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As part of its "pause for reflection" on the troubled Doha Round negotiations, the Cordell Hull Institute, along with the Cornell Law School, convened in Paris on July 9-10, 2004, an international roundtable meeting on the "Role of the WTO System in the World Economy".

The meeting was held at the Centre Panthéon, which houses the faculty of law of the Panthéon and Sorbonne universities, across the place from the Panthéon (pictured above).



Reproduced here is a summary of the paper by **Ernst-Ulrich Petersmann** (above), "On Reinforcing WTO Rules in Domestic Laws".

PANTHÉON-SORBONNE MEETING...

## On Reinforcing WTO Rules in Domestic Laws

Ernst-Ulrich Petersmann

A LIBERAL world trading system cannot function properly without a coherent framework of international and national rules that protects the liberty of the individual, limits abuses of power, promotes non-discriminatory conditions of competition and enjoys the support of parliaments, courts and citizens – including legal persons – in the participating countries. Those constitutional elements of the multilateral trading system should hold in the major trading countries that account for the bulk of the world economy. Each of them depends essentially on domestic law.

International rules do not enforce themselves. The world trading system depends for its effectiveness on domestic laws. One of the most significant statutes to have a bearing on the integration of the world economy was the Reciprocal Trade Agreements Act of 1934 in the United States. It was initiated during the Great Depression by Cordell Hull, who was the U.S. Secretary of State from 1933 through 1944 – for most of Franklin D. Roosevelt's long administration. The Act illustrates the importance of domestic legislation in changing the policy-making process and creating the legal foundation of a liberal trade regime.

- Parliamentary authorization to negotiate international trade-liberalizing commitments on a reciprocal and *unconditional* most-favored-nation (MFN) basis, and
- parliamentary "hand-tying" on final approval or disapproval of the agreements reached,

gives incentives for export industries to balance the protectionist pressures of import-competing industries and support reciprocal trade liberalization. Only in that way is it possible to prevent "protectionist log-rolling" – of the kind exhibited in the U.S. Smoot-Hawley Tariff Act of 1930 – from unraveling a liberal and

The full essay will appear in the volume arising from the meeting to be published as John J. Barcelo III and Hugh Corbet (eds), *Rethinking the World Trading System* (2005).

#### About the Author

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Earlier he was counsellor in the Legal Affairs Division at the GATT Secretariat.

#### About the Meeting

Thirty-five senior officials and independent experts, mainly from European countries, participated in the discussion.

The included: **Agnes van Ardenne**, the Netherlands minister for development cooperation; **Herwig Schlägl**, deputy secretary-general of the OECD, Paris; **Pierre Defraigne**, deputy director-general of trade in the European Commission; **Karl-Ernst Brauner**, director-general for foreign economic relations in the German Ministry of Economics; and **Claes Ljungdahl**, deputy director-general for foreign economic relations in the Swedish Ministry of Foreign Affairs; as well as **Olivier Cattaneo**, principal trade policy adviser in the Agence Française de Développement.

Also there were: **José Alfredo Graça Lima**, the Brazilian ambassador to the European Union; **Eduardo Perez Motta**, the Mexican ambassador to the WTO, Geneva; and **Nobuo Tanaka**, director-

non-discriminatory trading system, enhancing consumer welfare at home and abroad.

The rules-based multilateral trading system, founded on the General Agreement on Tariffs and Trade (GATT 1947), came into being in 1948. Since 1995, it has been administered by the World Trade Organization (WTO), which embraces not only the GATT as amended (cited today as the GATT 1994) but also the many other agreements, understandings and decisions reached in the Uruguay Round negotiations of 1986-94.

The full essay, to be published in the volume arising out of the Pantheon-Sorbonne meeting,<sup>1</sup> argues that in order to offer a more effective "constitution of liberty" – promoting open markets, non-discriminatory conditions of competition, democratic legitimacy and social justice – it is necessary for the WTO system to anchor internationally agreed rules more effectively in domestic laws. It is therefore important for the system to be supported through the activities of members of parliaments, through legislatures implementing negotiated agreements and through courts protecting citizens against arbitrary violations of WTO rules.

Although the rules of the multilateral trading system act as constraints on the behavior of governments, legislatures and citizens, including business enterprises, they have been agreed because they were seen at the time to be in the long-term interests of the countries in question. This summary makes the main points in the argument.

The post-World War II paradigm of perceiving inter-governmental organizations as frameworks for bureaucratic bargaining among professional elites is not sustainable from a democratic perspective. This approach needs to be replaced, albeit over time, by more democratic forms of multi-level governance and multi-level constitutionalism. With the rapid integration of the world economy, which has accelerated with the Information Revolution, there is a lack of public understanding of what is happening – giving rise to what some view as "public distrust" of inter-governmental responses. In view of the hegemonic, power-oriented attitude of the United States towards international law, political leadership required to bring about constitutional reforms in the WTO system must largely come from the European Union, given its experience with, and interest in, international economic-integration law and international constitutional democracy.

Yet the basic principles for constitutional reform in the multilateral trading system are based on American constitutionalism. For example, the Congress of the United States appears to control more effectively than the legislatures of most other WTO member countries the mandate, conduct and outcomes of international trade negotiations, including the implementation of agreements. The effectiveness of constitutional, anti-trust and trade laws in the

general of the multilateral trade bureau at Japan's Ministry of Economy, Trade and Industry.

Four members of the Institute's board attended: **Jagdish N. Bhagwati**, of the Council on Foreign Relations, New York; **Hugh Corbet**, the Institute's president; **Lorenz Schomerus**, former state secretary of the German Ministry of Economics; and **John M. Weekes**, former Canadian ambassador to the WTO and onetime chairman of the WTO General Council.

Others who took part were: **Jean-François Bellis**, of Van Bael & Bellis, attorneys-at-law, Brussels; **Joan Boer**, Netherlands ambassador to the OECD; Paris **Larry Bush**, of the Cornell Law School; **Victoria Curzon Price**, of the University of Geneva; **Andreas Freytag**, of the Friedrich Schiller University, Jena; **Otto Th. Genee**, of the Netherlands Ministry of Foreign Affairs; **Bernard Hoekman**, of the World Bank, Washington, DC; **Patrick Messerlin**, of the Fondation Nationale de Sciences Politiques, Paris; **E.U. Petersmann**, of the European University Institute, Florence; **J.F.R. Rollo**, of the University of Sussex, Brighton; **Clive Stanbrook**, of Stanbrook & Hooper, attorneys-at-law, Brussels; **Stefan Tangermann**, of the OECD, Paris; **Bruce Wilson**, of the WTO, Geneva; and **David Woolner**, of the Roosevelt Institute, Hyde Park, NY.



United States rest on the insight that freedom of trade and open competition depend on rules and rules-based coordinating mechanisms – such as market prices – that enable individuals to exercise equal liberties and limit abuses of power. By “equal liberties” are meant legal freedoms to have, acquire, produce and trade resources. And by “abuses of power” are meant monopolization, cartelization and other restraints of competition.

Without rules at both international and national levels, and without effective democratic control and enforcement of those rules in domestic laws, liberty has an inherent tendency to destroy itself through abuses of power (via discriminatory market-access barriers) and distortions of market mechanisms (via, for example, disregard of consumer preferences and consumer welfare).

This paradox of liberty is true for national as well as international, and for economic as well as political markets. Neither economic markets for the private supply of goods and services nor political markets (i.e., democracy) for the collective supply of public goods can properly function without constitutional rules. Such rules are needed to enable citizens to exercise their equal freedoms, participate in democratic decision making, determine market outcomes through demand and supply, limit abuses of power and enforce internationally agreed rules through independent courts in the communities where people live, work and die.

Even though American lawyers and politicians are likely to agree with these principles, they are reluctant to accept the need for worldwide rules of competition and for international constitutional restraints on abuses of trade-policy powers. In the 1940s, the United States exercised historic leadership – inspired by Cordell Hull – in bringing about the United Nations Charter, the Bretton Woods agreements which established the International Monetary Fund (IMF) and the World Bank, and the General Agreement on Tariffs and Trade as the legal basis for an international order aimed at achieving what has subsequently been called “embedded international liberalism”.<sup>2</sup>

By this last is meant the legislative delegation of limited executive powers to negotiate the liberalization of international trade and trade-related investment. Internationally agreed rules, it was believed, would limit abuses of foreign-policy powers and provide for the liberalization of barriers to trade on a reciprocal and *unconditional* most-favored-nation (MFN) basis. The implementation of those rules was left to the discretion of each country that formally agreed to abide by them.

One of the most sobering experiences of the post-World War II period has been the way, to varying degrees, internationally agreed rules have not been implemented effectively by governments. For example, just as many human-rights obligations continue to be disregarded in a large number of countries that

The meeting's opening and concluding sessions took place in historic Cercle de l'Union Interalliée (pictured above in the days of Marshall Foch).

The meeting was jointly convened and chaired by **John J. Barcelo III**, the Cromwell professor of international and comparative law at Cornell University, Ithaca, NY, and **Hugh Corbet**, president of the Cordell Hull Institute.

#### About the Series

The first meetings in the Institute's "pause for reflection" on the Doha Round negotiations were held in Washington, DC, on

- November 14, 2003, on getting the Doha Round negotiations back on track;

- May 28, 2004, on the elements of a "framework agreement" on agriculture, with farm leaders from the United States and Cairns Group countries; and

- June 16, 2004, on the ups and downs of the multilateral trading system since it was established after World War II.

The meetings followed the Institute's four post mortems on the failure of the WTO ministerial conference in Cancun, Mexico, in September 2003.



The **mockingbird** is the state bird of Tennessee. Cordell Hull represented a district of Tennessee in the Congress of the United

States, belong to the United Nations, the GATT prohibition of discriminatory non-tariff measures continues, more than half a century later, to be disregarded in many WTO member countries. In the multi-lateral trading system, non-tariff measures are often defined as devices that can be used to discriminate in favor of domestic suppliers and against foreign ones, thereby distorting international trade and competition.

Today's large number of "failed states", marked by grinding poverty, welfare-reducing policies and gross violations of human rights, has been a consequence of the post-war paradigm of embedded international liberalism. The lesson for public policy is that international trade rules depend for their effectiveness on their implementation in domestic legal systems and, too, on political support for them in democratically elected legislatures. Compliance with internationally agreed rules is still not adequately secured in the domestic legal systems of most WTO countries.

Compared with the GATT 1947, the Marrakesh Agreement of 1994, establishing the World Trade Organization, constitutes a more coherent and more comprehensive framework of rules and administrative organs. The WTO has clear legislative, executive and (quasi)judicial functions. In view of the "constitutional checks and balances" among the various WTO organs, and the explicit obligation of each member country to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements",<sup>3</sup> the Marrakesh Agreement is sometimes likened to an "international trade constitution"

Even so, repeated failures or near failures of the WTO system as a forum for multilateral trade negotiations, and more than 300 dispute-settlement proceedings (as at the end of 2004), has been evidence enough that the constitutional functions of guarantees of freedom, non-discrimination and the rule of law across frontiers cannot be fully effective unless national parliaments, administrations and courts understand, support and comply with the system's rules. If citizens, including legal persons, were allowed to invoke and enforce WTO obligations in domestic courts, many disputes over private interests and issues could be settled in those courts without them being politicized and turned into inter-governmental rows (mini "trade wars"), threatening international relations and frequently resulting – in cases of non-compliance with WTO rulings (arising from dispute-settlement panels) – in international sanctions being imposed.

European and American economic-integration law, and constitutional law in federal states, confirms the historical experience that empowering citizens through legal and judicial protection of individual rights and multi-level constitutionalism offers the most effective way of protecting freedom, non-discrimination, consumer-driven economic markets as well as citizen-driven political markets across frontiers. The full essay discusses in more detail

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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how conflicts between international and national trade rules can best be prevented or overcome.

Following the example of the WTO Agreement on Government Procurement, whose rules can be enforced through domestic courts under Article XX, and of the rights-based approach in the WTO Agreement on Trade-related Intellectual Property Rights, WTO member countries should negotiate additional reciprocal commitments to strengthen the implementation of WTO rules in their respective domestic legal systems. This they could do by incorporating precise and unconditional WTO obligations in domestic legislation and allow adversely affected citizens to enforce, through domestic courts, certain WTO guarantees of freedom and non-discrimination that are violated by their governments.

Such reciprocal commitments could not come about without the legislatures of WTO member countries becoming more involved in inter-governmental rule-making in order to overcome the tendency towards public distrust of internationally agreed rules. Inter-governmental organizations cannot provide for the same forms of direct citizen participation and democratic representation that is common in national democracies. But their "democratic deficits" could be reduced by promoting greater transparency and "deliberative democracy". They could provide members of parliament and "representatives of civil society" with rights to participate in international policy-making processes. This could be pursued through advisory roles that can offer better information and promote more "principled bargaining" in the public interest at international levels. Such parliamentary and advisory bodies exist in many European organizations. They are lacking in almost all worldwide organizations.

The practice in the United States, the European Union and other WTO member countries of preventing their citizens and courts from enforcing WTO obligations *vis-à-vis* domestic government measures reduces, in my view, the effectiveness of WTO rules and leads to widespread public distrust of the way international trade rules are agreed, implemented and enforced.

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<sup>1</sup> John J. Barcelo III and Hugh Corbet (eds), *Rethinking the World Trading System*, forthcoming.

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<sup>2</sup> Cf. John Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism and the Postwar Economic Regimes", in *International Organization*, Cambridge, vol. 36 (1982), pp. 195-232.

<sup>3</sup> Article XVI:4, Marrakesh Agreement Establishing the World Trade Organization, *Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts* (Geneva: World Trade Organization, 1995), p. 6.