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Case Western Reserve Journal of
International Law

Volume 51 | Issue 1

2019

Leverage Is Everything: Understanding the Trump Administration's Linkage between Trade Agreements and Unilateral Import Restrictions

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Richard O. Cunningham, *Leverage Is Everything: Understanding the Trump Administration's Linkage between Trade Agreements and Unilateral Import Restrictions*, 51 Case W. Res. J. Int'l L. 49 (2019)

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LEVERAGE IS EVERYTHING: UNDERSTANDING THE TRUMP ADMINISTRATION'S LINKAGE BETWEEN TRADE AGREEMENTS AND UNILATERAL IMPORT RESTRICTIONS

*Richard O. Cunningham**

This paper offers an understanding of the Trump administration's (Administration) often-perplexing approach to international trade policy and, in particular, the Administration's repeated threats to withdraw from or renegotiate bilateral, regional and multilateral trade agreements. The central premise offered here is that all Administration trade actions—including both its approach to trade agreements and its threats or use of unilateral import restrictions—must be seen in terms of two fundamental goals. The first is to eliminate U.S. trade deficits with foreign countries (individually or collectively). The second is to restore the U.S. manufacturing sector by limiting imports and by bringing back to the U.S. manufacturing that had been moved to other countries. Renegotiation of trade agreements and imposition of import restrictions are closely integrated tactics used to accomplish these goals. Thus, neither should be seen as an end in itself, but rather as leverage toward achieving whatever specific goal the Administration seeks at the time. In one situation, import restrictions (or threat thereof) may serve as leverage in a trade agreement negotiation. In another situation, a trade negotiation may be conducted in a manner that provides leverage to obtain a limitation of imports. In analyzing this approach to trade, this paper addresses the following: A brief summary of the Trump Administration's trade policy and objectives; specific examples of the Administration's leverage-based strategy in action; and more detailed discussions of the Administration's leverage strategies in the three most important areas of U.S. trade today: US-China trade, the effort either to change or withdraw from the World Trade Organization, and the attempt to reshape the structure of North America by renegotiating or withdrawing from the North American Free Trade Agreement.

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I. THE TRADE OBJECTIVES AND STRATEGIES OF THE TRUMP ADMINISTRATION

Donald J. Trump was elected President of the United States, largely because of an angry feeling on the part of a substantial segment of the American electorate that the globalization of the U.S. economy has enriched sophisticated, cosmopolitan East and West Coast Americans while leaving them behind.¹ The Trump campaign relentlessly complained that “bad trade agreements”² have permitted rising volumes of imports and have facilitated the movement of U.S. manufacturing operations offshore—thus depriving U.S. workers of good jobs in the manufacturing sector.³

It is important to note that this argument did not target, nor did it appeal to, a majority of Americans. Remember that Hillary Clinton received nearly three million more votes than Donald Trump.⁴ But it struck a chord of resentment in a swath of industrial states that had historically voted Democratic or are “swing states:” Pennsylvania, West Virginia, Ohio, Michigan, Wisconsin—all of

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1. See Robert Leonard, Opinion, *Why Rural America Voted for Trump*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/opinion/why-rural-america-voted-for-trump.html> [https://perma.cc/9EV6-GERT] (discussing the dynamics that led certain Americans to vote for Trump).
 2. MARCUS NOLAND ET. AL., PETERSON INST. FOR INT’L ECON., ASSESSING TRADE AGENDAS IN THE US PRESIDENTIAL CAMPAIGN 23 (2016).
 3. Donald J. Trump, United States 2016 Presidential Election Candidate, Speech at Alumisource in Monessen, Pennsylvania (June 28, 2016).
 4. Sarah Begley, *Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count*, TIME (Dec. 20, 2016), <http://time.com/4608555/hillary-clinton-popular-vote-final/> [https://perma.cc/5PB6-XE24].

which swung for Trump and gave him victory in the electoral college.⁵ This is the “base” that the President sees (correctly) as the key to continuation in power of his party, which is now the Trump Party more than a traditional Republican Party.⁶ And he sees maintaining the allegiance of the base as being dependent on his Administration making good on the trade promises he made during the campaign.

The Trump Administration therefore has little use for trade agreements or policies that enhance a rules-based trading system⁷ or that facilitate the development or maintenance of efficient “value chains” which diversify the international sourcing of production inputs.⁸ This view permeates almost every aspect of the Administration’s thinking about trade-related issues. For example, the Administration is hostile to investor-state dispute settlement provisions in trade agreements⁹--not out of concern about the possible liability of governments, but based on the view that providing a remedy against unfair actions by host governments would make it safer for U.S. companies to establish production abroad.¹⁰

Candidate Trump, in keeping with this view of trade, condemned the Trans-Pacific Partnership (TPP)¹¹ and President Trump

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5. Todd Spangler, *The Rust Belt Gave Trump Victory, Now They Want Jobs in Return*, USA TODAY (Jan. 18, 2017), <https://www.usatoday.com/story/news/politics/2017/01/18/rust-belt-voters-donald-trump/96670922/> [<https://perma.cc/JE9H-58AR>].
 6. Sheryl Gay Stolberg, *Two Years and Hundreds of Inflammatory Ads Later, the G.O.P. is the Party of Trump*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/republicans-midterms-trump-racial-division.html> [<https://perma.cc/JE8A-X422>].
 7. WAYNE M. MORRISON & ANDRES B. SCHWARZENBERG, CONG. RESEARCH SERV., IF11035, MANAGED TRADE AND QUANTITATIVE RESTRICTIONS: ISSUES FOR CONGRESS (2018).
 8. *Id.*; see also WTO ET AL., GLOBAL VALUE CHAINS IN A CHANGING WORLD (Deborah K. Elms & Patrick Low eds., 2013), https://www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_e.pdf (discussing the global value chains and the way they shape the international economy).
 9. James McBride, *How Are Trade Disputes Resolved?*, COUNCIL ON FOREIGN REL. (Oct. 25, 2018), <https://www.cfr.org/background/how-are-trade-disputes-resolved> [<https://perma.cc/2VCW-P4Y3>].
 10. See *id.* (discussing the Trump Administration’s concern with non-Americans have control over U.S. law with counterarguments that the current system of investor-trade agreements protects U.S. foreign investments).
 11. Cristiano Lima, *Trump Calls Trade Deal ‘a rape of our country,’ POLITICO* (June 28, 2016, 9:12 PM), <https://www.politico.com/story/2016/06/donald-trump-trans-pacific-partnership-224916> [<https://perma.cc/R7LE-UD4E>].

withdrew from it.¹² For similar reasons, his Administration essentially discontinued negotiations with the European Union for a Transatlantic Trade & Investment Partnership (TTIP).¹³ He condemned The WTO as hostile to American interests, and has recently threatened to “pull the United States out” if the WTO “does not shape up.”¹⁴ He also characterized the North American Free Trade Agreement (NAFTA) as “the worst trade deal ever,” and the Korea-U.S. Free Trade Agreement (KORUS) as “a horrible deal,” and pledged to either renegotiate or withdraw from them.¹⁵

The Administration has also initiated a series of proceedings aimed at severely restricting imports of industrial products.¹⁶ So-called “national security” investigations have been initiated under Section 232 of the Trade Expansion Act of 1962¹⁷ against imports of steel, aluminum, uranium and autos (including auto parts), and a further proceeding has been threatened against semiconductor imports.¹⁸ In addition, a proceeding under Section 301 of the U.S. Trade Act of 1974¹⁹ against Chinese technology-related practices has

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12. *Trump Executive Order Pulls Out of TPP Trade Deal*, BBC NEWS (Jan. 24, 2017), <https://www.bbc.com/news/world-us-canada-38721056> [<https://perma.cc/B6SL-SGG2>].
 13. Philip Blenkinsop, *U.S. Trade Talks in Deep Freeze After Trump Win, Says EU*, REUTERS (Nov. 11, 2016), <https://www.reuters.com/article/us-usa-election-eu-trade-idUSKBN1361UN> [<https://perma.cc/23JF-3TJB>].
 14. John Micklethwait et al., *Trump Threatens to Pull U.S. Out of WTO If It Doesn't 'Shape Up'*, BLOOMBERG (Aug. 30, 2018), <https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up> [<https://perma.cc/Z4HF-TL8L>].
 15. Michael Collins, *What is NAFTA? Seven Things to Know About the North American Free Trade Pact*, USA TODAY (last updated Aug. 23, 2018, 11:13 AM), <https://www.usatoday.com/story/news/politics/2018/08/23/nafta-seven-things-you-should-know-free-trade-agreement/1063956002/> [<https://perma.cc/B7AT-XB7W>]; Philip Rucker, *Trump: 'We May Terminate' U.S.-South Korea Trade Agreement*, WASH. POST (Apr. 28, 2017), https://www.washingtonpost.com/politics/trump-we-may-terminate-us-south-korea-trade-agreement/2017/04/27/75ad1218-2bad-11e7-a616-d7c8a68c1a66_story.html [<https://perma.cc/ATR4-DVTH>].
 16. *See Trump Directs Commerce to Open Section 232 Investigation of Auto Imports*, COVINGTON & BURLING LLP (May 24, 2018), https://www.cov.com//media/files/corporate/publications/2018/05/trump_directs_commerce_to_open_section_232_investigation_of_auto_import_s.pdf [<https://perma.cc/ZS9V-UVF2>] (discussing the restrictions on steel and aluminum imports).
 17. 19 U.S.C. §1862.
 18. COVINGTON, *supra* note 16.
 19. 19 U.S.C. §2411.

resulted in tariffs on \$50 billion of Chinese imports, with a specific threat of tariffs on an additional \$200 billion of Chinese imports.²⁰

It is important to understand two reasons why the Trump Administration has turned to Sections 232 and 301 as the principal vehicles for limiting imports. First, unlike such traditional “trade remedy” laws as the antidumping and countervailing duty statutes²¹, Sections 232 and 301 give the President essentially unlimited flexibility to devise whatever forms and levels of import restriction he deems appropriate.²² Thus, these remedies can be adapted to achieve whatever form and degree of leverage the Administration deems necessary.

Second, and perhaps more important, impositions of import restrictions under these laws are discretionary Presidential decisions that are not appealable to the U.S. courts.²³ Moreover, as to Section 232, it is this Administration’s firm (but quite likely erroneous) view that a decision to restrict imports cannot be challenged in a WTO dispute settlement proceeding.²⁴

It would, in the opinion of this writer, be a mistake to view the use of these two statutes by the Trump Administration purely in terms of the stated purposes of those laws – namely the protection of U.S. national security (Section 232) and removal or amelioration of a foreign government’s unjustifiable or unreasonable trade practices (Section 301). Rather, as the case-specific discussions in this paper will make clear, President Trump sees these proceedings as creating flexible threats of import restrictions that can be used as powerful leverage to put pressure on governments to make concessions in trade negotiations or to change trade (or other) policies in ways demanded by the United States.

It is often observed that Donald Trump is a “transactional” president.²⁵ Nowhere is that more evident than in his approach to

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20. Press Release, Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action (July 10, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/statement-us-trade-representative> [<https://perma.cc/L8CR-5XU3>].
 21. Trade Remedy Laws, U.S. Int’l Trade Comm’n, https://www.usitc.gov/trade_remedy_laws.htm [<https://perma.cc/HT9H-ASKC>].
 22. MARCUS NOLAND ET. AL., *supra* note 2, at 9-11.
 23. Trade Expansion Act of 1962 §232, 19 U.S.C. §1862 (1964); CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS (2018).
 24. *Panels Established to Review US Steel and Aluminum Tariffs, Countermeasures on US Imports*, WORLD TRADE ORGANIZATION (Nov. 21, 2018), https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm [<https://perma.cc/GX5J-6N5C>].
 25. See, e.g., Robert Costa, *Conservatives Now Wonder if Transactional Trump Might Leave Them in the Cold*, WASH. POST (Nov. 6, 2018),

international trade. Issues are to be resolved and goals to be achieved by negotiating a “deal,”²⁶ he is much less comfortable in negotiating about rules than he is about negotiating amounts and dollar values, as he has done in his long career in real estate.²⁷

In trade agreement negotiations, as well as in enforcement of U.S. trade laws, President Trump’s strong inclination is to put primary emphasis on reducing imports into the U.S., rather than reducing or eliminating foreign barriers to U.S exports.²⁸ At bottom, his critique of U.S. trade agreements is that they have opened up U.S. markets to imports.²⁹ He quotes George Washington and Abraham Lincoln to the effect that it is important to protect U.S. industries from import competition.³⁰

Underlying President Trump’s trade philosophy is a conviction that other countries have been “unfair” in trade.³¹ In part, this represents such traditional trade concerns as subsidies, dumping, theft or forced transfer of U.S. firms’ intellectual property, state control/guidance of producing enterprises and the like.³² But his

https://www.washingtonpost.com/politics/conservatives-now-wonder-if-transactional-trump-might-leave-them-in-the-cold/2018/11/06/09e399c2-e118-11e8-ab2c-b31dcd53ca6b_story.html?utm_term=.ddfd8937c77d [<https://perma.cc/S3KL-G3AA>] (referring to President Trump as “transactional Trump”).

26. See Philip Rucker & Josh Dawsey, *Trump Two Years In: The Dealmaker Who Can't Seem to Make a Deal*, WASH. POST (Jan. 20, 2019), https://www.washingtonpost.com/politics/trump-two-years-in-the-dealmaker-who-cant-seem-to-make-a-deal/2019/01/20/ecdede96-1bf9-11e9-88fe-f9f77a3bcb6c_story.html?utm_term=.edd3cbd63b37 [<https://perma.cc/Y9NM-QU4X>] (describing President Trump as a “dealmaker”).
27. See, e.g., David Nakamura & Seung Min Kim, ‘*He’s a Gut Politician*’: *Trump’s Go-To Negotiating Tactics Aren’t Working in Shutdown Standoff*, WASH. POST (Jan. 9, 2019), https://www.washingtonpost.com/politics/hes-a-gut-politician-trumps-go-to-negotiating-tactics-not-working-in-shutdown-standoff/2019/01/09/c7bb5ff2-142b-11e9-b6ad-9cfd62dbb0a8_story.html?noredirect=on&utm_term=.834e695a59cd [<https://perma.cc/SBU2-SDEJ>] (describing President Trump’s negotiating techniques).
28. *Id.*
29. Binyamin Appelbaum, *On Trade, Donald Trump Breaks With 200 Years of Economic Orthodoxy*, N.Y. TIMES (Mar. 10, 2016), <https://www.nytimes.com/2016/03/11/us/politics/-trade-donald-trump-breaks-200-years-economic-orthodoxy-mercantilism.html> [<https://perma.cc/AY7V-C6HH>].
30. Donald J. Trump, 2016 Presidential Candidate, Remarks in New York City: States of the Election (June 22, 2016).
31. *President Donald J. Trump is Confronting China’s Unfair Trade Policies*, THE WHITE HOUSE (May 29, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-confronting-chinas-unfair-trade-policies/> [<https://perma.cc/23ML-CYGD>].
32. *Id.*

definition of “unfairness” also extends to low wage rates and even to foreign consumers’ preference for German, Japanese or Korean automobiles over U.S. cars.³³

One is tempted to conclude that, except as to the Administration’s efforts to force structural changes in China’s “state capitalism” (discussed later in this paper), the allegations of “unfairness” are largely rhetorical and tactical. In most contexts, the U.S. is not seeking “fairness” for its own sake, but rather alleges “unfairness” as a justification for the threats of import restrictions that it uses as leverage to achieve the goals of eliminating bilateral trade deficits and bringing manufacturing – and jobs – back to the United States.

Much of President Trump’s approach to trade issues, and particularly to trade negotiations, is shared by his U.S. Trade Representative (USTR), Robert Lighthizer. For over a quarter century, Bob Lighthizer was the lead counsel in antidumping, countervailing duty, and safeguard cases brought by the American steel industry.³⁴ He shares the views that foreign governments and their exporters behave unfairly, that high tariffs are appropriate to respond to that unfairness and, most importantly for the discussion herein, that negotiations will not effectively address trade problems without the leverage provided by the threat that such high tariffs will be imposed if the foreign party does not agree to U.S. demands.³⁵ As Deputy USTR in the Reagan Administration, he negotiated comprehensive “voluntary” restraint agreements (VRAs) with foreign governments by threatening the imposition of high tariffs if they did not agree to quantitative limitations.³⁶

With these considerations in mind, I turn now to discussions of how this Administration’s leverage-based trade policy has been applied in specific negotiations.

33. See, e.g., Charles Riley, *Made in America: The German Cars Trump Doesn’t Want*, CNN (June 12, 2018), <https://money.cnn.com/2018/06/11/news/economy/german-cars-trump-trade/index.html> [<https://perma.cc/U7TS-9ZJV>] (describing President Trump’s statements about foreign consumers’ preference for German cars).

34. Ana Swanson, *The Little-Known Trade Adviser Who Wields Enormous Power in Washington*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/us/politics/robert-lighthizer-trade.html> [<https://perma.cc/9HWN-PZ7P>].

35. THE WHITE HOUSE *supra* note 31.

36. John Burton, *Trump Rolls the Dice on China Trade*, ASIA TIMES (Mar. 23, 2018), <http://www.atimes.com/article/trump-rolls-dice-china-trade/> [<https://perma.cc/W27S-Z5LQ>].

II. THE USE OF “NATIONAL SECURITY” IMPORT RESTRICTIONS AS LEVERAGE

Section 232, the “National Security Amendment,” authorizes the President, pursuant to an investigation and recommendation by the Department of Commerce, to “adjust” imports and/or to take other steps where imports of a product threaten to impair the national security of the United States.³⁷ The statute enumerates two alternative bases on which such a threat to national security may be found:

- The product in question is essential to national security and imports threaten the availability of sufficient supply of that product to meet national security needs, or
- Imports of the product threaten a domestic industry sufficiently to endanger the economic welfare of the country.³⁸

Until the Trump Administration, all Section 232 determinations have turned on the first of these two criteria—namely, whether imports threaten adequate supply to meet national security needs (considered to mean defense needs).³⁹ Applying that standard, import restrictions were ordered in only four cases.⁴⁰ Three were petroleum cases generally regarded as *sui generis*,⁴¹ and the fourth was a machine tool case in which the major exporting country agreed to voluntary export restraints.⁴² In all other cases, including a steel sector case in 2001, it was determined that, despite increasing imports and injury caused to U.S. producers by those imports, there was no threat to the adequacy of supply available to meet U.S. defense requirements.⁴³ In several cases, supply was found to be adequate on the basis of availability from “safe and reliable” foreign countries even if U.S. producers might not be able to supply adequate quantities.⁴⁴

37. Trade Expansion Act of 1962 §232, 19 U.S.C. §1862 (1964).

38. *Id.*

39. See CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 3–4 (2018) (describing the Section 232 investigations to date).

40. *Id.* at 3.

41. *Id.*

42. *Id.* at 4.

43. *Id.*

44. See McLARTY UPDATE: *Section 232 Aluminum/Steel Investigation Department of Commerce (DOC) Report Released*, McLARTY ASSOCIATES (Feb. 16, 2018), <https://maglobal.com/mclarty-update-section-232-aluminum-steel-investigation-department-commerce-doc-report-released/> [<https://perma.cc/GP2A-BAFC>] (describing the exclusion of “safe” foreign

And in the 2001 Section 232 steel case—the last case before the Trump Administration—Commerce stated explicitly that the issue of whether imports threatened the health of the domestic industry was “beyond the scope” of the Department’s inquiry.⁴⁵

The Trump Administration, only a few months after taking office, launched Section 232 proceedings on steel and aluminum imports.⁴⁶ Neither industry had petitioned for or even considered Section 232 relief.⁴⁷ The steel producers and their workers had supported Mr. Trump in the election⁴⁸ and, in so doing, had advocated a global limitation on steel imports. However, on the day they were summoned to the White House, they expected to be told that a safeguard proceeding would be initiated under Section 201.⁴⁹ To their great surprise, they were told that Section 232 proceedings would be initiated concerning imports of steel and aluminum.⁵⁰

After conducting investigations sufficient in its view to satisfy the vague procedural requirements of Section 232, the Department of Commerce found, as to both steel and aluminum, that imports threatened to impair the security of the United States.⁵¹ The Department then recommended that the President impose substantial tariffs to “adjust” imports sufficiently to permit both U.S. industries to increase their levels of capacity utilization—in the case of steel, to

countries from section 232 investigations); Andy Home, *RPT-COLUMN-Which Sledgehammer Will Trump Use on U.S. Aluminium Imports?*, REUTERS (Feb. 20, 2018), <https://www.reuters.com/article/usa-trade-steel-aluminium-ahome/rpt-column-which-sledgehammer-will-trump-use-on-us-aluminium-imports-andy-home-idUSL8N1QA5NF> [perma.cc/V56N-BNJJ] (describing the exclusion of “reliable supplier” foreign nations from section 232 investigations).

45. *The Effect of Imports of Iron Ore and Semi-Finished Steel On the National Security*, U.S. DEPARTMENT OF COMMERCE BUREAU OF EXPORT ADMINISTRATION 37 (2001).

46. CONG. RESEARCH SERV., *supra* note 39, at 5.

47. *Id.*

48. See Nick Carey, *Trump Steel Tariffs May Leave These U.S. Steelworkers Jobless*, REUTERS (Mar. 9, 2018, 4:55 PM), <https://www.reuters.com/article/us-usa-trade-steel-jobs/trump-steel-tariffs-may-leave-these-u-s-steelworkers-jobless-idUSKCN1GL2V9> [https://perma.cc/8H85-UXEL] (describing the impact on President Trump’s steel tariffs).

49. See Chad Brown, *Trump’s Long-awaited Steel and Aluminum Tariffs Are Just the Beginning*, PIIE (Mar. 26, 2018, 12:00 PM), <https://piie.com/blogs/trade-investment-policy-watch/trumps-long-awaited-steel-and-aluminum-tariffs-are-just> [https://perma.cc/M8UR-D4B7] (indicating that the tariffs were not what the steelworkers who voted for Trump were expecting).

50. CONG. RESEARCH SERV., *supra* note 39, at 5.

51. *Id.* at 6.

80 percent.⁵² In making these determinations, Commerce ignored past Section 232 precedent and did not consider whether imports threatened the adequacy of supply available for defense needs.⁵³ Such a standard would clearly not have justified an affirmative determination, since only small percentages of U.S. steel and aluminum production (three percent in the case of steel) are used for defense purposes.⁵⁴ Instead, Commerce determined that imports jeopardized the health of the domestic industry and thus, threatened U.S. economic welfare.⁵⁵ One might question that conclusion, at least as to the steel industry, which was enjoying strong operating results and had subjected the majority of imports to antidumping and countervailing duty orders.⁵⁶ But of course, these determinations were not appealable.⁵⁷

President Trump ordered that imports be “adjusted” by imposition of twenty-five percent tariffs on steel (slightly higher than Commerce had recommended) and ten percent on aluminum.⁵⁸ As to certain countries (including Canada, Mexico, Korea, Brazil, Argentina, Australia and the European Union), however, the President suspended imposition of those tariffs to permit those countries to negotiate alternative means of removing the threat to U.S. national security.⁵⁹ This was done for the stated reason that those countries are security allies of the United States.⁶⁰

Based on the foregoing, one may certainly conclude that these cases had little to do with either national security or, at least in the

52. *Id.*

53. *Id.*

54. *Id.* at 7.

55. *Id.* at 6.

56. See DEPT. OF HOMELAND SECURITY, ANTIDUMPING AND COUNTERVAILING DUTY ENFORCEMENT ACTIONS AND COMPLIANCE INITIATIVES: FY 2016, FISCAL YEAR 2017 REPORT TO CONGRESS, 21–30 (2017) (outlining imports from antidumping and countervailing duty cases).

57. CONG. RESEARCH SERV., *supra* note 39.

58. Johnathan Swan, *Trump Declares his Trade War: Targets Steel, Aluminum*, AXIOS (Mar. 1, 2018), <https://www.axios.com/trump-declares-his-trade-war-targets-steel-aluminum-2f68d5fe-69ec-4872-b1d5-aaae28f7bf4b.html> [<https://perma.cc/5K9J-JMLW>].

59. Lesley Wroughton, *Trump Temporarily Excludes EU, Six Other Allies from Steel Tariffs*, REUTERS (Mar. 23, 2018), <https://www.reuters.com/article/us-usa-trade-steel/trump-temporarily-excludes-eu-six-other-allies-from-steel-tariffs-idUSKBN1GZ0ET> [<https://perma.cc/PS3A-FXRQ>].

60. Ana Swanson, *White House to Impose Metal Tariffs on E.U., Canada and Mexico*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/politics/trump-aluminum-steel-tariffs.html> [<https://perma.cc/8LPS-A23D>].

case of steel, with serious threat to the viability of the U.S. industry. While the “adjustment” of imports definitely benefited both domestic industries, largely in the form of increased market prices,⁶¹ it is also clear that the Trump Administration used the Section 232 tariffs in its trade negotiations with several nations.

A. *Canada and Mexico*

The steel and aluminum tariffs—along with the subsequent threat of Section 232 tariffs on autos and auto parts—became a significant bargaining tool in the renegotiation of NAFTA.⁶² This is discussed in Section V of this paper.

B. *The European Union*

The EU strongly protested the steel and aluminum tariffs,⁶³ challenged them in the WTO,⁶⁴ implemented retaliatory tariffs⁶⁵ (justified by the interesting argument that the tariffs were in fact not national security measures, but were instead safeguard measures, which give rise to a claim for compensation under WTO rates), and initially insisted that it would not negotiate until and unless the EU were permanently and unconditionally exempted from any Section 232 steel and aluminum measures.⁶⁶ But this position changed when the Trump Administration initiated a Section 232 proceeding on autos and auto parts, implicating a much larger volume of trade and posing a far larger economic threat to EU Member States, especially

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61. Chris Isidore, *US Steel a Big Winner After Tariffs Boost Prices*, CNN MONEY (Aug. 2, 2018), <https://money.cnn.com/2018/08/02/news/companies/us-steel-earnings-tariffs/index.html> [https://perma.cc/M8KU-CCAV].
62. Andrew Mayeda et al., *Trump Turns Steel Tariffs into NAFTA Bargaining Chip*, BLOOMBERG (Mar. 6, 2018), <https://www.bloomberg.com/news/articles/2018-03-06/steel-tariffs-transform-into-nafta-chip-as-trump-plays-dealmaker> [https://perma.cc/8G4A-Z4KN].
63. *See US Tariffs a Dangerous Game, Says EU*, BBC (June 1, 2018), <https://www.bbc.com/news/business-44324565> [https://perma.cc/J4RC-VEVW].
64. *DS548: United States — Certain Measures on Steel and Aluminium Products*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm [https://perma.cc/E9W8-YDDA] (last visited Feb. 1, 2019); Request for Consultations by the European Union, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/1 (June 6, 2018).
65. European Commission Press Release IP/18/4220, EU Adopts Rebalancing Measures in Reaction to US Steel and Aluminium Tariffs (June 20, 2018).
66. European Commission Press Release IP/18/3641, Commission Statement Following US Announcement of an Extension Until 1 June of the EU's Exemption from US Tariffs on Steel and Aluminium Imports (May 1, 2018).

Germany.⁶⁷ At that point, an EU delegation hurried to Washington, offering increased purchases of U.S. products and a free trade negotiation covering most trade in goods, regulatory cooperation, and some services trade issues.⁶⁸ The U.S. agreed to enter the trade negotiation and to refrain from any new tariffs on imports from the EU (*i.e.*, deferral of Section 232 auto tariffs) pending the trade negotiation.⁶⁹ But the steel and aluminum tariffs remain in effect.⁷⁰ This means that, despite its repeated statements that it would not negotiate “with a gun to its head,”⁷¹ the EU is now negotiating with a United States that enjoys two major forms of tariff-based leverage—the ability to lift the steel and aluminum tariffs in response to EU negotiating concessions and the threat of imposing auto tariffs if the EU does not agree to U.S. negotiating demands.

C. South Korea

Here the U.S. used concessions to Korea in trade negotiations to achieve an agreement on steel and aluminum tariffs that the U.S. badly needed as a precedent for its Section 232 exemption negotiations with other nations.⁷² As noted earlier, Candidate Trump repeatedly derided the KORUS FTA as one of the worst trade deals ever negotiated.⁷³ Accordingly, one of the first tasks assigned to new USTR Lighthizer was to renegotiate KORUS to eliminate the U.S.

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67. *German Carmakers Dismayed as US Considers Imposing Auto Tariffs*, THE LOCAL (May 24, 2018), <https://www.thelocal.de/20180524/german-carmakers-dismayed-as-us-weighs-auto-tariffs> [https://perma.cc/8Q7E-CQMS].
 68. *See* Mark Landler & Ana Swanson, *U.S. and Europe Outline Deal to Ease Trade Feud*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/us/politics/trump-europe-trade.html> [https://perma.cc/GN88-JN4Z] (explaining events unfolding during negotiations).
 69. *Id.*
 70. *US Tariffs on Steel, Aluminum to Remain in Place During Talks with EU – Ross*, SPUTNIK NEWS (July 26, 2018), <https://sputniknews.com/world/201807261066715394-us-tariffs-eu-ross/> [https://perma.cc/KY8U-2JYN].
 71. Daniel Boffey, *Trump-Junker ‘Talks About Talks’ Met With Skepticism*, GUARDIAN (July 26, 2018), <https://www.theguardian.com/business/2018/jul/26/jean-claude-junker-donald-trump-trade-deal-washington-talks-analysis> [https://perma.cc/LQ4Y-CMSS].
 72. Allen Rappeport & Jim Tankersley, *Trump Gets First Major Trade Deal as South Korea Looks to Avoid Tariffs*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/business/south-korea-us-tariffs.html> [https://perma.cc/8CLF-F99W].
 73. Jim Tankersley, *Trump Signs Revised Korean Trade Deal*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/us/politics/south-korea-trump-trade-deal.html> [https://perma.cc/5U8Y-UXAU].

trade deficit to Korea.⁷⁴ Negotiations were commenced, which became a major political problem for the South Korean government at a time when it was important for the two countries to avoid conflicts that could interfere with their united effort to negotiate with North Korea.⁷⁵ And Ambassador Lighthizer quickly became convinced that no KORUS renegotiation could significantly improve the trade deficit unless it included Korean concessions in areas—such as rice trade—that both sides understood were non-negotiable.⁷⁶ Yet the President and Administration protectionists were threatening to walk away from KORUS if they could not announce some sort of success in the FTA renegotiation.⁷⁷

The solution to Ambassador Lighthizer's problem took the form of a deal to conclude the KORUS renegotiation with essentially cosmetic agreement changes in return for Korea agreeing to something the U.S. badly needed in connection with the Section 232 steel and aluminum measures.⁷⁸ When the U.S. invited countries to seek exemption for the Section 232 tariffs, it conditioned the granting of such exemptions on a country's agreement to implement alternative measures that would remove the threat posed to U.S. security by imports from that country.⁷⁹ USTR needed to make it clear that such an "alternative measure" would have to include a sharp reduction in that country's volume of steel and aluminum exports to the United States. And for that reason, USTR offered to conclude the KORUS

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74. The White House, Briefing Statement, President Donald J. Trump is Fulfilling His Promise on the United States-Korea Free Trade Agreement and on National Security (Sept. 24, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-fulfilling-promise-united-states-korea-free-trade-agreement-national-security/> [https://perma.cc/7H35-39HS].
75. Jane Chung & Christine Kim, *How Seoul Raced to Conclude U.S. Trade Deal Ahead of North Korea Denuclearization Summit*, JAPAN TIMES (Mar. 30, 2018), <https://www.japantimes.co.jp/news/2018/03/30/asia-pacific/politics-diplomacy-asia-pacific/seoul-raced-conclude-u-s-trade-deal-ahead-north-korea-denuclearization-summit/#.XFSO3i2ZM1I> [https://perma.cc/JU5R-FHKE].
76. See John Brinkley, *U.S. – S. Korea Trade Pact Revision is Full of Holes*, FORBES (Mar. 27, 2018), <https://www.forbes.com/sites/johnbrinkley/2018/03/27/us-korea-fta-revision-is-full-of-holes/#300b3b8420a3> [https://perma.cc/ERH3-NV24] (discussing the issues with the Korean trade renegotiation).
77. Danielle Paquette, *Republicans and Democrats Urge Trump Not to Break 'Vital' Deal with South Korea*, WASH. POST (Sept. 5, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/05/republicans-and-democrats-urge-trump-not-to-break-vital-deal-with-south-korea/?utm_term=.936aed34fe94 [https://perma.cc/TPA2-7FME].
78. Brinkley, *supra* note 76.
79. Wroughton, *supra* note 59.

renegotiation with two auto-related changes (that sounded good but were entirely cosmetic)⁸⁰ if Korea would agree, as a condition of exempting its steel exports from the Section 232 tariffs, to reduce the volume of its steel exports to an annual level 30 percent below the 2015-17 average.⁸¹

Korea agreed to that deal,⁸² which shows that leverage can work in both directions when unilateral import restrictions are imposed or threatened in parallel with trade negotiations. Here, it was the Korean political imperative to bring the KORUS renegotiation to an end that provided the leverage needed by the U.S. on a major issue relating to the Section 232 tariffs.

D. Turkey

It is important to understand that the leverage provided by unilateral import restrictions can be used as leverage for disputes that have nothing to do with trade, provided the Administration has the flexibility to increase or reduce the import restrictions at will. The Trump Administration's use of the Section 232 steel and aluminum tariffs for leverage in a non-trade issue with Turkey demonstrates how tariffs can become an all-purpose leverage device.

Turkey is a substantial exporter of steel to the United States.⁸³ Initially, its exports suffered as a result of the steel tariffs.⁸⁴ However, as U.S. steel market price levels rose, the effect of the tariffs became less onerous on all foreign exporters, including the Turkish producers.⁸⁵ This is what happens in a commodity market when the same tariff is imposed on imports from all sources.⁸⁶

80. Brinkley, *supra* note 76.

81. Hyunjoo Jin & Joyce Lee, *U.S., South Korea Revise Trade Deal, Korean Steel Faces Quota*, REUTERS (Mar. 25, 2018), <https://www.reuters.com/article/us-southkorea-trade-usa/u-s-south-korea-revise-trade-deal-korean-steel-faces-quota-idUSKBN1H206V> [<https://perma.cc/H9SN-K2ZT>].

82. Brinkley, *supra* note 76.

83. *Turkey Steel Exporters Don't Expect Big Impact From US Tariffs: Association*, HÜRRİYET DAILY NEWS (Mar. 2, 2018), <http://www.hurriyetdailynews.com/turkey-steel-exporters-dont-expect-big-impact-from-us-tariffs-association-128136> [<https://perma.cc/T65V-L4AG>].

84. Ceyda Caglayan, *U.S. Steel Tariffs Slash Turkey's Exports; Future Orders Recovering -Association*, REUTERS (June 27, 2018), <https://www.reuters.com/article/usa-trade-turkey-steel/us-steel-tariffs-slash-turkeys-exports-future-orders-recovering-association-idUSL8N1TT4HO> [<https://perma.cc/4WHD-A34Z>].

85. *Id.*

86. *See id.* (explaining result of a tariff in a commodity market).

This summer, however, a dispute arose over the Turkish Government's prosecution and imprisonment of an American pastor.⁸⁷ President Trump demanded that the pastor be released.⁸⁸ When the Turkish government refused, President Trump ordered that the Section 232 steel and aluminum tariffs on imports from Turkey be doubled, to fifty percent and twenty percent respectively.⁸⁹ In contrast to the effect of a tariff applied equally to imports from all sources, where increase in the market price can reduce or eliminate the burden on exporters, a tariff applied only to imports from one country hits that country's exporters with full impact.⁹⁰

Not surprisingly, the Turkish Government released the American pastor after the U.S. employed the Section 232 tariffs as leverage. Successful or not, however, this case shows that the Trump Administration regards these tariffs as potentially all-purpose leverage devices, not just means of ensuring national security or protecting a domestic industry.

III. SECTION 301 TARIFFS AND THE US-CHINA TRADE CONFLICT

Arguably the most important issue in international trade today is how China's "state capitalism" system can be reconciled with the rules-based WTO system.⁹¹ The USTR has conducted an investigation pursuant to Section 301 and has determined that China has acted unfairly in numerous respects.⁹² These include theft and forced transfers of U.S. companies' intellectual property, extensive subsidies, and restrictions on foreign firms' ability to do business in

87. Karen DeYoung et al., *Trump Takes Aim at Turkey, Announcing Doubling of Steel and Aluminum Tariffs in Effort to Punish Country*, WASH. POST (Aug. 10, 2018), https://www.washingtonpost.com/business/economy/trump-takes-aim-at-turkey-announcing-doubling-of-steel-and-aluminum-tariffs-in-effort-to-punish-country/2018/08/10/426616ba-9cbe-11e8-8d5e-c6c594024954_story.html?utm_term=.7890f0680bd0 [https://perma.cc/S3QL-ZZ4X].

88. *Id.*

89. *Id.*

90. *See id.* (contrasting effects of different tariffs).

91. Max J. Zenglein, *Europe Needs to Stand Up to China's State Capitalist Model*, MERCATOR INSTITUTE FOR CHINA STUDIES (July 27, 2018), <https://www.merics.org/en/blog/europe-needs-stand-chinas-state-capitalist-model> [https://perma.cc/3XUL-Z77P].

92. Office of the U.S. Trade Representative, Fact Sheet, Section 301 Investigation Fact Sheet (June 2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/june/section-301-investigation-fact-sheet> [https://perma.cc/UT7Y-DNPR].

China.⁹³ Pursuant to these findings, the United States has already imposed tariffs on \$50 billion of imports from China (in two tranches)⁹⁴ and China has retaliated by imposing tariffs on an equivalent volume of imports from the United States.⁹⁵ This is in addition to China-U.S. tariffs and retaliatory tariffs earlier in the year, growing out of the Section 232 investigations of steel and aluminum.⁹⁶

This tariff conflict is occurring alongside efforts by both countries to reach a negotiated resolution.⁹⁷ China has proposed on several occasions a “resolution” in which China would reduce the bilateral trade deficit by making quite large increases in its importation of U.S. goods, notably natural gas and agricultural products.⁹⁸ In June, Commerce Secretary Wilbur Ross agreed in principle to such a deal,⁹⁹ but it was opposed by senior Administration officials—led by USTR Lighthizer and Trade & Industrial Policy Advisor Peter Navarro—and the Chinese proposal was ultimately rejected.¹⁰⁰ Those U.S. officials, backed so far by President Trump, insist that any resolution must focus on commitments by China to modify a broad range of policies and practices that the United States considers not only unfair,

93. *Id.*

94. Office of the U.S. Trade Representative, Press Release, USTR Issues Tariffs on Chinese Products in Response to Unfair Trade Practices (June 15, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-issues-tariffs-chinese-products> [<https://perma.cc/PT8X-DL7Q>].

95. Charles Riley, *China to Put 25% Tariffs on \$16 Billion Worth of US Products*, CNN MONEY (Aug. 8, 2018, 10:19 AM ET), <https://money.cnn.com/2018/08/08/news/economy/china-tariffs-us-trade/index.html> [<https://perma.cc/AP7E-LFLS>].

96. U.S. Customs and Border Protection, Additional Duty on Imports of Steel and Aluminum Articles under Section 232 (Oct. 24, 2018), <https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel> [<https://perma.cc/LJ9M-DMX9>].

97. Berkeley Lovelace Jr., *US Hits China's ZTE with \$1 Billion Penalty in Deal to End Crippling Sanctions, Commerce Secretary Ross Says*, CNBC (June 7, 2018), <https://www.cnbc.com/2018/06/07/commerce-secretary-wilbur-ross-the-us-strikes-a-deal-with-zte.html> [<https://perma.cc/94DP-SUJD>].

98. Se Young Lee & Christian Shepherd, *China Plans Tariffs on \$60 Billion of U.S. Goods in Latest Trade Salvo*, REUTERS (Aug. 3, 2019 8:30 AM) <https://www.reuters.com/article/us-usa-trade-china-commerce/china-plans-tariffs-on-60-billion-of-us-goods-in-latest-trade-salvo-idUSKBN1KO1M2> [<https://perma.cc/8RNT-ZFUD>].

99. Lovelace, *supra* note 97.

100. Ana Swanson, *Trump's Trade War Spooks Markets as White House Waits for China to Blink*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/business/china-trade-war-peter-navarro.html> [<https://perma.cc/EY2R-38RE>].

but seriously disruptive of trade and injurious to the U.S. economy, including:

- requiring, as a condition of establishing operations in China, that a foreign company enter a joint venture with a Chinese competitor and transfer proprietary technology to that joint venture;
- theft, by “hacking” and otherwise, of U.S. firms’ intellectual property;
- maintaining market-disrupting overcapacity in steel and aluminum, with overcapacity in semiconductors scheduled to come on-stream soon;
- control by state-owned enterprises of China’s industrial assets, together with state ownership or control of some of the world’s largest banks;
- the “Made in China 2025” project, in which massive subsidies will be provided for the development (including technology development) of selected industries including semiconductors, aircraft, new energy vehicles and biotech; and
- control of data flows by requiring storage of data in China and by forbidding foreign companies to set up their own data centers in China.¹⁰¹

China has largely refused to negotiate on these issues, denying some of the allegations and taking the position as to others that, since China insists that it is still a developing country, that this status permits China to engage in these practices.¹⁰²

After failure in August of the latest set of China negotiations, President Trump announced the intention to apply tariffs to an additional \$200 billion in Chinese imports.¹⁰³ And he has intimated that he would consider tariffs on an additional \$267 billion in

101. Office of the U.S. Trade Representative, *supra* note 96.

102. Simon Lester & Huan Zao, *Is China Still a ‘Developing Nation’? Here’s the Problem With That*, CNBC, <https://www.cnbc.com/2018/04/25/what-trump-gets-right-about-china-and-trade.html> [<https://perma.cc/LWH5-Q4EE>].

103. Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, CHINA BRIEFING (Feb. 1, 2019), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/> [<https://perma.cc/24RQ-AB4J>].

imports.¹⁰⁴ That would place tariffs on essentially all of China's exports to the United States.¹⁰⁵

This accelerating trade war takes the Trump Administration's leverage strategy to what could be its ultimate test. China shows no sign of abandoning or ameliorating policies that it sees as essential to its rightful economic development. Moreover, the use of tariffs to enforce Section 301 determination is flatly WTO-inconsistent.¹⁰⁶ The USTR argument—that most of these Chinese practices are not specifically covered by WTO disciplines and “therefore” unilateral tariffs are a permissible remedy¹⁰⁷—does not, in the view of this writer, pass the “laugh test.” The point is that the U.S. is imposing tariffs in excess of its WTO-bound limits, without any WTO authority for so doing.¹⁰⁸

This is, of course, a difficult issue. There is validity in the U.S. concerns that China's practices are disruptive of trade and injurious to the United States, and that these practices are fundamentally inconsistent with the rules-based trading system. But it is also true that the U.S. response is WTO-inconsistent. This is the quintessential example of a dispute that should be settled by negotiation. But there seems to be no willingness on China's part to engage on these “structural” issues¹⁰⁹ and that is why the United States seems intent on continuing to ratchet up the leverage.

IV. U.S. DESIRE TO RENEGOTIATE THE WTO AGREEMENT

The World Trade Organization, the central authority in the rules-based trading system, was in large part the creation of U.S. trade policy.¹¹⁰ In particular, it was the United States that orchestrated (in the Uruguay Round) the creation of a Dispute Settlement Mechanism (DSM) that would apply the general language of the WTO

104. *Id.*

105. *Id.*

106. Sourabh Gupta, *Washington Has No Case For Its Proposed Section 301 Tariffs*, EAST ASIA FORUM (May 2, 2018), <http://www.eastasiaforum.org/2018/05/02/washington-has-no-case-for-its-proposed-section-301-tariffs/> [https://perma.cc/7F5U-NYGG].

107. *Id.*

108. *Id.*

109. Interview with Peter Navarro with William Gallo (VOA), Trade and Economic Adviser, White House (Dec. 6, 2018).

110. CATHLEEN CIMINO-ISAACS, CONG. RESEARCH SERV., *The World Trade Organization (WTO): Is US Participation at Risk?*, IN10945 (2018).

Agreements to specific disputes and whose rulings could not be vetoed by the losing WTO Member.¹¹¹

Today, the Trump Administration—both U.S. Trade Representative Lighthizer and the President himself—questions whether the WTO serves America’s interests,¹¹² objects in particular to the DSM,¹¹³ and has gone so far as to threaten U.S. withdrawal from the WTO.¹¹⁴ The Administration’s concerns focus primarily on what it perceives as three fundamental problem areas:

1.The difficulty in applying WTO rules to China’s “strategic capitalism”¹¹⁵ (or, as USTR describes it in the President’s 2018 Trade Policy Agenda, “the extensive distortions in China’s economy”).¹¹⁶

2.The divide that has progressively widened between the developed countries that originally founded the General Agreement on Tariffs and Trade (GATT) and developing countries—now the great majority of WTO Members—who see trade liberalization as secondary to those countries’ policies to promote their economic development.¹¹⁷ This split has been largely responsible for repeated stalemates in multilateral and plurilateral trade negotiations.¹¹⁸ And it raises serious and difficult questions when some developing countries—China, India and Brazil come to mind—evolve into major trading

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111. WAYNE MORRISON, CONG. RESEARCH SERV., IF10708, ENFORCING U.S. TRADE LAWS: SECTION 301 AND CHINA 1 (2019).
112. Ana Swanson, *Once the W.T.O.’s Biggest Supporter, US Is Its Biggest Skeptic*, N.Y. TIMES, (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/business/wto-united-states-trade.html> [<https://perma.cc/G82F-GRLZ>].
113. Micklethwait et al., *supra* note 14.
114. *Id.*
115. Richard D’Aveni, *The U.S. Must Learn From China’s State Capitalism to Beat It*, THE ATLANTIC (Nov. 5, 2012), <https://www.theatlantic.com/business/archive/2012/11/the-us-must-learn-from-chinas-state-capitalism-to-beat-it/264552/> [<https://perma.cc/EAH6-S469>].
116. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (2018) [hereinafter 2018 TRADE POLICY AGENDA].
117. Kemal Dervis & Caroline Conroy, *What’s Behind Trump’s Trade War?*, BROOKINGS (Oct. 9, 2018), <https://www.brookings.edu/opinions/whats-behind-trumps-trade-war/> [<https://perma.cc/MVQ9-J4LE>].
118. Marc Jarsulic et al., *Trump’s Trade Deal and the Road Not Taken*, CEN. FOR AM. PROGRESS (Feb. 1, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/02/01/465744/trumps-trade-deal-road-not-taken/> [<https://perma.cc/D67V-8GR2>].

nations yet continue to claim the “special and differential treatment” accorded by WTO rules to developing countries.¹¹⁹

The extent to which the DSM, in interpreting how the general rules set forth in the antidumping, countervailing duty, and safeguard agreements should be applied to specific facts, has frequently found U.S. trade remedy practices to be WTO-inconsistent (although the United States has won the vast majority of WTO challenges it has brought against other countries’ practices).¹²⁰

The Administration has embarked on a serious “commit[ment] to reform[] the global trading system in ways that lead to fairer outcomes for U.S. workers and businesses...”¹²¹ and to “press for significant reform of the WTO.”¹²² While all of the foregoing concerns are implicated in that effort, a specific focus, and the one as to which the Administration is employing the leverage tactics discussed in this paper, is a multi-faceted “reform” of the Dispute Settlement Understanding. The U.S. contends that:

- The application of Agreement rules to specific facts in ways that the U.S. believes do not “adhere[] strictly to the text of those agreements, as negotiated and agreed by its Members.”¹²³ The 2018 Trade Policy Agenda complains that “Concerns abound that dispute reports have added to or diminished rights or obligations in varied areas, such as subsidies, antidumping duties, and countervailing duties....”¹²⁴
- The rendering of “as such” rulings, which find that a country’s on-going rule or practice, not just the outcome of a particular

119. *US Wants WTO to Define ‘Developing Country’, Alleges Major Economies Self-define as Such to Avail Concessions*, FIRSTPOST (Mar. 2, 2018), <https://www.firstpost.com/world/us-wants-wto-to-define-developing-country-alleges-major-economies-self-define-as-such-to-avail-concessions-4373155.html> [https://perma.cc/KV9K-MRFS].

120. *See, e.g.*, Duane W. Layton & Paulette Vander Schueren, *WTO Rejects US Department of Commerce’s Antidumping Methodology for Non-Market Economies*, MAYER BROWN (Nov. 25, 2014), <https://www.mayerbrown.com/en/perspectives-events/publications/2014/11/wto-rejects-us-department-of-commerces-antidumping> [https://perma.cc/NQD2-9H6S].

121. Dennis Shea, Statement of the United States at the 14th WTO Trade Policy Review of the United States of America (Dec. 17, 2018).

122. 2018 TRADE POLICY AGENDA, *supra* note 116, at 33.

123. *Id.* at 24.

124. *Id.* at 23.

case, is a WTO violation.¹²⁵ In the U.S. view, “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.”¹²⁶

- “[T]he Appellate Body’s review of the meaning of a Member’s domestic law that is being challenged,”¹²⁷ and
- The Appellate Body’s position that “its reports effectively serve as precedent and that panels are to follow prior Appellate Body reports absent ‘cogent reasons.’”¹²⁸

These concerns clearly arise from a multiplicity of DSM rulings against U.S. practices in trade remedy (antidumping, countervailing duty, and safeguard) cases. In the U.S. view, “the WTO is undermining our country’s ability to act in its national interest.”¹²⁹ But “reforming” the DSM to “correct” these aspects of its current practice would be truly radical. It would in many ways take the system back to the very limited role it played in the GATT era and negate the very changes that the U.S. brought about in the formation of the World Trade Organization.

In seeking such “reform” of the DSM, the United States is using leverage in ways similar to the practices discussed earlier in this paper.

First, as noted earlier, President Trump has threatened to withdraw the U.S. from the WTO if U.S. demands are not met.¹³⁰ One must wonder, however, whether this withdrawal threat has much credibility. U.S. departure from the WTO would have massively severe adverse consequences for our country, such as:

- Countries could raise tariffs on U.S. goods at will;
- U.S. trade remedy duties, now permitted under the Antidumping, ASCM, and Safeguard Agreements, could be met with retaliatory tariffs;
- DSM challenges of foreign countries’ access barriers and other unfair practices, of which the U.S. has won the vast majority that it has brought, would no longer be available; and

125. See *id.* at 172-9 (discussing “as such” opinions).

126. *Id.* at 26.

127. *Id.* at 27.

128. *Id.* at 28.

129. *Id.*

130. Micklethwait et al., *supra* note 14.

- The U.S. could no longer participate in WTO multilateral or plurilateral negotiations to establish the rules of world trade.

Moreover, for all of these reasons, it seems inconceivable that the U.S. Congress would permit a U.S. withdrawal from the WTO.

But the U.S. has found another, much more effective, leverage procedure. Throughout the Trump Administration, the U.S. has exercised its right to block the appointment of new Appellate Body members to fill seats vacated by retirement, departure, or expiration of term.¹³¹ We have now reached the point where there are only three Appellate Body members remaining.¹³² Since each appeal to the Appellate Body must be heard by three members,¹³³ the departure of one more member—which will happen in December of 2019—and the U.S.’s refusal to allow a replacement will bring the Dispute Settlement Mechanism to a halt.

The WTO Membership is acutely aware of the impending crisis created by this U.S. leverage device.¹³⁴ Groups of Members have organized to explore ways to promote a compromise.¹³⁵ In a little-recognized part of the U.S.-EU *modus vivendi* reached this summer to defer the U.S. threat of auto Section 232 tariffs, the EU agreed to work with the U.S. to resolve U.S. concerns about the WTO.¹³⁶

It seems to this writer—and I say this with great concern—that the U.S. leverage strategy has a substantial likelihood of success in effecting changes in the DSM. The WTO Membership must find a way to appease the United States before the next Appellate Body vacancy occurs. While an agreement to adopt ways to address China’s “state capitalism” might well be enough to satisfy the Trump Administration, it seems clear to me that neither the China issue nor

131. *Id.*

132. Jennifer Hillman et al., *Three Approaches to Fixing the World Trade Organization’s Appellate Body: The Good, The Bad and the Ugly?*, INST. OF INT’L ECON. L. at 1-2 (2018).

133. *Id.* at 2.

134. See Tom Miles, *Trump’s Bonfire of the Treaties Sweeps Towards the WTO*, REUTERS (May 18, 2018), <https://www.reuters.com/article/-idUSKCN1IJ1K9> [<https://perma.cc/JUK3-6Y2U>] (describing the issues arising from President Trump’s chokehold over the WTO).

135. See, e.g., Adam Behsudi, *A Sign of Compromise at the WTO?*, POLITICO (July 18, 2018), <https://www.politico.com/newsletters/morning-trade/2018/07/18/a-sign-of-compromise-at-the-wto-283160> [<https://perma.cc/Q4K5-66MN>] (discussing a leaked EU proposal to try and compromise with the U.S. over WTO complaints).

136. Bryce Baschuk, *EU Revises Plan to Fix WTO in Bid to Get U.S. on Board*, BLOOMBERG (Nov. 1, 2018), <https://www.bloomberg.com/news/articles/2018-11-01/eu-is-said-to-revise-plan-to-fix-wto-in-bid-to-get-u-s-on-board> [<https://perma.cc/UA8X-4BYW>].

the developed/developing Member divide have any chance whatsoever of garnering sufficient support among the WTO Membership. At this time, therefore, that leaves DSM “reform” as the only way out. Which, of course, would be a great pity.

V. NAFTA

It is interesting to read the indictment of NAFTA set forth in the President’s 2018 Trade Policy Agenda. Almost all of the criticisms are directed at the Mexican portion of the trilateral agreement.¹³⁷ By far, the major concern is that NAFTA provided incentives for “thousands of American companies” to shift production to Mexico, where they would “pay far lower wages to workers.”¹³⁸ Canada gets a single sentence: “NAFTA failed to address longstanding and unfair Canadian trade practices across several industries.”¹³⁹

Accordingly, the primary U.S. negotiating goal was to “improve the U.S. trade balance and reduce the trade deficit with the NAFTA countries.”¹⁴⁰ This would be done by tightening rules of origin, especially for autos and auto parts, increasing the requirements both for regional content and for U.S. content, and by avoiding provisions that encourage outsourcing.¹⁴¹

As soon as the talks commenced, however, USTR put on the table a series of additional demands that provoked outrage in both Mexico and Canada, including:

- A “sunset” provision, under which NAFTA would have to be renewed every five years;¹⁴²
- Termination of the Chapter 19 provision that permitted U.S. import relief decisions to be appealed to a trilateral body instead of to domestic courts (a provision held dear by Canada);¹⁴³

137. 2018 TRADE POLICY AGENDA, *supra* note 116, at 7-9.

138. *Id.* at 7.

139. *Id.* at 8.

140. *Id.* at 9.

141. *Id.*

142. David Lawder, *U.S. Hikes Tensions in NAFTA Talks with Call for ‘Sunset Clause’*, REUTERS (Oct. 12, 2017), <https://www.reuters.com/article/us-trade-nafta/u-s-hikes-tensions-in-nafta-talks-with-call-for-sunset-clause-idUSKBN1CH2EO> [<https://perma.cc/VYW8-U6UP>].

143. Riyaz Dattu et al., *International Trade Brief: Trump Administration Takes Aim at Chapter 19 of NAFTA, U.S. Wish List for NAFTA Renegotiations and More*, OSLER (Apr. 6, 2017) <https://www.osler.com/en/resources/cross-border/2017/international-trade-brief-trump-administration-ta> [<https://perma.cc/K7FU-99RF>].

- A requirement that automobiles and parts entering the United States would not qualify for duty-free entry unless a certain percentage of their content be produced by workers paid at least \$16 per hour (compared with the average *daily* wage in Mexico's auto plants of \$25);¹⁴⁴
- Elimination or major modification of Canada's "supply management" regime for dairy and poultry;¹⁴⁵ and
- Reform of certain Canadian intellectual property rules and of procedural rules in certain provinces hampering sales of U.S. wines.¹⁴⁶

The negotiations were going nowhere by early 2018.¹⁴⁷ The U.S. Section 232 tariffs on steel and aluminum were met with retaliatory tariffs,¹⁴⁸ WTO challenges,¹⁴⁹ and declarations that the EU would not "negotiate with a gun to our heads."¹⁵⁰

Accordingly, the U.S. ratcheted up the leverage by announcing a Section 232 proceeding on automobiles and auto parts, despite opposition by U.S. auto and auto parts makers,¹⁵¹ whose operations are inextricably intertwined with their Mexican and Canadian

144. *Id.*

145. Alexander Panetta, *U.S. Asks Canada to End Dairy, Poultry Trade Barriers, Even As It Puts Up Its Own*, CANADIAN PRESS (Oct. 16, 2017), <https://globalnews.ca/news/3806997/nafta-supply-management-dairy-poultry-eggs/> [<https://perma.cc/Z2BS-WEA5>].

146. *Id.*

147. See Press Release, Office of the U. S. Trade Representative, *Fact Sheets: Closing Statement of USTR Robert Lighthizer at the Sixth Round of NAFTA Renegotiations* (Jan. 29, 2018) (mentioning the slow progress made in round 6 of 7 negotiation rounds).

148. See generally Robert Holleyman et al., *2018 Midterm Elections Update: Impact on U.S. Trade Policy*, CROWELL MORING (Nov. 7, 2018), <https://www.cmtradelaw.com/category/section-232-tariffs/> [<https://perma.cc/D4GW-GWEY>] (listing all retaliatory actions made by nations worldwide).

149. *Members Raise Concerns over US Section 232 Investigation on Automobiles and Automotive Parts*, WTO (July 3, 2018), https://www.wto.org/english/news_e/news18_e/good_03jul18_e.htm [<https://perma.cc/NZH8-XQ8Z>].

150. Boffey, *supra* note 71.

151. Ambassador Susan G. Esserman et al., *Commerce Initiates Section 232 Investigation of Imports of Automobiles and Automotive Parts*, STEPTOE (May 24, 2018), <https://www.steptoelaw.com/print/content/29966/Commerce-Initiates-Section-232-Investigation-of-Imports-of-Automobiles-and-Automotive-Parts.pdf?q=> [<https://perma.cc/4CF9-N7WT>].

operations.¹⁵² Shortly thereafter, President Trump announced that the United States would negotiate separately with Mexico and, if Canada did not join later a deal done with Mexico, the Canada part of NAFTA could be abandoned.¹⁵³ Mexico agreed, both because of the severe threat of auto tariffs and because of a turn taken by its domestic politics.¹⁵⁴

The leftist candidate, Lopez Obrador, won the election and became President at the end of 2018.¹⁵⁵ He wanted the NAFTA issue to be resolved before he assumed power.¹⁵⁶ And the outgoing President, Peña Nieto, wanted the new deal done in time for him to sign it.¹⁵⁷

So, as to Mexico, the combination of the leverage of threatened tariffs and the domestic Mexican politics got a deal done. A month later, Canada also signed what is now re-named the United States-Mexico-Canada Agreement, or USMCA.¹⁵⁸ One must conclude that the leverage of threatened Section 232 tariffs on autos and auto parts succeeded.

There remain, however, questions as to whether Canada and Mexico will ratify USMCA. Both countries believe they were

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152. Rob Stumpf, *Trump's New Trade Deal Could Affect One in Three Imported Vehicles From Mexico: Report*, THE DRIVE (Aug. 29, 2018), <http://www.thedrive.com/news/23212/trumps-new-trade-deal-with-mexico-would-affect-one-in-three-vehicles-says-reports> [https://perma.cc/34S3-K7RJ]; Jerry Edgerton, *If Trump Slaps Auto Tariffs on Canada, Here's What You'll Pay*, CBS (Sept. 5, 2018), <https://www.cbsnews.com/news/trump-auto-tariffs-canada-what-it-will-cost-you/> [https://perma.cc/X5ZX-UJ9F].
 153. Joyce McGregor, *Trump Announces U.S.-Mexico Trade Deal to Replace NAFTA, and Says 'We Will See' If Canada Can Join*, CBC NEWS (Aug. 27, 2018 10:24 AM), <https://www.cbc.ca/news/politics/nafta-us-mexico-progress-monday-1.4800182> [https://perma.cc/EF3L-36YP].
 154. Eric Kulisch, *Trump Vows to Scrap NAFTA, Threatens Canada After Reaching Deal with Mexico*, AUTOMOTIVE NEWS (Aug. 27, 2018), <https://www.autonews.com/article/20180827/OEM01/180829783/trump-vows-to-scrap-nafta-threatens-canada-after-reaching-deal-with-mexico>.
 155. Azam Ahmed, *Lopez Obrador, an Atypical Leftist, Wins Mexico Presidency in Landslide*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/americas/mexico-election-andres-manuel-lopez-obrador.html> [https://perma.cc/V5GL-K2GS].
 156. Elisabeth Malkin, *Mexico's New Leader, Once a Nafta Foe, Welcomes New Deal*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/world/americas/nafta-mexico.html> [https://perma.cc/C5B5-ZD7W].
 157. *Id.*
 158. Office of the U.S. Trade Rep., United States-Mexico-Canada Agreement Text, at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USCMA].

promised that, if they signed the new USMCA, they would be given exemptions from the Section 232 tariffs on steel and aluminum.¹⁵⁹ However, the United States has taken the position that such exemptions will be granted only if Mexico and Canada agree to quantitative limits on their steel and aluminum exports.¹⁶⁰ Both Canada and Mexico have threatened not to ratify unless tariff exemptions are granted without quantitative limitations.¹⁶¹ As of this writing, in April 2019, it is not clear how this issue will be resolved.

Very recently, President Trump has raised a new issue as to the Section 232 tariffs on autos and auto parts. Both Canada and Mexico are to be effectively exempted from any auto tariffs that are imposed by a USMCA provision that will allow each country to make tariff-free shipments of quantities that exceed their current levels of exports to the United States.¹⁶² However, USMCA is not yet in force and President Trump has recently threatened to place Section 232 tariffs on Mexican autos if Mexico does not adopt sufficient measures to stop the flow of Central American refugees to the United States and sufficient measures to stop the flow of dangerous drugs into the United States.¹⁶³

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159. Bill Tomson, *US Steel and Aluminum Tariffs Threaten Mexican, Canadian USMCA Support*, AGRI-PULSE (Feb. 13, 2019), <https://www.agri-pulse.com/articles/11903-us-tariffs-seen-holding-up-new-north-american-trade-pact> (“The [232] exemptions, officials said at the time, were tied to the negotiations to rewrite [NAFTA].”).
160. Mark O’Hara, *Section 232 Tariffs Could Be a Stumbling Block in USMCA*, MARKET REALIST (Apr. 4, 2019), https://articles.marketrealist.com/2019/04/section-232-tariffs-could-be-a-stumbling-block-in-usmca/?utm_source=google (“The administration is . . . trying to impose quotas on Canada and Mexico for granting them Section 232 exemptions.”).
161. See Josh Wingrove, *Canada Won’t Ratify New Nafta Deal If Metals Tariffs Remain in Place*, BLOOMBERG (Apr. 4, 2019), <https://www.bloomberg.com/news/articles/2019-04-05/canada-won-t-ratify-usmca-trade-deal-if-metals-tariffs-in-place> (quoting a Canadian envoy that the country “won’t move ahead on ratification so long as the U.S. tariffs remain in place”); see also Mike Blanchfield, *Mexico Won’t Ratify New NAFTA if U.S. Keeps Tariffs on Steel and Aluminum*, FINANCIAL POST (Mar. 4, 2019), <https://business.financialpost.com/news/economy/mexico-pushing-labour-reform-wont-ratify-new-nafta-with-u-s-tariffs-in-place> (stating that Mexico is “prepared to keep the status quo” with NAFTA “unless the Trump administration lifts the punishing tariffs it has imposed on Mexican steel and aluminum imports”).
162. Sabrina Rodriguez, *Trump: China Deal Could Be Reached in Weeks*, POLITICO (Apr. 5, 2019), <https://www.politico.com/newsletters/morning-trade/2019/04/05/trump-china-deal-could-be-reached-in-weeks-421870> (“ . . . [T]he three NAFTA countries signed side letters during negotiations that largely exempt autos and auto parts from Mexico and Canada from any potential tariffs.”).
163. See Dave Graham & David Ljunggren, *New NAFTA Deal ‘in trouble,’ Bruised by Elections, Tariff Row*, REUTERS (Apr. 7, 2019),

What does this tell us? It provides still further confirmation that, for the Trump Administration, threats of tariffs and other unilateral trade measures are seen as leverage instruments, including leverage with respect to objectives unrelated to trade.

VI. SOME CONCLUDING THOUGHTS

The foregoing narratives underscore the importance of considering trade negotiations and unilateral import restrictions together in order to understand both the nature of this Administration's goals and the dynamics of leverage in the negotiating process.

I would also observe that, as of April 2019, we have not yet seen a final endgame that would show how this Administration will handle a situation in which it actually has to exercise the leverage it has created. For now, the U.S. has not actually withdrawn from an existing trade agreement. TPP and TTIP were not agreements to which the U.S. had become a party, nor were they ones as to which the Trump Administration sought additional concessions, so there was no use of leverage to induce some agreement by other parties. Nor have we seen what the Administration would do if the other party were to refuse to agree to the U.S. demands, raising the question whether they would actually exercise the leverage they had created. Note in this regard that President Trump, upon reaching agreement with Mexico, initially gave Canada a one-week deadline to reach an agreement.¹⁶⁴ But when that did not happen, he extended that deadline until the end of September.¹⁶⁵ If Canada had not reached an agreement by then, would the President have "pulled the trigger" and imposed auto tariffs (Indeed, could he have done so, since the Commerce Department had not completed its process)? Would he have given the required 6-month notice of termination of NAFTA¹⁶⁶ as to Canada? Could he have terminated as to one country and not

<https://www.reuters.com/article/us-trade-nafta-analysis/new-nafta-deal-in-trouble-bruised-by-elections-tariff-rows-idUSKCN1RJ0BS> (noting that President Trump has threatened "to slap tariffs on Mexican auto exports unless Mexico does more to stop drug traffickers and illegal immigrants.").

164. Heather Long, *Friday Isn't the Real Deadline for 'NAFTA 2.0'*, WASH. POST (Aug. 30, 2018), <https://www.washingtonpost.com/business/2018/08/30/friday-isnt-real-deadline-nafta/> [<https://perma.cc/XF98-M6Q7>].
165. Ana Swanson, *White House Gives Canada More Time to Rework Nafta*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/business/us-canada-nafta.html> [<https://perma.cc/J54L-DNPS>].
166. Matt Kwong, *These Are the Steps Trump Would Have To Take To End NAFTA. It Won't Be Easy*, CBC NEWS (Aug. 29, 2018), <https://www.cbc.ca/news/world/nafta-mexico-trade-canada-us-trump-1.4802560> [<https://perma.cc/3WEV-F7Z8>].

the other? Or would he have had to terminate NAFTA entirely and re-cast the Mexico deal as a separate FTA? Finally, what will be the result of his new threat to impose Section 232 auto tariffs on Mexico if he is not satisfied with Mexico's refugee and drug policies?

The China Section 301 and WTO "reform" situations also raise complex, but immensely important questions. If no agreement is reached with China, will the Administration keep increasing the amount of Chinese imports on which tariffs are imposed? And what is the ultimate end game if, as I believe likely, China proves unwilling to negotiate some of the structural reforms demanded by the United States?

The WTO situation is even more complex, although the timeframe is more extended. The ultimate question is whether the United States is truly willing to bring the WTO dispute settlement system to a halt just to avoid meaningful WTO review of U.S. antidumping and countervailing duty decisions? Would it insist on something more, like better rules disciplining Chinese practices? Could such better rules be obtained? Would the WTO Membership simply refuse to accede to U.S. demands on any of these issues? Might the WTO find a way to appoint new Appellate Body members over U.S. objections? These are indeed big questions, and one lesson I draw is that, before establishing something that gives your country leverage, it is important to game plan for whether and how you might have to exercise that leverage. I do not see evidence that the Trump Administration has done that.