The Court of International Trade's Treatment of the Political Question Doctrine: Placing *Totes-Isotoner* in the Context of the Court's Recent and Anticipated Jurisprudence

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I. CURRENT STATE OF JURISPRUDENCE IN THE COURT OF INTERNATIONAL TRADE

In *Totes-Isotoner Corp. v. United States*,[1] a three-judge panel of the United States Court of International Trade ventured into what the Supreme Court of the United States has called "a delicate exercise in constitutional interpretation," namely, deciding whether a case poses a nonjusticiable "political question."[2]

The political question doctrine recognizes that certain disputes are inappropriate for judicial resolution if their subject matter has been exclusively assigned to the political branches or is better suited to resolution by those branches.[3] As the *Totes* court noted, the Supreme Court in *Baker v. Carr* "identified six characteristics of cases that are

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1. 569 F. Supp. 2d 1315 (Ct. Int'l Trade 2008), *reh'g denied*, No. 07-0001 (Ct. Int'l Trade Nov. 4, 2008).
2. *See* Baker v. Carr, 369 U.S. 186, 211, 217 (1962).
3. *See Totes*, 569 F. Supp. 2d at 1320-21.

inappropriate for judicial consideration under the political question doctrine"[4]:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[5]

In *Totes*, the Court of International Trade was called upon to determine, inter alia, whether the political question doctrine barred consideration of an importer's challenge to the constitutionality of the duty rate applicable to its imports of certain men's gloves.[6] The importer, Totes, alleged that this rate was discriminatory in violation of its right to equal protection of the law under the Fifth Amendment, inasmuch as the duty rate applicable to Totes' gloves was higher than the rate imposed on similar gloves imported for other persons.[7] Relying primarily on the first two factors cited in *Baker*, the Government maintained that Totes' action was nonjusticiable because the development and adoption of the tariff provisions involved issues of trade policy reserved to the political branches, specifically, the negotiation of agreements with foreign governments.[8] Totes countered that "its Complaint is a garden-variety equal protection claim challenging the statute imposing tariffs" that "invokes traditional constitutional equal protection standards readily subject to judicial administration."[9] The Court of International Trade sided with Totes, finding that its lawsuit invoked "the Court's traditional role of—and standards for—constitutional review."[10]

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4. *Id.* at 1321 n.5.
5. *Baker*, 369 U.S. at 217.
6. *Totes*, 569 F. Supp. 2d at 1319.
7. *Id.* at 1323 n.9.
8. *Id.*
9. *Id.* at 1321.
10. *Id.* at 1319, 1322. The court did, however, dismiss Totes' complaint on other grounds, without prejudice, for failure to state a claim upon which relief can be granted, with the case to be dismissed with prejudice if no amended complaint was filed within sixty days of the court's judgment. The court subsequently stayed its judgment insofar as it required Totes to amend its complaint within sixty days and granted Totes thirty days after issuing its decision on Totes' motion for reconsideration to file an amended complaint.

In holding that the case did not present a political question, the court relied on—indeed, found "directly applicable"—the Supreme Court's analysis in *Japan Whaling Ass'n v. American Cetacean Society*,[11] wherein the Court noted:

> [N]ot every matter touching on politics is a political question . . . and more specifically, that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."
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> . . . [W]e recognize the premier role which both Congress and the Executive play in [the conduct of the nation's foreign relations]. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.[12]

Applying these principles, the Court of International Trade concluded that the importer's complaint

> does not challenge the actions of the President or Congress in their respective spheres of responsibility for foreign commerce or foreign relations. Rather, it involves constitutional review of a domestic statute. It has long been the role of the court to adjudicate legislative classifications in view of the importance of the governmental interests involved.[13]

The Court of International Trade also rejected the Government's other contentions in support of its political question argument, finding that its decision on the merits would neither raise the "potential for embarrassment from multifarious pronouncements" nor would it require the Government to violate any international agreement by raising duties on gloves for persons other than men.[14]

The Court of International Trade's decision in *Totes* marks the second time in just over two years that it has relied on *Japan Whaling* to reject the Government's argument that the court should avoid deciding a case because of the political question doctrine. In *Canadian Lumber Trade Alliance v. United States*, Canadian lumber exporters and the Government of Canada challenged United States Customs and Border Protection (Customs) collection of antidumping and countervailing duties and its distribution of the funds to domestic producers pursuant to the Byrd Amendment for the years 2000 to 2005.[15] The Court of International Trade addressed whether U.S. law authorized the

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11. 478 U.S. 221 (1986).

12. *Totes*, 569 F. Supp. 2d at 1321-22 (quoting *Japan Whaling*, 478 U.S. at 229-30 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962))).

13. *Id.* at 1322.

14. *Id.* at 1322 n.8.

15. 425 F. Supp. 2d 1321, 1330 (Ct. Int'l Trade 2006).

Government of Canada or Canadian exporters to challenge the administration of U.S. trade laws and held that the exporters, not the Government of Canada, had standing and had brought justiciable claims.

The defendants in *Canadian Lumber* argued that "plaintiffs' complaints about the [Byrd Amendment] directly implicate foreign affairs and diplomacy, not matters properly addressed pursuant to the APA [Administrative Procedure Act] . . . [and therefore] present non-justiciable political questions and must be dismissed."[16] Relying on *Japan Whaling*, the Court of International Trade held that the issues presented were appropriate for judicial resolution because (1) the plaintiffs sought enforcement of Customs' nondiscretionary statutory obligation, (2) the terms of the statutes at issue were clear and unqualified, and (3) "Customs is in no way authorized to avoid compliance with statutory law under the guise of international diplomacy."[17]

Two months after it decided *Canadian Lumber*, the Court of International Trade again was called upon to determine whether its consideration of a case was barred by the political question doctrine. In *Tembec, Inc. v. United States*, the Canadian lumber industry, the Government of Canada, and several of Canada's provincial governments challenged the action of the United States Trade Representative (USTR) in which the USTR ordered implementation of a finding by the United States International Trade Commission (ITC) of "an affirmative threat of material injury arising from imports of Canadian softwood lumber into the United States."[18] The ITC's determination was issued after a World Trade Organization (WTO) panel found that a prior ITC determination that Canadian lumber imports threatened material injury to the U.S. market was inconsistent with treaty obligations.[19] The plaintiffs challenged the USTR's implementation order as an improper exercise of administrative authority.[20] The Court of International Trade held in favor of the plaintiffs, concluding that the USTR had authority only to revoke, totally or partially, antidumping and countervailing duty orders; however, it had no implied authority to implement any other ITC determination, including the determination at issue.[21]

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16. *Id.* at 1354 (alterations in original).
17. *Id.* at 1356-57.
18. 441 F. Supp. 2d 1302, 1305-06 (Ct. Int'l Trade 2006).
19. *Id.* at 1306.
20. *Id.*
21. *Id.* at 1342-43.

In its analysis, the Court of International Trade considered the political question doctrine, but found inapplicable all six of the *Baker v. Carr* factors. The court noted that "[t]he USTR, as part of the Executive Office of the President, undoubtedly has a role in the creation and management of U.S. trade policy" and that "[t]rade policy is an increasingly important aspect of foreign policy, an area in which the executive branch is traditionally accorded considerable deference."[22] However, the Court of International Trade recognized that "Congress also possesses some constitutional authority to regulate trade with foreign nations" and that in the relevant statutory context of this case, Congress gave the ITC, an independent agency, authority to decide whether it may take steps to comply with an adverse WTO report.[23] "Given this division of constitutional and statutory authority, the court [found] that there is no demonstrable textual commitment" of the matter to the political branches.[24] Additionally, the court held that the issues were "susceptible to judicial analysis and review" inasmuch as "the court [was] called upon to interpret the scope of authority conferred on the USTR by statute. There is no lack of judicially manageable standards to be used in interpreting a delegation of power from Congress to an executive agency."[25] The court noted that, "whereas attacks on foreign policymaking are nonjusticiable, claims alleging noncompliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs."[26] Going directly to the heart of the matter, the court further explained:

> Consideration of the USTR's authority to order implementation of [the ITC's decision] does not depend on the court's evaluation of the wisdom of a given implementation. The court is neither called upon to make trade policy, nor to direct the USTR as to whether any [particular] determination should be implemented. Rather, the court is merely asked to determine the bounds of the USTR's authority to order implementation.[27]

Although limited in number, the Court of International Trade's decisions discussed above—three in a span of little more than two years—show that the court has not been hesitant to tackle issues that arguably may be viewed as "political" or that touch upon foreign

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22. *Id.* at 1326 (quoting Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995)).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* (citing DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987)).
27. *Id.* at 1326-27.

relations in a general sense. Indeed, based on the outcome in these cases, the court appears to have taken to heart the Supreme Court's admonition in *Japan Whaling* that "not every matter touching on politics is a political question" nor does "every case or controversy which touches foreign relations lie[] beyond judicial cognizance."[28]

II. ANTICIPATED JURISPRUDENCE IN THE COURT OF INTERNATIONAL TRADE

The three recent cases in the Court of International Trade, among other factors, may predict a theme of jurisprudence in the Court of International Trade, disfavoring findings of nonjusticiability based on the political question doctrine, at least in the context of cases in which individual rights challenges are posed against government action in the field of international trade. The other factors consist principally of the general disposition of the Supreme Court over the past few decades against invocation of the political question doctrine and the concomitant, natural inclination of the judiciary to exercise its authority as the branch of government that interprets the law, even in cases that have political overtones.

The trend in the Supreme Court appears to reflect not only the twilight of the political question doctrine, but also the corresponding development of a new theory of judicial supremacy.[29] This is evident in the decision in *Bush v. Gore*,[30] which has been interpreted as one of the latest in a series of strong signals that the Court will not lightly be deterred from rendering an interpretation of the United States Constitution just because it touches on political considerations.[31]

To the extent that the political question doctrine may be invoked in future constitutional cases, it will likely be in a scenario involving "constitutional provisions which can properly be interpreted as wholly or in part 'self-monitoring' and not the subject of judicial review."[32] Self-

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28. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229-30 (1986).

29. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002).

30. 531 U.S. 98 (2000).

31. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1459 (2005). The doctrine has not become entirely obsolete, as reflected in two decisions in which the doctrine was invoked in the Court's refusal to review policies involving the National Guard and the congressional impeachment system. *See* Nixon v. United States, 506 U.S. 224 (1993); Gilligan v. Morgan, 413 U.S. 1 (1973). However, these are not typical of cases heard by the Court of International Trade.

32. Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1207 (2002)

monitoring provisions, according to Professor Louis Henkin, are those whose interpretation is committed to a coordinate political branch.[33] They are provisions that address and order the allocation of power between the Executive and Legislative Branches of government, or among the federal government and the states, which are governmental entities that, depending on one's confidence level, may be trusted to behave in a "constitutionally responsible manner" regarding these provisions.[34]

Even if the coordinate branches of government cannot be so trusted, at least one commentator has expressed some confidence in the rationale for committing these constitutional issues to them:

> [S]ince issues of constitutional power between the nation and the states and between the executive and legislative branches turn more on matters of pragmatic operation than on those of principled interpretation (unlike questions of individual rights), there is a much sounder basis for vesting such decisions with the political rather than judicial organs of government. . . . [S]ince the legislative and executive departments are well equipped to handle constitutional structure issues because the competing interests—federal power versus states' rights, congressional versus executive authority—are forcefully represented in the national political process, the justification for judicial review, the most antimajoritarian exercise of the national government's power, is at a low ebb in those matters.[35]

The Equal Protection Clause should not be regarded as a "self-monitoring" provision, whose interpretation might be committed to the Executive or Legislative Branch. The Clause has a long history of interpretation by the courts and protects the rights of those who, as a general rule, lack the power to resolve on a political basis disputes that arise with either the law as enacted by the legislature, or the administration of the law by the executive. Moreover, *Baker* established criteria for identifying a nonjusticiable controversy, such as whether there is "a lack of judicially discoverable and manageable standards for resolving it."[36] Relying on those criteria, most courts, including the Court of International Trade, may find "it natural to reject political question arguments by noting that only an ordinary question of constitutional

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(quoting Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622-23 (1976)).

33. *Id.*
34. *Id.* at 1208.
35. Choper, *supra* note 31, at 1466.
36. Baker v. Carr, 369 U.S. 186, 217 (1962).

interpretation of the sort courts routinely answer [is] at stake."[37] Particularly in cases involving challenges to laws that allegedly infringe individual rights, such as the Equal Protection Clause,

> [n]otions of judicial supremacy make doubtful any assertion that a constitutional provision should be self-monitoring in Henkin's sense, while skepticism about the ability of the political branches to behave in a constitutionally responsible manner undermines the claim that any constitutional provision should be self-monitoring in the sense that [Tushnet] has urged.[38]

Either way, the courts will likely feel uncomfortable about the prospect of a political branch either failing to interpret the constitutional provision as well as the courts would have interpreted it, or dispensing altogether with any consideration of the constitutional provision when conducting the activities complained of in a lawsuit. Indeed, in the Government's briefs urging the court's invocation of the political question doctrine, there was no allegation that the Executive Branch considered the implications of the gender and aged-based differences in tariff rates on the equal protection rights of importers. In other words, the specter of the conclusion, urged by the Government, that the Constitution committed to a political branch the power to negotiate and set the duty rates, is that there will be no consideration of the Clause or its potential violation. Acknowledging that reality only reinforces the impression of the courts that if they do not decide the applicability of the constitutional provision, no one else in the political branches will do so or do so properly.

This strongly suggests that, particularly in cases seeking the vindication of individual (as opposed to intergovernmental) rights, the courts will continue to assume the responsibility for interpreting and applying the constitutional provision, rather than invoke the political question doctrine to find the issue nonjusticiable.

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37. Tushnet, *supra* note 32, at 1208.

38. *Id.* Tushnet regards self-monitoring provisions to be "those to which the answer is, Yes; this provision gives Congress or the President the final power to specify the meaning of the Constitution that the litigants have raised." *Id.* at 1207. The authors regard the distinction drawn by Tushnet, between his concept of self-monitoring and Henkin's, to be unclear.