

# **SOVEREIGNTY, ECONOMIC AUTONOMY, THE UNITED STATES, AND THE INTERNATIONAL TRADING SYSTEM: REPRESENTATIONS OF A RELATIONSHIP**

Dan Sarooshi<sup>\*</sup>

## **Abstract**

The meaning of the concept of sovereignty is largely contingent upon the text in which it figures. There is no objective concept that is universally applicable and yet it is of foundational importance to the concept of a State and indeed of modern political knowledge. Much of the literature on sovereignty in international legal journals has been devoted to discussing the relationship between sovereignty and international law and organizations and the limitations that are said to flow therefrom for the exercise by the sovereign State of its powers within, and external to, its territory. This approach to sovereignty, as being mainly concerned with the locus of the exercise of powers of government, featured largely in debates in the US Congress when deciding whether the US should accept and implement the results of the Uruguay Round of trade negotiations. The approach of this article, however, is different: it conceptualises sovereignty as an essentially contestable concept - with a normative character and value content - and then goes on to consider what implications this conceptual approach has for the issue of the US relationship to the international trading system. A specific focus of enquiry is the controversial US value of economic autonomy - *in casu*, the capacity of corporations and States to make independent decisions about their respective economic futures - and a consideration of the extent to which US contestations of sovereignty within the GATT, the WTO, and also within its domestic legal and political system can be viewed as a contestation or even projection internationally of this value.

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<sup>\*</sup> Professor of Public International Law, Faculty of Law, University of Oxford; Fellow, The Queen's College, Oxford; and Member, WTO Dispute Settlement List of Panellists. The author wishes to thank Christopher Johns (Oxford BCL, 2004) for his research assistance.

# 1 Introduction

The meaning of the concept of sovereignty is largely contingent upon the text in which it figures. There is no objective concept that is universally applicable and yet it is of foundational importance to the concept of a State and indeed of modern political knowledge. Much of the literature on sovereignty in international legal journals has been devoted to discussing the relationship between sovereignty and international law and organizations and the limitations that are said to flow therefrom for the exercise by the sovereign State of its powers within, and external to, its territory. This approach to sovereignty, as being mainly concerned with the locus of powers of government, featured largely in debates in the US Congress when deciding whether the US should accept and implement the results of the Uruguay Round of trade negotiations.<sup>1</sup> The general approach adopted herein to sovereignty is different: it is not restricted to a discussion of where the locus of final decision-making power relating to aspects of economic policy should lie. Our focus instead is to approach sovereignty as an essentially contestable concept and to consider what implications this has for the issue of the US relationship to the international trading system.<sup>2</sup> To understand sovereignty as an essentially contestable concept does not mean, as we shall see, that the concept lacks value content or that it does not possess an important normative character. In fact, our analysis focuses on examining the value of economic autonomy<sup>3</sup> and considering to what extent US contestations of sovereignty within the GATT, now the WTO, and also within its domestic legal and political system can be viewed as a contestation of this value.<sup>4</sup>

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<sup>1</sup> See J. Jackson, 'The Great 1994 Sovereignty Debate: United States acceptance and implementation of the Uruguay Round results', in J. Jackson, *The Jurisprudence of GATT and the WTO* (2000) 367; and P. Mundo, *National Politics in a Global Economy: The Domestic Sources of US Trade Policy* (1999) 137.

<sup>2</sup> It is not possible in an article to conduct a comprehensive examination more generally of the US relationship to the international trading system. For a recent review of US trade policy, see the 2004 WTO Trade Policy Review of the US, Minutes of the Trade Policy Review Body Meeting, WT/TPR/M/126/Add.2, 25 March 2004; Report of the WTO Secretariat, WT/TPR/S/126, 17 December 2003; and Report by the US Government, WT/TPR/G/126, 17 December 2003 (all documents available at: [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp\\_rep\\_e.htm#us2004](http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#us2004))

<sup>3</sup> On what is meant by 'economic autonomy', see *infra* Section 3.

<sup>4</sup> It should be emphasized that this approach does not, of course, purport to provide a general explanation or rationale for US action in relation to the international trading system.

Moreover, this reliance on the value of economic autonomy as a constitutive value of the US conception of sovereignty *does not mean* that the WTO is an appropriate forum for the balancing of both trade and non-trade values (such as human rights). This type of different approach, advocated by Petersmann, presupposes that human rights and liberal trading rules (including WTO rules) are based on the same values. See, for example, E-U. Petersmann, 'The WTO Constitution and Human Rights', 3 *Journal of International Economic Law* (2000) 19; and E-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *EJIL* (2002) 621. This approach by Petersmann has, however, attracted considerable criticism: see, for example, P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 (4) *EJIL* (2002) 815; R. Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime', 96 *AJIL* (2002) 94 at 105; and R. Howse and K. Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far', in R. Porter, P. Sauvé, A. Subramanian, and A. Zampetti (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001) 227; and cf. in response, E-U. Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', 13 (4) *EJIL* (2002) 845.

## 2 Sovereignty as an Essentially Contestable Concept

Stephen Krasner has provided a useful typology of the concept of sovereignty, and yet there are still different ways of approaching, giving content to, and using the concept. In addition to domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty,<sup>5</sup> the concept of sovereignty, as the ultimate and supreme power of decision, can be both analyzed and qualified from the perspective of what can be called its ‘contestable elements’: such elements as legal *v.* political sovereignty, external *v.* internal sovereignty, indivisible *v.* divisible sovereignty, and governmental *v.* popular sovereignty.<sup>6</sup> These elements of sovereignty have always been contested and the outcome of these contests at a particular point in time have established where sovereignty can be said to rest on a number of different spectra where these contestable elements represent points of extremity. However the specific locus of decision-making power resulting from these contestations throughout history is almost secondary to the importance of the essentially contestable nature of sovereignty as a concept. I am using here the notion of an essentially contestable concept as it is used in the philosophy of language. Besson provides a useful meaning of this notion when she states: ‘[an essentially contestable concept] is a concept that not only expresses a normative standard or one or many values and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept itself is. It is the concept’s nature not only to be contested, but to be contestable in its essence, so that not only its applications, but its core criteria are contestable.’<sup>7</sup> This is central to sovereignty’s contribution: that the very existence of the concept generates arguments as to its core criteria: Are there conditions for the existence and application of sovereignty? Who should exercise sovereignty? What form should these entities take, what values should they seek to promote in the exercise of sovereignty, and how are these values to be reconciled in the case of conflict? Does the application of these values provide a means for determining, for example, the allocation of decision-making power between the local, national, and international planes? These are but a few of the questions that the essentially contestable nature of sovereignty raise and will continue to raise. As such, the concept of sovereignty assists in the continual redefinition by societies and States of who and what they are, and, moreover, identifies and even promotes loyalty to new forms of political, social,

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<sup>5</sup> S. Krasner, *Sovereignty: Organized Hypocrisy* (1999) 9.

<sup>6</sup> S. Besson, ‘Sovereignty in Conflict: Post-sovereignty or mere change of paradigms?’, in S. Tierney and C. Warbrick (eds.), *The Sovereignty of States and the Sovereignty of International Law* (forthcoming: 2004), 2.2.1.

<sup>7</sup> Besson, *ibidem*, 3. See also on essentially contestable concepts, for example, J. Gray, ‘On the Contestability of Social and Political Concepts’, 5 *Political Theory* (1977) 331, and W. Connolly, *The Terms of Political Discourse* (1993, 3<sup>rd</sup> ed.) 10 *et sequentia*.

and legal structures as they emerge over time. This understanding of the concept's role provides a cogent counter-argument<sup>8</sup> against those who advocate its abolition.<sup>9</sup>

The essentially contestable nature of sovereignty does not mean that as a concept it is purely descriptive and lacks a normative element. As Besson observes more generally:

'As a normative concept, the concept of sovereignty expresses and incorporates one or many values that it seeks to implement in practice; these values are, among others, democracy, human rights, equality and self-determination. Concept determination amounts therefore to more than a mere description of the concept's core application criteria; it implies an evaluation of a state of affairs on the basis of sovereignty's incorporated values. Despite the rhetoric that currently dominates political and legal analysis, the clarity of central political concepts like sovereignty therefore remains a myth. What lies behind the *prima facie* categorical use of these concepts are not facts that should be established, but conceptions and interpretations that should be evaluated and maybe amended in order to account better for the values encompassed by these concepts.'<sup>10</sup>

Whereas an early starting point for the concept of sovereignty focused only on paradigms involving the formulation and application of such statal values as exclusive control by a State of its territory and non-intervention in the internal affairs of other States. Today, through a process of contestation,<sup>11</sup> the concept in the Western liberal tradition has arguably been broadened both to include other actors and also to contain values such as legitimacy, autonomy, freedom, accountability, security, and equality that are core to a modern conception. This is not a static, exhaustive,<sup>12</sup> and some may even say accurate, list and indeed based on what I have said earlier it could not be: it is continually subject to contestation and change.

The point is though that these, or indeed other, values do provide sovereignty with a normative character which can be used to evaluate a state of affairs within a society<sup>13</sup> or, in our case of an international organization such as the WTO, between societies. This does raise a potential problem though for the internationalist, since so long as different societies possess differing approaches to these core values of sovereignty then a truly shared sense of sovereignty – and the ability and legitimacy of an international organization to exercise sovereign powers – becomes problematic.<sup>14</sup> But, to reiterate,

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<sup>8</sup> Another argument in favor of retaining the concept of sovereignty is because of its important role in the management of inequality between States, see B. Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599.

<sup>9</sup> Cf. N. MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review* (1993) 1.

<sup>10</sup> Besson, *supra* n.6, 3-4.

<sup>11</sup> On the history of contestation of conceptions of sovereignty, see, for example, J. Bartelson, *A Genealogy of Sovereignty* (1995); G. Schwarzenberger, *Power Politics: A Study of International Society* (1951) Chapters 3-5; and D. Philpott, 'Sovereignty', in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2003 Edition), available at <http://plato.stanford.edu/archives/sum2003/entries/sovereignty/>.

<sup>12</sup> For example, Joseph Weiler contends in the context of the EU that as a construct the EU does not presuppose the supreme authority and sovereignty of a single constitutional *demos*, but instead the value - what I would call sovereign value - of 'constitutional tolerance': see J. Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg', in K. Nicolaidis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001) Chapter 2.

<sup>13</sup> Besson, *supra* n.6, 2.

<sup>14</sup> But maybe this is to overstate the actual position, since there would seem to be identifiable commonalities that exist within 'world culture': Katzenstein, Keohane, and Krasner cite work by sociologists, led by John Meyer, who have demonstrated a

it is precisely the stimulation of this debate that is the vital, and indeed unique, contribution that the existence of the concept of sovereignty makes.

This process of contestation of sovereignty involves, in almost circular fashion, a set of ontological decisions. The first is ethical: deciding who *We* are: who is a friend, who is an enemy, and who is a stranger.<sup>15</sup> The other is metahistorical: where *We* came from, how *We* became friends, how *We* got here, where *We* are, and where *We* are going in the future.<sup>16</sup> It is obvious as such that the concept of sovereignty is inextricably intertwined with identity and history. But to put the point differently, the essentially contestable nature of the concept of sovereignty means that it continually generates discussion on, and contributes to the formulation, formation, and identification with, the concept of a community. History is replete with decisions that give identity to the *We* as opposed to the *Other* by focusing on geographical or other perceived differences between parts of humanity based on such factors as ethnicity, language, tribe, and even, it must be said with a degree of ironic circularity, nationality. Is it possible that the next stage of contestations of sovereignty may, ontologically, focus on the constitution of a community based on the extent to which different persons accept and apply values as opposed to differences based on, for example, tribe, ethnicity, and nationality? And the next question is can international organizations provide such a forum for the contestation and formulation of such values?

This leads to the central claim being advanced in this section: that the very existence of international organizations, such as the WTO, performs an important ontological function since these organizations provide a forum, transcendental to the State, where conceptions of sovereignty – and more specifically the content of sovereign values – can be contested on the international plane.<sup>17</sup> This is, moreover, arguably a positive development since simply transposing domestic conceptions of sovereignty onto the international plane is not always appropriate and indeed on the international plane the value may be developed more extensively than is possible at the national level.<sup>18</sup>

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large degree of similarity in formal national practices relating to issues as diverse as censuses, social security, education, and science despite significant variations in national socio-economic and ideological characteristics. (P. Katzenstein, R. Keohane, and S. Krasner, *International Organization at Its Golden Anniversary*, in P. Katzenstein, R. Keohane, and S. Krasner (eds.), (1999) 1 at 35.) See also R. Goodman and D. Jinks, 'Toward an Institutional Theory of Sovereignty', 55 *Stanford Law Review* (2003) 1749 at 1752-1753.

<sup>15</sup> J. Bartelson, *A Genealogy of Sovereignty* (1995) 6.

<sup>16</sup> *Ibidem*, 6.

<sup>17</sup> It should be made clear that this emphasis on the essentially contestable nature of sovereignty does not discredit realist explanations. To the contrary, in the process of contesting conceptions of sovereignty on the international plane it is likely that more powerful States will be able to project their approach to specific values to a much greater degree than will less powerful States. Consider, for example, the US projection of the value of economic autonomy: see *infra* Section 5.

Cf. Chimni who disputes the extent to which, if at all, there is widespread participation by States in the contestation of values within the WTO (B. Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15(1) *EJIL* (2004) 1 at 20); while Howse calls for greater participation by stakeholder representatives/NGOs in the negotiating processes of the WTO (R. Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime', 96 *AJIL* (2002) 94 at 116-117.)

<sup>18</sup> As, for example, Nicolaidis and Lacroix contend in relation to the pursuit of justice by the EU: 'It [the EU] can aspire to be more democratic and just than its nations of origin, working as it were from a blank slate or at least a slate where the weight of

In the case of the WTO this has been taken further by the provision of a dispute settlement system where WTO panels and the Appellate Body have in practice been given the authority to render interpretations of the WTO Agreements that bind Member States. These decisions represent in substance a determination by the Panels and Appellate Body of the values that underlie and inform the WTO and its Agreements. However, even here these decisions remain at a political level subject to contestation within the WTO<sup>19</sup> and also within its Member States. A good example of the latter is provided by the approach of the US Congress to the WTO dispute settlement system: that it is only the US Congress that can decide how it will, if at all, change US law to comply with a specific panel or Appellate Body decision in a case.<sup>20</sup> This approach in turn illustrates an aspect of the value of ‘economic autonomy’ that the US, through a process of contestation, is seeking both (i) to project internationally through the WTO, and (ii) to ensure the maintenance of with respect to its own relationship with the WTO and its Member States. By ‘economic autonomy’ is meant the capacity of an entity to make independent decisions about one’s economic future. This value of economic autonomy arguably has two aspects that influence US governmental action in relation to the international trading system: corporate economic autonomy and nation-State economic autonomy.

### 3 Economic Autonomy as a Value of Sovereignty

There is considerable controversy over the extent to which corporate economic autonomy should be guaranteed in a modern economy. There is broad acceptance of a general macro-economic position that espouses the importance of the free market in achieving competitiveness and, so the argument runs, generating maximum productivity and economic growth within an economy. Within this general approach, however, there can be said to exist a spectrum of more specific approaches. At one end of the spectrum is a complete *laissez faire* approach that dictates little or no government intervention in the market in order to ensure that the government does not answer the basic economic questions – such as what is to be produced, how is it to be produced, how much is produced, and for whom is it to be produced. At the other end of our spectrum is an approach that places considerable emphasis on

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national decisions may come to cancel each other.’ (K. Nicolaidis and J. Lacroix, ‘Order and Justice Beyond the Nation State: Europe’s Competing Paradigms’, in R. Foot, J. Gaddis, and A. Hurrell (eds.), *Order and Justice in International Relations* (2003) 125 at 137.)

<sup>19</sup> Consider, for example, the *de facto* change in approach by the Appellate Body in the *Asbestos* case as compared to that in the *Shrimp-Turtle* case over the *amicus curiae* issue in response to significant dissent voiced by developing country Member States in the WTO General Council: see more generally P. Mavroidis, ‘*Amicus Curiae* Briefs Before The WTO: Much Ado About Nothing’, 2 *Jean Monnet Working Paper* (2001), available at: <http://www.jeanmonnetprogram.org/papers/01/010201.rtf>. This opposition by developing country Members to *amicus curiae* briefs has continued more recently in response to US and EC proposals to reform the DSU and provide a framework for the submission of such briefs before WTO panels and the Appellate Body: see D. Sarooshi, ‘Reform of the World Trade Organisation Dispute Settlement Understanding’ in I. Mbirimi, B. Chilala, and R. Grynberg (eds.), *From Doha to Cancun: Delivering a Development Round* (2003) 105.

<sup>20</sup> See *infra* nn.101-102 and corresponding text.

preventing market externalities (such as corporate scandals and pensions scheme difficulties) and as such mandates the importance of the market – and for our purposes corporations – operating within a significant institutional, or at least regulatory, framework. Where a country like the US can be said to lie on this spectrum at a particular point in time will of course depend largely on the approach of a particular Executive and Congress.<sup>21</sup> As a general matter, however, the US can be said to have embraced to a considerable degree corporate economic autonomy as a value with the consequence that successive US governments have sought to maintain low levels of taxation and minimal levels of regulation of corporate actors.<sup>22</sup> This approach is, moreover, clearly evidenced by the US expressly rejecting the use of an industrial policy within its economy in order to minimize the level of governmental intervention within the US market.<sup>23</sup>

The acceptance and implementation in practice by the US of this value of corporate economic autonomy<sup>24</sup> has important implications for the multilateral trading system. Where other States do not,

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<sup>21</sup> As, for example, Howse states: '[At the end of the 1970s] came the economic conservative revolution (exemplified by Thatcher and Reagan at the level of political leadership), and with it a radically different outlook on the problems that ailed the multilateral trading system, and their solution. The problem was, at least for the United States, no longer framed in terms of the adequacy of the scope for adjustment under the existing rules of the game. In fact, the normative basis for interventionist adjustment policies was put in question by the moral laissez-faire outlook of the ascendant economic neo-Right, aided and abetted by public choice accounts of interventionism as the payment of rents to concentrated, entrenched constituencies. It was natural, then, in defining the U.S. interest in rewriting the rules of the game for multilateral trade, to focus on interventionist or otherwise "inappropriate" domestic policies in other countries as barriers to market access for the United States in areas in which it had a competitive disadvantage.' (R. Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime', 96 *AJIL* (2002) 94 at 101.)

<sup>22</sup> See C. Molyneux, *Domestic Structures and International Trade: The Unfair Trade Instruments of the United States and European Union* (2001) 42.

<sup>23</sup> See, for example, Molyneux, *ibidem*, 49-50.

<sup>24</sup> This does not mean, however, that the Executive and Congress have not intervened on a large number of occasions within the US market to protect domestic producers. For example, Congress bowed to increasing pressure in the 1970s from special interest groups to afford protection to domestic industries, especially the steel and auto industries, which sought protection from imports and support for their export markets. In the case, for example, of US steel producers, they sought and received government protection initially in the form of Voluntary Export Restraint Agreements ('VERs') concluded with first Japanese and European industries, and then Swedish and EC producers. These VERs had the effect of limiting imports of specialty steel into the US. More recently, however, President Bush introduced in 2002 a number of safeguard measures to afford protection to the US steel industry, see *infra* n.62.

Economists have analyzed this protection afforded the US steel industry and found, interestingly, that the firms that lobbied more were generally less competitive, larger, less diversified, and their executives got paid more than others in the industry. (S. Lenway, R. Morck, and B. Young, 'Rent Seeking, Protectionism, and Innovation in the American Steel Industry', 106 *The Economic Journal* (March 1996) 410.) The same study found that the restructuring that took place in the steel industry saw more innovative firms leave the industry more than firms that lobby more. (*Ibidem*.) As such, it has been argued that protection decreased innovation in the US steel industry rather than having increased it. (Mundo, *supra* n.1, 241.) This of course seems a logical outcome of protectionism: why spend resources introducing disruptive changes to production methods when a significantly less amount of resources can be spent on lobbying government for protection that will help redress the competitive balance of the domestic industry. What is problematic for the US as a consequence of the US steel industry's relative success in obtaining protection for several decades was that not only did it encourage the steel industry's dependence on government protection, but it encouraged other industries – and if the economists are to be believed it will largely be those who are less internationally competitive – that they too could pursue the adoption of protectionist policies as a buffer from foreign competitors. Some economists, however, suggest in the alternative that steel VERs played an important role in the industry being able to adjust to the new competitive environment by giving time to the integrated mills to improve wages, investment, and productivity. A study conducted by the US Economic Strategy Institute ('ESI') pointed to significant expenditures in the 1980s on new equipment, coupled with new agreements with the labor unions, as the major sources of a significant improvement in the industry's competitive position. (L. Chimérine, A. Tonelson, K. von Schrititz, and G. Stanko, *Can the Phoenix Survive? The Fall and Rise of the American Steel Industry* (1994) 64.)

according to the US, guarantee in practice this value, at least to a certain degree, within their economies then the US has taken measures – often on a unilateral basis – to ensure that US firms are not being prejudiced by the lack of a US industrial policy while other States do pursue such a policy conferring thereby an ‘unfair’ benefit on their firms. It is precisely in order to ensure US competitiveness in global markets that the US has sought to project through the multilateral trading system its approach of government non-intervention in the market (based on the value of corporate economic autonomy) as a foundational principle on which the system is to be based. This projection of corporate economic autonomy is particularly well-illustrated by the US approach to the issue of government subsidization first through the GATT and more recently through the WTO; an issue considered below in more detail.<sup>25</sup>

Turning now to our second aspect of economic autonomy, that of the nation-State, the claim being made here is that *one of the ways* of understanding why the US strives to maintain to a considerable degree this type of autonomy is precisely to ensure that it can project internationally its value of corporate economic autonomy. In this way the values of corporate economic autonomy and nation-State economy autonomy are inextricably linked.<sup>26</sup> It is this understanding which provides insight into the contradictory practice of the US in contesting this value of economic autonomy of the nation-State within first GATT 1947 and more recently within the WTO. The US has sought to retain a very considerable degree of autonomy in making decisions on trade both in terms of its international trading position but especially in relation to its own domestic trade law and practice;<sup>27</sup> while on the other hand the US has sought to use first the GATT and now the WTO to require other States to

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From amongst the voluminous literature on US government protection of its steel producers, see, for example, D. Beane, *The United States and GATT: A Relational Survey* (2000) 213; Mundo, *supra* n.1, 233-239; and H. Prechel, ‘Steel and the State: Industry Politics and Business Policy Formation, 1940-1989’, 55 *American Sociological Review* (1990) 648 at 656. For analysis more generally of how and why US industry preferences and strategies for protection change over time, see O. Hathaway, ‘Positive Feedback: The Impact of Trade Liberalization on Industry Demands for Protection’, 52 (3) *International Organization* (1998) 575.

<sup>25</sup> See *infra* nn.51-61 and corresponding text.

<sup>26</sup> This provides at least in part an explanation for the dichotomy in approach that lies at the heart of the US role in leading international efforts to liberalize trade.

On the one hand the US Executive has, historically, been the most important actor in international efforts to liberalize trade and to establish an international organization to further the process of trade liberalization. (See C. Wilcox, *The American Trade Program: What Do We Have At Stake?* (US Department of State Publication 2758, 1947.) The very structure of the GATT was modeled on US trade agreements negotiated in the decade after 1935: a schedule of tariff reductions ensconced within a broader agreement detailing obligations relating to such non-tariff trade restrictive measures as quantitative restrictions, discriminatory national tax treatment, onerous import technicalities, and discriminatory trade preferences for other States. (R. Hudec, *Essays on the Nature of International Trade Law* (1999) 19.) For a comprehensive account of the deliberations on the ITO and in particular on the US contribution see Hudec, *ibidem*, 25 *et sequentia*; and on the role of US internal political processes in forming the approach of the US Government towards the ITO, see S. Ariel Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (1996).

And yet, on the other hand, the US Congress has enacted protectionist legislation and, for a long time, sought to resist the establishment of an organization with binding powers in relation to trade liberalization: see Beane, *supra* n.24, 253-254.

<sup>27</sup> See, for example, T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1994)*, Vol.I, 862, and the controversial (unlawful) approach suggested by Cunningham and Crib who state that ‘in the rare case the United States believes a Panel or the AB [Appellate Body] clearly exceeded its authority on a truly important issue ... the only way to send a shot across the bow may be to openly disagree with the WTO and to offer a thorough explanation of that disagreement.’ (R. Cunningham and T.



change their international trading arrangements and more specifically their domestic trade regimes. The US has always been open about pursuing within its own domestic legal order protectionist policies on an *ad hoc* basis as are necessary, in its view,<sup>28</sup> to respond to what it perceives to be unfair trade advantages being gained by foreign producers as a consequence of foreign government action<sup>29</sup> in, for example, the case of subsidies or lack of effective foreign government action in the case of predatory pricing by foreign firms.<sup>30</sup> This US resort to *ad hoc* protectionism is not any worse than other States,<sup>31</sup> but the point is that it is not any better. Put differently, the US has not led by example in the projection internationally of the value of corporate economic autonomy (a value which other States do not so openly espouse), but by persuasion and in some cases economic coercion. But in a country such as the US where special interest groups have access and considerable influence<sup>32</sup> over legislators, some may argue that as a matter of design such an outcome may be inevitable. This brings us to a discussion of the contestation of economic sovereignty within the US, the contours of which are important when seeking to understand US contestation of the value of economic autonomy within first the GATT and now the WTO.

#### **4 The Contestation of Economic Sovereignty within the US: the Congress-Executive Relationship and Trade Policy Control**

There is in practice an uneasy power-sharing arrangement between the President and Congress in the control and conduct of trade policy on both the national and international planes.<sup>33</sup> The reason for this is that while Congress has under Article I of the Constitution absolute and plenary powers to regulate

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Cribb, 'Dispute Settlement Through the Lens of "Free Flow of Trade": A Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures', 6 (1) *JIEL* (2003) 155 at 170.

<sup>28</sup> Cf. the difficulty this poses to the US under the WTO Agreements: see *infra* nn.86-93 and corresponding text.

<sup>29</sup> See Molyneux, *supra* n.22, 31-32.

<sup>30</sup> As Molyneux states: 'Between 1980 and 1999, the United States initiated 315 countervailing duty procedures and 784 anti-dumping investigations. Its trade protectionist policy was further strengthened by the use of Section 301 as an export protectionist instrument. The [European] Community would also follow the same policy. ... From 1980 to 1999 the Commission initiated more than seven hundred and fifteen anti-dumping and countervailing duty cases.' (*Ibidem*, 31-32.)

<sup>31</sup> Cf. the case of the EC in using 'unfair trade' instruments: *ibidem*.

<sup>32</sup> Baldwin and Magee, for example, conclude that campaign contributions influenced US legislators' votes on the NAFTA and Uruguay Round bills. They state: 'The major conclusion of this study is that political contributions to legislators by organized labor and business groups significantly affected the voting outcome on two (NAFTA and GATT) of the three trade bills analyzed. We estimate that labor contributions or access to legislators gained through these contributions resulted in 67 extra votes against NAFTA and 57 extra votes against the GATT Uruguay Round bill. Contributions from business groups resulted in 41 extra votes in favor of NAFTA and 35 extra votes for the GATT bill. ... We estimate the price for labor groups to sway one vote against NAFTA and GATT to be about \$352, 000 and \$313, 000 respectively. ... We interpret these various results as evidence that legislators are responding on trade legislation to the economic and social concerns of their constituencies as well as to the wishes of their major contributors.' (R. Baldwin and C. Magee, 'Is trade policy for sale? Congressional voting on recent trade bills', 105 *Public Choice* (2000) 79 at 99.)

<sup>33</sup> As David Leebron states: 'While the President (or his delegate) is the exclusive representative of the United States in international dealings, Congress must generally approve or implement any agreements which touch on its legislative powers.' (D.

foreign trade, these powers are, however, balanced by Article II of the Constitution which confers on the President the power to conduct foreign relations including the foreign commerce of the United States.

The beginning of the last Century saw Congress as the main arm of government exercising trade policy powers, but there was then a marked shift in power towards the Executive that occurred after the disastrous Congressional experience with its 1930 Smoot-Hawley legislation which raised significantly overall US tariff levels in response to special interest representations.<sup>34</sup> This action led to other States raising their tariff barriers with the consequence that world trade stagnated.<sup>35</sup> This experience saw Congress delegate to the Executive – by the 1934 Reciprocal Trade Agreements Act (RTAA) – the power to manage and set trade policy, primarily tariff-levels.<sup>36</sup> The RTAA was used to good effect by the Executive and between 1934 and 1945 the US entered into 32 bilateral trade agreements with 27 countries, granting tariff concessions on 64% of dutiable imports and reducing tariff rates to an average of 44%.<sup>37</sup> Congress in the early years of the RTAA did not insist on approving these trade agreements, but it did make the grant of negotiating authority to the Executive temporary: the RTAA needed to be renewed by legislation every 3 years, the need for this renewal process continuing until the 1960s.<sup>38</sup> This new power and prestige given to the Executive came at a very considerable cost: the President now bore responsibility for trade policy. This has allowed Congress to shift politically sensitive trade policy demands onto the President, and this has been accompanied by Congress continually seeking to direct and constrain the Executive in the way that it exercises trade policy powers.

The 1962 Trade Expansion Act marked the first significant attempt by Congress to control the Executive in the exercise of trade policy powers. Many members of Congress viewed the State Department as insufficiently engaged or concerned with domestic economic interests in order to negotiate trade issues on behalf of the US, and so Congress created the position of Special Representative for Trade Negotiations (the predecessor to the Office of the Special Representative for Trade Negotiations which was later transformed into the US Trade Representative) to be the chief US

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Leebron, 'Implementation of the Uruguay Round Results in the United States', in J. Jackson and A. Sykes (eds.), *Implementing the Uruguay Round* (1997) 175 at 177.)

<sup>34</sup> See P. Low, *Trading Free: The GATT and US Trade Policy* (1993) 53-54.

<sup>35</sup> As Destler states: 'for the United States, imports dropped from \$4.40 billion in 1929 to \$1.45 billion in 1933, and exports plunged even more: from \$5.16 billion to \$1.65 billion'. (I. Destler, *American Trade Politics* (1992, 2<sup>nd</sup> ed.) 11.)

<sup>36</sup> See J. Jackson, 'The General Agreement on Tariffs and Trade in United States domestic law', in J. Jackson, *The Jurisprudence of GATT and the WTO* (2000) 195 at 199.

<sup>37</sup> Beane, *supra* n.24, 177-178.

<sup>38</sup> In the late 1940s and throughout the 1950s, Congress kept the Executive on a tight leash only renewing the RTAA on a one or two year basis (1948, 1951, 1953, 1954, 1955, 1958, and 1962). (Beane, *supra* n.24, 187.) This, unsurprisingly, constrained the Executive's ability to negotiate in the GATT rounds on tariff reductions during this period. (*Ibidem.*) Nonetheless, the renewed RTAA was the basis for the President to negotiate on behalf of the US in the first four GATT trade rounds. It was only in 1962 that Congress adopted the Trade Expansion Act which for the first time specifically authorized 'GATT' negotiations. It was also the first time that Congress gave express official recognition to the GATT and accepted its role in the trading regime.

representative in international trade negotiations.<sup>39</sup> Moreover, the 1962 Act required that two representatives drawn from both the House of Representatives and the Senate be accredited as members of US trade delegations in an attempt to ensure greater Congressional control and participation in trade negotiations.<sup>40</sup>

A significant point of conflict emerged in the Congress-Executive relationship when during the Kennedy Round the Executive negotiated and accepted an International Anti-Dumping Code which involved, *inter alia*, modification of the US method of determining customs valuation.<sup>41</sup> Congress considered that the Executive had, in accepting this Code, exceeded its negotiating authority, and in 1968 enacted a Statute providing that nothing contained in the International Antidumping Code shall be construed to restrict the discretion of the US International Trade Commission in performing its duties and functions under the Antidumping Act of 1921, and, moreover, that in performing their duties and functions under the Act, the Secretary of the Treasury and the Commission shall (i) resolve any conflict between the Code and the Act in favor of the Act, and (ii) take into account the provisions of the Code only insofar as they are consistent with the Act.<sup>42</sup> It was not until 1979 with the end of the Tokyo Round that the US Congress accepted a slightly changed international agreement on anti-dumping. The refusal by Congress to ratify the International Dumping Code was a severe blow to the Executive's perceived ability, among its trading partners, to negotiate an agreement and then deliver upon the agreement's provisions. This led to reluctance by US trading partners to negotiate with the Executive, and this in turn led President Nixon to seek from Congress a legislative framework that would grant the Executive more specific negotiating authority.

What emerged from this request by President Nixon<sup>43</sup> was the 'fast-track' approval process which requires the Executive to consult with Congress and the private sector on any non-tariff arrangements

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<sup>39</sup> Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962), s. 241. The STR provided a focal point for conflict between the Executive and Congress over trade, and subsequent Presidents tried to reduce the powers and budget of the STR. (Molyneux, *supra* n.22, 79.) Congress responded in the 1974 Trade Act by recreating the STR as the Office of the Special Representative for Trade Negotiations and by making it a statutorily based unit in the Executive Office of the President thereby ensuring that it could not be abolished without the support of the legislature. (S. 141 of the Trade Act of 1974, P.L. 93-618, as amended (repealing Section 241 of the Trade Expansion act of 1962, P.L. 87-794).)

<sup>40</sup> Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962), s. 243. Moreover, the President was required to seek advice from the Tariff Commission (re-named by s. 2231 of the 1974 Trade Act as the International Trade Commission) on the effects of proposed tariff reductions or duty-free treatment, and also to hold public hearings. (Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962), ss. 221-224.) This provision was carried over, with modifications, into ss.131-134 of the Trade Act of 1974 and s.1111 of the Omnibus Trade and Competitiveness Act of 1988.

<sup>41</sup> See generally F. Snyder, 'The Origins of the "Nonmarket Economy": Ideas, Pluralism, and Power in EC Anti-dumping Law about China', 7 *European Law Journal* (2001) 369 at 387-391; and J. Barcelo, 'Antidumping Laws as Barriers to Trade - The United States and the International Antidumping Code', 57 *Cornell Law Review* (1972) 491 at 532-558.

<sup>42</sup> Public Law 90-634, Title II, § 201, 82 Stat 1347, Oct. 24, 1968, as cited in D. Feld, 'Construction and Application of Anti-Dumping Act of 1921 (19 U.S.C.A. §§ 160- 173), Preventing Actual or Threatened Injury to Domestic Industry Resulting from Sale in the United States of Merchandise at Prices Lower than in Country of Origin', 42 *A.L.R Fed.* 821 at § 6. For a case where US courts upheld the provisions of this legislation over those of the International Antidumping Code, see *Timken Co. v. Simon* (1976) 176 App DC 219, 539 F2d 221.

the President planned to negotiate, but which in turn provides for a set of expedited legislative procedures that Congress will follow in deciding whether to accept, without amendment, bills that implement the results of a trade negotiation. This fast-track approval process, first established by Section 151 of the 1974 Trade Act, provides that fast-track authority can apply to the following: (i) implementing legislation that approves trade agreements, (ii) any statement of administrative action proposed to implement those agreements, and (iii) any necessary or appropriate changes in law (including amendments and repeals).<sup>44</sup>

The possession by the Executive of fast-track authority obviously gives it more credibility when negotiating trade agreements on behalf of the US and it also expressly authorizes the President to enter into agreements relating to non-tariff barriers.<sup>45</sup> However, the 1974 Act also gave Congress a greater opportunity to influence and control the Executive during negotiations by requiring that the President consult with Congress<sup>46</sup> and private sector advisory committees throughout any trade negotiations,<sup>47</sup> and that any agreement be implemented within the US by Congressional legislation.<sup>48</sup> This is clear evidence of a Congressional intent to retain US economic autonomy but also to ensure its separation of power *vis-à-vis* the Executive in the sense of always retaining final control over the content of US legislation.<sup>49</sup> These elements have been retained by Congress despite the evolution of fast-track

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<sup>43</sup> He requested unlimited tariff cutting authority and negotiating authority for non-tariff measures that would permit the implementation of negotiated results if Congress did not disapprove within ninety days: both of these requests being, however, rejected. (Low, *supra* n.34, 131.)

<sup>44</sup> This is subject to the President notifying Congress of his intention to enter into the agreement ninety days prior to signing the agreement, and thereafter transmitting to Congress the final agreement and draft implementing legislation. (Leebron, *supra* n.33, 190.) Upon submission of the implementing bill, both Houses of Congress are to refer it immediately to their appropriate committees which have a forty-five day maximum time-limit to report on the bill after which there is a further fifteen day period before the vote in both Houses takes place. There are no amendments permitted to the bill either in committee or on the floor of the Houses, and debate is limited strictly to twenty hours. (*Ibidem*, 191.) As such, within sixty days of submission by the President the implementing bill will be either adopted or rejected by Congress.

<sup>45</sup> The Tokyo Round results of 1979 were the first agreements to be implemented by use of the fast-track process. See Leebron, *supra* n.33, 190; and J. Jackson, 'United States law and implementation of the Tokyo Round negotiation', in J. Jackson, J. Louis, and M. Matsushita (eds.), *Implementing the Tokyo Round: national constitutions and international economic rules* (1984) 139.

<sup>46</sup> Moreover, Congress provided in the 1988 Act that the fast-track procedure may be nullified if the Executive branch fails to consult adequately with the Congress. (S. 1103 (c) (1) (E), 19 USC s.2903 (1995).) The Executive's authority was constrained by Congress in the Omnibus Trade and Competitiveness Act of 1988 which linked fast-track authority to the achievement by the Executive of sixteen negotiating objectives set out in the Act. On these objectives, see Leebron, *supra* n.33, 194 (n.83).

<sup>47</sup> The most important committee, the Advisory Committee for Trade Policy and Negotiations ['ACTPN'], was established by the 1974 Act and is today composed of up to forty-five individuals representing 'non-federal governments, labour, industry, agriculture, small business, service industries, retailers, non-governmental environmental and conservation organizations, and consumer interests.' (S. 135, 1974 Trade Act, 19 USC s. 2155 (b) (1), added by s. 128, URAA. The reference to environmental and conservation groups was added by the URAA, and the reference to non-federal governments was added by the 1988 Act: Leebron, *supra* n.33, 197 (n.93).) The ACTPN fully endorsed, with the exception of the labor representative, the Uruguay Round Agreements: see Leebron, *supra* n.33, 197.

<sup>48</sup> Ss. 102(e), 131-135 of the 1974 Trade Act.

<sup>49</sup> Moreover, fast-track authority was only granted initially for three years and required renewal every two years: Leebron, *supra* n.33, 195. As such, each of the three Presidents who were in office during the Uruguay Round negotiations had to seek fast-track authority (Reagan, 1988; Bush, 1991; and Clinton, 1993) for the continuance of US participation in the Round. After the adoption of the Uruguay Round Agreements Act by Congress, the Executive's Trade Promotion Authority (what was formerly called 'fast-track' authority) lapsed and was not renewed by Congress. It took a strong push by the Executive, including the USTR, to regain this authorization from Congress: see USTR Report of 30 April 2001, 4, available at:

authority into what is now called Trade Promotion Authority. For example, an implementing bill submitted formally by the President to Congress pursuant to Trade Promotion Authority is actually drafted by Congressional committees and the USTR, and only once a single bill emerges can it then at that relatively final stage be subject to changes by the President before being submitted to Congress under the Trade Promotion Authority (formerly known as fast-track) procedure.<sup>50</sup>

This control by Congress over the implementation of trade agreements has seen it try to ensure that US law can respond to foreign government action or inaction that is perceived to be a violation of its value of corporate economic autonomy. A good example of this is provided by an aspect of the US approach to subsidies adopted in the Uruguay Round Agreements Act ('URAA'). Previous GATT cases had decided that an 'arm's length' sale of a former State-owned company (e.g. a steel manufacturer) was sufficient to terminate the benefits of any subsidies that had been bestowed on it prior to the sale.<sup>51</sup> This was heavily contested by the US steel industry during the Uruguay Round, but the final WTO Agreement on Subsidies and Countervailing Measures did not require any change in this rule and indeed the initial draft of the US implementing legislation submitted by the Executive contained no provision dealing with such changes of ownership.<sup>52</sup> However, as Leebron notes 'An amendment was introduced as part of a package of Congressional staff recommendations that appeared to give the Commerce Department greater leeway to find that such subsidies continued after sale and could therefore be countervailed. Supported by the steel industry, the new provision was adopted as part of the implementing legislation.'<sup>53</sup> This approach, encapsulated in the URAA,<sup>54</sup> led the US to continue to impose countervailing duties against certain imports of UK steel<sup>55</sup> which inevitably resulted in a WTO case, the *US – Hot Rolled Lead* case.<sup>56</sup>

The alleged subsidies that were countervailed related principally to equity infusions granted by the UK Government to the former State-owned company, British Steel Corporation ('BSC'), between

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<http://www.ustr.gov/enforcement/super301.pdf>. Congress finally granted Trade Promotion Authority to the Executive by passage of the Trade Act of 2002 which entered into force on 6 August 2002. The 2002 Act grants trade negotiating authority to the Executive until 1 June 2005 with the possibility of a two-year extension.

<sup>50</sup> Nonetheless, this does provide the President with a degree of flexibility that has been important in garnering crucial support for the passage of a bill through Congress using the fast-track process: see Leebron, *supra* n.33, 192-193.

<sup>51</sup> Leebron, *ibidem*, 203.

<sup>52</sup> *Ibidem*.

<sup>53</sup> *Ibidem*, 204. Moreover, the *de facto* specificity test adopted by Congress in the URAA appears broader than the specificity test contained in the WTO Agreement on Subsidies and Countervailing Measures. Subsection 5A of s. 251 (a) in the URAA provides that a subsidy is specific if 'one or more' of the factors listed in the SCM Agreement are present; while Article 2 of the SCM Agreement simply lists the factors that 'may be considered' in determining whether a particular subsidy is specific. As Leebron notes 'Thus in cases in which the one factor suggests the subsidy is specific and the others suggest that it is not, US law may be in violation of the Agreement.' (Leebron, *ibidem*, 238.)

<sup>54</sup> See s. 251 (a), URAA, amending s. 771 (5), Tariff Act 1930, codified at 19 USC s. 1677.

<sup>55</sup> In the case of countervailing duties imposed against US imports of Mexican steel and the resultant WTO case, see *infra* n.61.

<sup>56</sup> *US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* case (the '*Hot Rolled Lead* case'), Panel Report, WT/DS/138/R, 23 December 1999; and *Hot Rolled Lead* case, Appellate Body Report, WT/DS/138/AB/R, 10 May 2000.

1977 and 1986. For the purposes of our present discussion it is sufficient to note that in 1986 BSC merged with a private company, subsequently established a subsidiary, and then in 1988 was fully privatized by the selling of shares in the former State-owned companies (BSC and the subsidiary) on the stock market.<sup>57</sup> Countervailing duties had originally been imposed by the US Department of Commerce (USDOC) on imports of leaded bars in 1993 on the basis that the pre-1986 subsidies had ‘travelled’ through to the privatized companies. This was despite the USDOC finding that the sale of these shares was at arm’s length, for fair market value, and consistent with commercial considerations. Since then there had been a number of USDOC annual reviews of the countervailing duties applied to imports of leaded bars originating in the UK. The EC challenged in particular the countervailing duties maintained following reviews of leaded bar imports in the years 1994 through to 1996. The USDOC decided to maintain the countervailing duties since it continued to find that a certain proportion of the financial contributions granted to BSC pre-1986 by the UK Government had ‘passed through’ to, and continued to benefit, the privatized companies.

The US made clear in the case its strident and general opposition to government intervention in the market to support domestic production when it argued that the meaning of one of the important definitional elements of a ‘subsidy’ in the SCM Agreement – whether the purported ‘subsidy’ had conferred a ‘benefit’ –<sup>58</sup> should be construed in very broad terms. More specifically, the US argued that the relevant ‘benefit’ is an advantage to a company’s productive operations rather than an advantage given to specific legal or natural persons, and as such a subsidy can be presumed to follow the productive operations that were subsidized without needing to have regard to changes in ownership. *In casu*, the US went on to argue that the USDOC was not required to find the existence of a ‘benefit’ specifically to the new, privatized, companies since their operations are ‘essentially the same as’ the operations of the former State-owned BSC, that is, they are all engaged in the same productive operations.

This approach was decisively dismissed by both the Panel<sup>59</sup> and Appellate Body<sup>60</sup> when they held that: (i) the recipient of a ‘benefit’ in Article 1.1(b) of the SCM Agreement must be a ‘natural or legal person’, and as such the USDOC review should have examined whether a ‘benefit’ accrued to the newly privatized companies following the changes in ownership rather than simply continuing the prior imposed countervailing duties; and (ii) the payment by the successor companies of fair market value for BSC and its subsidiary meant that they had not received a ‘benefit’ from the government’s

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<sup>57</sup> For a detailed description of the path to privatization of the British Steel Corporation, see the *US Hot Rolled Lead* case, Panel Report, WT/DS/138/R, 23 December 1999.

<sup>58</sup> Interestingly, the antecedent to the SCM concept that a subsidy must confer a benefit is provided by US law and in particular the decision of the US Court of International Trade (USCIT) in *Carlisle Tire and Rubber Co. v. United States*, 564 F. Supp. 834 at 837-838.

<sup>59</sup> *US Hot Rolled Lead* case, Panel Report, WT/DS/138/R, 23 December 1999, 6.69-6.70, 6.81-6.82, 6.86.

<sup>60</sup> *US Hot Rolled Lead* case, Appellate Body Report, WT/DS138/AB/R, 10 May 2000, 58, 74.

earlier ‘financial contributions’, and as such the countervailing duties imposed by the US Government were in violation of Article 10 of the SCM Agreement.

It seems clear that the US rationale for the imposition of countervailing duties in this case flows from its opposition to the original subsidization of the steel industry, the initial non-observance of the value of corporate economic autonomy. As such, the subsequent sale of the steel company for fair market value, after the government intervention had already taken place to establish the steel company as a viable entity, did not affect the value judgment by the US of the original government intervention in the market nor indeed its view that such interventions should be discouraged by penalizing the successor (privatized) corporations.<sup>61</sup> This attempt by the US to contest the application of its value of corporate economic autonomy before a WTO panel and Appellate Body provides a particularly stark contrast to recent protectionist measures enacted by the US government to shore up its ailing steel industry.<sup>62</sup> Moreover, this contrast becomes even more marked when consideration is had of the extent to which the US has sought to project internationally its value of corporate economic autonomy, especially in relation to government subsidies.<sup>63</sup>

Consider, for example, the following US statement contained in a communication to the WTO entitled ‘Subsidies Disciplines Requiring Clarification and Improvement’:

‘there is widespread and longstanding agreement that government subsidies distort the efficient allocation and utilization of resources, thereby undermining the best foundation of economic growth and development. The subsidy-induced production distortions that occur domestically frequently spill-over internationally, distorting the efficient flow of trade and diminishing the economic development and growth potential of all participants in the world economy. One of the fundamental economic principles upon which the trading system is based is that trade flows should be determined by comparative advantage and market forces, not government intervention. In

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<sup>61</sup> See also the case brought by Mexico against the US (*US–Countervailing Duties on Steel Plate from Mexico*, request for the establishment of a Panel, WT/DS280/2, 8 August 2003) where it challenges a 1998 USDOC decision to apply its ‘change-in-ownership’ methodology. USDOC imposed countervailing duties on a Mexican producer of carbon steel plate on the basis that the producer was the same entity before and after its privatization and as such the subsidies granted to the previously subsidized company continued to confer a benefit upon the company after privatization.

<sup>62</sup> See, for example, the ten safeguard measures introduced by President Bush on 5 March 2002 (‘Presidential Proclamation 7529’, 67 *Federal Register* 10553, March 7, 2002) and applied by the US on 20 March 2002 which established increases in duty and a tariff-rate quota pursuant to section 203 of the Trade Act on imports of certain steel products. This controversial measure was challenged by a number of States before a WTO Panel which ruled in their favor by holding that in the main the US measures were inconsistent with a number of the provisions of the WTO Safeguards Agreement and Article XIX of GATT 1994: see *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Panel Reports, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 11 July 2003; and *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, 10 November 2003. Subsequently, the President on 8 December 2003 terminated these import restrictions on steel by a Presidential proclamation that made no mention of the WTO ruling, but rather emphasized instead that the safeguard measure had now met most of its objectives: see ‘Presidential Proclamation 7741’, 68 *Federal Register* 68483; and ‘President’s Statement on Steel Proclamation’, 4 December 2003, available at <http://www.ustr.gov/sectors/industry/steel201/2003-12-04-president-statement.htm>.

This protectionist approach by the US government towards domestic steel production is not without precedent: see *supra* n.24.

<sup>63</sup> For a concise history of US trade disputes with a number of States over subsidies, see Stewart, *supra* n.27, 826-833.

recognition of this principle, Members have over time committed to increasingly stringent and mutually beneficial rules on the provision of subsidies.’<sup>64</sup>

The same communication contains a clear statement of the US ideological commitment to the value of corporate economic autonomy and, moreover, the extent to which the US would like to see this value applied by other States:

‘[We have previously noted] the importance of addressing those national government distortive subsidies “that are so entrenched or disguised within countries’ political and economic systems that it will take some time to identify and implement the appropriate multilateral disciplines necessary to root all of them out”. Many of these distortive practices take the form of indirect subsidies to specific companies or industries in which governments act through government-owned, government-controlled or government-directed private entities to provide financial support to companies, which would either not be available from the private sector or would not be available on the same terms. ... Under the existing terms of the Subsidies Agreement, the government provision of equity capital to a specific company or industry does not confer a benefit unless the investment decision can be regarded as inconsistent with the usual investment practice of private investors. While this standard needs clarification, the more fundamental issue is: should governments be investing in private sector companies and, if so, under what circumstances? ... If the equity markets determine that a company will not generate a market return, the actions of any government which determines otherwise should be subject to strengthened disciplines.’<sup>65</sup>

This approach to the value of corporate economic autonomy is not, however, free from considerable contestation even within the US, and it will necessarily change with different US administrations who place differing emphases on corporate economic autonomy as a basic value that should be maintained. This is well-illustrated by the Clinton Administration which had a very different approach to that of the earlier Bush Administration on the issue of government subsidization of research and development (‘R&D’) work being carried out by corporations. The Bush Administration had consistently opposed all non-actionable subsidies, including R&D subsidies, and clearly sought to project its value of corporate economic autonomy onto other States during the Uruguay Round negotiations.<sup>66</sup> However, the Clinton Administration reversed this approach once it came into power

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<sup>64</sup> ‘Subsidies Disciplines Requiring Clarification and Improvement’, Communication from the United States, TN/RL/W/78, (19 March 2003) 1. For similar US statements, see US Communication, TN/RL/W/27, 22 October 2002; and ‘Special and Differential Treatment and the Subsidies Agreement’, TN/RL/W/33, 2 December 2002, 3.

<sup>65</sup> ‘Subsidies Disciplines Requiring Clarification and Improvement’, *ibidem*, 3-4.

<sup>66</sup> Stewart provides a useful summary of one instance of contestation of this value within the Uruguay Round: ‘On September 27, 1990 ... [T]he United States submitted a new proposal, in which it addressed anew the subject of domestic subsidies, and urged that certain domestic subsidies be prohibited. In this submission, the United States restated its view that “increased disciplines over domestic subsidies is imperative.” The United States proposed that Article 1(1) of the Chairman’s text should be amended to include a list of specific practices which it believed should be prohibited ... . This submission by the United States was met with criticism by other negotiating participants. The EC criticized the proposal for *assuming that domestic subsidies, in themselves, were trade-distortive, while developing countries, such as India and Brazil, expressed the view that the new proposal was too extreme in curbing domestic subsidies, which they view as useful instruments of national economic development*. The US position, however, reflecting the trade negotiation objectives stated by Congress in the 1988 Trade Act, *remained that domestic subsidies must be restricted*. The September 1990 US proposal itself stated that “[t]he most important improvements, from our point of view, would be to prohibit certain domestic subsidies and to establish workable mechanisms to enforce those prohibitions. Without such improvements, we cannot even consider proposals which would make certain domestic subsidies non-actionable.”’ (Stewart, *supra* n.27, 872-873. Emphasis added.)



and actually pressed for increases in the amount that a government could contribute to R&D activities in the Uruguay Round negotiations<sup>67</sup> since it sought to foster industrial competitiveness and economic growth precisely, in part, by using R&D investments.<sup>68</sup> It seems clear that this approach of the Clinton Administration was designed to develop future technologies in which the US would enjoy a comparative advantage. As US Trade Representative Kantor explained in stark terms while giving testimony before the House of Representative Ways and Means Committee,

‘Subject to specific, limiting criteria, the [SCM] Agreement makes three types of subsidies non-actionable. Government assistance for industrial research and development is non-actionable if the assistance for “industrial research” is limited to 75 percent of eligible research costs and the assistance for “pre-competitive development activity” (through the creation of the first, non-commercial prototype) is limited to 50 percent of eligible costs. This will enable the Clinton Administration to continue to co-operate with industry to develop the technologies of tomorrow without the threat of countervailing duty actions, while ensuring that other countries cannot provide development or production subsidies free from such actions. ... We made substantial changes in the so-called subsidies text in order to make sure that we could have government-private partnerships for fundamental, basic and applied research; in order that we can do things as we did with SEMATECH, which was one of the reasons our semiconductor industry made such a wonderful comeback in the late 1980s and early 1990s and now dominates the world market in semiconductors; in order that we can have the government appropriately involved in a way that would put us in a competitive position, if not better than a competitive position in the world as we develop new technologies.’<sup>69</sup>

This approach not only represents a marked departure from the previous US approach of seeking to ensure the maintenance of the value of corporate economic autonomy, but also seeks to ensure that the comparative advantage which the US enjoys in the production of a large number of goods is preserved, indeed frozen, by the SCM Agreement which prevents foreign governments trying to improve their comparative advantage through such means, to quote USTR Kantor, as ‘development or production subsidies’;<sup>70</sup> while the US government was<sup>71</sup> to be left free ‘to continue to co-operate with industry to develop the technologies of tomorrow without the threat of countervailing duty actions’.<sup>72</sup>

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<sup>67</sup> This complete reversal of US policy on R&D subsidies in the Uruguay Round negotiations was noted by the Wall Street Journal in the following terms: ‘On the issue of research subsidies, the US faced a ... problem. The Bush administration wanted to wean the world of government subsidies; the current [Clinton] administration wants to use the government to spark research-based industries. The result is that the Clintonites had to argue strenuously to liberalize subsidy limits that the Bush team fought to impose. In the end, the US and EC agreed that governments could pay at least 50% of the cost of applied-research projects – enough to ensure that Mr Clinton’s pet projects in automobile and electronics research won’t run afoul of GATT.’ (‘Trade Acceptance: After Years of Talks, GATT Is At Last Ready To Sign Off on A Pact’, *Wall Street Journal*, 15 December 1993, at A7, as quoted in T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1994)*, Vol. IV, 234.)

<sup>68</sup> *The GATT Subsidies Code and its Impact on R&D: Hearing before the Subcommittee on Technology, Environment, and Aviation of the House Committee on Science, Space, and Technology*, 103d Cong., 2d Sess. 13-15 (1994) (Statement of John Gibbons, Director of the White House Office of Science and Technology Policy), as quoted in Stewart, *supra* n.67, 232-233.

<sup>69</sup> As quoted in Stewart, *ibidem*, 235 (n.52).

<sup>70</sup> *Ibidem*.

<sup>71</sup> Article 31 of the SCM Agreement provides that the R&D exemption contained in Article 8 would only apply initially for a provisional period of five years. The continued application of Article 8 was then to be dependent on a decision by the SCM Committee to continue its application. However the SCM Committee failed to reach a consensus on an extension before 31 December 1999, and as such the R&D exemption in Article 8 ceased to have effect. See the Report of the WTO Committee on Subsidies and Countervailing Measures, WTO Doc. G/L/408, 10 November 2000, 12.

<sup>72</sup> See *supra* n.69.

Let us now turn, finally, to examine US efforts to project internationally the observance of corporate economic autonomy.

## 5 US Action to Project Observance of Corporate Economic Autonomy

The failure by the US Congress to ratify the International Trade Organization ('ITO') Charter not only extinguished the embryonic existence of the ITO,<sup>73</sup> but compromised the ability of the US to lead and impose its vision of an international economic order on the community of States through the mechanism of the ITO and, some commentators argue, even through the GATT.<sup>74</sup> As such, Congress was forced to try and ensure observance internationally of its values – including that of corporate economic autonomy – by taking unilateral measures against States who did not comply adequately, in the US view, with the observance of these values within their economies. This US quest for a 'level playing field' in the trading system increasingly came to reflect the prevailing US view that its inability in some areas to compete abroad was in significant part due to the unfair trading practices of other States<sup>75</sup> and, accordingly, that the US Government had a key role to play in achieving competitiveness by reducing foreign government intervention within their economies.<sup>76</sup>

It was in particular the 1962 Trade Expansion Act that marked an important shift in US policy towards the taking of unilateral trade actions against other States: the President was granted a limited right to take retaliatory action against foreign governments who had caused harm to US companies. For example, Section 262 directed the President to react against unfair agricultural trade practices of countries exporting to the US. Congress, however, became increasingly unhappy over the reluctance

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<sup>73</sup> The legislation to ratify the ITO was being held up in a Congressional sub-committee to the point that the Executive withdrew it from consideration. (Beane, *supra* n.24, 10.) See also *supra* n.26.

<sup>74</sup> See, for example, Beane, *supra* n.24, 192. This can be contrasted with the position of the US in the very early years of the GATT where it often simply insisted upon something and it was agreed by GATT Contracting Parties. In fact, of the twenty-six articles in the original US proposal for GATT 1947, twenty-three of these were basically accepted as written and the three others, despite some opposition and slight modifications, were also accepted. (Beane, *supra* n.24, 10.) By the time of the fifth GATT Round, the so-called 'Dillon Round' (Geneva, 1961-1962), there were, however, two significant changes that affected the economic power of the US. The first is that the EEC for the first time negotiated as a single entity on behalf of its Member States and as such instantly posed an industrial bloc that offset US power and influence. Second, there were increasing numbers of States attaining independence from colonialism and these developing countries were increasingly acceding to GATT and were beginning to demand more from the US in negotiations. More recently, after the conclusion of the Uruguay Round, the USTR made a surprising admission about US economic power in one of its Section 301 Reports: 'There was a time when U.S. involvement in international trade negotiations was a prerequisite for them to succeed. That is no longer true. Other countries are writing the rules of the international trading system as they negotiate without us. The EU has free trade or customs agreements with 27 countries, and 20 of these agreements have been signed since 1990. The EU is in the process of negotiating 15 more. Last year, the European Union and Mexico – the second-largest market for American exports – entered into a free trade agreement. The EU is also negotiating free-trade agreements with the Mercosur nations and the countries of the Gulf Cooperation Council. Japan is negotiating a free trade agreement with Singapore, and is exploring free trade agreements with Mexico, Korea, and Chile. There are approximately 130 free trade agreements in force globally, but the United States has only two agreements in force: one is with Canada and Mexico (NAFTA), and the other with Israel.' (USTR Report of 30 April 2001, 4, available at: <http://www.ustr.gov/enforcement/super301.pdf>.)

<sup>75</sup> See, for example, J. Finger, 'The meaning of "Unfair" in United States import policy', 1 *Minnesota Journal of Global Trade* (1992), 35.

<sup>76</sup> Leebron, *supra* n.33, 185.

and slowness of the President to take measures under Section 262. There was also increasing frustration within Congress at the inadequacies in the GATT dispute resolution procedures in terms of both their speed and addressing US competitive concerns. Accordingly, Congress pursued unilateral measures with even more vigor in its 1974 Trade Act.

The 1974 Act established a more formal procedure for aiding US companies who had been injured by foreign competition. Individuals could directly petition agencies of the US government for assistance and this was intended to force the Executive to take action. This was coupled with Section 301 of the 1974 Act which gave the Executive a stronger capacity to take unilateral action than the earlier 1962 Act by authorizing retaliatory action against another State's 'unreasonable' and 'unjustifiable' trade practices which affect US commercial interests.<sup>77</sup> There was still, however, Congressional frustration with slow or inadequate Executive action and this led to Congress varying Section 301 in subsequent legislation which sought to require the Executive to make greater use of these retaliatory powers. For example, the 1988 Omnibus Trade and Competitiveness Act transferred Section 301 authority from the President to the USTR<sup>78</sup> (known as 'Super 301') for the following: (i) to determine the trigger of Section 301 action, that is whether foreign trade practices are 'unjustifiable', 'unreasonable', or 'discriminatory'; (ii) to decide whether and what action is appropriate; and (iii) to decide what implementing action should be taken.<sup>79</sup> Congress also made retaliatory action mandatory in response to 'unjustifiable' action. The 1988 Act did, however, afford the USTR a number of exceptional circumstances in which case it would not have to pursue Section 301 action. These circumstances are where: (i) the practice was not GATT inconsistent, (ii) the foreign country was eliminating the act, (iii) the other country offered compensation, (iv) in extraordinary cases the adverse impact on the US economy would outweigh the gains of pursuing action, and (v) the retaliation would cause serious harm to the national security of the United States. With the conclusion of the Uruguay Round Agreements and the establishment in particular of the WTO dispute settlement system, the first of these Section 301 exceptions was amended by US implementing legislation, the Uruguay Round Agreements Act (URAA), to provide that Section 301 action by the USTR is not required if the WTO Dispute Settlement Body ('DSB') adopts a report finding that the foreign government act, policy or practice at issue 'is not a violation of, or inconsistent with, the rights of the United States, or does not deny, nullify, or impair benefits to the United States under any trade

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<sup>77</sup> Examples of such practices include discriminatory rules of origin, government procurement practices, licensing systems, quotas, exchange controls, restrictive business practices, discriminatory bilateral agreements, variable levies, border tax adjustments, discriminatory road taxes and other taxes discriminating against imports, and certain product standards and subsidies.

<sup>78</sup> S. 1301(a) of the 1988 Omnibus Trade and Competitiveness Act (amending s. 301 of the 1974 Trade Act).

<sup>79</sup> It was pursuant to these provisions that the USTR began its practice of conducting formal consultations with a State and if necessary initiating GATT dispute settlement procedures on behalf of the US. The USTR was required by the 1988 Act to initiate investigations and get an elimination, reduction, or compensation on negative trade practices within a three year period from when it was identified. Moreover, the USTR had to submit an annual report to Congress on any progress against such actions or indicate other Section 301 actions needed to resolve the issue.

agreement.<sup>80</sup> However, 'Super 301' was still seen by US trading partners as a basis for aggressive US unilateralism,<sup>81</sup> and the fact that it survived as part of US law despite the Uruguay Round<sup>82</sup> resulted, unsurprisingly, in a challenge under the WTO's dispute settlement system. Let us turn to consider briefly the *US – Sections 301-310 of the Trade Act of 1974* case.<sup>83</sup>

The European Community claimed in the case that 'by adopting, maintaining on its statute book and applying Sections 301-310 of the 1974 Trade Act after the entry into force of the Uruguay Round Agreements, the US has breached the historical deal that was struck in Marrakech between the US and the other Uruguay Round participants. ... this deal consists of a trade-off between, on the one hand, the practical certainty of adoption by the Dispute Settlement Body of panel and Appellate Body reports and of authorization for Members to suspend concessions – in the EC's view, an explicit US request – and, on the other hand, the complete and definitive abandoning by the US of its long-standing policy of unilateral action. The EC submits that the second leg of this deal, which is, in its view, the core of the present Panel procedure, has been enshrined in the following WTO provisions: Articles 3, 21, 22 and, most importantly, 23 of the DSU and Article XVI:4 of the WTO Agreement.'<sup>84</sup> The US response to these claims was that its law was WTO consistent since 'Sections 301-310 permit the US to comply with DSU [WTO Dispute Settlement Understanding] rules and procedures in every case: Section 304 permits the USTR to base his or her determinations on adopted panel and Appellate Body findings in every case; and Sections 305 and 306 permit the USTR, in every case, to request and receive DSB authorization to suspend concessions in accordance with Article 22 of the DSU.'<sup>85</sup>

The Panel in deciding this case found that the relevant Sections of the 1974 Trade Act, ss. 304-306, did indeed constitute a *prima facie* violation of certain DSU provisions,<sup>86</sup> but that a violation could not be confirmed in the case.<sup>87</sup> The Panel based this decision on essentially a US promise, both

<sup>80</sup> Section 301(a)(2)(A), 19 USC §2411(a)(2)(A).

<sup>81</sup> See J. Jackson, 'The Great 1994 Sovereignty Debate: United States acceptance and implementation of the Uruguay Round results', in J. Jackson, *The Jurisprudence of GATT and the WTO* (2000) 367 at 391.

<sup>82</sup> Congress expressly preserved Section 301 authority when in section 102 (a) (2) of the URAA it stated that nothing in the Act shall be construed '... (B) To limit any authority conferred under any law of the United States, including Section 301 of the Trade Act of 1974, Unless specifically provided for in this Act.'

<sup>83</sup> *United States - Sections 301-310 of the Trade Act of 1974* case, WT/DS152/R, 22 December 1999.

<sup>84</sup> *Ibidem*, 7.2.

<sup>85</sup> *Ibidem*, 7.9.

<sup>86</sup> For example, in relation to Section 304 the Panel stated: 'Therefore, pursuant to our examination of text, context and object-and-purpose of Article 23.2(a) [of the DSU] we find, at least *prima facie*, that the statutory language of Section 304 precludes compliance with Article 23.2(a). This is so because of the nature of the obligations under Article 23. Under Article 23 the US promised to have recourse to and abide by the DSU rules and procedures, specifically not to resort to unilateral measures referred to in Article 23.2(a). In Section 304, in contrast, the US statutorily reserves the right to do so. In our view, because of that, the statutory language of Section 304 constitutes a *prima facie* violation of Article 23.2(a).' (*United States - Sections 301-310 of the Trade Act of 1974* case, WT/DS152/R, 22 December 1999, 7.97.) Section 304 confers on the USTR the right to determine whether 'the rights to which the United States is entitled under any trade agreements are being denied' even before the adoption by the DSB of its findings on the matter and as such also determines whether unilateral action must be taken by the US.

<sup>87</sup> As the Panel states 'We did not conclude that a violation has been confirmed. This is so because of the special nature of the Measure in question. The Measure in question includes statutory language as well as other institutional and administrative elements. To evaluate its overall WTO conformity we have to assess all of these elements together.' (*Ibidem*, 7.98.)

in a Statement of Administrative Action<sup>88</sup> and also before the Panel, that any Section 301 determination that there has been a violation or denial of US rights would be based only on a panel or Appellate Body decision adopted by the DSB.<sup>89</sup> This led the Panel to find Section 304<sup>90</sup> – and, using the same reasoning, Sections 305<sup>91</sup> and 306<sup>92</sup> – as not being inconsistent with US obligations under the DSU.<sup>93</sup>

For the internationalist, this express undertaking by the US is a positive step towards multilateralism and compliance with WTO obligations.<sup>94</sup> However a word of caution is required. It would be a mistake to ignore the importance placed by Congress on, for example, its value of corporate economic autonomy and the ability of the US to project internationally this value, especially where its non-observance is perceived to be undermining US competitiveness. This is well-illustrated by the debates in Congress on acceptance and implementation of the results of the Uruguay Round. As Jackson recounts: ‘US government officials ... in the Great 1994 Sovereignty Debate ... argued that no international body could require the US (not even in the loose sense of an international law norm) to do anything. In the view of this author, this interpretation is incorrect and not likely to be embraced by future panel reports. The language of the DSU includes a number of clauses that call for an obligation to perform according to panel findings. ... *Yet it was interesting that, as part of the sovereignty debate, US officials thought it would be useful to argue to the public and to the Congress as they did.* ... [Moreover,] [t]he US Congress made it very clear ... that it would not tolerate changes in section 301, and the Executive negotiating position followed that mandate. Consequently, except for some minor procedural amendments, section 301 remains intact. ... This [statutory provision],

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<sup>88</sup> This Statement of Administrative Action was submitted by the President to, and approved by, the Congress, and involved an undertaking by the Administration ‘to base any section 301 determination that there has been a violation or denial of US rights ... on the panel or Appellate Body findings adopted by the DSB.’

<sup>89</sup> The Panel found that the SAA had the consequence of effectively precluding a USTR determination of inconsistency prior to exhaustion of DSU proceedings and as such was a lawful curtailment by the US Administration of its statutory discretion under Sections 301-310. (*Ibidem*, 7.109, 7.112.) On the emphasis placed by the Panel on the US statements reaffirming its SAA undertaking, see *ibidem*, 7.114-7.126. Moreover, the US considered as important the fact that the US had never once made a Section 304(a)(1) determination: *ibidem*, 7.127-7.130.

<sup>90</sup> *Ibidem*, 7.135.

<sup>91</sup> *Ibidem*, 7.184-7.185.

<sup>92</sup> *Ibidem*, 7.170.

<sup>93</sup> The Panel did, however, serve a warning to the US when it stated: ‘Significantly, all these conclusions [findings of conformity] are based in full or in part on the US Administration’s undertakings mentioned above. It thus follows that should they be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted.’ (*Ibidem*, 8.1.)

<sup>94</sup> During the late 1980s the US either threatened or actually imposed trade retaliation in several disputes with Japan, the EC, Canada, and several smaller countries. There were occasional dispute settlement complaints by the States concerned, but the States in the end usually gave in and granted the market access demanded. (Hudec, *supra* n.26, 197.) As such, the US’s acceptance of a multilateral approach to dispute settlement and also enforcement in terms of the possibility of DSB-authorized retaliatory action was viewed generally as an important step towards a greater input of the rule of law in international economic affairs.

however, was perhaps the most important political bellwether of the sovereignty considerations in the Congress during the 1994 debate.<sup>95</sup>

The Uruguay Round results were not, however, without their strong supporters within the US. President Clinton – supported by large US business interests, including, for example, the US computer industry, the US Chamber of Commerce, the Business Roundtable, and the National Association of Manufacturers –<sup>96</sup> worked hard to ensure the adoption of the URAA.<sup>97</sup> There was, however, considerable opposition to the Act from a number of US unions and some industries (for example, the textile industry) who feared that cheaper imports would drive American producers out of business, leading to job losses.<sup>98</sup> There was opposition also from environmental groups who feared that the WTO and in particular the dispute settlement system would weaken the protection afforded the environment by US laws and regulations.

However among certain influential members of Congress the sticking point was over the perceived loss of US ‘sovereignty’ that would take place if Congress gave its consent to the WTO Agreements.<sup>99</sup> As Leebron states:

‘One theme dominated the debate over the Uruguay Round Agreements in the United States, and this was sovereignty. In this context, “sovereignty” primarily meant autonomy to determine various aspects of US policy. ... the greatest misgivings were ... . First was the virtually automatic approval of Dispute Settlement Panel decisions, and to some extent the imposition of “sanctions” for failure to comply with them. Secondly, the new agreements expressly set forth rules of decision that, although urging the continuance of consensus-based decision-making, also explicitly provided for majority votes on various matters. Both these elements had the consequence of eliminating any United States veto over WTO decision-making.’<sup>100</sup>

The technique that was adopted to counter these sovereignty concerns was to ensure that the Uruguay Round Agreements were not self-executing or did not otherwise constitute a basis for a cause of action in US law.<sup>101</sup> Members of Congress were assured, for example, that if the DSB decided in a case that

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<sup>95</sup> J. Jackson, ‘The Great 1994 Sovereignty Debate: United States acceptance and implementation of the Uruguay Round results’, in J. Jackson, *The Jurisprudence of GATT and the WTO* (2000) 367 at 388, 391 (emphasis added).

<sup>96</sup> See Mundo, *supra* n.1, 137.

<sup>97</sup> The final Congressional vote approving the agreements and the implementing legislation was by an overwhelming majority (288 to 146 in the House of Representatives, and 76 to 24 in the Senate), but it did not approach the nearly consensual vote in favor of the implementing legislation of the Tokyo Round agreements. (Leebron, *supra* n.33, 175 (n.2).)

<sup>98</sup> Mundo, *supra* n.1, 137.

<sup>99</sup> This was, for example, the view of Republican Senate Leader Robert Dole: J. Jackson, ‘The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results’, 36 *Columbia Journal of Transnational Law* (1997) 157; and Mundo, *ibidem*, 137.

For an example of the exaggeration and rhetoric adopted in this debate, even in academic journals, see McBride, S., ‘Dispute Settlement in the WTO: Backbone of the Global Trading System or Delegation of Awesome Power’, 32 *Law & Policy of International Business* (2001) 643 at 644; and Presley, M., ‘Sovereignty and Delegation Issues Regarding U.S. Commitment to the World Trade Organization’s Dispute Settlement Process’, 8 *Journal of Transnational Law & Policy* (1998) 173.

<sup>100</sup> Leebron, *supra* n.33, 176, 210-211.

<sup>101</sup> *Ibidem*, 211-212. There was, moreover, an express limit placed on the extent to which the URAA may be interpreted as altering US laws or administrative regulations not expressly specified in the Act. The Act states that it shall not be construed ‘(A) To amend or modify any law of the United States, including any law relating to – (i) the protection of human, animal, or plant life or health, (ii) the protection of the environment, or (iii) worker safety, or (B) To limit any authority conferred under any law of the

US legislation requires amendment to conform to the Uruguay Round Agreements, then the normal legislative process would have to be followed to change the legislation in question.<sup>102</sup> Moreover, a deal was struck between President Clinton and Senate Minority Leader Dole (soon to be Majority Leader after the newly elected Congress was sworn in)<sup>103</sup> to ensure safe passage of the URAA but also to assuage Senator Dole's concerns about the perceived loss of US sovereignty by ratification of the WTO Agreements. The compromise measure was to provide the US with a clear exit route out of the WTO should the Organization, in the view of a proposed Commission, negatively affect US interests.<sup>104</sup> In the end this proposed Commission was not established, but there has nonetheless been serious attempts made by the US Congress at least to consider the issue of withdrawal. For example, Congress requested that the General Accounting Office ('GAO')<sup>105</sup> undertake a study of the WTO dispute settlement system and its impact on foreign trade practices and on US laws and regulations in order to ascertain whether continued US participation in the WTO was in the national interest. The GAO stated in summation:

'Overall, our analysis shows that the United States has gained more than it has lost in the WTO dispute settlement system to date. WTO cases have resulted in a substantial number of changes in foreign trade practices, while their effect on U.S. laws and regulations has been minimal. In about three-quarters of the 25 cases filed by the United States, other WTO members agreed to change their practices, in some instances offering commercial benefits to the United States. ... As for the United States, in 5 of the 17 cases in which it was a defendant, two US laws, two US regulations, and one set of US guidelines were changed or subject to change. These changes have been relatively minor to date and the majority of them have had limited or no commercial consequences for the United States.'<sup>106</sup>

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United States, including Section 301 of the Trade Act of 1974, Unless specifically provided for in this Act.' (S. 102 (a) (2) (A)-(B) of the URAA.)

<sup>102</sup> Interestingly this seems to have been a retrogressive step: by way of contrast, the 1979 Trade Agreements Act implementing the Tokyo Round notably provides for a fast-track procedure for any bills submitted by the President to amend a statute to conform to one of the Tokyo Round Agreements approved by Congress, (s. 3 (c), Trade Agreements Act of 1979, 19 USC s. 2504) a provision that was also available for use by the President to change US legislation to comply with a dispute settlement ruling or amendment to any of the covered Agreements. (Leebron, *supra* n.33, 214.)

If agency regulations or practices are found to violate the WTO agreements, then modification can only take place after an extensive consultation exercise with relevant Congressional committees and private sector interests. (Leebron, *supra* n.33, 221.) However, the USTR has more discretionary powers in relation to implementation of a WTO dispute settlement finding if it relates to the regulations or practices of the International Trade Commission (ITC) or the DOC (or its International Trade Administration): see s. 129 (a), URAA, 19 USC s. 3538 (a); and in the case of the DOC, see s. 129 (b), URAA, 19 USC s. 3538 (b), both as cited in Leebron, *ibidem*, 222.

<sup>103</sup> Before the vote on the Uruguay Round implementing bill could take place, there were congressional elections in November 1994 which saw a Republic takeover of Congress. President Clinton persuaded congressional leaders to vote on the UR implementing bill before the new Congress was sworn in, but this was subject to the deal concluded between President Clinton and Senate Leader Dole. See A. Rubin, 'Dole, Clinton Compromise Greases Wheels for GATT', *Congressional Quarterly Weekly Report*, 26 November 1994, 3405.

<sup>104</sup> This was known as the 'three-strikes and we're out' clause. If a Commission of US judges who were to review WTO decisions found that the WTO had acted arbitrarily against US interests in three cases, then it could propose a joint congressional resolution instructing the President to withdraw the US from the WTO. On this proposed Dispute Settlement Review Commission, see J. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', 36 *Columbia Journal of Transnational Law* (1997) 157 at 186-187.

<sup>105</sup> The GAO is an agency of Congress. More information on its activities can be found at: <http://www.gao.gov>.

Largely on the basis of this Report, the US House of Representatives rejected a proposed resolution, by a vote of 363 to 56, that sought to withdraw congressional approval of US membership in the WTO.<sup>107</sup>

## 6 Concluding Remarks

A comprehensive examination of the US relationship with the international trading system would fill many volumes. The approach of this considerably shorter enquiry has been to focus on the GATT and the WTO as a forum where the US has sought to contest its values: for the purposes of this piece, the values of corporate economic autonomy and its concomitant of nation-State economic autonomy.

Whether the commissioning by Congress of the GAO Report<sup>108</sup> is part of a broader attempt to retain for the US the competence to determine when other States are acting in violation of values such as corporate economic autonomy remains to be seen.<sup>109</sup> What is clear, however, is that despite such (possibly rhetorical) action the futures of the WTO and the US are inextricably linked,<sup>110</sup> and as the WTO becomes an increasingly important forum for the contestation and acceptance of common values<sup>111</sup> the justification by the US of retaining nation-State economic autonomy loses any cogency it may have possessed. The real difficulty, however, will be where Congress considers that the common values being formulated through the process of contestation in the WTO do not adequately reflect US values or worse still are perceived to be undermining US competitiveness. This has been, and will likely continue to be, the point at which the US commitment to the rule of law in the multilateral trading system is really put to the test.

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<sup>106</sup> US General Accounting Office, 'WTO: US Experience to Date in Dispute Settlement System', contained in 94 *AJIL* (2000) 697 at 698.

<sup>107</sup> *AJIL*, 94 (2000) 698 (n.4).

<sup>108</sup> See *supra* nn.105-107 and corresponding text.

<sup>109</sup> This may of course involve a violation by the US of its WTO obligations: cf. the *Sections 301-310* case, *supra* nn.86-93 and corresponding text.

<sup>110</sup> See the Speech by WTO Director-General Supachai, 'American Leadership and the World Trade Organization: What is the Alternative?', National Press Club - Washington D.C., 26 February 2004, available at [http://www.wto.org/english/news\\_e/spsp\\_e/spsp22\\_e.htm](http://www.wto.org/english/news_e/spsp_e/spsp22_e.htm).

<sup>111</sup> Cf. *The Economist* newsmagazine which states: '[The United States and Europe] are, together, not only the main engine of the world's economy but the main custodian of its liberal values.' ('Mr Bush Goes to Europe', *The Economist* (9 June 2001) 9.)