

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

AN ESSAY ON THE CONCEPT OF RIGHTS IN
INTERNATIONAL TRADE

KENNETH W. DAM*

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.¹ 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. The North sought protection for manufactured items while the South was more interested in exports, primarily agricultural. This difference goes all the way back to the Constitution itself, when Southerners backed the prohibition on export taxes.² In Hull's days, Southerners instinctively understood the economic truth that a tax on imports is a *de facto* tax on exports.

* Max Pam Professor Emeritus of American and Foreign Law and Senior Lecturer, The University of Chicago; Senior Fellow, The Brookings Institution. The first draft of this essay was presented at a roundtable meeting, Pause for Reflection on the WTO System, convened by the Cordell Hull Institute in Washington, D.C., on June 16, 2004, to mark the seventieth anniversary of the Reciprocal Trade Agreements Act of 1934. The author would like to thank Hugh Corbet, Richard Gardner, Douglas Irwin, and Ernst-Ulrich Petersmann for their comments and suggestions.

1. 1 JULIUS W. PRATT, CORDELL HULL 1-2 (Robert H. Ferrell & Samuel Flagg Bemis, eds., 1964) (AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY, VOL. 12).

2. Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 288 (1977).

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 domestic matter. There was little or no thought of their effect on other countries.”³

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 post-war international trade conference.⁴ 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. . . .”⁵ 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.⁶ Evidently, even in 1925, he had 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 (“MFN”) clause.⁷ 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.⁸ Here we see the birth of his passion for non-discrimination in trade matters.

3. 1 CORDELL HULL, MEMOIRS OF CORDELL HULL 83 (1948) [*hereinafter* “Memoirs”].

4. *See id.* at 81–82.

5. *Id.* at 82.

6. *Id.* at 126.

7. *See id.* at 82–84.

8. *See id.* at 84–86.

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 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 MFN clause of the GATT and the work of the International Monetary Fund on exchange controls make it hard today to grasp fully the Europe of the 1930s.

The second event is much more recent. With the growth of terrorism, many have come to understand that economic development should be part of any long-run solution to terrorism in the Middle East and elsewhere. Extensive cross-country economic studies show that growth rates in the Third World are directly related to a country's openness to trade.⁹ 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 anti-dumping duties and the like, had not yet taken hold, and under the gold standard, exchange restrictions were rare. So Hull was ahead of his time in thinking about the non-economic 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 was appalled by the results of the Smoot-Hawley tariff legislation of 1930.¹⁰ Logrolling in Congress on individual tariff items had led to such a great gen-

9. E.g., Jeffrey Sachs and Andrew Warner, *Economic Reform and Global Integration*, 1995 BROOKINGS PAPERS ON ECON. ACTIVITY No. 1, at 1. See also JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 60-64 (2004).

10. PRATT, *supra* note 1, at 6.

eral increase in U.S. tariffs in that 1930 legislation that Hull felt it had been a cause of the Great Depression. Smoot-Hawley had produced indignation throughout the world, with many countries retaliating by raising their own tariffs on U.S. exports, which caused the British Commonwealth in the Ottawa agreements of 1932 to formalize Imperial Preference in a way that badly hurt U.S. exports.¹¹

I.

Hull had many accomplishments. But the reason Hull is remembered today is not his authorship of the U.S. income and estate tax laws. Nor is it for his admirable role as Secretary of State in World War II, helping to thwart Treasury Secretary Morgenthau's post-war plans for returning Germany to an agrarian society. Nor is he primarily remembered because—as Secretary of State in charge of post-war planning—he merited President Roosevelt's view of him as “the Father of the United Nations.”¹²

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 motivating forces behind the GATT and WTO. While the 1934 Reciprocal Trade Act provided only for bilateral agreements, it furnished the template for Congressional advance authorization for Executive Branch negotiation of trade agreements that has been so important for those post-war accomplishments and for the trade issues that the world is dealing with today.¹³

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.¹⁴ To be sure, reciprocity has

11. *Memoirs*, *supra* note 3, at 355.

12. PRATT, *supra* note 1, at 4, 757–62, 766.

13. *Id.* at 107–38.

14. In recent decades, some countries have unilaterally reduced tariffs. See GOING ALONE: THE CASE FOR RELAXED RECIPROCITY IN FREEING TRADE

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! Every American “votes” 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 Reciprocal Trade 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.¹⁵ 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 MFN 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 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 it did not work. Applying it to dozens of countries on thousands of products was mind-bogglingly complex. Discrimination was becoming the rule, not the exception. The United States therefore moved to unconditional MFN in the 1922 Trade Act, getting it through Congress perhaps only because that act increased average tariff rates

(Jagdish Bhagwati ed., 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.

15. *Memoirs*, *supra* note 3, at 359.

greatly.¹⁶ 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 Reciprocal Trade 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 offering 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 this 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 1930's helped to win negotiating reauthorization in 1937, 1940 and 1943, and to validate the notion that reciprocal negotiations and non-discrimination 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.¹⁷ Ill health had increasingly forced Hull to reduce his activities as Secretary of State; he

16. *See id.* at 360-61.

17. *See* WILLIAM ADAMS BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 15-22 (1950).

finally resigned in late 1944.¹⁸ Hull was thus unable to participate in the formulation of the U.S. 1946 proposal for an International Trade Organization ("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—we are perhaps fortunate that it failed. But a caveat is worth considering. The reason it failed was primarily because of the trade provisions; organized opposition by protectionist forces persuaded President Truman to draw back from asking the Senate to ratify it.¹⁹

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 portions of the Havana Charter.²⁰ 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.²¹

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

18. CORDELL HULL, THE MEMOIRS OF CORDELL HULL (Macmillan Co. 1948).

19. RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE* 373–78 (McGraw Hill 1980).

20. KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 10–13 (U. Chi. Press 1970).

21. *Id.* at 10–16.

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.²²

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").²³ 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.²⁴ Over the longer term, Chinese accession to the WTO will likely lead to extensive legalistic disputes about Chinese compliance, with unpredictable effects for the world trading system.

The real question is not the GATT versus the WTO, but rather what has been happening outside of their meeting rooms. This is the second change, 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 non-discrimination in that context.

The third change is the growing importance of trade in services. Here the protectionist mechanism does not lie in

22. *Id.* at 335–41.

23. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1226 (1994), Annex 2, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

24. See generally International Food & Agricultural Trade Policy Council, *Topics in Agricultural Trade: The Cotton and Sugar Cases*, (Jan. 13, 2005), at <http://www.agritrade.org/Brown%20Bag%20Series/DeCamargo%20Roundtable%20Summary.pdf> (accessed May 16, 2005).

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. 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. 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.²⁵

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 arrange-

25. 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 (U. Chi. Press 2001).

ments.²⁶ But on the other hand, these free trade agreements are a major challenge to Hull's non-discrimination principle. It is not just that the Article XXIV criteria for the exception to MFN are a dead letter—indeed, a dead article. Rather, too many bilateral agreements simply extend the area of protection rather than move toward true trade liberalization. They turn trade theory on its head. The practical effect of the proliferation of such agreements is what Jagdish Bhagwati aptly describes as a “spaghetti bowl.”²⁷ The result makes 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.²⁸ 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 well as its various free trade area agreements.²⁹ 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 non-discrimination principle.

26. See generally Transcript of Council on Foreign Relations, Corporate Conference, New York, NY, *US Priorities in Trade* (Mar. 10, 2005), at http://www.cfr.org/pub7947/carla_a_hills_charlene_barshefsky_lionel_barber/us_priorities_in_trade.php (accessed May 14, 2005).

27. *Alphabeti spaghetti*, *ECONOMIST*, Oct. 1, 1998, available at http://www.economist.com/surveys/displayStory.cfm?Story_id=605199.

28. E.g., Republic of Turkey, *Turkish Customs Tariff* (Jan. 1, 2004), available at <http://www.gumruk.gov.tr/tariff/guide.htm>.

29. European Commission, *Bilateral Trade Relations*, at http://europa.eu.int/comm/trade/issues/bilateral/countries/index_en.htm (accessed May 16, 2005).

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.³⁰ All that the President had to do was 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 Congress, which had not had an opportunity to participate in the initial authorizing legislation (traditionally within the scope of the House Ways & 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 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 anti-dumping statute) created a challenge for the Executive Branch because the US negotiators’ commitment to change

30. John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. 203, 211–16 (1995).

the legislation had been part of the US quid for other countries' quo on other trade measures."³¹

This imbroglio, even though embarrassing to the U.S. negotiators, raised the inter-branch 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 non-tariff trade barriers. The up-shot, enacted for the first time in the Trade Act of 1974, was what became known as "fast-track."³² 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.³³ The safeguards became progressively more stringent in later trade acts.³⁴ 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 logrolling into the equation much earlier in the process. Demands by powerful interest groups and consequently important Congressional leaders that future trade agreements include provisions on labor and environmental standards led to sharp divisions in

31. Dam, *supra* note 29, at 44.

32. Hal Shapiro & 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, 9-10 (2003).

33. *Id.* at 10-19.

34. Harold Hongju Koh, *The Fast-track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 148-61 (1992); Fast-track Laura L. Wright, *Trade Promotion Authority: Fast-track for the Twenty-First Century*, 12 WM. & MARY BILL RTS. J. 979, 985-87, 989-92 (2004).

Congress; the Clinton Administration was consequently without negotiating authority for most of its period in office.³⁵

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), Congress had coalesced around a number of procedural provisions that would allow Congressional leaders to influence the negotiations as they progressed.³⁶ Although the steadily encroaching role of 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 non-tariff 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 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 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 of all U.S. proposals even before they are tabled 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

35. Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301, 310–14 (1995); Wright, *supra* note 39, at 987–88.

36. A review can be found in Shapiro & Brainard, *supra* note 37, at 19–31; Fast-track, and Gregory Shaffer, *Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts*, 7 J. INT'L ECON. L. 629, 637 (2004).

power to terminate its advance authorization at any time. In fact, the current authorizing legislation explicitly provides that either house of Congress can repeal the authorization outright at any time.³⁷

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, 2005.³⁸ 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),³⁹ an ominous provision lets any individual member of either the House or the Senate introduce a "resolution of disapproval," which is to be considered on a "fast-track" basis by the House in question.⁴⁰ This provision opens the possibility that one chamber of 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 constella-

37. See discussion of 19 U.S.C. § 2903(d), in Shapiro & Brainard, *supra* note 41, at 19. Fast-track Fast-track 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 Proceedings.'" Koh, *supra* note 39, at 151-52.

38. 19 U.S.C.S. § 3803 (a) (2005).

39. INTERNATIONAL TRADE COMMISSION HOMEPAGE, at <http://www.usitc.gov> (as last modified 2004) (stating that the United States International Trade Commission is an "independent federal agency" and emphasizing its independent, non-partisan nature).

40. 19 U.S.C. § 3803(c) (1999).

tion of political power obtaining in the Presidency and the Congress after the 2004 elections.

V.

The June 2005 Congressional opt-out date is perhaps not as significant for the long run as 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.⁴¹ The hands of Congress have more recently 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 whose 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 an elected official—most likely an 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. 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, espe-

41. See Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast-track*, 3 MINN. J. GLOBAL TRADE 195, 199–200 (1994).

cially 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 it is time to find new ways to build on Hull's fundamental principles.⁴²

The problem of finding ways to enhance exporter influence on the content of rules governing international trade is growing, not receding. It is growing in part because of the success of part trade rounds. Those rounds have focused, particularly in the earlier rounds, on tariffs. As a result average industrial tariffs have fallen from about forty percent after World War II to about four percent with the conclusion of the Uruguay Round cuts.⁴³ Non-tariff barriers applicable at the border—such as quantitative restrictions—have also declined, perhaps even more greatly; the recent phase-out of textile quotas is a dramatic example.⁴⁴ The increasing convertibility of currencies around the world has meant that exchange controls no longer restrain international trade nearly to the extent they once did.

As a result, the focus for the future must be on restrictions that operate not at the border but within domestic economies. Trade in services negotiations, discussed above, illustrate the difficulties that arise because most services are highly regulated. Those negotiations, under current rules calling for sectoral negotiations, give little scope for services exporters to shape the negotiations. Until a better system emerges for trading off concessions on a cross-sectoral basis within services and

42. 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. INT'L ECON. L. 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.

43. KENNETH W. DAM, *THE RULES OF THE GLOBAL GAME: A NEW LOOK AT US INTERNATIONAL ECONOMIC POLICYMAKING* 74–75 (U. Chicago Press 2001).

44. See David A. Gantz, *New Challenges for the Maquiladoras: Legal and Policy Implications of NAFTA Article 303 For United States-Mexico Trade*, 30 DENV. J. INT'L L. & POL'Y 1, 13–17, 37–39 (2001).

between services and goods, progress will be difficult and halting.

Leaving aside the great political and technical difficulties in making progress in agricultural products—which prior to the Uruguay Round had been largely ignored⁴⁵—the biggest problem in good negotiations is that protection has increasingly been practiced in ways that cannot easily be addressed in international negotiations. Anti-dumping proceedings are a leading example. In the name of fairness, legislation in most countries now provides for the imposition of anti-dumping duties even when the tariff duty rate is zero and has been bound in prior trade negotiations. In the United States at least, the legislation has been steadily tightened to make it easier for industries seeking protection to prove dumping. And regulations implementing the legislation have been tightened as well.⁴⁶ “This darker face of the [anti-dumping] proceeding is so well known inside the Washington Beltway that it has become a trite joke among trade lawyers that [anti-dumping] is the protectionist’s weapon of choice.”⁴⁷

The important point about U.S. anti-dumping proceedings is not simply that changes have led to a system of regulation that allows anti-dumping duties to be applied where there is no dumping in the traditional meaning of the term. This is accomplished by the use of various shortcuts for determining the difference between the foreign price and the U.S. price (or even the difference between the foreign cost, which can be artificially constructed, and the U.S. price).⁴⁸ More important for the Hull principles is that there is no effective way for U.S. exporters to have a voice in those proceedings or in the rules applied in anti-dumping proceedings. U.S. exporters simply have no standing in anti-dumping proceedings or in judicial review of them. Congressmen, in turn, find it politically convenient to espouse strengthening the anti-dumping system and using the ostrich approach, ignoring the consequences for the

45. See generally Tim Josling & Dale Hathaway, *This Far and No Farther? Nudging Agricultural Reform Forward*, INTERNATIONAL ECONOMICS POLICY BRIEFS No. PB04-1, (Institute for International Economics Mar. 2004).

46. See generally Dam, *supra* note 49, at 148–61.

47. *Id.* at 148 (citing Gary Horlick, *The United States Anti-dumping System*, in ANTI-DUMPING LAW AND PRACTICE 103 n.4 (John H. Jackson et al. eds., 1989)).

48. Dam, *supra* note 49, at 153–55.

growth of international trade. And though at the WTO level the U.S. anti-dumping system is potentially in play in the "Rules" Section of the Doha Round negotiations,⁴⁹ the chances that there will be any cutback in the U.S. system now appear remote at best.

More generally, importers have many opportunities under U.S. trade law to gain protection under a host of safeguards. Beyond anti-dumping, U.S. trade law contains a number of provisions permitting action restraining imports, including countervailing duties (to offset foreign subsidies), Section 201 escape clause proceedings, Section 337 unfair methods of competition proceedings, and Section 232 national security investigations.⁵⁰ The impact of these remedies on international trade are seldom observed by the public, but some notion of their impact on trade patterns and on international relations can be gained by considering the March 2002 steel safeguard decision of President Bush, especially its many adjustments to accommodate complaining foreign countries and its ultimate termination in the face of a ruling by the World Trade Organization Appellate Body in November 2003.⁵¹

About the only U.S. trade law remedy that is designed to protect exporters is Section 301 on unfair foreign trade practices. This provision is designed to force open foreign markets. It operates not by harnessing the Hull reciprocity principle, but rather through unilateral threats of retaliation.⁵² To the extent that Section 301 has been successful—which itself is a controversial matter—it has at best tended to operate one country at a time. It thereby illustrates a problem that arises whenever U.S. policy departs from the GATT/WTO universal approach or even a regional approach (such as NAFTA), which is simply exacerbated by the failure to utilize the leverage of the reciprocity principle. Further, it illustrates the atavistic assumption that underlies so much of U.S. trade law,

49. See WTO Ministerial Declaration, Nov. 14, 2001, at para. 28.

50. For a convenient overview, see generally THOMAS V. VAKERICS ET AL., *ANTI-DUMPING, COUNTERVAILING DUTY, AND OTHER TRADE ACTIONS* (1987).

51. See generally Eliza Patterson, *WTO Rules Against US Safeguard Measures on Steel*, ASIL INSIGHTS (American Society of International Law), Nov. 2003, available at <http://www.asil.org/insights/insigh120.htm>. See also C. Fred Bergsten, *A Renaissance for U.S. Trade Policy?*, 81:6 FOREIGN AFF. 86, 86–87 (Nov.–Dec. 2002).

52. Dam, *supra* note 49, at 95–103.

which is that exports are good and imports are bad; this attitude is, in truth, a recurrence to mercantilist attitudes that were pervasive in earlier centuries but that do more harm than good in an era when globalization is a fact, and no longer a policy option. On the other hand, the very unilateral nature of the Section 301 remedy appears to appeal to Congress because it provides an answer to constituents pressing for help in dealing with foreign practices considered unfair. A Congressman can simply respond to constituent pressure by calling on the business in question to go to the Executive Branch and pursue a remedy under Section 301, rather than seeking new legislation. In that sense, Section 301 has the same political appeal to individual members of Congress as anti-dumping proceedings: both let Congress pass the political buck.⁵³

A possible approach to enhancing exporter influence is to find a way to give exporters legal rights. As we have seen, Congress has been careful in the construction of the anti-dumping system (and also in safeguard proceedings such as Section 201 referred to above) to keep U.S. exporters out of remedies enacted to protect import-competing domestic firms. And as we have seen, giving them rights against the U.S. government to force pressure on foreign governments, which is the theory of Section 301, is an inherently limited approach. But it is a precedent that could be broadened in the future.

Several steps have been taken that illustrate the benefits of creating legal rights for exporters. An example is the Trade-Related Intellectual Property agreement ("TRIPS") requiring WTO countries to provide a domestic remedy in intellectual property infringement situations. Articles 41 through 60 of the TRIPS agreement impose a rather thorough set of procedures to be followed by countries to give a remedy to foreign holders of intellectual property rights.⁵⁴ One can view the TRIPS remedies regime as a better way of carrying out the objectives of Section 301. It is created by agreement within the WTO, rather than unilaterally, and hence follows the reciprocity principle; it allows private firms and individuals to proceed directly in

53. *Id.* at 151-52.

54. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994).

the foreign territory rather than through the coercive and unilateral intermediation of the U.S. government. Thus, the power of the private parties depends on their legal rights, rather than on their political influence with the U.S. government.

By definition, TRIPS remedies apply only to intellectual property, not to trade in general. But one could see an extension to give exporters rights in importing countries where importing country action threatened to cut off their access. Such an extension seems rather speculative at the moment. But then, so too did the Reciprocal Trade Agreements Act of 1934 when Cordell Hull first proposed it (as did no doubt the GATT/WTO system when the initial ideas leading to it were proposed during the Second World War). Given the complexities of present-day WTO negotiations, such a system of exporter rights in importing countries could perhaps best be introduced in situations—such as intellectual property—where there was a widely perceived need to protect the rights acquired derivatively by exporters through substantive agreements between governments in WTO negotiations. In fact, it might be considered by some Americans to be a better alternative than the WTO dispute settlement system, which is becoming an increasingly neuralgic subject with some members of Congress. After all, giving foreigners legal rights in the domestic legal system preserves sovereignty (since it would be the result of country-to-country agreement) and cannot be criticized as ceding authority to unelected international judges.

Another international precedent is to be found in the 1996 plurilateral Agreement on Government Procurement.⁵⁵ Article XX of that Agreement requires governments to allow foreign suppliers to challenge breaches of the Agreement.⁵⁶ The underlying theory of that Article is that the rights the Agreement provides in opening government procurement to foreign contractors are difficult to enforce through the WTO dispute settlement system, dependent as it is on the willingness of governments to retaliate to enforce decisions. The drafters

55. Agreement on Government Procurement, Apr. 1, 1981, WTO Agreement, Annex 4(b), LEGAL INSTRUMENTS – RESULTS OF THE TOKYO ROUND, 18 I.L.M. 1052 (1979) [*hereinafter* “AGP”].

56. See Bernard M. Hoekman & Petros C. Mavroidis (eds.), *LAW AND POLICY IN PUBLIC PURCHASING* 20–22 (1997).

no doubt thought that a remedy for foreign contractors would be quicker and surer if the decision came from a domestic court of the offending country. The principle that one can perhaps extract from the TRIPS and Government Procurement agreements is that it is better to solve trade problems quietly and piecemeal out of the public gaze than to try to resolve public disputes through public confrontation between governments, even within the GATT/WTO dispute settlement system. When Congress gets involved in trade issues involving individual products, the results are not always edifying. Again, as in the case of trade negotiations, professional legal procedures out of the public eye with more or less automatic adoption of the results is likely to be more effective than political decision making, at least so long as there is legitimacy in the creation of the procedure. That is the Rule of Law principle that most people in most countries respect.

Would Congress be willing to allow foreign exporters to appear as parties in U.S. courts and administrative proceedings having to do with imports into the United States? Foreign exporters already have standing to defend themselves in, for example, anti-dumping cases where they have allegedly engaged in dumping.⁵⁷ The difference is that the foreign exporters would be able to assert affirmative rights, not just defend themselves in a case in which a U.S. firm or industry asserted rights under U.S. law. The right that the foreign exporter would be asserting would be a right that had already been agreed to by the United States at the international level, say, in a round of WTO trade negotiations.

It would be a big step to make WTO rights self-executing (that is, directly applicable) in the United States. Congress has traditionally resisted any such step,⁵⁸ and instead has created a system in which even agreements reached under fast-track procedures have to be the subject of implementing legislation. This requirement gives Congress a last-minute opportunity to fine tune the application of WTO trade agreements, especially with regard to non-tariff barriers, which—being embedded in

57. For a discussion of “interested parties” entitled to participate in an anti-dumping proceeding, *see* VAKERICS ET AL., *supra* note 56, at 40–44.

58. John H. Jackson, William J. Davey & Alan O. Sykes, Jr., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 129 (3d ed. 1995).

U.S. law—arguably need a statutory amendment process to be effective.⁵⁹

Making WTO trade agreements self-executing would therefore be a big step for Congress, but it would also be a step forward for U.S. commercial interests in world trade if they received similar rights in other countries. A less ambitious but perhaps politically more prudent approach than making WTO rights self-executing would be a two-step process in which Congress would agree in advance, with respect to specified trade subjects, to implement specific foreign exporters rights after they were reciprocally agreed upon with other countries. Indeed, such agreements on reciprocal foreign exporter rights could be authorized for negotiation and implementation under fast-track procedures.

In the fast track initial authorizing process (now called Trade Promotion Authority) 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,⁶⁰ 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. The concept of exporter rights suggested here is one possible way of strengthening the participation and influence of exporters in the international trading system.

59. The result is a good deal of last-minute haggling involving a final opportunity for affected interest groups to claw back some of their losses. See Dam, *supra* note 36, at 46.

60. David E. Skaggs, *How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made More Effective in the WTO?*, 7 J. INT. ECON. L. 655, 655 (2004).