UNITED STATES UNILATERALISM AND THE WORLD TRADE ORGANIZATION

Daniel C.K. Chow∗

ABSTRACT

Donald J. Trump's ascendance to the United States Presidency coincided with the adoption of an aggressive U.S. trade policy putting "America First," which the United States has backed by the use of unilateral trade sanctions in defiance of the World Trade Organization. The basic tenets of U.S. unilateralism, gleaned from legal sources propounded by the current U.S. Administration, are: (1) the United States will ignore any WTO decision with which it disagrees; (2) the United States will impose trade sanctions on WTO member nations without first consulting with or fulfilling any of the WTO's requirements; and (3) the United States will either follow the law of the WTO or disregard it entirely, depending on whether doing so suits U.S. needs, thus reducing the WTO to a mere instrumentality for U.S. purposes. These positions have alienated U.S. allies and caused powerful competitors, such as China, to retaliate. U.S. unilateralism threatens to undermine and reduce the WTO to irrelevance and to usher in a dangerous new era of economic nationalism and protectionism that could catastrophically affect the world economy.

∗ Frank E. and Virginia H. Bazler Chair in Business Law, the Ohio State University Michael E. Moritz College of Law. Thanks to my colleagues Ian Sheldon, William McGuire, and Thomas J. Schoenbaum for the benefit of many useful discussions.

I. INTRODUCTION

The ascendance of Donald J. Trump to the U.S. Presidency marked a fundamental shift in U.S. trade policy. While previous administrations sought to work within the cooperative multilateral framework of the General Agreement on Tariffs and Trade ("GATT")[1] and the World Trade Organization ("WTO"),[2] the Trump Administration announced that it would follow an "America First" policy, representing a revival of economic nationalism that would, if necessary, promote U.S. trade interests over those of its trading partners.[3] U.S. economic nationalism is an economic and political theory that advances U.S. international trade interests within the context of a zero-sum game in which nations are locked in bilateral duels to determine who is the winner and who is the loser in a trade deal.[4] Economic nationalism contends that previous U.S. administrations naively or foolishly entered into unfavorable trade deals that the United States has been engaged in for too long.[5] The Trump Administration intends to form new trade deals that favor U.S. interests and withdraw from, or pressure trading partners to renegotiate, unfavorable trade agreements, such as the Trans-Pacific

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

[2] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, [hereinafter WTO Agreement].

[3] *See President Trump Puts American Jobs First*, WHITE HOUSE (June 1, 2017), https://www.whitehouse.gov/briefings-statements/president-trump-puts-american-jobs-first/ [https://perma.cc/8SKC-8LSG]; *President Donald J. Trump's Foreign Policy Puts America First*, WHITE HOUSE (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-foreign-policy-puts-america-first/ [https://perma.cc/T5BU-YWVB].

[4] *See* Ian Sheldon, William McGuire & Daniel C.K. Chow, *The Revival of Economic Nationalism and the Global Trading System*, CARDOZO L. REV. 3-4 (forthcoming 2019).

[5] *See, e.g.*, Simon Lester & Inu Manak, *The Rise of Populist Nationalism and the Renegotiation of NAFTA*, 21 J. OF INT'L ECON. LAW 151, 153-56 (2018).

Partnership[6] and the North American Free Trade Agreement.[7]

The United States relies on the doctrine of unilateralism to implement economic nationalism and to assert the right to take legal measures against U.S. trading partners without notifying or consulting with those partners or the WTO.[8] Unilateral measures, such as trade sanctions imposed by the Trump Administration to promote U.S. economic nationalism, have shocked and antagonized U.S. trading partners and have brought the world economy to the brink of a global trade war.[9] While asserting the right to act independently in imposing trade sanctions is a hallmark of the Trump Administration's trade policy, unilateralism comprises several tenets discussed and analyzed in this Article.[10] Unilateralism has important implications for the future of the GATT/WTO and the multilateral trading system established over seven decades ago.[11]

Today, U.S. unilateralism threatens to undermine and collapse the WTO system and return the world to an era of global protectionism and economic nationalism. Global protectionism peaked in the 1930s when the U.S. passed the Smoot-Hawley Tariff Act, which imposed draconian tariffs meant to prevent trade.[12] Other nations erected similarly punitive tariffs as barriers to trade, creating an atmosphere of mistrust and hostility, which ultimately led to the Second World War.[13]

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[6] *See* Justin Sink & Jennifer Jacobs, *Trump Offers Trade to Asian Nations But Only If They Play Fair,* BLOOMBERG (Nov. 10, 2017), https://www.bloomberg.com/news/articles/2017-11-10/trump-offers-trade-to-asian-nations-but-only-if-they-play-fair (reporting the Trump Administration's preference for bilateral trade agreements that are reciprocal and fair, over the multilateral Trans-Pacific Partnership, which the Trump Administration views as unfair); *cf.* Ana Swanson, *Trump Proposes Rejoining Trans-Pacific Partnership,* N.Y. TIMES (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/us/politics/trump-trans-pacific-partnership.html (reporting that the Trump Administration would consider rejoining the Trans-Pacific Partnership only if the U.S. receives concessions that benefit it).

[7] Don Lee, *Trump is Pushing Hard to Reach NAFTA Agreement, Both with Trading Partners and with Congress*, L.A. TIMES (Apr. 24, 2018), http://www.latimes.com/business/la-fi-nafta-talks-20180424-story.html# [https://perma.cc/4RJ7-6QQV].

[8] *See* Lester & Manak, *supra* note 5, at 153.

[9] Doug Palmer, *Trump's Global Trade War,* POLITICO (May 5, 2018), https://www.politico.eu/article/donald-trump-duties-steel-aluminum-global-trade-war/ [https://perma.cc/55GW-HSTX].

[10] *See infra* Part II.

[11] *See* WTO Agreement, *supra* note 2; GATT *supra* note 1.

[12] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 18 (3d ed. 2017).

[13] *See id*.

The world could now be faced with a new era of global protectionism if the WTO collapses or is rendered irrelevant by U.S. actions.

This Article examines the main features of U.S. unilateralism and explains why it serves as a major threat to the WTO and the global trading system. As explained below, U.S. unilateralism has three major tenets: (1) the United States will ignore any decision of the WTO dispute settlement body that it finds inconsistent with U.S. sovereign interests;[14] (2) the United States will unilaterally impose trade sanctions on WTO countries without prior WTO approval;[15] and (3) the United States will utilize the WTO dispute settlement system when doing so serves U.S. interests and ignore the WTO dispute settlement system when it does not, thereby reducing the WTO to a mere instrumentality of U.S. objectives.[16] These positions, taken by the world's most powerful trading nation and a key founding member of the GATT/WTO, seem to completely undermine the credibility of the WTO and reduce it to a pawn in the U.S. game of power politics played against other nations.

This Article proceeds in four parts. Part II examines the basic elements of U.S. unilateralism as expressed by the Trump Administration in official comments, texts, and legislative enactments. Additionally, Part II analyzes the basis for the current U.S. intent to disregard WTO decisions that it finds do not align with U.S. sovereign interests. Part III explains that the United States asserts a right, in contravention of WTO law, to unilaterally impose trade sanctions on other WTO member nations without seeking the WTO's prior approval. Part III also describes how the United States invokes national security concepts to justify its actions and illustrates how that position could completely undermine the GATT/WTO. Part III then discusses a counterargument, raised by those who support the U.S. position, asserting that the U.S. rhetoric is only intended to be the first gambit in an ongoing trade negotiation. That is, the U.S. does not actually intend to impose sanctions but is merely threatening to do so as a negotiation tactic to bring recalcitrant trading partners to the table to renegotiate agreements that are presently unfavorable to the United States. Under this argument, the United States is not in violation of the WTO agreements because the threat of sanctions is lawful so long as the sanctions are not actually imposed. Finally, Part IV discusses the U.S. view of the WTO dispute settlement system as an instrument to be used when it serves U.S. interests and ignored when it does not.

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[14] *See infra* Part II.

[15] *See infra* Part III.

[16] *See infra* Part IV.

II. UNILATERALISM AS U.S. TRADE POLICY

A. *Legal Sources of U.S. Unilateralism*

In various pronouncements and legislative acts, the United States has announced a shift in trade policy. In his 2016 Inaugural Address, President Trump stated:

> We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength.[17]

Trump elaborated on this theme in his 2018 State of the Union Address, when he announced:

> America has also finally turned the page on decades of unfair trade deals that sacrificed our prosperity and shipped away our companies, our jobs, and our Nation's wealth. The era of economic surrender is over. From now on, we expect trading relationships to be fair and to be reciprocal.[18]

These elements of U.S. trade policy are formally set forth and elaborated upon in The President's 2017 National Trade Policy Agenda,[19] submitted by the United States Trade Representative ("USTR"). The USTR is the chief official of the executive branch with respect to international trade.[20] Federal law provides that the USTR shall have "primary responsibility for developing" U.S. international trade policy[21] and shall "act as the principal spokesman of the President on international trade."[22] The current USTR, Robert Lightziger, has identified four priorities for U.S. trade policy:

> (1) [D]efend U.S. national sovereignty over trade policy; (2) strictly enforce U.S. trade laws; (3) use all possible sources of

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[17] President Donald J. Trump, Inaugural Address (Jan. 20, 2017), https://www.whitehouse.gov/briefings-statements/the-inaugural-address/ [https://perma.cc/YH5P-LXXA].

[18] President Donald J. Trump, 2018 State of the Union Address (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/ [https://perma.cc/SK83-2NQJ].

[19] OFF. OF THE U.S. TRADE REPRESENTATIVE, THE PRESIDENT'S 2017 TRADE POLICY AGENDA (2017), https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf [https://perma.cc/VKV9-4Z32] (hereinafter USTR).

[20] *See* CHOW & SCHOENBAUM, *supra* note 12, at 117.

[21] 19 U.S.C. § 2171(c)(1)(A) (2012 & Supp. IV 2017).

[22] 19 U.S.C. § 2171(c)(1)(E) (2012 & Supp. IV 2017).

> leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property rights; and (4) negotiate new and better trade deals with countries in key markets around the world.[23]

The first priority set forth above, defending U.S. sovereignty over trade policy, focuses primarily on U.S. obligations under the WTO. The USTR elaborates:

> In late 1994, Congress approved the Uruguay Round Agreements Act, thereby paving the way for the United States' entry into the WTO. WTO members agreed to provisions to ensure that, if a country lost a dispute at the WTO and failed to bring its measure into compliance with WTO rules, to provide compensation, or otherwise to reach a mutually satisfactory solution, the complaining countries would have the right to be authorized to retaliate by imposing trade sanctions on the losing country.[24]

The USTR cautions, however, that although the dispute settlement system provides the losing country with three options,[25] these options exist only if the WTO decision is valid. The validity of any WTO decision depends on whether the decision meets certain requirements:

> The anchor for this new dispute settlement system was an agreement known as the Understanding on Rules and Procedures Governing the Settlement of Disputes, often called the Dispute Settlement Understanding (DSU). The core provision of the DSU was the express legal requirement that the WTO, through its dispute settlement findings and recommendations, could not "add to or diminish the rights or obligations" of the United States, or other countries under the WTO agreements. . . . The Clinton Administration and Congress both made clear that this language was essential to winning American support for the DSU. . . . [T]he American people were assured that, by the express terms of the DSU itself, this dispute settlement process would not alter the terms of what the United States had agreed to in the WTO Agreements, and what Congress thereafter expressly approved when it passed the Uruguay Round Agreements Act. . . . [T]he United States also

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[23] *See* USTR, *supra* note 19, at 2.

[24] *Id.*

[25] For an elaboration on each of these options, *see infra* note 28.

> entered into the DSU, which contained a clear and express legal limitation that the WTO dispute settlement process could not add to U.S. obligations or diminish U.S. rights under those agreements. By insisting on and negotiating the express terms of these agreements, the United States established clear and firm parameters for the role of the WTO in regulating trade.[26]

The USTR's statement makes clear that, in this context, defending U.S. sovereignty means asserting U.S. law and interests over the decisions of the WTO. The Dispute Settlement Understanding ("DSU"), a crowning achievement of the WTO, sets forth the procedures to be followed in the case of a trade dispute between two WTO members.[27] A nation that loses a WTO dispute has the option to bring its non-conforming measure into compliance, offer compensation to the complaining nation, or suffer the imposition of trade sanctions by the complaining nation.[28] According to the USTR statement, however, these options only apply if the WTO decision is valid, in that it does not "add to or diminish the rights and obligations" of the United States under the WTO agreements.[29] The historical record indicates that the United States insisted this language be expressly incorporated into the DSU, because it wanted to prevent the

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[26] *See* USTR, *supra* note 19, at 3.

[27] USTR, *supra* note 19, at 2-3.

[28] A nation that loses in a trade dispute before the WTO has three options. The first option is to bring the measure that violates a WTO agreement or obligation into compliance with the WTO agreements. This would involve withdrawing an illegal measure or amending it to so that it satisfies the requirements of the WTO. Bringing a non-conforming measure into compliance with the WTO is the ultimate goal of the WTO Dispute Settlement System. If the nation losing the dispute is reluctant to bring its measure into conformity, then that member can provide compensation to the complaining member. Compensation does not involve a payment but could consist of reducing tariffs on imports from the complaining member. Reducing tariffs on imports from the complaining member means that the complaining member will be able to ship more goods to the offending nation and earn more revenue, constituting compensation. The final option is trade retaliation. The complaining member may be authorized by the WTO to increase tariffs on imports from the offending member. Although compensation and retaliation may be authorized by the WTO, the ultimate goal is to induce compliance by bringing the non-conforming measure into compliance. Paying compensation and being subject to trade sanctions is meant to pressure or induce the offending member to bring its non-conforming measure into compliance. Any non-conforming measure is a distortion in the WTO system, and the distortion can only be cured by bringing the measure into conformity with the WTO agreements. The ultimate goal is to have all WTO members comply with the WTO agreements. *See* CHOW & SCHOENBAUM, *supra* note 12, at 83.

[29] USTR, *supra* note 19, at 3.

WTO dispute settlement bodies from creating "new" law.[30] In addition, the United States and other WTO members wanted to ensure that the WTO bodies would rule on issues of WTO law only, rather than on legal issues unrelated to trade law as set forth in the WTO agreements.[31] For example, WTO member states did not want the WTO to interject into its decisions issues that were not strictly related to trade law, such as those regarding human or workers' rights, and thereby introduce these issues into the WTO's jurisprudence.[32]

The Trump Administration has seemingly adopted a different interpretation of this language, under which any decision by the WTO that adds to or diminishes the rights set forth in WTO agreements is void and has no legally binding effect on the United States. Of course, this position leaves open the question of who is to determine whether a decision adds to or diminishes the rights in the WTO agreements. Apparently, according to the Trump Administration, it is the United States that determines whether this has occurred. If the United States determines that a WTO decision affects the U.S. rights in a manner

[30] WTO members consistently affirmed their understanding that the DSU would not allow for panels to create new rights and obligations throughout negotiations during the Uruguay Rounds.

See, *e.g.*, Multilateral Trade Negotiations the Uru. Round, *Meeting of 25 June 1987 Note by Secretariat*, para. 7, GATT Doc. MTN.GNG/NG13/2 (Jul. 15, 1987); Basic Instruments and Selected Documents, *Ministerial Declaration on Dispute Settlement Procedures (1981-82)*, GATT B.I.S.D. (29th Supp.), at 15-16 (Mar. 1983); Multilateral Trade Negotiations the Uru. Round, *Meeting of 23 and 24 June 1988 Note by the Secretariat*, para. 16, GATT Doc. MTN.GNG/NG13/8 (Jul. 5, 1988). These negotiations preceded the Dunkel Draft which contained language nearly identical to the current "add to or diminish rights and obligations" language. Multilateral Trade Negotiations the Uru. Round, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, S.2 art. 1.2, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) (the relevant language: "Recommendations and rulings under Article XXIII cannot add to or diminish the rights and obligations provided in the General Agreement). *See generally* TERENCE P. STEWART, AMY S. DWYER & ELIZABETH M. HEIN, Proposals for DSU Reform that Address Reform Directly or Indirectly, the Limitations on Panels and the Appellate Body Not to Create Rights and Obligations, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 331 (2006).

[31] WTO members did not want to see the creation of precedent and wanted the panel adjudications to deal with the trade transaction at hand. *See* THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), 210 (Terrence P. Stewart ed., 1993) (European Community members did not want to see precedents or binding new law created out of the panels). *See also* STEWART ET AL., *supra* note 30, at 331-36 (discussing current concerns of WTO members that the DSU panels are engaging in judicial activism in what is supposed to be a body that facilitates contractual disputes between member bodies).

[32] *See* CHOW & SCHOENBAUM, *supra* note 12, at 395-98.

that is not contemplated in the WTO agreements, the decision is void, and the United States is free to disregard it. In other words, if the United States disagrees with a WTO decision, the United States is not obliged to follow it.

Aside from the Trump administration's departure from the historical reasons for including the rights and obligations language in the DSU, the Trump administration's interpretation is one that the WTO member states would not likely have accepted. What organization would accept a position that would allow its members to refuse to follow dispute settlement decisions with which they disagree? Such a position would undermine the organization's authority and render its dispute settlement mechanism powerless. Nevertheless, this appears to be the United States' current position.

B. Further Legal Support of Unilateralism

The Trump Administration further justifies placing U.S. interests ahead of the WTO in the USTR statement:

> [T]he Uruguay Round Agreements Act also specifically provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a)(1). In other words, even if a WTO dispute settlement panel – or the WTO Appellate Body – rules against the United States, such a ruling does not automatically lead to a change in U.S. law or practice. Consistent with these important protections and applicable U.S. law, the Trump Administration will aggressively defend American sovereignty over matters of trade policy.[33]

By quoting the Uruguay Round Agreements Act, which provides that "no provision of the Uruguay Round Agreements"—i.e., the WTO agreements—"that is inconsistent with the any law of the United States shall have effect," the USTR seems to suggest that U.S. domestic law is supreme over the law of the WTO.[34] From this premise, the Trump Administration concludes that, when the United States loses a WTO dispute, it may choose whether to follow the resulting WTO decision.[35] However, these pronouncements are based upon a misleading interpretation of the quoted language in the Uruguay Round Agreements Act.

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[33] USTR, *supra* note 19, at 3.

[34] 19 U.S.C. § 3512(a)(1) (2012); *see also* USTR, *supra* note 19, at 3.

[35] USTR, *supra* note 19, at 3.

The WTO agreements are treaties that form part of international law.[36] Long ago, the U.S. Supreme Court established that international law is part of the federal law of the United States.[37] The U.S. Supreme Court has also long established a distinction between self-executing treaties that have direct effect within the U.S. legal order and non-self-executing treaties that do not have direct effect.[38] This language states that the WTO agreements are non-self-executing treaties.[39] For a non-self-executing treaty to take effect within the U.S. legal order, the United States must pass domestic implementing legislation.[40] It is this domestic legislation, which implements the obligations of the treaty, that has legal effect within the United States.[41] It is through this process that non-self-executing international legal obligations are transformed into legal obligations within the domestic legal order. Within the United States, the WTO agreements have been implemented through various provisions in the U.S. Code and state legislation.[42] Thus, the language quoted above stating that no provision of the WTO agreements that is inconsistent with U.S. law has effect merely indicates that it is the U.S. legislation implementing the WTO agreements, not the WTO agreements themselves, that have effect within the U.S. legal order.[43] The language does not state, as is implied by the USTR, that U.S. law is supreme over WTO law.

Decisions issued by the WTO dispute settlement bodies are treated differently from WTO agreements. The USTR is correct that WTO decisions have no direct effect within the U.S. legal order,[44] but this

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[36] Pascal Lammy, *The Place of the WTO and its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969, 971-73 (2006).

[37] Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains [commonly known as the Charming Betsy canon of interpretation] . . .").

[38] Bond v. United States, 134 S. Ct. 2077, 2084 (2014); Medellin v. Texas, 552 U.S. 491, 504-05 (2008); Whitney v. Robertson, 124 U.S. 190, 194 (1888)

[39] *See* USTR, *supra* note 19, at 3.

[40] *Medellin*, 552 U.S. at 504-05.

[41] *See Bond*, 134 S. Ct. at 2084-85.

[42] *See*, *e.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4809 (1994) ("An Act to approve and implement the trade agreements concluded in the Uruguay Round of multilateral trade negotiations."); 19 U.S.C. § 3532 (2012) (implementing the Uruguay Round Agreements);19 U.S.C.§ 3539 (2012) (establishing a fund for WTO disputes).

[43] *See* USTR, *supra* note 19, at 3.

[44] NSK Ltd. v. United States, 29 Ct. Int'l Trade 1, 8-9 (2005); *see also* 19 U.S.C. §3538 (2012); 19 U.S.C. §3533(f)(3) (2012).

does not mean that the United States has no legal obligations with respect to such decisions. The source of the legal obligation is not created by the WTO decision itself but by WTO agreements to which the United States is a signatory. In joining the WTO and the DSU, the United States affirmatively undertook the legal obligation to abide by the DSU, which specifically includes the obligation to abide by the WTO dispute settlement process and comply with WTO decisions.[45] This process contemplates that when nations lose a WTO dispute, they have three options: bring the non-conforming measure into compliance, offer compensation, or be subject to trade sanctions.[46] By signing the WTO agreements, the United States became legally obliged to follow DSU proscriptions with respect to WTO decisions.[47] The United States may choose to ignore this legal obligation, but doing so will put it in breach of its international treaty law obligations. It is not the case, as is implied by the USTR's statement, that the United States can disregard WTO decisions that rule against the United States with complete legal impunity. Additionally, contrary to the Trump Administration's assertions, the United States is not free to disregard any WTO decision it disagrees with; the United States ignores its legal obligations under the WTO when it does so. Nevertheless, although based on dubious legal reasoning, the current position set forth by the USTR appears to be that when the United States sees a conflict between a WTO decision and U.S. sovereign interests, the United States will protect its interests and disregard the WTO's decision. This is a central tenet of U.S. unilateralism.

III. U.S. UNILATERAL TRADE SANCTIONS

In addition to asserting the power to ignore WTO decisions, the Trump Administration claims the power to unilaterally impose trade sanctions against other WTO members. This tenet can be seen in the recent U.S. investigation of China's alleged theft of U.S. intellectual property.

A. Special 301 Investigation of China

On August 18, 2017, pursuant to instructions from President Trump,[48] the USTR initiated an investigation under Section 301 of the

[45] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

[46] *Id.* at arts. 3, 22.

[47] *Id.*

[48] Actions by the United States Related to the Section 301 Investigation of

Trade Act of 1974 of China's practices related to violations of U.S. intellectual property rights.[49] Section 301 also contains a procedure under which the USTR can file a parallel case in the WTO that will proceed simultaneously with the Section 301 investigation.[50] Although for the past twenty years the United States has brought a parallel WTO case for every Section 301 investigation, in this instance, the United States decided to proceed under U.S. law only.[51]

Section 301 of the Trade Act of 1974 sets out three categories of actionable practices, acts, or policies by a foreign country:

> (i) [T]rade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and that burden or restrict U.S. commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. commerce.[52]

If, after an investigation that includes public hearings, the USTR finds any of these categories to be present, the USTR is required to take action to eliminate the practices, acts, or policies in question.[53] In accordance with directions from the President, the USTR is authorized under Section 301 to take actions, including:

> (i) suspending, withdrawing or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country for such time as deemed appropriate; (iii) withdrawing or suspending preferential duty treatment under a preference program . . . .[54]

China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13099, 13099 (Mar. 27, 2018).

[49] *Id.*

[50] Trade Act of 1974, P.L 93-618, amended by 19 U.S.C § 2411 (b)-(c).

[51] *See* Actions Related to Technology Transfer, 83 Fed. Reg. at 13099; *see also* Charlotte Gao, *China 'Strongly Dissatisfied' with US Trade Investigation*, THE DIPLOMAT (Aug. 22, 2017), https://thediplomat.com/2017/08/china-strongly-dissatisfied-with-us-trade-investigation/ [https://perma.cc/K25J-N5V8].

[52] *Supra* note 50, 19 U.S.C § 2411 (b)-(c).

[53] *Id*. at (a), (c).

[54] OFF. OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. OF THE PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 4 (Mar. 22, 2018), https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF [https://perma.cc/8J9C-Q84M].

In its final report issued on March 18, 2018, the USTR found that China had engaged in a number of practices, acts, and policies "that are unreasonable or discriminatory and that burden or restrict [U.S.] commerce" in violation of the third category set forth in Section 301.[55] These practices include a technology transfer regime that forces U.S. companies to transfer their intellectual property to Chinese entities; a technology licensing scheme that discriminates against U.S. companies; a scheme to invest in U.S. companies for the purpose of acquiring U.S. intellectual property assets; and a scheme of cyber intrusions into U.S. commercial networks for the purpose of acquiring U.S. intellectual property assets.[56] On April 3, 2018, in accordance with Section 301 and directions from President Trump, the USTR released a list of Chinese products that would be subject to an additional 25 percent tariff; the tariff is to be applied to $50 billion worth of Chinese goods.[57] In response, China has vowed to impose equivalent tariffs on U.S. imports.[58]

As already noted, the United States decided to proceed with the Section 301 investigation against China without filing a parallel WTO case. Section 301 has long been controversial and has caused resentment from U.S. trading partners for its unilateral nature.[59] After the WTO was established in 1995, the United States added the procedure for filing a parallel WTO case to address the concern that Section 301 was a unilateral trade remedy in violation of the WTO.[60]

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[55] *Id*. at 17, 65, 147-50.

[56] *Id*. at 147-50.

[57] OFF. OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. OF THE PRESIDENT, UNDER SECTION 301 ACTION, USTR RELEASES PROPOSED TARIFF LIST ON CHINESE PRODUCTS para. 1 (Apr. 3, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/under-section-301-action-ustr [https://perma.cc/7DPR-WM2X]. The official notice of the specific tariffs can be found on the Federal Register. Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14906 (Apr. 6, 2018).

[58] *See* Sarah Zheng, *China Will Give as Good as it Gets in Trade War with United States, Ambassador Says*, SOUTH CHINA MORNING POST, (Apr. 3, 2018), http://www.scmp.com/news/china/diplomacy-defence/article/2140113/china-will-give-good-it-gets-trade-war-united-states [https://perma.cc/H2AC-CSC4].

[59] Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233, 251 n.92 (1996) (describing the negative reactions across the globe to section 301).

[60] Afterwards, the United States adopted the Uruguay Agreement, 19 U.S.C. §2413(a)(2), which allows for the USTR to file parallel with its investigations with the DSU. 19 U.S.C. § 2413(a)(2) (2012). For discussion of how the process works

In *United States –Sections 301-310 of the Trade Act of 1974*,[61] the European Communities brought a case in the WTO to challenge the unilateral nature of Section 301. The WTO panel held that Section 301 did not conflict with the WTO because Section 301 required U.S. authorities to wait until the WTO dispute settlement bodies reached a decision before making a determination under Section 301.[62] By waiting for the WTO to act first, Section 301 satisfied the requirement that the United States not impose sanctions prior to a WTO determination.[63] In the current case involving China, the United States decided to impose trade sanctions on China without first seeking any guidance or input from the WTO. Such an action by the United States is inconsistent with the result in the *Sections 301-310* case cited above; it also violates several other WTO legal obligations regarding trade sanctions discussed in the next section.

B. Trade Sanctions under the WTO

Under the WTO, when imposing tariffs on other WTO members, the United States has an obligation to comply with its tariff schedule, the Harmonized Tariff Schedule of the United States.[64] As part of its accession to the WTO in 2001, China entered into negotiations with all existing WTO members, including the United States, for a tariff schedule that would be acceptable to all members.[65] Once these negotiations concluded and the tariff schedule went into effect, the United States and China established reciprocal legal obligations under the WTO agreements to impose tariffs only in accordance with their respective tariff schedules.[66] All U.S. tariffs for goods from China are

regarding sections 301-310 work, *see* General Description of the Operation of Sections 301-310, Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, Annex II para. 4, WTO Doc. WT/DS152/R (Dec. 22, 1999) [Panel Report].

[61] Panel Report *supra*, note 60 at paras. 1.2, 1.4.

[62] *Id*. at§(b).

[63] *Id.*

[64] Harmonized Tariff Schedule of the United States (2018) Revision 11, USITC Pub. 4821 (Aug. 2018).

[65] Press Release, World Trade Organization, WTO Successfully Concludes Negotiations on China's Entry (Sep. 17, 2001), https://www.wto.org/english/news_e/pres01_e/pr243_e.htm [https://perma.cc/H49V-Y92V].

[66] Once China and the United States acceded to the WTO, both became bound by GATT Article II:1(a), which provides in relevant part: "Each contacting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Scheduled annexed to this Agreement." WTO Analytical Index, Article II Schedules of Concessions, 2

"bound" - subject to ceilings that cannot be lawfully exceeded without a specific justification recognized by the WTO.[67] This obligation concerning "bound" tariffs is specifically set forth in GATT Article II: 1(a)-(b) and is a core GATT/WTO obligation.[68]

A departure from Article II:1(a)-(b) in the form of additional tariffs can generally be justified in one of three ways: (1) a specific authorization from the WTO Dispute Settlement Body for increased tariffs or other trade sanctions;[69] (2) a specific exception to GATT obligations set forth in the general exceptions clause contained in GATT Article XX;[70] or (3) a safeguard measure to deal with a putative

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(1994) https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_jur.pdf [https://perma.cc/7XXP-32TF]. This provision means that GATT parties must not exceed the limits on tariffs set forth in each country's tariff schedule annexed to the GATT. *Id.*

[67] *See* WTO Analytical Index, *supra* note 66, at 2.

[68] *See id*.

[69] *See* CHOW & SCHOENBAUM, *supra* note 12, at 88.

[70] Article XX of the GATT provides in relevant part:

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the *conservation* of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

trade emergency imposed in accordance with GATT XIX and the WTO Safeguards Agreement.[71] In the case of the Special 301 tariffs, the United States did not go through any of these avenues. First, the WTO procedure for the authorization of trade sanctions requires that a country first bring a case in the WTO dispute settlement system.[72] A nation that wins the dispute can seek authorization for trade sanctions from the WTO in the event that the losing party refuses to comply with the recommendations of the WTO dispute settlement opinion.[73] The WTO can authorize trade sanctions to create pressure on the losing nation to comply with the WTO dispute settlement recommendations.[74] Trade sanctions are viewed within the WTO as a means to induce compliance, the ultimate goal of the WTO dispute settlement system.[75] Only full compliance can remove the distortion created by the offending trade measure.[76] The WTO views trade sanctions as a step in a formal process of a trade dispute settlement process, not as a measure that a nation can impose after independently determining that its rights have been violated as provided by Special 301.[77] Second, countries can justify trade sanctions in certain circumstances under the GATT general exceptions clause if any one of the specifically enumerated exceptions, set forth in the note below, are present.[78] An exception under Article XX(b) allows a country to impose trade sanctions without

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> (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan . . . . ;
>
> (j) essential to the acquisition or distribution of products in general or local short supply . . . .

GATT *supra* note 1, at 262.

[71] *See id.* at 258. This provision is supplemented by the WTO Agreement on Safeguards. Agreement on Safeguards, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154. For a discussion of safeguards, *see* CHOW & SCHOENBAUM, *supra* note 12, at 399-401. The WTO law on safeguards have been implemented into U.S. law by Sections 201-205 of the Trade Act of 1974. 19 U.S.C §§ 2251-55 (2012). For a discussion of safeguards under U.S. law, *see* CHOW & SCHOENBAUM, *supra* note 12.

[72] *See* CHOW & SCHOENBAUM, *supra* note 12.

[73] *See id.* at 87-88.

[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See id.*

[78] *See* GATT, *supra* note 1, at 262.

first obtaining authorization from the WTO.[79] For example, consider one of the most litigated exceptions under Article XX(b), the exception for "measures necessary to protect human, animal or plant life or health."[80] Suppose that a nation discovers that an imported food product contains toxins dangerous to human health. The importing nation could, based upon Article XX(b), impose a total trade ban or a quota of zero on the import. Although quotas are generally prohibited under GATT Article XI,[81] the quota in this case is exempted from the rule because it is necessary to protect human health. In the case of Article XX(b) and other exceptions, a jurisprudence has arisen under the GATT/WTO on the burden of proving such an exception.[82] In the case of restrictions on food imports, for example, the WTO requires scientific evidence and a risk assessment before a restriction can be

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[79] *See* CHOW & SCHOENBAUM, *supra* note 12, at 83-88.

[80] GATT, *supra* note 1, at 262. GATT Article XIX provides in relevant part:

> Emergency Action on Imports of Particular Products
>
> 1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers I that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Id. at 258. Issues under this provision were deemed to be so complicated that it was necessary to supplement the provision with the WTO Sanitary and Phytosanitary Measures Agreement. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm [https://perma.cc/47ME-LDV6].

[81] GATT Article XI provides in relevant part:

> General Elimination of Quantitative Restrictions
>
> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party.

A total trade ban, or a quota of zero, falls under the scope of this provision. GATT *supra* note 1, at 224.

[82] For example, a substantial amount of jurisprudence has arisen over the elements of the "chapeau" of Article XX, the introductory paragraph. *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 147-76, WTO Doc. WT/DS58/AB/R (adopted on Nov. 6, 1998).

justified.[83] In the case of the U.S. Special 301 tariffs imposed on China, the United States made no claim that the tariffs were justified under GATT Article XX. Finally, the United States may take temporary unilateral measures to raise tariffs or impose quotas, as a "safeguard" in the case of a putative trade emergency.[84] Under the GATT and the WTO Safeguards Agreement, such an emergency could exist if there was a sudden and unexpected surge in imports from China that could cause serious injury to a domestic U.S. industry.[85] To deal with such an emergency, the United States may impose trade barriers in the form of quotas or increased tariffs as a temporary measure to give U.S. industry some breathing room.[86] There was no indication of a surge in any of the targeted imports from China, and the United States never made any attempt to justify the Special 301 tariffs as a safeguard.

This brief review of the WTO law applicable to trade sanctions indicates that the United States has no justification under WTO law for the Special 301 tariffs. China is a member of the WTO and is entitled to the protection that the WTO offers on sudden unilateral tariff increases. The justification offered is that the tariffs are a response to China's practices that harm the United States by burdening U.S. commerce,[87] a ground that is nowhere recognized in the WTO. Nations are not allowed under the WTO to make their own determinations that their rights have been breached by other WTO members and then impose sanctions.[88] Nonetheless, despite a clear prohibition against unilateral tariffs, the United States seems determined to impose these tariffs. These measures illustrate the second tenet of U.S. unilateralism: the right to unilaterally impose trade sanctions on other WTO countries in disregard of WTO law.[89]

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[83] The use of scientific evidence and a risk assessment is required for trade sanctions imposed on food products. *See supra* note 80.

[84] *See* WTO Agreement on Safeguards, *supra* note 71, at 154.

[85] *See id.*, at 156.

[86] U.S. law provides that in a safeguards case, the U.S. President can increase tariffs, impose a quota, among other measures. *See* 19 U.S.C. § 2253(a)(3) (2012). Such remedies depend upon a finding by the U.S. International Trade Commission that imports are a cause of a serious injury or threat of a substantial injury to a domestic industry. *See id*.

[87] *See* 19 U.S.C. § 2411(a)-(b) (2012).

[88] Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792-93 (2001).

[89] *See supra* note 45, at 418.

C. U.S. Trade Sanctions under Section 232

An additional recent development is the claim by the United States that trade sanctions are justified as a matter of national security.[90] This assertion raises a different, although related, set of issues concerning unilateralism under the WTO. On March 8, 2018, President Trump announced additional tariffs of 25 percent on steel imports and 10 percent on aluminum imports from all countries pursuant to Section 232 of the Trade Expansion Act of 1962.[91] The U.S. Department of Commerce justified these tariffs by finding under Section 232 that steel and aluminum imports "threaten to impair national security."[92] By using Section 232, the United States also invokes GATT Article XXI, which creates an exception for "essential security interests."[93] By invoking Article XXI, the United States has ventured into a murky area long avoided by other WTO countries for political and policy reasons.

While GATT Article XX, discussed in the previous section, is the general exceptions clause, Article XXI deals specifically with an exception for security interests. GATT Article XXI states in relevant part:

> Nothing in this Agreement shall be construed
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its *essential security interests*
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations . . . .[94]

No GATT/WTO jurisprudence has ever been developed in the past

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[90] DEPT. OF COMMERCE, *Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House*, (Feb. 16, 2018), https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination [https://perma.cc/V43P-49WD].

[91] Proclamation No. 9704, Fed. Reg. 11621 (Mar. 8, 2018); Proclamation No. 9705, 83 Fed. Reg. 11626 (Mar. 8, 2018); s*ee also* 19 U.S.C. § 1862 (2012).

[92] *See supra* note 90.

[93] GATT art. XXI(b).

[94] GATT art. XXI (emphasis added).

seven decades concerning Article XXI because, throughout the entire history of the GATT/WTO since 1947, no nation has ever invoked the security exception in the GATT/WTO dispute settlement system.[95] Until the recent steel and aluminum tariffs imposed by the Trump Administration, the United States has never invoked Section 232 to justify sanctions against other WTO countries.[96]

These prior practices by other countries and prior U.S. administrations reflect a tacit understanding among GATT/WTO members that invoking the Article XXI exception could lead to the expansion of an exception that is so broad that it undermines GATT commitments altogether.[97] The notion of "essential security interests" is not further defined in Article XXI because of the concern that each nation could invoke what it deemed to be its national security interests in a wide range of situations and that it would be legally and politically difficult for the WTO to rule on what constitutes national security concerns for specific nations.[98] The United States' invocation of Section 232 and by implication Article XXI could open a Pandora's Box and lead other nations to follow suit by invoking this broadly-worded clause to justify a wide range of measures. In fact, this has already occurred in the case of China's retaliatory tariffs. When the United States announced its steel and aluminum tariffs, China

[95] *See c.f.* Krzysztof J. Pelc, *The U.S. Broke a Huge Global Trade Taboo. Here's Why Trump's Move Might Be Legal,* WASH. POST, (June 7, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/07/the-u-s-broke-a-huge-global-trade-taboo-heres-why-trumps-move-might-be-legal/?noredirect=on&utm_term=.e7eedfc07606 [https://perma.cc/LH88-BABG]; *see also* Roger Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 699 (2011).

[96] Tom Miles, *Trump's tariffs head for a legal minefield*, REUTERS (Mar. 16, 2018), https://www.reuters.com/article/us-usa-trade-wto/trumps-tariffs-head-for-a-legal-minefield-idUSKCN1GS1KL [https://perma.cc/M75P-QSWB].

[97] *See* Alford, *supra* note 95, at 698-702; U.N., ESCOR, 2nd Sess. of the Preparatory Comm. of the U.N. Conference on Trade & Emp't, 33rd mtg. of Commission A, at 19-21, U.N. Doc. E/PC/T/A/PV/33 (July 24, 1947) (statements of Dr. Speekenbrink from the Netherlands, Mr. Leddy from the United States, and Mr. Colban on from Norway).

[98] Different interpretations exist regarding the ability for a member state to self-judge what constitutes an Article XXI security interest and what action, if any, the WTO can take. *See* Alford, *supra* note 95 at 704-05. *See also* GATT Council, *Minutes of Meeting Held in the Centre William Rappard on May 29, 1985,* at 1-17, C/M/188 (June 28, 1985), https://docs.wto.org/gattdocs/q/GG/C/M188.PDF [https://perma.cc/P8GU-EKCX].

(dealing with a meeting over the United States citing Article XXI to enforce a trade embargo against the United States while smaller countries like Argentina and Peru believed that such unilateral action of the United States violated international law).

immediately responded with a threat to impose tariffs on 128 types of U.S. goods "in order to safeguard China's interests" and to "balance the losses caused by the steel and aluminum tariffs."[99] By invoking a long dormant clause, the United States may have opened a new and expansive tit-for-tat weapon that nations can use to justify mutual unilateral trade sanctions that could lead to a pervasive trade war and undermine the WTO.

D. Escalation of Trade Disputes

The use of unilateral sanctions by the United States and China's response illustrate how a trade war can easily erupt. On March 8, 2018, the United States announced proposed tariffs on steel and aluminum imports; on April 2, 2018, China responded by proposing an equivalent amount of tariffs on wine, pork, and pipes.[100] The next day, on April 3, 2018, the United States proposed additional tariffs on Chinese flat screen televisions, medical devices, aircraft parts, and batteries.[101] China immediately responded on April 4, 2018, with proposed additional equivalent tariffs on U.S. soybeans, cars, and chemicals.[102] Not only did China respond with an equivalent level of tariffs, but China also chose to target sectors that would cause the maximum amount of political distress to the United States.

Once the United States disregarded WTO rules in imposing tariffs, China responded in kind by ignoring WTO rules. The WTO has rules that tightly constrain trade retaliation to certain circumstances; these rules prevent countries from picking the most sensitive area in which to impose retaliatory tariffs because such actions antagonize trading partners and can cause a trade dispute to erupt into a full-blown trade war. Under the WTO, retaliatory tariffs, when authorized by the WTO, must in general be applied to the same sector of goods that have suffered harm by the initial offending measure.[103] This means that if the United States imposes an illegal tariff on steel and aluminum products from China, any retaliatory tariffs by China under the WTO

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[99] Megan Cassella, *China to slap tariffs on 128 U.S. goods*, POLITICO (Apr. 4, 2018), https://www.politico.com/story/2018/04/01/china-tariffs-trump-trade-924833 [https://perma.cc/WNE3-S589].

[100] Ana Swanson & Keith Bradsher, *Trump Doubles Down on Potential Trade War with China*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/business/trump-trade-war-china.html [https://perma.cc/VQ5G-C6PU].

[101] *See id.*

[102] *See id.*

[103] *See* CHOW & SCHOENBAUM, *supra* note 12, at 88.

must be on the same goods from the United States.[104] Instead, China chose to impose tariffs on agricultural products such as wine, pork, and soybeans that are produced by farmers in the U.S. Midwest who helped propel Trump to the U.S. Presidency.[105] The WTO rules controlling the application of retaliatory tariffs is designed to prevent just this type of rapidly escalating tactic. But once the United States acts outside the rules of the WTO by imposing unilateral tariffs, the WTO constraints on retaliatory tariffs do not apply. By acting unilaterally, the United States risks that other countries will respond in kind by ignoring the WTO rules on trade retaliation, thus heightening the chances of a trade war.

E. National Security Concerns under U.S. Legislation

So far, the discussion in this article has focused on sanctions on the trade in goods, but U.S. unilateralism extends to all areas of trade. National security concerns also play a major role in U.S. legislation affecting inbound foreign direct investment (FDI) in the United States. An example of FDI is when a U.S. corporation invests capital in a foreign country to establish a wholly owned subsidiary or acquires a foreign company through a merger and acquisition.[106] The U.S. parent company is a business entity under U.S. law, but it owns and manages a business entity established under the laws of a foreign nation.[107] The growth of FDI in the latter part of the twentieth century is a hallmark of modern international trade.[108]

The United States regulates inbound FDI under the Foreign Investment Security Act of 2007 ("FINSA").[109] Under FINSA, the Committee on Foreign Investment in the United States ("CFIUS"), an interagency committee chaired by the Secretary of the Treasury, reviews any national security concerns arising from inbound FDI transactions and makes recommendations to the President on whether to permit or reject the transaction.[110] On March 12, 2018,

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[104] *See id.*

[105] Sheryl Gay Stolberg & Ana Swanson, *Farmers' Anger at Trump Tariffs Puts Republican Candidate in a Bind*, N.Y. TIMES (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/us/politics/trump-trade-china-politics-heartland.html [https://perma.cc/4DLX-SGUG].

[106] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 350 (3d ed. 2015).

[107] *See id.*

[108] *See id.* at 355-56.

[109] Foreign Investment Security Act of 2007, Pub. L. No. 110-49, § 6, 121 Stat. 258 (2007).

[110] U.S. DEPT. OF THE TREASURY, THE COMMITTEE ON FOREIGN INVESTMENT IN THE

following recommendations made by CFIUS, President Trump issued an executive order prohibiting a takeover of Qualcomm Inc., a Delaware corporation in the telecommunications industry, by Broadcom Ltd., a Singapore corporation.[111] The executive order found that the takeover would endanger the national security of the United States.[112] The underlying concern was that removing Qualcomm, a major U.S. competitor, would ease the way for the Chinese companies, such as Huawei and ZTE, to gain supremacy in the global telecommunications field over U.S. competitors.[113]

Concerns about Chinese inbound FDI are not new to the Trump Administration. As early as 2012, during the Obama Administration, the House Permanent Select Committee on Intelligence raised concerns to CFIUS that Huawei and ZTE, two Chinese companies in the telecommunications industry seeking to acquire U.S. assets, are under the control or influence of the Chinese Communist Party.[114] In the same year, President Obama ordered the divesture by a Chinese company of its acquisition of Ralls Corp., a Delaware company and a wind turbine manufacturer, the first time in 22 years that the United States blocked an acquisition by a foreign company.[115] The Trump Administration, however, has announced that it may substantially expand its powers to restrict FDI. Currently, FDI transactions are reviewed on a case-by-case basis by CFIUS, but the United States is considering using the International Emergency Economic Powers Act of 1977 ("IEEPA") as the basis for blocking whole categories of FDI

UNITED STATES (CFIUS), https://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx [https://perma.cc/YAZ8-5YN6] (last visited Sept. 21, 2018).

111 Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11631 (Mar. 15, 2018).

112 *See id.*

113 *See* U.S. Dept. of the Treasury, Opinion Letter Re: CFIUS Case 18-036: Broadcom Limited (Singapore)/Qualcomm Incorporated (Mar. 5, 2018) (discussing how a weakening in Qualcomm's position would open the field for Chinese Company expansion, including Huawei, in the 5G standard-setting process), https://www.sec.gov/Archives/edgar/data/804328/000110465918015036/a18-7296_7ex99d1.htm. [https://perma.cc/DY3P-2V2H].

114 Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE: A Report by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger of the Permanent Select Committee on Intelligence, U.S. House of Representatives, Oct. 8, 2012.

115 ORDER SIGNED BY THE PRESIDENT REGARDING THE ACQUISITION OF FOUR U.S. WIND FARM PROJECT COMPANIES BY RALLS CORPORATION, THE WHITE HOUSE, 77 Fed. Reg. 60281 (Sept. 28, 2012).

transactions and seizing assets.[116] IEEPA empowers the U.S. President to declare a national emergency in response to an "unusual and extraordinary threat."[117] It has been previously invoked to address trade issues.[118] Under IEEPA, the President can declare entire sectors or industries off limits to FDI.[119] The President can also prohibit outward FDI flows, i.e., block transactions by U.S. companies to establish or acquire foreign companies.[120]

The United States can potentially use national security concerns in the area of FDI very expansively because FDI is not subject to WTO review. Unlike the trade in goods, services, technology, or intellectual property, the WTO does not regulate FDI, except in tangential ways.[121] For historical reasons, WTO countries could not reach an agreement on FDI.[122] As a result, disputes involving FDI cannot be brought in the WTO dispute settlement system. If a foreign country has a bilateral investment treaty ("BIT") with the United States or is a party to a regional trade agreement,[123] disputes involving FDI are subject to a dispute settlement mechanism under the applicable treaty

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[116] Bob Davis, *Treasury to Use National Security Laws to Shield U.S. Tech From China,* WALL ST. J., (Mar. 28, 2018), https://www.wsj.com/articles/treasury-to-use-national-security-laws-to-shield-u-s-tech-from-china-1522244695 [https://perma.cc/ZYJ8-XB5Q].

[117] IEEPA, Pub. L. 95-223, 91 Stat. 1626, 50 U.S.C. § 1701.

[118] *See* Continuation of Export Control Regulations, Exec. Order No. 13222, 66 Fed. Reg. 44025 (Aug. 17, 2011) (using IEEPA to continue the authority of the Export Administration Act, P.L. 96-72, after it expired); *cf., e.g.,* Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001) (using IEEPA after 9/11 to provide means to disrupt the financial foundation for terrorist organizations).

[119] 50 U.S.C. § 1702(a)(1) states in relevant part:

> "[T]he President may . . . investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States . . . ."

[120] *Id.*

[121] David Howard, *The Need For a Supranational Organization in Foreign Investment,* 8 NOTRE DAME J. OF INT'L AND COMP. L. 15, 15-16 (2018).

[122] *See* CHOW & SCHOENBAUM, supra note 106, at 397-99.

[123] A bilateral investment treaty (BIT) specifically provides for protections for FDI. Such protections are specifically created in the BIT. *See id.* at 362-64. An example of a regional treaty that provides for FDI protections is the North American Free Trade Agreement. For FDI protections under NAFTA, *see id*. at 387-89.

but still outside of the WTO.[124] If the country does not have a BIT or other applicable treaty with the United States, the rejection of FDI due to national security concerns becomes solely an issue of U.S. law to be decided by U.S. courts.[125] As China does not currently have a BIT with the United States,[126] its only recourse would be to proceed with a challenge through the U.S. legal and political system.[127] Challenging an adverse U.S. ruling on FDI might be futile because U.S. companies may refuse to go ahead with an FDI transaction in any event. U.S. companies have shown that an official negative decision by CFIUS or the President is unnecessary for them to withdraw from an FDI transaction.[128] In the past, as soon as there are indications that an FDI transaction is viewed unfavorably by CFIUS, U.S. companies have withdrawn from the transaction for fear of antagonizing the U.S. government.[129]

These recent developments signal that the United States can use national security as a reason to reject an FDI transaction and not be subject to an international body's oversight, but subject only to review of its own. Freed from any international constraints in the area of FDI, the United States may be entering into an unprecedented and extreme phase of nationalism and protectionism through the use of unilateral powers by the U.S. executive branch.

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[124] *See id.* at 365-66.

[125] *See* Daniel C.K. Chow, *Why China Wants a Bilateral Investment Treaty with the United States*, 33 B.U. INT'L L. REV. 431-433 (2015).

[126] *See* DEPT. OF STATE, UNITED STATES BILATERAL INVESTMENT TREATIES, https://www.state.gov/e/eb/ifd/bit/117402.htm [https://perma.cc/V8EV-878V] (last visited June 6, 2018). For a general overview of the issues surrounding a US-China BIT, *see* Chow, *supra* note 125, at 421.

[127] *See* Chow, *supra* note 125, at 431-33.

[128] *See* Kevin Granville, *Cfius, Powerful and Unseen, Is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/business/what-is-cfius.html [https://perma.cc/VH8A-2PSF] (reporting how CFIUS pressure led to the collapse of a deal between Fairchild, a U.S. company, and Fujitsu, a Japanese company); Committee on Foreign Inv. in the U.S., Annual Report to Congress 19 (Dec. 2013), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/2013%20CFIUS%20Annual%20Report%20PUBLIC.pdf [https://perma.cc/S8VT-U43N] (reporting that in 2012, 10 parties voluntarily withdrew cases and never refiled).

[129] *See id.*; *cf.* Diane Bartz, *Businesses Warn of Risk of Tighter Rules on U.S. Foreign Investment*, REUTERS (Jan. 18, 2018), https://www.reuters.com/article/usa-ma-congress/businesses-warn-of-risks-of-tighter-rules-on-u-s-foreign-investment-idUSL1N1PD1PN [https://perma.cc/LF33-ZJKW] (explaining businesses like IBM believe tighter CFIUS controls might make it hard to even sell overseas).

F. Trade Sanctions as a Negotiation Tactic

The United States has asserted the counterargument that it is using the prospect of trade sanctions to induce its trading partners to come to the negotiation table to revise unfair trade agreements that harm U.S. interests.[130] Under this line of reasoning, the U.S. strategy of using the threat of tariffs as a negotiation tactic does not violate the WTO agreements so long as the tariffs are never imposed. As an example, the United States points to the recently revised trade pact with South Korea announced by both parties on March 27, 2018.[131] To avoid the new tariffs on steel and aluminum, South Korea agreed to a number of new trade concessions, including a limit of 2.68 tons of steel exports to the United States per year or roughly 70 percent of the volume of steel exports from Korea to the States for the years 2015-17.[132] The United States quickly announced that the new pact vindicated its approach.[133] U.S. Treasury Secretary Steve Mnuchin declared, "I think the strategy has worked, quite frankly. We announced the tariff. We said we were going to proceed. But, again, we said we'd simultaneously negotiate."[134] Secretary Mnuchin boasted that the revised trade pact was a "win-win situation" for both countries.[135] President Trump's trade advisor Peter Navarro agreed that the threat to impose tariffs against South Korea yielded a good result.[136]

This approach of using the threat of trade sanctions as a gambit in a purported trade negotiation is not new but is a tactic that was made popular under previous U.S. administrations. In a notorious example, in 1981, to avoid U.S. trade sanctions, Japan agreed to "voluntarily"

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[130] *See* Alan Rappeport & Jim Tankersley, *Trump Gets First Major Trade Deal as South Korea Looks to Avoid Tariffs*, NY TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/business/south-korea-us-tariffs.html [https://perma.cc/BDJ6-6P4E]. This approach is consistent with the priorities set forth by the USTR in the President's 2017 National Trade Policy Agenda, discussed earlier. *See* USTR, *supra* note 19, at 1-2. In addition to asserting U.S. sovereignty over trade policy, a basic justification for unilateralism, the Trade Policy Agenda also calls for the U.S. to "(2) strictly enforce U.S. trade laws; (3) use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services; and (4) negotiate new and better trade deals with countries in key markets around the world." *See id.*

[131] *See* Alan Rappeport & Jim Tankersley, *supra* note 130.

[132] *See id.*

[133] *See id.*

[134] *See id.*

[135] *See id.*

[136] *See id.*

limit its export of passenger automobiles to the United States to 1.68 million vehicles per year.[137] Japan agreed to a "voluntary export restraint" ("VER") that was designed to help save the U.S. auto industry, which was under severe pressure due to imported Japanese cars.[138] These VERs were controversial on a number of fronts, including the ultimate cost of the program to the United States, which by all accounts far outweighed its benefits.[139] From the perspective of the WTO, there were a number of legal problems with the VERs used by the United States, including the WTO rule against the use of quotas.[140]

A fundamental rule of the GATT is that quotas are prohibited.[141] A quota is a numerical restriction imposed on the number of imports by the importing nation and is recognized as a pernicious trade restriction that creates a distortion in the free market.[142] In the 1980s, due to political pressure at home, the United States sought to limit the number of imported cars from Japan.[143] To avoid the prohibition on quotas, the United States sought to impose the limit by entering into VERs instead of using quotas.[144] The reasoning was that if the exporting country voluntarily agreed to limit the volume of its exports, then a quota was not involved since the source of the numerical restriction was a freely made decision by the exporting country, not a ban imposed by the importing country, as in a classic case of a quota.[145] Under this reasoning, a VER is permissible under the GATT, while a quota is not, even though the two measures lead to the same anticompetitive result and are in most other respects substantially equivalent. Of course, the WTO and other nations immediately recognized that VERs entered into under the threat of trade sanctions by the United States were not in fact "voluntary" but the result of intimidation.[146] In addition to their coercive nature, VERs created additional harms because the exporting country was required by the United States to implement an extensive monitoring system to ensure

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[137] *See* CHOW & SCHOENBAUM, *supra* note 12, at 411-15.

[138] *See id.*

[139] *See id.*

[140] The VER was arguably a quota imposed by the United States in violation of the general prohibition on quotas contained in GATT Article XI. *See* GATT art. XI.

[141] *See id.*.

[142] *See* CHOW & SCHOENBAUM, *supra* note 12, at 265-66.

[143] *See id.*

[144] *See id.* at 411-415.

[145] *See id.*

[146] *See id.*

that no quantities above the limit were exported.[147] The monitoring system created financial burdens on the exporting country and also delays in exports due to the need to satisfy the monitoring procedures.[148] Not only was the exporting nation harmed by these administrative burdens, but other importing nations were harmed because they also suffered delays in receiving the goods.[149] In another case involving a VER on semi-conductors imported from Japan by the United States, the European Communities brought a complaint in the WTO arguing that Japan's monitoring system led to delays in shipments of the chips to the European Communities.[150]

The harms associated with VERs led the WTO to subsequently eliminate them. When the WTO was established in 1995, the WTO enacted the WTO Safeguards Agreement.[151] Article 11 of the Safeguards Agreement provides that "a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side."[152]

Given this history and the WTO position on VERs, the use of threats by the United States to intimidate South Korea into its trade pact revisions appear to run afoul of the GATT/WTO. After announcing the additional steel and aluminum tariffs, the United States made it known that countries could apply for exemptions from the tariffs.[153] In exchange for the exemptions, countries would have to capitulate to the United States with new trade concessions. In the case of South Korea, the consideration for the tariff exemption was an agreement to "voluntarily" limit its export of steel, among other concessions.[154] In other words, South Korea entered into a VER with the United States for steel in contravention of the WTO prohibition against VERs contained in Article 11 of the Safeguards Agreement. The United States intimidated South Korea into accepting a quota in violation of

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147 *See* Report of the Panel, *Japan – Trade in Semi-Conductors*, ¶ 118, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.), at 116 (1988).

148 *See id.*

149 *See id.*

150 *See id*.

151 *See* WTO Agreement on Safeguards, *supra* note 71, at 154.

152 *Id.* at 159.

153 Ana Swanson, *Trump Prepares to Formalize Tariffs but Floats Exemptions,* NY TIMES (Mar. 7, 2018), https://www.nytimes.com/2018/03/07/us/politics/trump-steel-aluminum-tariffs.html [https://perma.cc/S2J7-FQVP]**.**

154 *US Exempts South Korea from Steel Tariffs, but Imposes Import Quota,* CNBC (Mar. 25, 2018), https://www.cnbc.com/2018/03/25/us-exempts-south-korea-from-steel-tariffs.html [https://perma.cc/N8U4-8M9W]**.**

GATT Article XI.[155] As for U.S. claims that its threats of sanctions are merely a negotiation tactic and are not coercive, the EU summed up the view of many countries when it stated that there is no negotiation when "it is with a gun to our head."[156]

IV. THE WTO AS AN INSTRUMENTALITY TO ACHIEVE U.S. ENDS

In its final Section 301 Report, at the same time that the USTR found China to be in violation of U.S. IP rights and subject to unilateral trade sanctions, the USTR also indicated the United States would file a case in the WTO against China for its discriminatory technology licensing practices.[157] Subsequently, on March 23, 2018, the United States formally filed a complaint in the WTO.[158] Given that the United States has indicated that it will ignore an unfavorable WTO decision,[159] it might seem inconsistent with the U.S. position to file a case against China in the WTO. It appears that, although the United States has filed a WTO case, it only intends to follow a ruling in its favor.[160] With a ruling in its favor against China, the United States will then seek to enforce it even though it will disregard a decision against it and ignore China's attempt to enforce such a contrary decision.[161] In other words, the United States will use the WTO when it suits U.S. interests and ignore the WTO when it does not. This is the third tenet of U.S. unilateralism. It also brings us to the crux of the shift in the current U.S. view towards the GATT/WTO.

While previous U.S. administrations viewed international trade as a rules-based multilateral trading system in which the United States was a member, albeit a powerful one, with the WTO at the top as its

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[155] *See id.*

[156] Richard Lough & Philip Blenkinsop, *EU Complains of "Gun to Our Head" Over Tariffs*, REUTERS (Mar. 23, 2018), https://www.reuters.com/article/us-usa-trade-eu-reax/eu-complains-of-trumps-gun-to-our-head-over-tariffs-idUSKBN1GZ14K [https://perma.cc/HH6Y-TK4B].

[157] U.S. TRADE REPRESENTATIVE, *supra* note 54.

[158] Request for Consultations by the United States, *China – Certain Measures Concerning the Protection of Intellectual Property Rights,* WTO Doc. WT/DS542/1 (Mar. 23, 2018).

[159] *See* the discussion in Part II of this Article, *supra*.

[160] *See id*.

[161] The formal explanation by the United States would be that unfavorable decision adds to or diminishes the rights of the United States under the WTO and is thus outside the legitimate scope of the WTO dispute settlement body and invalid. *See supra* note 19, at 2-3. By contrast, the decision against China would be within the scope of the powers of the WTO dispute settlement body and therefore valid and enforceable. *See id*.

governing body, the Trump Administration rejects this view.[162] Under the view followed by previous U.S. administrations, which has held sway for about seven decades, trade law is based on a top down model with the WTO at the apex and member countries below on an equal plane, all subject to the jurisdiction of the WTO. Under U.S. leadership, this model has been generally accepted by GATT/WTO countries and has led to many successes in reducing trade barriers.[163] By contrast, under the current U.S. view, international trade consists of discrete nations locked in a battle to achieve their own ends. Law exists only at the horizontal level in bilateral trade deals entered into between the United States and its trading partners. WTO law exists in this view only to the extent that the United States chooses to recognize it in the bilateral relationship. In the U.S. view, the WTO is a mere instrumentality to be used by the United States whenever appropriate. Moreover, law itself is always subordinate to political and economic goals. Unlike the rules-based system of the WTO, international trade, as envisioned by the United States, is based on economic and political power that can be used to intimidate trading partners when necessary.

Such a vision can quickly lead to the dismantling of the WTO because other nations may respond in kind and reject a multilateral approach in favor of a power-based approach. China, the United States' most important protagonist in trade, has already indicated that it will respond unilaterally with retaliatory tariffs.[164] In other words, China is announcing that if the United States acts first in breaking the rules of the WTO to further its interests, China will do the same in response to protect its interests. Such a position should not be surprising to the United States because for centuries the Chinese strategy in the art of war has been that, when faced with a superior enemy, China will not initiate an attack but will pour its energies into an active counterattack instead.[165] If other nations follow suit, the WTO could quickly implode as nations will feel free to disregard the WTO whenever it suits them. The world could return to the high point of protectionism and nationalism experienced in the 1930s when economic and political power, unconstrained by legal rules, led to the

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[162] *See supra* note 19 at 7.

[163] Bryan Schonfeld, *Why the U.S. Needs the World Trade Organization*, WASH. POST (Sept. 20, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/20/would-the-u-s-be-better-off-without-the-wto-not-when-the-wto-guides-98-percent-of-global-trade/?utm_term=.2e80b45d2dbd [https://perma.cc/4G4F-G8XA].

[164] Cassella, *supra* note 99.

[165] *See* SUN TZU, THE ART OF WAR, Chapter III, Attack by Stratagem (2009) (ebook).

use of military power that plunged the world into a catastrophic war.[166]

V. CONCLUSION

The GATT/WTO has reached a crossroads and a crisis unlike any in the previous seven decades of its existence. Several events, culminating in the adoption of economic nationalism and the use of unilateralism by the United States, have led the GATT/WTO down this path. Even prior to the election of Donald J. Trump to the U.S. presidency, events unfavorable to the GATT/WTO were unfolding. The GATT/WTO suffered a severe blow when the Doha Round of Negotiations, deadlocked for years, was finally given a merciful death by the Nairobi Ministerial Declaration on December 19, 2015.[167] The Doha Round was the GATT/WTO's most ambitious round of negotiations; it was complex and concerned many subjects, such as trade and the environment, electronic commerce, technology transfer, small economies, and developing countries.[168] Yet it was abandoned mainly due to the inability of countries to agree on issues concerning agriculture.[169] The failure was significant because the negotiations began in 2001 and were slated to conclude in 2005.[170] Ten years after the originally planned concluding date, the negotiations had consumed significant energy and resources of many WTO countries only to permanently stall.[171] The failure was also significant on a symbolic level, for it can also be seen as a negative referendum on multilateralism and its future. For years, while the Doha negotiations were deadlocked in a moribund state, nations began to enter into

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[166] *See* CHOW & SCHOENBAUM, *supra* note 12, at 18.

[167] See Shawn Donnan, World Trade Organisation Moves on from Stalled *Doha Round*, FIN. TIMES (Dec. 19, 2015), https://www.ft.com/content/08968f4e-a682-11e5-9700-2b669a5aeb83 **[**https://perma.cc/42LH-BUGR]**;** Carter Dougherty, Global Trade After the Failure of the *Doha Round*, N.Y. TIMES (Jan. 1, 2016), https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doharound.html?_r=0 [https://perma.cc/QLV5-DXQ2]**.**

[168] *See Deadlocked in Doha*, ECONOMIST (Mar. 27, 2003), https://www.economist.com/node/1667266 [https://perma.cc/M5PN-FMZ8]; Carter Dougherty, *Global Trade Talks Collapse over Agricultural Subsidies*, N.Y. TIMES (June 21, 2007), https://www.nytimes.com/2007/06/21/business/worldbusiness/21iht-wto.4.6264066.html?mtrref=www.google.com&gwh=13763828730844A2C5D3838114056BF4&gwt=pay [https://perma.cc/3H5D-7KT5]**.**

[169] *See id.*

[170] The announcement of Doha rounds set the conclusion for January 1, 2005. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002).

[171] *See id.; see also* Donnan, *supra* note 167.

regional trade agreements outside of the WTO, leading many observers to ask whether the WTO was still relevant.[172]

The ascension to power by the Trump Administration seems to have greatly exacerbated the WTO's difficulties and now threatens its demise. Due to dissatisfaction with the WTO, the United States is now blocking the appointment of new members to the WTO Appellate Body.[173] Without these appointments, the Appellate Body is or will soon be paralyzed and unable to decide cases on appeal from the WTO panels.[174] U.S. intransigence has left the WTO dispute settlement body unable to fully function at this crucial period in international trade.

Against this backdrop, U.S. unilateralism represents a grave threat to the future of the GATT/WTO and the multilateral trading system. The arguments spelled out in this Article indicate that the United States has adopted tenets of unilateralism that fundamentally reject the GATT/WTO multilateral system. The U.S. rejection could be the first step in an escalating trend to contest trade disputes outside of the WTO and to render it irrelevant. Already, China, the United States' chief competitor in trade, has vowed to match them in breaking WTO rules blow-for-blow. On its own, China will work within the WTO,[175] but if the United States rejects the rules of the WTO, China has vowed to immediately respond in kind.[176] Current disputes involving steel and

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[172] *See* Katherine Yester, *Irrelevant WTO,* FOREIGN POL'Y (Oct. 29, 2009), http://foreignpolicy.com/2009/10/29/irrelevant-wto/ [https://perma.cc/4B4D-ECGJ]; Shawn Donnan, *Trade talks lead to 'death of DOHA and birth of new WTO',* FIN. TIMES (Dec. 20, 2015), https://www.ft.com/content/97e8525e-a740-11e5-9700-2b669a5aeb83 [https://perma.cc/589Y-WWRC]; Carla Hills, *A Trans-Atlantic Trade Pact for the World,* N.Y. TIMES (Apr. 24, 2013), https://www.nytimes.com/2013/04/25/opinion/global/a-trans-atlantic-trade-pact-for-the-world.html [https://perma.cc/RRG5-CZ8W].

[173] *See* Tom Miles, *Diplomats Search for Way to Save Trade System after U.S. Vetoes Judges*, REUTERS (Nov. 27, 2017), https://www.reuters.com/article/us-usa-trade-wto/diplomats-search-for-way-to-save-trade-system-after-u-s-vetoes-judges-idUSKBN1DR2PR [https://perma.cc/KD87-C359].

[174] *See* Tom Miles, *U.S. Blocks WTO Judge Reappointment as Dispute Settlement Crisis Looms*, REUTERS (Oct. 3, 2018), https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O [https://perma.cc/P8GU-EKCX] (explaining though the Appellate Body will only be paralyzed in December 2019 when two more judges' terms expire, any recusals in the interim could have the same effect).

[175] This does not mean that China will not bend the rules of the WTO to its advantage. However, China will not openly declare that it is breaking the rules of the WTO unless the United States does so first.

[176] *See* Stolberg & Swanson, *supra* note 105.

aluminum and IP tariffs indicate that the United States and China, the world's two largest economies, have taken off the kid gloves, shaken off the constraint of legal rules, and are engaged in a dangerous battle in trade through power politics. Moreover, while China has been historically content to respond to U.S. challenges within the WTO, as China gains greater economic strength, it may begin to take a more aggressive role. The same principle of the Chinese strategy in the art of war that warns against an attack on an enemy possessing greater strength[177] also encourages attacks once superiority over the enemy is attained.[178] As China's economy is predicted to surpass that of the United States within a decade or so,[179] these events do not bode well for the future of the rules-based GATT/WTO.

As set forth in this article, unilateralism creates many perils, but the United States is not considering any alternative approaches to trade at present. The assertion of economic nationalism and unilateralism helped to propel President Trump to victory in the 2016 election and seem to be part of the Trump Administration's vow to fulfill the President's campaign promises. For political reasons, the United States is impervious to counterarguments against economic nationalism and unilateralism and unconcerned about their consequences. These political realities indicate that in order to change the present ominous course of the GATT/WTO and the multilateral system, the United States must, for its own reasons, reverse its policies or undergo a change in administration.

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[177] *See* text accompanying note 161.

[178] *See supra* note 161.

[179] Fergal O'Brien, *China to Overtake U.S. Economy by 2032 as Asian Might Builds*, BLOOMBERG (Dec. 25, 2017), https://www.bloomberg.com/news/articles/2017-12-26/china-to-overtake-u-s-economy-by-2032-as-asian-might-builds [https://perma.cc/NY4G-7YCP].