

# **TRUMP AND TRADE – POLICY AND LAW**

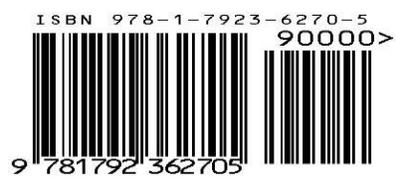
**BY Stuart S. Malawer, J.D., Ph.D.**



**Preface by Peter S. Watson, LL.B., DCL.**



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## PREFACE

The Honorable Peter S. Watson, *LL.B., DCL*

**It is good news that Professor Stuart Malawer has selected and compiled the numerous articles that he has authored over the last four years on global trade and, in particular, on the Trump administration's attack on the global trading system and his ferocious, unending attacks on the U.S. legal system and the rules-based international system and its institutions.**

**Professor Malawer and I share the experience of having earned both a law degree and a doctorate focusing on international law and trade. My professional experience includes serving on the National Security Council, as Chairman of the U.S. International Trade Commission, and as President of the Overseas Private Investment Corporation. Our professional and educational interests in global trade, international law, foreign policy, international investments, economic development, and national security overlap significantly.**

**Since the 1990s, I have collaborated with Dr. Malawer on a range of global activities. Most notably we have been colleagues at the Oxford Trade Program, a partnership between St. Peter's College, Oxford, and George Mason University. As part of that program, we developed a week-long Geneva program: held at the World Trade Organization in Geneva, Switzerland. This was one of the first global trade programs for graduate, business, law, and trade students emphasizing the WTO, its dispute resolution system, and other international institutions.**

**I agree fully with Dr. Malawer's conclusion: "Trump's attacks on the existing international system have significantly diminished the standing of the United States in diplomatic relations with our friends and allies and has only emboldened others to take unilateral actions. Consequently, over the last four years, the United States has failed to formulate viable foreign policies and strategies to tackle the multitude of global problems confronting its national interests and security."**

**If I were to summarize Professor Malawer's contribution, it would be the following: he clearly understands inter-connected trade, law and public policy problems within an interdisciplinary construct. His rigorous assessment, reflects an interest analysis approach to assessing very complex issues. We all owe a debt of appreciation to Professor Malawer for his early and persistent examination of trade policies under the Trump administration. He was an early mover in this space and has proven prescient. His discussion of challenges confronting the Biden administration is reasonable and pragmatic.**

## INTRODUCTION

Professor Stuart S. Malawer. *J.D., Ph.D.*

**Donald Trump and I are both from Queens, New York. In fact, we are about the same age and were almost neighbors, living less than two miles apart. I have followed his family and his business career since the 1960s. I watched the U.S. Department of Justice charge him in the 1970s for racial profiling in his family's real estate rentals and observed his opposition in the 1980s to Japanese investment because it competed with his activities in the New York City real estate market. From the earliest days, Donald Trump abused the domestic legal system and lambasted international trade and foreign investment.**

**On his first day in office, Trump withdrew from the Trans-Pacific Partnership. He has continued to oppose global trade and cooperation with a growing intensity throughout his four years in office. Simply put, he has shown nothing but contempt and blame for trade and multilateral cooperation.**

**Trump's continuous attacks on the World Trade Organization (WTO) and his recent withdrawal from the World Health Organization in the midst of the global pandemic are among his most egregious actions. From the outset of his administration, he imposed unilateral tariffs and trade sanctions that are legally questionable under U.S. and international law. He resorted to tariff wars and a broad range of other trade and investment threats against a large number of countries.**

**His default policy actions are to complain, reject and withdraw. He has complained about NAFTA, NATO, the European Union, the United Nations, the International Criminal Court, the International Court of Justice, and the WTO, among others. He has withdrawn from the Iranian nuclear deal, a bilateral agreement with Iran, UNESCO, the UN Human Rights Council, and the Open Skies Treaty. The Trump administration's aggressive use and weaponization of treaty termination has never previously occurred. His foreign policy doctrine can very well be labelled "Rejection and Withdrawal."**

**These actions or threatened actions concerning trade and treaty relations are consistent with Trump's "America First" world view, which championed American isolationism in the 1930s. This policy from the ashes of an unfortunate era has only made the United States less safe today. It has placed the United States in opposition to other nations trying to confront global issues collectively.**

**Trump's foreign policy and trade actions have not led to anything good. They have only hurt the U.S. economy, farmers, and workers. For example, his agricultural tax subsidies to offset export losses to farmers have proven gravely ineffective and his tariffs have not increased manufacturing jobs in the United States. Exports have been dramatically reduced. His use of export and investment controls have significantly hurt technology and telecommunication firms. Global supply chains remain global and reshoring is not happening. His unending and ever-growing animosity toward China, supercharged by his claims relating to the origins of the global pandemic, has now become his principal 2020**

reelection strategy. This continues in light of the racial unrest within the United States, which the president further heightened by his astounding militarized response.

This book is a compilation of my writings as an observer of Trump's trade policies over the last four years (and a few earlier ones). These have appeared in various academic journals and on my blog "Global Trade Relations." In particular, I focus on the legal aspects of Trump's protectionist policies, which harken back to the 1930s but in many ways are much worse than those policies. Donald Trump clings to the delusion that bilateral pressure will rebalance trade in favor of American industry. Trump's trade actions raise the issues of constitutional law and the interrelationship of public international law and U.S. constitutional law as matters of paramount concern today. The Trump administration's actions have also given rise to a new aggressive and proactive federalism to counteract erratic, incoherent, and failed policies (e.g., trade, immigration, climate control, and the COVID-19 pandemic).

If you think about it, the world of the 1930s was much less economically or politically interconnected. If the earlier protectionist, mercantilistic and unilateral policies led to global economic chaos and then war, what can today's actions lead to in a time of nuclear weapons and billions more people involved in global commerce?

Trump's policies represent an aggressive attack on the post-World War II international order. Most notably, Trump's attack on the judicial system of the WTO, as a derogation of U.S. sovereignty, is hugely baffling. The WTO's dispute resolution system was an American initiative that reflected the core American belief in a rules-based global system and the American value of relying upon litigation to provide fair judicial determination of conflicts. Trump's policies reflect his reliance on unilateral actions, raw power politics, the law of the jungle, bluster, and threats. This has only led to needless stress on the U.S. and global economies.

Trump's attacks on the existing international system have significantly diminished the standing of the United States in diplomatic relations with our friends and allies and has only emboldened others to take unilateral actions. Consequently, over the last four years, the United States has failed to formulate viable foreign policies and strategies to tackle the multitude of global problems confronting its national interests and security.

In the run up to the fall 2020 presidential election, I offer this book as a primer on Trump's trade policies and his ferocious and unending attacks on both the U.S. legal system and the rules-based international system and its institutions.

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# Trump, Litigation and Threats: From Queens to the World Stage.

Stuart S. Malawer\*

**Abstract:** Donald Trump’s methods of operating and conducting national security and foreign policy are exactly the same as they would be if he were engaged in real estate transactions and deals. To Donald Trump, trade policy, foreign policy, and national security policy are transactions and zero-sum games. My thesis is straightforward: One can draw a straight line from Donald Trump’s ruthless mode of operating in the contentious world of New York real estate to his operations on the world stage today. From Queens to the world stage, there is a straight line from using threats and litigation to avoid commercial and contractual obligations to using threats and litigation in conducting US foreign and trade policy. Especially as to policies pertaining to the World Trade Organization (“WTO”) and U.S.–China trade relations. His weaponization of tariffs and economic sanctions is now being wielded as a principal tool of US foreign policy for the first time since the early 1930s.

**Key Words:** Trade Wars, Tariff Wars, Economic Sanctions, Trump’s Real Estate, Trump’s Domestic Litigation, Foreign Policy by Tariff Threats, National Security, §232 National Security Tariffs, World Trade Organization, Dispute Resolution System.

## Introduction

Donald Trump was born and raised in Queens, New York, one of the five boroughs of New York City, with a current population of more than two million. His formative years were during the 1960s and 1970s. Born in Queens at about the same time as Trump, I lived within a mile or two of Donald Trump during many of those formative years.

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From the outset of Donald Trump’s real estate career, and then his public one, I understood his ruthless approach to conducting transactions, always relying upon bullying and threats in negotiations and utilizing meritless litigation.

Very simply, his views were fostered by his contentious real estate career, which was conducted through myriad partnerships initially funded and organized by his father, Fred Trump. Multimillion dollar portfolios in real estate are often controlled by a small number of people operating through family-controlled or mom-and-pop operations. In this case, the Trump Organization, which Donald Trump organized in 1976 when he began to emerge from his father’s coattails.

Unfortunately, the real estate industry is marked by extremely contentious relations. Threats and litigation are hallmarks of this hypercompetitive industry, in which millions, if not billions, of dollars are at stake. Real estate and partnership litigation are well-known to be extraordinarily brutal because so much money and so many egos are involved. Donald Trump is a product of this environment, even more so than most real estate investors.

Donald Trump’s methods of operating and conducting national security and foreign policy are exactly the same as they would be if he were engaged in real estate transactions and deals. To Donald Trump, trade policy, foreign policy, and national security policy are transactions and zero-sum games. He makes decisions with only a few people around him, including his family members, using threats and litigation to get his way.

My thesis is straightforward: One can draw a straight line from Donald Trump’s ruthless mode of operating in the contentious world of New York real estate to his operations on the world stage today.

From Queens to the world stage, there is a straight line from using threats and litigation to avoid commercial and contractual obligations to using threats and litigation in conducting US foreign and trade policy. Especially as to policies pertaining to the World Trade Organization (“WTO”) and U.S.–China trade relations. His weaponization of tariffs and economic sanctions is now being wielded as a principal tool of US foreign policy for the first time since the early 1930s.

President Trump’s ruthless approach has been employed in a range of multilateral trade relations and bilateral agreements (such as the Trans-Pacific Partnership and the United States-Mexico-Canada Agreement), and bilateral agreements with Korea and Japan. It has also gone beyond bilateral trade disputes by attacking the legitimacy of the WTO’s judicial system and, indeed, the WTO itself. Beyond trade, this caustic approach has been applied to a range of issues in American foreign policy. For example, the withdrawal by the United States from a broad list of international agreements and institutions, including the Iran nuclear deal, UNESCO, and the Paris Climate Accord.

## **Donald Trump’s World of Litigation - Yesterday and Today**

### ***Before Becoming President***

In the recent book entitled, “PLAINTIFF IN CHIEF—A PORTRAIT OF DONALD TRUMP IN 3,500 LAWSUITS” (2019) by James D. Zirin, a trial lawyer and federal prosecutor in New York for

more than 50 years,<sup>1</sup> the author examines the lengthy history of Donald Trump in private litigation and concludes Donald Trump’s political worldview was molded in the courtroom. “Trump sees law not as a system of rules to be obeyed and ethical ideals to be respected, but as a weapon to be used against his adversaries or a hurdle to be sidestepped when it gets in his way. He has weaponized the justice system throughout his career, and he has continued to use these backhanded tactics.”<sup>2</sup> Zirin concludes his extensive investigative study of Donald Trump’s history of private litigation by stating, “[T]he past is prologue, and his 3,500 or more lawsuits furnished an accurate prediction as to how he would react in office. He has not disappointed, and it has not been a pretty picture.”<sup>3</sup>

In an earlier and perhaps even more extensive analysis, USA TODAY in 2016 examined 4,095 cases involving Donald Trump stretching back to the 1970s.<sup>4</sup> For the first time, this study categorized the extensive number of cases involving Trump in federal, state, and county courts throughout the United States. These cases involved trademarks, casinos, contract disputes, employment, golf clubs, government and tax issues, media and defamation, personal injury, and real estate. The largest numbers of cases were related to casinos, personal injury, and real estate.<sup>5</sup>

Some of the very earliest cases filed against Fred and Donald Trump involved refusals to rent to blacks in Trump properties in the 1960s and 1970s. The US Department of Justice sued the father and son in 1973<sup>6</sup> in a case the family fought tooth and nail. A consent decree was entered against the Trumps. James Zirin concluded, “A life of litigation was the building block for Trump’s approach to public office.”<sup>7</sup> Trump’s politics of grievance and resentment today has at its foundation grievances nurtured from his earliest days in real estate. When Manhattan real estate families viewed him as being from the outer-borough of Queens and not one of them.

### *Since Becoming President*

After examining the cases that have involved President Trump since his coming into office, NEW YORK TIMES reporter Peter Baker stated, “Even as President Trump tries to fend off the ultimate threat of impeachment for high crimes and misdemeanors, he and his team are waging simultaneous legal battles on a wide array of fronts, facing perhaps more significant challenges with more consequences to his presidency than any modern occupant of the Oval

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<sup>1</sup> James Zirin, Plaintiff in Chief—A Portrait of Donald Trump in 3,500 Lawsuits (2019).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 237. The Pulitzer Prize winner Michael D’Antonio summarizes his prelection treatise of Donald Trump by stating, “Menace has long been a defining characteristic of the Trump modus operandi.” Michael D’Antonio, The Truth About Trump 2 (2016).

<sup>4</sup> John Kelly and Nick Penzenstadler, “How USA TODAY NETWORK is Tracking Trump Court Files.” USA Today (June 1, 2016). <https://www.usatoday.com/story/news/politics/elections/2016/06/01/how-usa-today-network-gathered-trump-court-files/85043410/>

<sup>5</sup> *Id.*

<sup>6</sup> Jonathan Mahler and Steve Eder, “‘No Vacancies’ for Blacks: How Donald Trump Got His Start, and Was First Accused of Bias.” New York Times (August 27, 2016). <https://www.nytimes.com/2016/08/28/us/politics/donald-trump-housing-race.html>

<sup>7</sup> Zirin at xvi.

Office has confronted at one time.”<sup>8</sup> These cases have entailed defamation lawsuits and disputes over turning over his tax returns, among a broad range of other actions, including immigration and the environment.<sup>9</sup>

President Trump is being sued for exceeding his executive authority and for personal matters. As president, he seems to have relished the idea that he or his administration would be a defendant in cases that starkly diverge from prior administration policies. In the context of trade, for example, his administration has been sued by US steel importers for improperly imposing tariffs under national security legislation (Section 232 of the Trade Expansion Act of 1974).<sup>10</sup> Most recently, a newer case by Turkey in the United States Court of International Trade may have historically significant implications. The recent preliminary decision in this case, to deny the government’s motion to dismiss, has the potential to change the landscape surrounding the laws for trade remedies under a national security rationale.<sup>11</sup> Baker concluded: “Mr. Trump has always had a taste for legal combat ... He sued contractors and debtors as well as Bill Maher and Miss Pennsylvania.”<sup>12</sup>

As the impeachment scenario unfolds, President Trump is confronting a broad range of legal and investigatory proceedings.<sup>13</sup> For example, House committees are seeking to gain access to Trump’s tax and business records, and New York (Manhattan) prosecutors have also subpoenaed his tax returns. Lawsuits were filed concerning the emolument clause. A recent analysis of Trump’s legal troubles concluded: “Trump, already facing an impeachment trial while campaigning for a second term in office, is saddled with an unprecedented onslaught of investigations and lawsuits, many alleging he is violating the law by accepting money from U.S. taxpayers and foreign governments.”<sup>14</sup>

A former federal judge, Brooke Masters, recently pointed out, “Never in history have the federal courts been called upon - and been eager to - decide so many disputes over presidential power, or for that matter, separation of powers between the president and congress.”<sup>15</sup> Masters continued, “Despite the conservative majority in the Supreme Court it is not clear how these battles will turn out. The historical precedents are not comforting for

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<sup>8</sup> Peter Baker, “Trump is Fighting So Many Legal Battles, It’s Hard to Keep Track.” New York Times (November 6, 2019). <https://www.nytimes.com/2019/11/06/us/politics/donald-trump-lawsuits-investigations.html>

<sup>9</sup> Andrew Harris, “Impeachment Adds to a Long List of Trump’s Legal Headaches.” Bloomberg (January 11, 2020). <https://www.bloomberg.com/news/articles/2020-01-11/impeachment-adds-to-a-long-list-of-trump-s-legal-headaches>

<sup>10</sup> Stuart Malawer, “Pending Section 232 Litigation and Broader Trade Trends: Will US Courts Restrict Presidential Authority from Relying Upon ‘National Security’?” 5 China and WTO Review No. 1 at 183 (2019); Stuart Malawer, “Trump, Trade and National Security: Will Federal Court Rein in the President?” 5 China and WTO Review No. 2 at 417 (2019).

<sup>11</sup> *Transpacific Steel LLC v. United States* at United States Court of International Trade (Slip Op. 19-1422). <https://www.cit.uscourts.gov/sites/cit/files/19-142.pdf>

<sup>12</sup> Baker.

<sup>13</sup> Baker.

<sup>14</sup> Anita Kumar, “How Trump Fused is Business Empire to the Presidency.” Politico (January 20, 2020). <https://www.politico.com/news/2020/01/20/trump-businesses-empire-tied-presidency-100496>

<sup>15</sup> Brooke Mastes, “US Courts are a Trump Battleground.” Financial Times (December 10, 2019). <https://www.ft.com/content/788f4268-06ce-11ea-a958-5e9b7282cbd1>

the president.”<sup>16</sup> Indeed, the General Accounting Office (“GAO”) recently declared President Trump’s withholding of military aid to Ukraine a violation of federal law (the Impoundment Control Act).<sup>17</sup> The GAO report stated: “Faithful execution of the law does not permit the President to substitute his own policy priorities for those that Congress has enacted into law.”<sup>18</sup>

## Trump’s Tariffs and Economic Sanctions

Tariffs and economic sanctions have become the central tools of President Trump’s trade policy in particular and foreign policy in general. A recent article in the WALL STREET JOURNAL stated: “The Trump administration is wielding U.S. economic might - through tariffs, sanctions and other measures - as a geopolitical weapon for battles with adversaries and allies alike.”<sup>19</sup> Trump’s slogan “America First” was a policy espoused by American isolationist in the 1930s and by the German-American Bund, as a central plank in its pro-Nazi policies.

Within the United States, the president’s use of tariffs has come under legal attack. For example, the Court of International Trade in New York, in a series of cases, is considering the validity of the administration’s use of Section 232 of the Trade Act of 1974 as a basis for imposing steel tariffs on various countries.<sup>20</sup> Indeed, the US Department of Justice has just recently become involved in the Section 232 issue, making the case even more politicized. The Justice Department backed up the president for not following a new statutory provision claiming that provision violates executive privilege.<sup>21</sup> This provision requires publication of a Section 232 report by the US Department of Commerce as to proposed tariffs on auto exports from Europe. Paul Krugman, a well-known international economist, recently exclaimed: “Trump’s scofflaw behavior with regard to auto tariffs is part of a broader pattern of abuse of power and contempt for the rule of law.”<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> “Office of Management and Budget—Withholding of Ukraine Security Assistance.” General Accounting Office B-331564 (January 16, 2020). <https://www.gao.gov/assets/710/703909.pdf>

<sup>18</sup> *Id.* at 1.

<sup>19</sup> Jon Hilsenrah and Laurence Norman, “Trump Wields U.S. Economic Might in Struggles with Allies and Adversaries Alike.” Wall Street Journal (January 17, 2020). <https://www.wsj.com/articles/trump-wields-u-s-economic-might-in-struggles-with-allies-and-adversaries-alike-11579280987> The issue of the legality of economic sanctions under international treaty law is ripe for assessment today. Especially as it relates to the validity of treaties under Article 52 of the Vienna Convention on the Law of Treaties, which declares treaties procured through the threat or use of force as void. *See generally*, Stuart Malawer, Imposed Treaties and International Law (1977).

<sup>20</sup> Josh Zumbrun, “Lawsuits Take on Trump’s Tariff Effort.” Wall Street Journal (December 25, 2019). <https://www.wsj.com/articles/trade-court-lawsuits-take-on-trumps-tariff-campaign-11577269800?mod=searchresults&page=1&pos=1>

<sup>21</sup> “Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security.” U.S. Dept. of Justice (Slip Opinion January 17, 2020). <https://www.justice.gov/olc/file/1236401/download>

<sup>22</sup> Paul Krugman, “Trump is Abusing His Tariff Power, Too.” New York Times (January 23, 2020). <https://www.nytimes.com/2020/01/23/opinion/trump-auto-tariff.html>

The Trump administration has been employing tariffs and economic sanctions more vigorously than any other administration as the principal tools of its foreign policy. You might even call Trump’s stance in this regard foreign policy by tariff threats.

Perhaps the best example of this policy is the recent phase one agreement pausing the trade war between the United States and China. Despite cries of mercantilism and managed trade, the agreement keeps in place a huge number of tariffs on Chinese imports and an additional number that may be applied by the administration if there is a lack of cooperation by China. Indeed, the Trump administration has imposed newer duties on downstream steel and aluminum products such as nails and cables. Illustrating the economic concept of “cascading tariffs.” An even newer case in the Court of International Trade has challenged this as being an unconstitutional delegation of legislative authority by congress to the president. Additional Section 232 cases (National Security) are expected to be filed by downstream steel users of derivative products in the Court of International Trade challenging the newer tariff increases. So the threats by Trump continue to this day. Two WASHINGTON POST reporters have noted: “Trump’s maximalist approach to diplomacy has become a hallmark of his administration’s foreign policy.”<sup>23</sup>

What is even more startling, but not as well publicized, is the way this new agreement does an end run around traditional dispute settlement. A well-known commentator, Bob Davis, recently determined, “The phase-one deal between the U.S. and China could upend the way trade disputes are settled globally.”<sup>24</sup> The deal rejects the use of an independent tribunal and substitutes three rounds of negotiations that will then allow unilateral sanctions to be imposed by the United States if there is no resolution of the trade dispute.

This unorthodox provision reflects the administration’s obsession with doing away with the Appellate Body of the WTO, the entire WTO dispute resolution system, as well as independent dispute panels elsewhere, viewing them as a violation of US sovereignty.

Bob Davis also concluded: “The Trump administration has been fiercely critical ... believing that panels suck away U.S. sovereignty and don’t follow trade law. The administration has crippled the WTO dispute-resolution system by not approving new judges.”<sup>25</sup> The Council on Foreign Relations in a recent publication stated: “U.S. President Donald J. Trump has long criticized trade dispute resolution panels as unfair and ineffective ... While some critics says dispute panels undermine national sovereignty, proponents argue they offer much-needed protections that boost confidence in global investment and trade wars.”<sup>26</sup>

It should be noted there are a number of concerns relating to the validity of the US–China trade agreement in the context of the WTO rules. For example, does the agreement

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<sup>23</sup> Anne Gearan and John Hudson, “Strong-Arm Tactics Remain Standard.” Washington Post (January 20, 2020). <http://thewashingtonpost.newspaperdirect.com/epaper/viewer.aspx>

<sup>24</sup> Bob Davis, “U.S.–China Deal Could Upend the Way Nations Settle Disputes.” Wall Street Journal (January 16, 2020). <https://www.wsj.com/articles/u-s-china-deal-could-upend-the-way-nations-settle-disputes-11579211598>

<sup>25</sup> *Id.*

<sup>26</sup> James McBride and Andrew Chatzky, “How Are Trade Disputes Resolved?” Council on Foreign Relations (Backgrounder) (January 6, 2020). <https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved>

violate the most-favored-nation principle as to new tariff levels or violate GATT Article XXIV, which allows only custom union and free trade agreements as an exception to the most-favored-nation principle? The European Union trade commissioner Phil Hogan was quoted as saying: “We haven’t analyzed the document in detail, but we will. And if there’s a WTO compliance issue, of course we will take a case [to the WTO].”<sup>27</sup>

## Trump Administration in the WTO

My analysis of the Trump administration’s litigation strategy in the WTO is a bit different from my assessment of President Trump’s domestic litigation strategy.

In contrast to his personal history of often filing multiple lawsuits without merit, the Trump administration has refrained from such filings in the WTO. Instead, the United States has continued to file disputes with merit in the WTO. For example, in 2018, it filed eight cases and pursued three earlier cases. The recent 2019 USTR Trade Policy Agenda stated: “In 2018, the United States continued to be one of the most active participants in the WTO dispute settlement process.”<sup>28</sup> This is a bit of an overstatement. It is also somewhat at odds with the United States’ public attacks on the dispute resolution system, the Appellate Body, and the WTO. To further illustrate this inconsistency, the United States has recently appealed a panel decision in favor of India over US steel duties, even though the Appellate Body is not functioning because of a lack of judges due to US actions.<sup>29</sup>

However, much more seriously, President Trump has more broadly aimed at destroying the dispute resolution system, taking particular aim at the Appellate Body. This scheme, in the even larger context of attacking the entire WTO system and the rules-based global trading system, makes no sense. Analysts have unanimously concluded that the United States wins more WTO cases than China in US–China trade disputes,<sup>30</sup> and the WTO usually sides with the United States in these disputes.<sup>31</sup> This mirrors my earlier conclusions concerning the WTO litigation.<sup>32</sup> However, the administration’s policy today is starkly in-

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<sup>27</sup> James Politi, “Brussels Attacks US–China Trade Deal.” Financial Times (January 16, 2020). <https://www.ft.com/content/6a6b5548-3877-11ea-a6d3-9a26f8c3cba4>

<sup>28</sup> 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program 45 (USTR 2019). [https://ustr.gov/sites/default/files/2019 Trade Policy Agenda and 2018 Annual Report.pdf](https://ustr.gov/sites/default/files/2019%20Trade%20Policy%20Agenda%20and%202018%20Annual%20Report.pdf)

<sup>29</sup> “U.S. Files Appeal into System It Has Broken.” Reuters <https://www.reuters.com/article/us-usa-trade-wto/u-s-files-appeal-into-wto-system-it-has-broken-idUSKBN1YM1XB> See also, Report on the Appellate Body of the World Trade Organization (USTR) (February 2020) [https://ustr.gov/sites/default/files/Report on the Appellate Body of the World Trade Organization.pdf](https://ustr.gov/sites/default/files/Report%20on%20the%20Appellate%20Body%20of%20the%20World%20Trade%20Organization.pdf)

<sup>30</sup> Jeffrey Schott and Euijin Jung, “The United States Wins More WTO Cases than China in US—China Trade Disputes.” Peterson Institute for International Economics (November 22, 2019) (reviewing cases from 2002–2019). <https://www.piie.com/research/piie-charts/united-states-wins-more-wto-cases-china-us-china-trade-disputes>

<sup>31</sup> Jeffrey Schott and Euijin Jung, “In US—China Trade Disputes, the WTO Usually Sides with the United States.” Peterson Institute for International Economics (March 12, 2019). <https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-disputes-wto-usually-sides-united-states>

<sup>32</sup> Stuart Malawer, “U.S. – China Trade Relations – Litigation in the WTO Since 2001 (2001-2014).” 26 International Law Practicum No. 2 at 122 (Autumn 2013). [http://globaltraderelations.net/images/Malawer.U.S. - CHINA LITIGATION IN THE WTO 2001-2014 NYSBA, International Law Practicum Spring 2014 .pdf](http://globaltraderelations.net/images/Malawer.U.S.-CHINA%20LITIGATION%20IN%20THE%20WTO%202001-2014%20NYSBA,%20International%20Law%20Practicum%20Spring%202014.pdf)

line with Trump's earlier behavior as a real estate operator, attacking publicly courts and institutions with which he has found himself at odds, no matter what.

## Note on Trump's Worldview

What accounts for President Trump's worldview? First, as I discussed, is his outlook that threats, bullying and unilateral actions are the way to go. These views were solidified in his opposition to Japan's aggressive role in New York real estate in the 1980s. I simply do not believe there is any coherent strategy behind any of his substantive actions. Indeed, these actions have often caused increased tensions with many countries. President Trump, harking back to his real estate days, views all relations as transactional. He views them as zero-sum games: you either win or lose. "But to the extent there is a Trump doctrine, it amounts to this: Use tariffs, sanctions, and other means of economic pressure to compel U.S. adversaries - and, as often, allies - to accede to White House demands."<sup>33</sup> This perspective continued at the recent Davos conference in January 2020, where President Trump again threatened Europeans with new tariffs on auto exports to the United States.<sup>34</sup>

Before coming to the White House, President Trump had no military or government experience, having immersed himself in the insular world of New York real estate. While New York City is a great world capital and very demographically diverse, neither quality is true for the world of the real estate developers in Manhattan. Therefore, the president came to the office with no real understanding of diplomacy or the world. He viewed tariffs and trade relations as essentially bilateral transactions, by which he could maximize US economic power to get his way.<sup>35</sup>

So far, this has happened, but to a limited extent. Trump's policies have caused significant injury to U.S. farmers and the manufacturing sector. Indeed, in December 2019, the Federal Reserve Board released a study on tariffs and manufacturing and concluded the benefit from tariff protections "is offset by larger negative effects from rising input costs and retaliatory tariffs."<sup>36</sup> Commentators reviewing this report further observed, "American businesses and consumers, not China, are bearing the financial brunt of President Trump's trade war."<sup>37</sup>

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<sup>33</sup> Anne Gearan and John Hudson, "Strong-Arm Tactics Remain Standard." Washington Post (January 20, 2019). <http://thewashingtonpost.newspaperdirect.com/epaper/viewer.aspx>

<sup>34</sup> Heather Long, "Trump Threatens Europe with Fresh Tariffs in Davos, Deepening the Rift with Long Time Allies." Washington Post (January 21, 2020). <https://www.washingtonpost.com/business/2020/01/21/trump-threatens-europe-with-fresh-tariffs-davos-deepening-rift-with-long-time-us-allies/> See also, David Lynch "Trump's Recent Trade Moves Show Adversarial Approach has Only Just Begun" Washington Post (February 18, 2020) [https://www.washingtonpost.com/business/economy/trumps-recent-trade-moves-show-adversarial-approach-has-only-just-begun/2020/02/18/05772170-49ee-11ea-b4d9-29cc419287eb\\_story.html](https://www.washingtonpost.com/business/economy/trumps-recent-trade-moves-show-adversarial-approach-has-only-just-begun/2020/02/18/05772170-49ee-11ea-b4d9-29cc419287eb_story.html)

<sup>35</sup> Jackson Diehl, "Trump's Hallmark Foreign Policy Failure? 'Maximum Pressure.'" Washington Post (January 19, 2020). [https://www.washingtonpost.com/opinions/global-opinions/trumps-hallmark-foreign-policy-failure-maximum-pressure/2020/01/19/0a2ae796-3874-11ea-bb7b-265f4554af6d\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/trumps-hallmark-foreign-policy-failure-maximum-pressure/2020/01/19/0a2ae796-3874-11ea-bb7b-265f4554af6d_story.html)

<sup>36</sup> Aaron Flaaen and Justin Pierce, "Disentangling Effects of the 2018–2019 Tariffs on a Globally Connected U.S. Manufacturing Sector." Federal Reserve Board (December 23, 2019). <https://www.federalreserve.gov/econres/feds/files/2019086pap.pdf>

<sup>37</sup> Jeanna Smialek and Ana Swanson, "American Consumers, Not China, Are Paying for Trump's Tariffs." New York Times (January 6, 2020). <https://www.nytimes.com/2020/01/06/business/economy/trade-war->

## Conclusion

From his days owning and managing middle-class apartments as a real estate operator in Queens, New York, to his time in the White House, Donald Trump has relied upon threats and bullying and today has grossly abused the domestic and international legal systems.

On January 15, 2020, the day President Trump signed the limited trade agreement with China, which were a result of his tariff and threats, the articles of impeachment were delivered to the Senate to commence his trial on two impeachment charges. The two articles of impeachment are for abuse of presidential authority and obstruction of Congress. To me, these acts are a direct byproduct of his general disregard for legal rules and institutions going back to his earliest real estate days in the 1960s and 1970s.

Trump's disregard for international laws, institutions, alliances, and agreements is extremely worrisome. He possesses a truly generalized hatred for all rules that is mirrored in many ways, his management of the Trump Organization and his career as a real estate professional.

Trump's disregard of international rules is clearly seen in his attacks on a broad range of treaties and institutions. I would argue none is more delusional than his frontal attacks on the WTO, the dispute resolution system and the Appellate Body. These were devised primarily by the United States. They are the central pillars of the global trading system today. They help establish and litigate global trade rules. The boy from Queens is now causing havoc in Geneva, Brussels, Tokyo, Seoul, and almost all other world capitals.

Of course, President Trump's abuse of US trade legislation (in his tariff and trade wars), his pattern of bullying and threats, his disregard of domestic law in a broad range of domestic matters, and his dealings with Congress are related stories. His rejection of international rules and institutions has its roots in his shameless attacks on domestic US law and institutions. All of these affronts are directly related to Trump's days in Queens as a landlord sued by many, including the US Department of Justice. These affronts continue today and are getting worse.

President Trump's story has yet to play out on either the national or the international stage. His impeachment is already history. The 2020 presidential election is looming. We all wait to see the outcome.

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[tariffs.html](#) See also, Heather Long and Andrew Van Dam, "U.S. Manufacturing Sector Spent 2019 in a Mild Recession." *Wall Street Journal* (January 17, 2020).  
<http://thewashingtonpost.newspaperdirect.com/epaper/viewer.aspx>

## **Trump, Trade & National Security -- Will Federal Courts Rein in the President?**

**By Stuart S. Malawer, J.D., Ph.D.<sup>°</sup>**

**Abstract:**

President Trump has, for the first time in U.S. trade history, aggressively redefined U.S. trade policy as a supporting actor of U.S. national security policy. Presidential actions have involved a broad array of legislation, such as trade sanctions and export controls. Most astonishing is that President Trump has imposed trade restrictions by relying upon unilateral findings of national security risks or the existence of national emergencies. We are now at a point where federal courts in the United States have been asked to review the validity of presidential trade actions. Specifically, the central legality of the broad delegation of congressional trade authority that has occurred over the last 75 years. I predict the federal courts will uphold the separation of powers in the face of the outrageous and unprecedented onslaught of presidential tariff and trade actions by a president relying upon dubious claims of national security and national emergency.

**Keywords:**

National security, national emergency, Section 232, separation of powers, nondelegation of legislative function, trade policy, federal litigation and trade, WTO litigation.

### **President Trump’s Aggressive Trade Actions.**

Ever since the inauguration of President Trump, I have written about President Trump’s trade policy.

In part, I have focused on the president’s reliance on federal statutes. Especially those delegating congressional authority to him to take trade actions that rely upon his sole discretionary determinations of national security risks or national emergencies.

To me, trade policy has become one of the most important aspects of foreign policy today. Legal aspects of global trade relations are the trickiest and of the gravest importance. Lawyers and law have become central to formulating the rules of trade and judicial tribunals in enforcing them, both at the national and international levels. Lawyers are predominant in

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the Office of the United States Trade Representative whose primary functions are to negotiate trade agreements and to conduct trade relations.

We are now at a point where federal courts in the United States, the largest economy in the world, have been asked to review the validity of presidential trade actions. Specifically, the central legality of the broad delegation of congressional trade authority that has occurred over the last 75 years.

President Trump has, for the first time in U.S. trade history, aggressively redefined U.S. trade policy as a supporting actor of U.S. national security policy. Presidential actions have involved a broad array of legislation, such as trade sanctions and export controls. They have most prominently involved trade remedy legislation relating to retaliation, safeguards, antidumping and subsidies. President Trump has imposed trade remedies for reasons that are overtly associated with foreign policy. “The manner in which Mr. Trump is wielding America’s economic power is unprecedented, as he uses sanctions, tariffs, trade negotiations and export controls interchangeably.”<sup>1</sup> Most astonishing is that President Trump has imposed trade restrictions by relying upon unilateral findings of national security risks or the existence of national emergencies.<sup>2</sup>

President Trump is increasingly blurring the line between America’s national and economic security, enabling him to harness powerful tools meant to punish the world’s worst global actors and redirect them at nearly every trading partner, including Mexico, Japan, China and Europe .... His approach has grown more aggressive over the past two years, culminating in an expansive view of national security that has plunged the United States into an economic war with nearly every trading partner .... The Trump administration is facing challenges in court and at the World Trade Organization over its use of national security provisions.<sup>3</sup>

The most recent trade restrictions—who knows which others will arise—concern national security claims as a basis for the following: new tariffs on Mexican goods to induce greater immigration control under the International Emergency Economic Powers Act;<sup>4</sup> restrictions on Chinese telecom giant Huawei, in the name of national security, under Section

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<sup>1</sup> Sam Fleming, “Currency Warrior: Why Trump is Weaponizing the Dollar.” FINANCIAL TIMES (July 1, 2019). <https://www.ft.com/content/5694b0dc-91e7-11e9-aea1-2b1d33ac3271>

<sup>2</sup> “These days, the biggest, baddest weapon in the American arsenal isn’t a missile, or a tank, or a jet fighter. It is America’s economic clout.” Gerald Seib, “U.S. Risks Over Using Its Economic Weapons.” WALL STREET JOURNAL (May 13, 2019). <https://www.wsj.com/articles/the-risks-in-overusing-americas-big-economic-weapon-11557750009>

<sup>3</sup> Ana Swanson and Paul Mozur, “Trump Mixes Economic and National Security, Plunging the U.S. into Multiple Fights.” NEW YORK TIMES (June 8, 2019). <https://www.nytimes.com/2019/06/08/business/trump-economy-national-security.html>

<sup>4</sup> The International Emergency Economic Powers Act (IEEPA), Title II of Pub.L. 95–223, 91 Stat. 1626, enacted October 28, 1977. <https://www.law.cornell.edu/uscode/text/50/chapter-35>

889 of the National Defense Authorization Act (2019);<sup>5</sup> and national security claims for imposing tariffs on uranium imports (which the administration has at this point declined to do) and steel and aluminum, applicable to many of our trading partners and closest allies, under Section 232 of the Trade Expansion Act.<sup>6</sup> President Trump continues to threaten the imposition of new tariffs, as retaliation under Section 301 of the Trade Act of 1974, on German car imports, currency manipulators FT, and most recently on France for its adoption of new tax legislation aimed at American technology and social media firms.<sup>7</sup> The administration favors factoring currency manipulation into subsidy determinations.<sup>8</sup>

## FEDERAL LITIGATION AND PRESIDENT TRUMP'S ACTIONS.

Two highly significant court actions are already pending against the Trump administration for its trade actions. The first concerns steel imports from many U.S. trading partners, including China. The second, which was recently filed, concerns investment and trade restrictions on Huawei. A third case, concerning the “Mexican immigration tariffs” may well be imminent and will probably involve the U.S. Chamber of Commerce, among others.

Filed by steel importers, the first case, involves the older U.S. Supreme Court case *Algonquin* (1976), which concerned tariffs and the national security provision (Section 232) of the Trade Expansion Act of the 1960s. This case was appealed to the Supreme Court, following expedited statutory rules by the steel importers, following an adverse decision by the Court of International Trade. The lower court grudgingly upheld President Trump’s steel tariffs under Section 232 because it hesitated to overrule even questionable precedents. However, the Supreme Court denied hearing the case on the expedited basis.<sup>9</sup> The steel importers have now appealed to the U.S. Court of Appeals to the Federal Circuit.

The second case, recently filed by Huawei, in which it now asks for summary judgment, addresses the constitutional prohibition against congressional bills of attainder that single out persons, companies or groups for punishment.<sup>10</sup> Congress seemingly singled

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<sup>5</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, Aug. 13, 2018, 132 Stat. 1636  
[https://www.law.cornell.edu/topn/john\\_s\\_mccain\\_national\\_defense\\_authorization\\_act\\_for\\_fiscalyear\\_2019](https://www.law.cornell.edu/topn/john_s_mccain_national_defense_authorization_act_for_fiscalyear_2019)

<sup>6</sup> Trade Expansion Act of 1962, Pub. L. 87-794, Oct. 11, 1962, 76 Stat. 872 (19 U.S.C. 1801 et seq.)  
[https://www.law.cornell.edu/topn/trade\\_expansion\\_act\\_of\\_1962](https://www.law.cornell.edu/topn/trade_expansion_act_of_1962)

<sup>7</sup> William Mauldin, “French Digital Tax to Face U.S. Probe.” WASHINGTON POST July 10, 2019).  
<https://www.wsj.com/articles/u-s-launches-probe-of-french-digital-tax-11562797720>

<sup>8</sup> James Dorn, “Trump’s New Currency Plan a Flimsy Attempt to Confront China.” THE HILL (February 16, 2017).  
<https://thehill.com/blogs/pundits-blog/international/319919-trumps-new-currency-plan-a-flimsy-attempt-to-confront-china>

<sup>9</sup> “Challenge to Trump Steel Tariffs Nixed by U.S. Supreme Court.” REUTERS (June 24, 2019).  
<https://www.reuters.com/article/us-usa-court-steel-idU.S.KCN1TP1PZ>

<sup>10</sup> Arjun Kharpal, “Huawei Files New Legal Action as it Tries for a Swift End to its Lawsuit against the U.S. Government.” POLITICO (May 29, 2019). <https://www.cnbc.com/2019/05/29/huawei-files-motion-for-summary-judgement-in-lawsuit-against-us.html>

out Huawei by imposing restrictions on it for national security reasons under the new National Defense Authorization Act (Section 889). The chief legal officer of Huawei argues that the U.S. Constitution prohibits such acts and that, “The ban is a quintessential bill of attainder and a violation of due process.”<sup>11</sup>

The third possible case, threatening tariffs on Mexican imports, is based upon President Trump’s claim that Mexican immigration policy is a threat to U.S. national security under the International Emergency Economic Powers Act. Even though the administration has backed of this threat recently, a legal action is still possible and would certainly raise the threshold issue, if that claim is sufficient to satisfy the national security requirement.

Federal courts review presidential actions, even when they involve foreign policy. This goes back to *Curtis Wright* (1936),<sup>12</sup> a 1930s Supreme Court case involving an arms embargo declared by President Roosevelt during the Chaco War in Latin America, and *Youngstown* (1952),<sup>13</sup> where the Supreme Court addressed President Truman’s seizure of steel mills during the Korean War. In *Youngstown*, the court clearly stated that the president’s powers as commander in chief do not include seizing domestic steel mills. Justice Jackson stated that the president is commander in chief of the military, not commander in chief of the nation. In *Dames and Moore*,<sup>14</sup> the 1981 Supreme Court case involved President Carter’s Iranian Hostage Agreements. It upheld those agreements only after a very careful analysis and a finding of congressional authorization or implicit congressional acceptance of presidential actions involving settlement of diplomatic claims.

Presidential actions—even when the president argues that they are not reviewable by courts—are indeed subject to judicial review. This is what is call the rule of law. Congress makes the laws, and all laws and executive actions must comply with the U.S. Constitution to uphold the structure of the federal government and to preserve individual rights.

Under the U.S. Constitution, Congress has exclusive authority over trade. However, much of this authority has been delegated to the executive branch over the decades since the 1930s. So far, Congress has failed to reclaim its trade authority (or its war-making authority).

Congress has the sole constitutional authority to enact new taxes. Congress never intended to abrogate its taxing authority by allowing any president to unilaterally impose

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<sup>11</sup> Song Liuping, “Huawei and the U.S. Constitution.” WALL STREET JOURNAL (May 28, 2019). <https://www.wsj.com/articles/huawei-and-the-u-s-constitution-11558989190>

<sup>12</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). <https://www.law.cornell.edu/supremecourt/text/299/304>

<sup>13</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). <https://www.law.cornell.edu/supremecourt/text/343/937>

<sup>14</sup> *Dames & Moore v. Regan*, 453 U.S. 654 (1981). <https://caselaw.findlaw.com/us-supreme-court/453/654.html>

new tariffs, which are taxes on U.S. imports paid by U.S. firms and consumers. Tariffs and foreign retaliatory tariffs hurt everyone, including farmers, importers, consumers and domestic producers. Recent U.S. government figures indicate that the revenue on Trump’s tariffs on \$250 billion of Chinese imports do not cover the bailout to U.S. farmers let alone other injured parties. NYT 7.16 Another metric demonstrating the negative economic impact of the trade war on the United States is the huge decline of 56% of Chinese buyers of U.S. homes over the prior 12 months. WSJ 7.18.19

A Supreme Court case decided in June, surprisingly, indicates that the court may be on the verge of “rejuvenating the nondelegation doctrine.” While *Gundy v. U.S.*<sup>15</sup> dealt with a nontrade issue, the Supreme Court indicated, in the next appropriate case, it might well reconsider the fundamental constitutional question of congressional delegation of authority to the executive branch. This would have a huge implication for trade cases that may be heard by the court in its next session. A lead editorial in the *Wall Street Journal* succinctly stated the historical possibility of such a review.

The courts have been reluctant to police this blurring of legislative and executive authority, but that may be changing. In *Gundy v. U.S.* on Thursday, three of the Supreme Court conservatives showed an appetite for rejuvenating the “nondelegation doctrine,” which holds that Congress cannot under the Constitution delegate legislative power to another body.<sup>16</sup>

The editorial goes on to point out while the three conservative justices dissented, one conservative justice (Justice Brett Kavanaugh) abstained, and one (Justice Samuel Alito), while concurring with the majority, did not support its rationale. Thus, if a trade case comes along involving the issue of congressional delegation of authority to the president, the Supreme Court may very well make a historical decision to uphold Congress’s role in foreign trade and limit the president’s authority to take broad unilateral action.

## REVIVING SEPARATION OF POWERS AND THE NEW FEDERALISM.

To me, this possibility represents a renewed interest in reviving not only separation of powers but federalism (federal–state relations) in other cases, attacking President Trump’s powers. I wrote, at the early outset of the Trump administration, on the new emerging federalism and newer state and local actions:

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<sup>15</sup> *Gundy v. U.S.* (Supreme Court No. 17-6086) (June 21, 2019). <https://www.law.cornell.edu/supct/cert/17-6086>

<sup>16</sup> Lead Editorial, “Who Makes the Law.” WALL STREET JOURNAL (June 21, 2019). <https://www.wsj.com/articles/who-makes-the-law-11561157080?mod=searchresults&page=1&pos=7>

**This newer federalism promotes global engagement and observation of international rules. This is remarkably different from the older version that supported states’ rights and segregation and was primarily based in the South.**

**Today, we see a rapidly evolving anti-Trump resistance in the widespread movement for “sanctuary cities” and the more recent “city-state climate coalition ... These local actions by cities and states are in opposition to President Trump’s national policies relating to immigration enforcement, the rejection of the Paris Climate Accord, and a general contempt for a rules-based international order.<sup>17</sup>**

President Trump’s reliance on the 1976 National Emergencies Act to declare an “emergency” to reallocate U.S. Department of Defense funds to build his wall along the Mexican border only further reflects the extent to which a president’s actions create constitutional battles involving the separation of powers and federalism.<sup>18</sup> Sixteen states immediately filed cases in federal court, as well as various private legal actions.<sup>19</sup> Indeed, the Supreme Court recently “reined in a wayward president” in the case invalidating the inclusion of a citizenship question in the 2020 Census.<sup>20</sup>

A March 2019 study concluded that the federal courts have ruled against the Trump administration at least 63 times during the past two years. Recent cases have only increased Trump’s losing number.<sup>21</sup> To me, President Trump’s litigation obsession while in office

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<sup>17</sup> Stuart Malawer, “Trump’s Foreign Policy and the New Federalism.” RICHMOND TIMES-DISPATCH (June 17, 2017). <https://www.richmond.com/opinion/their-opinion/guest-columnists/stuart-s-malawer-trump-s-foreign-policy-and-the-new/article-fff22996-d7cb-596f-a1b1-7cb1573e643e.html>

<sup>18</sup> Peter Baker, “Trump Declares a National Emergency, and Provokes a Constitutional Clash.” NEW YORK TIMES (February 15, 2019). <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html>

<sup>19</sup> Charlie Savage and Robert Pear, “16 States Sue to Stop Trump’s Use of Emergency Powers to Build Border Wall.” NEW YORK TIMES (February 18, 2019). <https://www.nytimes.com/2019/02/18/us/politics/national-emergency-lawsuits-trump.html?auth=login-email&login=email> . “The outcome of the challenges to Trump’s order could ultimately depend on how much deference courts are willing to give him as president arguing there is a national security issue, said Bobby Chesney, a constitutional law professor at the University of Texas.” Mark Berman, Fred Barrash and Maria Sacchetti, “Courts Face Difficult Question in Battle over Trump Order.” WASHINGTON POST (February 19, 2019). [https://www.washingtonpost.com/national/trumps-emergency-declaration-to-pay-for-border-wall-faces-a-lengthy-court-battle/2019/02/19/723b61d6-3473-11e9-854a-7a14d7fec96a\\_story.html?utm\\_term=.520c729a3ca1](https://www.washingtonpost.com/national/trumps-emergency-declaration-to-pay-for-border-wall-faces-a-lengthy-court-battle/2019/02/19/723b61d6-3473-11e9-854a-7a14d7fec96a_story.html?utm_term=.520c729a3ca1)

<sup>20</sup> Editorial, “A Win for Democracy.” WASHINGTON POST (July 12, 2019). [https://www.washingtonpost.com/opinions/our-democratic-institutions-reined-trump-in-on-the-census/2019/07/12/c1fa16a0-a425-11e9-b732-41a79c2551bf\\_story.html?utm\\_term=.ceadee97009a](https://www.washingtonpost.com/opinions/our-democratic-institutions-reined-trump-in-on-the-census/2019/07/12/c1fa16a0-a425-11e9-b732-41a79c2551bf_story.html?utm_term=.ceadee97009a)

<sup>21</sup> “Federal judges have ruled against the Trump administration at least 63 times over the past two years, an extraordinary record of legal defeat .... In case after case, judges have rebuked Trump officials for failing to follow the most basic rules of governance for shifting policy, including providing legitimate explanations supported by facts ....” Fred Barbash and Deanna Paul, “The Real Reason the Trump Administration is Constantly Losing in Court.” WASHINGTON POST (March 20, 2019). [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9\\_story.html?utm\\_term=.c9d8303aad3](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html?utm_term=.c9d8303aad3)

mirrors his abuse of the domestic legal system, manifested by his involvement in more than 3,500 cases as a private party and real estate developer.<sup>22</sup>

On the legislative front, the Senate has recently rebuked President Trump’s declaration of an emergency under the Arms Export Control Act to sell arms to Saudi Arabia and the United Arab Emirates. This evidences a growing bipartisan consensus that the president’s reliance on declarations of emergencies and national security rationales is facing growing domestic political resistance.<sup>23</sup>

The Senate voted to block the sale of billions of dollars of munitions to Saudi Arabia and the United Arab Emirates on Thursday, in a sharp and bipartisan rebuke of the Trump administration’s attempt to circumvent Congress to allow the exports by declaring an emergency over Iran.<sup>24</sup>

## WTO LITIGATION AND THE U.S.

It is important to note that on the international level the legal process is also moving toward examining President Trump’s trade actions based upon national security. Numerous cases have been filed against the United States in the World Trade Organization’s dispute resolution system concerning the administration’s reliance on national security.<sup>25</sup> The administration argues that the WTO cannot review such national security determinations. To use an American legal term, these issues are not justiciable. Unfortunately for the administration, the WTO recently ruled in a case brought by the Ukraine against the Russian Federation that national security determinations are indeed reviewable.<sup>26</sup> This does not bode well for the pending cases against the United States. But it should be said that the administration recently seems to be a bit more willing to settle WTO cases even though it lost the recent case concerning Chinese state owned enterprises. NYT 7.15

On a related point concerning the U.S.-China litigation in the WTO, it should be noted that there has been robust litigation within the WTO between the parties. China has implemented all decisions against it, and the U.S. has mostly done the same. The following observations I wrote several years ago remain valid today.<sup>27</sup>

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<sup>22</sup> Jesse Byrnes, “Trump Involved in 3,500 Law Suits: Report.” THE HILL (June 1, 2016). <https://thehill.com/blogs/blog-briefing-room/news/281908-report-trump-involved-in-3500-lawsuits>

<sup>23</sup> Catie Edmondson, “Senate Rebukes Trump Bid to Bypass Congress on Arms Sales.” NEW YORK TIMES (June 20, 2019). <https://www.nytimes.com/2019/06/20/us/politics/saudi-arms-sales.html>

<sup>24</sup> Id.

<sup>25</sup> DS544: United States — Certain Measures on Steel and Aluminum Products. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/DS544\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS544_e.htm)

<sup>26</sup> DS-512 — “Ukraine and Russia— Measures Concerning Traffic in Transit.” [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds512\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm)

<sup>27</sup> Stuart Malawer, “U.S.-China Trade Relations – Litigation in the WTO 2001 – 2014.” INTERNATIONAL LAW PRACTICUM (Spring 2014) Vol.27, No. 1 at p. 122. <http://globaltraderelations.net/images/Malawer.U.S. - CHINA LITIGATION IN THE WTO 2001-2014 NYSBA, International Law Practicum Spring 2014 .pdf>

**I view U.S.-China litigation in the WTO as validating the strength and critical importance of the WTO and its dispute resolution system. China is now the second-largest economy in the world. It is expected that disputes increase with trade flows. The strength of the international system is not in the absence of disputes, but in the way that they are resolved ... An examination of the cases involving China shows that trade disputes that arise between it and the United States are submitted to the WTO and are resolved, either by diplomatic negotiations in the consultation stage or in the litigation phase. No enforcement actions by either country asking for sanctions have been filed under Article 22 of the Dispute Settlement Understanding.<sup>28</sup>**

**I suspect and hope this pattern will continue with the Trump administration despite recent animosity towards the WTO, the dispute resolution system and the Appellate Body. It is in the national interest of the United States to ensure a rules-based system with impartial adjudication of the rules.**

#### **PREDICTION.**

**While it is always dangerous to predict how a federal court or the Supreme Court will decide a case, I predict the federal courts will uphold the separation of powers in the face of the outrageous and unprecedented onslaught of presidential tariff and trade actions by a president relying upon dubious claims of national security and national emergency. Personal gripes can never be a basis for trade policy. My guess is that this will come from the steel importers' case concerning Section 232. Hopefully, Congress will also find the will to claw back some of the trade authority it has delegated to the president. President Trump is obviously determined to disregard U.S. and international law and destroy the modern, rules-based global trading order.**

**President Trump, the leader of the country that built the world trading system, continues to disrupt international commerce as a weapon wielded in pursuit of national aims ... The escalating trade war has dealt a potentially grievous blow to the workings of the global commercial system, and especially to its de facto referee, the World Trade Organization.<sup>29</sup>**

**This global system has been the foundation of U.S. foreign and national security policy since 1945 and remains so today. "Bretton Woods shaped the post-second world war era not so much because of the specific agreements reached, but because of the commitment to institutionalize co-operation."**

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<sup>28</sup> **Id.** at 126.

<sup>29</sup> **Peter Goodman, "Globalization is Moving Past the U.S. and its Vision of the World Order." NEW YORK TIMES (June 19, 2019). <https://www.nytimes.com/2019/06/19/business/globalization-us-world-order.html>**

## Trump's Tariff Wars: A Political and Historical Perspective

Stuart S. Malawer\*\*

*With President Trump's recent imposition of USD 34 billion in new tariffs on imports from China, and with China's prompt retaliation, the US is now in its biggest trade war with China and other countries since the 1930s. President Trump's policies focusing on threats, trade deficits and bilateral trade, as well as the movement away from the postwar international system, have been historical aberrations since 1945. The US trade diplomacy ought to concentrate on building coalitions and viable proposals for addressing trade issues, including those concerning World Trade Organization rule-making and dispute resolution. This would help to ensure a rules-based trading system.*

*Keywords: Trump's Tariffs, US-China Trade War, Trade and National Security, Article XXI, WTO Security Exception, Section 232 of Trade Expansion Act, Section 301 of Tariff Act*

As President Trump recently imposed USD 34 billion in new tariffs on imports from China and China took prompt retaliation against them, the US is now in its biggest trade war with China and other countries since the 1930s.<sup>1</sup>

The Trump administration previously imposed tariffs on washing machines, solar energy cells, aluminum and steel.<sup>2</sup> The president threatened to impose an additional USD 200 billion of new tariffs on China<sup>3</sup> and threatened two days later to impose tariffs on as much of USD 500 billion of Chinese imports.<sup>4</sup> He then threatened to increase the rate of the proposed tariffs. Yet even newer global tariffs have been threatened on automobiles and uranium imports. China has filed a novel World Trade Organization (WTO) complaint

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<sup>1</sup> H. Lockett, *US Imposes Tariffs of \$34bn of Imports from China*, FIN. TIMES, July 6, 2018, available at <https://www.ft.com/content/b77361e8-80b3-11e8-bc55-50daf11b720d>. See also A. Swanson, *Trump's Trade War with China is Officially Underway*, N.Y. TIMES, July 5, 2018, available at [https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html?emc=edit\\_na\\_20180706&nl=breaking-news&nid=1146225sing-news&ref=cta](https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html?emc=edit_na_20180706&nl=breaking-news&nid=1146225sing-news&ref=cta) (all last visited on Aug. 7, 2018).

<sup>2</sup> Q. Bui & N. Irwin, *How Much Will the Trade War Cost a Typical American Family? Around \$60 (So Far)*, N. Y. TIMES, July 13, 2018, available at <https://www.nytimes.com/interactive/2018/07/12/upshot/trade-war-cost-families.html> (last visited on July 13, 2018).

<sup>3</sup> A. Swanson & J. Tankersley, *U.S. Threatens Tariffs on \$200 Billion of Chinese Goods, From Tilapia to Handbags*, N. Y. TIMES, July 11, 2018, available at <https://www.nytimes.com/2018/07/10/us/politics/trump-china-trade-war.html> (last visited on July 12, 2018).

<sup>4</sup> N. Timiraos & H. Torrey, *Trump Continues Criticism of Fed, Renews Threat on China Imports*, WALL ST. J., July 20, 2018, available at <https://www.wsj.com/articles/trump-says-hes-ready-to-impose-tariffs-on-500-billion-in-chinese-imports-1532085168> (last visited on Aug. 7, 2018).

against the US without waiting for the imposition of the threatened tariffs.<sup>5</sup> President Trump's actions escalate the tariff war with the grave possibility of expanding into other areas of trade, investment and international relations.

President Trump has ended the phony war with China (or, as the Germans called the first eight months of World War II, the *sitzkrieg*) with his recent actions. He has finally started a real trade war. In the 1940s, both sides thought the war would be short. Of course, it was not. It was horrendous and spanned continents, involving millions of people.

This trade war is already a tariff onslaught against not just China but a broad range of others, including the European Union (EU), Canada and Mexico. It is unlike earlier trade disputes under the General Agreement on Tariffs and Trade (GATT) and the WTO. An attack by the US, relying on national security rationale and the resurrection of trade retaliation, is aimed at restructuring the rules and institutions of the postwar world. While ostensibly addressing bilateral trade deficits and intellectual property rights, among other issues, Trump's trade war is intended to protect legacy industries.

Fortunately, not much actual impact on trade has been made except for some on US agricultural exports and minimal increases in some domestic prices. The recent Yuan devaluation has kept US price increases limited. Only nascent opposition to Trump's trade actions by his supporters and by Republicans in Congress, as well as some newer opposition from the US Chamber of Commerce and the Koch brothers have recently emerged.

At this point, taking a step back to assess Trump's tariff and trade policies from a broad historical and political perspective is a worthwhile and necessary undertaking. Fortunately, three books were published recently that help with this broad assessment. An economist, a historian, and a foreign policy expert wrote these books. Although they do not address Trump's policies directly, these works provide the broad context for where his policies fit into US political and international history. This fit is not good.

These books are particularly important for the many lawyers serving in the trade offices throughout the federal government. They are especially informative for those from private practices who view trade primarily through the lens of industries impacted by imports. American lawyers populate almost all of the important trade policy positions, starting with the Office of the United States Trade Representative. Trade policy includes a great deal more than just narrow private and domestic interests. It increasingly includes the critical issues of foreign policy and national security.

In *CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY* (2017),<sup>6</sup> economist Douglas Irwin makes the following three observations. First, the three main purposes of the US trade policy have historically been the three Rs: revenue, restrictions and reciprocity. The US first collected tariffs historically to increase national revenue. It then restricted imports with

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<sup>5</sup> Lily Kuo, China Files Complaint to WTO over Trump's \$200bn Tariff Plan, *GUARDIAN*, July 16, 2018, available at <https://www.theguardian.com/business/2018/jul/16/china-files-complaint-to-wto-over-trump-tariff-plan> (last visited on July 21, 2018).

<sup>6</sup> D. IRWIN, *CLASHING OVER COMMERCE – A HISTORY OF US TRADE POLICY* (2017).

tariffs to help domestic industries before moving on to reciprocity as the basis of the modern trading system, as embodied in the GATT and the WTO. Second, tariff policy has always been the result of clashing economic interests, such as between manufacturers and consumers. Third, changes in trade and tariff policies have resulted from two great historical events: the American Civil War and the Great Depression. Irwin leaves an open question about whether President Trump's election will be another turning point in US trade policy.<sup>7</sup>

In *THE SOUL OF AMERICA* (2018),<sup>8</sup> presidential historian Jon Meacham traces the various difficult aspects of the US history from slavery to the Civil War, Reconstruction, Jim Crow laws, the Red Scare and the revival of the Ku Klux Klan of the 1920s, the internment of Japanese-Americans during World War II, McCarthyism of the 1950s and the “massive resistance” throughout the 1960s. His thesis is simple: Bad things have happened in US history, and combatting them is a constant. Retroactive forces are always present. However, the US has generally moved forward and has produced a better nation.<sup>9</sup> Jon Meacham is not optimistic about whether President Trump can rise to the occasion of confronting the challenges facing the US this decade, but he leaves the question open. He concludes his study by stating that understanding the past can be orienting.<sup>10</sup>

In *A WORLD IN DISARRAY* (2017),<sup>11</sup> foreign policy expert Richard Haas examines the domestic and international forces at work today and concludes that long-standing, deep divisions exist in the US and globally. These have resulted in part from globalization and rapid technological developments.

These divisions in the US, including cultural conflict, economic inequalities and immigration control, have been exacerbated by slow economic growth in the US and abroad since the Great Recession of 2008. Governments have simply not formulated effective domestic policies with which to address the economic and social consequences of this new era. Populism and nationalism have only increased. Haas argues that a new World Order 2.0 needs to be developed, taking into account a broad range of new forces and challenges. He also argues that frequent reversals of US foreign policy are simply not helpful.<sup>12</sup>

These authors noted to varying degrees the long history of the delegation of congressional trade authority to the president and the growth of executive authority in foreign affairs.<sup>13</sup> These developments simply cannot be understated. They need to be emphasized again. As trade and national security have grown in importance as domestic issues, President Trump has increasingly relied on both the broad delegation of trade authority and the past expansion of presidential authority in foreign affairs. His ever-growing reliance on national security as a rationale for trade actions is unprecedented.

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<sup>7</sup> *Id.* at 687.

<sup>8</sup> See generally J. MEACHAM, *THE SOUL OF AMERICA – THE BATTLE FOR OUR BETTER ANGELS* (2018).

<sup>9</sup> *Id.* at 28.

<sup>10</sup> *Id.* at 439.

<sup>11</sup> See generally R. HAAS, *A WORLD IN DISARRAY: AMERICAN FOREIGN POLICY AND THE CRISIS OF THE OLD ORDER* (2017).

<sup>12</sup> *Id.* at 306.

<sup>13</sup> See *Congress vs. Trump on Tariffs*, WALL ST. J. (Editorial), June 28, 2018, available at <https://www.wsj.com/articles/congress-vs-trump-on-tariffs-1528414368> (last visited on July 1, 2018).

The president's reliance on Section 232 of the Trade Expansion Act and its authorization for trade actions based on national security (aluminum and steel) has already been attacked in the WTO and the federal courts. Complainants in the WTO, including the EU, China,<sup>14</sup> India, Canada, Mexico and most recently Russia,<sup>15</sup> rely on Article XXI. They argue that US actions do not qualify as valid national security actions under global trade law. Even Switzerland has filed a rare WTO challenge.<sup>16</sup> These countries contend that those actions are just a subterfuge for protectionist measures. The US has filed a bizarre WTO case contending that five of these countries have violated trade rules by retaliation against the US 232 tariffs.<sup>17</sup> New domestic litigation filed in the US Court of International Trade in New York contends that the broad congressional delegation of trade authority to the president under Section 232 is unconstitutional.<sup>18</sup> It contends that Congress has delegated away its legislative function by not establishing sufficient criteria for executive action. In fact, Congress is currently considering restricting the president's authority relying on Section 232.<sup>19</sup>

The president's request to broaden the coverage of the Committee on Foreign Investment in the US is being considered by Congress.<sup>20</sup> His frequent calls for action are unsettling under other US legislation authorizing presidential actions based on national emergencies (e.g., the International Emergency Economic Powers Act as a basis for restricting foreign direct investment in the US)<sup>21</sup> and export controls for regulating outward investment and technology transactions.<sup>22</sup> This is inconsistent with US demands for greater investment liberalization in China.

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<sup>14</sup> See China initiates WTO dispute complaint against US tariffs on steel, aluminum products, WTO News, Apr. 9, 2018, available at [https://www.wto.org/english/news\\_e/news18\\_e/ds544rfc\\_09apr18\\_e.htm](https://www.wto.org/english/news_e/news18_e/ds544rfc_09apr18_e.htm) (last visited on July 1, 2018).

<sup>15</sup> See Russia Initiates WTO dispute complaint against US steel, aluminium duties, WTO News, July 2, 2018, available at [https://www.wto.org/english/news\\_e/news18\\_e/ds554rfc\\_02jul18\\_e.htm](https://www.wto.org/english/news_e/news18_e/ds554rfc_02jul18_e.htm) (last visited on July 2, 2018).

<sup>16</sup> See Switzerland initiates WTO dispute complaint against US steel, aluminium duties, WTO News, July 12, 2018, available at [https://www.wto.org/english/news\\_e/news18\\_e/ds556rfc\\_12jul18\\_e.htm](https://www.wto.org/english/news_e/news18_e/ds556rfc_12jul18_e.htm) (last visited on July 12, 2018).

<sup>17</sup> See United States initiates dispute complaints against five members over duties on US products, WTO News, July 19, 2018, available at [https://www.wto.org/english/news\\_e/news18\\_e/ds557\\_to\\_561rfc\\_19jul18\\_e.htm](https://www.wto.org/english/news_e/news18_e/ds557_to_561rfc_19jul18_e.htm) (last visited on July 21, 2018).

<sup>18</sup> American Institute for International Steel, Inc., et al v. United States, et al. (U.S. Court of International Trade) (Case # 18-00151 filed June 27, 2018), available at [http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED\\_June\\_27\\_AIIS\\_-\\_Plaintiffs-Complaint.pdf](http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED_June_27_AIIS_-_Plaintiffs-Complaint.pdf) (last visited on July 1, 2018).

<sup>19</sup> See Portman to Introduce Bill Aimed at 'Reforming' Section 232 Statute," World Trade Online, July 12, 2018, available at <https://insidetrade.com/daily-news/portman-introduce-bill-aimed-%E2%80%98reforming%E2%80%99-section-232-statute> (last visited on July 12, 2018).

<sup>20</sup> A. Swanson & A. Rappeport, *Trump May Soften Sweeping Plan to Restrict Chinese Investments*, N.Y. TIMES, June 26, 2018, available at <https://www.nytimes.com/2018/06/26/us/politics/trump-cfius-chinese-investment.html> (last visited on July 1, 2018).

<sup>21</sup> S. Donnan, *Trump Targets Investments as Trade War Heats Up*, FIN. TIMES, June 25, 2018, available at <https://www.ft.com/content/c002dadc-766b-11e8-b326-75a27d27ea5f> (last visited on July 2, 2018).

<sup>22</sup> See *Trump's Bizarre U-Turn on Sanctions against ZTE*, FIN. TIMES (Editorial), May 15, 2018, available at <https://www.ft.com/content/55b8cab8-5764-11e8-b8b2-d6ceb45fa9d0> (last visited on July 1, 2018).

The president's reliance on unilateral retaliation concerning China's intellectual property policies (Section 301 of the Tariff Act of 1974)<sup>23</sup> and his recent request for new auto tariffs on national security grounds (Section 232 again) only add more fuel to the fire regarding Trump's tariff threats, professing reliance on national security, regardless of the reality.<sup>24</sup> His threats have continued by opening a new investigation concerning uranium imports under Section 232.<sup>25</sup> The use of tariffs to confront intellectual property practices is not a meaningful strategy. Section 232 was part of the broader legislation of 1962 that was intended to promote trade expansion, not retaliation. Trump's reliance on national security to impose tariffs, in fact, endangers real American national security interests. Trump's view of geopolitics as being analogous to real estate negotiations is quite unnerving. His ignorance of the global trading system and global supply chains is astounding.

Today, only the federal courts can effectively check presidential actions. Congress has proved to be ineffective in providing oversight.<sup>26</sup> However, even the last resort of judicial review may prove ineffective. Although cases have looked through a president's claims of national security, others have upheld such claims. For example, take a look at the recent Supreme Court case upholding President Trump's immigration ban focused primarily on Muslims!<sup>27</sup> The majority of the court refused to look beyond the broad statutory language and the Trump administration's reliance on national security despite the president's many derogatory remarks concerning Muslims. The possible appointment of a new associate justice of the Supreme Court at this time raises even more concerns.<sup>28</sup>

Let's recall some of President Trump's actions relating to treaties and multilateral arrangements. He withdrew from the Trans-Pacific Partnership Agreement, the Paris Climate Accord, the Iran nuclear deal and the United Nations Human Rights Council. Further, he is renegotiating the North American Free Trade Agreement and is battering the WTO almost daily, especially its dispute resolution system, even though the US continues to win cases at the WTO.<sup>29</sup> The president has not offered any coherent proposals addressing newer issues of trade. Trump appears to be on the verge of quitting the WTO by proposing

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<sup>23</sup> See USTR Robert Lighthizer Statement on the President's Additional Section 301 Action, USTR News, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/ustr-robert-lighthizer-statement> (last visited on July 1, 2018).

<sup>24</sup> See *The National Security Tariff Ruse*, WALL ST. J. (Editorial), Mar. 13, 2018, available at <https://www.wsj.com/articles/the-national-security-tariff-ruse-1520897310> (last visited on July 1, 2018).

<sup>25</sup> Ed Crooks, *Trump Administration Weighs Tariffs on Uranium Imports*, FIN. TIMES, July 19, 2018, available at <https://www.ft.com/content/f23cc632-8ac2-11e8-b18d-0181731a0340> (last visited on July 21, 2018).

<sup>26</sup> S. Hughes, *U.S. Senate Takes Symbolic Step to Curb White House on Trade*, WALL ST. J., July 11, 2018, available at <https://www.wsj.com/articles/senate-takes-step-to-assert-power-on-trade-1531328759> (last visited on July 12, 2018).

<sup>27</sup> *Trump v. Hawaii* (U.S. Supreme Court decision on June 26, 2018), available at [https://www.supremecourt.gov/opinions/17pdf/17-965\\_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf) (last visited on July 1, 2018).

<sup>28</sup> S. Stolberg, *Democrats Zero in on Kavanaugh's Defense of Presidential Power*, N. Y. TIMES, July 11, 2018, available at <https://www.nytimes.com/2018/07/11/us/politics/democrats-brett-kavanaugh-supreme-court.html> (last visited on July 12, 2018).

<sup>29</sup> See, e.g., *US Prevails in Showing US Subsidies to Airbus Continues to Break WTO Rules*, USTR News, May 15, 2018, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/united-states-prevails-showing-eu> (last visited on July 1, 2018).

legislation to accomplish this.<sup>30</sup> President Trump even threatens our allies, including South Korea, Canada, Germany, the UK and the EU, almost daily over tariff issues. He threatens NATO over illusory issues as well.<sup>31</sup> He reimposed broad economic sanctions on Iran in an apparent violation of international law. President Trump doubled down when he promised payments to US farmers hurt by the retaliatory tariffs. Such payments would be illegal under WTO subsidy rules and would further damage the trading system. American and foreign firms in the US have begun to make plans to produce abroad to avoid retaliatory tariffs.<sup>32</sup> The president's tariff threats and bullying have brought the international trading system to the verge of a trade war.<sup>33</sup> Under Article 52 of the Vienna Convention on the Law of Treaties, which is incorporated into WTO law by Article 3 of the Dispute Settlement Understanding, duress and coercion is simply impermissible in treaty relations. Agreements resulting from illegal duress are void.

“These are dark days for the global trading system.”<sup>34</sup> The US delegation even refused to go along with the World Health Organization's code on marketing breast milk, threatening other members and overturning nearly 40 years of consensus.<sup>35</sup> The president's preference for bilateral deals and use of the US leverage are ominous.

So, what can be said about President Trump's mercantilist and protectionist trade and tariff policies so far when placed in this broader political ecosystem of the US and international history?

My conclusion is simple. President Trump's policies focusing on threats, trade deficits and bilateral trade, as well as the movement away from the postwar international system, have been historical aberrations since 1945. President Trump's tariff tirade is theater, not policy. So far, President Trump has only accomplished a two-front trade war with the EU and China with local hostilities involving Canada and Mexico. His baseless attacks and contempt for rules and institutions simply do not inspire confidence. Trump's attack on the WTO as well

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<sup>30</sup> G. Rushford, *Trump's War on the WTO*, WALL ST. J., July 5, 2018, available at <https://www.wsj.com/articles/trumps-war-on-the-wto-1530723098> See also J. Swan, *A Leaked Trump Bill to Blow up the WTO*, AXIOS, available at [https://www.axios.com/trump-trade-war-leaked-bill-world-trade-organization-united-states-d51278d2-0516-4def-a4d3-ed676f4e0f83.html?utm\\_source=twitter&utm\\_medium=twsocialshare&utm\\_campaign=organic](https://www.axios.com/trump-trade-war-leaked-bill-world-trade-organization-united-states-d51278d2-0516-4def-a4d3-ed676f4e0f83.html?utm_source=twitter&utm_medium=twsocialshare&utm_campaign=organic) (last visited on July 2, 2018).

<sup>31</sup> K. Rogers, *Trump's NATO Visit Marked by Stiff Handshakes and Uncomfortable 'Family Photos,'* N. Y. TIMES, July 12, 2018, available at <https://www.nytimes.com/2018/07/12/world/europe/trump-nato-body-language.html> (last visited on July 12, 2018).

<sup>32</sup> P. Campbell, *Tariff Threat Forces Carmakers to Plan Switch from Global to Local Production*, FIN. TIMES, July 3, 2018, available at <https://www.ft.com/content/50e7bada-6a47-11e8-8cf3-0c230fa67aec> (last visited on July 4, 2018).

<sup>33</sup> See *How Should Europe Respond to Trump's Bullying?*, N.Y. TIMES (Editorial), June 22, 2018, available at <https://www.nytimes.com/2018/06/21/opinion/europe-trump-bullying.html> (last visited on July 1, 2018).

<sup>34</sup> See *A Measured Cheer for the EU-Japan Trade Deal*, FIN. TIMES (Editorial), July 17, 2018, available at <https://www.ft.com/content/3c44a364-85fd-11e8-a29d-73e3d454535d> (last visited on July 21, 2018).

<sup>35</sup> A. Jacobs, *U.S. Delegation Disrupts Accord on Breast Milk*, N.Y. TIMES, July 9, 2018, available at <https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html> (last visited on July 9, 2018).

as his reliance on national security and unilateral retaliation are most regrettable.<sup>36</sup> Not only is global trade at risk but also so is the rule of law in trade relations.<sup>37</sup> Even the Iranian government has recently resorted to litigating differences over trade sanctions by filing an action against the US in the International Court of Justice.<sup>38</sup>

The US trade diplomacy ought to concentrate on building coalitions and viable proposals to address trade issues, including those concerning the WTO rule-making and dispute resolution. This would help to ensure a rules-based trading system.<sup>39</sup>

It is important to be careful. The president's actions are rooted in the clash of competing domestic interests, going back to the founding of the US. These may very well take hold for the remainder of his term and perhaps beyond. Destructive forces are always lurking below the surface. Even though things have been somewhat stable for the past 75 years, it does not mean they will remain so. It will require very hard and serious work by the US and foreign leaders to help to ensure a future in which we have not failed in overcoming our historical challenges.

As one final historical note, the Confederate forces fired the first shots of the American Civil War when they bombarded Fort Sumter on April 12, 1861. There were actually no fatalities during this battle. Each side thought the war was to be short. Four years later in April 1865, almost 620,000 American soldiers were dead, which is more US deaths than in all of the American wars fought over two centuries up through the Vietnam War. Wars, military and trade are unpredictable and usually very costly.

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<sup>36</sup> S. Nixon, *Trump Puts the WTO on the Rope*, WALL ST. J., July 11, 2018, available at <https://www.wsj.com/articles/trump-puts-the-wto-on-the-ropes-1531340083> (last visited on July 12, 2018).

<sup>37</sup> J. Bacchus, *America Needs the WTO*, WALL ST. J., July 12, 2018, available at <https://www.wsj.com/articles/america-needs-the-wto-1531435787> (last visited on July 13, 2018).

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## **TRUMP’S YEAR-ONE TRADE POLICIES:**

### **Belligerent Rhetoric – But Still Unsettled.**

**Stuart Malawer**

#### **Year-One's Score**

**It has been one year since President Trump took office. He came to office riding a tide of anti-trade rhetoric as one of the most protectionist candidates ever to have won an election. Trade was clearly a major issue, which is quite rare in presidential politics. The recently concluded WTO Ministerial Conference in Buenos Aires achieved no significant accomplishments.<sup>1</sup> During the conference, the United States Trade Representative (“USTR”) Robert Lighthizer made unsettling and acrimonious statements.**

**The WTO is losing its essential focus on negotiation, and is becoming a litigation-centered organization .... Too often members seem to believe they can gain concessions through lawsuits they could never get at the negotiating table .... It’s impossible to negotiate new rules when many of the current ones are not being followed.<sup>2</sup>**

**Ominously, a few weeks after the Buenos Aires ministerial conference, on the first anniversary of President Trump’s inauguration, the administration submitted to Congress its report on China’s WTO compliance.<sup>3</sup> It stunningly stated:**

**It seems clear that the United States erred in supporting China’s entry into the WTO on terms that have proven to be ineffective .... [T]his mechanism (the WTO dispute resolution system) is not designed to address a situation in which a WTO member has opted for a state-led trade regime ...<sup>4</sup>**

**Even more ominously, a few days after the conclusion of the Buenos Aires ministerial conference, President Trump announced his first major trade remedies decision. He authorized safeguard tariffs on washing machines and solar products aimed at South Korea and China.<sup>5</sup> This decision might very well mark a turning point that seriously begins implementation of the president’s belligerent rhetoric. On the other hand it may not. At this point it is unclear. More trade remedy cases are pending.<sup>6</sup> Future actions will be more determinative.**

**President Trump’s recent speech to the World Economic Forum at Davos merely restated his long-standing call for greater trade enforcement actions (and for greater investment into the US.). President Trump said: “We will enforce our trade laws and restore integrity to our trading system.”<sup>7</sup> But there was no explicit condemnation of China or the WTO. While**

Trump did not espouse a return to the American leadership in the global system, he did announce a possible reconsideration of the Trans-Pacific Partnership (“TPP”).

Most recently, in his first State of the Union Address President Trump directly addressed global trade but only in five surprisingly short sentences. He neither announced any new trade actions, nor lambasted the global trading system or its institutions or specific countries. Interestingly, President Trump seemingly narrowed his concerns primarily to protecting American intellectual property rights through trade enforcement. President Trump simply stated:

The era of economic surrender is totally over ... We will work to fix bad trade deals and negotiate new ones

And we will protect American workers and American intellectual property through strong enforcement of our trade rules.<sup>8</sup>

What can be then be said about the US trade policy after one year of the Trump administration? First, there were some international highlights related to global trade and business during the first year of the Trump administration. They are:

- The U.S. withdrew from the Trans-Pacific Partnership and opposes granting market economy status to China.<sup>9</sup> No new WTO case has been filed by the U.S. The OECD agreed on a global tax avoidance treaty, and the U.S. refused to sign it.<sup>10</sup>
- There was no U.S. withdrawal from the WTO or its dispute-resolution system. However, the Trump administration has made constant complaints about them.<sup>11</sup> The administration has focused on protecting U.S. sovereignty and rejecting so-called expansive interpretations made by the WTO and, in particular, by its Appellate Body.<sup>12</sup>

Second, the US neither declared China to be a currency manipulator, nor imposed a border tax on its exports. The USTR is assessing Section 232 (national security) action against China for its domestic steel and aluminum policies<sup>13</sup> and those relating to the mandatory transfer of intellectual property rights under Section 301. The International Trade Commission (“ITC”) recommended safeguard action against China and South Korea under Section 201 concerning solar panels and washing machines and President Trumped announced the imposition of safeguard duties.<sup>14</sup> Responding to this, South Korea and China promptly filed new cases against the US in the WTO.<sup>15</sup> The US Department of Commerce also authorized a subsidy duty on Canadian lumber.<sup>16</sup>

## Observations

*WTO*

In this regard, my observations are as follows. Not much international action has taken place, as opposed to diffused proposals and extensive rhetoric. Rather, more domestic trade remedy proceedings against China have been initiated and threatened. However, only recently have safeguard duties been imposed in one case. No real significant action against the WTO or its dispute-resolution system has taken place, either. In fact, in recent cases, the US continues to win as both a complainant and a respondent. For example, in a case involving Boeing, the WTO reversed its state subsidies ruling in favor of the US.<sup>17</sup> The WTO upheld the US labeling regulations for tuna in a compliance case introduced by Mexico.<sup>18</sup> Also, the US won a WTO case brought against it by Indonesia concerning the US antidumping duties.<sup>19</sup> Canada has recently filed two new cases against the US contesting duties on lumber imports<sup>20</sup> and broadly attacking the US trade remedies system.<sup>21</sup> The US is expected to contest them. From 1995 to 2017, the US has been a complainant in 115 cases and a respondent in 130 cases at the WTO. It has won a huge majority of them as complainant and a majority of all cases. The US has been involved in nearly half of all WTO cases.<sup>22</sup> Clearly, it is the greatest user of the dispute-resolution system.

## NAFTA

NAFTA renegotiation is moving along bitterly. The US opposes the dispute resolution procedures (Chapters 11 and 19) providing for investor-dispute panels and national appeals from dumping and subsidy determinations.<sup>23</sup> Some actions on trade in the Department of Commerce and the ITC - such as a Commerce Department subsidies ruling against Canada's Bombardier - have taken place. Reliance on administrative trade remedies has increased significantly. This includes rare reliance on national security (Section 232)<sup>24</sup> and retaliation (Section 301). There was a 16-year high on private corporate actions (79 new investigations by the Department of Commerce) in 2017, undoubtedly inspired by the administration's anti-trade rhetoric.<sup>25</sup> More such actions are expected. However, interestingly, the ITC recently ruled against Boeing and for Bombardier when it determined that Boeing was not injured.<sup>26</sup>

## Comments

The grave decline in cases brought to the WTO compared to other presidential administrations is historic.<sup>27</sup> (None have been brought by the Trump administration.)

Congressional action concerning the Committee on Foreign Investment in the United States ("CFIUS")<sup>28</sup> seems imminent. In addition, implementation of the new tax legislation concerning global taxation of multinational corporations is proceeding.<sup>29</sup> Tightening foreign investment rules, especially those relating to Chinese investment in the technology sector, and taxing multinationals and their overseas profits seem to be about right, but caution is needed. Europeans have already warned the US that various tax provisions, such as an excise tax on purchases by the American firms from their subsidiaries, may violate the WTO obligations.<sup>30</sup>

The economic need of foreign direct investment for state economic development is great. States want foreign investment. CFIUS - the interagency committee of the federal

government that reviews the national security implications of foreign investment in the US companies or operations - should not become a disincentive for foreign investors.<sup>31</sup>

A growing divide already exists between the federal government and the states over such investment. State governors, including most Republican ones from agricultural states, strongly support greater trade and foreign investment considering it the key to competing successfully in the global economy.

## **The Bottom Line**

The administration's noise and tone are quite unsettling. Failure by the administration to act more forcefully so far is undoubtedly a result of the clash of domestic interests. But the rhetoric and posturing (over national sovereignty, unilateral measures, bilateral trade deals, sanctions, and trade deficits) are already impacting trade flows and diminishing the American standing in the global system. This is occurring even as domestic and global economies and public markets are rebounding significantly. Hopefully, these trade noises and recent actions are not an overture to really harmful policies.<sup>32</sup>

Most distressing, however, is the administration's lack of leadership in negotiating newer trade rules and its opposition to litigating existing trade disputes. Trade Representative Lighthizer's recent commentary, which criticized the WTO as now being 'litigation-centered,' at the WTO Ministerial Conference is truly baffling.<sup>33</sup> The US was pushing for a rules-based global system throughout the postwar era. It was the principal architect of this system during the Uruguay Round in the early 1990s. The American held the view that negotiated rules must be litigated and enforced when a dispute exists. Otherwise, what is the sense of negotiating them?

This was also one of the main reasons that the WTO was subsequently approved by Congress. Most importantly, why not litigate important trade issues today, especially when diplomatic negotiations of those issues are stalled? The role for judicial determinations in the trade world should not be restricted because the negotiation of newer, more complex rules has been slowed. This is like telling the Supreme Court and the federal judiciary to stop deciding cases because Congress is unable to address newer issues. Indeed, this is precisely the time when judicial determinations are needed the most to resolve disputes over trade issues, even in light of the inability to formulate or legislate newer rules.

Lighthizer comes from the old world of protecting legacy industries such as steel; he does not have a sense of the importance of moving ahead with newer technological issues of trade, such as blockchain,<sup>34</sup> data flows, ecommerce, and artificial intelligence. He is a captive of the old era and not an advocate for embracing the newer digital era and its future. The American leadership in both developing newer rules for global trade and litigating existing concrete and complex cases cannot be abrogated. This should be one of the primary aims in the current US trade policy.

President Trump's well-known disregard for rules stem in part from his years of unrelenting real estate litigation and real estate transactions. Such experience, including dealing principally with only two parties to real estate contracts, have undoubtedly colored his administration's disdain for multilateral rules and institutions, espousal of unilateral actions, and policies in favor of bilateral trade deals. This disdain reflects President Trump's disdain for domestic rules and institutions.

The impact of President Trump's trade actions on the US role in the postwar world order seems most worrisome. China and the EU are the ones moving to fill the leadership gap. Most recently, the EU and Japan signed a huge bilateral trade agreement.<sup>35</sup> The TPP nations have finalized their pact.<sup>36</sup> (The US might now want to rejoin.) The US has not renegotiated or entered into any new bilateral agreements. Its renegotiations with Canada, Mexico and South Korea continue with a multitude of problems. There are no new negotiations with the EU concerning trade and investment.

## Conclusion

The US is increasingly isolationist and parochial, reminding one of the 1930s in terms of the pre-Cordell Hull days of the Great Depression. Trump's revisionist view of the US national interests is different from other presidents since World War II. These views are moving away from active engagement and moving toward being more isolationist and nationalist. Even the term 'America First' has its origins in the isolationism of the US in the 1930s. The 'America First' policy today abandons the American architecture of the postwar world and its leadership. We will soon know if 'America First' will mean 'America Alone.' Current policy creates more uncertainty and promotes disorder. That is not good.

The administration's recently released national security strategy merely restates President Trump's view on weaponization of trade, stronger trade enforcement, and his belligerent trade rhetoric.<sup>37</sup> It moves trade to the center of national security policy and views more explicitly China as a strategic rival, not merely a trade competitor. However, this strategy otherwise breaks no new ground. It presents neither coherent policy nor consistency. The next few months will see if President Trump's rhetoric and minimal actions so far will turn into something worse, i.e., real Trumpian trade wars.

President Trump's nihilistic efforts are those of an international cowboy, rebranding, unfortunately, the earlier stereotype of the Ugly American. Reflecting the views of his tribal and nativist base in the US, the traditional Republicans and their support of international trade have inexplicably fallen away and are complicit in the humiliation of America's leadership and greatness.

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## Trump's China Trade Policy: Threats and Constraints

Stuart S. Malawer\*

*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

### 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. This is clearly evidenced by the appointment of his new trade team.

The appointed 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 1920."<sup>1</sup>

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

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<sup>1</sup> Editorial, *Trump's Antitrade Warriors*, *WALL ST. J.*, Jan. 17, 2017, available at <https://www.wsj.com/articles/trumps-antitrade-warriors-1484609800>. "But his choice of advisers makes it clear that strict enforcement of trade rules, including with import barriers, is on the table." See W. Mauldin, *Trade is First in Firing Line*, *WALL ST. J.*, Jan. 17, 2017, available at <https://www.wsj.com/articles/donald-trumps-trade-picks-point-to-confrontation-1484560817> (all last visited on Feb. 5, 2017).

National Trade Council. He recently declared the WTO rules as biased and grossly unfair.<sup>2</sup> 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 war<sup>3</sup> and disdains multilateral treaties.<sup>4</sup>

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.<sup>5</sup> This resentment is central to the wave of populist nationalism raging against the globalization that is sweeping a number of countries.<sup>6</sup>

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."<sup>7</sup>

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.

## 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

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<sup>2</sup> S. Donnan, US Trade Chief Drives Supply Chain Switch, FIN. TIMES, Feb. 1, 2017, available at <https://www.ft.com/content/8dc63502-e7c7-11e6-893c-082c54a7f539> (last visited on Feb. 5, 2017).

<sup>3</sup> E. Porter, A Trade War against China Might Be a Fight Trump Couldn't Win, N.Y. TIMES, Nov. 23, 2016, available at [https://www.nytimes.com/2016/11/22/business/a-trade-war-against-china-might-be-a-fight-trump-couldnt-win.html?\\_r=0](https://www.nytimes.com/2016/11/22/business/a-trade-war-against-china-might-be-a-fight-trump-couldnt-win.html?_r=0) (last visited on Feb. 5, 2017).

<sup>4</sup> M. Fisher, Trump Prepares Orders Aiming at Global Funding and Treaties, N.Y. TIMES, Jan. 25, 2017, available [https://www.nytimes.com/2017/01/25/us/politics/united-nations-trump-administration.html?\\_r=0](https://www.nytimes.com/2017/01/25/us/politics/united-nations-trump-administration.html?_r=0). See also Explanatory Statement – Moratorium on New Multilateral Treaties (Draft), available at <http://us-global-law.net/images/Trump.Treaty.Exec.Order.1.27.17.pdf> (all last visited on Feb. 5, 2017).

<sup>5</sup> Editorial, Donald Trump's Victory Challenges the Global Liberal Order, FIN. TIMES, Nov. 10, 2016, available at <https://www.ft.com/content/a4669844-a643-11e6-8b69-02899e8bd9d1> (last visited on Feb. 5, 2017).

<sup>6</sup> F. Fukuyama, US against the World? Trump's America and the New Global Order, FIN. TIMES, Nov. 12, 2016, available at <https://www.ft.com/content/6a43cf54-a75d-11e6-8b69-02899e8bd9d1>. See also G. Seib, The World Order in Flux, WALL ST. J., Dec. 20, 2016, available at <http://www.wsj.com/graphics/year-in-review-2016> (all last visited on Feb. 5, 2017).

<sup>7</sup> E. Alden, The Roots of Trump's Trade Rage, POLITICO, Jan. 16, 2017, available at <http://www.politico.com/magazine/story/2017/01/the-roots-of-trumps-trade-rage-214639> (last visited on Feb. 5, 2017).

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,<sup>8</sup> 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.<sup>9</sup> This occurred shortly after the Obama administration filed yet another case against China over its tariff rate quotas for agricultural imports.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

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:<sup>13</sup> 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.

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<sup>8</sup> United States Challenges Canadian Trade Measures That Discriminate against Wine, USTR Press Release, Jan. 18, 2017, available at [https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/Challenges\\_Canadian\\_Trade\\_Measures\\_That\\_Discriminate\\_Against\\_US\\_Wine](https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/Challenges_Canadian_Trade_Measures_That_Discriminate_Against_US_Wine) (last visited on Feb. 5, 2017).

<sup>9</sup> Obama Administration Files WTO Complaint on China's Subsidies to Aluminum Producers, USTR News, Jan. 12, 2017, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/Obama-Administration-Files-WTO-Complaint-China-Aluminum> (last visited on Feb. 5, 2017).

<sup>10</sup> United States Challenges Chinese Grain Tariff Rate Quotas for Rice, Wheat, and Corn, USTR Press Release, Dec. 15, 2016, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/december/united-states-challenges-chinese> (last visited on Feb. 5, 2017).

<sup>11</sup> United States Challenges Canadian Trade Measures That Discriminate against Wine, USTR Press Release, Jan. 18, 2017, available at [https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/Challenges\\_Canadian\\_Trade\\_Measures\\_That\\_Discriminate\\_Against\\_US\\_Wine](https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/Challenges_Canadian_Trade_Measures_That_Discriminate_Against_US_Wine) (last visited on Feb. 5, 2017).

<sup>12</sup> China Files WTO Complaint against the US, EU over Price Comparison Methodologies, WTO News, Dec. 12, 2016, available at [https://www.wto.org/english/news\\_e/news16\\_e/ds515\\_516rfc\\_12dec16\\_e.htm](https://www.wto.org/english/news_e/news16_e/ds515_516rfc_12dec16_e.htm). See also United States - Measures Related to Price Comparison Methodologies, WTO Doc. DS 515 (Request for Consultation on December 12, 2016), available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=233337&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=233337&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) (all last visited on Feb. 5, 2017).

<sup>13</sup> M. Wolf, The March to World Disorder, FIN. TIMES, Jan. 6, 2017, available at <https://www.ft.com/content/ef13e61a-ccec-11e6-b8ce-b9c03770f8b1> (last visited on Feb. 5, 2017).

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.”<sup>14</sup> 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.”<sup>15</sup>

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,<sup>16</sup> and in the federal courts.

In particular, economic advisers in the White House’s Council of Economic Advisers, have 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.<sup>17</sup>) Secretary of Commerce Wilbur Mills, a billionaire, corporate investor, and strident critic of China’s trade policies,<sup>18</sup> favors the tough enforcement of existing rules.<sup>19</sup> Newly named Ambassador to China Terry Branstad is a former Iowa state governor who supports greater state

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<sup>14</sup> R. Cohen, Pax Americana is Over, N.Y. TIMES, Dec. 17, 2016, available at <https://www.nytimes.com/2016/12/16/opinion/trumps-chinese-foreign-policy.html> (last visited on Feb. 5, 2017).

<sup>15</sup> E. Luce, President Signals Demise of US-Created Global Order, FIN. TIMES, Jan. 21, 2016, available at <https://webcache.googleusercontent.com/search?q=cache:Mff84IZuVbsJ:https://www.ft.com/content/18faf0a6-b251-11e6-a37c-f4a01f1b0fa1+&cd=1&hl=en&ct=clnk&gl=us> (last visited on Feb. 5, 2017).

<sup>16</sup> N. Timiraos, Divisions Lurk on Economic Team, WALL ST. J., Jan. 10, 2017, available at <https://www.wsj.com/articles/trump-picks-set-economic-policy-on-unpredictable-course-1483985065>. See also D. Nakamura, Trump’s Trade Advisers Could Compete for Influence, WASH. POST, Jan. 4, 2017, available at [https://www.washingtonpost.com/politics/trumps-trade-advisers-could-compete-for-influence/2017/01/03/2d048adc-d1f3-11e6-9cb0-54ab630851e8\\_story.html?utm\\_term=.e573ff851c6c](https://www.washingtonpost.com/politics/trumps-trade-advisers-could-compete-for-influence/2017/01/03/2d048adc-d1f3-11e6-9cb0-54ab630851e8_story.html?utm_term=.e573ff851c6c) (all last visited on Feb. 5, 2017).

<sup>17</sup> “Some members of Congress have been clamoring for changes to the way the Committee on Foreign Investment in the US scrutinizes deals and are calling for a broadening of its now relatively narrow national security-focused mandate.” See S. Donnan, Surge in Chinese Corporate Investment into the US, FIN. TIMES, Jan. 3, 2017, available at <https://webcache.googleusercontent.com/search?q=cache:5pxGbwwshHN0J:https://www.ft.com/content/b0cc57c8-d09f-11e6-9341-7393bb2e1b51+&cd=1&hl=en&ct=clnk&gl=us> (last visited on Feb. 5, 2017).

<sup>18</sup> S. Donnan, Ross Steps up anti-Beijing Rhetoric Adding to Fears of a China Trade War, FIN. TIMES, Jan. 19, 2017, available at <https://www.businessdayonline.com/ross-steps-anti-beijing-rhetoric-adding-fears-china-trade-war> (last visited on Feb. 5, 2017).

<sup>19</sup> W. Mauldin & B. Leubsdorf, Ross Previews Trade Policy, WALL ST. J., Jan. 19, 2017, available at <https://www.wsj.com/articles/commerce-secretary-nominee-wilbur-ross-set-for-confirmation-hearing-1484735400>(last visited on Feb. 5, 2017).

agricultural exports to China,<sup>20</sup> and former Governor of Georgia Sonny Purdue, the new Secretary of Agriculture, also favors agricultural exports.<sup>21</sup>

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.<sup>22</sup> The federal courts may well be the last but best defense against a broad range of Trump's 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.<sup>23</sup> 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' of foreign nations.<sup>24</sup> 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.<sup>25</sup> Some may or may not give President Trump scant authority

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<sup>20</sup> B. Appelbaum & Terry Branstad, Iowa Governor, Is Trump's Pick as China Ambassador, N.Y. TIMES, Dec. 7, 2016, available at <https://www.nytimes.com/2016/12/07/us/politics/terry-branstad-china-ambassador-trump.html> (last visited on Feb. 5, 2017).

<sup>21</sup> J. Bunge, J. Newman & K. Gee, USDA Pick Has Roots in Farm Country, WALL ST. J., Jan. 20, 2017, available at <https://www.wsj.com/articles/agriculture-secretary-nominee-sonny-perdue-known-for-promoting-trade-1484844335> (last visited on Feb. 5, 2017).

<sup>22</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 US 579, 72 S.Ct. 863 (1952), available at <https://supreme.justia.com/cases/federal/us/343/579/case.html> (last visited on Feb. 5, 2017).

<sup>23</sup> K. Bradsher, In China-U.S. Trade War, Trump Would Have Weapons, N.Y. TIMES, Nov. 10, 2016, available at <https://www.nytimes.com/2016/11/11/business/international/trump-china-us-trade-war.html> (last visited on Feb. 5, 2017).

<sup>24</sup> *United States v. Curtis-Wright Export Corp*, 299 U.S. 304 (1936), 57 S.Ct. 216 (1936), available at <https://supreme.justia.com/cases/federal/us/299/304/case.html> (last visited on Feb. 5, 2017). (Justice Sutherland quoting Justice Marshall's statement made to the U.S. Congress in 1800).

<sup>25</sup> Committee of Ways and Means, Compilation of U.S. Trade Statutes (2013), available at [https://waysandmeans.house.gov/UploadedFiles/2013\\_Blue\\_Book\\_.pdf](https://waysandmeans.house.gov/UploadedFiles/2013_Blue_Book_.pdf) (last visited on Feb. 5, 2017).

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.<sup>26</sup> ‘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.”<sup>27</sup>

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.”<sup>28</sup> 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,<sup>29</sup> 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.

## Conclusion

On President Trump’s first full workday at the White House, he signed an executive memorandum requesting that the US trade representative formally withdraw the US from the Trans-Pacific Partnership and its negotiations.<sup>30</sup> This was done a week later by a letter

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<sup>26</sup> P. Gramm & M. Solon, Understanding the Trump Trade Agenda, WALL ST. J., Dec. 1, 2016, available at <https://www.wsj.com/articles/understanding-the-trump-trade-agenda-1480638501> (last visited on Feb. 5, 2017).

<sup>27</sup> J. Lyons & W. Mauldin, Remaking Global Trade Brings New Risks, WALL ST. J., Jan. 25, 2017, available at <https://www.wsj.com/articles/trump-places-tall-order-on-trade-1485279458> (last visited on Feb. 5, 2017).

<sup>28</sup> R. Samuelson, The New World Order, 2017, WASH. POST, Jan. 2, 2017, available at [https://www.washingtonpost.com/opinions/the-new-world-order/2017/01/01/fc54c3e6-ce9d-11e6-a747-d03044780a02\\_story.html?utm\\_term=.ac34b52c3834](https://www.washingtonpost.com/opinions/the-new-world-order/2017/01/01/fc54c3e6-ce9d-11e6-a747-d03044780a02_story.html?utm_term=.ac34b52c3834) (last visited on Feb. 5, 2017).

<sup>29</sup> FT View, Donald Trump’s Dangerous Delusions on Trade, FIN. TIMES, Nov. 14, 2016, available at <https://www.ft.com/content/356e6968-a822-11e6-8b69-02899e8bd9d1> (last visited on Feb. 5, 2017).

<sup>30</sup> Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, available at <https://www.whitehouse.gov/the-press->

to the signatories of the TPP.<sup>31</sup> 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 economic economics for decades.<sup>32</sup>

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”<sup>33</sup> Trump’s withdrawal from the TPP totally ignored larger geostrategic and geopolitical dimensions.<sup>34</sup>

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.”<sup>35</sup> 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.<sup>36</sup> 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,

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office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific See also The larger shock in TPP’s failure is the symbolism of the U.S. withdrawing from global trade leadership. See also Editorial, Trumps Pacific Trade Retreat, WALL ST. J., Jan. 24, 2017, available at <https://www.wsj.com/articles/trumps-pacific-trade-retreat-1485216787> (all last visited on Feb. 5, 2017).

<sup>31</sup> The United States Officially Withdraws from the Trans-Pacific Partnership, USTR Press Release, July 30, 2017, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> (last visited on Feb. 5, 2017).

<sup>32</sup> P. Baker, Upending Trade Policies, Trump Scraps Asia Pact, N.Y. TIMES, Jan. 24, 2017, available at [https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?\\_r=0](https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0) (last visited on Feb. 5, 2017).

<sup>33</sup> Editorial, Opening Salvos in a New Trade War, N.Y. TIMES, Jan. 24, 2017, available at <https://www.nytimes.com/2017/01/23/opinion/opening-salvos-in-president-trumps-trade-war.html> (last visited on Feb. 5, 2017).

<sup>34</sup> J. Chin, China Says It Is Ready to Take Lead Role, WALL ST. J., Jan. 24, 2017, available at <https://www.wsj.com/articles/china-says-prepared-to-lead-global-economy-if-necessary-1485178890> (last visited on Feb. 5, 2017).

<sup>35</sup> J. Bacchus, Trump’s Challenge to the WTO, WALL ST. J., Jan. 5, 2017, available at <https://www.wsj.com/articles/trumps-challenge-to-the-wto-1483551994> (last visited on Feb. 5, 2017).

<sup>36</sup> N. Irwin, What Will Trump Trade Policy Actually Look Like? Three Possibilities, N.Y. TIMES, Nov. 23, 2016, available at <https://www.nytimes.com/2016/11/22/upshot/what-will-trump-trade-policy-actually-look-like-three-possibilities.html> (last visited on Feb. 5, 2017).

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,<sup>37</sup> 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.<sup>38</sup>**

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.<sup>39</sup>**

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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<sup>37</sup> D. Sevastopulo, S. Donnan & C. Weaver, *Trump Puts Protectionism at Heart of US Economic Policy*, FIN. TIMES, Jan. 24, 2017, available at <https://www.ft.com/content/cc7742a4-e17e-11e6-8405-9e5580d6e5fb> (last visited on Feb. 5, 2017).

<sup>38</sup> See Donald Trump's Inaugural Speech, Annotated, available at <https://www.nytimes.com/interactive/2017/01/20/us/politics/donald-trump-inauguration-speech-transcript.html> (last visited on Feb. 5, 2017).

<sup>39</sup> President Xi's speech to Davos in Full, *available at* <https://www.weforum.org/agenda/2017/01/full-text-of-xi-jinping-keynote-at-the-world-economic-forum>. Subsequently, a spokesman for China's Foreign Ministry declared that China was trying to improve market order and believed its subsidies were legal under the rules of the World Trade Organization. *See* J. Chin, *China Says it is Ready to Take Lead Role*, WALL ST. J., Jan. 24, 2017, *available at* <https://www.wsj.com/articles/china-says-prepared-to-lead-global-economy-if-necessary-1485178890> (all last visited on Feb. 5, 2017).

## OBAMA, WTO TRADE ENFORCEMENT, AND CHINA

Stuart S. Malawer, *J.D., Ph.D.*

This year, President Obama claimed that since he entered office in 2009, his administration filed 20 WTO cases and won every one that was decided.

At the time of this assertion, there were 11 filings against China.

The cases filed against China that have been won by the United States have concerned, among others, Chinese duties or restrictions on U.S. high-tech steel exports,<sup>1</sup> violation of intellectual property rights,<sup>2</sup> dumping of Chinese tires into the U.S. marketplace,<sup>3</sup> restrictions on imports of autos into China,<sup>4</sup> and restricted use of electronic payment systems (credit cards) in China.<sup>5</sup> It also involved Chinese restrictions on exports of rare Earth elements<sup>6</sup> and other raw materials from China.<sup>7</sup>

This certainly sounds like a great achievement for U.S. trade enforcement that would reflect a sterling record in the WTO dispute resolution system.

But is it a great achievement? It might be, but it is not the whole story. The whole story is much more nuanced and important to understand.

The Obama administration does not point out that China has prevailed in a number of cases brought by China against the United States.

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<sup>1</sup> “China—Countervailing and Antidumping Duties on Grain Oriented Flat-Rolled Electrical Steel (GOES) from the United States.” DS414 (Compliance report adopted August 31, 2015). This compliance proceeding was the first time any WTO member challenged China’s compliance with an adverse finding.

<sup>2</sup> “China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights.” DS362 (Panel report January 26, 2009).

<sup>3</sup> “United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tires from China.” DS399 (AB report adopted October 5, 2011).

<sup>4</sup> “China—Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States.” DS440 (Panel report May 23, 2014).

<sup>5</sup> “China—Certain Measures Affecting Electronic Payment Services.” DS413 (Panel Report July 16, 2012).

<sup>6</sup> “China—Measures Related to the Exportation of Rare Earth, Tungsten and Molybdenum.” DS431 (AB report adopted August 29, 2014).

<sup>7</sup> “China—Measures Related to the Exportation of Various Raw Materials.” DS394 (AB report January 30, 2012).

Take, for example, the 2012 case decided against the United States that involved the use of “zeroing” as a method for calculating antidumping duties.<sup>8</sup> Another case was decided in 2014 against the United States regarding its application of non-market status in calculating dumping and countervailing duties for certain Chinese imports.<sup>9</sup> Yet another case decided in 2015 involved the wrongful determination that a state-owned enterprise is a public body and thus capable of providing illegal government subsidies.<sup>10</sup> Indeed, just this May, China has requested a compliance procedure against the United States for its failure to implement a decision involving countervailing duties on Chinese exports by state-owned enterprises.<sup>11</sup>

Newer cases that have been brought by the United States are pending and involve Chinese taxation on aircraft<sup>12</sup> and “demonstration bases” (special manufacturing zones) that seem to be in the process of settling before litigation.<sup>13</sup> Both involve issues of subsidies. The 12th and most recent case filed by the Obama administration against China was filed this June. It involves Chinese compliance with a prior decision regarding the dumping and countervailing duties imposed on the import of U.S. broiler chickens.<sup>14</sup>

The only other compliance case ever filed by a WTO member was also filed by the United States, and it was decided last year.<sup>15</sup> As recently observed, “[I]t is becoming clear that the US and its geopolitical rival are already skirmishing ahead of what could be a combative summer.”<sup>16</sup> Perhaps the most important metric to look at when determining a member’s compliance with the WTO’s decisions is whether it has authorized sanctions against a country for not implementing its panel or Appellate Body recommendations. Surprisingly, it is not China but the United States that holds the honor of being sanctioned the most. China has never been sanctioned. No such sanctions have ever been authorized in U.S.-China disputes.

For example, the United States was sanctioned in 2015 for not complying with the “Country of Origin Labeling” (COOL) requirements in two cases brought by Canada and Mexico

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<sup>8</sup> “United States—Anti-Dumping Measures on Shrimp and Diamond Sawblades from China.” DS4222 (Panel Report June 8 2012).

<sup>9</sup> “United States—Countervailing and Anti-Dumping Measures on Certain Products from China.” DS449 (AB report adopted July 22, 2014).

<sup>10</sup> “United States—Countervailing Duty Measure on Certain Products from China.” DS437 (AB report adopted January 16, 2015).

<sup>11</sup> “China Requests Consultations with US Over Compliance in Countervailing Duties Dispute.” WTO NEWS (May 13, 2016).

<sup>12</sup> “China—Tax Measures Concerning Certain Domestically Produced Aircraft.” DS501 (Consultation requested December 8, 2015).

<sup>13</sup> “China—Measures Related to Demonstration Bases and Common Service Platforms Programs.” DS489 (Request for consultations February 11, 2015).

<sup>14</sup> “China—Antidumping and Countervailing Duty Measures on Broiler Products from the United States.” DS427 (Compliance proceedings ongoing May 27, 2016). “The United States Challenges China’s Non-Compliance at the WTO on Behalf of American Farmers.” USTR PRESS RELEASE (May 19, 2016).

<sup>15</sup> “China—Countervailing and Antidumping Duties on Grain Oriented Flat-Rolled Electrical Steel (GOES) from the United States.” DS414 (Compliance report adopted August 31, 2015).

<sup>16</sup> Donnan, “US and China Skirmish as Trade Clash Looms.” FINANCIAL TIMES (March 11, 2016).

concerning the import of beef and pork.<sup>17</sup> U.S. rules required the identification of the foreign source of imports, which violates WTO rules.

An examination of the most recent WTO report on sanctions that covers its first 20 years (1995–2014)<sup>18</sup> indicates the following: sanctions were authorized against the United States in three distinct cases involving the use of foreign sale corporations, cotton subsidies, and restrictions on online betting services. These cases involved multiple complaining parties. Therefore, the United States has been sanctioned more than any other country.

Before concluding, it's interesting to put all of this in a slightly broader context.

In the 25-year history of the WTO, over 500 trade disputes have been submitted. The dispute settlement system experienced its busiest year in 2015, with an average of 30 active panels per month.<sup>19</sup> Most of the referred requests involved trade remedy issues regarding dumping, subsidies, and safeguards, among others.

The United States is the leading user of the dispute resolution system,<sup>20</sup> though many countries use it. Developing countries now file about one-half of the cases each year. Out of the 500 cases filed, only about one-third of them wind up in full litigation before a panel. Most are settled in the diplomatic consultation stage that precedes the panel hearing. The United States has won the vast number of cases it litigated in the WTO as both a complainant and respondent. There have only been a handful of requests for sanctions, and even fewer have been authorized. However, perhaps only three or four of those requests for sanctions were implemented, which is not much.

The United States has filed more cases against China than any other country. Interestingly, China has tended to promptly implement all adverse decisions that the United States has made against it.

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<sup>17</sup> "United States—Certain Country of Origin Labelling (COOL) Requirements." DS384 (Authorization to retaliate December 21, 2015).

<sup>18</sup> "Overview of the State of Play of WTO Disputes -- (Section IV – Recourse to Article 22)" in the 2014 ANNUAL REPORT OF THE DISPUTE SETTLEMENT BODY OF THE WTO. WT/DSB/64/Add.1 (November 26, 2014).

<sup>19</sup> "Chapter -- Dispute Settlement Activity in 2015" in WTO ANNUAL REPORT FOR 2016. [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep16\\_chap6\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_chap6_e.pdf)

<sup>20</sup> Malawer, "U.S.-China Trade Relations – Litigation in the WTO 2001-2014." INTERNATIONAL LAW PRACTICUM (Spring 2014) Vol. 27, No. 1.

## What are my conclusions?

- The Obama administration has generally been very active in WTO litigation and successful in WTO litigation against China specifically.
- However, the United States has also lost a number of cases brought against it by China. Of course, the administration doesn't normally broadcast this.
- The United States is the country against which sanctions have been authorized the most, though only a few times.
- China has implemented adverse WTO decisions. This should be noted more by the administration since it shows a positive aspect of China's engagement in the global trading system and its acceptance of and role in developing rules of the road.

My general conclusion is that the Obama administration is correct in broadly stating its success in WTO litigation in general as well as against China. In terms of full disclosure, however, the United States has taken some unsettling actions, namely not fully disclosing its losses to China, China's general compliance, and sanctions that have been authorized against it. The recent U.S. opposition to reappointing a Korean judge to the Appellate Body because of his decisions concerning U.S. trade remedy laws is disappointing.<sup>21</sup>

My take is that as the primary architect of the WTO, its dispute resolution system, and its judicial and rules-based approach to global trade relations, the United States should be a bit more careful and supportive so as not to undermine this system. In particular, the United States should promptly implement decisions made against it.

In a lead editorial, the *Financial Times* recently stated, "The problem is not just that the (trade remedy) rules are often arbitrary and skewed—the US has rightly lost case after case at the World Trade Organization over the way it imposes such tariffs."<sup>22</sup> Indeed, a few days earlier, another article in the *Financial Times* concluded, "[T]he US has spent years to defend indefensible rules governing the imposition of antidumping and countervailing duties on imports.... In 2014 ... Washington finally admitted (after losing a case brought by Brazil concerning cotton support programs) it could not bring itself to cut the handouts to its own farmer...."<sup>23</sup> Most recently the *Financial Times* concluded once again, "In the case of the US, while the legalistic nature of its antidumping regime will not change, the administration could at least give up trying to defend its more egregious aspects from legal challenge in the WTO."

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<sup>21</sup> "Washington Threatens to Undermine the WTO." FINANCIAL TIMES (June 1, 2016). "Washington has taken the unusual step of blocking the reappointment of Seung Wha Chang ...."

<sup>22</sup> Lead Editorial. "Coping with a World of Too Much Chinese Steel." FINANCIAL TIMES (June 10, 2016).

<sup>23</sup> "Washington Threatens to Undermine the WTO." FINANCIAL TIMES (June 1, 2016).

**The system has served U.S. national interests well in resolving trade disputes in general and those between the United States and China.**

**It is not the absence of litigation that makes a system successful. Rather, it is how the cases are resolved when commercial disputes arise, as they do when more international commercial transactions occur. So far they have been successfully resolved within the system.**

**Hopefully, the judicial and diplomatic approach developed in the WTO can be expanded to apply to non-commercial disputes between China and the United States. After all, the commercial and political relationships between China and the United States are critically interrelated and are the most important as the 21st century rolls along.**

**The Obama administration should be proud of its strategy in the WTO generally and its enforcement of actions against China, but there is no need to puff it up. A realistic assessment would analyze both the United States' and China's losses as well as sanctions by other countries against the United States, which would more accurately describe a complex system and make this unique international legal system look more balanced. It would give U.S. policy makers the opportunity to further the global trading system in a more realistic manner.**

**Trade enforcement strategy is an important trade policy and foreign policy issue. Above all else, it has huge geopolitical implications for U.S. national security. This is especially true in the context of U.S.-China relations.**

**CHINESE ECONOMIC CYBER ESPIONAGE --  
U.S. LITIGATION IN THE WTO & OTHER  
DIPLOMATIC REMEDIES.**

by **Stuart S. Malawer, *J.D., Ph.D.***

**Introduction**

Countering Chinese economic cyber espionage is one of the most complex challenges of contemporary U.S. foreign policy. The Chinese government's systematic hacking into the computer networks of companies to gain commercial advantages for Chinese firms has resulted in "the greatest transfer of wealth in history."

Fundamentally, Chinese economic cyber espionage compromises the competitiveness of U.S. firms in China and globally. It is integral to China's mercantilist economic and trade policies. Such espionage, more precisely termed 'commercial' cyber espionage, is difficult to detect, to guard against, and to formulate policy responses in regard to. In particular, the diplomatic and global legal regime governing intellectual property rights predates such commercial espionage. The Internet and information and advanced communications technologies only became a feature of the global landscape since the adoption of the Uruguay Round Agreements, which included the intellectual property agreement (TRIPS), in 1995. Thus, any effective international legal remedy needs to creatively interpret and apply the terms of that agreement.

Fortunately, a creative legal response is available to counter this threat. The most promising and immediate remedy for the United States is to launch litigation against China in the World Trade Organization's (WTO's) dispute resolution system, relying on the TRIPS Agreement. Litigation would have a significant possibility of success and, at the minimum, a real potential to foster a settlement and adoption of basic understandings between these two countries during or after these proceedings. A corollary of this legal strategy is to commence diplomatic actions within the WTO's negotiating process to update TRIPS or conclude a new plurilateral agreement in order to address economic cyber espionage explicitly. Additionally, the United States should convene a general diplomatic conference to propose general rules for the cyber domain and international agreements to reflect these rules.

## Background

The recently released 2015 report by the Obama administration on national security strategy declares that "the United States has a special responsibility to lead a networked world."<sup>1</sup> It argues that cybersecurity requires international norms need to be observed and there is shared responsibility among states. This reflects the administrations earlier views, as enunciated in its 2011 report on an international strategy for cyberspace, that its goal is to support the rule of law in cyberspace.<sup>2</sup> The 2015 White House Summit on Cybersecurity, while focusing on the need of domestic legislation, also declares that cybersecurity is a shared responsibility, between government and its private sector.<sup>3</sup>

President Obama recently raised the specific issue of cyber security and the stealing of trade secrets and intellectual property rights with President Xi Jinping of China at the Asia-Pacific Economic Cooperation (APEC) summit in Beijing in November 2014.<sup>4</sup> Obama had raised the issue before in private talks with China's president in June 2013. Tom Donilon, U.S. national security advisor, had also previously highlighted the administration's focus on cyber security at the Asia Society in 2013, when he stated:

[Cyber security] is not solely a national security concern or a concern of the U.S. government. Increasingly, U.S. businesses are speaking out about their serious concerns about the sophisticated, targeted theft of confidential business information and proprietary technologies through cyber intrusions emanating from China on an unprecedented scale . . . . As the President said in the State of the Union, we will take action to protect our economy against cyber-threats. <sup>5</sup>

In May 2014, the U.S. Department of Justice indicted five members of the Chinese military for hacking into corporate computer networks and stealing trade secrets from major American firms. This was the first time such criminal charges were filed against

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<sup>1</sup> Executive office of the President of the United States, *National Security Strategy* 12 (February 2015).

<sup>2</sup> Executive Office of the President of the United States, *International Strategy for Cyberspace* 8 (May 2011).

<sup>3</sup> "FACT SHEET: The White House Summit on Cybersecurity and Consumer Protection." (White House, Office of the Press Secretary) (February 13, 2015).

<sup>4</sup> Cory Bennett, "Obama Urges China to Stop Cyber Theft," Internet, <http://thehill.com/policy/cybersecurity/223555-obama-urges-china-to-stop-cyber-theft> (date accessed: 18 November 2014).

<sup>5</sup> Tom Donilon, "The Asia-Pacific in 2013," (Remarks given to the Asia Society, White House Press Office, Washington, D.C., 11 March 2013).

officials and military officers in another country.<sup>6</sup> This indictment was based upon an earlier private report revealing the role of the People’s Liberation Army in hacking into computer systems of American firms.<sup>7</sup> A newer report has been released, claiming that a second Chinese military unit has been identified as hacking into U.S. companies.<sup>8</sup> Indeed, it now appears that criminal gangs, adapting their criminal activity to the digital age, may be becoming proxies for nations carrying out cyberattacks.<sup>9,10</sup> This newer focus on specific firms for commercial advantage is in addition to the more widespread intrusions by intelligence agencies into critical infrastructure and private firms for traditional intelligence reasons of national security.

The Obama administration’s policy concerning cyber espionage has gradually developed to include the use of “trade tools.”<sup>11</sup> In explaining the administration’s 2013 cyber security strategy, a report from the Executive Office of the President indicated one of the strategy action items was to sustain and coordinate international engagement with trading partners.<sup>12</sup> In particular, the report concluded, “The Administration will utilize trade policy tools to increase international enforcement against trade secret theft to minimize unfair competition against U.S. companies.”<sup>13</sup> The use of trade tools and restrictions would impose real costs on China.

In June 2014, the then-new ambassador to China, Max Baucus, specified the trade strategy by arguing that China’s criminal behavior ran counter to its commitments to the WTO.<sup>14</sup> At about the same time, Senator Charles Schumer (D., N.Y.) called on U.S. Trade Representative Michael Froman to file a legal action against China in the WTO as a response

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<sup>6</sup> Ellen Nakashima and William Wan, “U.S. Announces First Charges against Foreign Country in Connection with Cyberspying,” Internet, [http://www.washingtonpost.com/world/national-security/us-to-announce-first-criminal-charges-against-foreign-country-for-cyberspying/2014/05/19/586c9992-df45-11e3-810f-764fe508b82d\\_story.html](http://www.washingtonpost.com/world/national-security/us-to-announce-first-criminal-charges-against-foreign-country-for-cyberspying/2014/05/19/586c9992-df45-11e3-810f-764fe508b82d_story.html).

<sup>7</sup> Mandiant Intelligence Center Report, *APT 1: Exposing One of China's Espionage Units* (2013). See also Sanger, Barboza, and Pehlroth, “Chinese Army Unit is Seen as Tied to Hacking against the U.S.,” *New York Times* (February 13, 2013).

<sup>8</sup> Hannah Kuchler and Demetri Sevastopulo, “Second China Unit Accused of Cyber Crime,” Internet, <http://www.ft.com/cms/s/0/3a1652ce-f027-11e3-9b4c-00144feabdc0.html#axzz3SVXsLA8t>.

<sup>9</sup> Sam Jones and Hannah Kuchler, “World’s most advanced hacking spyware let loose,” Internet, <http://www.ft.com/intl/cms/s/0/8392d196-7323-11e4-907b-00144feabdc0.html#axzz3SVXsLA8t>.

<sup>10</sup> Ellen Nakashima, “Foreign Powers Steal Data on Critical U.S. Infrastructure, NSA Chief Says,” Internet, [http://www.washingtonpost.com/world/national-security/nsa-chief-foreign-powers-steal-data-on-critical-us-infrastructure/2014/11/20/ddd4392e-70cb-11e4-893f-86bd390a3340\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-chief-foreign-powers-steal-data-on-critical-us-infrastructure/2014/11/20/ddd4392e-70cb-11e4-893f-86bd390a3340_story.html).

<sup>11</sup> Executive Office of the President of the United States, *Administration Strategy on Mitigating the Theft of U.S. Trade Secrets* (February 2013).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Reuters, “US Ambassador Baucus Says China Hacking Threatens National Security,” Internet, <http://www.ibtimes.com/us-ambassador-baucus-says-china-hacking-threatens-national-security-1611080>.

to Chinese cyberattacks on American firms.<sup>15</sup> Specifically, Schumer noted “that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contained in the WTO requires each participating nation to protect trade secrets.”<sup>16</sup> A Department of Defense consultant and former CIA officer supported filing charges against China in the WTO because the “burden of proof in a WTO proceeding is far easier to sustain than a criminal indictment in U.S. District courts.”<sup>17</sup> They also pointed out that a ruling would be from distinguished international jurists and not merely from a national court, thus elevating the international perception of the legitimacy of the proceedings and findings.

## The TRIPS Agreement

It is clear that the TRIPS does not explicitly address economic cyber espionage for commercial or trade gain. As it was adopted in 1994 and went into effect in 1995, the agreement preceded the great changes brought about by the revolution in information and communications technologies in the last twenty years. But one needs to see how the general and specific provisions of that agreement, as a multilateral agreement that is intended to govern intellectual property rights, apply to newer events in the future. As of today, no WTO cases have addressed this issue.

The starting point is Article III (1) of TRIPS, which restates the National Treatment Principle, the most basic GATT principle that is incorporated in all of the Uruguay Round Agreements and applied here as to intellectual property rights. The key language is “Each Member shall accord to the nationals of other members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property. . .”<sup>18</sup> The most obvious intent of this provision is to make sure that a member state does not discriminate between domestic and foreign companies *within* the member state as to the recognition and enforcement of intellectual property rights.

Does this provision intend to restrict a member state’s efforts to secure trade secrets and other intellectual property information *within* its territory and then pass it on to its domestic firms? Of course, this seems to fall squarely within the provision’s language. Now, what if the member state directs its efforts to secure information *abroad* and then turn it over to its

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<sup>15</sup> Press Release, U.S. Senator Schumer, “Schumer Calls on U.S. Trade Rep to File WTO Suit in Response to Chinese Cyberattacks,” Internet, [http://www.legistorm.com/stormfeed/view\\_rss/535617/member/85.html](http://www.legistorm.com/stormfeed/view_rss/535617/member/85.html) (Accessed Feb. 19, 2015).

<sup>16</sup> *Ibid.*

<sup>17</sup> James P. Farwell and Darby Arakelian, “China Cyber Charges: Taking Beijing to the WTO Instead,” Internet, <http://nationalinterest.org/blog/the-buzz/china-cyber-charges-take-beijing-the-wto-instead-10496>.

<sup>18</sup> Article III (1).

domestic firms? Is this a loophole? Not in this case. As is apparent in snooping on foreign firms *within* the member state, the protected information is being used to benefit local firms. In other words, it is providing treatment to foreign firms doing business within the member state that is less favorable than it provides to its own national firms.

Does GATT Article XXI (as restated in TRIPS Article LXXIII), “Security Exception,” provide a defense to a member state for such activities? No, because GATT Article XXI (b)(iii) provides that “Nothing in this agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its *essential security interests* taken in *time of war or other emergency in international relations*.”<sup>19</sup> (Emphasis added). China could hardly claim that cyber theft of commercial information is part of its “essential security interests” and that this is a “time of war or other emergency in international relations.”

It is important to note that no WTO cases have ever involved the Security Exception. A determination involving this clause would certainly be highly important to developing global trade law in the context of technological advances and national security concerns today. Needless to say, almost any determination concerning the Security Exception would be seen as highly politicized one impacting a state's national sovereignty.

## Recent Viewpoints in the Literature

David Fidler from Indiana Law School has argued that the WTO is *not* an appropriate venue for addressing economic cyber espionage by China.<sup>20</sup> His three arguments can be summed up as making the following points: that intellectual property rights are granted and protected by TRIPS on a territorial basis, burden of proof is difficult to carry in the dispute resolution system, and there is a lack of public international law on economic espionage. Fidler fails to consider that cyber actions by China outside of its territory but with effects and benefits within its territory, as to its own firms, are reasonably included within the language of the National Treatment Principle of TRIPS (Article III).

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<sup>19</sup> GATT Article XXI(b)(iii).

<sup>20</sup> David P. Fidler, “Why the WTO is Not an Appropriate Venue for Addressing Economic Cyber Espionage,” <http://armscontrollaw.com/2013/02/11/why-the-wto-is-not-an-appropriate-venue-for-addressing-economic-cyber-espionage/>; David P. Fidler, “Economic Cyber Espionage and International Law: Controversies Involving Government Acquisition of Trade Secrets through Cyber Technologies,” *Insights* 17, no. 10 (March 2013): n.p.

The burden of proof in the WTO’s trade and commercial proceedings is much less stringent than in criminal proceedings against Chinese officials in the United States.<sup>21</sup> The WTO proceedings are for typical trade disputes, not criminal activity. It is best to understand that any discussion of China's cyberespionage today does not involve public international law nor 'economic' espionage generally but rather the more properly termed 'commercial' espionage against specific firms in the context of particular WTO obligations.

In a 2014 law review article, Christina Skinner concluded that the WTO “is the most appropriate and effective forum for asserting claims regarding” China’s economic cyber espionage.<sup>22</sup> She argued further that general international law would support this claim. She further contended that an action would also be available under Article XXIII (1)(b) of GATT as a “non-violation complaint.” That provision allows contracting parties to bring complaints if a benefit is being nullified as a result of a government measure, whether or not it conflicts with a particular provision.

An earlier analysis by a leading Washington law firm suggests that two additional remedies might be considered: updating TRIPS through the negotiating process of the WTO and considering some sort of Special §301 action (under the Trade Act of 1974)<sup>23</sup> with the USTR.<sup>24</sup> An earlier review by another expert concluded that “no grand, ambitious overhaul of the TRIPS Agreement is necessary to reach consensus on the problem cyber-attacks pose for owners of targeted proprietary information.”<sup>25</sup> It should be noted that a §301 action generally or a more specific Special §301 action concerning intellectual property rights is based upon either an illegal or unreasonable foreign action. The administration can do either of these without a private complaint. However, in both cases they would only lead to a filing of a WTO case. Nevertheless, these various options should also be considered carefully.

Interestingly, in a recent corporate filing with the U.S. Department of Commerce (International Trade Administration) concerning solar panel imports from China, a U.S. firm is seeking higher tariffs to counter the Chinese government’s hacking and theft of trade

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<sup>21</sup> James P. Farwell and Darby Arakelian, “China Cyber Charges: Taking Beijing to the WTO Instead,” Internet, <http://nationalinterest.org/blog/the-buzz/china-cyber-charges-take-beijing-the-wto-instead-10496>.

<sup>22</sup> Christina Parajon Skinner, “An International Law Response to Economic Cyber Espionage,” *Connecticut Law Review* 1165 (May 2014).

<sup>23</sup> Pub. L. 113-185, 19 USC §2411.

<sup>24</sup> Kurt Calia and others, “*Economic Espionage and Trade Secret Theft: An Overview of the Legal Landscape and Policy Responses*,” Internet, [http://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/Covington\\_SpecialIssueBrief.pdf](http://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/Covington_SpecialIssueBrief.pdf).

<sup>25</sup> Gerald O’Hara, “Cyber-Espionage: A Growing Threat to the American Economy,” *CommLaw Conspectus* 19 (2010): 241.

secrets from it.<sup>26</sup> This case could give the Obama administration another statutory means of imposing unilateral restrictions. This would be via the actions of the two agencies (the U.S. Department of Commerce and the U.S. International Trade Commission) charged with administering trade remedy laws.

Notably, if the United States takes unilateral action under Section 301 or other trade provisions and imposes trade sanctions, then China would most likely file an action against the United States in the WTO. As a respondent, the United States would then be forced to rely on an Article XXI defense of national security. This might very well be yet another approach to counter Chinese cyber activities. However, this approach runs counter to the general restriction against members unilaterally imposing restrictive trade measures unless authorized by WTO provisions such as those relating to dumping, subsidies, or safeguards. It would impose the burden of proof on the United States to establish that its actions were required by national security considerations in a time of an international relations emergency or time of war.

In essence, this alternative approach would be the inverse of the strategy of bringing an action against China. The unilateral imposition of U.S. sanctions would have less global legitimacy at the outset than if they were imposed pursuant to authorization by the Dispute Settlement Body of the WTO.

## **Legal and Diplomatic Strategies to Counter Chinese Cyber Espionage**

The best approach is for the United States to file an action in the WTO, receiving the blessings of the WTO before imposing sanctions. This would garner the most international support for U.S. actions. The fact of the matter is that China has a relatively good record of observing WTO dispute resolution system recommendations. Compliance is in its national interest and part of its desire to be viewed as a responsible global player. The most difficult part of bringing a WTO case is determining the source of the computer intrusions, the information taken, and the information provided to commercial operations in China .

In such an action by the United States, China would probably raise the issue of U.S. cyber espionage for economic purposes, citing the recent disclosure of the National Security Agency's (NSA's) penetrations into Huawei.<sup>27</sup> The U.S. reply would certainly reference

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<sup>26</sup> Diane Cardwell, "Solar Company Seeks Stiff U.S. Tariffs to Deter Chinese Spying," Internet, [http://www.nytimes.com/2014/09/02/business/trade-duties-urged-as-new-deterrent-against-cybertheft.html?\\_r=0](http://www.nytimes.com/2014/09/02/business/trade-duties-urged-as-new-deterrent-against-cybertheft.html?_r=0).

<sup>27</sup> David E. Sanger and Nicole Perlroth, "N.S.A. Breached Chinese Servers Seen as Security Threat," Internet, <http://www.nytimes.com/2014/03/23/world/asia/nsa-breached-chinese-servers-seen-as-spy-peril.html> .

economic espionage to protect the national security interests of the United States<sup>28</sup> and that commercial information was not turned over to private industry. Independent of speculation, the NSA's company-specific intrusion into the network and equipment of China's leading telecom company does dilute the strength of U.S. claims against China's targeting of specific firms for their commercial secrets.

One additional point needs to be made. Prior to full litigation before a WTO panel, there is a requirement of consultations. It is often in this context that diplomatic solutions are worked out bilaterally. Parties often report mutually agreed upon solutions to the WTO. More cases have actually been resolved in this stage than have gone through the full litigation process. If this diplomatic-legal process of the WTO can somewhat successfully address the issue of China's economic cyber espionage, it could help resolve similar disputes between other countries.

It might help establish a mindset and a willingness among government officials to create diplomatic solutions to other instances of cyber espionage by both state and non-state actors. For example, China, in promoting itself as a responsible member, may very well agree to pressure North Korea to abide by these newer rules.

The United States could pursue two additional diplomatic remedies. First, it could start negotiating within the WTO system for the extension of the TRIPS agreement to explicitly address cyber espionage. This could be either open to all members or perhaps as a more limited plurilateral agreement for interested members. Second, it could promote a general diplomatic conference outside of the WTO to address a broad range of issues concerning cyber espionage, including but not limited to its commercial aspects. This would be something akin to the naval disarmament conferences of the inter-war period<sup>29</sup> and the arms-control treaties of the Cold War era.<sup>30</sup>

## Conclusion

The United States recently imposed limited economic sanctions on North Korea in response to its cyberattack on Sony Pictures Entertainment over the movie "The

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<sup>28</sup> David E. Sanger, "Fine Line on U.S. Spying on Companies," Internet, <http://www.nytimes.com/2014/05/21/business/us-snooping-on-companies-cited-by-china.html> .

<sup>29</sup> Stuart Malawer, "Cyber Warfare: Law and Policy Proposals for U.S. and Global Governance," 58 *Virginia Lawyer* (February 2010): 28.

<sup>30</sup> "Arms Control for a Cyberage." Internet, [http://www.nytimes.com/2015/02/26/opinion/arms-control-for-a-cyberage.html?\\_r=0](http://www.nytimes.com/2015/02/26/opinion/arms-control-for-a-cyberage.html?_r=0)

Interview."<sup>31</sup> For the first time, the United States has imposed economic and trade sanctions to counter a country's use of destructive cyber actions. While these were limited trade and financial sanctions, mainly directed at North Korea's export arms industry and selected senior government and intelligence officials, they highlight the lack of both a domestic and international legal architecture governing cyber actions by state actors especially in retaliation for a state attack on a commercial entity.

The havoc produced by the recent North Korean cyberattack on Sony glaringly demonstrates the need to take first steps in creating global rules for the cyber domain since "there are no international treaties or norms about how to use digital weapons or respond to cyberattacks."<sup>32</sup> A recent report from the Center for Strategic and International Studies concluded "Some cyber threats can only be addressed through indirect action, using agreements on trade or law enforcement cooperation to restrain cyber espionage, the use of proxies, or nonstate actors."<sup>33</sup>

A successful action by the United States and compliance by China would be a limited, but an important step in tackling the technological advances in cyber espionage and promoting a rules-based system of global governance. Bringing an action at the WTO would be a proactive leveraging of existing institutions and agreements to address this newest national security threat to the United States and the competitiveness of U.S. firms worldwide.

Chinese economic cyber espionage has become a critical issue in U.S.-China trade. The WTO is the premier international institution addressing trade issues. The TRIPS Agreement addresses many of the intellectual property issues. The dispute resolution system of the WTO has a good track record of resolving high-flying trade disputes at the consultation stage or through the entire resolution process. This involves multilateral authorized sanctions to coerce national compliance. The United States should utilize this effective and creative process that has developed over the past thirty years to address the evolving nature of global trade in this digital era.

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<sup>31</sup> David E. Sanger and Michael S. Schmidt, "More Sanctions on North Korea After Sony," Internet, <http://www.nytimes.com/2015/01/03/us/in-response-to-sony-attack-us-levies-sanctions-on-10-north-koreans.html>.

<sup>32</sup> Editorial, "Deterring Cyberattacks From North Korea," Internet, <http://www.nytimes.com/2014/12/30/opinion/deterring-cyberattacks-from-north-korea.html>.

<sup>33</sup> Center for Strategic & International Studies, *Conflict and Negotiation in Cyberspace* (February 2013): 52.

## **TRUMP, TRADE AND STATES.**

**By Stuart S. Malawer\***

### **INTRODUCTION.**

The founding of the Virginia Colony in the New World by the Virginia Company reflected the British Empire's notion that enlightenment would come through trade. By the post-World War II era this notion was unequivocally adopted by U.S. policymakers.

This belief in the linkage between trade and the spread of liberal values has been the cornerstone of U.S. foreign policy for over 75 years. It was the underpinning of the architecture of the United States' international trade and investment rules-based system that has evolved since the adoption of the Bretton Woods system, the General Agreement on Tariffs and Trade and subsequently, by the World Trade Organization (WTO). It resulted in the historical growth of liberal democracy in the United States and elsewhere globally. Donald Trump was elected, in large part, by those who now felt marginalized by globalization. Globalization and the liberal economic order is now under challenge by him and his trade policy pronouncements.

Now what?

### **TRUMP AND U.S. TRADE POLICY.**

The election of Donald Trump as a protectionist president proclaiming "America First" jeopardizes this post-war historical development of a firmly grounded international political system. He won the election by appealing to those harmed by globalization and his war against globalization.<sup>1</sup> He lost the nation's global cities to rural voters and the Rust Belt.<sup>2</sup> Now state, national, and state economic development is at stake.

The recent failure of Trans-Pacific Partnership (TPP) to even come up for a vote in Congress and Trump's recent vow to walk away from the TPP his first day in office<sup>3</sup> not only weakens the economic leadership of the U.S., but also the national security and foreign policy of the U.S. in Asia and the larger global system. His threats to bring even newer

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<sup>1</sup> Chandy and Selde, "Donald Trump and the Future of Globalization." BROOKINGS UP FRONT (November 21, 2016) at [https://www.brookings.edu/blog/up-front/2016/11/18/donald-trump-and-the-future-of-globalization/?utm\\_campaign=Brookings+Brief&utm\\_source=hs\\_email&utm\\_medium=email&utm\\_content=38230996](https://www.brookings.edu/blog/up-front/2016/11/18/donald-trump-and-the-future-of-globalization/?utm_campaign=Brookings+Brief&utm_source=hs_email&utm_medium=email&utm_content=38230996) (Accessed November 26, 2016).

<sup>2</sup> Muro and Liu, "Another Clinton-Trump Divide: High-Output America vs Low Output America." BROOKINGS (THE AVENUE) (November 29, 2016). (Accessed December 9, 2016).

<sup>3</sup> Announced on a *You Tube* video on November 22, 2016. <https://www.youtube.com/watch?v=8W84i3aeo60> (Accessed November 23, 2016).

enforcement cases against China in the WTO and domestically and impose new tariffs on all Chinese imports certainly do not help.<sup>4</sup>

This weaponing of trade ignores the strategic role of global trade in U.S. diplomacy. It represents a new age of deglobalization.<sup>5</sup> Most of all, it provides openings for other countries, namely China, to compete more effectively geopolitically and economically against the U.S. and to write newer rules governing global trade.<sup>6</sup> It puts US firms and industries at significant risk, among other reasons, for failure to appreciate the growth of global supply chains.<sup>7</sup>

The TPP would have reduced some 18,000 tariffs for U.S. firms, strengthen intellectual property rights, impose restrictions on government-owned corporations, provide other advantages and protections for U.S. firms abroad.

Indeed, China's President Xi Jinping declared at the recent Asian-Pacific Economic Cooperation summit in Peru, given this new "hinge moment" in China-U.S. relationship, China is now the emerging leader in international commerce. That China will be broadening its own Asian regional trade arrangement, the Regional Comprehensive Economic Partnership, with fewer disciplines on trade than TPP, with newer members, perhaps including Singapore, Vietnam, Japan and Australia, among others.<sup>8</sup>

Of course, Trump also has his sights on NAFTA and the WTO. Both those organizations contain withdrawal provisions. However, under the U.S. Constitution presidents have the authority to terminate international agreements at any time whether or not this would violate U.S. international legal obligations. If this would happen global legal matters would become much worse.

## GLOBAL TRADE AND STATES.

Here a few comments concerning the significance of global trade for individual states and Global Cities.

While the focus on global trade has almost always been on the role of the federal government, it is states and that have the principal responsibility of providing for the well-being of its citizens. Many states have been very aggressive in promoting trade and

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<sup>4</sup> Magnier and Mauldin, "China Faces off Against World on Open Global Markets." WALL STREET JOURNAL (December 10, 2016).

<sup>5</sup> Sharma, "When Border Closes." NEW YORK TIMES (November 13, 2016).

<sup>6</sup> Donnan and Schipani, "China Manoeuvres to Fill US Free-Trade Role." FINANCIAL TIMES (November 21, 2016); Editorial Board, "A Retreat from TPP Would Empower China." NEW YORK TIMES (November 21, 2016).

<sup>7</sup> Porter, "A Trade War against China Might Be a Fight Trump Couldn't Win." NEW YORK TIMES (November 23, 2016); Goodman, Gough, Wee and Ewing, "Trump's Tough Trade Talk Could Damage American Factories." NEW YORK TIMES (December 3, 2016).

<sup>8</sup> "China Touts its Own Trade Pact as U.S. Backed One Withers." WALL STREET JOURNAL (November 22, 2016).

investment for many years as a means of economic development, from the most rural and agricultural to the most urbanized.

States are obviously subject to all of the crosswinds of laws, politics, and policies emanating from Washington. From trade agreements to trade sanctions and to reactions by foreign governments. It is the Congress that has exclusive authority to regulate international commerce and the federal government that has exclusive authority over states concerning trade under the Supremacy Clause (Article VI) of the U.S. Constitution. Presidents have great delegated authority and some inherent authority in trade as part of their general foreign affairs powers. Nevertheless, states have a very real and significant role in engaging in global trade.<sup>9</sup> This involves export and investment promotion activities as well as issues of state taxation.<sup>10</sup> States often conclude agreements with subnational units of foreign countries.<sup>11</sup>

Put very simply, the failure by the new administration in Washington, D.C., to protect and promote global commerce would have more than a trickle-down effect on states. From perhaps higher foreign tariffs to outright restrictions on new foreign investment. This is terrible for state economies often still struggling from the 2008 financial crisis and consistent budgetary restrictions from Washington.

Keep in mind that of all developed countries the United States has one of the lowest level of engagement with global trade as evidenced by the low ratio of foreign trade to overall GDP – 28% in 2015<sup>12</sup> and U.S. trade accounts for only 11% of global trade volumes. This should not be looked at as a problem but as an incentive to grow trade significantly.

Now returning to Trump's trade policies.

## CONCLUSION – Global Cities and States.

With respect to U.S. domestic policy over the past eight years, the United States has incomprehensibly failed to provide effective legislation and policies directly aimed at those left behind in this new era of hyper-globalization.

That was a terrible blunder, indeed. Instead of focusing on interest rates day after day the Congress and the President should have specifically targeted jobs. Those endangered by globalization, new global supply chains, technological developments in communications,

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<sup>9</sup> Bradsher," In China-U.S. Trade War, Trump Would Have Weapons." NEW YORK TIMES (November 10, 2016).

<sup>10</sup> See generally, "Globalism & States: International Trade & State Policies," 16 VIRGINIA BAR ASSOCIATION JOURNAL 5 (No. 1, Winter 1990); Malawer, "'States' & International Transactions: Federalism & Foreign Affairs," 37 VIRGINIA LAWYER 11 (No. 11, May 1989).

<sup>11</sup> For example, "MOU between VEDP and Victoria, Australia." GOVERNOR'S PRESS RELEASE (November 21, 2016) at <https://governor.virginia.gov/newsroom/newsarticle?articleId=18349> (Accessed November 26, 2016).

<sup>12</sup> WORLD BANK NATIONAL ACCOUNTS DATA, AND OECD NATIONAL ACCOUNTS DATA FILES. <http://data.worldbank.org/indicator/NE.TRD.GNFS.ZS> (Accessed November 23, 2016).

robotics, digital commerce, among others. Unfortunately, we can't go back. We can't have a do-over. Trade is developing in many different ways regardless of trade policy.

But to formulate trade policies primarily to protect rural and unemployed manufacturing workers is a grave mistake.<sup>13</sup> It is global cities and states connected to the global economy that are the drivers of economic development and global prosperity, such cities contribute 80% of global gross domestic product.<sup>14</sup>

Many other countries are facing this same political dynamics and policy choices including the UK, France and Turkey, among others. This is what has been called the rise of *populist nationalism*.<sup>15</sup> The rise of such corrosive nationalism led to nothing good in the 1930s, where it was nurtured by a mercantilist zero-sum view of global trade, unemployment, persecution of numerous populations, protectionism and extreme nationalism.<sup>16</sup>

The challenge now is for the U.S. to put in place immediately a broad range of domestic policies regarding trade adjustment assistance, public and private reinvestment into infrastructure, and global tax reform to recapture the billions of offshore dollars being hoarded by U.S. multinationals. This goes way beyond a more protectionist industrial policy and claims to end currency manipulation, which is really yesterday's issue.<sup>17</sup>

The federal and state governments and global cities, with a broad outward-looking mindset, need to aggressively engage collectively the global system. This entails having complimentary domestic social and economic policies ensuring a competitive home front.

Blustering away at globalization, walking away from the TPP, withdrawing from NAFTA or the WTO, and from leadership in the global trading system are not good for developing viable U.S. policies for trade, geostrategic relations or promoting state economic development.

It's certainly not too late to start over.

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<sup>13</sup> De Soto, "The Real Enemy for Trump is Mercantilism, Not Globalism." WALL STREET JOURNAL November 28, 2016).

<sup>14</sup> "About the Global Cities Initiative of the Brookings Institution." <https://www.brookings.edu/about-the-global-cities-initiative/> (Accessed November 24, 2016). See also, "Cities of the West are Bulwarks against Right-Wing Nationalism, Experts Say." WASHINGTON POST (November 24, 2016).

<sup>15</sup> Fukuyama, "US against the World? Trump's America and the New Global Order." FINANCIAL TIMES (November 12, 2016).

<sup>16</sup> Editorial, "Donald Trump's Dangerous Delusions on Trade." FINANCIAL TIMES (November 14, 2016).

<sup>17</sup> Gramm and Solon, "Understanding the Trump Trade Agenda." WALL STREET JOURNAL (December 1, 2016); Editorial, "Trump's Chinese Currency Manipulation." WALL STREET JOURNAL (December 9, 2016).

## TRUMP’S FOREIGN POLICY & THE NEW FEDERALISM

Stuart S. Malawer, *J.D., Ph.D.*

A new aggressive and proactive federalism seems to be evolving in the United States.

This newer federalism promotes global engagement and observation of international rules. This is remarkably different from the older version that supported states’ rights and segregation and was primarily based in the South.

Today, we see a rapidly evolving anti-Trump resistance in the widespread movement for “sanctuary cities” and the more recent “city-state climate coalition.” Virginia is one of the most recent members of that coalition.

These local actions by cities and states are in opposition to President Trump’s national policies relating to immigration enforcement, the rejection of the Paris Climate Accord, and a general contempt for a rules-based international order.

In particular, these policies relate to trade, climate change, immigration, multilateral alliances, and almost any international agreement that restricts the United States from taking unilateral actions. These historical changes have occurred under the claim by President Trump of protecting the United States and its national sovereignty.

Cities, counties, and states are taking the lead in interfacing with the global economic system to promote local economic development and jobs.
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What else can be said?

This incipient development on city and state levels results from President Trump's isolationist retreat from America's engagement in the global system. This engagement has been a hallmark of U.S. foreign policy since before 1945. This incomprehensible retreat by the world's most powerful nation has seemingly been done with little thought and even less collaboration with Trump's key national security, military, and foreign policy advisers. Some advisers, however, have seemingly betrayed their own competence by recently declaring there is no longer a global community.

This atavistic retreat to isolationism is a rejection of the rules and institutions that have marked U.S. engagement in international relations since the end of World War II. That engagement had its earlier grounding in the United States' participation in World War I and then in the 1930s under President Roosevelt's Open Door Policy and his revamping of U.S. trade policies under Secretary of State Cordell Hull.

Those policies espoused open trade, adhering to the most-favored-nation principle as a life-saving antidote to the competitive tariff hikes globally, which had led to the Great Depression. That principle was later multilateralised in the post-war international economic system. This system persists today, but it is under attack by the Trump administration. Most recently, this is seen in its refusal to sign the historic OECD treaty on multinational tax avoidance and bilateral tax treaties signed by 70 other countries recently.

With only a slight knowledge of U.S. diplomatic history, one can draw a straight line from President Woodrow Wilson's plea to Congress to stay involved in the global system after the Great War (only to see the League of Nations, the Permanent Court of International Justice, and the Versailles Treaty defeated in the U.S. Senate) to President Trump's nihilistic foreign policies today. Of course, nothing good came from the failure of President Wilson's efforts. Twenty years later, German troops marched across Europe.

The resurgence of the states' and cities' roles in foreign affairs is reminiscent of the role states had under the Articles of Confederation immediately after the Revolutionary War in the 1780s. This is seen even going back to the Middle Ages, when states and cities were the central players in international trade, as part of the Hanseatic League within the Holy Roman Empire.

Today, it is the global city and cities of all sorts that are powering international engagement, innovation, and economic development. Cities, counties, and states are taking the lead in interfacing with the global economic system to promote local economic development and jobs.

What we see today are unprecedented actions by the United States on the global stage causing more disorder and insecurity. Just witness the recent flare-up in relations with Qatar and growing Saudi-Iranian hostilities instigated by President Trump's visit to Saudi Arabia. To many, these actions and policies evidence failed national leadership and bizarre foreign policies.

We are now encountering unprecedented actions on the sub-national level, among city and state governments as a reaction to failed national governance and as blowback to skewed populism. These actions have been powered by extensive and broad-based individual and corporate support.

These activities are growing in intensity. For example, state attorneys general have been energized in bringing judicial challenges to Trump's policies, most notably to immigration. Canada has begun negotiating directly with the states and cities that are members of the new climate coalition. Cities and states are expanding their sister-city and sister-state relations abroad. Most recently Virginia, completed a memorandum of understanding with the Mexican state of Baja California to promote trade.

Whether the Trump administration and its Justice Department will attempt to block these grassroots political actions by resorting to the federal courts is another question. Of course, these courts have not been very favorable to the administration's actions and its reliance on national security and the president's foreign policy powers, under either the principles of the separation of powers or federalism.

Thus, the growing opposition of cities and states to President Trump's failed foreign policies are spawning a new proactive federalism focusing on locally generated foreign policies. This is setting up a legally and politically historic battle over the new federalism.

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## **LOOKING AT DISPUTE RESOLUTION IN THE TRANS-PACIFIC PARTNERSHIP.**

**Stuart S. Malawer**

**Economists, politicians, trade activists, non-governmental organizations (NGOs), and members of numerous private sector organizations have already pronounced the proposed Trans-Pacific Partnership agreement (TPP) dead on arrival. Misunderstandings run rampant concerning this proposed free-trade arrangement, which involves nine countries: the United States, Canada, Japan, Australia, New Zealand, Chile, Peru, Brunei, Vietnam and Singapore. For example, recently the presidential hopeful Donald Trump declared that the TPP gives China an advantage, but of course, China is not even a member of the TPP.**

**While the TPP is very controversial and politicized, and while it may never be passed by Congress, it is incumbent on lawyers and law professors to apply their objective assessment to the TPP provisions that are most closely related to their field: dispute resolution processes. This will allow for a more balanced and mature debate regarding the future of the TPP as it proceeds through the congressional process.**

**The following is a look at the salient aspects of Chapter 28 (Dispute Settlement)<sup>1</sup> and Chapter 9 (Investment).<sup>2</sup>**

### **General**

**The Dispute Settlement Procedures outlined in Chapter 28 are intended to resolve trade disputes between states; these are separate from the Investor-State Dispute Settlement (ISDS) mechanism provided in Chapter 9, which focuses on disputes between private parties and governments over investment issues.**

### **Between Member States**

**Under Chapter 28 of the TPP, the resolution of trade disputes between member states involves obligations concerning cooperation, consultation, good offices, conciliation and mediation. However, if these procedures do not resolve a trade dispute, the complaining party may request a panel, which will issue a binding report. This type of panel process is at the heart of a compulsory arbitration system. Panels are authorized to resolve disputes and to issue sanctions in order to enforce their decisions. Specifically, panels may authorize the suspension of benefits.**

**For trade disputes between member states, a roster of panel members shall be established. Panelists are required to have expertise or experience in law and international trade. The**

function of the panel is to provide an objective assessment. Panels generally make their decisions by consensus.

Oral arguments are permitted, and the resulting hearings are open to the public; written submissions are also allowed, and the parties are required to make their submissions public. Third parties, including NGOs, may participate, and experts may be requested by a party or by the panel.

While the TPP will be a regional organization, it may very well have trade obligations similar to the World Trade Organization (WTO) a larger multilateral organization. It is conceivable that a state may take action for a trade restriction under either entity. Thus, there is a provision in the TPP agreement permitting a member to decide which forum in which to bring its complaint.

Unlike the WTO's system there is no appeals process. It is unclear why this is so, as an appeal mechanism would not be much more time-consuming. It would provide a level of oversight to ensure a uniformity of decisions.

Consultations are required to be held before filing for a panel hearing. Essentially, this provision requires diplomatic negotiations before resorting to litigation. Referring to the Vienna Convention on the Law of Treaties<sup>3</sup> for treaty interpretation is very welcome.<sup>4</sup> This convention, concluded in 1969, is the most important multilateral treaty, as it codifies the rules of treaty law. It covers such topics as treaty conclusion, interpretation, termination and invalidity.<sup>5</sup> By incorporating the rules of treaty interpretation as enumerated in the Vienna Convention (Articles 31 and 32), the TPP agreement removes disputes over the rules of treaty interpretation.

Chapter 28 sets firm guidelines for interpreting all TPP obligations. In particular, any WTO obligations incorporated in the TPP are to be interpreted in light of the WTO's panel and Appellate Body reports. This is a clear nod to precedent, which the WTO seems to accept in practice. The Appellate Body hears appeals from panels in the WTO system. Precedent is not specifically included in the WTO agreements, but both panel and Appellate Body reports actually cite earlier cases. Thus, it is a significant jurisprudential development that the TPP is explicitly granting precedential value to such reports when similar trade obligations are involved.

Most importantly, in private commercial disputes between firms, no firm may bring an action to domestic courts: "No Party may provide a right of action under its domestic law...."<sup>6</sup> Instead, parties are encouraged to use international arbitration to settle private disputes with the government.

## **Investor-State Disputes**

The investment chapter of TPP (Chapter 9) treats the issues arising between investors, most often multinational corporations, and host states. Most often these issues relate to the nationalization and expropriation of direct investments. These have been long-standing

issues in international law and the subject of extensive international arbitration. These issues have primarily been the subject of bilateral, not multilateral, treaties.

This chapter provides a multilateral agreement concerning substantive rules for foreign investment, a separate dispute settlement procedure, and binding arbitration. Unlike the panel system established for state-state trade disputes, the system established in this chapter, known as Investor–State Dispute Settlement (ISDS), incorporates already-existing institutions. The principal issue that has arisen is whether investment disputes between private parties and states should be resolved outside of national courts.

In foreign investment disputes between a firm and a state, investors can choose either institutional or ad hoc arbitration. Arbitration may be brought before the World Bank's International Centre for Settlement of Investment Disputes (ICSID),<sup>7</sup> the panels established by the investment agreement chapter,<sup>8</sup> or any other agreed-upon arbitral tribunal. There is mandatory consent to arbitration by host states.<sup>9</sup>

Specific rules are provided for panels and arbitration unless others are agreed upon. The agreement requires a consultation prior to submitting a request for arbitration. The arbitration shall be conducted in a transparent manner with documents provided to the public. The parties generally select the arbitrators. The Code of Conduct for the panels for state-state disputes (from Chapter 28), which is still to be formulated, is intended to also be applicable in some manner to the investor-state dispute settlement panels. There is currently no appeals process, but an appellate mechanism may be developed in the future. Parties are permitted to make written submissions, and interim measures of protection may be ordered.

The governing law comprises the rules of the TPP and the applicable rules of international law.<sup>10</sup> This provision again demonstrates that the TPP is intended to fit squarely within the world of public international law. Unlike most costs for international arbitrations, attorney fees may be awarded. This rule is intended to restrict frivolous actions.

Final awards are deemed to be enforceable within each defending state. Such awards are explicitly considered to fall within international arbitral conventions concerning enforcement, such as the New York Convention, the Inter-American Convention, and the World Bank (ICSID) Convention.<sup>11</sup> This ensures that international arbitration is easier to enforce than domestic judgments, which are not generally automatically enforceable in another jurisdiction.

This is an updated version of the ISDS procedures that the United States has used for many years in bilateral investment treaties and in NAFTA, which established international panels to review investment disputes.<sup>12</sup> These provisions reflect the updated ones in the 2012 Model Bilateral Investment Treaty (BIT) issued by the U.S. Department of State.<sup>13</sup> Similar provisions are being negotiated with the European Union under the Transatlantic Trade and Investment Partnership (TTIP) agreement. More than 3,000 agreements worldwide utilize some form of ISDS, and the United States is party to 50 such agreements.<sup>14</sup>

## Foreign Investment

Chapter 9 also provides substantive rules concerning the protection of foreign investment. These rules are aimed primarily at issues related to the nationalization, expropriation and compensation of foreign investments,<sup>15</sup> as well as the transfer of funds relating to those investments. Performance requirements, such as exports or domestic content requirements, are prohibited. A "minimum standard treatment" of investments is required. Obligations apply to all sectors unless negotiated and excluded (a "Negative List").<sup>16</sup>

Most interestingly, this chapter includes (in an annex) a provision confirming the customary international laws concerning the minimum standard of treatment (MST)<sup>17</sup> and the protection of aliens' investments. Expropriation and nationalization are prohibited. Direct and indirect expropriation and interference with reasonable investment-backed expectations are all included in this prohibition.

The agreement requires national and most-favored-nation treatment of investments. This means that there should be no discrimination between investments by foreign firms and those by domestic ones. The agreement applies to measures taken by central or subnational (regional or local) units and to state enterprises that exercise governmental authority. This is a newer addition to the world of foreign investment law.

## Observations

The Obama administration has argued that the TPP system has been significantly enhanced and adjusted. For example, it now allows NGOs to provide amicus briefs and for panels to have more transparency. This tracks developments within the WTO, which has gradually increased transparency over the last 20 years.

Provisions are included that specifically reference customary international laws concerning foreign investment and the Vienna Convention on the Law of Treaties regarding treaty interpretation. This clearly demonstrates that these newer provisions sit firmly within the growing international legal system, which provides "rules of the road" for a dynamic global economy. Developing such "rules of the road" has long been one of the Obama administration's trade and foreign policy objectives.<sup>18</sup> The intent is to now write such rules for newer issues—ones that would eventually be applicable to a larger number of states, including China.

## Conclusion

From a legal and foreign policy perspective, the TPP dispute resolution system is a well-thought-out approach to global trade and investment litigation for the ever-growing, interconnected ecosystem of world trade. It builds upon prior experience and updates prior practice, especially in terms of transparency. It sets the terms for future trade relations. This is good for U.S. national interests, the global economic system and both old and new players in this system.

The objective of securing a neutral adjudicator for an international investment dispute is as warranted today as it was years ago. No international juridical system for investment disputes yet exists, but Congress does have the right to enact new legislation whenever it wants to limit interpretations given by international arbitration. There can be no serious objection based on the argument that these decisions and interpretations are binding as precedent in domestic litigation or domestic law; they are not.

1. Chapter 28—Dispute Resolution in the TPP. (Official Text) USTR (Nov. 5th, 2015). <https://medium.com/the-trans-pacific-partnership/dispute-settlement-a5b4569a9a55#.s03n4c9ai>.

2. Chapter 9—Investment and TPP. (Official Text) USTR (Nov. 5th, 2015). <https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.2z2wgwos8>.

3. Vienna Convention on the Law of Treaties (concluded 1969). [https://treaties.un.org/doc/Publication/UNTS/Volume 1155/volume-1155-I-18232-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf).

4. Chapter 28.11(3).

5. Malawer, "A New Concept of Consent and World Public Order: 'Coerced Treaties' and the Convention on the Law of Treaties." *Vanderbilt Journal of International Law* 1 (1970-1971).

6. Chapter 28. Article 28.21.

7. World Bank (International Centre for Settlement of Investment Disputes). <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>.

8. Chapter 9, Article 9.18 (4).

9. Chapter 9, Article 9.19.

10. Chapter 9, Article 9.24(1).

11. Chapter 9, Article 9.28(12).

12. USTR Summary of TPP under "New Features." (November 2015). <https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.5sqt3gk4d>.

13. 2012 Model Bilateral Investment Treaty, <http://www.state.gov/documents/organization/188371.pdf>.

14. Investor-State Dispute Settlement (ISDS), USTR website (Fact Sheet) (March 2015). <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.

15. Chapter 9, Article 9.7.

16. Chapter 9, Article 9.11.

17. Chapter 9, Article 9.6.

18. 2015 Trade Policy Agenda and 2014 Annual Report, 3 (USTR 2015).

## **THREE TRADE CASES TO REIN IN TRUMP’S TARIFFS.**

**By Stuart S. Malawer**

**I predict that three major federal court cases, which might involve the U.S. Supreme Court, will rein in President Trump’s abuse of trade legislation by November 2020. They all involve presidential claims of national security to impose tariffs and other trade restrictions. To do so would be in the best national security interests of the United States and American democratic governance.**

**The most recent trade restrictions — who knows which others will arise — concern national security claims as a basis for new tariffs on Mexican goods to induce greater immigration control, restrictions on Chinese telecom giant Huawei in the name of national security, and national security claims for imposing tariffs on steel applicable to many of our trading partners and closest allies.**

**Two significant court actions already are pending against the Trump administration for its trade actions. The first, which is pending at the Supreme Court, concerns steel imports from many U.S. trading partners, including China. The second, which was just filed, concerns investment and trade restrictions on Huawei. A third case concerning the “Mexican immigration tariffs” is imminent and probably will involve the U.S. Chamber of Commerce, among others.**

**Filed by steel importers, the first case involves the older Supreme Court case *FEA v. Algonquin SNL Inc.* (1976), which concerned tariffs and the national security provision (Section 232) of the Trade Expansion Act of the 1960s. This case is now appealed to the Supreme Court by the steel importers, following an adverse decision by the Court of International Trade. The lower court grudgingly upheld President Trump’s steel tariffs because it hesitated to overrule even questionable precedents.**

**The second case just filed by Huawei addresses the constitutional prohibition against congressional bills of attainder that single out persons, companies or groups for punishment. Congress seemingly singled out Huawei by imposing restrictions on it for national security reasons under the new National Defense Authorization Act (Section 889).**

**The third possible case, threatening tariffs on Mexican imports, is based upon President Trump’s claim that Mexican immigration policy is a threat to U.S. national security under the International Emergency Economic Powers Act. Any legal action would certainly raise the threshold issue, if that claim is sufficient to satisfy the national security requirement that allows for a valid emergency declaration.**

**Federal courts review presidential actions even when they involve foreign policy.**

**This goes back to *United States v. Curtiss-Wright Export Corp.* (1936), a Supreme Court case involving an arms embargo declared by President Roosevelt during the Chaco War in Latin America, and *Youngstown Sheet & Tube v. Sawyer* (1952), where the Supreme Court addressed President Truman’s seizure of steel mills during the Korean War. In this case, the court clearly stated that the president’s powers as commander in chief do not include seizing domestic steel mills. Justice Robert Jackson stated the president is commander in chief of the military, not commander in chief of the nation.**

**Presidential actions — even when the president argues they are not reviewable by courts — are indeed subject to judicial review. This is what is called the rule of law. Congress makes the laws, and all laws and executive actions must comply with the U.S. Constitution to uphold the structure of the federal government and to preserve individual rights. This is the essence of America’s exceptionalism.**

**Under the U.S. Constitution, Congress has exclusive authority over trade. However, much of this authority has been delegated to the executive branch over the decades. So far, Congress has failed to reclaim its trade authority.**

**Congress has the sole constitutional authority to enact new taxes. Congress never intended to abrogate its taxing authority by allowing any president to unilaterally impose new tariffs, which are taxes on U.S. imports paid by U.S. firms and consumers. Tariffs and foreign retaliatory tariffs hurt everyone, including farmers, importers, consumers and domestic producers. They are detrimental to state and national economic development.**

**I predict the federal courts will uphold the separation of powers in face of this unprecedented onslaught of presidential tariff and trade actions by a president relying on dubious claims of nation security. This system has been the foundation of U.S. foreign and national security policy since 1945 and remains so today. The preservation of this system is in the national security interest of the United States, as well as basic American governance.**

**International Lawyer --  
A Dialogue with Dr. Stuart S. Malawer**

**Professor Dr. Stuart Malawer**



## **INTRODUCTION**

**Dr. Stuart S. Malawer is *Distinguished Service Professor of Law and International Trade* at George Mason University. Dr. Malawer graduated from the University of Buffalo in New York majoring in American history and Soviet studies and went to Cornell Law School for his Juris Doctor. Then, he entered the graduate program in International Relations at the University of Pennsylvania (Wharton School). He was awarded both a master's degree and a doctorate from Penn combining law, business, and foreign policy. Dr. Malawer also earned a Diploma from the research center at the Hague Academy of International Law in The Netherlands and then studied at the Harvard Law School (where he taught in the International Tax Program) and at St. Peter's College, Oxford.**

**At the height of the Vietnam War, Dr. Malawer began his teaching career at the University of Pennsylvania (Wharton School). He eventually moved to George Mason University School of Law in Virginia and then to the new Schar School of Policy and Government there. He is now serving for George Mason University as *Distinguished Service Professor of Law and International Trade*. Professor Malawer was the founder and director of its graduate program in international transactions and commerce and was subsequently named *Distinguished Professor of the Year*. For more than ten years as director, he organized and led graduate programs in global trade to Oxford (St. Peter's College) and Geneva.**

**Dr. Malawer is a member of the state bars of New York and Virginia. He is a former chairman of the International Practice Section of the Virginia State Bar and the author of**

more than 100 articles and numerous books on international law, international trade, the WTO, and national security. He was a gubernatorial appointee in Virginia to various state boards and committees focused on economic development and international trade. He is particularly interested in the growing relationship of sub-national political units (states and cities) to the global economy. He was a delegate on various gubernatorial trade missions from Virginia to China, India, and Japan. He has travelled widely throughout Asia, including visiting Vietnam, Cambodia, Singapore, Malaysia, Indonesia, and Thailand.

Dr. Malawer met Sandy Kazin on a blind date during her high school days and they have been married for over 50 years now. His wife is in private practice and has consulted extensively with critical federal agencies. Dr. Malawer has two brothers (an orthopedic surgeon and a lawyer), a son and a daughter who are both lawyers with the federal government (US Dept. of Justice and the US Dept. of Education). His son-in-law is a naval officer and lawyer. A spirit of public service has been cultivated in his family.



## QUESTIONS & ANSWERS

*1. Dear viewers and readers! Today, we have invited Dr. Stuart Malawer, Distinguished Service Professor of Law & International Trade at George Mason University for the interview. He is a truly inspirational international lawyer in the US and rest of the world. A very warm welcome to the Dr. Malawer, sir! We usually begin our interview with a few personal questions. Would you please tell us about your family, your experiences in the early years and as a teenager?*

I was born and grew up in New York. My parents were separated, so I lived in Queens just a few miles from President Trump's home. But I also spent a lot of time in Manhattan, where my father lived. This was near the United Nations. I went to a public high school in Queens. While in high school, I studied Russian and took numerous courses in government and history. As most New Yorkers did, I thrived in the global mix of peoples and businesses.

I graduated from high school at a young age and then went to the largest state university in New York. I graduated from university in three years and then went to law school. Then, I was 19. I should also mention that my father was a professional boxer and track star in the 1930s. He qualified in track for the Olympics in Munich. He also founded a manufacturing company with his brother during the depression and became very successful.

*2. You began studying law at Cornell Law School. How about your days in Ithaca? What was the most impressive subject in your law school? Could you also tell us about your college (undergraduate) life?*

As an undergraduate at the University of Buffalo, I was a history major and my focus was American history and Soviet studies. I was just sixteen years when I started in the undergraduate program. I found the university to be quite outstanding and took a broad range of classes related to international subjects. One of the best professors I had was an émigré from Czechoslovakia who escaped after the communist takeover. Instead of the normal four years, I graduated after three.

I went to Cornell Law School and was the youngest student in my class. Cornell Law School was truly outstanding, and at that time, Cornell was only one of two law schools in the country that had received a huge grant from the Ford Foundation to support international legal studies. That was a principal reason I chose to study there. What made Cornell so special was that the school paid 100% of its attention to teaching. This devotion to teaching remains with me today and inspires me in my teaching practices. I view teaching to be the primary importance in university life, although it is not easy. The students enrich my life and bring the world to me.

*3. After graduating from Cornell Law School, you were awarded a doctorate in international relations and a diploma of international law from the University of Pennsylvania and The Hague Academy of International Law, respectively. It is an exceptional course to be a top academic in public international law and diplomacy, but not very general track for American lawyers, most of whom seem to prefer practicing law over research. What brought you to the scholastic world? How about your vision at that time?*

I'm not sure it is accurate to say that most American international lawyers prefer to practice. I know a lot of public international lawyers who are in various universities and government positions. Nevertheless, my reason for not joining a law firm was simple. I was always interested in public policy and foreign policy. After considering a Wall Street firm, as most of my Cornell classmates did, I decided that was not how I wanted to spend my life. The choice was either to practice transactional law on Wall Street in New York City or focus on policy and international affairs in Washington, D.C. I had to make that choice several times during my career, and each time, I chose Washington and international affairs. That's why

I went to Penn immediately after Cornell. Cornell did a great job in international law, but I wanted more in the way of looking at a broad array of related issues, such as foreign policy, international business, and international relations, among others.

*4. Public international law is not so popular among the US legal scholars and practitioners. What do you suppose is the main reason for American lawyers not to be interested in public international law? How about the current and future trend?*

Again, I'm not so sure it is correct to say that public international law is not popular among legal scholars. Nevertheless, it seems to me that a number of legal scholars look at other areas of the law or sub-areas of public international law (such as international trade law or related Constitutional law questions) because many have grown in complexity and other areas have become critically important and interconnected today. The whole range of business and finance areas have become important not only to increasingly global activities of law firms but for governments. Many of these areas include issues of public international law, as well as newer issues, such as cybersecurity, transfer of technology, and data privacy.

*5. As an American lawyer, you have a wide range of interests in Asia. In particular, you were a member of the Virginia Governors' trade missions (Governors Warner and Kaine) to China, India, and Japan and have been working with many other Asian partners. What did you do for these missions?*

Most people inside and outside the United States do not realize how important of a role individual states or other sub-national (cities and counties) units play in local economic development and in engaging in the global economy. Virginia is one of the leading states that has been very active in promoting international trade as a means of fostering economic development within the state itself. However, many people within Virginia, including government officials, still don't fully support trade. My role was to assist the various governors of Virginia in arguing for public support and, in particular, in helping engage the public universities in this effort. To that end, I participated in the trade delegations and have served on various state boards promoting international trade and economic development and formulating a public diplomacy strategy. I am particularly interested in the role of states and cities in connecting with the global economy, despite the fact the US Constitution gives exclusive authority to the federal government to regulate international commerce.

*6. Increasing tensions in international trade were amplified recently with President Trump declaring a trade war against China. How do you evaluate his China trade policy? Could you also tell us about the origin of this current standoff between the US and China from a historical*

*and political perspective? How do you predict the course for US-China relations in the next decade?*

President Trump's trade policy is belligerent and totally counter-productive to US national interests and those of the international system. That's not good! It rejects the post-war system, and is not sustainable. My sense is that the origins in current US-China trade tensions is in the failure of the United States to develop domestic economic programs to address the harshness of globalization and the last ten years of the Great Recession. I'm optimistic, nonetheless. There is nothing inherent in US-China relations that makes those relations belligerent. Once President Trump leaves the scene, we will return to economic competition that can be managed by international institutions, such as the WTO's dispute resolution system. We all have an interest in observing the rules of the game and in jointly developing newer ones to address newer economic and technological developments. We all want to provide our citizens a better living.

*7. The US-Korea FTA is under negotiations for amendment. Do you think now is a high time for its revision? What is the main stance of the Trump administration for the US-Korea FTA?*

I don't think revision of the bilateral trade agreement between Korea and the US is really the big issue that the Trump administration makes it out to be. Focus on bilateral trade agreements and bilateral trade deficits is an unfortunate part of President Trump's nihilistic trade narrative. His demand for voluntary export restraints is clearly illegal under the GATT and the Safeguards agreement. His policies are driven by his mistaken views concerning the US electorate and the nature of the inter-connectedness of the global economy. The real focus of the US trade policy should be on promoting a multilateral trading system that is governed by mutually agreed upon rules and where disputes are settled peacefully. In the long run, the viability of global trade and international relations is based upon the consent of states. Consent brought about by the threat or use of force in treaty relations is prohibited. Such threats are in violation of Article 52 of the Vienna Convention on the Law of Treaties. This is a key aspect of the post-1945 international system.

*8. President Trump has drastically changed his position towards North Korea and decided to meet Kim Jong Un on June 12 in Singapore, to discuss a complete denuclearization of North Korea. What do you suppose is the core reason for President Trump's acceptance to the summit quite suddenly? Do you think he has real intentions to barter with Kim Jong Un to dismantle the current nuclear program?*

I believe President Trump's core reason in announcing a meeting with Kim Jong Un probably has very little to do with North Korea. President has no real understanding of

international affairs nor anything about North Korea. I believe everything he says or does concerning events outside of the United States has everything to do with his distorted perception of events inside of the United States. By that I mean his focus on domestic politics and his own standing with declining numbers of political supporters. He lacks a geostrategic vision and has no coherence or consistency of views. In short, I do not think dismantling North Korea's nuclear program is his real goal.

*9. Early twenty-first century is so turbulent with a fast-changing Asia. Many dramatic and historical events have been and will occur in this region such as the rapid rise of China as a hegemonic power, peace and reunification of the two Koreas, economic welfare of ASEAN, etc. What should be the long-term strategy of the US in light of changing regional politics? How do you envision the two sides – US and Asia – progress toward a peaceful relationship in the twenty-first century?*

Again, I'm optimistic. I believe this may be more up to the United States than the Asian countries. I believe mature political leaders in the United States will successfully accommodate the changing landscape throughout Asia. This includes the countries from India to Indonesia and beyond. There is really no reason peaceful relations cannot be promoted and sustained. This is in the national interests of the United States. Terminating treaties and withdrawing from international institutions is not the way to go. The challenge is to manage resurgence in populism and nationalism. Building walls is not the answer, but paving pathways to the global system is critical. Thoughtful leadership, better diplomacy, utilization of multilateral institutions will ultimately allow for managing political differences among countries that will benefit people everywhere.

*10. Can you give a piece of advice for young lawyers and students interested specifically in public international law, who are beginning their career? What, in your opinion, is the most important value for them to keep in mind?*

Viewing public international law as a means of addressing an ever-changing and more complex global landscape will promote the effective management of public and private activities. Most importantly, the scope and complexity of public international law is ever-expanding to newer areas such as global technology, and international lawyers need to keep abreast of these changes and focus on the areas that drive their passion.

*11. Would you say if you have had serious hardships or difficulties, despite your successful course of life? If so, what were they and how did you overcome those difficulties? What was the significance of those challenges in your life?*

I don't want to end this interview on a down note. But since you asked, I will tell you. There is a good ending. I'm a horseback rider and have had my own horse for years. In 1990, I was in a barn tacking up Victoria when the barn's hayloft collapsed on me. Initially, I was left for dead by the emergency responders. It took me another two years before I could walk without significant pain, of which I still have some. I was told then never to ride again. Well, I didn't listen, and I've been ridding ever since. The moral of the story? Just persevere, and never give up!

Interview by Eric Yong Joong Lee

## A SELECTED LIST OF RECENT PUBLICATIONS

### Books

TRUMP'S TRADE -- POLICY AND LAW (forthcoming 2020).

CYBER SECURITY EXPORT MARKETS (U.S. Dept. of Defense & Virginia, 2014).

GLOBAL TRADE AND INTERNATIONAL LAW (Hein & Co., 2012).

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## **CHINESE INVESTMENT & STATE ECONOMIC DEVELOPMENT – LEGAL & POLICY ISSUES.**

**By Stuart S. Malawer, *JD., Ph.D.*,**

**As a result of the 2008 global financial crisis and the Great Recession, states are confronting fierce fiscal challenges, and the job market is weak. In addition, the U.S. economy is not recovering as it has following past economic downturns. Now in the wake of the debt-ceiling crisis, the possibility of a double-dip recession is becoming a distinct possibility. In response to these increasingly bleak prospects. Job creation is now viewed as the number one national and global issue.**

**What should states and the federal government do to promote foreign direct investment (FDI) and economic development given growing concerns over national security?<sup>1</sup>**

**This article focuses on Chinese corporate investment, discusses legal and policy issues, and concludes with several proposals.**

**States have only begun to systematically and aggressively recruit direct investment from foreign firms, especially those based in China. Focusing on attracting Chinese FDI is at least as beneficial as states utilizing traditional efforts of export promotion focused on small and midsized firms. A recent report by the Council on Foreign Relations concludes that “increased Chinese investment should be a top U.S. priority.”<sup>1</sup>**

**The federal government has become more supportive of states as they expand their international economic development efforts. In addition to his revived push to create jobs and expand exports, President Obama’s newer international investment initiatives are reaffirming traditional U.S. open investment policies. The intent of these policies is to remove regulatory uncertainties restricting FDI in the U.S. However, more needs to be done.**

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<sup>1</sup> A recent study provides data on FDI in each state for 2004-2010 and ranks the recipient states. Burghard Group, “Global FDI Flows by Destination States, USA.” (August 2011). Available from <http://strengtheningbrandamerica.com/>.

<sup>1</sup> A. Card, T. Daschle, E. Alden and M. Slaughter, “U.S. Trade and Investment Policy.” 74 (Independent Task Force Report No. 67 of the Council on Foreign Relations, September 2011).



*Dr. Malawer with Levin Zhu, President,  
China International Capital Corporation (CICC).*

The establishment of new foreign firms in a state has a major multiplier effect on local employment. For example, new firms often expand. In addition, as foreign firms' customers and suppliers increase, domestic firms grow. These new foreign-owned firms do not require many economic incentives or local tax subsidies to expand their operations into the U.S. since it is in their corporate interest to do so. Establishing subsidiaries in the U.S. allows foreign multinational corporations to be located in the world's largest marketplace, avoid U.S. trade restrictions, take advantage of a cheaper dollar, and avoid currency fluctuations.

However, although states need foreign investments, federal government policies are still viewed by foreign investors as barriers to such investments. In addition, public support for these investments and state trade policies is often lacking. Such policies sometimes create popular resistance. Newer concerns related to national security and the remaining Cold War mentality of many politicians and Americans militate against welcoming investments from China and other emerging markets. Similar resistance occurred in the 1980s, when Japan Inc. invested in a large number of asset classes in the U.S. It continues today, fueled by some of the same anxieties about foreigners and spurred by newer ones involving cybersecurity, the rise of state-owned enterprises, cheap government funding, and foreign sovereign wealth funds.

In 2006, I wrote, "Transnational corporate undertakings have raised national security anxieties worldwide. Resource nationalism and renewed reaction to globalization further stir global anxieties."<sup>2</sup> The last five years have highlighted these developments to an even greater degree. This is especially true in light of the global recession and China's continuing growth.

The following observations are particularly important with regard to Chinese investment and state economic development in the U.S. today.

First, Chinese firms will make between \$1 trillion and \$2 trillion in direct investments globally over the next 10 years. Outward direct investment from China is growing at a rate 20% to 30% annually. Chinese corporate investments abroad have increased dramatically, with huge investments recently in Europe and Brazil. Foreign mergers and acquisitions by

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<sup>2</sup> S. Malawer, "Global Mergers and National Security." *Virginia Lawyer* 34 (December 2006).

Chinese firms last year totaled \$23.8 billion. This accounted for 40% of all FDI. China is now the second- largest acquirer of foreign business entities.<sup>3</sup> Private and state-owned Chinese firms use both retained capital and loans from state banks.

While investing much more in other countries, Chinese investment in the U.S. was \$5 billion in 2010.<sup>4</sup> China has already invested in 35 of the 50 states, with the largest going to Texas, New York, and Virginia.<sup>5</sup> New York City alone has more than 60 private and state-owned Chinese companies registered with the city<sup>6</sup> and is the top city for Chinese FDI in the U.S.<sup>7</sup> China's overseas direct investment for this year is projected to increase at least 10%.<sup>8</sup>

The China Investment Corporation, a sovereign wealth fund, has invested its initial \$200 billion.<sup>9</sup> Merely holding U.S. government debt and retaining large corporate and national dollar reserves is becoming unacceptable and overly risky for China and its corporations. The China International Capital Corporation, the respected investment bank, has recently opened offices in New York. Outbound direct investment from China is expected to overtake FDI in China within three years.<sup>10</sup> Chinese companies were among the fastest growing overseas investors in 2010.<sup>11</sup>

Second, Chinese operating firms are reorienting their global business strategies to avoid domestic trade restrictions and to more fully participate in the global economy to enhance their corporate transactions through acquisitions.<sup>12</sup> China has been the world's largest target for anti-dumping investigations, primarily in the U.S. and the European Union but now including other countries such as India and Brazil. As Chinese firms mature, they are clearly interested in developing strategies to overcome trade restrictions,<sup>13</sup> Buy America provisions, a falling dollar, and rising wages in China, as well as servicing their own domestic markets and developing newer global markets.

Publicly listed Chinese companies operating in the U.S., which often use reverse mergers<sup>14</sup> to avoid the scrutiny of an initial public offering (IPO), have raised issues concerning

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<sup>3</sup> L. Lan, "Overseas Spending Spree to Continue." *New York Times* (August 26, 2011) (article originally published in the *China Daily*).

<sup>4</sup> J. Flannigan, "A Wave of Chinese Money Gives a Lift to Companies Struggling in Tough Times." *New York Times* (July 7, 2011).

<sup>5</sup> D. Rosen and T. Hanemann, "An American Open Door – Maximizing the Benefits of Chinese Direct Investment." 32 (Asia Society) (May 2011). This report relies upon data provided by "The Chinese Investment Monitor," which is an excellent source of interactive data. Available from <http://rhgroup.net/china-investment-monitor/>

<sup>6</sup> Z. Yuwei, "Land of Opportunity." *Washington Post* (May 9, 2011).

<sup>7</sup> "FDI Global Outlook Report 2011." 12 (FDI Special Report) *Financial Times* (2011).

<sup>8</sup> D. Qungfen, "ODI Rebounds after July Decline." *Washington Post* (September 12, 2011) (article originally published in the *China Daily*).

<sup>9</sup> J. Dean, "China Fund Taps New CIO." *Wall Street Journal* (July 13, 2011).

<sup>10</sup> D. Qingfen, "ODI Set to Overtake FDI within Three Years." *China Daily* (May 6, 2011).

<sup>11</sup> "FDI Global Outlook Report 2011." 3 (FDI Special Report) *Financial Times* (2011).

<sup>12</sup> "There is also the wider issue of how to address Chinese companies expanding global operations through acquisition that do not touch upon issues of national security." From S. Davidoff, "Actions of U.S. and China to Shape Deals to Come." *New York Times* (February 2, 2011).

<sup>13</sup> P. Rui, "Ending Trade Discrimination." *China Daily* (May 6, 2011).

<sup>14</sup> K. Scannell, "Reverse Mergers Test U.S. Regulators." *Financial Times* (July 5, 2011).

corporate transparency, governance, and fraud. Chinese firms often use foreign shell companies that issue American Depositary Receipts (ADRs) to attract U.S. investors.<sup>15</sup> The SEC, the Public Company Accounting Oversight Board (PCAOB),<sup>16</sup> and other bodies can ensure financial propriety by exercising diligent oversight of Chinese companies and their auditors. Various rules included in Sarbanes-Oxley<sup>17</sup> and Dodd-Frank<sup>18</sup> are specifically applicable extraterritorially and are useful in policing foreign investment in the U.S. in an era of cross-border transactions from a wide range of foreign companies.

Third, because of its concern for national security, the U.S. federal government has been needlessly hostile toward Chinese investment at times. The recent treatment of the Chinese-based company Huawei before the Committee on Foreign Investment in the U.S. (CFIUS)<sup>19</sup> this year was not helpful.<sup>20</sup> Huawei is the second-largest telecommunication equipment and networking company in the world and has extensive operations throughout Europe. It recently established the center of its U.S. operations in Texas.<sup>21</sup> Governors throughout the U.S. as well as their regional and national associations are active in promoting FDI to alleviate state distress.<sup>22</sup> The U.S. government plays an important role in reviewing foreign takeovers and acquisitions, but it should not become an overly politicized process aimed at parochial domestic interests.

Recent legislation, the Foreign Investment and National Security Act (FINSIA), requires CFIUS to investigate all foreign transactions involving a corporation that is owned by a foreign government.<sup>23</sup> This provision seems to be aimed at China and sets the wrong tone if we want to encourage foreign investment. The same can be said for proposed legislation declaring currency undervaluation as a factor in determining illegal export subsidies.<sup>24</sup> It is interesting to note that China ranked only eighth in takeovers of critical technology

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<sup>15</sup> J. Jannarone, “Not All Chinese ADRs are Created Equal.” *Wall Street Journal* (July 28, 2011).

<sup>16</sup> D. McMahon & M. Rapport, “Challenges Auditing Chinese Firms.” *Wall Street Journal* (July 12, 2011).

<sup>17</sup> M. Lambelet, “The Extraterritorial Effects of the Sarbanes-Oxley Act of 2002.” (University of Geneva, October 2003).

<sup>18</sup> B. Protess, “Unearthing Exotic Provisions Buried in Dodd-Frank.” *New York Times* (July 13, 2011).

<sup>19</sup> S. Raice, “Small Deal Brings Scrutiny to Huawei.” *Wall Street Journal* (November 18, 2010).

<sup>20</sup> K. Hille, S. Kirchgaessner & P. Taylor, “China and the U.S.: Access Denied.” *Financial Times* (April 7, 2011).

<sup>21</sup> Texas, one of the most politically conservative states, opted for recruiting Huawei despite the federal government’s concerns over national security. C. Leonnig & K. Tumulty, “Perry Welcomed Chinese Firm Despite Security Concern.” *Washington Post* (August 14, 2011).

<sup>22</sup> The National Governors Association’s briefing, “Attracting Foreign Direct Investment into the States.” (May 17, 2011). Available from <http://www.nga.org>; Southern Governors Association, “Economic Ties with China.” (Annual meeting 2010). Available from [www.SouthernGovernors.org](http://www.SouthernGovernors.org).

<sup>23</sup> “Foreign Investment, CFIUS, and Homeland Security: An Overview.” (GAO Report, February 2010).

<sup>24</sup> W. Morrison and M. Labonte, “China’s Currency: An Analysis of the Economic Issues.” (Congressional Research Service Report RS21625) (August 3, 2011).

companies in the U.S. from 2007 to 2009.<sup>25</sup> The *Financial Times* recently declared, “The Chinese rightly warn against protectionism wrapped in national security.”<sup>26</sup>

Fourth, other countries, such as Canada, Australia, and Germany, have become leery of foreign takeovers, especially of industries involving commodities and agricultural land.<sup>27</sup> Reactions against foreign investment are rooted in national security concerns and opposition to deeper globalization, where foreign investment in domestic economies is becoming as important as trade between states. This foreign investment is highlighted by the expansion of foreign corporations from emerging markets into a broad range of domestic markets. This newer corporate activity involves not only sales but also manufacturing, research and development, and the provision of services in a domestic market.

Fifth, the traditional U.S. openness toward foreign investment must be further safeguarded. Although FDI in the U.S. increased by 49% in 2010, it is still lower than at its height prior to the 2008 financial crisis.<sup>28</sup> The U.S. should not only promote investments from our multinational corporations abroad but also welcome such investments from foreign multinationals and sovereign wealth funds from emerging markets, including China. Generally, state-owned enterprises operate to maximize their profits, as do purely private firms. Sovereign wealth funds also want to maximize their returns.<sup>29</sup> Secretary of the Treasury Timothy Geithner recently stated, “I am very confident that if you look over the next several years, you’re going to see Chinese investment in the United States continue to expand very, very rapidly.”<sup>30</sup> Vice President Joseph Biden wrote subsequently, “China can make our country more prosperous, not less. As trade and investment bind us together, we have a stake in each other’s success.”<sup>31</sup>

President Obama’s declaration in June 2011 supporting a “fair and equitable” approach to foreign direct investment<sup>32</sup> is most welcome, as is his establishment of “SelectUSA” as the first coordinated federal effort to promote FDI in the U.S.<sup>33</sup> However, federal policies could further remove regulatory and congressional uncertainty relating to review of foreign mergers and transactions that are seen as risk factors restricting FDI. The federal

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<sup>25</sup> CFIUS Annual Report to Congress.” 20 (November 2010).

<sup>26</sup> Editorial, “Wen in Europe.” *Financial Times* (June 25, 2011).

<sup>27</sup> “Law and Policies Regulating Foreign Investment in 10 Countries.” (GAO Report, February 2008). See Table 1: “Selected Laws and Regulations Addressing Foreign Investment Restrictions” on page 8.

<sup>28</sup> Council of Economic Advisers, “U.S. Inbound Foreign Direct Investment.” (June 2011).

<sup>29</sup> D. McMahon, L. Wei & V. Guevarra, “Wealth Funds Fight for Reputation.” *Wall Street Journal* (May 10, 2011).

<sup>30</sup> “China’s Investment in U.S. to Expand in Future: Geithner.” Available from Xinhuanews at <http://news.xinhuanet.com> (May 10, 2011).

<sup>31</sup> J. Biden, “China’s Rise Isn’t Our Demise.” *New York Times* (September, 8, 2011).

<sup>32</sup> “Statement by the President on United States Commitment to Open Investment Policy.” White House (June 20, 2011).

<sup>33</sup> “Executive Order Establishing SelectUSA Initiative.” White House (June 15, 2011).

government should become more aggressive in attracting FDI to the U.S.<sup>34</sup> The recent high-level task force report of the Council on Foreign Relations concludes, “Historically, the United States has never concerned itself in a systematic way with attracting and retaining foreign investment. As the world’s largest market, it was simply assumed that big companies would make investing in the United States a high priority. That is no longer the case.”<sup>35</sup>

Sixth, whereas federal enforcement of export controls on the transfer of technology to foreign affiliates in the U.S. is necessary, as is securities review concerning any publicly listed foreign company in the U.S, policies do not need to be discriminatory. The conclusion of more bilateral tax and investment treaties with foreign countries by the federal government is an additional incentive for foreign firms to invest in the U.S.<sup>36</sup> Nevertheless, states must ensure that their tax and regulatory systems provide parallel rights.

Seventh, although members of the public and many policymakers do not generally realize it, states have become major players in international trade and global investment. This is occurring despite the fact that the U.S. Constitution gives Congress the exclusive right to regulate foreign trade and prohibits states from entering into treaties. The competition for new business takes place at the state level, one corporation at a time. States that are not aggressive or have regulatory and tax disincentives lose in the global marketplace.

Simply put, being competitive in the global marketplace is the answer to the economic and business distress at home. States should expand their global outreach by opening more offices overseas to sell their jurisdictions. Attracting Chinese corporations will not likely raise complaints about corporate welfare because they probably will not require expensive state incentives. Similarly, attracting such corporations will preclude the complaints of beggarthy-neighbor and the race-to-the bottom-mercantilism that are often heard when one state persuades a firm from another state to relocate. Chinese companies are joining the global marketplace because of internal corporate dynamics to gain greater market access and profitability. As a result of these newer global strategies, market forces are forcing the Chinese companies to comply with national rules governing business transactions. This parallels China’s general observance of trade

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<sup>34</sup> "(F)ederal, not just state-led, efforts to court foreign investors" are required for U.S. job creation." A. Card, T. Daschle, E. Alden and M. Slaughter. "A Pro-Trade Agenda for U.S. Jobs." *Wall Street Journal* (9.17.11).

<sup>35</sup> A. Card, T. Daschle, E. Alden and M. Slaughter, "U.S. Trade and Investment Policy." 74 (Independent Task Force Report No. 67 of the Council on Foreign Relations, September 2011).

<sup>36</sup> T. Siegmann, "The Impact of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investments." SSRN 1268185 (November 2007).

## **WHEN GLOBAL TAXATION AND U.S. POLITICS COLLIDE.**

**By Stuart S. Malawer, *J.D., Ph.D.***

**Anger over tax havens for individuals and multinational corporations has moved from the margins to the mainstream. This is a red-hot issue in the U.S. presidential campaign.**

**This anger shows signs of growing almost daily with the newest disclosures and corporate schemes for reorganization. Popular resentment of secret deals and ineffective global tax rules is putting immense pressure on governments to formulate and execute new policies to tax real economic activities worldwide.**

**In particular, the problem for the United States and the European Union in taxing the offshore income of multinational corporations is simple: We are trying to tax global transactions, yet we are still living in a multi-jurisdictional world.**

**In other words, the U.S. and the E.U. are trying to tax transactions outside of their territorial jurisdictions, which is very tough.**

**The only global tax system today is a collection of national ones with few tax treaties. This allows for lawful tax avoidance. Lawful tax avoidance allows firms to take full advantage of the skewed system while evading their national and corporate responsibilities to governments and communities in their home jurisdictions, which provide them with their legal standing, protection, and support. This doesn't sound right.**

**By and large, the disconnect between limited national jurisdiction and global transactions is the underlying problem. This actually makes tax avoidance both lawful and insidious. Both the U.S. and the E.U. are beginning to grapple with the issue; sometimes they are at odds and sometimes not.**

**Both have taken important steps in mandating bank disclose foreign depositors. For example, under the Foreign Tax Compliance Act of 2010 (FACTA), there is a U.S. tax on foreign banks for noncompliance when the U.S. requests names of U.S. depositors. The U.S. Treasury Department's Financial Crimes Enforcement Network (FinCen) is considering establishing an analogous disclosure of beneficial owners of offshore shell companies to help fight money laundering. Those companies provide secrecy for foreign buyers of ultra-expensive condos in New York and Miami.**

**The pending actions by the E.U. against Apple and the recently announced anti-inversion rules by the U.S. Treasury are just the latest round of attacks on tax avoidance.**

The recent release of the “Panama papers” further highlights the already intolerable situation concerning individuals stashing money abroad.

This raises issues about the facilitation of tax evasion and the failure to exercise due diligence by financial institutions.

The claim that “double-taxation treaties” should not mean “no taxation treaties” is ringing true more and more every day. The amount of money kept by U.S. firms abroad by utilizing corporate inversions, tax deferrals, transfer pricing, and earnings stripping (i.e. the use of tax-deductible intracompany loans) is staggering about \$1 trillion. To me, “deferral taxation” really means either no taxation or very little taxation after repatriation, which is rare

Understanding global business and trade must include understanding the taxation of these cross-border corporate and investment transactions. The use of offshore shell companies is legitimate in some trade and investment transactions. But the story is much broader than that.

Apple, Microsoft, and Google alone have piled about \$500 billion into offshore accounts. Apple’s tax rate for overseas transactions is about 2.5 percent, while for domestic operations it is about 17 percent. The same can be said for other IT, Internet, and pharmaceutical firms that rely on intensive intellectual property rights and intangibles assets while the firms are incorporated and doing business in the U.S.

What should be done?

My sense is that both the U.S. and the E.U. really need to get serious about global tax avoidance by multinationals. The Organization for Economic Cooperation and Development (OECD) and the G-20 can help, but the answer at this point is better legislation and aggressive prosecutions by national authorities.

The debate about overall corporate tax rates is somewhat real, but I believe that even if these were lowered, tax evaders would still find it attractive not to pay the amounts due. We’ll see.

But to begin, we in the United States need an honest discussion of the responsibilities that individuals and multinational corporations have to pay their taxes whenever real economic and business transactions take place.

The U.S. can start this process by having an honest discussion during this campaign season. Hopefully, this will lead to better national legislation and international cooperation and regulation.

One idea to consider is to include tax transparency as well as corporate and banking transparency when negotiating new trade agreements. This would subject countries to trade sanctions for failing to comply with tax transparency and other treaty obligations to disclose

**banking information. This would exert a significantly greater amount of pressure on non-complying countries than is being done today.**

**But more importantly, addressing global tax avoidance and bank secrecy would start to rebuild popular trust in trade. The failure to do so would only encourage more anti-trade resentment.**

**Global tax avoidance is a blight on our tax system. If stashed funds abroad are repatriated, they could be used for corporate reinvestment in the U.S. Taxes paid on those funds could go to rebuild our infrastructure.**

**Multinational corporations have an obligation to the communities where they do business and to the country that sustains them. U.S. multinationals benefit from U.S. laws and diplomacy. They need to act responsibly.**

## **IS THE IRANIAN HOSTAGE AGREEMENT GOOD DIPLOMACY AND LAW?**

**The transfer of \$1.7 billion to Iran to secure the release of the hostages this month coincided with the implementation day of the Iranian nuclear agreement and the lifting of economic sanctions.**

**This raises unfortunate and lingering memories of the way President Jimmy Carter negotiated the first Iranian hostage agreement of the early 1980s. The result was the release of 52 American hostages 444 days after their capture in the American Embassy in Teheran in 1979.**

**This hostage situation was one of the earliest forms of state-supported terrorism in which the United States negotiated to get the hostages back. This terrorism was in clear violation of public international law and international diplomatic agreements.**

**In particular, the first hostage-release raised the dual questions of whether the payment for the release made diplomatic sense and whether it was lawful under U.S. and international law. These same two questions can be asked about the 2016 payment.**

**In both cases, payments by the United States in the 1980s and in 2016, were made to secure the release of hostages.**

**In 1979, international executive agreements were used that established arbitral proceedings in The Hague. These agreements were concluded under the president's authority to conduct foreign affairs and to settle diplomatic claims. Such authority was upheld by the U.S. Supreme Court in *Dames & Moore v. Regan* in 1981.**

**Thus, in the early historical evolution of international terrorism, both Presidents Carter and Ronald Reagan, as well as the Supreme Court, upheld constitutional and international legal constructs that allowed this diplomatic arrangement to end the hostage crisis, but with uncertain implications for encouraging future episodes.**

**This was despite the fact that Article 52 of the Vienna Convention on the Law of Treaties, governing coercion and duress on a state during the treaty-making process, requires uncoerced state consent. It declares that a “treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”**

**Needless to say, attacking a U.S. embassy and holding diplomatic hostages is a grievous use of armed force against the diplomatic premises and personnel of the United States in violation of long-standing customary international law and the Vienna Convention on Diplomatic Relations.**

**In 2016, President Obama has used similar executive agreements to free the latest hostages, but no new arbitral proceedings have been authorized. In fact, the recent payment was made for the purpose of settling earlier arbitral proceedings in connection with the initial hostage release.**

**In 1982, I wrote in the MIT-published International Security Review:**

**“The Hostage Accords, their negotiation and implementation, raise questions concerning international law, constitutional law, and foreign policy. Specifically, questions arise, among others, concerning the validity of the accords under international and constitutional law, of foreign policy relating to the authority of the President, and of renouncing the Accords as a matter of foreign policy. ... (T)hese three questions have not been satisfactorily assessed, let alone answered.”**

**The new Iranian hostage agreement raises the same questions today — some 35 years later, unfortunately.**

**Are we now paying the price of this Carter-Reagan model in a newer era of global relations and law in which weaker nations and ever-expanding and changing terrorist groups exercise asymmetrical power, where less powerful states and non-state actors can significantly impact more powerful states such as the United States?**

**Does this traditional approach to law and diplomacy, adopted again by President Obama in January of this year, now act as a form of moral hazard that further encourages even more destructive actions by state-sponsored terrorists and non-state actors?**

**Does this legal and diplomatic approach make for good domestic or global public policy in the 21st century? For the United States and other democratic nations?**

**Needless to say, the above questions, as well as more specific legal and diplomatic questions, require much further, detailed exploration.**

**But, at this point, my quick conclusion is the following: On balance, especially given some hindsight since the early 1980s, both hostage deals made sense in their immediate diplomatic contexts and both were lawful (under both constitutional and international law).**

**But both deals raise disturbing questions concerning their impact on international law and global diplomacy as we go forward in this newer era in which state-sponsored terrorism is more full-blown and in which non-state-supported terrorism is accelerating, as demonstrated by ISIS and company.**

## **U.S.-CHINA LITIGATION IN THE WORLD TRADE ORGANIZATION**

**By Stuart S. Malawer, J.D., Ph.D.**

**The World Trade Organization dispute resolution system is widely used and is a litigation-oriented process. It is at the core of global trade relations today. Both the United States and China have been aggressive users of it. Each country has shown a willingness to address contentious issues. This has been to the benefit of both. As newer trade issues arise this process will be indispensable in keeping U.S.-China trade relations on a stable course.**

### **BACKGROUND**

**The World Trade Organization (WTO) negotiates and adjudicates global trade rules. The dispute resolution system is at the heart of the WTO today. It is the judicial system of the WTO and of the global trading system.**

**The WTO and its dispute resolution system are the successor to the older, much weaker GATT system, and came into existence in 1995. For the first time in history, there is now a multilateral system that resolves trade disputes with binding decisions enforceable by sanctions. There is nothing else like this in the international economic arena today.**

**The basis of the dispute resolution system is the WTO's "Dispute Settlement Understanding," one of the multilateral agreements that came into force in 1995. It establishes compulsory jurisdiction, binding decisions, and trade sanctions to enforce those decisions. The dispute resolution system applies all the rules found in the whole range of WTO trade agreements relating to agriculture, intellectual property, subsidies, services, investment measures, merchandise trade, among others.**

**The United States has filed various actions against China concerning what it considers improper export subsidies and failure to enforce intellectual property rights. On the other hand, China has filed actions against the United States for their imposition of antidumping duties and safeguard tariffs. Most trade cases before the WTO involve "trade remedy legislation" authorizing dumping, subsidies, and safeguard measures. The dispute resolution system is widely used by many states, but most WTO litigation involves that between the United States and the EU. However, the most politicized and high-profile litigation involves the United States and China.**

The actual dispute resolution process combines traditional negotiations and litigation and is relatively simple and quick. From start to finish this entire process takes 12 to 15 months. States file a request for consultation which involves confidential diplomatic negotiations between the parties. If consultation does not result in a settlement, the complaining party may request the establishment of a panel to hear the case. This is where the litigation takes place. However, the majority of cases requesting consultation are resolved without ever going through the full litigation process.

Panel members are trade experts selected by the WTO and then chosen by the parties. The cases are decided by the panelists and not juries—a seeming adaptation of the civil-law approach to litigation. For a very long time these proceedings were closed and did not allow amicus briefs, but this has now changed.

Parties may appeal the decision of the panel to the Appellate Body which is composed of members selected by the WTO. Determinations by both the panel and Appellate Body are required to be adopted by the Dispute Settlement Body, essentially the entire membership of the WTO. In reality this adoption has proven to be automatic. When a decision is finalized, the losing party is required to bring its offending measure into compliance with the decision (technically, a recommendation) which allows it to formulate the specifics of its compliance.

If there is a failure to comply after a reasonable time, the complaining party may request the panel to authorize imposition of sanctions on the losing state. Most often, these sanctions are tariff surcharges on imports from the responding state until the offending measure is removed. Requests for sanctions have been very rare and, even when authorized, they have not often been imposed. States are no longer allowed to unilaterally impose trade sanctions on others unless authorized by the WTO. Only multilateral trade sanctions as authorized by the WTO are lawful under global trade law today.

## **BUSH AND OBAMA**

During the last presidential election, President Barack Obama made much of his record for bringing legal actions against China and his aggressiveness in the WTO legal process as a means of enforcing global trade obligations.

It is interesting to note that President Bill Clinton actually brought a far larger number of cases before the WTO than either President George W. Bush or President Obama. Over eight years, Clinton brought 69 cases, whereas Bush brought 24 cases. In four years, Obama brought only 11 cases.

Comparing Bush's eight years and Obama's first four years, it is clear that Obama has been more aggressive than his predecessor.

What is most interesting is that Obama was much more focused on China in WTO litigation than Bush. Bush brought a total of 24 cases; only seven were directed against China. Obama brought 13 cases; eight of them were against China. It is fair to conclude that Obama was

very aggressive against China in his four years. I would also add that he was hyper-focused on this litigation. (WTO website, "Disputes from Countries/Territories," (Aug. 1, 2013).

## CHINA IN THE WTO

China has brought 11 actions against WTO members. It brought eight cases against the United States and three against the EU. However, China has been brought before the WTO more often than it has brought cases. The cases brought by China almost exclusively involved dumping and safeguard issues. "Dumping" refers to the sale of goods below fair market value and "safeguards" to actions countering a surge of imports. China argued that the United States improperly imposed dumping duties on the import of various products into the United States since they were not being sold at less than fair value. It also contended that the United States incorrectly imposed safeguard duties on import of steel and tires from China since there was no surge of such imports into the United States. The cases brought by the United States involved, among other issues, intellectual property rights, dumping, and export controls. In the 11 decided cases involving the United States and China, the United States won a total of eight cases, whereas China won three.

One of the highest-profile trade issues, the valuation of the yuan, has not been submitted by the Obama administration to the WTO, despite significant demands from Congress and the public. Many in Congress contend that the yuan is undervalued against the dollar, thus allowing Chinese imports into the United States at a cheaper price. In my opinion, both the Bush and the Obama administrations understand that the WTO agreements were never intended to cover this type of currency-exchange issue. Similarly, no cases have been filed by China against the United States concerning U.S. restrictions on Chinese direct investment in the United States when based upon claims of national security. The WTO provides architecture for global trade relations. The WTO's central mandate is trade, not finance or investment.

## OBSERVATIONS

The Obama administration has not filed a new case against China since the 2012 election. In contrast, both the EU<sup>1</sup> and Japan<sup>2</sup> have filed actions. Moreover, China has filed a recent action against the EU.<sup>3</sup>

Some observers argue that constant litigation is corrosive to the international trading system. For example, one commentator laments the fact that "more and more of the work of trade relations has shifted away from negotiations and towards litigation and arbitration."<sup>4</sup>

However, others have taken a more nuanced approach. An earlier skeptic recently stated, "In fact, the situation is more complex, and less worrying, than it might appear...[A] heartening amount of the litigation has actually been aimed at preventing arbitrary trade restrictions in the future... Much is aimed at obtaining rulings preventing others using 'trade

defense' instruments, such as antidumping and countervailing duties as a politicized tool of arbitrary retaliation."<sup>5</sup>

I view U.S.-China litigation in the WTO as validating the strength and critical importance of the WTO and its dispute resolution system. China is now the second-largest economy in the world. It is expected that disputes increase with trade flows. The strength of the international system is not the absence of disputes, but the way in which they are resolved. The failure of the WTO to conclude the Doha round of negotiations, the current round of multilateral negotiations that was authorized in 2001 and aimed at the formulation of new trade rules to assist developing countries, only highlights the growth and immense historical significance of the dispute resolution system.

An examination of the cases involving China shows the trade disputes that arise between it and the United States are submitted to the WTO and are resolved, either by diplomatic negotiations in the consultation stage or in the litigation phase. No enforcement actions by either country asking for sanctions have been filed under Article 22 of the Dispute Settlement Understanding.

The primary focus of China's litigation in the WTO has been the United States. Nevertheless, China is paying an increasing amount of attention to the EU and other countries.<sup>6</sup> China's use of the dispute resolution system and observance of its decisions are beneficial developments in promoting a rules-based global trading system. It shows a growing acceptance of global trade rules by China. This represents an understanding that to benefit from the global trading system it needs to follow the rules of the road.

## CONCLUSIONS

The WTO Annual Report for 2013<sup>7</sup> concluded, "In sum, WTO dispute settlement activity increased markedly in 2012. It is clear that WTO members, both developed and developing, continue to have a high degree of confidence in the WTO dispute-settlement mechanism to resolve their disputes in a fair and efficient manner. It is also evident that members are confident that the system is capable of adjudicating a wide variety of disputes covering significant questions and complex issues."<sup>8</sup>

It is worthwhile to note the recent observation by Pascal Lamy, Director General of the WTO.<sup>9</sup> He argued that trade frictions are a statistical proportion of trade volumes, whereas trade disputes are a statistical proportion of trade frictions. He brushed off concerns about the increasing number of trade disputes between the United States and China. He contended that the WTO mechanism takes the heat out of disputes by utilizing a process that is rules-based, predictable, and respected.<sup>10</sup>

While inheriting a complex trade situation,<sup>11</sup> the Obama administration has clearly put trade at the heart of its second-term agenda.<sup>12</sup> This policy includes negotiating the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). However, at the core of the administration's trade policy is its insistence on greater trade

enforcement by U.S. trade agencies and the WTO, particularly with China. What is the point of negotiating rules if they are not enforced? New Secretary of State John Kerry succinctly stated, "Foreign policy is economic policy."<sup>13</sup>

The 2012 Report to Congress on China's WTO Compliance by the USTR stated clearly the central position of WTO litigation in U.S.-China trade relations: "When trade frictions have arisen, the United States has preferred to pursue dialogue with China to resolve them. However, when dialogue with China has not led to the resolution of key trade issues, the United States has not hesitated to invoke the WTO's dispute settlement mechanism. In fact, the United States has used this mechanism against China more than any other WTO member."<sup>14</sup> This policy is set to continue under the newly appointed USTR, Michael Forman, a former member of the National Security Council.<sup>15</sup>

Newer trade issues are emerging swiftly. For example, the EU just filed the first case in the WTO against the Russian Federation.<sup>16</sup> (The Russian Federation joined the WTO last year.) A recent WTO panel, "Defining the Future Trade Issues," released its report in April of this year.<sup>17</sup> It enumerated nine issues, including competition policy, international investment, currencies, labor, climate change, corruption,<sup>18</sup> and coherence of international economic rules.

To this list, I would add the issue of cyberespionage for commercial and economic gain as a new front in global trade wars. The Obama administration has suggested<sup>19</sup> that trade tools should be used, which would possibly involve WTO litigation.<sup>20</sup> In addition to this newer issue, I would add two additional ones: foreign direct investment and taxation. Growing foreign investment by Chinese companies has raised questions of national security.<sup>21</sup> Tax avoidance has become the scourge of many countries and international organizations.<sup>22</sup>

Challenges remain and are expected to continue. Those relating to the most important bilateral trade relations in the world today between the United States and China are set to grow as trade develops even more. Global transactions in a multijurisdictional world need a mechanism to resolve a wide range of business, trade, and economic issues.<sup>23</sup> In an increasingly interconnected trading system and a less hierarchical political system, cooperation through diplomacy and adjudication is preferable to outright power-politics confrontation. Each country has shown that it is willing to work with the other to apply the rules of global trade, which will need to continue as new disputes arise and newer trade issues emerge.

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## GLOBAL GOVERNANCE OF E-COMMERCE AND INTERNATIONAL TRADE

by Stuart S. Malawer

**We are still in the early stages in meeting the challenges to traditional territorially based political and legal systems posed by inherently borderless communications and Internet technologies. The challenge confronting the global trading system is to develop an international structure that supports growth of global electronic commerce for all. This critical effort involves creating a structure or regime that precludes dysfunctional international, national or regional actions that would create new trade barriers or keep old ones in place. Robert Zoellick, the new United States Trade Representative (USTR), said:**

**“To promote an effective international economic system, we should also strive for creativity in governance. In the modern, wired world, government will become increasingly ineffective if it fails to keep up. This logic of governance should extend to the rules of our trading system. To enable businesses, economies, and societies to change to meet the challenges of new circumstances, our trading rules should be flexible enough to respect different national approaches while consistently challenging actions that discriminate against others and thwart openness with protectionist barriers.” (Speech, *The United States, Europe, and the World Trading System*, April 15, 2001).**

**This article reviews recent developments and highlights concerning global governance of e-commerce and Internet trade. In addition to identifying and examining recent actions of the United States and major global institutions, this article concludes that there is now a growing awareness that meaningful global action is required. Some preliminary actions have been taken, but much work remains. Several suggestions will be made to ensure that the global structure that emerges fully supports sustaining dynamic growth of e-commerce and Internet trade. This global structure needs to protect and to build upon the entrepreneurial and innovative foundation of the Internet.**

**In particular, this article summarizes the actions and developments, from 1998 to early 2001, taken by the United States, the European Union, and major international institutions concerning global governance of e-commerce and Internet trade. It begins with a look at the United States and the European Union, and then addresses developments at the World Trade Organization (WTO), the**

World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU), the Organization for Economic Cooperation and Development (OECD), and the U.N. Commission for Trade and Development (UNCTAD).

## UNITED STATES

In January 2001, the Clinton Administration released the third annual report on e-commerce entitled *Leadership for the New Millennium, Delivering on Digital Progress and Prosperity*. While earlier reports focused on more general issues involving e-commerce and trade, this report explored the domestic and digital divide. In releasing the report, former President Clinton recognized that the information technology sector was responsible for almost one-third of recent U.S. economic growth. Furthermore, the IT sector was responsible for increasing U.S. productivity and global competitiveness. The second annual report, *Towards Digital Equality* (1999), enumerated major policy challenges confronting the administration. These challenges included:

- Establishing meaningful consumer protection;
- Promoting broadband deployment;
- Engaging developing countries in e-commerce; and
- Recognizing that small and medium-sized enterprises are crucial to our continued economic success.

The United States, in continuing its diplomatic effort, concluded a number of bilateral or joint statements with individual countries concerning global e-commerce. This new and innovative approach attempts to further establish a common agreement with trading partners on basic U.S. policy positions and principles concerning the evolving global governance and development of the Internet. Agreements have been concluded with Chile (2000), Columbia (2000), the Philippines (2000), the European Union (2000, 1997), the United Kingdom (1999), Egypt (1999), Australia (1998), France (1998), Ireland (1998), Japan (1998) and the Netherlands (1997). As provided in the *U.S.- U.K. Joint Statement*, the provisions typically proclaim general principles that are the cornerstone of U.S. policy on global e-commerce. For example:

- The private sector should lead in the development of electronic commerce and in establishing business practices.
- Governments should ensure that business enjoys a clear, consistent, and predictable legal environment to enable it to prosper, while avoiding unnecessary regulations or restrictions on electronic commerce.

- **Governments should encourage the private sector to meet public interest goals through codes of conduct, model contracts, guidelines, and enforcement mechanisms developed by the private sector.**
- **Government actions, when needed, should be transparent, minimal, non-discriminatory, and predictable to the private sector.**
- **Cooperation among all countries, from all regions of the world and all levels of development, will assist in the construction of a seamless environment for electronic commerce.**

**As in the *U.S.- U.K. Joint Statement*, they often identify specific issues including tariffs; taxes; electronic authentication/electronic signatures; privacy; open access; information security; electronic payments; intellectual property rights; and consumer protection. The United States issued a series of important annual reports concerning United States and global trade. The annual report on telecommunications is of particular importance, since telecommunications provides infrastructure for e-commerce transactions. The USTR performs an annual review of foreign compliance with telecommunications trade agreements under Section 1377 of the 1988 trade act. Zoellick has said:**

**“Telecommunications trade agreements, particularly in the World Trade Organization [Basic Telecommunications Agreement of 1998], have been a driving force in opening up world markets to high-technology trade and investment. These agreements have sparked increased competition and dramatic growth in global networks. Vigorous monitoring and enforcement of these trade agreements is critical ” (Press Release, April 2, 2001).**

**ICANN was established to assume responsibility for IP (Internet Protocol) space allocation and domain name system management, among other responsibilities. Recently, it authorized new top-level domain names (.biz and .info). ICANN is dedicated to preserving operational stability of the Internet by providing a formal structure for the inclusion of domestic and global interests as the technical coordinating body for the Internet. While conflict has surrounded the substantive decisions made and its organizational structure, ICANN’s privatized approach is unique and somewhat successful especially arbitration of domain name disputes.**

“The Uniform Dispute Resolution Policy,” ICANN’s creation provides a hint of what direction the future governance of the Internet and e-commerce may take, one involving more private and government coordination.

- Practitioner’s Research Note: *U.S. Trade Law & Policy*.

Two annual reports of the USTR on global trade and the United States are of great usefulness: *2001 National Trade Estimate Report on Foreign Trade Barriers* (USTR, 2001) and *2001 Trade Policy Agenda & 2000 Annual Report of the President of the United States on the Trade Agreements Program* (USTR, 2001). In addition, the joint publication on trade law, *Overview & Compilation of U.S. Trade Statutes* (GPO 1997), by the House Ways and Means Committee and the Senate Finance Committee is invaluable. It provides an outstanding compilation of U.S. laws relating to U.S. trade.

#### EUROPEAN UNION (EU)

*The U.S.-EU Statement on Data Privacy* was issued last year (May 31, 2000). This agreement continues the often-bitter dialogue concerning the safe harbor privacy arrangement. That agreement relates to U.S. firms complying with requirements of the *European Directive on Data Protection* for transfers of data from the EU to a third country (for example, the United States). While the safe harbor arrangement is to become effective this summer, only a few large American firms have agreed to its terms. This remains an important issue in U.S.- EU relations.

One of the most important bilateral statements on global e-commerce concluded by the United States is one with the European Union, *Building Consumer Confidence in E-Commerce and the Role of Alternative Dispute Resolution* (December 2000). Building on the *U.S.- EU Joint Statement on Electronic Commerce*, issued in December 1997, the U.S. and the EU focused concern more on the issue of the consumer. Specifically, it addressed developing self- regulatory codes of conduct and alternative means of dispute resolution to increase consumer confidence in e-commerce. This agreement relied on the work of the Organization for Economic Cooperation and Development (OECD) and its consumer guide- lines issued in December 1999.

Several pieces of EU legislation relating to jurisdiction have raised concerns with the United States over Internet litigation. Most recently, *EC Regulation (No. 44/2001)*, dated Dec. 22, 2000, which governs jurisdiction and enforcement of judgments, raises significant concerns. While not an international action

between the United States and the EU, this and other directives have a direct impact on the way the Internet develops and on U.S. firms. For the United States, these actions indicate a somewhat less cooperative effort that has the potential of raising barriers to greater electronic trade. However, the EU Commission appears most recently to be rethinking its position concerning Rome II (the EU's proposal relating to consumer protection and Internet commerce.)

Specifically, the Commission is rethinking the issue of cross-border jurisdiction in litigation involving Internet transactions. The Commission appears to be moving away from the "principle of destination" (the consumer) to the "principle of country-of-origin" (the supplier or the server). There is a suggestion that e-commerce should have an arrangement separate from other international sales transactions. This approach would bring Rome II more in line with other existing European law. (Cross-border jurisdiction is also subject to protracted talks within the Hague Conference on International Law.)

The European Union has addressed e-commerce in a series of major reports over the last few years. For example, the EU issued the *Bangemann Report of 1994* and the *Bangemann Charter* in 1998. Each report discussed the global information society and the needs to strengthen international coordination. In 1997, the EU issued a report, entitled "*European Initiative in E-Commerce*," which discussed some very basic and general topics including the e-commerce revolution, access to e-commerce (the telecommunications liberalization), and creating favorable regulatory and business environments.

#### WORLD TRADE ORGANIZATION (WTO)

*The Declaration of Global E-Commerce*, issued in 1998, is the most important item to come from the WTO. This ministerial declaration proclaimed a need for the establishment of a work program and a moratorium on new Internet restrictions. Subsequently, in 1998, a work program was established. The Council on Services was requested to examine the treatment of e-commerce under the GATS, especially as to modes of supply. The Council on Goods was to examine e-commerce relating to GATT 1994, focusing on market access and valuation. The Council on Intellectual Property was to examine the intellectual property issues relating to e-commerce. In fact, various progress reports of the councils have been submitted recently to the General Council. The United States was particularly pleased by the strong support that the General Council gave to key principles of e-commerce in December 2000. However, WTO is only now moving forward with efforts as to e-commerce and the Internet.

The initial effort by the WTO to understand the benefits and challenges concerning the use of the Internet for commercial purposes appeared in its 1998 special study, *Electronic Commerce, and the World Trade Organization*. Various policy issues were identified including: the legal and regulatory framework for Internet transactions; security and privacy; taxation; access to the Internet; intellectual property questions; and regulation of content.

The main issues confronting the WTO are defining the types of e-commerce and Internet transactions that fall within its different trade agreements; choosing which agreements are applicable and determining what modifications or changes must be implemented. The key question facing the WTO is this: Should a specific trade agreement related to e-commerce be completed or should the existing ones be made to work? (The latter sentiment, favored by the United States, is known as “technology neutrality.”) Many states support the use of the WTO to deal with trade issues generally because of its binding dispute resolution system.

It should be noted that the *International Trade Center*, a joint subsidiary organ of the WTO and the U.N. (UNCTAD), recently has been engaged in promoting e-commerce as part of its mandate to provide technical cooperation and trade promotion for developing countries. While not a policy organ, it has become a more important player in cooperating with the WTO and representing the interests of less developed countries.

Important issues of e-commerce and intellectual property rights (copyright, trademark and patents); further, it described the challenges facing developing countries. In 1999, in another early effort, Dr. Kamil Idris, the director-general of WIPO, suggested the adoption of the *WIPO Digital Agenda*, which was subsequently approved by the U.N. General Assembly. The main points were the following:

- The importance of broadening the participation of developing countries in e-commerce.
- The need to adjust the international legislative framework to foster e-commerce. In particular, adapting broadcasters’ rights to the digital era and fostering international protection of databases.
- The implementation and further development of rules concerning domain names (*The Report on Domain Name Process*) and the resolution of conflicts between these names and intellectual property rights.
- The development of international rules concerning Online Service Providers.

- The adjustment of the international framework for serving the public interest in the global economy.

In 1999, WIPO finalized its first report on issues relating to Internet domain names and intellectual property rights (namely trade- marks) and dispute resolution. The report was made available to the *Internet Corporation of Assigned Names and Numbers* (ICANN). A system was established, and WIPO now assists in arbitrating domain name disputes under rules adopted by ICANN, based upon the recommendations made by WIPO in its report. *The WIPO Arbitration and Mediation Center* is a hugely successful system that assists in the resolution of domain name disputes. However, a number of issues were not discussed or addressed in the 1999 report, such as tradenames and geographical indications. A new series of consultations are being held and a second report is expected by late 2001. The center is currently working to develop a set of guidelines specifically tailored to meet the needs of the application service (ASP) industry. It is also conducting an assessment of “keyword” disputes.

#### ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT

In December 2000, the OECD released *Guidelines for Consumer Protection in the Context of E-Commerce*, which sets out the core characteristics of effective consumer protection for online business-to-business transactions. In 1998, the OECD held a conference in Ottawa called, *A Borderless World—the Potential for Global E-Commerce*, which set the tone of its subsequent activities. The OECD agreed to move forward on studying the taxation of electronic commerce and is expected to publish a progress report in 2001. The earlier report, *The Economic and Social Impacts of Electronic Commerce* released in 1998, began the OECD’s efforts on e-commerce. It was prepared as background for the Ottawa Conference. More recent conferences have been held in 1999 on e-commerce and in 2001 on emerging markets and e-commerce. The OECD conducts a huge amount of research on numerous topics relating to e-commerce, information society and telecommunications. The OECD’s aim, in part, is to produce agreements that can be accepted by trading countries.

#### INTERNATIONAL TELECOMMUNICATIONS UNION

The ITU is the organization that coordinates global telecom networks and services. It is composed of governments and private sector members. In 1998 the ITU launched the “*Electronic Commerce— Developing Country Project*” (EC-DC) to assist developing countries in establishing the necessary infrastructure and pooling of resources to foster e-business transactions. In

cooperation with the World Trade Center network's global infrastructure, this EC-DC effort is aimed at bridging the international digital divide and helping less developed countries to significantly enhance their communications and economic development. The ITU is active in the development of standards for electronic commerce and wireless communications. Recently, the ITU decided to proceed with the preparation of a "World Summit on Information Society" (WSIS), to be held in 2003. The activities of the ITU are essential in providing the infrastructure for global e-commerce.

#### U.N. COMMISSION FOR TRADE & DEVELOPMENT

UNCTAD adopted an important resolution in January 2001 concerning the least developed countries (LDCs) and e-commerce. It recognizes that the LDC's have constraints keeping them from participating in e-commerce. It suggests several international policies to address this situation. The UNCTAD effort to address the international digital divide with a focus on the least developed countries is belated. Last year, UNCTAD published an important study entitled, "*Electronic Commerce and Development*" (2000). This report puts forward an important message that economic development must come through the participation of private sector interests in the LDC's, but the LDC's need to attract them by taking appropriate public policy actions.

#### • *Note:* Other International or Regional Institutions

Other international and regional institutions are active in various aspects of e-commerce and trade. For example, the *United Nations Commission on International Trade Law* (UNCITRAL) produced a model law, The UNCITRAL Model Law on Electronic Commerce, in 1996, with revisions in 1998. This model law is intended for adoption by developing countries in the interest of harmonizing national law in order to promote economic development. UNCITRAL's Working Group on Electronic Commerce is continuing its work. *Asia-Pacific Economic Cooperation* (APEC) established a working group of experts in 1999. In March 2001, APEC issued "A BLUEPRINT FOR ACTION ON ELECTRONIC COMMERCE." In May 2001, APEC announced its "BEIJING INITIATIVE ON HUMAN CAPACITY BUILDING." The *Hague Conference on Private International Law*, an intergovernmental organization whose purpose is to work for the progressive unification of the rules of private international law, is continuing its negotiations concerning adoption of "*The Convention on Jurisdiction and Foreign Judgments.*" These negotiations cover important issues relating to litigating Internet transactions in foreign jurisdictions.

## CONCLUSIONS

**In my last article for the *Virginia Lawyer* (June/July 1999), entitled *Internet Commerce and Trade Policy*, I offered several observations:**

- The WTO should be the focus of global efforts to develop favorable trade law concerning e-commerce and Internet trade;**
- The U.S. has general acceptance for its policy of less regulation is best;**
- The international legal and institutional framework confronting Internet trade today needs to adapt quickly to ensure a market-driven approach and global growth.**

**In light of the recent developments in global trade relations noted above, I offer the following additional observations:**

- The WTO should continue to be the focus of U.S. actions in fostering favorable trade laws concerning electronic commerce. However, the WTO's actions, since 1998, have been very minimal. There is still disagreement over which trade agreement(s) should be applicable to particular e-commerce transactions or if an entirely new one needs to be formulated.**
- There seems to be a growing acceptance globally of the U.S. view that less regulation is best. (Witness the newer activities of U.S. bilateral statements relating to e-commerce with our trading partners and the newer activities of UNCTAD and the ITU concerning bridging the "international digital divide.")**
- The international legal and institutional framework relating to the Internet needs to adapt quickly. Advances in global e-commerce are continuing while the legal-political structure is still groping for direction and coherence. (Witness the growing dispute between the United States and the EU dealing with litigating consumer actions over Internet transactions and the continuing debate over privacy of data.) If there is a significant delay in fashioning a global approach (which may very well be some form of greater coordination of regional and national legislation), then the threat of dysfunctional national and sub-national legislation may come to pass and negatively impact the development of global e-commerce.**

**Pascal Lamy, the EU Commissioner for Trade, said recently:**

**“Trade governance is but one aspect of global governance and the WTO is but one of the global actors. But as a relatively (and I underline relatively) strong and well-functioning player, the WTO is often perceived as a broader governance tool, one that should take on board other issues, and become a central global governance machine. It is not the right response to all global concerns. Globalization requires improved governance also in a range of other policy areas.” (Speech, *Trade Policy and Governance in the Global Economy*, April 10, 2001).**

**But in the area of e-commerce and trade, the World Trade Organization is the obvious leader. The World Trade Organization’s crucial mandate is to manage trade disputes and develop new trade rules. The Internet is having an historical impact on global trade. Such an impact will be even more dramatic in the future. The World Trade Organization must take the lead in addressing the trade issues relating to Internet trade. The WTO needs to be creative. However, parallel efforts and coordination with other institutions are required.**

**The efforts of WIPO concerning intellectual property and the ITU concerning telecommunication infrastructure are obviously of great importance, but must be fully coordinated with the WTO. It is up to the leaders of the trading nations to further the initial actions springing up. A network of entrepreneurs commercially developed the Internet. Creating a viable international institutional and legal structure to govern its activities and to protect and foster its founding spirit, will only further ensure its success and that of global e-commerce. This will be good for global trade, economic development— and peaceful relations.**

## **GLOBAL MERGERS AND NATIONAL SECURITY**

**by Stuart S. Malawer**

**The world of global mergers today is like a Virginia steeplechase, frantic and exciting, with a field of powerful participants. The competitors are hyperactive; adrenalin is flowing, leaving spectators anxious and amazed. In an instant a horse may stumble; if so, it will almost certainly face a horrible end.**

**Global mergers are in a turbo-charged environment, where activity is at a historical high. Corporations look for deals worldwide. But in the postmortems of all tragedies, one can usually spot early warning signs, almost always overlooked until it is too late. Were there unforeseen obstacles? Were the participants new and inexperienced? Did they understand the rules? Did the participants react irrationally?**

**Since September 11, 2001, the global merger field has become more dangerous. New, inexperienced players have entered the world of cross-border acquisitions and mergers. Each player has its agenda. Now the home countries of the experienced firms and others are beginning to change the rules— creating new challenges for all.**

### **The Global Landscape — Investment Data and Recent Deals**

**International transactions are at the heart of economic globalization,<sup>1</sup> and foreign direct investment is a critical aspect of these transactions. Cross-border acquisitions and global mergers are at the transactions' core. Transnational corporate undertakings have raised national security anxieties worldwide.<sup>2</sup> Resource nationalism and renewed reaction to globalization further stir global anxieties. Combine these concerns with the growing number of global takeovers by private and state-owned firms from China, Russia and India, and a dramatically new and unsettling global landscape emerges.<sup>3</sup> This latest global environment has evolved in the post-9/11 world, in part from reactions to the threat of global terrorism, but also in large measure from economic change in developing economies. The change has been accentuated by high energy and commodity prices and an international economy awash in private capital, as well as corporate and government surpluses.**

## Global Data

The merger boom of the late 1990s is back.<sup>4</sup> Worldwide deals reached a total volume of \$2.8 trillion in 2005, up from \$1.9 trillion in 2004.<sup>5</sup> In the first quarter of 2006, \$857 billion in global mergers and acquisitions were announced—the highest level since 2001.<sup>6</sup>

The year 2006 may set new records.<sup>7</sup> As of May 2006, global mergers and acquisitions topped \$1.3 trillion, a 40 percent increase over the same period the prior year. The announced U.S. merger activity for the current year as of May 2006 was \$476 billion, the highest since 2001.<sup>8</sup> A recently released annual study on foreign direct investment by the United Nations Conference on Trade and Development (UNCTAD) determined that global foreign direct investment (FDI) inflows rose by 29 percent to \$916 billion in 2005, compared to a 27 percent increase in 2004.<sup>9</sup> “As in the late 1990s, that growth was spurred by cross-border mergers and acquisitions,” the study concluded.<sup>10</sup> The study found that the value and number of mergers and acquisitions in 2005 were comparable to the averages in 1999–2001.<sup>11</sup> The study also noted that many parts of the world undertook intense discussions on economic protectionism.<sup>12</sup> It did not discuss the issue of national security,<sup>13</sup> and it ominously concluded that “the number of changes (to a host country’s regulatory environment) making a host country less welcoming to FDI was the highest ever recorded by UNCTAD.”

This current pattern of FDI growth and importance of global mergers is similar to the go-go years of the late 1990s. An earlier study by UNCTAD in 2000 determined that global mergers amounted to \$710 billion as part of the total worldwide foreign direct investment of \$880 billion in the 1990s.<sup>14</sup> *See chart 2 , above right.*

The study determined that eighty percent of foreign direct investment into the United States during the late 1990s resulted from cross-border mergers and acquisitions.<sup>15</sup> According to the U.S. Bureau of Economic Analysis, foreign direct investment into the United States last year reached its highest level since 2001.<sup>16</sup>

Recent data confirm that the global merger boom is roaring back. Such mergers are the major source of FDI into the United States, and, despite the war on terrorism, foreign direct investment into the United States.

**Mergers and acquisitions of U.S. firms are at their highest levels since 9/11.<sup>17</sup>**

### **Global Deals**

**American anxiety over global mergers and their implications for national security reached record heights with the aborted management takeover of several U.S. port facilities by the United Arab Emirates- based Dubai Ports World in early 2006. This political fiasco for the Bush administration came a few short months after the China-based CNOOC Ltd. dropped its bid for U.S.-based Unocal and its global oil reserves. This aborted acquisition occurred shortly after the takeover of IBM's PC business by China-based Lenovo and Singapore Technologies Telemedia's purchase of Global Crossing and acquisition of its global fiber optics network. The recent transatlantic purchase of Lucent Technologies by France's Alcatel raised concerns of national security regarding sensitive telecommunications research.**

**National security concerns are not limited only to the United States government. China Mobile Communications Corp, the world's largest wireless operator based on subscribers and market capitalization, was forced to drop its \$5.3 billion bid for European-based Millicom International Cellular.<sup>18</sup> This decision came in the midst**

**of mounting concern in Europe of Chinese ownership in the telecom sector. Only after a severely bruising battle did India- based Mittal take over European-based Arcelor to form one of the largest steel companies in the world— and only after the Russian firm Severstal was dropped, perhaps for being viewed as more of a national security risk.<sup>19</sup>**

**The offer by Tata Steel to buy British steel- maker Corus Group would make it the biggest foreign acquisition by an Indian company. However, the more recent offer by the Brazilian steel giant Companhia Siderurgica Nacional (CSN) for Corus strikingly highlights the tip of a very large iceberg of a rapidly changing structure of global trade. Global mergers are significantly driven by companies from develop- ing countries. These companies are well on their way to becoming the great industrial enterprises of the Twenty- First Century.<sup>20</sup>**

**India's outbound merger and acquisition growth is greater than ever.<sup>21</sup> Its outbound investment is almost as great as its inbound deal value.<sup>22</sup>**

**However, India is also concerned about national security— particularly the**

effect of foreign investment into its infrastructure. China has complained that several Chinese companies, including telecommunications firm Huawei Technologies Co., have been blocked from bidding on projects because security clearances have been withheld.<sup>23</sup> India is considering new legislation similar to the legal regimes in the European Union and the United States that review foreign investment in context of security concerns. China is also raising fears that it will restrict foreign takeovers of state-owned companies.

Russia-based Gazprom's proposed takeover of Centrica in the United Kingdom and its interest in investing in European pipelines has raised concerns in the United Kingdom and Europe, relating primarily to the aggressiveness of Russian firms in the global energy sector.<sup>24</sup> This aggressiveness has particularly aggravated the situations in France<sup>25</sup> and Germany.<sup>26</sup> Russia's cutoff of natural gas supplies to the Ukraine earlier this year, and its interest in increasing its stake in EADS, an aerospace group, has further inflamed political sentiment.<sup>27</sup>

The Russian Federation's most recent threat to curb foreign investment into the massive Sahalin-2 project and the Shtokman natural gas field,<sup>28</sup> along with its growing restrictions on investment in the energy sector generally, highlight a new dimension of global mergers and national security— one of “resource nationalism,” in which the protection of natural resources, principally oil and energy reserves, is viewed as a matter of national security. This trend is also visible in Bolivia's recent restrictions on foreign firms participating in its oil industry<sup>29</sup> and the attempt by Ecuador to terminate its long-term production agreement.<sup>30</sup> These actions by Bolivia and Ecuador further extend resource nationalism in Latin America that is evidenced by Venezuela's long-standing restrictions on its oil industry, which are clearly directed against the United States.

The intriguing aspect of these new global realities is that many of the global mergers are now emanating from companies in the Middle East, China, India and Russia. For example, the recent merger of two Russian firms (Rusal and Sual) and a Swiss firm (Glendore) created the world's largest aluminum company, overtaking Alcoa of the United States.<sup>31</sup> If concluded the proposed acquisition of Oregon Steel by the Russian firm Evraz will be the largest Russian takeover of a U.S. firm. Many of the transactions are energy and commodities related. But now some of these countries are concerned about growing foreign investment into their strategic industries. Countries are beginning to restrict foreign takeovers based on their own national security calculations— in many ways mirroring those made in the U.S. and Europe.

This increasing concern for national security in economic and business

transactions is new to today's global economy. The recent 2006 report of the Organization for Economic Co-operation and Development (OECD) on foreign direct investment states, "Issues of security and other strategic concerns have moved to the forefront of domestic and international investment policy making."<sup>32</sup> The secretary-general of the OECD noted it recently. He said, "The global economy is also facing a resurging risk of international investment protectionism. Foreign corporate takeovers have been made subject to tighter political scrutiny in major countries, both members and non-members of the OECD."<sup>33</sup> Indeed, the OECD considers recent action restricting takeovers to be going "beyond just national defense to include energy security."<sup>34</sup> The report notes that "concerns about essential national interests are on the rise" and can be seen in Europe, the United States, China and India.<sup>35</sup>

### Major Developments

Four newer realities in global trade in the post- 9/11 world are clearly discernible:

- Takeovers and foreign investment are emanating from firms based in developing countries such as India and the United Arab Emirates (UAE), as well as from countries transitioning from central planning such as China and Russia.
- National security fears are arising among many governments, not only those in the United States and Europe, but also governments in Russia, India and China.
- This rise occurs in tandem with latent protectionism in many countries and with an increasing reaction against global integration, now referred to by some as "economic patriotism."

Most important is understanding why takeovers and foreign investment are emanating more today from developing countries and those transitioning from central planning to free markets. There are five major reasons and five supporting causes.

The five major reasons are:

- The World Trade Organization (WTO) has spurred the growth of world trade and investment over the last ten years. India and China have greatly benefited from membership in the WTO, and the Gulf states have prospered from both trade liberalization and higher oil prices.
- Foreign companies that have foreign government equity are in a strong

position to mount foreign takeovers. They do not have to worry about the reaction of public markets. This is true of firms in many countries, including China and Russia.

- Growth in foreign corporate profits and surpluses (retained earnings) provide a ready war chest to be utilized by foreign corporations in their cross-border takeovers.<sup>36</sup>
- The increase in oil revenues and those due to higher commodity prices have allowed foreign governments to finance overseas activities. Russia and the UAE are examples of this development.<sup>37</sup>

Because abundant liquidity exists throughout the world, it is easy to convert corporate reserves into corporate bids. Historically low interest rates for corporate borrowers facilitate ever more crossborder transactions. An explosion in foreign capital markets of initial public offerings (IPOs) allow for even greater financing.<sup>38</sup> For example, the IPO of the Industrial & Commercial Bank of China, Ltd. (ICBC), in October 2006, was the world's largest IPO. This has pushed China's stock exchanges into the world's biggest source of new listings, ahead of those in New York and London. Growth in private equity, responsible for more than 20 percent of recent merger activity in the U.S. and the EU, introduces a new and potentially significant and worrisome player into global mergers, and strong economic growth in a range of countries provides firms a strong basis for global undertakings.

There are new major players in global trade that have so much capital available and growing market prowess that they are able to more strenuously compete for global mergers— which they have done with increasing success. Public demand for increased congressional oversight of foreign takeovers persists, but to a weakened degree. “A key issue for Congress is whether and in what way it should respond to essentially private economic investment activities and how to assess the impact of such investments on the nation's security.”<sup>39</sup> After a year of consideration, Congress has not enacted any changes.

The principal legislative and regulatory process to review foreign takeovers of U.S. firms is the Committee for Investment in the United States (CFIUS) as strengthened by the Exon-Florio amendment. This review process gives the U.S. president significant powers to block particular types of foreign investment.

In 1975 an executive order established CFIUS as an interagency panel, primarily to monitor foreign direct investment into the United States.<sup>40</sup> In 1988

the Exon-Florio amendment strengthened and better focused the review of acquisitions and mergers.<sup>41</sup> This amendment was enacted amid congressional concerns over foreign acquisitions of U.S. firms, particularly by firms from Japan. This change was included as a provision of the Defense Production Act. The new legislation authorized the president to investigate the impact of foreign acquisitions of U.S. companies on national security. It also authorized the president to suspend or prohibit acquisitions that might threaten national security. CFIUS was delegated responsibility for investigating foreign acquisitions, when necessary.

The legislation established a ninety-day review process involving a voluntary submission by the acquiring party, an initial review period of thirty days to determine whether the acquisition could pose a threat to national security, and an additional forty-five-day investigation that results in a report to the President. The president then has fifteen days to allow, suspend or prohibit the transaction. It is important to note that national security is not defined; only factors to consider are enumerated. Withdrawing and refining notices restart the review clock.

In 1992 amendments were adopted that require greater reporting to Congress. A report to Congress was required if the president made any decision. An investigation was required if the acquiring company is controlled or acting on behalf of a foreign government (Byrd Amendment). When credible evidence was found, a report was also required every four years.

The current regulatory process is minimally transparent and discretionary only. The committee's mandate is not well defined; there is no definition of national security to provide guidance to the committee or parties to a transaction. The statute provides for factors to be considered in determining a threat to national security. They include the transaction's impact on domestic production for national defense; the effect on the capacity of industries to meet defense requirements; the foreign control of commercial activity; the transaction's implications for national security, the military, technology transfer as to terrorism; and the potential effects on U.S. technological leadership.

In a seminal study last year, the Government Accountability Office empirically examined the cases considered by the CFIUS between 1997 and 2004. The CFIUS had 470 notifications<sup>42</sup> and only 45 investigations, resulting in just two presidential determinations—both concerning telecommunications..

Clearly, this process has not resulted in many or even significant decisions blocking foreign takeovers for national security reasons. It seems that the CFIUS process draws more heat than the outcome would otherwise suggest.

Legislative proposals during the 2006 congressional session have generally

required greater congressional notification and greater review by the CFIUS. The Senate and House have considered two different sets of proposals. Currently, legislators are at a standoff. Strangely, the House's deliberations are more balanced and less restrictive—contrary to its normal position in trade matters when compared to the Senate.

In the Senate, the Shelby-Sarbanes Bill required congressional notification when a review is initiated. It mandated a forty-five-day investigation when a foreign government-controlled entity is involved. It also required a ranking of countries based on compliance with weapons-control deals. In the House, the Blount Bill was less stringent than the Senate deliberations would have required. The House appears to have recognized to a greater extent that economic security entails encouraging foreign investment. Congressional notification would be required only upon the completion of a review. Other items also considered were the tracking of mitigation agreements that protect critical infrastructure and provide for new roles for the Department of Homeland Security and the Director of National Intelligence.<sup>43</sup>

As of the 2006 mid-term elections, the Congress has not enacted any changes to the CFIUS regime. Virginia Senator John W. Warner has been a voice of reason,<sup>44</sup> who blocked an attempt to push through the Senate a proposal that would have toughened national security reviews of foreign takeovers of U.S. assets.<sup>45</sup>

### Conclusions

The policy challenge to the United States is to continue promoting the economic benefits of global trade and mergers within this new global dynamic. The unanswered question is whether in the coming years new national security goals will outweigh other goals that promote economic development and political development. The future of the trading system depends on the answer that the United States and others provide.

We have had a change in the political dynamics within the United States and within other countries. The role of national security and reaction against globalization are growing pieces of this new post-9/11 era. In global trade relations today, the world is more multipolar, as evidenced by the rise of the BRIC countries (Brazil, Russia, India and China) the reemergence of Japan; and the dynamic growth of Korea. New sources of wealth from global trade and petrodollars are fueling and super-charging global mergers. New players are emerging with new interests.

Warning signs show that the global trading system could suffer a disaster. Russia is reimposing controls on foreign investors in strategic industries. India

is considering controls on Chinese investment into its infrastructure and energy sectors. China is wary of foreign takeovers of its state- controlled industries. Korea is worried about foreign private equity in its industry reorganization.<sup>46</sup> The Ukraine is considering restricting foreign participation in the development of its Black Sea oil and gas reserves.<sup>47</sup>

The current slowdown in the U.S. economy and continuous growth overseas will only enhance the activities of foreign firms and create even more fertile ground for global mergers.<sup>48</sup> This year's record U.S. investment abroad in foreign capital markets only adds greater fuel to cross-border takeovers to be undertaken by a range of foreign firms.<sup>49</sup> The declining dollar will also spur greater acquisitions of U.S. firms.

The promotion of global mergers promotes global trade, which holds the promise of aiding in transforming inefficient markets and undemocratic societies. However, a concern for national security is increasingly posing a challenge to the growth and promise of trade in the post-9/11 era. The reemergence of latent protectionism fueled by growing reaction to global integration only adds to this situation. But if the warn- ing signs are heeded, the global system may yet avoid a catastrophe.

There are positive global developments. While investment controls are being considered worldwide, few have been adopted. The United States has recently concluded negotiations with Russia concerning its accession to the WTO and Vietnam has won admission to the WTO.<sup>50</sup> The proposals to change U.S. legislation regulating foreign direct investment have stalled. U.S. policy remains anchored in the belief that global business transactions, global mergers, trade, and investment are beneficial to bringing needed political and cultural change worldwide.

However, as a result of the historical victory of the Democratic Party in the mid-term elections, there is now a new uncertainty about U.S. trade policy. The Vietnam trade bill extending most-favored-nation treatment to Vietnam was initially defeated prior to its passage in the end-of-the year tax and trade bill. Congressional approval of legislation implementing Russian accession to the WTO as well as renewal of "Fast Track Authority" has become more questionable.<sup>51</sup>

The global economy seems strong; all of its horses are running. But warning signs are present. Almost a century ago an earlier era of globalization was ended by a single shot. Overreaction today could have the same result.

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## **Blog Posts from *Global Trade Relations – Trump and Trade***

*GlobalTradeRelations.com*

**2016-2020.**

### **Trump’s Foreign Policy Doctrine — “Rejection and Withdrawal.”**

Posted on May 28, 2020

Trump’s withdrawal from a range of international agreements and institutions (Trans-Pacific Partnership, Paris Climate Accord, Iran nuclear deal, UNESCO, UN Human Rights Council, Open Skies Treaty) from the very outset of his term can now be loosely labeled a foreign policy doctrine. I would call this Trump doctrine “Rejection and Withdrawal.”

Trump has established a pattern of rejection and withdrawal from a broad range of international agreements and institutions—from trade agreements to nuclear arrangements and now the World Health Organization. His actions constitute rejection and withdrawal from the rules-based international legal and political order that evolved in the post-1945 world.

These actions or threatened actions (especially against the World Trade Organization and from NAFTA) are consistent with his “America First” slogan, which signaled American isolationism in the 1930’s has, in fact, made the United States less safe in this decade. It has placed the United States behind other nations trying to confront global issues collectively.

An absence of international cooperation leads only to counter-productive unilateral actions such as tariffs, boycotts, export controls, trade sanctions, foreign investment controls). This has been made abundantly clear most recently. Note Trump’s glaring failure to cooperate during this global pandemic where he has fallen back on blame and name calling to an extreme, especially in regard to China.

Needless to say, this is now part of Trump’s reelection strategy. We need global cooperation to meet global problems. There is no way around this.

Clearly, many world leaders learned this lesson from the 1930’s, when the world was far less interconnected. But I guess Trump missed that lesson in school as well as in life.

### **Trump’s Trade Delusions and the WTO..**

Posted on May 19, 2020

From “*The WTO is Needed Today as Much as Ever.*” Lead Editorial from the *Financial Times* (May 19, 2020).

The World Trade Organization is under attack, above all by the US, the country most responsible for its creation.

Donald Trump clings to the delusion that bilateral pressure will rebalance trade in favor of American exporters. Yet, as Jeffrey Schott of the Peterson Institute for International Economics notes, the president’s deals “have barely done anything to improve US access to foreign markets”. Worse, his bullying has caused costly retaliation.

The US cannot abolish the WTO. But it can wound it. Indeed, it has already done so by rendering the WTO’s appellate body inoperative. Others are trying to create a temporary substitute. Yet this can only be a makeshift solution.

Worse, the collapse of the judicial function is far from the only peril confronting the WTO. The legislative function, which requires fresh agreements among members.

Again, the delusion has surfaced that the WTO undermines sovereignty. But trade relations always involve at least two governments. If all insist on absolute sovereignty, the security needed by enterprises located in all others disappears. That is why wise leaders understand that binding mutual commitments increase effective sovereignty. Again, the more global the agreements the greater is the security.

If we did not have the WTO, we would have to invent it. Today, that would be impossible. Happily, we only need to make sure it survives, in order to underpin the open global economy we will all need on the other side of the pandemic.

## **Trump’s WTO Campaign Despite the Global Pandemic.**

Posted on May 15, 2020

The WTO Director-General’s recent resignation adds a new degree of uncertainty to global commerce in the midst of a global pandemic that is about to cast global and U.S. trade relations into uncharted territory.

This unforeseen situation and the growing global pandemic emerged as the Trump administration’s term enters its last few months. Trump’s response to the pandemic will likely be the focus in the run-up to the presidential election—especially regarding trade relations with China, whom Trump has decided to scapegoat rather than cooperate with in confronting this global health crisis. This China scapegoating seems to be his new election strategy.

The pandemic that involves both public health and economic concerns must be placed squarely within the context of trade conflicts spurred on by Trump’s tariff, trade and investment wars over the last four years. His reliance on export controls (Huawei), his restrictions on foreign direct investment into the U.S. (by China), and his ‘America First’

protectionism have been hallmarks of Trump’s foreign policy since (and even before) coming to office. Protectionism and isolationism did not work in the 1930s.

The WTO’s operations and especially its dispute resolution process have been crippled since last year due to U.S. actions. For example, the U.S. has refused to approve nominees to fill vacancies on the Appellate Body, thus stalling critical trade case decisions by the dispute resolution system.

This policy of attacking the WTO has been central to Trump’s generalized attack on the global system and on its institutions and alliances. Recall Trump’s disparagement of the World Health Organization and of the International Criminal Court as well as his withdrawal from the Trans-Pacific Partnership (TPP), UNESCO and the Paris Climate Accords, among others. In addition, he demanded to renegotiate NAFTA and a host of bilateral trade agreements.

These actions are a call to arms to subvert the larger global order—not just the global trading system. This global order and trading system were the great contributions of American diplomacy in the post-war era. Trump’s actions are a massive attack of the global rule of law that mirrors his domestic attack on the rule of law and on institutions within the U.S.

World trade was already declining because of Trump’s trade wars, and trade has plunged further since the pandemic brought many countries’ economic activity to a standstill. Trade is predicted to plunge even more. Trump’s erratic actions, blaming and bullying have not helped. Indeed, they will only accelerate the further deterioration of global trade, investment and the American economy.

Trump’s policies toward the pandemic and global trade will be his foreign policy’s lasting legacy of the last for years and the central battleground for his reelection.

## **Trump’s Erratic China Policy — Alarming.**

Posted on May 8, 2020

Observations from the *Financial Times* lead editorial today “Trump’s Erratic China Policy Risks Backfiring” ——

- Unfortunately, President Donald Trump’s approach to China is so erratic that it alarms US allies.
- Trump is looking at making it easier to sue the Chinese government for damages in US courts. While such an action might be tempting for businesses efforts to secure financial reparations from China is dubious under international law — and would almost certainly retaliation.

- The Trump administration’s policies towards China are part of a broader U.S. assault on the international rules-based order.
- The broader difficulty is that the Trump administration’s goal is not to compel China to follow international rules — an aim they would support — but to destroy the rules.
- The White House has pulled the US out of the Paris climate accord, the Iran nuclear deal and the Trans-Pacific Partnership, and is deliberately hobbling both the World Trade Organization and the World Health Organization. And the president has threatened to impose tariffs on Germany and Japan — and has expressed skepticism about NATO and hostility towards the EU.

## **Supreme Court and National Security — Are Trade Actions Immune from Review?**

Posted on April 13, 2020

The U.S. Court of Appeals for the Federal Circuit concluded recently that §232 of the Trade Expansion Act of 1962 does not offend the *non-delegation doctrine*. Thus, upholding President Trump’s steel tariffs. But the story on §232 and the non-delegation doctrine is not over.

Shortly after the Federal Circuit issued its decision the American Institute for International Steel announced that it would seek review by the Supreme Court.

Although several members of the court have expressed an interest in revisiting the non-delegation doctrine, the Supreme Court has often avoided resolving issues involving national security. But not always by any means. Just think about cases involving the rights of Guantanamo detainees. We’ll see.

The Federal Circuit Court relied on an old case (*Algonquin* 1976) to uphold President Trump’s actions. From a different era. And was very narrow as to both the executive action examined and international consequences.

By the way, WTO cases are pending also involving President Trump’s steel tariffs and national security. Those actions created a diplomatic crisis involving international commerce not existing in the earlier 1970’s case.

## **Trump’s Trade Affronts Are Getting Worse.**

Posted on February 19, 2020

Trump’s disregard for international laws, institutions, alliances, and agreements is extremely worrisome. He possesses a truly generalized hatred for all rules that is mirrored

in many ways, his management of the Trump Organization and his career as a real estate professional.

Trump's disregard of international rules is clearly seen in his attacks on a broad range of treaties and institutions. I would argue none is more delusional than his frontal attacks on the WTO, the dispute resolution system and the Appellate Body. These were devised primarily by the United States. They are the central pillars of the global trading system today. They help establish and litigate global trade rules. The boy from Queens is now causing havoc in Geneva, Brussels, Tokyo, Seoul, and almost all other world capitals.

Of course, President Trump's abuse of US trade legislation (in his tariff and trade wars), his pattern of bullying and threats, his disregard of domestic law in a broad range of domestic matters, and his dealings with Congress are related stories. His rejection of international rules and institutions has its roots in his shameless attacks on domestic US law and institutions. All of these affronts are directly related to Trump's days in Queens as a landlord sued by many, including the US Department of Justice. These affronts continue today and are getting worse.

President Trump's story has yet to play out on either the national or the international stage. His impeachment is already history. The 2020 presidential election is looming.

## **Trump's More Aggressive Attacks on the WTO.**

Posted on February 14, 2020

Good summary of President Trump's current attack plan on the WTO by *Bloomberg's Terms of Trade* today (February 14th, 2020). The long-standing Trump administration animosity towards the WTO and the existing global trading system is gaining steam and becoming more aggressive. This is alongside of the administration's newer vengeful attacks in the domestic realm in the post-impeachment saga.

President Donald Trump has never been a fan of the World Trade Organization.

For years Trump has called the Geneva-based body the "worst trade deal ever" — largely because he believes the WTO helped China gain a competitive advantage over the U.S. and precipitated the loss of thousands of American jobs.

Trump's trade chief, Robert Lighthizer, supports this view and has expertly poked at the organization's weaknesses.

Under Lighthizer's stewardship the U.S. has:

- Imposed hundreds of billions of dollars' worth of *unilateral tariffs* against China

- Exploited the WTO's *national security loophole* to levy duties on steel and aluminum
- Paralyzed the WTO appellate body, which can no longer resolve trade disputes

Collectively, these actions have thrust the WTO into the most acute existential crisis of its 25-year history.

But Trump may not be finished yet.

As Bloomberg reported this month, U.S. officials are now mulling America's withdrawal from the WTO *Government Procurement Agreement* — a global trade alliance covering government contract opportunities worth \$1.7 trillion.

U.S. withdrawal from the pact would effectively block most foreign, non-defense contractors from bidding on American public tenders. In turn, a wide range of U.S. businesses would lose access to a nearly \$900 billion procurement marketplace offered by the GPA's other 47 members.

Perhaps an even bigger blow would be a plan Trump insiders are said to be mulling to reset American tariff commitments at the WTO by *increasing the tariff ceilings* — or *bound rates* — agreed to by previous administrations.

The move stems from the Trump administration's long-held frustration with the WTO's principle of *most-favored-nation (MFN)* nondiscrimination, which requires members to offer the same tariff rates equally to all of the organization's 164 members. In essence, MFN is the cornerstone of the WTO — and undermining it risks tipping over the entire ant farm.

“President Trump sees it only as a constraint on his ability to strike quick-and-dirty deals,” said Chad Bown, a senior fellow at the Peterson Institute for International Economics. “But take away MFN, and suddenly the entirety of benefits that the WTO provides begins to unravel, including those that Americans have enjoyed for decades.”

On one hand, these kinds of salvos against faceless bureaucrats in Geneva will be an easy sell at home for Trump's core voters during an election year.

But defenders of the rules-based global trading system say dismantling it would cause a severe shock to the American economy. They argue that despite its flaws, the WTO provides businesses with the certainty to trade and expand their operations internationally. Ultimately, the results are robust export industries that create good jobs, and for consumers, diverse and low-cost products moving around the world.

## **National Security & Trade Law: New U.S. and WTO Cases — Troubles for Trump’s Trade Policy?**

Posted on April 12, 2019

Two historic cases involving the issues of national security and trade have been decided recently, one by a federal court and one by a panel at the World Trade Organization (WTO). Despite the grave importance of these two cases for the United States and the global trading system, not much attention has been given to them.

The first case, *American Institute for International Steel v. United States*, was decided by the Court of International Trade in New York on March 25, 2019. This upheld the president’s authority to impose tariffs under Section 232(b) of the Trade Expansion Act of 1962 in cases involving threats to national security. This is the first time in over forty years that a federal court has addressed this issue and upheld the president’s delegated authority to do this.

The second case, *Ukraine v. Russia Concerning Traffic in Transit*, was decided by a panel within the dispute resolution system of the WTO on April 5, 2019. The panel upheld the right of the Russian Federation to impose restrictions on Ukraine under GATT Article XXI, the national security exception. This is the first time the WTO has ever applied this provision. The panel decided that national security as a defense was reviewable by the WTO. Additionally, it determined that Russia’s reliance on it was justifiable.

The US submission, as a third-party, argued against the WTO’s jurisdiction to hear this issue. This is probably because it intends to raise this same defense in the barrage of litigation already filed in the WTO against the U.S. tariffs on steel and aluminum, which rely upon Section 232. The U.S. probably will also rely upon the GATT Article XXI defense when its new sanctions on Cuba are utilized which allow extensive litigation against a wide range of foreign companies dealing with nationalized properties.

What do these cases mean for the U.S. and the Trump administration’s trade and tariff policies? To me, they mean big trouble. Why?

Reading the federal case closely discloses serious concerns about the court’s judgment: “To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President’s section 232 authority.” A blistering separate opinion questioning the delegation of authority to the president is provided in an even graver tone: “If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?”

The report of the WTO panel concluded, “This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI ....” It argued that under customary international rules of interpretation, the panel can judicially review invocation of national

security and that Russia met its requirements. The panel went on to warn, “However, this does not mean that a member is free to elevate any concern to that if an ‘essential security’ interest.”

So what does this mean for the Trump administration?

It ought to be very concerned. The Court of International Trade decision will undoubtedly be appealed directly to the US Supreme Court. The warnings in its opinions are ominous. The WTO panel decision is more than ominous. It considers claims of national security to be both reviewable by the WTO panel and subject to a decision on their merits.

My guess is that the Trump administration will fight to preclude a Supreme Court review of the issue of the legality of the delegation of national security powers and will outwardly be even more hostile to the WTO if that’s even possible. No one can say that law and trade aren’t among the crucial issues of the day.

## **US Court of International Trade — Pending §232 Steel Case — Real Danger for the Trump Administration.**

Posted on January 17, 2019

This article discusses *American Institute for International Steel v. the United States*, which is pending in the little-known United States Court of International Trade in New York. It involves an attempt to declare that the US legislation delegating authority to the president to impose trade restrictions is an unconstitutional delegation of legislative authority. A loss would legally curtail the president’s discretionary power to use national security as a reason to impose punitive measures against trading partners. The article identifies legal trends, where this case fits into the trade policy debates, and why it is so important. The article concludes that domestic U.S. litigation in 2019 may well have a tremendous impact on U.S. law and the global trading system. Many in the domestic and international trading communities (as well as those in the foreign policy and national security communities) are waiting for the results of this little-known steel litigation.

## **Is Trump's Trade Policies Really About Trade? Hint, Maybe Not.**

Posted on November 27, 2018

To me the US – China trade dispute is not really that much about trade, tariffs or technology. What I would call T<sup>3</sup>.

It's about changing the rules of the game, global relations. In particular, it's about President Trump's innate desire to destroy almost everything that preceded him — alliances, trade flows, global norms and multilateral institutions, Not sure why. But that's his psychology and method of operating as to everything. Creating havoc. Period.

In terms of formulating a US trade policy. It would be most effective for the Trump administration (those officials that actually have some real control over policies and who have a minimum sense of diplomatic history, international relations, international economics and international law) to actually utilize the WTO's dispute resolution system to address real issues.

This would help channel US-China trade disputes into an international mechanism that can actually assist in resolving real issues. And away from very real and dangerous conflicts and military confrontations.

The WTO dispute resolution system has a good track history of diplomatic and legal settlement of concrete disputes. It has precluded these disputes from escalating out of control. After all this global system was the American intent behind being the principal architect of the post-war system and the WTO's dispute resolution system.

This American policy of fostering an international judicial mechanism reflects the core American belief in a rules-based system and the American values of relying upon a fair judicial determination of conflicts. Not reliance on unilateral actions, raw power politics, the law of the jungle, or bluster and threats.

## **US Dept. of Justice Enlisted in Trade War With China — What's the End Game?**

Posted on November 2, 2018

The U.S. Department of Justice (National Security Division) has now been enlisted by the Trump administration into its expanding trade war with China. This marks a significant escalation of legal and economic weapons used by the United States.

US international economic legislation gives the president broad powers to conduct economic warfare. However, the use of such legal powers is always a policy issue. I've written before

on Chinese economic espionage and technology. I agree it's a problem—it has multiple dimensions. But what is the best remedy? What's the end game?

On November 1<sup>st</sup>, Attorney General Sessions proclaimed a new China initiative that augmented the administration's prior use of trade retaliation (Section 301) and aggressive trade actions under a national security rationale (Section 201).

Simultaneously with this new initiative, on November 1<sup>st</sup>, the Justice Department announced that a federal grand jury indicted a Chinese state-owned enterprise (SOE) with crimes related to theft of technology and trade secrets. In addition, the Justice Department filed a civil lawsuit on the same day, seeking to enjoin the SOE from future transfers of technology and from exportation of products to the United States relying upon such technology.

In addition to the above, Attorney General Sessions also stated on November 1<sup>st</sup> that this new anti-China initiative would include vigorous application of other pieces of U.S. international economic legislation, including the Foreign Agent Registration Act, rigorous implementation of the new foreign investment rules (CFIUS) as to Chinese investments and transactions in the US, more extensive application of the Foreign Corrupt Practices Act, and better utilization of mutual legal assistance agreements.

The enlisting of broad criminal prosecutions and the reliance on a wide range of international economic legislative enactments represent a significant escalation of the trade war with China. (This raises the larger issue of the role of domestic courts in foreign affairs, a topic for another posting). How this plays into bringing about a diplomatic resolution of a broader range of non-technology trade issues remains to be seen.

While criminal prosecutions have a significant and justifiable role to play in enforcement of intellectual property rights, I would personally prefer to see more conciliation and international action than greater criminal prosecutions. (Prosecutorial discretion is extraordinarily important in state and federal criminal prosecutions.) This would include greater use of the dispute resolution process of the WTO in coordination with other countries. (The United States has won over 2/3 of the cases it has brought in the WTO.)

It is trade and economic negotiations, without duress and threats that will finally resolve US-China disputes and result in better management of trade relations as well as larger political relations. It is in the foreign policy and national security interests of the United States that criminal prosecutions and overly-broad unilateral reliance on domestic economic legislation (for example, sanctions and export controls) are not used as threats and political theater.

## **U.S. and China Trade Disputes in the WTO (since Trump) — Some Real Facts.**

Posted on October 26, 2018

U.S.–China trade relations are the most important bilateral trade relations today. The conflict between these countries has already progressed to a trade war. What is not well known is how this conflict is playing out in the WTO's dispute resolution system.

An examination of the trade cases filed by both China and the U.S. in the WTO during the first two years of the Trump administration is extraordinarily illuminating. Careful analysis reveals important facts that are not well known and are often miscast as reality.

This litigation has implications for trade relations with China; broader U.S. trade policy; and even broader U.S. policy toward international law, multilateral institutions, and the international political system.

Between January 2017 and October 2018, China initiated five cases against the United States. These questioned the conformity of various signature trade actions by the Trump administration. For example, China attacked the imposition of tariffs on solar panels as a safeguard measure. It also attacked the imposition of other tariffs on steel and aluminum by the U.S. as a national security measure. Two cases also questioned the U.S.'s unilateral retaliation against a broad range of China's exports to the U.S.

Most recently, China contested the validity of U.S. tariffs on exports that were imposed as retaliation for alleged intellectual property rights violations. The U.S. contends that China requires forced technology transfer as a condition for entering into joint ventures. China considers that these are essentially private corporate transactions that are utilized worldwide by many firms as a means of doing business and securing market access.

The U.S. has only belatedly filed two cases against China. One alleges that the Chinese response to new U.S. tariffs because of intellectual property rights violations was filed too early. The other argues that China's retaliatory tariffs, imposed in response to U.S. tariffs on steel and aluminum imports, which were based on a national security rationale, cannot be reviewed by the WTO.

It is clear that China is trying to rely on the WTO's dispute resolution system as a means of managing U.S.–China trade relations. The Trump administration has only barely begun to catch up.

The backdrop to this series of litigations by both parties is the Trump administration's very public disdain for the WTO. The administration has condemned the WTO's ability to negotiate newer trade rules (the WTO's negotiations have been a failure). It called for possible withdrawal from the WTO. In addition to this threat, the Trump administration has

focused its criticism particularly on the dispute resolution system, where it claims the decisions have ignored the law and the US has lost all its cases.

The facts demonstrate otherwise.

The U.S. was a major supporter of the establishment of the WTO. In addition, it was the principal architect of the dispute resolution system, which involves both diplomatic negotiations and, if they fail, binding adjudication with enforcement. The U.S. negotiated this because it was perceived to be in its national interest and exercise of its national sovereignty.

The U.S. wanted to create a rules-based trade system as a means of diplomatically resolving and adjudicating disputes—a system that would mirror the U.S. legal system and its unique values. In this system, rights and obligations are assumed by all nations as a means of creating a multilateral system. Where the law of the jungle (power politics) gives way to the rule of law with mutual benefit for all.

Since 1995, the U.S. has been the greatest user of the WTO's dispute resolution system. The U.S. has won most of its cases. In fact, surprisingly, China has implemented all decisions that have gone against it. The U.S. has not.

My conclusions are as follows: first, it is in the national interest of the U.S. to remain in the WTO. Second, it is similarly in our interest to remain part of the dispute resolution system. Third, a wide variety of U.S.–China trade disputes have been litigated. China has implemented all adverse decisions, but the US has not, especially regarding the methodology of determining dumping and subsidy cases.

There is no reason U.S.–China trade issues cannot be settled in the WTO's dispute resolution system. Facts support this. It is better to settle trade disputes in the WTO than on the global stage, where trade disputes can easily spill over to a real battlefield.

## **Trump and Weaponization of Treaty Termination — Constitutional and International Legal Issues.**

Posted on October 25, 2018

President Trump is aggressively terminating treaties. The U.S. Constitution establishes procedures for treaty making but says nothing about treaty termination. This treaty-making power is shared with the Senate. Little case law addresses the issue of treaty termination, which raises significant international law and constitutional issues impacting U.S. foreign policy and national security.

The following are some announcements concerning terminating treaties that the Trump administration made just this October:

- The Trump administration announced pulling out of the 1955 bilateral treaty with Iran. This announcement came immediately after the International Court of Justice ruled in Iran’s favor and awarded it provisional measures in Iran’s action contesting renewed U.S. trade sanctions.
- At that time, the administration declared that it would review all treaties that give the International Court of Justice (ICJ) jurisdiction to decide disputes with the U.S.
- Also at that time, the administration declared that it would no longer be bound by the Vienna Convention on Diplomatic Immunity’s “optional clause,” which the U.S. accepted as giving the ICJ jurisdiction over treaty disputes involving the U.S.
- Immediately afterward, the administration announced its intention to withdraw from the 144-year-old International Postal Treaty (Universal Postal Union).
- Most recently, this month, the Trump administration announced it will withdraw from the Intermediate-Range Nuclear Forces Treaty (INF) with Russia.

Of course, the administration previously withdrew from the multilateral nuclear agreement with Iran, threatened to withdraw from the North American Free Trade Agreement, continuously threatens to withdraw from the World Trade Organization, and refused to continue negotiating the Trans-Pacific Partnership on the administration’s first day in office. The administration continuously threatens to withdraw from various bilateral trade deals. This threat of treaty termination is made alongside the administration’s threats to withdraw from a host of multilateral organizations and other diplomatic undertakings.

So, what’s the relevant U.S. constitutional law concerning the president’s authority to terminate treaties?

In 1979, the Supreme Court upheld President Carter’s unilateral withdrawal from the defense treaty with Taiwan. It considered treaty termination to be a non-justiciable “political question.” In a subsequent case involving the termination of the Anti-Ballistic Missile treaty by President Bush in 2002, a federal district court held that treaty termination was also a non-justiciable question. However, keep in mind that even though broad deference is made to the president in foreign affairs, the Supreme Court’s *Curtis-Wright Case* of 1936 clearly makes this point. More recent cases have consistently reviewed executive actions that affect national security. Witness the recent federal cases concerning President Trump and various immigration matters.

Proponents of broad presidential power concerning treaty termination argue that such power is implicit in the president’s foreign affairs and diplomatic powers. This statement is true to an extent. However, it does not extend to all cases of termination, such as those

concerning non-self-executing treaties that have been implemented via congressional legislation. This is especially true concerning treaties or executive agreements regarding trade issues, where Congress has exclusive authority and where the agreements are implemented through congressional legislation.

The Trump administration's aggressive use of treaty termination amounts to a weaponization of this power that has not previously occurred.

No matter what the domestic legality of the termination of a treaty may be, presidential termination does, in fact, terminate the agreement between the U.S. and its treaty partner. However, this termination may well be a violation of the treaty if it does not comply with the withdrawal provisions of the treaty, and such termination would place the U.S. in violation of international law.

International lawyers, foreign policy experts and Congress, among others, need to seriously review this matter. Because treaties create international and domestic laws, Congress should have major input in their formation and termination. Of course, the violation of international law raises serious foreign policy and national security concerns for the entire nation.

## **Trump and an International Law Strategy — More Litigation?**

Posted on June 15, 2018

Why is it that Qatar recently filed legal actions in both the World Trade Organization and the International Court of Justice to enforce its international legal rights (against the UAE blockade) and the Trump administration has filed no cases, whatsoever, in the ICJ and only 1 or 2 in the WTO concerning a myriad of perceived global grievances?

A number of cases have been filed against the U.S. in the both the WTO and in the ICJ and the U.S. has not responded by counter litigation.

Wouldn't filing such cases by the US be at least good optics supporting int'l litigation and judicial tribunals as a means of settling disputes rather than undiplomatic language, bluster, and unilateral threats?

After all the U.S. was the primary architect of both the ICJ and the WTO which reflect U.S. exceptionalism and its defining adherence to a rules-based system and protection of rights by judicial mechanisms.

If you recall Iran recently filed a case against the U.S. in the ICJ concerning execution on its assets (of its central bank). This involved a case by private plaintiffs in U.S. domestic courts attempting to satisfy judgments against Iran for its acts of international terrorism. Why hasn't the U.S. responded by filing its own cases addressing a myriad of complaints against Iran?

By the way even the Philippines filed a case against China over the South China Sea in the Permanent Court of Arbitration (which it won recently). Again why hasn't the U.S. responded with its own case over law of the sea issues in the South China Sea?

It seems to me that a legal strategy focusing on international tribunals is in the U.S. national interest. It is pursuant to historical American values of promoting the rule of law and reliance upon litigation to settle disputes. It would do wonders in giving U.S. diplomacy a firmer grounding in international law.

Of course, this would be a steep hill to climb by the Trump administration that has gone out of its way to terminate treaties, to lambast multilateral institutions and to almost totally neglect international judicial institutions.

Nevertheless, such litigation would provide invaluable experience for the many lawyers in the U.S. Department of State before resigning and entering private practice.

## **WTO Cases & the Trump Era — U.S. becoming more active?**

Posted on May 23, 2018

Here's a quick review of WTO litigation concerning the U.S. (as either a complainant or respondent) during Trump's presidency so far.

The U.S. has been the respondent in 12 cases and the complainant in only 3 cases.

Countries that brought actions against the U.S. have been India (1), Korea (3), China (2), Vietnam (2), Canada (3) and Turkey (1). Cases against the U.S. have involved §232 duties on steel and aluminum, §201 duties on washers and solar panels, §301 measures concerning intellectual property rights, among others.

The Trump administration has brought only three cases in the WTO. One case has been brought against each China, India, and Canada. They have involved intellectual property rights, among others.

What can be said so far at this point?

Most of the cases brought against the U.S. have been by our allies or friendly states. Only two were brought by China. The cases the U.S. brought involved all but one against an ally or a friendly country. (The other was against China.)

The U.S. is defending all the cases brought against it during the short Trump administration and has only belatedly filed a major case against China (in which China has responded by its own case). So despite the U.S. pronounced opposition to the WTO and its

dispute resolution system the U.S. continues to use it. Becoming more active recently in defending cases and bringing them. That's good — at least for now.

*[June 3rd Update — Both the EU and Canada have recently filed cases against the U.S. for its imposition of tariffs on steel and aluminum imports under Section 232 'National Security.']*

## **Trump and New WTO Litigation, Finally.**

Posted on May 22, 2018

**What passes as conventional knowledge and received wisdom in the Trump administration (better known as 'Trump Think' in Trumpland) concerning U.S.-China trade relations and the WTO (and particularly its dispute resolution system)?**

**Simply put it is two-fold – China has taken advantage of its WTO membership since its accession in 2001 and, in particular, it is useless to rely upon the WTO's dispute resolution process to resolve disputes. This is because, according to Trump Think, everyone knows — China never observes the rules of global trade nor decisions of the WTO.**

**Well, let's look at "Just the facts" as my favorite detective Sgt. Joe Friday said in the long-ago TV detective show "Dragnet."**

**What the facts are concerning China and litigation in the WTO with a focus on the U.S.**

**I want to start and end with the very short history of WTO litigation during the Trump administration. Three salient facts jump out.**

**One. The Trump administration never filed a case during its first year. It only belatedly filed one against China (concerning intellectual property rights) as part of its onslaught in spring 2018 to force China's capitulation to its broad trade and investment demands.**

**Two. China responded to Trump's trade demands by filing its own two cases against the United States. The first concerning the U.S. reliance on §301 unilateral retaliation to impose restrictions on a range of Chinese products because of alleged China's violations of intellectual property rights. The second concerning U.S. reliance on §232 national security to impose restrictions on steel and aluminum imports from China.**

**Three. The recent action by the United States in the dispute resolution system is in the broader context of the Trump administration's public disdain of the WTO and, in particular, its dispute resolution system. The Trump administration argues that system is a gravely flawed legal process that works against U.S. national interests.**

**One additional intervening event occurred and should be noted. The WTO issued a compliance report concerning a prior case brought by China against the United States. It**

found that the United States was not in compliance with prior recommendations concerning state owned enterprises are not necessarily a ‘public body’ for the determination of government subsidies. The U.S. is appealing this panel compliance decisions.

What can be surmised from the above?

Despite the Trump administrations’ disdain for the WTO’s dispute resolution systems it is now participating somewhat in it, finally. This is a good development.

## **Constitutional and International Legal Issues — Trump’s Foreign Policy.**

Posted on May 22, 2018

The interrelationship of public international law and U.S. constitutional issues is of paramount concern today. However, it’s unfortunate that neither universities nor public policy communities have fully grasped this in connection with the Trump administration actions.

This is especially the case in light of unprecedented challenges to both the international and the constitutional legal systems that current United States policy presents. It is the Trump administration that has more than any other administration forced these issues to the forefront. They need to be addressed, now.

To illustrate the above here are some issues that need to be examined by law professors and foreign policy experts.....

What is the *President’s authority to terminate a treaty unilaterally* when not complying with the withdrawal provisions of the treaty? (Keep in mind that there is nothing in the Constitution about terminating a treaty.) What if there is implementing legislation? Can the President still terminate a validly negotiated and implemented treaty? (Think about the TPP, the Paris Agreement or the Iranian Nuclear agreement. And Trump’s treats concerning NAFTA and the WTO.)

Since *customary international law* is deemed by the Supreme Court to be the supreme law of the land *is the President bound by it?* Can he ignore it? For example, by negotiating terms of international agreements that have been deemed unlawful? (Think about the voluntary export restraints in the new U.S.-Korea agreement.) *Can the President violate customary international law* (Article 52 of the Vienna Convention in the Law of Treaties) and threaten the use of military force in order to coerce another country to enter into an agreement?

Think about the current Iranian and North Korea situations today and even U.S. trade negotiations with China. The Article 52 rule that voids agreements brought about by the

threat or use of armed force was adopted to not give juridical recognition to the type of military threat by Nazi Germany in bringing about the Munich Agreement in the 1930's. (And older ones with China.)

What should be the *role of U.S. domestic courts in the international legal system*?

Should courts limit the *defense of sovereign immunity in actions concerning terrorism and torture*? Should courts apply constitutional protections to actions by the U.S. military and intelligence agencies *outside of the U.S.*? Should courts be required to look to international law and foreign law in interpreting U.S. laws? To what extent should foreign plaintiffs (individuals and corporation) have standing to utilize U.S. court to enforce their international legal claims? (Think about international human rights violations.)

Constitutional and international law are most often taught as discreet courses and often dealing with esoteric and philosophical perspectives. It is necessary today to focus on the inter-relationship of these courses in the context of foreign policy issues. Both in a professional and real world context. This is the critical challenge today — for both these subject areas — in order to stay relevant.

## §232 + Art. XXI = WTO Blowup?

Posted on February 18, 2018

The reliance of the Trump administration on Section 232, the national security provision under the Trade Expansion Act of 1962, to impose trade restrictions on import of steel and aluminum, would certainly run into very serious WTO challenges. This defense by the U.S. in the WTO most likely would lead to blowing up the WTO.

The possibility of this has been heightened by the recent determination by the Dept. of Commerce recommending to President Trump to take a range of retaliatory trade actions based on this provision concerning steel and aluminum imports.

In the WTO's dispute resolution procedure the United States would have to rely upon the almost never-used defense of the "security exception" provided under Article XXI of the GATT agreement. The U.S. did offer this defense in the older GATT case, never finalized by an adopted panel report, brought by Nicaragua in the 1980s. Bahrain has recently stated its intention to rely upon this same defense in the new case brought by Qatar against Bahrain over its trade embargo.

No matter what the outcome would be over the U.S. defense of national security, if either it is upheld or rejected, the outcome would not be pretty. In fact, it would be an unmitigated disaster.

If upheld the WTO decision would allow other countries to potentially take trade actions under Gatt Article XXI. For example, China could argue its Internet rules and various export controls of minerals are for the protection of its national security. The Russian Federation could argue that it could impose restrictions on trade with the EU because of its trade sanctions over the Ukraine and this would be a valid exercise of Russia's rights of the national security exception.

If the U.S. loses this major case undoubtedly the Trump administration would never honor its obligation to comply with the decision.

Here you would have the major architect of the WTO and its dispute resolution system rejecting the core aspects of today's global system. That's certainly not good.

By the way Article XXI has requirements that the U.S. most likely could not meet in its defense. For example, trade restrictions such as higher tariffs or trade sanctions, need to be in protection of "*essential security interests ... or taken in time of war or other emergency in international relations.*" There is a global glut of steel and aluminum. The U.S. is not in a time of war or other international relations emergency.

Added to this the Trump's administration's public contemplation of declaring a "*national emergency*" under the *International Emergency Economic Powers Act of 1977*, concerning China's restrictions on intellectual property right, the situation becomes even more bizarre. There is simply no national emergency concerning intellectual property rights. U.S. firms are free to enter into joint ventures in China or not to enter into such business relationships that involves licensing of technology. This is really a matter of global corporate strategy.

That law provides the President to regulate commerce after declaring a "national emergency" in response to any unusual and extraordinary threat to the United States which has a foreign source. While administrations have relied upon this, often in cases involving foreign military actions, no administration considered violation of intellectual property rights as a national emergency. This would most certainly also be rejected by the WTO.

In addition, the U.S. Supreme Court in the seminal cases of *Curtis Wright (1936)*, *Youngstown (1952)*, and *Dames & Moore (1981)* make it clear that the President has no inherent authority as commander-in-chief to impose embargoes or to take other actions relating to commerce. Authorizing these actions are within the exclusive authority of the Congress. The President can only act pursuant to a delegation of authority in these areas. Thus, the Presidents determination of "*national security*" under Section 232 or "*national emergency*" under the IEEPA is reviewable by the federal courts.

Federal courts have consistently upheld their right to review executive actions in light of the executive's claims of foreign policy and national security. Just look at the recent wave of decisions concerning review of President Trump's immigration decisions. Just recall the

Supreme Court’s review of post-9/11 cases concerning detainees rights and the right of habeas corpus.

This entire scenario of possible reliance on national security or a national emergency to impose U.S. trade restrictions because of concerns over steel and aluminum imports or transfer of intellectual property rights, foreshadows a potential trade disaster of the first order. One that U.S. economic history and trade diplomacy have not seen since the founding of the post-war international economic order.

## Trump and Trade — Waiting for the Other Shoe to Drop?

Posted on February 15, 2018

The recently concluded *WTO Ministerial Conference in Buenos Aires*, in December, achieved no significant accomplishments. During the conference, the United States Trade Representative (“USTR”) Robert Lighthizer made unsettling and acrimonious statements.

*The WTO is losing its essential focus on negotiation, and is becoming a litigation-centered organization .... Too often members seem to believe they can gain concessions through lawsuits they could never get at the negotiating table .... It’s impossible to negotiate new rules when many of the current ones are not being followed.*

Ominously, a few weeks after the Buenos Aires ministerial conference on the first anniversary of President Trump’s inauguration the administration submitted to *Congress its report on China’s WTO compliance*. It stunningly stated:

*It seems clear that the United States erred in supporting China’s entry into the WTO on terms that have proven to be ineffective .... [T]his mechanism (the WTO dispute resolution system) is not designed to address a situation in which a WTO member has opted for a state-led trade regime ...*

Most recently, in his first *State of the Union Address* President Trump directly addressed global trade but only in five surprisingly short sentences. He neither announced any new trade actions, nor lambasted the global trading system or its institutions or specific countries. Interestingly, President Trump seemingly narrowed his concerns primarily to protecting American intellectual property rights through trade enforcement. President Trump simply stated:

*The era of economic surrender is totally over .... We will work to fix bad trade deals and negotiate new ones .... And we will protect American workers and American intellectual property through strong enforcement of our trade rules.*

From 1995 to 2017, the US has been a complainant in 115 cases and a respondent in 130 cases at the WTO. It has won a huge majority of them as complainant and a majority of all

cases. The US has been involved in nearly half of all WTO cases. Clearly, it is the greatest user of the dispute-resolution system.

*There was a 16-year high on private corporate actions (79 new investigations by the Department of Commerce) in 2017, undoubtedly inspired by the administration's anti-trade rhetoric. The Trump administration during its first year conducted 82 major antidumping and countervailing investigations, a 58 percent increase over 2016.*

*The grave decline in cases brought to the WTO compared to other presidential administrations is historic. (None have been brought by the Trump administration.)*

The administration's noise and tone are quite unsettling. Failure by the administration to act more forcefully so far is undoubtedly a result of the clash of domestic interests. But the rhetoric and posturing (over national sovereignty, unilateral measures, bilateral trade deals, sanctions, and trade deficits) are already impacting trade flows and diminishing the American standing in the global system. This is occurring even as domestic and global economies and public markets are rebounding significantly.

Hopefully, these trade noises and recent actions are not an overture to really harmful policies. We'll see pretty soon .....

## **Trump's Attack on the Trade System and Rules — Main Show About to Start?**

Posted on January 8, 2018

U.S. leadership in developing newer rules for global trade and in litigating existing concrete and complex cases cannot be abrogated. It should be one of the primary aims in current U.S. trade policy.

President Trump's well-known disregard of rules, stemming in part from his years of unrelenting real estate litigation, undoubtedly colors his administration's disdain for multilateral rules and institutions and its espousal of unilateral actions in global affairs.

The impact on the role of the U.S. in the postwar order seems most worrisome. China, Japan, and the European Union are the ones moving to fill the leadership gap. Most recently, Japan and the EU signed a huge bilateral trade agreement.

The U.S. is increasingly isolationist and parochial, reminding one of the 1930s in terms of the pre-Cordell Hull days of the Great Depression. Trump's revisionist view of U.S. national

interests is different from other presidents since World War II. These views are moving away from active engagement and moving toward being more isolationist and more nationalist.

It abandons the American architecture of the postwar world and its leadership. It creates more uncertainty and promotes disorder. That's not good.

The administration's recently released national security strategy merely restates President Trump's belligerent trade rhetoric. It moves trade to the center of national security policy. But this strategy otherwise breaks no new ground. There are the same trade complaints: unfair trade, violations of U.S. sovereignty, disparagement of multilateral institutions, and a need for greater trade enforcement.

President Trump's nihilistic efforts are those of an international cowboy, rebranding, unfortunately, the earlier stereotype of the Ugly American. Reflecting the views of his tribal and nativist base in the U.S., the traditional Republicans and their support of international trade have inexplicably fallen away and are complicit in the humiliation of America's historical leadership and greatness.

## **Trump and Trade: One Year (Almost) — How Bad?**

Posted on December 5, 2017

It's been almost one year since

President Trump took office. He came to office riding a tide of anti-trade rhetoric. One of the most protectionist candidates ever to have won election. Clearly trade was a major issue. Which is very rare in presidential politics. So what's the record? Any conclusions at this point?

Here are some international highlights for global trade during this first year of the Trump administration.

- The U.S. withdraws from the TPP.
- Both the U.S. and the EU opposes granting of market economy status to China.
- The U.S. is continuing Obama's case in the WTO against China involving aluminum and the issue of market economy status.
- But no new WTO case has been filed.
- The WTO's Trade Facilitation Agreement (TFA) has come into effect along with the previously updated Information Technology Agreement (ITA). (Which China has joined.) So the WTO is continuing negotiating new trade rules, somewhat, despite the failure of Doha.
- The OECD has agreed upon a global tax avoidance treaty that the U.S. has not signed.
- The WTO in the Boeing case reversed its state subsidies ruling in favor of the U.S.

- The WTO upholds the U.S. labeling regulations for tuna in a compliance case brought by Mexico.
- The U.S. has just won a WTO case brought against it by Indonesia concerning U.S. antidumping duties.
- The Trump administration is still dealing with a WTO case filed by China concerning the anti-dumping methodology not utilizing a market economy status.
- The U.S. withholds appointments to the Appellate Body of the WTO.
- The U.S. opens renegotiation of NAFTA.
- No withdrawal from the WTO or its dispute resolution system.
- But consistent complaints by the Trump administration about the WTO and its dispute resolution system. Even though it handles increasingly complex regulatory cases (not merely tariff disputes but ‘non-tariff issues) from a broad range of countries. Disputes are fairly promptly decided, decisions are generally complied with, and just a few sanctions were authorized.
- No new bilateral trade agreements. Nothing much is happening concerning negotiations with the EU. Even though the EU is moving forward, most recently with Japan.
- Some additional trade controls concerning Cuba and Iran.

And here are some U.S. domestic highlights for global trade:

- The U.S. has not declared China to be a currency manipulator.
- The U.S. has not imposed a border tax on U.S. exports.
- The USTR is assessing Section 232 (national security) action against China for its domestic steel policies.
- The ITC is considering safeguard action under Section 201 against China concerning solar panels and washing machines.
- The Dept. of Commerce ruled against China concerning aluminum imports using non-market economy methodology in its anti-dumping calculation.
- Dept. of Commerce on subsidy duty on Canadian Lumber.
- The USTR is assessing Section 232 action against China for its intellectual property policies in the context of U.S. joint ventures and requirements of technology transfer.
- The pending U.S. tax legislation provides for greater taxation of U.S. multinationals and a reduced tax rate on repatriated income. Probably resulting primarily in corporate dividends and buy backs.
- The Congress is considering revising and extending CFIUS to outward transactions.

What are my conclusions?

- Not much international action but a bit more domestic action against China.
- No real significant action against the WTO.
- In fact, the U.S. continues to win its cases in the dispute resolution system as both complainant and respondent.
- The U.S. continues to defend and have outstanding cases yet to be decided.
- The U.S. has been a complainant in 115 cases and a respondent in 130 cases. (The U.S. has been involved in nearly 1/2 of all WTO cases.)

- The WTO continues to negotiate new trade agreements, somewhat.
- NAFTA renegotiation is moving along slowly. There is always an international legal right to request to renegotiate international agreements when circumstances evolve.
- Some actions on trade in the Dept. of Commerce and the International Trade Commission. For example. a Commerce Dept. subsidies ruling against Canada's Bombardier. But really nothing very much at this point.
- Reliance on domestic trade remedy legislation, and even somewhat of an increase, is usual U.S. practice going back decades.
- But the decline in cases brought to the WTO compared to other presidential administrations is significant.
- Review by USTR has not resulted in any unilateral actions, yet.
- Congressional action concerning both CFIUS and global taxation seem imminent. Tightening up foreign investment rules and taxation of multinationals seem about right.

What's the bottom line?

However, noise and tone are quite unsettling. This rhetoric and posturing (over national sovereignty, unilateral measures, bilateral trade deals, sanctions, and trade deficits) are already impacting trade flows and diminishing the standing of the U.S. in the global system. This even as the domestic and global economies are rebounding well.

The impact on the role of the U.S. in the post-war order seems most worrisome. It's more isolationist and more parochial, reminding one of the 1930's. Reflecting a view of U.S. national interest differently than presidents have since World War II. It's moving away from active engagement and toward being more alone and abandoning the American architecture of the post-war world. In a sense his unilateral international efforts could well be labeled that of an international cowboy. Reflecting his tribal and nativist base in the U.S.

This has ominous implications for America's national security. But that's another story.

Be careful. The year isn't over, yet.

## **Qatar-UAE in the WTO — National Security Defense — Scary Outcome for Everyone?**

Posted on November 27, 2017

At the request of Qatar, the WTO's Dispute Settlement Body (DSB) agreed on November 22nd to establish a panel to examine trade sanctions imposed by the United Arab Emirates (UAE) on Qatar.

In another words the litigation process has now actually started for real between Qatar and the UAE in the WTO's dispute resolution system. Essentially, it raises the issue of the legality of the *Saudi-UAE-Bahrain boycott* imposed on Qatar.

Most importantly this litigation, raises specter of the '*security exception*' under GATT Article XXI. This defense has never been litigated nor decided upon in the WTO. It poses real problems for the trading system.

A review or ruling by the WTO on this issue has the possibility of blowing up the global trading system. Certainly if it is heard by the panel and most certainly if it is decided that the defense is not applicable.

The United States notes that this dispute is political in nature and is inappropriate for WTO dispute settlement. But Qatar argues that the security exception is subject to multilateral review and the UAE and Saudi Arabia are incorrect in believing otherwise. The UAE argues that issues of national security are political matters and are not capable of review by the WTO dispute settlement mechanism. It argues that members have the authority to self-determine its application.

Needless to say the issue of the national security exception, as it is generally known, raises the very basic question of the competence of the WTO to review its application and then to make a determination. The group of issues presented by the national security exception is clearly the third-rail of the WTO system.

Let's quickly look at Article XXI. It states, in part:

**Nothing in this Agreement shall be construed**

**(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its *essential security interests***

**(iii) taken in *time of war* or other *emergency in international relations* ...**

So it seems to me that the national security exception is limited to actions taken during a "time of war" or "another emergency in international relations." It is not a wide open exception, to be self-policed or unilaterally applied. It also seems to me the language of this provision requires a factual determination. Were the measures taken during a time of war? Were they taken during an international emergency? And most importantly were essential security interests involved? I see no limitation anywhere in the WTO documents restricting normal judicial review of this provision nor the conditions prescribed within it.

In the recent past there was some hint that the Russian Federation did not consider security defense available to the U.S. if an action was brought against it for its sanctions imposed on Russia because of its intervention in the Ukraine. The Russian Federation

threatened to bring an action in the WTO. But this hasn't happened, yet. China also indicated that it might avail itself of the national security exception if the U.S. brought an action contesting China's cybersecurity hacking of U.S. firms. A wide reliance on the national security exception is in no state's national interest.

The hope of many is that this pending Qatar-UAE dispute will be resolved before the underlying Saudi-Iranian relations spin further out of control. It's in everybody's interest. Including those of the U.S. and the Trump administration.

## **Ominous Signs — For China and Even More So for the WTO?**

Posted on November 22, 2017

**No new final trade actions by the Trump administration, but several ominous signs — for both China and the WTO as well as the trading system.**

- **The U.S. International Trade Commission is recommending *escape clause action* under Section 201 (tariff-rate quotas) concerning Samsung's *washing machines* being imported from Korea into the United States and action concerning *solar panels* from China.**
- **Bills are moving along in Congress concerning CFIUS which are in fact aimed at confronting Chinese investment into U.S. technology and communications firms.**
- **The USTR is continuing its Section 301 investigation (unilateral retaliation) as to China's intellectual property practices.**
- **The aluminum case pending in the WTO was originally filed by the Obama administration is heating up. Parties are arguing over the "market-economy status" of China.**
- **The national security Section 232(b) case concerning steel imports is also pending.**

**So the question is now this — Do these actions indicate a willingness by Trump and Lighthizer to confront China more forcefully? Or do they go a gigantic step further to contest the legitimacy of the dispute resolution system of the WTO and, in fact, the entire WTO along with the entire international economic order of the post-war world?**

**My guess is that you'll see more aggressive confrontation concerning China and a broadside on the WTO. This would be a great mistake. This would amount to tearing down well-working systems and no attempt to build upon them. But we'll see .....**

..... “Trump to Decide on Tariffs for Imported Washing Machines.” *New York Times* (Nov. 22, 2017).

..... “U.S. Toughens on China Trade.” *Wall Street Journal* (Nov, 22, 2017).

## America First, Trade Last? — 13 Obvious Observations.

Posted on November 20, 2017

Here are 13 observations relevant to the current trade debate ..... They indicate to me that Trump’s trade policies are already detrimental to the U.S. and does nothing to help us domestically or internationally.

- *Only 1% of U.S. companies export and not many government entities try to increase this.*
- *Trade and tax policy in the U.S. does almost nothing to promote manufacturing exports.*
- *Withdrawing from TPP, Nafta or the WTO won’t help increase U.S. exports but only worsen them as other countries take our current markets.*
- *Trade agreements have opened a huge number of foreign markets to U.S. exporters.*
- *Bilateral trade deficits as a concept doesn’t make any sense.*
- *With the China’s WTO Accession Agreement the U.S. did not reduce one tariff. China reduced its tariff levels significantly.*
- *Strategically, pulling out of TPP gave China a huge political and foreign policy victory in the largest markets in the world.*
- *The WTO’s dispute resolution system has been a great success — the U.S. has won most of its cases it has filed. This has furthered the rules-based system of trade and international relations.*
- *U.S. multinationals are doing well internationally and are keeping much of their profits offshore and untaxed by the U.S.*
- *Repatriating offshore trillions of U.S. multinationals (mainly IT firms) won’t increase U.S. reinvestment but only increase shareholder dividends — this is what happened last time there was an offshore tax holiday.*
- *Unilateralism is not the way to go in the post-war international system which the Trump administration seems to disdain along with multilateral trade agreements and multilateral institutions. The world has rejected such actions and so has former U.S. administrations.*
- *Sovereignty is not abrogated when we enter into mutually beneficial agreements and arrangements. Mutual consent is the basis of good treaty law and global governance.*
- *The role of states such as New York, California and Virginia in promoting trade and foreign investment is increasingly important as the federal government is becoming more anti-trade and restrictive as to foreign investment.*

..... “America First, International Trade Last.” *Financial Times* (Nov. 2, 2017).

.....”The Wrong Way to Think About Trade.” *Wall Street Journal* (Nov. 20, 2017).

## **Trump’s Asia Trip — Just More Complaints?**

Posted on November 18, 2017

**Donald Trump just returned from his trip to Beijing and Vietnam (APEC). He was nice to China in Beijing, critical of China in Vietnam, and when home complained about the WTO again. What’s up?**

**Very simply he is out to get the WTO and its dispute resolution system. Who really knows why? He and the USTR Lighthizer complain about loss of U.S. sovereignty and loss of U.S. cases in the WTO.**

**Just don’t know where they get this stuff from.**

**The U.S. has filed more cases than any other country in the WTO. The U.S. won most of them and only lost a small share of cases when it was the responding party. In fact, just in the last few days the U.S. won three additional cases involving Indonesia, Mexico and Korea.**

**Most importantly, the U.S. was the principal architect of both the WTO and most certainly of its dispute resolution system as well as the post-war international system. Which saw a destroyed world economy return to great prosperity for millions of people.**

**This system reflects the American focus on rules and enforcement of them by a litigation / judicial process. The system has proven to be extremely effective and, in fact, the most effective international judicial mechanism ever, period.**

**Both Trump and Lighthizer both have a grievance mentality. Lighthizer lost most of his trade remedy cases, when in private practice, they were appealed to the WTO. Trump just always views himself as a victim.**

**The post-war system, rules and institutions are under attack by Trump and his administration. This serves no rational purpose. This really needs to stop, now.**

**My earlier post is at “Trump’s War on the WTO ....” Here are some additional thoughts:**

- **Sidelining the dispute resolution system in the WTO is a sneaky means of killing the WTO’s effectiveness as an international institution.**
- **By vitiating the WTO / DSU might well encourage more unilateral actions against the U.S. since there would be no international mechanism to address trade complaints.**

- If the president withdraws from either NAFTA or the WTO this would most likely generate domestic law suits in the U.S.
- These agreements (Nafta and the WTO) were authorized by Congress and then effectuated by implementing legislation.
- Diplomatic agreements have been abrogated by former presidents but not trade agreements.
- Terminating the WTO agreement, even though it has a withdrawal provision, raises questions if the president is even permitted to do it internationally.
- This is because powers to conclude these agreements were delegated to the president in the first place and there is implementing legislation that serves as law of the land. That he can't do anything about. Indeed, he seems to be required Constitutionally to enforce these provisions.

My sense it that the above raise questions that are not clearly answered by prior case law and makes for really good litigation by the interested parties. Almost guaranteed. We'll see.

## **Technology, Antitrust, Trade, Taxes .... Laws Need an Update?**

Posted on July 30, 2017

Good piece by Steve Pearlstein of George Mason (Schar School) in the *Washington Post* today on tech companies and antitrust.

It's clear to me that U.S. antitrust enforcement is behind the curve concerning global tech companies. Current economic theories of antitrust focus on price competition and protecting the consumer. Not sure how well that is working out.

The EU is clearly now in the lead on antitrust enforcement (Google case).

Two additional thoughts.

One, the impact of globalization, not only technology, on antitrust needs to be much better understood.

Two, there is a critical inconsistency in economic theory concerning antitrust and trade remedies.

Current antitrust laws emphasis is on protecting, so it says, the consumer. But trade law (antidumping and subsidies) aim at protecting U.S. producers. This goes back to the late 19<sup>th</sup> century.

**My conclusion. Really need a more global and consistent assessment of U.S. economic legislation dealing with both antitrust and trade remedies (and I would add tax law) in today's high-tech and interconnected markets.**

**Reaction to Trump's Foreign Policies & Rise of City and State Foreign Policies — More than Just Resistance , a Global Development.**

**Posted on July 14, 2017**

**More on the emerging new federalism and foreign affairs as a reaction to President Trump's foreign policies concerning such areas as trade, climate immigration, among other areas. This nascent development more than just resistance. It represents significant developments concerning newer manifestations of federalism to match the 21st century reality of an interconnected world on all levels.**

**The role of states and cities in the U.S. as to foreign affairs and trade is certainly not well defined in and under the U.S. Constitution. Especially in its 21st century context and in light of empirical practices over the years.**

**By the way, this resurgence of local actors in the global system is not just limited to the United States. Subnational units worldwide are bypassing ineffective central governments to better engage the global system for the benefit of their citizens to promote better trade, investment, and economic development.**

**More on the emerging new federalism as a reaction to President Trump's foreign policies as to trade, climate and immigration. This is more than just resistance. It represents significant developments concerning newer manifestations of federalism to match the 21st century reality.**

**By the way this resurgence of local actors in the global system is not just limited to the United States. Subnational units worldwide are bypassing ineffective central governments to better engage the global system for the benefit of their citizens to promote better trade, investment and economic development.**

**Some interesting developments just the last few days:**

- **Canadian and Mexican officials are meeting directly with governors of U.S. states at the National Governors Association meeting to discuss trade and NAFTA. They want to gain political allies and the governors want to gain export sales and promote economic development.**
- **More than 200 cities and states are holding meetings and local summits in support of the Paris Climate Agreement. Some here and perhaps some abroad.**

- **The U.S. Dept. of Justice (Attorney General) has called for possible legal action against sanctuary cities, e.g., for failing to turn over local information concerning immigrants to the federal government.**
- **The Congressional Research Service has released a surprisingly poorly drafted report questioning the authority of states to do anything in the area of international trade or foreign relations. (Failing to cite the definitive Supreme Court case addressing implied preemption and foreign trade.)**

**States have huge rights in the foreign affairs area. But they are limited by various powers of the federal government. These limitations are not well defined, especially not in today's context. No Supreme Court case has broadly restricted the rights to states to engage in the global economy. Today they have trade missions, they tax international transactions, etc. For example, my home state of Virginia has recently completed MOUs concerning trade with a Baja California (a Mexican state) and Mexico City.**

**What can be said about these latest developments? As to the entire area of the relation of constitutional law to American foreign relations we need to go back to the writings of Louis Henkin and the more recent ones of Justice Breyer.**

**New constitutional law is about to be made as a result of incoherent and isolationist policies of President Trump and reaction to it. These policies fly in the face of the real economic and national security interests of the United States and the international system. Local governments are paying the price for this folly. They and no one else can afford it. (Similar developments can be seen in countries overseas. For example, the City of London is negotiating with EU officials directly in Brussels as to financial aspects relating to London institutions under Brexit.)**

**Very simply this issue of national subunits engaging the global system and bypassing incompetent national leadership is evolving nationally and globally. In the United States this will undoubtedly lead to very contentious legal and political battles over the new federalism in the courts, Congress, state houses, and city halls. Stay tuned .....**

## **Global Cities and Global Trade.**

**Posted on July 5, 2017**

**The latest example of global cities bypassing central governments to conduct their own foreign policy and trade policy is the case of the City of London.**

**London is sending its own delegation to Brussels to negotiate directly with the EU to establish a post-Brexit financial system to ensure the role of London in global finance. This is actually with the consent of Whitehall and EU officials in Brussels.**

To me this is the only the most recent example of global cities in the world and especially in the United States to engage in global commerce more forcefully. Especially since central governments seem to be incapable of developing meaningful policies for economic development and jobs that focus on trade, finance, investment and involving meaningful engagement with the global economic system.

In the context of national sovereignty the older concern of sovereignty slipping and going to international organizations is receding in importance. It is now being raised as to the role of states and cities as they bypass central governments to formulate and negotiate their own foreign policies and trade policies directly with foreign governments. This is true as to countries that have a federal system of government as well as non-federal ones.

National sub-divisions are finding it crucial to interact with the global systems directly, out of necessity since central governments have not been very good at this for a long time.

Stay tuned .....

## **Reaction to Trump’s Policies & Rise of the New Federalism.**

Posted on June 20, 2017

A new aggressive and proactive federalism seems to be evolving in the United States.

This newer federalism promotes global engagement and observation of international rules. This is remarkably different from the older version that supported states’ rights and segregation and was primarily based in the South.

Today, we see a rapidly evolving anti-Trump resistance in the widespread movement for “sanctuary cities” and the more recent “city-state climate coalition.” Virginia is one of the most recent members of that coalition.

These local actions by cities and states are in opposition to President Trump’s national policies relating to immigration enforcement, the rejection of the Paris Climate Accord, and a general contempt for a rules-based international order.

In particular, these policies relate to trade, climate change, immigration, multilateral alliances, and almost any international agreement that restricts the United States from taking unilateral actions. These historical changes have occurred under the claim by President Trump of protecting the United States and its national sovereignty.

What else can be said?

**This incipient development on city and state levels results from President Trump’s isolationist retreat from America’s engagement in the global system. This engagement has been a hallmark of U.S. foreign policy since before 1945. This incomprehensible retreat by the world’s most powerful nation has seemingly been done with little thought and even less collaboration with Trump’s key national security, military, and foreign policy advisers. Some advisers, however, have seemingly betrayed their own competence by recently declaring there is no longer a global community.**

**This atavistic retreat to isolationism is a rejection of the rules and institutions that have marked U.S. engagement in international relations since the end of World War II. That engagement had its earlier grounding in the United States’ participation in World War I and then in the 1930s under President Roosevelt’s Open Door Policy and his revamping of U.S. trade policies under Secretary of State Cordell Hull.**

**Those policies espoused open trade, adhering to the most-favored-nation principle as a life-saving antidote to the competitive tariff hikes globally, which had led to the Great Depression. That principle was later multilateralised in the post-war international economic system. This system persists today, but it is under attack by the Trump administration. Most recently, this is seen in its refusal to sign the historic OECD treaty on multinational tax avoidance and bilateral tax treaties signed by 70 other countries recently.**

**With only a slight knowledge of U.S. diplomatic history, one can draw a straight line from President Woodrow Wilson’s plea to Congress to stay involved in the global system after the Great War (only to see the League of Nations, the Permanent Court of International Justice, and the Versailles Treaty defeated in the U.S. Senate) to President Trump’s nihilistic foreign policies today. Of course, nothing good came from the failure of President Wilson’s efforts. Twenty years later, German troops marched across Europe.**

**The resurgence of the states’ and cities’ roles in foreign affairs is reminiscent of the role states had under the Articles of Confederation immediately after the Revolutionary War in the 1780s. This is seen even going back to the Middle Ages, when states and cities were the central players in international trade, as part of the Hanseatic League within the Holy Roman Empire.**

**Today, it is the global city and cities of all sorts that are powering international engagement, innovation, and economic development. Cities, counties, and states are taking the lead in interfacing with the global economic system to promote local economic development and jobs.**

**What we see today are unprecedented actions by the United States on the global stage causing more disorder and insecurity. Just witness the recent flare-up in relations with Qatar and growing Saudi-Iranian hostilities instigated by President Trump’s visit to Saudi Arabia. To many, these actions and policies evidence failed national leadership and bizarre foreign policies.**

We are now encountering unprecedented actions on the sub-national level, among city and state governments as a reaction to failed national governance and as blowback to skewed populism. These actions have been powered by extensive and broad-based individual and corporate support.

These activities are growing in intensity. For example, state attorneys general have been energized in bringing judicial challenges to Trump's policies, most notably to immigration. Canada has begun negotiating directly with the states and cities that are members of the new climate coalition. Cities and states are expanding their sister-city and sister-state relations abroad. Most recently Virginia, completed a memorandum of understanding with the Mexican state of Baja California to promote trade.

Whether the Trump administration and its Justice Department will attempt to block these grassroots political actions by resorting to the federal courts is another question. Of course, these courts have not been very favorable to the administration's actions and its reliance on national security and the president's foreign policy powers, under either the principles of the separation of powers or federalism.

Thus, the growing opposition of cities and states to President Trump's failed foreign policies are spawning a new proactive federalism focusing on locally generated foreign policies. This is setting up a legally and politically historic battle over the new federalism.

## **Justice Gorsuch and International Law — Not Clear.**

Posted on May 30, 2017

**JUSTICE GORSUCH, INTERNATIONAL LAW AND U.S. LAW —** Justice Gorsuch displayed a somewhat confused & restricted approach to international & foreign law during his Senate confirmation.

There is a critical distinction between international law and foreign law. International law (both conventional and customary) are incorporated into US law as the supreme law of the land under Article VI of the U.S. Constitution. Judges need to know this (judicial notice).

Foreign law, considered a fact issue in the U.S., belongs to the world of comparative and conflict of law. This often needs expert testimony.

The big issue today is will the Supreme Court look at legal solutions by foreign courts as a means of understanding today's global problems. Not in interpreting the Constitution itself but helping the court to fully assess the dimensions of the problem under consideration.

Justice Breyer is a leading advocate of this approach. A detailed assessment of Justice Gorsuch's prior decisions would probably lead to a better understanding of his views in this contentious area.

## **New US-China Trade Understanding — Not Much Substance. Better than Nothing?**

Posted on May 15, 2017

The new understanding between China and the US on trade is very welcomed. Even though it is very minor and a seeming betrayal of Trump's campaign promises to the white working class. Here are a few thoughts:

- The linkage between security and trade is important. As long as this provides for growing trade ties and better political relations between the U.S. and China.
- The actual provisions of this new understanding, dealing with US beef imports to China, electronic payment systems in China, and LNG exports to China, have been in the works before the Trump administration. For example, the WTO already ruled on EPS. China had previously committed to implement that decision. And these matters in general have only been minor annoyances or friction in US-China trade.
- China has no obligation to purchase LNG. The lifting of restrictions on US beef imports relate to a very outdated response to health issues of US cattle last decade.
- The provision allowing for cooked-chicken into the US from China is very problematical. Food safety and security in China is widely considered by the Chinese themselves as very poor throughout China. That's why Chinese agricultural firms have been buying and investing in US agricultural and food companies, for among other reasons, to secure better technology.
- The Trump administration's threat to the WTO, by reliance of Section 232 'National Security Provision' to impose additional tariffs on imported steel, can explode in the faces of the U.S., the WTO and the global trading system. There has never been a WTO decision on Article XXI of the GATT that governs the security exception.

My conclusion — This understanding, not binding legal obligations, is not unexpected. They do not address the main issues. May just be window dressing. Hope not. We'll see. Probably pretty shortly.

## **Trump’s New Attack on the WTO ..... Is Trump’s Trade Policy Becoming More Dysfunctional & Dangerous?**

Posted on May 2, 2017

On day 100 Trump signed an EO critical of the WTO. This follows 100 days of complaints. This is really unfortunate.

Trump’s recent trade complaints target China, Canada, Mexico, South Korea, Japan, the EU and now to the entire rules-based system of treaties, institutions, and dispute resolution.

The remarks accompanying this recent Executive Order by Wilbur Ross were totally unfounded. The Trump / Ross attack on the dispute resolution system is totally baffling.

The US was the primary architect of the dispute resolution system and the primary user of it. The US has brought more cases and won more cases than any other country. Why condemn the dispute resolution system? It has succeeded better than anyone could have imagined. This is the way to resolve disputes. The US has been really successful.

What’s the point? Attacking the entire system? Yes. Trump’s trade policy gets dumber and more dangerous by the day, more inconsistent and more dysfunctional.

## **100 Days & Trump’s Trade Policies — Disarray, Dysfunctional but Not Much Damage, Yet.**

Posted on April 26, 2017

What can be said of Trump’s trade policies in the first 100 days? Here are some of my thoughts in outline form.

Recent trade actions .....

- Threatening withdrawal from both NAFTA and the WTO.
- Subsidy duties on Canadian softwood lumber (to counter provincial subsidies).
- Threatening Canadian dairy industry over import restrictions.
- § 232(b) national-security investigation of steel (principally from China).
- Withdrawing from TPP.

Recent failure to react .....

- **Not declaring China a currency manipulator.**
- **Not tearing up NAFTA (wanting some minor renegotiation).**
- **Backing off the border adjustment tax.**
- **Concluding only a 100-day study period for US-China trade relations.**
- **No cases filed in the WTO.**

Pending .....

- **Possible new domestic trade remedy actions concerning aluminum, semi-conductors and shipbuilding.**
- **Supporting possible new bilateral negotiations.**
- **Constant concerns over the WTO's dispute resolution system and the issue of US sovereignty.**

What to make of this? .....

- **Trump has *not* given into his extreme campaign rhetoric.**
- **Trump relies upon older trade remedy laws to address older trade issues (steel, lumber ...)**
- **Neglected addressing the issues of the 21<sup>st</sup> century, for example cybertheft and digital commerce as well as newer issues of global taxation, global finance and growth of foreign antitrust regulations.**
- **The disorder and disarray in his White House and administration is being mirrored in his disarray in international economic and trade policy**

Conclusions .....

- **Good he has so far averted trade wars.**
- **But by focusing on older issues he is looking backward.**
- **Need to move beyond trade remedy laws that go back to the early 1900s as well as focusing on trade deficits in merchandise trade and focus on trade issues of the day.**
- **Reliance on older trade remedy laws is not helpful. They focus on producers and not domestic consumers and real issues of competitiveness and innovation.**

General Observations .....

- **Not much has happened. There has been a disconnect in his actions and campaign rhetoric. But there is no coherent trade policy, whatsoever. Focusing on Trump's failure to appreciate the strengths of the existing international trade and multilateral system is a grave error.**
- **Focusing on §232(b) national-security investigations is totally unfounded. We can import steel from a host of our friends during any sort of emergency. There's a world glut.**

- He needs to transcend his earlier restrictive protectionist, transactional, and mercantilist views and more fully appreciate the global trends and the need for effective national and multilateral actions under thoughtful American leadership.
- The US needs to once again reassert its traditional leadership in global trade relations. It's in our national interest.

## **President Trump returned to his attack on global trade — Is This a Good Trade Policy?**

Posted on April 21, 2017

After failing to declare China a currency manipulator this week President Trump returned to his attack on global trade.

Relying upon rarely utilized “national security” arguments and questioning the well-known restrictions on domestic content requirements and the principle of non-discrimination for private and public contracts.

The following two executive orders are highly questionable under global trade rules of the WTO and its Government Procurement Agreement — the new executive order requesting Section 232 review of steel imports on national security grounds and the new executive Order on “*Buy American*” as to steel for construction contracts.

Most importantly these executive orders indicate the still unresolved civil war within the administration between the ‘nationalists’ and the ‘globalists.’

What is required for a sane American trade policy is a return to a firm acceptance of the trading order that emerged during the last few decades. In which the United States was the primary architect. We’ll see how this plays out.

## **Trump’s 100-Day Trade Plan — Really?**

Posted on April 11, 2017

What emerged from the Xi – Trump summit on the most crucial issue of trade wasn’t very much. Not even a real plan. Just a vague undertaking to review some trade issues. So after all these weeks we now have a committee to conduct a vague review of some sort.

This stands in stark contrast with Trump’s promise to take swift and decisive action — on currency manipulations, tariffs, and a host of other items.

This “plan” also stands in stark contrast to the administration’s threats against the WTO and in particular its dispute resolution system.

For example, Wilbur Ross declared this week that a cause of US trade deficits is the “*asymmetrical World Trade Organization rules and interpretations.*” I have no idea what he is talking about. Maybe it’s the string of defeats we have had concerning trade remedies. Most of these cases were brought by Canada, the EU and a range of other countries including, for example, Vietnam and Thailand.

Most recently this week a number of global economic institutions have come to the defense of the WTO and in particular the dispute resolution system — including the World Bank, the IMF, the OECD and the ILO. They forcefully proclaim that the WTO is essential to fostering global trade and avoiding trade wars.

At this point what is the bottom line?

The upside is that the Trump administration, by its failure to take any meaningful trade action, is now coming around to hopefully a more conventional policy. This reflects that the more experienced players in the administration are now beginning to take charge of trade policy.

The next 100 days and counting will tell us a lot more. My guess is not much action will be taken. And that’s good for all of us.

## **Trump & Trade — What Trade Policy?**

Posted on April 3, 2017

Disarray in the Trump trade team has failed to produce disruptive trade policies that were promised. Indeed, Trump’s trade agenda is going down to defeat as did his attack on Obamacare and his Muslim travel ban.

This disarray in trade reflects a broader disarray throughout the Trump administration. But it is worthwhile to quickly review Trump’s trade actions thus far.

Most recently the Trump administration released its first two Executive Orders on trade on March 31st, 2017. One called for a plan to address the technical issue of bonding requirements in antidumping and countervailing duty cases. The other requested a joint report on trade deficits.

President Trump did withdraw from TPP negotiations. He has yet to start renegotiations of NAFTA. But his indications so far, by examining his correspondence with Congress, is that

they will address only minor aspects of the trade arrangement. His tax proposals for tax on imports and subsidies for exports are not going anywhere. They clearly violate WTO rules.

Of course, nothing has yet been done concerning the WTO itself or China. The administration is still reviewing the question of the Yuan valuation. The first meeting with President Xi is still a few days away. My bet is that not much will happen. We may even be surprised on the upside.

My conclusions — What has been produced is very minimalistic. In fact, no policies at all have been enunciated let alone implemented. His USTR hasn't even been confirmed.

My take — trade is deeply embedded in the economy throughout the United States, in its states, counties, and cities. The constraints in the U.S. political system — legal, political, judicial, and business — are now belatedly creating a reality check that is blowing away demagogic tweets.

## **Trump, Courts and National Security.**

Posted on February 12, 2017

‘Deference’ doesn’t mean ‘unreviewable’ even as to national security claims, Mr. President. Really very basic civics.

The lead editorial in today’s *Wall Street Journal* is wrong. S.Ct. cases, *Youngstown* and *Boumediene*, fully support the 9th Cir decision against Trump. This is really basic judicial review to ensure compliance with the U.S. Constitution, both as to separation of powers and individual rights. This includes review of presidential actions involving foreign policy & national security. Even the Commander-in-Chief power is limited by the Constitution. The conservative Bush Supreme Court upheld the rights of non-American detainees being held in Guantanamo after 9-11. This is the hallmark of American ‘exceptionalism.’

## **Trump and WTO— The Coming Litigation, Sooner than Later.**

Posted on January 26, 2017

On President Trump’s first full workday at the White House he signed an executive memorandum requesting the United States Trade Representative to formally withdraw the United States from the Trans-Pacific Partnership and its negotiations. This was primarily a symbolic move, since the TPP had no chance of Congressional approval.

Trump’s actions and pronouncements raise the question what is the future of U.S. 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 Congress to take a range of actions. He will most certainly attempt to enforce some of his views through the WTO especially concerning China.

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.”

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.

The trade battle within the administration will not be a simple one; it will undoubtedly be messy.

## **Trump Trade Policy — The Upcoming U.S. – China Trade Fight in the WTO .....**

Posted on January 13, 2017

China and U.S. litigation in the WTO will almost immediately be ground zero for the new Trump administration’s aggressive global trade policy. This is clearly evidenced by the appointment of his new trade team. These appointments include a harsh China trade critic and a leading protectionist trade lawyer.

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

What’s the future of trade relations with China under the new Trump administration? 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 Congress to take a range of actions. He will most certainly attempt to enforce some of his views through the WTO. Whether he will be successful is another story. Whether he will accept adverse decisions is also another matter. The trade battle within the administration will not be a simple one. It will undoubtedly be messy. There are many players involved.

On top of all this, we have a changing global environment in terms of declining support for global engagement and the rise of new trading powers. Whether Trump decides to terminate agreements unilaterally will depend on whether he transcends his narrow view of trade and grows in office.

## **Trump and Trade — Does his business background lead to bad trade policy?**

Posted on December 26, 2016

Trade is about the only international issue Trump has really cared about consistently since his Japan bashing of the 1980s. His business school background at Wharton and then his experience running the Trump Organization have informed his view of trade as a zero-sum transaction. There are only winners and losers.

Now Trump has appointed the little-known business school professor Peter Navarro as his alt- ego on China bashing. What is this all about? How do these two seminal events, the Wharton School and his real estate experience, lead to this devastating appointment and Trump's mindset?

Once you pose the question like this the answer is simple.

Business schools then and now rarely teach much about global trade. What they do is discuss international business. And this is discussed as transactions from the corporate perspective. That is the bottom line. Do you make money or don't you.

Business school courses may be called multinational business, corporate strategy or the like. But business schools do not teach trade in a contextual situation. This is not within their core agenda. They never discuss trade in the context of foreign policy, national interest, national security, or geopolitics.

What about Trump's global business experience?

Well that just enforces his worldview of trade as being a bottom line business transaction. Do you make money or not. How do you negotiate? Well, there is simply no real difference between real estate negotiations from diplomatic negotiations. Just bluster and bully. That's all you need to do. Well that just won't work very well in a multipolar world where there are a world of variables at work and many powerful players.

So what's the bottom line for US trade relations under Trump? Not good.

China, the EU, Japan, Korea, India or even Russia are not buying or selling real estate, cross-licensing trademarks or refinancing hotels and casinos. These countries have long histories with many interests and great deal of experience over many years. The world of power politics is different from the world of New York real estate deals.

My conclusion. The immediate future is not going to be pretty. We'll see. Just buckle up.

## **New WTO Case by China --- Response to Trump's Insults?**

Posted on December 14, 2016

Trump threatens a great upheaval in foreign policy and global trade relations. Especially in U.S. trade relations with China. But is it somewhat consistent with the Obama's tough enforcement policy against China in the WTO's dispute resolution system.

Over the last 15 years, since China's accession to the WTO, U.S-China trade relations have largely been conducted within a framework of international law rather than open trade warfare. One of the great achievements of the past 15 years has been the role of multilateral rules in containing arguments. China, whose leaders initially seemed to regard being sued in the WTO as a personal affront, has come to recognize international litigation as a routine way of doing business.

Then what happened recently since Trump's election?

On December 10<sup>th</sup> the day before the 15<sup>th</sup> anniversary of China's accession to the WTO, the Obama administration decided it was *not* going to grant China 'market-economy status.' Most legal experts believe this was intended to be automatic on December 11<sup>th</sup>, 2016. Fifteen years from the date of the Accession Protocol of 2001 under Article 15(d).

Two days later, one day after the 15<sup>th</sup> anniversary, Beijing marked the anniversary by filing a new WTO case against the United States and Europe. China alleged that they failed to treat it as a market economy and therefore not utilizing a more favorable calculation of anti-dumping duties on Chinese goods. Since they would continue to use third-country cost (and not China's lower actual costs). Of course, which allows for a finding of a larger margin of dumping and consequently a larger antidumping duty.

The Obama administration two days later filed a new case against China contesting its agricultural duties relying on 'tariff rate quotas' mechanism' (TRQ). This continues a hardline approach by the Obama administration against China in the WTO dispute resolution system in which it has filed 15 cases. This has been a very tough enforcement approach since his inauguration. More aggressive than an also tough Bush administrations.

But now the question arises why China's immediate response to this case and not all the other times during the Bush – Obama years?

My take ..... It was probably Trump's consistent threats (trade, tariffs, TPP, Taiwan, South China Sea) against China. If it wasn't for them China probably would have waited until dumping or subsidy cases were actually determined and then ask for WTO review. That has been the general practice.

But of course China has the option to go directly to the WTO when a country has restrictive legislation or other practices or policies in place. It doesn't have to wait until a case is actually decided. It's China's option. And China decided to take a rather unusual and aggressive step.

Why?

My guess is to send a broader message to the U.S. '*Don't mess with us. If you want confrontation then you get confrontation.*' This is unfortunate for both countries. A new administration allows a natural inflection point to allow for new diplomatic initiative to allow peaceful resolution of disputes. Not more aggressive actions. At least not usually.

We'll see how this plays out.

But this is not a good beginning to U.S. – China trade or diplomatic relations in the Trump era.

## **CyberBulling, Real Estate Scrooge — Global Affairs & National Security — The Next Four Years.**

Posted on December 9, 2016

Trump has engaged in cyber shaming and this should be held up as a model. As a model for all school children of what *never* to do.

Trump's soul is one of the archetype scrooge in real estate. Bluster, don't pay your contractors, nor investors, and then file bankruptcy while deducting other people's losses resulting in no tax liability for years.

How will this play out in the world of diplomacy, international affairs and National Security?

There is no doubt in my mind it will be disastrous. Why?

For example, real estate negotiations to purchase property is essentially a *zero sum game*. As a buyer you get a lower purchase price and the seller gets less. You save money, the seller loses money. That *winner-take-all approach* is not going to work in a world where there are

so many variables to consider. There is a multitude of national interests and power positions to assess as well as a global networking effect that magnifies unilateral actions.

What about bluster and fear?

I can tell you that historically even if a country gets its way initially as to an international agreement, as soon as circumstances change, the agreement will be repudiated and thrown out. Such *unequal agreements* are often the seeds of a newer and fiercer confrontation.

Just look at what happened after the Versailles Peace Treaty that ended World War One. This treaty led in great part to the rise of the Nazis in Germany, to the overthrow of the Weimar Republic, and in a few short years to World War II. China is still unhappy about a wide-range of colonial era and other agreements imposed upon it from the Indian border to the Russian border.

By the way Hitler was democratically elected and then appointed as Chancellor of Germany. To a great extent this resulted from the immense resentment to the grossly one-sided peace treaty and grave economic stress caused by a U.S.-inspired trade war and the Great Depression.

What's my conclusion concerning Trump's foreign policy over the next four years? Buckle up. We're in for a ride. It may not be good.

## **Trump Trade and State Economic Development— Chaos Ahead?**

Posted on December 2, 2016

The founding of the Virginia Colony in the New World by the Virginia Company reflected the British Empire's notion that enlightenment would come through trade. By the post-World War II era this notion was unequivocally adopted by U.S. policymakers.

This belief in the linkage between trade and the spread of liberal values has been the cornerstone of U.S. foreign policy for over 75 years. It was the underpinning of the architecture of the United States' international trade and investment rules-based system that has evolved since the adoption of the Bretton Woods system, the General Agreement on Tariffs and Trade and subsequently, by the World Trade Organization (WTO). It resulted in the historical growth of liberal democracy in the United States and elsewhere globally. Donald Trump was elected, in large part, by those who now felt marginalized by globalization. Globalization and the liberal economic order is now under challenge by him and his trade policy pronouncements.

### .... Trump and Trade Policy.

The election of Donald Trump as a protectionist president proclaiming “America First” jeopardizes this post-war historical development of a firmly grounded international political system. He won the election by appealing to those harmed by globalization and his war against globalization. He lost the nation’s global cities to rural voters and the Rust Belt. Now state, national, and international economic development is at stake.

The recent failure of Trans-Pacific Partnership (TPP) to even come up for a vote in Congress and Trump’s recent vow to walk away from the TPP his first day in office[ not only weakens the economic leadership of the U.S., but also the national security and foreign policy of the U.S. in Asia and the larger global system. This weaponizing of trade ignores the strategic role of global trade in U.S. diplomacy. It represents a new age of deglobalization. Most of all, it provides openings for other countries, namely China, to compete more effectively geopolitically and economically against the U.S. and to write newer rules governing global trade. It puts US firms and industries at significant risk.

The TPP would have reduced some 18,000 tariffs for U.S. firms, strengthen intellectual property rights, impose restrictions on government-owned corporations, provide other advantages and protections for U.S. firms abroad.

Indeed, China’s President Xi Jinping declared at the recent Asian-Pacific Economic Cooperation summit in Peru, given this new “hinge moment” in China-U.S. relationship, China is now the emerging leader in international commerce. That China will be broadening its own Asian regional trade arrangement, the Regional Comprehensive Economic Partnership, with fewer disciplines on trade than TPP, with newer members, perhaps including Singapore, Vietnam, Japan and Australia, among others.

Of course, Trump also has his sights on NAFTA and the WTO. Both those organizations contain withdrawal provisions. However, under the U.S. Constitution presidents have the authority to terminate international agreements at any time whether or not this would violate U.S. international legal obligations. If this would happen global legal matters would become much worse.

### .... Virginia in the Global Trading System.

Before concluding, here a few comments concerning the significance of global trade for Virginia.

First and foremost global trade is the critical core of Governor McAuliffe’s focus on developing a “New Virginia Economy.” His administration has conducted over 20 foreign trade missions to promote Virginia exports and foreign direct investment into the Commonwealth. Virginia has trade and related offices throughout the world. Governor

**McAuliffe’s trade policies can be traced directly back to those of Governor Baliles up through Governors Warner, Kaine and McDonnell.**

**Here are some basic facts concerning global trade and economic development that the Virginia Economic Development Partnership provides on its websites.**

- **In the last five years foreign companies have created more than 15,000 new jobs and \$4.6 billion in direct investment in the Commonwealth.**
- **More than 700 foreign companies have operating subsidiaries or affiliates within Virginia.**
- **Small and midsize companies can become major competitors through exporting, especially with the utilization of the Internet, websites, and digital ecommerce.**
- **95% of consumer demand is outside of the U.S.**
- **Companies have increased 8-14% productivity due to export sales and competition.**
- **60% of small and midsize companies do business in more than six countries.**
- **Workers at companies that export earn 15% more than workers at domestic-only companies.**

**Here are some additional facts provided by the Port of Virginia on its website.**

- **374,000 jobs, or 9.4% of Virginia resident workforce, work in port-related jobs.**
- **Over \$1.6 billion of total merchandise is received in the Port of Virginia’s Foreign Trade Zone.**
- **The Port of Virginia’s Foreign Trade Zone produces over \$430 million in exports annually.**
- **\$1.2 billion is invested in port-related economic development.**
- **The Virginia Inland Port has generated investments totaling more than \$620 million.**

**While there is a recent report[ by the Joint Legislative Audit and Review Commission questioning efficacy of specific foreign investment activities and state economic incentives there is overall realization that export trade activities have been outstanding and are**

essential to the well-being of Virginia in today's global economy. Indeed, the General Assembly authorized the establishment of the new Virginia World Trade Corporation to promote exports and global trade that is to commence operation in 2017. Thus, the General Assembly is attempting to keep Virginia in the forefront of global activities, ahead of many other states competing in the global system.

While the focus on global trade has almost always been on the role of the federal government, it is states that have the principal responsibility of providing for the well-being of its citizens. Virginia has been very aggressive in promoting trade and investment for many years as a means of economic development in all areas of the Commonwealth, from the most rural to the most urbanized.

But Virginia and other states are obviously subject to all of the crosswinds of laws, politics, and policies emanating from Washington. From trade agreements to trade sanctions and to reactions by foreign governments. It is the Congress that has exclusive authority to regulate international commerce and the federal government that has exclusive authority over states concerning trade under the Supremacy Clause (Article VI) of the U.S. Constitution. Presidents have great delegated authority and some inherent authority in trade as part of their general foreign affairs powers. Nevertheless, states have a very real and significant role in engaging in global trade.[12] This involves export and investment promotion activities as well as issues of state taxation.[13] A recent example is Virginia concluding a sister-state understanding on cyber development with Victoria, Australia.

Put very simply, the failure by the new administration in Washington, D.C., to protect and promote global commerce would have more than a trickle-down effect on Virginia and other states. From perhaps higher foreign tariffs to outright restrictions on new foreign investment. This is terrible for state economies still struggling from the 2008 financial crisis and consistent budgetary restrictions from Washington that impact Virginia from its defense industries to high-tech firms to agricultural exports and to almost everything else.

Keep in mind that of all developed countries the United States has one of the lowest level of engagement with global trade as evidenced by the low ratio of foreign trade to overall GDP – 28% in 2015[15] and U.S. trade accounts for only 11% of global trade volumes. This should not be looked at as a problem but as an incentive to grow trade significantly.

Now returning to Trump's trade policies.

## CONCLUSION.

With respect to U.S. domestic policy over the past eight years, the United States has incomprehensibly failed to provide effective legislation and policies directly aimed at those left behind in this new era of hyper-globalization.

That was a terrible blunder, indeed. Instead of focusing on interest rates day after day the Congress and the President should have specifically targeted jobs. Those endangered by globalization, new global supply chains, technological developments in communications, robotics, digital commerce, among others. Unfortunately, we can't go back. We can't have a do-over. Trade is developing in many different ways regardless of trade policy.

But to formulate trade policies primarily to protect rural and unemployed manufacturing workers is a grave mistake. It is global cities and states connected to the global economy that are the drivers of economic development and global prosperity, such cities contribute 80% of global gross domestic product.

Many other countries are facing this same political dynamics and policy choices including the UK, France and Turkey, among others. This is what has been called the rise of *populist nationalism*. The rise of such corrosive nationalism led to nothing good in the 1930s, where it was nurtured by a mercantilist zero-sum view of global trade, unemployment, persecution of numerous populations, protectionism and extreme nationalism.

The challenge now is for the U.S. to put in place immediately a broad range of domestic policies regarding trade adjustment assistance, public and private reinvestment into infrastructure, and global tax reform to recapture the billions of offshore dollars being hoarded by U.S. multinationals.

Both federal and state governments, with a broad outward-looking mindset, need to aggressively engage collectively the global system. This entails having complimentary domestic social and economic policies ensuring a competitive home front.

Blustering away at globalization, walking away from the TPP, withdrawing from NAFTA or the WTO, and from leadership in the global trading system are not good for developing viable U.S. policies for trade, geostrategic relations or promoting state economic development.

It's certainly not too late to start over.

## **Trump & TPP Withdrawal — Now What? — Domestic Crumps & Global Tsunamis? Most Likely.**

Posted on November 21, 2016

Trump now promises to withdraw from the TPP on his first day in office. Great. This is the start of Protectionism Part II — Continuation from the Depression and Smoot-Hawley of the 1930s. This New Protectionism 2.0 is a disgrace for U.S. diplomacy and trade policy.

It's contrary to U.S. national interests, geopolitical strategy in Asia, and global trade relations generally. It also raises serious national security considerations and those of global competitiveness of the U.S. and its firms. Of course fostering higher prices for goods purchased by every American.

Clearly this withdrawal plays into China's hands. Helping them to trade more within their own region (the Regional Comprehensive Economic Partnership or the RCEP). Helping China to develop their own trading bloc with our friends. It also opens the gates to allowing China to write the new rules-of-the road for global trade and its newer issues.

What was Trump thinking? Really! Probably not much at all. Real estate deals are not the same as diplomacy. They are not zero sum games that maximizes profits and cash flow for one party and commissions to a third party. Obviously, withdrawal from TPP is throwing a bread crumb to the Rust Belt and to its unemployed workers with outdated skills.

The problem is not trade but technology and long-term demographic changes, among others.. It is also the failure of public and corporate policy to reinvest funds into infrastructure of all types and thus create widespread employment. This would help those suffering from the harshness of globalization, technological changes as well as demographic changes.

Withdrawal from TPP is not going to help anyone. It will only cause an avalanche of international political and economic tsunamis for the U.S. Just wait.

## **Trump and Trade — Back to the Future?**

Posted on November 12, 2016

The founding of the Virginia colonies in the New World by the Virginia Company reflected the notion of the British Empire that through trade would come enlightenment. By the post-war era this was unequivocally adopted by U.S. policymakers.

This belief in the linkage between trade and the spread of liberal values has been the cornerstone of U.S. foreign policy for over 75 years. It was the underpinning of the U.S. architecture of a rules-based system of international trade and investment that has evolved since the adoption of the Bretton Woods system, the GATT and subsequently by the WTO. It resulted in historical U.S. and global growth and of liberal democracy.

Now what?

The election of Donald Trump as a protectionist president proclaiming “America First” jeopardizes this post-war historical development of a firmly grounded international political system. But also state, national, and international economic development is at stake.

Today’s failure of TPP to even come up for a vote in Congress, not only impairs the economic leadership of the U.S., but also the national security and foreign policy of the US. In both Asia and the larger global system. It provides openings for other countries to compete more effectively against the US politically and economically. It puts US firms and industries at risk.

The incomprehensible failure of US domestic policy over the last eight years was its failure to provide effective legislation and policies directly aimed at those left behind in this new era of hyper-globalization.

Yes. That was a terrible blunder. Instead of focusing on interest rates day-after-day we should have specifically targeted jobs. Period. Too bad. We can’t go back. No, we can’t have a do over.

By the way many other countries are facing this same failure including the UK, France and Turkey, among others. This is what has been called the rise of ‘populist nationalism.’ It led to nothing good in the 1930s where it was nurtured by unemployment, persecution of populations, protectionism and extreme nationalism.

But the challenge is now for the U.S. to put in place immediately a broad range of domestic policies of trade adjustment assistance, public and private reinvestment into infrastructure, and global tax reform to recapture the billions of offshore dollars being hoarded by US multinationals, among others. This is a start. To do otherwise is crack thinking that would unfortunately reflect our national opioid scourge. One scourge is enough.

## **Trade Begets More Trade .... Yes, But More is Needed.**

Posted on March 26, 2016

Fred Smith, CEO of FedEx, in an outstanding piece in today's Wall Street Journal gives a ringing repudiation of today's trade critics. He reviews the history of world trade and global commerce from the Great Depression to today's absurd Presidential primaries. Here are some of his highlights.

- **President Roosevelt and his Secretary of State Cordell Hull vision was that liberalized global trade would lead to greater peaceful relations and international cooperation.**
- **Technological progress in telecommunications and transportation revolutionized global trade in the 1960s and 1970s.**
- **The GATT/WTO trade rounds liberalized trade through multiple trade rounds. While they did not cover sea trade or aviation historical developments occurred in those sectors including containerization and 'Open Skies.'**
- **Deregulation and other developments (such as Open Skies) made for fantastic explosion of international travel that fed into even greater international trade and investment.**
- **The growth of computing power and informational technology have transformed much of trade and created entirely new forms of electronic commerce.**
- **There is an innate desire to travel and trade.**
- **History shows trade made easy begets more trade, more jobs and more prosperity.**

I would add that the harshness of globalization spawns harsh criticism. But better trade enforcement and upgraded trade adjustment assistance can help address many legitimate concerns. Other policies favoring innovation, skills training and sensible tax policies are part of the remedy. The remedy does not include populist inspired protectionism. But trade does beget more trade. That's good for all of us.

## **China & U.S. Jobs — Some Facts — And Trump.**

Posted on March 25, 2016

Three really important facts concerning trade surplus, direct investment and exports were discussed by the *Financial Times* yesterday. They relate directly to the hotly debated topic of U.S. – China trade relations and jobs. Any lessons here for Donald Trump?

- *The U.S. has not had a total trade surplus since 1975 and only a minimal one since before 1961. This is long before China emerged as a super economy. (Chart below) And the U.S. has had a surplus in services since 1970.*
- *Foreign direct investment in the U.S. and ‘reshoring’ has created more than 250,000 new jobs in the U.S. last year (2015). (Chart below) A huge increase since 2007. Much of this has actually been because of Chinese foreign investment.*
- *U.S. exports to China from 2009-2014 supported over 350,000 new jobs. (Chart below) China is a gigantic domestic market for consumer and capital goods. And it’s growing.*

What’s my conclusion?

Simple. Understanding *U.S. – China trade relations* is a lot more nuanced than we hear during this political season. It also involves understanding some very basic facts about global trade. The U.S is dependent on a viable and vibrant global trading system. So are American states, cities, counties and U.S. workers. Needless to say, ‘*Trump the Tradester,*’ who is from the greatest global city in the world and center of global commerce, is glaringly off the mark.

## Trump, Trade and Foreign Policy — Free Fact Zone (FFZ).

Posted on March 18, 2016

*‘The Donald’ aka ‘The Trade Trickster’* disparages current trade agreements, ongoing trade negotiations, globalization, US trade policy, U.S foreign policy, and US national security policy. Hope this doesn’t reflect his education at the Wharton School which he constantly reminds us of.

I’ve written before as to his wildly delusional views on these issues. But here are some additional thoughts:

- *Protectionism undermines the future growth of the U.S.*
- *Much of increased foreign competitiveness is due to innovation in production and smart machines.*
- *Protectionism is an irrelevant remedy for increased competitiveness of foreign firms.*
- *The real focus should be on structural upgrades in the political – economic system in the U.S. This ecosystem needs to have both greater public investment and greater private investment and innovation.*
- *These upgrades includes changes to trade adjustment assistance legislation, skills training, and retraining at all levels. This requires greater cooperation between governments of all levels (federal, state and local) and firms of all sizes.*
- *Many US multinationals are merely piling up great amounts of dollars in offshore accounts. They are not reinvesting these trillions of dollars into the US economy or workplace.*

- To boot these firms *don't pay either US or foreign taxes* on these funds. Some of our most highly successful firms, in particular technology and pharmaceutical firms, are guilty of this.
- Chaotic policies enunciated by Trump would call into question the role of US leadership in the global system.
- Trump's call for renewed waterboarding and killing of families of terrorists would wreak havoc on the US military and US leadership in the world.
- It's already clear many of our closest allies are mocking The Donald as being out-of-touch with the political and economic global system today.

My conclusion is that while Trump may know something about real estate and hotels, although even that has been called into question for a long time, the world is different from the world of real estate deals in New York or the world he grew up into in Queens in the 1950s and 1960s. Which he doesn't seem to have transcended and to be stuck in. Not even the Wharton School could get him to understand reality and how it changes.

For The Donald trade policy, foreign policy and national security policy are fact free zones informed only by his own inner being. This is not good for anyone not even him.

## National Security & Chinese Investment.

Posted on March 17, 2016

The most recent data from CFIUS concerning Chinese investment in the U.S. discloses the following:

- China had the most "*covered transactions*" (mergers and direct investments) for the latest data period (2014) that is reported by CFIUS in its new annual report released in 2016 — greater than the U.K., Canada, Germany, Netherlands or Japan.
- 1/4th of all completed Chinese transactions were mergers and other acquisitions.
- There were twice as many completed transactions in 2004 than the prior year.

Simply put this data continues the narrative that Chinese investment into the US. is huge and growing. This is continuing in 2016 with massive new investments as part of China's outward investment strategy. Chinese corporations want to diversify away from domestic investment in a slowing China. This can be seen by such investments into U.S. real estate including hotel chains and its corporations.

I conclude from the above data that such investment, even if reviewed for national security implications, are extremely important for continuing merger deals and health of the U.S. economy. This despite the fact that there is growing popular resentment of such deals and investments. Not unlike the earlier period of Japanese investment into the U.S.

The national security reviews or the threat of them have not slowed the investment and commercial drivers of such investment. My take is that this is good for the U.S. economy and economic development in the U.S. generally. It provides new capital and new global markets for U.S. firms.

## Protectionism & Presidential Powers — Are Trade Powers Limited?

Posted on March 10, 2016

Yes, *Presidential trade powers* are very broad. But they are *delegated powers* by the Congress. They are limited by the U.S. Constitution Article 1, Section 8, Clause 3. This gives *exclusive authority* to the Congress to regulate global trade. What Congress gives it can take back.

In addition to the Constitution's restriction on the Presidential powers in foreign trade, U.S. actions are also significantly limited by our membership in the World Trade Organization.

Specifically, the *WTO's dispute resolution process* is aimed at restricting unilateral trade restrictions. When such national actions are reviewed they can be found as inconsistent with our trade obligations. If not removed multilateral trade sanctions by the WTO may be authorized and imposed by a member state who brought the action in the WTO. The U.S., as almost all other countries, have an excellent record of complying with the international review over the last 20 years.

Here are some additional thoughts:

- *But for the WTO review of protectionist measures* of the last 20 years, and potential for such review, such measures would have certainly been more extensive. They certainly would have restricted global trade growth.
- *Creating protectionist walls around trade is self-defeating.*
- *The growing protectionist sentiment* within the U.S. and abroad is disconcerting.
- *But the answer to globalization and technologically-driven trade* and investment is better enmeshing yourself in the global ecosystem. If you don't you may never work again. This is essentially a question of developing a *global mindset and relevant skills*. Constant dismay and dissent is not going to help. It's also self-defeating
- *Better trade enforcement* of existing rules and international obligations is part of the answer. The Congress provided for this, in part, in its recent legislation (*Trade Enforcement Act 2015*). This new legislation puts trade enforcement leadership

squarely within the USTR. The U.S. has been very effective in bringing enforcement actions in the WTO. It has been the most aggressive.

- On the *state and federal level policies* should be enacted to help particularly in *export promotion and increasing foreign direct investment*. 90% of the world's consumers live outside of the United States. Foreign operations in a state drives greater exports. State actions have a great influence in promoting trade and economic development. They are indispensable.
- In addition *universities need to develop programs focusing on the global system and develop the mindset and skills* to participate in it. This should be a top priority. This is especially true of public universities that live off state funding and are obligated to residents and state taxpayers.

## Trump & Trade Wars — No Doubt About it.

Posted on March 2, 2016

— BACK TO THE FUTURE — Herbert Hoover & Trade Wars — No Doubt About it.

Trump *aka* “*Trump the Trade Mister*” poses a huge risk to U.S. trade and economic growth. He would have at his disposal huge delegated trade powers under existing legislation. He could cause great damage to the U.S. in its global trade relations and its domestic economy generally. No doubt about it. The potential for wrongdoing is tremendous.

Here are a several points made by recent editorials with a few by me:

- *The pace of global economic growth continues to tumble* and this is bad for U.S. growth.
- *Trade global growth of below 2% is now well below GDP* for the first time since 9/11.
- *The paradox of trade politics* is when things are bad people take it out on trade. It is clear many have turned against globalization and the liberal economic order as a result of popular frustration. Those benefiting from trade are always more diffused than those injured by it.
- It was the *Republican President Herbert Hoover who signed Smoot-Hawley* in 1930 that escalated the stock market crash and slowdown into a global trade war and the Great Depression. This of course led directly to World War II.
- It wasn't until FDR and his Secretary of State Cordell Hull slowly rebuilt the global trading system pursuant to the *Congressional Reciprocal Trade Agreement Act of 1934* that eventually led to the Bretton-Woods system, GATT and now the WTO.
- Congress delegated under this act (RTAA) huge *unilateral powers* to the President. These powers are still in place and form the basis of executive actions in U.S. trade relations today. This is the way we carry on our global trade relations.
- Congress has exclusive authority to regulate trade under *Article 1, Section 8, Clause 3 of the U.S. Constitution*. The President has delegated authority by Congress today and this is at the disposal of a new President. Although at times this can be challenged in the federal courts and in the WTO.

- *Four trade remedy tools, among others, have been delegated to the President including Super 301 ('Retaliation'), Section 232 (National Security), Section 201 ('Safeguards') and 'Currency Manipulation.'* They all provide authority to unilaterally impose trade restrictions may in fact be considered invalid under our international obligations.
- These provisions are in addition to a host of other statutes concerning trade and investment that can hamper global trade relations. Such as *CFIUS and its national security reviews* of foreign investment.
- Needless to say, the President has tremendous powers to *terminate trade negotiations* (TPP, TTIP), trade agreements, bilateral, regional and multilateral ones. This may violate our international obligations but such treaty termination is within the unilateral powers of the President and is binding as domestic law.

So what's the bottom line?

Trump has no understanding of international economic history. This despite the fact that he went to Wharton, which he constantly reminds us of, and of which I'm sure Wharton would like to forget.

Unfortunately, Trump would have at his disposal, as President today, powerful unilateral measures authorized by Congress that can poison our trade relations and send us back to the future.

## **Non-Compliance & Retaliation in the WTO — What's the Data? — Any Surprises?**

Posted on February 23, 2016

In the recent report of the Dispute Resolution Body of the WTO, in its annex entitled "*Overview of the State of Play*," there is a chart listing cases brought under Article 22.2 of the *Dispute Settlement Understanding*. It enumerates cases that resulted in WTO authorization of 'retaliation.' This is important and it is unfortunate this data is buried so deep. What is shown by the data?

Out of almost 500 cases filed in the first 20 years of the WTO (1995-2015) only 10 cases resulted in authorization by the WTO of retaliation. Not very many.

Actually, it is even less than you see. One case was brought by different parties. Technically they were counted as two separate cases. In fact, they really aren't. Another case authorization was given twice. If you combine those cases and consider them as one you have only 8 cases. What gets even more interesting is that a number of those cases where authorization was given, *retaliation was never implemented*.

Which countries had retaliation authorized against it? The U.S. leads with 4 such cases and the EU with 2 such cases. (Canada and Brazil with one each in the same case.)

So where does that leave us as to the *question of non-compliance and retaliation of WTO decisions?*

Well the answer is pretty clear. Out of 500 cases filed (*request for consultations*) only 8 cases resulted in authorization for retaliation, and less were even implemented. While this is not the whole story it does indicate a pretty good rate of compliance. And not unexpectedly it's the U.S. and the EU who bore the brunt of retaliation. And in these cases it's those two countries that requested such authorization against each other.

But this makes sense. The volume of trade between the U.S. and the EU is huge. As trade flows increase disputes increase. That's only natural. It is not the absence of disputes that characterizes a legal system. But it's the way they are resolved. The WTO has a good story to tell about resolving global trade disputes and having the offending measures lifted. In fact, an excellent story to tell.

## **US – CHINA LITIGATION IN THE WTO 2001 - 2014**

**by Stuart S. Malawer**

### **INTRODUCTION**

**What does the history of WTO litigation disclose concerning China's role in this dispute-resolution system and what does it say about US policies?**

**My approach is to examine litigation data provided by the WTO and the United States Trade Representative (USTR) concerning the WTO dispute resolution system: generally from its inception in 1995; the role of the United States in the dispute-resolution system since 1995; the activity of the Bush and Obama administrations in it from 2001 - 2013; China's record in the WTO dispute resolution system since 2001; and generally recent activities in it for last year and up through July 2013.**

**A series of charts with short explanatory passages best illustrates this story.**

**My specific conclusions are straightforward. The dispute-resolution system is widely used by many countries, developed and developing; the US has been the most active country in it, The US focus in it has increasingly been on China, Chinese litigation involving the US is the focus of its litigation in the WTO, and the pace of WTO litigation generally has now picked up even more in the WTO.**

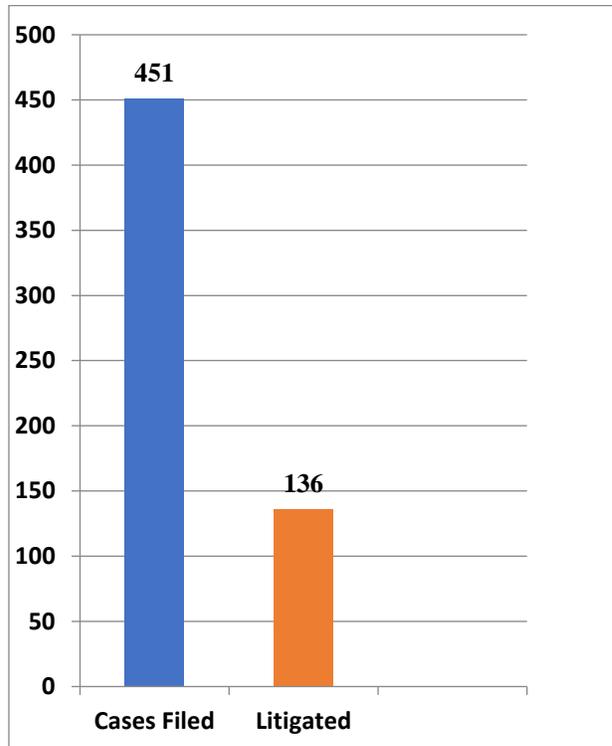
**This review of US - China litigation is not a narrative of deadly, winner-take-all conflict, but of competition reflecting trade flows and friction, which are addressed successfully in a rules-based system. Such legal conflict and diplomatic resolution is the way the system was intended to work by its architects, principally the United States.**

**My general conclusion is that, while the US and China are competitors, they have in fact channeled their major trade disputes into an international diplomatic and adjudicatory mechanism that evidences cooperation and management. This is beneficial to both parties generally, US - China trade relations, and global governance.**

### **WTO / DSU -- OVERVIEW**

**At the outset of any discussion of WTO litigation it is important to note that only about 1/3 of cases filed go through the entire WTO litigation system. (It is a bit higher for cases involving the United States.) The first stage in the litigation process is filing a request for consultation. This stage involves confidential diplomatic negotiations. Often cases are dropped in this stage, even when there may not have been an agreement to remove contested restrictions. Only after negotiations are not successful can the parties request a panel to be formed. The chart below covers January 1, 1995 through October 31, 2012. Of the 451 cases filed (request for consultations) only 136 led to fully litigated decisions.**

Chart 1 -- WTO Cases Filed & Litigated from January 1, 1995 - October 31, 2012.



Data Source: 2012 Annual Report of the DSB (Nov. 30, 2012) -- "Overview of State of Play of WTO Cases" by the Secretariat is amended to the DSB Report WT/DSB/58/Add.1

#### U.S IN THE WTO / DSU (1995 - 2012).

**The United States has been extremely active in the WTO litigation process.**

**In fact, it has been the most active member.<sup>1</sup> The United States was brought before the WTO more often than it brought cases, about 50% more often. As the complainant, it brought 99 cases, and was a respondent in 140. Of the 99 cases it brought, 42 went onto the litigation process, resulting in 38 wins and just 4 losses. Of the 140 cases brought against the United States it lost 50 but won a relatively high number of 17. In total the United States won just**

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<sup>1</sup> Of 451 filed cases (requesting consultation), the United States filed 239. Of the litigated 145 cases, the United States filed 109.

about as many cases as it lost (55 wins and 54 losses). It is interesting to note that a slightly higher number of cases went on to the full litigation process when it was the complainant than when it was the respondent.

Data Source for Charts 2 - 5" USTR, "Snapshot of US Cases in the WTO." (August 8, 2012).  
[http://www.ustr.gov/sites/default/files/Snapshot%20Aug8.fin\\_.pdf](http://www.ustr.gov/sites/default/files/Snapshot%20Aug8.fin_.pdf)

Chart 2 -- US as Complainant 1995 - 2012.

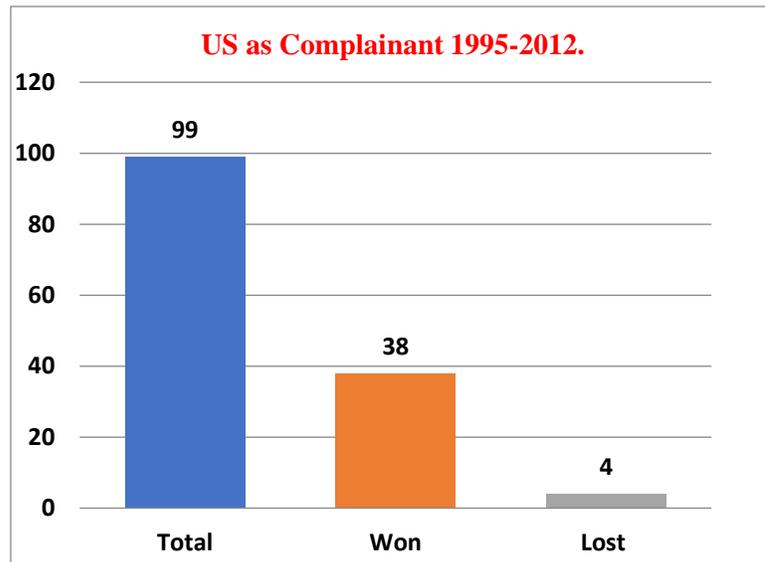
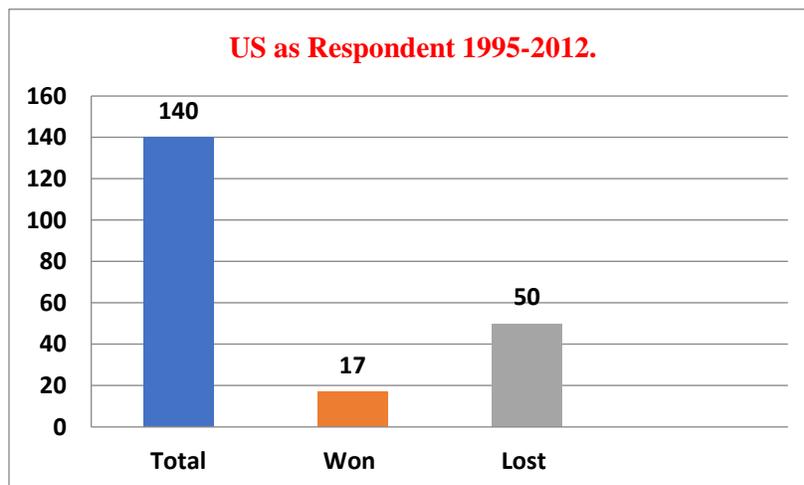
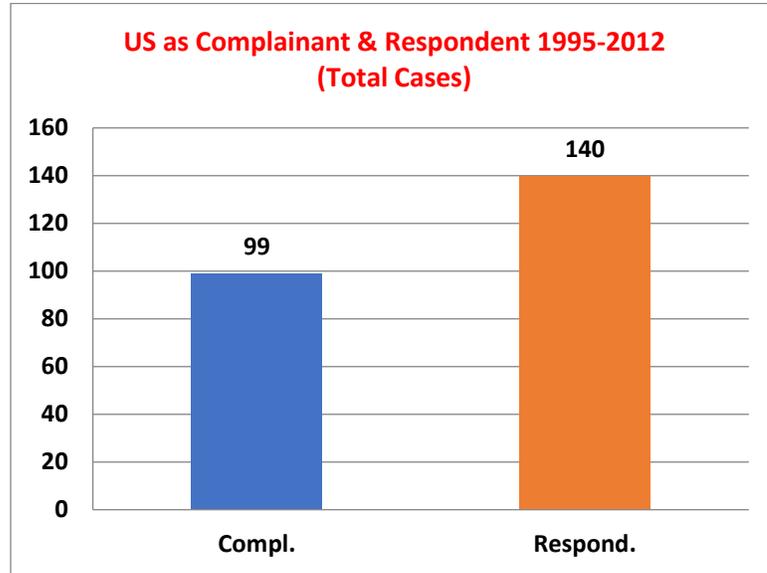


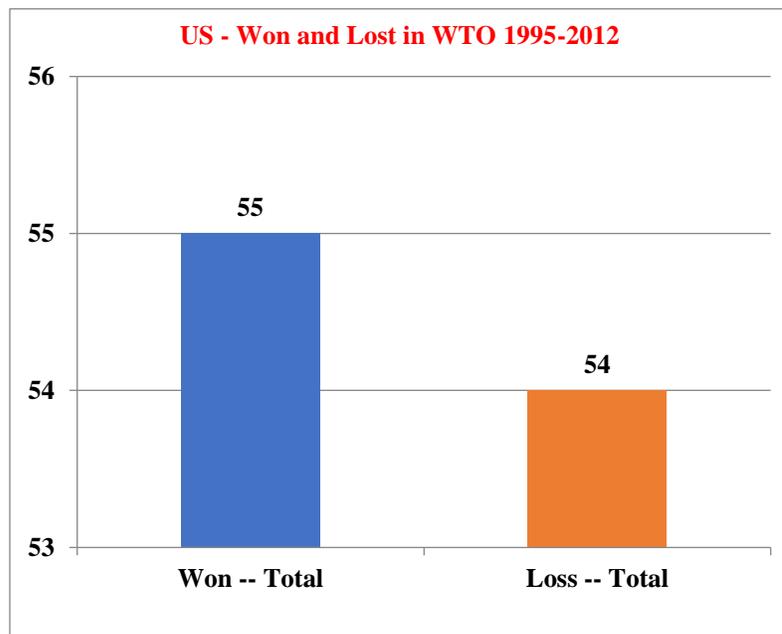
Chart 3 -- US as Respondent 1995 - 2012.



**Chart 4 -- US as Complainant and Respondent 1995 - 2012.**



**Chart 5 -- Total US Won / Lost as Complainant and Respondent 1995 - 2012.**



## BUSH / OBAMA IN THE WTO / DSU (2001 - 2013)

During the recent presidential election, President Obama made much of his record in bringing legal actions against China and of his aggressiveness in the WTO legal process generally as a means of enforcing global trade obligations.

It is instructive what the data evidences.

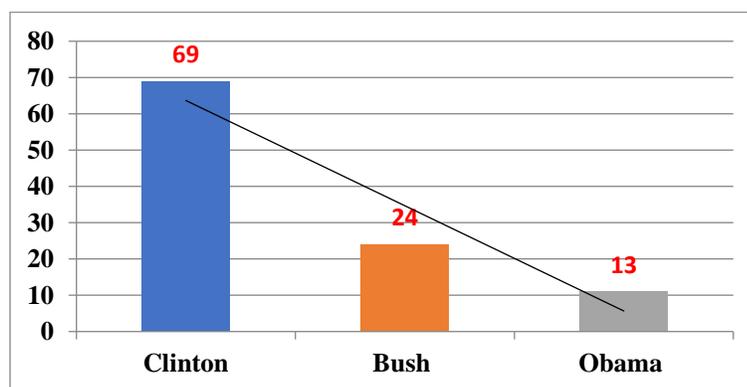
President Clinton actually brought a fair number of cases before the WTO than either President Bush or President Obama. Over eight years, President Clinton brought 69 cases, President Bush brought 24 cases, and in four years President Obama brought only 11 cases.

Comparing President Bush's eight years and President Obama's first four years, it is clear that President Obama has been more aggressive than his predecessor. President Obama brought 8 cases in four years to President Bush's 7 cases in 8 years.

But what is most interesting is that President Obama was much more focused on China in WTO litigation than President Bush. President Bush brought a total of 24 cases and only 7 were directed against China. President Obama brought 13 cases and 8 of them were against China. So it is fair to say that President Obama was very aggressive against China in his four years but I would add that he was hyper-focused on this litigation.

Data Source for Charts 6 - 8: WTO website, "Disputes from Countries / Territories." (June 25, 2013).  
[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)

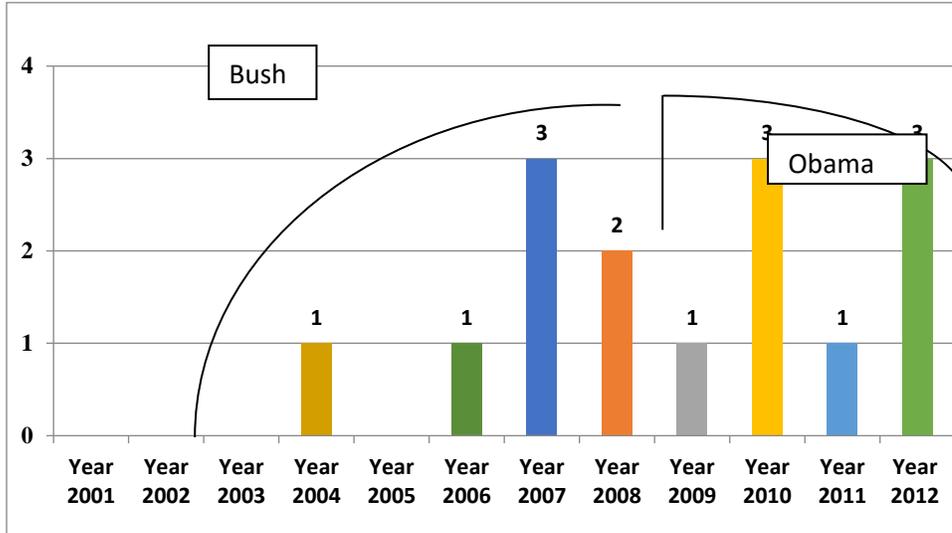
Chart 6 -- "Clinton, Bush and Obama -- Total WTO Cases Brought (Jan. 1993 - June 2013)."



**Chart 7 -- US Cases Against China -- Bush & Obama (2001 - June 2013)**

Bush (January 2001 - January 2009) ..... 7

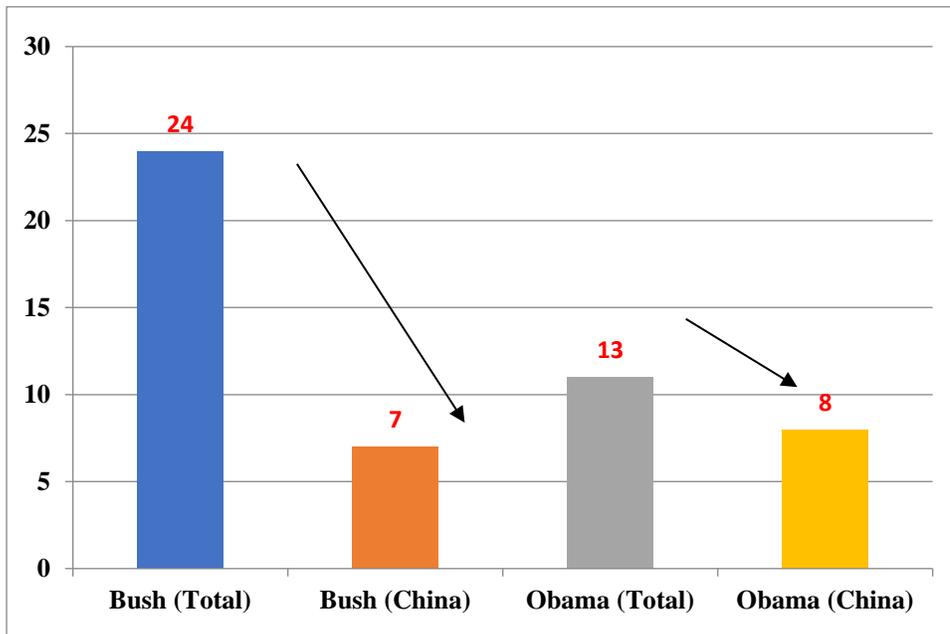
Obama (January 2009 - June 2013) ..... 8



**Chart 8 -- Total Cases and China Cases by Bush & Obama (2001 - June 2013)**

Bush ----- 24 Total WTO cases / 7 China cases brought

Obama – 13 Total WTO cases / 8 China cases brought



## CHINA IN THE WTO /DSU

From almost immediately after its accession to the WTO, in 2001, China has become extremely knowledgeable in the WTO litigation process. In fact, China filed a case against the United States before the United States filed its onslaught of cases against China.<sup>2</sup>

China and the US have been major adversaries in the WTO's litigation process, but China's litigation has also involved other member states, such as the EU and Japan.

China has brought 11 actions against WTO members. China brought 8 cases against the US and 3 against the EU. But China has been brought before the WTO more often than it has brought cases. China has been a respondent in 30 cases. The United States brought 15 cases and the EU brought 7, and 9 other cases have been filed, including those by Mexico and Japan. It should be noted that most of the cases brought against China were parallel actions to those filed by the US, but some were totally independent.

In the 11 cases brought by China, 5 have been decided concerning the US. China won 3, and the U.S prevailed as the respondent in 2 cases. These cases almost exclusively involved dumping and safeguard issues. The others are pending. In the 15 actions brought by the US against China, the US won all of the 6 decided cases. These cases involved, among other issues, intellectual property rights, dumping and export controls. Thus, in the 11 decided cases involving the US and China, the US won a total of 8 cases and China won 3.

One of the highest profile trade issues, the valuation of the yuan, has not been submitted by the Obama administration to the WTO. This, despite significant demands from Congress and the public. This is because, in my opinion, both the Bush and Obama administrations understand that the WTO agreements were never intended to cover this type of currency-exchange issue. Likewise, no cases have been filed by China against the US concerning US restrictions on Chinese direct investment into the US on the basis of national security or other concerns. The WTO's central mandate is trade and not finance. The WTO provides an architecture for global trade relations.

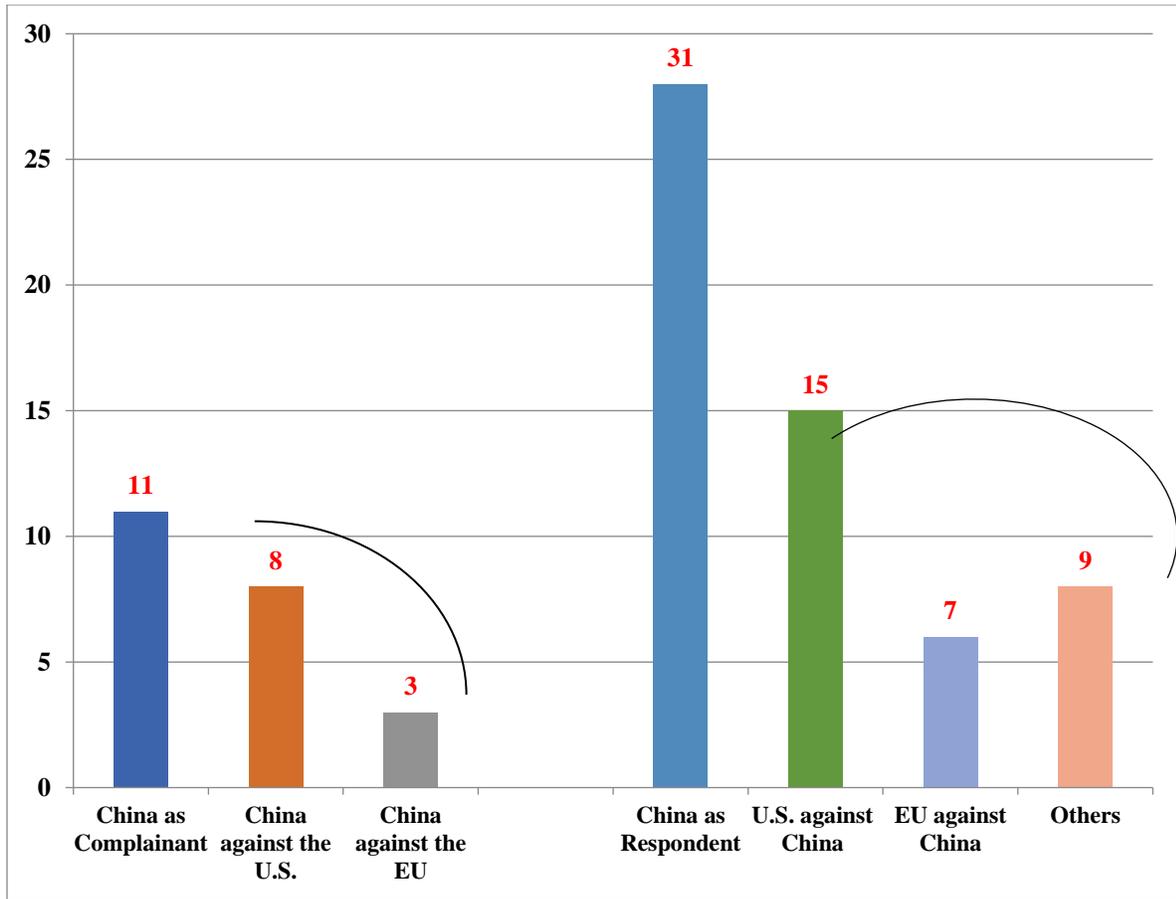
Data Source for Charts 9 - 11: WTO website, "Disputes from Countries / Territories." (June 25, 2013). [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)

Chart 9 -- China as a Complainant and Respondent (2001 - 2013)

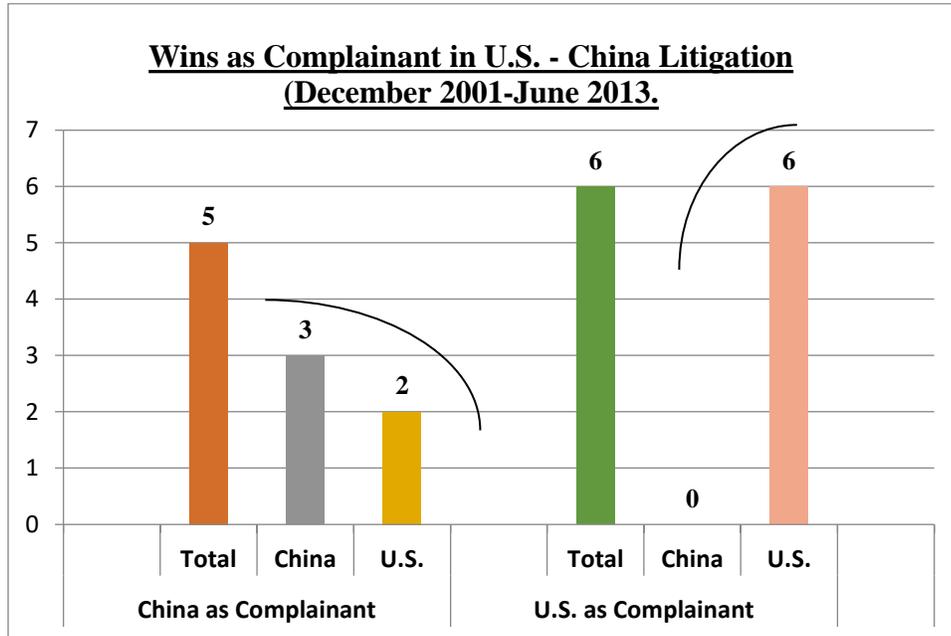
<b><u>China as Complainant</u></b>	<b>11</b>
China against the US	8
China against the EU	3
<b><u>China as Respondent</u></b>	<b>31</b>
US against China	15
EU against China	7
Others	9

<sup>2</sup> DS 252. *China v. US (US Safeguard Measures on China Steel Imports)* (March 26, 2002).

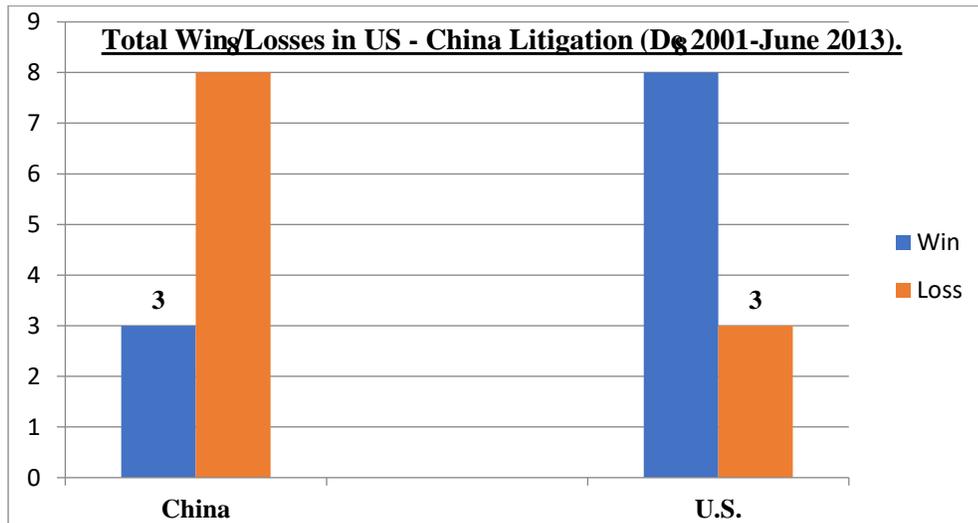
Trump and Trade – Policy and Law.



**Chart 10 -- Wins in US - China Litigation**



**Chart 11 -- Total Wins / Losses in US - China Litigation**



## WTO / DSU -- OVERVIEW

The Obama administration has not filed a new case against China since the 2012 election. To the contrary, both the EU<sup>3</sup> and Japan<sup>4</sup> have filed actions and China has filed an action against the EU<sup>5</sup>, among others.

What else can be said about China litigation in the WTO?

Some argue that such constant litigation is corrosive to the international trading system. For example, one commentator laments the fact that "(M)ore and more of the work of trade relations has shifted away from negotiations and towards litigation and arbitration."<sup>6</sup> Another argues, "The Obama administration has put enforcement of trade agreements at the heart of the approach toward China .... But winning in the courtroom is often only the start of the battle."<sup>7</sup>

However, others have taken a more nuanced approach. In fact an earlier skeptical commentator recently stated, "In fact, the situation is more complex, and less worrying, than it might appear .... (A) heartening amount of the litigation has actually been aimed at preventing arbitrary trade restrictions in the future .... Much is aimed at obtaining rulings preventing others using 'trade defense' instruments such as antidumping and countervailing duties as a politicized tool of arbitrary retaliation."<sup>8</sup>

I view US - China litigation in the WTO as validating the strength and critical importance of the WTO and its dispute-resolution system. China is now the second largest economy in the world. It is only expected that as trade flows increase so do disputes. The strength of the international system is not the absence of disputes but how they are resolved. The failure of the WTO to conclude the Doha round of negotiations and the formulation of new trade rules only highlights the growth and immense significance of the dispute-resolution system.

An examination of the cases involving China discloses that disputes arise between the major trading countries and they are submitted to the WTO and they are resolved, either by diplomatic negotiations in the consultation stage, or by the panel or Appellate Body in the litigation phase. No actions by either country have been filed under Article 22 of the Dispute Resolution Understanding (DSU) asking for sanctions because of failure to comply with the recommendations of a panel or the appellate body. The primary focus of China's litigation in the WTO has been on the United States, but increasingly it is paying attention to the EU and others.<sup>9</sup> China's use of the dispute-resolution system, and its observance of its decisions, is a beneficial development in promoting a rules-based global trading system.

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<sup>3</sup> DS 360. *EU v China (China A/D Duties on EU Steel Imports)* (June 13, 2013).

<sup>4</sup> DS 454. *Japan v. China (China A/D Duties on Japan Steel Imports)* (May 24, 2013).

<sup>5</sup> DS 454. *China v. EU (European Subsidies in Renewable Energy Sector)* (Nov. 5, 2012).

<sup>6</sup> Beattie, "How Lawsuits are Coming to Dictate the Terms of Trade." *Financial Times* (February 20, 2007).

<sup>7</sup> Schneider, "At WTO, US Racks up Wins Against China, But the Benefit is Less Than Certain." *Washington Post* (August 9, 2012).

<sup>8</sup> Beattie, "Decommission the Weapons of Trade Warfare." *Financial Times* (August 8, 2012).

<sup>9</sup> Yap and Shangguan, "China Ups Ante in Trade Spat with E.U." *Wall Street Journal* (June 5, 2013) (involving solar panels and wine subsidies).

Chart 12 -- Summary of China's WTO Litigation (2001 - 2013)

Data Source: WTO website, "Disputes from Countries / Territories." (June 25, 2013).  
[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)

**CHINA'S WTO LITIGATION (2001 - 2013)**

[11 as Complainant; 31 as Respondent]

*As of June 25, 2013*

**CHINA AS COMPLAINANT**

Respondent	Subject Matter of Case	Status	DS No.	Win	
				<u>China</u>	<u>US</u>
US	US Safeguard Measures on Steel Imports from China	AB (2003)	252	X	
US	Dumping & Subsidies -- Paper Imports from China	Consul. 2007	368	///	
US	Dumping & Subsidies -- Certain Products from China	AB 2011	379		X
US	§ 727 (2009 Act) Denial of Poultry Imports from China	Panel 2120	392	X	
US	§ 421 (1974 Act) Safeguard -- Tire Imports from China	AB 2011	399		X
US	Dumping -- Shrimp and Diamond Sawblades	Panel 2012	422	X	
US	Subsidies -- Various Products	Consultation 2012	437	///	
US	Dumping -- Various Products	Consultation 2012	449	///	

[Non- US Respondents]

				<u>China</u>	<u>EU</u>
EC	Dumping -- Iron & Steel Fasteners from China	AB 2011	397	X	
EU	Dumping -- Footwear Imports from China	Panel 2011	405	X	
EU	Subsidy -- Reusable Energy Sector	Consultation 2012	452	///	

**CHINA AS RESPONDENT**

Complainant	Subject Matter of Case	Status	DS No.	Win	
				<u>China</u>	<u>US</u>
US	VAT on Integrated Circuits	MAS (2005)	309	///	
US	Measures on Import of Auto Parts*	AB (2008)	340		X
US	Taxes & Refunds to China Firms*	Panel--MAS (2007)	358	///	
US	Protection of IPR.	Panel (2009)	362		X
US	Distrib. of Audiovisual and Entertainment Prod.	AB (2009)	363		X
US	Financial Information Services & Suppliers*	Consult.--MAS (2008)	373	///	
US	Grants & Loans (Subsidies)*	Consult. since 2008	387	///	

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US	China's Raw Material Restraints*	AB 2012	394		X
US	Restrictions on Credit Card & Elect. Payments	Panel 2012	413		X
US	Dumping / Subsidies Duties on Steel from US	AB 2012	414		X
US	Subsidies on Wind Power Equipment	Consult. since 2010	419	///	
US	Restrictions on Broiler Products	Panel pending 2012	427	///	
US	Export Restrictions on Rare Earth Metals*	Consult. filed 2012	431	///	
US	Dumping & Subsidies on US Auto Imports	Consult. filed 2012	440	///	
US	Subsidies on Autos and Auto Parts	Consult. filed 2012	450	///	

\* Parallel Cases with other Complainants.

[Non-US Complainants]

--- Often Parallel Cases with the US ---

				<u>China</u>	<u>Other</u>
EC	Measures on Import of Auto Parts*	AB (2008)	339		X
Canada	Measures on Import of Auto Parts*	AB (2008)	342		X
Mexico	Taxes & Refunds to China Firms*	Panel -- MAS (2008)	359	///	
				///	
EC	Financial Information Services & Suppliers*	Consult. -- MAS (2008)	372	///	
Canada	Financial Information Services & Suppliers*	Consult.-- MAS (2008)	378	///	
				///	
Mexico	Grants & Loans (Subsidies)*	Consult. since 2008	388	///	
Guatemala	Grants & Loans (Subsidies)*	Consult. since 2009	390	///	
EC	Raw Material Export Restraints*	AB 2012	395		X
Mexico	Raw Material Export Restraints*	AB 2012	398		X
EC	Iron & Steel Fasteners from EU (Dumping)	Consult. since 2010	407	///	
EU	Dumping Duties on X-Ray from EU	Panel since 2012	425		X
EU	Export Restrictions on Rare Earth Metals*	Consultation 2012	432	///	
Japan	Export Restrictions on Rare Earth Metals*	Consultation 2012	433	///	
Mexico	Subsidies on Apparel & Textile	Consultation 2012	451	///	
Japan	Chinese A/D Duties on Steel	Consultation 2012	454	///	
Europe	Chinese A/D Duties on Steel	Consultation 2013	460	///	

## CONCLUSION

An analysis of all WTO cases filed in 2012 discloses that the United States filed 5 cases (requests for consultation), and China and Japan filed 3 each.<sup>10</sup> The main targets were China (7), the United States (6), and the EU (3).<sup>11</sup> *The WTO Annual Report for 2013* concluded, "In sum, WTO dispute settlement activity increased markedly in 2012. It is clear that WTO members, both developed and developing, continue to have a high degree of confidence in the WTO dispute settlement mechanism to resolve their disputes in a fair and efficient manner. It is also evident that members are confident that the system is capable of adjudicating a wide variety of disputes covering significant questions and complex issues."<sup>12</sup>

It is worthwhile to note the recent observation by Pascal Lamy, the Director General of the WTO.<sup>13</sup> He considered that trade frictions are a statistical proportion of trade volumes, and trade disputes are a statistical proportion of trade frictions. He brushed off concerns about the increasing number of trade disputes between the United States and China. He contends that the WTO mechanism takes the heat out of disputes by utilizing a process that is rules based, predictable, and respected.<sup>14</sup>

Lamy warned in a later presentation earlier this year that geopolitics is back at the trade table.<sup>15</sup> He noted that the value chains are multilateralizing and that trade governance needs to meet this challenge. He argued that China would benefit from taking a more active role in global governance in trade and related issues. "China's economic take-off benefited from a stable external environment. Its sustainability depends on a well-functioning global trading system. As a key stakeholder, China should take a more proactive role in international economic governance ...."<sup>16</sup>

While inheriting a complex trade situation<sup>17</sup>, the Obama administration has clearly put trade at the heart of its second-term agenda.<sup>18</sup> This includes negotiating the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). But at the core of the administrations' trade policy is greater trade enforcement by the WTO and particularly with China. What is the sense of negotiating rules if they are not enforced? The new Secretary of State John Kerry succinctly stated, "Foreign policy is economic policy."<sup>19</sup>

At least in the terms of adjudicating trade disputes, and governing existing and emerging trade issues, the WTO has proven itself beyond the dreams of the early architects of the dispute-resolution system.

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<sup>10</sup> *2013 Annual Report of the World Trade Organization* 82 at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep13\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep13_e.pdf)

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* 89.

<sup>13</sup> Politi, "Lamy Dismisses Rise in U.S.-China Disputes." *Financial Times* (October 1, 2012).

<sup>14</sup> *Id.*

<sup>15</sup> Lamy, "Putting Geopolitics Back at the Trade Table." *WTO News* (January 29, 2013).

<sup>16</sup> Lamy, "China Should Be More Active in Global Economic Governance." *WTO News* (March 24, 2013).

<sup>17</sup> Schneider, "Inheriting a Complex Trade Agenda." *Washington Post* (June 22, 2013).

<sup>18</sup> McGregor, "Obama Puts Trade at Heart of Agenda." *Financial Times* (February 5, 2013).

<sup>19</sup> Gordon, "Kerry Links Economics to Foreign Policy." *New York Times* (January 25, 2013).

Newer and novel trade issues are emerging swiftly in this rapidly globalizing trading system. A recent WTO panel, "Defining the Future Trade Issues," released its report in April of this year.<sup>20</sup> It enumerated nine such issues: competition policy, international investment, currencies, labor, climate change, corruption, and coherence of international economic rules. Some of these have been around for a while and some have become much more pressing recently.

To this list I would add the issue of cyberespionage for commercial and economic gain as a new front in global trade wars. The Obama administration has suggested<sup>21</sup> that trade tools ought to be used and this would possibly involve WTO litigation.<sup>22</sup> In addition to this newer issue I would also add three additional issues, foreign direct investment, corruption and taxation. Growing foreign investment by Chinese companies have raised questions of national security.<sup>23</sup> Foreign corruption has been subject to increased government prosecution in the US and other countries.<sup>24</sup> Tax avoidance has become the scourge of many countries and have now been targeted by many countries as economic development and national budgets come under increasing pressure because of global economic problems.<sup>25</sup> These areas could certainly benefit from greater multilateral-based solution through the WTO. They may even be subject to future litigation in the WTO even under existing rules.

Challenges remain and are set to continue. Those relating to the most important bilateral trade relations in the world today, between the US and China, are set to grow as trade develops even more. Global transactions in a multijurisdictional world need a mechanism to resolve a wide-range of business, trade, and economic issues. In an increasingly interconnected trading system and a less hierarchical political system cooperation through diplomacy and adjudication is preferable to outright power-politics confrontation. Each country has shown they are willing to work together to apply the rules of global trade and they will need to continue applying them to newer situations.<sup>26</sup> So far, so good.

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<sup>20</sup> "The Future of Trade: The Challenges of Convergence." (WTO Panel Report to the Director-General) (April 24, 2013).

<sup>21</sup> "The Administration will utilize trade policy tools to increase international enforcement against secret theft to minimize unfair competition against US companies." "Administration Strategy on Mitigating the Theft of US Trade Secrets." 4 (White House) (February 2013). "Finally, we need China to engage with us in a constructive direct dialogue to establish norms of behavior in cyberspace." "Remarks by Tom Donilon to the Asia Society -- The US and Asia-Pacific in 2013." (March 11, 2013).

<sup>22</sup> Nakashima, "'Cyber-Spying Said to Target US Business.'" Washington Post (February 11, 2013).

<sup>23</sup> Herzstein, "The Dangers Behind the Smithfield Deal." Washington Post (June 1, 2013).

<sup>24</sup> "A Resource Guide to the U.S. Foreign Corrupt Practices Act." (USDOJ and SEC) (November 2012).

<sup>25</sup> Houlder, "Nations on Defensive as Anger Grows Over Tax Avoidance." Financial Times (April 29, 2013).

<sup>26</sup> Croft, "Law & National Borders -- Legal Minefields Sit on National Borders." Financial Times (5.2.11).

Epilogue – *After the Election* .....

## **Biden, National Security, Law & Global Trade: Less Subterfuge & More Strategy in the New Era of Crisis**

Stuart S. Malawer\*

*The US has entered a new era of crisis. President Biden has just been inaugurated. He faces historical challenges to return the US to global leadership. The primacy purpose of this article is to discuss national security and trade policy in the new Biden administration. First, I look at the historic and dubious claims made by the Trump administration in utilizing national security as a cover for protectionist trade actions, as well as at the federal court cases addressing these claims. I then assess the cases that have come before the WTO over the last two years, raising for first time the issue of the national security exception under GATT Article XXI. Finally, I conclude that President Biden’s overwhelming priority is to resurrect American democracy and alliances. But he will also need to address a broad range of trade issues and to restrict reliance on national security as a cover for populist and protectionist policies.*

### **Keywords**

**Biden, National Security Exception, GATT Article XXI, Section 232 of the Trade Expansion Act of 1962, U.S. Tariff and Trade Policies.**

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All the websites cited in this paper were last visited on January 20, 2021. The paper was completed as of that date.

## 1. Introduction.

The United States (US) has entered a new era of crisis. President Biden has just been inaugurated and former President Trump has been impeached for the second time. At this critical turning point, it is necessary to closely evaluate the US trade policy over the last four years focusing primarily on the Trump administration's use of national security as a rationale for a broad range of tariff and trade actions.

The primacy purpose of this article is to discuss the role national security will play in informing President Biden's trade policy. However, first I look at the historic and dubious claims made by the Trump administration in utilizing national security as a cover for protectionist trade actions, as well as at the federal court cases addressing these claims. I will then assess the cases that have come before the WTO over the last two years, raising for first time the issue of the national security exception under GATT Article XXI. While issues concerning national security and trade can be quite technical, they are exceedingly significant. It is unfortunate that there has been little comment on this dual-track line of cases that involve national security in the US domestic courts and trade cases that raise the national security exception in the WTO's dispute resolution system.

These dual-track cases seem to have been overshadowed by President Trump's constant and broad claims of grievances, his bullying and protectionist policies from the very outset to the desperate, and dying days of his administration. For example, his trade actions over the last days of his administration included a Section 301 action on Vietnam for alleged currency manipulation, which of course is not proscribed by GATT rules; duties and retaliatory duties on French wine included as part of the continuing *Boeing-Airbus* dispute over sanctions; extension of Section 201 safeguard tariffs on washer imports from China and efforts to delist Chinese telecom firms from the US public markets; prohibiting the US private and state investment in Chinese companies; expanding the number of Chinese companies on the export blacklist - also known as the Entity List -; and banning the US transactions with eight Chinese software apps. In a further flurry of last-minute restrictions, the Trump administration issued new rules restricting import of Chinese technology. These actions have already resulted in a new Chinese blocking statute aimed at the US sanctions. In four years, the Trump administration initiated a total of 306 antidumping and

countervailing duty investigations, 283 percent more than the Obama administration initiated over eight years.

It is now up to President Biden to recalibrate the American approach to trade relations, particularly with China, and the relation between trade and national security - at least in the context of applying unilateral trade measures including tariffs and trade sanctions. The widening use of tariff exclusions over the last few years and the minimal impact of Trump's trade war on the US manufacturing growth only served to increase the dysfunction of his protectionist trade measures. Those seemingly only led to managed trade, which brought domestic cronyism.

My general prediction is that the Biden administration will most likely draw more heavily on national security to guide the US trade and tariff policies than did administrations prior to the Trump administration, but using a much more restricted and circumspect approach than that of the Trump administration. Biden will do so in a broader and more realistic way than has been seen in the last four years, and the process will observe domestic and international law more rigorously. Trade policies will be neither erratic nor punitive.

However, the Biden administration will not implement trade actions immediately. It will review Sections 232 and 301 tariffs methodically. The same can be said concerning the US-China trade relations and longstanding US-EU trade relations. This review will now include the recently concluded EU-China investment treaty as well as bilateral trade relations with the UK as a result of Brexit.

Given the much more pressing domestic, legal and policy issues currently confronting the US (COVID-19, alliance relations, nuclear arms, the global climate crisis and Iran, among others), the Biden administration will need to address those issues first. In addition, the traditional lack of consensus and conflict over trade issues within the Democratic Party will hamper a broader trade review as well as a more specific review of trade-based national security actions.

## 2. Section 232 Cases (National Security, Trade & Tariffs in the US)

I have written about national security and President Trump’s trade actions several times in this Review.<sup>1</sup> In 2019, I concluded the following, which is even more valid today:

Active and positive engagement with the global economy, not restrictive actions or tariffs harking back to the beginning of the American republic up through the 1930s, is essential to global trade and domestic economic development. Even the term ‘America first’ that President Trump favors was used by isolationists and protectionists in 1930s America. The policies espoused at that time did not lead to greatness but only global warfare. Positive US engagement with the global economy and international political system is essential to American security today.<sup>2</sup>

The most recent development to question and restrict the administration’s ability to take trade actions under a national security rationale is the recent decision by the United States Court of International Trade in *Transpacific Steel LLC v. U.S.*<sup>3</sup> This case declared illegal Trump’s attempts to add to the list of items covered by his previous tariff declarations. The Court held that the statutory period stated in the statute is binding, and if an action does not fall within that period, then it is not permitted.<sup>4</sup> An appeal to the United States Federal Court of Appeals was rejected as premature.

Specifically, the United States Court of International Trade held that Trump’s actions to adjust tariffs against Turkish steel producers were illegal; that the broad language of Section 232 to impose trade restrictions for national security reasons was subject to strict time periods; and that the president acted outside of those limits.<sup>5</sup> To me, this decision

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<sup>1</sup> S. Malawer, *Trump, Recent Court Cases and the 2020 Presidential Election*, 6 CHINA & WTO REV. 407 (2020), available at [http://cwr.yiil.org/home/pdf/archives/2020v6n2/cwr\\_v6n2\\_08.pdf](http://cwr.yiil.org/home/pdf/archives/2020v6n2/cwr_v6n2_08.pdf); S. Malawer, *Trump, Litigation and Threats: From Queens to the World Stage*, 6 CHINA & WTO REV. 209 (2020), available at [http://cwr.yiil.org/home/pdf/archives/2020v6n1/cwr\\_v6n1\\_08.pdf](http://cwr.yiil.org/home/pdf/archives/2020v6n1/cwr_v6n1_08.pdf); S. Malawer, *Trump, Trade and National Security: Will Federal Courts Rein in the President?* 5 CHINA & WTO REV. 417 (2019), available at [http://cwr.yiil.org/home/pdf/archives/2019v5n2/cwr\\_v5n2\\_08.pdf](http://cwr.yiil.org/home/pdf/archives/2019v5n2/cwr_v5n2_08.pdf).

<sup>2</sup> S. Malawer, *Trump, Trade and National Security: Will Federal Courts Rein in the President?*, 5 CHINA & WTO REV. 417 (2019), available at [http://cwr.yiil.org/home/archives\\_v5n2\\_08](http://cwr.yiil.org/home/archives_v5n2_08).

<sup>3</sup> *Transpacific Steel LLC v. U.S.*, 415 F. Supp. 3d 1267 (Ct. Int’l Trade 2019), available at [https://scholar.google.com/scholar\\_case?case=441330581420334771&hl=en&as\\_sdt=6.47](https://scholar.google.com/scholar_case?case=441330581420334771&hl=en&as_sdt=6.47).

<sup>4</sup> *Id.* at 1276.

<sup>5</sup> “Therefore, the Plaintiff has stated a claim for a refund because after the time periods set by Congress for Presidential action had passed, the President lacked power to take new action and issued Proclamation 9772 without the procedures as required by Congress.” *See id.*

underscores that Section 232 is subject to judicial review and that presidential action is invalid if it does not fall within the prescribed time limits.

In an earlier case in 2020 - *The American Institute for International Steel v. U.S.*,<sup>6</sup> that addressed President Trump's national security tariffs on steel and aluminum - the federal circuit held that Section 232 did not violate the nondelegation doctrine. The United States Supreme Court denied further review of the case. However, judges in the United States Court of International Trade, which was the trial court in 2019, expressed skepticism about the President's use of national security arguments.<sup>7</sup>

Recent skirmishes in various courts between the Trump administration and TikTok indicate an ever-growing judicial skepticism of the Trump administration's reliance on a national security rationale for trade or investment restrictions. The federal court ruled that the administration's actions violated the First Amendment right to freedom of expression.<sup>8</sup> In this case, the administration relied on national security concerns under the International Economic Emergency Act (IEEPA), but the federal court determined that the plaintiffs had not effectively disputed that claim.<sup>9</sup>

### 3. The Most Pressing Trade Policy Problems President Biden Will Face.

The following is my partial list of trade problems confronting Biden:<sup>10</sup>

- Trump's tariff and trade wars, especially with China, raising the basic issues of confrontation or cooperative competition.
- Rebuilding alliances and a multilateral global strategy which in particular addresses trade and political disputes relating to U.S.-China relations.<sup>11</sup>

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<sup>6</sup> American Institute for International Steel v. United States (Feb. 28, 2020), *available at* [https://fedcircuitblog.com/wp-content/uploads/2020/04/19-1727.Opinion.2-28-2020\\_1542185.pdf](https://fedcircuitblog.com/wp-content/uploads/2020/04/19-1727.Opinion.2-28-2020_1542185.pdf)

<sup>7</sup> *American Institute for Int'l Steel, Inc. v. U.S.*, No. 18-00152 (Ct. Int'l Trade 2019), *available at* <https://law.justia.com/cases/federal/appellate-courts/cit/18-00152/18-00152-2019-03-25.html>.

<sup>8</sup> *US WeChat Users Alliance v. Trump*. (Case No. 20-cv-05910-LB) (Sept. 19, 2020) (Federal District Court of Northern California), *available at* <https://www.courtlistener.com/recap/gov.uscourts.cand.364733/gov.uscourts.cand.364733.59.0.pdf>.

<sup>9</sup> *Id.* at 18-9.

<sup>10</sup> See generally S. Lester, *Trade Policy Under a Biden Administration: An Overview of the Issues and Some Practical Suggestions*, 76 FREE TRADE BULL. (Cato Institute), June 9, 2020, *available at*, <https://www.cato.org/publications/free-trade-bulletin/trade-policy-under-biden-administration>.

<sup>11</sup> B. Davis & L. Wei, *Biden Plans to Build a Grand Alliance to Counter China. It Won't be Easy*, WALL ST. J., Jan. 7, 2021, *available at* <https://www.wsj.com/articles/biden-trump-xi-china-economic-trade-strategy-policy-11609945027>.

- More specific China trade issues, such as China’s implementation of a Phase One agreement to purchase more U.S. products and commodities,<sup>12</sup> the lifting of various Sections 232 and 301 tariffs on Chinese exports to the United States and of various transactional sanctions, particularly on investments in Chinese firms and Chinese investment into the U.S., and issues of human rights—specifically the use of Uighurs as prison labor.
- Legislative efforts to restrict and transfer some delegated tariff authorities back to the President and perhaps to the Treasury Department.
- Trade relations with the EU and the UK after the recent Brexit deal, including the competing retaliatory tariffs resulting from the *Boeing and Airbus cases*,<sup>13</sup> the digital taxation proposals emanating from the EU concerning global internet firms and issues concerning the newly announced EU-China investment treaty.<sup>14</sup>
- The global tax avoidance of global tech firms, global e-commerce and the threatened EU digital taxation.
- WTO issues, especially the decimation of the Appellate Body by the Trump administration and the selection of a new WTO director-general.
- Other WTO issues, including the growing reliance on litigation within the WTO and the continuing failure to negotiate new trade rules.
- The Paris Climate Accord.
- Sanctions related to the Iranian nuclear deal from which Trump withdrew.
- Reconstitution of an Asian alliance and joining of the newly revised Comprehensive and Progressive TPP (CPTPP) to offset the Chinese-inspired Regional Comprehensive Economic Partnership (RCEP).
- Renewal and expansion of the Trade Promotion Authority (formerly known as “fast track authority”) and review of the Buy American Act.
- Changes by the Trump administration to the duty-free tariff treatment of various nations under the Generalized System of Preferences (GSP).
- Reconsideration of recent trade sanctions (for example, designating Cuba a State-Sponsor of Terrorism) in the last days of the Trump administration.

To be clear, these trade issues represent just a small part of the much larger problem the Trump administration is leaving to the Biden administration. Trade is only a part of greater

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<sup>12</sup> C. Bown, *U.S. - China Phase One Tracker: China’s Purchase of U.S. Good*, Petersen Institute for International Economics Charts (Jan. 8, 2021), available at <https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods>.

<sup>13</sup> Panel Report, *EC and certain member States - Large Civil Aircraft*, WTO Doc. WT/DS316/R (adopted June 1, 2011), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds316\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm).

<sup>14</sup> “The timing – with a newly aggressive China seen as a strategic rival to the United States and just weeks before Joseph R. Biden Jr. becomes president – has opened the European Union to questions and criticism, from analysts and particularly American officials ....” See S. Erlanger, *Will the Sudden EU Trade Deal With China Damage Relations with Biden?*, N. Y. TIMES, Jan. 6, 2021, available at <https://www.nytimes.com/2021/01/06/world/europe/eu-china-deal-biden.html>

domestic and global economic issues such as the following disastrous foreign policies that have led to unfortunate military conflicts (for example, the Saudi and UAE intervention in Yemen); failure to control the COVID-19 pandemic in the US; unrestrained cyberattacks by Russia on American institutions; global competition over emerging technologies; and the general US withdrawal from international institutions and attack on international law. The Trump administration withdrew from the WHO, the Paris Climate Accord, Open Skies Treaty and the Iranian nuclear deal. It imposed sanctions on prosecutors of the International Criminal Court and forced negotiations of trade agreements with a host of countries. The big question really is, what will be the US role in the world after Trump?<sup>15</sup>

The Trump administration bullied its allies and others without clear strategic or foreign policy reason. To me, this was a continuation of Trump's personal inclinations to do simply whatever he wants, regardless of domestic or international law, to deconstruct international alliances and institutions.<sup>16</sup>

#### 4. WTO and National Security Exception

The WTO will not render a decision on Trump's national security-based tariffs on steel and aluminum until later this year.<sup>17</sup> A number of very significant developments, however, have occurred in the WTO over the last year or so, including historic actions that have gone mainly unnoted. For the first time, the WTO heard two cases dealing with GATT Article XXI (security exception), and a third is now pending.

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<sup>15</sup> R. O'Rourke, *U.S. Role in the World: Background and Issues for Congress*, CRS Report (R44891: January 6, 2021), available at <https://fas.org/sgp/crs/row/R44891.pdf>.

<sup>16</sup> See generally C. Brown & D. Irwin, *Trump's Assault on the Global Trading System*, FOREIGN AFF. (Sept. – Oct. 2019), available at <https://www.queensu.ca/sps/sites/webpublish.queensu.ca.spswww/files/files/Events/Conferences/TradeInstitute/2019/2019%20FA%20Bown%20Irwin%20Trump's%20Assault%20on%20the%20Global%20Trading%20System.pdf>.

<sup>17</sup> A large number of pending cases have been filed in the WTO contesting U.S tariffs on steel and aluminum based on national security. For example, see *US - Steel and Aluminium Products (Russia)*, WTO Doc. WT/DS554/19 (adopted Sept. 10, 2019), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/554-19.pdf&Open=True>.

In September 2020, in a case brought by Qatar, the WTO issued a panel report in the *Qatar-Saudi Arabia* case concerning the national security exception in the TRIPS Agreement,<sup>18</sup> which parallels GATT Article XXI. The panel found the exception somewhat applicable on behalf of Saudi Arabia. This case involved a Saudi-led boycott against Qatar. It was subsequent to the first case decided by the WTO that involved the national security exception - *Ukraine v. Russia* in 2019.<sup>19</sup> In that case, the Panel held that the claim of national security was reviewable and that it applied in favor of the Russian Federation.<sup>20</sup> This case involved Russian restrictions on Ukrainian transports through Russian territory. The US supported Russia's claim, consistent with the Trump administration's position that national security defense is not reviewable by the WTO.<sup>21</sup> American lawyers essentially argued that such claims are 'political' and 'nonjusticiable.'<sup>22</sup>

In addition to the US case pending before the WTO concerning national security tariffs on steel and aluminum, another case is pending. In *South Korea v. Japan*,<sup>23</sup> Japan relies on the national security exception to justify restrictions on exports to South Korea of chemicals used primarily in the production of smartphones and computer display screens.<sup>24</sup>

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<sup>18</sup> *Qatar - Goods from the UAE*, WTO Doc. WT/DS576/3 (adopted Aug. 3, 2019), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/576-3.pdf&Open=True>.

<sup>19</sup> Panel Report, *Russia - Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds512\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm).

<sup>20</sup> *Id.* at 104.

<sup>21</sup> D. Palmer, *US Sides with Russia in WTO National Security Case Against Ukraine*, POLITICO, July 30, 2018, available at <https://www.politico.eu/article/us-sides-with-russia-in-wto-national-security-case-against-ukraine>.

<sup>22</sup> Both Washington and Moscow insist Article 21 claims are "non-justiciable" – meaning WTO panels can't rule on any dispute invoking the national security exemption. *Id.* See also W. Reinsch & J. Corporal, *The WTO's First Ruling on National Security: What Does it Mean for the United States?* Critical Questions (Center for Strategic and International Studies) (April 5, 2019), available at <https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states>.

<sup>23</sup> Panel Report, *Korea - Radionuclides (Japan)*, WTO Doc. WT/DS495/R (adopted Apr. 26, 2019), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds495\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds495_e.htm). For details, see Soojin Nam & Eric Yong Joong Lee, *Who Violated International Law? Critical Analysis of Abe's Export Restrictions to Korea*, 12 J. EAST ASIA & INT'L L. 353-71 (2019), available at [http://journal.yiil.org/home/pdf/publications/2019\\_12\\_2\\_pdf/jeail\\_v12n2\\_07.pdf](http://journal.yiil.org/home/pdf/publications/2019_12_2_pdf/jeail_v12n2_07.pdf).

<sup>24</sup> Jinguyan Zhou, *New WTO Ruling on National Security in Qatar-Saudi Arabia Case and Its Impact on South Korea-Japan Dispute*, 24 ASIL Insights, Sept. 3, 2020, available at <https://www.asil.org/insights/volume/24/issue/22/new-wto-ruling-national-security-qatar-saudi-arabia-case-and-its-impact>.

Older disputes going back to pre-WTO days seem to have raised the issue of national security but were ostensibly settled through diplomacy.<sup>25</sup>

It is mystifying that the Trump administration filed only two new cases in the WTO against China given that it viewed China as the great Satan of global trade. This occurred even though the US has continued to lose cases to China in the WTO - for example, an Obama-era Section 301 case.<sup>26</sup> Presidents Clinton, Bush and Obama filed a great many more cases against China and generally more cases than the Trump administration did.<sup>27</sup> That is another story, however.

## 5. Conclusion: Reasserting Congressional Authority over Trade Issues Involving National Security.

I agree with the view that the case for liberal trade and multilateral involvement remains as strong as ever. The Trump administration's trade war and its wars on everything and everyone must be reversed. The Biden administration has its work cut out for it.

In light of the Trump-inspired insurrection and takeover of the Capitol building on January 6, 2021, and the president's second impeachment,<sup>28</sup> however, President Biden's overwhelming first priority is to resurrect American exceptionalism and democracy.<sup>29</sup> The greatest problems confronting the new Biden administration are now domestic. The crucial threat now is from domestic, not international terrorism. This represents a significant paradigm shift from September 11, 2001 to January 6, 2021, in just twenty years. The need

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<sup>25</sup> B. Murrill, *The "National Security Exception" and the World Trade Organization*. CRS Report (LSB10223: Nov. 28, 2018), available at <https://fas.org/sgp/crs/row/LSB10223.pdf>. See generally Analytical Index of the GATT 599-610 (Article XXI Security Exceptions) for a discussion of the drafting history and diplomatic history especially during the 1980s and 1990s of the national security exception, available at [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art21\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf).

<sup>26</sup> US - Tariff Measures, WTO Doc. WT/DS543/10 (adopted Oct. 27, 2020), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/543-10.pdf&Open=True>.

<sup>27</sup> S. Malawer, *Obama, WTO Trade Enforcement and China*, 2 CHINA & WTO REV. 361 (2016), available at, [http://cwr.yiil.org/home/pdf/archives/2016v2n2/cwr\\_v2n2\\_09.pdf](http://cwr.yiil.org/home/pdf/archives/2016v2n2/cwr_v2n2_09.pdf).

<sup>28</sup> N. Fandos, *Trump Impeached for Inciting Insurrection*, N. Y. TIMES, Jan. 13, 2021, available at, <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html>.

<sup>29</sup> So, this is how it ends. The presidency of Donald John Trump, rooted from the beginning in anger, division and conspiracy-mongering, comes to a close with a violent mob storming the Capitol at the instigation of a defeated leader trying to hang onto power as if America were just another authoritarian nation. See P. Baker, *The Violent End of the Trump Era, A Mob at the Breach of Democracy*, N. Y. TIMES, Jan. 6, 2021, available at <https://www.nytimes.com/2021/01/07/us/politics/the-violent-end-of-the-trump-era-a-mob-and-the-breach-of-democracy.html>.

for structural economic and cultural reforms including massive infrastructure investments is most glaring. These issues will be among the most pressing for the new president in confronting the economic disparity in the country.

A recent NEW YORK TIMES editorial stated: “Something very basic in America’s relationship with the world has been broken.”<sup>30</sup> At the same time, an editorial in the FINANCIAL TIMES proclaimed: “America has a national security problem in the form of the far right .... The costs are increasingly unmistakable.”<sup>31</sup>

Trade is but one of the great issues facing the new Biden administration. However, it is one of the most important, especially as it relates to national security and its gross misapplication as cover for protectionist policies. Trump’s last- minute trade and foreign policy actions placed more landmines in clear sight of the new Biden administration (for example, greater diplomatic contacts with Taiwan) and need to be quickly addressed.

Newer trade and non-trade issues seem to be emerging each day: for example, the impact of digital platforms on American politics. All of this is on top of real trade concerns and different views on a great range of trade and investment issues within the Democratic Party, especially with regard to labor, the environment and development of work-centered policies. There is a wide range of interest groups within the Democratic Party. Trade policy has hurt minorities in American society, not just poor white and rural communities.<sup>32</sup>

The appointment of a new trade, foreign policy and national security team by Biden seems very promising. The team seems seasoned, experienced, professional and pragmatic, with a mature understanding of the US and global issues and interests.<sup>33</sup> However, the greatest problems now confronting the new Biden administration are domestic. A recent Congressional Research Service report (August 2020) concluded the following:

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<sup>30</sup> See *Awe and Shock* (Lead Editorial), N. Y. TIMES, Jan. 8, 2021, available at <https://www.nytimes.com/2021/01/08/opinion/world-capitol-attack-trump.html>.

<sup>31</sup> See *Donald Trump Must be Held Accountable for the Storming of the Capital* (Lead Editorial), FIN. TIMES, Jan. 7, 2020, available at <https://www.ft.com/content/c7af1bca-3d0a-49f7-be20-e3460479b89a>.

<sup>32</sup> T. Jan, *U.S. Trade Policies Have Disproportionately Harmed Black and Latino Workers, Not Just the White Working Class*, WASH. POST, Jan. 8, 2020, available at <https://www.washingtonpost.com/business/2021/01/08/trump-trade-black-latino-workers>.

<sup>33</sup> S. Siddiqui, D. Dougherty & L. Melgar, *Who Are Joe Biden’s Cabinet Picks? The Full List*, WALL ST. J., Jan. 11, 2021, available at <https://www.wsj.com/graphics/joe-biden-cabinet>.

The U.S. unilateral actions under Section 232 have raised the level of tension with U.S. trading partners and could pose risks to broader international economic cooperation. The strain on international trading relationships also could have broader implications, including for cooperation between the United States and allies on foreign policy issues and U.S. credibility in future trade negotiations.<sup>34</sup>

In my view, one of the first issues that the Biden administration ought to confront is the longtime delegation (since the 1930s) of trade authority from Congress to the President, particularly in the area of national security, found in various legislative enactments, especially Section 232 of the Trade Expansion Act<sup>35</sup> and Section 1701 of the International Emergency Economic Powers Act.<sup>36</sup> While it may seem counterintuitive for Biden to restrict his own authority, it is necessary to ensure that the abuse and corruption of national security cannot happen again. Recently proposed legislation by Virginia senator Tim Kaine, the Reclaiming Congressional Trade Authority Act of 2019,<sup>37</sup> did not gain much traction, unfortunately. But its time has now come again.

Such restriction would be something akin to post-Watergate legislation -passed in the aftermath of President Nixon's abuses and criminal and unethical activities - that restricted presidential powers and reasserted Congressional authority, which worked to some extent. Remember that Congress, not the President, has the exclusive authority to regulate trade. However, since the 1780s, trade policy has increasingly been understood to have critical foreign policy implications and has become central to foreign affairs. Of course, the President

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<sup>34</sup> R. Fefer et al., *Section 232 Investigations: Overview and Issues for Congress*, CRS Report (R45249: Aug. 24, 2020) at 55, available at <https://fas.org/sgp/crs/misc/R45249.pdf>.

<sup>35</sup> 19 U.S. Code § 1862 - Safeguarding National Security, available at <https://www.law.cornell.edu/uscode/text/19/1862>.

<sup>36</sup> 50 U.S. Code § 1701 - Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities, available at <https://www.law.cornell.edu/uscode/text/50/1701>.

<sup>37</sup> Reclaiming Congressional Trade Authority Act of 2019, available at [https://murphy.house.gov/uploadedfiles/6.24.19\\_summary\\_of\\_reclaiming\\_congressional\\_trade\\_authority\\_act.pdf](https://murphy.house.gov/uploadedfiles/6.24.19_summary_of_reclaiming_congressional_trade_authority_act.pdf).

has extensive powers related to foreign affairs, including the ability to negotiate and withdraw from international agreements.

This balance of power between the branches needs to be recalibrated now. The direction in which the WTO has moved in cases concerning national security is not a good omen for the US. Recalibrating domestic law would most likely preclude future quite questionable US actions from being contested (and ruled against) by the WTO and the global trading system. That is good for everyone. But most importantly, first and foremost, President Biden needs to revitalize American democracy in the post-Trump world and then reclaim America's global leadership.<sup>38</sup>

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<sup>38</sup> B. Hoffman, *Domestic Terrorism Strikes U.S. Capitol, and Democracy*. Council on Foreign Relations (January 7, 2021), available at [https://www.cfr.org/in-brief/domestic-terrorism-strikes-us-capitol-and-democracy?utm\\_source=twtw&utm\\_medium=email&utm\\_campaign=TWTW%202021January8&utm\\_content=A&utm\\_term=TWTW%20and%20All%20Staff%20as%20of%207-9-20](https://www.cfr.org/in-brief/domestic-terrorism-strikes-us-capitol-and-democracy?utm_source=twtw&utm_medium=email&utm_campaign=TWTW%202021January8&utm_content=A&utm_term=TWTW%20and%20All%20Staff%20as%20of%207-9-20).