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

By Steven H. Becker and Paul A. Horowitz[1]

In *Totes-Isotoner Corp. v. United States*,[2] a three-judge panel of the United States Court of International Trade ("CIT") ventured into what the U.S. Supreme Court has called "a delicate exercise in constitutional interpretation," namely, deciding whether a case poses a nonjusticiable "political question."[3]

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.[4] As the *Totes* court noted,[5] the Supreme Court in *Baker v. Carr* identified six characteristics of cases that are inappropriate for judicial consideration under the political question doctrine:

> 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

---

[1] Messrs. Becker and Horowitz are partners in the international law firm, Baker & McKenzie LLP. The firm represents certain importer/plaintiffs in the litigation, in which *Totes* (represented by other counsel) is the lead case, involving importers' challenges to the constitutionality of various duty rates under the equal protection provisions of the United States Constitution. Mr. Becker is co-chairman of the plaintiffs' steering committee in that litigation. Previously, he was co-chairman of the plaintiffs' steering committee in the litigation involving the challenge to the constitutionality of the Harbor Maintenance Tax as applied to exported merchandise. Valuable assistance in the preparation of this paper was provided by Lindsay A. Minnis, an associate at Baker & McKenzie LLP.

[2] 569 F. Supp. 2d 1315 (Ct. Int'l Trade 2008), *reh'g denied*, Slip Op. 08-119 (Ct. Int'l Trade Nov. 4, 2008).

[3] *See Baker v. Carr*, 369 U.S. 186, 211 (1962).

[4] *See Totes*, 569 F. Supp. 2d at 1320-21.

[5] *Id*. at 1321 n.5.

> potentiality of embarrassment from multifarious pronouncements by various departments on one question.[6]

In *Totes* the CIT 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. The importer, Totes, alleged that this rate is 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 is higher than the rate imposed on similar gloves imported for other persons. 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.[7] Totes countered that "its Complaint is a garden-variety equal protection claim challenging the statute imposing tariffs" which "invokes traditional constitutional equal protection standards readily subject to judicial administration."[8] The court sided with *Totes*, finding that its lawsuit invoked "the Court's traditional role of—and standards for—constitutional review."[9]

In holding that the case did not present a political question, the court relied on—indeed, it found "directly applicable"—the Supreme Court's analysis in *Japan Whaling Ass'n v. Am. Cetacean Soc'y*,[10] wherein the Court noted that

---

[6] *Baker*, 369 U.S. at 217.
[7] *Totes*, 569 F. Supp. 2d at 1321.
[8] *Id.*
[9] *Id.* at 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 is filed within 60 days of the court's judgment. The court subsequently stayed its judgment insofar as it requires Totes to amend its complaint within 60 days, and granted Totes 30 days after issuing its decision on Totes' motion for reconsideration to file an amended complaint.
[10] 478 U.S. 221 (1986).

> not 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. . . ."
>
> [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.[11]

Applying these principles, the CIT 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 [the HTSUS]. It has long been the role of the court to adjudicate legislative classifications in view of the importance of the governmental interests involved.[12]

The court 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 require the Government to violate any international agreement by raising duties on gloves for persons other than men.[13]

The CIT'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*,[14] Canadian lumber exporters and the Government of Canada challenged U.S. Customs' collection of antidumping and countervailing duties and its distribution of the funds to domestic producers pursuant to the Byrd Amendment for the years 2000-2005. The court addressed whether U.S. law authorized the Government of

[11] *Totes*, 569 F. Supp. 2d at 1321-22 (quoting *Japan Whaling*, 478 U.S. at 229-30, quoting *Baker*, 369 U.S. at 211).
[12] *Id.* at 1322.
[13] *Id*. n.8.
[14] 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006).

Canada or Canadian exporters to challenge the administration of the U.S. trade laws, and held that the exporters, but 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 . . . [and therefore] present non-justiciable political questions and must be dismissed."[15] Relying on *Japan Whaling*, the court held that the issues presented were appropriate for judicial resolution because (i) the plaintiffs sought enforcement of Customs' non-discretionary statutory obligation, (ii) the terms of the statutes at issue were clear and unqualified, and (iii) "Customs is in no way authorized to avoid compliance with statutory law under the guise of international diplomacy."[16]

Two months after *Canadian Lumber* was decided, the CIT 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,*[17] the Canadian lumber industry, the Government of Canada and several of Canada's provincial governments challenged the action of the United States Trade Representative in which the USTR ordered implementation of a finding by the United States International Trade Commission of an affirmative threat of material injury arising from imports of Canadian softwood lumber into the United States. The ITC's determination was issued after a WTO panel found that a prior ITC determination that Canadian lumber imports threatened material injury to the United States market was inconsistent with treaty obligations. The plaintiffs challenged the USTR's implementation order as an improper exercise of administrative authority. The court held

[15] *Id.* at 1354.
[16] *Id.* at 1356-57.
[17] 441 F. Supp. 2d 1302 (Ct. Int'l Trade 2006).

in favor of the plaintiffs, concluding that the USTR had authority only to revoke, totally or partially, antidumping and countervailing duty orders, and had no implied authority to implement any other ITC determination, including the determination at issue.

In its analysis, the court 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."[18] However, the court 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.[19] "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.[20]

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."[21] The court noted that, "whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that

[18] *Id.* at 1326 (quoting *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995)).
[19] *Id.* at 1326.
[20] *Id*.
[21] *Id*.

the court undertakes may have an effect on foreign affairs."[22] 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.[23]

Although limited in number, the CIT'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 touching upon foreign 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."

Anticipated Jurisprudence in the CIT

The three recent cases in the CIT, among other factors, may foretell a jurisprudence in the court that will disfavor 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.

---

[22] *Id.* (*citing DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev*., 810 F.2d 1236, 1238 (D.C. Cir. 1987)).
[23] *Id*. at 1326-27.

The trend in the Supreme Court appears to reflect not only a decline of the political question doctrine, but also the closely-related ascendancy of a new theory of judicial supremacy. This is evident in the decision in *Bush v. Gore*,[24] 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 Constitution just because it touches on political considerations.[25]

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."[26] Self-monitoring provisions, according to Professor Louis Henkin, are those whose interpretation is committed to a coordinate political branch.[27] They are provisions which 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.[28]

Even if the coordinate branches of government can not be so trusted, at least one commentator has expressed some confidence in the rationale for commiting these constitutional issues to them: "Since issues of constitutional power between the nation and the states and between the executive and legislative branches turn more on matters of

---

[24] 531 U.S. 98 (2000)

[25] True, the doctrine has not met its demise altogether, 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 impreachment system. *See Nixon v. United States*, 506 U.S. 224 (1973); *Gilligan v. Morgan*, 413 U.S. 1 (1973). However, these are not typical of cases heard by the CIT.

[26] 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 (quoting Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622-23 n.17).

[27] Tushnet, *supra*, at 1207.

[28] *Id*. at 1208.

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."[29] "[S]ince the legislative and executive departments are well equipped to handle constitutional 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."[30]

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." Relying on those criteria, most courts, including the CIT, may find it "natural to reject political question arguments by noting that only an ordinary question of constitutional interpretation of the sort courts routinely answer" is at stake.[31] Particularly in cases involving challenges to laws which 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

[29] Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L.J. 1457, 1466.
[30] *Id*.
[31] Tushnet, *supra*, at 1208.

constitutionally responsible manner undermines the claim that any constitutional provision should be self-monitoring in the sense that [has been] urged."[32]

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 done, or dispensing altogether with any consideration of the provision when conducting the activities complained of in the 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 inter-governmental) rights, the court 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.

*This is a draft of an article that is forthcoming in 17 Tul. J. Int'l & Comp. L. (2009). Reprinted with the permission of the Tulane Journal of International and Comparative Law.

[32] *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." The authors regard the distinction drawn by Tushnet, between his concept of self-monitoring and Henkin's, to be unclear.