

Trump's China Trade Policies: Threats and Constraints

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United States litigation against China in the WTO will be ground zero for the new Trump administration's aggressive trade policy. Five important facts must be highlighted to better understand the likely actions of the Trump administration. First, heightened judicial advocacy within the WTO will be consistent with both the Bush and Obama administrations' aggressive use of the WTO's dispute settlement system. Second, international judicial activism is squarely within the context of unfolding historical changes in international relations. Third, China hawks in the Trump administration will be competing with a number of countervailing forces in the White House, throughout the administration, and in the federal courts. Fourth, the US Congress has the exclusive authority to regulate global trade. However, much of this exclusive authority has been delegated to the president. Fifth, Trump considers trade as a zero-sum transaction, with a focus on the bottom line, to the exclusion of all else.

Keywords: Trump, China Trade, WTO, Ground Zero, International Judicial Activism

1. Introduction

The Chinese and US litigation in the WTO will almost immediately be ground zero for the new Trump administration's aggressive global trade policy.¹ This is clearly evidenced by the appointment of his new trade team.² The appointed

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team members include a harsh China trade critic and a leading protectionist trade lawyer. A recent editorial in *THE WALL STREET JOURNAL* stated: “The President-elect has assembled the most antitrade team of presidential policy advisers since the 1920s.”³

Peter Navarro, a little-known business professor, has been a most vociferous critic of China’s trade practices. He will be serving in the White House as the director of the new National Trade Council. He recently declared the WTO rules as biased and grossly unfair.⁴ Robert Lighthizer has been a leading lawyer in bringing domestic trade actions against steel imports for years and has also been a bitter critic of China. He will be the new US Trade Representative. Both seem to be the alter ego of US President Trump, who appears to be itching for a trade war⁵ and disdains multilateral treaties.⁶

Trump has clearly elevated trade to a top priority in the new White House, reflecting the critical role of trade in the presidential election, during which millions of those who felt marginalized by globalization and resented it, particularly in the Rust Belt, supported him.⁷ This resentment is central to the wave of populist nationalism raging against the globalization that is sweeping a number of countries.⁸

Decision-making concerning trade in the White House will involve much more than trade, however. It will also fall within the broader context of other international and domestic political, economic, investment, and security concerns. Yet, trade transactions and their impact within the US are of central concern for Trump. This has been the case ever since Trump’s opposition to Japan’s economic takeover of trophy US real estate in the 1980s. A political commentator recently noted: “Trump has a long-standing, consistent view on US trade with the rest of the world: They are winning and we are losing.”⁹

The primacy purpose of this research is to analyze the grounds for the new Trump administration’s aggressive China trade policy. In this paper, five important facts will be addressed.

2. Five Important Facts

Five important and often-overlooked facts must be highlighted to better understand

the likely actions of the new Trump administration toward China and trade.

First, heightened judicial advocacy within the WTO, if chosen as an early policy, will, in fact, be consistent with both the Bush and Obama administrations' aggressive use of the WTO's dispute settlement system against China. The Obama administration brought 16 WTO cases against China out of a total of 26 enforcement cases over eight years,¹⁰ vastly more than it brought against any other country. The most recent case, involving subsidies to the aluminum industry, occurred just two weeks before former US President Obama's leaving office.¹¹ This occurred shortly after the Obama administration filed yet another case against China over its tariff rate quotas for agricultural imports.¹² The Obama administration continued its unrelenting trade enforcement actions in the WTO by filing its last case, which was against Canada and concerned restrictions on the import of US wine, two days before President Trump's inauguration.¹³

The Trump administration will likely bring newer cases to the WTO. However, these may very well be accompanied by greater bluster and numerous tweets. It is important to note that the Obama administration never questioned the fairness or bias of WTO rules. This criticism should now be expected by the new Trump administration. In fact, the filing of the most recent case by China against the US concerning the failure of the US to grant China "market economy status" prior to Trump's inauguration may be viewed as a preemptive action against the incoming Trump administration.¹⁴

Second, this international judicial activism and larger trade and political confrontation with China are squarely within the context of two still-unfolding historical changes in international relations:¹⁵ The first change is the growing global resistance to freewheeling and Western-driven globalization. The second is the slowly dissolving 'Pax Americana,' which led to the creation of multilateral institutions and global trade rules that have been in place since World War II. The first change certainly contributed to Trump's presidential victory. The second change seems to be ushering in a more virulent form of power politics and an extreme national interest approach to foreign affairs.

A well-known observer noted, "But some things may be emerging from the fog. Trump is not interested in the rules-based international order the United States has spent the last seven decades building and defending. His foreign policy will be transactional."¹⁶ After Trump's inaugural address, another well-known

commentator observed: “The rest of the world should be on notice. Mr. Trump intends to rip up the US created global order His presidency will mark a new era of trade protectionism.”¹⁷

Third, although trade will be clearly elevated to a prominent place in a protectionist president’s White House agenda, the China hawks will be competing with a significant number of countervailing forces in the White House itself, throughout the administration,¹⁸ and in the federal courts.

In particular, economic advisers in the White House’s Council of Economic Advisers, have traditionally taken a mainstream approach to trade. Political appointees in the administration (*e.g.*, former ExxonMobil CEO and Secretary of State Rex Tillerson and former president of Goldman Sachs and director of the National Economic Council Gary Cohn) have a more business-related and pragmatic view of trade. The same can be said for the new Secretary of the Treasury Steve Mnuchin, a hedge fund CEO, regarding international investments. (The incoming administration has not focused on the issue of Chinese investment in the US even though foreign investment often leads to more employment and exports.¹⁹) Secretary of Commerce Wilbur Mills, a billionaire, corporate investor, and strident critic of China’s trade policies,²⁰ favors the tough enforcement of existing rules.²¹ Newly named Ambassador to China Terry Branstad is a former Iowa state governor who supports greater state agricultural exports to China,²² and former Governor of Georgia Sonny Purdue, the new Secretary of Agriculture, also favors agricultural exports.²³

By definition, national security advisers view trade in a broader context rather than only as a business transaction or aggregate economic data. They will undoubtedly focus on the geopolitical and geostrategic implications of trade relations. Most importantly, a US Congress controlled by the more traditional free-trade Republicans, who have supported multilateral trade agreements and the US multinational corporations doing business and investing in China, will offer a strong counterweight to a hyper-aggressive trade policy with China bordering on protectionism and mercantilism.

It is extremely important not to underestimate the role of federal courts to review executive actions even when they have foreign policy and trade implications. The well-known case of *Youngstown Sheet & Tube v. Sayer* (1952) declared presidential actions unconstitutional when they are outside of the

president's authority and are contrary to existing legislation.²⁴ The federal courts may well be the last but best defense against a broad range of Trump's policies. President Trump will also find that a number of state and cities dependent on trade, as well as large segments of corporate America, will restrain him and resist implementation of protectionist policies.

Fourth, the US Congress has the exclusive authority to regulate global commerce and trade. This is under Article 1, section 8, clause 3 of the US Constitution. However, much of this exclusive authority has been delegated to the president over the years.²⁵ Such trade power is unlike the foreign affairs power of the president under the US Constitution, which gives the president primary responsibility and broad inherent authority as the 'sole organ' of the nation in foreign affairs and as the 'sole representative' with foreign nations.²⁶ The trade power of the president, principally to negotiate trade agreements and to enforce them, is much more limited. The president has no inherent authority in the international trade arena. However, the president does have the authority to withdraw from treaty negotiations and authority related to settlement of international claims based on his broad powers in foreign affairs.

A number of congressional statutes allow for presidential actions imposing trade measures and trade sanctions.²⁷ Some may or may not give President Trump scant authority to do what he promised during the campaign, such as imposing higher tariffs or a border adjustment tax, or declaring China as a currency manipulator.²⁸ 'Fast-Track' authority allows the president to commence new trade negotiations. However, these statutes require specific administrative and procedural requirements. They must be followed, although the US Congress can change them.

One must keep in mind that the US' actions are subject to review by the WTO's dispute settlement system regarding its consistency with international obligations. This includes tax proposals linked to trade. *E.g.*, two observers recently noted that "(A)n across-the-border-tariff could put the US at odds with WTO rules, opening up the US to retaliatory measures from China."²⁹

One additional point that is often overlooked is that presidents, under their treaty power, can terminate a treaty or executive agreement at any time, regardless of whether there is a termination clause in the agreement or whether this would violate international obligations. Needless to say, this power has great disruptive

potential if Trump were to utilize it to withdraw from either NAFTA or the WTO.

Fifth, Trump's view of international relations is primarily connected to his views toward international trade. A noted economic expert stated, "Trump has his own ideas about weakening the international order. His chosen field is trade."³⁰ Specifically, Trump's view of trade has been informed by his education at the Wharton School that probably did not include courses in international trade or international law, his career in real estate, and his experience of living through the 1980s, when Japan was buying one trophy building after another in the US, including in his hometown of New York.

Trump considers trade as a zero-sum transaction,³¹ with a focus on the bottom line, to the exclusion of all else. His views mirror the protectionist and mercantilist ones of former US President Hoover, who led the US into the Great Depression. To an extent, they even mirror those of China today. Beyond these limited views of the business nature of trade, Trump displays no grand strategy at all, espousing only bilateral deal-making.

3. Conclusion

On President Trump's first full workday at the White House, he signed an executive memorandum requesting that the US trade representative formally withdraws the US from the Trans-Pacific Partnership and its negotiations.³² This was done a week later by a letter to the signatories of the TPP.³³ This withdrawal was primarily a symbolic move, as the TPP had no chance of congressional approval. *THE NEW YORK TIMES* reported this and stated:

President Trump upended America's traditional, bipartisan trade policy ... and declared an end to the era of multinational trade agreements that defined global economics for decades.³⁴

THE NEW YORK TIMES declared in an editorial that "President Trump seems intent on starting a trade war." It went on to state that countries "would file cases against the United States at the World Trade Organization, which has power to authorize retaliatory tariffs on American products, potentially hurting exporters like Boeing,

General Electric and farmers in the Midwest.”³⁵ Trump’s withdrawal from the TPP totally ignored larger geostrategic and geopolitical dimensions.³⁶

Trump’s actions and pronouncements raise the question, what is the future of US trade relations? It is difficult to say precisely, but we have a good idea: It is not good! Just get ready for some rocky times.

The president has broad delegated authority from the US Congress to take a range of actions. He will most certainly attempt to enforce some of his views through the WTO. The former WTO Appellate Body member from the US declared: “The real battle would come in Geneva, in international lawsuits before the judges of the World Trade Organization.”³⁷ Whether he will be successful is another story, and whether he will accept adverse decisions is also another matter. Failure to do so would certainly upend the global trading order.³⁸ The trade battle within the administration and the courts will not be a simple one; it will undoubtedly be messy.

Many countries are involved in trade and economic diplomacy. On top of all of this, we have a changing global environment in terms of declining support for global engagement, along with the rise of new trading powers. Whether Trump decides to terminate agreements unilaterally or to demand renegotiation will depend on whether he transcends his narrow view of trade and grows while in office, or if he continues to weaponize trade for narrow domestic interests and as a means of pressuring countries to mold their foreign policies to the will of the new administration.

Trump’s inaugural speech on January 20, 2017, extolling extreme nationalistic and protectionist themes,³⁹ is not encouraging:

From this day forward, it’s going to be only America first, America first. Every decision on trade, on taxes, on immigration, on foreign affairs will be made to benefit American workers and American families. We must protect our borders from the ravages of other countries making our products, stealing our companies and destroying our jobs.⁴⁰

These remarks are particularly discouraging and ominous when contrasted to those of China’s President XI at the recently concluded Davos conference.

There was a time when China also had doubts about economic globalization, and

was not sure whether it should join the World Trade Organization. But we came to the conclusion that integration into the global economy is a historical trend.⁴¹

The best hope for the future is that China and the US do not decide to play chicken in their trade relations in this Chinese Year of the Rooster.

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