

CORDELL HULL, THE RECIPROCAL TRADE AGREEMENT ACT, AND THE WTO

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The significance of the Reciprocal Trade Agreements Act of 1934 for the present GATT/WTO system lies in a very few central ideas. They are all principles espoused by Cordell Hull. It is therefore worth understanding how these ideas came to dominate the thinking of Cordell Hull and how they led directly, under his leadership, to the Reciprocal Trade Agreements Act of 1934. Against that background we can investigate how those ideas came to be central concepts in the second half of the Twentieth Century in the GATT system. The final question addressed in this paper is whether those concepts retain validity in the Doha Round and the post-Doha world.

Cordell Hull was a Democrat from Tennessee. He was therefore from his beginning adult years a low tariff proponent as fit the pattern for Democrats not just in those days but from the earliest days of the Republic. It was after all the North that had sought protection for manufactures and the South that was more interested in exports, primarily agricultural products to be sure. Indeed, this difference goes all the way back to the Constitution itself, when it was the Southerners who backed the prohibition on export taxes.<sup>1</sup> In Hull's days the economic truth that a country that taxes imports will find it harder to export was instinctively understood in the South.

In his instructive Memoirs, Hull explained that before he came to Washington he had "breathed in the fire of great tariff battles—but they were battles fought on the home grounds that high tariffs or low tariffs were good or bad for the United States as a purely

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<sup>1</sup> Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. of Chicago L. Rev. 271 (1977).

domestic matter. There was little or no thought of their effect on other countries.”<sup>2</sup>

Only later, during World War I, did Hull change his perspective. What distinguished Hull from most of his colleagues in the U.S. Congress at that time was that he came to see the tariff issue as an international issue. In 1916 he made a speech in the House of Representatives calling for a postwar international trade conference (remember this was World War I, not II). The conference would reach agreements not just on tariffs but on “trade methods, practices, and policies which in their effects are calculated to create destructive international controversies....”<sup>3</sup> The conference never took place, but in 1925 he introduced a resolution in the House calling for a trade conference. His addition to the draft resolution of a call for immediate unilateral reduction in U.S. tariffs “of course doomed it,” as he later admitted.<sup>4</sup> Evidently he had even in 1925 not fully appreciated the reciprocity principle that was later to become obvious to him as Secretary of State.

Even before his 1916 House speech proposing a trade conference, Hull in 1914 wrote to Secretary of State Lansing urging the adoption of an unconditional most-favored-nation clause. In doing so, he had three evils in mind. The first was boycotting of countries (we would call it “trade sanctions” today). The second was subsidizing exports that had the effect of destroying particular foreign industries. And the third was Imperial Preference, under which England, its colonies, and the Commonwealth countries gave one another more favorable trade treatment than they gave others, which he considered patently unfair.<sup>5</sup> Here we see the birth of his passion for nondiscrimination in trade matters.

When I first became interested in trade matters, I read a bit about Cordell Hull. But I did not spend much time exploring his ideas because, frankly, I thought they were a

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<sup>2</sup> Cordell Hull, *The Memoirs of Cordell Hull*, Vol. I, 83 (1948) (hereafter “Memoirs”)

<sup>3</sup> Memoirs 82.

<sup>4</sup> Memoirs 126.

<sup>5</sup> Memoirs 84-85.

bit silly. I thought the great emphasis he repeatedly put on tariffs as a threat to world peace was rather too idealistic. How could lowering tariffs help avoid war? Such talk was just political hyperbole, I thought.

I still hold that view of the early Hull, but two later events have changed my mind on the substance of the issue. The first grew from an interest I developed as a visiting professor in Germany when I learned how Adolph Hitler had ruthlessly used bilateral trade agreements and exchange controls to subjugate Balkan countries as a prelude to sending in his panzer divisions. The most-favored-nation (MFN) clause of the GATT and the work of the International Monetary Fund on exchange controls makes it hard today to grasp fully the Europe of the 1930s.

The second event is much more recent. With the growth of terrorism we have come to understand that the higher incomes that economic development can bring will have to be part of any long-run solution to terrorism in the Middle East and elsewhere. We now know from extensive cross-country economic studies that growth rates in the Third World are directly related to a country's openness to trade.<sup>6</sup> Even in this light, Hull's fixation on tariffs as a threat to peace may seem a bit shallow. But we should remember that tariffs were the only important trade barriers that he knew as a young legislator. The technology of trade protection, with its antidumping duties and the like, had not yet taken hold. And under the gold standard, exchange restrictions were rare.

So we can conclude that Hull was ahead of his time in thinking about the noneconomic effects of rampant protectionism and especially of trade discrimination.

His appointment as Secretary of State by President Roosevelt in 1933 and his experiences that year with the London Economic and Montevideo conferences caused Hull to turn from advocacy to action. He came to realize that mere persuasion does not carry one very far, either in Washington or in the world at large. And he was appalled by

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<sup>6</sup> E.g., Jeffrey Sachs and Andrew Warner, *Economic Reform and Global Integration*, Brookings Papers on Economic Activity, No. 1 (1995). See Jagdish Bhagwati, *In Defense of Globalization* 60-64 (2004).

the results of the Smoot-Hawley tariff legislation of 1930. Logrolling in the Congress on individual tariff items had led to such a great general increase in U.S. tariffs in that 1930 legislation that Hull felt it had been a cause of the Great Depression. And when he got to the State Department he quickly realized that Smoot-Hawley had produced indignation throughout the world, had caused many countries to retaliate by raising their own tariffs on U.S. exports, and had caused the British Commonwealth in the Ottawa agreements of 1932 to formalize Imperial Preference in way that badly hurt U.S. exports.<sup>7</sup>

## I.

Hull had many accomplishments. But the reason Hull is remembered today is not that he was an original author of the U.S. income and estate tax laws. Nor is he is given the credit he deserves for his role as Secretary of State in World War II, helping to thwart Treasury Secretary Morgenthau's postwar plans for returning Germany to an agrarian society. Nor is he primarily remembered because—as Secretary of State in charge of postwar planning—he merited President Roosevelt's view of him as “the Father of the United Nations.”<sup>8</sup>

Rather remarkably, in an era when war and peace rank higher in public attention than international trade policy, he is best known today for the key strategic concepts that underlay the Reciprocal Trade Agreements Act of 1934 and that became the motive forces behind the GATT and WTO. Today we can see all of the benefits that trade liberalization has brought in worldwide prosperity in the last half of the 20th century. It is true that the 1934 Act provided only for bilateral agreements, but it furnished the template for Congressional advance authorization for Executive Branch negotiation of trade agreements that has been so important for those postwar accomplishments and for the trade issues that the world is dealing with today.

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<sup>7</sup> Memoirs 355.

<sup>8</sup> Julius Pratt, Cordell Hull xiii (1964).

Hull's key insight was that unilateral tariff reduction was not in the political cards in most countries and certainly not in the U.S. Congress. One could not expect to get something for nothing. Only the prospect of expanding markets for exports through foreign tariff reduction could lead to a reduction of domestic tariffs. Hence reciprocity was the key, and trade agreements were the mechanism.<sup>9</sup> To be sure, reciprocity has been called mercantilism, and indeed it is based on the primitive premise that exports are good and that imports are bad. But practical trade politics are based on just such a premise. The readers of this essay do not need to be told how limited that premise is. And not just in economic theory! The fact is that in the United States 270 million people vote with their feet, or perhaps one should say with their wheels, for cheap imports when they drive to their local shopping malls. Still, individual behavior is one thing, and politics—especially trade politics—is another.

The 1934 Act had, from Hull's point of view, two other advantages. The first was that it involved getting advance authority from the U.S. Congress.<sup>10</sup> I would add that implicit in Hull's thinking, especially in the light of the then recent Smoot-Hawley experience, was that it gave exporting industries an equal voice, at least potentially, with import competing industries. Moreover, the Act broke the logrolling dynamics of Smoot-Hawley, when any day a new product might come up for a vote on a higher tariff without anyone having the occasion to consider the overall effects of dozens of such protectionist votes.

Another important aspect of the Hull approach was the inclusion in the bilateral agreements of the unconditional most-favored-nation clause. Although unconditional MFN had been widely used prior to World War I, conditional MFN had been followed for a time by the United States. The idea behind the conditional version was that the

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<sup>9</sup> In recent decades some countries have unilaterally reduced tariffs. See Jagdish Bhagwati (ed.), *Going Alone: The Case for Relaxed Reciprocity in Freeing Trade* (2002). Australia is a leading example. And of course the United States and most developed countries have done so for the poorer developing countries as part of a worldwide movement in the Generalized System of Preferences.

<sup>10</sup> *Memoirs* 359.

United States would not have to give away something for nothing by making concessions available to all countries just because it made concessions to one country. Concessions would be generalized, but only at a price of reciprocal concessions. Conditional MFN sounds good in a political speech, but the short of it is that it did not work. The complications in trying to apply it to dozens of countries on thousands of products were mind-boggling. The result was that discrimination was becoming the rule, not the exception. The United States therefore moved to unconditional MFN in the 1922 trade act, getting it through the Congress perhaps only because that act increased average tariff rates greatly. And because the 1922 act was so protectionist, little good came of the transition to unconditional MFN; if there are no concessions, there is nothing to generalize to third countries.

In the context of tariff reductions, however, unconditional MFN acted as a trade accelerator, lowering tariffs in the world generally. To be sure, in any one bilateral agreement, the “giving away something for nothing” objection had greater rhetorical appeal than it would have later in a post-World War II GATT context. In that later multilateral context, negotiations were carried on with the principal supplier of a product and hence uncompensated spill-overs were minimized. And in the multilateral context, the end-of-round settling up process was an opportunity to deal with political objections back home by extracting last-minute concessions from otherwise uncompensated MFN beneficiaries.

Though the 1934 Act provided only for bilateral agreements, Hull intended to negotiate with a great many countries, and he did not intend to let third country principal suppliers get a windfall. He could avoid that problem by concessions to any given country only with respect to products on which they were a principal supplier. I have not been able to verify that that was Hull’s strategy, but clearly the political vulnerabilities from applying unconditional MFN in the bilateral context was a motive for moving after World War II to a multilateral forum. In the meantime, Hull achieved his objective of

avoiding discrimination. He was perhaps fortunate that the gradual recovery of the world economy in the last half of the 1930s helped to win negotiating reauthorization in 1937, 1940 and 1943, and to validate the notion that reciprocal negotiations and nondiscrimination were in the national interest.

After World War II the Hull approach was incorporated in the Havana Charter of 1948, which created the International Trade Organization. Ill health had increasingly forced Hull to reduce his activities as Secretary of State and he finally resigned in late 1944. So Hull was unable to participate in the formulation of the U.S. 1946 proposal for an ITO, and he does not mention the subject in his memoirs. Nonetheless, the trade portion of the ITO charter was built on the principles that I have just reviewed.

The ITO went beyond trade. The Havana Charter was an ambitious effort to create an international institution comparable to the International Monetary Fund and the World Bank. Indeed, it went well beyond trade negotiations to include a full range of economic chapters ranging from commodity agreements to economic development and even to employment. When one considers the socialist thinking, nationalizations and central planning that were so much the vogue in the late 1940s in Paris and London and other major capitals, we are perhaps fortunate that it failed and thus those ideas did not become part of official international trade doctrine through the ITO. But a caveat is worth considering. One reason it failed was the trade provisions; organized opposition by protectionist forces persuaded President Truman to draw back from asking the Senate to ratify.<sup>11</sup>

That's the bad news. The good news is that the first round of trade negotiations envisaged in the Havana Charter had already been concluded in Geneva in 1947 in the course of the successive diplomatic meetings leading to the Havana Charter the following year. In an example of inspired pragmatic innovation, trade officials rescued the trade

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<sup>11</sup> Richard N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective* 373-378 (New expanded ed. 1980).

portions of the Havana Charter. The 1947 agreement was called the General Agreement on Tariffs and Trade. It was primarily a list of tariff concessions by various countries, but in order to prevent backsliding most of the text of the trade ITO “Commercial Policy” chapter had been included as general terms. With the ITO gone, those general terms became the core of a broad international agreement.<sup>12</sup>

The General Agreement on Tariffs and Trade thus rather incongruously became a de facto international organization, the GATT. Trade officials found a small chateau near the edge of Lake Geneva to house what became known as the Secretariat and also found a way to finance staff activities. With strong leadership by the U.S. State Department and by GATT’s outstanding director general, Eric Wyndham White, a number of successive trade rounds were organized and successfully concluded. The GATT did not have as august a name as the IMF or the World Bank, but the pragmatic innovation flourished.<sup>13</sup>

## II.

Today, of course, we have the World Trade Organization. Views may vary on whether it is a better organization than the old GATT. Aside from the greater capacity to handle more meetings and more countries and publish more reports, the biggest difference is the Dispute Settlement Understanding (DSU). Lawyers tend to believe it to be a great step forward. A cynic might say that that fact merely shows the power of self-interest in motivating people to take trade issues seriously. But the DSU is a big change, and its full significance is only now becoming appreciated. Cases have already been brought for the tactical advantages their outcomes will have in the Doha Round negotiations. And over the longer term it is likely that Chinese accession to the WTO will lead to extensive legalistic disputes about Chinese compliance, with unpredictable effects for the world trading system.

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<sup>12</sup> Kenneth W. Dam, *The GATT: Law and International Economic Organization* 10-16 (1970).

<sup>13</sup> *Id.* at 335-341.



The real question is not the GATT versus the WTO, but rather what has been happening outside of their meeting rooms. A second change is the steady movement away from tariffs and toward a multitude of indirect protectionist devices, especially barriers embedded in domestic national legislation. It is harder to apply the Hull principles of reciprocity and nondiscrimination in that context.

The third change is the growing importance of trade in services. Here the protectionist mechanism does not lie in trade law at all, but rather in domestic regulation of the particular service industry. Service industries are mostly subjected to comprehensive economic regulation, best known not to trade lawyers but to specialized lawyers and bureaucrats involved in that regulation. But perhaps a more serious problem is that services negotiations fail to meet one of the conditions that were so important to Hull that he did not draw specific attention to it. What happens in a conventional tariff round is that countries make trade-offs, seeking concessions in goods of interest to their exporters and reluctantly making concessions on goods of import-competing industries. In other words, reciprocity works. But such reciprocity is unlikely to be present in purely sectoral negotiations.

In the Doha Round financial services negotiations, for example, developing nations have little or no interest in trying to compete in developed country financial markets because they know it would be a money-losing proposition. The reciprocity principle that served the world so well in the industrial tariff world where cross-sectoral trade-offs were the *modus vivendi* has little to offer in making sectoral negotiations in services a success. Sweet reason (as opposed to hard bargaining) may bring an opening of financial services markets, but reason did not play a decisive role in opening industrial markets. It is true that at the end of the financial services negotiations some cross-sectoral trade-offs may occur even though the structure of the services negotiations is sector-by-sector. But the Doha Round is so complex that the opportunity for last-minute trade-offs is limited. To make trade in services negotiations productive, we have to rethink the

whole basis of negotiations. In doing so, we shall probably be led to try to find a way to utilize Hull's concept of reciprocal concessions.<sup>14</sup>

The third big change is the proliferation of regional and bilateral free trade areas. The U.S. Trade Representative Robert Zoellick makes a powerful case for competitive liberalization. It is true that in the early going in the Uruguay Round, the United States would probably not have gotten to the bargaining table at all if the Europeans had not been convinced that the United States was going to push regional arrangements. But on the other hand, these free trade agreements are a major challenge to Hull's nondiscrimination principle. It is not just that the Article XXIV criteria for the exception to MFN are a dead letter—indeed, a dead article. Rather it is that too many bilateral agreements are simply an extension of the area of protection rather than a move toward true trade liberalization. They turn trade theory on its head. And of course the practical effect of the proliferation of such agreements is what Jagdish Bhagwati accurately describes as a spaghetti bowl. Not only does the result make a mockery of what Hull admired as a single-column tariff—the same rate for every country. Today countries have many columns—occasionally more than a dozen—and increasingly complex rules of origin, all carefully drafted by trade lawyers and lobbyists. Though Cordell Hull would be gratified by the success in bringing down average tariff rates around the world, he would not be entirely satisfied with the role of free trade areas in that process.

In any event, the current U.S. push for new bilateral and regional agreements has produced only modest results, judged by amounts of increased trade. And Zoellick is right in stressing that the United States is late to the game of seeking advantages by discriminatory provisions. The European Union has some kind of discriminatory arrangement with the vast majority of all countries in the world, taking into account special provisions for developing countries and for aspirants for future membership as

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<sup>14</sup> For more on services negotiations, see Kenneth W. Dam, *The Rules of the Global Game: A New Look at US International Economic Policymaking* 113-130 (2001).

well as its various free trade area agreements. Even Japan has started to explore special trading arrangements. The sum of all of this activity raises the question of the current force of Hull's nondiscrimination principle.

### III.

Perhaps the greatest current problem in the Doha Round is a result of the continuing effort of the U.S. Congress to undercut a further important principle of Cordell Hull's Reciprocal Trade Agreements Act. Under that Act and well into the period of successive GATT negotiating rounds, it was fully accepted that so long as the results of the negotiations were within the scope of the authorizing legislation, those results went into effect as soon as the round was over. All that the President had to do was to proclaim that the negotiating results had become effective.

Once GATT negotiations began to go beyond tariffs and other border barriers, implementation no longer consisted of anything so simple as, for example, simply changing the duty rate for a particular product in a customs schedule. Internal law had to be changed. But since the whole point under the Hull principles for a President in obtaining advance negotiating authority was to avoid having at that early point to identify what particular concessions he would make, it would not be prudent—indeed, before the round commenced it would often be impossible—to identify the particular internal statute that might need amendment as a result of negotiations stretching over several years. The substantive committees of the Congress, which had not had an opportunity to participate in the initial authorizing legislation (traditionally within the scope of the House Ways and Means and the Senate Finance Committees) would want an opportunity to hold hearings and pass on the changes to “their” statute.

This potential problem became a reality in the 1960s when the Congress refused to enact several important legislative changes that the Executive Branch negotiators had agreed to as concessions in response to negotiating demands from GATT partner

countries. “The refusal of Congress to pass the required bills (one on an ‘American selling price’ customs valuation for certain products and the other a change in the antidumping statute) created a challenge for the Executive Branch because the US negotiators’ commitment to change the legislation had been part of the US quid for other countries’ quo on other trade measures.”<sup>15</sup>

This imbroglio, even though embarrassing to the U.S. negotiators, raised the interbranch stakes substantially in the struggle to obtain Congressional authorization for a further round of GATT trade negotiations, since it was clear (in view of the great progress in bringing down tariff barriers among developed countries) that the new round would necessarily cut much deeper into internal nontariff trade barriers. The upshot, enacted for the first time in the Trade Act of 1974, was what became known as “fast track.” Congress would commit in advance, as part of the authorization legislation, to vote up or down the entire package of concessions. It would be all or nothing.

Even in the 1974 Act Congress imposed a number of procedural safeguards to assure that it would not be surprised by what happened in the Geneva negotiations. It would be kept informed and be in a position to bring political pressures on the negotiators if it saw fit to do so. The safeguards became progressively more stringent in later trade acts.<sup>16</sup> In addition, Congress began to seek to include certain demands in the negotiation authorizing legislation as to what should be in the final package and as to what should not be negotiated. Although fast track had originally reduced the power of interest groups to engage in log-rolling because it would be too late once the negotiations were completed, these new wrinkles on the authorizing process brought interest group log rolling into the equation at a much earlier time in the process. Demands by powerful interest groups and consequently important Congressional leaders that future trade

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<sup>15</sup> Id. at 44.

<sup>16</sup> Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 *Brooklyn J. of Int. Law* 143 (1992); Laura L. Wright, *Trade Promotion Authority: Fast Track for the Twenty-First Century*, 13 *Wm. & Mary Bills of Rights J.* 979 (2004).

agreements include provisions on labor and environmental standards led to sharp divisions in the Congress; the Clinton Administration was consequently without negotiating authority for most of its period in office.

By the time the Bush Administration was able to obtain in 2002 what was now called Trade Promotion Authority (so named in part to attempt to avoid the “fast track” nomenclature that proved anathema to various Congressional leaders and import-competing industries and their unions), the Congress had coalesced around a number of procedural provisions that would allow Congressional leaders to influence the negotiations as they progressed.<sup>17</sup> Although the steadily encroaching role of the Congress frustrated U.S. negotiators and infuriated some foreign negotiators who felt that they never knew whether U.S. negotiators would be able to follow through on proposed compromises, the fast track process has actually worked quite well since its original passage in 1974, leading to unparalleled low tariff rates and to substantial inroads on nontariff barriers. No trade agreement has yet failed to win Congressional fast track approval after the completion of negotiations.

#### IV.

The question that remains in many minds, especially outside the United States, is whether the Congress will eventually undermine entirely the traditional GATT/WTO process of negotiations by professional trade officials meeting out of the view of the public in order to achieve breakthroughs in the struggle for freer international trade. The fear is that the Congress may eventually reject the results of a multi-year negotiation or—more likely—that the U.S. interest group process, operating through the Congressionally-retained right to be currently informed on all U.S. proposals even before they are tabled

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<sup>17</sup> A review can be found in Hal Shapiro and Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 *Geo. Wash. Int. L. Rev.* 1 (2003), and Gregory Shaffer, *Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts*, 7 *J. of Int. Econ. Law* 629, 637 (2004).

in Geneva, may result in no major agreements being reached in the first place. Congressional objections to U.S. negotiators' proposals have to be taken seriously because Congress has the power to terminate its advance authorization at any time. In fact, the current authorizing legislation explicitly provides that either house of the Congress can repeal the authorization outright at any time.<sup>18</sup>

Perhaps more alarming for free trade proponents, particularly in view of the slow progress of the Doha Round, is the "drop-dead date" of June 1, 2005. Congress gave itself an opportunity to stop the Doha Round in its tracks as of that date. The legislative technique used was to provide, in the 2002 authorizing statute, negotiating authority only through June 1, 2005. True, the statute provides for an automatic extension of negotiating authority through June 1, 2007, but only under specific conditions. In addition to the procedural requirement that the President must seek the extension, providing prescribed information about the agreements he expects to achieve, along with a report on economic impact from the International Trade Commission (a body that by no means is controlled by the President), an ominous provision is that any individual member of either the House of Representatives or the Senate may introduce a "resolution of disapproval," which is to be considered on a "fast track" basis by the House in question.<sup>19</sup> This provision opens the possibility that one House of the U.S. Congress may abort the Doha round in 2005 under a procedure affording a veil of Congressional deliberative process to cover what could prove to be simply a surrender to protectionist forces. Such a resolution would require a majority vote of disapproval, but only in one of the houses of Congress. This extension-disapproval arrangement is potentially a threat to the Doha Round, depending on the state of the U.S. economy and the constellation of political power obtaining in the Presidency and the Congress after the 2004 elections.

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<sup>18</sup> See discussion of 19 U.S.C. 2903(d), in Shapiro and Brainard, *supra*, at 19. In any event, one should remember the "oft-overlooked fact that, as a legal matter, the Fast Track 'emperor' has no clothes: the statutory Fast Track procedures that modify internal house rules in no way legally 'bind' Congress [because] the Constitution specifically authorizes '[e]ach House [to] determine the Rules of its Procedures.'" Koh, *supra*, at 151-152.

<sup>19</sup> 19 U.S.C. 3803(c).

## V.

Perhaps more ominous than this June 2005 Congressional opt-out date, however, is the continuing departure from the simple Cordell Hull principles of reciprocity, advance authorization, professional negotiations out of the public eye, and more or less automatic adoption of the results of the negotiations. It has been said that the essence of the Hull approach was that Congress agreed, in authorizing negotiations, to tie its hands thereafter. The hands of Congress have been largely untied and are increasingly meddling in the negotiations themselves. Moreover, the very right of Congress to be fully informed in advance of forthcoming U.S. proposals means that the concept of professional negotiations out of the public eye is increasingly at risk.

One can, of course, make an argument that transparency is a democratic value. But it is also true that the original idea of advance authorization was that it would be difficult to know at that early point exactly what domestic ox was likely to be gored. Moreover, at that early point both exporter industries and import-competing industries would have equal access to the Congressional process. But when Congress—most likely a single individual, but politically powerful, member of Congress—uses the right to be informed to attempt to preempt a U.S. concession on behalf of a constituent protectionist interest, exporting interests are unlikely even to know what is happening, much less be able to organize to oppose. After all, normal principles of collective action tell us that the costs to individual exporting companies from the opportunities indirectly foregone through the failure of the negotiators in the face of Congressional opposition to make an additional concession are likely to be quite small while the transaction costs of bringing about united countervailing influence from exporters as a class are likely to be large. That is the very type of collective action problem that Hull's Reciprocal Trade Agreements Act, especially as complemented by the fast track procedure, was designed to overcome.

What can be done to arrest the resulting gradual erosion of the U.S. ability to

lead—indeed, to continue to support—the long-term fight for freer trade? Probably very little. But returning to first principles, it would be interesting to see what could be done to strengthen the role of those economic interests that seek lower barriers. Bringing exporters into the process that import-competing firms dominated in Smoot-Hawley was the Hull-inspired form of statecraft to overcome the influence of protectionist forces.<sup>20</sup> The question today is how exporting interests can find renewed influence in the domestic U.S. struggle between the forces of freer trade and protection in view of the gradual erosion of the original fast track rules.<sup>21</sup>

One way to achieve some balance would be to give importers who benefit from trade concessions rights balancing those that import-competing firms have in domestic law to protect themselves from imports through antidumping and countervailing duty cases and Section 201 escape-clause proceedings. Since the persistent trend is to make such anti-import procedures ever more protectionist and stringent, the rollback of those anti-import procedures is almost surely not a politically viable strategy. Attempting to accord domestic interests favoring imports procedural rights in the foregoing protectionist-friendly proceedings may be equally problematical, though there are powerful transparency and fairness arguments to be made for allowing everyone with an interest to be heard.

How can exporters be given a greater voice to offset protectionism? There are few precedents in U.S. domestic law for exporter rights. The principal one, Section 301, even if regarded as generally a positive provision, addresses foreign protectionism, not domestic protectionism. One international precedent is the provision in the Trade-Related Intellectual Property agreement requiring WTO countries to provide a domestic remedy

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<sup>20</sup> See Kenneth W. Dam, *The Rules of the Global Game: A New Look at US International Economic Policymaking* 36-72 (2001).

<sup>21</sup> An alternative approach would, in effect, attempt to co-opt the U.S. Congress through inter-parliamentary participation in some form of WTO parliamentary oversight. See Ernst-Ulrich Petersmann, *Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO. Introduction and Summary*, 7 *J. of Int. Econ. Law* 585, 590-592 (2004). This idea does not seem likely to lead to fruition at this time, but domestic political changes in the United States could make it a more promising idea in the future.



in intellectual property infringement situations.<sup>22</sup> Another international precedent is to be found in the 1996 plurilateral Agreement on Government Procurement. Article XX of that Agreement requires governments to allow suppliers to challenge breaches of the Agreement.<sup>23</sup>

These two international precedents involve giving exporters procedural rights in an importing country, but they do not address exporters' rights in their own country. Still, they are perhaps a first step in internationalizing the understanding that international trade liberalization is often less about the international negotiating process than about providing a domestic mechanism by which exporters can be given opportunities and means to offset the political influence of import-competing firms. In the fast track (now the Trade Promotion Authority) initial authorizing process the influence of exporters and importers are reasonably balanced. But as David Skaggs, a former Congressman, observed, members of Congress most often hear from constituents about trade when they are angry,<sup>24</sup> which in practical terms means that those who lose from trade are more likely to gain the ear of Congress than those who hope to gain.

Hopes for continued trade liberalization therefore depend, at least in the United States, on institutional arrangements assuring that exporting interests can be provided opportunities and means to offset the political influence of import-competing firms threatened by such liberalization. That idea first reached fruition in Hull's Reciprocal Trade Agreements Act. It flourished with the GATT and with fast track, but it is always exposed to domestic backsliding.

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<sup>22</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Part III.

<sup>23</sup> See discussion in Bernard M. Hoekman, Introduction and Overview, in Bernard M. Hoekman and Petros C. Mavroidis (eds.), *Law and Policy in Public Purchasing 20-22* (1997).

<sup>24</sup> David E. Skaggs, How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made More Effective in the WTO?, 7 *J. of Int. Econ. Law* 655, 655 (2004).