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With the multilateral trading system in crisis, following the collapse of the World Trade Organization's Ministerial Conference in Cancún in September 2003, the Cordell Hull Institute convened a series of meetings. The third one, a meeting of the Institute's Trade Policy Roundtable on June 16, 2004, addressed the need to "Pause for Reflection on the WTO System".

The meeting was held at Arnold & Porter, attorneys-at-law in Washington, DC. Pictured above is the well of the firms building.

The meeting marked the seventieth anniversary of Cordell Hull's Reciprocal Trade Agreements Act of 1934.

Reproduced here is the paper by **Kenneth W. Dam** (above) on the

PAUSE FOR REFLECTION…

Significance of the Reciprocal Trade Agreements Act

Kenneth W. Dam

THE SIGNIFICANCE of the Reciprocal Trade Agreements Act of 1934 for the present multilateral trading system, administered by the World Trade Organization (WTO), lies in a few central ideas. They are all principles espoused by Cordell Hull in the course of a long political career. It is therefore worth understanding how those ideas came to dominate Hull's thinking and how they led directly, under his leadership, to the Reciprocal Trade Agreements program. Against that background we can investigate how they came to be key concepts in the second half of the twentieth century in the multilateral trade regime founded on the General Agreement on Tariffs and Trade (GATT) which, in revised form, is today a part of the WTO system. The final question addressed in this essay is whether those concepts retain validity in the Doha Round negotiations and the post-Doha world.[1]

Cordell Hull was a Democrat from Tennessee. He was therefore, from his early 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 back to the Constitution itself, when it was the Southerners who backed the prohibition of export taxes.[2] 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.

Evolution of Cordell Hull's Thinking

In his instructive *Memoirs*, Hull explained that before going 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]

"Significance of the Reciprocal Trade Agreements Act" that was presented at the meeting.

About the Author

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Dr Dam is the author, most recently, of *The Rules of the Global Game: a New Look at U.S. International Economic Policymaking* (2002). His other books include: *The GATT: Law and International Economic Organization* (1970), *Oil Resources: Who Gets What, How?* (1976) and *The Rules of the Game: Reform and Evolution in the International Monetary System* (1982). He is also co-author, with George P. Shultz, of *Economic Policy: Beyond the Headlines* (1977 and 1998).

About the Meeting

After the WTO Ministerial Conference in Cancún came to grief, the Doha Round negotiations were seen worldwide to be in deep trouble, struggling with apparently intractable issues in an atmosphere of division and distrust, unable to get any traction.

When the negotiators back in Geneva still couldn't find

Only later, during World War I, did Hull change his perspective. What distinguished Hull from most of his colleagues in the Congress of the United States at the time was that he saw 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 (remember this was World War I, not II). The conference would reach agreements not only on tariffs but also on "trade methods, practices and policies which, in their effects, are calculated to create destructive international controversies..."[4] The conference never took place. In 1925, however, Hull introduced a resolution in the House again calling for an international trade conference. His addition to the draft resolution of a call for the immediate unilateral reduction in U.S. tariffs "of course doomed it", as he later admitted.[5] Evidently he had not yet fully appreciated the principle of reciprocity that was later to become obvious to him as Secretary of State.

Even before his 1916 speech in the House proposing an international trade conference, Hull wrote in 1914 to the then Secretary of State, Robert Lansing, urging the adoption of an unconditional most-favored-nation (MFN) clause. In doing so, he had three evils in mind. The first was trade boycotts of countries (nowadays we would call them "trade sanctions"). The second was subsidizing exports that had the effect of destroying particular foreign industries. And the third was Imperial Preference, under which the United Kingdom, its colonies and the Commonwealth dominions gave one another more favorable trade treatment than they gave others, which he considered patently unfair.[6] Here we see the birth of his passion for non-discrimination international trade matters.

When I first became interested in trade policy, I read a little about Cordell Hull, but 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 around the world help to avoid war? Such talk was just political hyperbole, I thought.

I still hold that view of the early Cordell 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 the 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 (IMF) 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 we have come to understand how the higher incomes

a basis on which to re-engage, many asked whether the negotiations were salvageable or, if that was too soon to determine, whether it wasn't time to reflect on what the negotiations and the WTO system itself were trying to achieve.

Restoring the momentum of trade liberalization in the world economy is critical – following the Iraq crisis – to strengthening multilateral cooperation in general and, more particularly, in the WTO system.

At the core of the WTO struggle are two major issues that have got harder and harder to resolve as, over the course of half a century, the major trading powers have brushed them aside as "too difficult".

• One is the liberalization of trade in temperate-zone agricultural products, important to low-cost producers not only in developing countries but also in Oceania, North America and even parts of Europe.

• The other is the liberalization of trade in labor-intensive manufactures, such as textiles and clothing, footwear, furniture and earthenware, items that developing countries produce in quantity as they industrialize and begin to export to earn the foreign exchange they need to import and grow.

Resolving the impasse in the WTO system is not only a matter of sorting out the modalities for negotiations on the different items on the Doha Round agenda. The sources of tension and suspicion run deep and, to be understood, they have to be put in historical context and clarified in a longer-term perspective.

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.[7] 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 we can conclude that Cordell Hull was ahead of his time in thinking about the non-economic effects of rampant protectionism and especially of trade discrimination.

Cordell Hull's appointment as Secretary of State by President Franklin D. Roosevelt in 1933 and his experiences that year with the London Economic Conference and Montevideo Conference caused Hull to turn from advocacy to action. He saw the shortcomings of multilateralism of the London and Montevideo kind and became interested in bilateral approaches.[8] He came to realize, moreover, that mere persuasion does not carry one very far either in Washington or in the world at large. And he was appalled by 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 was a cause of the Great Depression. When he got to the State Department he quickly realized that Smoot-Hawley had produced indignation throughout the world, had provoked 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 a way that badly hurt U.S. exports.[9]

Inspiration for a Multilateral Regime

Hull had many accomplishments. But the reason he is remembered today is not as an original author of the U.S. income and estate tax laws. Nor is he given the credit he deserves for his role as Secretary of State in World War II in helping to thwart Treasury Secretary Henry Morgenthau's post-war plans for returning Germany to an agrarian society.[10] 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".[11]

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 became the driving forces behind the GATT and now the WTO. These days we can see the benefits that trade liberalization brought in worldwide prosperity in

Other Speakers

The roundtable meeting was attended by 55 trade policy specialists, mostly from the Washington DC area.

Besides Dr Dam, other speakers at the meeting were **Ernesto Zedillo**, the former President of Mexico and now director of the Yale Center for the Study of Globalization, New Haven, CT; **Harald Malmgren**, chairman of Malmgren O'Donnell Ltd, financial advisers, London and Washington, DC; **Richard Eglin**, director of the trade and finance division at the WTO Secretariat, Geneva; **John M. Weekes**, former Canadian ambassador to the WTO and now senior policy adviser at Sidley Austin Brown & Wood, attorneys-at-law, Geneva; and **Ann Tutwiler**, president of the International Food & Agricultural Trade Policy Council, based in Washington, DC.

Others who spoke were: **Roberto Abdenur**, the Brazilian ambassador to the United States; **Anders Ahnlid**, minister at the Royal Swedish Embassy, Washington, DC; **Jagdish Bhagwati**, professor of economics at Columbia University, New York, NY; **Jean-Francois Boittin**, minister at the French Embassy, Washington, DC; and **Hugh Corbet**, president of the Cordell Hull Institute.

In addition, there were: **Gary N. Horlick**, a partner at Wilmer Cutler Pickering Hale & Dorr, attorneys-at-law, Washington, DC; **Sidney Weintraub**, of the Center for Strategic and International Studies, Washington, DC; and **David Woolner**, executive director of the Franklin &

the last half of the twentieth century. It is true that the 1934 act provided only for bilateral agreements, but it furnished the template for Congressional advance authorization for the negotiation of trade agreements by the Executive Branch, important in achieving those post-war accomplishments and in addressing the trade issues that confront the world economy today.

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 U.S. tariffs. Hence reciprocity was the key and trade agreements were the mechanism.[12] To be sure, reciprocity has been called mercantilism and, indeed, it is based on the primitive premise that exports are good and imports are bad. But practical trade politics are based on just such a premise. Readers of this essay do not need to be told how limited is that premise. And not just in economic theory! The fact is that 270 million people in the United States vote with their feet – or perhaps one should say with their wheels – to buy 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. One was that it involved getting advance authority from the U.S. Congress.[13] I would add that implicit in Hull's thinking, especially in the light of the Smoot-Hawley experience, was that it gave exporting industries, at least potentially, and equal voice with import-competing industries. Moreover, the act broke the logrolling Smoot-Hawley dynamics in which, 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 of unconditional MFN treatment in bilateral agreements. Although the unconditional MFN clause 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 the 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. As a result, discrimination was becoming the rule, not the exception. So the United States moved to unconditional MFN treatment in the Tariff Act of 1922. It got through the Congress perhaps only because the act greatly increased average tariff rates. And because the 1922 act was so protectionist, little good came of the

Eleanor Roosevelt Institute at the FDR Presidential Library, Hyde Park, NY.

The meeting was chaired by **William D. Rogers**, vice chairman of Kissinger Associates, international consultants, New York, who recently retired as senior partner at Arnold & Porter, and **Lord Parkinson**, former British secretary of state for trade and industry.

Trade Policy Roundtable

The Cordell Hull Institute's Trade Policy Roundtable is sponsored by seven international law firms in Washington, DC: Akin Gump Strauss Hauer & Feld, Arnold & Porter, Hogan & Hartson, O'Melveny & Myers, Sidley Austin Brown & Wood, Steptoe & Johnson and Wilmer Cutler Pickering Hale & Dorr.

transition to unconditional MFN treatment; if there are no concessions, there is nothing to generalize to third countries.

In the context of tariff reductions, however, unconditional MFN treatment 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 the post-World War II context of the GATT system. In that later multilateral context, negotiations were carried on with the principal supplier of a product and hence uncompensated spillovers 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.

Although 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 reduce that MFN-related problem by agreeing to U.S. concessions on any given product by agreeing to a U.S. concession on any given product first with that product's principal supplier in order to obtain the maximum reciprocal concessions. I have not been able to verify that that was Hull's strategy, but clearly the political vulnerabilities from applying unconditional MFN treatment, 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 international trade in the last half of the 1930s helped to win negotiating re-authorization 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 draft Havana Charter of 1948, which sought to create the International Trade Organization (ITO). 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. proposal in 1946 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 with the IMF 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, London and other major capitals, we are perhaps fortunate that it failed and thus those ideas did not become part of the official international trade doctrine through the

ITO charter. But a caveat is worth considering. One reason it failed was the trade provisions. Organized opposition by protectionist forces persuaded President Harry S. Truman to draw back from asking the Senate to ratify the charter.[14]

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 diplomatic meetings in preparation for the Havana Conference the following year. In an example of inspired pragmatic innovation, trade officials rescued the trade 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 draft chapter on commercial policy, including rules on non-tariff measures, had been included as general terms. With the ITO gone, those general terms became the core of a broad international agreement.[15]

Thus the General Agreement on Tariffs and Trade became, rather incongruously, a *de facto* international organization, the GATT. Trade officials found a small *château* overlooking Lake Geneva to house what was known as the GATT Secretariat and also found a way to finance staff activities. With strong leadership by the U.S. State Department and by the GATT's outstanding director-general, Eric Wyndham White, a number of "rounds" of multilateral trade negotiations 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.[16]

Changes in the World Trading System

Today 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 being 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 China's accession to the WTO will 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 their meeting rooms. A second change is the steady movement away from tariffs and towards a multitude of indirect protectionist devices, especially trade-distorting non-tariff measures inside borders, embedded in

domestic national legislation. It is harder to apply the Hull principles of reciprocity and non-discrimination in that context.

A third change is the growing importance of trade in services. Here the protectionist mechanism does not lie in trade law at all, but in domestic regulation of the various service industries. Service industries are mostly subjected to comprehensive economic regulation, best known not to general trade lawyers, but to specialized lawyers and the bureaucrats involved in those regulatory systems. But perhaps a more serious problem is that negotiations on trade in services fail to meet one of the conditions so important to Hull that he did not draw specific attention to it. What happens in a conventional tariff-cutting round is that countries make trade-offs, seeking concessions in goods of interest to their exporters, while reluctantly making concessions on the products 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 countries have little or no interest in trying to compete in developed-country financial markets, for they know it would be a money-losing proposition. The principle of reciprocity that served the world so well in negotiations on industrial tariffs, where cross-sectoral trade-offs were the *modus vivendi*, has little to offer in making a success of sectoral negotiations on trade in services. Sweet reason (as opposed to hard bargaining) may bring about 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 negotiations on trade in services is sector-by-sector. But the Doha Round negotiations are so complex that the opportunity for last-minute trade-offs will be 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.[17]

A fourth 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 negotiations, 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 these free trade agreements are a major challenge to the principle of non-discrimination.

It is not just that Article XXIV, laying out criteria for departures from the MFN principle to form a customs union or free trade area, is 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 towards true trade liberalization. They turn trade theory on its head. 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 schedule – 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. Although 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, or the way they have been pursued, 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. Ambassador 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 countries around the world, taking into account special provisions for developing countries and, too, for aspirants for membership of its single market as 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 questions about the current force of non-discrimination as the cornerstone of the multilateral trading system.

Growth of Congressional Meddling

Perhaps the biggest problem in the Doha Round negotiations is a consequence of the continuing effort in 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 rounds, it was fully accepted that, as 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 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 as simple as, for example, 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 the

responsibility 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 to which the Executive Branch negotiators had agreed 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 U.S. negotiators' commitment to change the legislation had been part of the U.S. *quid* for other countries' *quo* on other trade measures."[18]

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 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 measures. The upshot, enacted for the first time in the Trade Act of 1974, was what became known as "fast track" trade-negotiating authority. 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 Tokyo Round negotiations, which were launched in 1973. It would be kept informed and be in a position to bring political pressures to bear on the negotiators if it saw fit to do so. The procedural safeguards became progressively more stringent in later trade legislation.[19] In addition, Congress began to seek to include certain demands in the negotiating-authority legislation, both as to what should be in the final package and what should not be negotiated.

Although the fast-track process had originally reduced the power of interest groups to engage in logrolling because it would be too late once the negotiations were completed, these new wrinkles in the authorizing process brought interest-group logrolling into the equation at a much earlier stage in the process. Demands by powerful interest groups, and consequently by important Congressional leaders, that future trade agreements include provisions on labor and environmental standards led to sharp divisions in the Congress. Thus the Clinton Administration was without trade-negotiating authority for most of its period in office – after the Uruguay Round negotiations were completed.

By the time the Bush Administration was able to obtain in 2002 what is now called "trade-promotion authority" (so named in part to avoid the "fast track" nomenclature that proved anathema to

various Congressional leaders and import-competing industries and their labor unions), the Congress had coalesced around a number of procedural provisions that would allow Congressional leaders to influence the negotiations as they progressed.[20] 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 non-tariff barriers. No trade agreement has yet failed to win Congressional fast-track approval after the completion of negotiations.

Undermining of Trade Negotiations

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 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.[21]

Perhaps more alarming for free trade proponents, particularly in view of the slow progress of the Doha Round negotiations, is the "drop-dead date" of June 1, 2005. Congress gave itself an opportunity to stop the first WTO round in its tracks as of that date. The legislative technique used in the 2002 authorizing statute was to provide trade-negotiating authority only through to June 1, 2005. True, the statute provides for an automatic extension of negotiating authority through to 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 an economic-impact report from the International Trade Commission (a body that by is no means 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.[22]

This last provision opens the possibility that one house of the U.S. Congress may abort the Doha Round negotiations in 2005 under a

procedure affording a veil of Congressional deliberative process to cover what could simply be 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 WTO negotiations, depending on the state of the U.S. economy and, after the 2004 elections, on the constellation of political power obtaining in the Presidency and the Congress.

Inhibiting U.S. Ability to Lead

Perhaps more ominous than the Congressional opt-out date, however, is the continuing departure from Cordell Hull's simple 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 now become largely untied and the leaders on Capitol Hill 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 make an argument that transparency is a democratic value. It is also true, however, 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 exporting industries and import-competing industries would have equal access to the Congressional process. But when Congress – most likely a single, but politically powerful, member of Congress – uses the right to be informed to attempt to pre-empt a U.S. concession on behalf of a protectionist interest, exporting interests are unlikely even to know what is happening, much less be able to organize opposition. After all, normal principles of collective action tell us that

- the costs to individual exporting companies of 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, 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

The **mockingbird** is the state bird of Tennessee. Cordell Hull represented a district of Tennessee in the Congress of the United States, and was elected a senator from there, before becoming U.S. Secretary of State (1933-44).

"The mockingbird is known for fighting for the protection of his home – falling, if need be, in its defense. Mockingbirds are not intimidated by animals larger than themselves and have been known to attack eagles"

– Diana Wells, *100 Birds and How They Got Their Names* (Chapel Hill, NC: Algonquin, 2002)

Trade Policy Analyses

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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 the Smoot-Hawley period was the Hull-inspired form of statecraft to overcome the influence of protectionist forces.[23] 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.[24]

One way to achieve some balance would be to give importers who benefit from trade-concession rights a way of balancing those that import-competing firms have in domestic law to protect themselves from imports through anti-dumping 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 not, almost surely, a politically viable strategy. Attempting to accord domestic interests, those favoring imports, procedural rights in the foregoing protectionist-friendly proceedings may be equally problematical, although 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 of the Trade Act of 1974 (as amended), even if regarded as generally a positive provision, addresses foreign protectionism, not domestic protectionism. One international precedent is the provision in the Agreement on Trade-related Aspects of Intellectual Property Rights requiring WTO countries to provide a domestic remedy to infringements of intellectual property rights.[25] Another international precedent is to be found in the 1994 plurilateral Agreement on Government Procurement, where Article XX requires governments to allow suppliers to challenge breaches of the agreement.[26]

These two international precedents involve giving exporters procedural rights in an importing country, but they do not address exporters' rights in their own country. Even so, 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 initial process of obtaining fast-track negotiating (now trade-promotion authority) the influence of exporters and importers are reasonably balanced. But as David Skaggs, a former Congressman, has observed, members of Congress most often hear from constituents about trade when they are angry,[27] which in practical terms means those who lose from trade are more likely to get 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 Cordell Hull's Reciprocal Trade Agreements Act. It flourished with the GATT and with fast-track negotiating authority, but it is always exposed to domestic backsliding.

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[1] This a revised version of the paper presented at the roundtable meeting, "Pause for Reflection on the WTO System", convened by the Cordell Hull Institute in Washington, DC, 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.

[2] Kenneth W. Dam, "The American Fiscal Constitution", *University of Chicago Law Review*, Chicago, Vol. 44 (1977), p. 271.

[3] Cordell Hull, *The Memoirs of Cordell Hull* (New York: Macmillan Company, 1948), Vol. I, p. 83 (hereafter *Memoirs*).

[4] *Idem*., p. 82.

[5] *Idem.*, p. 126.

[6] *Idem*., pp. 84-85.

[7] E.g., Jeffrey Sachs and Andrew Warner, "Economic Reform and Global Integration", *Brookings Papers on Economic Activity*, Brookings Institution, Washington, DC, No. 1 (1995). Also see Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004), pp. 60-64.

[8] *Memoirs*, *op. cit*., p. 356.

[9] *Idem.*, p. 355.

[10] The story has finally been told in Michael Beschloss, *The Conquerors: Roosevelt, Truman and the Destruction of Hitler's Germany, 1941-1945* (New York and London: Simon & Schuster, 2002).

[11] Julius W. Pratt, *Cordell* Hull (New York: Cooper Square, 1964), Vol. I, p. xiii.

[12] In recent decades some countries have unilaterally reduced tariffs. See Bhagwati (ed.), *Going Alone*: *The Case for Relaxed Reciprocity in Freeing Trade* (Cambridge, MA: MIT Press, 2002). Australia is a leading developed-country 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. Some developing countries have also reduced tariffs unilaterally, notably China throughout the 1990s. See William Martin, Betina Dimanrana, Thomas W. Hertel and Elena Ianchovichina, "Trade Policy, Structural Change and China's Trade Growth", in Nicholas C. Hope, Tenis Tao and Mu Yang Li (eds), *How Far Across the River? Reform at the Millennium* (2003), pp. 153 and 159 (Table 6.1).

[13] *Memoirs*, *op. cit*., p. 359.

[14] Richard N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective*, revised edition (New York: McGraw-Hill, 1980), pp. 373-78.

[15] Dam, *The GATT*: *Law and International Economic Organization* (Chicago and London: University of Chicago Press, 1970), pp. 10-16.

[16] *Idem*., pp. 335-41.

[17] For more on services negotiations, see Dam, *The Rules of the Global Game*: *A New Look at US International Economic Policymaking* (Chicago and London: University of Chicago Press, 2001), pp. 113-30.

[18] *Idem*., p. 44.

[19] Harold Hongju Koh, "The Fast Track and United States Trade Policy", *Brooklyn Journal of International Law*, New York, Vol. 18 (1992), p.143; and Laura L. Wright, "Trade Promotion Authority: Fast Track for the Twenty-first Century", *William & Mary Bill of Rights Journal*, Williamsburg, VA, Vol. 13 (2004), p. 979.

[20] 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", *George Washington International Law Review*, Washington, DC, Vol. 35 (2003), p. 1 *et seq*.; and Gregory Shaffer, "Parliamentary Oversight of WTO Rule-Making: The Political, Normative and Practical Contexts", *Journal of International Economic Law*, Washington, DC, Vol. 7 (2004), pp. 629 and 637.

[21] See the discussion of 19 U.S.C. 2903(d), in Shapiro and Brainard, *supra*, p. 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*, pp. 151-52.

[22] 19 U.S.C. 3803(c).

[23] See Dam, *The Rules of the Global Game*: *A New Look at US International Economic Policymaking* , *op. cit*., pp. 36-72.

[24] 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", *Journal of International Economic Law*, Vol. 7 (2004), pp. 585 and 590-92. 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.

[25] Agreement on Trade-related Aspects of Intellectual Property Rights, Part III.

[26] See discussion in Bernard M. Hoekman, "Introduction and Overview", in Hoekman and Petros C. Mavoidis (eds.), *Law and Policy in Public Purchasing* (Ann Arbor, MI: University of Michigan Press, 1997), pp. 20-22.

[27] David E. Skaggs, "How Can Parliamentary Participation in WTO Rule-Making and Democratic Control be Made More Effective in the WTO?", *Journal of International Economic Law*, Vol. 7 (2004), p. 654.