multifiber Arrangement, see *infra* note 29. For further information about managed trade, see R. WALDMANN, *MANAGED TRADE* (1986); Passell, *Managed Trade or Open Trade*, N.Y. Times, Apr. 5, 1989, at D2, col. 1 (discussing benefits and drawbacks of managed trade).

3. See, e.g., *U.S. Limits Increase on Van Tariffs*, N.Y. Times, Feb. 17, 1989, at D1, col. 6 (reporting what was described as "purely technical" decision by Treasury Department to classify

The increased importance of Customs Service ("Customs") and Commerce Department ("Commerce") product classifications by type or country of origin has made it more important than ever that interested parties be able to participate in the process by which these classifications are made.⁴ The "notice-and-comment" features of the Administrative Procedure Act⁵ were designed to afford parties affected by agency regulations a meaningful opportunity to participate in the rulemaking process. Agencies need not, however, provide these opportunities for public participation when the regulations in question involve a military or foreign affairs function of the United States.⁶

This Note considers the foreign affairs exemption to the APA's notice-and-comment requirements, as applied to Customs and Commerce regulations affecting classifications of goods imported into the United States.⁷ The primary vehicles for this investigation will be two Federal court decisions, *Mast Industries v. Regan*,⁸ a 1984 decision by the Court of Inter-

imported vans and sport-utility vehicles as cars, not trucks, thereby avoiding tenfold increase in their tariffs).

4. Participation in the classification process allows interested parties the chance to raise arguments and bring to decision-makers' attention facts which would otherwise remain hidden. For a discussion of the benefits of public participation in the rulemaking process, see K. DAVIS, *ADMINISTRATIVE LAW AND GOVERNMENT* 124-25 (2d ed. 1975). The formal comment process is especially important in the international trade context, where disparities in parties' political strength, see, e.g., N.Y. Times, Apr. 23, 1984, at D1, col.1 (reporting potential electoral importance of domestic steel interests in 1984 election); institutional dynamics, see *infra* note 82; and the unexpected consequences of decisions, see *infra* notes 84-87 and accompanying text, often mean that not all relevant groups are consulted before decisions are made. Importers are often the major losers in this process. Without the political clout of domestic manufacturers, they must rely either on formal administrative processes or diplomatic pressure from the countries where the imported goods originate. The latter course carries with it the high risk that private interests will be sacrificed for the sake of broader political relations, as occurred in 1981 when the U.S. Government directed that all lawsuits against public Iranian entities be suspended as part of the agreement that ended the 1979-81 hostage crisis.

Because diplomatic channels offer little hope of redress, the primary means by which importers can defend their interests are the procedural safeguards provided by administrative agencies.

5. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982 and Supp. V 1987) [hereinafter APA or cited by section only].

6. See *infra* notes 21-22 and accompanying text.

7. The specific focus of this Note is the use (or misuse) of the foreign affairs exemption to deny notice-and-comment rights in import classification decisions. For a broad consideration of the foreign affairs exemption, see Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221 (1972). This Note neither analyzes the justification for the foreign affairs exemption per se, nor argues for a complete repeal of the foreign affairs exemption, as Professor Bonfield does. Rather, it attempts to justify a statutory grant of notice-and-comment rights in import classification cases by demonstrating the misuse of the foreign affairs exemption, the tool employed by Federal courts and government agencies to deny these rights. The value of this functional approach is (inadvertently) suggested by Bonfield himself when, in the course of calling for the repeal of the foreign affairs exemption in the name of administrative process, he suggests a continuation of the denial of notice-and-comment for rulemaking pursuant to the Multifiber Arrangement, see *infra* note 29, but under another of the statutory exemptions to the notice-and-comment rules. See Bonfield, *supra*, at 281-82.

By avoiding the mere substitution of labels for the same denials of notice-and-comment, the functional approach of this Note may perhaps prove useful in analyzing the administrative process due in other substantive legal areas implicating foreign affairs, such as immigration. See, e.g., *infra* text accompanying notes 27-28.

8. 596 F. Supp. 1567 (Ct. Int'l Trade 1984), *aff'd on other grounds*, 822 F.2d 1069 (Fed. Cir. 1987).

national Trade, and *American Association of Exporters and Importers-Textile and Apparel Group v. United States*,⁹ a 1985 Federal Circuit opinion. Both these decisions considered regulations relating to textile imports pursuant to the Multifiber Arrangement.¹⁰ In both cases the courts vindicated the agency's¹¹ claim that such regulations fell under the foreign affairs exemption to the APA's notice-and-comment provisions.¹²

After a brief examination of the APA's notice-and-comment structure in Section I, Section II examines judicial interpretations of the foreign affairs exemption, paying special attention to the holdings in *Mast* and *AAEI-TAG*. In response to these rulings, Section III proposes and attempts to justify a statutory grant of notice-and-comment opportunities for most instances of Customs and Commerce rulemaking concerning the classification of imported goods.

I. THE APA'S NOTICE-AND-COMMENT PROVISIONS

Congress passed the APA in response to the explosive growth of the administrative state during the New Deal era.¹³ Tom Clark, Attorney General at the time of the Act's passage, noted the fundamental character of the rights set out in the APA when he described it as "a restatement of the law of due process for administrative agencies."¹⁴

The spirit of Clark's comment is evident in the notice-and-comment provisions of the APA, which set forth requirements for public participation in the agency rulemaking process. The notice-and-comment provisions require that advance notice of proposed rulemaking be published in the *Federal Register*,¹⁵ that interested persons be afforded the chance to submit comments concerning the proposed rule,¹⁶ that the final rule be published at least thirty days before its effective date,¹⁷ and that interested persons be able to petition for "the issuance, amendment, or repeal of a

9. 751 F.2d 1239 (Fed. Cir. 1985) [hereinafter *AAEI-TAG*].

10. Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840 [hereinafter MFA]. For a discussion of the MFA, see *infra* note 29.

11. *Mast* involved Customs regulations. In *AAEI-TAG* Customs merely implemented the decision of the Committee for the Implementation of Textile Agreements [hereinafter CITA], an arm of Commerce.

12. *Mast* and *AAEI-TAG* are important because they are the only recent cases in which Federal judges have analyzed in any detail the applicability of notice-and-comment requirements to import classification decisions. *Mast* in particular attempts to provide an analytical framework for considering APA-based challenges in this field. Judges in two cases since *Mast* have cited its analysis as sufficient to decide the applicability of the foreign affairs exemption to import classification decisions. See *Carlisle Tire and Rubber Co. v. United States*, 634 F. Supp. 419, 423 (Ct. Int'l Trade 1986); *American Inst. for Imported Steel v. United States*, 600 F. Supp. 204, 211 (Ct. Int'l Trade 1984).

13. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:7, at 17-24 (1978).

14. Address by Attorney General Clark to the American Bar Association, reprinted in 92 CONG. REC. 2,088 (daily ed. Mar. 8, 1946).

15. APA § 4, 5 U.S.C. § 553(b) (1982).

16. *Id.* § 553(c).

17. *Id.* § 553(d).

rule."¹⁸ A noted commentator has described this system as "one of the greatest inventions of modern government."¹⁹

The same commentator, however, notes that "the weakness of [the notice-and-comment provisions] may lie in [their] extensive exceptions."²⁰ The APA includes an intricate and interlocking series of exemptions from different segments of the notice-and-comment provisions.²¹ This Note examines in detail the interpretation of the term "foreign affairs" as used in section 553(a)(1) of the APA, which exempts from notice-and-comment procedures "military and foreign affairs functions."²²

II. JUDICIAL INTERPRETATIONS OF THE FOREIGN AFFAIRS FUNCTION

A. *Interpretations Before Mast and AAEL-TAG*

Before the ruling in *Mast*, judicial interpretation of the foreign affairs exemption centered on attempts by the Immigration and Naturalization Service (INS) to invoke this exemption for its rulemaking regarding the status of aliens living in the United States.²³ These cases can be divided into two groups: those growing out of INS actions affecting Iranian aliens during the hostage crisis of 1979-81,²⁴ and all others.²⁵ In the Iranian

18. *Id.* § 553(e).

19. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §6:1, at 448 (1978). *But see* Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1073 (1976) ("Public participation [in administrative rulemaking] will not always improve agency decisionmaking enough to offset the costs of imposing the procedure.").

20. K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 122 (1975).

21. Agencies invoking the foreign affairs exemption are exempted from all of the notice-and-comment requirements of § 553. Agencies are exempt from the provision of a time and place for public comment (and presumably, though not explicitly, the requirement of allowing actual comment) "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." § 553(b). The requirement of § 553(d) that a rule be published thirty days before its effective date is governed by its own "good cause" exemption, § 553(d)(3). Neither of the good cause exemptions, however, allows agencies to deny interested parties the right to petition for alteration of a rule already promulgated, (§ 553(e)). In contrast, the foreign affairs exemption also permits agencies to deny the right to petition. There also exist other exemptions to the notice-and-comment requirements, none of which is relevant to our subject. For a discussion of these other exemptions, see Bonfield, *supra* note 7.

22. The relevant section of the APA provides that "this section [mandating notice-and-comment procedures] applies . . . except to the extent that there is involved . . . a military or foreign affairs function of the United States. . . ." 5 U.S.C. § 553(a)(1).

23. *But see* *WBEN, Inc. v. United States*, 396 F.2d 601, 616 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (FCC ruling on allocated strength of radio station signal was foreign affairs function as rule was made pursuant to U.S.-Canada radio agreement); *Carlisle Tire & Rubber Co. v. United States*, 634 F. Supp. 419, 423 (Ct. Int'l Trade 1986) (*de minimis* rule in dumping case not foreign affairs function); *American Inst. for Imported Steel v. United States*, 600 F. Supp. 204, 211 (Ct. Int'l Trade 1984) (embargo rule on European steel exempt as foreign affairs function because rule goes to purpose of international agreement to limit imports).

24. *E.g.*, *Nademi v. INS*, 679 F.2d 811 (10th Cir.), *cert. denied*, 459 U.S. 872 (1982); *Malek-Marzban v. INS*, 653 F.2d 113 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980); *Akbari v. Godshall*, 524 F. Supp. 635 (D. Colo. 1981).

25. *E.g.*, *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985); *Hou Ching Chow v. Attorney Gen.*, 362 F. Supp. 1288 (D.D.C. 1973).

cases the INS consistently won the right not to provide a notice-and-comment period. In the other immigration cases, however, courts ruled against the applicability of the foreign affairs exemption.²⁶ Both sets of cases based their holdings on the strength of the connection between the INS rule and the President's foreign policy. The Iranian cases, upholding use of the foreign affairs exemption, turned on the courts' findings that in promulgating the rules in question, the INS was implementing the broader American reaction to the hostage seizure.²⁷ In contrast, an Eleventh Circuit court ruled against the INS' claim to an exemption for rulemaking concerning the internment of Haitian refugees in the early 1980's, citing the tenuous connection between the rules and the President's foreign policy.²⁸

B. *Issues in Mast and AAEI-TAG*

1. *Introduction*

Both *Mast* and *AAEI-TAG* consider, *inter alia*, APA-based challenges to agency rulemaking pursuant to bilateral export restraint agreements entered into as part of the MFA.²⁹ In both cases the plaintiffs claimed that the rules were invalid because the agencies in question did not provide a notice-and-comment period. The agencies countered that the regulations were foreign affairs functions and therefore exempt under the foreign affairs exemption.

The Customs rule challenged in *Mast* altered the criteria for determining the country of origin of textile products, requiring more substantial transformation of a product before it could be considered a product of the country where that transformation occurred.³⁰ This rule threw into confusion the carefully crafted plans of many foreign textile manufacturers, who had arranged the production process so that the final stage was performed in countries which had excess capacity under their quotas due to either larger quotas or smaller pre-existing export industries.³¹

26. *E.g., Jean*, 727 F.2d at 962.

27. *See, e.g., Malek-Marzban*, 653 F.2d at 115-16.

28. *Jean*, 727 F.2d at 962.

29. The MFA is a multilateral agreement by which signatories agree to cooperate to minimize "market disruption" in the international textile trade. MFA, *supra* note 10. Under the auspices of the MFA, major textile exporting nations enter into bilateral export restraint agreements with major importing countries. For more information on the MFA, see Giesse & Lewin, *The Multifiber Arrangement: "Temporary" Protection Run Amuck*, 19 L. & POL'Y INT'L BUS. 51, 98-107 (1987).

30. The regulation was an interim rule, taking effect five weeks after its appearance in the *Federal Register*. Notice-and-comment was provided prior to the promulgation of the final rule. However, the interim rule remained in effect during the notice-and-comment period. The *Mast* court ruled that the APA requires notice-and-comment for rules regardless of their interim status. *Mast Indus. v. Regan*, 596 F. Supp. 1567, 1579 (Ct. Int'l Trade 1984), *aff'd on other grounds*, 822 F.2d 1069 (Fed. Cir. 1987).

31. For example, under the new rules assembly of a garment in one country from pieces knitted abroad would no longer suffice to transform the garment into a product of the assembling country. Thus, the change in the country-of-origin rules meant that sweaters assembled in Hong Kong from

The challenged rule in *AAEI-TAG* was Commerce's decision to invoke a provision of the U.S.-People's Republic of China textile restraint agreement³² that authorized Commerce to impose a quota on Chinese textile exports to the United States if the Department found "disruption" of the U.S. textile market.³³ In both of these cases the court ruled that the promulgation of these rules constituted a foreign affairs function, thus validating the agencies' denial of notice-and-comment procedures based on the foreign affairs exemption.

2. *The Broad Scope of the Holding in Mast*

After an inconclusive examination of the legislative history of the exemption³⁴ the *Mast* court ruled in favor of Customs. Specifically, the court held that the regulations in question "'clearly and directly' involve[d] a foreign affairs function," language the court borrowed from the House report on the APA.³⁵

The court reached this conclusion through several steps. First, it ruled that the negotiation of agreements with foreign governments clearly and directly involved a foreign affairs function.³⁶ It then found a foreign affairs function whenever the President "defines, modifies or even violates the terms of an international agreement, or directs his subordinates to do so."³⁷ The court concluded that to the extent the interim regulations defined or altered quantitative limits on textile imports, their promulgation also "clearly and directly" involved a foreign affairs function and was therefore exempt from the notice-and-comment requirements of the

panels knitted in China would now be considered products of China, a country which had a substantially smaller quota for sweater exports to the U.S. than Hong Kong. Giesse & Lewin, *supra* note 29, at 134-36.

32. Agreement Relating to Trade in Cotton, Wool and Man-made Fiber Textiles and Textile Products, Sept. 17, 1980, United States-People's Republic of China, 32 U.S.T. 2071, T.I.A.S. No. 9820.

33. *Id.* art. VIII.

34. The legislative history is even more ambiguous than conceded by the *Mast* court. For example, the court's discussion of the scope of "foreign affairs" fails to mention the comment by the House sponsor of the APA that "the exempted foreign affairs are those diplomatic functions of high importance which do not lend themselves to public procedures and with which the general public is ordinarily not concerned." 92 CONG. REC. 5,755 (1946). This view contradicts the *Mast* court's more expansive interpretation of "foreign affairs" yet is not mentioned in the opinion. Even more significant is the court's treatment of a passage from the House and Senate reports on the APA that defined foreign affairs functions as those "which so affect the relations of the United States with other governments that, for example, public rule-making would provoke definitely undesirable international consequences." H. R. REP. NO. 1980, 79th Cong., 2d Sess. 23 (1946); see also S. REP. NO. 752, 79th Cong., 1st Sess. 13 (1945). It is a reflection of the vagueness of this formulation that the two opinions considered in this Note take completely different approaches to this definition: The *Mast* court denied that the Government actually needed to demonstrate these consequences whereas the *AAEI-TAG* court purported to find these consequences in the Government's argument. *Mast*, 596 F. Supp. at 1581; *American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985).

35. *Mast* at 1583.

36. *Id.* at 1582.

37. *Id.*

APA.³⁸ In reaching this conclusion the court noted that the interim regulations "[went] directly to the purpose of the trade agreements, i.e., the limitation of textiles imported into the United States."³⁹

The *Mast* court's holding thus exempted from notice-and-comment a broad category of administrative rules, made pursuant to policy agreements to limit imports, which themselves affect the quantity or type of goods to be allowed into the United States. By the logic of *Mast*, the promulgation of any Customs rule that happens to affect the limits on the importation of a particular good is automatically exempt as a foreign affairs function, as long as the policy decision to agree to those limits (for example, the decision to reach a trade agreement with a foreign nation) was itself a foreign affairs function.⁴⁰ This interpretation (which appears to be the most reasonable reading of the case⁴¹) would exempt from notice-and-comment Customs classifications affecting a large percentage of imported goods, for which access to the American market depends on a Customs classification decision.⁴² In the absence of definitive legislative history supporting this interpretation,⁴³ the ruling's potentially enormous impact on the classification of imports should require very strong policy

38. *Id.* at 1583.

39. *Id.* The Court of International Trade cited this reasoning in a similar case, *American Inst. for Imported Steel v. United States*, 600 F. Supp. 204, 211 (Ct. Int'l Trade 1984), in which the court also upheld Customs' denial of notice-and-comment based on the foreign affairs exemption.

40. A hypothetical case may clarify this point. Assume that the U.S. and South Korea agree to restrict the importation into the U.S. of "high-grade" Korean steel, with no limits on the importation of other Korean steel. In such a case it would probably be Customs' responsibility to formulate a precise definition of "high-grade" unless the term was unambiguously defined in the actual international agreement. (Such specificity would be unusual in these cases; for example, the U.S.-China textile treaty at issue in *AAEI-TAG* gave little guidance on the standards for determining "market disruption.") Customs' definition of "high-grade" steel would clearly affect the quantity of Korean steel which could be imported since, for example, a narrow definition would place most Korean steel in the category with no import restrictions. The logic of the *Mast* opinion would require the conclusion that the Customs rule was exempt as a foreign affairs function, since the regulation "define[s] or alter[s] quantitative limitations in [a] bilateral trade agreement." *Mast*, 596 F. Supp. at 1583.

41. It could be argued that the *Mast* holding is limited to cases in which agency action bears directly on an international agreement rather than on a domestic statute enacted pursuant to an international agreement (for example, implementing legislation of a non-self-executing treaty). This reasoning appears to be prohibited by the opinion itself, which stressed the regulation's relation not to the international agreement as such, but to the subject matter of the international agreement:

The Court holds that *to the extent that the interim regulations define or alter quantitative limitations in bilateral trade agreements or unilaterally imposed restrictions on textile imports*, they "clearly and directly" involve a "foreign affairs function" and are exempt from the prior notice and comment provisions of the APA.

Mast, 596 F. Supp. at 1583 (emphasis added). This holding indicates that the court would reach the same conclusion if the identical regulations had been promulgated pursuant to a Congressional statute implementing the MFA and not pursuant to the agreement itself.

42. For example, the *Mast* holding would apply to Customs classification procedures affecting the importation of any goods whose tariff or quota treatment was determined by either a bilateral trade agreement or a multilateral agreement such as the General Agreement on Tariffs and Trade. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. The significance of the holding in *Mast* should thus be clear, given the large percentage of imported goods for which either GATT or a bilateral treaty arrangements determines quota or tariff treatment.

43. See *supra* note 34.

reasons for construing the exemption in this way. None of the courts faced with this issue has so far managed to adduce convincing policy reasons for construing trade agreements so broadly.

3. AAEI-TAG: *The Fear of Stockpiling*

AAEI-TAG affirmed the legality of a Commerce decision to institute textile import quotas and take other action pursuant to bilateral and multilateral trade agreements to which the United States was a party. The AAEI-TAG court also affirmed Commerce's invocation of the foreign affairs exemption to dispense with provision of a notice-and-comment period before taking these actions.

In finding a foreign affairs function, the Federal Circuit court in *AAEI-TAG* took a very different approach from the court in *Mast*. The *AAEI-TAG* court put forth two separate arguments. The first relied on the legislative history, also cited in *Mast*,⁴⁴ allowing exemptions for matters which "so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences."⁴⁵ The court noted the possibility that prior disclosure of the Government's intention to impose these restrictions would lead to a temporary surge in imports of the affected goods, as importers rushed to purchase goods before they became more scarce.⁴⁶ The court found that such a surge would frustrate the intent of the regulations, which were ostensibly designed to ease market disruption in the textile trade.⁴⁷ The *AAEI-TAG* court characterized this potentially counterproductive effect as falling into the category of "definitely undesirable international consequences" and thus affirmed Commerce's invocation of the exemption.⁴⁸

As an alternative argument supporting the invocation of the exception, the court noted the possibility that the President might use his authority to implement the textile agreements as "part of his overall foreign policy."⁴⁹ This argument rested on speculation that the President might act in this field as part of "the Government's overall political agenda concerning relations with another country"⁵⁰ and that these actions should therefore be exempt from notice-and-comment. Relying on both speculation and vague terms such as "overall foreign policy" and "overall political agenda," this

44. *Mast*, 596 F. Supp. at 1581.

45. American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (quoting H. R. REP. NO. 1980, 79th Cong., 2d Sess. 23 (1946), and S. REP. NO. 752, 79th Cong., 1st Sess. 13 (1945)).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

alternative rationale would seem to lead to inconsistent rulings whose legal foundation could not be found in the opinion itself.⁵¹

The court's primary argument—that prior publication of the rule would defeat its purpose—is not unique to rules implicating foreign affairs functions. For example, any agency rule implicating purely domestic commerce could fall in the category of rules for which prior publication would be self-defeating. As the court's reasoning does not necessarily implicate any “foreign” quality as the rationale for the exemption, use of the “foreign affairs” exemption in this case appears inappropriate. If anything, the court's rationale seems more illustrative of a “good cause” exemption.⁵²

Nonetheless, the court in *AAEI-TAG* found a foreign affairs exemption by linking this “self-defeating” argument to the “definitely undesirable international consequences” language in the legislative history.⁵³ This argument makes some initial intuitive sense, since a rational importer would presumably attempt to buy as much of a product as possible upon learning that the government was considering regulations which, if promulgated, would severely limit its availability. The logistical and financial realities of importing,⁵⁴ however, call into question the threat posed by stockpiling and thus the harm caused by provision of notice-and-comment in such cases.

Two factors are key to assessment of the stockpiling concern. First, any harm caused by provision of a notice-and-comment period is limited by the relatively short time-frame these procedures require. Second, international trade is an ongoing activity.⁵⁵ Any stockpiling harm would therefore equal only the amount stockpiled during the period between the publica-

51. See, e.g., *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981) (involvement of foreign affairs “obvious” in regulation directing that INS act against Iranian aliens residing in United States during hostage crisis).

52. See *supra* note 21.

53. In doing so, the *AAEI-TAG* court agreed with the main scholarly interpretation of the foreign affairs exemption, Bonfield, *supra* note 7. Bonfield specifically cites the Textile Import Program as an example “in which advance public procedures of the type listed in section 553 may either cause the very evil that the proposed rules are designed to avoid, seriously impair the ability of the agency to perform its ‘military or foreign affairs function,’ or produce other serious undesirable consequences.” Bonfield, *supra* note 7, at 280. Although he advocates the repeal of the foreign affairs exemption, Bonfield indicates that he would continue to favor denying notice-and-comment in situations such as those in *Mast* and *AAEI-TAG* under the aegis of the good cause exemption. Bonfield, *supra* note 7, at 356.

54. See *infra* notes 55–62 and accompanying text.

55. The analysis would be different if the activity in question were not ongoing. For example, if the issue were a decision to freeze a foreigner's U.S. assets, provision of notice-and-comment would completely defeat the purpose of the rule, since any potential target could withdraw assets during the interim period (In that case, the complete frustration of the proposed rule would outweigh the advantages of notice-and-comment.) However, decisions to reclassify imported goods are made *exactly because* the imports are expected to continue into the future. Thus, international trade is a field in which the harm from notice-and-comment would be, at worst, limited.

tion of the notice of rulemaking and the effective date of the final rule, a period as short as four-to-five weeks.⁵⁶

Several factors reduce the degree to which provision of a notice-and-comment period would induce stockpiling. First, the time lag between ordering inventory from a foreign producer and actually having it clear Customs reduces importers' ability to react to publication of the proposed rule by instantaneously stockpiling large quantities of the goods in U.S. warehouses. Even assuming that foreign suppliers would be willing to divert shipments to the U.S. in response to a deadline, the time lag involved would mitigate the amount of attempted stockpiling.⁵⁷

Second, stockpiling would require either large outlays of cash or, more likely, extensions of credit to finance the purchases. Access to credit depends on the financial condition of the individual firm involved; it is therefore impossible to generalize about the effect of this requirement on the amount of goods actually stockpiled. Still, the need to finance any stockpiling should also mitigate any such activity.⁵⁸

Finally, and perhaps most fundamentally, a decision to import based on proposed rulemaking is essentially a wager that a final rule will be adopted which will severely reduce the product's availability. It is at least questionable whether importers would be willing to take this risk, to the extent of stockpiling enough goods to disrupt the market, on the basis of a proposed rule. Indeed, the legislative history of the "short-supply controls" provision of the Export Administration Act⁵⁹ explicitly justifies its

56. See, e.g., *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 558-59 (10th Cir. 1986) (APA does not mandate specific number of days for which agency must accept comments); *Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 534 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982) (30-day comment period with regard to rulemaking that adopted stringent fire protection program for nuclear power plant not unreasonable, despite technical nature of subject). A five-week period would allow 30 days for notice-and-comment plus one week to evaluate the comments. This one week period should be sufficient, as agencies could also evaluate comments when received throughout the comment period.

57. Empirical evidence supports this assertion. When Customs promulgated the country-of-origin regulations which led to the *Mast* suit, importers responded not by stockpiling, but by cancelling previously-placed orders. See Giesse & Lewin, *supra* note 29, at 136. The regulations took effect five weeks after their publication in the *Federal Register*. Different industry structures render unhelpful any generalization from this particular case. Nevertheless, it does suggest that stockpiling is not as automatic a response as might initially be thought. One textile importer noted that it usually took from six to nine months to complete a deal, from signing a contract to accepting delivery of the merchandise. Xinhua General Overseas News Service, Aug. 22, 1984 (quoting Sam Gluckson, Chairman, Textile Apparel Group, American Association of Exporters and Importers). In the case of steel, a Commerce Department official estimated that during 1988 the average lag between ordering imported steel and taking delivery exceeded three months. Telephone interview with Jeff Laxague, Division Director, Office of Agreements Compliance, Department of Commerce (Nov. 22, 1988).

58. See, e.g., *ROBERT MORRIS ASSOCIATES, COMMERCIAL LOANS TO BUSINESS*, Unit 6, at 3 (1984). Even if the financing is secured by the inventory purchased with the loan proceeds, the credit risk (and thus the interest cost to the borrower) remains high due to the inherent riskiness of maintaining a large amount of inventory. See *infra* notes 61-62 and accompanying text.

59. 50 U.S.C. app. § 2406 (1982 & Supp. V 1987). The short supply controls allow the President to limit exports of certain commodities in periods of shortage to avoid domestic economic dislocation. In the case of scrap metal, domestic users and unions involved in those industries can petition for the imposition of controls.

provision of notice-and-comment on the theory that proposed rulemaking alone will not panic the market into stockpiling.⁶⁰ The risk is not merely that controls will not be imposed and that importers will then be saddled with extra inventory they did not need to buy. Rather, by stockpiling the importer guesses about the state of the market several months later, when economic conditions and tastes might well be different. Stockpiling is thus a hazardous proposition, especially in products like textiles, where marketing is affected by changing tastes and a seasonal product line,⁶¹ and in raw or intermediate commodities, where prices fluctuate widely at the wholesale level.⁶²

C. *The Applicability of Other Rationales for Invoking the Foreign Affairs Exemption*

Government agencies have offered a variety of alternative-rationales for invoking the foreign affairs exemption. Certain of them are easily answered. For example, the Postal Service and the Department of the Treasury have both invoked the foreign affairs exemption when the agencies have claimed that a proposed rule was either not controversial enough or too insignificant to warrant the expense of providing a notice-and-comment procedure.⁶³ Similarly, the Department of State has cited the foreign affairs exemption where affected members of the public have not been identified or where the rule affects all citizens equally.⁶⁴ None of these rationales fits trade decisions, however, given the controversial nature of these issues, their high stakes, and the extreme interest particular parties have in their outcomes.

60. S. REP. NO. 169, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1147, 1159 ("Concern was expressed that the filing of petitions [triggering the notice-and-comment procedures] could precipitate panic ordering of the commodity or material in question, but the majority of the members of the Committee believe that once the procedure has been in effect for a period of time and it has been demonstrated that the filing of a petition does not necessarily result in a decision to impose monitoring or controls, the market is not likely to respond unduly to the mere filing of a petition.").

It is significant that these controls deal with exports of scrap metal, a product in which there is a highly developed market and rapid price swings in response to perceived trends in availability. Congress was well aware of this situation when it provided the notice-and-comment procedures. *See, e.g., U.S. Export Control Policy and Extension of the Export Administration Act: Hearings on S. 737 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 35-36 (1979) (statement of Frank Weil, Assistant Secretary of Commerce).

61. *See, e.g., Robinson, Some Caveats to Inventory Financing*, J. COM. BANK LENDING, Apr. 1979, at 35, 36 (noting riskiness of inventory, for example, clothing, which is susceptible to seasonality or style-based obsolescence); *see also* Dicker, *How to Temper the Risks of Loans to Apparel Companies*, COM. LENDING REV., Spring 1989, at 3, 5-6 (noting style and seasonality riskiness of apparel inventory).

62. *See, e.g., AM. METALS MARKET*, Jan. 18, 1989, at 19 (graph) (composite price of shredded scrap steel rises by approximately 45% between June and November, 1987); *THE ECONOMIST*, Oct. 10, 1988, at 113 (index of industrial metals prices falls 13.8% in one month); *THE ECONOMIST*, Dec. 12, 1987, at 115 (price of nickel doubles during 1987).

63. *See* Bonfield, *supra* note 7, at 272.

64. *Id.*

At least one agency has complained of the general loss of flexibility entailed by the notice-and-comment requirements. This lack of flexibility was cited as a justification for invoking the foreign affairs exemption whenever the rule in question has some connection to foreign affairs.⁶⁵

Such an argument is disingenuous. By itself, lack of flexibility cannot be considered a justifiable rationale given the emphasis the APA places on the concept of participatory rulemaking. In addition, even if lack of flexibility were a justifiable reason for denying notice-and-comment, the foreign affairs exemption would not be the proper vehicle for its expression. Rather, such a rationale would best be expressed by the "good cause" exemption.⁶⁶

More plausible, and more related to "foreign affairs," is the use of the exemption in cases involving confidentiality; that is, cases where rulemaking either requires secrecy to be effective or is based upon secret information, thereby reducing the usefulness to the agency of public comment. For example, the Department of State has used this rationale to justify its failure to provide notice-and-comment procedures in formulating its responses to political upheavals abroad.⁶⁷

This rationale is totally inapposite to rulemaking involving international trade. While diplomatic information regarding foreign countries' trade policies may be kept secret, most other information relevant to Customs and Commerce decisions of this type is not confined to governments. Information on market trends, product availability, and the like is disseminated widely, and private parties may well have information that public rulemakers do not. Events in the *Mast* litigation demonstrate that government rulemakers may in fact often be surprised by the information which exists in the public sphere.⁶⁸

Thus, the other rationales offered by agencies for invoking the foreign affairs exemption fail to make a persuasive argument for its denial in the context considered by this Note. In contrast to the issues giving rise to these proffered rationales, international trade issues are important and controversial, and information possessed by private parties can significantly improve the quality of agency decision-making.

III. PROPOSAL

Because stockpiling is not a likely reaction to the provision of a notice-and-comment period, and because *Mast* and *AAEI-TAG* ignore the benefits afforded by these procedures, use of notice-and-comment procedures in this area should be maximized. Specifically, interested persons should al-

65. *Id.* at 273-74.

66. *See supra* note 21.

67. *See* Bonfield, *supra* note 7, at 283-84.

68. *See infra* notes 84-87 and accompanying text.

ways have the right to notice-and-comment in Customs and Commerce rulemaking⁶⁹ directly affecting the volume or type of imports unless the President declares a national emergency pursuant to the International Emergency Economic Powers Act.⁷⁰

This proposal takes the form of a statute, enacted pursuant to Congress' constitutional authority to regulate foreign commerce,⁷¹ requiring that Customs and Commerce provide notice-and-comment opportunities in any rulemaking affecting the volume or type of imports into the U.S., unless the President declares a national emergency pursuant to IEEPA. It would also specifically prohibit use of the foreign affairs or good cause exemptions⁷² of section 553 to deny notice-and-comment.⁷³

More extensive notice-and-comment rights in international trade rulemaking by Customs and Commerce provide significant benefits relating both to the quality and the fairness of the rulemaking process.

First, the proposed statute provides a clearer standard for granting these rights than does the foreign affairs exemption as presently construed. Cases like *AAEI-TAG*, which rest on conclusory statements that agency actions might be part of the President's "overall foreign policy,"⁷⁴ require almost pure speculation by courts, which in most cases are unwilling to require disclosure of the information used in the President's decision.⁷⁵

69. This Note limits its call for statutorily-mandated notice-and-comment to Customs and Commerce rulemaking because it seeks to limit the statute's breadth to the functional area of international trade. Expansion of the proposed statute's coverage to all agencies would implicate various other governmental functions (e.g., procurement), analysis of which is beyond the scope of this Note. For a discussion of issues surrounding procurement, see Golub & Fenske, *U.S. Government Procurement: Opportunities and Obstacles for Foreign Contractors*, 20 GEO. WASH. J. INT'L L. & ECON. 567 (1987) (factors entering U.S. Government procurement decisions).

70. 50 U.S.C. §§ 1701-1706 (1982) [hereinafter IEEPA]. IEEPA authorizes the President to declare a national emergency if he finds the existence of "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." *Id.* §1701(a). Presidents have invoked IEEPA on several occasions to impose sanctions against foreign nations. See, e.g., Exec. Order No. 12,513, 3 C.F.R. 342 (1986) (sanctions against Nicaragua). For more information on IEEPA, see Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1229-42 (1987).

71. U.S. CONST. art. I, § 8, cl. 3.

72. Use of the good cause exemption would also be explicitly prohibited, given the superficial suitability of the good cause exemption in cases similar to *Mast* and *AAEI-TAG*. See Bonfield, *supra* note 7, at 291-315. Prohibiting use of only the foreign affairs exemption would thus allow Customs or Commerce to continue to deny notice-and-comment by invoking the good cause exemption.

73. Substantial precedent exists for statutory mandates of notice-and-comment rights in specific situations. Over 130 statutes specifically refer to § 553. Most of these references require the relevant agency to follow the procedures set forth in § 553 in their rulemaking pursuant to that statute. E.g., 30 U.S.C. § 1267(g) (1982) (procedure for rulemaking to guard against conflicts of interest among state mine regulators). Congress has also explicitly prohibited agency use of particular exemptions set forth in § 553 to deny notice-and-comment. E.g., 15 U.S.C. § 1262 (1982) (Health and Human Services Department procedure for declaring toys hazardous, prohibiting agency use of good cause exemption).

74. *American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985).

75. E.g., *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (declining to review presidential determinations on grants of airline routes based on foreign policy information available only to President).

The proposed statute authorizes the President to dispense with notice-and-comment only if he explicitly asserts the existence of "an unusual and extraordinary" foreign-based threat, the language which triggers his authority under IEEPA.⁷⁶ This requirement obviates the need for courts to reach decisions based on speculation and a near-total lack of information.

Second, the statute would assure better balancing of the interests of competing groups. Trade issues are especially susceptible to domestic pressure by well-organized interest groups (usually groups which either import the good in question or manufacture competing domestic products).⁷⁷ Indeed, it could be said that trade decisions are to a large degree choices made between two domestic groups, namely, importers and manufacturers of competing domestic products. Two commentators have put it bluntly: "politics dictate policy choices in the realm of U.S. textile and apparel trade."⁷⁸ Similar observations could be made with regard to other industries.⁷⁹ The stakes in these decisions are often large enough to compel heavy lobbying.⁸⁰ The fact that various groups consider these issues so important makes public rulemaking all the more fundamental to fulfilling the APA's vision of open government. Mandated notice-and-comment procedures ensure at least some access to decision-makers for all interested parties.⁸¹

The contentiousness of trade decisions also increases the potential for agency abuse of the traditional judicial deference to the Executive's conduct of foreign affairs. By requiring presidential certification before rulemaking can be exempted from notice-and-comment, the proposed statute reduces the potential for abuse of the exemption by taking the decision out of the hands of agencies more prone to pressure or capture by interest groups.⁸² In addition, the requirement that the President declare a na-

76. 50 U.S.C. § 1701 (1982).

77. For an analysis of this phenomenon, see K. JONES, *POLITICS VS. ECONOMICS IN WORLD STEEL TRADE* 41-48 (1986).

78. Giesse & Lewin, *supra* note 29, at 81.

79. See, e.g., Walter, *Structural Adjustment and Trade Policy in the International Steel Industry*, in *TRADE POLICY IN THE 1980's*, at 483, 509 (W. Cline ed. 1983) ("[T]he steel industry has shown a singular ability to penetrate governmental institutions and achieve a telling impact on public policy. . . . Governments have gone to great lengths to assure the proper legal and political frameworks within which the sectoral protection of steel can be realized."); see also *U.S. Limits Increase on Van Tariffs*, *supra* note 3, at D1, col. 6 (describing foreign lobbying to change Customs Department classification of vans and sport-utility vehicles as trucks, which had increased their tariff rate tenfold).

80. See, e.g., *American Trade Policy: Actors, Issues, Options*, 6 *YALE L. & POL'Y REV.* 49 (Special Issue 1988) (noting favorable economics of lobbying); see also *N.Y. Times*, Apr. 23, 1984, at D1, col. 1 (noting extensive lobbying efforts by steel interests to ensure passage of quota bill).

81. The opportunity to comment would, of course, be open to all groups, not just importers or manufacturers of domestic competing products. The APA's definition of "person" makes no mention of nationality as a criterion. 5 U.S.C. § 551(2) (1982). Nor should mandated notice-and-comment be dismissed out of hand as ineffective in allowing interested groups to contribute meaningfully to agency deliberations. See, e.g., J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 452 (1985) (giving example of significant change in agency rule based on comments submitted by interested parties).

82. Capture of agencies by private interests has led to the situation characterized as the "iron

tional emergency before using IEEPA's powers will tend to limit use of this power in cases involving only one industry.⁸³

Third, international trade is an area in which notice-and-comment is especially important because of the threat of international retaliation against U.S. actions perceived as protectionist. Prior notice would alert policy-makers to the concerns of groups not directly connected with the subject matter at issue but whose interests could suffer if the action was carried out. For example, the country-of-origin rules challenged in *Mast* provoked strong protests from U.S. agricultural interests, who feared a repeat of the 1983 Chinese boycott of American wheat in response to previous protectionist textile rules promulgated by the U.S.⁸⁴ In addition, a Hong Kong commercial association responded to the new regulations by boycotting American tobacco products, threatening \$50 million in U.S. cigarette exports.⁸⁵ Moreover, it was thought that South Korea might respond by cutting back purchases of American goods as diverse as nuclear power equipment and farm products.⁸⁶ A spokesperson for the Reagan Administration admitted that the widespread opposition to the regulations had surprised "at least some people" in the White House.⁸⁷

As the *Mast* court itself noted, the APA's notice-and-comment provisions were included in part to avoid precisely this problem.⁸⁸ An analogous situation exists with respect to section 301 of the Trade Act of 1974,⁸⁹ which authorizes the President to respond to unfair foreign trade practices and provides for notice-and-comment procedures before presidential action.⁹⁰ As one commentator on section 301 noted, the purpose of notice-and-comment in that context "is to try to ensure that any . . . action taken under section 301 furthers United States interests and limits any adverse effects on sectors of the economy other than those of the petitioning industry or industries."⁹¹ For much the same reason, Congress has also mandated the provision of notice-and-comment for government ac-

triangle" between industry, the relevant congressional committees, and the agencies. See G. ADAMS, *THE IRON TRIANGLE* 24-26 (1981); cf. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 230 (1984) (committee system "exerts pressure for the creation of private benefits flowing to the constituencies represented on the committee").

83. But see Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1234-38 (1987) (discussing potential overuse of presidential powers under IEEPA).

84. *Textile Regulations Protests Interfering with Strategy to Get President Reelected*, 1 Int'l Trade Rep. (BNA) No. 8, at 204 (Aug. 22, 1984). Indeed, China did cancel some wheat orders in response to the new textile regulations. Women's Wear Daily, Aug. 23, 1984, at 19.

85. *Customs Service Announces Partial Delay in Implementing Country-of-Origin Rules*, 1 Int'l Trade Rep. (BNA) No. 9, at 228 (Aug. 29, 1984).

86. E. Asian Executive Rep., Oct. 15, 1984, at 13.

87. N.Y. Times, Sept. 6, 1984, at D6, col. 1.

88. *Mast Indus. v. Regan*, 596 F. Supp. 1567, 1579 (Ct. Int'l Trade 1984), *aff'd on other grounds*, 822 F.2d 1069 (Fed. Cir. 1987).

89. 19 U.S.C. §§ 2411-2416 (1982 & Supp. V 1987).

90. For a discussion of the § 301 procedures, see Bello, *Section 301 of the Trade Act of 1974: Requirements, Procedures and Developments*, 7 NW. J. INT'L L. & BUS. 633, 650-51 (1986).

91. *Id.* at 651.

tions taken pursuant to other trade statutes.⁹² The proposed statute's provision of notice-and-comment procedures would serve the same salutary purpose.

Obtaining input before the promulgation of a rule is especially important in trade issues, as the diplomatic character of international trade relations makes it more difficult for Customs to back down from implementing a final regulation than to refrain from promulgating a proposed regulation in the face of threatened retaliation. In other words, a notice-and-comment period before the adoption of the final regulation affords an opportunity for a graceful retreat should the proposal elicit threats of retaliation from abroad. In the *Mast* case, the reaction to the regulations, including foreign threats of retaliation, forced government officials to consider what were described as "fairly radical proposals" including delaying enforcement of the regulations.⁹³ This embarrassment may have been avoided had Customs provided a notice-and-comment period before promulgating the rules.⁹⁴

Fourth, provision of notice-and-comment would elicit from the public information to help the agency reach a better decision. This would have been the case in the fact situations surrounding both *Mast* and *AAEI-TAG*. In *Mast* the issue was the new country-of-origin rules for textiles, promulgated pursuant to the section of the MFA authorizing anti-circumvention measures. The plaintiffs, however, had strong arguments that the new regulations not only fell well outside the range of previous anti-circumvention measures taken by Customs, but also found no support in the section of the MFA cited by Customs as authority for their promulgation.⁹⁵ In *AAEI-TAG* the issue was even clearer: a Commerce finding of "market disruption," a term defined in the MFA⁹⁶ and incorporated into the U.S.-China textile agreement cited by Commerce as authority for the imposition of the textile quota.⁹⁷ As in *Mast*, the plaintiffs in *AAEI-TAG*

92. *E.g.*, 19 U.S.C. § 2702 (Supp. V 1987) (presidential revocation of beneficiary status of nation under Caribbean Basin trade agreement); 19 U.S.C. § 2251 (1982 & Supp. V 1987) (trade relief if rising imports threaten U.S. industry).

93. *Women's Wear Daily*, Dec. 5, 1984, at 9.

94. An analogous argument in favor of informal rulemaking has also been made in the context of export controls. For example, in calling for a notice-and-comment period before export controls could be promulgated, one commentator has written that "notice and comment rulemaking would assure a reasonable time for consideration of, and public discussion about, proposed foreign policy controls. *The controls would not be in effect [during the notice-and-comment period], and the President could not argue that the Rubicon had been crossed.*" Debevoise, *Trade Restraints: The Legal-Political Dichotomy*, 14 U. Tol. L. Rev. 1299, 1313 (1983) (citation omitted) (emphasis added), see also J. MASHAW & R. MERRILL, *supra* note 81, at 453 (advance notice of proposed rulemaking "can . . . also permit the agency to identify pockets of resistance to, or arguments against, new policies before committing its full energies and prestige to an unpopular initiative").

95. See Giesse & Lewin, *supra* note 29, at 131-36; see also N.Y. Times, Sept. 6, 1984, at D6, col. 1 (GATT panel requests suspension or withdrawal of U.S. regulations).

96. MFA, 25 U.S.T. 1001, 1017, T.I.A.S. No. 7840, at 16.

97. Agreement Relating to Trade in Cotton, Wool and Man-made Fiber Textiles and Textile Products, Sept. 17, 1980, United States-People's Republic of China, 32 U.S.T. 2071, 2077-78, T.I.A.S. No. 9820, at 7-8.

had substantive arguments challenging the validity of the agency's finding of "market disruption."⁹⁸ In both cases, then, the importer-plaintiff made arguments, supported by data, directly challenging the interpretation made by the agency. As the *Mast* court itself noted, a prime reason behind the notice-and-comment provisions was the drafters' desire to create mechanisms for agencies to receive all relevant information before making a decision.⁹⁹ Denial of notice-and-comment in these circumstances defeats that purpose.

Fifth, the proposed statute would harmonize agency practice by providing in fact situations like those in *Mast* and *AAEI-TAG* the same notice-and-comment procedures which agencies such as Customs already provide in analogous situations. For example, Customs regulations presently allow for public rulemaking in cases arising out of claims alleging that imported goods are misclassified.¹⁰⁰ The regulations allow these product classification petitions to be filed by "domestic interested parties," defined as manufacturers, trade groups, trade associations, or unions involved in the production of a domestic competing good.¹⁰¹ Notice of the filing is published in the *Federal Register*,¹⁰² and interested parties may submit comments. If Customs determines that the challenged classification is incorrect, it publishes a notice to that effect in the *Customs Bulletin* and the *Federal Register*.¹⁰³ The rule becomes effective thirty days after publication.¹⁰⁴

Thus, the existing Customs regulations parallel the notice-and-comment procedures this Note proposes for similar agency determinations, such as those discussed in *Mast* and *AAEI-TAG*.¹⁰⁵ This fact undercuts

98. The plaintiffs noted, for example, that the Commerce determination was based on market information as much as two years old. *American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States*, 751 F.2d 1239, 1242-43 (Fed. Cir. 1985).

99. *Mast Indus. v. Regan*, 596 F. Supp. 1567, 1579 (Ct. Int'l Trade 1984), *aff'd on other grounds*, 822 F.2d 1069 (Fed. Cir. 1987).

100. 19 C.F.R. §§ 175.22-.25 (1988).

101. *Id.* at § 175.3.

102. *Id.* at § 175.21(a).

103. *Id.* at § 175.22(a).

104. *Id.*

105. These regulations are, in fact, quite similar to the rules at issue in *Mast* and *AAEI-TAG*. Customs has provided notice-and-comment in cases where domestic companies challenged product classifications explicitly mentioned in international agreements. An example is the petition filed January 4, 1988, by Armco, Inc., and Allegheny-Ludlum Steel Corporation, two domestic steel producers, challenging the classification of silicon electrical steel. *See* 53 Fed. Reg. 26605-06 (July 14, 1988) (noting that product in question was covered by specific category of Voluntary Restraint Agreement on Steel between U.S. and Japan). That these cases turned on the interpretation of an international agreement renders them analytically indistinguishable from *AAEI-TAG*, in which Commerce denied notice-and-comment.

The only plausible distinction is between these product classification procedures and the rules in *Mast*; namely, that the *Mast* rules apply to a broad category of goods (as opposed to individual products) and were promulgated by Customs acting on its own (and not by a formal petition filed by a domestic interest group).

The second difference is not significant. Indeed, Customs' action in *Mast* can hardly be described as having been taken on its own accord, given the intense political pressure applied by the domestic textile lobby to tighten the country-of-origin rules. *See, e.g.,* Giesse & Lewin, *supra* note 29, at 129-30. The same argument can be made for most trade decisions, given the degree of political pres-

the argument that denial of notice-and-comment in cases such as *Mast* and *AAEI-TAG* is justifiable, either generally as a foreign affairs function or because it might lead to undesirable international consequences.

Even while providing these substantial benefits, the proposed statute does not entail any significant costs. The risk of stockpiling, cited by the court in *AAEI-TAG*, has been shown to be minimal.¹⁰⁶ The only other fear articulated by either the *Mast* or the *AAEI-TAG* court is of interference with the President's conduct of foreign policy.¹⁰⁷ The proposed statute, however, allows an exemption from notice-and-comment if the President finds "an unusual and extraordinary" foreign-based threat to the American economy, or to United States foreign policy or security interests, and acts on that finding by declaring a national emergency and invoking powers granted him by IEEPA. Thus, for example, trade embargoes imposed in response to what are perceived as serious threats to U.S. political or security interests could be exempted from prior public rulemaking if the President made the requisite determination.¹⁰⁸

To summarize, the proposed statute promotes the general goal of government open to citizen input and the specific goal of fairer and more consistent decision-making in trade issues. Combined with the presidential power to circumvent notice-and-comment when necessary to protect national interests, and in light of the illusory nature of the stockpiling fear, the provision of notice-and-comment presents no significant drawbacks.

sure brought to bear on the trade bureaucracy. Thus, the only potentially significant difference is the broader nature of the rules in *Mast*, compared to the individual product classifications for which Customs already provides notice-and-comment. There seems to be no analytical basis for distinguishing based on the degree of specificity of the proposed rule. It makes little sense to provide a different notice-and-comment regime for rules relating, say, to textiles in general than for rules relating to individual textile products, since the agency could presumably choose to couch its regulations at whatever level of generality necessary to avoid having to provide notice-and-comment. The similarities between the product classification petitions and the procedures in *Mast* and *AAEI-TAG* therefore seem to outweigh any differences.

106. See *supra* notes 55-62 and accompanying text.

107. American Ass'n of Exporters and Importers-Textile and Apparel Group, 751 F.2d 1239, 1249 (Fed. Cir. 1985).

108. The proposed statute does not provide for judicial review of the President's certification. While judicial review might help ensure that presidential certifications are made on the basis of genuine national interests and not as a cover for avoiding notice-and-comment, it is questionable whether a court would agree to undertake such a review. The case against reviewability in our situation is strengthened by the fact that a reviewing court would need to examine a presidential finding that, based on information presumably known only to him, a threat existed of the sort contemplated by IEEPA. In the past courts have refrained from conducting reviews of foreign policy actions based on information the court believes should be confidential. See, e.g., *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (Court declines to review presidential determinations on grants of airline routes based on foreign policy information available only to President). But see *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (political question doctrine does not bar Court from interpreting domestic statute which may require repudiation of international agreement).

V. CONCLUSION

Writing over twenty years ago, one commentator cited "the talismanic deference to, and loose definition of, the magic words 'foreign affairs' " as a major barrier to the provision of administrative process to parties engaged in international economic relations.¹⁰⁹ Sadly, that comment rings as true today as in 1965, as evidenced by the rulings in *Mast* and *AAEI-TAG*. Congress should bestow on parties engaged in international commerce the same procedural rights described by Attorney General Clark in 1946 as components of basic due process law.¹¹⁰ This Note has demonstrated not just the general, widely-known benefits of notice-and-comment procedures, but also the special benefits such procedures offer in the international trade area. It has also demonstrated the illusory nature of the fears expressed by the courts in denying notice-and-comment rights in this sphere. With no apparent significant costs to mandating these procedures, the case for denying such basic rights appears weak indeed.

109. Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 ADMIN. L. REV. 159, 164 (1965).

110. See *supra* note 14 and accompanying text.

