Trump, Trade, and US-China Economic Relations

Motivations and Measures for Transforming America's Trade Policy

Sourabh Gupta

Institute for China-America Studies

February 2017

Trump, Trade, and US-China Economic Relations

Motivations and Measures for Transforming America's Trade Policy

Sourabh Gupta

Resident Senior Fellow, Institute for China-America Studies

The Institute for China-America Studies is an independent, non-profit think tank funded by the Hainan Nanhai Research Foundation in China. ICAS seeks to serve as a bridge to facilitate the exchange of ideas and people between China and the United States. It achieves this through research and partnerships with institutions in both countries that bring together Chinese and American academic scholars as well as policy practitioners. ICAS focuses on key issue areas in the US-China relationship in need of greater mutual understanding. It identifies promising areas for strengthening bilateral cooperation in the spheres of Asia-Pacific economics, trade, international relations as well as global governance issues, and explores the possible futures for this critical bilateral relationship. ICAS is a 501(c)3 nonprofit organization.

ICAS takes no institutional positions on policy issues. The views expressed in this document are those of the author alone.

Institute for China-America Studies
1919 M St. NW Suite 310
Washington, DC 20036
www.chinaus-icas.org

Contents

Appendices

List of Figures, Tables, and Boxes

Figures

Tables

Boxes

Executive Summary

On November 8, 2016, Donald J. Trump, defeated his Democratic Party challenger, Hillary R. Clinton, in one of the greatest, come-from-behind, surprise victories since Harry Truman defeated his Republican challenger, Thomas Dewey, in 1948. His victory is ascribed to the hollowing-out of basic manufacturing in the "swing" electoral college states of Ohio, Pennsylvania, Michigan and Wisconsin. These states host a disproportionate share of low-wage manufacturing workers exposed to the forces of globalization. Candidate Trump campaigned on an unabashedly anti-trade and anti-immigrant platform and successfully tapped into the accumulated resentment.

Three of the seven central points of President Trump's economic plan to rebuild the American economy and "Make America Great Again" are outright mercantilist or protectionist initiatives directed at China. From trade flows to foreign exchange markets to inward investment approvals, the single most important implication for US-China economic relations is that they are headed for an extended period of significant turbulence.

President Trump has assembled a team of trade negotiators and advisors who, in various shades, share his tough-minded outlook towards China. Wilbur Ross, Robert Lighthizer and Peter Navarro hold a shared belief that China is the "biggest trade cheater in the world." They propose several common solutions. First, they propose to impose a stiff tariff on Chinese manufactured goods that are imported into the US. Second, they recommend imposing countervailing duties on Chinese exports after designating the renminbi to be a fundamentally undervalued currency that, effectively, confers an export subsidy to Chinese producers. Third, they propose equalizing the effects of China's value added tax (VAT) rates by imposing a VAT-like or "destination-based" border adjustment measure on all imports entering the US. Finally, they propose bringing additional cases to the WTO's Dispute Settlement Body (DSB) to force China's compliance with its obligations while at the same time strongly resisting any attempts by China to dilute US trade remedies and safeguards relief laws through the DSB mechanism.

For all the unity in their views, Wilbur Ross, Robert Lighthizer and Peter Navarro hold varying individual persuasions vis-à-vis China that do not seamlessly overlap. These views range from the Ross' mercantilist realism to Lighthizer's protectionist sophistry to Navarro's extreme hostility. The National Trade Council (NTC), the new international trade strategy office created within the White House, will ostensibly coordinate these competing viewpoints. It will also enable US trade policy objectives to be more tightly integrated within broader structural industrial policy goals and be more amenable to overall control by the White House. The extent to which the trade oversight

committees on the Hill acquiesce (or not) to the relative down-grading of the role of the Commerce Department and the United States Trade Representative's office – and thereby to their own jurisdictional authority, will determine whether the NTC's trade policy role is ultimately that of a coordinator, a control tower or something more. The NTC could also assume an expanded role within the Committee on Foreign Investment in the United States (CFIUS) - the inter-agency process that will screen Chinese inward investment into the US.

President Trump campaigned on a platform of ripping up existing trade agreements, renegotiating others, and imposing a 35 % tariff on imports from Mexico and 45 % tariffs on imports from China. Congressionally delegated powers to control foreign commerce and impose unilateral trade measures could, in theory, allow him to follow through on his promises.

Congressionally delegated powers can be divided into three categories: (a) conventional enforcement measures; (b) unconventional enforcement measures; and (c) extreme enforcement measures. Of particular interest are the Unconventional Enforcement Measures that have been used only sparingly by US presidents in recent times but which President Trump could deploy as his principal weapon of trade enforcement. Some of the enforcement tools at his disposal could be newly re-interpreted, such as the authority to slap countervailing duties on exports from countries with "manipulated" currency values. Still others are in the process of being drawn up, such as the potential imposition of a "border-adjusted and destination-based" corporate income tax.

As on select occasions in the past, a period of economic upheaval could also provide a fertile breeding ground for a Congressional-Executive Branch consensus to take hold to augment the statute books with harsher trade enforcement tools. This could be one of the more lasting and illiberal legacies of the Trump Administration in the area of domestic trade policy.

Before President Trump unilaterally follows through with these measures, he should pay heed to the non-discrimination, predictability, and fair competition principles that are embedded in the global trading system's legal architecture. Treating a currency's value as a countervailable subsidy is a violation of the WTO's Subsidies and Countervailing Measures Agreement. The design of a "border tax" that is neither an "indirect" tax nor factors labor costs within its tax base is similarly a violation of international rules. These and other planned enforcement measures laid out by President Trump do not fully conform to the global trading system's prevailing laws and rules. If enforced against China, they will almost certainly invite legal challenges at the World Trade Organization (WTO) as well as unilateral retaliatory measures, perhaps, against US trade interests that could range from civil aircraft to agricultural products to the availability of rare earth elements used in commercial and military electronics.

Furthermore, repeated adverse WTO rulings could sap the Trump Administration's commitment to the WTO's dispute settlement system altogether. Robert Lighthizer has concurred in the past with the view that the US should not necessarily be bound by adverse WTO rulings. In that case, the damage will not be limited to just a noticeable setback in US-China economic ties. The hitherto (relatively) successful multilateral trading order could also suffer a body blow.

SECTION I

THE TRUMP ADMINISTRATION AND INTERNATIONAL TRADE: KEY PLAYERS AND US-CHINA POLICY IMPLICATIONS

Introduction

On November 8, 2016, Donald J. Trump, defeated his Democratic Party challenger, Hillary R. Clinton, in a hard-fought presidential campaign, despite having trailed his opponent in every authoritative pre-poll survey in the months leading into the election. Despite losing the popular vote, Candidate Trump pulled off narrow but remarkable victories in the "swing" states of Ohio, Pennsylvania, Michigan and Wisconsin. The election was one of the greatest, come-from-behind, surprise victory since Harry Truman defeated his Republican challenger, Thomas Dewey, in 1948.

President Trump's victory is ascribed to the hollowing-out of basic manufacturing in the American heartland, particularly in those "swing" states of Ohio, Pennsylvania, Michigan and Wisconsin. In these states a disproportionate share of manufacturing workers, particularly low-wage manufacturing workers, were exposed to the forces of globalization. The job insecurity and deep resentment among predominantly white men and women in affected communities were important factors that tipped the election in Trump's favor. Candidate Trump had campaigned on an unabashedly anti-trade and anti-immigrant platform and successfully managed to tap into accumulated resentment against Asian and Mexican exporters and Latino and Muslim immigrants. He was also able to train the anger of the electorate at mainstream politicians who benefit from ballots cast by rank-and-file voters but then cater in office primarily to the interests of their deep-pocketed elite backers.

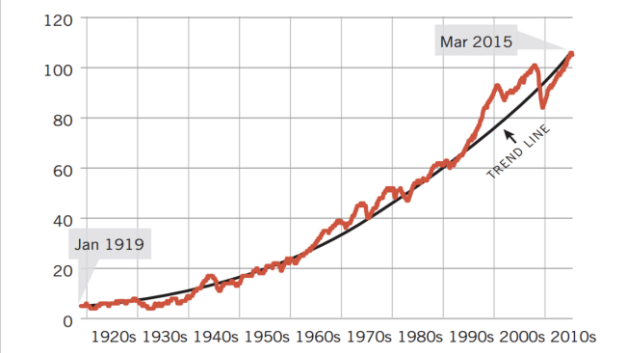
President Trump's victory is ascribed to the hollowing-out of basic manufacturing in the American heartland.

The electorate's anger has bubbled to the surface against the larger backdrop of stagnant incomes and rampant inequality. Real median household incomes in 2016 remain below 2000 levels, even as the income of the richest 5% of households has doubled. The top 3% of American households, meanwhile, account for over half of all household wealth in the country.[1] Just as important, there has been a steady rise in the proportion of working age men neither in work nor seeking it - from about 3% in the 1950s to 12%. Indeed, the US has suffered the second-largest increase in male non-participation in the labor force since 1990 among OECD countries,[2] and economists foresee the size of this group of unemployed or unemployable men rising to a quarter of all working age men by mid-century.[3] A measure of this rich-poor economic divide within the electorate is also evident in the economic geography of the country. While Donald Trump won the majority vote in more than 2,600 counties nationwide, these counties combined generate just 36% of US economic activity. Meanwhile, Hillary Clinton won the majority vote in less than 500 counties nationwide,

Misdiagnosing the Problem – *US Manufacturing is Doin' Just Fine*

Donald Trump successfully appealed to the gut instincts of many working and middle class Americans who have been led to believe that globalization and free-trade agreements is the reason why the US manufacturing sector has hollowed out and their incomes have stagnated. While globalization is indeed a factor in this hollowing out phenomenon, the role of technological innovation and automation is far greater. The growth of US manufacturing production is in fact a testament to this power of automation. Far from declining, as the protectionists contend, US manufacturing production operated above trend through the mid-1990s to the mid-2000s and,[4] even after accounting for the damaging output losses caused by the Great Recession, continues to grow as per its long-term trend.

Figure 1. US Manufacturing Production Index, 1919 - 2014[5]



It is employment in US manufacturing on the other hand that has experienced a substantial decline – a direct consequence of rapid improvements in automation-linked processes. Manufacturing's share of total non-farm employment in the US has fallen from 24% in 1971 to 8.6% today. Although a substantial decline, the rate of decline of the share of employment in manufacturing is (marginally worse but) comparable to that of Germany's – hitherto held up as a bastion of enlightened manufacturing sector policies among advanced economies.[6] The German share of employment in manufacturing too fell from 39% in 1971 to 19% in 2015. Parenthetically, the US economy's boom-bust cycle has been the sector's 'own worst enemy' in terms of the offshoring of jobs. US multinational companies are disproportionately large employers, generating as much as 20% of total US employment even though they account for as little as 1% of all US firms.[7] During each economic downturn, the level of employment in the parent entity of US multinational companies has declined more sharply than it has among its foreign affiliates, and each decline in unemployment has lasted longer than it did compared to employment losses at the foreign affiliate.[8] Indeed, many foreign affiliates have even bucked this trend in employment losses, even as parent company employment in the US has registered a secular decline.

Trump's misdiagnosis of the problem and appeal to old-fashioned protectionism will not boost American industrial competitiveness. That will require fiscally prudent government, a financially well-regulated economy, investment in public expenditure, and restoration of the frayed social contract (affordable college education, social security, progressive taxation) to enable the working and middle class to seize the opportunities that a globalized world continues to throw up.

yet these counties account for 64%, or almost two-thirds, of US economic activity.[10]

Candidate Trump campaigned on an unabashedly anti-trade platform, with China listed as a key economic violator. Three of seven points of the centerpiece of his economic plan to rebuild the American economy and "Make America Great Again" are in fact outright mercantilist or

protectionist initiatives that relate to China. **One of the single most important implications of a Trump Administration, going forward, is that US-China economic relations will encounter an extended period of significant turbulence.** From trade flows to foreign exchange markets to inward investment approvals, no single element of the comprehensive bilateral economic relationship will escape unscathed.

> Three of seven points of the centerpiece of his economic plan to rebuild the American economy and 'Make America Great Again' are in fact outright mercantilist or protectionist initiatives that relate to China.

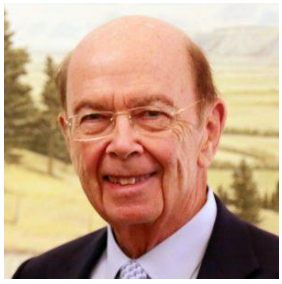
First, Trump promised to brand China a "currency manipulator", meaning that China illegally maintains an undervalued currency to gain a trade advantage. This could potentially trigger countervailing duties against Chinese exports. Second, Trump promised to impose every economic tool at his disposal to counter China's allegedly illegal trade activities. To this end, he enumerated an unusually detailed list of statutory trade policy enforcement tools – **Section 201 and 301 of the Trade Act of 1974; Section 232 of the Trade Expansion Act of 1962** – which he intends to use against Beijing. Third, Trump promised to instruct his USTR to bring trade remedy cases against China, both domestically and at the World Trade Organization (WTO), with the claim that China unfairly subsidizes its exporters. Over and above the enforcement tools listed above, Trump, as president, will also enjoy broader Congressionally delegated enforcement authority – Section 337 of the Tariff Act of 1930; Section 701 of the Trade Enforcement Act of 2015; Section 122 of the Trade Act of 1974; Section 5 of the Trading with the Enemy Act of 1917; Section 203 of the International Emergency Economic Powers Act of 1977 – to raise tariffs, regulate imports or otherwise retaliate against foreign countries that damage US trade interests or engage in unfair trade practices. Fourth, Trump promised to impose a hefty "border tax" that would apply to all imports, including those from China (while exempting US exporters from the tax).

Since his victory, President-elect and now President Trump has continued to forcefully emphasize many of these points, including pulling out of the Trans-Pacific Partnership (TPP) agreement altogether. In his mind, the purpose of flagging these trade enforcement tools is not to signal immediate retaliation. Rather, the threat of enforcement will supposedly induce America's key trade antagonists – China, Mexico, Japan, South Korea and Germany – to cease their "unfair" practices and policies and "end, not start, [the] trade war" that some of these countries have supposedly been engaging in since the late-1980s and early-1990s.[11] To this end, Mr. Trump has also assembled a team of trade negotiators and advisors who, in various shades, share his tough-minded outlook, and created a new international trade strategy office within the White House called the National Trade Council (NTC).

Key Personalities

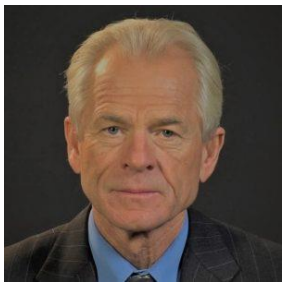
President Trump's key international trade policy nominees are: **Wilbur Ross**, to lead the US Department of Commerce; **Robert Lighthizer**, to lead the office of the United States Trade Representative (USTR); and **Peter Navarro**, to lead the newly-formed National Trade Council (NTC). Aside from the three, Trump also appointed, **Jason Greenblatt**, his long-time business lawyer to a position of "special representative for international negotiations". Not much is known about Greenblatt's economic and trade policy views or the views of Trump's son-in-law, **Jared Kushner**, who is also expected to weigh in on aspects of international negotiations as a senior White House advisor. Mr. Kushner has in fact been a regular presence by the president's side in the Oval Office, and beyond, during all important Asia-related conversations so far.

Figure 3. Key Nominees of Trump's Trade Policy Team[12]



Wilbur Ross

Robert Lighthizer



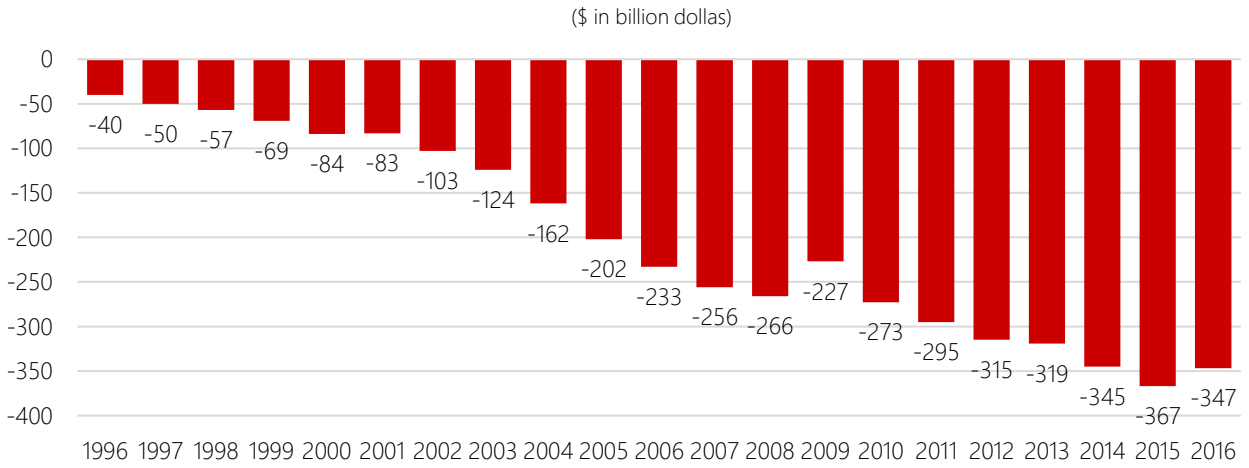
Peter Navarro

A number of shared beliefs, particularly vis-à-vis China, unites Trump's core trade policy nominees. First, Ross, Lighthizer and Navarro all hold the view that China is the "biggest trade cheater in the world," which has led to the hollowing-out of the US manufacturing base. In addition to pointing to the bilateral trade deficit, they make several inflated claims to support their proposition. China's elaborate web of unfair trade practices, they argue, includes illegal export subsidies, massive dumping of select products such as aluminum and steel on world markets below cost, the theft of intellectual property, currency manipulation, forced technology transfers, and widespread reliance upon both sweatshop labor and pollution havens.

Second, pressed to identify with specificity China's major violations of international trade law (beyond ongoing anti-dumping and other routine infractions), they shakily point to only two: (a)

its tightly-managed currency value which they allege leads to a competitive undervaluation of the renminbi and constitutes an export subsidy; and (b) its abuse of WTO rules related to value added taxes (VAT) which tempts American companies to offshore their production units and enables China to raise or lower VAT rebates contingent on export and thereby manipulate the scale of China-domiciled production.[13] This, in turn, aggravates global surplus capacity in certain products such as steel, which are dumped thereafter in foreign markets.

Figure 4. US Merchandise Trade Balance with China: 1996-2016[14]



More broadly, they take recourse to the argument that China is too big, too complex, and institutionally too different for it to be accommodated within the WTO system. The WTO, they claim, is simply not designed to deal with a legal and political system so at odds with the basic premises on which the organization was founded.[15]

Third, Ross, Lighthizer and Navarro are united in lamenting USTR's reluctance to use – almost to the point of its obsolescence - Section 301 (of the Trade Act of 1974). Section 301 had empowered the president to unilaterally impose decisive trade policy penalties to protect US economic interests if foreign partners were deemed to engage in unjustifiable, discriminatory or restrictive trade practices. Section 301 could be and was wielded unilaterally. Using Section 301 authority, President Reagan had imposed quotas on imported steel, protected Harley-Davidson motorcycles from Japanese competition (by imposing a 45% tariff), restrained imports of semiconductors (with a tariff as high as 100%) and automobiles, and limited imports of sugar and textiles in the 1980s. As part of the Uruguay Round Agreement Act of 1994, the US effectively gave up its ability to threaten Section 301 penalties (to induce appropriate trade behavior) against other WTO members in exchange for the facility to use the WTO's dispute settlement system instead.

Ross, Lighthizer and Navarro propose (in varying degrees) a number of common solutions to counter China's "unfair trade practices."[16] First, they propose to impose a stiff tariff on Chinese manufactured goods that are imported into the US. Second, they recommend imposing counter-

The Reach – *And Lack Thereof* – of International Trade Law

Since the completion of the Uruguay Round of trade negotiations and the creation of the WTO, there has been no completed round of trade negotiations. The Doha Round, initiated in 2001, is considered to have failed. As such, the multilateral disciplines negotiated in 1995 remain for the most part the existing basis of international trade law, as adjudicated at the World Trade Organization's dispute settlement system.

In the period since 1995 however, there have been remarkable advances in the means of trade flows (most notably in the area of electronic commerce and data flows) and in the type of players involved (notably state-owned enterprises – SOEs). **Enforceable international trade rules therefore have failed to keep up with the revolutionary changes within the international trading system – in turn, opening up a gap between undesirable national practices and acceptable international behavior.** Many national regulations enacted or activities conducted by countries in the areas of trade in services, electronic commerce, and state-trading enterprises could be considered as disguised barriers to trade.[16] Yet given the lack of binding, or substantive, international rules in these areas, such regulations or activities are hard to pin down at the WTO as a non-conforming or illegal practice. Prevailing international investment rules, too, can at best be characterized as 'soft law' and lack sufficient enforceability. Moreover, given the lack of an overarching multilateral treaty or agreement in this area, investment-related rules are typically governed by provisions in bilateral agreements concluded between the home and host country.

The solution to these problems is to engage all key systemic players, including China, within a multilateral or broad-based regional format and update the international trade and investment rules to make them current with prevailing realities. Enforcing punitive unilateral measures that have a questionable legal basis or drawing up preferential trade arrangements (PTAs) that deliberately exclude systemic players from the table, as was the case with China's exclusion from the Trans-Pacific Partnership (TPP) agreement, is not a durable solution to the problem.

vailing duties (CVDs) on Chinese exports after designating the renminbi to be a fundamentally undervalued currency that effectively confers an export subsidy to Chinese producers. Third, they propose equalizing the effects of China's VAT rates by imposing a VAT-like or "destination-based" border adjustment measure on all imports entering the US. Finally, Ross, Lighthizer and Navarro propose bringing additional cases to the WTO's Dispute Settlement Body (DSB) to force China's compliance with its obligations while at the same time strongly resist any attempts by China to dilute US trade remedies and safeguards relief laws through the DSB mechanism.

Over and beyond these enforcement-side measures, they have also laid down a benchmark for any trade agreement or deal (with China or others): **to receive a positive hearing, the deal should decrease the trade deficit, strengthen the manufacturing base, and increase the economy's growth rate. This benchmark could well be described as the "Trump Trade Doctrine".** Holding international trade deals to this standard may be a hard act to follow.

For all the unity in their viewpoints, Ross, Lighthizer and Navarro also hold varying individual persuasions vis-à-vis China that do not seamlessly overlap. Of the three, **Wilbur Ross**, a 79-year

old billionaire distressed-asset investor, holds the least antagonistic view towards China. As a collector of fine Chinese art and more recently as a business partner for state-owned enterprises (SOEs) in the shipping and energy sectors, Ross is no stranger to China. Neither is he an anti-trade ideologue. Before assuming his role in the Trump 2016 campaign effort, Ross was quick to acknowledge that the renminbi was currently overvalued, not undervalued, and that treating China as "the whipping boy … just as Japan was some 15 years ago" will not bring jobs back to the US – rather they would migrate to other low-cost Asian producers.[18]

> To receive a positive hearing, the deal should decrease the trade deficit, strengthen the manufacturing base, and increase the economy's growth rate. This benchmark could well be described as the "Trump Trade Doctrine".

Wilbur Ross is best described as a pro-business mercantilist, and his operating model best characterized as **"banking selectively on protectionism."**[19] Ross views the imposition of a temporary tariff as an expedient barrier to shield "sunset" industries as they restructure in the face of foreign competition. Free trade agreements with secondary producers which disrupt prevailing supply chains and provide temporary relief to domestic producers are also a part of his toolkit. In 2002, Ross correctly betted on and exploited President George W. Bush's temporary safeguards on steel (that lasted from 2002 to late-2003) to purchase uncompetitive mills, which he then turned around for a profit with the cooperation of the industry's powerful unions. In 2005 and 2006, he supported the Central America Free Trade Agreement (CAFTA) and, taking advantage of its complex sourcing/origination rules which were deliberately written into the agreement to undercut Asian textile and apparel exporters, revived a host of bankrupt domestic textile/fabric manufacturing companies. As Commerce Secretary, Ross is likely to be a vocal supporter of *temporary* protection for domestic sectors that stand to benefit from anti-trade sentiment.

In his early days as Commerce Secretary-designate, he has already signaled his intent to renegotiate the auto parts provisions in NAFTA (North American Free Trade Agreement), so as to: (a) re-shore (bring back to US) parts of the automotive production chain that have moved to Canada or Mexico, and (b) limit competition from Asian manufacturers, whose imported inputs deemed as qualifying regional content as per NAFTA's "rules of origin" are used by Canadian and Mexican producers and the finished product thereafter exported to the US market. This is also the reason that the Trans-Pacific Partnership (TPP) agreement had no chance of being passed by a Trump Administration. The motor vehicle provisions of TPP, including auto parts rules-of-origin provisions, were even more demanding than those in NAFTA (to compensate Japan for the deep market opening demanded by USTR within its farm sector). The auto parts re-negotiation is consistent with Ross' approach of "banking selectively on protectionism" to revive less competitive American manufacturing sectors within US industry.

Robert Lighthizer, a long-standing international trade attorney and former trade official under President Ronald Reagan, is the savviest of the three in terms of understanding multilateral and domestic trade law. **Lighthizer is best characterized as a pro-business protectionist** – a relatively rare breed within the Republican Party. He is an ardent supporter of the use of tariffs to

US-Japan Trade Frictions then (1960s-1990s) … and China today: *Will Past be Prologue?*[20]

The US supported Japan's entry to the General Agreement on Tariffs and Trade (GATT) in 1955. However, starting with Japanese textiles exports, tensions soon arose in the bilateral trade relationship. The first US-Japan **orderly marketing arrangement** was signed as early as 1957, signifying a non-most favored nation (MFN) approach on the part of Washington to resolve its bilateral trade frictions. Over the following decades, this took the form of bilateral **voluntary export restraints (VER)** that were negotiated across a wider range of products. Typically, rapid export growth would result first in a US safeguard (Section 201) petition requesting relief from surging Japanese imports for an injured domestic industry, which would then be followed up by a negotiated VER. By the 1980s, US anti-dumping law became the primary import-restricting means to seek out new trade measures that would typically result in a bilaterally negotiated VERs limiting Japanese exports to the US. This reached a peak during the 1984-1988 period when Washington initiated more than 20 new anti-dumping investigations on Japanese exporting firms - the most notorious of these being a semiconductor VER negotiated after a pair of anti-dumping petitions filed in 1985. Japan alone accounted for more than 20% of all new anti-dumping measures the US imposed during this period. Interestingly, the US never used its countervailing duty law to restrain imports from Japan during this period of intense trade friction.

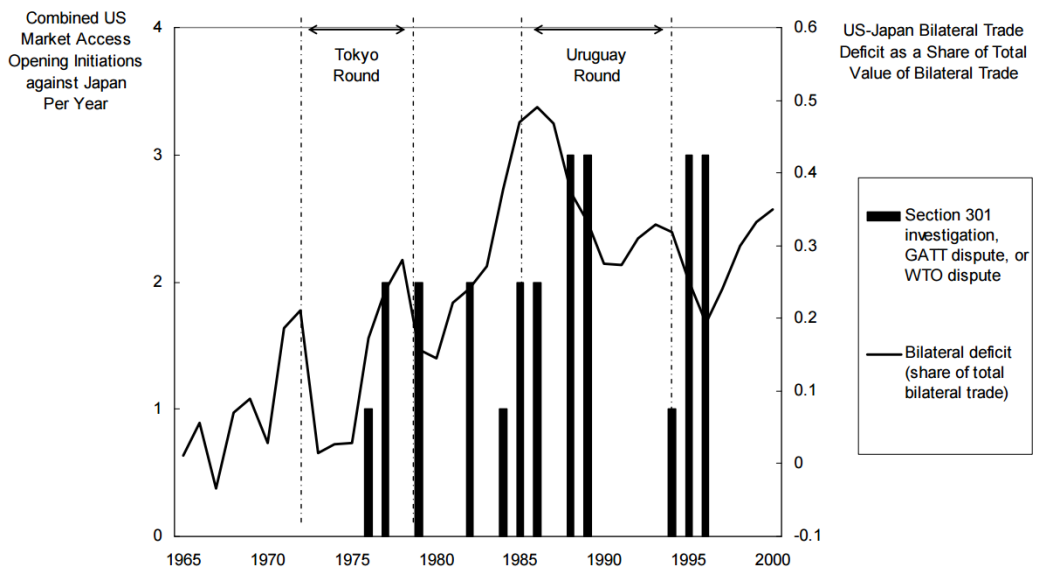
Table 1. Examples of US Safeguard and Antidumping Petitions Resulting in VERs with Japan, 1975–1997

	US Law	Product	Petition Year	USITC Case Number	Initial Year of VER
1	SG	Stainless steel and alloy tool steel	1975	201-TA-5	1976
2	SG	Footwear	1975	201-TA-7	1976
3	SG	Footwear	1976	201-TA-18	1977
4	SG	Television receivers	1976	201-TA-19	1977
5	SG	Certain motor vehicles and chassis/bodies thereof	1980	201-TA-44	1981
6	SG	Carbon and certain alloy steel products	1984	201-TA-51	1984
7	AD	Erasable programmable read-only memory-semiconductors (EPROMS)	1985	731-TA-288	1986
8	AD	256K and above Dynamic random access memory-semiconductors (DRAMS)	1985	731-TA-300	1986
9	AD	Photo paper and chemicals	1993	731-TA-661	1994
10	AD	Sodium azide	1996	731-TA-740	1997

AD = antidumping, SG = safeguard, US = United States, USITC = United States International Trade Commission, VER = voluntary export restraints. Notes: SG refers to a safeguard under the US Section 201 law; AD refers to antidumping under the US Section 731 law.

Parallel to the efforts to limit Japanese exports with the use of domestic trade remedies measures, particularly anti-dumping policy, Washington also adopted a legalistic and coercive approach to improving its exporters' access to the Japanese market through the combined use of GATT dispute settlement and **Section 301** policy actions. Over twenty years, starting in the mid-1970s, the US pursued at least two-dozen formal Section 301, GATT, and WTO trade disputes against Japan. Washington's use of GATT dispute settlement in an attempt to open up Japan's market to its firms was most frequent during the 1977–1988 period, when it filed a total of 11 formal disputes against Japan. Starting in the mid-to-late 1980s, the US shifted away from using GATT dispute settlement (partly out of frustration with its relatively toothless dispute settlement provisions) and instead relied solely on its unilateral Section 301 policy tool to pursue cases against Japan. Whereas all but one of the Section 301 investigations against Japan during 1977–1988 had resulted in the US bringing a formal GATT trade dispute, none of the next four Section 301 cases, initiated during 1989–1994, did so.

Figure 5. The US-Japan Bilateral Trade Deficit and US Section 301, GATT, and WTO Formal Trade Dispute Activity against Japan, 1965-2000

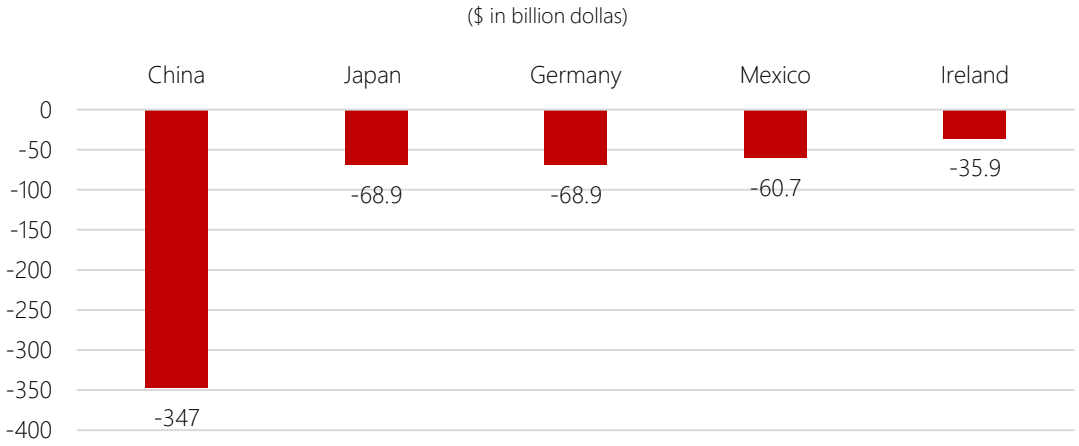


GATT = General Agreement on Tariffs and Trade, PRC = People's Republic of China, US = United States, WTO = World Trade Organization.

The range of sectors and issues subjected to additional US market access demands spanned a wide range. In the 1970s, desired market access was primarily in agriculture-based products (tobacco and leather) and lower value-added manufacturing (silk, cigars, cigarettes, footwear, and bats). By the mid-1980s, while there was continued pressure to obtain access in the Japanese market for US agricultural products and wood products, a wider set of exportable products, such as intellectual property-intensive products (semiconductors, supercomputers, satellites), also came to the fore. New issue-areas, such as in the trade in services sector (construction, architectural, engineering) and government procurement, also became a bone of contention.

promote American industry and traces his intellectual origins to Alexander Hamilton who was equally adept at mixing capitalism with protectionism.[21] At USTR in the 1980s, Lighthizer negotiated voluntary restraint agreements (VERs) with countries accused of dumping steel in the US market, including Japan, the EU, Mexico and South Korea. These VERs to limit exports to the US were negotiated under the threat of unilateral imposition of Section 301 penalties if these countries did not comply. In private practice, he has continued to represent "sunset" industries, such as steel.

Figure 6 . Five Largest US Merchandise Trade Imbalances: 2016[22]



Lighthizer's views of China's rules-based engagement (for the most part) within the international trading system are particularly troublesome given his deep understanding of trade law. His China trade policy objectives revolve entirely around protectionism: strengthen trade remedies laws; provide effective safeguards relief to industry; treat China as a non-market economy for anti-dumping purposes; and bring additional cases to the WTO. Moreover, Lighthizer has hinted in the past that the US should not be bound by adverse WTO Dispute Settlement Body (DSB) rulings. WTO law, he concurs, should be better understood as instrumental law that is only worthy of compliance to the extent that compliance makes American people better off.[23] Circumvention of the hitherto relatively successful WTO dispute settlement system that Washington has spent decades establishing is fraught with risk. It could place the rules-based multilateral trade order on the slippery slope to the zero-sum contestation that had characterized trade relations in the pre-War era.

It is worth noting that when the US acceded to the WTO in the mid-1990s, then-Senate Minority Leader Robert Dole had introduced legislation that would offer an "escape" from adverse WTO rulings, and thereby restore the US' trade sovereignty. The legislation called for the creation of a commission of federal judges that would evaluate whether the WTO had exceeded its interpretative authority in any case which the US lost within the dispute settlement system.[24] If the panel found that to be the case, Congress could thereafter debate a resolution proposing the US' withdrawal

from the WTO Agreements. The Dole proposal did not garner the requisite legislative support at the time but considering Lighthizer's past association with Dole, this option of threat of exit from the dispute settlement pillar of the WTO if the US keeps losing cases at the DSB during the Trump Administration should not be ruled out lightly.

WTO Dispute Settlement and US Compliance

The US' track record of full compliance with adverse WTO dispute settlement rulings is a patchy one. A study conducted in 2014 found that, as of early-2012, in one-third of the cases where the US did not prevail on the core issue at stake in the dispute, the US had failed to follow through fully with corrective measures and come into compliance.[25] The most infamous of these today is the *Online Gambling Restrictions* (DS285) case with Antigua and Barbuda. Ten years after a WTO arbitrator approved an annual $21 million award in Antigua and Barbuda's favor for the US' violation of its General Agreement on Trade in Services (GATS) market access commitment, the tiny Caribbean nation is still waiting in 2017 to collect on this amount.[26] Meantime, the US has run up a cumulative bilateral balance of trade surplus over this period that is larger than the Caribbean nation's annual gross domestic product.

Adverse WTO panel or Appellate Body decisions are not self-executing within US law; they do not amend or modify it in any way, shape or form. All necessary or appropriate changes to US law to remedy a conflict between WTO agreements and US law and implement an adverse decision must be enacted by way of subsequent legislation. Getting such legislation passed however is a tall order and USTR's voice on the Hill is neither the loudest nor the most powerful to push these corrective measures through. Members of Congress, unlike the Executive Branch, are typically less responsive to the material consequences of WTO non-compliance given the lack of connection to their constituencies and immediate interests.

Where an adverse WTO panel or Appellate Body decision is compliable within the bounds of existing law, i.e. within the power of the Executive Branch to reinterpret US statute, compliance has typically been quicker and much better. This is usually the case with adverse rulings involving US safeguards, antidumping and countervailing duty determinations. In such cases, USTR can direct the concerned US agency (Department of Commerce; US International Trade Commission) to issue a "Section 129 Determination" (Commerce Dept.) or a "Section 129 Consistency Determination" (USITC) that would render that agency's actions, going forward, "not inconsistent with the findings" of the WTO Panel or Appellate Body.[27]

Bearing in mind the US' patchy record of compliance, it is imperative that the executive branch under Robert Lighthizer's leadership not become a foot-dragger too, like the US Congress, on WTO compliance-related matters.

Early in his policy career, while serving as chief of staff on the US Senate Finance Committee, Lighthizer developed professional ties with then-Senator Robert Dole and later went on to serve as treasurer for Dole's presidential bid in 1996. Dole, it should be noted, was recently instrumental in putting together the phone conversation between Trump and Taiwanese leader Tsai Ing-wen and he has also helped convene meetings between Taiwanese diplomats and the Trump transition

team.[28] Lighthizer could potentially be an advocate for a US-Taiwan Free Trade Agreement, given his past proximity to Dole.

Of the three, **Peter Navarro**, a 67-year-old Harvard-educated economics professor, is the **most ideologically opposed to trade and the most hostile in his views on China.** He is also one of the rare few economists holding senior positions in the Trump Administration. His ideological hostility to China, ironically, also makes him the closest ideological soul-mate of the three on trade policy to Donald Trump. And unlike the other two, he will work out of an office space close to the Oval Office, hence it will be easier for him to have the President's ear. For Navarro (and Trump), China and its litany of unfair trading practices *is* the world's "central" problem and,[29] until this problem is fixed, trade will remain a zero-sum game with China as the winner and US as loser and there will be no global prosperity. Indeed, for Navarro (and Trump), the US-China trading relationship is a threat to the American way of life itself. Navarro's primary solution is to impose a very hefty tariff on all Chinese exports to the US.

Navarro's ideological hostility to China, ironically, also makes him the closest ideological soul-mate of the three on trade policy to Donald Trump.

Navarro shares an interesting similarity with Trump. Both have held a long-standing ambition since their early 40s to hold elected office – identifying initially with Democrats, not Republicans. Navarro had run, unsuccessfully, in a number of races, including for mayor of San Diego and for the US Congress. He has authored three books on China - *The Coming China Wars: Where they will be Fought, How they Can be Won (2006)*; *Death by China: Confronting the Dragon – A Call to Action (2011)*; *Crouching Tiger: What China's Militarism Means for the World (2015)*. Each book takes a more hawkish and a more antagonistic view of China than the previous one. A 2012 documentary film that accompanied his book *Death by China* even had an animation of a Chinese knife stabbing a map of the United States causing blood to gush out freely. The film's marketing materials included a blurb by Donald Trump praising the film. Unsurprisingly, his criticisms of China also go well beyond trade and economic issues: he has advocated for a full-scale containment of China.

To the extent that the National Trade Council (NTC) manages to impose its will on US trade policy and industrial strategy, Peter Navarro's presence within the inner sanctum of presidential authority could potentially have lasting, negative repercussions for US-China economic ties.

Key Institutional Novelty: The National Trade Council (NTC)

Given the range of views on China, which span Ross' mercantilist realism to Lighthizer's protectionist sophistry to Navarro's extreme antagonism, the role of the newly-constituted **National Trade Council (NTC)** within the White House assumes significance. Peter Navarro will be the Director of the NTC. By itself, the creation of a new council is not groundbreaking: Before the Clinton Presidency in 1993, there was no such entity called the National Economic Council (NEC) within the White House, yet it has now become a permanent fixture. (The NEC in the Trump Administration is led by Gary Cohn, a senior investment banker from the Wall Street firm, Goldman Sachs.) Rather, what is groundbreaking about the NTC is that there will now be more players involved in US international trade policy-making, and that US trade policy will be integrated more comprehensively within broader structural industrial policy goals. In this regard, two key areas of the NTC's focus have already been identified: "buy American, hire American" and defense industrial base revitalization.

The key roles of the National Trade Council are expected to be three-fold: First, the council will provide a "sounding board" for opinions among various senior officials and government departments on trade policy. Second, the NTC will provide an arena for expressing competing views on US trade priorities and policies to President Trump. Other strong executive branch power centers on trade policymaking, especially USTR, are likely to see a demotion in their powers. Wilbur Ross, though, will be a key player, straddling both his close ties to Trump and his Commerce Department leadership role. And third, the NTC will enable President Trump to be the "decider" who controls the overall manufacturing and international trade strategy and policy out of the White House. In this context, Trump's style of management bears recalling: he often purposely places two or more people on the same task so that they compete with each other and, in the process, breed the best outcome. The NTC is expected to provide a forum for tensions on trade policy choices which, in Trump's view, will lead to the best choice. Given the relatively narrow range of views that he will hear though, it is more likely that Trump will end up making poor choices on trade policy – poor choices which fit into his predetermined protectionist view of how America has been cheated by foreign countries.

From the point of view of the US-China economic relationship, there are two additional points that bear noting. First, the control tower for many existing US-China bilateral economic initiatives, such as the Strategic and Economic Dialogue, resides in the White House. With Peter Navarro, as

NTC director, now effectively having the lead role within this control tower, the outlook for these dialogue formats has been thrown into disarray. There will no doubt be a high-level US-China bilateral trade and economic dialogue format during the Trump Administration. However, what shape this dialogue format will take and which agencies will represent the US at the table is in doubt. This shake-up should not affect the Joint Committee on Commerce and Trade (JCCT) process or the Bilateral Investment Treaty (BIT) negotiations, but it could slow down and delay them significantly. At this time, there are no indications as yet as to where the White House intends to go with the BIT negotiations. In time, there should be greater clarity though.

Second, at this time, the NTC's key sectoral focus areas are the domestic and defense industrial base and "Buy America" procurement provisions, which ensure that public procurement contracts are fulfilled primarily using American-made products.[30] However, down the line, there is a likelihood that the NTC could take an expanded role in the inter-agency process that screens Chinese inward investment into the US – the Committee on Foreign Investment in the United States. CFIUS is currently chaired by the US Treasury Department. There have been growing calls for the CFIUS to limit, or altogether ban, the acquisition of US companies by Chinese state-owned enterprises (SOEs) or Chinese SOE-linked companies, especially in the semiconductor sector. Even though Chinese semiconductor foundry companies are at least one-and-a-half generations behind the state of the art in volume production, a January 2017 Obama Administration commission report called for scrutiny to be paid to Chinese investment in this sector.[31] The Obama Administration had blocked the acquisition of German chip equipment manufacturer, Aixtron, by Chinese investors last December. And in its 2016 annual report, the Congressionally-created US-China Economic and Security Review Commission went so far as to recommend that all Chinese SOE's be barred from acquiring or gaining effective control of US companies.[32]

> …what is groundbreaking about the NTC is that there will now be more players involved in US international trade policy-making, and that US trade policy will be integrated more comprehensively within broader US structural industrial policy goals.

As such, given its domestic and defense industrial base regeneration and oversight responsibilities, the NTC could assume a much more prominent or direct role in vetting any such non-greenfield Chinese inward investment proposals. This could range from endorsing a national economic security test for all such acquisition transactions to setting investment caps in select technology-embedded sectors to drawing up a negative list of sectors, such as semiconductors, where Chinese SOE or SOE-linked transactions would encounter automatic denials.

Conclusion

Ever since his formative interactions with Asian (at the time, Japanese) businesspeople during his 1980s days as a young real estate developer in Manhattan, it has been one of Donald Trump's cardinal beliefs that Asians tend to be mercantilist and one-sided in their business practices. This permeates into their international economic practices and strategic approaches too. In his mind, Asian nations have their national security underwritten by the United States, yet they do not reciprocate by providing fair and equal economic access to their domestic market to US goods and services. As he observed in a noteworthy interview at the time:[33]

> "The Japanese have their great scientists making cars and VCRs and we have our great scientists making missiles so we can defend Japan. Why aren't we being reimbursed for our costs? The Japanese double-screw the US, a real trick: First they take all our money with their consumer goods, then they put it back in buying all of Manhattan. So either way, we lose."

In his book, *The Art of the Deal,* his manifesto of how to do business that was published in 1987, Trump had similarly complained how difficult it was to do business with the Japanese. He even went so far as to pay for a full-page advertisement in *The New York Times*, *The Washington Post* and *The Boston Globe* that denounced the Japanese, saying that while the US paid for their defense, they built a strong economy based on a deliberately weak yen. Asked hypothetically at the time what the first thing he would do upon entering the Oval Office, Trump had observed:[34]

> "A toughness of attitude would prevail. I'd throw a tax on every Mercedes-Benz rolling into this country and on all Japanese products, and we'd have wonderful allies again."

Very little about Trump's language or understanding of Asia's economic practices or approaches appears to have changed; it is simply frozen in the same place as the 1980s. Asians always win and Americans always lose because US leaders and negotiators are weak-willed and sloppy in pursuing their interests and exacting hard bargains. The only differences now are that he regards China rather than Japan as the chief villain and, most importantly, he occupies the Oval Office and is empowered to follow through on his long-held beliefs.

In Peter Navarro, President Trump will also enjoy a close policy advisor who shares and adumbrates a harsher shade of this viewpoint. The extent to which their views will prevail in the overall domestic trade policy formulation and implementation process will depend however on the strength and authority that the President vests in the National Trade Council (NTC). With USTR statutorily required to lead trade negotiations and the trade oversight committees on the Hill

determined to protect their jurisdictional turf (by holding USTR and the Commerce Department directly accountable), the NTC's ability to override these agencies (or not) in its role as policy coordinator, policy control tower - or something more - will require careful watching. The latitude - or relative lack thereof, that the Trump Administration will enjoy to ratchet up trade barriers and enforcement measures against foreign trading partners within the ambit of the international trading system's rules and principles, will also require careful watching. It is this topic to which the report will now turn.

SECTION II

INTERNATIONAL TRADE RULES
AND
US DOMESTIC TRADE PROTECTION / ENFORCEMENT MEASURES

The World Trading System: Laws, Rules and Principles

On 15 April 1994, the full package of measures that became the Uruguay Round agreements was formally signed in the Moroccan city of Marrakesh. The Uruguay Round package was embodied in a document of approximately twenty-six thousand pages, listing detailed commitments that ranged from tariff schedules to technical standards to dispute settlement procedures. The document, by and large, constitutes the prevailing body of international trade rules and laws, given the failure to conclude the subsequent Doha Development Round of negotiations which was initiated in December 2001. Although voluminous in size and detail, the Uruguay Round agreements and the international trading system is premised on three simple bedrock principles that run throughout the document's text. These are: non-discrimination, predictability, and fair competition.

As part of the **non-discrimination principle**, countries are not allowed to discriminate between their trading partners. If one country is granted a special favor (such as a lower customs duty rate for one of their products), that favor must be extended to all other World Trade Organization (WTO) members. This is known as **most-favored-nation (MFN)** treatment. Some narrow exceptions apply. For example, countries can set up a free trade agreement that applies only to goods and services traded within the group – in effect, discriminating against goods and services from countries outside the group. Equally, as part of the non-discrimination principle, countries are not allowed to discriminate between foreign producers and domestic producers. Once a foreign good or service has cleared the customs barrier at the border, imported and locally-produced goods are to be treated equally from a regulatory and judicial standpoint within the domestic tariff area. This is referred to as **national treatment**. Simply stated, countries must extend equal treatment to their counterparts – be it a foreign trade partner at the tariff boundary or a foreign product within their marketplace (domestic tariff area).

> The rules-based international trading order operates on three bedrock principles – *non-discrimination, predictability, and fair competition.*

As part of the **predictability principle**, countries are required to "bind" their market opening commitments and transparently notify these bindings when they open their markets to goods or services of foreign producers. These bindings amount to ceilings on customs tariff rates. Countries are at liberty to lower their "applied" tariff rates beneath their "bound" levels but they are not allowed to raise them *above* their "bound" rates. To change their tariff bindings upwards, countries must first negotiate that change with trading partners, which could mean compensating them for loss of trade benefits incurred. The purpose of this predictability principle is to instill confidence

in foreign companies, investors and governments that trade barriers (including tariffs and non-tariff barriers) will not be raised arbitrarily. Simply stated, raising tariffs beyond committed bound levels is a violation of international trade law.

Finally, as part of the **fair competition principle**, countries are allowed in clearly enunciated limited circumstances to impose various remedial or protective measures to discourage "unfair" practices, such as export subsidies and the dumping of products at below cost to gain market share. The issues involved are complex, and the rules try to establish what is fair or unfair and how governments can respond by charging additional import duties to compensate for the damage caused by the "unfair" practices. As written into the trading system, the rules come in two forms: (a) rules that enable actions against dumping, i.e. selling at an unfairly low price, and (b) rules on subsidies and countervailing duties to offset the effect of non-compliant subsidies.

As per the **WTO Anti-Dumping Agreement**, governments are allowed to offset the effects of dumping by a foreign trading partner when there is genuine ("material") injury to the competing domestic industry. In order to do so, the government must be able to show that dumping is taking place, calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price), and show that the dumping is causing injury or threatening to do so to domestic industry. Detailed procedures are established for initiating and investigating anti-dumping cases. Anti-dumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would lead to injury.

The **WTO Subsidies and Countervailing Measures Agreement** pursues two separate purposes: It outlines rules that regulate the provision of domestic subsidies; and outlines rules that regulate the actions that countries can take to counter the effects of subsidies which are deemed to be trade-distorting and hence non-compliant (called actionable or prohibited subsidies). For a domestic policy measure to be considered a "subsidy," it must satisfy three elements: (a) a financial contribution (b) by a government or any public body within the territory of a member country (c) which confers a benefit. Each of these terms – financial contribution; public body; benefit – is defined in law. Furthermore, as per the Agreement, the subsidy must be "specific," i.e. it must have been provided on an export-contingent and enterprise-specific, industry-specific or region-specific basis.[35] Where an input or factor price distortion exists in a trading partner's economy on a generally-available basis or economy-wide scale, such as unusually low tax rates, below-market interest rates or a currency's value, such a distortion in the allocation of resources is *not* considered to be a subsidy or form of subsidization, as per the Agreement. Such distortions typically appear in developing economies that are in a transitional stage towards marketization. As with anti-dumping procedures, there are detailed rules for deciding whether a product is being subsidized, criteria for determining whether imports of subsidized products are hurting ("causing injury to") domestic industry and rules on the implementation and duration (normally five years) of countervailing measures.

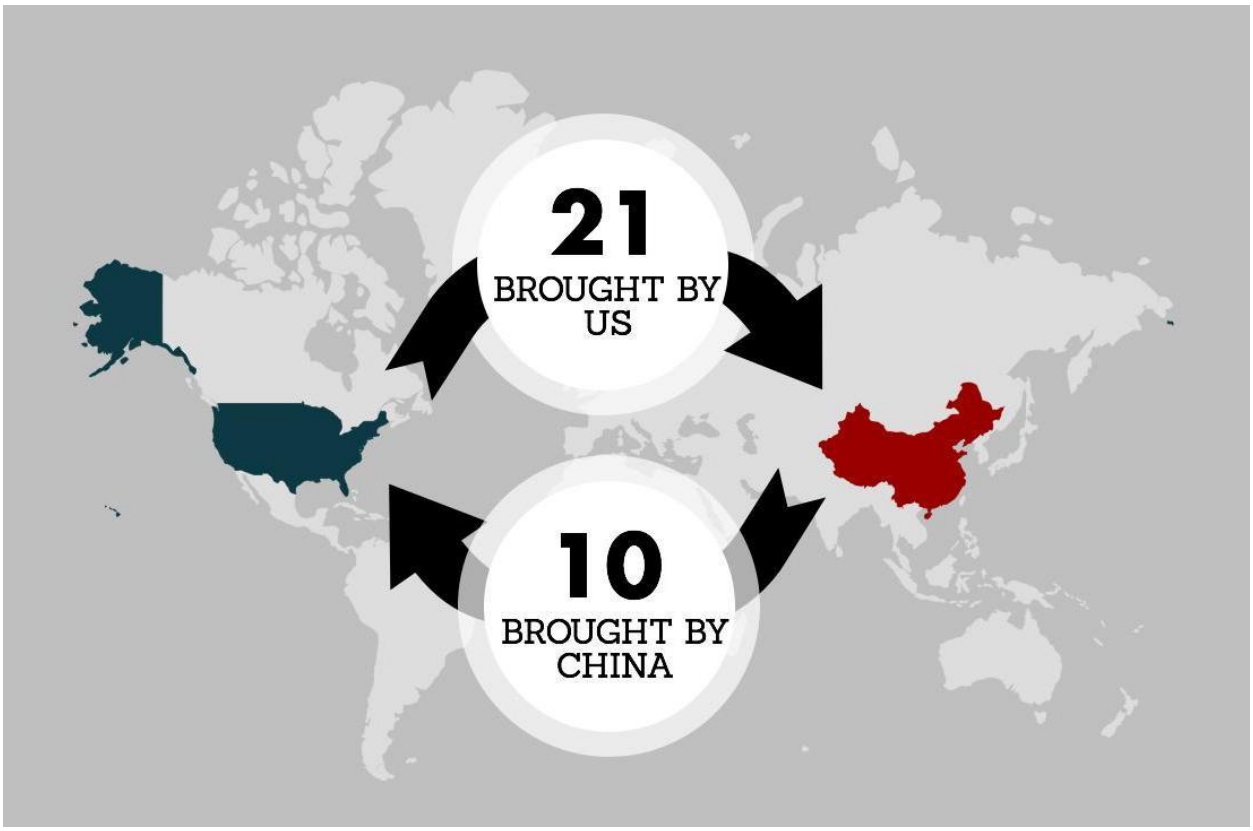
Apart from the use of anti-dumping and countervailing measures, from a trade protection standpoint, governments are also allowed to take recourse to safeguards or emergency measures to temporarily limit an import "surge" and thereby *safeguard* domestic industries. An import "surge" justifying safeguard action can be a real increase in imports (an absolute increase) or an increase in the imports' share of a shrinking market, even if the import quantity has not increased (a relative increase). The **WTO Safeguards Agreement** sets out criteria for assessing whether "serious injury" is being threatened or caused and the factors which must be considered in determining the impact of imports on the domestic industry. Typically, the injury requirement to be demonstrated under a safeguards investigation is higher than the requirement in an "unfair" (antidumping/countervailing duty - AD/CVD) trade investigation, and the safeguards measure must be applied only to the extent necessary to prevent or remedy the injury and help the domestic industry concerned to adjust. Further, following the establishment of the WTO in 1995, countries are no longer allowed to impose or demand that foreign trade partners exercise/maintain voluntary export restraints (VERs) or orderly marketing arrangements to limit exports to their market. The application of 1980s-vintage VERs is no longer admissible in the international trading system.

If any of these three bedrock principles (non-discrimination; predictability; fair competition), as written into the various WTO agreements are violated by a member country, the affected or "complainant" country can file a "violation complaint" against the former and invoke the **WTO's dispute settlement mechanism**. For the "violation complaint" to succeed, the complainant has to satisfy two conditions: first, show that the defendant or "respondent" country has failed to carry out its WTO obligations; second, that as a result of this failure, the benefits and expectations of gains from membership that would have accrued to the "complainant" country has directly or indirectly been nullified or impaired. The **GATT Article XXIII Nullification or Impairment provision** is the standard provision under the dispute settlement system, which countries use to seek redressal of a violation of obligations committed by a counterpart Member State.[36] Nullification or impairment would arise most plainly when a "respondent" country raises tariffs above its "bound" levels but it would also arise when the improved market access presumed to flow from a bound tariff reduction has been undercut by subsidization or other non-conforming practices. For the most part, the typical international trade law infractions tend to be a violation of the "most favored nation" principle and the "national treatment" principle.

However, it is worth recalling at this juncture that in the period since 1995, there have been remarkable advances in the means of trade flows (most notably in the area of electronic commerce and data flows) and in the type of players involved (notably state-owned enterprises – SOEs). Enforceable international trade and investment rules have failed however to keep up with the revolutionary changes within the international trading system – in turn, opening up a gap between undesirable national practices and acceptable international behavior. Particularly in the areas of trade in services, electronic commerce and state-trading enterprises, many national regulations enacted could be considered as disguised barriers to trade. Yet, given the lack of binding, or

substantive, international rules, they are in effect hard to pin down within the WTO dispute system as a nullification or impairment violation.

Figure 7. Number of WTO Disputes between United States and China[37]



The **WTO's Dispute Settlement Body (DSB)** is the supreme authority with regard to administering the WTO's dispute settlement system. It enjoys the authority to establish "panels" of experts to consider a case and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations and has the power to authorize retaliation when a country does not comply with a ruling within "a reasonable period of time". Since 1995, 522 disputes have been brought to dispute settlement by member countries and over 350 rulings issued. **The US has been the greatest user of the dispute settlement system, being the complainant in 114 of the 522 instances.**[38] Of these 114 cases, 21 have been against China. China on the other hand has been a complainant in 15 cases and a respondent in 39 others since its accession to the WTO in December 2001. Of the 15 cases where it has been a complainant, 10 of them have been against the US. Most of these cases are relatively recent origin, dating from 2007 onwards.

President Trump campaigned on a platform of ripping up existing trade agreements (TPP), renegotiating other trade agreements (NAFTA), and imposing a 35% tariff on imports from Mexico and 45% tariffs on imports from China. Before he unilaterally translates his aspirations

into actions, he should pay heed to the non-discrimination, predictability, and fair competition principles that are embedded in the global trading system's legal architecture. As currently conceived, many of the enforcement measures listed in his Seven Point Plan to regenerate the US economy do not conform to these prevailing laws and rules. **If enforced, these measures will almost certainly invite legal challenges at the WTO as well as, perhaps, unilateral retaliatory actions.** These could range from sanctions against Trump-friendly rural districts (duties on soybeans, corn and ethanol by-products), to termination of high-profile product purchases (civil aircraft) with consequent employment losses along the supply chain, to embargoes on foreign sales of critical commodities in which China enjoys a production monopoly (rare earth elements). China could also bar its state-owned enterprises from conducting business domestically with US firms – in effect instituting a "Buy No America" policy.[39]

It is an enumeration of these enforcement measures, as well as the broader corpus of domestic trade remedies statutes and tariff authority delegated by the US Congress to the executive branch, to which this report will now turn.

US Law and Delegated Presidential Tariff Trade Enforcement Powers

Article I of the US Constitution authorizes Congress to raise revenues through taxes, tariffs and duties, and regulate international commerce. As such, the US Congress enjoys the sole prerogative on international trade matters. Indeed, until the early-1930s, Congress itself usually set tariff rates for imported products.[40] Article II of the US Constitution authorizes the President "to make treaties, provided two thirds of the Senators present concur." Because the President enjoys the authority to negotiate international treaties including trade agreements but does not possess express constitutional authority to impose or modify tariffs, he/she must find that authority for tariff and trade enforcement-related action in statute. Congress, as the principal, delegates statutory tariff and enforcement powers to its agent, the President, and he/she must operate within the ambit of these delegated powers to initiate actions or measures against its foreign trading partners. Such delegated presidential powers must conform to domestic law. Such powers, however, might or might not conform to international law because some of these congressionally-delegated statutory powers (written decades ago) themselves transgress prevailing international trade law.

Article I of the US Constitution authorizes Congress to raise revenues through taxes, tariffs and duties, and to regulate international commerce. As such, the US Congress enjoys sole prerogative on international trade matters.

Congressionally-delegated presidential powers to control foreign commerce and impose unilateral trade measures can be divided into three categories:

(a) conventional enforcement measures;

(b) unconventional enforcement measures;

(c) extreme enforcement measures.

President Trump could in theory implement his campaign platform promises using these three categories of unilateral enforcement measures. **Of particular interest are the Unconventional Enforcement Measures that in recent times have only been used very sparingly by US presidents, but which President Trump could deploy as his principal weapon of trade enforcement.**

(A) Conventional Enforcement Measures

As has been the case with previous administrations, the Trump Administration will continue to utilize a variety of trade remedy measures authorized by the Trade Act of 1974 and the Tariff Act of 1930 – better known as the Smoot-Hawley Tariff Act. These measures are WTO-compliant but require the Administration to follow procedures that are consistent with those laid down in the relevant WTO agreement.

- Section 201 of the Trade Act of 1974 (Safeguards Investigation)

  Section 201 allows for the temporary restriction of a product through higher tariffs or other measures if a domestic industry is seriously injured or threatened with serious injury by increased imports. Section 201 does not require a finding of an unfair trade practice, as is the case with the antidumping and countervailing duty (AD/CVD) investigations. However, the injury threshold under Section 201 is considered to be more difficult than is the case with the unfair trade - AD/CVD - statutes. Section 201 requires that the injury or threatened injury be "serious" and that the increased imports must be a "substantial cause" (important and not less than any other cause) of the serious injury or threat of serious injury to the domestic industry. Criteria for relief must be consistent with provisions defined in the WTO Agreement on Safeguards. In 2002, President Bush had imposed a Section 201 safeguard measure on a wide range of steel products. The measure was however successfully challenged by the European Union and a host of other countries, including China, on the basis that the US had failed to provide a reasoned and adequate explanation for the imposition of the measure consistent with provisions of the WTO Safeguards Agreement. As a result, the US was forced to terminate the measure in 2003.

  Section 201 was one of three statutory enforcement tools listed by the Trump team as part of its centerpiece Seven Point Plan to rebuild the American economy. **A Section 201 measure, as a *temporary* restriction, would also fit ideally within Wilbur Ross' model of "banking selectively on protectionism" to relieve competitive pressure on domestic sectors that stand to benefit from anti-trade sentiment.** However, any new authorization by President Trump will likely face a WTO challenge within the dispute settlement system. Furthermore, it could also invite tit-for-tat retaliatory investigations by trade partners, including China, as has typically been the case.

- Section 337 of the Tariff Act of 1930

  Section 337 authorizes the investigation of claims of unfair trade practices pertaining to intellectual property rights, including infringement of a US patent, copyright or registered trademark by a foreign good. By and large, the measure has been used by companies in the electronics and consumer goods sector to obtain relief from foreign action. Of late, the Section's anti-monopoly provisions have also been sought to be used by a wider range of

industries (stainless steel; carbon and alloy steel products) to obtain relief.[41] The standard to prove injury in this regard is a high one.

The complainant needs to establish that the foreign supplier is engaging in predatory pricing as evidence of unreasonable restraint of trade. Low but non-predatory prices cannot give rise to such monopoly-related injury. Section 337 investigations are also initiated independently by the US International Trade Commission (USITC) and adjudicated principally before Administrative Law Judges, as per the Administrative Procedures Act. As such, President Trump would have little control over the overall investigatory process but could still find the USITC's decision on remedies challenged at the WTO.

- Title VII of the Tariff Act of 1930 (Anti-Dumping and Countervailing Duty investigations)

  Under the Tariff Act of 1930, US industries may petition the government for relief from imports that are sold at less than fair value ("dumped") or which benefit from prohibited subsidies provided through foreign government programs. Two separate government agencies are involved in administering US' AD/CVD investigations. The US Department of Commerce determines whether the dumping or subsidizing exists and, if so, the margin of dumping or amount of the subsidy; the USITC determines whether there is material injury or threat of material injury to the domestic industry by reason of the dumped or subsidized imports. Material injury is loosely defined as "harm which is not inconsequential, immaterial or unimportant" – as such the threshold for finding injury or threatened injury is lower than that of a Section 201 safeguards investigation.

  While general practice is for the Commerce Department to initiate AD/CVD investigations pursuant to a petition filed by a domestic industry or party, regulations allow for AD/CVD investigations to also be initiated at the "[Commerce] Secretary's own initiative." Wilbur Ross has signaled that he intends on this basis to self-initiate AD/CVD investigations for particular products from particular countries in an effort to restrain imports and impose high duties on these products and countries. However, self-initiation can be controversial and could invite tit-for-tat retaliatory action from foreign governments. The criteria for relief must also be consistent with provisions defined in the WTO's Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.

China and Market Economy Status (MES) Issue

When China joined the WTO in 2001, its accession terms allowed other WTO members to treat it as a non-market economy (NME) when assessing anti-dumping duties during a transitional 15-year period. That gave trade partners the advantage of using a third country's prices to gauge whether China was selling its goods below market value, making it easier to find evidence of dumping. This provision was inserted as an interim arrangement, given the large size of the

Chinese economy, the economic distortions still produced by the Chinese government's intervention, and the role of its state-owned enterprises.

Starting with President Clinton and continuing under Presidents Bush and Obama (during his first term), the office of the USTR repeatedly affirmed that China's non-market economy status would come to an end in December 2016. However, starting 2012, USTR reversed its position and now holds that the granting of market economy status (MES) is not automatic.[42] On December 12, 2016, the day following the expiration of the transitional period, China filed a request for consultations leading potentially to a legal challenge at the WTO against the US (and the EU) for failure to grant unconditional MES status to China when assessing dumping duties. The MES debate is centered on paragraph 15(a)(ii) of Section 15 of China's WTO Accession Protocol. The relevant subparagraphs of Section 15 state:[43]

15. Price Comparability in Determining Subsidies and Dumping

(a)(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production, and sale of that product.

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. ***In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.*** *In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the NME provisions of subparagraph (a) shall no longer apply to that industry or sector.*

A plain reading of the provision suggests that treatment of China as a non-market economy was to expire unconditionally on December 11, 2016.

Separately, it should be noted, the US maintains a set of statutory tests to determine whether an economy can be classified as a market economy. These include: the extent to which the currency is convertible, the extent to which wage rates are determined by free bargaining between labor and management, the extent to which joint ventures or other investments by foreign firms are permitted, the extent of government ownership or control of the means of production, and the extent of government control over the allocation of resources.

The US record on this count is poor, having lost case after case at the WTO DSB primarily due to its flawed methodology of calculating anti-dumping margins with a view to providing relief. Indeed, almost all the cases brought by China against the US at the WTO relate to the latter's inconsistent application of the Anti-Dumping Agreement and the Subsidies and Countervailing Measures Agreement to find injury and provide relief to domestic petitioners. More broadly, of the 73 disputes on which the WTO has issued

decisions challenging a country's use of trade remedy measures, fully 38 of them has involved a violation of the rules by the US.[44]

Cases Brought by China against the US' AD/CVD Relief Measures[45]

DS252 : Definitive Safeguard Measures on Imports of Certain Steel Products
DS368 : Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China
DS379 : Definitive Anti-Dumping and Countervailing Duties on Certain Products from China
DS422 : Anti-Dumping Measures on Shrimp and Diamond Sawblades from China
DS437 : Countervailing Duty Measures on Certain Products from China
DS449 : Countervailing and Anti-dumping Measures on Certain Products from China
DS471 : Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China
DS515 : Measures Related to Price Comparison Methodologies

(B) Unconventional Enforcement Measures

Many of the unconventional enforcement measures have fallen into disuse but President Trump could revive and deploy them as his principal weapon of trade enforcement. He could also add to this toolkit of measures with the cooperation of the US Congress. Past Congresses have actively debated the merits of treating a foreign trading partner's undervalued currency as a countervailable export subsidy. Similarly, the present Republican leadership in the House of Representatives and the White House are in ongoing discussions on levying a "border-adjusted" corporate tax. Many of these enforcement tools, and their purposes, were listed in the Seven Point Plan that forms the centerpiece of President Trump's trade agenda to restore the American economy to its past glory. As also noted, many of these measures do not - or will not - conform to prevailing international trade law and, if enforced, will almost certainly invite legal challenges at the WTO as well as unilateral retaliatory measures by foreign trading partners.

- Section 701 of the Trade Enforcement Act of 2015 – Treating "Currency Manipulation" as a Countervailable Export Subsidy

  Since 1988, the US President has possessed congressionally-delegated tools to address and challenge the foreign exchange policies of major trading partners. On a rare few occasions in the late-1980s and early-1990s, the US Treasury Secretary, on behalf of the president, has named a trading partner as a "currency manipulator" – Korea and Taiwan (Republic of China) in1988; Taiwan, again, and China in 1992. Each citation lasted at least two six-month reporting periods for Korea and Taiwan; for China, it lasted five cycles.

The International Monetary System and "Currency Manipulation"

The International Monetary Fund (IMF), not the World Trade Organization, is the appropriate international forum to discuss and sort out currency-related matters. Article I of the Articles of Agreement (AoA) of the IMF tasks the Fund with the responsibility to promote exchange stability, maintain orderly exchange arrangements and ensure avoidance of competitive exchange depreciation. Article IV, Section 1(iii) of the AoA provides that members "shall avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members."

With a view to ensuring this goal, the Fund has conducted three significant episodes of surveillance reviews (1977, 2007, 2012) that set the rules to supervise arrangements for maintaining stable exchange rates within the international monetary system. As per the 2012 surveillance review, a Member Country would *only* be acting inconsistently with Article IV, Section 1(iii) if the Fund determined that:[46]

> *the member was manipulating its exchange rate or the international monetary system "in order to prevent effective balance of payments adjustment or* ***to gain an unfair competitive advantage*** *over other members."*

In order to judge that the manipulation was being conducted "to gain an unfair competitive advantage," the Fund would have to show that:

> *the* ***purpose*** *of securing such fundamental exchange rate misalignment in the form of an undervalued exchange rate* ***is to increase net exports****.*

As such, to confirm "manipulation", fundamental exchange rate misalignment must be conjoined with the *purpose* of securing an increase in net exports. The fact that the country's policies merely have the effect of securing an increase in net exports is not sufficient. The IMF thereafter lists several objective indicators to guide its assessment. They are:[47]

- protracted large-scale intervention in one direction in the exchange market
- official or quasi-official borrowing that either is unsustainable or brings unduly high liquidity risks, or excessive and prolonged official or quasi-official accumulation of foreign assets, for
- balance of payments purposes
- (a) the introduction, substantial intensification, or prolonged maintenance, for balance of payments purposes, of restrictions on, or incentives for, current transactions or payments, or (b) the introduction or substantial modification for balance of payments purposes of restrictions on, or incentives for, the inflow or outflow of capital
- the pursuit, for balance of payments purposes, of monetary and other financial policies that provide abnormal encouragement or discouragement to capital flows
- fundamental exchange rate misalignment
- large and prolonged current account deficits or surpluses
- large external sector vulnerabilities, including liquidity risks, arising from private capital flows.

The US' three criteria, as per Section 701, to determine that a foreign trading partner is engaging in "unfair currency practices" is a highly selective application of the IMF's guidelines and indicators.

In 2015, following an intense debate in the 114th Congress on the merits of including sanctionable currency clauses within the trading system, three new criteria were laid down to determine whether a foreign trade partner is engaging in "unfair currency practices"[48] As per Section 701 of the Trade Enforcement Act of 2015, these are: (a) a bilateral trade surplus larger than $20 billion to confirm a finding that it is *significant; (b*) a current account surplus larger than 3% of that economy's GDP to find that it is *material;* and (c) repeated net purchases of foreign currency to the tune of 2% or more of its GDP over a year to find guilt of *persistent one-sided intervention.* Should a trading partner satisfy all three criteria, it is to be subjected to an "enhanced bilateral engagement" process with meaningful penalties attached if the "appropriate policies to correct its undervaluation and external surpluses" are not adopted.[49] The penalties include a list of one or more of four authorized actions but does not include the imposition of countervailing duties as an authorized action. No president has as yet sanctioned a foreign trading partner's currency valuation to be a countervailable export subsidy on the basis of its presumed undervaluation.

Candidate and president-elect Trump had nonetheless repeatedly threatened to find China to be a "currency manipulator" and impose trade sanctions on the country. **To do so, as president, he could direct his Commerce Secretary to pursue countervailing duties on imports from any country (China) designated by his Treasury Secretary to be "currency manipulator", claiming that the undervaluation of the currency (in China's case, the renminbi) confers a margin of subsidy to its merchandise exports to the US which is countervailable**. Such CVDs that treat the renminbi to be a countervailable export subsidy will almost certainly be immediately challenged and, most likely, defeated at the WTO.

> An input or factor price distortion exists in a trading partner's economy on a generally-available basis or economy-wide scale, such as unusually low tax rates, below-market interest rates or *a currency's value*, such a distortion in the allocation of resources is *not* considered to be a subsidy.

As previously noted, **where an input or factor price distortion exists in a trading partner's economy on a generally-available basis or economy-wide scale, such as unusually low tax rates, below-market interest rates or a currency's value, such a distortion in the allocation of resources is *not* considered to be a subsidy, or form of subsidization, as per the WTO Agreement on Subsidies and Countervailing Measures.**[50] For a foreign trading partner's subsidy to be countervailable by the imposition of duties, it must be shown to be export-contingent and "specific"– i.e. enterprise-specific, industry-specific or region-specific – and thereby trade-distorting. A currency's value hence cannot, as per prevailing international trade rules, be treated as a prohibited and hence countervailable export subsidy.

- "Border Adjusted" Corporation (Business) Tax

  As president-elect and as president, Donald Trump has promised to impose a stiff "border tax" on exports to the US, with a particular focus on those goods produced by US manufacturers who have relocated their factories overseas. The Republican leadership in

WTO, "Border Adjustability" and House Republicans' Tax Blueprint

WTO rules permit the imposition of "border adjusted" consumption-based taxes, such as a value-added tax (VAT). GATT Article II:2(a) allows a government to impose at the time a product crosses its border "a charge equivalent to an internal tax imposed … on a like domestic product," as long as the internal charge is imposed consistent with the "national treatment" principle. 'Border adjustability' is a key feature of a VAT and VATs are not deemed to be trade-distorting. Because the tax is imposed at each stage of the production value-added process until final consumption and is rebated along the way at each prior value addition stage, the tax gets rebated when a good crosses the border at the exporters end and gets imposed when it arrives and crosses a border at the importers end. As such, border adjustments increase the cost of imported goods and reduce the cost of products exported abroad. However, when a country trades with another country that similarly imposes such a border-adjusted tax, which is the global norm, the effects offset each other.

Unique among countries, however, the US maintains a worldwide (as opposed to territorial) system of corporate taxation which, in effect, obliges US exporters to implicitly bear the cost of the US corporate income tax while imports into the US do not have to bear any such cost. It is this deficiency that the House Republican leadership tax blueprint aims to rectify by imposing a border-adjusted, destination-based, corporate income tax.

As currently written, however, the design of the tax falls afoul of international trade rules. For a "border adjusted" tax to be WTO-compliant, the Subsidies and Countervailing Measures (SCM) Agreement requires it to be an "indirect" tax. Consumption-based taxes are "indirect" taxes; a corporate income tax, as sought to be imposed by the House Republican leadership, is a "direct" tax (which applies to income, profits and factors of production). Such "direct" taxes are deemed to be prohibited export subsidy as per a reading of Article 1, Article 3.1(a) and Annex I(e) of the Agreement:[50]

- ***Article 1:*** a subsidy is said to exist *"if there is a* ***financial contribution*** *by a government or any public body"* where **government revenue that is otherwise due is foregone** or not collected (e.g. fiscal incentives such as a tax credit);

- ***Article 3.1(a):*** **subsidies "*** ***contingent,*** *in law or in fact, whether solely or as one of several other conditions,* ***upon export performance***" shall be prohibited (especially if certain deductions and therefore lower rates for domestically-produced goods are allowed which is denied to same imported products);

- ***Annex I(e):*** *The* ***full or partial exemption remission****, or deferral specifically* ***related to exports, of direct taxes*** *or social welfare charges paid or* ***payable by industrial or commercial enterprises****.*

the House of Representatives, in consultation with the White House, has already moved forward on a blueprint of a "border-adjusted, cash flow-based approach for taxing business income that is to be applied on a destination basis."[52] As a "border adjusted" and "destination based" tax, all products, services and intangibles that are imported, including from China, is to be subject to the tax at the border while all products, services and intangibles produced in the US and exported abroad will *not* be subject to tax. The cash-flow design and destination basis mimics a consumption-based approach to taxation.

For a "border adjusted" tax to be WTO-compliant, the Subsidies and Countervailing Measures Agreement requires it to be an "indirect" tax. Consumption-based taxes, such as a Value Added Tax (VAT) are "indirect" taxes; a corporate income tax, as sought to be imposed by the House Republican leadership, is a "direct" tax (which applies to income, profits and factors of production). Such "direct" taxes are deemed to be a prohibited export subsidy as per a reading of Article 1, Article 3.1(a) and Annex I(e) of the Agreement (*see box p.34*). In addition to this WTO-non-compatibility, the House Republican leadership tax blueprint also exempts domestic labor costs from the tax net, a practice common to direct taxes but not for "indirect" taxes. According to the method for calculating a VAT, the cost of labor is not deductible and is hence included in the tax base. Under the prevailing Republican tax blueprint however, a business can take an immediate deduction for its wage expenses and leave this factor of production out of the tax base. Giving a full deduction for labor costs amounts, in effect, to a prohibited export subsidy as a well as a violation of the national treatment principle. Until both these design lapses are fixed, the "border tax" will be successfully challenged at the WTO by the US' trading partners, including China, and could open the door to significant DSB-authorized trade sanctions against the US.

The Trump Administration and the House Republican leadership could, in theory, implement a complementary policy of introducing a VAT and equivalently reduce payroll taxes to make the design WTO-compliant. The former, however, is a political impossibility within Republican Party ranks; implementing the latter would overcomplicate the design and collection of the tax.[53] Further, at this time of writing, influential Republican senators and a host of powerful importer lobby groups have raised objections to the tax. How the House Republican leadership and the Trump Administration go about grafting a destination-based tax within what is fundamentally a worldwide system of direct taxation (the current US tax system) *and yet preserves WTO-compatibility*, remains to be seen. In whichever shape or form it is imposed, it will have a direct negative impact on all products and services imported into the US, including from China.

- Section 232(b) of Trade Expansion Act of 1962

Section 232(b) authorizes the Commerce Secretary to investigate the effect of imports on US "national security" and on this basis enables the US President to raise tariffs or otherwise regulate imports as necessary to strengthen national security. The important

criteria considered during the investigation are: (a) requirements of the defense and essential civilian sectors; (b) growth requirements of domestic industries to meet national defense requirements; (c) impact of foreign competition on the economic welfare of an essential/critical domestic industry; (d) displacement of any domestic products by imports causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity.

Historically, Section 232(b) has been invoked to limit imports of only particular items. Since the US joined the WTO in 1995, only two Section 232 investigations have been authorized – on crude oil in 1999 and on iron and steel in 2001.[54] In neither case was action recommended to the president. Much earlier though, in 1971, President Nixon had used Section 232(b) authority (in addition to other statutes) to famously impose his across-the-board 10 % surcharge at the time of the impending collapse of the Bretton Woods fixed exchange rate parities. President Ford, too, had sought to use 232(b) authority to impose a fee on petroleum and related products in 1975. **Like Nixon, President Trump could utilize Section 232(b) authority to penalize Chinese imports in overcapacity (steel, aluminum) or high-technology (semiconductors) sectors – especially if the dollar is deemed to be trading well above its fair market value.**

A surcharge on specific Chinese products would also fit within Commerce Secretary Ross' model of "banking selectively on protectionism" to temporarily relieve competitive pressure on domestic sectors that stand to benefit from anti-

Section 232(b) was one of three statutory enforcement tools listed by the Trump team as part of its centerpiece Seven Point Plan to rebuild the American economy. It places no limit on the nature of restrictions or the height of tariffs when imposed. And WTO law includes a national security exception clause (**GATT Article XXI Security Exceptions**) that permits a country to depart from its international trade obligations, including tariff bindings, at a time of war or other emergency in international relations.[55] However, during a non-international emergency situation, a dispute settlement panel will look unfavorably on the US' claims if China files a legal challenge arguing that its legitimate expectations of trade benefits were nullified or impaired by the US action. China could also take unilateral trade measures to restrict US access to its domestic market, such as barring state-owned enterprises from doing business with US firms, terminating its purchases of high-profile products, like civil aircraft and soybeans, and reneging on corrective measures instituted to comply with adverse WTO awards in intellectual property rights-related areas of US interest.

- Section 122 of Trade Act of 1974

Section 122 grants the President special powers "to deal with large and serious United States balance-of-payments deficits" by imposing temporary import surcharges up to 15 % or quantitative restrictions, or a combination of the two. The duration of such restrictions

is limited to 150 days unless Congress authorizes an extension. Unlike Section 232(b), Section 122 surcharges can be imposed across the board without the need for a finding of threat to national security. As such, Section 122 could serve as a handy introductory tool against China for President Trump prior to the imposition of harsher measures a couple of months later.[56] Its imposition could also be paired with an announcement that China is a "currency manipulator", as is reflected in its large bilateral trade surplus with the US. A surcharge on specific Chinese products would also fit within Commerce Secretary Ross' model of "banking selectively on protectionism" to temporarily relieve competitive pressure on domestic sectors that stand to benefit from anti-trade sentiment. A Section 122 surcharge that exceeds US tariff bindings will almost certainly be challenged and defeated by China at the WTO because it nullifies or impairs its legitimate expectations of trade benefits.

- Section 301 of Trade Act of 1974

Section 301 grants the President broad authority to unilaterally suspend US trade concessions or impose duties or other restrictions on the products or services of offending nations. The president can act on a non-discriminatory, industry-specific basis or may even target specific countries. He is also authorized to employ "any diplomatic, political, or economic leverage available" to remedy the unreasonable or discriminatory burdens imposed on US commerce by foreign governments. Given the breadth of authority, President Trump could pursue action under Section 301 against a number of foreign "unfair" trade practices, including market access restrictions and currency manipulation. Indeed, Section 301 was one of three statutory enforcement tools listed by the Trump team as part of its centerpiece Seven Point Plan to rebuild the American economy. This having been said, USTR has since the late-1990s interpreted Section 301 to require that it take any alleged violations of US rights *first* to the WTO's dispute settlement mechanism. In order to settle a case brought by the European Union in the late-1990s, the US agreed not to unilaterally invoke Section 301 prior to an affirmative WTO determination on the merits of its claim. The WTO Panel in the E.U.-brought case had found that the US failure to pursue WTO action in lieu of unilateral trade measures under Section 301 would violate its WTO commitments. As such, since the late-1990s, USTR has not imposed unilateral sanctions under Section 301 authority.

USTR has since the late 1990s interpreted Section 301 to require that it take any alleged violations of US rights first to the WTO's dispute settlement mechanism.

This reluctance to use Section 301 authority as a handy tool to unilaterally threaten and bludgeon trading partners has, as pointed out earlier, been a point of common lament of Ross, Lighthizer and Navarro. Using Section 301 authority, President Reagan had, after all, imposed quotas on imported steel, protected Harley-Davidson motorcycles from

Japanese competition, restrained imports of semiconductors and automobiles, and limited imports of sugar and textiles in the 1980s. These unilateral and successful impositions had left a lasting impression on a young Donald Trump as well as on a young Robert Lighthizer's during his early Reagan-era days at USTR. **As such, the stance of the Trump Administration on Section 301 authority will merit close watching.** Although use of

Table 2. US Section 301 Investigations Targeting Japan's Import Market Access, 1975–1997[56]

	Product-Alleged Market Access Issue	Year*
1	Steel–Japan/EC agreement "deflected" Japanese production to the US market	1976
2	Thrown silk–discriminatory market access agreement with Brazil, Republic of Korea, PRC	1977
3	Leather–quantitative import restrictions and high tariffs	1977
4	Cigars–import barriers and discriminatory internal taxes	1979
5	Pipe tobacco–high import prices and limits on distribution and advertising	1979
6	Leather footwear–quantitative import restrictions	1982
7	Semiconductors–domestic policies created "protective structure" and market access barrier	1985
8	Cigarettes–high tariffs, domestic monopoly, distribution restrictions	1985
9	Citrus-import quotas on fresh oranges and juice, domestic content requirements	1988
10	Construction services–barriers to foreign architectural, engineering, consulting services	1988
11	Satellites–ban on government procurement of imports	1989
12	Supercomputers–restrictive government procurement practices of imports	1989
13	Wood products–technical barriers to trade (product standards, building codes, testing, and certification) affecting imports	1989
14	Auto parts–policies restricting foreign access to replacement parts market	1994
15	Consumer photographic film and paper–discriminatory policies inhibiting sale and distribution of foreign products	1995
16	Agricultural products–"codling moth" testing requirement results in import ban of apricots, cherries, plums, pears, quince, peaches, nectarines, apples, walnuts	1997

EC = European Commission, PRC = People's Republic of China, US = United States.
Note:
* Earliest year of initiation of formal Section 301 petition or GATT/WTO dispute.

this authority will almost certainly be defeated at the WTO's DSB, Lighthizer is on the record supporting the view that WTO rulings need not necessarily be complied with because such rulings amount to instrumental law and is "only worthy of compliance to the extent that compliance makes [American] people better off."[58]

(C) Extreme Enforcement Measures

- Section 5(b) of Trading with the Enemy Act (TWEA) of 1917

  TWEA authorizes the President to regulate all forms of international commerce and to freeze and seize foreign assets during times of war. It was enacted when the US was entering World War I, hence as originally written Section 5(b) of TWEA delegated broad wartime powers to the President that were not confined to commerce with the enemy nation or nations. In 1933, the US Congress amended TWEA to apply not only during periods of declared war but also "during any other period of national emergency declared by the President." In 1976, Congress again amended TWEA to cover existing declared emergencies but restricted new actions to solely those "during the time of war."

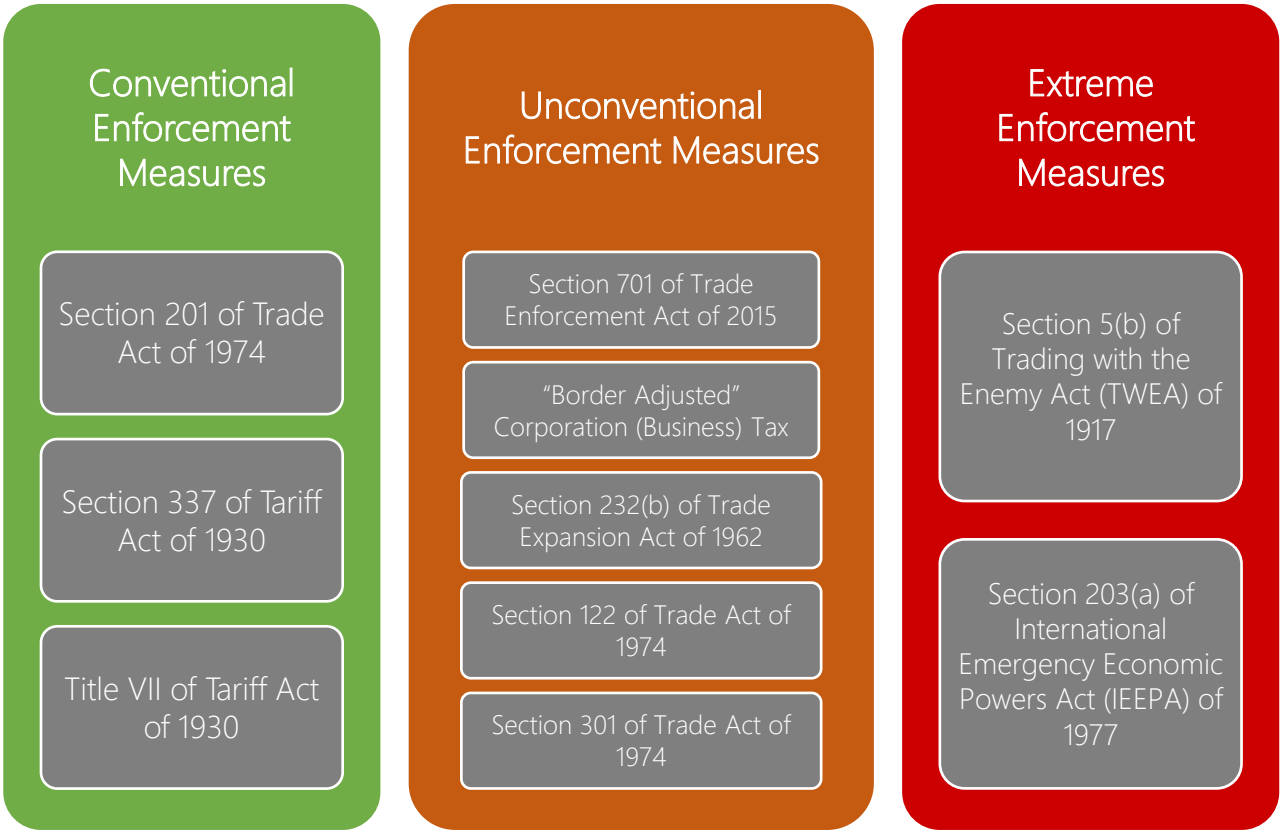
  Over time, Section 5(b) of TWEA has come to be seen as an overall weapon of economic warfare. President Trump could thus potentially cite continuing legal authority from the Iraq and Afghanistan wars and thereafter sharply raise tariffs on any country, including China, if he so desires. This would be an extreme measure. President Roosevelt had used TWEA to declare a bank holiday, President Johnson used it to restrict direct investment, and President Nixon also referenced it while imposing a 10% surcharge on imports. All these actions were taken, however, before TWEA's 1976 amendment which restricted all new presidential actions to solely "during the time of war." As earlier noted, WTO law includes a national security exception clause (**GATT Article XXI Security Exceptions**) that permits a country to depart from its international trade obligations, including tariff bindings, at a time of war or other emergency in international relations. China, on the other hand, could file a legal challenge claiming that its legitimate expectations of trade benefits have been nullified or impaired by the US action as well as take wide-ranging unilateral actions of its choosing.

- Section 203(a) of International Emergency Economic Powers Act (IEEPA) of 1977

  IEEPA authorizes the President to declare the existence of an "unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States" that originates "in whole or substantial part outside the United States." Following the declaration, the President can block transactions and freeze assets to deal with the threat. The purpose of IEEPA is to provide the President tools to impose economic sanctions on adversaries in situations that fall short of TWEA's "during the time of war" limitation.

Although this Act is supposed to be exercised only during an "unusual and extraordinary threat," US courts have never questioned presidential declarations of a "national emergency" under the National Emergencies Act. Further, the repeated references of IEEPA to impose sanctions against small countries, such as Sierra Leone, Somalia, Panama and Nicaragua in circumstances that hardly reach the threshold of posing an "unusual or extraordinary threat" to the US, suggests that the bar to declaring a "national emergency" is a low one.[59] Again, China could resort to GATT's Article XXIII Nullification or Impairment provision or unilateral actions of its choosing in response.

Figure 8. Summary of Trade Enforcement Powers



Conclusion

On November 8, 2016, Donald J. Trump overcame long odds to become the 45th president of the United States of America. The victory was all the more improbable, given that he ran against his own party's establishment as much as he ran against Hillary R. Clinton and the formidably well-oiled Democratic Party political machine. The victory reinforced in his mind the correctness of his strong – and unvarnished – convictions, including on trade policy, and will usher in a period of anti-establishment presidential leadership. "Business-not-as-usual" will be the watchword on policy, especially on trade policy, going forward.

Mr. Trump prevailed by staying loyal to a core set of protectionist (and anti-immigrant) views that he has long held, which tapped into the accumulated resentment of important sections of the electorate at a time of economic dislocation. China was a key target of his anti-trade views and three of seven points of his centerpiece economic plan to rebuild the American economy and "Make America Great Again" are mercantilist or protectionist initiatives that relate to China. In the short-to-medium term ahead, US-China economic ties from trade flows to foreign exchange markets to inward investment approvals will experience a period of significant turbulence.

Unilateral punitive measures against Beijing are not likely to be imposed at an early date. But to the extent that they are imposed following a one-sided consultation process that lacks a genuine spirit of give-and-take on the part of the Trump Administration, the potential for significant bilateral trade friction and even an outbreak of trade warfare should not be ruled out.

Beyond US-China ties, President Trump's remarkable elevation to the White House and strong views on trade policy also has the potential to re-write the long-held, mainstream consensus on trade policy in Washington, D.C. President Trump has long viewed himself as a champion of the American worker and now aims to bend the Republican Party – hitherto a relative bastion of free trade thinking, to his line of reasoning. Should he succeed and rank-and-file segments of the party defect entirely from its pro-trade moorings, the decades-old American consensus on trade could be shot through with harsh streaks of protectionism.

Past periods of economic upheaval have provided a fertile breeding ground for Congress and the White House to come together and augment the statute books with hard-hitting trade enforcement tools. The risk, going forward, is that such tools are authorized and thereafter employed liberally in a manner that are often-times inconsistent with the US' international trade commitments. In that case, not just US-China economic ties but the larger rules-bound multilateral trading system, too, will be all the worse off.

Appendices

Appendix I Summaries of WTO Dispute Settlement Cases Brought by US Against China[60]

Case Number	Date Initiated	Issue	Status/Outcome
DS519	January 2017	Subsidies to Chinese aluminum producers	Pending
DS517	December 2016	Administration of tariff-rate quotas for rice, wheat, and corn	Pending
DS511	September 2016	Use of excessive domestic subsidies for rice, wheat, and corn	Pending
DS508	July 2016	Export duties on nine (later expanded to 15) different raw materials	Pending
DS501	December 2015	Hidden and discriminatory tax exemptions for domestic Chinese aircraft producers	Pending
DS489	February 2015	Measures providing subsidies contingent upon export performance to enterprises in several industries	In April 2016, the two sides reached a Memorandum of Understanding. China agreed to remove WTO-inconsistent provisions.
DS450	September 2012	Export subsidies to auto and auto parts manufacturers in China	Pending
DS440	July 2012	WTO-inconsistent use of antidumping and countervailing measures (duties of up to 21.5%) against certain imported US-made vehicles	In May 2014, WTO panel ruled several measures were inconsistent with China's WTO obligations.
DS431	May 2012	Improper use of antidumping and countervailing duties on broiler products	In August 2013, WTO panel found certain Chinese measures inconsistent with WTO obligations. In July 2014, China informed DSB that it had implemented the DSB rulings. US disagreed with China's assertion and requested creation of WTO compliance panel, which was formed in July 2016.
DS427	March 2012	Export restrictions on rare earths and two other minerals (separate cases brought by EU and Japan)	Panel ruled several policies were inconsistent with WTO rules, which was largely upheld on appeal by China. In May 2015, China informed DSB it had implemented the ruling.

DS419	December 2010	Government programs extending subsidies to Chinese wind power equipment manufacturers that use parts and components made in China rather than foreign-made parts and components	On June 7, 2011, USTR announced China had agreed to end these subsidies, but noted that China had failed to fully report all of its subsidy programs.
DS414	September 2010	Discrimination against US suppliers of electronic payment services	In 2012, USTR announced that the US had largely prevailed in the ruling by a WTO dispute panel. In July 2013, China announced it had implemented the WTO's ruling, but the US disagreed with that assertion and said it would continue to monitor China's actions.
DS413	September 2010	Improper application of antidumping duties and countervailing duties on imports of grain oriented flat-rolled electrical steel from the United States	In June 2012, a panel ruled largely in favor of US position and this was generally upheld on appeal in October 2012. In December 2013, USTR stated that China had failed to remove the duties and in February 2014 requested a WTO compliance panel. That panel called on China to implement the WTO findings. In August 2015, China said that the duties had expired.
DS394	June 2009	Export restraints on various raw materials	In July 2011, a panel found that China's export taxes and quotas on raw materials violated its WTO commitments and this ruling was largely upheld on appeal. In January 2013, China reported that it implemented the ruling.
DS387	December 2008	Export subsidies for Chinese "Famous Chinese" brands programs	In December 2009, the USTR announced that China had agreed to eliminate these programs.
DS373	March 2008	Discriminatory treatment of US suppliers of financial information services in China	In November 2008, the USTR announced that China had agreed to eliminate discriminatory restrictions.
DS363	April 2007	Noncompliance with the WTO TRIPS agreement, namely in terms of its enforcement of IPR laws	In January 26, 2009, the WTO ruled that many of China's IPR enforcement policies failed to fulfill its WTO obligations. In June 2009, China announced that it would implement the WTO ruling by March 2010.
DS362	April 2007	Failure to provide sufficient market access to IPR-related products, namely in terms of trading rights and distribution services	In August 2009, a panel ruled that many of China's regulations on trading rights and distribution of films for theatrical release, DVDs, music, and books and journals were inconsistent with China's WTO obligation and this was largely upheld on appeal. In February 2010, China stated that it would implement the WTO's ruling.
DS358	February 2007	Government regulations giving WTO-inconsistent import and export subsidies to various industries in China	In November 20007, China agreed to eliminate the subsidies in question by January 1, 2008.
DS340	March 2006	Discriminatory regulations on imported auto parts, which often applied the high tariff rate on finished autos (25%) to certain auto parts (which normally averaged 10%)	In February 2008, a panel ruled that China's discriminatory tariffs were inconsistent with its WTO obligations. China appealed the decision, but a WTO Appellate Body largely upheld the WTO panel's decision. In August 2009, China said it had implemented the decision.

DS309	March 2004	Discriminatory tax treatment of imported semiconductors	The USTR announced in July 2004 that China had agreed to end its preferential tax policy, and in October 2005, both sides announced that the issue had been resolved. However, the USTR expressed concerns over new forms of financial assistance given by the Chinese government to its domestic semiconductor industry.

Appendix II Summaries of WTO Dispute Settlement Cases Brought by China Against US[61]

Case Number	Date Initiated	Issue	Status/Outcome
DS515	December 2016	Discriminatory provisions of US law that treat China as a "non-market economy" in case of antidumping proceedings involving products from China	Pending
DS471	December 2013	Improper application of methodologies used by US in antidumping investigations	In October 2016, a panel faulted the US' use of weighted average-to-transaction (WA-T) methodology in computing antidumping margin as well as its overly broad application of the 'Single Rate Presumption' norm. But it sided with other aspects of the US' application of the WA-T methodology. China has appealed aspects of the ruling, and the Appellate Body is currently seized of the matter.
DS449	September 2012	Improper application of: (a) Countervailing measures exclusively imposed on non-market economies; (b) Antidumping and countervailing measures on Chinese imports; and (c) failure to avoid double remedies by way of concurrent application antidumping and countervailing duties	In July 2014, the Appellate Body ruled that US acted inconsistently with its SCM Agreement obligations by failing to avoid double remedies. But US was within its right to take legislative action regarding cases pending before its courts so long as such legislation did not re-open already-decided court decisions. Final action to implement findings is pending.
DS437	May 2012	Improper countervailing duty measures and "rebuttable presumption" assumption used to identify state-owned enterprises (SOEs) as a 'public bodies'.	In June 2014, a panel upheld China's claim challenging the US' "rebuttable presumption" that majority owned SOEs are 'public bodies' within meaning of the SCM Agreement. Panel found in US' favor though regarding US' calculations of specificity determinations. Both parties cross-appealed. Appellate Body ruling in December 2014, mostly in China's favor, was adopted by DSB in January 2015. Actions to implement findings is pending.
DS422	February 2011	Discriminatory use of antidumping measures (zeroing methodology) on frozen warm-water shrimp and diamond sawblades from China	In June 2012, a panel ruled that the US' use of 'zeroing' was inconsistent with its Antidumping agreement obligations. The US brought he measures at issue into full compliance with the ruling in March 2013.
DS399	September 2009	Increased tariffs on certain passenger vehicle and light truck tires from China, causing material injury to the domestic industry	In September 2011, the Appellate Body (AB) upheld the US' defense that the subject tires were a "significant cause" of material injury and that China had failed to establish that the remedy imposed by the US was excessive.
DS392	April 2009	Discriminatory regulations that prohibit imports of poultry products from China	In September 2010, a panel ruled that US had violated the MFN treatment vis-à-vis China as well as applied the SPS Agreement without appropriate risk assessment and scientific evidence. No corrective recommendations were

			made because the offending rule implementing the ban had since expired.
DS379	September 2008	Improper use of antidumping and countervailing measures on certain Chinese products, ranging from steel pipes to laminated woven sacks to off-the-road tires	The Appellate Body (AB) ruled in March 2011 that US acted inconsistently with its SCM Agreement obligations by finding SOE's to be 'public bodies' as well as imposing double remedies from simultaneous application of AD and CVDs on the same imported product. On other points, AB ruled in US' favor.
DS368	September 2007	Discriminatory antidumping and countervailing duties on coated free sheet paper from China	Case was terminated in 2007 when US did not implement the relevant trade restriction after making negative final injury determination.
DS252	March 2002	Improper application of additional tariffs, as a safeguard measures on imports of certain steel products from countries, including China	In May 2003, a panel ruled that the US had failed to provide a reasoned and adequate explanation for the imposition of the measures. In December 2003, the US repealed the offending tariffs.

Appendix III Excerpt from 2016 USTR Report to Congress on China's WTO Compliance Summary Conclusions regarding China's WTO Compliance Efforts[62]

TRADING RIGHTS

China appears to be in compliance with its trading rights commitments in most areas. One significant exception involves China's restrictions on the right to import theatrical films, which China reserves for state trading. In 2012, following a successful WTO case brought by the United States challenging these restrictions, the United States and China entered into an MOU providing for substantial increases in the number of US films imported and distributed in China each year and substantial additional revenue for foreign film producers, although China has not yet fully implemented its MOU commitments.

IMPORT REGULATION

Tariffs

China has timely implemented its tariff commitments for industrial goods each year.

Customs and Trade Administration

Customs Valuation

China has issued measures that bring its legal regime for making customs valuation determinations into compliance with WTO rules, but implementation of these measures has been inconsistent from port to port, both in terms of customs clearance procedures and valuation determinations.

Rules of Origin

China has issued measures that bring its legal regime for making rules of origin determinations into compliance with WTO rules.

Import Licensing

China has issued measures that bring its legal regime for import licenses into compliance with WTO rules, although a variety of specific compliance issues continue to arise.

Non-Tariff Measures

China has adhered to the agreed schedule for eliminating non-tariff measures, but new prohibitions on the import of remanufactured products have generated concerns.

Tariff-rate Quotas on Industrial Products

Concerns about transparency and administrative guidance have plagued China's tariff-rate quota system for industrial products, particularly fertilizer, since China's accession to the WTO.

Other Import Regulation

Antidumping

China has issued laws and regulations bringing its legal regime in the AD area largely into compliance with WTO rules, although China still needs to issue additional procedural guidance such as rules governing expiry reviews. More significantly, China needs to improve its commitment to the transparency and procedural fairness requirements embodied in WTO rules, as the WTO found in three disputes brought by the United States. In addition, China needs to eliminate its apparent use of trade remedy investigations as a retaliatory tool.

Countervailing Duties

China has issued laws and regulations bringing its legal regime in the CVD area largely into compliance with WTO rules, although China still needs to issue additional procedural guidance such as rules governing expiry reviews. More significantly, China needs to improve its commitment to the transparency and procedural fairness requirements embodied in WTO rules, as the WTO found in three disputes brought by the United States. In addition, China needs to eliminate its apparent use of trade remedy investigations as a retaliatory tool.

Safeguards

China has issued measures bringing its legal regime in the safeguards area largely into compliance with WTO rules, although concerns about potential inconsistencies with WTO rules continue to exist.

EXPORT REGULATION

China maintains numerous export restraints that raise serious concerns under WTO rules, including specific commitments that China made in its WTO accession agreement. In the two WTO cases decided to date in this area, the WTO found that exports restraints maintained by China on raw material inputs breached China's WTO obligations.

INTERNAL POLICIES AFFECTING TRADE

Non-discrimination

While China has revised many laws, regulations and other measures to make them consistent with WTO rules relating to most-favored nation treatment and national treatment, concerns about compliance with these rules still arise in some areas.

Taxation

China has used its taxation system to discriminate against imports in certain sectors. This tax treatment raises concerns under WTO rules relating to national treatment.

Subsidies

China continues to provide injurious subsidies to its domestic industries, and some of these subsidies appear to be prohibited under WTO rules. Although China submitted a long-overdue WTO subsidies notification in 2015 covering subsidies provided during the period from 2009 to 2014, this notification was far from complete. In addition, China continued to have a poor record of responding to other WTO members' questions about its subsidies before the WTO's Subsidies Committee.

Price Controls

China has progressed slowly in reducing the number of products and services subject to price control or government guidance pricing.

Standards, Technical Regulations and Conformity

Assessment Procedures China continues to take actions that generate WTO compliance concerns in the areas of standards, technical regulations and conformity assessment procedures, particularly with regard to transparency, national treatment, the pursuit of unique Chinese national standards, and duplicative testing and certification requirements.

Restructuring of Regulators

China has restructured its regulators for standards, technical regulations and conformity assessment procedures in order to eliminate discriminatory treatment of imports, although in practice China's regulators sometimes do not appear to enforce regulatory requirements as strictly against domestic products as imports.

Standards and Technical Regulations

China continues to pursue the development of unique Chinese national standards, despite the existence of well-established international standards, apparently as a means for protecting domestic companies from competing foreign technologies and standards.

Conformity Assessment Procedures

China appears to be turning more and more to in-country testing for a broader range of products, which does not conform with international practices that generally accept foreign test results and certifications.

Transparency

China has made progress but still does not appear to notify all new or revised standards, technical regulations and conformity assessment procedures as required by WTO rules.

Other Industrial Policies

State-owned and State-invested Enterprises

The Chinese government has heavily intervened in investment and other strategic decisions made by state-owned and state-invested enterprises in certain sectors.

State Trading Enterprises

It is difficult to assess the activities of China's state trading enterprises, given inadequate transparency and China's failure to meet the WTO's detailed reporting requirements for state trading enterprises.

Government Procurement

While China is moving slowly toward fulfilling its commitment to accede to the GPA, it is maintaining and adopting government procurement measures that give domestic preferences.

INVESTMENT

China has revised many laws, regulations and other measures on foreign investment to eliminate WTO-inconsistent requirements relating to export performance, local content, foreign exchange balancing and technology transfer. However, some of the revised measures continue to "encourage" these requirements. Although China continues to consider reforms to its investment regime, including the use of a "negative list," many aspects of China's investment regime, including lack of a substantially liberalized market, maintenance of administrative approvals and the potential for a new and overly broad national security review system, continue to cause foreign investors great concern. China also has issued industrial plans covering the auto and steel sectors that include guidelines that appear to conflict with its WTO obligations. In addition, China has added a variety of restrictions on investment that appear designed to shield inefficient or monopolistic Chinese enterprises from foreign competition.

AGRICULTURE

While China has timely implemented its tariff commitments for agricultural goods, a variety of non-tariff barriers continue to impede market access, particularly in the areas of SPS measures and inspection-related requirements. In addition, China's TRQ system for bulk agricultural commodities does not seem to function consistent with China's WTO accession agreement. It also appears that China is exceeding its domestic support commitments for certain agricultural commodities.

Tariffs

China has timely implemented its tariff commitments for agricultural goods each year.

Tariff-rate Quotas on Bulk Agricultural Commodities

China's TRQ system for bulk agricultural commodities does not seem to be consistent with China's WTO accession agreement and is characterized by opaque management practices. In December 2016, the United State launched a WTO case challenging China's administration of TRQs for rice, wheat and corn.

China's Biotechnology Regulations

China's dysfunctional biotechnology approval process continues to affect trade.

Sanitary and Phytosanitary Issues

China's regulatory authorities continue to impose SPS measures in a non-transparent manner and without clear scientific bases, including BSE-related import bans on US beef and beef products, pathogen standards and residue standards for raw meat and poultry products, and an Avian Influenza-related import suspension on all US poultry products. Meanwhile, China has made some progress but still does not appear to notify all proposed SPS measures as required by WTO rules.

Inspection-related Requirements

China's regulatory authorities continue to administer onerous inspection-related requirements, and a new food safety certificate requirement has the potential to create significant market access challenges.

Domestic Support

In recent years, China has been significantly increasing domestic subsidies and other support measures for its agricultural sector, including a number of products competing with imports from the United States. In September 2016, the United States launched a WTO case challenging China's government support for the production of rice, wheat and corn as being in excess of China's commitments.

Export Subsidies

It is difficult to determine whether China maintains export subsidies in the agricultural sector, in part because China has not notified all of its subsidies to the WTO.

INTELLECTUAL PROPERTY RIGHTS

Despite ongoing revisions of laws and regulations relating to intellectual property rights, and greater emphasis on rule of law and enforcement campaigns in China, key weaknesses remain in China's protection and enforcement of intellectual property rights, particularly in the area of trade secret misappropriation. Intellectual property rights holders face not only a complex and uncertain enforcement environment, but also pressure to transfer intellectual property rights to enterprises in China through a number of government policies and practices.

SERVICES

While China has implemented most of its services commitments, concerns remain in some service sectors. In addition, challenges still remain in ensuring the benefits of many of the commitments that China has nominally implemented are available in practice, as China has continued to maintain or erect restrictive or cumbersome terms of entry or internal expansion in some sectors. These barriers, often imposed through non-transparent and lengthy licensing processes, prevent or discourage foreign suppliers from gaining market access through informal bans on entry, high capital requirements, branching restrictions or restrictions taking away previously acquired market access rights.

Distribution Services

China has made substantial progress in implementing its distribution services commitments, although significant concerns remain in some areas.

Wholesaling Services

China has issued regulations generally implementing its commitments in the area of wholesaling and commission agents' services. One significant exception involves China's restrictions on the distribution of imported theatrical films. In 2012, following a successful WTO case brought by the United States challenging these restrictions, the United States and China entered into an MOU providing for substantial increases in the number of US films imported and distributed in China each year and substantial additional revenue for foreign film producers, although China has not yet fully implemented its MOU commitments. Meanwhile, US companies continue to have concerns about restrictions on the distribution of other products, such as pharmaceuticals, crude oil and processed oil.

Retailing Services

China has issued regulations generally implementing its commitments in the area of retailing services, although some concerns remain with regard to licensing discrimination. China continues to maintain restrictions on the retailing of processed oil.

Franchising Services

China has issued regulations generally implementing its commitments in the area of franchising services.

Direct Selling Services

China has issued regulations generally implementing its commitments in the area of direct selling services, although significant regulatory restrictions, including service center requirements imposed on the operations of direct sellers, continue to generate concerns.

Financial Services

Banking

China has taken a number of steps to implement its banking services commitments, although some of these efforts have generated concerns, and there are some instances in which China still does not seem to have fully implemented particular commitments, such as with regard to Chinese-foreign joint banks and bank branches.

Motor Vehicle Financing

China has implemented its commitments with regard to motor vehicle financing.

Insurance

China has issued measures implementing most of its insurance commitments, but these measures have also created market access problems and foreign insurers' share of China's market remains very low.

Financial Information

In response to a WTO case brought by the United States, China has established an independent regulator for the financial information sector and has removed restrictions that had placed foreign suppliers at a serious competitive disadvantage.

Electronic Payment Services

China has not yet implemented electronic payment services commitments that were scheduled to have been phased in no later than December 11, 2006. China agreed to implement these commitments by July 2013 in order to comply with the rulings in a WTO case brought by the United States, but it has not yet done so.

Legal Services

China has issued measures intended to implement its legal services commitments, although these measures give rise to WTO compliance concerns because they impose an economic needs test, restrictions on the types of legal services that can be provided and lengthy delays for the establishment of new offices.

Telecommunications

It appears that China has nominally kept to the agreed schedule for phasing in its WTO commitments in the telecommunications sector. However, restrictions maintained by China on value-added services have created serious barriers to market entry for foreign suppliers seeking to provide value-added services. In addition, China's restrictions on basic services, such as informal bans on new entry, a requirement that foreign suppliers can only enter into joint ventures with state-owned enterprises and exceedingly high capital

requirements, have totally blocked foreign suppliers from accessing China's basic services market.

Audio-visual and Related Services

China has taken steps to comply with the rulings in a WTO case brought by the United States with regard to the distribution of DVDs and sound recordings, although more steps are needed. Meanwhile, China's restrictions in the area of theatre services have wholly discouraged investment by foreign suppliers, and China's restrictions on services associated with television and radio greatly limit participation by foreign suppliers. Many Chinese government agencies are now seeking to regulate audio-visual and other media services, and this situation has created a lack of clarity about which laws and regulations apply to these services.

Internet-related Services

China's Internet regulatory regime is restrictive and non-transparent and impacts a broad range of commercial services activities conducted via the Internet. In addition, China's treatment of foreign companies seeking to participate in the development of cloud computing services, including computer data and storage services provided over the Internet, raises concerns in light of China's GATS commitments.

Construction and Related Engineering Services

China has issued measures intended to implement its construction and related engineering services commitments, although these measures are problematic because they also impose high capital requirements and other constraints that limit market access.

Educational Services

China made only limited GATS commitments in the educational services sector, and it has not sought to go beyond those commitments.

Express Delivery Services

China has allowed foreign express delivery companies to operate in the express delivery sector and has implemented its commitment to allow wholly foreign-owned subsidiaries by December 11, 2004. However, China has blocked foreign companies' access to the document segment of China's domestic express delivery market.

Logistics Services

China has generally allowed foreign companies to supply logistics services, but foreign companies can face restrictions that are not applied to domestic companies.

Aviation Services

China has provided additional market access to US providers of air transport services through progressive liberalization of a bilateral agreement with the United States, although China has not yet fully implemented its commitments under that agreement.

Maritime Services

Even though China made only limited WTO commitments relating to its maritime services sector, it has increased market access for US service providers through a bilateral agreement.

Tourism and Travel-related Services

China treats foreign travel agencies less favorably than domestic travel agencies in some respects, while China's regulation of foreign suppliers of global distribution system services has generated concerns in light of China's GATS commitments.

LEGAL FRAMEWORK

Transparency

Official Journal

China has re-confirmed its commitment to use a single official journal for the publication of all trade-related laws, regulations and other measures. To date, it appears that some but not all central government entities publish their trade-related measures in this journal, although they take a narrow view of the types of trade-related measures that need to be published.

Translations

China has not yet established an appropriate infrastructure to undertake the agreed upon translations of its trade-related measures into one or more of the WTO languages in a timely manner.

Public Comment

China has adopted notice-and-comment procedures for proposed laws and committed to use notice-and-comment procedures for proposed trade- and economic-related regulations and departmental rules, subject to specified exceptions. However, in practice, many of these measures are not made public prior to implementation.

Enquiry Points
China has complied with its obligation to establish enquiry points.

Uniform Application of Laws
Some problems with the uniform application of China's laws and regulations persist.

Judicial Review
China has established courts to review administrative actions involving trade-related matters, but few US or other foreign companies have had experience with these courts.

Other Legal Framework Issues
Various other areas of China's legal framework can adversely impact the ability of the United States and US exporters and investors to enjoy fully the rights to which they are entitled under the WTO agreements.

About the Author

Sourabh Gupta is a senior international relations policy specialist. His areas of specialization include: analysis of key major power relationships in the Asia-Pacific region, analysis of developments in Asian economic regionalism, World Trade Organization-related politics and negotiations, land and maritime territorial disputes as well as maritime law-related developments in the Asia-Pacific region. He holds master's degrees in international security studies and international relations from Georgetown University and Syracuse University, respectively, and a bachelor's degree from the University of Mumbai.

Acknowledgements

I am deeply grateful to Junxiao Peter Liang for his research and technical assistance and to Alek Chance for his editorial support. – SG

Notes

[1] DeNavas-Walt and Proctor, “Income and Poverty in the United States: 2013,” 5.
[2] Furman, “The United States and Europe: Short-Run Divergence and Long-Run Challenges.”
[3] Summers, “A disaster is looming for American men.”
[4] Hicks and Devaraj, “The Myth and the Reality of Manufacturing in America.”
[5] Ibid, 3.
[6] DeLong, “NAFTA and other trade deals have not gutted American manufacturing — period.”
[7] Moran, “American Multinationals and American Economic Interests: New Dimensions to an Old Debate,” 4.
[8] Jackson, “Outsourcing and Insourcing Jobs in the US Economy: Evidence Based on Foreign Investment Data,” 10.
[9] Trump, “Donald J. Trump Address: Declaring American Economic Independence.”
[10] Muro and Liu, “Another Clinton-Trump divide: High-output America vs low-output America.”
[11] Navarro and Ross, “Scoring the Trump Economic Plan: Trade, Regulatory, and Energy Policy Impacts.”
[12] All three portraits were acquired from the public domain or labeled for noncommercial reuse
Robert Lighthizer: https://greatagain.gov/ustr-dcf9bf87f3bd#.fs9y2e2y0
Wilbur Ross: https://upload.wikimedia.org/wikipedia/commons/5/54/Wilbur_Ross.jpg
Peter Navarro: https://i.vimeocdn.com/video/553661009_1280x720.jpg
[13] Navarro and Ross, “Scoring the Trump Economic Plan: Trade, Regulatory, and Energy Policy Impacts.”
[14] Morrison, “China-US Trade Issues,” 10.
[15] Lighthizer, “Testimony Before the US-China Economic and Security Review Commission,” 17.
[16] Navarro and Ross, “Scoring the Trump Economic Plan: Trade, Regulatory, and Energy Policy Impacts.”
[17] Barfield, “Crafting an Action-Driven Response to China’s Digital Trade Barriers,” 5.
[18] Schreckinger, “Wilbur Ross’s Chinese Love Affair.”
[19] The Economist, “Mr. Protectionism's riskiest call.”
[20] Bown and McCulloch, “US-Japan and US-PRC Trade Conflict: Export Growth, Reciprocity, and the International Trading System,” 7, 14.
[21] Lighthizer, “Donald Trump is no liberal on trade.”
[22] Morrison, “China-US Trade Issues.”
[23] Lighthizer, “Testimony Before the US-China Economic and Security Review Commission,” 33.
[24] Horlick, “WTO dispute settlement and the Dole commission."
[25] Chilton and Bewster, “"Supplying Compliance: Why and When the US Complies with WTO Rulings,"221.
[26] Antigua and Barbuda DSB Report.
[27] Grimmett, “World Trade Organization (WTO) Decisions and Their Effect in US Law,” 6.
[28] Arnsdorf, “Dole lobbied Trump's team on Taiwan for months.”
[29] Davidson, “Trump’s Muse on US Trade with China.”
[30] The Trump-Pence Presidential Transition Team, “President-Elect Donald J. Trump Transition Builds Out White House Policy Team.”
[31] Executive Office of the President, "Ensuring Long-Term US Leadership in Semiconductors," 7.
[32] US-China Economic and Security Review Commission, "2016 Report to Congress of the US-China Economic and Security Review Commission," 126.
[33] Plaskin, “Playboy Interview: Donald Trump (1990).”
[34] Ibid.
[35] World Trade Organization, “Agreement on Subsidies and Countervailing Measures.”
[36] General Agreement on Tariffs and Trade Article XXIII.

[37] World Trade Organization, “Map of disputes between WTO Members.”
[38] World Trade Organization, “Dispute Settlement.”
[39] Noland et al., “Assessing Trade Agendas in the US Presidential Campaign,” 34.
[40] Lewis, “Presidential Authority over Trade: Imposing Tariffs and Duties,” 2.
[41] Clinton et al., “Implications of the 2016 US Presidential Election for Trade Policy, 2nd Edition,” 8.
[42] Barfield, “Crafting an Action-Driven Response to China’s Digital Trade Barriers.”
[43] World Trade Organization, “Accession of The People's Republic of China,” 8-9.
[44] Stewart and Drake, “How The WTO Undermines US Trade Remedy Enforcement,” 2-3.
[45] World Trade Organization, “Map of disputes between WTO Members.”
[46] International Monetary Fund, “Modernizing the Legal Framework for Surveillance - An Integrated Surveillance Decision,” 26.
[47] International Monetary Fund, “Guidance Note for Surveillance Under Article IV Consultations,” 51.
[48] US Department of Treasury, “Foreign Exchange Policies of Major Trading Partners of the United States: Report to the Congress,” 1.
[49] Bergsten and Schott, “TPP and Exchange Rates,” 353.
[50] World Trade Organization, “Agreement on Subsidies and Countervailing Measures.”
[51] World Trade Organization, “Agreement on Subsidies and Countervailing Measures.”
[52] A Better Way, “Tax Policy Paper.”
[53] Avi-Yonah and Clausing, "Problems with Destination-Based Corporate Taxes and the Ryan Blueprint," 13.
[54] Clinton et al., “Implications of the 2016 US Presidential Election for Trade Policy, 2nd Edition,” 10.
[55] General Agreement on Tariffs and Trade Article XXIII.
[56] Noland et al. “Assessing Trade Agendas in the US Presidential Campaign,” 11.
[57] Bown and McCulloch, “US-Japan and US-PRC Trade Conflict: Export Growth, Reciprocity, and the International Trading System,” 15.
[58] Lighthizer, “Testimony Before the US-China Economic and Security Review Commission,” 33.
[59] Noland et al. “Assessing Trade Agendas in the US Presidential Campaign,” 13.
[60] Morrison, “China-US Trade Issues,” 48.
[61] The World Trade Organization, “Map of disputes between WTO Members.”
US Trade Representative, “Pending WTO Disputes” “Concluded WTO Dispute Proceedings.”
[62] US Trade Representative, "2016 Report to Congress on China’s WTO Compliance" 24-29.

Bibliography

A Better Way. “Tax Policy Paper.” *Speaker of the House*. June 24, 2016. https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf

Antigua and Barbuda’s Dispute Settlement Body (Antigua and Barbuda DSB) Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/DSB/R, November, 23, 2016, http://www.ip-watch.org/weblog/wp-content/uploads/2016/11/DSB-statements-23.11.16-1.pdf

Arnsdorf, Isaac. “Dole lobbied Trump's team on Taiwan for months,” *The Politico Magazine*. December 6, 2016. http://www.politico.com/story/2016/12/bob-dole-donald-trump-taiwan-232266

Avi-Yonah, Reuven S., and Clausing, Kimberly. "Problems with Destination-Based Corporate Taxes and the Ryan Blueprint," *Law and Economics Research Paper Series* 16-029, University of Michigan Law School, January 2017.

Barfield, Claude. "Crafting an Action-Driven Response to China’s Digital Trade Barriers," *American Enterprise Institute*, January 25, 2017, http://www.aei.org/publication/crafting-an-action-driven-response-to-chinas-digital-trade-barriers/

_____, “China should be granted market economy status,” *East Asia Forum*, December 11, 2016, http://www.eastasiaforum.org/2016/12/11/china-should-be-granted-market-economy-status/

Bergsten, C. Fred., and Schott, Jeffrey J. “TPP and Exchange Rates.” In *Trans-Pacific Partnership: An Assessment*, edited by Cathleen Cimino-Isaacs and Jeffrey J. Schott, 349-354. Peterson Institute for International Economics. July, 2016.

Bown, Chad., and McCulloch, Rachel. “US-Japan and US-PRC Trade Conflict: Export Growth, Reciprocity, and the International Trading System,” *ADBI Working Paper Series*, no. 158, November, 2009.

Chilton, Adam, S., and Bewster, Rachel. "Supplying Compliance: Why and When the US Complies with WTO Rulings," *The Yale Journal of International Law* 39, no. 201 (2014): 219-239.

Clinton, William., Lincicome, Scott., Picone, Brian., Eglin, Richard., and Barrett, William. “Implications of the 2016 US Presidential Election for Trade Policy, 2nd Edition,” White & Case, January 13, 2017, https://www.whitecase.com/publications/alert/implications-2016-us-presidential-election-trade-policy

Davidson, Adam. “Trump’s Muse on U.S. Trade with China,” *The New Yorker*, October 12, 2016, http://www.newyorker.com/business/currency/trumps-muse-on-u-s-trade-with-china

DeLong, J. Bradford. “NAFTA and other trade deals have not gutted American manufacturing — period,” *Vox*, January 24, 2017, http://www.vox.com/the-big-idea/2017/1/24/14363148/trade-deals-nafta-wto-china-job-loss-trump

DeNavas-Walt, Carmen., and Proctor, Bernadette D. “Income and Poverty in the United States: 2013,” US Census Bureau, September, 2014, http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf

The Economist. “Mr Protectionism's riskiest call,” January 22, 2004, http://www.economist.com/node/2367396

Executive Office of the President. "Ensuring Long-Term US Leadership in Semiconductors," *President’s Council of Advisors on Science and Technology*, January, 2017, https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_ensuring_long-term_us_leadership_in_semiconductors.pdf

Furman, Jason. “The United States and Europe: Short-Run Divergence and Long-Run Challenges,” *Bruegel*, May 11, 2016, http://bruegel.org/events/the-united-states-and-europe-short-term-divergence-but-shared-challenges/

General Agreement on Tariffs and Trade Article XXIII, April 15, 1994, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1994].

Grimmett, Jeanne. “World Trade Organization (WTO) Decisions and Their Effect in US Law,” *CRS Report for Congress*, February 4, 2011, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1812&context=key_workplace

Hicks, Michael J., and Srikant Devaraj. "The Myth and the Reality of Manufacturing in America," *Ball State University Center for Business and Economic Research*, June, 2015, http://conexus.cberdata.org/files/MfgReality.pdf

Horlick, Gary N. "WTO dispute settlement and the Dole commission," *J. World Trade* 29 (1995): 45.

International Monetary Fund. “Modernizing the Legal Framework for Surveillance - An Integrated Surveillance Decision,” June 26, 2012.

_____. “Guidance Note for Surveillance Under Article IV Consultations,” May, 2015.

Jackson, James K. “Outsourcing and Insourcing Jobs in the US Economy: Evidence Based on Foreign Investment Data,” *CRS Report for Congress*, May 10, 2012, https://fas.org/sgp/crs/misc/RL32461.pdf

Lewis, Caitlain Devereaux. “Presidential Authority over Trade: Imposing Tariffs and Duties,” *CRS Report for Congress*, December 9, 2016 https://fas.org/sgp/crs/misc/R44707.pdf

Lighthizer, Robert. “Testimony Before the US-China Economic and Security Review Commission,” *US-China Economic and Security Review Commission*, June 9, 2010, https://www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf

_____. “Donald Trump is no liberal on trade,” *The Washington Times*, May 9, 2011, http://www.washingtontimes.com/news/2011/may/9/donald-trump-is-no-liberal-on-trade/

Moran, Theodore H. “American Multinationals and American Economic Interests: New Dimensions to an Old Debate,” *Working Paper Series 09-3*, Peterson Institute for International Economics, June, 2009.

Morrison, Wayne. "China-US Trade Issues," *CRS Report for Congress*, February 9, 2017 https://fas.org/sgp/crs/row/RL33536.pdf

Muro, Mark., Liu, Sifan. "Another Clinton-Trump divide: High-output America vs low-output America," *The Brookings Institution*, November 29, 2016, https://www.brookings.edu/blog/the-avenue/2016/11/29/another-clinton-trump-divide-high-output-america-vs-low-output-america/

Navarro, Peter., and Ross, Wilbur. "Scoring the Trump Economic Plan: Trade, Regulatory, and Energy Policy Impacts," September 29, 2016, https://assets.donaldjtrump.com/Trump_Economic_Plan.pdf

Noland, Marcus., Hufbauer, Gary, Clyde. Robinson, Sherman., and Moran, Tyler. "Assessing Trade Agendas in the US Presidential Campaign," *PIIE Briefing 16-6*, Peterson Institute for International Economics, September, 2016.

Plaskin, Glenn. "Playboy Interview: Donald Trump (1990)," *Playboy*. March 14, 2016. http://www.playboy.com/articles/playboy-interview-donald-trump-1990

Schreckinger, Ben. "Wilbur Ross's Chinese Love Affair," *The Politico Magazine*, January 2, 2017, http://www.politico.com/magazine/story/2017/01/wilbur-rosss-chinese-love-affair-214590

Stewart, Terence and Drake, Elizabeth. "How the WTO Undermines US Trade Remedy Enforcement," February 2017, http://www.americanmanufacturing.org/page/-/uploads/resources/How%20the%20WTO%20Undermines%20U.S.%20Trade%20Remedy%20Enforcement.pdf

Summers, Lawrence. "A disaster is looming for American men," *The Washington Post*, September 26, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/09/26/larry-summers-a-disaster-is-looming-for-american-men/

Trump, Donald. "Donald J. Trump Address: Declaring American Economic Independence," *Trump and Pence for President*, June 28, 2016, https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-re-declaring-our-american-independence

Trump-Pence Presidential Transition Team. *President-Elect Donald J. Trump Transition Builds Out White House Policy Team*, January 5, 2017, http://www.presidency.ucsb.edu/ws/index.php?pid=119958

US-China Economic and Security Review Commission. "2016 Report to Congress of the US-China Economic and Security Review Commission," November, 2016, https://www.uscc.gov/Annual_Reports/2016-annual-report-congress

US Trade Representative. "2016 Report to Congress on China's WTO Compliance," January, 2017, https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf

US Trade Representative. "Pending WTO Disputes" "Concluded WTO Dispute Proceedings," Retrieved February 24, 2017, https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement

US Department of Treasury. "Foreign Exchange Policies of Major Trading Partners of the United States: Report to the Congress". Washington, DC, April 29, 2016. https://www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/2016-4-29%20(FX%20Pol%20of%20Major%20Trade%20Partner)_final.pdf

World Trade Organization. “Agreement on Subsidies and Countervailing Measures (“SCM Agreement”),” Retrieved February 24, 2017, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm

World Trade Organization. “Accession of The People's Republic of China,” *Protocols of Accession*. Retrieved February 24, 2017, https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm

World Trade Organization. “Chronological list of disputes cases,” *Dispute Settlement*. Retrieved February 24, 2017, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

World Trade Organization. “Map of disputes between WTO Members,” *Dispute Settlement*, Retrieved February 24, 2017, https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm

1919 M Street NW Suite 310
Washington, DC 20036
www.chinaus-icas.org