A RETURN TO BILATERAL AGREEMENTS: AN END TO THE NONDISCRIMINATORY MULTILATERAL TRADING SYSTEM?

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I. INTRODUCTION

In one of the first executive orders signed after his inauguration, President Donald J. Trump directed the Office of United States Trade Representative (USTR) to withdraw the United States as a signatory to the Trans-Pacific Strategic Economic Partnership Agreement (TPP) reached with eleven Pacific nations during the Obama administration and to “permanently” withdraw from any further TPP negotiations. President Trump expressly declared in this document that it was the intention of his administration “to deal directly with individual countries on a one-on-one (or bilateral) basis in negotiating future trade deals.”¹ He further directed USTR to begin pursuing “bilateral trade negotiations to promote American industry, protect American workers, and raise American wages.”²

The President’s background in private business traces a path of real estate deals exhibiting his approach to most decision making. It is often said that he has a “transactional” rather than a strategic perspective. He has the reputation of a shrewd businessman who makes decisions quickly—some say impulsively—based on his assessment of the transaction at hand, viewing his goals in every deal as a zero-sum game. One side wins and the other side necessarily loses. Generally, the businessman’s goals are narrowly focused on maximizing monetary profit for immediate or long-term gain. Within the bounds of fiduciary responsibilities and legal and ethical rules, this focus is appropriate to satisfy shareholders, business partners, and personal needs. Every tool, from economic dominance to filing bankruptcy, can be employed to gain leverage for winning or preserving profit. In a private trade transaction, it is understandable that the businessperson may be able to bring greater leverage in a one-on-one, bilateral transaction negotiating with a party with fewer resources, rather than try to reach agreement with multiple parties with diverse interests and potentially enhanced leverage with combined resources.

In the political economy of the post-World War II era, however, the United States has been the principal architect of the nondiscriminatory multilateral trading system in an effort to promote and sustain economic stability among scores of state actors with economies engaged in rules-based, free market trade. A critical question immediately comes to mind from the Trump administration’s decision to terminate multilateral trade agreements and direct USTR to focus engagement on bilateral, country-by-country trade

agreements: Is this the beginning of the end of the rules-based liberal economic order created in the post-war years to settle disputes and reduce discriminatory trade barriers through a multilateral trading system?

II. CORDELL HULL AND THE STRUGGLE TO CREATE THE MULTILATERAL SYSTEM

Most of the free world has lived under the economic stability of the predominantly nondiscriminatory trading system of the multilateral General Agreement on Tariffs and Trade (GATT) initiated in 1948, which has continued under the World Trade Organization (WTO) since 1995. This system was constructed on the ruins not only of two world wars, but the trade wars of the interwar years and the Great Depression. When Franklin D. Roosevelt defeated President Herbert Hoover in the 1932 election, at the onset of the Depression, he selected as his Secretary of State Senator Cordell Hull (D-TN), who led the long struggle to create this system. Hull, as a congressman in 1916, had begun calling for an “international trade congress” to be formed among all commercial nations to promote peace through fair trade and the avoidance of trade warfare.3

An ardent life-long proponent of free trade, Hull led the opposition on the Ways and Means Committee against the infamous Smoot-Hawley Tariff Act of 1930 that brought U.S. protective tariff levels to nearly the highest levels in history and provoked retaliatory trade measures against American exports in an already depressed world economy.4 In an era when the United States had the largest, but also the most protected, market in the world and other nations engaged in trade wars or traded on mercantilist principles of bilateral barter, Secretary of State Hull began slowly to bring tariffs down and transform the trading system one country at a time using broad authority granted by the Reciprocal Trade Agreements Act (RTAA) of 1934.

Hull waged the struggle to create this system against both domestic and foreign opposition forces. Unlike the battles Hull had waged against protectionist Republicans in Congress—who had fiercely protected domestic manufacturers against imports since the Civil War—his trade opponents were often found within his own party. Although President Roosevelt supported a more liberal trade program, Hull was forced into internecine

3 42 CONG. REC. 10,653–54 (July 8, 1916).
combat with some of the New Deal insiders of the Roosevelt administration who saw Hull’s trade idealism as a distraction, at best, from their domestic programs addressing unemployment. The New Dealers’ solutions were focused on increasing domestic purchasing power, and trade promotion policy was not among those solutions. Generally viewed as economic nationalists, the New Deal planners were not enamored by free trade philosophy, and, in fact, they feared that a focus on tariff reform might be at cross purposes with their own domestic recovery plans. In the second year of the Roosevelt Administration, however, Hull overcame most of the New Deal opposition to his trade program when FDR enthusiastically proposed and easily passed the RTAA through Congress.5

Nevertheless, a major new internal problem developed after Roosevelt appointed George N. Peek in December 1933 to be his special assistant on foreign trade. Much of the trade policy debate throughout 1934 and 1935 was dominated by the conflict between Hull’s internationalist approach and Peek’s nationalistic perspective. Peek was a former farm implement manufacturer who had been vice president of John Deere and Company and president of the Moline Plow Company. A firm believer in maintaining a favorable balance of trade through export subsidies and dumping surplus agriculture products in foreign markets, Peek had been trying to implement his trade beliefs as head of the Agriculture Adjustment Administration (AAA) even before becoming FDR’s foreign trade assistant in the White House. At the AAA, he came into direct conflict with Secretary of Agriculture Henry A. Wallace and Undersecretary Rex Tugwell. Wallace had become one of Hull’s allies on trade. Wallace’s influential pamphlet, America Must Choose, supporting the RTAA, had even attracted the endorsement of Henry L. Stimson, Hoover’s Secretary of State.6 Tugwell, one of the original members of Roosevelt’s Brain Trust and a New Deal economist, was no friend to Hull’s laissez-faire trade policies, which Tugwell considered anachronistic, but he strongly opposed Peek’s export dumping proposals because he was attempting to raise farm prices and reduce surplus agriculture through domestic production controls. Tugwell advised Wallace that dumping American farm exports would only provoke retaliation.

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Roosevelt often chose subordinates with conflicting views so that he could play one against the other and be free to make his own decisions. The President’s selection of Peek, first perhaps to counterbalance Wallace and then to spar with Hull, suited his decision-making process. George Peek saw in his new job in the White House an opportunity to take over trade policy coordination and to neutralize Hull’s liberal trade goals. While Hull was out of the country, Peek submitted a plan to the President for reorganization of the administration’s trade policy apparatus which put him at the helm. Opposition to Peek’s plan came naturally from the State Department, and Wallace joined Commerce Secretary Daniel C. Roper in weighing in on Hull’s side against Peek’s proposal. Roosevelt ultimately confirmed that Hull and the State Department would be in charge of RTAA trade negotiations, but not before he further entrenched Peek as a problem for Hull by naming him head of the newly created Office of the Special Adviser on Foreign Trade. Further, the President endowed Peek’s office with a huge budget for statistical analysis and appointed him president of the newly established Export-Import Bank of Washington (Exim Bank). The Exim Bank was created initially to finance export sales to the Soviet Union and Cuba, but Peek immediately began to use it to pursue his own trade program, which ran diametrically counter to Hull’s efforts.

For Hull, a critical aspect of the trade program was the requirement he had imposed that agreements under the RTAA be negotiated under the unconditional “most-favored-nation” (MFN) principle—that is, on a nondiscriminatory basis with all trading partners that did not discriminate against the United States. This requirement allowed Hull to multilateralize the tariff reductions obtained in bilateral agreements. Simply stated, it worked as follows: If in bilateral negotiations with country X, the United States agreed to reduce tariffs on a particular product, it committed also to grant this tariff reduction on the same product from all other countries that maintained nondiscriminatory tariffs on imports from the United States. Likewise, if country X later reduced the tariff on a product for a third country below the rate established in the agreement with the United States, country X committed to grant the same reduction on that product when imported from the United States. Thus, among the group of nations that practiced nondiscriminatory trade policies, trade restrictions reduced in bilateral agreements benefited all trade.

MFN clauses had been included in bilateral trade agreements for centuries. The principle was employed in the first United States treaty, a 1788 agreement with France, and in the controversial Jay Treaty with Great Britain in 1794. George Washington endorsed the concept in his famous Farewell Address, in which he declared “our commercial policy should hold
an equal and impartial hand; neither seeking nor granting exclusive favors or preferences.” But since the eighteenth century most of these clauses were employed in a conditional form. Under this practice, concessions granted by the United States in bilateral trade agreements were extended to third countries only on the condition that the third country “pay” for them by granting concessions of equivalent value to the United States. Although the conditional approach sounds reasonable in theory, the practical effect of requiring specific payments for nondiscriminatory trade concessions produced perpetual market distortions as countries haggled over an acceptable “price” for each concession in negotiations that had to be repeated every time a country granted a new concession undercutting rates included in previous agreements. Even when an agreement resolved the distortion in rates, exporters lost market share during the period of discrimination, and the process was never-ending. The conditional approach also made broad tariff reductions difficult, if not impossible, to implement.

During the Harding administration, Secretary of State Charles Evans Hughes finally abandoned the use of conditional MFN policy in favor of the unconditional approach. Under Secretary Hughes the United States signed the first unconditional MFN agreement with Germany in December 1923 and converted a number of existing preferential agreements to nondiscriminatory arrangements. But as exorbitant rates—guarded by ardent Republican Senate protectionists—prevailed in the decade that followed, there was little interest in or hope for ratification of trade agreements of any kind. Many agreements with major trading partners, such as Great Britain, continued in the conditional format, and some agreements had no MFN provision at all, as was the case with Canada.

In stark contrast to Hull’s almost religious fervor for an international trading system with reduced barriers and no preferences or discrimination, George Peek saw the reciprocal trade program as an opportunity to sell surplus American products through one-on-one horse trading for national advantage without regard to broader multilateral implications. He urged the President to “return to the traditional realistic policy of conditional most-favored-nation treatment,” charging that Hull’s unconditional MFN policy amounted to “unconditional economic disarmament.” The RTAA provided that duties arrived at under the contemplated agreements and proclaimed under the Act would apply to imports from “all foreign countries” except countries that discriminated against American commerce and Cuba, which

8 Gilbert C. Fite, George N. Peek and the Fight for Farm Parity 276 (1954).
had an established U.S. tariff preference program. This provision appears to have supported Hull’s view, but the language was vague enough for alternative interpretations, especially in view of the Act’s express purpose of “expanding foreign markets for the products of the United States.”

For a period of time, there was some uncertainty as to which approach the President favored after he told a press conference that with most nations having withdrawn into a policy of economic nationalism and self-sufficiency, his best hope for the trade program was “to get some special agreements with different countries... on a barter basis.” In mid-December 1934, Hull received an urgent message that the President had tentatively approved a barter agreement just negotiated by Peek with Germany. Essentially, the agreement provided for the sale of 800,000 bales of cotton under a complicated formula that allowed the Germans to pay one-fourth of the price to the Exim Bank (under Peek’s leadership) in dollars and the remainder in Deutschmarks. The bank would then sell the German currency at a discount to American importers exclusively for the purchase of wine, fertilizer, and other goods from Germany. Under the fiercely nationalistic economic policies implemented by German Chancellor Adolph Hitler and his Minister of Economics and Reichsbank President, Dr. Hjalmar H.G. Schacht, to finance German recovery and rearmament, Germany was entering into a number of these bilateral barter arrangements. Schacht had recently announced that Germany would terminate its unconditional MFN commitment with the United States. Peek’s deal effectively subsidized German exports to the United States, thus discriminating against competing exports from other foreign sources.

Hull was shocked and outraged. He knew that Peek had been negotiating with the Germans but was preoccupied with his own negotiations with Brazil, which he hoped would lead to the first agreement under the RTAA. If the German deal went through, it would stop the Brazilian negotiations in their tracks and potentially destroy Hull’s entire trade program. The actual bilateral trade implications of the potential agreement with Brazil were not significant. To Hull, however, the issue was much bigger than bilateral trade benefits. The US–Brazil agreement—one committed to unconditional MFN treatment with the largest economy in Latin America—would lay the

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9 Sayre, supra note 7, at 205–06.
11 While the first trade agreement concluded after the RTAA was signed into law was a preferential agreement with Cuba, negotiations on that agreement began before Roosevelt sent the trade agreements bill to Congress, and its terms were not part of Hull’s MFN trade program.
cornerstone for his policy in the Americas. It would also make an important statement promoting his goal of ending trade restrictions in a new world economic order. In a seven-to-one vote of the interagency committee approving Hull’s draft proposal for the Brazilian trade agreement, Peek was the lone dissenter. Despite his apparent drift toward Peek’s point of view, the President approved Hull’s draft agreement with Brazil.

When the Brazilian negotiators got word of the deal that Peek was making with the Germans, they submitted a protest to the State Department with a reminder that Brazil was also a major cotton exporter and that they had been stalling a German delegation seeking the same preferential barter with Brazil. If the United States went through with the German agreement, the Brazilians said that they would have to accept their own German offer and defer negotiations with the United States indefinitely. Other countries followed with reprisal threats in reaction to the possibility of American preferential treatment for German imports that were competitive with their own. Chile, for instance, threatened to dump its fertilizer on the American market if it had to in order to compete with the German product shipped under preferential conditions.

Hull met with the President and presented the case that the German agreement posed a devastating threat to the Brazilian negotiations and to all other possible agreements under the Act. He believed that the agreement contravened the RTAA’s provision requiring equality of commercial treatment and that the Act did not contemplate discriminatory barter transactions. The Secretary argued that a deal giving discriminatory market access to German imports was not even necessary to sell American cotton to Germany—a country desperate for cotton. He thought the Germans, who were openly in default on two billion dollars in debt to the United States, were acting in bad faith in seeking a trade agreement with a creditor they had previously snubbed. The agreement was, Hull said, “a very good trade bargain for Germany, but with little gain and large risks for the United States....The proposed plan is almost certain to engender extreme resentment among that large section of the American public which is violently opposed to the Hitler regime.”12 Under the weight of Hull’s argument, affirmed by the support of all of the relevant cabinet secretaries, Roosevelt relented and withdrew his approval of Peek’s agreement.

Most of the national media and economic scholars favored Hull’s policy, derisively referring to the views of his opponent as “Peekonomics.”13 The

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13 FITE, supra note 8, at 279.
Washington Post called Peek’s plan “essentially unworkable” and said Hull’s was on “strong ground” and the only one that offered any expectation of future trade expansion. But Peek had his own political and academic supporters, mainly from the isolationist and protectionist camps. The influential historian and later a prominent isolationist critic of FDR, Charles A. Beard, called Peek “the realist among the administration men engaged on the foreign trade side,” observing that “Peek’s mind does not seem to be encumbered by a thousand exploded economic dogmas that no longer fit the world of reality.”

Peek continued publicly and ruthlessly to disparage the State Department’s trade policies. At an Armistice Day speech, he finally stepped over the line. He declared that the choice for the United States on trade policy and a broad range of other issues was between Americanism and internationalism. “When we Americans choose—let us choose America,” he concluded, implying that the administration was moving in an un-American direction with laissez-faire policies that opened U.S. markets to foreign advantage. The pro-Republican Washington Herald reported on Peek’s speech highlighting the slanted details of the choice with a supporting editorial headlined, “Sane Nationalism or Fatuous Internationalism—Which Shall It Be?”

Roosevelt reacted with a letter to Peek, denouncing his misrepresentations of administration policy, calling the speech “rather silly,” and claiming it sounded “like a Hearst paper.” The President even denounced one point in Peek’s speech as “a deliberate lie.” When Peek offered his resignation, the President promptly accepted. With Peek’s departure, Hull and his trade policy had finally triumphed within the Roosevelt administration.

Hull’s victory over Peek marked a turning point for his trade program, which now embedded internationalism into the economic fabric of the New Deal and signaled the beginning of a revolution in the governance of world trade. With his trade philosophy now predominant and unchallenged within the administration, Hull signed the Brazilian agreement and secured unconditional MFN agreements with eight countries by the end of 1935. But success for his ultimate goals remained far from certain on the road ahead. The Brazil deal drew virulent reaction from American manufacturers of products competing with imports receiving tariff concessions under the

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14 Mr. Hull and Mr. Peek, WASH. POST, Sept. 21, 1934; see also Divided Counsels, supra note 12.
15 FITE, supra note 8, at 279.
16 Id. at 281.
17 Sane Nationalism or Fatuous Internationalism—Which Shall It Be?, WASH. HERALD, Nov. 26, 1935.
18 FITE, supra note 8, at 284–85.
agreement. Prompted by Peek, domestic producers worried about the MFN benefits to third country imports and brought their concerns to Congress where bipartisan criticism began to grow, forcing Hull and Roosevelt to combat this criticism each time the RTAA came up for renewal.

At the same time, countries began lining up to become a part of the American MFN system to get out from under the Smoot-Hawley rates imposed on imports from countries without a nondiscriminatory trade agreement with the United States. Under Hull’s leadership, the trade program, now more than ever, emphasized the broader goal of expanding world trade through a wider application of nondiscriminatory MFN treatment over the promotion of specific bilateral trade objectives. Ironically, in negotiating the development of this system, the strongest foreign opposition force with which Hull and his successors at the State Department contended came from their allies in the Anglo-American special relationship that emerged during the same time period.

To a large extent, Hull based his trade program on nineteenth century British free trade policies, which the U.K. government ultimately abandoned after World War I. Hull’s goals now ran counter to the trade policies that Britain increasingly pursued in the 1930s, including, most importantly, the imperial preference system adopted at the Ottawa Imperial Conference of 1931, which was implemented largely in reaction to the Smoot-Hawley Tariff Act of 1930. The discriminatory preferences created a sterling bloc within the British Commonwealth that effectively denied access to American exports and restricted necessary raw materials otherwise available from the dominions of the Empire.

Trade agreements Britain had recently concluded with Argentina, Germany, Italy, and other countries outside the Commonwealth were strictly designed to balance trade on a purely bilateral, barter basis, thus limiting commerce with other nations and obstructing the expansion of multinational trade. Early in 1936, Hull began lecturing the British Ambassador to Washington, Sir Ronald Lindsay, on the importance of his program to international peace and prosperity. He cited the sacrifice made by the United States of vast quantities of American cotton exports when it rejected the Peek barter arrangement with Germany that was similar to the current British agreements. In addition, he referred to the absence of a barter requirement in the U.S.-Brazil agreement, an approach, Hull noted, that allowed Brazil to use the proceeds from exports to the United States, regardless of bilateral trade balances, to buy U.K. or other nations’ exports and increase multilateral trade. He estimated that there was room for a $20 billion increase in international trade, which could provide employment for twelve
to fourteen million people and “would probably mark the difference between war and peace in Europe in the not distant future.”

The British were not moved by Hull’s sermons, especially as they emanated from a senior official representing a country still maintaining prohibitive tariffs at the world’s highest levels. Opposition to returning to nondiscriminatory trade policies came principally from the British Treasury and Board of Trade, whose senior officials were skeptical of the likelihood that American protectionism would diminish. Neville Chamberlain, then Chancellor of the Exchequer, was the son of the imperialist Member of Parliament Joseph Chamberlain, who as Colonial Secretary at the turn of the twentieth century had led a failed movement promoting imperial preferences and urged an end to British free trade policies. After a difficult period of negotiations, Hull finally reached a modest trade agreement with Britain, which included some minor breaches in the preferential wall around the Empire in November 1938. The effective lifespan of this agreement was short due to Britain’s declaration of war in September 1939, but the issues raised by the imperial preferences lived on as a stumbling block for future U.S.-U.K. negotiations for years.

The nondiscriminatory trade principle came up on important occasions in the development of the special Anglo-American relationship during and after World War II. Dealing with the legal limitations of neutrality imposed by Congress and a cash-short Britain, Roosevelt came up with the Lend-Lease military aid program that did not require Britain to pay for the aid in dollars or loans. Rather, the provisions of the Act authorizing Lend-Lease allowed “payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.” With Hull and the State Department overseeing how the “indirect benefit,” commonly referred to later as “the Consideration,” would be defined after the hostilities ended, this provision would have a huge impact on post-war economic restructuring. Hull immediately seized on the language as leverage to eliminate the Commonwealth’s imperial preferences in future trade negotiations—leverage he did not have in reaching the pre-war bilateral trade agreement with Britain. With this provision in the Lend-Lease Act, the State Department sought to define the Consideration for Lend-Lease aid as a commitment to nondiscriminatory trade practices even though the U.S.-U.K. Mutual Aid Agreement was yet to be negotiated and Congress had not yet approved the $7 billion appropriation to fund the aid.

19 Hull, supra note 12, at 521.
In August 1941, for the first time since each had become head of his respective government, President Roosevelt met with Prime Minister Winston Churchill secretly aboard war ships in Placentia Bay off the coast of Newfoundland in what would become known as the Atlantic Conference. Roosevelt had been planning the meeting for months in order to discuss war aims. It was his intention to issue a joint declaration aimed at educating the American public as to what was at stake in the conflict and to generate public opinion against isolationists in Congress. Churchill also enthusiastically desired the meeting but with a more specific purpose in mind—tying the United States to the war effort. After several days of meetings, the two leaders issued an unsigned joint declaration, later dubbed the “Atlantic Charter,” setting forth the guiding principles “on which they base their hopes for a better future” in the post-war world. While the meeting began molding the intimate personal relationship between the two leaders that became vitally important to the future alliance and prosecution of the war, it also drew attention to the stark differences each leader represented in his historical outlook on world affairs and, in particular, on imperialism. This difference was manifested in the drafting of the provision of the declaration guaranteeing post-war access to equal trade to all nations.

Roosevelt preferred a requirement that access to trade be “without discrimination and on equal terms.” Churchill, however, insisted on language that allowed deference to the Ottawa Agreement preferences, arguing that the nondiscrimination commitment would require convening a conference of the British Commonwealth for approval. This would take time, which neither party had, because Churchill wanted to begin the aid flow as soon as possible and Roosevelt wanted the declaration released promptly to begin using it to mobilize domestic support for his efforts on behalf of the allied cause against Hitler. Against persistent opposition from the State Department (Hull did not attend due health issues), the President finally gave in to Churchill and accepted the following language for the paragraph describing the trade principle:

[The U.S. and the U.K.] will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;22

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Although the principle called for trade to be “on equal terms,” it did not expressly prohibit “discrimination” and included the phrase urged by Churchill, “with due respect for their existing obligations,” a loophole allowing the Ottawa preferences to survive.

On February 23, 1942, the British signed the Mutual Aid Agreement containing the following language in Article VII describing the Consideration for Lend-Lease aid:

In the final determination of the benefits to be provided to the United States of America by the Government of the United Kingdom in return for aid furnished under the Act of Congress of March 11, 1941, the terms and conditions thereof shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of world-wide economic relations. To that end, they shall include provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers; and in general, to the attainment of all the economic objectives set forth in the Joint Declaration made on Aug. 12, 1941 [the Atlantic Charter], by the President of the United States of America and the Prime Minister of the United Kingdom.

In a message sent to Churchill, urging the British Cabinet to approve Article VII, Roosevelt assured them that the United States was not asking for a commitment in advance to abolish Empire preference. This message cleared the logjam blocking settlement of the Lend-Lease aid agreement, but it clouded the meaning of Article VII, which would be a critical element and a source of much friction in postwar trade negotiations. While many in the State Department would persistently cite the provision as a commitment to

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end the discriminatory imperial preferences, the British, equally inaccurately, recorded in their Cabinet minutes that Roosevelt had affirmed that there was no such commitment and that these preferences “should be excluded from our discussions.”

The difficult Anglo-American negotiations over discriminatory trade preferences and MFN did not end when the United States entered the war and the special relationship was enhanced by a military alliance. The tough trade negotiations continued during and after the war, even as the United States came to the financial aid of Britain to alleviate the destruction and depletion of resources caused by the war. Temporary exceptions were allowed in the GATT for reconstruction, development, and the Commonwealth preference arrangements. Yet, despite the objections of the British and other countries seeking preferential arrangements and permanent exceptions from the rules, Cordell Hull and his disciples at the State Department, such as Will Clayton, the first Undersecretary of State for Economic Affairs, infused the nondiscriminatory trade principles in the commercial policy provisions of the GATT. The unconditional MFN principle, requiring nondiscriminatory treatment among all the GATT contracting parties, is firmly established in Article I, the cornerstone of the agreement and now of the WTO. A national treatment standard also required nondiscriminatory treatment between imported and domestically produced goods with respect to internal taxation and regulation. Standards on antidumping and countervailing duties procedures, as well as safeguard measures under the escape clause and other measures, were provided to establish a code of nondiscriminatory practices for the contracting parties.

These principles were not new to the British; their experts had collaborated with the State Department in formulating the Proposals for the failed International Trade Organization (ITO) Charter in 1945. Hull had included similar provisions in trade agreements negotiated under the Reciprocal Trade Agreements Act, and the British had employed nondiscriminatory principles before retreating from free trade after the First World War. The senior experts from the United States and the United Kingdom had collaborated with common objectives in 1942–1943 as they began crafting the outline for a “Commercial Union” and a multilateral trade agreement in pursuit of the economic goals for the post-war world described


in the Atlantic Charter. The devastating impact of the war on the world’s economy, however, made these plans less practicable. Most of the countries participating in the U.N. Preparatory Conferences during 1946–1947 in London and New York, which led to the GATT agreement in Geneva and the ITO talks in Havana in 1948, did so either to avoid being left out of assistance programs such as the Marshall Plan or to avoid being excluded from any trade deal organized by the United States (the country with the largest import market in the world). Few were drawn to these negotiations because they shared, with Hull, Clayton, and the presidents they served, the belief that freer trade under uniform principles of fair-dealing set out in the GATT or the draft ITO Charter would bring economic stability and prosperity to the world and underpin American prosperity. Only the United States had the economic strength and dedicated interest to carry this long-term strategy of building a nondiscriminatory multilateral trading system with such broad goals.

III. THE TRUMP TRADE DOCTRINE

The trade goals of the Trump administration, even as they first emerged during the 2016 presidential election, are much more narrowly focused than the broad strategic goals of the Roosevelt-Truman State Department. As senior policy advisors to the Trump campaign in September 2016, Wilbur Ross, now Secretary of Commerce, and Peter Navarro, an economics professor at the University of California-Irvine business school and currently a senior trade advisor in the White House, issued a report, “Scoring the Trump Economic Plan,” in rebuttal to the conclusion reached in the non-partisan (though conservative “supply-side” analysis) by the Tax Foundation of Trump’s tax plan. The Tax Foundation Report predicted that Trump’s plan would cost $2.6 trillion in revenue losses to the U.S. Treasury. The Ross-Navarro Report called the Tax Foundation Report “incomplete and highly misleading,” because it isolates the tax cuts from revenue offsets they predict will come from Trump’s “synergistic suite of trade, regulatory, and energy policy reforms.”

27 For a more thorough discussion of negotiations of Anglo-American trade negotiations, including the postwar GATT and International Trade Organization negotiations, see Johnson, supra note 4, at 314–402.
On the trade piece, Ross and Navarro argue that Trump’s “tough, smart” negotiators will renegotiate every one of the “poorly negotiated trade deals,” dating “back to at least 1993,” coinciding with presidency of William J. Clinton. Renegotiations would be conducted according to the “Trump Trade Doctrine,” which they defined as ensuring that “any deal must increase the GDP growth rate, decrease the trade deficit, and strengthen the U.S. manufacturing base.” The deals to be renegotiated include not only NAFTA and other regional and bilateral free trade agreements completed under Presidents Clinton, George H.W. Bush, and George W. Bush, but also the multilateral World Trade Organization (WTO) agreements. Ross and Navarro propose that the WTO be amended to favor and give more control to the United States based upon its leverage as the largest importer, third-largest exporter, and currently the largest economy in the world. They boldly forecast that the Trump Trade Doctrine will eliminate the overall U.S. trade deficit of $500 billion, end off-shoring of American jobs, and rebuild America’s manufacturing base. Suffice to say, it will take more than “smart, tough” negotiators to pull off this miraculous trifecta, but they do not stop there with bold predictions.

In addition to the increased revenue they project to be derived from regulatory and energy reforms, the Report predicts that Trump’s trade policies alone will produce $2.44 trillion in revenues to offset the revenue loss from the proposed tax cut. The President called Navarro “a visionary economist” when he selected him to serve as the White House inside guru on trade policy, but more realistic experts would describe this paper as offering only delusions of grandeur.

Navarro explained his approach to eliminating the trade deficit to the Wall Street Journal in terms that would be familiar to the eighteenth century mercantilists and to the Germans during the inter-war years under Hitler’s fiercely nationalistic Minister of Economics H.H.G. Schacht, who negotiated bilateral barter agreements. It is the very approach Secretary of State Cordell Hull fought against in the 1930s when establishing the nondiscriminatory trade program under the RTAA beginning in 1934. “Any country we have significant trade deficit with needs to work with us on a product-by-product and sector-by-sector level,” Navarro declared, “to reduce that deficit over a

30 Id. at 17–18.
31 Id. at 17.
32 Id. at 19.
specified period of time. This simple formula might seem reasonable in a government-controlled, nonmarket economy ruled by National Socialism or communism, but it is less than practical in a market-driven economy. Trade agreements are about balancing the legal rules of trade; they are not intended to change the economics of supply and demand. Navarro, following Trump’s political instincts, seems most interested in trying to exploit the trade deficit for political gain, regardless of its economic relevance to the U.S. economy.

At the end of March, President Trump signed an executive order requiring a “systematic evaluation” of all bilateral trade deficits and all free trade agreements (FTAs), including the North America Free Trade Agreement (NAFTA) and the WTO, to determine the impact of these agreements and whether there have been violations, abuses, and what actions need to be taken with respect to them. The President put Secretary Wilbur Ross in charge of the evaluation, and Ross attempted to explain the project to the press assembled in the White House Briefing Room the day before the signing. Like Navarro, Ross focused on the bilateral trade deficits because that is where the President directed his focus. But of the countries with whom the United States has the top ten largest deficits, only two were involved in United States’ free trade agreements, but all were in the WTO—China ($347 billion), Japan ($69 billion), Germany ($65 billion), Mexico ($63 billion), Ireland ($36 billion), Vietnam ($32 billion), Italy ($28.5 billion), South Korea ($28 billion), and India ($24 billion).

Frankly, Ross showed surprisingly little understanding of the nondiscrimination principle that is a cornerstone of the GATT/WTO system, saying:

\[\text{[T]he President has talked a lot about [reciprocity]; namely if we have a country that has big trade barriers against us, we should logically have similar trade barriers against them. . . . The only problem is, the World Trade Organization has what’s called a “most favored nation clause,” meaning that}\]


of all the countries with whom we do not have a free-trade agreement, we must charge the same tariff on the same item to those . . . countries as we charge to the others. So that’s a significant impediment toward getting to anything like a reciprocal agreement.37

Secretary Ross seems to have missed the point that Secretary of State Hull entered into numerous bilateral agreements based upon reciprocity under the Reciprocal Trade Agreements Act with the MFN clause central to the agreement to ensure that the United States would benefit from future tariff reduction granted by its trading partners. The point he seems to be making here is that he favors returning to the period when discriminatory actions were permissible and trade wars were prevalent. As noted earlier, the Navarro/Ross paper written during the campaign called for fundamental amendments to the WTO agreements based upon the leverage held by the United States as the number one importer in the world, the number three exporter, and with a trade deficit that equals the cumulative surplus of the rest of the world. Citing this leverage again to the press, Ross said, “I wouldn’t dismiss the potential for seeking modification.”38 Although any such amendment seems unlikely, it is a very troubling proposition for those concerned about maintaining the liberal world trade order and the economic stability developed after the Second World War.

IV. LIGHTHIZER AND THE WTO

Statutorily, the central figure on the Trump trade team is the President’s pick to lead USTR, Robert E. Lighthizer, despite the leading role played by Secretary Ross during Lighthizer’s long confirmation process. An affable and highly competent trade lawyer-lobbyist, Lighthizer is arguably the most qualified of any of Trump’s initial cabinet appointees in terms of direct experience and specialized talent. If the president is serious about dismantling the established liberal trade order and replacing it with a nationalistic, protectionist regime armed and ready for the trade wars to follow, he has chosen in Lighthizer a master technician equipped and possibly willing to lead the effort. After a substantial tenure on Capitol Hill as chief counsel and staff director on the Senate Finance Committee under Chairman Bob Dole in the early 1980s, Lighthizer served for several years as

38 Id.
Deputy USTR under President Ronald Reagan. Reagan normally talked like a free trader but often walked like a protectionist with Lighthizer leading the march. At a time when Japan was the most threatening trade ogre to American industry—the role now played by China—Reagan bashed Japan with every protectionist tool in the USTR arsenal.

Much later, in private practice on the protectionist side, Lighthizer testified before the House Ways and Means Trade Subcommittee in 2007 that the United States was being treated unfairly in the WTO dispute settlement system. He called the system “fundamentally flawed” with “rogue” WTO panel and Appellate Body decisions exceeding their mandate and engaging in “judicial activism,” a term no doubt employed to conjure up memories among conservatives of the U.S. Supreme Court under Chief Justice Earl Warren. He charged that these decisions were “gutting our trade laws,” citing two instances where WTO decisions ultimately prompted legislation eliminating U.S. antidumping provisions that had given excessive advantages to U.S. domestic industry. The Manufacturers Alliance for Productivity and Innovation, however, disputed Lighthizer’s analysis with a study showing that over the previous five years the United States had “benefited substantially from its participation in WTO disputes, having prevailed in twice as many disputes as it lost.”

In a March 2008 op-ed piece in the New York Times, Lighthizer scolded the then presumptive Republican presidential nominee Senator John McCain for citing his unbridled support for free trade to “prove his bona fides as a conservative.” Lighthizer correctly noted that conservatives from Alexander Hamilton, who, Lighthizer wrote, “could be considered the founder of American conservatism,” to former Senator Jesse Helms (R-NC) have opposed free trade. President Reagan, “the personification of modern conservatism,” according to Lighthizer, “often broke with free-trade dogma.” From his own experience, Lighthizer reminded McCain that Reagan, despite his “open-markets rhetoric,” restricted imports of automobiles, steel, sugar, textiles, and motorcycles (to protect Harley-

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41 Id. at 116–17.
42 Study Rebuts Claim of U.S. Disadvantage in WTO Dispute Settlement, supra note 39.
44 Id.
Davidson); and Reagan “made Japanese imports more expensive” by forcing Japan to increase the value of the yen.45 Lighthizer declared that free trade is not the mantra of conservatives; it is rather the ideal of “liberal elites,” like Senator Ted Kennedy (D-MA), who embrace it “with a passion that makes Robespierre seem prudent.”46 McCain has a long memory and did not forget this scolding when Lighthizer came up for confirmation nine years later. He and Senator Ben Sasse (R-NE) sent a long public letter to Lighthizer in a similarly scolding tone announcing their opposition to his nomination because of his “vocal advocacy for protectionist shifts in our trade policies, the Administration’s ongoing, incoherent, and inconsistent trade message,” and his “skepticism of NAFTA.” They declared, “America deserves a USTR who will renegotiate NAFTA in order to build on its successes, not as a pretext for unraveling it.”47

Three years after his op-ed on McCain, Lighthizer had better luck when he chose to enter the fray supporting the budding Donald Trump presidential campaign in 2012. In an op-ed in the Washington Times, Lighthizer praised Trump for his anti-China protectionist rhetoric that was then being criticized within the GOP. A potential Trump campaign would at least focus attention on China’s abusive trade practices, Lighthizer predicted, and thus “will have done a service to both the Republican Party and the country.”48 As a top lobbyist for the steel industry and lead counsel for the U.S. Steel Corporation in trade litigation, Lighthizer’s personal views on China and the WTO offered a legalistic version of Trump’s visceral reactions to trade questions.

During the presidency of Barack Obama, Lighthizer admonished USTR for “wringing its hands” with China and urged aggressive and imaginative action to address the U.S.-China trade deficit. The hand-wringing characterization of Obama’s USTR was not substantiated in the record. Obama filed twenty-five WTO cases during his two terms, including sixteen against China,49 all of which that were decided by the end of his second term having been won or settled favorably. The aggressive new actions

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45 Id.
46 Id.
Lighthizer proposed included some that had been rejected by the George W. Bush and Obama administrations as not sanctioned under the GATT/WTO agreements.

Defending the aggressive approach, Lighthizer observed, “WTO commitments are not religious obligations.”\(^{50}\) He argued:

> The point is that an unthinking, simplistic and slavish dedication to the mantra of “WTO-consistency” . . . makes very little sense, and is plainly not dictated by our international obligations. Indeed, derogation may be the only way to force change in the system.\(^{51}\)

At the time he made this statement—seven years before he would become USTR—he stated explicitly, “I am not advocating that the United States leave the WTO system—that body is too important to us and the global trading system.”\(^{52}\) A serious question arises, however, considering his lack of commitment to WTO obligations: Will he be willing to chuck the system that has effectively provided a rules-based, liberal trade order since 1948 now that he is a member of a team determined to upend the political order under the slogan of America First?

With strong bipartisan support, Lighthizer was overwhelmingly confirmed over McCain’s objection.

Even before he was confirmed by the Senate to lead USTR, his influence was obvious in “The President’s 2017 Trade Policy Agenda,” publically submitted to Congress by USTR, as required by statute, on March 1, 2017. This document declares: “It is time for a more aggressive approach. . . . [I]t is time for a new trade policy that defends American sovereignty.”\(^{53}\) The new Trump agenda adopts Lighthizer’s view in the same language he expressed in 2010—that WTO commitments are not “religious obligations.”\(^{54}\) The agenda explains that “if a WTO dispute settlement panel—or the WTO Appellate Body—rules against the United States, such a

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\(^{51}\) Id. at 35.

\(^{52}\) Id. at 33.


\(^{54}\) Evaluating China’s Role in the World Trade Organization Over the Past Decade Before the U.S.–China Econ. and Sec. Review Comm., supra note 50.
ruling does not automatically lead to a change in U.S. law or practice . . . [and] the Trump Administration will aggressively defend American sovereignty over trade policy.55 It promises that the Trump administration “will act aggressively as needed” to combat unfair trade practices through U.S. trade remedies, such as Section 301 of the Trade Act of 1974, “when the WTO adopts interpretations of WTO agreements that undermine the ability of the United States” to employ these remedies.56

I was among the majority of Members of Congress in 1994 who voted for the Uruguay Round implementing legislation that created the WTO and vividly remember insisting with others that the legislation make clear that WTO commitments and dispute decisions would not impact our national sovereignty and would not be binding on federal or state law.57 The WTO dispute settlement system, which is arguably the most effective international legal forum in world history, is based entirely on voluntary participation and compliance. When a decision goes against the United States and would require a legislative change for compliance, Congress can ignore the decision if it so chooses. That was what Congress did when Brazil won a WTO decision holding U.S. cotton subsidies to be in violation of WTO obligations. The winning side is authorized under WTO agreements to retaliate against the offending side by withdrawing trade concessions by, for example, raising tariffs against the member refusing to comply. In an unusual outcome in the Brazil cotton case, the United States ultimately reached a monetary settlement favoring Brazilian farmers and retained the “illegal” subsidies for its cotton farmers.

Since 1995, the WTO has handled over 500 disputes in a manner that has enhanced the rules-based trade system and thus maintained global economic stability. On balance, these WTO decisions have been highly favorable to U.S. interests. Prior to this system, the old GATT dispute process had serious weaknesses that made it less useful in the establishment of trade rules defining unfair trade practices. As I recall as a Ways and Means staff assistant at the time, Congress, responding to this weakness, enacted Section 301 of the Trade Act of 1974 as a mechanism for unilateral enforcement by the United States of fair trade practices. Among the strong motivations for creating a new dispute settlement system under the WTO in the Uruguay Round was the ineffectiveness of the GATT system for settling disputes and the criticisms against unilateral U.S. actions under Section 301. After 1995, Section 301 has continued to be used for certain limited purposes, but

55 Id. at 3.
56 Id. at 4.
expansion of its use as a vigilante-style, unilateral preference over the WTO dispute settlement process (as arguably contemplated under the Lighthizer/Trump agenda) poses serious risks of retaliation and trade wars in a wild-West style environment.

The initial reactions to Trump’s 2017 Trade Agenda following its release have been mixed. Naturally, the traditional protectionists have responded positively. The American Alliance for Manufacturing, a partnership between import-sensitive domestic manufacturers and the United Steelworkers Union, praised it, observing that the WTO dispute system fails to respect “long-standing recognition of the legitimacy of trade remedies.”58 The reaction on Capitol Hill, however, has been wary at best from trade leadership of both Parties. Congressman Richard Neal (D-MA), the ranking Democrat on Ways and Means, agreed that the WTO dispute system deserves some criticism but said: “[I]t sounds like the Administration is considering a far too drastic response. We need to fix the problems with the current international trading system, not scrap the system altogether.”59

Congressman Kevin Brady (R-TX), chairman of Ways and Means, issued a statement agreeing with Trump’s effort to make a better deal for American workers, but defended the WTO:

I strongly believe that our current trade agreements—including the WTO—have been successful for Americans because these agreements establish a firm rule of law to hold our competitors in check and open markets for us to sell our goods, services, and farm products. However, I agree with President Trump that we should improve our trade agreements to make them better serve American workers.60

With this degree of bipartisan support for the WTO in the House, it seems unlikely that the President would dump that organization as he has the Paris Climate Agreement, TPP, and other international agreements. Under the Uruguay Round Agreements Act, any member of the Senate or House may introduce a joint resolution to revoke Congressional approval of the WTO agreements once every five years. Rep. Ron Paul (R-TX) introduced one in 2000; Rep. Paul and Rep. Bernie Sanders (I-VT) tried again in 2005. Neither

59 Id.
resolution got many votes. Embarrassingly to me as a Georgian, however, even though only twenty percent of the House voted in favor of the 2005 resolution, a bipartisan majority of the Georgia delegation voted to revoke the WTO.61 This was clearly a political throwaway vote. Even if the resolution had passed both houses (and the Senate has never even considered such a resolution), every president since the GATT/WTO has existed, except possibly the present one, would have vetoed it, requiring a two-thirds vote in both houses to override. Thus, despite the political rhetoric emanating from the White House, there remains a strong base of political support for the WTO system under the clouds currently hanging over the system.

As the Trump administration enters its second year, however, the threat it presents to the stable trading system created seventy years ago under the persistent ideal of Cordell Hull and the leadership of Roosevelt and Truman is unmistakable.