

THE PERILS OF ECONOMIC NATIONALISM AND A PROPOSED PATHWAY TO TRADE HARMONY

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In a sharp break from past policy, the United States has announced and is implementing a policy of economic nationalism in the name of political populism that seeks strict border controls over all forms of economic factors of production, products, services, investment, and people. The avowed purpose of this policy is to protect national security and to improve the balance of trade of the United States. This article argues that this policy of economic nationalism, on its face, is contrary to accepted rules, procedures, and principles of international law and threatens irreparable harm to the multilateral system of trade and investment developed under American leadership since World War II. Furthermore, because economic nationalism flies in the face of generally accepted economic principles and experience, it cannot attain its stated goals.

International economic imbalances facing the United States can be best addressed by employing macroeconomic tools and using established multilateral economic forums. Although the new United States' policy of economic nationalism is directed at all U.S. trading partners, even against close allies such as the European Union, Canada, and Japan, a particular target of this policy is Chinese trade and investment. China's emergence as a great economic power cannot be substantially impeded by U.S. unilateral actions. The rise of China can best be managed by (1) renewed emphasis on the existing rules of the multilateral trading system; (2) confronting China with new regional trade rules and investment rules agreed by the United States and its allies, principally the Transpacific Partnership Agreement and the Trans-Atlantic Trade and Investment Partnership Agreement; (3) a new "Trump Round" of trade negotiations at the WTO; and (4) continued bilateral engagement.

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INTRODUCTION

After more than two decades of relative quiet, international trade and investment law has once again taken center stage in importance in the annals of international law.¹ In an historic shift the United States has taken steps to implement new trade and investment policies sparking anxiety and anger in capitals all over the world.² The administration of President Donald J. Trump has announced new trade policies based on an ideology of “economic nationalism.”³ The purpose of these new trade policies is to improve the terms

1. See Zachary Karabell, *Trump’s Creative Destruction of the International Order*, FOREIGN POLICY (June 11, 2018, 9:37 PM), <http://foreignpolicy.com/2018/06/11/trumps-creative-destruction-of-the-international-order>.

2. See, e.g., David Ignatius, *The ‘What Ifs’ of Frayed Ties with Europe*, WASH. POST, May 18, 2018, at A19.

3. See Ian M. Sheldon, William McGuire & Daniel C.K. Chow, *The Revival of Economic Nationalism and the Global Trading System*, CARDOZO L. REV. (forthcoming 2019), for a discussion of the basic tenets of economic nationalism.

of trade of the United States with respect to its economic partners.⁴ The Trump administration's trade policy singles out China for special opprobrium because of its large trade surplus with the United States; however, no economic partner of the United States is exempt from criticism.⁵ Even NATO allies in the European Union, Canada and Mexico are caught up in this new movement.⁶ As a result, important economic treaties, the North American Trade Agreement (NAFTA) and the World Trade Organization agreements achieved in the historic Uruguay Round in 1994, are under fire.⁷

The Trump administration's actions concerning international trade are unprecedented in the post-World War era. They are troubling because, for the first time in modern history, the United States is blatantly and unapologetically disregarding established rules of international trade and the multilateral trading system developed under U.S. leadership during the past seventy years.⁸ The Trump administration's trade policy seeks to promote U.S. interests through protectionism, bilateral "deals" to rebalance trade flows between countries, and by managing trade sector-by-sector notwithstanding objective legal rules.⁹

Our thesis in this article may be simply stated: we believe economic nationalism is fundamentally wrongheaded. Economic nationalism is based on flawed economic analysis and false economic assumptions.¹⁰ However, we agree that serious unanticipated problems have come to the fore in the political economy and the law of international trade that need to be addressed. First, the U.S. trade-in-goods deficit, \$807.5 billion in 2017,¹¹ is excessive. This

4. *See id.*

5. *See* Jeremy Diamond, *Trump Knocks U.S.-Japanese Trade Relationship as Unfair*, CNN (Nov. 5, 2017, 10:00 PM), <https://www.cnn.com/2017/11/05/politics/trump-us-japanese-trade/index.html>; Mark Thompson & Charles Riley, *Trump Attacks Germany as 'Very Bad' on Trade*, CNN MONEY (May 26, 2017, 10:12 AM), <http://money.cnn.com/2017/05/26/news/economy/trump-germany-bad-trade-cars/index.html>.

6. *See The Latest: Trump Renews Trade Criticism of Mexico, Canada*, AP NEWS (June 19, 2018, 1:30 PM), <https://www.apnews.com/85a33d2bda604003bb30f26c63a72204>.

7. *See* Gregg Ip, *Weakened NAFTA, WTO Would Pave Way for Conflict*, WALL ST. J. (Oct. 18, 2017, 5:20 PM), <https://www.wsj.com/articles/weaker-trade-arbiters-pave-way-for-conflict-1508340483>.

8. Ambassador Rufus Yerxa, former Deputy U.S. Trade Representative and Deputy Director General of the WTO, has stated: "The Trump administration pretty much signaled it is throwing out the rule book on trade." David J. Lynch et al., *Trump Imposes Steel and Aluminum Tariffs on the E.U., Canada, and Mexico*, WASH. POST (May 31, 2018), <https://www.washingtonpost.com/business/economy/trump-imposes-steel-and-aluminum-tariffs-on-the-european-union-canada-and-mexico/2018/05/31>.

9. *See* U.S. TRADE REPRESENTATIVE, THE PRESIDENT'S 2017 TRADE POLICY AGENDA 1-2 (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf>.

10. *See infra* Part III.

11. U.S. Trade in Goods and Services – Balance of Payments (BOP) Basis (1960 through 2017), available at www.census.gov/foreign-trade/statistics/historical/gands.pdf. *See also* U.S. BUREAU OF ECON. ANALYSIS & U.S. CENSUS BUREAU: THE BEA WIRE, 2017 TRADE GAP IS \$568.4 BILLION (Mar. 7, 2018), <https://www.bea.gov/news/blog/2018-03-07/2017-trade-gap-5684-billion#>.

problem, long ignored by policymakers, needs attention. Second, certain rules of the multinational trading system and trade pacts such as the North American Trade Agreement, are out of date and need revision.¹² Third, fundamental economic interface problems exist between the United States and certain countries, especially China.¹³ In short, the terms of trade between the United States and the rest of the world need improvement.

We therefore not only offer criticism of the economic nationalism policies of the Trump administration; we also outline alternative solutions to the trade problems that plague the United States. Specifically, we call upon the Congress to act to provide macroeconomic cures for trade deficits. We also suggest ways of engaging China to deal with American grievances with that nation.

This article, proceeds in four parts. In Part I we explore what we believe are the real, underlying causes of U.S. trade imbalances, macroeconomic factors largely within the control of the United States. We propose macroeconomic solutions that should be undertaken by the Congress and the administration. In Part II we summarize the doctrine of economic nationalism put forward by the United States and the specific steps being taken to implement that doctrine. In Part III we analyze the tenets of economic nationalism to expose its falsehoods and flawed assumptions. In Part IV we propose international law-based solutions to present trade problems and the so-called “China Shock” that currently plagues the multilateral trading system. The United States and other trading nations must find common ground to manage present difficulties and to achieve new settlements in international trade.

I. A MACROECONOMIC SOLUTION TO TRADE IMBALANCES

The underlying cause of the U.S. trade deficit is the macroeconomic imbalance between the low U.S. savings rate and the United States’ need for domestic investment capital. Since U.S. domestic savings fall far short of fulfilling the United States’ need for capital, the U.S. economy is sustained by massive amounts of foreign investment capital.¹⁴ The sources of this investment capital are the dollars earned when U.S. trading partners run trade surpluses with the United States.¹⁵ Understanding these macroeconomic facts is key to understanding trade imbalance problems.

12. *See infra* Part IV.B.

13. *Id.*

14. *See* James McBride, *The U.S. Trade Deficit: How Much Does It Matter*, COUNCIL ON FOREIGN REL. (Oct. 17, 2017), <https://www.cfr.org/backgrounder/us-trade-deficit-how-much-does-it-matter> (describing how shortfalls in savings are financed by foreign lenders).

15. *See* Kimberly Amadeo, *U.S. Debt to China, How Much It Is, Reasons Why, and What if China Sells*, THE BALANCE (Nov. 1, 2018), <https://www.thebalance.com/u-s-debt-to-china-how-much-does-it-own-3306355> (discussing how China uses dollars gained through exports to the United States to buy treasuries).

Superficial analysis may lead to the conclusion that the U.S. trade deficit may be cured by erecting trade barriers to imports and getting U.S. trading partners to revalue their currencies against the U.S. dollar. This is the basic premise of the Trump administration's economic nationalism. Empirical evidence shows that this approach has not worked in the past. The Reagan administration employed this strategy with respect to Japan in the 1980s.¹⁶ Not only did this strategy not work,¹⁷ it resulted in economic disaster for Japan.¹⁸ In the 1980s the Reagan administration, to reduce the growing trade deficit with Japan, adopted trade restrictions in the form of "voluntary" quotas on autos, machine tools, and other Japanese exports.¹⁹ In the 1985 Plaza Accord, Japan agreed to accept a large degree of appreciation of its currency, the yen, against the U.S. dollar.²⁰ These actions failed to make even a small decrease in the U.S. trade deficit with Japan.²¹ In 1985, the trade deficit was forty-six billion dollars;²² and in 1989 the deficit was forty-nine billion dollars.²³ In Japan the doubling of the yen contributed to an asset bubble, which caused great economic problems in that country.²⁴ The U.S. trade deficit with Japan was temporarily lowered only in 1990-92, when Japan's bubble economy collapsed.²⁵ But the deficit with Japan rebounded in 1993 to over fifty-nine

16. See Lee Branstetter, *Do Trade Restrictions Work? Lessons from Trade with Japan in the 1980's*, PBS (Nov. 20, 2017, 2:29 PM), <https://www.pbs.org/newshour/economy/making-sense/do-trade-restrictions-work-lessons-from-trade-with-japan-in-the-1980s>.

17. See *id.*

18. The Japanese "bubble economy" famously collapsed in 1990, sending Japan into a long recession. The collapse of Japan's "bubble economy" had many causes that are beyond the scope of this article to relate, but economic historians date the beginning of the Japanese "bubble" to September, 1985, when Japan entered into the Plaza Accord with the United States and several other nations. The Plaza Accord engineered a radical depreciation of the U.S. dollar against the yen in order to increase U.S. exports. Instead of narrowing the U.S. trade deficit with Japan, however, the effect of the Accord was to stimulate massive borrowing and speculation in Japan, fueling an asset "bubble" that burst in 1990. See Eric Johnston, *Lessons from When the Bubble Burst*, JAPAN TIMES (Jan. 6, 2009), www.japantimes.co.jp/news/2009/01/06/reference/lessons-from-when-the-bubble-burst/#. XAsjR_ZKgcg; Naoki Abe, *Japan's Shrinking Economy*, BROOKINGS PRESS (Feb. 12, 2010), www.brookings.edu/opinions/japans-shrinking-economy.

19. *Id.*

20. Takatoshi Ito, *The Plaza Agreement and Japan: Reflection on the 30th Year Anniversary* 3-4 (Rice University's Baker Institute for Public Policy, Working Paper, 2015), <https://www.bakerinstitute.org/media/files/files/0eb0ad16/WorkingPaper-Plaza-Ito-092815.pdf>.

21. See Branstetter, *supra* note 16.

22. U.S. CENSUS BUREAU, TRADE IN GOODS WITH JAPAN (2018), <https://www.census.gov/foreign-trade/balance/c5880.html> (rounding to the nearest billion).

23. *Id.*

24. See Maurice Obstfeld, *Time of Troubles: The Yen and Japan's Economy* 4-6, 51-104 (Nat'l Bureau of Econ. Research, Working Paper No. 14816, 2009), <http://www.nbr.org/papers/w14816> (analyzing the Plaza Accord).

25. See U.S. CENSUS BUREAU, *supra* note 22.

billion dollars, and it remains high today. In 2017, it was sixty-nine billion dollars.²⁶

The Trump administration's tariffs and other measures have failed to reduce the U.S. trade deficit. Despite the administration's tariffs and other trade measures, and notwithstanding a huge rise in U.S. energy exports stemming from greater U.S. production of oil and gas, Americans are buying ever more foreign goods and services. In October, 2018, the last statistic available before this article went to press, the U.S. trade deficit widened to \$55.5 billion, the highest monthly deficit in ten years.²⁷

Trade import restrictions and currency changes will not sink the trade deficit because excessive foreign imports constitute only the symptoms not the root cause of the trade deficit. The root cause of the U.S. trade deficit is the current macroeconomic structure of the U.S. economy, which emphasizes consumption and government spending and disincentives saving. The four components of U.S. GDP are: (1) consumer spending; (2) investment; (3) net exports; and (4) government spending.²⁸ Of these the most important are the first and last, consumer and government spending. Consumer spending is emphasized in the United States, in recent years hovering around seventy percent of GDP.²⁹ The second major component, government spending, is excessive and virtually out of control. According to the Congressional Budget Office (CBO), the combination of the unfunded tax cut enacted by the Congress in 2017, and the \$1.3 trillion government spending bill enacted in 2018, mean that the U.S. budget deficit will rise to \$804 billion in fiscal 2019, and will exceed one trillion dollars in fiscal 2020.³⁰

The structure of the American economy that emphasizes consumer spending means that the personal savings rate in the United States is quite low. In December, 2017 the U.S. personal savings rate fell to 2.4%, a twelve year

26. *Id.*

27. Binyamin Appelbaum and Jim Tankersly, *Trade Deficit and Oil Sales Rise Together*, N.Y. TIMES, Dec. 7, 2018, at B1. The highest recorded U.S. trade deficit (\$762 billion) occurred in 2006, during the administration of President George W. Bush.

28. BUREAU OF ECON. ANALYSIS, GROSS DOMESTIC PRODUCT: FIRST QUARTER 2018 (THIRD ESTIMATE); CORPORATE PROFITS: FIRST QUARTER 2018 (REVISED ESTIMATE) 4 (2018), available at <https://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm>.

29. See Kimberly Amadeo, *The Components of GDP Explained*, THE BALANCE, <https://www.thebalance.com/components-of-gdp-explanation-formula-and-chart-3306015> (last updated Oct. 3, 2018).

30. Jeff Stein, *Deficit to Exceed \$1 Trillion per Year by 2020, CBO Says*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/business/economy/deficit-to-top-1-trillion-per-year-by-2020-cbo-says/2018/04/09/93c331d4-3c0e-11e8-a7d1-e4efec6389f0_story.html; Damian Paletta & Erica Werner, *How Congress's and Trump's Latest Deficit Binge Paved the Way for the Next One*, WASH. POST (Apr. 16, 2018), https://www.washingtonpost.com/business/economy/how-congress-and-trumps-latest-deficit-binge-paved-the-way-for-the-next-one/2018/04/15/2d198608-3f2f-11e8-8d53-eba0ed2371cc_story.html.

low.³¹ The U.S. personal savings rate since 1960, has averaged only 8.2%,³² one of the lowest rates in the developed world.³³ From a macroeconomic standpoint, the United States has a severe shortage of domestic savings with which to fund two very important items of its economy — *investment* and the *fiscal deficit*.

Where does the money come from every year to fund these two critical items? Answer: foreign capital. The United States needs and is dependent upon importing massive amounts of foreign capital every year to fund needed U.S. investment and the U.S. budget deficit because domestic savings alone cannot do the job.

And where do foreign countries get the dollars to supply the capital needed by the U.S. economy? Answer: from their trade surpluses with the United States. George P. Schultz, former U.S. Secretary of Labor, Treasury and State, and Martin Feldstein, professor of economics at Harvard and former Chairman of the U.S. Council of Economic Advisors, put it succinctly: “If a country consumes more than it produces, it must import more than it exports. That’s not a rip-off, that’s arithmetic Federal deficit spending, a massive and continuing act of *dissaving*, is the culprit. Control that spending and you will control trade deficits.”³⁴ Schultz makes the further important point that the trade deficit cannot be “fixed” by taking measures that close the deficit with one or a few countries.³⁵ Unless fundamental macroeconomic reform is undertaken, reductions in deficits with a country like China will only result in deficit increases with other nations. The overall trade deficit will remain.³⁶

Analysis of the macroeconomic root causes of the trade deficit points the way toward reforms that will sink this deficit if we wish to make them. The solutions are quite simple, but politically complex. Three things should be done. First, as Schultz and Feldstein state, Congress must act to reduce the U.S. budget deficit. Second, economic incentives should be put in place to stimulate

31. Jeffrey Bartash, *Why the Saving Rate Falling to a 12-Year Low Is Not a Death Knell for the U.S. Economy*, MARKETWATCH (Jan 30, 2018, 1:53 PM), <https://www.marketwatch.com/story/why-the-savings-rate-falling-to-a-12-year-low-is-not-a-death-knell-for-the-us-economy-2018-01-29>.

32. FED. RESERVE BANK OF ST. LOUIS, FRED: PERSONAL SAVING RATE (2018), <https://fred.stlouisfed.org/series/PSAVERT> (average of saving rate percentages for the range of January 1, 1960 to May 1, 2018).

33. Maria Lamagna, *Why Americans Are Some of the World’s Worst Savers*, MARKETWATCH (Apr. 14, 2016, 2:34 PM), <https://www.marketwatch.com/story/why-americans-are-some-of-the-worlds-worst-savers-2016-04-14>.

34. George P. Shultz & Martin Feldstein, Opinion, *Everything You Need to Know About Trade Economics, in 70 Words*, WASH. POST (May 7, 2017) (emphasis added), https://www.washingtonpost.com/opinions/everything-you-need-to-know-about-trade-economics-in-70-words/2017/05/05/a2b76a02-2f80-11e7-9dec-764dc781686f_story.html?utm_term=.0f3ea6627bfb.

35. *Id.*

36. *Id.*; see also, Martin Feldstein, *Inconvenient Truths About the U.S. Trade Deficit*, WALL ST. J. (Apr. 25, 2017), <https://www.wsj.com/articles/inconvenient-truths-about-the-u-s-trade-deficit-1493155446>.

domestic savings. Third, tax measures should be put in place to stimulate American exports.

Tax reform can incentivize saving. At present, if we save money, we must pay a good portion of the money we earn from saving to the IRS in taxes. Americans are presently taxed on earnings from savings at ordinary income rates, so high-earners—who are most likely to save money—are taxed on their savings-earnings at the marginal rate of thirty-seven percent.³⁷ Thus, if such a person earns a dollar on savings, he/she will get to keep only sixty-three cents; thirty-seven cents will go to the U.S. government. By contrast, our high-earning individual is not taxed at all by the federal government on his/her spending. State sales taxes vary, but the average tax is 6.5%.³⁸ Thus, it is far more advantageous from a taxation standpoint to spend rather than to save money in the United States.

Reducing the trade deficit through tax reform would mean some combination of reducing the taxes on savings and increasing the taxes on consumption. For example, Congress could enact a tax bill reducing the individual income tax rates substantially and instituting some form of national consumption tax. In the European Union, for example, member nations collect national “value-added” taxes that range as high as twenty-five percent.³⁹ Virtually every nation, over 140 countries, including major trade partners of the United States, levy a national tax on consumption, with some exemptions, such as medicines and foodstuffs.⁴⁰

It is virtually certain that the foregoing tax reform, which would also help to get the federal budget under control, would immediately begin to reduce the U.S. trade deficit. Since this tax reform would incentivize saving rather than spending, the U.S. savings rate would rise, replacing, to some degree, the need for imported foreign capital. Such reform would also greatly incentivize U.S. companies to export, because, under international rules, a national consumption tax *may be collected at the border on imported products*⁴¹ and *may be rebated*

37. See Amir El-Sibaie, *2018 Tax Brackets*, TAX FOUND. (Jan. 2, 2018), <https://taxfoundation.org/2018-tax-brackets/> (listing the highest marginal tax rate on income to be thirty-seven percent).

38. JARED WALCZAK & SCOTT DRENKARD, TAX FOUND., *STATE AND LOCAL SALES TAX RATES 2018*, 5 (2018), available at <https://files.taxfoundation.org/20180313143458/Tax-Foundation-FF572.pdf> (number derived by averaging the states', excluding D.C., combined state and local sales tax rate).

39. RANDALL G. HOLCOMBE, *THE VALUE ADDED TAX: TOO COSTLY FOR THE UNITED STATES 5* (Mercatus Ctr., 2010), <https://www.mercatus.org/system/files/VAT.Special-Study.-Holcombe.pdf>.

40. Kyle Pomerleau, *How Many Countries in the World Have a Value-Added Tax?*, TAX FOUND. (Nov. 19, 2015), <https://taxfoundation.org/how-many-countries-world-have-value-added-tax>.

41. General Agreement on Tariffs and Trade 1994 (GATT 1994), Art. III.2, 1867 U.N.T.S.187. At present the United States is the only important trading nation in the world that does not benefit from substantial tax rebates on exported products. Since 1971, the U.S. Congress has tried to remedy this situation by enacting tax incentives for U.S. exporters. In this endeavor, the United States has been rebuffed at every turn because its solutions have

on exports.⁴² Thus, a ten percent consumption tax enacted by the U.S. Congress would amount to a ten percent tax on all imported products in addition to the applicable tariffs; and U.S. exporters would get a rebate of ten percent, the amount of the consumption tax they have to pay on domestic sales. Taxing imports (through a consumption tax not tariffs) and rebating taxes on exports would doubtless operate to reduce the trade deficit as net U.S. exports would greatly increase. The U.S. trade deficit would begin to fall dramatically through enactment of these simple but important measures. Although these are simple measures, they may lack political support because of the anti-tax culture in the United States. Political leaders have an obligation to educate the public as to the great advantage of these policies.⁴³

II. ECONOMIC NATIONALISM AMERICAN STYLE

A. Objectives of U.S. Policies

In its March 2018 Trade Report,⁴⁴ the United States Trade Representative (USTR) expressed extreme dissatisfaction with the World Trade Organization (WTO) and the multilateral trading system. Two salient points stand out in the

been found illegal under international law. See Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations”*: Recourse to Article 21.5 of the DSU by the European Communities, WTO Doc. WT/DS108/AB/RW (Jan. 14, 2002); Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations”*, WTO Doc. WT/DS108/AB/R (Feb. 24, 2000); Panel Report, *United States Tax Legislation (DISC)*, GATT Doc. L/4422 (Nov. 2, 1976).

42. The WTO rules on subsidies allow rebates of taxes to exporters for direct but not indirect taxes. Consumption taxes are considered direct taxes. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex I(e), 1869 U.N.T.S. 14.

43. E.g., Jeanna Bryner, *Why Americans Hate Paying Taxes*, LIVE SCIENCE (May 23, 2012), <https://www.livescience.com/20518-paying-taxes-moral-principles.html>; Reuven S. Avi-Yonah, *The Political Pathway: When Will the U.S. Adopt a VAT?*, in THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA 334 (Tax Analysts ed., 2011). Another tax that should be considered is a Carbon Tax on all products manufactured by processes involving burning fossil fuels. Such a tax as proposed by former U.S. officials, James Baker III, George P. Schultz, and Henry M. Paulson, would vary depending upon the volume of fossil fuel consumed in the making of each category of products. See James A. Baker III et al., *The Conservative Case for Carbon Dividends*, CLIMATE LEADERSHIP COUNCIL (Feb. 2017), <http://www.clcouncil.org/media/TheConservativeCaseforCarbonDividends.pdf>. Although not mentioned by Baker et al., an international trade advantage of such Carbon Tax is that the rules of the GATT [Art. II:2(a)] permit such a tax equivalent to that levied on domestic products to be collected at the border on like imported products. Moreover, U.S. exporters would get a 100% rebate of this tax, since it qualifies for “border tax adjustment” under the rules of the WTO Subsidies and Countervailing Measures (SCM) Agreement, Annex I(h), (i) and footnote 61.

44. U.S. TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (2018), [hereinafter USTR 2018 TRADE POLICY], <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017>.

criticism of the WTO. First, the report accuses WTO members, singling out China by name, of “intentionally avoiding, circumventing and violating” WTO commitments.⁴⁵ Second, the report accuses the WTO dispute settlement panels and the appellate body of judicial activism in its jurisprudence.⁴⁶ The report charges they “add to and diminish” rights of the United States and other countries under the WTO agreements.⁴⁷ The report calls for “reform” of the multilateral trading system, but only singles out three areas: agricultural trade, fisheries subsidies, and digital trade.⁴⁸

What is salient about the Trump administration’s trade policies is its unilateralism. The trade policy actions of the Trump administration rest on legal authority under U.S. national laws.⁴⁹ As a result, numerous countries and the European Union have lodged complaints against the United States at the WTO, but the Appellate Body of the WTO is currently dysfunctional because the United States is blocking new appointments.⁵⁰ Thus, it will be years, if at all, before the WTO renders definitive rulings in the pending cases.

The Trump administration’s trade policy rests on four key ideas. First, the United States’ trade-in-goods deficits are excessive. This problem is not new; the United States has run deficits in trade in goods every year since 1975.⁵¹ In 2017, the U.S. trade-in-goods deficit ballooned to \$807.5 billion, its widest mark in nine years.⁵² In that year, the United States ran a trade deficit in goods with every major trading partner: China: \$376 billion,⁵³ Canada: \$18 billion,⁵⁴

45. *Id.* at 29.

46. *Id.* at 22-24.

47. *Id.* at 28.

48. *Id.* at 30-31. The Report acknowledges that the Doha Development Agenda (DDA) is effectively dead, with there having been a consensus at the WTO Ministerial Conference in 2015 not to continue DDA negotiations.

49. *Id.* at 14-19.

50. The USTR Robert Lighthizer commented to *The Wire* on October 27, 2017 that the WTO dispute settlement has “diminished what we bargained for” at the WTO. The United States objects to both procedural and substantive aspects of the dispute settlement system and has been blocking appointment of WTO Appellate Body judges. Priti Patnaik, *Why Has the U.S. Launched an Offensive Against WTO's Dispute Settlement System?*, WIRE (Oct. 27, 2017), <https://thewire.in/external-affairs/us-launched-offensive-wtos-dispute-settlement-system>.

51. For the statistics, see U.S. CENSUS BUREAU, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES- BALANCE OF PAYMENTS (BOP) BASIS (2018), <https://www.census.gov/foreign-trade/statistics/historical/gands.pdf>. See also Kimberly Amadeo, *U.S. Trade Deficits by Country with Current Statistics and Issues*, BALANCE (Nov. 21, 2018), www.thebalance.com/trade-deficits-by-country-3306264.

52. U.S. Trade in Goods and Services, *supra* note 11; BUREAU OF ECON. ANALYSIS & U.S. CENSUS BUREAU, *supra* note 11.

53. BUREAU OF ECON. ANALYSIS & U.S. CENSUS BUREAU, CB 18—33, BEA 18—11, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES JANUARY 2018 (2018) (numbers in text rounded down to nearest billion), <https://www.bea.gov/system/files/2018-03/trad0118.pdf>. For the latest available figures, see Kimberly Amadeo, *supra* note 51.

54. Amadeo, *supra* note 51.

Mexico: \$71 billion;⁵⁵ Japan: \$69 billion;⁵⁶ and Germany: \$65 billion.⁵⁷ The Trump administration believes that its policy actions will improve the terms of trade between the United States and other nations, decreasing the trade deficit substantially.⁵⁸ President Trump's understanding of international trade is that it is a "zero sum game," so that a trade deficit for the United States represents "lost" money.⁵⁹ His administration aims to reverse these "losses" and bring down the U.S. trade deficit.⁶⁰

Second, the Trump administration blames international trade for lost jobs, particularly manufacturing jobs, and, in addition, wage stagnation resulting from imports from low wage countries. President Trump has stated that "politicians have aggressively pursued a policy of globalization - moving our jobs, our wealth and our factories to Mexico and overseas" and that "[t]his wave of globalization has wiped out our middle class."⁶¹

Third, Trump maintains that "trade reform creates jobs."⁶² The Trump administration's tariff actions are designed to create incentives for foreign companies to open factories in the United States instead of exporting their foreign-made products into the United States.⁶³ President Trump himself has stated that "foreign countries [with respect to international trade] cheat in every way imaginable."⁶⁴ The principal offender is China, which was the subject of a

55. *Id.*

56. *Id.*

57. *Id.* For the entire European Union, the 2017 U.S. trade-in-goods deficit was \$151.3 billion (including \$283.3 billion in exports and \$434.6 billion in imports). U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c0003.html> (last visited Jan. 26, 2019).

58. See U.S. TRADE REPRESENTATIVE, *supra* note 9. For a full explanation of how Trump administration trade actions are designed to advantage the United States vis a vis other trading nations, see 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT, OFFICE OF THE U.S. TRADE REPRESENTATIVE 1-3 (Mar. 2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>.

59. On March 5, 2018, for example, President Trump was quoted in the *New York Times*, stating, "we lost, over the last number of years, \$800 billion a year." Jim Tankersley, *Trump Hates the Trade Deficit. Most Economists Don't*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/us/politics/trade-deficit-tariffs-economists-trump.html>.

60. Veronique de Rugy, Opinion, *How Trump Misunderstands Trade*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/opinion/trump-china-trade-deficit.html>.

61. *Full Transcript: Donald Trump's Jobs Plan Speech*, POLITICO (June 28, 2016) [hereinafter *Jobs Speech*] (delivered in Monessen, Pa.), <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>.

62. *Id.*

63. *After Trump Tariffs, Chinese Solar Company Says It Will Build U.S. Factory*, CNN MONEY (Jan. 30, 2018), <http://money.cnn.com/2018/01/30/news/economy/jinko-solar-us-china-trump/index.html>.

64. *Jobs Speech*, *supra* note 61.

scathing *2017 Report to Congress on China's WTO Compliance*,⁶⁵ which we analyze later.

Fourth, the Trump administration's actions are designed to compel trading partners of the United States to negotiate new trade agreements that are more favorable to U.S. interests. President Trump has promised that, he will "negotiate fair, bilateral trade deals that bring jobs and industry back onto American shores."⁶⁶ The Trump administration has been clear that it wishes to obtain new settlements in international trade that eliminate unfair practices of other countries and change the rules to be more favorable to the United States.⁶⁷ The trade actions of the Trump administration, therefore, are not only ends in themselves, but also means to correct misdeeds and create new common ground in international trade.

Will "America First" economic nationalism work as a strategy to repair the U.S. trade deficit and induce other nations to enter into trade and investment agreements more favorable to the United States? We consider this question in the next section of this article. We believe it is no accident that significant American measures on international trade have come on the heels of the worst economic crisis since the Great Depression in the 1930s, the Global Financial Crisis of 2008-2009.⁶⁸ This crisis produced what is termed the "Great Recession" because unemployment in the United States rose to ten percent in October, 2009 as millions of jobs were lost, and U.S. gross domestic product (GDP) declined by over four percent.⁶⁹ The Global Financial Crisis adversely affected millions of ordinary Americans (not to mention people around the world). At one point in 2009, non-governmental jobs were lost at a rate of 306,600 per month;⁷⁰ manufacturing jobs were decreasing at a rate of 170,000 per month;⁷¹ wages stagnated;⁷² "underemployment" reached over six percent

65. See generally U.S. TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

66. *Trump Says US to Quit TPP on First Day in Office*, BBC (Nov. 22, 2016), <https://www.bbc.com/news/world-us-canada-38059623>.

67. See U.S. TRADE REPRESENTATIVE, *supra* note 9.

68. For a fuller account of the Global Financial Crisis, see generally THOMAS J. SCHOENBAUM, *THE AGE OF AUSTERITY* (2012).

69. Robert Rich, *The Great Recession*, FEDERAL RESERVE HISTORY (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_recession_of_200709.

70. U.S. BUREAU LABOR STATISTICS, USDL-09-0908, *THE EMPLOYMENT SITUATION-JULY 2009* 21 (2009), https://www.bls.gov/news.release/archives/empsit_08072009.pdf (306,600 is the average private sector payroll loss calculated using seasonally adjusted numbers from line 2 of Table B-1). At its low point, February 2010, U.S. employment had declined by 8.8 million from its pre-recession peak. Christopher J. Goodman and Steven M. Mance, *Employment Loss and the 2007-09 Recession: An Overview*, BUREAU OF LABOR STATISTICS, *MONTHLY LABOR REVIEW* 3-4 (Apr. 2011), <https://www.bls.gov/opus/mlr/2011/04/art1full.pdf>.

71. U.S. BUREAU LABOR STATISTICS, USDL-09—1583, *THE EMPLOYMENT SITUATION-DECEMBER 2009* 2-3 (2009), https://www.bls.gov/news.release/archives/empsit_01082010.pdf.

as people who could not find full-time jobs were working part-time,⁷³ and income inequality rose between American “elites” and ordinary working people.⁷⁴

The aftermath of the Global Economic Crisis produced the slowest economic recovery of the post-1945 period, as real U.S. GDP grew by an average of 1.5% between 2009 and 2016; wage growth for ordinary people continued to stagnate, and many people continued to work only part-time.⁷⁵ On top of all the economic bad news, the aftermath of the Global Economic Crisis contributed to political dysfunction in the U.S. Congress,⁷⁶ as major laws were passed, if at all, by vote of only one political party.⁷⁷ Worse yet, the U.S. budget deficit is on course to top \$1 trillion per year in 2020,⁷⁸ and total U.S. debt has reached levels (in relation to GDP) not seen since the World War II era.⁷⁹

In the election of 2016, many Americans, unsurprisingly, were looking for drastic measures to cure the political and economic malaise affecting the nation. For the first time in many decades, international trade and its presumed effects became a major issue in the presidential and congressional campaigns.⁸⁰ In the 2016 election, the three major candidates, Donald J. Trump, Hillary R. Clinton, and Bernie Sanders all agreed on just one major issue — international

72. U.S. BUREAU OF LABOR STATISTICS, *THE RECESSION OF 2007-2009* 17 (2009), https://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

73. ANDREW SUM & ISHWAR KHATIWADA, BUREAU OF LABOR STATISTICS, *THE NATION'S UNDEREMPLOYED IN THE "GREAT RECESSION" OF 2007-09* 6 (2010), <https://www.bls.gov/opub/mlr/2010/11/art1full.pdf> (defining “underemployed” to be the ratio of persons underemployed to total employed in a given period).

74. TIMOTHY SMEEDING, THE RUSSELL SAGE FOUNDATION & THE STANFORD CENTER ON POVERTY AND INEQUALITY, *INCOME, WEALTH, AND DEBT AND THE GREAT RECESSION I* (2012), https://inequality.stanford.edu/sites/default/files/IncomeWealthDebt_fact_sheet.pdf (reporting that the great recession did not reduce income inequality since the wealthy have recovered nicely while the poorer have not).

75. See SUM, *supra* note 73, at 6-11.

76. See Susan Page, *Financial Crisis: Bernanke, Paulson, Geithner Offer Lessons From Banking, Housing Meltdown*, USA TODAY (July 18, 2018, 12:01 AM), <https://www.usatoday.com/story/money/2018/07/18/financial-crisis-bernanke-paulson-geithner-offer-lessons-meltdown/784726002>.

77. See David Rogers, *Senate Passes \$787 Billion Stimulus Bill*, POLITICO (Feb. 13, 2009), <https://www.politico.com/story/2009/02/senate-passes-787-billion-stimulus-bill-018837> (reporting the passage of the American Recovery and Reinvestment Act of 2009 with no Republican support in the House of Representatives and three Republican Senators).

78. CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: 2018-2028* 4 (2018), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53651-outlook.pdf>.

79. Mark Whitehouse, *America Is Going Even Deeper into Debt*, BLOOMBERG (Apr. 23, 2018), <https://www.bloomberg.com/view/articles/2018-04-23/america-is-going-even-deeper-into-debt>.

80. See John Brinkley, *Why is Trade Such a Big Deal in the Election Campaign?*, FORBES (Mar. 3, 2016, 10:19 AM), <https://www.forbes.com/sites/johnbrinkley/2016/03/03/why-is-trade-such-a-big-deal-in-the-election-campaign/#5081832d331d>.

trade.⁸¹ All three presidential candidates, who differed radically on virtually everything else, embraced the idea that international trade was, to a great degree, behind America's economic woes.⁸² This attack on international trade, symbolized by the opposition of all three candidates to the Trans-Pacific Partnership Agreement,⁸³ was somewhat disingenuous. Although international trade and investment do undeniably raise legitimate economic and political issues there was no evidence that international trade was a principal cause of the Global Economic Crisis nor of the subsequent slow growth.⁸⁴ During the 2016 electoral campaign, international trade was used as a convenient scapegoat to make expedient political points.

Upon taking office, in his inaugural address, January 20, 2017, President Trump made clear his intention to shift American policy toward international trade. He announced a new "America First" trade policy as follows: "We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength."⁸⁵

A year and a half into his term, President Trump has made good his threatened changes in policy. Although the U.S. Constitution grants authority over foreign commerce to Congress,⁸⁶ President Trump exercises enormous power given to him by past delegations of Congress. President Trump has exercised his delegated authority over trade by taking a bold and aggressive series of actions, which we now summarize.

81. See Ewan Roy, *What Are the U.S. Presidential Candidates Saying About International Trade?*, TRADE READY (Mar. 15, 2016), <http://www.tradeready.ca/2016/trade-takeaways/u-s-presidential-candidates-saying-international-trade/>; David Weigel, *Sanders, Joined by Rust Belt Democrats, Praises Trump for Nixing TPP*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/01/23/sanders-praises-trump-for-nixing-tpp-delighted-to-work-with-him-on-pro-worker-policies/?utm_term=.9107cef5fb9e.

82. *See id.*

83. *See id.*

84. Various causes have been asserted to have led to the Global Financial Crisis ranging from financial deregulation, state indulging rent-seeking corporations, concentration of the banking system, structural macro-economic imbalances in the world economy, to issues with intellectual property rights. Stephanie Blankenburg & José Palma, *Introduction: The Global Financial Crisis*, 33 CAMBRIDGE J. ECON. 531, 531-35 (2009). Instead of international trade being a cause, it has been touted as a solution, especially for developing countries. *See* Press Release, Second Committee, Sixty-Seventh General Assembly, Trade Imbalances Worsening Effects of Global Crisis for Least Developed Countries, Second Committee Told During Discussion on Macroeconomic Policy Questions, U.N. Press Release GA/EF/3345 (Oct. 23, 2012), <https://www.un.org/press/en/2012/gaef3345.doc.htm>.

85. President Donald J. Trump, Inaugural Address (Jan. 20, 2017) (transcript available at <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/>) [hereinafter Trump Inaugural Address].

86. U.S. CONST. art. I, § 8, cl. 3.

B. *Executive Orders and Actions*

- The USTR Trade Policy Agenda (March 2017) was released stating the elements of the America First trade policy: (1) the assertion of U.S. sovereignty; (2) WTO dispute decisions (and presumably WTO agreements) are “not binding or self-executing” regarding the United States; (3) there is to be strict enforcement of U.S. trade laws; (4) maximum leverage will be exercised to open foreign export markets to U.S. exporters; and (5) new and better trade deals will be negotiated.⁸⁷
- At the G-20 Meeting in March 2017, the Trump Administration refused to sign a “no protectionism” pledge. At the G-7 Meeting in June 2018, President Trump similarly refused to sign the final joint communique.⁸⁸
- Executive Order of March 31, 2017, Omnibus Report on Significant Trade Deficits,⁸⁹ required the U.S. Department of Commerce and the USTR to identify trading partners with which the United States had a significant 2016 deficit in goods trade.⁹⁰ For each such trading partner, these agencies were to submit a report that (1) assessed the major causes of the trade deficit; (2) assessed whether the trading partner is engaged in any practice that places the commerce of the United States at an unfair disadvantage; (3) assessed the effects of the trade relationship on the industrial base of the United States; (4) assessed the effects of the trade relationship on employment and wage growth in the United States; and (5) identified imports and trade practices that may be impairing the national security of the United States.⁹¹
- Executive Order of March 31, 2017 on Enhanced Collection and Enforcement of Anti-Dumping, Countervailing Duty, and Customs Laws⁹² requires relevant government agencies to develop strategic

87. U.S. TRADE REPRESENTATIVE, THE PRESIDENT’S 2017 TRADE POLICY AGENDA 2-6 (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf>.

88. Vivian Salama et al., *Trump Says U.S. Won’t Endorse G-7 Communique*, WALL ST. J., (June 9, 2018), <https://www.wsj.com/articles/donald-trump-pitches-tariff-free-trade-zone-to-g-7-allies-1528556581>.

89. Exec. Order No. 13,786, 82 Fed. Reg. 16,721 (Mar. 31, 2017).

90. *Id.* at § 2.

91. *Id.*

92. Exec. Order No. 13,785, 82 Fed. Reg. 16,719 (Mar. 31, 2017) [hereinafter Anti-Dumping EO]. The U.S Department of Commerce has implemented this Executive Order, aggressively filing antidumping and countervailing duty cases under U.S. law. The most important of the cases involves softwood lumber imports from Canada, a dispute that has raged since 1982. In 2017, the Department of Commerce announced antidumping and countervailing duties averaging 20.83% on \$5 billion of imports of softwood lumber from

plans for combatting violations of U.S. laws concerning dumping, subsidies, and customs for goods imported into the United States.⁹³ This order also requires relevant agencies to establish timely and efficient enforcement of laws protecting intellectual property rights holders from the importation of counterfeit goods. Implementing this order, the U.S. Department of Commerce initiated 102 new anti-dumping and countervailing duty investigations between January 20, 2017 and March 8, 2018, a ninety-six percent increase compared to the same period in 2016-17.⁹⁴

- Executive Order of April 18, 2017, Buy American, Hire American⁹⁵ requires strict enforcement of all laws and regulations requiring domestic purchases of goods and services; assessment by relevant agencies of the impact of all U.S. trade agreements on the operation of such laws; and restricting the issuance of H-1B immigration visas to only the “most skilled” foreign workers.⁹⁶
- Executive Order of April 29, 2017, Addressing Trade Agreement Violations and Abuses⁹⁷ requires the U.S. Department of Commerce and the USTR to conduct comprehensive performance reviews of all trade and investment agreements to which the United States is a party as well as all trade relations with countries with which the United States does not have free trade agreements but with which the United States runs significant trade deficits.⁹⁸ The performance reviews were to identify violations, unfair treatment, or abuses and to recommend appropriate actions designed to redress such violations, unfair treatment, or abuses.⁹⁹

Canada. The United States charges that softwood lumber imports benefit from Canadian subsidies since harvesting fees are set administratively and are very low. Press Release, U.S. Dep’t of Commerce, U.S. Dep’t of Commerce Finds Dumping and Subsidization of Imports of Softwood Lumber from Canada (Nov. 2, 2017), <http://www.commerce.gov/tags/softwood-lumber>. Canada has challenged the U.S. action at the WTO in two cases. Requests for Consultations by Canada, *United States — Countervailing Measures on Softwood Lumber from Canada*, WTO Doc. WT/DS533/1 (Nov. 28, 2017); Requests for Consultations by Canada, *United States — Antidumping Measures Applying Differential Pricing Methodologies to Softwood Lumber from Canada*, WTO Doc. WT/DS534/1 (Nov. 28, 2017).

93. See Anti-Dumping EO, *supra* note 92, at § 4.

94. U.S. DEP’T OF COMMERCE, U.S. DEPARTMENT OF COMMERCE ISSUES AFFIRMATIVE PRELIMINARY DETERMINATION ON FORGED STEEL FITTINGS FROM CHINA (2018), <https://www.commerce.gov/news/press-releases/2018/03/us-department-commerce-issues-affirmative-preliminary-determination-0>.

95. Exec. Order No. 13,788, 82 Fed. Reg. 18,637 (Apr. 18, 2017).

96. *Id.* § 3, 5.

97. Exec. Order No. 13,796, 82 Fed. Reg. 20,819 (Apr. 29, 2017).

98. *Id.* at § 2.

99. *Id.* at § 3.

- Executive Order of April 29, 2017, Establishment of Office of Trade and Manufacturing Policy¹⁰⁰ creates a new White House office to advise the president on trade, serve as a liaison between the president and line agencies, and undertake special projects as requested by the president.¹⁰¹

C. Trade Agreements

The Trump administration has taken significant actions with respect to agreements with U.S. trade partners:

- *The Trans-Pacific Partnership Agreement (TPP)*. On January 23, 2017, President Trump signed a Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiation and Agreement,¹⁰² thus terminating a six-year effort by the previous U.S. administration to establish a Pacific Rim free trade and investment union between the United States and eleven other Pacific Rim nations. Notably, the eleven nations remaining completed new negotiations and, on March 8, 2018, the revised agreement, the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) was signed by Australia, New Zealand, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Vietnam.¹⁰³ The CPTPP will enter into force establishing a free trade area among its signatories sixty days after the signatories have ratified it or, if not all signatories have ratified it within two years of its initial signing, when at least half of the signatories accounting for eight-five percent of the combined GDP of the original signatories in 2013 have signed it.¹⁰⁴
- *The Transatlantic Trade and Investment Partnership (T-TIP)*. In 2013, the United States and the European Union kicked off negotiations on a proposed free trade agreement between the world's two largest advanced industrial economies intended to eliminate tariffs and to harmonize U.S. and EU safety and environmental standards. As stated in the *U.S. EU Joint Report on T-TIP Progress to Date* (Jan. 17, 2017),

100. Exec. Order No. 13,797, 82 Fed. Reg. 20,821 (Apr. 29, 2017).

101. *Id.* at § 3.

102. Withdrawal of the United States From the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8,497 (Jan. 23, 2017).

103. Tim McDonald, *Asia-Pacific Trade Deal Signed by 11 Nations*, BBC (Mar. 8, 2018), <https://www.bbc.com/news/business-43326314>.

104. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 30.5, Mar. 8, 2018, [hereinafter CPTPP], <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/#CPTPP>.

negotiators have made “considerable progress,” including agreement to eliminate ninety-seven percent of all tariffs. Although President Trump has decried certain tariff disparities between the U.S. and the EU, the Trump administration has chosen not to continue these negotiations, and on February 8, 2018, the EU Trade Commissioner, Cecilia Malmstrom, announced that the EU would not negotiate free trade agreements with any nation that does not accept the Paris Climate Agreement of 2015.

- *The North American Free Trade Agreement (NAFTA)*. President Trump, who had previously advocated for withdrawal from NAFTA,¹⁰⁵ instead, in August 2017, began a renegotiation of NAFTA with Canada and Mexico.¹⁰⁶ On September 30, 2018, after marathon negotiations, the three NAFTA nations released the text of an updated NAFTA, the “United States-Mexico-Canada Agreement” or USMCA.¹⁰⁷ President Trump, who previously had denounced NAFTA as “the worst trade deal ever made,” now called the USMCA “a wonderful new trade deal.”¹⁰⁸ On November 30, 2018, President Trump signed the USMCA and stated that he would formally withdraw the United States from NAFTA.¹⁰⁹ Since the USMCA is designed, like NAFTA, as a Congressional Executive Agreement, Congressional approval is necessary before the USMCA can go into effect.

The USMCA, which consists of 34 Chapters and associated tariff schedules, annexes, and side letters, is a continuation of NAFTA insofar as it creates a free trade area among the three countries with respect to free movement of goods, services and investment. Ironically, many Chapters of the USMCA that update NAFTA are similar or identical to the TPP. Among the

105. Although the matter is not entirely settled, we believe that President Trump — using the executive authority of the President — may not unilaterally withdraw from NAFTA without the approval of Congress. NAFTA was enacted as a Congressional-Executive Agreement through the exercise of the joint authority of the President and the Congress. Congressional action was accomplished through the enactment of the NAFTA Implementation Act, 19 U.S.C. § 3301 (1993), and scattered sections of Title 19 of the U.S. Code.

106. *The North American Free-Trade Agreement Renegotiation Begins*, ECONOMIST (Aug. 17, 2017), <https://www.economist.com/finance-and-economics/2017/08/17/the-north-american-free-trade-agreement-renegotiation-begins>.

107. The Agreement Between the United States of America, the United Mexican States, and Canada, United States-Mexico-Canada [hereinafter USMCA], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico#>.

108. *Donald Trump Ends NAFTA Dispute ‘With a Wonderful New Trade Deal’*, GUARDIAN (Oct. 1, 2018), <https://www.theguardian.com/us-news/video/2018/oct/01/donald-trump-ends-bitter-trade-dispute-with-a-wonderful-new-trade-deal-video>.

109. Glenn Thrush, *Trump Says He Plans to Withdraw from NAFTA*, N.Y. TIMES, Dec. 2, 2018, at A1.

many Chapters of the TPP incorporated into the USMCA are Chapter 7, Customs and Trade Facilitation; Chapter 19, Digital Trade; Chapter 20, Intellectual Property; Chapter 22, State-Owned Enterprises; Chapter 23, Labor; Chapter 24, Environment (however, with no mention of climate change); Chapter 25, Small and Medium-Sized Businesses; Chapter 27, Anticorruption; and Chapter 28, Good Regulatory Practices.

The USMCA contains provisions not found in NAFTA or the TPP. First, Chapter 2 (National Treatment and Market Access for Goods) marginally liberalizes trade in dairy products, eggs, and poultry between the United States and Canada.¹¹⁰ Whereas the TPP would have allowed U.S. exporters to access up to about 3.25% of the domestic Canadian dairy market, the USMCA expands this share to 3.59%.¹¹¹ Second, the USMCA significantly strengthens rules of origin that must be met for products to qualify for duty-free treatment by the three countries.¹¹² Most importantly, the North American content requirement for autos and auto parts is raised from 62.5% to 75%, and 40-45% of auto parts must be manufactured by workers earning at least \$16 per hour.¹¹³ The impact of these rules of origin changes and other USMCA provisions will be to advance protection of the U.S. market in eight key economic areas: manufacturing (especially autos and light trucks), services, agriculture, technology, pharmaceuticals, textiles, energy, and retail.¹¹⁴ Third, the USMCA contains a “sunset clause:” unless renewed the Agreement terminates after sixteen years.¹¹⁵ Fourth, while the USMCA retains the binational panel procedure of NAFTA that allows independent review of final antidumping and countervailing duty determinations by national authorities, the USMCA abolishes the investor-state dispute settlement (ISDS) system between the United States and Canada; the ISDS procedure is retained for investment disputes between the United States and Mexico.¹¹⁶ Fifth, the USMCA, Chapter 33 pledges that all three nations will avoid currency manipulation or devaluation for competitive purposes.¹¹⁷

As one reviewer, Catherine Rampell, put it, “the USMCA is mostly just a smooshing together of two trade deals that [President Trump previously]

110. USMCA, *supra* note 107, at Chapter 2, U.S. TRQ Appendix to U.S. Tariff Schedule; CA TRQ Appendix to CA Tariff Schedule.

111. USMCA, Chapter 3, Annex 3-B, Section C, Dairy Pricing and Exports.

112. *See generally* USMCA, *supra* note 107, at Chapter 4, Rules of Origin and Product Specific Rules.

113. USMCA, *supra* note 107, at Chapter 4, Appendix to Annex 4-B, Provisions Relating to Product Specific Rules of Origin for Automotive Goods.

114. For a full account of these and other changes wrought by USMCA, see Thomas J. Schoenbaum, *The Art of the Deal and North American Free Trade: Advantage for the United States?*, OHIO ST. BUS. L. REV. (forthcoming 2019).

115. USMCA, *supra* note 107, at Art. 34.7.

116. *See* USMCA, *supra* note 107, at Appendix 14D, Mexico-United States Investment Disputes.

117. Such a pledge was missing from the TPP; however, the TPP countries separately gave such a pledge in a side letter in 2016.

derided as the worst trade deals ever made.”¹¹⁸ In any case the USMCA is the first free trade agreement on record that seeks to increase international barriers to trade and investment. Significantly, U.S. tariffs on steel and aluminum are unaffected by the USMCA. The United States reportedly wishes to negotiate quotas on imports of Mexican and Canadian steel as a condition of lifting these tariffs.¹¹⁹ Moreover, the USMCA preserves the right of the United States to impose national security tariffs on Canada and Mexico, including on autos and auto parts if exports exceed certain quotas.¹²⁰

- *Korean-United States Free Trade Agreement (KORUS)*. In March 2018, the Trump administration announced agreement with South Korea to revise certain aspects of KORUS, the free trade agreement between South Korea and the United States that entered into force in 2012.¹²¹ The KORUS revision, which is effective May 1, 2018, has three main provisions: (1) the quota of cars that each U.S. automaker may export to South Korea is raised to 50,000 vehicles per year; (2) the twenty-five percent tariff on light trucks imported into the United States is extended to 2041; and (3) to escape the imposition of tariffs on steel, South Korea agrees to limit its export of steel products to the United States to seventy percent of the average annual shipments to the United States from 2015 to 2017.¹²²

D. *Currency Manipulation*

The Trump administration has charged several countries with manipulating their currencies to obtain an advantage in trade with the United States. Some obligations of countries to maintain stable currency policies derive from international commitments established by the WTO and its affiliate institution, the International Monetary Fund (IMF), which was established at the end of the

118. Catherine Rampell, *NAFTA 2.0, with a Splash of TPP*, WASH. POST (Oct. 2, 2018), <https://www.pressreader.com/usa/the-washington-post/20181002/282003263363877> (attributing this insight to Professor Emily Blanchard of the Dartmouth University School of Business).

119. Alan Rappeport and Glenn Thrush, *U.S. Weighs Steel Quotas Instead of Tariffs on Canada and Mexico*, N.Y. TIMES, Nov. 21, 2018, at A1.

120. Side letters exchanged between the USTR and Canada and Mexico.

121. Press Release, U.S. Trade Representative, Joint Statement by the U.S. Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim (Mar. 28, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-statement-united-states-trade>.

122. Fact Sheet, U.S. Trade Representative, New U.S. Trade Policy and National Security Outcomes with the Republic of Korea (Mar. 2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/new-us-trade-policy-and-national>.

Second World War as a non-governmental organization to discourage countries from devaluating their currencies.¹²³

Article IV:1(iii) of the Articles of Agreement of the IMF places an important obligation upon member states concerning currency exchange rate policies. An IMF member must “avoid manipulating exchange rates . . . to gain an unfair competitive advantage over other members.”¹²⁴ The obligation to avoid “currency manipulation in IMF Article IV:1(iii) is supplemented by the General Agreement on Tariffs and Trade (GATT), Article XV on Exchange Arrangements. GATT Article XV:4 states that WTO members “shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor . . . the intent of the provisions of the Articles of Agreement of the International Monetary Fund.”¹²⁵ An addendum to Article XV, Ad Article XV, Paragraph 4, further defines the word “frustrate” by stating that “infringements of the letter [of the Article] by exchange action shall not be regarded as a violation . . . if, in practice, there is no appreciable departure from the intent of the Article.”¹²⁶

We can see from parsing these two articles that the obligations they embody are difficult, if not impossible, to enforce. The IMF is devoid of any compulsory dispute settlement system; thus, currency misalignments may be addressed only informally.¹²⁷ While the GATT 1994 may be enforced through the WTO dispute settlement system, to prevail based on GATT Article XV:4 requires consideration of whether there is an “appreciable departure” as well as an analysis of “intent” with regard to any alleged currency manipulation. These are notably difficult issues. Unsurprisingly, no IMF or WTO member has been officially and formally sanctioned or condemned for currency exchange rate manipulation.¹²⁸

Rather than making formal complaints at the IMF or WTO, successive U.S. administrations have found it productive to engage in direct negotiations with countries concerning exchange rate misalignment.¹²⁹ In 1985, such talks produced the Plaza Accord, which devalued the U.S. dollar against key countries’ currencies in response to ongoing U.S. trade deficits and trade surpluses by Germany and Japan.¹³⁰ As a result of the Plaza Accord the Japanese yen doubled in value against the dollar and the German mark rose by

123. See *Cooperation and Reconstruction (1944-71)*, IMF, <http://www.imf.org/external/about/histcoop.htm> (last visited Nov. 9, 2018).

124. Articles of Agreement of the International Monetary Fund, art. IV, § 1(iii), July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39.

125. General Agreement on Tariffs and Trade, art. XV, § 4, Oct. 30, 1947, 61 Stat. A-11,55 U.N.T.S. 194 [hereinafter GATT].

126. *Id.* at art. XV.

127. Daniel C.K. Chow, *Can the United States Impose Trade Sanctions on China for Currency Manipulation?*, 16 WASH. U. GLOBAL STUD. L. REV. 295, 302-03 (2017).

128. For more complete analysis, see generally Claus D. Zimmermann, *Exchange Rate Manipulation and International Law*, 105 AM. J. INT’L L. 423 (2011).

129. See *infra* notes 130, 132.

130. Jeffrey Frankel, *The Plaza Accord, 30 Years Later* (Harv. Kennedy Sch., Working Paper No. RWP15-056, Sept. 20, 2015).

forty percent.¹³¹ Notoriously, however, U.S. trade deficits continued, and France, the United Kingdom, Japan, Canada, and Germany and the United States were constrained to enter into the Louvre Accord in 1987 to stabilize the value of the U.S. dollar.¹³² Thus, international agreements to intervene in the international currency markets for political purposes have not been met with success.

In 2015, the United States enacted the Currency Undervaluation Investigation Act,¹³³ which requires the Secretary of the Treasury to conduct annual reviews of major U.S. trading partners to determine if they are guilty of currency manipulation.¹³⁴ Under this Act, a nation may be designated a currency manipulator and become subject to trade and investment sanctions if three conditions are met: (1) an overall large current account surplus (three percent or more of GDP); (2) a large bilateral trade deficit with the United States (twenty billion dollars or more); and (3) persistent and substantial intervention in the international currency markets to prevent appreciation of its currency.¹³⁵ No country has yet been designated a currency manipulator under this law, but the latest biannual *Report to Congress* (April 2018) the U.S. Department of the Treasury places India, China, Japan, South Korea, Germany, and Switzerland on a watch list to be monitored as currency manipulators.¹³⁶ The Trump administration has charged that China's currency, the yuan, was undervalued and Trump himself has condemned China for currency manipulation activities. But, as of this writing, the administration has only placed China on the watch list.¹³⁷

However, as reported in the *Washington Post*, President Trump, on April 16, 2018, writing on Twitter, accused both China and Russia of manipulating their currencies in a way that gives both countries an unfair trade advantage.¹³⁸ He stated: "Russia and China are playing the Currency Devaluation game as the United States keeps raising interest rates. Not acceptable!"¹³⁹

131. Eduardo Porter, *Whoops! It's 1985 All Over Again*, N.Y. TIMES (Dec. 19, 2004), <https://www.nytimes.com/2004/12/19/business/yourmoney/whoops-its-1985-all-over-again.html>.

132. Jack Barnes, *The World Needs a New Louvre Accord*, BUS. INSIDER (Feb. 1, 2011), <http://www.businessinsider.com/the-world-needs-a-new-louvre-accord-2011-2>.

133. 2015 Trade Facilitation and Enforcement Act Title VII, 19 U.S.C. §§ 4421-22.

134. *Id.* §§ 4421(a), (c).

135. U.S. DEP'T OF TREASURY, MACROECONOMIC AND FOREIGN EXCHANGE POLICIES OF MAJOR TRADING PARTNERS OF THE UNITED STATES 2 (2018), <https://home.treasury.gov/news/press-releases/sm0348>.

136. *Id.* at 2-5.

137. *See id.* at 2, 15-17; Zeeshan Aleem, *Trump Called China a Currency Cheat. Then He Changed His Mind. Now He's Changed It Again.*, VOX (Apr. 16, 2018), <https://www.vox.com/world/2018/4/16/17242946/trump-twitter-china-currency-devaluation-manipulation> (reporting President Trump's flip flopping of condemning China for currency manipulation).

138. Damian Paletta, *Trump, Opposing Treasury Dept., Says China and Russia Devalue Currencies*, WASH. POST, Apr. 17, 2018, at A7.

139. *Id.*

E. *Tariffs*

The Trump administration has taken significant actions to impose tariffs on imports.

- *Safeguard Tariffs.* On January 22, 2018, the USTR announced that President Trump has approved safeguard tariffs of twenty-five percent to thirty percent to be imposed for three years on imported large residential washing machines and four years on imported solar photovoltaic cells and modules.¹⁴⁰ These safeguard tariffs were imposed under section 201 of the Trade Act of 1974 which allows such tariffs to be imposed by the president on the complaint of a domestic industry after an investigation by the U.S. International Trade Commission.¹⁴¹ The statutory ground for such tariffs is that imports are causing or threatening a sudden serious injury to a domestic industry in the United States.¹⁴²

The safeguard tariffs on solar cells are reportedly having a negative effect on the solar industry in the United States.¹⁴³ Major solar energy projects have been cancelled and an estimated \$8 billion worth of utility projects were either canceled or put on hold for the five-year period ending in 2022.¹⁴⁴ A reported 9,000 jobs in the U.S. solar industry were either lost or not added because of the tariffs.¹⁴⁵

- *National Security Tariffs on Steel and Aluminum.* On March 8, 2018, President Trump announced new tariffs of twenty-five percent on steel imports¹⁴⁶ and ten percent on aluminum imports¹⁴⁷ into the United

140. Press Release, U.S. Trade Representative, President Trump Approves Relief for U.S. Washing Machine and Solar Cell Manufacturers (Jan. 22, 2018). *See also* Douglas J. Heffner and Richard P. Ferrin, *White House Clarifies Section 201 Trade Remedies for Solar Cells and Large Residential Washers*, DRINKERBIDDLE (Jan. 25, 2018), <https://www.drinkerbiddle.com/insights/publications/2018/01/white-house-clarifies-section-201-trade-remedies>. These duties were upheld in court. *Silfab Solar, Inc. v. United States*, 892 F.3d 1340 (Fed. Cir. 2018). The tariffs on solar cells and modules amount to 30% the first year; 25% the second year; 20% the third year; and 15% the fourth and final year. In each year the first 2.5 gigawatts of imported solar cells are exempt.

141. 19 U.S.C. § 2251 (2016).

142. *Id.* at § 2251(a).

143. Cathy Bussewitz, *Solar-Energy Projects Canceled, Delayed over Tariffs*, *Industry Says*, SEATTLE TIMES, Dec. 14, 2018, at A12.

144. *Id.* Only about ten percent of solar panels installed in the United States are made domestically. *Id.*

145. *Id.*

146. Proclamation No. 9704, Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 11,619 (Mar. 8, 2018). Protectionism for the U.S. steel industry has a long history. *See* Dana Milbank, *An Old Story about Steel*, WASH. POST, Mar. 11, 2018, at A16. In the 1960s, the United States began to import about twenty percent of steel, and imports today

States. The basis for these tariffs is section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, which allows the president to impose tariffs to safeguard national security after an appropriate investigation by the U.S. Department of Commerce.¹⁴⁸ Canada, Mexico, South Korea, Argentina, Australia, Brazil, and countries of the European Union, representing sixty-three percent of U.S. steel imports, were initially exempted from the tariffs until June 1, 2018.¹⁴⁹ But on May 31, 2018, the Trump administration announced that these tariffs would

hold at about twenty-five percent as of 2017. The United States is the biggest importer of steel in the world (\$29.1 billion in 2017) with steel products coming from 110 countries and territories. The top ten sources, about eighty percent of imports, are Canada, Brazil, South Korea, Mexico, Japan, Turkey, Russia, Germany, Taiwan, and Vietnam. The U.S. steel industry is characterized by two basic facts. First, the U.S. consumption of steel is decreasing, about half as much per-capita as in the 1970s. Second, the entire industry is becoming progressively less labor-intensive over time. U.S. steel production is down by one-third since the 1970s, but employment is down by about three-quarters. There is a long history of U.S. government intervention against imports to help the U.S. steel industry. In 1978, the Carter administration instituted a “trigger price mechanism” to levy duties on cheap imported steel. The Reagan administration instituted voluntary restraints and tariff duties. See Samuel L. Bright & Joseph A. McKinney, *The Economics of the Steel Trigger Price Mechanism*, 19 BUS. ECON. 40, 40-46 (1984). The Clinton administration enforced anti-dumping and countervailing duties, and the Bush administration introduced safeguard duties in 2002. In 2017, when President Trump took office, 113 antidumping and countervailing duty actions were being applied to imported steel. See INTERNATIONAL TRADE ADMINISTRATION, GLOBAL STEEL MONITOR, STEEL IMPORTS REPORT, at 7 (2017). The U.S. steel industry has been a chronic complainer to government, ever clamoring for protection from imports. David Stockman, U.S. budget director under Reagan in the 1980s, called steel the “crybabies of the Beltway Lobby Farm.” Joe Concha, *Former Reagan Budget Director: ‘Steel Industry Are Crybabies’ and Trump Is Their ‘Biggest Sucker Yet,’* HILL (Mar. 8, 2018), <http://thehill.com/homenews/media/377484-former-reagan-budget-director-steel-industry-are-crybabies-and-trump-is-their>.

147. Proclamation No. 9705, Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

148. Since 1980, the Department of Commerce has conducted only fourteen investigations under section 232, and tariffs were imposed only in one case, in 1982, when President Reagan embargoed crude oil produced by Libya. U.S. DEP’T OF COMMERCE, SECTION 232 INVESTIGATIONS PROGRAM GUIDE: THE EFFECTS OF IMPORTS ON THE NATIONAL SECURITY 16 (2007).

149. This exemption, originally until May 1, 2018, was extended at the last minute to June 1, 2018, causing great uncertainty in the business world. Everett Rosenfeld, *U.S. Extends Tariff Exemptions for European Union and Other Allies*, CNBC (Apr. 30, 2018), <https://www.cnbc.com/2018/04/30/us-extends-tariff-exemptions-for-eu-and-other-allies.html>. The Trump administration is also acting on national security grounds to restrict investment by Chinese companies. On March 12, 2018, the U.S. Department of the Treasury and President Trump invoked national security to prohibit Broadcom, a Singapore-based company dominated by China, from taking over Qualcomm, a U.S. technology company. Press Release, U.S. Dep’t of the Treasury, Statement by Sec’y Mnuchin on the President’s Decision Regarding Broadcom’s Takeover Attempt of Qualcomm (Mar. 12, 2018), <https://home.treasury.gov/news/press-releases/sm0309>. The legal basis for this decision was § 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, 50 U.S.C. App. § 2170.

be imposed on all U.S. trading partners beginning June 7, 2018.¹⁵⁰ The U.S. Department of Commerce is permitted to exempt individual U.S. importers from the steel and aluminum tariffs on a case-by-case basis. As reported April 17, 2018, more than 1,200 applications for waivers or exemptions are pending for the steel tariffs, and 125 requests for waivers from the aluminum tariffs are pending. A waiver may be granted only if a company needs certain steel or aluminum items that cannot be made in the United States.¹⁵¹

- *National Security Investigation into Imports of Cars, Trucks and Auto Parts.* On May 23, 2018, the Trump administration announced that it would begin an investigation under section 232 of the Trade Expansion Act to determine whether such imports endanger U.S. national security.¹⁵² U.S. officials confirmed that their intent is to impose twenty-five percent tariffs on future imports of autos, trucks and auto parts.¹⁵³
- *Section 301 tariffs on \$50 billion of Chinese products.*¹⁵⁴ On March 22, 2018, the Trump administration announced the imposition

150. Press Release, White House, President Donald J. Trump Approves Section 232 Tariff Modifications (May 31, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-section-232-tariff-modifications-2>. It is notable that the Trump administration imposed the steel and aluminum tariffs on Canada despite the fact that U.S. steel exports to Canada exceed steel imports. Canada immediately retaliated by imposing tariffs on U.S. steel, aluminum and dozens of additional American exports. Kim Mackrael, *Canada Considers Imposing Tariffs on Steel Imports*, WALL ST. J., June 29, 2018, at A8.

151. Heather Long, *Firms Flood Commerce with Requests for Tariff Waivers*, WASH. POST, Apr. 17, 2018, at A16.

152. Press Release, Dep't Commerce, U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports (May 23, 2018), <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>.

153. Shawn Donnan, *Trump Stirs Global Anger with Car Tariff Threat*, FIN. TIMES, May 25, 2018, at 6. See also Carl Surran, *Trump Considers Tariffs on New Imported Autos up to 25%*, WALL ST. J., May 23, 2018, at 1.

154. There is a long history in U.S. law for the President to be delegated authority by Congress to act unilaterally to impose tariffs or other trade restrictions in response to discriminatory or unfair treatment by trading partners. The first such statute was § 317 of the Tariff Act of 1922, which was superseded by § 338 of the Tariff Act of 1930, which has not been used lately, but is still governing law, 19 U.S.C. § 1338 (2016). See John K. Veroneau & Catherine H. Gibson, *Presidential Tariff Authority*, 111 AM. J. INT'L L. 957 (2017). The modern version of this unilateral Presidential authority, which was used by President Trump, is § 301 of the Trade Act of 1974, 19 U.S.C. §§ 2411-2420. In 1984, Congress added "special section 301," 19 U.S.C. § 2420 (2016), to the President's powers, allowing unilateral action in response to unfair failure to protect U.S. intellectual property rights. In 1988, Congress added "super section 301," 19 U.S.C. § 2420 (2016), which establishes a biannual review of "trade enforcement priorities," unfair and discriminatory actions by trading partners.

of new twenty-five percent tariffs on fifty billion dollars of Chinese products imported into the United States.¹⁵⁵ The authority for the imposition of these tariffs is section 301(b) of the Trade Act of 1974, as amended, 19 U.S.C. § 2411(b), which allows the president to impose tariffs in retaliation for a foreign country's unreasonable or discriminatory act or practice that burdens the commerce of the United States.¹⁵⁶ The grounds for these tariffs are an alleged forced transfer of technology by U.S. companies doing business in China as well as a lack of protection of U.S. technology and trade secrets.¹⁵⁷ The tariffs are allegedly levied on Chinese products benefiting from the failures to protect intellectual property rights.¹⁵⁸

- *Additional Section 301 Tariffs on Chinese Products.* On April 5, 2018, President Trump instructed the USTR to undertake the process necessary to put tariffs on an additional \$100 billion of Chinese products.¹⁵⁹ Then in June, 2018, in a series of decisions, the Trump administration raised this additional tranche of section 301 tariffs on Chinese products to \$200 billion.¹⁶⁰ President Trump further threatened that, if China retaliated, he will order the USTR to impose tariffs on a third tranche of \$200 billion of Chinese products.¹⁶¹ If all three tranches of tariffs are implemented, total Chinese imports of \$450 billion will be subject to additional U.S. tariffs, almost as much as the total of \$505 billion in goods that the United States imported

155. Bob Davis, *U.S. to Apply Tariffs on Chinese Imports, Restrict Tech Deals*, WALL ST. J. (Mar. 22, 2018), <https://www.wsj.com/articles/u-s-to-apply-tariffs-on-50-billion-of-chinese-imports-1521723078>.

156. *Id.*

157. *Id.*

158. The question of the conformity of § 301 with U.S. obligations under the WTO was litigated at the WTO. In 1999, in response to a complaint brought against the United States by the European Communities, a WTO dispute settlement panel found that the U.S.C. § 301 remedies constitute a “serious threat” to the WTO dispute settlement system and are “prima facie” inconsistent with WTO obligations. However, the panel concluded that the United States was not in violation of its WTO commitments because a Statement of Administrative Action approved by Congress if § 301 determinations would be based upon findings of a WTO panel or the Appellate Body, implying that the United States would not act unilaterally. Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS52/R (adopted Dec. 22, 1999) (holding that § 301 did not violate the WTO).

159. Steve Holland & David Lawder, *Trade Dispute Escalates as Trump Threatens \$100 Billion More in China Tariffs*, REUTERS (June 6, 2018), <https://www.reuters.com/article/us-usa-trade-china/trade-dispute-escalates-as-trump-threatens-100-billion-more-in-china-tariffs-idUSKCN1HC1RW>.

160. Press Release, U.S. Trade Representative, USTR Robert Lighthizer Statement on the President's Additional China Trade Action (June 18, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-robert-lighthizer-statement-0>.

161. William Mauldin, *Trump Prepares More Tariffs for China*, WALL ST. J., June 19, 2018, at 1.

from China in 2017.¹⁶² On October 1, 2018, the United States began to levy tariffs of ten percent on the additional \$200 billion worth of Chinese imports, announcing that, if no progress is made toward agreement with China on outstanding trade issues, the tariff would be raised to twenty-five percent on January 1, 2019.¹⁶³ On December 1, 2018, after dinner with China President Xi Jinping, President Trump announced a “temporary truce” for ninety days with respect to new tariffs on Chinese imports. In return for President Xi’s promise to buy more U.S. agricultural and energy products, President Trump agreed to hold off on additional tariffs on Chinese imports until March 1, 2019.¹⁶⁴ At this writing the two sides are holding talks on outstanding trade issues.

The imposition of these tariffs and threatened tariffs by the United States has caused global criticism against the United States. Key trading partners of the United States, including the European Union, Canada, Mexico, Japan, and China, are currently retaliating by raising tariffs against U.S. exports.¹⁶⁵ A complete list of retaliatory tariffs levied by seven nations and the European Union, at this writing, is available on the web site of the U.S. International Trade Administration.¹⁶⁶

The economic effect of tariffs is well known, both theoretically and empirically. In fact, there is a recent case in point: the safeguard tariffs of up to thirty percent imposed by the George W. Bush administration on imported steel products in March 2002.¹⁶⁷ These tariffs caused declines in both U.S. employment and GDP,¹⁶⁸ and were withdrawn on December 4, 2003, after being declared illegal by the Appellate Body of the WTO.¹⁶⁹

162. *Id.*

163. Alan Rappeport, *A New Round of Tariffs on Chinese Goods*, N.Y. TIMES, Sept. 23, 2018, at A1.

164. Keith Bradsher and Alan Rappeport, *U.S.-China Trade Truce Gives Both Sides Welcome Breathing Room*, N.Y. TIMES, Dec. 2, 2018, at A1.

165. Vicki Needham, *Lighthizer Blasts EU, Key Trading Partners for Retaliatory Tariffs*, THE HILL (June 6, 2018), <http://thehill.com/policy/finance/394296-lighthizer-blasts-eu-key-trading-partners-for-retaliatory-tariffs>.

166. International Trade Administration, https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002097/asp.

167. David Sanger, *Bush Puts Tariffs of as Much as 30% on Steel Imports*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2002/03/06/us/bush-puts-tariffs-of-as-much-as-30-on-steel-imports.html>.

168. Robert Read, *The Political Economy of Trade Protection: The Determinants and Welfare Impacts of the 2002 U.S. Emergency Steel Safeguard Measures*, 28 WORLD ECON. 1119, 1119-37 (2005).

169. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/AB/R, DS249/AB/R, DS251/AB/R, DS252/AB/R, DS253/AB/R, DS254/AB/R, DS258/AB/R, DS259/AB/R (adopted Nov. 11, 2003). By withdrawing the tariffs, the United States escaped retaliatory tariffs which would have been imposed by trading partners.

Considering the economic effect of the 2002 steel tariffs,¹⁷⁰ the likely economic impact of the Trump tariffs on steel and aluminum, for example, are as follows: (1) prices of imported steel and aluminum products will rise equivalent to the tariffs imposed; prices for competing *domestic* steel products will also rise, as domestic steel producers' foreign competition is eliminated; (2) prices of products made in steel and aluminum consuming industries will rise across the board. Steel and aluminum consuming industries may experience difficulties in obtaining quantities and qualities of these metals that they need; (3) gains in employment by domestic steel and aluminum producing industries will likely be offset by greater job losses in metal consuming industries;¹⁷¹ (4) improvements in the U.S. balance of trade due to diminished steel and aluminum imports from high-cost countries will likely be offset by increased steel and aluminum imports from low-cost countries, resulting in *no net benefit* for the U.S. balance of trade. Price increases, job losses, and economic disruption will occur in U.S. industries adversely affected by retaliatory tariffs imposed by U.S. trading partners.

F. *On the Defensive in the WTO*

On the international law front, the Trump administration has largely refrained from taking meaningful action at the WTO;¹⁷² the United States is on the defensive as far as international law is concerned. The Trump USTR is faced with defending U.S. trade policies, most notably in the dispute settlement system of the WTO. Member States affected by U.S. trade actions have filed numerous complaints against the United States at the WTO.¹⁷³ These cases

170. Steel: Monitoring Developments in the Domestic Industry, USITC Pub. 3632, Inv. No. TA-204-9, (Sept. 2003); Steel-Consuming Industries: Competitive Condition with Respect to Steel Safeguard Measures Vol. III: Executive Summaries and Investigation, USITC Pub. 3632, Inv. No. 332-452 (Sept. 2003), https://www.usitc.gov/publications/safeguards/3632/pub3632_vol3_all.pdf; JOSEPH FRANCOIS & LAURA M. BAUGHMAN, THE UNINTENDED CONSEQUENCES OF U.S. STEEL IMPORT TARIFFS: A QUANTIFICATION OF THE IMPACT DURING 2002 (2003); Steel Consuming Industries: Competitive Conditions with Respect to Steel Safeguard Measures, USITC Pub. 3632, Inv. No. 332-452 (Sept. 2003), Vol. III Executive Summary pp. vii-xii.

171. The 2002 steel tariffs reportedly caused the loss of over 200,000 jobs in steel consuming industries, more than the entire number of people employed (187,500) in U.S. steel production. See Francois & Baughman, *supra* note 170, at Executive Summary.

172. In contrast to the Obama USTR, which by the authors' count filed fourteen requests for consultations against China at the WTO, the Trump USTR has only filed one significant case, Requests for Consultations by the United States, *China—Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. No. WT/DS/542/1 (Mar. 23, 2018).

173. See https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm for examples of pending cases against the United States. See, e.g., Request for Consultations by India, *United States—Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS547/1 (May 23, 2018); Request for Consultations by the Republic of Korea, *United States—Safeguard Measure on Imports of Large Residential Washers*, WTO Doc. WT/DS546/1 (May 14, 2018); Request for Consultations by China, *United States—Certain*

challenge the legality under international law of virtually every U.S. action taken; WTO members allege that U.S. actions violate WTO agreements to which the United States is a party.¹⁷⁴ The pending cases will take years to wind their way through the WTO dispute settlement process; but if, as is likely, the WTO rulings go against the United States, WTO members will be authorized to maintain significant trade sanctions against U.S. exports.¹⁷⁵ The United States thus faces future widespread international condemnation and a broad array of trade sanctions against U.S. products in international trade if it persists in its nationalistic economic policies.

III. FALLACIES OF ECONOMIC NATIONALISM

Economic nationalism,¹⁷⁶ as defined by Steve Bannon, President Trump's erstwhile chief strategist, is a political and economic doctrine that advocates stricter border controls by the United States with respect to all factors of production — goods, services, capital and people — on grounds that this is necessary for the economic welfare of the people of the United States.¹⁷⁷

Measures on Steel and Aluminum Products, WTO Doc. WT/DS544/1 (Apr. 5, 2018); Request for Consultations by Vietnam, *United States—Certain Measures Concerning Pangasius Seafood Products from Vietnam*, WTO Doc. WT/DS540/1 (Feb. 22, 2018).

174. *See id.*

175. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

176. Economic nationalism is rooted in two historical movements, mercantilism and nationalism. Mercantilism is the view that economic success requires promoting exports, restrictions on imports, and government control over capital flows. Nationalism is excessive pride in one's own nation and a belief in its superiority to the detriment of other nations and people. Mercantilism emphasizes the promotion of exports and restrictions on imports in international trade.

177. Speaking about the American economy and economic nationalism to the California GOP, Steve Bannon said:

When those people finally understand what economic nationalism is about and it's not about your race, your color, your gender, your religion, your ethnicity, your sexual preference. It's about one thing: Are you a citizen of the United States of America? Because if you are a citizen, there are certain responsibilities and obligations that come with that. But as a citizen also you should have preference for jobs and economic opportunities. Economic nationalism is not what's going to drive us apart, it's what's going to bind us together.

We've had a very dangerous thing come as conservatives over the last 30 or 40 years — just another thing I know everybody in this room is not going to agree with. This kind of Austrian School of economics, this kind of Ayn Rand, you know, where everything was about the economy. What was most important six weeks before the election — gotta see what the unemployment rate is, it's GDP as everything. We are not an economy. We are a country. We have a social fabric and a civic responsibility. By the way, I'm a free market capitalist, as most of you are, right? That's the underpinnings of our society. But we are a civic society, it's more than an economy. An economic nationalism, looking out for our fellow men to make sure that manufacturing jobs that we allowed go to Asia come back to the United States of America.

This Is What Steve Bannon Told the California Republican Party Convention, L.A. TIMES (Oct. 21, 2017), <http://www.latimes.com/politics/la-pol-ca-steve-bannon-california-republicans-transcript-20171021-htmlstory.html> (reporting a transcript of Steve Bannon's speech).

Economic nationalists accordingly seek restrictions on immigration, close scrutiny on foreign investment, and border impediments, such as tariffs, on imported products.¹⁷⁸ Economic nationalists believe that a country's economy will perform better if its industries and workers are protected from foreign competition.¹⁷⁹ Economic nationalism emphasizes sovereignty, independence, and control over national borders. It is thus the antithesis of globalization, which emphasizes the interdependence of nations, open borders, and free trade.¹⁸⁰ For the economic nationalist, production of goods and services should be structured so as to benefit in-country workers.¹⁸¹ Globalization of production, in contrast, emphasizes global supply chains of production, the ability to obtain goods and services from different locations for maximum benefit in terms of cost, variety, and quality. Although the discussion in this article focuses on restrictions on trade, the Trump administration also advocates border restrictions on immigration as well as enhanced scrutiny of foreign investment on national security grounds.¹⁸²

On June 28, 2016, in Monessen, Pennsylvania, now-President Trump delivered a “stem-winder” campaign speech, outlining his plan of trade reform to fix the American economy.¹⁸³ “This wave of globalization,” he stated, “has wiped out [the] middle class . . . Today, we import nearly \$800 billion more in goods than we export . . . [Trade is] [a]t the center of this catastrophe . . . Massive trade deficits subtract directly from our [GDP] . . . America’s ‘job creation deficit’ is due to trade . . . Trade reform creates jobs . . . It’s time to [reclaim] our economic independence.”¹⁸⁴ If we do this, Trump promised, “[a] new era of prosperity will finally begin.”¹⁸⁵

178. See Ben Chu, *What is Steve Bannon’s ‘Economic Nationalism’? And Should We Be Scared?*, INDEPENDENT (Feb. 24, 2017, 4:27 PM), <https://www.independent.co.uk/news/business/news/steve-bannon-economic-nationalism-what-is-it-explained-donald-trump-cpac-2017-a7598181.html>. In 2018, the Trump administration and Congress enacted the Foreign Investment Risk Review Modernization Act, which tightens controls on incoming foreign investment in the name of national security. For the text of this law, see https://home.treasury.gov/sites/default/files/2018-08/the-foreign-investment-risk-review-modernization-act-of-2018-FIRRMA_0.pdf.

179. See Trump Inaugural Address, *supra* note 85 (“We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength.”).

180. Economic nationalism also emphasizes a version of “populism” that has two defining characteristics: (1) support of ordinary working people against international “elites,” and (2) a belief that only populist leaders can understand the situation and combatting the elitists.

181. See Read, *supra* note 168.

182. The Trump administration is backing new legislation to enhance national security reviews of foreign direct investment, the Foreign Investment Review Modernization Act, which became law in 2018, S.2098, 115th Cong (2018).

183. *Jobs Speech*, *supra* note 61.

184. *Id.* The published transcript of this speech omits certain quoted remarks which the authors noted when the speech was orally delivered.

185. *Id.*

Clearly Trump's clarion call to arms has superficial appeal — here is a businessman, a novice to the political fray, with a simple solution: fix international trade and everyone, particularly ordinary workers, will be restored to prosperity. However, Trump's proposed solution will not work because, as we will show, economic nationalism does not stand up under economic analysis. Furthermore, since economic nationalism involves numerous violations of established international trade law rules, this doctrine invites retaliation by trading partners of the United States that will ultimately harm the American economy. Thus, although we agree that the global trading system is in need of reform, Trump's solutions are not the answer. We will propose our own solutions in Part IV of this article. In this Part, we explore the assumptions behind economic nationalism in order to demonstrate their falsity.

A. *Jobs and Wages*

A major impetus behind economic nationalism is job creation for workers in the United States.¹⁸⁶ Economic nationalists view international trade as a “job-killing machine.”¹⁸⁷ The Trump administration advocates putting “America first” in manufacturing and trade. Public Citizen, the liberal advocacy organization founded by Ralph Nader, makes three charges against international trade and, specifically against the North American Free Trade Agreement (NAFTA): “Lost Jobs, Lower Wages, Increased Inequality.”¹⁸⁸ Public Citizen argues that “[the] [d]evastation of U.S. manufacturing [caused by trade], drives down wages, erodes [the] tax base, [and] heightens inequality.”¹⁸⁹ It is notable that the Trump administration, firmly anchored in the Republican Party and conservatism, which for decades has meant open markets and free trade, in this case is aligned with far left, anti-globalist organizations and labor unions. How valid are these charges?

Is trade a “job-killing machine,” the culprit responsible for shuttered and deserted factories in America's heartland? The truth here is not readily apparent because of the difficulty of separating out the causal factors leading to employment opportunities. It is easy to find studies by reputable economists that attribute massive job losses to international trade. For example, on NAFTA's 20th anniversary in 2014, trade skeptic Lori Wallach found NAFTA

186. See Chu, *supra* note 178; Trump Inaugural Address, *supra* note 85.

187. Peter S. Goodman, *Behind Trump's Trade Deficit Obsession: Deficient Analysis*, N.Y. TIMES (Apr. 5, 2017), <https://www.nytimes.com/2017/04/05/business/trump-xi-trade-deficit-china.html>; see also Chu, *supra* note 178; WHITEHOUSE.GOV, *supra* note 85.

188. PUBLIC CITIZEN, NAFTA'S LEGACY: LOST JOBS, LOWER WAGES, INCREASED INEQUALITY (2017), <https://www.citizen.org/our-work/globalization-and-trade/more-job-off-shoring-more-income-inequality#reports> (last accessed Apr. 10, 2018).

189. PUBLIC CITIZEN, RESOURCES TO TRACK TRADE-RELATED JOB LOSS FOR YOUR STATE AND DISTRICT, <https://www.citizen.org/sites/default/files/manufacturing-job-loss.pdf> (last accessed Apr. 10, 2018).

had destroyed one million American jobs.¹⁹⁰ It is equally easy to find assertions that praise the employment effects of international trade. For example, in December 1993, President Bill Clinton declared, upon signing NAFTA, that “NAFTA will tear down trade barriers . . . and create 200,000 jobs [in the United States] by 1995 alone.”¹⁹¹ How should we evaluate these opposing claims?

To understand the relationship between employment and trade, let us put the problem in context. Employment in the United States is dynamic, in constant flux. At the beginning of the twentieth century, most workers in the United States were engaged in agriculture and manual labor.¹⁹² Jobs in manufacturing gained during World War II and continued to rise in the post-war period.¹⁹³ U.S. employment in manufacturing reached its peak—19.4 million workers—in 1979.¹⁹⁴ Then came a slow decline: in 1987, there were 17.6 million manufacturing jobs and in November, 2001, 15.8 million.¹⁹⁵ In the twenty-first century, however, began a precipitous decline in manufacturing employment that accelerated during the Great Recession of 2008-09. In early 2010, manufacturing employment touched bottom at 11.5 million jobs.¹⁹⁶ Then, beginning in 2010, the U.S. economy started adding manufacturing jobs at a slow but steady rate. As of this writing in November 2018, 12,807,000 people are employed in manufacturing, still substantially below pre-recession levels.¹⁹⁷ Of course the absolute numbers do not tell the whole story. To complete the picture, it is notable that in 1953, 32.1% of the U.S. work force was engaged in manufacturing; by 2017, this number was only 8.5%.¹⁹⁸

Thus, manufacturing employment has declined both as a percentage of the U.S. workforce and in real terms. But this was not driven by trade; it was an integral part of an industrial restructuring of the U.S. economy. As manufacturing jobs have declined, employment in service-producing industries have risen at an even faster pace. Indeed, with respect to work, the twentieth

190. See Lori Wallach, *NAFTA at 20: One Million U.S. Jobs Lost, Higher Income Inequality*, HUFFINGTON POST (Jan. 6, 2014, 3:19 PM), https://www.huffingtonpost.com/lori-wallach/nafta-at-20-one-million-u_b_4550207.html.

191. William J. Clinton, U.S. President, Remarks on Signing the North American Free Trade Agreement Implementation Act (Dec. 8, 1993), in GERHARD PETERS & JOHN T. WOOLLEY, *THE AMERICAN PRESIDENCY PROJECT* (2018), <https://www.presidency.ucsb.edu/node/219946>.

192. Marlene A. Lee & Mark Mather, U.S. Labor Force Trends, 63 (2) *Population Bulletin* 3, 9 (Washington D.C., 2008) [hereinafter Lee and Mather].

193. See EMPLOYMENT STATISTICS, MANUFACTURING, FEDERAL RESERVE BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/MANEMP> (last visited Jan. 27, 2019).

194. *Id.* See also Drew DeSilver, *Most Americans Unaware that as U.S. Manufacturing Jobs Have Disappeared, Output Has Grown*, PEW RESEARCH CENTER: FACTTANK (July 25, 2017), www.pewresearch.org/fact-tank/2017/07/25/most-americans-unaware-that-as-u-s-manufacturing-jobs-have-disappeared-output-has-grown.

195. *Id.*

196. *Id.*

197. *Id.*

198. DeSilver, *supra* note 194.

century saw the “rise of the services economy.”¹⁹⁹ All over the world, but especially in developed countries, services (as opposed to manufacturing) became the dominant form of work.²⁰⁰ In fact, the United States led (and still leads) the world in services employment. In the 1940s, employment in services in the United States surpassed 50%; in the 1960s, employment in services exceeded 60%;²⁰¹ by 1991 services employment in the United States was 73%, and in 2016, 80.3% of working Americans—more than 8 out of 10—were employed in services.²⁰² This trend is projected to continue: by 2026, the U.S. Bureau of Labor Statistics projects that 81% of working Americans will have services jobs,²⁰³ employed in such industries as travel and tourism; environmental services; transportation; health; banking, financial and insurance; E-business; architecture, construction and engineering; education and training; commercial, professional and technology services; telecommunications and informational services.²⁰⁴ Moreover, this growth in services employment is reflected in international trade. The United States by far leads the world in export of services: U.S. service exports have risen from \$404 billion in 2006, to more than \$798 billion in 2017.²⁰⁵ The U.S. trade surplus in

199. Robert Millward, “The Rise of the Services Economy,” Chapter 10, pp. 238-266, in *The Cambridge Economic History of Modern Britain* (R. Floud & P. Johnson eds., 2004).

200. For global data, see *Employment in Services* (percent of total employment), WORLD BANK, <https://data.worldbank.org/indicator/SL.SRV.EMPL.ZS> (last visited Jan. 27, 2019).

201. Doug Short, *Charting the Incredible Shift from Manufacturing to Services in America*, BUS. INSIDER (Sept. 5, 2011) [using data drawn from U.S. Bureau of Labor Statistics], <https://www.businessinsider.com/charting-the-incredible-shift-from-manufacturing-to-services-in-america-2011-9>.

202. *Employment Projections*, U.S. BUREAU OF LABOR STATISTICS, www.bls.gov/emp/tables/employment-by-major-industry-sector.htm (last updated Oct. 24, 2017).

203. *Id.*

204. A legitimate question is whether these new service jobs are vulnerable to “offshoring,” the movement of jobs and tasks from one country to another. In 2007, Princeton University economist Alan Blinder published a study concluding that between twenty-two and twenty-nine percent of all American jobs, especially those in the services sector, are vulnerable to offshoring to low-cost countries such as India. Alan S. Blinder, *How Many U.S. Jobs Might Be Offshorable?* (CEPS Working Paper 142, March 2007), www.princeton.edu/ceps/workingpapers/142blinder.pdf. Blinder argued, however, against trade protectionism as a solution to this problem, advocating rather “rethinking” the U.S. educational system so that job skills of workers are upgraded. Alan Blinder, *Free Trade Is Great, But Offshoring Rattles Me*, WASH. POST, May 25, 2007, at A15. Other economists have disputed Blinder’s conclusions, arguing that there are positive labor effects from services offshoring as well as negative labor effects. See Brian K. Kovak, Lindsay Oldenski & Nicholas Sly, *The Labor Market Effects of Offshoring by Multinational Firms: Evidence for Changes in Global Tax Policies* (National Bureau of Economic Research, Working Paper 23947, October 2017), www.bis.gov/opub/mir/2018/beyond-bis/labor-market-effects-of-offshoring.htm. Tax reform may be the key to disincentivize offshoring. See Brad W. Seltzer, *Tax Reform and the Trade Balance*, COUNCIL ON FOREIGN REL. (Dec. 6, 2017), <https://www.cfr.org/blog/tax-reform-and-trade-balance>.

205. *U.S. Imports of Services by Major Category*, U.S. CENSUS BUREAU, https://www.census.gov/foreign-trade/press-release/current_press_release/exh4.pdf.

services has grown as well, attaining \$255.3 billion in 2017, more than triple the figure in 2003.²⁰⁶

The Trump administration, therefore, has spotlighted a real problem, the steady decline in manufacturing in the United States that has accelerated in the twenty-first century, but has misdiagnosed the causes of this phenomenon. Whereas the Trump administration blames international trade and, especially, the trade imbalance with China, for the decline in U.S. manufacturing, the evidence overwhelmingly points to other causal factors. As famously penned by Shakespeare, “The fault, dear Brutus, is not in our stars, but in ourselves, that we are underlings.”²⁰⁷

A first cause of the manufacturing decline is the rise of the services economy. This change is the result of natural industrial restructuring. Americans no longer work in primarily blue collar employment, but rather enjoy white collar service jobs that require upgraded skill levels. By one measurement, since the peak of manufacturing employment in 1979, the United States has lost seven million manufacturing jobs, but added (net) fifty-three million higher-paying jobs in services industries.²⁰⁸ The new services employment experienced by U.S. workers was, however, geographically unevenly distributed. The shift from manufacturing to services was most acutely felt in the Midwest and the Northeast as factories closed or moved to new locations and the new services jobs increased in the South and the West.²⁰⁹

A second cause of the recent decline in U.S. manufacturing is the run-up and the crash experienced during the Great Recession of 2007-09, the worst economic crisis the world had seen since the Great Depression of the 1930s. Prior to this time, the number of manufacturing jobs went down with recessions but rebounded when the economy recovered.²¹⁰ This pattern seems to have changed, however. As we have seen, between 2001 and 2011, manufacturing employment declined by about one-third to under 12 million jobs; most of this decline occurred during the Great Recession of 2008-2009.²¹¹ In the years since 2011, manufacturing has recovered somewhat, adding about 800,000 jobs, to reach the 2018 total of 12.8 million. At this writing, with the U.S.

206. Alan Reynolds, *The Growing U.S. Trade Surplus in Services, Part Two*, CATO INST. (July 10, 2018, 1:49 PM), <https://www.cato.org/blog/growing-us-trade-surplus-services-part-two>.

207. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 1, scene 3.

208. Tim Worstall, *The U.S. Lost 7 Million Manufacturing Jobs – And Added 53 Million Higher-Paying Services Jobs*, FORBES (Oct. 29, 2016), www.forbes.com/sites/tim-worstall/2016/10/19/the-u-s-lost-7-million-manufacturing-jobs-and-added-33-million-higher-paying-services-jobs/#20dcd4254a20.

209. Lee and Mather, *supra* note 192, at 7, 13. See also John Kasarda, *Industrial Restructuring and the Changing Location of Jobs*, in STATE OF THE UNION: AMERICA IN THE 1990s (Reynolds Farley eds., 1995).

210. See Lois M. Plunket, *The 1980s: A Decade of Job Growth and Industry Shifts*, 113 MONTHLY LAB. REV. 3, 4 (1990).

211. See Martin Neil Baily & Barry P. Bosworth, *U.S. Manufacturing: Understanding Its Past and Its Potential Future*, 28 J. OF ECON. PERSP. 3, 6 (2014).

economy at almost full employment (unemployment stands at 3.7%),²¹² manufacturing employment is increasing at a rate of about 300,000 jobs per year.²¹³

Despite the fact that, at this writing, the U.S. economy is in its 113th consecutive month of economic growth, the second longest expansion in U.S. history,²¹⁴ the Trump administration's message that trade is a "job-killing" machine still resonates. There appear to be three reasons for this. First, the recovery from the Great Recession is, as we noted above,²¹⁵ the slowest economic recovery of the post-1945 period. Second, manufacturing output (and jobs), which plummeted during the Great Recession, has not rebounded well. During the last decades of the twentieth century, despite lower employment totals, manufacturing output soared in the United States. Manufacturing output grew to be over twice as great as in the 1980s, and the United States remained the largest exporter of products in the world.²¹⁶ But this changed during and after the Great Recession. Manufacturing output plunged twenty-four percent and has been slow to recover.²¹⁷ Moreover, the United States slipped to be in third place, behind China and the EU, in manufacturing exports.²¹⁸ Third, the average American worker has not benefited from the current economic recovery. The average wage earned by Americans, adjusted for inflation, has been flat for approximately four decades; labor market wage gains have flowed largely to the highest tier of American workers.²¹⁹

The basic reason for this lackluster performance leads to the third cause we posit for current decline in manufacturing in the United States: *poor productivity growth*. Despite continuous economic growth for almost a decade, multifactor productivity in manufacturing from 2004 to 2016, (and no doubt continuing into the present) has *declined* by an average of 0.3% per year.²²⁰

212. See Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, The Employment Situation—December 2018 (Jan. 4, 2019), www.bls.gov/news.release/pdf/empsit.pdf.

213. U.S. BUREAU OF LABOR STATISTICS, CURRENT EMPLOYMENT STATISTICS HIGHLIGHTS (2018), <https://www.bls.gov/ces/highlights092018.pdf>.

214. The current recovery began in June 2009. See Doug Mataconis, *Economic Storm Clouds on the Horizon*, OUTSIDE THE BELTWAY (Dec. 6, 2018), <https://www.outsidethebeltway.com/economic-storm-clouds-on-the-horizon>.

215. See text accompanying note 75, *supra*.

216. DeSilver, *supra* note 194.

217. *Id.*

218. CENTRAL INTELLIGENCE AGENCY, *The World Factbook*, www.cia.gov/library/publications/the-world-factbook/rankorder/2078rank.html (last visited Dec. 10, 2018).

219. Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RESEARCH CENTER: FACTTANK (Aug. 7, 2018), www.pewresearch.org/fact-tank/2018/08/07/for-most-u-s-workers-real-wages-have-barely-budged-in-decades.

220. Multifactor productivity measures real economic output per labor hour. For a comprehensive report, see Michael Brill et al., *Multifactor Productivity Slowdown in U.S. Manufacturing*, BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW (July 2018), <https://www.bls.gov/opub/mlr/2018/article/multifactor-productivity-slowdown-in-us-manufacturing.htm>.

While the Trump administration places virtually all of the blame on international trade for the decline in manufacturing jobs, there is little evidence that this is the case. First, the timing of the decline in American manufacturing employment does not suit blaming trade and China; in the year 2000 NAFTA and the WTO agreements were already several years old, and China was just beginning its economic rise. Second, the fact that most of the decline took place during the Great Recession indicates that economic conditions and other factors played a dominant role rather than trade.

We conclude that the Trump administration is taking a very real problem out of context, exaggerating its importance, and using it to mount a policy, economic nationalism, which is unwise and will ultimately be ineffective in attaining even its own announced ends. We believe that trade is, at most, a secondary cause of the decline in manufacturing jobs; more important causes include economic conditions, technological developments that allow greater production with fewer workers, and the long-term movement of American workers out of making products and into services jobs. We also believe that the Trump administration, in exaggerating the impact of trade on manufacturing in the United States, ignores the benefits of trade for consumers and job creation.

Exaggerating the role of international trade in the decline of American manufacturing also misses the mark because it overlooks the importance of enhancing productivity in reinvigorating manufacturing.²²¹ Since the revival of manufacturing began after the Great Recession in 2011, productivity, defined as output per worker hour, has lagged.²²² Two major reasons why productivity is low in the United States are (1) the sorry state of American infrastructure; and (2) the worker “skills gap.” Infrastructure is the backbone of the U.S. economic system, but, according to the American Society of Civil Engineers, there is now a backlog of \$4.5 trillion in U.S. infrastructure needs.²²³ The “skills gap” refers to the fact that there is a significant deficiency between the skills necessary to fill manufacturing jobs in today’s economy and the skills demonstrated by available applicants.²²⁴ The Manufacturing Institute estimates that, between 2018 and 2025, 3.5 million new jobs in U.S. manufacturing will be created, but, because of the “skills gap,” 2 million of these jobs will go unfilled.²²⁵ Both these problems require urgent attention but are being ignored by the Trump administration and the Congress.

221. See Martin Neil Baily & Barry P. Bosworth, *U.S. Manufacturing: Understanding Its Past and Potential Future*, 28 J. ECON. PERSPECTIVES 3, 5 (2014).

222. Peter Coy, *American Factories Have One Very Big Problem*, BLOOMBERG NEWS (May 9, 2018, 8:03 AM) www.bloomberg.com/news/articles/2018-05-09/american-factories-have-one-very-big-problem.

223. *Failure to Act: Closing the Investment Gap for America’s Economic Future*, AM. SOC’Y CIV. ENGINEERS (2016), <https://www.infrastructurereportcard.org/wp-content/uploads/2016/10/ASCE-Failure-to-Act-2016-FINAL.pdf>.

224. DELOITTE CONSULTING & MFG. INST., *Skills Gap Report: 2015 and Beyond* (2015), <http://www.themanufacturinginstitute.org/~media/827DBC76533942679A15EF7067A704CD.ashx>.

225. *Id.*

To further understand the true relationship between trade and employment, consider that, as a percentage of the U.S. economy, imports amount to only 14.69% of GDP.²²⁶ Thus, only a minority of American workers are directly affected by import competition, and a majority of U.S. imports come from high-wage countries such as the European Union and Japan.²²⁷ Moreover, in the huge and complex American economy jobs are constantly and routinely being created and destroyed for a variety of reasons. For example, in a typical one-month period, April 2018, 5.4 million jobs were “lost.”²²⁸ American workers left their employment for various reasons, such as retirement, layoffs, disabilities, or to take new employment. But in that same month, 5.6 million jobs were created in terms of new hires.²²⁹ Thus, it is evident, as economist Donald J. Boudreau has stated, in comparison with the naturally occurring “job churn” in the United States, “job losses from trade sink into insignificance.”²³⁰ Boudreau points out that, even if Wallach is correct in her estimate of jobs destroyed by NAFTA, “it took freer trade with Mexico two decades to destroy as many American jobs as are now destroyed every eighteen days on average.”²³¹

Moreover, both sides seem to adopt extreme views on either side of the “jobs” debate. We advance the following propositions, which we believe are unassailable. First, international trade both destroys and creates jobs; thus, the crucial issue is the net effect in terms of quantity of jobs. Imports do have some employment effect. A study by economists David Autor, David Dorn and Gordon Hanson estimates that between 1999 and 2011, trade with China destroyed 2.4 million jobs.²³² The authors further conclude that these job losses had an adverse economic effect on the local labor markets where such losses were concentrated, and the process of adjustment to these job losses was slower than expected.²³³ But this negative effect must be balanced by the fact that buyers import products, not because they are compelled to do so, but

226. WORLD BANK, IMPORTS OF GOODS AND SERVICES (PERCENT OF GDP) (2016), <https://data.worldbank.org/indicator/NE.IMP.GNFS.ZS?locations=US> (data for the United States for the year 2016).

227. Japan and the European Union alone make up 27.5% of total imports while Africa and Central and South America make up 6.5%. U.S. CENSUS BUREAU & BUREAU OF ECON. ANALYSIS, CB 18-81, BEA 18-26, MONTHLY U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES, APRIL 2018 17 (2018), <https://www.bea.gov/news/2018/us-international-trade-goods-and-services-april-2018>.

228. BUREAU OF LABOR STATISTICS, USDL-18-0940, JOB OPENINGS AND LABOR TURNOVER SURVEY NEWS RELEASE (2018), https://www.bls.gov/news.release/archives/jolts_06052018.htm.

229. *Id.*

230. Donald J. Boudreaux, *Trade Is Not a Job Killer*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/28/opinion/trump-tariffs-trade-war.html>.

231. *Id.*

232. David Autor, David Dorn, & Gordon Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes on Trade*, 8 ANN. REV. ECON., 205, 205-40 (2016).

233. *Id.*

because they cannot find comparable domestically made items in terms of quality or price. Studies also show that job losses in the United States from import competition especially affect low-skilled workers without a high school degree while job losses from imports among U.S. workers with a college degree are found to be “insignificant.”²³⁴

In addition, international trade creates jobs in at least three ways. Trade involves exports as well as imports, and the making of products in the United States for export is estimated to support approximately 10.7 million U.S. jobs.²³⁵ On average, workers in export industries also earn higher wages than workers in non-exporting firms, up to eighteen percent.²³⁶ International trade also includes foreign direct investment (FDI), which involves foreign individuals and companies opening businesses and factories in the United States. As we have seen, the United States benefits from net FDI, and in 2015, 6.8 million U.S. workers were employed by foreign-based companies doing business in the United States.²³⁷ Furthermore, even imports create substantial employment opportunities in the United States. Imported products must be handled, installed, sold and serviced in the United States by U.S. workers.²³⁸ A 2012 study has determined that two lines of imports from China alone, toys and apparel, support a total of 576,000 jobs in the United States.²³⁹

Second, the causal connection between trade, job losses, and wage stagnation is obscure because it is difficult to separate the causal effects of trade from other factors, such as improvements in technology and unrelated economic factors. This is particularly true with respect to establishing the cause of the decrease in manufacturing jobs over time, for example the last fifty years. The majority of economists²⁴⁰ state in numerous studies, that import

234. ABIGAIL COOKE ET AL., CHEAP IMPORTS AND THE LOSS OF U.S. MANUFACTURING JOBS (U.S. Census Bureau Ctr. for Econ. Studies, Working Paper, 2016), <https://www2.census.gov/ces/wp/2016/CES-WP-16-05.pdf>.

235. JEFFREY HALL, INT’L TRADE ADMINISTRATION, JOBS SUPPORTED BY STATE EXPORTS, 2016 2 (2017), https://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_005558.pdf.

236. U.S. COUNCIL OF ECONOMIC ADVISORS, INDUSTRIES AND JOBS AT RISK IF THE TRANS-PACIFIC PARTNERSHIP DOES NOT PASS 9 (2016).

237. U.S. DEPARTMENT OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (2017), <https://www.commerce.gov/news/fact-sheets/2017/10/foreign-direct-investment-united-states>.

238. Tariffs on solar panels aimed at China are predicted to result in substantial job losses even though there is little domestic production in the United States because companies will have to terminate employees who service, install, and sell solar panels. See McKenna Moore, *Trump’s Solar Tariffs May Cost up to 23,000 U.S. Jobs, But Boost Domestic Manufacturing*, FORTUNE (June 11, 2018), www.fortune.com/2018/06/11/trumps-solar-tariffs-costing-jobs-boost-manufacturing.

239. Derek Scissors et al., *Trade Freedom: How Imports Support U.S. Jobs*, HERITAGE FOUND. (Sept. 12, 2012), <https://www.heritage.org/trade/report/trade-freedom-how-imports-support-us-jobs>.

240. See, e.g., JUSTINO DE LA CRUZ & DAVID RIKER, U.S. INT’L TRADE COMM’N, THE IMPACT OF NAFTA ON U.S. LABOR MARKETS (2014).

competition is responsible for, at most, about seventeen percent of manufacturing job losses;²⁴¹ eighty-eight percent is due to other causes, such as automation, technological improvements, and increases in productivity.²⁴² It is evident that employment in manufacturing is following a long-term trajectory (similar to employment in agriculture) of increasing production with ever fewer workers.²⁴³

Third, the relationship between trade and employment is not static; it is a moving target, always changing. For example, when China was a low wage country in the decades of the 1990s and 2000s,²⁴⁴ a valid charge might have been that Chinese imports had a negative impact on some wages in the United States. But China today is a middle-income country so the charge loses validity as it is no longer true that Chinese workers are paid substantial less. Policy prescriptions for correcting problems in trade tend to become quickly outdated. A constant that will not change, however, is the demand in all industries for highly skilled workers. In the next ten years, economists expect that 3.5 million new jobs in manufacturing will be available, but about 2 million of such jobs will go unfilled because of skills deficiencies.²⁴⁵

Fourth, when it comes to the choice of remedies to help U.S. workers displaced or adversely affected by trade, the worst option of all is to erect trade barriers against imports. In March 2002, President George W. Bush imposed safeguard tariffs on steel imports to help the steel industry.²⁴⁶ The result of such tariffs, according to the U.S. International Trade Commission,²⁴⁷ and the Consumer Industries Trade Action Coalition,²⁴⁸ was disastrous. The prices for all forms of steel, both domestic and imported, rose, and shortages appeared

241. See LORI G. KLETZER, *JOB LOSS: FROM IMPORTS: MEASURING THE COSTS* 10 (Peterson Institute for Int'l Econ., pub., 2001) (placing manufacturing job losses in multiple industries between eleven and seventeen percent); MICHAEL HICKS & SRIKANT DEVARAJ, *THE MYTH AND THE REALITY OF MANUFACTURING IN AMERICA* 7 (Ball State University Center for Business and Economic Research, ed. 2015), <https://conexus.cberdata.org/files/MfgReality.pdf> (placing manufacturing job loss around 13.4 percent).

242. HICKS & DEVARAJ, *supra* note 241, at 6.

243. *The Manufacturing Paradox: How Do You Get Far More Output with Far Fewer Workers?*, *ECONOMIST* (Nov. 1, 2001), <https://www.economist.com/special-report/2001/11/01/the-manufacturing-paradox>.

244. See ABIGAIL COOKE ET AL., CES 16-05, *CHEAP IMPORTS AND THE LOSS OF U.S. MANUFACTURING JOBS 2* (U.S. Census Bureau Center for Econ. Studies, 2016).

245. Reid Wilson, *U.S. Economy Faces Impending Skills Gap*, *HILL* (Feb. 13, 2018), <http://thehill.com/homenews/state-watch/373527-us-economy-faces-impending-skills-gap>.

246. Press Release, George W. Bush White House, *President Announces Temporary Safeguards for Steel Industry* (Mar. 5, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020305-6.html>.

247. U.S. INTERNATIONAL TRADE COMMISSION, *INV. NO. TA-204-9, STEEL: MONITORING DEVELOPMENTS IN THE DOMESTIC INDUSTRY* (2003).

248. JOSEPH FRANCOIS & LAURA BAUGHMAN, *THE UNINTENDED CONSEQUENCES OF U.S. STEEL IMPORT TARIFFS: A QUANTIFICATION OF THE IMPACT DURING 2002 AT EXECUTIVE SUMMARY* (CITAC Found., 2003).

because of the uncertainty caused by tariffs.²⁴⁹ As a result, every U.S. state experienced employment losses in steel consuming industries, with the highest losses occurring in California (19,392 jobs lost), Texas (15,826 jobs lost), Ohio (10,553 jobs lost), Michigan (9,829 jobs lost), Illinois (9,621 jobs lost), Pennsylvania (8,400 jobs lost), New York (8,901 jobs lost) and Florida (8,370 jobs lost).²⁵⁰ The total welfare loss to the U.S. economy was over thirty million dollars; jobs in the domestic steel industry were temporarily preserved, but at an estimated economic cost of \$400,000 per job.²⁵¹ In addition, the 2002 steel safeguard tariffs were declared illegal under the rules of the WTO in 2003,²⁵² and were removed by President Bush in December, 2003.²⁵³ This experience shows that, rather than tariffs or trade restrictions to create or preserve American jobs, a better remedy is government investment in skills education and adjustment assistance to workers displaced by trade.

Fifth, the U.S. government is especially deficient in putting in place retraining programs and safety nets to assist workers and communities adversely affected by the trade “job churn.” The chief program in this regard at the federal level is adjustment assistance, authorized under the Trade Act of 1974,²⁵⁴ supplemented by the Trade Act of 2015.²⁵⁵ Under the Trump administration adjustment assistance has not been funded; although annual reports on adjustment assistance are required by Congress, the last annual report listed on the U.S. Department of Labor’s web site in for 2016.

B. *Trade Deficits*

In this section we examine three issues. First, in numerous pronouncements, the Trump administration has stated that international trade is a zero-sum game in which a trade gain by one nation must be accompanied by a trade loss suffered by another nation. Is this the case? Second, we consider how the trade deficit numbers mislead in that they do not take into account global supply chains; thus, we look behind the trade deficit numbers. Third, we consider the trade deficit in the context of the United States’s current account in order to provide a real understanding of the trade deficit.

249. *Id.*

250. *Id.*

251. Doug Palmer, *Why Steel Tariffs Failed When Bush Was President*, POLITICO (Mar. 7, 2018), <https://www.politico.com/story/2018/03/07/steel-tariffs-trump-bush-391426>.

252. Report of the Appellate Body, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248 249, 251, 252, 253, 254, 258, 259/AB/R (Dec. 10, 2003).

253. Heather Long, *Remember Bush’s 2002 Steel Tariffs? His Chief of Staff Warns Trump Not to Do the Same*, WASH. POST: WONKBLOG (Mar. 6, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/06/remember-bushs-2002-steel-tariffs-his-chief-of-staff-warns-trump-not-to-do-the-same/?utm_term=.36b0e41a1288.

254. 19 U.S.C. § 2271 (2015).

255. Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 361, 362 (2015) (This law will expire in 2022).

1. *Trade as a Zero-Sum Game*

International trade is not a zero-sum game. Rather, trade is a positive sum game in which both sides of the transaction benefit. The idea that a trade deficit represents a loss of income and that trade flows between nations must be reciprocal to be fair misunderstands trade. Trade deficit statistics normally focus only on products or goods, physical items imported or exported.²⁵⁶ A trade deficit in goods exists when a nation purchases more goods from a trading partner than it sells to the same partner. For example, the U.S. trade deficit in goods with China in 2017 was about \$375 billion, meaning that U.S. importers purchased \$375 billion more in goods from China than importers in China purchased from the United States.²⁵⁷ Specifically, the United States exported \$129.89 billion in goods to China, while China exported \$505.47 billion in goods to the United States.²⁵⁸ The difference here—the deficit—is not a loss to anyone; rather both sides gained what they bargained for in a positive-sum, win-win series of transactions.

To understand this, consider our own individual situations. If we buy a loaf of bread from a grocery store, we incur a trade deficit with the store, in that the store has our money and did not purchase anything from us. To avoid this trade deficit, we could do one of two things: we could either insist that the grocery store act reciprocally, and buy an equivalent item from us; or we could make the loaf of bread, and forego the purchase. Obviously, neither course of action makes sense. Since we are lawyers, the store would have to purchase our legal services in exchange for the loaf of bread we buy, a highly unrealistic expectation. The second option, making the bread ourselves, is even less appealing because, even if we are wonderful bakers, we would have to devote five hours to bread-making that we could gainfully devote to law practice at a rate of \$500 per hour. This lost “opportunity cost” is \$2,500, which represents the cost of “domestic” production in lieu of “importing” bread from the grocery store. Thus, it is evident that in every trade transaction both sides gain even without reciprocity and even if a trade deficit is involved. Trade does not “detract” from U.S. GDP. It is true that, if we buy a shirt made in China, the invoice price of the imported shirt does not count as an addition to U.S. GDP, but there is no *subtraction* from U.S. GDP. In fact, our purchase of an imported shirt will virtually always add to U.S. GDP in that, since we purchase at retail, the retail markup as well as any associated services will *add* to U.S. GDP. Thus, purchases of imported products do not subtract from and virtually always

256. James McBride, *The U.S. Trade Deficit: How Much Does It Matter?*, COUNCIL ON FOREIGN REL. (Oct. 17, 2017), <https://www.cfr.org/backgrounders/us-trade-deficit-how-much-does-it-matter> (critiquing Donald Trump’s narrow focus on trade in goods, disregarding trade in services).

257. U.S. CENSUS BUREAU, FOREIGN TRADE: TRADE IN GOODS WITH CHINA, <https://www.census.gov/foreign-trade/balance/c5700.html> (number in text rounded down to the nearest hundredth).

258. *Id.*

add to U.S. GDP. International trade does not have to be exactly reciprocal to be fair.

2. *Global Supply Chains: Behind the Trade Deficit Numbers*

Global supply chains are now commonplace in business and commerce.²⁵⁹ With the advent of the world-wide web and instantaneous communication, companies can specialize, concentrate on their core competence, and sell what they make all around the world. Companies that make sophisticated products increasingly need the ability to source the components of their products from around the world to obtain the best quality and price. Global supply chains are necessary to produce the best technology and highest quality products to satisfy consumer demand. International trade is the essential element that makes possible these global supply chains.

Because of global supply chains, many products moving in international trade, including the most technologically advanced products, are no longer made in one country.²⁶⁰ Products that are the most important by value typically contain components from around the world.²⁶¹ Such products, however, must be assembled into finished goods in a specific geographical place. Currently, China, the world's factory, sits in the middle of many global supply chains.²⁶² Multinational companies from all over the world find it in their interest to source components from around the world, ship them to China, where they are assembled into finished goods; then the finished products are exported to the United States and around the world.²⁶³

Trade statistics, however, do not reflect the activities of these global supply chains. A product containing components from around the world that is assembled in China before being exported to the United States, is classified statistically as 100% a Chinese export.²⁶⁴ This is misleading because the value added in China may be relatively little compared to the total value of the product, which may be designed in the United States and contain components

259. Martin Bresslein & Stephan Huber, *International Trade in Parts, Components, and Final Goods: Who Trades What with Whom?* (Nov. 2016) (unpublished manuscript) (on file with University of Regensburg).

260. *Id.*; see Christopher Minasians, *Where Are Apple Products Made?*, MACWORLD UK (Sept. 18, 2017), <https://www.macworld.co.uk/feature/apple/where-are-apple-products-made-3633832/> (describing the international origin of the components of the iPhone).

261. *Id.*

262. China's status as the factory of the world is changing due to increasing Chinese labor costs. Companies are moving to locations like Indonesia instead. Matthias Lomas, *Which Asian Country Will Replace China as the 'World's Factory'?*, DIPLOMAT (Feb. 18, 2017), <https://thediplomat.com/2017/02/which-asian-country-will-replace-china-as-the-worlds-factory>.

263. *See id.*

264. In 2015, China made half of the world's goods, including seventy percent of the world's mobile phones. *Made in China*, ECONOMIST (Mar. 12, 2015), <https://www.economist.com/leaders/2015/03/12/made-in-china>.

from many different countries. What is termed a “canonical” example of this situation is the Apple iPhone.²⁶⁵ This important product is designed in the United States, but assembled in China;²⁶⁶ the iPhone contains components from many countries, including Japan, Taiwan, South Korea, Europe and the United States.²⁶⁷ Yet these phones are assembled in China and count 100% as Chinese exports.²⁶⁸ Experts estimate that, although these iPhones count statistically as Chinese exports, the value added by Chinese assembly is only about \$8 per phone for the iPhone 6, which retails in the United States for about \$750.²⁶⁹

3. *The U.S. Balance of Payments*

Trade deficit numbers can only be understood in the context of the U.S. balance of payments and the relationship between the U.S. current account and the U.S. capital (financial) account. Every nation keeps a current account recording its monetary transactions on a yearly basis, marking them as either credits or debits.²⁷⁰ The main components of the current account are net trade in goods and services and net current unilateral financial transfers abroad.²⁷¹ Thus, imports are registered as debits in the current account, while exports are registered as credits.²⁷² By this measure, in 2017 the United States’ current account registered a net debit of \$807.5 billion, the size of the trade-in-goods deficit.²⁷³

But trade in goods is only one component of the current account. Another important component of the current account is net trade in services. In trade in services in 2017, ²⁷⁴ the United States had a net *surplus* of \$255 billion,

265. Andrew Van Dam, *The Obsolete Number that Drives Trump’s Obsession and How to Fix It*, WASH. POST (Mar. 13, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/12/the-obsolete-number-that-drives-trumps-china-obsession-and-how-to-fix-it/?utm_term=.bedf38e8d89e.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, COUNTRY COMPARISON: CURRENT ACCOUNT BALANCE, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2187rank.html> (listing the current account balances of the countries of the world).

271. *Id.*

272. BUREAU OF ECON. RESEARCH, BEA 18-28, U.S. INTERNATIONAL TRANSACTIONS: FIRST QUARTER 2018 AND ANNUAL UPDATE 8 (2018), <https://www.bea.gov/resources/learning-center/what-to-know-international-trade-investment>.

273. BUREAU OF ECON. ANALYSIS & U.S. CENSUS BUREAU, *supra* note 11.

274. Service exports reflect such items as financial services, computer software, know-how, royalty payments, licensing fees, and people-based services, such as legal and architectural services. See Kimberly Amadeo, *U.S. Imports and Exports with Components and Statistics*, BALANCE (Aug. 22, 2018), <https://www.thebalance.com/u-s-imports-and-exports-components-and-statistics-3306270>.

exporting \$798 billion in services, while importing \$543 billion.²⁷⁵ This surplus is generally growing year-over-year. Thus, when considering the matter of a trade deficit, it is misleading to omit consideration of trade in services. The surplus in trade in services reduces the impact of the trade deficit in goods so that the combined trade deficit is lowered to \$552 billion.

Moreover, a trade deficit in goods can be understood only in the context of the second component of the two accounts relevant to balance of payments, that is, the capital (financial) account, which measures on a yearly basis a country's net change in foreign ownership of physical and financial assets.²⁷⁶ Regarding the balance of payments, the most important component of the capital account is foreign direct investment (FDI).²⁷⁷ In 2017, FDI in the United States amounted to \$259.6 billion;²⁷⁸ this inflow of dollars further offset the trade deficit in goods. FDI is important for two basic reasons: first FDI shows confidence in the U.S. economy by foreign investors who establish a factory or business or acquire business interests or assets. Second, FDI means employment for American workers and new products for American consumers.²⁷⁹

The capital account and FDI also play a crucial role with respect to the U.S. balance of payments because the capital account and the current account are like opposite sides of the same coin — considered together they must add up to near zero,²⁸⁰ U.S. dollars earned by foreigners selling products to U.S. consumers must find their way eventually back to the United States.²⁸¹ Thus, a deficit in the U.S. current account inevitably will reflect a surplus in the U.S. capital account.

275. U.S. CENSUS BUREAU & BUREAU OF ECON. ANALYSIS, CB 18-15, BEA 18-06, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES DECEMBER 2017, 4-5 (2018), <https://www.bea.gov/newsreleases/international/trade/2018/trad1217.htm> (rounding numbers to the nearest billion).

276. Scott Wolla, *International Trade*, FED. RESERVE BANK OF ST. LOUIS: PAGE ONE ECONOMICS (Nov. 1, 2016), <https://research.stlouisfed.org/publications/page1-econ/2016> (defining capital account).

277. Kimberly Amadeo, *Foreign Direct Investment, Its Pros, Cons, and Importance to You*, THE BALANCE (Jun. 28, 2018), <https://www.thebalance.com/foreign-direct-investment-fdi-pros-cons-and-importance-3306283> (defining Foreign Direct Investment).

278. OECD, FDI IN FIGURES 10 (2018), <http://www.oecd.org/investment/investment-policy/FDI-in-Figures-April-2018.pdf> (rounded down to nearest billion).

279. See SELECTUSA, BENEFITS OF FOREIGN DIRECT INVESTMENT (FDI), <https://www.selectusa.gov/FDI-Benefits> (last visited Dec. 12, 2018). This site, operated by the U.S. Department of Commerce, states that, as of 2016, 7,087,900 jobs in the United States were generated by this FDI.

280. In this case FDI falls short by \$36 billion because there are other components of the capital account besides FDI, such as capital inflows of purchases of U.S. treasury bills as well as interest payments made by the U.S. Treasury to foreign interests holding U.S. debt obligations. See Kimberly Amadeo, *Current Account Deficit: Its Components and Causes*, BALANCE, www.thebalance.com/current-account-deficit-definition-components-and-causes-3305831.

281. In general, U.S. dollars cannot be spent in foreign countries.

This fuller picture of the U.S. current account in relation to the trade deficit shows why the United States has been able to run a trade deficit every year since 1975.²⁸² Most nations would encounter severe balance of payments problems — they would run short of payment reserves of their currencies and their currencies would be severely devalued — if they ran a trade deficit for a long period. The United States, in contrast, is able to run a trade deficit because the United States has run a trade surplus in services every year since 1971,²⁸³ and the United States is in demand as the preeminent destination for foreign capital in the form of FDI.²⁸⁴ Moreover, the U.S. dollar is the world's preeminent reserve currency;²⁸⁵ thus, every nation in the world seeks to hold U.S. dollars in reserve. Apart from FDI, nations and foreign investors seek to purchase U.S. treasury debt (bonds), the world's safest investment, and U.S. securities (corporate equity and debt). Foreign net purchases of U.S. treasury debt in 2017 totaled over twenty billion dollars.²⁸⁶ Thus, in 2017 the U.S. trade deficit was further offset not only by the surplus in services (\$255 billion)²⁸⁷ and FDI (\$259.6 billion),²⁸⁸ but also net purchases of U.S. treasury debt²⁸⁹ and portfolio investment in U.S. companies.

Thus, the United States has the luxury of running large trade deficits without serious disruption of its economy. This is not to say the situation is ideal. The U.S. trade deficit is made possible by the extraordinary demand around the world for U.S. services and, especially, for U.S. investments and

282. See Dan Ikenson, *41 Straight Years of Trade Deficits Yet America Still Stands Strong*, FORBES (Aug. 23, 2016), www.forbes.com/sites/danikenson/2016/08/23/41-straight-years-of-trade-deficits-yet-america-stil-stands-strong/#754c86a62d4c.

283. U.S. CENSUS BUREAU & BUREAU OF ECON. ANALYSIS, U.S. TRADE IN GOODS AND SERVICES — BALANCE OF PAYMENTS (BOP) BASIS (June 6, 2018), available at www.census.gov/foreign-trade/statistics/historical/gands.pdf. See also *U.S. Trade Surplus in Services*, MYLO TRADE (Dec. 2, 2017), www.mylotrade.com/the-u-s-trade-surplus-in-services.html.

284. See Press Release, U.S. Dep't of Commerce, U.S. Commerce Department Releases New Report on Foreign Direct Investment Trends (June 20, 2016), <https://www.commerce.gov/news/press-releases/2016/06/us-commerce-department-releases-new-report-foreign-direct-investment>.

285. See Richard Leong, *Dollar Decline Rekindles Reserve Currency Wonders*, REUTERS (Mar. 7, 2018), <https://www.reuters.com/article/us-global-dollar-analysis/dollar-decline-rekindles-reserve-currency-worries-idUSKCN1GJ2XW> (discussing why fears of the U.S. dollar losing its status as the premier reserve currency are unfounded).

286. U.S. DEP'T OF TREASURY, NET PURCHASES OF U.S. TREASURY BONDS & NOTES BY MAJOR FOREIGN SECTOR: FOREIGN OFFICIAL INSTITUTIONS, OTHER FOREIGNERS, AND INTERNATIONAL & REGIONAL ORGANIZATIONS (2018), <http://ticdata.treasury.gov/Publish/tressect.txt> (calculating the number by taking the sum of Total Net Foreign Purchases over the range of the months of 2017 and rounding up to the nearest billion).

287. U.S. CENSUS BUREAU & BUREAU OF ECON. ANALYSIS, *supra* note 275.

288. U.S. BUREAU OF ECON. ANALYSIS, NEW FOREIGN DIRECT INVESTMENT IN THE U.S.: 2017, www.bea.gov/news/2018/new-foreign-direct-investment-united-states-2017.

289. U.S. DEP'T OF TREASURY, *supra* note 286.

government debt.²⁹⁰ If the situation changes with respect to any of these components, the United States could experience a financial crisis. Perhaps the greatest balance of payments vulnerability facing the United States is the amount of U.S. treasury debt that is held by foreigners, including foreign governments. At present 29.9% of U.S. Treasury debt is foreign-owned,²⁹¹ including about 5.6% held by the government of China.²⁹² In the long- and even medium-term, it is dangerous for the United States to borrow excessively from foreign governments. Fortunately, we can (and should) do something to remedy this situation. In the next section, we summarize the measures that will effectively reduce the U.S. trade deficit.

C. *Perils of American Unilateralism*

The President's Trade Policy Agenda released by the USTR in March 2017, states that "[e]very action we take with respect to trade will be designed to increase our economic growth, promote job creation in the United States, promote reciprocity with our trade partners, strengthen our manufacturing base and our ability to defend ourselves, and expand our agricultural and service industry exports."²⁹³ The Policy Agenda further states that a priority is to "use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property rights; and negotiate new and better trade deals with countries in key markets around the world."²⁹⁴

While we applaud the general aims of the USTR's Trade Policy Agenda, we believe that there are many perils associated with excessive unilateralism in imposing tariffs and other bullying economic measures as a means of implementing that policy.

290. See Tim Worstall, *America's Trade Deficit Is Largely Paid for by European Investment in American Manufacturing*, FORBES (June 22, 2016), <https://www.forbes.com/sites/timworstall/2016/06/22/americas-trade-deficit-is-largely-paid-for-by-european-investment-in-american-manufacturing/#60344a7644f9> (describing the demand for investing in the United States); Jim Zarroli, *America Has a Large Trade Deficit, But Economists Aren't Too Concerned About It*, NPR (Mar. 28, 2018), <https://www.npr.org/2018/03/28/597688347/america-has-a-large-trade-deficit-but-economists-arent-too-concerned-about-it> (describing the demand for U.S. debt instruments).

291. See Kimberly Amadeo, *U.S. Debt to China: How Much Does It Own?*, BALANCE (July 2, 2018), <https://www.thebalance.com/u-s-debt-to-china-how-much-does-it-own-3306355>.

292. See *id.*

293. U.S. TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 1 (2017), <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-trade-policy-agenda-and-2016>.

294. *Id.* at 2.

The Trump administration has imposed tariffs unilaterally on many imported products to fulfill its “economic nationalism” commitments on trade. The stated reasons for such tariffs are twofold. First, the Trump administration has a goal of establishing reciprocity of treatment in both tariff schedules and trade flows with U.S. trading partners.²⁹⁵ Second, tariffs are being used as “leverage” to bargain with trade partners for new and better trade agreements.²⁹⁶ We take issue in large measure with how these aims are being implemented.

1. *The Search for Reciprocity*

It is sometimes stated that the World Trade Organization mandates free trade for all members. This is not the case. The WTO expressly permits border measures to control imports. However, WTO rules as expressed in the GATT, permit, as a general rule, only one kind of border measure on imports: “duties, taxes or other charges”²⁹⁷. In other words, tariffs, are generally permitted by the WTO. Only in exceptional cases may other measures, such as trade quotas or bans, be employed.²⁹⁸ Thus, at the WTO, all nations are permitted to use tariffs but cannot use other trade measures without additional justification.

Tariffs are subject to certain WTO rules. Article II of the GATT requires each WTO member to maintain a schedule of trade concessions that it agrees to accord to all other WTO members.²⁹⁹ These trade concessions generally consist of commitments not to levy or charge a greater tariff than stated in its Schedule.³⁰⁰ These are known as tariff “bindings.” GATT Article II requires WTO members not to charge tariffs to WTO members exceeding these bindings.³⁰¹ Customs fees or other charges may be made only commensurate with the cost of services rendered.³⁰²

The GATT requires publication and efficient administration of trade regulations.³⁰³ Most tariffs are *ad valorem* duties, expressed as a percentage of the value of the import.³⁰⁴ The GATT regulates valuation for customs purposes,³⁰⁵ so a member state cannot undermine its tariff commitments by artificially inflating the value of an import. To standardize tariff classifications

295. See Kellie Ell, *Former Office Depot CEO: Using Tariffs to Bolster Trade Leverage Is Working for Trump*, CNBC (May 31, 2018), <https://www.cnbc.com/2018/05/31/trump-uses-tariffs-to-bolster-trade-leverage--and-its-working-ceo.html>.

296. *Id.*

297. GATT art. XI:1.

298. See GATT arts. XI:2, XII, XV, XIX, XX, & XXI.

299. GATT art. II.

300. See *id.*

301. GATT art. II:1(b).

302. GATT art. II:2(c).

303. GATT art. X.

304. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 200 (3d ed. 2017).

305. GATT art. VII.

of products, WTO members employ the Harmonized Commodity Description and Coding System issued by the World Customs Council, which consists of 5,300 items arranged in 99 chapters and covers all goods.³⁰⁶ Chapters are designated by a two-digit number appearing at the beginning of the classification.³⁰⁷ The two-digit number is followed by a four-digit number indicating further subheadings for goods covered by a chapter.³⁰⁸ Most tariffs are stated at the six-digit level of classification.³⁰⁹ The United States imposes a tariff at the eight digit level.³¹⁰ A tariff does not have to be “bound” in a WTO member’s Schedule of Concessions, but in fact, most tariffs are bound, at least by the United States and other developed countries.³¹¹

Once a tariff is bound in a WTO member’s Schedule, the listed tariff constitutes the maximum charge that may be levied on imports from any WTO member. The Most-Favored Nation rule of the GATT requires any special trade privilege granted to one WTO member to be accorded immediately and unconditionally to all other WTO members.³¹² After the applicable tariff is paid on the imported product, national treatment must be accorded to foreign products in competition with domestic products in the WTO member’s internal market.³¹³

Reciprocity in tariff bindings is not required by the GATT or any other WTO agreement. Since 1947, trade negotiations have been conducted on a multilateral basis; each state involved is required to submit “offers” in the form of tariff concessions to be accorded to all other members.³¹⁴ Every member has the right to review all offers and to ask for changes.³¹⁵ Bargaining thus takes place on a multilateral basis; negotiations continue until a consensus is reached among all members on every other member’s offered concessions.³¹⁶ In the case of new members, such as China, there must be agreement on an Accession

306. *Harmonized Commodity Description and Coding Systems (HS)*, UN TRADE STATISTICS, <https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/Harmonized-Commodity-Description-and-Coding-Systems-HS> (last visited Jan. 27, 2019).

307. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 137 (3d ed. 2015).

308. *See id.*

309. *See id.*

310. *See id.*

311. Tariffs are “bound” under GATT art. II:1(b).

312. GATT art. I:1. GATT art. XXIV makes an exception to this rule for customs unions and free trade areas. The WTO Generalized System of Preferences makes exceptions to this rule for developing country exports.

313. GATT art. III.

314. *See* WORLD TRADE ORG., *PRINCIPLES OF THE TRADING SYSTEM*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (describing how the Most Favored Nation principle requires countries to offer the same trade terms).

315. *See* Marrakesh Agreement Establishing the World Trade Organization art. X, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO].

316. *Id.*

Agreement by every existing member.³¹⁷ Each Accession Agreement contains a Schedule of trade concessions.³¹⁸ After the initial Schedule and Accession Agreement is approved, a new WTO member joins the other members in any subsequent trade negotiation in making further trade concessions.³¹⁹

Under these conditions, reciprocity in the sense of exact equivalence of specific tariffs or trade flows may not be possible or even desirable. Each member country has different economic advantages, needs and desires; different countries will both offer and seek different kinds of trade concessions. It is also impossible to predict exact trade flows when negotiating trade concessions. The WTO does, however require reciprocity in a general sense in two instances. First, the GATT requires that trade negotiations be conducted on a “reciprocal and mutually advantageous” basis.³²⁰ Second, modification of Schedules of trade concessions must be done on a reciprocal basis. Any member whose trade is harmed by withdrawal of another member’s trade concession has the right to withdraw an equivalent trade concession.³²¹

Strict reciprocity in trade may be desirable and “fair” in some cases but not in others. For example, the United States currently charges a 2.5% levy on imported foreign cars, while the EU imposes a tariff of 10%. Such a disparity between two advanced industrial economies seems unnecessary and unfair. But the way to change this situation is not a tit-for-tat trade war. In fact, Germany, the EU’s largest manufacturer of automobiles, and the German Association of the Automotive Industry (VDA) have publicly stated their willingness to reduce car tariffs to zero on both sides of the Atlantic if this could be done as part of a larger trade agreement, the T-TIP, which the Trump administration has rejected.³²²

On the other hand, sometimes trade may be “fair” without strict tariff reciprocity. For example, Canada retains high tariffs on dairy products, ranging from 270% for milk, up to as high as 313.5% for butterfat. But these are what is called tariff rate-quotas, which only apply to imports above a certain designated quota while a lower rate applies to imports below the designated number. Each year the Canadian government decides the quota of products that may be imported at zero tariffs. Thus, the high tariff is designed to operate as a quota so that the high tariffs set are never in fact collected. The United States applies

317. Agreement Establishing the World Trade Organization, Article XII (Accession). See also *WTO Accessions*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/acc_e.htm.

318. *Members’ Commitments*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm.

319. After accession, the acceding party becomes a full-fledged member 30 day after its signature. This makes it join all future negotiations about trade and concessions. See WORLD TRADE ORG., CURRENT STATUS OF WTO ACCESSIONS, https://www.wto.org/english/thewto_e/acc_e/acc_status_e.htm.

320. WTO art. XXVIII.

321. WTO art. XXVIII.

322. Jack Ewing, *Europe Retaliates Against Trump Tariffs*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/business/economy/europe-tariffs-trump-trade.html>.

a similar system of tariff rate-quotas on dairy products, but the range of tariffs is lower. Thus, it may seem that Canada's system is unfair, but this is not the case. In 2017, the United States exported \$792 million in U.S. cheese, milk, and butter products, while Canada exported only \$149 million to the United States.³²³ The United States, as a low-cost producer, enjoys a 5:1 trade advantage on dairy trade with Canada despite the tariff differences.

2. *Leverage to New Trade Agreements*

An important purpose of the tariffs announced by the Trump administration is to induce trading partners to negotiate and enter into new trade agreements more favorable to the United States. Larry Kudlow, chair of the U.S. National Economic Council and chief economic advisor to President Trump, has sought to calm markets by asserting that Trump's tariffs are principally negotiating sticks to increase the United States' leverage in demanding favorable actions on trade from China and other U.S. trade partners.³²⁴ In this same vein, Alan Wolff, an American who is Deputy Director of the WTO, argues that U.S. unilateral actions simply reflect American dissatisfaction with current trade practices and that "common ground must be found, new [trade] balances struck."³²⁵ Wolff and Michael Gadbaw, a prominent U.S. trade lawyer, citing the U.S. unilateral actions by presidents Nixon and Carter in the 1970s and President Reagan in the 1980s, argue that U.S. unilateral action is necessary to shake up the system and to get serious trade negotiations going.³²⁶ These authorities argue that Nixon, Carter and Reagan all achieved success in the form of needed trade and monetary reforms. These reforms are as follows.

- *The "Nixon shock."* In August 1971, President Nixon, citing U.S. balance of payment difficulties, announced that the United States would levy a ten percent surcharge (extra tariff) on all imports and that the United States would no longer support an international gold price of thirty-five dollars per ounce.³²⁷ This unilateral action led to the

323. Geoffrey Mohan, *Behind Trump's Dairy Rant, a Cheesed-off Wisconsin and Canada's Sacred Cows*, L.A. TIMES (June 13, 2018), <http://www.latimes.com/business/la-fi-dairy-canada-20180612-story.html>.

324. Jacob Pramuk, *Larry Kudlow: Trump's Tariffs on China May Not Go into Effect*, CNBC (Apr. 4, 2018), <https://www.cnbc.com/2018/04/04/larry-kudlow-says-trump-china-tariffs-may-not-take-effect.html>.

325. See Alan Wolff, WTO Deputy Director-General, Address at IMF (Apr. 4, 2018), in WORLD TRADE ORG., https://www.wto.org/english/news_e/news18_e/ddgra_04apr18_e.htm.

326. Michael Gadbaw, *Toward a Trump Round: Time to Negotiate!*, ECONOMATTERS (Apr. 10, 2018), <https://www.theglobalist.com/trump-trade-protectionism-wto-gatt-china-united-states-globalization>.

327. Sandra Ghizoni, *Nixon Ends Convertibility of U.S. Dollars to Gold and Announces Wage/Price Controls*, FEDERAL RESERVE HISTORY, https://www.federalreservehistory.org/essays/gold_convertibility_ends (last visited Nov. 10, 2018).

Smithsonian Agreement in December, 1971, and ultimately to the system of floating exchange rates of today.³²⁸

- *Carter and the steel trigger-price mechanism.* President Carter imposed a trigger-price mechanism to assure high import prices for imported steel.³²⁹ Nixon and Carter's actions led directly to the successful conclusion of the GATT Tokyo Round of Multilateral Trade Negotiations in 1979.³³⁰
- *Reagan unilateral protectionism.* President Reagan took many actions aimed at closing the trade deficit with Japan. For example, in 1981, the Reagan administration negotiated a voluntary export restraint agreement with Japan, limiting the number of autos exported to the United States from Japan.³³¹ This agreement had mixed results. On the plus side, the voluntary export restraint saved an estimated 44,000 U.S. auto jobs and caused Japanese auto companies to build several factories in the United States employing American workers.³³² On the minus side, the voluntary export restraint caused price increases for both domestic and imported autos transferring an estimated \$15.7 billion from U.S. consumers to both domestic and foreign auto producers.³³³ A second important action was the U.S.-Japan Semiconductor Trade Agreement of 1986, which featured a floor price for imports and a voluntary import expansion by Japan aiming for a twenty percent domestic market share for imports within five years.³³⁴ The impact of this agreement is unclear. Critics say that this agreement was inefficient and produced above average profits for Japanese memory producers and an advantage to Japanese chip producers.³³⁵ They also say that both U.S. and Japanese companies prospered, yet the windfall profits accrued to mainly Japanese firms that composed

328. Owen Humpage, *The Smithsonian Agreement*, FED. RESERVE HISTORY, https://www.federalreservehistory.org/essays/smithsonian_agreement (last visited Nov. 10, 2018).

329. Jimmy Carter, U.S. President, Statement on the American Steel Industry Revitalization Program, (Sept. 30, 1980).

330. See G. John Ikenberry, *Manufacturing Consensus: The Institutionalization of American Private Interests in the Tokyo Trade Round*, 21 COMP. POL. 289, 289-90, 296-97 (1989).

331. Steven Berry et al., *Voluntary Export Restraints on Automobiles: Evaluating a Trade Policy*, 89 AM. ECON. REV. 400, 400 (1999).

332. DOMINICK SALVATORE, INTERNATIONAL ECONOMICS 262 (11th ed. 2016).

333. *Id.*

334. Douglas Irwin, *The U.S.-Japan Semiconductor Trade Conflict*, in THE POLITICAL ECONOMY OF TRADE PROTECTION 5, 5, 10 (Anne O. Krueger ed., 1996).

335. Richard Baldwin, *The Impact of the 1986 US-Japan Semiconductor Agreement*, 6 JAPAN & WORLD ECON. 129, 151 (1994).

ninety percent of the market.³³⁶ Defenders of the agreement point out that during the course of the pact and its renewal in 1991 that U.S. producers achieved thirty-one percent foreign market share in Japan.³³⁷ This trend of international expansion in semiconductors has continued. For example, in 2015, U.S. semiconductor companies led in global market share with fifty percent compared to Japanese companies' share of eleven percent.³³⁸

Will the Trump administration's unilateral actions lead to favorable outcomes this time? Conditions in 2018 are very different from conditions in the 1970s and 1980s, and events so far show that the United States is ultimately playing a dangerous game. American unilateralism is likely to fail for three main reasons. First, unlike the case in the 1970s and 1980s, the WTO now maintains a rules-based dispute settlement system.³³⁹ Since the U.S. tariff actions are likely to be inconsistent with U.S. obligations undertaken at the WTO, U.S. trade partners will likely win their cases at the WTO and have the right to exact trade compensation against the United States. Second, unlike in the 1970s and 1980s when the United States was the eminent economic and military power, in 2018, the United States is facing China, a formidable economic competitor that is due to surpass the United States in GDP by 2029.³⁴⁰ China has shown no signs of yielding to U.S. economic pressure. Third, in the 1970s and 1980s many U.S. allies were sympathetic to the U.S. arguments and positions.³⁴¹ In 2018, the United States is essentially alone, having antagonized virtually every country, ally and non-ally, not only in trade

336. *Id.* at 130-31.

337. Leslie Helm, *U.S., Japan Reach Accord on a New Semiconductor Trade Agreement*, L.A. TIMES (Aug. 3, 1996), http://articles.latimes.com/1996-08-03/business/fi-30814_1_japan-semiconductor-agreement.

338. INT'L TRADE COMM'N, 2016 TOP MARKETS REPORT SEMICONDUCTORS AND SEMICONDUCTOR MANUFACTURING EQUIPMENT 1 (2017), https://www.trade.gov/topmarkets/pdf/Semiconductors_Executive_Summary.pdf.

339. Under the GATT dispute settlement system, the losing party could block adoption of GATT panel reports for an indeterminate period of time. Under the WTO, panel and appellate body reports are adopted automatically. Daniel H. Erskine, *Resolving Trade Disputes: The Mechanisms of GATT/WTO Dispute Resolution*, 2 SANTA CLARA J. INT'L L. 40, 41-42, 69 (2004).

340. Malcolm Scott & Cedric Sam, *Here's How Fast China's Economy Is Catching Up to the U.S.*, BLOOMBERG (May 24, 2018), <https://www.bloomberg.com/graphics/2016-us-vs-china-economy/> (projecting China's GDP to surpass the United States based on projected growth rates of 2.0% for the United States and 6.5% for China).

341. HUMPAGE, *supra* note 328 (describing the international community working to help stabilize the world's monetary order after the Nixon Shock); Baldwin, *supra* note 309, at 135 (explaining how Japan worked with the United States to help the U.S. semiconductor industry).

but also in other matters such as the expenses of NATO and withdrawal from the Paris Climate Agreement.³⁴²

a. *WTO Norms*

Unilateral tariffs are within the president's powers under U.S. domestic law, but may violate international law. All the tariff raises enumerated above in this article are subject to bound Most Favored-Nation rates under GATT Article II. Thus, when these tariffs are tested because of complaints at the WTO, the United States will have to find justification in the GATT or other WTO agreement. Furthermore, the intent of the Trump administration is to offer tariff relief in exchange for voluntary export restraints that limit exports into the United States. Voluntary export restraints are on their face illegal under WTO rules. Article 11(b) of the WTO Agreement on Safeguards explicitly forbids "voluntary export restraints" and "orderly market agreements."³⁴³ Thus, *prima facie*, the U.S. bilateral managed trade policy is illegal; and the United States seems likely to lose all three tariff cases:

- *Safeguards tariffs on solar panels and washing machines.* The authority for this action is section 201 of the Trade Act of 1974, but at the WTO U.S. legal measures will be judged under Article XIX of the GATT and the WTO Safeguards Agreement. The last time the United States invoked the section 201 safeguard, the Bush steel tariffs in 2002, the WTO Appellate Body faulted the United States for failing to provide an adequate and reasoned explanation of how "unforeseen developments" led to an increase in imports that caused or threatened to cause "serious injury" to domestic producers.³⁴⁴
- *National security tariffs on steel, aluminum, cars, trucks, and auto parts.* The national security exception of the GATT³⁴⁵ permits trade actions necessary to protect security interests regarding (i) fissionable materials or the materials from which they are derived; (ii) traffic in weapons or arms; and (iii) matters of war or emergency in international relations.³⁴⁶ None of these three matters apply to these

342. Valerie Volcovici, *U.S. Submits Formal Notice of Withdrawal from Paris Climate Pact*, REUTERS (Aug. 4, 2017), <https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBNI1AK2FM>.

343. World Trade Organization Agreement on Safeguards, Art. 11(b).

344. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248, 249, 251, 252, 253, 254, 258, 259/AB/R (adopted Nov. 10, 2003).

345. GATT art. XXI.

346. The scope of Article XXI is admittedly unsettled. This Article has been invoked only infrequently and its scope has never been conclusively determined either by the WTO Ministerial Conference or in a binding GATT/WTO decision. The main argument is

tariffs. About ninety-eight percent of metal and vehicle imports come from allies with whom the United States has national security treaties.³⁴⁷ As the economist Paul Krugman has argued, “the idea that imported cars pose a national security threat is absurd.”³⁴⁸

- *Section 301 tariffs.* These tariffs *prima facie* are inconsistent with GATT Article I on Most-Favored Nation treatment since they apply only to China. They are proposed to be taken unilaterally without first recourse to the WTO, which flies in the face of the WTO panel report ruling cited above,³⁴⁹ which upholds section 301 actions only on terms that recourse will first be made to the WTO.

If the United States loses one or more of these cases at the WTO, the United States is obligated under international law to promptly comply with the recommendations of the Dispute Settlement Body of the WTO,³⁵⁰ which undoubtedly will require the repeal of the tariffs. If the United States fails to rescind the tariffs within a reasonable time, usually fifteen months,³⁵¹ U.S. trading partners will be authorized by the WTO to adopt compensation in the form of trade retaliation against U.S. exports.³⁵²

b. *Trade “War” with China*

The opening salvo of a trade “war” with China occurred when the United States announced the imposition of tariffs on approximately fifty billion dollars

whether, as a security exception, its application is up to the self-judgment of the WTO member that invokes it. See Roger Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011). Although the term “emergency in international relations” is not defined, this term must have some objective legal meaning; this meaning cannot refer to a simple imbalance in trade between members of the WTO. Nothing in any of the WTO agreements requires equality of trade flows between nations. No provision of the WTO agreements has been held to be self-judging or completely subjective in character. For cases and analysis, see MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY* 548-51 (3d ed., 2015).

347. Catherine Rampell, Opinion, *So You’re Telling Me My Subaru Is a National Security Threat?*, WASH. POST (May 24, 2018), https://www.washingtonpost.com/opinions/trump-knows-how-to-ruin-the-whole-thing/2018/05/24/3eb8c67c-5f90-11e8-a4a4-c070ef53f315_story.html?utm_term=.e98e9acc0b87.

348. Paul Krugman, *Trump’s Manchurian Trade Policy*, N.Y. TIMES, May 30, 2018, at 14.

349. See *supra* note 158: Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS52/R (adopted Dec. 22, 1999).

350. DSU, *supra* note 175, at art. 21(1).

351. *Id.* art. 21(4).

352. *Id.* art. 22.

of imports from China.³⁵³ The Chinese products involved were some 1,300 different tariff items.³⁵⁴ The tariffs are proposed on the authority of sections 301(b) and 304(a) of the Tariff Act of 1974,³⁵⁵ and the U.S. justification for the tariffs is based on the following acts by China: (1) requiring or pressuring U.S. companies to transfer technology; (2) forcing the transfer of technology from U.S. companies on non-market terms; and (3) Chinese investments or acquisition of U.S. companies for the purpose of obtaining access to technology.³⁵⁶

White House and U.S. Department of Commerce officials urged calm in the face of growing concern of the public, emphasizing that no U.S. tariffs had yet gone into effect. The Secretary of Treasury, Steven Mnuchin, stated that, “whatever happens, I don’t expect it to have a meaningful impact.”³⁵⁷ But President Trump himself stated that, “It’s [the deficit with China] out of control,” and that trade wars are “good” and “easy to win.”³⁵⁸ Chinese premier, Li Keqiang, acknowledged that “a large trade deficit is not something we want to see,” and promised to consider reforms. But China made clear that “we are confident and capable of meeting any challenge.”³⁵⁹

353. Ana Swanson, *White House Unveils Tariffs on 1,300 Products*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/politics/white-house-chinese-imports-tariffs.html>.

354. *Id.*

355. 19 U.S.C. § 2411(b), 2414(a). These provisions provide authority under U.S. law for unilateral trade actions by the President.

356. U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 5 (2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

357. Michelle Ye Hee Lee et al., *Trump, Allies Play Down Fears of Trade War with China on Economy*, WASH. POST (Apr. 8, 2018), https://www.washingtonpost.com/politics/trump-allies-play-down-concerns-about-effect-of-trade-war-with-china-on-economy/2018/04/08/47796dd0-3b31-11e8-974f-aacd97698cef_story.html?utm_term=.0a2d170027e5.

358. David Lynch, *China Threatens to Raise Tariffs on About \$3 Billion of U.S. Imports*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/business/economy/trump-moves-toward-imposing-steep-tariffs-on-china-sending-stocks-plummeting/2018/03/22/5cd3a7c6-2dfe-11e8-8ad6-fbc50284fce8_story.html?utm_term=.b7fb25ca962a.

Experience with trade wars belies the idea that such wars are good and easy to win. A case in point is the “Chicken War” between the United States and the European Community (EEC) in the 1960s. In 1962, the EEC unilaterally raised tariffs on U.S. poultry exports. In 1963, the United States retaliated by placing a twenty-five percent import duty on imports of pick-up trucks. Both sides lost this “war” and the matter is not settled even today. The United States continues to levy its twenty-five percent tariff on pick-up trucks today, and few people now remember why; and U.S. exports of poultry to the EU continue to be negligible. ROSS B. TALBOT, *THE CHICKEN WAR: AN INTERNATIONAL TRADE CONFLICT BETWEEN THE UNITED STATES AND THE EUROPEAN ECONOMIC COMMUNITY, 1961-64* (1978). For information on how the EU blocks U.S. poultry exports, see Mohammed Mahdi Ghodsi & Robert Stehrer, *EU Trade Regulations and Imports of Hygienic Poultry 2* (Vienna Inst. for Int’l Econ. Stud., Working Paper No. 135 (2017)), <https://wiiw.ac.at/eu-trade-regulations-and-imports-of-hygienic-poultry-dlp-4209.pdf>.

359. Lynch, *supra* note 358.

The American action began a flurry of activity between the United States and China, the world's two largest economies, dueling tariffs and trade punishments, followed by negotiations and an agreement devoid of specifics. The steps taken are below.

China, on April 2, 2018, announced immediate retaliatory tariffs in response to the U.S. steel and aluminum tariffs that would go into effect on three billion dollars of 128 categories of U.S. exports, mainly agricultural products.³⁶⁰ These tariffs target businesses in rural America.³⁶¹

China, on April 4, 2018, announced that it planned retaliatory tariffs in response to the U.S. section 301 tariffs of fifty billion dollars on 106 categories of U.S. exports, including aircraft and autos as well as agricultural goods.³⁶²

President Trump, on April 6, 2018, instructed the USTR to undertake the process necessary to impose tariffs on an additional one hundred billion dollars of Chinese exports.³⁶³

The U.S. Department of Commerce, on April 16, 2018, issued a "denial order" blocking for seven years Zhongxing Telecommunications Equipment Corporation (ZTE), a major Chinese telecommunications company, from purchasing telecom components from U.S. companies.³⁶⁴ This denial of export privileges hurts American companies, but effectively puts ZTE out of business, at least temporarily. The denial order was issued because it was found that ZTE had misled U.S. investigators regarding the re-export of ZTE products containing component products made in America to North Korea and Iran.³⁶⁵

360. Damian Paletta, *Trade War Escalates as China Says It Will Impose Tariffs on 128 U.S. Exports, Including Pork and Fruit*, WASH. POST (Apr. 1, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/01/trade-war-escalates-as-china-vows-to-impose-tariffs-on-128-u-s-exports-including-pork-and-fruit/?utm_term=.1fd22960a695.

361. See David Lynch, *The Winners in Trump's Trade War? This Indiana Family. The Losers? The Same Family.*, WASH. POST (Apr. 9, 2018), https://www.washingtonpost.com/business/economy/the-winners-in-trumps-trade-war-this-indiana-family-the-losers-the-same-family/2018/04/09/3f738a4a-3bf8-11e8-8d53-eba0ed2371cc_story.html?utm_term=.5dc56ebb610e; see also Seung Min Kim, *Farm-state Republics Chafe at Trump's Trade Policies but Are Reluctant to Confront Him*, WASH. POST (Apr. 20, 2018), https://www.washingtonpost.com/politics/no-did-he-do-that-republicans-chafe-at-trumps-trade-policies-but-are-reluctant-to-confront-him/2018/04/19/203b492a-4313-11e8-bba2-0976a82b05a2_story.html?utm_term=.24d45d7509e5.

362. *Key Events in Rapid Escalation of U.S.-China Trade Dispute*, REUTERS (Apr. 5, 2018), <https://www.reuters.com/article/us-usa-trade-china-timeline/key-events-in-rapid-escalation-of-u-s-china-trade-dispute-idUSKCN1HD071>.

363. Holland & Lawder, *supra* note 159.

364. Press Release, U.S. Dep't of Commerce, Sec'y Ross Announces Activation of ZTE Denial Order in Response to Repeated False Statements to the U.S. Gov't (Apr. 16, 2018), <https://www.commerce.gov/news/press-releases/2018/04/secretary-ross-announces-activation-zte-denial-order-response-repeated>.

365. *Id.*

After a plea from Chinese President Xi, President Trump directed Commerce Secretary Wilbur Ross to review this case.³⁶⁶

China, on April 17, 2018 announced it was imposing a new tariff of 178.6% on imports of sorghum (a cereal grain) from the United States, allegedly as an anti-dumping charge.³⁶⁷ On May 18, 2018, China announced that it was ending this anti-dumping investigation amid marked chaos occurring in grain markets in both China and the United States over the new tariffs.³⁶⁸

This tit-for-tat dueling tariff “war” first came to a head in May 2018. A top-level U.S. negotiating team led by Treasury Secretary Steven Mnuchin went to Beijing for talks, and a Chinese delegation led by Vice Premier Liu He visited Washington DC. On May 19, 2018. China and the United States announced an agreement devoid of specific actions or promises, but promised expanded trade in manufactured goods and stronger cooperation in enforcement of intellectual property protection.³⁶⁹ China agreed to lower tariffs on unspecified American products and to buy “significantly” more goods and services from the United States, including “meaningful increases in United States’ agriculture and energy exports.”³⁷⁰ Both sides agreed to take “effective measures” to reduce the U.S. trade deficit.³⁷¹

366. David J. Lynch, *China Agrees to Buy ‘Significantly’ More From the U.S. but Doesn’t Commit to Specific Amount*, WASH. POST (May 19, 2018), https://www.washingtonpost.com/news/business/wp/2018/05/19/china-agrees-to-buy-significantly-more-u-s-goods-and-services-in-bid-to-ease-trade-tensions-according-to-joint-statement/?utm_term=.e7fd5fc0c327. On June 7, 2018, the Department of Commerce announced resolution of the ZTE matter. Commerce rescinded the Denial Order on condition that ZTE pay a one billion dollar fine, place \$400 million in escrow to assure future compliance, change the members of its board of directors and executive management team, and install an American nominated compliance team to assure future compliance by the company. Ann Swanson, *Trump Strikes Deal to Save China’s ZTE as North Korea Meeting Looms*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/business/us-china-zte-deal.html>.

367. Emily Rauhala, *In New Sign of Trade Battle, China Slaps U.S. Sorghum Producers with 179 Percent Deposit*, WASH. POST (Apr. 18, 2018), https://www.washingtonpost.com/world/asia_pacific/in-new-sign-of-trade-war-china-slaps-us-sorghum-producers-with-179-percent-deposit/2018/04/17/ff8de9c8-4216-11e8-baaf-8b3c5a3da888_story.html?utm_term=.d2a4bba1bb60.

368. Paul Wiseman & Kelvin Chan, *Beijing Showing Signs of Compromise in Trade Talks with US*, US NEWS (May 18, 2018), <https://www.usnews.com/news/business/articles/2018-05-18/as-talks-resume-china-ends-anti-dumping-probe-of-us-sorghum>.

369. China rejected U.S. demands to state a specific amount of American goods it would commit to import. Ginger Gibson & David Lawder, *China Agrees to Import More from U.S., No Sign of \$200 Billion Figure*, REUTERS (May 19, 2018), <https://www.reuters.com/article/us-usa-trade-china/china-agrees-to-import-more-from-u-s-no-sign-of-200-billion-figure-idUSKCN1IKOPM>.

370. *Id.*

371. On May 22, 2018, China, in a bow to the Trump administration’s demand for “reciprocity,” announced cuts in import duties levied on car and car parts. Tariffs on imported cars were cut from 25% to 15%, while tariffs on imported car parts were cut to 10%. See Alan Tovey, *China Cuts Car Import Duties as US Trade War Fears Recede*,

In return for these promises, the Trump administration agreed *not* to impose the tariffs on \$150 billion of Chinese products he announced on March 22 and April 6 pursuant to section 301 of the Trade Act of 1974.³⁷² China agreed not to impose the retaliatory tariffs it had decreed on April 2 and 4.³⁷³ Secretary Mnuchin stated on May 20 that the Trump administration was putting its trade “war” with China “on hold.”³⁷⁴ While Trump administration cast the agreement with China as a victory, critics, such as Senator Marco Rubio of Florida opined that “China has out-negotiated the U.S. again.”³⁷⁵

On May 29, 2018, in a stunning reversal reflecting disagreement among the president’s trade counselors,³⁷⁶ the Trump administration rekindled the trade spat with China, announcing that the United States would proceed with imposing the section 301 tariffs on fifty billion dollars in Chinese imports, and would, in addition, impose investment restrictions on Chinese companies.³⁷⁷

China’s response to this Trump administration move came when, on June 3, 2018, Secretary of Commerce Wilbur Ross arrived in Beijing for talks on the implementation of the Sino-U.S. agreement of May 19. China warned that “[i]f the United States introduces trade sanctions, including a tariff increase [against China], all the economic and trade achievements negotiated by the two parties will not take effect.”³⁷⁸ The Chinese statement added that “[t]he negotiating process should be ‘based on the premise’ of not fighting a ‘trade war.’”³⁷⁹

On June 15, 2018, however, the Trump administration affirmed that twenty-five percent tariffs would be levied upon fifty billion (1,102 categories) of Chinese exports beginning July 6, 2018;³⁸⁰ China immediately announced

TELEGRAPH (May 23, 2018, 2:10 PM), <https://www.telegraph.co.uk/business/2018/05/22/china-cut-car-import-tariffs-trade-war-fears-recede>.

372. Julia Horowitz, *US and China Call a Ceasefire in Trade Dispute*, CNN MONEY (May 21, 2018, 6:07 AM), <http://money.cnn.com/2018/05/19/news/china-united-states-trade-announcement/index.html?iid=EL>.

373. *Id.*

374. David J. Lynch, *Critics Fear Trump is Ceding Too Much to China on Trade*, WASH. POST (May 20, 2018), https://www.washingtonpost.com/business/economy/critics-fear-trump-is-ceding-too-much-to-china-on-trade/2018/05/20/6d6d2b76-5c6a-11e8-a4a4-c070ef53f315_story.html?utm_term=.59fe2132eee7.

375. *Id.*

376. See Shawn Donnan, Tom Mitchell & Xinning Liu, *Trump Threats Complicate Trade Talks with Beijing*, FIN. TIMES (May 30, 2018), <https://www.ft.com/content/9c98ef28-63d8-11e8-90c2-9563a0613e56>.

377. Shawn Donnan, *White House Rekindles China Trade War with Hit List on \$50 Billion of Imports*, FIN. TIMES (May 29, 2018), <https://www.ft.com/content/eeb93e74-6352-11e8-90c2-9563a0613e56>.

378. Joe McDonald, *China Warns the U.S. that Any Trade Deals Are Off if Trump’s Threatened Tariffs Go Ahead*, BUS. INSIDER (June 3, 2018), <https://www.businessinsider.com/ap-the-latest-china-warns-us-no-deal-if-tariffs-go-ahead-2018-6> (quoting Xingua News Agency).

379. *Id.*

380. Jacob Pramuk, *Trump to Slap 25% Tariffs on up to \$50 Billion of Chinese Goods; China Retaliates*, CNBC (June 15, 2018, 8:05 AM), <https://www.cnbc.com/2018/06/15/>

that it would impose a twenty-five percent tariff on fifty billion dollars of U.S. exports, currently about one-third of total U.S. exports to China.³⁸¹ The Chinese tariff is being applied to 659 categories of U.S. goods. China's Foreign Ministry accused the United States of "provoking the trade war."³⁸²

On June 19, 2018, the Trump administration escalated the trade dispute with China, announcing that additional section 301 tariffs would be levied upon \$200 billion of Chinese exports, and that, if China retaliates further, the United States would levy section 301 tariffs on a third tranche of an additional \$200 billion of Chinese imports.³⁸³ Thus, new tariffs levied or proposed against China may cover \$450 billion total of Chinese exports, most of the \$506 billion China exported to the United States in 2017.

Then on December 11, 2018, over dinner with President Xi Jinping, President Trump entered into a verbal agreement to hold further tariffs on Chinese products in abeyance for 90 days, until March 1, 2019, in order to give the two countries time to strike a "lasting agreement" on trade matters.³⁸⁴ In return for this truce, President Xi stated that China would purchase a "not yet agreed upon, but very substantial amounts of [U.S.] agricultural, energy, industrial" and other products to reduce the U.S. trade deficit. Ironically, on that same day, Canada, on the request of the United States, arrested Huawei CFO, Meng Wanzhou, on grounds of suspicion of fraud in connection with representations made concerning U.S. sanctions on Iran.³⁸⁵

There is widespread agreement that this tariff war will harm both sides and that the entire world will suffer economically, although there is disagreement on the extent of the economic damage.³⁸⁶ An IMF Report released April 17, 2018, predicted that tariffs and other trade barriers leading to a ten percent

trump-administration-to-slap-a-25-percent-tariff-on-50-billion-of-chinese-goods-threatens-more.html.

381. *Id.*

382. Bob Davis, Vivian Samala & Lingling Wei, *China Issues Retaliatory Tariffs as Trade Fight Heats Up*, WALL ST. J. (June 16, 2018, 6:34 PM), <https://www.wsj.com/articles/white-house-announces-tariffs-on-50-billion-of-goods-from-china-1529065534?ns=prod/accounts-wsj>.

383. William Mauldin, *Donald Trump Threatens New Tariffs on \$200 Billion in China Imports*, WALL ST. J. (June 19, 2018), <https://www.wsj.com/articles/donald-trump-readies-new-tariffs-for-china-1529365844>.

384. Lingling Wei, Bob Davis, & Alex Leary, *U.S., China Reach a Truce on Trade*, WALL ST. J., Dec. 2, 2018, at 1; Paul Weisman, Zeke Miller & Catherine Lucey, *U.S., China Agree to 90-day Cease-Fire in War over Tariffs*, SEATTLE TIMES, Dec. 2, 2018, at A2; Keith Bradsher & Alan Rappeport, *Trade War Cease-Fire Gives Both Sides Political Breathing Room*, N.Y. TIMES, Dec. 2, 2018, at A1.

385. Felix Salmon, *Huawei CFO's Arrest Shakes Up Trump's Trade War Truce with China*, AXIOS (Dec. 9, 2018), www.axios.com/huawei-cfo-arrest-meng-wanzhou-reactions-fa4b917d-48ea-4d7c-9e2f-a5a2830ca7ae.html.

386. See David J. Lynch, *Why China Could Withstand the Trade War for Longer than Trump Thinks*, WASH. POST (Sept. 13, 2018), https://www.washingtonpost.com/business/economy/why-china-could-withstand-the-trade-war-far-longer-than-trump-thinks/2018/09/13/a0d9fca2-b77b-11e8-a7b5-adaaa5b2a57f_story.html.

increase in import prices would lower global GDP by about 1.75 percent.³⁸⁷ Christine Lagarde, Managing Director of the IMF, added that “[t]he actual impact on growth is not very substantial, when you measure in terms of global GDP,” but the uncertainties involved are likely to lead to an “erosion of confidence” that will “choke off investment,” a main driver of future growth.³⁸⁸

A second important casualty of this trade spat is the rules-based system of international trade administered by the WTO.³⁸⁹ The United States and other nations have spent decades of effort creating the WTO, international agreements, and a vibrant dispute settlement system for international trade. Now that system is in crisis, as both China and the United States are operating outside the system of rules, returning to a power based political system of international trade actions. If these two largest economies can flout the rules, other states will be encouraged to do so as well.

Of course, the Trump administration officials appear to believe this contretemps will end with China coming to terms as Japan did under U.S. pressure in the 1980s. The Trump administration is seeking a new trade deal with China that would be a prelude to far-reaching trade settlements with the rest of the world. “When you’re already \$500 billion down,” President Trump states (referring to the U.S. trade deficit), “you can’t lose!”³⁹⁰ Commerce Secretary Ross expressed confidence the spat with China will be settled through diplomacy: “Even shooting wars end with negotiations,” he says, “[s]o it wouldn’t be surprising at all if the net outcome of all this is some sort of negotiation”³⁹¹

There are at least three reasons why the U.S. approach in use trade sanctions to pressure China into capitulating may not be successful:

China is different and much more powerful than Japan in the 1980s.³⁹² China is a rising power that will not be denied. Already a global force politically and economically, China will soon be a global military power as

387. IMF, *World Economic Outlook April 2018*, at 22 (2018), <https://www.imf.org/en/Publications/WEO/Issues/2018/03/20/world-economic-outlook-april-2018>.

388. David Lawder, *U.S.-China Trade Row Threatens Global Confidence: IMF’s Lagarde*, REUTERS (Apr. 19, 2018), https://www.reuters.com/article/us-china-us-trade-idUSKBN1HQ1ZC?utm_source=34553&utm_medium=partner.

389. See Daniel C.K. Chow, William McGuire & Ian Sheldon, *A Legal and Economic Critique of President Trump’s China Trade Policies*, 79 U. PITT. L. REV. 205 (2017).

390. David Lynch & Emily Rauhala, *Trump Pushes Back on Fears of a Trade War With China*, WASH. POST (April 3, 2018), https://www.washingtonpost.com/world/asia_pacific/china-fires-back-at-trump-with-tariffs-on-106-us-products-including-soybeans-cars/2018/04/04/338134f4-37d8-11e8-b57c-9445cc4dfa5e_story.html?utm_term=.21d7d65f17c2.

391. *Id.*

392. See Bob Davis, *In Trade Fight, China Today Differs From 1980s Japan*, WALL ST. J. (Apr. 9, 2018, 12:36 PM), <https://www.wsj.com/articles/in-trade-fight-china-today-differs-from-1980s-japan-1523202722>.

well.³⁹³ China's economy is growing at a rate of over six percent and is on track to surpass that of the United States in 2029.³⁹⁴ China is spearheading major new economic initiatives independently from the United States, most importantly the Belt and Road Initiative that focusses on economic cooperation and connectivity between Eurasian nations.³⁹⁵ China has over three trillion dollars in financial reserves, including approximately one-third of the foreign debt owed by the United States.³⁹⁶ Unlike Japan in the 1980s, China is not dependent on the United States either politically, economically, or militarily.³⁹⁷

The United States' economic nationalism has alienated to some extent virtually every nation, including traditional friends and allies. Former Secretary of the Treasury, Larry Summers, states: "[I]t has been the unfortunate accomplishment of U.S. trade policy in recent months to cause most of the world to rally to China's side because of our disregard for the WTO and the global [trade] system."³⁹⁸ The Trump administration has particularly alienated nations of the European Union.³⁹⁹ Not only the Trump administration's trade measures but also such actions as withdrawal from the Paris Climate Accord have alienated the EU.⁴⁰⁰ The Trump administration's economic nationalism

393. See Jonathan Marcus, *The 'Globalisation' of China's Military Power*, BBC (Feb. 13, 2018), <https://www.bbc.com/news/world-asia-china-43036302>.

394. See Scott & Sam, *supra* note 340.

395. See *What is China's Belt and Road Initiative?*, ECONOMIST (May 15, 2017), <https://www.economist.com/the-economist-explains/2017/05/14/what-is-chinas-belt-and-road-initiative>.

396. Salvatore Babones, *China Is Sitting On \$3 Trillion in Currency Reserves, But Is That Enough?*, FORBES (May 24, 2018), <https://www.forbes.com/sites/salvatorebabones/2018/05/24/china-is-sitting-on-3-trillion-in-currency-reserves-but-is-that-enough/#3dad67635fce>; see Amadeo, *supra* note 173.

397. Richard Rosecrance, *The U.S.-Japan Trading Relationship and Its Effects*, 1 IND. J. GLOBAL LEGAL STUD. 139, 139-40 (describing how Japan's high saving rate created a dependence on the United States' high consumption rate).

398. *Four Reasons Chinese Officials Aren't Buying Trump's Trade Threats*, WASH. POST (Apr. 9, 2018), https://www.washingtonpost.com/opinions/four-reasons-chinese-officials-arent-buying-trumps-trade-threats/2018/04/09/178face2-3c1c-11e8-974f-aacd97698cef_story.html.

399. See Michael Birnbaum, *Japan, EU Spar with U.S. Over Trade, Tariffs*, WASH. POST (Mar. 11, 2018), https://www.washingtonpost.com/world/europe/japan-and-eu-spar-with-us-in-brussels-over-trade-and-tariffs/2018/03/10/7d427b2c-23e5-11e8-946c-9420060cb7bd_story.html?utm_term=.5ad778ab5261. In that article, Birnbaum quotes anonymous European policymakers as worrying that "the tariffs are part of a broader assault by the Trump administration on ties between Europe and Washington, which has been the backbone of the post-World War II Western order". . . "[w]e are living in a time of unraveling." This view holds that the Trump tariffs "represent another step away from . . . the post-World War default of free trade and international cooperation—and back toward the 19th century ways of nationalism, protectionism, and great-power rivalry." Max Fisher, *Trump's Tariffs: Another Retreat From Postwar World Order*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/world/asia/trump-tariffs-china-trade.html>.

400. See Eric Levitz, *Trump Sees Alienating Our European Allies as an End in Itself*, N.Y. MAG (June 2, 2017), <http://nymag.com/daily/intelligencer/2017/06/trump-sees-alienating-our-european-allies-as-end-in-itself.html>.

involves seeking energy independence by reliance on increased exploitation of fossil fuels, such as coal, oil, and natural gas.⁴⁰¹ In June, 2017, on the occasion of President Trump's withdrawal from the Paris Climate Accord, the USTR stated that this action removed "another unfair trade barrier that America cannot afford."⁴⁰² On March 13, 2018, the EU announced that it would no longer sign trade deals with any country that is a non-party to the Paris Climate Accord.⁴⁰³

So far, the United States has derived little from its policy of economic nationalism. Only one serious negotiation with a trading partner has successfully been concluded, the Agreement reached on March 26, 2018 with South Korea to revise the Korean-U.S. Free Trade Agreement (KORUS).⁴⁰⁴ The original agreement was negotiated over many years and, although signed in 2007, did not go into force until 2012. KORUS consists of twenty-four chapters with three annexes and over 500 pages of closely packed text.⁴⁰⁵ The revision agreement between the United States and South Korea makes only three small changes: (1) a twenty-five percent tariff in effect for years on pickup trucks will be extended to 2041; (2) Korean quotas on imported U.S. autos will be doubled to 50,000 per year, although no U.S. carmaker has ever exceeded more than a fraction of the existing quota of 25,000; and (3) the existing quota on steel imports from South Korea will be reduced to seventy percent of its recent shipments.⁴⁰⁶ These measures are unlikely to make even a dent in the U.S. trade deficit with South Korea, which was \$22.9 billion in 2017.⁴⁰⁷

To sum up—economic nationalism will likely fail to attain its objectives. But although we believe that the remedy of the Trump administration is wrong-headed, we agree with the diagnosis—there is a serious mismatch between the economies of China and the US, and certain practices of China urgently need correction. We propose a solution in the next section of this article.

401. See Christopher Helman, *Trump, in the Name of American Energy Independence, Moves to Scrap Obama's Climate Plans*, FORBES (Mar. 28, 2017), <https://www.forbes.com/sites/christopherhelman/2017/03/28/trump-in-the-name-of-american-energy-independence-scrap-obamas-climate-plans/#79abbb872258>.

402. Press Release, U.S. Trade Representative, USTR Robert Lighthizer Statement on the President's Paris Accord Decision (Jun. 1, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/ustr-robert-lighthizer-statement>.

403. Jon Stone, *EU to Refuse to Sign Trade Deals with Countries that Don't Ratify Paris Climate Change Accord*, INDEPENDENT (Feb. 12, 2018), <https://www.independent.co.uk/news/world/europe/eu-trade-deal-paris-climate-change-accord-agreement-cecilia-malmstr-m-a8206806.html>.

404. U.S. TRADE REPRESENTATIVE, U.S.-KOREA FREE TRADE AGREEMENT, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta>.

405. *Id.*

406. U.S. TRADE REPRESENTATIVE, FREE TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KOREA (June 30, 2007), <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

407. U.S. TRADE REPRESENTATIVE, *supra* note 404.

IV. THE PATH FORWARD: MULTILATERALISM

Unresolved trade issues and problems have accompanied the rise of China to prominence as the world's largest exporting nation.⁴⁰⁸ China's rise has created a backlash of economic nationalism and protectionism in the United States. While we have diagnosed these trade issues and problems differently from the Trump administration, we agree that the trade problems that created economic nationalism are real and must be addressed. In this section we propose an alternative set of solutions to these problems that are much superior to economic nationalism. Our proposals center on China, which we believe is at the heart of the trade issues and imbalances facing the United States. Parenthetically we add that it is profoundly misguided for the United States to pick trade fights with traditional trade partners, such as Canada, Mexico, Japan, and the European Union, which fundamentally have similar interests in trade as the United States. These nations should be enlisted as allies in the effort to harmonize the rise of China with the multilateral trading system.

We propose a five-point solution based on multilateralism to the trade problems facing the United States. Since the 1940s the United States has built and relied upon multilateral institutions to deal with international economic issues. The United States should renew its commitment to such institutions in order to reinvigorate and to restore the multilateral trading system. First, the United States should pursue the creation of blockbuster free trade agreements on a regional basis, the TPP with Asia and the Pacific Rim and the T-TIP with the EU and Europe. Second, the United States should take the lead in convening a new "round" of trade negotiations at the WTO in order to identify and agree on needed reforms of both WTO agreements and the WTO dispute settlement mechanism.⁴⁰⁹ Third, the United States should form a coalition of WTO members to file what Jennifer Hillman⁴¹⁰ terms a "big, bold, comprehensive" case against China to challenge a range of Chinese unfair trade practices. Fourth, the United States should make a renewed effort to participate actively in WTO committees and working groups. Fifth, the United States (joined as appropriate by other nations such as the EU and Japan) should

408. In 2009, China displaced the United States as the world's largest exporting nation measured by value added. BAILY & BOSWORTH, *supra* note 221; *see also What Country Is the World's Largest Exporter of Goods?*, INVESTOPEDIA, <http://www.investopedia.com/ask/answers/011915/what-country-worlds-largest-exporter-goods.asp> (last visited Jan. 27, 2019).

409. At this writing the Appellate Body of the WTO is facing crisis. Since August 2017, the United States, taking advantage of WTO rules requiring consensus decisionmaking, has blocked the appointment of new members of the Appellate Body. As a result, as of September 30, 2018, the Appellate Body was reduced to three members, the minimum necessary to function. *See International Centre for Trade and Sustainable Development, WTO Appellate Body Prepares for Reduced Slate of Judges by Month's End*, 22 BRIDGES 29, 13, 13-15 (2018), <https://www.ictsd.org/sites/default/files/bridgesweekly22-29a.pdf>.

410. *Hearing on U.S. Tools to Address Chinese Market Distortions Before the U.S. – China Economic and Security Review Commission*, 115th Cong. 78 (2018) (statement of Jennifer Hillman) [hereinafter Hillman Testimony].

engage China in bilateral trade and investment discussion covering the entire range of trade issues that divide the United States and China.

The multilateral trading system — the rules-based global trading system — is currently facing its greatest crisis in history. Created out of the ashes of World War II in 1947, the GATT and the WTO have spearheaded a long period of almost eight decades of world economic expansion and prosperity.⁴¹¹ Ironically the multilateral trading system is now threatened by its own success. Because it was so successful, nations of every stripe have clamored to join, so that now the WTO is an organization of 164 very diverse States.⁴¹² Once controlled by the Americans and the Europeans, the WTO is now dominated by developing countries, many of whom have been so successful they are now termed “emerging market countries.” The term emerging market country, which was coined in 1981 by World Bank economist Antoine Van Agtmael, refers to a disparate group of former developing countries that are now intermediate income countries, experiencing high rates of economic growth, and coping with high economic and political expectations, but often inadequate laws and economic and political institutions.⁴¹³ Emerging market countries have benefited greatly from global economic institutions like the WTO, IMF, and World Bank.⁴¹⁴ Emerging market countries, however, have the potential to disrupt the established economic order because, although they have many of the characteristics of the long-developed countries like the United States, emerging market countries often lack many of the prerequisite standards and institutions, such as the rule of law, that characterize long-developed nations.⁴¹⁵ A shifting group of about twenty countries may be classified as emerging market countries, famously including the BRICS, Brazil, Russia, India, China, and South Africa.⁴¹⁶ Many economists believe that in the future, China and India will dominate global manufacturing, and natural resources and raw materials

411. See WORLD TRADE ORG., THE WTO CAN . . . CONTRIBUTE TO PEACE AND STABILITY, https://www.wto.org/english/thewto_e/whatis_e/tif09_e/10thi09_e.htm (last visited July 5, 2018).

412. WORLD TRADE ORG., MEMBERS AND OBSERVERS, https://www.wto.org/english/thewto_e/whatis_e/tif09_e/org6_e.htm (last visited July 5, 2018).

413. Justin Kuepper, *What Are Emerging Markets?*, BALANCE (Oct. 27, 2016), <https://www.thebalance.com/what-are-emerging-markets-1978974>.

414. However, the last series of world trade negotiations, the Doha Development Agenda, which kicked off in 2001, was effectively killed by opposition from two emerging market states, India and Brazil in cooperation with China. See Susan Schwab, *After Doha Why the Negotiations Are Doomed and What We Should Do About It*, 90 FOREIGN AFF. 104, 107-09, 110-11, 114 (2011).

415. Hannah Beyer & Fred Fening, *The Impact of Formal Institutions on Global Strategy in Developed vs. Emerging Economies*, 3 INT’L J. BUS. & SOCIAL SCI. 30, 31 (2012).

416. Kimberly Amadeo, *What Are Emerging Markets? Five Defining Characteristics*, BALANCE (Mar. 22, 2018), <https://www.thebalance.com/what-are-emerging-markets-3305927> (listing the Morgan Stanley Capital International Emerging Market Index of twenty-three countries and eight more from other sources).

will be dominated by Russia and Brazil.⁴¹⁷ The rise of China and the other BRICS countries is the major cause of the present crisis of confidence in the institutions and rules of the multilateral trading system. As Larry Summers has stated, “[t]he real cause of economic disruption was not trade agreements, but the rise of emerging markets as major participants in the global economy.”⁴¹⁸ China is the paradigm emerging market nation, destined to become the largest economy in the world.⁴¹⁹ The world, particularly the United States, was not prepared for China’s rise. The rapid rise of China has is causing what is termed, “China shock” in the United States.⁴²⁰ Economists David Autor, David Dorn and Gordon Hanson have made careers documenting “China shock” and its impact on every part of the United States.⁴²¹

In the United States and in many places around the world, the reaction to “China shock” is economic nationalism and protectionism. Nowhere is economic nationalism more potent than in the United States. Leavened with a heavy dose of populism, economic nationalism was responsible, at least in part, for the election of Donald J. Trump. The Trump administration is now engaged in what the voters elected it to do, declare the independence of the United States from the scourge of China shock by ending what it terms unfair Chinese exploitation of the U.S. economy. In this section we first address “China shock,” the impact of the economic rise of China; we then turn to analysis of how the United States can deal with China alternative to the President’s current policy of economic nationalism.

A. *China Shock*

Emerging market countries have taken advantage of the global, rules-based, multilateral system of trade and investment, the world economic order that the United States and its allies built painstakingly at the end of World War II. Each year the USTR compiles and publishes a National Trade Estimate

417. INVESTOPEDIA, BRAZIL, RUSSIA, INDIA AND CHINA (BRIC), <https://www.investopedia.com/terms/b/bric.asp> (last visited July 5, 2018).

418. Lawrence H. Summers, Opinion, *Four Reasons Chinese Officials Aren’t Buying Trump’s Trade Threats*, WASH. POST (Apr. 9, 2018) https://www.washingtonpost.com/opinions/four-reasons-chinese-officials-arent-buying-trumps-trade-threats/2018/04/09/178face2-3c1c-11e8-974f-aacd97698cef_story.html?utm_term=.aa11966baab5.

419. Geoff Clovin, *China Will Overtake the U.S. as World’s Largest Economy Before 2030*, FORBES (Feb. 9, 2017), <http://fortune.com/2017/02/09/study-china-will-overtake-the-u-s-as-worlds-largest-economy-before-2030>.

420. David Autor, David Dorn & Gordon Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, 3-4 (Nat’l Bureau of Econ. Research, Working Paper 21906, 2016).

421. See David Autor et al., *The China Trade Shock: Studying the Impact of China’s Rise on Workers, Firms, and Markets*, THE CHINA TRADE SHOCK, www.chinashock.info (last visited Jan. 27, 2019).

Report on Foreign Trade Barriers.⁴²² The 2017 Report lists and analyzes the trade and investment barriers for sixty-two nations and the European Union.⁴²³ For each country, all trading partners of the United States, ten categories of trade barriers are examined: import barriers, sanitary and phyto-sanitary and technical standards, government procurement, export subsidies, lack of protection of intellectual property, services barriers, investment barriers, government tolerance of anticompetitive practices, digital trade barriers, and other barriers, such as bribery and corruption.⁴²⁴

So-called “emerging market economy nations” feature prominently in this document. China, the preeminent emerging trading nation, merits separate treatment by the USTR in the *2017 Report to Congress on China’s WTO Compliance*.⁴²⁵ This report of over 150 pages details the huge range of barriers that American business will encounter in trying to export products or services or upon placing an investment in China. The report on China recounts a range of barriers to trade in virtually every sector of the Chinese economy, covering: import regulation;⁴²⁶ export regulation;⁴²⁷ internal policies affecting trade, such as subsidies, state-owned enterprises, and standards;⁴²⁸ government procurement;⁴²⁹ investment regulation;⁴³⁰ lack of protection of intellectual property;⁴³¹ barriers to delivery of services, such as banking, insurance and legal services;⁴³² and deficiencies in transparency and in the framework of laws.⁴³³

The Report also analyzes the commitments made upon China’s accession to the WTO and determines that many of the commitments made have not been fulfilled, even today, some seventeen years later.⁴³⁴

422. U.S. TRADE REPRESENTATIVE, 2018 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf>.

423. U.S. TRADE REPRESENTATIVE, 2017 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2017), <https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf>.

424. *Id.*

425. U.S. TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (2018) [hereinafter 2017 CHINA REPORT], <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

426. *Id.* at 34-44.

427. *Id.* at 44-47.

428. *Id.* at 47-83.

429. *Id.* at 78-83.

430. *Id.* at 83-95.

431. *Id.* at 107-17.

432. *Id.* at 117-37.

433. *Id.* at 137-48.

434. *Id.* at 26-27, 33-148. China, however, defends its record in fulfilling its commitments to the rules of the World Trade Organization. In a White Paper published online on June 28, 2018, China made four points. First, China cited its progressively lower tariffs, which, compared to 2001, when it attained WTO membership: average tariffs have been lowered from 15.3% to 9.8%; average tariffs on manufactured products have been

The Report details two general categories of trade issues. First, the Report details matters that constitute violations or inconsistencies with China's obligations either under its Protocol of Accession to the WTO or one or more of the international trade agreements under the umbrella of the WTO.⁴³⁵ Second, the Report discusses matters of incompatibility between China and the United States that are not covered expressly or adequately by the WTO or international agreements.⁴³⁶ The latter category of issues is the most serious. These include:

Chinese industrial policy involves government intervention to promote, guide and support domestic companies and institutions. This industrial policy is not market-driven but rather seeks to align economic development with a central government five-year plan, currently Made in China 2025. China discriminates in favor of domestic firms in terms of such matters as standards, regulations, and access to raw materials.⁴³⁷

Many Chinese companies are state-owned enterprises (SOEs) that routinely receive subsidies and other government benefits and, as a result, do not operate according to market economy principles.⁴³⁸

Excess industrial capacity, stemming from overinvestment and production requirements necessary to meet central planning targets, is a common phenomenon in China, which is relieved by promoting exports.⁴³⁹

Foreign investment is strictly regulated in China to serve perceived governmental ends. Foreign investors must conform to the Chinese government's latest five-year plan; different requirements and procedures exist for each category of industry; and many key economic sectors are reserved to Chinese-majority companies.⁴⁴⁰

China's lack of protection of intellectual property and forced transfer of technology is rooted in a policy of "indigenous innovation," promotion of technological development of Chinese companies by taking over foreign technological capabilities.⁴⁴¹ A 2018 Section 301 Report by the USTR⁴⁴²

lowered from 14.8% to 8.9%; and average tariffs on agricultural products have been lowered from 23.2% to 15.2%. China promised to progressively lower tariffs and to eliminate restrictions on imported services. Second, China stated that it firmly supports the rules of the WTO and the multilateral trading system. Third, China maintained that it has significantly contributed to the world economy after its accession to the WTO. Fourth, China stated that it is "actively advancing [market] opening to a higher level." See *White Paper on China and WTO Released*, THE STATE COUNCIL INFORMATION OFFICE, THE PEOPLE'S REPUBLIC OF CHINA (June 28, 2018), http://english.scio.gov.cn/whitepapers/2018-06/28/content_53828503.htm (last visited Jan. 27, 2019).

435. See *supra* note 434 and accompanying text.

436. 2017 CHINA REPORT, *supra* note 425, at 7.

437. *Id.* at 7.

438. *Id.* at 13.

439. *Id.*

440. *Id.* at 83-95.

441. *Id.* at 107-17.

details four specific unfair practices concerning technology and intellectual property. First, China uses foreign ownership restrictions to require or pressure foreign companies to transfer technology to Chinese entities. Second, China's licensing requirements force U.S. companies to enter into licensing agreements on non-market terms that favor Chinese recipients of the technology. Third, the Chinese government directly support, directs and unfairly facilitates the acquisition of foreign companies in order to obtain cutting-edge technology. Fourth, China supports and conducts unauthorized intrusions into and theft of commercial information and trade secrets.

Two additional recent matters may be cited as emblematic of "China shock."

- *Vitamin C antitrust litigation.* In a multidistrict antitrust class action brought by U.S. purchasers of Vitamin C products from several Chinese companies, the court found that the Chinese companies conspired to fix prices and control the supply of vitamin C products imported into the United States in violation of section 1 of the Sherman Act and sections 5 and 16 of the Clayton Act.⁴⁴³ Despite these violations, the Second Circuit Court of Appeals ruled that the complaint against the Chinese companies must be dismissed on grounds of international comity since the price fixing and supply limitations were mandated by Chinese government policies.⁴⁴⁴ The Second Circuit ruled that a foreign government's construction of its own law is conclusive and binding if that construction is "reasonable."⁴⁴⁵ The U.S. Supreme Court reversed this decision, holding that a foreign government's construction is entitled to "substantial, but not conclusive weight,"⁴⁴⁶ and that Rule 44 of the Federal Rules of Civil Procedure requires the court to engage in its own research and make its own determination in the matter.⁴⁴⁷
- *ZTE export controls guilty plea.* On March 8, 2017, a major Chinese telecommunications company, Zhongxing Telecommunications Equipment Corporation (ZTE), pled guilty and agreed to pay a total fine of \$1.19 billion, admitting violations of U.S. export control regulations and the U.S. International Emergency Economic Powers

442. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018).

443. *In re Vitamin C Antitrust Litig.*, 279 F. Supp. 2d 522, 522 (E.D.N.Y. 2012).

444. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

445. *Id.* at 189.

446. *Animal Science Prod. Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869-70 (2018).

447. *Id.*

Act⁴⁴⁸ by selling telecom products containing components produced by U.S. companies to Iran and North Korea.⁴⁴⁹

As set forth in Part II of this article, the Trump administration has chosen the course of economic nationalism to deal with China.⁴⁵⁰ President Trump seems to have abandoned the WTO as a recourse. He has stated that the WTO is “unfair to the United States.”⁴⁵¹ The Trump administration also rejects multilateralism in favor of bilateral engagement. During a press conference with the Prime Minister of Japan, President Trump, in rejecting the Trans-Pacific Partnership, said, “But I like bilateral. I think it’s better for our country. I think it’s better for our workers. And I would much prefer a bilateral deal.”⁴⁵² We believe President Trump’s rejection of multilateralism is erroneous.

B. *The Smart Way to Deal with China*

The best way to deal with the trade abuses of China (and other trade partners) is through multilateral engagement. Bilateralism also should play an important role, but President Trump is wrong to give up on multilateralism and the WTO. It is important as well, in dealing with China, that the United States, as stated by Pascal Lamy, the former Director General of the WTO, exercise leadership to seek a broader opening of international trade rather than its own narrow interests.⁴⁵³ The United States should adopt a two-part strategy to deal with China and the American trade deficit. First, four separate multilateral strategies should be undertaken as specified below. Second, bilateral economic discussions should be continued and strengthened.

448. 50 U.S.C. §§ 1701-07 (1977).

449. See Ross, Dep’t of Commerce, *supra* note 364.

450. Catherine Rampell, Opinion, *Trump Embraces the Dumb Way to Deal with China*, WASH. POST, (Mar. 23, 2018), https://www.washingtonpost.com/opinions/trump-embraces-the-dumb-way-to-deal-with-china/2018/03/22/d0169d8c-2e0e-11e8-b0b0-f706877db618_story.html?utm_term=.4b898e5bf28b.

451. For President Trump’s complete statement, see Jessica Dye, *Trump Calls WTO “Unfair” to U.S. in Latest Trade Barb*, FIN. TIMES (Apr. 6, 2018), www.ft.com/contact/afce06d0-39aa-11e8-8eee-e06bde01c44. See also, Fareed Zakaria, *On This One Big Point Trump is Right*, WASH. POST, Apr. 6, 2018, at A17.

452. Steve Holland, *Trump, Japan’s Abe Agree to Intensify Trade Talks*, REUTERS (Apr. 18, 2018), <https://www.reuters.com/article/us-usa-japan-trade-imbalances/trump-japans-abe-agree-to-intensify-trade-talks-idUSKBN1HP37W>.

453. See Pascal Lamy, Opinion, *Former WTO Chief: How this Trade War Ends*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/04/10/trade-war/?utm_term=.2e8590a41967.

1. *Box China in with Regional Free Trade Agreements, the TPP⁴⁵⁴ and the T-TIP⁴⁵⁵*

President Trump made a significant error when he rejected the TPP out of hand. The TPP would have included the United States, Japan, and ten additional vibrant and important economies of the Asia-Pacific (but not China) in the world's largest free-trade area.⁴⁵⁶ The Trump administration spent over a year renegotiating NAFTA,⁴⁵⁷ but in truth NAFTA was successfully renegotiated by the Obama administration --- the TPP. Since the TPP included Canada and Mexico and updates virtually every provision of NAFTA, the TPP was in fact an enlargement and renegotiation of NAFTA. The TPP updates out-of-date provisions of NAFTA. For example, the TPP contained innovative provisions on digital trade and online trade.⁴⁵⁸ The TPP covered a substantial volume of U.S. export trade; in 2014 U.S. export industries shipped \$726.5 billion in goods and \$169.4 billion in services to the eleven TPP partner countries.⁴⁵⁹ The TPP would have increased exports, since this agreement eliminates over 18,000 tariffs TPP countries presently levy on U.S. exports.⁴⁶⁰ The TPP would have had little effect on imports, since the U.S. economy is already open to the putative TPP partner countries. The TPP was designed to combat diversion of export opportunities from the United States to China, which is aggressively pursuing market access agreements with the same set of countries.⁴⁶¹ The TPP would have substantially increased American jobs and economic growth.⁴⁶²

454. TRANS-PACIFIC PARTNERSHIP FULL TEXT, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP].

455. Negotiations on a Transatlantic Trade and Partnership Agreement were begun by President Obama, but are now suspended. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

456. Kevin Granville, *What Is TPP? Behind the Trade Deal That Died*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?mtrref=www.google.com>.

457. See *supra* notes 105-17 and accompanying text.

458. See U.S. TRADE REPRESENTATIVE, E-COMMERCE AND TELECOMMUNICATIONS, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-6>.

459. Fact Sheet, U.S. Dep't of Commerce, Int'l Trade Administration, U.S. Export Fact Sheet (Nov. 4, 2015), <https://2016.trade.gov/press/press-releases/2015/export-factsheet-110415.pdf>.

460. Jackie Calmes, *What Is Lost by Burying the Trans-Pacific Partnership*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/business/economy/donald-trump-trade-tpp-trans-pacific-partnership.html>.

461. Without the TPP, about ten percent of U.S. export opportunities—\$225 billion—are at risk of being diverted to China. U.S. COUNCIL OF ECONOMIC ADVISORS ISSUE BRIEF, NOV. 2016 1, https://obamawhitehouse.archives.gov/sites/default/files/page/files/201611_cost_of_tpp_delay_issue_brief.pdf.

462. The most widely cited study on the matter is by PETER PETRI ET AL., THE TRANS-PACIFIC PARTNERSHIP AND ASIA-PACIFIC INTEGRATION: A QUANTITATIVE ASSESSMENT

The most important aspect of the TPP, however, is that this agreement is designed to make American rules and values preeminent for trade in the Asian-Pacific region.⁴⁶³ The United States is, in fact, locked into a competition with China that transcends the bilateral US-China relationship.⁴⁶⁴ The United States and China have very different economic systems. The economic system of China is dominated by governmental industrial policies, rather than free market principles.⁴⁶⁵ A major problem of trade with China is that interface of Chinese economic policies conflicts with American rules and values. These interface problems are extremely difficult because they are not technically violations of WTO trade rules. Thus, these problems cannot be resolved through dispute settlement at the WTO. But trade peace between China and the United States can never be achieved unless these underlying interface conflicts are resolved. Therefore, the TPP has major importance; the TPP is designed to resolve many of these conflicts in favor of the United States.

The TPP establishes “rules of the road” for trade that reflect American rules and values and are designed to “box” China into accepting American-led economic principles instead of Chinese Communist Party industrial policies.⁴⁶⁶ The idea of the TPP is to spread American economic values so they become generally accepted in the Asian-Pacific region, and China will have no choice but to conform, at least to some degree.⁴⁶⁷

A complete analysis of the TPP is beyond the scope of this article, but we now provide salient examples of TPP rules that would have a substantial impact on changing Chinese economic practices.

- *Intellectual property.* The Trump administration’s case for tariffs against China is that China forces U.S. companies to transfer technology to Chinese joint venture companies and that Chinese companies steal U.S. technology and fail to respect U.S. intellectual

(Peterson Inst. of Int’l Econ., 2012). This study estimates that the TPP would have added seventy-seven billion dollars per year to U.S. real incomes, produced by 650,000 workers by 2025. An updated study by the Peterson Institute of International Economics in 2016 found that the greatest beneficiary of the TPP would be the United States. The TPP would increase real income (GDP) in the United States by \$131 billion and increase annual exports by \$357 billion. PETER A. PETRI & MICHAEL G. PLUMMER, *THE ECONOMIC EFFECTS OF THE TRANS-PACIFIC PARTNERSHIP: NEW ESTIMATES* (Peterson Inst. of Int’l Econ., 2016).

463. See James McBride, *What Is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN REL. (May 15, 2018), <https://www.cfr.org/background/what-trans-pacific-partnership-tpp>.

464. See *id.*

465. 2017 China WTO Report, *supra* note 425, at 29.

466. See Barack Obama, Opinion, *President Obama: The TPP Would Let America, Not China Lead the Way on Global Trade*, WASH. POST (May 2, 2016), https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.16b34437ffb0.

467. See *id.*

property rights.⁴⁶⁸ Forced transfer of technology is expressly prohibited in the TPP, which provides in Article 9.10: “No party shall enforce any commitment or undertaking . . . to transfer a particular technology, production process, or other proprietary knowledge to a person in its territory.”⁴⁶⁹ This provision is an integral part of the TPP chapter that provides stringent protection for all categories of intellectual property rights, including electronic trademarks and pharmaceuticals containing biologics.⁴⁷⁰

- *State-owned enterprises (SOEs)*. The TPP contains innovative and comprehensive provisions regulating the activities of SOEs.⁴⁷¹ SOEs must act in a way that reflects free market commercial considerations. They are forbidden to discriminate in favor of domestic firms or against foreign businesses.⁴⁷² SOEs must not benefit from “non-commercial” government assistance (no subsidies),⁴⁷³ and transparency of operations is required.⁴⁷⁴ These provisions are enforceable; The TPP (Art. 17.5) establishes a civil claims procedure to create a cause of action to obtain monetary damages for injuries caused by non-commercial operations of SOEs. The TPP also establishes a committee on SOEs to monitor SOEs,⁴⁷⁵ and to conduct, if necessary, further negotiations to curb abuses of SOEs.⁴⁷⁶
- *Small- and medium-sized enterprises*. The TPP streamlines customs procedures for small and medium-sized enterprises and requires publication of all customs and trade-related forms and paperwork online, meaning less paperwork and fewer delays to express shipments.⁴⁷⁷
- *Agricultural exports*. The TPP would dramatically lower tariffs and quotas for American agricultural exports, thus greatly benefitting rural and small-town America.⁴⁷⁸

468. Davis et al., *supra* note 382.

469. China should be required to accept this rule, which would outlaw forced disclosure or transfer of technology as a condition of accessing the Chinese market.

470. *See* TPP art. 9.10.

471. TPP ch. 17.

472. TPP art. 17.4.

473. TPP art. 17.6.

474. TPP art. 17.10.4.

475. TPP art. 17.12.

476. TPP art. 17.14.

477. TPP art. 24.1.

478. TPP art. 2.28.

- *Services.* The TPP contains chapters on various types of services important in the United States⁴⁷⁹ including telecommunications,⁴⁸⁰ banking, and insurance.⁴⁸¹ The TPP ensures that flows of digital goods like music, video, software, and games remain duty free, and copyright safe harbors are provided for internet service providers.⁴⁸²
- *Competition policy.* The TPP provides American style rules with respect to competition policy⁴⁸³ including substantive rules and the institution of a right of private action for damages in the event of injury from cartels or monopolies.⁴⁸⁴
- *Investment policy.* The TPP requires international standards for the protection of investments, including investor-state arbitration to remedy abuses.⁴⁸⁵
- *Government regulations.* The TPP requires fair, open and predictable governmental regulations and national treatment for foreign companies.⁴⁸⁶ The TPP also mandates regulatory coherence among parties to preclude regulations from artificially inhibiting trade flows.⁴⁸⁷
- *Government procurement.* The TPP requires national treatment for some aspects of government procurement and fair and open procedures for regulations.⁴⁸⁸
- *Labor standards and worker protections.*⁴⁸⁹ The TPP requires trade partners to enact enforceable labor rights, such as the right to form unions and collective bargaining.⁴⁹⁰ Employment discrimination is prohibited and laws on labor safety and minimum wages and hours are required.⁴⁹¹ These provisions help to ensure that U.S. trade partners do

479. TPP ch. 10.

480. TPP ch. 13.

481. TPP ch. 11.

482. TPP ch. 1.

483. TPP ch. 16.

484. TPP art. 16.3.

485. TPP ch. 9.

486. TPP ch. 25.

487. *Id.*

488. TPP ch. 15.

489. TPP ch. 19.

490. *Id.*

491. *Id.*

not derive unfair competitive advantage from low standards protecting workers.

- *Protection of the environment.*⁴⁹² The TPP requires parties to join major international environmental agreements.⁴⁹³ Fishing subsidies and illegal logging are addressed, and parties may not weaken protection of the environment for attracting international investment.⁴⁹⁴
- *Currency manipulation pledge.* In November 2015, each of the TPP countries also agreed to and signed a Joint Declaration not to manipulate their national currencies or to implement a currency policy for the purpose of gaining a trade advantage.⁴⁹⁵

Adherence to the TPP would enable the United States to confront Chinese structural economic practices from a position of strength. American concerns about unfair Chinese economic practices are widely shared. As Lee Hsien Loong, Prime Minister of Singapore, stated in an op-ed article on April 19, 2018, “there is broad political support [in Asia]” for American measures standing up to China.⁴⁹⁶ If the United States were a party to the TPP, all 12 TPP parties would likely stand with the United States.

The United States should further act to speed up negotiations designed to conclude a Transatlantic Trade and Investment Partnership (T-TIP) Agreement⁴⁹⁷ between the European Union and the United States. The T-TIP, similarly to the TTP, would be designed to establish comprehensive, common, and high standards to govern trade and investment between the United States and the nations that are members of the EU.⁴⁹⁸ With the push by China to implement a Belt and Road Initiative to include members of the EU,⁴⁹⁹ it is more important than ever for the United States and the EU to agree on common high standards for trade and investment that reflect the shared values of western democracies.

In summary, were the United States armed with both the TPP and the T-TIP, with common high standards for trade, and investment that reflect

492. TPP ch. 20.

493. *Id.*

494. TPP arts. 20.3, 20.16-20.17.

495. U.S. DEP’T TREASURY, JOINT DECLARATION OF THE MACROECONOMIC AUTHORITIES OF TRANS-PACIFIC PARTNERSHIP COUNTRIES, https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf.

496. Lee Hsien Loong, *Nobody Wants a Trade War*, WASH. POST, Apr. 19, 2018, at A17.

497. *See* U.S. TRADE REPRESENTATIVE, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP, <https://ustr.gov/ttip>.

498. *Id.*

499. Belt & Road, *supra* note 395.

American values, the United States would be able to confront China from a position of strength. By contrast, the Trump administration is using unilateral tariffs to confront China, thereby foregoing working with allies, and forfeiting the high ground in this dispute. As Singapore Prime Minister Lee Hsien Loong has stated:

Unilateral tariffs are not the correct solution. Competition between the United States and China is to be expected. But whether this competition takes place within a framework of interdependence and generally accepted international rules makes all the difference. Ultimately, what is at stake is war and peace and the security and stability of the world.⁵⁰⁰

We believe that, if the United States and Asia-Pacific as well as the United States and the EU present a united front with respect to trade rules, China will out of self-interest make reforms to its economy and even join the TPP, conforming to rules favored by the United States and its trading partners.

2. *A “Trump Round” of Trade Negotiations*

The WTO is presently in disarray. The last WTO Ministerial Conference held at Buenos Aires December 10-13, 2017, ended without a Ministerial Declaration and without any multilateral agreement on any subject.⁵⁰¹ The United States blocked a proposal by India and developing countries to continue to address the negotiating topics of the Doha Development Agenda.⁵⁰² On the positive side, however, WTO members agreed to continue talks on the issue of fisheries subsidies with a view to coming to an agreement by 2019.⁵⁰³ In addition seventy-one members agreed to meet and seek common ground on rules relating to electronic commerce;⁵⁰⁴ fifty-eight members agreed to meet and seek common ground on services;⁵⁰⁵ seventy members agreed to meet and seek common ground on investment facilitation;⁵⁰⁶ and eighty-five members agreed to meet and seek common ground with respect to small and medium-sized exporters.⁵⁰⁷ The United States should join with other WTO members to

500. Lee Hsien Loong, *supra* note 496.

501. Luc Cohen & David Lawder, *WTO Meeting Ends in Discord, Ministers Urge Smaller-scale Trade Talks*, REUTERS, Dec. 13, 2017, <https://www.reuters.com/article/us-trade-wto/wto-meeting-ends-in-discord-ministers-urge-smaller-scale-trade-talks-idUSKBN1E71IJ>.

502. David Lawder, *U.S. Trade Chief Hails WTO Splinter Groups as Victory*, REUTERS, Dec. 14, 2017, <https://www.reuters.com/article/us-trade-wto-usa/u-s-trade-chief-hails-wto-splinter-groups-as-victory-idUSKBN1E834M>.

503. World Trade Organization, *Fisheries Subsidies*, WTO Doc. WT/MIN(17)/64.

504. World Trade Organization, *Joint Statement on Electronic Commerce*, WTO Doc. WT/MIN(17)/60.

505. World Trade Organization, *Joint Ministerial Statement on Services Domestic Regulation*, WTO Doc. WT/MIN(17)/61.

506. World Trade Organization, *Joint Ministerial Statement on Investment Facilitation for Development*, WTO Doc. WT/MIN(17)/59.

507. World Trade Organization, *Declaration on the Establishment of a WTO Informal Work Programme for MSMEs*, WTO Doc. WT/MIN(17)/58.

expand this work program to include issues such as the definition of “developing country” in the WTO; industrial policies and trade; technology transfer and protection of intellectual property; excess capacity and other important issues that directly affect China. Such an agenda may be termed a “Trump round” of trade negotiations. If consensus cannot be achieved in such negotiations, a fallback position may be to seek pluri-lateral WTO agreements.⁵⁰⁸

3. *Use of the WTO Dispute Settlement System*

Another method the United States should use to confront China is increased use of the WTO dispute settlement system. A major strength of the WTO is the opportunity of any member to file a legally cognizable complaint against any member who is violating multilateral trade rules or denying trade benefits. Since this dispute settlement was instituted in 1995, the WTO has handled over 550 trade disputes, including many filed by the United States. In the past the United States has successfully employed dispute settlement to vindicate its rights under the multilateral trading system.⁵⁰⁹ This method should be employed judiciously, confined to cases where it is possible to show a violation of one of more of the WTO agreements by China. The USTR, reflecting the President’s view of the WTO, seems to have largely given up on WTO dispute procedures. The USTR has filed only one new case against China, claiming relatively narrow violations of intellectual property rights.⁵¹⁰

Jennifer Hillman, professor at Georgetown University and a former member of the WTO Appellate Body, has proposed that the United States, together with a coalition of like-minded WTO members, file a comprehensive, “big [and] bold” case against China at the WTO.⁵¹¹ The purpose of such a case would be to litigate in a coordinated fashion against China in order to hold China to its trade commitments and to spotlight the trade problems caused by

508. The Agreement Establishing the World Trade Organization (1994), Art. II, provides for the conclusion of Plurilateral Trade Agreements that involve less than all of the WTO members that such members may join on a voluntary and reciprocal basis.

509. For example, in the EC Bananas case, the United States won a legal victory that was followed by negotiations that resulted in the phasing out of trade quotas by the EU, thereby benefitting U.S. companies exporting bananas. Appellate Body Report, *EC — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, (adopted Sept. 25, 1997). In the EC — Hormones case, the United States won a legal victory that led to negotiations that expanded exports of non-hormone beef in the EU. Appellate Body Report, *EC — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (adopted Feb. 13, 1998). See James B. Stewart, “Banana War” Offers Primer for Handling Trade Conflict, N.Y. TIMES, June 22, 2018, at B4.

510. Requests for Consultations by the United States, *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 18, 2018). A number of cases filed by the United States are pending against China as a result of actions begun during the Obama administration.

511. Hillman Testimony, *supra* note 410, at 2.

its policies.⁵¹² Such a case would involve not only specific violations of WTO trade agreement rules, but would also involve trade practices that may not violate a trade rule but “nullify or impair” trade commitments or concessions.⁵¹³ A case against China should, according to Hillman, involve the following matters:⁵¹⁴

- Technology Transfer
- Discriminatory Licensing Restrictions
- Outbound Investment and “Made in China 2025”
- Theft of Trade Secrets and Other Intellectual Property
- Investment Restrictions
- Subsidies
- Export Restraints
- Standards
- Services
- Agriculture
- Transparency

The USTR should not relegate WTO dispute settlement to secondary status when it comes to China. Instead, preparing and filing new WTO cases should have the highest priority. A “full-court press” is needed to file complaints with the WTO whenever analysis shows the possibility of a Chinese policy or action that is inconsistent with WTO rules or China’s Protocol of Accession.⁵¹⁵ Such a course has many advantages. First, China is vulnerable to losing at the WTO. China has lost cases dealing with financial services;⁵¹⁶ intellectual property;⁵¹⁷ and export controls⁵¹⁸. A second advantage of bringing cases against China at the WTO, is that other WTO members such as the EU with many of the same criticisms of China may join the case, and in that way the United States can take a multilateral approach to curbing China’s trade behavior.⁵¹⁹ Third, if China loses, there are real consequences. Under WTO rules the winning party

512. *See id.*

513. *Id.* at 3-10.

514. *Id.* at 3-9.

515. *See Accession of the People’s Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001).

516. *See Panel Report, China—Certain Measures Affecting Electronic Payment Services*, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012).

517. *See Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Mar. 20, 2009).

518. *See Appellate Body Report, China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394, 395, 398/AB/R (adopted Feb. 22, 2012); *see also Appellate Body Report, China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS431, 432, 433/AB/R (adopted Aug. 29, 2014).

519. *See DSU, supra note 175, arts. 4, 9.*

or parties will be authorized to exact trade compensation from China.⁵²⁰ For these reasons, the United States should raise recourse to the WTO to the highest priority in dealing with China.

4. *Use of WTO Councils, Committees and Working Groups*

The WTO operates through a Ministerial Conference that meets every two years and a General Council that meets periodically as needed.⁵²¹ The Director-General of the WTO carries out the function of managing and supervising over 600 full-time staff workers of the WTO,⁵²² but the Director General has no independent executive powers.⁵²³ Much of the work of the WTO is conducted by various councils, committees and working groups that are charged with dealing with particular areas, problems or policy issues.⁵²⁴ The US, like most members, operates a Permanent Mission to the WTO in Geneva.⁵²⁵ The U.S. Mission is composed of officials from the USTR, the U.S. Department of Agriculture, and the U.S. Department of Commerce.⁵²⁶ Officials of the U.S. Mission have the right to serve on all WTO bodies, including the various councils, committees, and working groups.⁵²⁷

The United States has pulled back noticeably from participation and leadership in the WTO. Our perusal of all of the councils, committees, and working groups of the current WTO discloses that not a single one is chaired by a U.S. official. After the conclusion of the WTO Ministerial meeting in Buenos Aires in December, 2017, foreign press reports commented that U.S. leadership of the organization was missing.⁵²⁸ Dr. Arancha Gonzalez, Director of the International Trade Centre in Geneva, which is charged by the United Nations to provide technical assistance in trade to developing countries, has said that the WTO serves U.S. interests and believes it is worth preserving.⁵²⁹ She

520. See DSU, *supra* note 175, art. 22.

521. See *The WTO*, WORLD TRADE ORG. (WTO), https://www.wto.org/192nglish/thewto_e/thewto_e.htm.

522. See *Overview of the WTO Secretariat*, WTO, https://www.wto.org/english/thewto_e/secre_e/intro_e.htm.

523. *Id.*

524. See *WTO Organizational Chart*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm.

525. See *Our Relationship*, U.S. MISSION IN GENEVA, <https://geneva.usmission.gov/our-relationship>.

526. *International Trade*, U.S. MISSION IN GENEVA, <https://geneva.usmission.gov/international-trade>.

527. See *Membership, Aliances and Bureaucracy*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.

528. See, e.g., *WTO Summit Ends Without Substantial Deals After U.S. Criticism and Snub of Leadership Role*, JAPAN TIMES (Dec. 14, 2017), <https://www.japantimes.co.jp/news/2017/12/14/business/wto-summit-ends-without-substantial-deals-u-s-criticism-snub-leadership-role>.

529. See *Geneva Trade Official Backs WTO, Says It Serves U.S. Interests*, AP NEWS (Apr. 11, 2018), <https://www.apnews.com/267e03d3b3c34350b9823a304b2c973e>.

commented that the United States has a tendency to “exaggerate [the weaknesses] and ignore [the] successes [of the WTO].”⁵³⁰

Rather than downgrading its participation in the work of the WTO, the United States should redouble its efforts to chair and to participate in the WTO at all levels, especially in the work of the councils, committees, and working groups. In these bodies the United States would have the opportunity to form coalitions of like-minded WTO members that could advocate changes to benefit the United States. For example, the United States should take the initiative in starting discussions at the WTO about over-capacity in the global steel industry. Instead, the United States is on the defensive at the WTO as numerous states complain in various WTO committees against U.S. trade actions or bring complaints against the United States under the dispute settlement mechanism. The United States should also participate more actively in the work of the WTO Trade Policy Review Body, which conducts and publishes periodic reviews of the trade compliance of each WTO member.

5. *Continued Bilateral Engagement*

The USTR Report on China from January 2018 clearly expresses frustration with bilateral engagement with China.⁵³¹ The Report notes that bilateral discussions have been held between the United States and China since 1983, in the form of the U.S.-China Joint Commission on Commerce and Trade and the China-U.S. Strategic and Economic Dialogue, initiated in 2009.⁵³² In April 2017, President Xi and President Trump agreed to suspend these talks in favor of a new bilateral high-level discussions known as the Comprehensive Economic Dialogue.⁵³³ As of January 2018, the USTR report argues, too little has resulted from such dialogues, and, as a result, the report declares, the United States intends to “focus . . . on enforcement” of its trade rights.⁵³⁴ The USTR report thus signals a fundamental change in U.S. trade policy, to take enforcement action rather than continue what the Trump administration views as fruitless bilateral discussions.

While this frustration may be, to a degree, understandable, we believe it is misguided to give up on friendly bilateral discussion like what occurred in the past several presidential administrations. First, the Comprehensive Economic Dialogue was ongoing for only six months⁵³⁵ before the United States announced the end of further talks. Second, the agenda of the Comprehensive Economic Dialogue was too broad. Rather than discussing all conceivable economic problems, the talks should have been structured to focus only on

530. *Id.*

531. *See generally* 2017 CHINA REPORT, *supra* note 425.

532. *See id.* at 28-29.

533. *See id.*

534. *Id.* at 25.

535. *See id.* at 25-28.

trade and investment. Third, American officials from prior administrations who have participated in bilateral talks with China disagree with the Trump administration's view that the talks have been unproductive. For example, former U.S. Treasury Secretary Larry Summers, who participated in the Joint Commission on Commerce and Trade during both the Clinton and Obama administrations, states that, "[I]t is wrong to say that nothing has been achieved through negotiation with China."⁵³⁶ He points out that:

[O]nly a few years ago, China's current account surplus was the largest relative to gross domestic product among significant countries, it held down its currency to maintain demand for its exports, and most of the software used on the personal computers and electronics for sale in its major cities were pirated. China's global surpluses are now below the U.S. negotiating targets of a few years ago, China has spent about \$1 trillion propping up its currency, and intellectual property protections are far better enforced.⁵³⁷

Thus, the Trump administration's abandonment of bilateral economic dialogue is premature. Bilateral talks between China and the United States should be restructured to focus on trade and investment, and should be reestablished independent of the tariffs the Trump administration intends to impose on China. Establishing a permanent, wide-ranging and open dialogue with China is essential. The United States should also invite allied partner nations to participate, such as the EU and Japan.

CONCLUSION

International trade has a high priority on the "America first," economic nationalist agenda of the Trump administration. In less than two years in office, the Trump administration has taken an unprecedented series of decisions on international trade, including starting talks with Canada and Mexico on renegotiating NAFTA, withdrawal from the TPP, and the imposition of tariffs on a variety of products for national security considerations. In taking these decisions, the United States has emphasized its powers under national law rather than the international law based on the multilateral trading system.

The United States is correct that international trade needs reform, particularly in the light of the "China shock," the rise of China as an economic power. Trade needs reform as well because of the growing trade deficit of the United States and the people and communities left behind by globalization. However, promoting economic nationalism and ignoring the rules of international law are not the correct formulas for reforming international trade. Trade reform will not cure the U.S. deficit problem without macroeconomic reforms designed to address the U.S. budget deficit, savings rate, and the domestic rate of investment. The best path to trade reform is not unilateralism but rather multilateralism in accordance with the rules and procedures of the

536. Summers, *supra* note 418.

537. *Id.*

multilateral trading system. The United States should engage other nations through the TPP, the T-TIP, and the WTO. The United States should join with its allies in fashioning up-to-date trade rules that go beyond those of the WTO, which China will be invited to accept out of its own self-interest. Trade reform can also be obtained by multilateral engagement at the WTO and greater use of the dispute settlement system of the WTO as well as through WTO institutions. Finally, high-level bilateral talks on economic and trade matters between the United States and China should continue. If these measures and diplomatic tracks are employed judiciously and persistently, the United States and its allies can meet the problems of current international trade problems and the economic rise of China.

