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Uncertainty Because of Upheaval in International Trade Law: What Is Happening at the WTO, in FTAS and in US Policy?

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UNCERTAINTY BECAUSE OF UPHEAVAL IN INTERNATIONAL TRADE LAW: WHAT IS HAPPENING AT THE WTO, IN FTAS, AND IN U.S. POLICY?

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I. Uncertainty and Upheaval at All Three Levels

The *Oxford English Dictionary* teaches that "uncertainty" refers to matters or effects that are "open to question," "in doubt," or "unforeseeable." The venerable OED also teaches that "upheaval" is synonymous with "disruption," "revolution," and "chaos." It is lexicographically accurate to say that since the election of Donald J. Trump to the Presidency, the world of International Trade Law has been cursed by uncertainty and upheaval. What has happened at all three levels of International Trade Law: multilateral (*i.e.*, World Trade Organization (WTO)); regional (*i.e.*, free trade agreement (FTA)); and national (*i.e.*, U.S.) level law – has been unforeseeable and chaotic.

What follows is a synopsis of the uncertainty, caused by the upheaval, at each level:

(1) At the WTO, the focus is on the future of the "crown jewel" of the multilateral trading system, namely, dispute settlement, and particularly the future of the Appellate Body, which has issued over 100 opinions since inception on 1 January 1995. By December 2019, the Appellate Body may cease to function.

(2) At the FTA level, attention is on the *United States-Canada-Mexico Agreement* (*USMCA*), sometimes called the *North American Free Trade Agreement* (*NAFTA*) 2.0. This deal was signed on 30 November 2018, but has not yet entered into force. Whether the *USMCA* will take effect (and if not, whether *NAFTA* 1.0 will remain in force) is uncertain, thus causing potential disruption to North American supply chains.

(3) At the U.S. level, the focus is on the use of Section 232 of the *Trade Expansion Act of 1962*, as amended, against steel and aluminum imports, and possibly against car and car parts, respectively; and on the unilateral 10-25 percent tariffs on a vast array of Chinese products under Section 301 of the *Trade Act of 1974*, as amended, to retaliate against China's theft of intellectual property (IP).

The uncertainty generated by upheaval implicates interests in Kansas and Missouri, plus most if not all other States.

For example, for many businesses in this region, and indeed across America, the Section 232 and 301 cases have cast doubt on whether, and what, products might be exempt entirely from a tariff retaliation list, and if not, whether specific merchandise might be excluded from coverage on such a list. There are yet more illustrations of the tangible turmoil across International Trade Law since January 2017. For example, at the multilateral level, the WTO Appellate Body issued decisions in antidumping (AD) and countervailing duty (CVD) cases that generated controversy, thanks in part to their being misconstrued. At the FTA level, uncertainty shrouds Congressional action on the *USMCA*, as well as certain provisions in this FTA (including major industrial sectors, such as autos, and on labor and employment discrimination rules). At the domestic level, there are concerns about the Trump Administration's continued use of Section 232 against Canadian and Mexican steel and aluminum, and against all foreign autos and auto parts. There also is doubt as to the future of the Sino-American Trade War triggered by the Section 301 action.

II. Multilateral Level: The Future of the WTO Appellate Body

In domestic judicial systems, potential candidates for judgeships are screened, overtly or not, in part on the extent to which their views on legal controversies accord with the nominating authority. "What does the candidate think about so and so, and how might she rule on such and such?" are questions asked of most judicial nominees. So, it would be naïve to think WTO Members nominate or support Appellate Body candidates looking only at the quality of the legal minds of prospective nominees.

Conceptually, some WTO Members regard themselves as "Principals," and Appellate Body candidates as their prospective "Agents." The Principals care about ideology over expertise, and pliability over independence. Thus, the Principals do not regard those candidates as "Trustees" for the GATT-WTO system, nor do they regard themselves as common beneficiaries in the system subject to an impartial rule of law. Empirical testing of Principal-Agent hypotheses suggests Members exercise their power to nominate and appoint judges in a way that influences the preferences of judges. One study, surveying the record of all Appellate Body Members "present[s] a view of an Appellate Body appointment process that, far from representing a pure search for expertise, is deeply politicized and offers member-state principals opportunities to influence

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Appellate Body members *ex ante* and possibly *ex post*."[2] The same study also shows "the Appellate Body nomination process has become progressively more politicized over time as member states, responding to earlier and controversial Appellate Body decisions, became far more concerned about judicial activism and more interested in the substantive opinions of Appellate Body candidates, systematically championing candidates whose views on key issues most closely approached their own...."[3]

An illustrative example is the case of Professor James Thuo Gathii, a Kenyan citizen and chaired Professor at Loyola Law School in Chicago. He was nominated in May 2013 to fill a vacancy on the Appellate Body. Despite support from many WTO Members, he faced strong, and ultimately insurmountable, opposition from the U.S. The irony of this opposition was the Administration had professed on various occasions support for developing and least developed countries, especially in Africa, and the (former) President – Barack H. Obama – had Kenyan roots. Why, then, the opposition?

The academic publications of Professor Gathii on International Trade Law "raised alarm bells in Washington." He had:

> written in the past about the need to incorporate social justice concerns in the WTO agenda and ... criticized the WTO "bias" toward the interest of its rich members in areas such as trade in goods, services, and protection of intellectual property rights.
>
> In a 2005 paper for the *Emory International Law Review*, "International Justice and the Trading Regime," Gathii said the global trading system is "rigged and distorted" in favor of developed countries and that the WTO dispute settlement system "has largely helped entrench the trading benefits of rich countries that can afford to participate as repeat players that in turn shape the WTO's jurisprudence."[4]

Perhaps it is not America's responsibility to ensure Appellate Body candidates care about poor countries, yet such disregard would depart from the attitude in the era of President John F. Kennedy

[2] Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS issue 2, 391-415 (June 2014). [Hereinafter, *Agents, Trustees, and International Courts*.] *See also* Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS issue 1, 33-63 (March 2008) (noting that "Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary," and arguing the threat of "recontracting" by a Principal to influence an international organization is not central to the Principal-Trustee relationship, *i.e.*, Trustees are beyond such threats).

[3] *Agents, Trustees, and International Courts*.

[4] Daniel Pruzin, *WTO Selection Panel to Recommence Search For Appellate Body Judge Following Deadlock*, 31 International Trade Reporter (BNA) 150 (23 January 2014). *See also* Daniel Pruzin, *WTO DSB Chairman Proposes Process For Filling Contested Appellate Vacancy*, 31 International Trade Reporter (BNA) 793 (1 May 2014) (reporting "[t]he U.S. has objected to Kenya's Gathii based on his writings in legal journals claiming that the WTO's dispute settlement system is biased in favor of rich countries").

The deadlock among Members over four candidates, one of whom was Professor Gathii, persisted, with the option of starting the search from scratch floated, and then withdrawn. *See* Daniel Pruzin, *WTO Dispute Chairman Postpones Restart Of Search for New Appellate Body Judge*, 31 International Trade Reporter (BNA) 198 (30 January 2014). One candidate (Joan Fitzhenry, an Australian AD lawyer) dropped out in March 2014.

(1961-1963). That responsibility may be for poor countries themselves.

Yet, if the responsibility of an academic is to speak the truth to power, as Palestinian intellectual and Columbia University English Professor Edward W. Said (1935-2003) explained in *Representations of the Intellectual* (1996), then scholars who aspire to the Appellate Body should take note of the Gathii case. That power is formidable. The Transnational Institute, while agreeing the *Dispute Settlement Understanding* (*DSU*)is the "crown jewel" of the WTO, also observed "the reality is that almost no government goes into the DSM [Dispute Settlement Mechanism] without the pressure of their corporations."[5] The same interests lobbying the United States Trade Representative (USTR) or its counterpart in another WTO Member to lodge a WTO complaint have a stake in the composition of the Appellate Body. Why not push for judges in Geneva to be pliant?

Indeed, the pushing by America did not stop with the failed Gathii nomination. In March 2017, the Administration of President Donald J. Trump suggested it might ignore WTO Panel or Appellate Body decisions with which it disagreed, in particular, those that infringed on American sovereignty. The 336-page *President's Trade Policy Agenda*, submitted to Congress, intoned:

> It is time for a more aggressive approach. The Trump Administration will use all possible leverage to encourage other countries to give U.S. producers fair, reciprocal access to their markets....

Among the top priorities the *Agenda* listed were:

> resisting efforts by other countries or Members of international bodies like the World Trade Organization – to advance interpretations that would weaken the right and benefits of, or increase the obligations under, the various trade agreements to which the United States is a party.

Then, in summer 2017, the U.S. launched a strategy of blocking new appointments to the Appellate Body until its demand – an end to what it saw as judicial activism – was met.[6] That strategy was

[5] Mary Louise F. Malig, The Transnational Institute, *Big Corporations, The Bali Package, and Beyond – Deepening TNCs Gains from the WTO*, 6 (November 2014), *posted at* www.tni.org/sites/www.tni.org/files/download/wto-big_business_bali_0.pdf.

[6] *See* Robert McDougall, *The Search for Solutions to Save the WTO Appellate Body*, European Centre for International Political Economy (ECIPE), December 2017, http://ecipe.org/publications/the-search-for-solutions-to-save-the-wto-appellate-body/ (hereinafter, *The Search for Solutions*); Manfred Elsig, Mark Pollack & Gregory Shaffer, *Trump is Fighting An Open War On Trade. His Stealth War On Trade May Be Even More Important.*, THE WASHINGTON POST MONKEY CAGE, 27 September 2017, www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?utm_term=.61e43149aade (hereinafter, *Trump is Fighting*); Damian Paletta & Ana Swanson, *Trump Suggests Ignoring World Trade Organization In Major Policy Shift*, 1 March 2017, THE WASHINGTON POST, www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-may-ignore-wto-in-major-shift-of-u-s-trade-policy/?utm_term=.219bb71bffcc. *See also* Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, *in* THE POLITICS OF INTERNATIONAL LAW (Wayne Sandholtz & Christopher Whytock, eds., 2016) (University of California Irvine School of Law Research Paper Number 2016-10, https://ssrn.com/abstract=2748883) (evaluating "the selection process of those who interpret the rules; ... the context and politics of rule interpretation; and ... compliance with WTO dispute settlement rulings," and arguing "the selection

more aggressive than before. And, this strategy continued throughout 2018 and into 2019.[7] Put bluntly, from the official American perspective, nominating WTO Appellate Body members is akin to nominating U.S. Supreme Court justices: ideology and judicial interpretative philosophy matters – and matters a lot.

In the past, unhappy with their decisions against American trade measures, the U.S. opted not to reappoint two Americans to the Appellate Body (Jennifer Hillman in 2011, and Merit E. Janow in 2007), and in 2016 the U.S. went further by blocking the reappointment of an Appellate Body judge from another Member (South Korea's Seung Wha Chang). To be sure, reappointment to a second four-year term is not automatic under the *DSU*. But, the less certain reappointment is, the greater the potential for erosion of judicial independence.

For the U.S., that independence should be challenged if judicial activism erodes the carefully crafted balance of rights and obligations achieved through Uruguay Round negotiations. So, blocking reappointment of American and non-American judges alike proved America would take revenge against any judge it did not like, based on the reports that judge had co-written during her first four-year term, and on the nature an pattern of her questioning during oral arguments (because, as the USTR put it, "... it is not difficult to ascertain from the questions posed by a[n] [Appellate Body] member ... at an oral hearing that the member is associated with the views expressed in an Appellate Body Report related to those questions"[8]). Chang's sin was issuing "wrong" decisions, "wrong" because he "overstep[ed] the boundaries" to which WTO Members agreed under the *DSU*.[9] The USTR said those decisions "went beyond what was needed to settle an individual dispute based on the parties' specific arguments." The USTR cited (1) 46 pages (amounting to two-thirds of the Report) of *obiter dicta* in the 2016 *Panama-Argentina GATS* (General Agreement on Trade in Services) dispute (DS 453), (2) a dilated discussion of the SPS agreement (in DS 430, Closing Statement of the United States at the Oral Hearing in India – Measures Concerning the Importation of Certain Agricultural Products from the United States (AB-2015- 2/DS430) (20 March 2015) that had nothing to do with the issues on appeal, (3) overturning a Panel holding on the basis of an argument not raised on appeal, and (4) an intrusion (in DS449) into domestic law in which the Appellate Body substituted its judgment as to what is lawful in the legal system of that of the Member. The USTR challenged other WTO Members with this question:

> If a candidate for appointment to the Appellate Body were to say openly that he or she would issue Appellate Body Reports that do what the Reports we have discussed did – that is, the candidate would issue reports where more than 2/3 of the Report were *obiter dicta* on issues not necessary to resolve the dispute, the candidate would issue reports engaging in abstract interpretation and raise concerns on matters not under appeal, the candidate would reject an appeal by a party but then reverse a Panel and find a breach on a basis not argued by that party, and the candidate would issue reports substituting the Appellate Body's judgment for what is lawful under a Member's domestic law for the view of that legal system itself – would your government support that candidate for appointment?[10]

With that question, the U.S. sank the reappointment of Mr. Chang, but got a strong reply letter.

Six of the Appellate Body members, including America's Thomas Graham and India's Ujal Singh Bhatia, wrote to DSB Chairman (South Africa's WTO Ambassador, Xavier Carim) to counter the American attack:

> "With regard to accuracy, no case is the result of a decision by one Appellate Body Member, nor should interpretations or outcomes be attributed to a single Member," the six AB members maintained.
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> ...
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> "Appeals are heard and decided by three Members who are chosen randomly to constitute the Division for each case," the AB members maintained.
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> "During a Division's consideration of a case, there is always a formal, intensive exchange of views, in person in Geneva, between the three Division Members and the Appellate Body Members who are not on the Division," the six members argued.
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> In short, "Our Reports are reports of the Appellate Body," they asserted.
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> ...
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> ... [T]he AB members said that they are guided by Articles 3:2, 17, and 19:2 of the *Dispute Settlement Understanding* in adjudicating appeals and clarifying existing provisions of the covered agreements "without adding to or diminishing the rights and obligations provided in those [covered] agreements."
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> "We strive to adhere to that mandate when deciding complex issues that arise in a variety of circumstances, frequently on matters of first impression," the AB members said.
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> "Whether we have always succeeded is a subject we leave to the WTO Membership to discuss," the six members suggested, maintaining that the WTO Members are well within their rights to comment on the AB Reports as set out in Article 17:14 of the *Dispute Settlement Understanding*. The AB members said they are open to "other informed and constructive comments."
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> As regards the "trust that WTO Members place in the independence and impartiality of AB Members," the six members said, "*we are concerned about the*

of Appellate Body members, panelists, and Secretariat members affects the interpretation of WTO rules," [c]ertain interpretations, in turn, encounter stark resistance, leading to compliance challenges," "[t]he compliance challenges threaten the authority of panels and the Appellate Body, and can, in turn, inform subsequent interpretive choices, as well as the selection process of Appellate Body members and panellists," hence "[l]aw and politics ... continuously interact, shaping the WTO's dispute settlement process).

7 *See* Raj Bhala, INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK, Volume One (Interdisciplinary Foundations and Fundamental Obligations) (Durham, North Carolina: Carolina Academic Press, 5th ed., 2019).

8 Statement by the United States at the Meeting of the WTO Dispute Settlement Body, 23 May 2016, 5, www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf. [Hereinafter, May 2016 U.S. DSB Statement.]

9 May 2016 U.S. DSB Statement, 5; *Trump is Fighting*.

10 May 2016 U.S. DSB Statement, 9.

tying of an Appellate Body Member's reappointment to interpretations on specific cases and even doing so publicly."

"The dispute settlement system depends upon WTO Members trusting the independence and impartiality of Appellate Body Members," the six members emphasized.

"*Linking the reappointment of a Member to specific cases could affect that trust,*" they lamented.[11]

All 13 living former Appellate Body members (three of whom were American, James Bacchus, Jennifer Hillman, and Merit E. Janow) reinforced this letter with another one (also to Ambassador Carim), explaining:

> if, now, the fact that a Member of the Appellate Body joined in the consensus on the outcome on a particular legal issue or on a particular dispute becomes for the first time a factor in a decision on that Member's reappointment, all of the accomplishments of the past generation in establishing the credibility of the WTO dispute settlement system can be put in jeopardy. This raises the possibility of inappropriate pressures by participants in the WTO trading system. There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgments in the WTO's rule-based system of adjudication.
>
> ... The unquestioned impartiality and independence of the Members of the Appellate Body has been central to the success of the WTO dispute settlement system, which has in turn been central to the overall success of the WTO. Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the very future of the entire WTO trading system at risk.[12]

Taking aim at the American argument that Mr. Chang and the Appellate Body were guilty of overreach:

> From time to time, one or more of the Members of the WTO may differ with a decision reached by the Appellate Body, but this does not necessarily mean that the Appellate Body has acted outside its mandate in reaching that decision. Such differences are unavoidable in a rule- based system that seeks to resolve international disputes between disputing parties that maintain conflicting views of the meaning of the rules. Indeed, such differences are intrinsic to the very process of legal interpretation – the core competency of the Appellate Body.[13]

[11] D. Ravi Kanth, *AB Members Challenge U.S. Over Reappointment of Seung Wha Chang*, Third World Network, TWN Info Service on WTO and Trade Issues, 24 May 2016, www.twn.my/title2/wto.info/2016/ti160516.htm (emphasis added).

[12] Letter to Ambassador Xavier Carim of South Africa, Chairman, Dispute Settlement Body, World Trade Organization, from Georges Abi-Saab, *et al.*, 31 May 2016, http://worldtradelaw.typepad.com/files/abletter.pdf. [Hereinafter, May 2016 Former Appellate Body Member Letter.]

[13] May 2016 Former Appellate Body Member Letter.

The Appellate Body members had a constructive solution for the U.S., namely, change the rules through a forthcoming biennial WTO Ministerial Conference:

> Should WTO Members ever conclude that the Appellate Body has erred when clarifying a WTO obligation in WTO dispute settlement, the Marrakesh Agreement establishing the World Trade Organization spells out the appropriate remedial act. Article IX:2 of the Marrakesh Agreement, on "Decision-Making," provides, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by a "three-fourths majority of the Members." Any such legal interpretation would, of course, be binding in WTO dispute settlement. We observe that, to date, the Members of the WTO have not seen the need to take any such action.[14]

Of course, the criticism did not stop with present and former Appellate Body members. Dozens of WTO Members – including Argentina, Australia, Brazil, Canada, China, Colombia, Egypt, EU, Guatemala, Honduras, Hong Kong, Iceland, India, Japan, Korea, Mexico, New Zealand, Nigeria, Oman, Paraguay, Russia Singapore, Taiwan, Thailand, Uruguay, and Vietnam – made the same points: America's blockage of Appellate Body candidates had serious adverse systemic effects and undermined the rule of law.[15] India, for example, "emphasized that the reappointment process must not compromise the independence and impartiality of the Appellate Body."[16]

The American blockage strategy meant that by December 2017, the Appellate Body ranks dropped to just four members, and by September 2018, just three would be left – the Chair, India's Ujal Singh Bhatia (whose term ended 10 December 2019), plus the members from U.S. (whose term ended the same as Chairman Bhatia's), and China. With the *DSU* requirement that three members must hear a case, the Appellate Body was in crisis.[17] The Appellate Body invoked Rule 15 of its *Working Procedures*, entitled "Transition," which states:

> A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, *complete the disposition of any appeal to which that person was assigned while a Member*, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.[18]

In other words, departing judges would continue to work on appeals filed before their terms had ended or resignations took effect. But, that could mean long extensions, because the extant appeals

[14] May 2016 Former Appellate Body Member Letter.

[15] World Trade Organization, *WTO Members Debate Appointment/Reappointment of Appellate Body Members*, 23 May 2016, www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm. [Hereinafter, *WTO Members Debate.*]

[16] *Quoted in WTO Members Debate.*

[17] *See* Tom Embury-Dennis, *Trump Could Cause World Trade System To Freeze Up After Vetoing Appointment Of Judges, Diplomats Fear*, INDEPENDENT, 28 November 2017, www.independent.co.uk/news/world/americas/donald-trump-world-trade-dispute-system-veto-judges-appointments-global-freeze-us-diplomats-warning-a8079876.html.

[18] Emphasis added.

often were complex (as in the *Boeing – Airbus* disputes). And, they could not work on new appeals, which were piling up.

America objected to that practice, too. The U.S. pointed to Rule 14(2) of the *Working Procedures*:

> The resignation [of an Appellate Body member] shall take effect 90 days after the notification has been made pursuant to paragraph 1, unless the DSB, in consultation with the Appellate Body, decides otherwise.

With complex issues in many appeals, there was a risk that Appellate Body members would be staying on long past the 90-day period. That, America indicated, undermined the basic composition and operation of a permanent seven-member group. So, the U.S. was adamantly opposed to the scenario in which former members are "continuing to act as though they are still members of the Appellate Body."[19]

The U.S. also suggested Reports issued after the end of a member's terms violated *DSU* rules and were ineligible for DSB adoption by the reverse consensus rule. That objection came up in August 2017, in the context of the Appellate Body Report in *EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (DS442).[20] One of the members, Hyun Chong Kim of Korea, resigned from the Appellate Body, effective 1 August 2017. Ironically, he did so to become the Minister of Trade for Korea, in response to demands from the Trump Administration to renegotiate *KORUS*. However, the Appellate Body scheduled circulation of that Report for 5 September – after the effective date of Mr. Kim's resignation. Consequently, said the U.S., this was issued by two, not three, members, in violation of *DSU* rules, so it would have to be adopted by the regular normal consensus rule.[21] That raised the spectre America would block adoption of Reports it did not like, as occurred in the pre-Uruguay Round era.

In January 2018, the U.S. rejected a proposal by 58 other WTO Members to begin forthwith the process of selecting three new Appellate Body members. Instead, in a broad-side attack in February, President Trump called the WTO a "catastrophe."[22] And, in March the USTR slammed the *DSU*:

> ... [T]he WTO has not always worked as expected. Instead of serving as a negotiating forum where countries can develop new and better rules, it has sometimes been dominated by a dispute settlement system where activist "judges" try to impose their own policy preferences on Member States. Instead of constraining market distorting countries like China, the WTO has in some cases given them an unfair advantage over the United States and other market-based economies. Instead of promoting more efficient markets, the WTO has been used by some Members as a bulwark in defense of market access barriers, dumping, subsidies, and other market distorting practices. The United States will not allow the WTO – or any other multilateral organization – to prevent us from taking actions that are essential to the economic well-being of the American people.[23]

The USTR declared "[t]he most significant area of concern has been panels and the Appellate Body adding to or diminishing rights and obligations under the *WTO Agreement*:

> ... Concerns abound that dispute reports have added to or diminished rights or obligations in varied areas, such as subsidies, antidumping duties, and countervailing duties; standards (under the *TBT Agreement*); and safeguards. For example:
>
> - The United States and several other Members have expressed significant concerns with a number of Appellate Body interpretations that would significantly restrict the ability of WTO Members to counteract trade-distorting subsidies provided through SOEs, posing a significant threat to the interests of all market-oriented actors.
> - In a number of disputes, the United States has expressed concerns with the Appellate Body's interpretation of the non-discrimination obligation under the *TBT Agreement* which calls for reviewing factors unrelated to any difference in treatment due to national origin. The United States has pointed out that this approach could find that identical treatment of domestic and imported products could nonetheless be found to discriminate against imported products due to differences in market impact. There is nothing in the text or negotiating history of the *TBT Agreement* to support that Members had ever negotiated or agreed to such an approach.
> - The United States disagreed with Panel and Appellate Body Reports in the [2000] *U.S.-FSC* [*Foreign Sales Corporation*] dispute, which resulted in an interpretation under which WTO rules do not treat different (worldwide vs. territorial) tax systems fairly. This dispute disregarded the broader perspective that, in the GATT, Members had agreed to an understanding that a country did not need to tax foreign income, and there was no evidence that the U.S. FSC distorted trade or was more distortive than the territorial tax system used by most other WTO Members.
> - In a number of disputes, the United States has expressed concerns that the Appellate Body's non-text-based interpretation of Article XIX of the GATT 1994 and the *Safeguards Agreement* has seriously undermined the ability of Members to use safeguards measures. The Appellate Body has disregarded the agreed WTO text and read text into the Agreement, applying standards of its own devising.

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[19] *Quoted in* Bryce Baschuk, *U.S. Block on Appellate Body Could Unravel WTO, Official Says*, 35 International Trade Reporter (BNA) 460 (5 April 2018).

[20] *See* Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 31 August 2017, https://geneva.usmission.gov/wp-content/uploads/2017/08/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf.

[21] The problem was even worse: the second four-year term of another member, Ricardo Ramirez- Hernández, ended 30 June 2017, hence the Report arguably had just one signatory who was a *bona fide* member. But, the U.S. welcomed the continued service of Mr. Ramirez in the appeals he had been adjudicating prior to 30 June.

[22] *Trump Calls WTO A "Catastrophe," Says U.S. Losing Out And Needs New Deal*, RT, 27 February 2018, www.rt.com/usa/419874-trump-wto-catastrophe-world-trade-organization/.

[23] United States Trade Representative, *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program*, March 2018, at 3 https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF. [Hereinafter, *2018 Trade Policy Agenda*.]

- Another area of concern is that the Appellate Body in effect created a new category of prohibited subsidies that was neither negotiated nor agreed by WTO Members (*U.S. – CDSOA, i.e.*, the 2003 *Byrd Amendment* case, WT/DS217/AB/R, WT/DS234/AB/R (adopted 27 January 2003)). The U.S. Congress had made a policy decision to assist industries harmed by illegal dumping and subsidization, and no provision in the *WTO Agreement* limits how a WTO Member might choose to make use of the funds collected through antidumping and countervailing duties.

It has been the longstanding position of the United States that panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements, as negotiated and agreed by its Members. Over time, U.S. concerns have increasingly focused on the Appellate Body's disregard for the rules as set by WTO Members. ... ...[T]he problem has been growing worse, and not better.[24]

The USTR also attacked the Appellate Body for not following the *DSU* and its own rules.[25]

[24] *2018 Trade Policy Agenda*, 23-24.

[25] For example, the USTR accused the Appellate Body of "[d]isregard for the 90-day deadline for appeals, "[c]ontinued service by persons who are no longer AB members," and "[i]ssuing advisory opinions on issues not necessary to resolve an appeal:"

> Since at least 2011, the United States and other Members have been expressing concern regarding the Appellate Body's decision to ignore the mandatory 90-day deadline for deciding appeals set out in WTO rules. Instead, the Appellate Body has assumed the authority to take whatever time it considers appropriate for individual appeals. However, WTO Members agreed in the *DSU* that for each appeal "[i]n no case shall the proceedings exceed 90 days."22 The 90-day deadline helps ensure that the Appellate Body focuses its report on the issue on appeal. The Appellate Body has never explained on what legal basis it could choose to breach a clear and categorical rule set by WTO Members.
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> ...
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> Another example of a failure by the WTO to follow the rules that apply to it arises from continued service deciding appeals by persons who are not Appellate Body members. Recent decisions by the Appellate Body to, in its words, "authorize" a person who is no longer a member of the Appellate Body to continue hearing appeals created a number of very serious concerns, which the United States has expressed.
>
> First, and foremost, the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. The Appellate Body purports to find in Rule 15 of its *Working Procedures* the authority to "deem" as an Appellate Body member one of its own members whose term has expired. However, under the *WTO Agreement*, it is the Dispute Settlement Body, not the Appellate Body, that has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving. Indeed, Rule 15 itself acknowledges that it applies to "a person who [has] cease[d] to be a member of the Appellate Body."
>
> ...
>
> The United States has been increasingly concerned by the tendency of WTO reports to make findings unnecessary to resolve a dispute or on issues not presented in the dispute. Article 3:4 of the *DSU* provides that: "Recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this *Understanding* and under the covered agreements." Similarly, Article 3:7 provides that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute." And pursuant to Articles 7:1 and 11 of the *DSU*, Panels and the Appellate Body are charged with making those findings "as will assist in making" the DSB in making a recommendation, pursuant to Article 19:1, to a Member to bring a measure that has been found to be WTO-inconsistent into conformity with WTO rules. ... WTO Panels and the Appellate Body are not to make findings that cannot "assist the DSB in making [its] recommendations."
>
> The purpose of the dispute settlement system is not to produce Reports or to "make law," but rather to help Members resolve trade disputes among them. WTO Members have not given Panels or the Appellate Body the power to give "advisory opinions" as some national or international tribunals have. Indeed, both the *Dispute Settlement Understanding* and the *WTO Agreement* expressly provide that WTO Members, acting in the Ministerial Conference or General Council, have the "exclusive authority" to render an authoritative interpretation of the WTO agreements.

2018 Trade Policy Agenda, 24-26.

Likewise, the USTR castigated the Appellate Body for its *de novo* review of facts and domestic laws:

> Another significant concern is the Appellate Body's approach to reviewing facts. Article 17:6 of the *DSU* limits an appeal to "issues of law covered in the panel report and legal interpretations developed by the panel." Yet the Appellate Body has consistently reviewed Panel fact-finding under different legal standards, and has reached conclusions that are not based on Panel factual findings or undisputed facts.
>
> The United States has also noted with concern the Appellate Body's review of the meaning of Member's domestic law that is being challenged. In a WTO dispute, the key fact to be proven is what a Member's challenged measure does (or means), and the law to be interpreted and applied are the provisions of the WTO agreements. But the Appellate Body consistently asserts that it can review the meaning of a Member's domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for Appellate Body review. Furthermore, when the Appellate Body reviews the meaning of a Member's domestic measure, it does not provide any deference to a Panel's findings of fact.

2018 Trade Policy Agenda, 27-28.

[26] *2018 Trade Policy Agenda*, 28.

However, to what extent is the U.S. to blame for these problems by blocking appointment of replacement Appellate Body members?

Finally, the USTR castigated the Appellate Body for its treatment of its reports as precedent:

> Without basis in the *DSU*, the Appellate Body has asserted its reports effectively serve as precedent and that panels are to follow prior Appellate Body reports absent "cogent reasons." However, this is not consistent with WTO rules. WTO Members established one and only one means for adopting binding interpretations of the obligations that they agreed to: Article IX: 2 of the *WTO Agreement*. While Appellate Body Reports can provide valuable clarification of the covered agreements, Appellate Body Reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed. Indeed, the Appellate Body's approach means that Panels are simply to abdicate their responsibility to conduct an objective assessment of the matters before them and just follow prior Appellate Body reports.[26]

So, what were the options to rectify this "catastrophe"?

The President did not suggest any, other than renegotiating trade deals (under threat of withdrawal), but among those discussed in and outside of Geneva were:

(1) Majority voting for the appointment of Appellate Body members.
(2) A change in *Working Procedures* whereby the Appellate Body would accept no new appeals until its ranks are restored to full strength, would dispose of appeals automatically upon their filing and allow Panel Reports to be adopted as final.
(3) Greater reliance on WTO bilateral arbitration as a means of appeal, in lieu of a full-blown, litigation-style appeal. *DSU* Article 25 allows disputing Members to use a so-called "appeal-arbitration" process, but of course requires both complainant and respondent to agree, and America in either role might abjure.
(4) Negotiation of a new WTO dispute settlement agreement that would apply on a plurilateral basis, to be invoked only if the Appellate Body could not function.
(5) Voluntary agreement between a complainant and respondent to forego their right of appeal.

None of these options was attractive; each suffered from conceptual and/or practical problems. Yet, excluding America from the *DSU* – that is, not addressing its systemic concerns – also was a poor option, at least if Members wanted to keep the world's largest and most powerful country in their club: was it "time to consider an accommodation on some of the U.S.' systemic concerns, if only to preserve the legitimacy of the WTO and its adjudicative function, and avoid a more damaging retreat from the rules-based international trade order," as "unilateralist" as those concerns might be?[27] Was the Melian Dialogue the alternative?

III. Regional Level: To Pass, or Not to Pass, *NAFTA* 2.0?

Will the U.S. Congress pass the USMCA? This FTA was signed by the three Parties – America, Canada, and Mexico – on 30 November 2018. But, opposition to it has coalesced around various issues.

Consider, first, the structure of *NAFTA* 2.0 in comparison with *NAFTA* 1.0 Manifestly, the first iteration of *NAFTA* had 22 Chapters (two of which had Chapter-specific Annexes), plus seven general Annexes. (It also had *Side Letters*, particularly to protect America's long-standing sugar TRQs.) The second iteration has 34 Chapters (two of which had Chapter-specific Annexes, plus general Annexes and 12 *Side Letters*. Looking at the Chapter titles indicates clearly that the larger number of Chapters in the second iteration than the first iteration is thanks in part to splitting Chapters from the first iteration, and in part to coverage of new issues, some of which did not exist in the late 1980s and early 1990s when *NAFTA* 1.0 was negotiated, and/or were not thought proper for inclusion in a trade agreement.

Reviewing the titles of the general Annexes shows that they are structured quite differently in the two agreements. The *NAFTA* 2.0 Annexes reflect what the U.S. did in its other post-*NAFTA* 1.0 FTAs, namely, divide non-conforming measures (so-called "NCMs") in FDI, services, and financial services into two categories: NCMs subject to standstill and rachet commitments, and NCMs not subject to those commitments. A "standstill" commitment is a pledge not to cut-back

[27] *The Search for Solutions*.

on market access or national treatment from the current position. (For example, if the U.S. today allows 10 Mexican banks to establish branches anywhere in America, and offer the same products as U.S. banks, then the U.S. will not subsequently cut the number to five Mexican banks). A "rachet" commitment indicates that if a new liberalization is granted as to market access and/or national treatment, then that new liberalization would become the new benchmark. (To continue that example, if next year the U.S. allows 20 Mexican banks unrestricted branching and level-playing field competition with American banks, then that allowance becomes the new base for market access). Any NCM (as the term "non-conforming" connotes) is a derogation from free trade obligations (typically in respect of market access and/or national treatment) that are otherwise mandated in the core text of an FTA, *i.e.*, in the appropriate Chapter (*e.g.*, on financial services). NCMs not subject to the standstill or rachet commitments are less-free trade oriented than those that are subject them subject. That is because the former group are akin to unbound tariffs – they could go up, *i.e.*, become more protective, anytime.

Second, consider what in that structure of the Chapters, Annexes, or *Side Letters* caused the Parties to agree to the *USMCA*. The organization of rules is one matter, but the substantive content of those rules is quite another. In truth, much of the substantive content of *NAFTA* 2.0 looks like *NAFTA* 1.0, with certain ideas or provisions grafted from TPP. Of course, a complete appraisal of what each of them "got" versus "gave" involves a painstaking analysis of not only the provisions in each Chapter, but also the NCMs in the Annexes, and the details of the *Side Letters*. That said, what was the overall balance of rights and obligations that persuaded Canada, Mexico, and the U.S. to agree to *NAFTA* 2.0 – the key provisions that led to a "Grand Bargain" of sorts (though not nearly so grand as that of the 1986-1994 Uruguay Round, discussed in a separate Chapter)?

If the rhetoric of President Donald J. Trump on 1 October 2018 (the day after the *USMCA* negotiations concluded), then there was not much of a balance. He declared the pact to be "truly historic," and "the biggest trade deal in the United States history."[28] Yes, revising *NAFTA* 1.0 was historically significant, but no, *NAFTA* 2.0 was not the largest trade agreement. That crown goes to the Uruguay Round Agreements, signed with over 100 countries, which gave birth to the WTO. The President spoke of the "deficiencies and mistakes" in *NAFTA* 1.0, which was "perhaps the worst trade deal ever made," judged the new agreement to be "much more reciprocal," and said it "will support many – hundreds of thousands – American jobs."[29] He saw *NAFTA* 2.0 as an example of his "America First" policy, and declared that "[w]ithout tariffs we wouldn't be talking about a deal," meaning that the actual imposition of Section 232 steel and aluminum tariffs, and the threatened imposition of Section 232 auto and auto parts tariffs, forced Canada and Mexico to the bargaining table with America, and compelled them to submit to American demands.[30]

The reality was more nuanced than the American President bellowed, as Canadian Prime Minister Justin Trudeau explained (politely). *NAFTA* 2.0 was "profoundly beneficial" to Canadians, but the deal was tough to negotiate, and the outcomes were not all one way:

[28] *Quoted in Donald Trump Says New Trade Deal is "Most Important Ever,"* BBC NEWS, 1 October 2018, www.bbc.com/news/business-45711595. [Hereinafter, *Donald Trump Says*.]
[29] *Quoted in Donald Trump Says*.
[30] *Quoted in Donald Trump Says*.

> We had to make compromises, and some were more difficult than others" .... We never believed that it would be easy, and it wasn't, but today is a good day for Canada.[31]

Ultimately (perhaps) the President agreed with the Prime Minister. After declaring it a "privilege" to trade with the U.S., Mr. Trump added:

> So we have negotiated this new agreement [with Mexico and Canada] based on the principle of fairness and reciprocity - to me it's the most important world in trade, because we've been treated so unfairly by so many nations all over the world.[32]

He concluded the *USMCA* was "terrific" for all three Parties. What, then, were the terms that caused the Parties to agree to the deal? That is, what was the overall economic "give" and "take" that caused them to see the deal as, on balance, in their self-interests?

First, America achieved its objective of a vastly tighter auto ROO. The 12.5 percentage point increase (from 62.5% to 75%) in required North American value added, and the $16 per hour minimum wage test for 40%-45% of the value, was the strictest ROO found in any FTA in the world.[33] President Trump called the new ROO "the most important thing," and predicted:

> We will be manufacturing many more cars. And our companies won't be leaving the United States, firing their workers and building their cars elsewhere. They no longer have that incentive.[34]

America also won a modest increase in access to Canada's dairy market, essentially from 3.25% of that market (which Canada conceded in *TPP*, and continued in *CPTPP*), to 3.59% (for the benefit solely of American dairy exports). Further, America persuaded Canada to eliminate its Class 7 UF milk classification, which the U.S. said impeded exports of this product. The U.S. did not have to concede its own milk and sugar quota protections. The U.S. also obtained clear MFN and national treatment commitments with respect to financial services, and persuaded Canada and Mexico to prohibit local data storage. And, a copyright protection rule of 70 years, protections for trade secrets, and a commitment to enforce IPRs with civil and criminal penalties.

Alas, the U.S. had to concede that neither Canada nor Mexico would accept a five-year Sunset Rule on *NAFTA* 2.0. As per Article 34:7, the U.S. settled for a 16-year period, with joint review after six years, and renegotiations (if necessary) to extend for a further 16-year term, and so forth:

Article 34:7: Review and Term Extension

[31] *Quoted in Donald Trump Says*.

[32] *Quoted in Donald Trump Says*.

[33] To be sure, the *USMCA* lacks a mechanism for adjusting the $16 for inflation, a point critics noted. *See* David Leonhardt, *Trump's NAFTA is Like a Bacon Sandwich*, NEW YORK TIMES, 2 October 2018, www.nytimes.com/2018/10/02/opinion/trump-nafta-mexico-canada-trade-deal.html). [Hereinafter, *Trump's NAFTA*.]

[34] *Quoted in* Shannon Pettypiece & Andrew Mayeda, *Trump Lauds NAFTA Successor Accord, Chides Tariff "Babies" (1)*, 35 International Trade Reporter (BNA) 1283 (4 October 2018).

1. This Agreement shall terminate 16 years after the date of its entry into force, unless each Party confirms it wishes to continue the Agreement for a new 16-year term, in accordance with the procedures set forth in paragraphs 2 through 6.

2. No later than the sixth anniversary of the entry into force of this Agreement, the Commission shall meet to conduct a "joint review" of the operation of the Agreement, review any recommendations for action submitted by a Party, and decide on any appropriate actions. Each Party may provide recommendations for the Commission to take action at least one month before the Commission's joint review meeting takes place.

3. As part of the Commission's joint review, each Party shall confirm, in writing, through its head of government, if it wishes to extend the term of the Agreement for another 16-year period. If each Party confirms its desire to extend the Agreement, the term of the Agreement shall be automatically extended for another 16 years and the Commission shall conduct a joint review and consider extension of the Agreement term no later than at the end of the next six-year period.

4. If, as part of a six-year review, a Party does not confirm its wish to extend the term of the Agreement for another 16-year period, the Commission shall meet to conduct a joint review every year for the remainder of the term of the Agreement. If one or more Parties did not confirm their desire to extend the Agreement for another 16-year term at the conclusion of a given joint review, at any time between the conclusion of that review and expiry of the Agreement, the Parties may automatically extend the term of the Agreement for another 16 years by confirming in writing, through their respective head of government, their wish to extend the Agreement for another 16-year period.

5. At any point when the Parties decide to extend the term of the Agreement for another 16-year period, the Commission shall conduct joint reviews every six years thereafter, and the Parties shall have the ability to extend the Agreement after each joint review pursuant to the procedures set forth in paragraphs 3 and 4.

6. At any point in which the Parties do not all confirm their wish to extend the term of the Agreement, paragraph 4 shall apply.

The Sunset Clause settlement assured the U.S. that *NAFTA* 2.0 would remain a living document, and potentially an up-to-date, evergreen one, in that the reviews by the Parties would be undertaken at six-year increments, and thereby give the Parties a decade to fix problems before considering whether to approve or terminate the 16-year mark.

Second, Canada saw its three "red lines" respected against severe American onslaughts. The *NAFTA* 1.0 Chapter 19 AD-CVD dispute resolution panel system carried through to *NAFTA* 2.0 (in Chapter 10). So, also, did the *NAFTA* 1.0 cultural industry protections (in Article 32:6 of the *USMCA*). And, via the Section 232 *Side Letter*, the U.S. pledged not to impose national security tariffs on up to 2.6 million vehicles (including cars, and SUVs, but not pick-up trucks) from Canada, and to consider upward revisions of that cap. The initial threshold was passive, set at 40% higher than Canadian shipments.

As for the dairy concessions Canada made were not cosmetic, and the Dairy Farmers of Canada opined that 220,000 Canadians in the dairy sector were "sacrificed."[35] But, in no way did the U.S. succeed in dismantling Canada's long-standing SMS scheme.[36] Canada did not get expanded access to U.S. government procurement markets, nor an easing of immigration rules on *NAFTA* business visas (so-called "TN" visas, via an expansion of the list of eligible occupations eligible for those visas) for its professionals to migrate temporarily to the U.S. (as the visa rules remained largely the same as in *NAFTA* 1.0, though the cap on TN visas for Mexican workers was eliminated).[37]

Finally, Mexico won a clear statement about the sovereignty of its energy resources. Like Canada, Mexico obtained a Section 232 exemption for more vehicles (again, cars and SUVs, but not pick-up trucks) than it historically shipped on an annual basis. Also like Canada, the cap was passive – 40% over Mexico's annual shipments. And, Mexico was willing to see labor rates rise in Mexico, with the new auto ROO, to address socioeconomic inequalities that worsened after *NAFTA* 1.0. At the same time, Mexican officials conceded that roughly 32% of the cars made in Mexico (at the time the *USMCA* was agreed) would not qualify for DFQF treatment, because of the new ROO.

Moreover, the drastic reduction of the *NAFTA* 1.0 Chapter 11 ISDS mechanism did not help Mexico in the eyes of foreign direct investors. They enjoyed the certainty of the mechanism with respect to any FDI under *NAFTA* 1.0 (as opposed to adjudicating expropriation and nationalization claims in Mexican courts, which they perceived as less independent than ISDS panels). With *NAFTA* 2.0, the subject matter jurisdiction of ISDS panels was cut down (to the energy, infrastructure, NG, oil, and telecommunications sectors), and only with respect to Mexico (*i.e.*, ISDS mechanism was phased out for Canada). Mexico also conceded less access to American government procurement markets than they had under the old *NAFTA* (though they had not taken advantage of that access).

Aside from their individual, self-interested calculations, the three Parties also came together on shared (or mostly shared) interests. A new Chapter on digital trade, with enforceable consumer protections and limits on liability for third party content posted on internet platforms, and restrictions on the ability of a government to force disclosure of source code, were examples.

[35] *Quoted in USMCA Trade Deal*.

[36] *See* Emily Tamkin, *Trump Has Won The Dairy War With Canada. But Was It Worth It?*, BUZZFEED.NEWS, 1 October 2018, www.buzzfeednews.com/article/emilytamkin/trump-wins-the-dairy-war-with-canada-but-was-it-worth-it#.adBi7Xzvkz.

[37] *See* Daniel Dale & Tonda Maccharles, *Canada, U.S. Reach New NAFTA Deal*, THE STAR (Toronto), 30 September 2018, https://www.thestar.com/news/world/2018/09/30/canada-us-reach-nafta-deal.html.

They agreed to retain the *NAFTA* 1.0 Chapter 20 state-to-state dispute settlement mechanism. They all could take pride in higher and/or more enforceable labor and environmental standards, albeit with varying degrees of enthusiasm. Likewise, with respect to the protection period for biologic medicines (*i.e.*, the period of market protection for branded biologics before they faced competition from generics), 10 years reflected a compromise between America's 12-year rule, and Canada's 8-year rule.[38] (Arguably, it was not markedly different from the "5 + 3" rule in *TPP*.)

The Parties also resolved a three-way controversy about the thresholds for cross-border shipments that would be duty-free: the U.S. level remained at $800, while Mexico and Canada raised theirs to $100 and $117, respectively – in effect, a compromise between on-line retailers and local store owners. And, they resolved certain *sui generis* disputes, such as that between the U.S. and Canada on selling wine: the two Parties agreed in a *Side Letter* that Canadian liquor stores (by 1 November 2019) could not prohibit U.S. wine on their shelves. (Stores, particularly in British Columbia, had been doing so via the so-called "store within a store" requirement, whereby imported wines could not be sold on the same shelves as Canadian wine.) But, they left some issues unresolved, most notably, Section 232 steel and aluminum tariffs.[39]

Indubitably, each Party knew it had a shared interest in staying in an integrative, rule-of-law framework that, on balance, had served each of them well for nearly one quarter of a century. They felt the sheer force of historical and political forces in favor of continued North American integration, above and beyond the reciprocal economic concessions they weighed as individually beneficial. Hopefully, they learned the bitter lesson of political history: do not oversell a trade deal to the public, as was done with *NAFTA* 1.0 in the early and mid-1990s.[40] Surely, going forward, they felt the need to repair their relationships after over a year of bitterness.[41]

[38] *See USMCA Trade Deal*; Heather Long, *U.S., Canada, and Mexico Just Reached a Sweeping New NAFTA Deal. Here's What's In It*, THE WASHINGTON POST, 1 October 2018, www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?noredirect=on&utm_term=.a7d44482624d.

[39] That Canada was willing to sign *NAFTA* 2.0 without a settlement of the Section 232 dispute was notable. Canada relies heavily on the American market for its aluminum and steel exports. Indeed, 84% (as of October 2018) of Canadian aluminum production is shipped to Canada, hence the 10% Section 232 tariff affected most of Canada's output of that commodity. Canada is somewhat less dependent on America as a steel market, but the 25% Section 232 is an even more serious impediment than the 10% duty. *See* Danielle Bochove, Josh Wingrove & Joe Deaux, *With NAFTA Deal, Trump Opens Door to Metal Tariffs Agreement (2)*, 35 International Trade Reporter (BNA) 1284 (4 October 2018).

[40] *See Trump's NAFTA* (stating: "The main thing to know about the big new North American trade deal is that it's not actually a new trade deal. It's a set of modest revisions to *NAFTA* – the old deal – and President Trump is exaggerating their significance, so he can claim to have replaced *NAFTA*," and reporting a tweet from historian Kevin Kruse: "I made a wonderful new sandwich by adding Lettuce and Tomato to Bacon and some bread. I'm calling it the LTB!").

[41] *See Lessons*; David Ljunggren & Steve Holland, *How Trump's Son-in-law Helped a $1.2 Trillion Trade Zone Stay Intact*, REUTERS, 1 October 2018, www.reuters.com/article/us-trade-nafta-kushner/how-trumps-son-in-law-helped-a-1-2-trillion-trade-zone-stay-intact-idUSKCN1MC04M. At the November 2018 G-20 Summit in Buenos Aires, outgoing Mexican President Enrique Peña Nieto bestowed on President Trump's son-in-law, Jared Kushner, Mexico's highest honor, the Order of the Aztec Eagle for Mr. Kushner's work on the *USMCA*, but his doing so provoked widespread criticism, because of Mr. Trump's stance toward, and comments about, Mexican immigrants. *See Mexican Honor for U.S.'s Kushner Sparks Criticism*, BBC NEWS, 28 November 2018, www.bbc.com/news/world-latin-america-46376341; *Mexico to Bestow Top Honor on Trump Son-in-law, Sparking Twitter Outcry*, REUTERS, 27 November 2018, www.reuters.com/article/us-mexico-politics-kushner/mexico-to-bestow-top-honor-on-trump-son-in-law-sparking-twitter-outcry-idUSKCN1NX071.

IV. National Level (1): Will the Section 232 National Security Tariffs on Canadian and Mexican Steel and Aluminum End?

- **Findings and Choices**

On 11 and 20 January 2018, the Department of Commerce (DOC) delivered its Section 232 *Steel* and *Aluminum Reports*, respectively, to President Trump. Neither was released publicly, until 16 February. Both found imports "threatened to impair the national security" as per Section 232.

In its 262-page *Steel Report*, the DOC found:

- The United States is the world's largest importer of steel. Our imports are nearly four times our exports.
- Six basic oxygen furnaces and four electric furnaces have closed since 2000 and employment has dropped by 35% since 1998.
- World steelmaking capacity is 2.4 billion metric tons, up 127% from 2000, while steel demand grew at a slower rate.
- The recent global excess capacity is 700 million tons, almost 7 times the annual total of U.S. steel consumption. China is by far the largest producer and exporter of steel, and the largest source of excess steel capacity. Their excess capacity alone exceeds the total U.S. steel-making capacity.
- On an average month, China produces nearly as much steel as the U.S. does in a year. For certain types of steel, such as for electrical transformers, only one U.S. producer remains.
- As of February 15, 2018, the U.S. had 169 antidumping and countervailing duty orders in place on steel, of which 29 are against China, and there are 25 ongoing investigations.[42]

And, in its 239-page *Aluminum Report*, the DOC found:

- Aluminum imports have risen to 90% of total demand for primary aluminum, up from 66% in 2012.
- From 2013 to 2016 aluminum industry employment fell by 58%, 6 smelters shut down, and only two of the remaining 5 smelters are operating at capacity, even though demand has grown considerably.
- At today's reduced military spending, military consumption of aluminum is a small percentage of total consumption and therefore is insufficient by itself to preserve the viability of the smelters. For example, there is only one remaining U.S. producer of the high-quality aluminum alloy needed for military aerospace. Infrastructure, which is necessary for our economic security, is a major use of aluminum.

[42] United States Department of Commerce, *Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House* (16 February 2018), www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination. [Hereinafter, *Secretary Ross Releases*.]

- The Commerce Department has recently brought trade cases to try to address the dumping of aluminum. As of February 15, 2018, the U.S. had two antidumping and countervailing duty orders in place on aluminum, both against China, and there are four ongoing investigations against China.[43]

So, the DOC offered the President a menu of choices:[44]

(1) Global Tariff Option

- A tariff of at least 24% on all steel products from all countries.
- A tariff of least 7.7% on all aluminum products from all countries.

(2) Hybrid Option

- A tariff of at least 53% on all steel merchandise from 12 countries: Brazil; China; Costa Rica; Egypt; India; Korea; Malaysia; Russia; South Africa; Thailand; Turkey; and Vietnam. Steel exports from all other counties would be subject to a quota. For each such other country, steel exports would be capped at 100% of that country's 2017 steel exports to America, on a product-by-product basis. So, for instance, if Canada shipped 100 metric tons of stainless steel in 2017, and 200 metric tons of steel coil, then its exports of those products would be limited to 100 and 200 metric tons, respectively.
- A tariff of 23.6% on all aluminum merchandise from five sources: China; Hong Kong; Russia; Venezuela; and Vietnam. Aluminum exports from each other countries would be capped at 100% of its 2017 exports, on a product-specific basis, to America.

(3) Global Quota Option

- A global quota, with country-specific shares in that quota, on all steel goods. Each country's share would equal 63% of its 2017 steel exports, *i.e.*, its exports to America would be slashed by one-third.

[43] *Secretary Ross Releases*.

[44] *See* United States Department of Commerce, *United States Department of Commerce, The Effect of Imports of Steel on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended*, 11 January 2018, www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf; *United States Department of Commerce, The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended* (17 January 2018), www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_aluminum_on_the_national_security_-_with_redactions_-_20180117.pdf; David Lawder & Lesley Wroughton, *U.S. Commerce Department Proposes Hefty Import Curbs on Steel, Aluminum*, REUTERS, 16 February 2018, https://www.reuters.com/article/us-usa-trade-steel/u-s-commerce-department-proposes-hefty-import-curbs-on-steel-aluminum-idUSKCN1G01QB. [Hereinafter, *U.S. Commerce Department Proposes*.]

- A global quota, with country-specific shares in that quota, on all aluminum goods. Each country's share would equal 86.7% of its 2017 aluminum exports, *i.e.*, its shipments to America would be cut by 13%.

The options contained no *a priori* exemptions for *NAFTA* Parties. For all three options, any American company could request an exclusion for a specific product, if the U.S. lacked sufficient domestic production capacity in that product and the company needed it, or (somewhat ironically) on national security grounds.

None of the menu options was "light" fare, *i.e.*, they all called for heavy trade barriers. They suffered from obvious defects. First, a global remedy – whacking all steel or all aluminum product categories, instead of targeting certain product categories – might have unintended consequences. It might deprive the American market of one class of merchandise (that is not produced in high volumes in America), but have little effect on another class (where America has production capacity). Second, quotas create administrative costs, quota rents, and races among suppliers to get their merchandise under the quota threshold. Thus, they suffer from the familiar flaws laid bare by Neo-Classical Economic analysis. Third, none of the options dealt directly with the core problem of global overcapacity in the steel and aluminum markets. That required a plurilateral negotiated outcome. Fourth, penalizing foreign countries that trade fairly, and steel and aluminum consumers in America (*e.g.*, the downstream steel-consuming industry, which employs 6.5 million Americans), when significant excess capacity in just a few countries, such as China, existed, seemed ineffective.

The DOC defended these options as necessary to give the American steel and aluminum industries long-term viability. By that, the DOC meant boosting U.S. capacity utilization to roughly 80% in each industry, up from the 2017 level of 73% in steel and 48% in aluminum, by slashing steel imports by 13.3 million metric tons and aluminum imports by 669,000 tons.[45] Query whether 80% was a realistic target. In steel, world capacity utilization rates averaged from 71.7% (April 2016) to 73.5% (September 2017).[46] Surely other steel producers would not trade off a drop of several percentage points in their use rates for an increase in America's rate.

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With the discretion to accept, modify or reject the DOC recommendations, the President had 90 days (from the delivery dates) to make his decision. Beleaguered steel and aluminum workers, long-promised relief, were not left wondering for long whether DOC found a national security threat from foreign imports to justify the President unilaterally adjusting imports through a tariff or quota, or entering into negotiations with foreign shippers. In March 2018, Mr. Trump chose a more extreme version of Option 1: global tariffs of 25% and 10% on steel and aluminum, respectively.[47]

[45] *See* Natalie Wong & Danielle Bochove, *As Trump Targets Foreign Metal, Canada Argues for Exemption*, 35 International Trade Reporter (BNA) 269 (22 February 2018).

[46] *See* World Steel Association, *Press Release – September 2017 Crude Steel Production*, www.worldsteel.org/media-centre/press-releases/2017/september-2017-crude-steel-production.html.

[47] On steel, see *Presidential Proclamation on Adjusting Imports of Steel into the United States*, 8 March 2018, www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/. *Proclamation 9705 of 8 March 2018*, 83 Federal Register number 51, 11625-11630 (15 March 2018). "Steel articles"

However, the President exempted imports from Canada and Mexico. He held open the possibility of further country-specific exemptions for countries with which America enjoys a "security relationship," but left that term undefined. The State Department said 54 other countries participated in collective defense arrangements with America, including most of the EU (via the April 1949 NATO accord), Australia and New Zealand (on account of a September 1951 treaty, and the September 1954 *South East Asia Treaty*), Korea and Japan (through October 1953 and January 1960 bilateral defense treaties, respectively), plus Costa Rica, Thailand, Turkey, and Venezuela.[48] Brazil said it, too, qualified, thanks to the September 1947 *Rio Treaty*. Presumably, all arrangements counted, and there was no need for a new deal – a position Australia asserted. The obvious country not in a deal, and thus ineligible for a security arrangement waiver, was China. But, what about India, which collaborates with the U.S. on security matters, but lacks a full defense treaty?

Two weeks after issuing the *Proclamations*, and the day before the Section 232 tariffs took effect, the Administration clarified several questions on both country-specific exemptions and product-specific exclusions.[49] For example:

covered by the 25% tariff, as per Paragraph 11(1) of this *Proclamation*, were HTSUS 6-digit CTSH categories "7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90…." Paragraph 11(3) authorized the Commerce Secretary to grant product-specific exclusions "for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality," and for "specific national security considerations."

On aluminum, see *Presidential Proclamation on Adjusting Imports of Aluminum into the United States*, 8 March 2018, www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/. *Proclamation 9704 of 8 March 2018*, 83 Federal Register number 51, 11619-11624 (15 March 2018). "Aluminum articles" covered by the 10% tariff, as per Paragraph 10(1) of this *Proclamation*, were the following four-digit CTH, plus two 10-digit categories: "(a) unwrought aluminum (HTS 7601); (b) aluminum bars, rods, and profiles (HTS 7604); (c) aluminum wire (HTS 7605); (d) aluminum plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607); (e) aluminum tubes and pipes and tube and pipe fitting (HTS 7608 and 7609); and (f) aluminum castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70)." Here, too, the *Proclamation* (in Paragraph 10(3)) authorized the Commerce Secretary to exclude "any aluminum article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality," and for "specific national security considerations."

Both *Proclamations* took effect after 15 days of signing, *i.e.*, 23 March.

[48] *See* U.S. Department of State, U.S. Collective Defense Arrangements, www.state.gov/s/l/treaty/collectivedefense/ (as of March 2019).

[49] *See Presidential Proclamation Adjusting Imports of Steel into the United States*, 22 March 2018, ¶¶ 4-9, (1), www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-2/; *Presidential Proclamation Adjusting Imports of Aluminum into the United States*, 22 March 2018, ¶¶ 4-9, (1) www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states-2/; The White House, *President Trump Approves Section 232 Tariff Modifications*, 22 March 2018, www.whitehouse.gov/briefings-statements/president-trump-approves-section-232-tariff-modifications/; *China Hits Back on Trump Tariffs as Europe Off Hook for Now*, BLOOMBERG, 22 March 2018, www.bloomberg.com/politics/articles/2018-03-22/trump-orders-50-billion-hit-on-china-goods-amid-trade-war-fears.

Requests for one-year country- or product-specific exclusions from the Section duties needed to follow DOC procedures, published at 83 Federal Register number 53, 12106-12112 (19 March 2018). Notably, within less than one month of this publication, over 1,300 exclusion petitions (with product exemption requests from 65,000 companies) had been filed.

(1) Korea agreed to reduce its steel exports to America by 30%, in exchange for the rest of its steel being excluded from the Section 232 tariffs.[50] Much of the steel Korea exports originates in China (including steel subject to U.S. AD-CVD orders), and Korea processes it before shipping it onward. Query whether this agreement constituted a VER, and violated the WTO *Safeguards Agreement*? After all, under the deal, Korea said it would limit its annual steel exports to America to 70% of the average of its steel exports between 2015-2017 (to 2.7 million tons annually). Would the U.S. invoke the GATT Article XXI national security provision as a defense, given that the violation is of a different accord?

(2) Australia, Argentina, Brazil, and the EU won "suspensions," *i.e.*, temporary exemptions (spanning roughly five weeks), of the 25% and 15% tariffs on their steel and aluminium exports, respectively.

Amazingly, the Pentagon openly disagreed with the White House in initiating a Section 232 action. Secretary of Defense James Mathis published a "consolidated position from the DOD:"

> DoD believes that the systematic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security. As such, DoD concurs with the Department of Commerce's conclusion that imports of foreign steel and aluminum based on *unfair* trading practices impair the national security. .... [H]owever, the U.S. military requirements for steel and aluminum each only *represent about three percent of U.S. production*. Therefore, DOD does *not* believe that the findings in the [DOC's *Section 232*] *Reports* impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements.[51]

The DOD favored targeted tariffs, which would shield our allies, and collaborative solutions to deal with the underlying problems of Chinese trans-shipment and over-capacity.

- **Trade War?**

Foreign trade partners reacted swiftly. China called the DOC *Reports* "baseless," and a disguised safeguard measure, thus entitled China under the WTO *Agreement on Safeguards* to draw a list of concessions to the U.S. it would suspend.[52] That way, China felt it could insulate itself from catalyzing a trade war with its own unilateral measures: by characterizing America's Section 301 action as a veiled safeguard, China could accuse the U.S. of acting outside the lines, while its retaliation stayed within them. Of course, the U.S. did not notify the WTO of its Section

[50] *See* David Lawder, *U.S., South Korea to Revise Trade Pact with Currency Side-Deal, Autos Concessions*, REUTERS, 27 March 2018, www.reuters.com/article/us-usa-trade-southkorea/u-s-south-korea-to-revise-trade-pact-with-currency-side-deal-autos-concessions-idUSKBN1H32SI; Tolusse Olorunnipa & Andrew Mayeda, *Trump Scores His First Revized Trade Deal, With South Korea*, BLOOMBERG, 27 March 2018, www.bloomberg.com/news/articles/2018-03-28/trump-scores-his-first-revised-trade-deal-with-south-korea.

[51] Memorandum for Secretary of Commerce from Secretary of Defense General James N. Mattis, Response to Steel and Aluminum Policy Recommendations (undated), www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf.

[52] *Quoted in U.S. Commerce Department Proposes; China Adopts*.

232 action as a "safeguard," which it was obliged to do if that action indeed was a safeguard. And, if it was, then the U.S. would have to offer China – and all other WTO Members with a substantial export interest in the subject merchandise – the opportunity for consultations with a view to them suspending equivalent trade concessions against the U.S.

So, China contemplated safeguard-like retaliation on American coal, electronics, sorghum, and soybean exports, and shifting LCA purchases from Boeing to Airbus. Specifically, China listed 128 American exports it hit (effective 2 April 2018) in a two-tiered fashion:[53]

(1) A first group of 120 items, including, fruit (fresh and dried), ginseng, nuts, rolled steel bars, and wine, would draw a 15% tariff, if the two countries could not reach an agreement on compensation.

(2) A second group of 8 items, which included frozen pork and other processed agricultural goods, and scrap aluminum, would draw a 25% tariff, assuming no compensation agreement, and following China's evaluation of the effects of retaliation against the first group.

The Chinese tariffs, affecting $3 billion of trade, were worth $611.5 million. The EU also threatened retaliation against American exports of cheese, juice, Kentucky bourbon, peanut butter, Harley-Davidson motorcycles, and Levi's jeans. Japan said it would consider retaliatory levies on American imports, plus a WTO lawsuit co-filed with the EU against the U.S.[54] China and other partners also had planned ahead: during 2017, in anticipation of the possibility of their exports being hit with a Section 232 action, they upped steel exports to the U.S. by 15%.[55]

Jamaica, too, had its worries: it is a top producer of bauxite, which is an input into aluminum.[56] Chinese and Russian interests held alumina refineries in Jamaica, and such foreign direct investment (FDI) bolstered Jamaica's economy (including by cutting the country's debt from 140% to 105% of GDP). The Section 232 action, coupled with trade sanctions imposed by the Trump Administration against Russia, could hobble Chinese and Russian aluminum exports to America, with adverse upstream knock on effects for Jamaica's bauxite sector and FDI inflows.

Many WTO Members threatened a *DSU* case, raising the spectre of a showdown over GATT Article XXI. That spectre materialized on 5 April 2018, when China filed suit against the U.S., with China following through on its contention that the Section 232 action 25% steel and 10% aluminum duties were disguised safeguards ("safeguards measures in substance," as China

[53] *See China Hits; China Adopts; China Hits Back with Tariffs on U.S. Imports worth $3 bn.*, BBC NEWS, 2 April 2018, www.bbc.com/news/world-asia-43614400; Teaganne Finn, *Perdue Backs Trump's China Tariffs as Farmers Fear Retaliation*, International Trade Daily (BNA) (26 March 2018); *Markets Edgy on Trade War Fears*, BBC NEWS, 23 March 2018, www.bbc.com/news/business-43510802.

[54] *See* Brian Yap, *Japan Could Retaliate Against Trump's Metals Tariffs*, 35 International Trade Reporter (BNA) 547 (19 April 2018).

[55] *See* Tolusse Olorunnipa, *Republicans Challenge Trump on Steel, Aluminum Tariffs*, 35 International Trade Reporter 252 (22 February 2018).

[56] See Lucien Chauvin, *Jamaica Concerned Over Collateral Damage of U.S. Tariffs*, 35 International Trade Reporter (BNA) 533 (19 April 2018).

put it in its *DSU* complaint), and failed to meet the criteria for safeguard actions set out GATT Article XIX and the WTO *Safeguards Agreement*.[57] China's complaint alleged:

> the United States has failed to make proper determination and to provide reasoned and adequate explanation of "unforeseen developments," imports "in such increased quantities" and "under such conditions," and "cause or threaten to cause serious injury to domestic producers," and the United States has also failed to follow proper procedural requirements including, for example, notification and consultation procedures, and has failed to apply the measures in a proper manner, for example, application irrespective of source of supply and only for necessary period of time.[58]

China further argued the Section 232 tariffs breached U.S. tariff bindings under Article II:1(a)-(b) of the General Agreement on Tariffs and Trade (GATT), violated the U.S. most favored nation (MFN) obligation under Article I:1 (because they were selectively applied against certain Members, such as China), and were administered in a non-transparent (namely, non-uniform, partial and unreasonable manner) in breach of Article X:3(a).

Would the Section 232 tariffs boost jobs? Domestic observers pointed out tariffs would benefit a concentrated few, but hurt many.[59] For instance, steel mills with excess capacity could be restarted, albeit with delay. U.S. Steel was an example: it considered restarting one of its two idled blast furnaces at its Granite City, Illinois facility, and thus hiring 500 workers, but the process would take four months. Steel producers that rely on specialty steel imports might end up laying off workers. Russian-based Novolipetsk Steel PAO was an example: it has plants in Indiana and Pennsylvania that make steel sheet for customers like Caterpillar, Inc., using steel slap imports, and considered laying off up to half of its 1,200 workers at those plants.

V. National Level (2): Will Section 232 National Security Tariffs on Foreign Autos and Auto Parts be Imposed?

• May 2018 Investigation Announcement

On 23 May 2018, Donald J. Trump announced he had instructed the DOC to initiate the third Section 232 investigation of his Presidency, namely, against imports of automobiles, including light trucks, SUVs, and vans, plus auto parts. The President called for consideration of a global tariff of up to 25% on all such merchandise, arguing "[c]ore industries such as automobiles

[57] *See* World Trade Organization, *United States – Certain Measures on Steel and Aluminum Products – Request for Consultations by China*, WT/DS544/1, G/L/1222, G/SG/D50/1 (9 April 2018) [hereinafter, *Complaint*]; World Trade Organization, *China Initiates WTO Dispute Complaint Against U.S. Tariffs on Steel, Aluminum Products* (9 April 2018). Both documents are at www.wto.org/english/news_e/news18_e/ds544rfc_09apr18_e.htm.

[58] *Complaint*, ¶ B (first bullet point).

[59] Nick Carey, *Trump Tariffs Could Cost as well as Create Steel Jobs*, REUTERS, 7 March 2018, www.reuters.com/article/us-usa-trade-steel-capacity/trump-tariffs-could-cost-as-well-as-create-u-s-steel-jobs-idUSKCN1GJ39R.

and automotive parts are critical to our strength as a Nation."[60] His Secretary of Commerce, Wilbur Ross (1937-), added:

> "There is evidence suggesting that, for decades, imports from abroad have eroded our domestic auto industry," said Secretary Ross. "The Department of Commerce will conduct a thorough, fair, and transparent investigation into whether such imports are weakening our internal economy and may impair the national security."
>
> During the past 20 years, imports of passenger vehicles have grown from 32 percent of cars sold in the United States to 48 percent. From 1990 to 2017, employment in motor vehicle production declined by 22 percent, even though Americans are continuing to purchase automobiles at record levels. Now, American owned vehicle manufacturers in the United States account for only 20 percent of global research and development in the automobile sector, and American auto part manufacturers account for only 7 percent in that industry.
>
> Automobile manufacturing has long been a significant source of American technological innovation. This investigation will consider whether the decline of domestic automobile and automotive parts production threatens to weaken the internal economy of the United States, including by potentially reducing research, development, and jobs for skilled workers in connected vehicle systems, autonomous vehicles, fuel cells, electric motors and storage, advanced manufacturing processes, and other cutting-edge technologies.[61]

Exactly how broad the investigation would be was unclear. "Motor vehicles and parts" is a broad, undefined category, and the official pronouncements were inclusive: "automobiles, including cars, SUVs, vans and light trucks, and automotive parts."[62] So, for example, were components of vehicular air-conditioning systems, such as freon, included? What about mirrors used on the reverse side of car eyeshades, or removable picnic tables built into the trunks of SUVs?

• 10 Doubts

Naturally, the statutory legal criteria for the Section 232 auto investigation were the same as those in the steel and aluminum cases. However, the auto investigation raised even more serious

[60] The White House, *Statement from the President on Potential National Security Investigation into Automobile Imports*, 23 May 2018, www.whitehouse.gov/briefings-statements/statement-president-potential-national-security-investigation-automobile-imports/.

[61] U.S. Department of Commerce, 23 May 2018, *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, www.commerce.gov/print/3540.

Following this announcement was one concerning a public hearing. *See* U.S. Department of Commerce, *Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts*, 83 Federal Register number 104, 24735-24737 (30 May 2018), www.gpo.gov/fdsys/pkg/FR-2018-05-30/pdf/2018-11708.pdf. [Hereinafter, *Public Hearing Notice*.] As of 29 June 2018, DOC had received roughly 2,500 comments. David Shepardson, *GM Says U.S. Import Tariffs Could Mean "Smaller" Company, Fewer Jobs*, REUTERS, 29 June 2018, www.reuters.com/article/us-usa-trade-autos/gm-says-u-s-import-tariffs-could-mean-smaller-company-fewer-jobs-idUSKBN1JP2PZ. [Hereinafter, *GM Says*.]

[62] *Public Hearing Notice*, 24735.

doubts than the cases against steel and aluminum, in at least 10 respects. One of them concerned the criteria: the auto investigation referred to the *NSIBR*, published at Section 705.4 of the CFR, which contain eight criteria. The Trump Administration added six criteria, five of which were based on the *NSIBR* criteria and adjusted for the auto context, but one of which appeared novel:[63]

(1) "The quantity and nature of imports of automobiles, including cars, SUVs, vans and light trucks, and automotive parts and other circumstances related to the importation of automobiles and automotive parts."
(2) "Domestic production needed for projected national defense requirements."[64]
(3) "Domestic production and productive capacity needed for automobiles and automotive parts to meet projected national defense requirements."[65]
(4) "The existing and anticipated availability of human resources, products, raw materials, production equipment, and facilities to produce automobiles and automotive parts."[66]
(5) "The growth requirements of the automobiles and automotive parts industry to meet national defense requirements and/or requirements to assure such growth, particularly with respect to investment and research and development."[67]
(6) "The impact of foreign competition on the economic welfare of the U.S. automobiles and automotive parts industry."[68]
(7) "The displacement of any domestic automobiles and automotive parts causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects."[69]
(8) "Relevant factors that are causing or will cause a weakening of our national economy."[70]
(9) "The extent to which innovation in new automotive technologies is necessary to meet projected national defense requirements."
(10) "Whether and, if so, how the analysis of the above factors changes when U.S. production by majority U.S.–owned firms is considered separately from U.S. production by majority foreign-owned firms."
(11) "Any other relevant factors."[71]

[63] The criteria are quoted from the *Public Hearing Notice*, 24736. The adaptations for the automotive industry, and the novel tenth criterion, are evident from comparing *Public Hearing Notice*, 24736 with 15 C.F.R. § 705.4(a)(1)-(5), (b)(1)-(3), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[64] *See* 15 C.F.R. § 705.4(a)(1), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[65] *See* 15 C.F.R. § 705.4(a)(2), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[66] *See* 15 C.F.R. § 705.4(a)(3), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[67] *See* 15 C.F.R. § 705.4(a)(4), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[68] *See* 15 C.F.R. § 705.4(b)(1), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[69] *See* 15 C.F.R. § 705.4(b)(2), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[70] *See* 15 C.F.R. § 705.4(b)(3), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.
[71] *See* 15 C.F.R. § 705.4(a)(5), www.gpo.gov/fdsys/pkg/CFR-2018-title15-vol2/pdf/CFR-2018-title15-vol2-sec705-4.pdf.

The first nine criteria were familiar, as was the eleventh: they were the ones used in earlier Section 232 cases, adapted for the automotive industry. But, the tenth criterion never had been used before. Was the Trump Administration sending a protectionist, even xenophobic, message, that domestic production by domestic, but not foreign, companies enhances American national security.

Second, did auto imports truly threaten to impair American national security? Autos are a consumer good. As the Association of Global Automakers argued in opposition to any Section 232 action, "America does not go to war in a Ford Fiesta."[72] Similarly, the Alliance of Automobile Manufacturers (the members of which include Daimler, GM, Ford, and Toyota), not only intoned "there is no basis to claim that auto-related imports are a threat to national security," but also highlighted the fact 98% of U.S. auto imports come from America's allies.[73] That is, nearly 25% of all autos sold in America are imported, but allied countries are the largest sources of cars and car parts.[74] The U.S. (in 2017) imported 8.3 million, and exported nearly two million, vehicles. Of the imports, 2.4 million came from Mexico, and 1.8 million from Canada – 50.6% from America's *NAFTA* partners.[75] Other major car exporters to America were Germany, Japan, and Korea (accounting for 11%, 21%, and 8% of U.S. vehicle imports, respectively, in 2017), allies that disagreed with the auto case and that already were angered by the steel and aluminum cases.[76] Moreover, about 12 million cars and trucks were made in the U.S. (in 2017), including by German, Japanese, and Korean companies, all of which had large U.S.-based manufacturing and assembly plants. The majority of Japanese and Korean vehicles sold in the U.S. were made in the U.S. How, then, were friendly foreign imports undermining American national security?

Third, were the figures quoted by Secretary Ross illustrative of a significant increase in all types of vehicles and components? He spoke of a 16% increase in imports between 1997-2017, and a 22% drop in employment between 1990-2017. What he did not mention was that since 2009, auto output in the U.S. grew 124%.[77] Obviously, the variables he cited did not match, and he conflated correlation with causation: were imports to blame for the decline in employment, or were their other factors, such as automation and recession? Equally obviously, the time periods were not co-extensive. In essence, a persuasive case had yet to be made that imports were a cause of declines in American automotive output and employment (*e.g.*, imports increased relative to domestic production), and that such declines impaired national security, though of course, Section 232 requires neither a showing of causation nor injury.

[72] *Quoted in* David Shepardson, *Automakers Warn U.S. Tariffs Will Cost Hundreds of Thousands of Jobs, Hike Prices*, Reuters, 27 June 2018, www.reuters.com/article/us-usa-trade-autos/automakers-warn-u-s-tariffs-will-cost-hundreds-of-thousands-of-jobs-hike-prices-idUSKBN1JN1T2. [Hereinafter, *Automakers Warn.*]
[73] *Automakers Warn.*
[74] *See* Andrew Mayeda & Ryan Beene, *Trump Orders Probe to Consider Tariffs on U.S. Auto Imports*, 35 International Trade Reporter (BNA) 739 (31 May 2018).
[75] *See Trump Administration Launches Vehicle Import Probe*, BBC NEWS, 24 May 2018, www.bbc.com/news/world-us-canada-44234245.
[76] *See* Andrew Mayeda, Ryan Beene & Jenny Leonard, *Trump Threatens Allies With New Tariffs, Sowing Global Confusion*, BLOOMBERG, 23 May 2018, www.bloomberg.com/news/articles/2018-05-24/trump-orders-probe-to-consider-tariffs-on-u-s-auto-imports. [Hereinafter, *Trump Threatens.*]
[77] *See* Daina Beth Solomon & David Lawder, *Mexico's Pena Nieto "Optimistic" on NAFTA as Country Makes New Offer*, REUTERS, 24 May 2018, www.reuters.com/article/us-trade-nafta-mexico/mexico-says-will-not-renegotiate-nafta-under-pressure-but-makes-new-offer-idUSKCN1IQ01Y.

Fourth, what would the Section 232 action mean for the American economy? On the one hand, "[t]he White House thinks the penalties would encourage domestic investment and automotive production and support U.S. workers...." But on the other hand:

> But America's carmakers, including Ford, General Motors and Fiat Chrysler, are wary as they watch what's happening to other companies caught in Trump's trade war, such as Harley-Davidson. The motorcycle maker suddenly found the European Union imposing tariffs on its U.S.-manufactured products after Trump [in March 2018] instituted penalties [under Section 232] on steel and aluminum from Europe.
>
> The auto industry is ... raising concerns about the intricacy and global nature of how cars and trucks are made, with parts crossing borders many times to build one automobile. Domestic and foreign brands alike are concerned that penalties would disrupt sales and hurt their bottom lines.
>
> Unlike the steel and aluminum tariffs – where some companies, unions and lawmakers offered measured support for the president's attention and protection – there is near-unanimous opposition among those same groups against the push to impose tariffs on cars.
>
> ...
>
> A tax on foreign autos could have far deeper impacts than the steel and aluminum duties Trump has already imposed [under Section 232, in March 2018]. The U.S. imported some $360 billion in cars, car parts and engines last year [2017], compared to $29 billion in steel and $18 billion in aluminum.
>
> ...
>
> The probe is geared at helping domestic brands, but even the Big Three automakers are making it clear they aren't asking for tariff protection.
>
> ...
>
> Most cars made in the U.S. today are composed of only about 75 percent U.S. content, for example, meaning manufacturers would still have to pay the tariffs on the remaining 25 percent of parts. Of the top 10 domestically produced cars with the most U.S. content, four are made by the Japanese brand Honda.
>
> A 25 percent tariff, as the administration has threatened, would lead to a loss of 195,000 jobs in the U.S. auto industry [representing 1.9% of the labor force in the auto and auto parts industry] over a three-year period, as production would drop off by 1.5 percent, according to a recent study from the Peterson Institute for International Economics. The study projected that if other countries retaliate [in kind, with tariffs on the same merchandise], U.S. job losses could reach 624,000 [representing 5% of the auto and auto parts workforce, owing to an output decline of 4%].[78]

[78] Megan Cassella, *"This Would Widen the Trade War Tenfold:" U.S. Automakers Say No To Trump's Car Tariffs*, POLITICO, 26 June 2018, www.politico.com/story/2018/06/26/us-automakers-trump-administration-car-tariffs-653654?cid=apn.

The Institute inclines toward free trade, and its study is Sherman Robinson, Karen Thierfelder, Jeffrey J. Schott, Euijin Jung, Zhiyao (Lucy) Lu & Melina Kolb, *Trump's Proposed Auto Tariffs Would Throw US Automakers and Workers Under the Bus*, (31 May 2018), https://piie.com/blogs/trade-investment-policy-watch/trumps-proposed-auto-tariffs-would-throw-us-automakers-and. The study relies on a multi-sector, multi-country, global CGE. See id., Appendix, and indicated:

> The 195,000 and 624,000 figures are how many workers would become unemployed in the national economy because of macroeconomic adjustment to the shock. The percent change of employment in the auto and part industries are displaced workers who may find other jobs or be unemployed.

Id., fn. 1.

So, consider the significance of the cost to American consumers of a comprehensive 25% auto and auto parts tariff. Many car and component companies could not absorb that increase, and would need to choose between laying off employees or passing on the tariff to consumers. Average American households, given their already high levels of debt, could not themselves absorb those increases:

> U.S. American consumers would have to pay $5,000 to $7,000 more for their vehicles on average, potentially reducing U.S. auto sales by 4 million to 5 million units a year….
>
> …
>
> "It'll hurt the U.S. as much as it'll hurt Canada," said [Jerry] Dias [Canadian President, UNIFOR, which represents Canadian autoworkers at FCA, Ford, and GM], who pointed out that the majority of parts in Canadian-built vehicles come from the U.S. …
>
> The problem with auto tariffs is that it takes a long time to shift production, meaning American consumers would pay the price for several years, said Flavio Volpe, president of the Automotive Parts Manufacturers' Association, which represents Canada's auto suppliers.
>
> "If your objective is to have the American companies as well as the Japanese set up on the U.S. side of the border, you're asking private companies to absorb billions of dollars of costs," Volpe said, adding that it would make the North American industry less competitive against rising Chinese players. "At a time when the U.S. is targeting China, it is infinitely dumb."[79]

[79] Kristine Owram, *Trump Auto Tariffs Would Slam Canada as Trade Rhetoric Heats Up*, BLOOMBERG, 12 June 2018, www.bloomberg.com/news/articles/2018-06-12/trump-auto-tariffs-would-slam-canada-as-trade-rhetoric-heats-up. [Hereinafter, *Trump Auto Tariffs*.]

Likewise, "[t]he Alliance of Automobile Manufacturers, representing General Motors Co, Ford Motor Co, Daimler AG, Toyota and others," said in its 27 June 2018 comment letter to the DOC against deployment of Section 232 on auto and auto part imports:

> "We believe the resulting impact of tariffs on imported vehicles and vehicle components will ultimately harm U.S. economic security and weaken our national security," the group wrote, calling the tariffs a "mistake" and adding imposing them "could very well set a dangerous precedent that other nations could use to protect their local market from foreign competition."

Tariffs on auto parts would cause the cost of a U.S.-origin car to jump by $2,000.[80]

So, many consumers might postpone or avoid altogether a new car purchase altogether, substitute a cheaper, U.S.-made vehicle, or perhaps look to the used car market. The diminution in demand for cars could lead to a vicious downward spiral across the North American vehicle and parts industries. The multiplier effects to other goods and services sectors could push the American economy into recession. Those effects could be exacerbated by counter-retaliation against the U.S., for example by Canada, which is America's top export destination for motor vehicles. The EU, too, would counter-retaliate, as it warned in its 10-page comment letter to the DOC arguing against any Section 232 action:

> EU companies make close to 2.9 million cars in the United States, supporting 120,000 jobs – or 420,000 if car dealerships and car parts retailers are included.
>
> ...
>
> Imports had, it said, not shown a dramatic increase in recent years and largely grown alongside overall expansion of the U.S. car market, with increased demand that could not be met by domestic production.
>
> ... [T]ariffs on cars and car parts could undermine U.S. auto production by imposing higher costs on U.S. manufacturers. The EU had calculated that a 25 percent tariff would have a initial $13-14 billion negative impact on U.S. gross domestic product with no improvement to its current account balance.

The Alliance said its analysis of 2017 auto sales data showed a 25 percent tariff on imported vehicles would result in an average price increase of $5,800, which would boost costs to American consumers by nearly $45 billion annually.

Automakers are concerned tariffs would mean less capital to spend on self-driving cars and electric vehicles.

"We are already in the midst of an intense global race to lead on electrification and automation. The increased costs associated with the proposed tariffs may result in diminishing the U.S.' competitiveness in developing these advanced technologies," the Alliance wrote.

Toyota said in a statement Wednesday that new tariffs "would increase the cost of every vehicle sold in the country." The automaker said the tariffs would mean even a Toyota Camry built in Kentucky "would face $1,800 in increased costs."

Quoted in Automakers Warn.

To be sure, auto producers were concerned about their own bottom lines adversely affected by multiple Section 232 cases. In September 2018, Ford said the 10% aluminum and 25% steel tariffs had cost Ford $1 billion in profits since their initial imposition in March, and warned new Section 232 tariffs on auto and auto parts would cost 300,000 auto-sector jobs nationwide in factories and dealerships. *See* Nick Carey & David Shepardson, *Trump Metals Tariffs Will Cost Ford $1 billion in Profits, CEO Says*, REUTERS, 26 September 2018, www.reuters.com/article/us-ford-motor-tariffs/trump-metals-tariffs-will-cost-ford-1-billion-in-profits-ceo-says-idUSKCN1M61ZN.

[80] *U.S. Faces Retaliation if Car Tariffs Go Ahead*, BBC NEWS, 19 July 2018, www.bbc.co.uk/news/business-44894417. [Hereinafter, *U.S. Faces*.]

> Assuming counter-measures along the lines of those taken in response to existing U.S. [Section 232] import tariffs on steel and aluminum, up to $294 billion of U.S. exports – 19 percent of overall U.S. exports – could be affected....[81]

Simply put, 25% Section 232 tariffs could be a major self-inflicted wound to the American economy.

Fifth, was there a "China card" to play in the Section 232 auto investigation? China is not an exporter of cars, light trucks, or SUVs to America, though it is a source of various parts. The Pentagon had opposed the steel and aluminum tariffs, and it would not be a surprise if it opposed the auto case, too, finding that the merchandise in question is not strategic, and there is no Sino-American great power conflict at stake. At best, any "China card" seemed pre-emptive, that is, the Trump Administration sought to blunt China's aspirations to enter the American automotive market.[82]

Sixth, were America's *NAFTA* partners the real targets of the Section 232 auto case?[83] Announcing the investigation appeared to be an unartful negotiating tactic to pressure Canada and Mexico on auto ROOs in the theretofore unsuccessful *NAFTA* renegotiations. Consider Canada's vulnerability:

> Motor vehicles and parts were Canada's biggest export after energy products, representing about 16 percent of the C$7.4 billion ($5.7 billion) in shipments over the first four months of this year [2018]. The Canadian auto industry directly employs about 130,000 people and contributes more than C$20 billion annually to gross domestic product, according to the Canadian Vehicles Manufacturers' Association, which represents the Canadian arms of General Motors Co., Ford Motor Co. and Fiat Chrysler Automobiles NV.
>
> If the tariffs are implemented, they would shave about 0.6 percent off Canadian economic growth....
>
> ...
>
> With the economy growing at about 2.2 percent, that's lopping off more than a quarter of growth....

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[81] Jan Strupczewski & Philip Blenkinsop, *EU Warns U.S. of Boomerang Effect if Trump Imposes Car Levies*, Reuters, 2 July 2018, www.reuters.com/article/us-usa-trade-eu/eu-warns-u-s-of-boomerang-effect-if-trump-imposes-car-levies-idUSKBN1JS0R9.

As the EU applies a 10% MFN rate on cars, compared with America's 2.5% duty, with no 25% retaliation or counter-retaliation, the EU tariff is 75% higher than the American one. With 25% retaliation and counter-retaliation added to the applied MFN rates, the difference in tariff narrows to 21.4% (the percentage difference between 35%, which is the sum of 25% and 10% by the EU, and 27.5%, which is the sum of 25% and 2.5% by the U.S.). However, as a practical matter, the cumulative EU tariff is a significant impediment, insofar as consumers respond to absolute values. Prospective European consumers of U.S. car imports find a 35% cumulative EU barrier even worse than prospective American consumers of EU car imports find a 27.5% impediment.

[82] *See* David Shepardson & Jeff Mason, *U.S. Launches Auto Import Probe, China Says Will Defend Interests*, REUTERS, 24 May 2018, www.reuters.com/article/us-usa-trump-autos/u-s-launches-auto-import-probe-china-says-will-defend-interests-idUSKCN1IO1YM.

[83] *See Trump Threatens*.

> Five automakers – GM, Ford, FCA, Toyota Motor Corp. and Honda Motor Co. – produced about 2.2 million vehicles in Canada last year [2017]. Approximately 85 percent of those vehicles are exported, with the vast majority going to the U.S. The most popular models shipped to the U.S. include the Toyota RAV4 and the Honda Civic, both assembled in Ontario plants.[84]

Manifestly, a 25% tariff on such exports would pose an a major impediment to U.S. market access, and "threaten an ever-shrinking sector in Canada that lost 53,000 jobs between 2001 and 2014." (Reinforcing this vulnerability was personal invective: White House trade advisor Peter Navarro said "there's a 'special place in hell' for foreign leaders like [Canadian Prime Minister Justin] Trudeau who engage in bad faith with [President] Trump…."[85]) Mexico, too, was vulnerable to a 25% tariff, even though many of the Canadian jobs were lost to Mexico:

> Canada's loss has been Mexico's gain, as production there has soared thanks to *NAFTA* and other trade deals. In 2008, Mexico surpassed Canada for the first time to become the second-largest North American producer of light vehicles…. While total Canadian production may decline by 135,000 units between 2016 and 2020, Mexico's are forecast to rise by 850,000. The threat of tariffs add to the uncertainty in the industry, which faces a potential trade overhaul as a result of *NAFTA* negotiations.[86]

In other words, Mexico's aspirations for growth in the American market were imperiled by the Section 232 action.

Seventh, would the uncertainty created by the Section 232 auto case cause auto and auto parts companies to re-think their supply chains, with a view to re-ordering them outside of the U.S.? After all, Canada and Mexico were *CPTPP* members, and have FTAs with the EU. So, automotive products originating in Canada and Mexico would have DFQF access to the *TPP* 11 countries, and the EU. Of course, such re-ordering would take time, and depend on the position of a firm in the commercial chain, and as an importer, exporter, or both. But, in the long run, investing more heavily in operations outside the U.S. might have the advantages of enhancing market access in third countries, and hedging against U.S. political risk.

Eighth, would this uncertainty deter foreign companies from investing in the U.S. and hiring Americans? Volvo, a China's Zhejiang Geely Holding Group, answered in the affirmative.[87] Before the Section 232 auto investigation, Volvo had been importing all of the vehicles it sold in America. With rising U.S. demand for its cars, it built a new factory in South Carolina, which initially employed 900 Americans. Volvo planned to boost production via a $1.1 billion factory expansion, and increase to 4,000 its labor force. They would make cars not only for domestic sale, but also for exportation. But, two prospects imperiled Volvo's plans: Section 232 tariffs imposed

[84] *Trump Auto Tariffs*.
[85] *Quoted in Trump Auto Tariffs*.
[86] *Trump Auto Tariffs*.
[87] *See* Harriet McLeod, *Volvo Cars Says Auto Tariffs Threaten Jobs at New Plant*, REUTERS, 20 June 2018, www.reuters.com/article/us-autos-trade-volvo/volvo-cars-ceo-says-auto-tariffs-threaten-jobs-at-new-u-s-plant-idUSKBN1JG3BL.

by the U.S. on auto parts Volvo imported to incorporate into finished vehicles; and counter-retaliatory tariffs imposed by China, the EU, and other countries on the vehicles it exports.

Volvo was not alone in this response. BMW, too, said a Section 232 action against car and car parts would compel it to reduce its investment and workforce at its Spartanburg, South Carolina factory.[88] That plant is BMW's largest production facility in the world, and BMW exports annually 70% of the vehicles that roll off its assembly lines. However, the counter-retaliatory measures China and the EU took in the Section 232 steel and auto cases included tariffs on those exported vehicles, which BMW said it could not "completely absorb," and thus would have to raise prices on models shipped from South Carolina to China.[89] And, the American 25% and 10% steel and aluminum tariffs, respectively, had raised the cost of inputs BMW imported for use in those exports. If the U.S. proceeded with Section 232 auto and auto part tariffs, then foreign countries again would counter-retaliate. At that point, BMW could not absorb the higher counter-retaliatory tariffs on its car exports, nor the higher U.S. tariffs on its auto part imports. BMW would have to shift production and jobs to China and the EU.

When China did impose counter-retaliatory measures, not only in response to the U.S. Section 232 steel and aluminum actions, but also in the Section 301 case (discussed in a separate Chapter), BMW said it would have to raise the price of two crossover SUV models it makes in Spartanburg, South Carolina and ships to China: the X4, X5, and X6.[90] China had lowered its applied MFN auto tariff from 25% to 15%, but its 25% counter-retaliation (effective 6 July 2018) meant BMW (and all other auto) shipments from the U.S. to China faced a 40% tariff. So, BMW – which in 2017 had exported over 100,000 vehicles from America to China – said it would raise its retail prices in China on those two models by 4%-7%. BMW might have liked to raise them further, but stiff competition in China among luxury brands impelled it to absorb the remainder of the 25% counter-retaliatory tariff – and, consider shifting production and jobs overseas. In November 2018, BMW weighed shifting production from its Spartanburg facility – which was its largest in the world, employing 10,000 workers, and which exported 70% of its production to China and other countries – to China.[91]

Most notably, GM – America's largest automaker – joined Volvo and BMW in saying tariffs of up to 25% on autos and auto parts would threaten American jobs.[92] GM has (as of June 2018) 110,000 employees at its 47 manufacturing facilities across the U.S., and (between 2009-2018) invested over $22 billion in these facilities. Seventy percent of the cars GM sells in the U.S. (as of 2017) are made in those facilities, while the remaining 30% are imported (86% of the imports

[88] *BMW Says U.S. Tariffs on EU Cars May Hit Investment There*, REUTERS, 30 June 2018, www.reuters.com/article/us-usa-trade-autos-bmw/bmw-says-u-s-tariffs-on-eu-cars-may-hit-investment-there-idUSKBN1JQ0EZ.
[89] Nick Carey, *Tariffs on U.S.-Made Models Will Mean Pricier BMWs in China*, REUTERS, 6 July 2018, www.reuters.com/article/us-usa-trade-china-bmw/tariffs-on-u-s-made-models-will-mean-pricier-bmws-in-china-idUSKBN1JW1YV.
[90] *See* Norihiko Shirouzu, *Exclusive: BMW to Raise Prices of Two U.S.-Made SUV Models in China*, REUTERS, 28 July 2018, www.reuters.com/article/us-usa-trade-china-bmw/exclusive-bmw-to-raise-prices-of-two-u-s-made-suv-models-in-china-idUSKBN1KJ024.
[91] *See* Gabrielle Coppola, *BMW May Shift Production to China from U.S. as Trade War Bites*, 35 International Trade Reporter (BNA) 1484 (15 November 2018).
[92] *See GM Says*.

are from Canada or Mexico, thanks to *NAFTA*, and the remaining 14% are from China or the EU). A Section 232 action, and the foreseeable counter-retaliation by other countries, would raise the cost of inputs GM imports, and impede market access for finished vehicles – just as would happen with Volvo and BMW. So, in its comment filed with the DOC, GM warned that a trade war in cars and car parts would "lead to a smaller GM, a reduced presence at home and abroad for this iconic American company, and risk less – nor more – U.S. jobs." GM would be forced to raise prices (on domestic car sales, due to higher imported input costs caused by the Section 232 tariffs, and on foreign sales, due to counter-retaliatory duties on finished vehicles), which would lead to lower sales, and thus a vicious cycle of shrinking output and employment, not to mention investment, R&D, and innovation.

Ninth, would the Section 232 case embolden WTO Members other than the U.S. to implement protectionist measures under the guise of national security? If so, and if any WTO challenges against such measures were met by respondents with invocation of the GATT Article XXI national security exception, then the threat to the WTO dispute settlement system, and indeed the GATT-WTO trade order, would be grave indeed. As Japan's Minister of Trade, Hiroshige Seko, said: "Imposing broad, comprehensive restrictions on such a large industry could cause confusion in world markets, and could *lead to the breakdown of the multilateral trade system based on WTO rules*."[93] In effect, America's steel and aluminum cases, followed by its auto case, would have catalyzed the demise of the liberal multilateral trade order.

Finally, would the U.S. grant selected country-specific and/or product-specific exemptions to any Section 232 tariffs it imposed? For example, would Korea receive one, as it had from the steel and aluminum tariffs, thanks to its agreement to revise *KORUS*? If so, then what price would Korea have to pay? Would it be a VER, which, as in the steel and aluminum case, might be illegal under GATT-WTO rules?

- **July 2018 Section 232 Presidential Auto *Proclamation* and Aftermath**

Not surprisingly, the prospect of a Section 232 investigation attracted widespread opposition in the U.S. The DOC had until February 2019 to report its findings to the President. Nevertheless, by mid-July 2018, about 2,300 comments were submitted to the DOC from foreign governments (including Japan and Korea, which both manufacture vehicles in, and export them to, the U.S.), individuals, industry groups, and unions, including globally integrated auto producers like GM, and antique auto enthusiasts – and only three supported a Section 232 case (with the UAW providing the strongest support, but still calling for targeted action to support re-investment in America's auto factories and prevent anymore offshoring of production and jobs).[94] As the

[93] *Quoted in Trump Threatens* (emphasis added). Likewise, he and EU Trade Commissioner Cecilia Malmstroem said in May 2018 joint statement they issued after meeting with the USTR, Ambassador Robert Lighthizer: "This would cause serious turmoil in the global market and *could lead to the demize of the multilateral trading system based on WTO rules.*" *Quoted in* EU-Japan Joint Statement, 31 May 2018, http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156907.pdf, and in Nikos Chrysoloras, *Car Tariffs May Lead to Demize of Global Trade System: EU, Japan*, 35 International Trade Reporter (BNA) 756 (7 June 2018) (emphasis added).

[94] *See* U.S. Department of Commerce, *Section 232 National Security Investigation of Imports of Automobiles and Automotive Parts Hearing Panel Schedule*, 19 July 2018, www.commerce.gov/sites/commerce.gov/files/autos_232_hearing_-

investigation proceeded in the U.S., foreign countries devised strategies to counter any Section 232 tariffs their autos or auto parts might face.

The EU drew up a counter-retaliation list of American exports, pledging to impose steep tariffs on up to € 20 billion worth of U.S. imports.[95] Mexico pledged to defend its interests, possibly by accepting an annual DFQF cap of 2.4 million vehicles, with cars and SUVs above that limit subject to Section 232 tariffs.[96] Canada declared it would respond "proportionately," though whether it could afford a dollar-for-dollar response was dubious.[97] Auto and auto parts suppliers in Canada were dependent on the American market to a greater degree than its aluminum and steel producers, making the Canadian tit-for-tat response to the Section 232 aluminum and steel tariffs less difficult. And, in July 2018, Japan and Korea joined the EU, Canada, and Mexico to discuss the common threat of another Trump Administration Section 232 action, vowing not only counter-retaliatory tariffs, but also a WTO lawsuit.[98] These countries, representing nearly $1 trillion in global auto exports, also broached the subject of a plurilateral agreement to slash tariffs on autos,

july_19_2018_panel_schedule_final_071218.pdf; *U.S. Faces*; Ryan Beene, Gabrielle Coppola & Andrew Mayeda, *Trump Takes Heat on Car Tariffs as Industry Warns of Job Losses*, 35 International Trade Reporter (BNA) 1010 (26 July 2018); Rossella Brevetti & Len Bracken, *No Decision Made on Auto Tariffs Yet, Commerce Chief Says*, 35 International Trade Reporter (BNA) 1013 (26 July 2018).

[95] *See* Jonathan Stearns, *EU Eyes Tariffs on $23 Billion of U.S. Goods If Trump Taxes Cars*, BLOOMBERG LAW INTERNATIONAL TRADE NEWS, 23 January 2019, https://news.bloomberglaw.com/international-trade/eu-eyes-tariffs-on-23-billion-of-us-goods-if-trump-taxes-cars-2.

EU data indicate (as of October 2018) that one out of every six passenger cars sold in the U.S. is a pick-up, but thanks to the U.S. MFN duty of 25% on them, hardly any are imported from outside the *NAFTA* region. Jonathan Stearns, *EU Eyes Quick U.S. Trade Pact to Avoid Trump's Car-Tariff Threat*, 35 International Trade Reporter (BNA) 1320 (11 October 2018).

[96] *See* Julie Gordon & Sharay Angulo, *Canada Rejoins NAFTA Talks as U.S. Auto Tariff Details Emerge*, REUTERS, 28 August 2018, https://www.reuters.com/article/us-trade-nafta/canada-rejoins-nafta-talks-as-u-s-autos-tariff-details-emerge-idUSKCN1LD1T4.

[97] *See* Kristine Owram & Josh Wingrove, *Facing Trump Auto Tariff Threat, Canada Response Isn't So Clear*, 35 International Trade Reporter (BNA) 1004 (26 July 2018).

[98] *See* Bryce Baschuk, *Major Car Exporters Weigh Response to Trump Duty Threats*, 35 International Trade Reporter (BNA) 1060 (9 August 2018).

Japan temporarily staved off the threat of 25% Section 232 tariffs by agreeing to enter into bilateral FTA negotiations with the U.S., which it did in September 2018: the U.S. would not impose that national security remedy against Japanese cars and car parts, at least not as long as the negotiations continued. The U.S. also agreed not to ask for *TPP* Plus agricultural concessions, that is, access to the Japanese farm goods beyond what Japan already had conceded under *TPP*. However, Japan insisted the talks were limited to trade in goods, and that if the U.S. sought an ambitious deal covering services, IP, and other issues, then it must rejoin *TPP*. *See* Steve Holland & David Lawder, *Japan Dodges U.S. Auto Tariffs, For Now, as Trump and Abe Agree on Talks*, REUTERS, 27 September 2018, www.reuters.com/article/us-usa-trade-japan/japan-dodges-u-s-auto-tariffs-for-now-as-trump-and-abe-agree-on-trade-talks-idUSKCN1M62Q9. Japan had good reason to be incensed about its auto and auto part exports being deemed by the Trump Administration an impairment to U.S. national security. Japanese car producers (in 2017) employed 92,710 workers in, exported 423,415 cars and trucks from, the U.S. *See* Japan Automobile Manufacturers Association, Inc., *2018-2019 Contributions Report Shows JAMA Members' Commitment to Manufacturing & the American Workforce* (undated), www.jama.org/2018-2019-contributions-report-shows-jama-members-commitment-manufacturing-american-workforce/; JAPAN AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., JAMA IN AMERICA: A STRONG COMMITMENT TO MANUFACTURING & THE AMERICAN WORKFORCE, (June 2018), www.jama.org/wp-content/uploads/2018/06/report-for-web-low-res-final.pdf.

The U.S. agreed to a similar arrangement with the EU – it would hold off on imposing Section 232 tariffs on European auto and auto parts while the EU remained engaged with the U.S. in a possible bilateral FTA. *See* Richard Bravo, Jenny Leonard & Shawn Donnan, *Trump's European Union Trade Talks Quickly Become Contentious*, 35 International Trade Reporter (BNA) 1385 (25 October 2018).

which would be an open one (meaning it would be extended on an MFN basis under GATT Article I:1 to all WTO Members). When, in November, GM announced plans to close five North American facilities, including in Ohio, Maryland, and Michigan, and lay off 15,000 workers, President Trump renewed calls for imposition of a 25% tariff on auto imports.[99] GM said its decision was based on sluggish demand for six models of sedans, which it would stop manufacturing, and explained it was not offshoring production and employment of those sedans. The President insisted tariffs would save jobs.

On 17 February 2019, the end of the 270-day investigation deadline, the DOC delivered its Section 232 report to the President.[100] Reportedly, the DOC called for tariffs, possibly of up to 20%-25%, on fully assembled vehicles and parts, plus targeted tariffs on components and technologies used for EVs and automated, internet-connected, and shared vehicles. The President had 90 days to decide on a course of action. Opposition to taking any action was considerable. No American auto producer had called for the investigation when it was launched in May 2018, and many feared slapping tariffs on auto and auto parts imports would cause job losses, boost the cost of vehicles to consumers, and drive R&D and investment offshore. Indeed, the Center for Automotive Research in Ann Arbor, Michigan, forecast that a 25% tariff would cause job losses of 336,900 in auto and auto-related sectors, and raise the cost of light-duty vehicles by an average of $2,750, forcing many consumers to buy used cars, and thereby driving down annual new sales by 1.3 million units.[101]

Nevertheless, the President remarked that "I love tariffs, but I also love them to negotiate," signalling he might take action as leverage in FTA negotiations to compel the EU and Japan to open their markets further to American car and car part exports.[102] The President's remark belied the logic that any Section 232 action was needed to defend America's national security. To the contrary, Germany's car industry pointed out it strengthens America by employing over 113,000 workers across 300 factories in the U.S., and is largest exporter of cars from America, with many such exports shipped to China.[103] The same doubt, of course, had been cast on the Section 232 steel and aluminum actions, especially with that merchandise coming from close allies like Canada and Mexico. In the auto case, Canada and Mexico secured a guarantee from America in the *USMCA* negotiations (discussed in a separate Chapter) that they could each export 2.6 million vehicles duty-free to the U.S., should the President take action. As Senator Robert Portman (1955-, Republican-Ohio), a former USTR said: "There is no way that minivans from Canada are a national security threat."[104] Indeed, he sponsored legislation (Senate Bill 365) in February 2019, to shift responsibility for Section 232 investigations from the DOC to the Pentagon.

99 *See* David Shephardson, *Trump Says Studying New Auto Tariffs After GM Restructuring*, REUTERS, 28 November 2018, www.reuters.com/article/us-usa-trump-autos-tariffs/trump-says-studying-new-auto-tariffs-after-gm-restructuring-idUSKCN1NX1VV.

100 *See* David Lawder & David Shepardson, *U.S. Agency Submits Auto Tariff Probe Report to White House*, REUTERS, 17 February 2019, www.reuters.com/article/us-usa-trade-autos/u-s-agency-submits-auto-tariff-probe-report-to-white-house-idUSKCN1Q706C. [Hereinafter, *U.S. Agency.*]

101 *See U.S. Agency.*

102 *Quoted in U.S. Agency.*

103 *Quoted in European Car Imports No Threat to U.S. National Security: VDA*, REUTERS, 17 February 2019, www.reuters.com/article/us-germany-trade-autos/european-car-imports-no-threat-to-u-s-national-security-vda-idUSKCN1Q60IJ.

104 *Quoted in* David Lawder & David Shepardson, *Automakers Brace for U.S. Government Report on Import Tariffs*, REUTERS, 15 February 2019, www.reuters.com/article/us-usa-trade-autos/automakers-brace-for-u-s-government-report-on-import-tariffs-idUSKCN1Q503G.

VI. National Level (3): Will the Section 301 Sino-American Trade War End?

- **Not a "Cold War" or "Thucydides Trap," but an "Open Society War"**

Regardless of whether, how, and when the U.S. and China resolve their commercial differences, the Sino-American Trade War is best understood as a battle in a broad, deep conflict – an Open Society War. None other than the thoughtful investor, George Soros (1930-), and his intellectual mentor, the renowned philosopher, Karl Popper (1902-1994), suggest this characterization. Popper wrote *The Open Society and Its Enemies* (1945) while at the University of Canterbury, New Zealand, and joined (in 1946) the London School of Economics, where Soros was his student (from 1947-54). At the January 2019 World Economic Forum in Davos, Switzerland, it was Soros who delivered the most important speech.[105] Applying Popper's concept of an "open society," Soros castigated the closed nature of Chinese governance, singling out President Xi Jinping (1953-, President, 2013-) and the abuse of large, data-rich information technology to spin a "web of totalitarian control the likes of which not even George Orwell could have imagined."[106]

To be sure, there are at least two other characterizations of the Sino-American Trade War: "Cold War" and "Thucydides Trap."[107] Both are flawed. Throughout the Soviet-American Cold War, the two superpowers had very little trade and FDI relations, and there was no nexus of supply chains dependent on them. Their fighting was "hot," through proxies across Third World countries. Today's American and Chinese economies are intertwined. Indeed, theirs is the most important bilateral economic relationship in the world on which many other countries depend. And, while the two powers flex their military muscles across the Nine Dash Line (discussed in a separate Chapter) and the Formosa Straits, they have (thus far) avoided widespread agency-based conflicts.

Calling the Trade War a "Thucydides Trap" mistakenly casts the U.S. as in decline. America's global economic and military reach remain unparalleled. Its conscious, bipartisan link

105 *See* George Soros, Remarks Delivered at the World Economic Forum, 24 January 2019, www.georgesoros.com/2019/01/24/remarks-delivered-at-the-world-economic-forum-2/. [Hereinafter, January 2019 Soros Speech.]

106 January 2019 Soros Speech. Mr. Soros is not alone in commenting that China has become less open under the leadership of President Xi than his predecessors, contrary to the expectations of the West throughout the 1990s and early 2000s. *See* NICHOLAS R. LARDY, THE STATE STRIKES BACK: THE END OF ECONOMIC REFORM IN CHINA? (Washington, D.C.: Peterson Institute for International Economics, January 2019); Arvind Subramanian & Josh Felman, *The Coming China Shock*, PROJECT SYNDICATE, 5 February 2019, www.project-syndicate.org/commentary/coming-china-shock-end-of-exceptionalism-by-arvind-subramanian-and-josh-felman-2019-02.

107 For these respective characterizations, see, e.g., Robert D. Kaplan, *A New Cold War Has Begun*, FOREIGN POLICY, 7 January 2019, https://foreignpolicy.com/2019/01/07/a-new-cold-war-has-begun/; GRAHAM ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP? (New York, N.Y.: Houghton Mifflin Harcourt, 2017).

of trade and national security policies shows it understands the sources of its power. America post-9/11 is not at all like Britain post-Second World War, nor is America "fearful" of a rising China in the sense that democratic Ancient Athens was of oligarchic Sparta in the Peloponnesian War (431-404 B.C.). For all its self-inflicted wounds and undignified political leaders, America remains the beacon of hope because of its long-term commitment to freedom – to an open society. As politically incorrect as it is to say, few millennials would migrate to China over America if offered a choice free of job, family, or language constraints.

The Soros-Popper formulation is that underlying the Sino-American trade fight is a conflict over openness in all aspects of human endeavor. To see why that is correct, that what is happening is an "Open Society War," consider two questions:

1st: In practice, do the four specific areas of dispute in the Section 301 case suggest the Chinese economy is "open"?

2nd: In theory, does governance in China bear the three hallmarks of an "open" society?

The case for a negative answer to both questions is strong.

- **Four Trade Controversies and Openness of Chinese Economy**

As to the first question, the core controversies raised by *Made in China 2025* pertain to (1) market access, (2) subsidies, (3) SOE reform, and (4) IPR protection. Market access is *ipso facto* about openness. Explicit industrial policy-based market share targets impede, even annul, market-based outcomes. China's pledge (in January 2019 talks with the USTR) to boost purchases of soybeans only reinforce the reality of state control: SOEs are the buyers, the soybeans are for state reserves, and thus these purchases are immune from the 25% counter-retaliatory tariff the CCP imposes in the Trade War.[108] The pledge to close its trade surplus with America by 2024 neglects the truth (that economists tire of recounting) that differential savings and investment rates cause bilateral trade imbalances. The pledge also neglects the fact that Chinese tariff and non-tariff barriers, including JV expectations (if not outright requirements), plus the CCP's grip on the *yuan* (discussed in a separate Chapter), have embedded in the psyche of American producer-exporters the sense that the Chinese market is difficult to "crack" open.

Subsidies are about whether central or sub-central government support to an enterprise or industry is lawful under the WTO *Agriculture* and *SCM Agreements*. They also are about transparency. Finding out exactly what officials in Beijing and provincial capitals are or are not giving to Chinese firms mystifies American competitors seeking a level playing field against those firms in the Chinese and third-country markets. That is why the USTR repeatedly and pointedly bemoans the tardy, incomplete nature of Chinese notifications to the WTO.

SOEs raise the problem of whether they operate on commercial terms when they compete with private companies. They also require definition: what criteria identify whether a particular

[108] *See* Karl Plume, *Exclusive: China Buys U.S. Soybeans A Day After Trade Talks – Traders*, REUTERS, 1 February 2019, www.reuters.com/article/us-usa-trade-china-soybeans/exclusive-china-buys-u-s-soybeans-a-day-after-trade-talks-traders-idUSKCN1PQ5CK.

entity is state owned or otherwise acts as a governmental body? Sunshine illuminates both issues: opening the books and records of SOEs (while protecting confidential business information) shows how whether they behave in response to arm's length supply and demand pricing; and seeing their ownership and control structure, and their authority and influence patterns, shows whether they are "public" or "private." But, it is overcast in China, as the uproar over Huawei's relationship to the CCP suggests.[109]

Respecting IPRs is about openness, too. An IPR is granted only after competition among entrepreneurial inventors as diverse as the young Steve Jobs (1955-2011) to established PhRMA companies. The IPR is a reward for the winner, and an incentive for the next round of competitors. Forcible technology transfers, whether through JV contracts or state-sponsored cyberattacks, disrupts this process and its outcomes. IP misappropriation awards monopoly patent, trademark, and copyright privileges not on the basis of merit, but rather insider dealing, and incentivizes unscrupulous, rent-seeking behavior under the guise of industrial policy. Here, again, Huawei is a case in point: is its technology a result and/or enabler of espionage?

- **Chinese Governance and Three Hallmarks of Open Society**

To address the second question, recall what Popper taught Soros and the world in *The Open Society and Its Enemies* and apply that teaching to China. Horrified by events in the 1930s, Popper was rare among scholars to critique and condemn both fascism and communism, and traced the origins of both to Plato, Hegel, and Marx. Popper's reading of these "false prophets" has been criticized: maybe Popper took Plato too seriously at his word, or maybe Popper read too much mysticism into Hegel. But, "got them wrong," Popper did not, and besides, whose exegesis of any difficult philosophical text is immune from questioning? Moreover, Popper's *tour de force* is a defense of liberal democracy that endures, and to which Soros dedicates his eleemosynary Open Society Foundations. For them, an "open" society bears three hallmarks.

First, it is a democracy. Democracy need not take a particular form, but the irreducible requirement is the government can be removed without bloodshed, at least at periodic intervals. "*All that counts is whether the government can be removed without bloodshed*," he says.[110] Popper never advocated violence, except as a last resort in two limited cases: against a tyranny that made non-violent reform impossible, but then only to establish democracy; or to save democracy from attack by an existential threat, as happened across Europe in the 1930s.

The CCP shows no sign of openness to multi-party elections or other peaceful forms of transitions of power, as occurs in Taiwan. To the contrary, changes to China's Constitution instilled in October 2017 at the 19th National Congress of the CCP, under the rubric of "Xi Jinping

[109] *See* Sheridan Prasso, *China's Digital Silk Road is Looking More Like An Iron Curtain*, BLOOMBERG, 9 January 2019, www.bloomberg.com/news/features/2019-01-10/china-s-digital-silk-road-is-looking-more-like-an-iron-curtain (reporting "China is exporting to at least 18 countries sophisticated surveillance systems capable of identifying threats to public order and has made it easier to repress free speech in 36 others, according to an October [2018] report published by Washington watchdog Freedom House"). The Freedom House study is Adrian Shahbaz, *Freedom on the Net – The Rise of Digital Authoritarianism*, Freedom House, https://freedomhouse.org/report/freedom-net/freedom-net-2018/rise-digital-authoritarianism.

[110] *Quoted in* HERBERT KEUTH, THE PHILOSOPHY OF KARL POPPER 242 (Cambridge, England: Cambridge University Press, 2015) (emphasis original). [Hereinafter, KEUTH.]

Thought on Socialism with Chinese Characteristics in a New Era," cement CCP control over all aspects of life. Five months after conferring the honor of mention in the Constitution on Mr. Xi, an honor conferred only on Mao Zedong (1893-1976) and Deng Xiaoping (1904-1997), the National People's Congress abolished Presidential term limits, thus projecting his position and "Thought" indefinitely. Mr. Xi is no Maoist, but he is no fan of Deng's openness, either, as Steve Tsang, Director of the China Institute at the University of London School of Oriental and African Studies explains: "Xi sees no place for political experimentation or liberal values in China, and regards democratization, civil society, and universal human rights as anathema."[111] Just ask Uyghur Muslims detained in what human rights organizations decry as a network of camps about the likelihood of "democracy" in Popper's sense of the term. Or ask long-suffering Tibetan Buddhists. The U.S. *Reciprocal Access to Tibet Act* (H.R. 1872), which both the House and Senate passed unanimously, and President Trump signed on 19 December 2018, is about openness.[112] *RATA* calls for American diplomats, journalists, and tourists to have the same, equal access to the Tibet Autonomous Region as their Chinese counterparts have across America.

Second, "critical rationalism" prevails in an open society. Popper means criticism is tolerated, and errors are corrected. "[O]ne of the best senses of 'reason' and 'reasonableness,'" he declares, is "openness to criticism."[113] The CCP rightly criticizes internal corruption. Yet, the Party errs insofar as prosecutions of wayward cadres are persecutions of dissident colleagues. From the Great Firewall to the 2010 WTO Appellate Body Report in the *Audio Visual Products* case, censorial CCP limits on tolerance abound. Note the importance of a liberal arts education, especially in the humanities, to foster "critical rationalism."

The reason critical rationalism is absent is the presence of what Popper calls "crude monism." A closed society fails to differentiate man-made rules from natural law. Distinctions of right-versus-wrong conduct that rulers impose, and those distinctions embedded in the human heart from an extrinsic, higher source, are indistinguishable. With the CCP as the source and summit of law, China seems "crudely monistic." This feature is the one on which Soros most focuses, declaring at Davos:

> I use "open society" as shorthand for a society in which the rule of law prevails as opposed to rule by a single individual and where the role of the state is to protect human rights and individual freedom. In my personal view, an open society should pay special attention to those who suffer from discrimination or social exclusion and those who can't defend themselves.[114]

Experience backs his view: he's a survivor of Nazi-occupied Hungary.

Finally, an open society is free of "historicism." Popper knew Marx to be a determinist, meaning Marx believed history moves according to inexorable laws. For Marx, the law is materialism that drives class struggle between the bourgeoise and proletariat. The struggle is

111 Steve Tsang, *What is Xi Jinping Thought?*, PROJECT SYNDICATE, 5 February 2019, www.project-syndicate.org/commentary/china-xi-jinping-thought-reform-by-steve-tsang-2019-02.
112 *See* www.congress.gov/bill/115th-congress/house-bill/1872.
113 *Quoted in* KEUTH, 240.
114 January 2019 Soros Speech.

resolved, the exploitative drudgery capital imposes on labor ends, when class tensions burst into a revolution that reconfigures production. Historicism is a tenet of CCP ideology, proven correct by the 1949 Communist Revolution. Since then, history advances through utopian social engineering: from the 1966-76 Cultural Revolution and population control to obedience to Confucian values and adherence to industrial policy, the CCP constructs a stable, harmonious society. The edifice is not economically egalitarian in outcome, but it is one in which citizens believe (falsely or not) they might get rich.

Popper's open society and its friends like Soros reject historicism. Deterministic laws exclude the possibility of rational political intervention, of choice, and thus of decision-making accountability. Moreover, Popper warned that Marx's "attempt to make heaven on earth invariably produces hell."[115] So, Popper favors the piecemeal social engineering typical in an open society. Change should occur incrementally to avoid excesses and allow for reversal if it is misguided.

- **Odd Bedfellows**

No case is airtight. Reasonable minds can differ as to the "openness" of China's economy and society. History will be the ultimate judge in the Open Society War. But already, the Section 301 case has made bedfellows of adversaries: Messrs. Soros and Trump. The President accused the Financier of funding protests against his Supreme Court pick, Brett Kavanaugh.[116] The Financier called the President a "narcissist" who "considers himself all-powerful" and "is willing to destroy the world."[117] Yet, America would betray its core liberal democratic principles if it did not insist on openness in trade relations with China, and would jeopardize its economic strength – and thus its national security – if it failed to obtain from China substantive, structural, and verifiable reform. That is an historical choice in favor of an open society of which Popper's student would be proud.

- **Towards an End to the War?**

As the deadline of midnight on 1 March 2019 for elevating Wave Three tariffs from 10% to 25% approached, America and China negotiated tirelessly to end the Trade, or Open Society, War that had started with the 22 March 2018 USTR *Section 301 Report*, and led to Wave One tariffs, effective 6 July, 25% on $34 billion worth of Chinese imports, Wave Two Tariffs effective 23 August, of 25% on $16 billion, and Wave Three tariffs effective 24 September of 10% on $200 billion, initially scheduled to increase to 25% on 1 January 2019, postponed to 2 March). The two sides outlined six MOUs, as follows:[118]

(1) Agriculture

115 *Quoted in* KEUTH, 240.
116 *See* https://twitter.com/realDonaldTrump/status/1048196883464818688.
117 *Quoted in Trump is "Willing to Destroy the World:" George Soros*, NEW YORK POST, 9 June 2018, https://nypost.com/2018/06/09/trump-is-willing-to-destroy-the-world-george-soros/.
118 *See* Jeff Mason, *Exclusive: U.S., China Sketch Outlines of Deal to End Trade War – Sources*, REUTERS, 20 February 2019, www.reuters.com/article/us-usa-trade-china-deal-exclusive/exclusive-u-s-china-sketch-outlines-of-deal-to-end-trade-war-sources-idUSKCN1QA07U; *Factbox: U.S., China Drafting Memorandums for Possible Trade Deal*, REUTERS, 20 February 2019, www.reuters.com/article/us-usa-trade-china-deal-factbox/factbox-u-s-china-drafting-memorandums-for-possible-trade-deal-idUSKCN1QA07W [hereinafter, *Factbox*].

Under this MOU, China would liberalize market access to American exports of beef, grains, poultry, and other farm products, plus cut tariffs on ethanol and distiller dried grains (an ethanol by-product).[119] The MOU also would require China to speed up approval of GM seeds (so that American farmers hesitant to plant those seeds without knowing whether the resulting crops will be eligible for entry into China can do so).

(2) Currency

This MOU would prevent China from devaluating the *yuan*, as the U.S. said it did in 2018 after America initially imposed the Section 301 tariffs to offset the effects of those tariffs. Rather, China would have to maintain stability in the *yuan*-dollar exchange rate.

(3) Forced Technology Transfer and Cyber Theft

This MOU would oblige China to ensure foreign companies are not pressured to transfer their technology "through joint venture requirements, unfair business licensing and product approval practices, or other forms of coercion."[120] It also would require China to prosecute hackers, and any support for cybertheft of trade secrets.

(4) IPRs

This MOU would call on China to strengthen its IP licensing laws to ensure that licensed IP is not stolen, and to step up criminal prosecutions of copyright violations.

(5) NTBs

The *Made in China 2025* industrial subsidies would be dealt with by this MOU, as would be business licensing procedures, product standard reviews, and other measures that unfairly advantage Chinese over American firms and merchandise. The obligations

[119] Ethanol is a case study of how markets improvise to cope with government interventions. *See* Chris Prentice & A. Ananthalakshmi, *Long, Strange Trip: How U.S. Ethanol Reaches China Tariff-Free*, REUTERS, 7 February 2019, www.reuters.com/article/us-usa-trade-ethanol-insight/long-strange-trip-how-u-s-ethanol-reaches-china-tariff-free-idUSKCN1PW0BR. Absent the counter-retaliatory tariffs China imposed on American merchandise, U.S.-origin ethanol would be shipped from ports such as Texas City and Beaumont, Texas, move through the Panama Canal, and be discharged at a Chinese port, such as Zhoushan. However, on 23 and 27 June 2018, after loading 25,000 and 10,000 tons, respectively, at those two Texas ports, and proceeding through the Canal, a cargo of ethanol arrived on 13-15 August near Singapore, and a ship-to-ship transfer occurred (from the *High Seas* tanker ship to the *QUDS* tanker ship), with the cargo moving to the port of Kuantan, in Malaysia. At that port, an additional 12,074 tons of Asian-origin ethanol was loaded, after which the cargo sailed to Zhoshan, where it arrived on 26-30 August. All of the cargo was unloaded, free of the up to 70% counter-retaliatory duty that China otherwise would have levied had the ethanol been shipped directly from America. In not imposing the duty, China followed rules to which China had agreed with *ASEAN*, namely, that U.S. ethanol blended with at least 40% Asian-made fuel essentially was considered as non-U.S. origin, and thus free of duty. The circuitous route and blending of ethanol, though inefficient and distortive of market-based trade flows (*e.g.*, Malaysia had not exported ethanol for at least three years before the Section 301 case), was lawful (and, apparently, replicated on at one other occasion). Of course, this creativity helped American ethanol producers cope with their status as collateral damage in the Sino-American dispute, but undermined the protective effect for Unipec (a Chinese state-owned company under the parent, Sinopec) of China's counter-retaliation. *See id.*

[120] *Factbox*.

incumbent on China would address the billions of dollars of anticipated Chinese investments in its strategic high-technology sectors (*e.g.*, aerospace, AI, EVs, pharmaceuticals, robotics, and semiconductors) in which China seeks a dominant position, so that China does not create excess capacity, and over-produce, as occurred in the aluminum and steel sectors.

(6) Services

Via this MOU, China would open further its financial services markets to foreign suppliers, especially credit card companies (*e.g.*, MasterCard and Visa) so they can compete with Chinese monopolies (namely, China UnionPay Ltd.). China also would ensure its regulations that allow foreign insurance companies to take controlling stakes in local JVs are transparent and applied in a non-discriminatory manner.

The gist of each MOU was to lay out specific Chinese commitments, coupled with specific metrics by which the U.S. could verify whether China fulfilled those commitments, and an enforcement mechanism to ensure China did so that included periodic reviews of Chinese progress. Ultimately, the U.S. reserved the right to reimpose any Section 301 tariffs that it withdrew, if China did not undertake the structural reforms the MOUs identified.

Additionally, the U.S. and China drafted a list of 10 American exports (agricultural commodities, energy, industrial products, and high-tech goods such as semiconductors) that China would buy to help shrink its bilateral trade surplus. And, at the insistence of President Trump, both sides agreed they would not call their arrangements "MOUs."[121] The President thought MOUs were not binding, and thus demanded they call them "trade agreements." That rubric, however, raised the prospect Congress might seek to review and vote on the package of deals.

Citing "substantial progress" in the negotiations, but not specifying the nature of that "progress" or explaining why it was "substantial," on 24 February 2018 the President decided to

[121] *Trump's Trade Chief Lectures His Boss and Gets Earful in Return*, BLOOMBERG LAW INTERNATIONAL TRADE NEWS, 22 February 2019, https://news.bloomberglaw.com/international-trade/trumps-trade-chief-lectures-his-boss-and-gets-earful-in-return. The Oval Office exchange between the President and USTR, in the presence of China's top chief negotiator, Liu He, was comical:

> Trump told gathered reporters that the memorandums would "be very short term. I don't like MOUs because they don't mean anything. To me, they don't mean anything."
>
> Lighthizer then jumped in to defend the strategy, with Trump locking on. "An MOU is a binding agreement between two people," he said. "It's detailed. It covers everything in great detail. It's a legal term. It's a contract."
>
> But the President, unswayed, fired back at Lighthizer. "By the way I disagree," Trump said.
>
> The top Chinese negotiator, Vice Premier Liu He, laughed out loud.
>
> "The real question is, Bob," Trump said, "how long will it take to put that into a final binding contract?"

Quoted in id.

extend the deadline of midnight, 1 March, for increasing the Wave Three tariffs from 10% to 25%.[122] For how long, he did not say, and the USTR announcement in the *Federal Register* indicated the suspension was indefinite. But, Congress stated that if no MOUs/agreement was reached by 17 March, then the USTR must delineate a process for importers of Chinese products to pursue product exclusion requests.[123]

Already, some U.S. companies were re-orienting their production out of China to avoid entirely Section 301 tariffs. For example, Kent, the bicycle manufacturer, moved its production of bike frames from China to Cambodia, which not only had relatively lower labor costs, but also qualified for GSP treatment based on a 35% value added ROO (discussed in a separate Chapter).[124] Specialized Bicycle Components had done so already, leaving China for Cambodia, Taiwan, and Vietnam as of December 2018. As a *CPTPP* Party, Vietnam was especially attractive.

Such moves were smart. Companies did not necessarily need to onshore production from China to the U.S., nor did they have to cease using all Chinese parts. Rather, they needed to blend the best arrangement of production location, sourcing options, and potential preferential trading arrangements, and adjust accordingly. Bicycle production in the U.S. had plummeted from 15 million in the 1970s to 500,000 in 2019, though still, 94% of finished bikes, and 60% of components (*e.g.*, handlebars, seats, tires, and tubes), sold in the U.S. were made in China.[125] The lack of deep-water port capacity and inability to accommodate large container vessels still kept China in the bike race vis-à-vis Cambodia, Vietnam, and other South East Asian countries. And, significantly, even when bike companies shifted from China to a South East Asian country, they moved robots out of Chinese facilities for work such as welding, and put them in their new factories. So, the job-creation impact in such countries was limited – as it would be (or would have been) in the U.S. (*a fortiori*, given the higher labor costs).

[122] Quoted in Carlos Barria, *Trump Announces Delay of Tariffs on Chinese Goods Due to "Substantial Progress" in Talks to End U.S.-China Trade War*, BUSINESS INSIDER, 26 February 2019, https://www.businessinsider.com/trump-china-tariff-increase-delayed-past-march-1-deadline-2019-2.

[123] *See* Office of the United States Trade Representative, Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 28 February 2019, https://ustr.gov/sites/default/files/enforcement/301Investigations/301_Notice_2-28-2019.pdf.

Congress did so on 15 February 2019, mandating that regardless of whether or when the Wave Three rate increases from 10% to 25%, the USTR must lay out an exclusion process for this Wave of tariffs, in a joint House-Senate statement accompanying a budget bill. The statement said:

> It is concerning that there is no exclusion process for goods subject to tariffs in round 3 of the Section 301 proceeding, as was done in the first two rounds. USTR shall establish an exclusion process for tariffs imposed on goods subject to Section 301 tariffs in round 3. This process should be initiated no later than 30 day after enactment of this Act, following the same procedures as those in rounds 1 and 2, allowing stakeholders to request that particular products classified within a tariff subheading subject to new round 3 tariffs be excluded from the Section 301 tariffs.

Explanatory Statement Submitted by Mrs. Lowey, Chairwoman of the House Committee on Appropriations, Regarding H.J. Resolution 31, *Consolidated Appropriations Act 2019*, at 38, https://docs.house.gov/billsthisweek/20190211/116hrpt9-JointExplanatoryStatement-u1.pdf.

[124] *See* Rajesh Kumar Singh, *How U.S. Bike Companies Are Steering Around Trump's China Tariffs*, REUTERS, 26 February 2019, www.reuters.com/article/us-usa-trade-bicyles-insight/how-u-s-bike-companies-are-steering-around-trumps-china-tariffs-idUSKCN1QF0G1. [Hereinafter, *How U.S. Bike Companies*.]

[125] *How U.S. Bike Companies*.

As businesses made adjustments to their global supply chains, political leaders and trade negotiators on both sides searched for the kind of substantial progress that America could accept, and China could give, to end the War. The USTR, Ambassador Robert Lighthizer, put it quite rightly in his February 2019 Congressional testimony that America "is not foolish enough" abandon the threat of Section 301 tariffs following any single trade negotiation with China, because "[t]he reality is this [structural changes in China] is a challenge that will go on for a long, long time," and China presented the "most severe challenge" ever faced by American trade policymakers.[126]

VI. What Next?

More uncertainty and more upheaval are still to come. Perhaps it is best to consult your lawyer!

[126] *Quoted in* David Lawder, *U.S. Trade Chief Sees Long-term China Challenges, Continued Tariff Threat*, REUTERS, 27 February 2019, www.reuters.com/article/us-usa-trade-china-house/u-s-trade-chief-sees-long-term-china-challenges-continued-tariff-threat-idUSKCN1QG250. *See also See* Opening Statement of USTR Robert Lighthizer to the House Ways and Means Committee, 27 February 2019, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/february/opening-statement-ustr-robert (describing, with respect to China, the "large and growing trade deficit and their unfair trade practices – including technology transfer issues, failure to protect intellectual property, large subsidies, cyber theft of commercial secrets and other problems – as major threats to our economy," and indeed, an "existential problem."

Questions?

Thank you

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