



US TRADE POLICY UNDER TRUMP

Assessing the Unilateralist Turn

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ABSTRACT

This DIIS report examines US trade policy during the first ten months of Donald Trump's presidency, up to early November 2017. It identifies the main points of Trump's trade policy and compares them to mainstream US trade policy since the 1970s. It then documents the extent to which they have been implemented to date, and the consequences that have followed. The report finds that Trump has already implemented his campaign pledges on trade to a large extent, but that many of the expectations accompanying them have so far not been fulfilled. This is less a matter of time, or the result of internal opposition, than it is of resistance from the US's major trade partners. One possible outcome of this deadlock is an international trade war.

INTRODUCTION

This report examines US trade policy during the first ten months of Donald Trump's presidency, from his inauguration in late January 2017 to late-November 2017.

The report begins by identifying the distinctive features of Trump's declared approach to trade during the presidential election campaign of 2016 and showing how these departed from established US trade policy. It then goes on to examine the extent to which the new approach has been implemented during the first months of the presidency.

Donald Trump's trade policy represents a radical departure from the US mainstream over the last forty years or more. This radicalism consists not only in its unilateralism and its echoes of mercantilism, but also in the systemic nature of its ambition.

Policy implementation is traced through detailed documentation of the Trump administration's efforts to put into practice the seven concrete proposals Trump outlined during his main trade speech on the campaign trail and in his 'Trade Policy Agenda' of March 2017. The report concludes by assessing the level of implementation and practical results of Trump's agenda to date, the limitations on its implementation and effectiveness, and how events may play out in the presidency's next phase.

Donald Trump's trade policy represents a radical departure from the US mainstream over the last forty years or more. This radicalism consists not only in its unilateralism and its echoes of mercantilism, but also in the systemic nature of its ambition. This entails challenging to some degree or another almost every trade agreement to which the US has been a party, forging new deals with countries that have previously been reluctant to enter into them, intensifying the use of traditional US trade remedies, and bringing into play a range of others which had fallen into disuse.

While it is still too early in Trump's presidential term to arrive at an assessment of the extent to which the policy agenda he outlined in June 2016 and restated in March 2017 will be fully implemented, sufficient evidence is available to judge whether significant progress has been made toward this goal. Arguably, sufficient evidence also exists to identify the constraints on and limitations of its present and future implementation, as well as to predict how it is likely to unfold in the short term.

Briefly, the report finds that Trump has already implemented his campaign pledges on trade to a large extent, but that many of the expectations accompanying them have so far not been fulfilled. The administration's lack of success in achieving significant concessions from the US's major trade partners thus far is likely to be blamed on internal enemies by Trump and those closest to him, who will point to the restraining hands applied by Mnuchin, Cohn and 'the Generals'. This group does indeed represent a limitation on Trump fulfilling his campaign pledges in their entirety, but their hand has been applied quite selectively, namely to cases that are likely to have the greatest international political and economic impact, and in any case it has not been an important brake on policy effectiveness.

The great obstacle here is the willingness of other major trading powers to play along, a tendency that has been strengthened by the US's increasing self-imposed isolation on other central issues in international policy. The US is offering little or nothing in trade-offs on any front for the major concessions it is demanding on trade.

It is difficult to predict how events will be played out in the second year of a Trump administration, but an international trade war following the indiscriminate application of Section 232 tariffs is one scenario which the US's trading partners need to take seriously and plan for.

REPUBLICAN AND DEMOCRATIC TRADE POLICY FROM THE 1970s TO 2016

A politically bipartisan consensus favouring free trade, conceptualized as both an economic opportunity for US firms and a way of cementing a 'free world' under US political leadership, first emerged in the early 1970s. Its first major manifestation was the 1974 Trade Act, passed by Congress without any significant difference in voting between the parties.¹ Although cracks in the consensus appeared in the 1980s, mainly over how to deal with increased imports of manufactures from Japan, no serious challenge to it emerged before the final stage of negotiations over the North American Free Trade Agreement (NAFTA) in 1994. This saw US trade unions opposing the agreement and thus the leadership of the Democratic Party, a phenomenon that was to be repeated subsequently almost every time the US entered a new agreement. However, the Democratic Party leadership generally succeeded in preventing union opposition from spreading more widely by promoting side protocols to these agreements aimed at safeguard labour rights and environmental protection, and by promising to enforce US trade remedy laws more forcefully.

When examining the Democratic and Republican Party platforms on trade for the two elections prior to 2016, a continued consensus is evident on the benefits of open markets and of existing and new bilateral and multilateral agreements (including the Trans-Pacific Partnership or TPP), the WTO and its Doha round.² On the other hand, rising concerns over trade partners' 'unfair' practices were reflected in the platforms of both parties in 2008 and 2012, along with promises to combat them. More specifically, promises of action against Chinese infringements of WTO rules on subsidies, 'currency manipulation' and violation of US intellectual property

rights featured in the Republican platform in 2008 and both parties' platforms in 2012. That said, sections on trade occupied only a small fraction of the content of both parties' platforms and did not figure among the central issues advanced by either party in these campaigns.

FROM THE PRESIDENTIAL CAMPAIGN TO THE 'PRESIDENT'S TRADE POLICY AGENDA 2017'

In contrast, trade policy enjoyed an elevated status during the contests to nominate presidential candidates in 2016, due to the strong focus on the issue by Bernie Sanders and Donald Trump in particular. In the case of the Democrats, the strength of Sanders' challenge to Hillary Clinton pushed the party to include trade-policy commitments in its final platform that implicitly departed from the consensus. These included:

- 'Reviewing', with a view to renegotiating, the US's major bilateral trade agreements, with a special focus on measures to strengthen the protection of workers' rights, labour standards, the environment and public health; and
- Reserving approval of new trade agreements to those which 'support American jobs, raise wages and improve national security and include strong and enforceable labour and environmental standards in their core texts'.³

In the case of the Republicans, a greater challenge to the free-trade consensus was unexpectedly unveiled in the House Republicans' 'A Better Way' programme of June 2016. The taxation section of this programme proposed that 'products, services and intangibles that are exported...will not be subject to US tax regardless of where they are produced (whereas) products, services and intangibles that are imported to the US will be subject to US tax regardless of where they are produced'.⁴ Implementation of this 'Border Adjustment' element in the corporate tax system was envisaged occurring by shifting the modality of business taxation from an income

to a cash-flow basis and by introducing special tax provisions for goods moving across borders. Imports would be taxed by levying a value-added tax surcharge, while exports would be given a corresponding value-added tax deduction. For its architects, House Speaker Paul Ryan and House Ways and Means Committee Chair Kevin Brady, the proposal had two justifications. First it would raise \$1 trillion over ten years, preventing a proposed cut in the overall rate of corporate tax from impacting on the US deficit. Secondly, and more crucially, it would incentivize US companies to export more and retain production onshore, or even return off-shored production to the US.

The main trade themes of Trump's campaign were that the focus of US trade policy should be redefined to combat rising US trade deficits and reductions in manufacturing employment.

Ironically, in promising differential VAT liability or deductibility for imports and exports, the Border Adjustment proposal mimicked provisions in the tax regimes of China and certain other countries that US trade lawyers representing import-sensitive sectors like Robert Lighthizer had for years argued were providing illegal subsidies to domestic companies in the countries in question.⁵ During the campaign, Trump's own attitude to the Border Adjustment proposal was unclear. While some of his associates distanced themselves from it,⁶ he did not do so explicitly. Rather, his emphasis was elsewhere.

The main trade themes of Trump's campaign were that the focus of US trade policy should be redefined to combat rising US trade deficits and reductions in manufacturing employment. He claimed that both followed directly from deficiencies in the trade deals that the US had negotiated since 1990, or in some cases in their enforcement. The US had mistakenly focused heavily on negotiating plurilateral deals such as NAFTA and multilateral ones under the WTO. The US would be better served by new or renegotiated bilateral trade deals, since these would allow the US to fully exploit its economic and political leverage.

While the centrality to trade policy of deficits, their employment consequences and measures to reverse them had always been a central theme in Trump's own pronouncements on trade – as early as 1987, he took out full-page advertisements in three US national newspapers attacking Japan for building 'a vibrant economy with unprecedented surpluses at the expense of enormous US trade deficits'⁷ – such

concerns were otherwise voiced by only two relatively isolated sections of US public opinion: a handful of conservative 'China hawks'⁸ on the one hand, and trade unions and a small group of economists working in union-linked think tanks on the other.⁹

During the campaign, Trump's team outlined a series of pledges on trade that were significantly more detailed than those of the Democrats. They were announced in the course of Trump's major campaign speech on trade in Monessen, Pennsylvania, on 28 June 2016. Presenting a 'seven-point plan to change our failed trade policies', Trump promised:

- Withdrawal from the Trans-Pacific Partnership Agreement.
- Appointment of 'the toughest and smartest...trade negotiators'.
- Direction of the Secretary of Commerce 'to identify every violation of trade agreements (that) foreign countries (are) currently using, (and directing) all appropriate agencies to use every tool under American and international law to end these abuses'.
- Renegotiation of NAFTA, or withdrawal from it if Canada and Mexico did not agree to renegotiate.
- 'Label(ing) China a currency manipulator and meet(ing) manipulation 'sharply... (including) by tariffs and taxes'.
- 'Instruct(ing) the United States Trade Representative (USTR) to bring trade cases against China both in this country and at the WTO'.
- '(Using) every lawful presidential power to remedy trade disputes, including application of tariffs consistent with Sections 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962'.¹⁰

On 3 January 2017, Trump announced that Robert Lighthizer would be his nominee as United States Trade Representative (USTR). Over the years, Lighthizer had been a vocal supporter of tougher US trade remedy enforcement and of labelling China a 'currency manipulator'. However, he was also a severe critic of the WTO, in which he identified two main defects. The first was the 'judicial overreach' of its Dispute Settlement system, which had challenged the way the US implemented some of its more effective trade remedies. The second was its inability to deal effectively with China.

On the Dispute Settlement system, Lighthizer wrote in 2007:

'WTO jurists (in Dispute Settlement Panels and the Appellate Body) have engaged in an all-out assault on trade remedy measures...writing new requirements into WTO agreements and (rendering) the Safeguard Agreement...a virtual dead letter.... It is hard to overstate the threat this poses to the integrity of the system. Unlike national legal systems, there are precious few avenues to address judicial activism at the WTO. You pretty much have to gain consensus to change the agreements or simply withdraw...'¹¹

For Lighthizer, the WTO Dispute Settlement body's most damaging decisions for the US were its striking down of the so-called 'Byrd Amendment' mandating that anti-dumping duties be distributed to injured producers when collected, and its use of 'zeroing' in calculating anti-dumping margins.¹² The Byrd Amendment provided a great incentive to US firms to petition for anti-dumping cases to be brought, while 'zeroing' allowed inflation of the compensatory anti-dumping duties they would receive if successful.¹³

While complaints have long been mainstream in the US about the decisions reached by the WTO in these cases and about the Dispute Settlement system's so-called 'judicial overreach' more generally,¹⁴ the proposal that the US might 'simply withdraw' from the WTO or its Dispute Settlement body in response is extreme even in the US context.

Lighthizer also maintained that the WTO was intrinsically incapable of preventing China from abusing multilateral trade rules. This was primarily because its transgressions of, for example, rules on subsidies tended to be in forms that either did not directly breach these WTO rules (as in the case of 'currency manipulation') or had a generality that ran into WTO requirements to demonstrate specific subsidy benefits and injuries before the latter became actionable. In this context, Lighthizer urged that WTO cases continue to be brought against China when they had a chance of succeeding, but that the US's main focus should be on aggressively using permissive provisions in US trade law returning to impose tariffs and duties unilaterally.¹⁵

Lighthizer's nomination as USTR was not approved by Congress until April 2017, but his presence in the Trump trade team from November 2016 meant that a further trade policy goal was identified in March 2017 when Trump's campaign promises on trade were restated.

While complaints have long been mainstream in the US about the decisions reached by the WTO in these cases and about the Dispute Settlement system's so-called 'judicial overreach' more generally, the proposal that the US might 'simply withdraw' from the WTO or its Dispute Settlement body in response is extreme even in the US context.

The Preface on 'The President's Trade Policy Agenda' to the USTR Annual Report condenses the 'Seven points' announced in June 2016 into three 'priorities'.¹⁶ An additional, fourth priority was to 'Defend our national sovereignty over trade policy'. It reminded readers that, under US law, the rulings of the WTO Dispute Settlement Body were not binding or self-executing and promised that, 'consistent with... applicable US law, the Trump Administration will aggressively defend American sovereignty of trade over matters of policy'.¹⁷

How should the new trade agenda be characterized? Clearly it includes elements of protectionism, particularly in relation to the promised use of trade legislation from 1962 and 1974 to impose tariffs unilaterally or halt imports altogether by using safeguard actions. It also embodies elements of mercantilism in both its anchorage in the problematic of deficit reduction and its promise to force open foreign markets. But there is more to it than imposing tariffs and safeguards on the one hand and striving to restore US manufacturing employment and trade surpluses on the other. Its most pervasive quality is its unilateralism, reflected in its assumptions that the US does not really need formal agreements, or at least not plurilateral or multilateral ones, to trade successfully or to enforce its will internationally, that US trade laws alone are a sufficiently powerful resource to accomplish this and that they are above any international challenge.

IMPLEMENTATION OF TRUMP'S SEVEN-POINT PROGRAMME, JANUARY-SEPTEMBER 2017

As already indicated, the approach adopted in this section will generally be documentation-driven, rather than more discursive. An exception will be the treatment of Trump's Point 5 on 'currency manipulation', where some conceptual as well as practical background will be provided.

Implementation of Trump's promises will be reviewed in the order in which he made them in Monessen, with some elaborations and a few qualifications. Consideration of Point 1 will be broadened to consider post-withdrawal relations with other countries that negotiated the TPP. Point 2 will be broadened by providing an overview of trade policy formation in the Trump administration. Point 3 will be discussed here in relation to all trade relations and agreements that the US is a party to, or which it seeks to be a party to, apart from with TPP countries and China. Trade relations with the NAFTA countries will be covered in both Points 3 and 4. Trade relations with China will be covered in Points 5-7, with a special focus on 'currency manipulation' in Point 5 and intellectual property in Point 7. US relations with the WTO will be covered in Points 3 and 6.

1. WITHDRAWAL FROM THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

Trump withdrew the US from the twelve-nation¹⁸ Trans-Pacific Partnership Agreement (TTP) on his first day in office, a process simplified by the fact the Agreement was still awaiting ratification. This was the first time that the US had ever withdrawn from an international trade agreement it had previously championed.

Shortly after Trump's announcement, the remaining TPP countries indicated that they would continue with the Agreement irrespective of US participation. At a meeting following the APEC summit in November 2017 they agreed a new draft excluding 20 provisions that had been insisted upon by the US. These mainly concerned investor protection and Intellectual Property (IP). Four minor outstanding issues were referred for further negotiation (Morning Trade at politico.com 13-11-17).

Withdrawal from the TPP implied that the US would be unable to exercise leverage over the content of new agreements being negotiated by the Asian TPP signatories, including potentially significant ones such as the sixteen-nation East Asian Agreement and EU-Japan. On the other hand, Trump's intention was clearly to increase US leverage over certain TPP countries with which it lacked pre-existing Free Trade Agreements.

Within a week of declining to ratify the TPP, Trump indicated that he wanted to initiate bilateral talks with Japan. At the same time, he repeated complaints over Japan's 'unfair practices' in respect to US auto imports. The tariff and non-tariff aspects of the US-Japan auto trade were the subject of intensive negotiations during the TPP process, some of which were resolved in a special annex to the agreement. It was unclear whether the US hoped that this annex could be carried over into a bilateral agreement (Bridges 21-3, 02-02-17).¹⁹

Trump's intention was clearly to increase US leverage over certain TPP countries with which it lacked pre-existing Free Trade Agreements.

Prior to Trump's summit with Shinzo Abe on 10 February 2017, Japanese officials suggested that bilateral negotiations were unlikely, although at the summit the US and Japan agreed to launch a 'cross-sectoral dialogue' on trade and monetary policy, led by the US Vice President and Japan's Deputy Prime Minister, Taro Aso. A first session of this dialogue took place at the end of April 2017, but Japanese sources continued to cast doubt on the likelihood of negotiations on a bilateral trade deal emerging from it (Bridges 21-5, 16-02-17 and 21-14, 27-04-17). Japan continued to avoid discussing the subject in the run-up to the second session of the dialogue, which took place in mid-October. As the meeting ended, minor concessions on agricultural market access and on imports of US autos were announced, but no mention was made of the contentious issue of market access for US beef.²⁰

In the cases of Malaysia and Vietnam, rather than pressing – at least initially – for Free Trade Agreements, the US has confined itself to raising trade grievances. At a meeting in September 2017, Malaysia's Minister of Trade and Industry Mustapa Mohamed was pressed by Lighthizer to review Malaysian treatment of US exports of agricultural products and other goods, access for US companies to the Malaysian insurance and financial services markets and protection of US IP²¹ – all topics that were covered in the TPP. While Malaysia agreed to undertake the review, neither its timeline nor whether or not the US offered anything in return is known.

In the case of Vietnam, the US used a meeting between Vietnam's PM Nguyen Xuan Phoc, Lighthizer and the US Agriculture Secretary, Sonny Perdue, during the former's visit to Washington in May 2017 to press for removal of a quarantine on US distillers' dried grains (DDGs) and restoration of Codex Maximum Residue Level standards for certain veterinary drugs used by the US livestock industry. Vietnam made these changes in September 2017.²²

2. APPOINTMENT OF TRADE NEGOTIATORS AND RECONSTITUTING TRADE POLICY-MAKING

'I know them all', Trump said in his Monessen speech of the 'trade negotiators' he would appoint. By Summer 2017, Congress had approved the nomination of five prominent trade lawyers at USTR (Robert Lighthizer, USTR; Stephen Vaughn, Counsel; Jamieson Greer, Chief of Staff; Pamela Marcus, Deputy Chief of Staff; and Timothy Relf, Senior Advisor), as well as one at the Department of Commerce (Gil Kaplan, Head of International Trade Administration and responsible for enforcement). Like Lighthizer, Vaughn and Kaplan had represented US steel and/or manufacturing companies in international trade disputes and had called for more aggressive enforcement of US trade laws, especially in relation to China, in political arenas.²³

While the division is often depicted as a relatively straightforward one between 'China hawks' led by Trump and 'doves' who argue that the unrestrained pursuit of hawkish policies has undesirable economic and/or security consequences, this may be an over-simplification, as may be the view that the 'doves' are coming to outweigh the 'hawks'.

In July 2017 the professional lobbyist Dennis Shea was nominated by Trump as Deputy USTR and US ambassador to the WTO. Shea was a member of the US-China Economic and Security Review Commission, a panel created by Congress but without formal constitutional status. In testimony to the Senate Banking Committee in 2016, he stated that 'USTR needs to be more assertive in bringing enforcement cases against China.'²⁴ Shea's nomination is still awaiting Congressional approval at the time of writing.

Senior figures in the USTR office and the Department for Commerce, whose Secretary (Wilbur Ross) shares similar views to those of Trump,²⁵ are only one pole in an apparently multipolar and contested trade policy-making context in the administration. Other poles include Peter Navarro's National Trade Council, which was set up by Trump shortly after his inauguration, was reconfigured as the Office of Trade and Manufacturing Policy in late April and was then folded into the National Economic Council in September 2017;²⁶ the National Economic Council itself;²⁷ the offices of the Chief of Staff,²⁸ National Security Adviser,²⁹ Senior Policy Advisor³⁰ and White House Chief Strategist;³¹ the Secretaries for certain Departments other than Commerce, particularly the Treasury,³² Agriculture³³ and Defence;³⁴ and lobbyists for different US manufacturing, resource, retail and commerce interests, as well as umbrella organizations such as the US Chamber of Commerce.

The administration members most frequently named by commentators as counterpoints to the Trump agenda are Cohn, Mnuchin and Purdue, although by October 2017 Mattis, Kelly and McMaster were also being referred to in this way. While the division is often depicted as a relatively straightforward one between 'China hawks' led by Trump and 'doves' who argue that the unrestrained pursuit of hawkish policies has undesirable economic and/or security consequences, this may be an oversimplification, as may be the view that the 'doves' are coming to outweigh the 'hawks'. The different extent of involvement in trade policy issues of the oppositional 'poles', the different foundations and degrees of their divergence from the Trump trade policy agenda, and more especially the apparent absence of any common alternative trade policy agenda, suggests a constantly shifting and perhaps chaotic terrain, but not one that has fundamentally shifted over time. While implementation of the trade agenda has proceeded in fits and starts, its basic outline remains undiluted. Moreover, while the influence of some of its most outspoken outriders, such as Peter Navarro and Steve Bannon, appears to have waxed and waned over time, changes in their official status have perhaps reflected an intensification of efforts to sideline them rather than any actual sidelining. Certainly the argument of one commentator in

August 2017 that Trump's trade agenda was 'achieving little'³⁵ seems premature. Perhaps the only safe prediction is that there is unlikely ever to be a settled status for trade policy in the Trump administration.

Meanwhile it is worth underlining the absence of Congress and the leadership of both House Republicans and Democrats from any significant role in trade policy-making since January 2017. On the side of the Republican Party, the proposal for a Border Adjustment tax sunk without trace in July 2017 when Ryan and Brady dropped it from their plans to reform the US tax code. Notably, this resulted more from the combined opposition of leading party donors and Trump himself rather than from any pro-trade revolt.³⁶ In fact, opposition within the party to Trump's stance on trade – which had already been falling during the presidential campaign – now dwindled further. When Robert Lighthizer's nomination arrived in the Senate in May 2017, only three Republican senators voted against him, despite his chequered history of party loyalty.³⁷

A large majority of Democrat senators also voted for him. This reflects the fact that, rather than providing opposition to the Trump agenda, the Democratic Party has increasingly come to voice similar positions. In July 2017 Democrat leaders in Congress launched a new political programme, 'A Better Deal', whose section on trade and jobs promised to 'crack down on foreign countries that manipulate trade rules and penalize corporations that outsource American jobs.' Concrete proposals included the following:

- An independent Trade Prosecutor who would 'challenge unfair practices by foreign countries, like China...without relying on the...WTO process'. The Prosecutor would be based in the US International Trade Commission³⁸ rather than the office of the USTR, whose General Counsel (Vaughn) was said to have 'not done enough to stop cheating...only a small number of cases (have been) addressed.' The Prosecutor would also determine whether WTO Dispute Settlement body rulings were in conflict with US law.
- Renegotiation of NAFTA to introduce disciplines on currency manipulation and digital trade, to strengthen disciplines on state-owned enterprises and subsidies, and to bring toughened disciplines on labour and the environment into the main agreement. Furthermore, reforms to the NAFTA Dispute Settlement process should be introduced to protect US sovereignty, including its trade enforcement laws.
- Currency manipulation should be defined in US law as a government subsidy whose trade enforcement remedy shall be the imposition of Countervailing Duties.³⁹

3. IDENTIFICATION OF TRADE AGREEMENT VIOLATIONS TO END ABUSES

Two Presidential Executive Orders were issued during the first months of the Trump presidency as a prelude to implementation of this pledge.

Ross was instructed to ‘use every available measure under the law to end these abuses...and if they don’t get cleared up, end the trade agreements’.

First, at the end of March 2017, an order was made concerning the US’s trade deficits with various countries. The USTR and the Commerce Department were instructed to determine the extent and causes of the US’s deficits with partner countries, including allegedly unfair trading practices. ‘For many years the US has not obtained the full scope of benefits anticipated under a number of international trade agreements and from participating in the WTO’.⁴⁰ These bodies were instructed to assemble an ‘Omnibus Report on Significant Trade Deficits’ (as of 2016) within ninety days. While, in an interview with CNBC on 30 March, Wilbur Ross argued that US trade deficits were caused in part by the US having ‘the lowest tariff rates and lowest non-tariff barriers in the world’, the report was expected to focus mainly on trade partners’ ‘unfair trading practices’. By mid-April 2017 the Department of Commerce had identified thirteen countries and blocs with which the US could be said to have ‘significant’ deficits, namely Canada, China, the EU, India, Indonesia, Japan, South Korea, Malaysia, Mexico, Switzerland, Taiwan, Thailand and Vietnam.⁴¹

Second, on 29 April 2017 a further executive order on ‘Trade Agreement Violations and Abuses’ was issued,⁴² tasking the USTR and Department of Commerce with a ‘performance review’ of all US trade and investment agreements and trade preference programmes with a view to identifying all violations and abuses by these by foreign counterparts. Besides being a signatory to multiple WTO agreements, the US is a party to fourteen 14 free-trade agreements and three trade-preference schemes with developing countries. In the short term, reports covering each and every one of these were to be submitted to the President within 180 days. In the longer term, in Trump’s words, Ross was instructed to ‘use every available measure under the law to end these abuses...and if they don’t get cleared up, end the trade agreements’ (Bridges 21-14, 04-05-17).

Why the first investigation should have had a 90-day deadline and the second a 180-day one is unclear, particularly since the USTR’s Annual Report already provides a comprehensive review of all the trade agreements to which the US is a party (not including coverage of broader US trade policy initiatives and trade enforcement, this review ran to 148 pages in 2017).⁴³ Probably these initiatives were simply intended to signal and justify long-term, comprehensive changes in relations with very large numbers of trading partners.

By mid-April 2017 the Department of Commerce had identified thirteen countries and blocs with which the US could be said to have ‘significant’ deficits.

In terms of dealing with perceived trade violations, abuses and injuries at the hands of trade partners in the short term, a number of well-established enforcement tools remained at the disposal of the administration. These are an Anti-Dumping Duty, Countervailing Duty and Safeguard Investigations and tariffs; suspension of partners’ trade preferences (in the case of trade preference programmes); use of state-to-state consultations to resolve bilateral disputes, amend bilateral agreements or forge more advantageous ones; and initiation of dispute settlement proceedings in the trade agreements where these are provided for. With the exception of the WTO’s Dispute Settlement proceedings, in relation to which the Presidential Trade Agenda had already expressed reservations, an intensification of US action in each of these areas after January 2017 might have been expected. The extent to which this has been borne out will be reviewed for each enforcement tool in turn.

Anti-Dumping Duty, Countervailing Duty and Safeguard Investigations and measures

Under US trade law, Anti-Dumping (AD) Duty, Countervailing Duty (CVD) and Safeguard Investigations and measures may be initiated following petitions from US companies, trade bodies or trade unions to the Department of Commerce and/or International Trade Commission (ITC). The Department of Commerce undertakes the external element of investigations relating to allegations of dumping (export sales below market price) and of exporters benefitting from foreign government subsidies. ITC conducts the internal US investigation into whether a US industry has been materially injured. The definitions of ‘dumping’, ‘subsidy’ and ‘injury’ used are

set out in US law, but this generally shadows the relevant WTO Articles. Preliminary investigations, normally taking around six weeks, can lead to preliminary determinations that AD/CVDs be levied on the foreign import in question. These duties are then collected from US importers.⁴⁴ Final determinations normally take five to six months.

According to the Department of Commerce, enforcement using this tool has increased markedly since Trump's inauguration. On 25 October 2017 it stated that 77 new AD and CVD investigations had been launched between his inauguration and this date, as opposed to 48 during the same period in 2016 (CNBC 28-10-17). While this increase is significant, looking at the data over a longer time series, it continues a trend dating back to 2010,⁴⁵ when the Obama administration launched the Trade Law Enforcement Initiative.⁴⁶ On the other hand, a series of very high-profile AD/CVD investigations of close trading partners – most notably Canada – have been launched under Trump.

Safeguard actions are trade remedies permitted under WTO rules in cases where industries and/or employment have suffered 'injuries' from 'unforeseen' surges of cheap imports. Unlike AD and CVD actions they are time-limited, but there is no requirement that unfair trading practices be shown or even that named parties be targeted. While Safeguard actions are commonly used by developing countries that lack the capacity to conduct detailed AD and CVD investigations, they are not much used by developed ones, and prior to 2017 had only been invoked by the US twice in the 21st century.⁴⁷ Nonetheless, some trade hawks have considered them more relevant today than in the past because (it is argued) AD and CVDs actions can be by-passed by exporters re-routing penalized exports through third countries.

Under Trump, petitions on injuries consistent with the use of Safeguard remedies have already been accepted in two instances by the ITC in relation to imports of solar cells and washing machines. At the time of writing, investigations are proceeding in order to determine whether to levy tariffs on all washing machine imports from two South Korean companies from all countries and on solar cell imports from all companies from all countries. ITC has until November to make its recommendations (Financial Times 22-09-17).

Finally on this topic it is worth noting that the only proposal which the US under Trump has brought to a WTO body is one apparently aimed at making US AD and CVD actions easier. This proposal, circulated to the Committee on Goods on 30 October 2017, would introduce penalties against members failing to meet their

notification requirements under the Agreement on Subsidies and Countervailing Measures. A WTO Secretariat document from April 2017 (w546R8.pdf at www.wto.org) reported that 51% of members had not met their notification requirements dating from 2015, 38% had not met them from 2013 and 36% had not met them from 2011. The great majority of non-compliant members were low income countries. The US proposal was to introduce a sliding scale of penalties depending on the time elapsed since a member's last notification, and ranging from barring members from chairing WTO bodies to declaring them 'inactive' and ineligible for 'aid for trade'.⁴⁸

Suspension of Trade Preferences

The US maintains three programmes under which developing countries are given either duty-free or duty- and quota-free access to the US market for a range of products. Typically, Least Developed Countries (LDCs) are given more generous preferences than developing ones.

The largest of these programmes is the US Generalized System of Preferences (GSP), covering around 120 countries. Others are the programmes under the African Growth and Opportunity Act (AGOA) and the Caribbean Basin Economic Recovery Act (CBERA), covering around forty and eleven countries respectively. The major trade benefit bestowed by eligibility to these programmes concerns clothing and textiles from LDCs, which otherwise face considerable US tariff and non-tariff barriers, especially Rules of Origin.

Eligibility criteria for these programmes typically include levels of economic development; governance, including friendliness to US investment and Intellectual Property rights; human rights performance, including on workers' rights; openness to US exports (though not necessarily provision of reciprocal access); and having systems in place allowing the US to monitor the conformity of beneficiary country exports with programme conditions, especially on origin. Countries whose economic development is deemed to have sufficiently improved over time are 'graduated' to Free Trade Agreements; China and Vietnam have never been eligible for the US GSP due to their designation as communist countries. Suspension of preferences typically arises from USTR investigations conducted at the request of other US government agencies.

Suspensions from both the GSP and AGOA have been common over the years. Three countries were suspended from the GSP between 2012-16, namely Argentina, Bangladesh and Russia,⁴⁹ and four were suspended from AGOA without later

reinstatement in the same period, namely South Sudan, Gambia, Swaziland and Burundi. A majority of these suspensions were based on deemed failures in governance, including in relation to workers' rights and workers' safety.

A self-initiated USTR review of Bolivia's eligibility for GSP was launched in June 2017, referencing concerns over child labour, and in June-July 2017 USTR began an 'out-of-cycle' review of the AGOA eligibility of Rwanda, Uganda and Tanzania following a petition from the US Secondary Materials and Recycled Textiles Association. These countries were implementing a phased ban on imports of second-hand clothing, including from the US.⁵⁰

While there has been no clear acceleration of preference suspension as yet under Trump, the USTR website states that the Bolivia review is 'the first self-initiated GSP review in this century', while the AGOA review is the first to follow from a private petition.⁵¹ Moreover, in October 2017 USTR announced a more systematic approach to reviewing the eligibility of all GSP beneficiaries. Every beneficiary would be subject to triennial assessment, and, where this raised 'concerns', a full review could be undertaken.⁵²

Bilateral state-to-state consultations and agreements

Bilateral trade grievances may be resolved by state-to-state consultations leading to a Memorandum of Understanding (MoU) signed between the two parties or by seeking to amend existing bilateral agreements or forge new ones. Although more than one of these methods may be pursued, even simultaneously, they will be considered separately here.

Resolution of trade grievances by means of bilateral state-to-state consultations was probably the commonest method used by all countries prior to the creation of the WTO Dispute Settlement mechanism in 1994. It has remained an option favoured by many countries since, even when both parties are members of the WTO and/or the same bilateral or regional free trade agreement. Traditionally the US has been one of these countries, forcing trade partners to accept voluntary restraints on their export of steel, automobiles, textiles and clothing in the Nixon and Reagan eras, through numerous agreements on IP with south-east Asian countries in the 1980s and 1990s, to an agreement on beef with the EU in 2009. On the other hand, the incidence of US use of this 'aggressively unilateralist'⁵³ channel did decline over time, being replaced by a preference for concluding new Free Trade Agreements.

There have been a number of examples of state-to-state negotiations to settle the US's disputes by means of new understandings or wider agreements of this kind since Trump's inauguration. Some have been covered under Point 1, and US-China state-to-state negotiations will be described under Point 6. The remainder discussed here concern US-South Korea, US-Mexico and US-India negotiations. The absence of state-to-state negotiations over the US-Canada Softwood Lumber dispute will also be discussed.

A desire to renegotiate the South Korea-US Free Trade Agreement (KORUS), signed in 2007 and already renegotiated once,⁵⁴ was first indicated by Vice-President Mike Pence in mid-April 2017 during a visit to South Korea. Pence pointed to a 'concerning' US trade deficit of \$27 bn. in 2016 (Financial Times 18-04-17). The issue resurfaced during a meeting between Presidents Trump and Moon Jae-in at the end of June 2017, when South Korea signalled its reluctance to enter into renegotiation. However, a few days later the US invoked Article 22.2 of KORUS, thus triggering a special meeting of trade representatives within thirty days to discuss amending the pact. Besides the general issue of the US's trade deficit with South Korea, the White House's concerns fixed on claims that non-tariff barriers continued to obstruct South Korean imports of US automobiles and steel.⁵⁵

In early September, 2017, and apparently against opposition from Cohn, McMaster and Mattis, Trump instructed officials to begin preparations for withdrawal from KORUS.

South Korea responded to this on 24 July 2017, agreeing to a meeting, but proposing that it should comprise a joint effort to 'objectively investigate, research and assess the effects of KORUS with a view to developing US-Korean economic and trade relations in an expanded and balanced direction'.⁵⁶ Discussions then occurred in August 2017 in Seoul, culminating in a video conference between Lighthizer and the South Korean Trade Minister, Kim Hyun-Chong. In a subsequent statement, Kim said 'we told the US that it's necessary to figure out the reasons for the trade imbalance through a joint study... From my point of view, there's no agreement regarding negotiations'. Kim also denied that a date had been set for any future meeting (Bloomberg 22-08-17).


In early September, and apparently against opposition from Cohn, McMaster and Mattis, Trump instructed officials to begin preparations for withdrawal from KORUS (Washington Post 02-09-17). Against this background, further discussions took place in early October 2017, following which a South Korean government statement was released saying that the two sides had reached an understanding to 're-open' the terms of the deal (Morning Trade at politico.com 05-10-17).

The US embarked upon negotiations with Mexico in May-July 2017 concerning sugar exports to the US. The issues involved reiterated issues subject to a 2014 MoU between the parties. Mexican sugar exports to the US were excluded from NAFTA until 2008 but after bumper Mexican sugar harvests in 2012 and 2013, US refiners accused Mexico of dumping and successfully petitioned for AD and CV duties in retaliation. In 2014 these were suspended in return for Mexico's agreement to the US imposing import quotas for refined and unrefined sugar and minimum prices to prevent US producers being undercut, as well as to definitions of 'sugar requiring further refinement' proposed by US refiners.⁵⁷ In return Mexico gained the status of the US's 'international supplier of first resort' (i.e. after US supplies had been exhausted).

By 2017 US sugar refiners were arguing that these measures were ineffective in preventing dumping, and they lobbied the Department of Commerce to re-impose AD and CV duties corresponding to a combined 80% of import prices; in response, Mexico threatened to impose duties on imports of US high fructose corn syrup. In June 2017 Wilbur Ross and the Mexican government reached a draft agreement promising to end the dispute. In return for the suspension of US AD/CVDs and continuing designation as the US's supplier of first resort, Mexico agreed that refined sugar should make up only 30% of its total sugar exports to the US (down from a 53% quota in 2014-16) and that the definition of refined sugar be tightened, meaning that a higher proportion of imports would be refused this status. It also agreed to higher minimum prices and shipment arrangements, again making it more likely that imports would pass through US refineries, and to new US enforcement measures. Despite this, as of June 2017, US refiners continued to complain, and in the agreement eventually signed in July 2017 minimum import prices were increased further.⁵⁸

As regards India, during a visit to Washington in June 2017 Prime Minister Narendra Modi was apparently pressed by Lighthizer and Ross to abandon its price controls on certain medical devices. In response, India actually extended the coverage of these controls, provoking further pressure from Lighthizer in September 2017. The result of this pressure remains unclear.⁵⁹

The US apparently passed up the opportunity to negotiate the ending a further trade dispute bilaterally in May 2017 when a foreign head of state suggested that the two countries work out a 'long-term settlement'.⁶⁰ The dispute in question is probably the longest running in US trade history: the Softwood Lumber dispute with Canada. This dates from 1982 and was subject to dispute settlement proceedings in the Canada-US FTA that pre-dated NAFTA, in NAFTA itself and at the WTO before resulting in a series of bilateral agreements dating from 1986-91, 1996-2001 and 2006-15. The last of these was followed by a year-long moratorium on trade defence measures. Over the years the US has consistently maintained that Canadian lumber exports to the US are subsidized as a result of the public ownership of forests in Canada and the public setting of raw timber prices. Accordingly the US lumber industry has repeatedly petitioned the Department of Commerce to impose AD/CVDs.⁶¹ Petitioning was renewed in November 2016. Following investigations, a preliminary AD/CVD judgement was issued by ITC in January 2017, and preliminary AD/CVDs were levied in April and confirmed in June. In this case, the Trump transition team had apparently concluded as early as November 2016 that it was more likely to gain concessions through trade remedies and an aggressive negotiating stance on NAFTA than through bilateral negotiations.⁶²



The dispute in question is probably the longest running in US trade history: the Softwood Lumber dispute with Canada.

Thus while the Trump team's strongly signalled move toward the bilateral resolution of trade grievances through either MoUs or broader agreements has unfolded on a number of fronts, progress on it to date has been uneven.

Initiating Dispute Settlement proceedings in the trade agreements where these are provided for

Countries essentially use institutionalized Dispute Settlement (DS) mechanisms provided for in trade agreements to remedy what they see as unfair treatment of their exports and exporters. Despite its considerable reservations, and while itself frequently being subject of complaints under both the WTO and other agreements, prior to the Trump presidency the US was one of the most frequent users of the WTO Dispute Settlement mechanism as a complainant. From 1 January 2012 to 30 August 2017, the US brought seventeen cases as a complainant out of a total of a hundred brought by all WTO members. In addition it joined 45 other cases as a third party.⁶³

Since Trump's inauguration, the US has not brought any new case to the WTO as a complainant, although it has joined two cases as a third party.⁶⁴ Furthermore, the US has de facto blocked the appointment of replacements for three retiring members of the DS Body's seven-member Appellate Body (AB), questioning the practice of allowing retiring members to continue to serve while their replacements are sought. One AB member is currently continuing to serve on the body even though his term has expired, a situation which the US says should have been formally approved by the DS Body first.⁶⁵

The US has de facto blocked the appointment of replacements for three retiring members of the DS Body's seven-member Appellate Body, questioning the practice of allowing retiring members to continue to serve while their replacements are sought.

DS mechanisms for trade disputes are also provided for in most Free Trade Agreements (FTAs), including all but one⁶⁶ of those to which the US is a party. However, the US has rarely used these. Since January 2012, it has made only three requests for NAFTA DS Panel Reviews, two of which were made in 2012. Since Trump's inauguration a single US NAFTA Panel Review request has been made, but this was withdrawn shortly afterwards.⁶⁷ The US has also used the NAFTA renegotiation process to propose fundamental changes to each of its DS chapters (see below).

The FTAs to which the US is a party have been almost free of US-initiated DS cases. The USTR website lists only one, concerning labour rights in Guatemala and dating from 2014, where a Panel Review was requested under the Dominican Republic-Central America-US FTA. This is still ongoing.

While the Trump team has voiced largely negative opinions of DS mechanisms, and indeed is actively involved in their disruption, it may be premature to conclude that it has shelved their use completely or permanently. Rather, it may be waiting for an adverse ruling in a very high-profile dispute to withdraw completely from the DS Body (see below, Section 6).

4. RENEGOTIATION OF NAFTA OR WITHDRAWAL IF CANADA AND MEXICO DO NOT AGREE

The Trump administration gave Congress notice of its intention to trigger renegotiation of NAFTA in mid-May 2017, with negotiations starting in August after a ninety-day period for domestic US consultation. At this time Lighthizer briefed journalists that it was the US's wish to renegotiate NAFTA on a trilateral basis, although bilateral negotiations would be also considered if trilateral negotiations proved unsuccessful (Washington Post 18-5-17). Renegotiation was not opposed by Canada or Mexico. It is commonly believed that both the US and Mexico wished the negotiations to be concluded by the end of 2017.

On 17 July 2017 the USTR released a negotiating mandate.⁶⁸ This embodied a mixture of proposals to bring existing NAFTA provisions in line with later WTO agreements and also in some cases 'WTO+' texts that had been agreed in the TPP negotiations, with other proposals aimed at introducing new NAFTA chapters in areas such as 'currency manipulation', where there was little sign of disagreement among the parties, and with others again that would modify existing NAFTA provisions in an asymmetrical way favouring the US.

The first set of these, involving updating NAFTA's WTO compatibility or borrowing 'WTO+' TPP drafts, included proposals on Trade in Services, Customs and Trade Facilitation, Technical Barriers to Trade and Competition and State-owned Enterprises, as well as parts of the mandate's proposals on Sanitary and Phytosanitary Standards (SPS) and IP. The second set, besides proposing a new chapter on 'currency manipulation' included demands for new chapters on Labour and the Environment,⁶⁹ Digital Trade, Energy, Corruption and 'Good Regulatory Practice'.

The third set, where asymmetrical treatment was explicitly demanded or implied, involved proposals or parts of proposals in a wide variety of areas. On agriculture it was proposed to allow the US to establish seasonal import quotas for fruit and vegetables,⁷⁰ as well as in respect of SPS issues, to create a 'mechanism to resolve expeditiously unwarranted barriers that block the export of US food and agricultural products'. On IP it was proposed that rules shall be adopted to prevent 'systems for protecting or recognizing geographical indications' from 'undermining market access for US products'.⁷¹ On Investment it was proposed to 'establish rules that reduce or eliminate barriers to US investment in all sectors in NAFTA countries' and 'Secure for US investors in NAFTA countries important rights consistent with US

legal principles and practice, while ensuring that NAFTA country investors in the US are not accorded greater substantive rights than domestic investors'. On Government Procurement the mandate called for continuing exclusion from coverage of sub-central government entities and several named central government programmes,⁷² while 'increas(ing) opportunities for US firms to sell US products and services into the NAFTA countries'.

There were further proposals embodying explicit or implied asymmetry on Rules of Origin, Trade Remedies and Dispute Settlement (DS). On Rules of Origin, the mandate called for ensuring 'that the benefits of NAFTA go to products genuinely made in the US and N. America' and that 'Rules of Origin incentivize the sourcing of goods from the US and N. America'. These objectives stopped short of two linked proposals signalled by the Trump administration prior to July 2017. These were for country-specific origin rules⁷³ and updating the list of auto parts referred to in calculating whether automobiles meet the current 62.5% NAFTA country origin requirement.⁷⁴

On Trade Remedies, the mandate called for elimination of the NAFTA safeguard rule 'so that it does not restrict the ability of the US to apply measures in future investigations', thus 'preserv(ing) the ability of the US to enforce rigorously its...AD, CVD and Safeguard laws'. The 1994 NAFTA global safeguard provision had allowed each country to exclude imports from other NAFTA countries under the terms of WTO Article XIX (i.e. where an import surge caused injury to domestic production) only when these imports constituted a 'substantial share' of all imports or 'contributed importantly' to the injury.

On DS, the mandate calls for an end to NAFTA's Chapter 19 DS Mechanism. Chapter 19 provided for binational panels to determine whether final AD and CVD decisions made in domestic tribunals were consistent with the national laws of the country making the decision. In most cases, NAFTA Chapter 19 Panel decisions lowered US AD and CVDs against Canadian and Mexican exports that the US had deemed to be dumped and/or subsidized.⁷⁵ The mandate then proposes a new DS Mechanism but provides little detail on this.

In August 2017 the parties agreed to conduct seven rounds of negotiations during the remainder of the year. At the fourth of these, in October 2017, the US is said to have introduced clarifications to its Government Procurement and Rules of Origin objectives (see above) and completely new proposals on textiles and clothing, dairy and poultry, trucking from Mexico to the US, DS and NAFTA renewal. Some of these had been already leaked during the third round.

On government procurement, the US now proposed a cap on its own market for contracts 'at a dollar-for-dollar level with the combined Canada (and) Mexico (government procurement) markets.' This would entail lower combined US market access for Canada and Mexico than that currently enjoyed by some non-NAFTA countries (Bloomberg 29-09-17).

On Rules of Origin for autos, the US now proposed that NAFTA-eligible vehicles should have a US content requirement of 50%, to be implemented immediately, and that the cumulative NAFTA content requirement should be 85%, to be implemented over two years (Freund op. cit., Financial Times 06-10-17; Morning Trade at politico.com 06-10-17, 16-10-17).⁷⁶

The US now further proposed that textiles and clothing be excluded from NAFTA coverage over a two-year period (Bloomberg 29-09-17). On the other hand, it also proposed that the exclusion of dairy products from NAFTA since 1994 be lifted by Canada phasing out tariffs on all its 'Supply Managed' products over ten years. Canada was also called on to grant the US immediately a zero-tariff quota equivalent to 32.5% of Canadian domestic dairy production and to lower Canadian prices for milk protein concentrate products to the global price (Toronto Star 09-10-17; Morning Trade at politico.com 17-10-17). On trucking from Mexico, the US now wanted Mexico to recognize its right to use Safeguard measures under certain conditions (Morning Trade at politico.com 15-11-17).

On DS, the new proposals concerned Chapters 11 and 20 of NAFTA covering investor-state and state-state disputes rather than Chapter 19 discussed above. The US called for Chapter 11 to be amended, first by introducing an 'opt-in' clause that would in effect make the whole process voluntary; and second, by removing two of the grounds under which foreign investors could claim protection against state actions by requesting an arbitration panel. The grounds the US now sought to eliminate were an investor's non-receipt of 'a minimum standard of treatment' (i.e. fair and equitable treatment), a concept which the US holds has been subject to biased interpretation by panels; and 'indirect expropriation', that is, state actions that devalue an investment without actually confiscating it (Morning Trade at politico.com 10-10-17). At a press briefing following Round 4, Lighthizer indicated that the rationale of this proposal was to reduce incentives for US foreign investment in Mexico and Canada (Morning Trade at politico.com 18-10-17).

NAFTA's Chapter 20 DS process, which is reserved for disputes between governments regarding the interpretation or application of NAFTA and involves binding arbitration by panels, has not been invoked since 2000, when the US blocked the selection of a panel. The US now proposed that it be replaced by a system of non-binding or 'advisory' arbitration.⁷⁷

The proposals as a whole have been widely interpreted as a deliberate attempt to end the negotiations.

On NAFTA renewal, the US now proposed adding a so-called 'sunset clause' to the agreement. At the end of a five-year period, further renegotiation shall automatically be triggered should certain conditions be met or any party to the agreement request this. One of the automatic triggers demanded was the existence of a US trade deficit with the other NAFTA countries (Morning Trade at politico.com 14-09-17 and 25-10-17).

Many of these proposals have been greeted with astonishment and dismay by lobby groups and commentators.⁷⁸ On Rules of Origin, for example, the American Automotive Trade Policy Council stated they 'would be counterproductive and harmful and undermine our global competitiveness' (Morning Trade at politico.com 06-10-17). The proposals as a whole have been widely interpreted as a deliberate attempt to end the negotiations, although prior to Round 4 both Justin Trudeau and Mexican Finance Minister Jose Antonio Meade indicated that Canada and Mexico would not be the first to abandon the negotiations (Morning Trade at politico.com 16-10-17).

Lighthizer concluded with the thinly veiled threat: 'We should take all the time between now and our next round to reasonably assess what can now be done to arrive at a balanced, modern agreement.'⁷⁹

In any event, Round 4 ended in deadlock. A joint statement was issued to the effect that 'new proposals created challenges, and ministers discussed the significant conceptual gaps between the parties', that Round 5 would be postponed until November 17-21, and that the negotiations generally would if necessary continue

into 2018 (Bloomberg 17-10-17). At a press conference following this, Canadian Foreign Minister Chrystia Freeland accused the US of taking a 'winner takes all' approach, adding 'we have seen proposals that would turn the clock back on 23 years of predictability, openness and collaboration' (Reuters 17-10-17).

Lighthizer issued his own statement, claiming first, that Canada and Mexico had refused to accept texts already agreed in the TPP on digital trade, telecoms and anti-corruption. Secondly, and more seriously, 'we see no indication that our partners are willing to make any changes that will result in a rebalancing and reduction in (our) huge trade deficits...after many years of one-sided benefits their companies have become reliant on special preferences...(they) are unwilling to give up unfair advantage'. He went on: 'continuing to design national manufacturing (policies)...largely dependent on exports to the US without balance cannot long continue...it is also unreasonable to expect that the US will continue to encourage and guarantee US companies to invest in Mexico and Canada primarily for export to the US. All parties must understand this and be responsible if there is any chance for these negotiations to be successful.' He concluded with the thinly veiled threat: 'We should take all the time between now and our next round to reasonably assess what can now be done to arrive at a balanced, modern agreement.'⁷⁹

5. LABELLING CHINA A CURRENCY MANIPULATOR AND TAKING SHARP COUNTER-MEASURES

Government intervention in foreign exchange markets to prevent currencies from rising against the US dollar has long been seen by a surprisingly wide range of US economists and policy-makers as 'currency manipulation' (CM). Responding to CM is seen as requiring a tough stance since 'an undervalued exchange rate is both an import tax and an export subsidy and is hence the most mercantilist policy imaginable.'⁸⁰

The US first incorporated the concept of CM into trade law under the Reagan administration in the 1980s, when its traditional current account surpluses first turned consistently negative. The Omnibus Trade and Competitiveness Act (1988) directed the Treasury Department to examine the economic policies of countries running large current account surpluses with the US and to submit to Congress annual reports on them, including on whether their exchange rate policies utilized CM. The relevant sections of the Act (3004-06) did not define CM or indicate what evidence was relevant to its determination, other than that the country in question

had intervened in some way in the foreign exchange market and that it had both a bilateral current account surplus with the US and a global one with all its trading partners.⁸¹ Where CM was determined, the Treasury Department was mandated to initiate bilateral negotiations to force the country concerned to make balance of payment adjustments and eliminate its unfair advantage. The Act expired in 1991, was renewed under Clinton in 1994-97, and then briefly expired again before being further renewed in 1999.

Between 1988 and 1990, the Treasury found that Taiwan, South Korea and China had manipulated exchange rates and run both bilateral and global surpluses. CM activities cited in the Treasury reports included (in the case of Taiwan) 'substantial (foreign) exchange restrictions under the managed float system and heavy direct intervention by the Central Bank in foreign exchange markets'; (in the case of S. Korea) 'substantial foreign exchange restrictions under the managed float system; and exchange rate pegging to a basket of currencies'; and (in the case of China) 'repeated devaluations and control on market rates and external trade'.⁸² All of these determinations were revoked by 1991. In the July 1994 report, China was again found to have manipulated its currency as a result of 'its continued reliance on foreign exchange restrictions'. This determination was revoked in December 1994.⁸³

Despite repeated denunciations of China's and others' CM, including a pledge by Obama to 'beef up US enforcement' in 2008 (Reuters 30-10-08), the Treasury made no determination of CM between 1994 and the introduction of a new US trade law in 2016. Partly this may have reflected increased technical caution by those making determinations. The 2003 report stated that the IMF was now consulted before any determination was made and implied that the criterion for identifying CM had tightened: 'a peg or intervention does not in and of itself satisfy the statutory test'.⁸⁴ Partly also it should be seen in the context of the wider bilateral relationship between the US and China, the main candidate for a CM determination. Labelling China might have hindered progress in wider areas, including trade and investment access, IP protection and (from 2008) actions to alleviate the global financial crisis.

In any case, as argued by Staiger and Sykes in a seminal paper published by the National Bureau for Economic Research in 2008,⁸⁵ US theory and practice on CM was riddled with problems. These authors show that:

- Current account surpluses typically have multiple causes⁸⁶ and government interventions in foreign exchange markets typically have multiple rationales,⁸⁷ the export promotion contribution of which is hard to differentiate. This makes it difficult to argue that foreign exchange market interventions are in breach of WTO Article XV(4) (on use of trade measures for balance of payments purposes).
- If, consistent with mainstream trade theory, flexible prices are assumed, then, while CM may be equivalent to imposing a tax on imports and providing a subsidy to exports, it should nonetheless have no trade effects. This is because, over time, the two sets of incentives should cancel each other out.⁸⁸
- In the WTO Agreement on Subsidies and Countervailing Measures, subsidies are defined as 'specific', 'a financial contribution by government or any public body', and as conferring a clear 'benefit'. However, China's currency peg, for example, has generalized effects rather than supporting specific exporters, it is not associated with an explicit 'financial contribution', and only in the case of 'sticky' prices with certain pricing modalities will there be any discernible effects, although even here none that impact meaningfully on the terms of trade.
- Also problematic is the claim that foreign exchange market intervention is in breach of WTO rules on 'Non-violation Complaints', which concern the nullification or impairment of reasonable expectations arising from tariff concessions, possibly including those made by China at the time of its WTO accession in 2001. But the Chinese currency peg was known to all WTO members at this time and was apparently not seen as a problem, and thus no expectations could have been frustrated by its continuation.

While this contribution appeared to influence Department of Commerce officials in their 2009 decision to reject a petition to initiate a CVD investigation into Chinese currency practices on the grounds that it 'failed to properly allege the specificity element',⁸⁹ it had little influence on most US politicians or economists. In 2010, Democrats in Congress proposed a bill (HR 2378) to amend US CVD law by adding a CM clause that waived the 'specificity' condition for a subsidy to be actionable. Having apparently died, this was reintroduced in 2013 and then again in 2015, when it passed in both houses. The Obama administration responded by vetoing it and introducing instead the Trade Facilitation and Trade Enforcement Act, which became law in 2016. This revised the criteria by which the Treasury Department was to determine CM and reserved possible determinations of CM to the US's twelve major trading partners.

The new criteria were more operational than those of the 1988 Act. Under it a country shall be named as engaging in CM if:

- Its trade surplus with the US is higher than \$20bn or 0.1% of US GDP
- Its global surplus is 3% or higher of its own GDP
- It makes 'persistent one-sided interventions in the foreign exchange market' amounting to 2% or more of GDP in a calendar year.

The new Act further stipulated that CM labelling would trigger bilateral negotiations with a one-year time frame for the offending country to concede. Non-compliance would be met by denial of OPIC financing for US investments in the country,⁹⁰ exclusion of the country from US government procurement, and denial of access to US bilateral or regional trade agreements.⁹¹ Following the change in the law, the Treasury Department has not cited any country for CM. The April 2017 Report stated that the aim of China's foreign exchange market interventions had, after a decade, switched to preventing further devaluation of the renminbi. China, however, remains on the watch list for fulfilling two of three conditions, as do Japan, South Korea, Taiwan, Germany and Switzerland.

The April 2017 Report stated that the aim of China's foreign exchange market interventions had, after a decade, switched to preventing further devaluation of the renminbi.

While successive administrations, including Obama's and Trump's, have failed to cite China for CM, Trump's is the first to seek to include new CM disciplines in trade agreements.⁹² In this, as well as in his campaign calls for the unilateral imposition of tariffs against China over CM, he is following not only a considerable body of opinion in both the Republican and Democratic parties, but also earlier calls by leading US economist, including Paul Krugman.⁹³ Meanwhile US-based trade economists, including Fred Bergsten and Joseph Gagnon, have attacked the proposals that were eventually embodied in the 2016 Act for applying definitions which are too narrow, have proposed new methods for measuring CM for retaliation purposes, and have

outlined a design for new CM chapters in US FTAs.⁹⁴ Others, including Aaditya Mattoo, Arvind Subramanian, Gary Hufbauer, Jeffrey Schott and Douglas Irwin, have called for WTO disciplines to be revised or supplemented in order to identify the conditions under which complaints against CM might succeed.⁹⁵

Trump continued to cite China (and sometimes Japan) for CM up to early April 2017, referring to China on two occasions as a CM 'world' or 'grand' champion.⁹⁶ However, in his first public pronouncement after taking office, Steve Mnuchin told CNBC that, regarding these claims, the Treasury would 'follow our normal practice of analysing the currency practices of all major US trading partners. We'll do this as we have in the past. We're not making any judgments (now)' (23-02-17). Similarly, at his Senate confirmation hearings in March, Lighthizer expressed doubts regarding CM claims against China and stressed that any decision on this would be Mnuchin's alone (thehill.com 14-03-17). On 12 April, as the 2017 Treasury report was being released, Trump indicated that in his opinion too China was now no longer guilty of CM (Wall Street Journal 12-04-17).

6. BRING TRADE CASES AGAINST CHINA

With CM on the back burner, the US under Trump proceeded on three trade-policy fronts in relation to China. At least one of these may be seen as also intensifying pressure on the WTO. This front is to target China for AD and CVD investigations and subsequent application of duties, while using its pre-existing methodology for determining dumping margins. Eighteen of the 38 AD and CVD investigations launched by the ITC between the inauguration and 5 October 2017 that were still active on this date have been directed at Chinese exports,⁹⁷ and fourteen of the 42 AD and CVD orders issued by the ITC over the same period have been directed against Chinese exporters.⁹⁸ At between a third and a half of all cases, Chinese shares of investigations and orders in this period are now higher than in the recent past and are diverging increasingly from China's share of US imports.⁹⁹

The US uses a different methodology to calculate dumping margins in relation to China (and a few other countries) than it does normally. This is the so-called 'surrogate country' method, as opposed to the standard one. Under the standard method authorities compare costs and prices in the exporting country with those in the importing one whereas, under the analogue country one, they may nominate a third country with a similar level of economic development to the exporting one and

use costs and prices from this country instead for purposes of comparison. Under WTO rules, this may be applied in the case of exports from non-market economies on the grounds that costs and prices in such economies are not transparent. In practice this allows determinations of anti-dumping margins that are significantly greater than would otherwise be the case.

It should be noted that the US has designated the treatment of China's complaint against it by the WTO as a test case for determining its continued participation in the WTO DS mechanism and perhaps even in the WTO itself.

Under its 2001 WTO Accession Agreements, China accepted that other member countries could treat it as a non-market economy (NME) for AD and CVD duty purposes for a further fifteen years. Subsequent to the expiry of this period, in December 2016, the US and the EU continued to so treat it.¹⁰⁰ In December 2016 China requested consultations with the US and EU on this question, and in April 2017 the WTO agreed to establish DS Panels to review its complaints (DS 515 and 516). The US responded in March by launching an internal investigation into whether to continue its NME treatment of China. This concluded in late October, finding that it should.¹⁰¹

On 19 July 2017 the talks concluded without further agreement. No joint statement was issued, nor was there a joint press conference.

It should be noted that the US has designated the treatment of China's complaint against it by the WTO as a test case for determining its continued participation in the WTO DS mechanism and perhaps even in the WTO itself. In testimony before Congress on 21 June 2017, Lighthizer stated that DS 515 was 'the most serious litigation that we have at the WTO right now' and that it would be a 'cataclysmic mistake for the WTO to grant China market economy status' (Financial Times 21-06-17).

A second front on which the US has tried to remedy what it saw as its unfair treatment by China has been bilateral negotiations, which, it hoped, would cover several outstanding grievances, including not only dumping and subsidies, but also market access and IP infringements. With China's consent, negotiations were launched following two days of discussions between Trump and Xi Jinping in mid-April 2017 with a time horizon of a hundred days.¹⁰² On 13 May 2017, a ten-point 'Early Harvest' package from the talks was unveiled. China would resume imports of US beef suspended since 2003, speed up approval of GM crops and other US biotech products, and allow foreign-owned financial groups to offer credit rating services. Bond underwriting and settlement licenses would be issued to two US financial firms, and US-owned credit card firms could now apply for licenses to settle renminbi payments in China. In exchange, China would be given US market access for cooked poultry products and greater access to US LNG exports. Finally there would be an exchange of delegations to attend US and Chinese foreign investment summits. But as the Financial Times stated, 'most of Beijing's main promises had been made before or were in line with China's existing international commitments' (13-05-17).

On 19 July 2017 the talks concluded without further agreement. No joint statement was issued, nor was there a joint press conference (bbc.co.uk/news, 20-07-17). Separate statements issued by the two parties merely reiterated the talks' initial objectives (Bridges 21-27 27-07-17). Between May and July, China's major proposed concession was apparently to offer elimination of 150 MT of its steel industry overcapacity by 2022. As will be seen, this represented about 46% of its share of nominal global overcapacity as of 2015. Despite its endorsement by Ross, Trump is said to have twice vetoed its inclusion as an outcome of the talks (Financial Times 28-08-17).

The reason for this, given to the Financial Times by an unnamed US official, was that Trump had by this time 'decided that he wanted to go in a different direction – more toward tariffs' (ibid.).¹⁰³ Presented as a response to Chinese IP infringements, and to be implemented following an investigation under a provision of the 1974 Trade Act, this would be the third front opened by the Trump administration on US-China trade relations. It will be discussed in the following section.

7. USING EVERY LAWFUL PRESIDENTIAL POWER TO REMEDY TRADE DISPUTES

In June 2016 the G-7 called for immediate action on global overcapacity in the steel sector, including the removal of 'market distorting' measures, at its meeting in Japan. Both leading academics and the OECD put capacity at 2.3 bn. tonnes in 2015, while demand only reached 1.6 bn. Brun has attributed 336.2 MT of this 731 MT overcapacity to China.¹⁰⁴ However, at a meeting of major industry players convened by the OECD and the Belgian government in April 2016, no agreement was reached on either the reasons for overcapacity or what actions were needed to reduce it. At both meetings, most fingers were pointed at China. In May 2016 the EU threatened AD actions against Chinese steel imports, and in the same month the US also confirmed it was launching AD investigations into carbon and alloy steel products imported from China. This coincided with the conclusions of US AD and CVD investigations into corrosion-resistant steel-product imports from various countries, including China. These found dumping margins of 210% and subsidy rates of 39-240% and applied corresponding preliminary duties. The EU went on to apply anti-dumping duties on Chinese steel products in December 2016.

On 20 and 29 April 2017, Presidential Memoranda to the Secretary of Commerce were issued, citing Section 232 of the US Trade Expansion Act of 1962, to launch investigations of steel and aluminium imports from the rest of the world. Section 232 names national security as a ground for launching trade defence actions. This was the first time since 2001 that the US had invoked this provision (Washington Post 21-04-17). Also notable about the investigations was the fact that they were 'self-initiated': that is, unlike those just described, they did not stem from private petitions.

For the White House, the principal advantages of using Section 232 were first that, it meant that the problem of re-routing exports through third countries would be dealt with; secondly, that it only required Presidential authority; and thirdly, that national security grounds are hard (although not impossible) to challenge through the WTO DS system.

It was evident from the outset that the US was interpreting 'national security' in the broad sense made permissible by this Act to refer to loss of US industrial capacity and employment generally, rather than simply defence industry capacity and employment.¹⁰⁵ For the White House, the principal advantages of using Section 232 were first that, like the safeguard actions described above, it meant that the problem of re-routing exports through third countries would be dealt with; secondly, that it only required Presidential authority; and thirdly, that national security grounds are hard (although not impossible) to challenge through the WTO DS system.

Shortly after the investigations were launched, it became evident that the US was contemplating using Section 232 grounds to introduce a high (perhaps 20%) tariff on all steel imports from all non-NAFTA countries. An alternative proposal, initially said to be circulated by 'trade moderates' in the Trump team, was for import quotas. At Trump's request the results of the investigations were apparently ready in late June 2017, although by law the deadline for the report's completion was 270 days. On 30 June 2017 Politico.com reported that the administration was now considering a 'compromise' response to the investigation's reports, which would target tariffs at a narrower range of countries. Besides the administration's internal divisions, 'international relations' grounds probably played a role here. These included an impending G20 leaders' summit, threats of retaliation from important trade partners, and hopes of securing Chinese mediation in the North Korea crisis. In any event, at the time of writing the report remains unpublished. It is now expected to appear in January 2018, following which Trump will have ninety days to respond.

US concerns about inadequate protection of IP in certain countries date back to the 1980s and in 1988 resulted in the initiation of annual reports by the USTR under an amendment to Section 301 of the 1974 Trade Act. The resulting so-called 'Special 301' reports are aimed at identifying countries whose IP laws are either lacking or are not being implemented such that they present impediments to US companies and products. A statutory category of worst offender, 'Priority Foreign Countries', was created against which the USTR is required to launch detailed investigations and if necessary take up trade remedies. A non-statutory category of 'Priority Watch List' countries was also created. These are countries judged by the USTR as having 'serious IP rights deficiencies' requiring heightened attention.

Over the last decade, only one country, Ukraine, has been designated a Special 301 'Priority Foreign Country' (in 2006, 2013 and 2014). In 2006 this designation was removed following an 'Out-of-Cycle Review'. In 2013 and 2014 investigations were conducted which confirmed the allegations but suspended the application of remedies 'due to the political situation in Ukraine'.¹⁰⁶

China has been on the 'Priority Watch List' throughout the last decade, and in 2007 it became the subject of a WTO panel referral by the US concerning IP (DS 362). The panel ruled in the US's favour, and China implemented changes in its IP law and customs regulations in 2010.

In early August 2017, the Trump administration was reported to be considering a self-initiated Section 301 investigation into the trade consequences of China's amended IP laws.¹⁰⁷ These still require foreign companies investing in China to transfer technology to local subsidiaries and partners (Financial Times 02-08-17). On 14 August, Trump instructed the USTR to 'consider' using Article 301 in relation to this issue, a request agreed to by Lighthizer a few days after. This launched a process, including consultations with Congress, which was expected to lead to a formal investigation taking up to a year (Financial Times 13-08-17). At the same time, the US unsuccessfully approached the EU Commission, several EU member states and Japan with requests that they take parallel unilateral action (Financial Times 22-09-17). While noteworthy, US Section 301 investigations are less uncommon than Section 232 ones: a non IP-related 301 investigation of alleged violations of the US-EU beef agreement of 2009 initiated under the Obama administration is still ongoing.

Hence, while the Trump administration has utilized Sections 232 and 301 to initiate investigations, no findings have yet been published, nor have any retaliatory tariffs been applied as a result.

Unilateralism in practice: **IMPLEMENTATION AND EFFECTIVENESS**

Donald Trump's trade policy represents a radical departure from the US mainstream over the last forty years or more. This radicalism consists not only in its unilateralism and its echoes of mercantilism, but also in the systemic nature of its ambition. This entails challenging to one degree or another almost every trade agreement to which the US has been a party, forging new deals with countries that were previously reluctant to enter them, intensifying the use of traditional US trade remedies, and bringing into play a range of others which had fallen into disuse.

Trump's trade agenda appears to command increasing bipartisan support. This has undoubtedly helped insulate the administration from the open hostility of most trade lobby groups to its policies.

While it is still too early in Trump's presidential term to arrive at an assessment of the extent to which the policy agenda he outlined in June 2016 and restated in March 2017 will be fully implemented, sufficient evidence is available to judge whether significant progress has been made toward this goal. Arguably, sufficient evidence also exists to identify constraints and limitations on the policy's present and future implementation, as well as to predict how it is likely to unfold in the short-term.

The first of Trump's campaign promises on trade was to withdraw from the TPP. As this was still awaiting ratification when he assumed office, it was possible for him to do so immediately and without further consultation. This left US trade with six of the countries who had negotiated the TPP continuing to be conducted under the rules of pre-existing Free Trade Agreements, including NAFTA. With respect to the remaining five, the US has made a priority of targeting Japan for negotiation of a Free Trade Agreement, though its overtures in this regard have so far been rebuffed. Trump's second promise was to hire a cadre of professionals who could implement his agenda aggressively and effectively. The head of this cadre, Robert Lighthizer, worked in the transition team from November 2016 and appears to have advised on the selection of its other members. Its three senior members are all specialists in trade litigation and share Trump's views on China. Lighthizer has also been a consistent unilateralist critic of the WTO. However, while this cadre has loyally implemented decisions reached in the White House, the process by which these decisions have been reached has been fraught by division and has at times been chaotic. A 'realist' wing of the administration, albeit with a shifting membership and lacking a coherent alternative approach, has mediated on behalf of some external forces and applied a brake on certain of Trump's policies. Contrary to what has occurred in other policy areas, the same cannot be said of Congress. Here Trump's trade agenda appears to command increasing bipartisan support. This has undoubtedly helped insulate the administration from the open hostility of most trade lobby groups to its policies.

Trump's third promise was to identify and end violations of trade agreements by the US's trading partners using all available tools and agencies. While the reports ordered with some fanfare by Trump in March-April 2017 to provide its enforcement specialists with evidence of unfair trading practices and agreement violations remain unpublished,¹⁰⁸ some progress in anti-violation actions is evident on a number of fronts. The US has launched an increased number of AD and CVD investigations, two Safeguard Investigations, the first for many years, and out-of-cycle reviews of the eligibility of four countries for its trade preference programmes, as well as adopting a more systematic approach to reviewing GSP eligibility generally. It has also used bilateral negotiations to press South Korea into renegotiating KORUS and Mexico into de facto voluntary restraint on its sugar exports.

On the other hand, US use of AD and CVD investigations and orders was already increasing prior to 2017 and, having been an intensive user of the WTO DS mechanism as a complainant up to 2017, the US has not brought an entirely new case before it since Trump's election. Indeed, at the time of writing, it was actively obstructing the work of the DS Appellate Body.

Trump's fourth promise was to renegotiate NAFTA or withdraw from it if a renegotiation favourable to the US proved impossible. By November 2017 this promise appeared to be on the verge of fulfilment, although the terms on which this might occur remained unclear. Between July and October 2017, the US severely escalated its demands to Canada and Mexico on Government Procurement and Rules of Origin and introduced completely new demands on textiles and clothing, dairy and poultry, Dispute Settlement and NAFTA renewal. The explicitly unilateralist nature of most of these demands suggested that they were put forward for the purpose of forcing Canada and Mexico to reject them outright, thereby providing an excuse for US withdrawal. Canada and Mexico may decline to provide this excuse in the short term, preferring to drag out negotiations a little longer. But certainly the agreement now appears to have no long-term future.

Trump's fifth promise was to cite China for CM and deal with this by introducing 'tariffs and taxes'. Following a US Treasury report in April 2017 that stated that China was no longer trying to force down the value of the renminbi in foreign exchange markets, Lighthizer publicly deferred to Treasury Secretary Steve Mnuchin, and Trump began claiming responsibility himself for 'making China behave'. However, the USTR is still pressing ahead with the idea of including chapters prohibiting currency manipulation in the US's bilateral trade treaties.

Trump's sixth promise was to bring 'cases' against China, including at the WTO, on a wide variety of issues besides CM. There have been increases in the numbers of AD and CVD investigations of exports by Chinese firms since Trump assumed office, both absolutely and relative to all AD and CVD investigations. However, up to mid-November 2017 the administration's main approach to dealing with China had been to combine bilateral negotiations with threats of far-ranging unilateral action against Chinese exports generally. At the time of writing, neither channel had yielded any significant concessions.

The WTO has one 'case', brought to it by China against the US in the last days of the Obama administration, whose outcome will be more crucial to future US-China trade relations than any of the fresh AD and CVD investigations launched by the US since January 2017. This concerns the US's ongoing treatment of China as a non-market economy for purposes of calculating dumping margins. Lighthizer has indicated that the US will not comply with an adverse WTO ruling on this issue, opening the way for China to invoke retaliation.¹⁰⁹

Trump's seventh promise was to 'self-initiate' so-called Section 232 and Section 301 investigations and actions, leading to the unilateral imposition of tariffs in respect of one or more products and one or more countries. Both laws have indeed been invoked to launch investigations, one of which has already concluded and the other is ongoing. So far no new tariffs have been imposed as a result of the first investigation, but it seems clear that this is a deferral rather than a change of heart. Barring the unlikely event of China and a range of other countries introducing voluntary export restraints for steel later in 2017, US tariffs are expected to be imposed early in 2018. The outcome of the Section 301 investigation next year can be expected to follow the same course.

Hence, of the seven promises, four (points 1, 2, 3 and 4) have been largely or fully fulfilled, two have been partially fulfilled (points 6 and 7), and one has been dropped in the specific form it was raised (point 5), although the US will clearly demand 'currency manipulation' chapters in all future bilateral deals it signs. This assessment belies the claims of a number of commentators around August 2017 that Trump's trade agenda had stalled.

It is difficult to predict how events will play out in the second year of a Trump administration, but an international trade war following from the indiscriminate application of Section 232 tariffs is one scenario which the US's trading partners need to take seriously and plan for.

On the other hand, each of the promises was accompanied by signals about what could be expected as a result of its fulfilment. Withdrawing from the TPP would bring Japan and others to the bilateral negotiating table; appointing Lighthizer and company and bombarding trading partners with trade remedy cases would force

concessions from them; and igniting the Section 232 and 301 fuses would wring spectacular reverses of policy from China. These expectations have been partly met in a few instances and largely unmet in others.

The administration's lack of success in so far achieving significant concessions from the US's major trading partners is likely to be blamed on internal enemies by Trump and those closest to him. They will point to the restraining hands applied by Mnuchin, Cohn and 'the Generals'. This group does indeed represent a limitation on Trump fulfilling his campaign pledges entirely, but their hand has been applied quite selectively to cases that are likely to have the greatest international political and economic impact, and in any case it has not been an important brake on policy effectiveness. The greatest obstacle here is the willingness of other major trading powers to play along, a tendency which has been strengthened by the US increasing its self-imposed isolation on other central issues in international policy. The US is offering little or nothing in the form of trade-offs on any front for the major concessions it is demanding on trade.

NOTES

- 1 Baldwin, R. (1984) 'The changing nature of US trade policy since World War II', pp. 5-32 of Baldwin, R. and Kreuger, A. (eds.), *The structure and evolution of US trade policy*. National Bureau of Economic Research, Washington.
- 2 2008 Democratic Party Platform www.presidency.ucsb.edu/papers_pdf/78283.pdf, 2008 Republican Party Platform www.presidency.ucsb.edu/papers_pdf/78545.pdf, 2012 Democratic Platform 'Moving America Forward' www.presidency.ucsb.edu/papers_pdf/101962.pdf, 2012 Republican Platform 'We believe in America' www.presidency.ucsb.edu/papers_pdf/101961.pdf. All accessed 23 October 2017.
- 3 Democratic Party Platform July 21 2016, pp 13-14. www.presidency.ucsb.edu/papers_pdf/117717.pdf accessed 8 August 2017. The programme also repeated, in strengthened language, commitments from 2012 to rigorously enforce trade remedies against China.
- 4 A Better Way: Our vision for a Confident America: Tax, June 24 2016, p. 28 <https://www.speaker.gov/sites/speaker.house.gov/files/documents/ABetter-Booklet.pdf> accessed 21 August 2017.
- 5 Lighthizer, R. (2007) Testimony to Senate Committee on Finance, hearing on 'Trade enforcement for a 21st century economy', 12 June, <https://www.finance.senate.gov/imo/media/doc/47516.pdf> accessed 12 October 2017.
- 6 Navarro, P. and W. Ross (2016). 'Scoring the Trump economic plan.' 29 September 2016.
- 7 New York Times, Washington Post and Boston Globe, 2-9-87.
- 8 The first conservative 'China hawk' with an interest in trade recruited to the Trump campaign was Dan DiMitteo, a metallurgist and former chairman of the steel company Nucor (April 2016), and Peter Navarro, a business school professor who apparently came to Trump's attention around the same time through Jared Kushner's browsing on Amazon (Vanity Fair 15-04-17). Navarro was the first economist on the Trump campaign team and co-wrote the campaign's main economic statement (see footnote 8 above), although when the trade section of the Trump transition team was formed in November 2016, its only members were DiMiccio and his own recruit Robert Lighthizer, a trade lawyer. From 2005, Lighthizer had represented US Steel in a series of anti-dumping cases where Nucor was a co-plaintiff, and he had been a deputy United States Trade Representative under Reagan.
- 9 Most prominent amongst these was Robert Scott of the Economic Policy Institute. Lighthizer cited Scott as the source of his argument in favour of a surcharge on Chinese imports in his 2010 testimony to the US-China Economic and Security Review Commission (see below).
- 10 time.com/4386335/Donald-trump-trade-speech-transcript/ accessed 21 August 2017. The speech is also available as a YouTube video.
- 11 'Is the WTO Dispute Settlement system fair?' (Debate with Daniel Ikerson, February 2007). Council on Foreign Relations, <https://www.cfr.org/article/wto-dispute-settlement-system-fair> accessed 6 October 2017.
- 12 For reference, see footnote 5 above. 'Zeroing' refers to calculation of the volume of dumping from a given country in a way that disregards goods from that country not sold at dumped prices.
- 13 The Byrd Amendment was passed in 2000 and struck down by the WTO in 2002 in DS 217, but was not repealed by the US until 2006 (effective 2007). 'Zeroing' by the EU was struck down by the WTO in 2003 (DS 141), but the US continued to apply it and indeed may be still doing so. The US lost zeroing cases at the WTO in 2006 (DS 294), 2009 (DS 350), 2012 (DS 402) and 2015 (DS 429).
- 14 See, for example, US submissions in 2005-06 during the WTO negotiations on Improvements and Clarifications of Dispute Settlement Mechanism. These submissions proposed that 'WTO Panel and Appellate Body decisions shall never go beyond what was necessary to solve a specific dispute in relation to a specific agreement', 'The rights and obligations of WTO Members shall never be either reduced or supplemented by adjudicative bodies', and that 'There shall never be extrapolation of intent, including the intent behind any ambiguity, from any WTO text'. See <https://ustr.gov/issue-areas/enforcement/us-proposals-wto-dispute-settlement-understanding-negotiations> accessed 30 August 2017.
- 15 Lighthizer, R. (2010). 'Evaluating China's role in the WTO over the past decade', Testimony before the US-China Economic and Security Review Commission, June 9. <https://www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf> accessed 2 September 2017.
- 16 'Strictly enforcing US trade laws'; 'Using leverage to open foreign markets'; and 'Negotiating new and better trade deals'.
- 17 <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf> accessed 7 August 2017.
- 18 Besides the US, TPP involved Japan, Mexico, Canada, Australia, New Zealand, Vietnam, Peru, Chile, Malaysia, Singapore and Brunei. The US had pre-existing Free Trade Agreements with Mexico, Canada, Australia, Peru, Chile and Singapore.
- 19 In a Congressional nomination hearing document submitted in March 2017, Lighthizer stated that, during the TPP negotiations, the US had made notable progress in advancing its agricultural trade interests and that this too would remain a US priority when bilateral talks with Japan were initiated (politico.com 14-03-17).
- 20 The agricultural products were Japanese persimmons and Idaho potatoes. On US autos, the Japanese agreed to 'streamline' their noise and emissions testing procedures (<https://www.whitehouse.gov/the-press-office/2017/10/16/joint-press-release-vice-president-mike-pence-and-deputy-prime-minister> accessed 19 October 2017). In November 2017 it emerged that the mid-October meeting had also resulted in a Memorandum of Understanding on transport issues (MorningTrade.at politico.com, 14-11-17).
- 21 <https://ustr.gov/about-us/policy-offices/press-office/press-release/2017/September/united-states-and-malaysia> accessed 12 September 2017.
- 22 <https://ustr.gov/about-us/policy-offices/press-releases/2017/September/usda-ustr-announce-vietnam> and <https://www.usmef.org/key-topic-vietnam-proposes-changes-to-import-mrls/> both accessed 11 September 2017.
- 23 Trump initially announced that the lawyer representing his own businesses, Jason Greenblatt, would also play a role in international trade negotiations as his 'Special Representative on International Negotiations'. Subsequently Greenblatt appears to have acted officially only as an adviser to Jared Kushner on the Middle East.
- 24 https://www.cov.com/media/files/corporate/publications/2017/07/trump_puts_china_under_microscope_with_wto_envoy_nom.pdf accessed 21 August 2017.
- 25 In his Congressional nomination hearings, Ross stated that the US should not put up with 'malicious trading activities, state-owned enterprises or subsidised production' in its trade relations. He added that the TPP's Rules of Origin for autos, which he considered disadvantaged US exports, alone justified withdrawal, and he emphasised the usefulness of trade defence remedies as 'negotiating tools' money.cnn.com/2017/01/18/investing/Wilbur-ross-hearing-trump-commerce-secretary/index.html accessed 4 February 2017.
- 26 New York Times 20-10-17.
- 27 Headed by Gary Cohn, a former investment banker.
- 28 At least from the appointment of John F. Kelly in July 2017.
- 29 At least from the appointment of Lt Gen. H. R. McMaster in May 2017.
- 30 Steven Miller, a career political aide.
- 31 Steve Bannon, a former investment banker and Hollywood producer. Dismissed from office August 2017.
- 32 Steve Mnuchin, another former investment banker and hedge-fund owner.
- 33 Sonny Purdue III, a career politician.
- 34 James Mattis, a retired general.
- 35 Shawn Donnan, Financial Times 13-08-17.
- 36 Lobbying by business against 'border adjustment' began in the period between Trump's election victory and his inauguration and was led by the commodity trader Koch Industries (Bloomberg 08-12-16), whose owners were important donors to individual Republican politicians' campaigns, though not to Trump's own. In the first weeks of his Presidency, Trump stated it had no place in his plans despite its inherent protectionism, saying 'Any time I hear "border adjustment", I don't love it. Because usually it means we're going to get adjusted into a bad deal. That's what happens...It's too complicated' ([Wall Street Journal](http://WallStreetJournal) 16-01-17).

- 37 During the 2008 presidential campaign, Lighthizer wrote an op-ed in the New York Times (06-03-08) attacking the presumptive Republican candidate John McCain as an 'unbridled free-trader' whose approach was 'not in the best traditions of American conservatism'. The Republicans voting against his nomination in 2017 were John McCain, Ben Sasse and Cory Gardner (Politico 11-05-17).
- 38 Together with the Department of Commerce, the US International Trade Commission is one of the two agencies that private entities have to petition in order to launch trade enforcement remedies (see below).
- 39 All quotes in this summary are from 'A Better Deal on Trade and Jobs', <https://democrats.senate.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Trade-and-Jobs-FINAL.pdf> accessed 2 August 2017.
- 40 'Presidential Executive Order Regarding Omnibus Report on Significant Trade Deficits', <https://www.whitehouse.gov/the-press-office/2017/03/31/presidential-executive-order-regarding-omnibus-report-significant-trade> accessed 5 April 2017.
- 41 www.judsupra.com/legalnews/commerce-and-ustr-hold-public-hearing-66039 accessed 29 June 2017.
- 42 <https://www.whitehouse.gov/the-press-office/2017/05/01/presidential-executive-order-addressing-trade-agreement-violations-and-abuses> accessed 6 May 2017. The investment agreement element of this order, and US complaints in relation to other parties to its investment agreements, are not discussed in this paper.
- 43 <http://ustr.gov/sites/default/files/reports/2017/AnnualReport/AnnualReport2017.pdf> accessed 26 May 2017.
- 44 AD/CVD collection from importers is traditionally a task for US Customs, but in April 2017 a further Presidential Executive Order instructed the US Department of Homeland Security to develop a plan within ninety days to require all importers 'posing a risk to the revenue of the US' to post bond or similar payments against possible determinations of liability for AD/CVDs. The order stated that US importers had to date failed to remit \$2.3 bn. of officially designated AD/CVDs (Financial Times 04-04-17).
- 45 Available data do not allow a longer time-series comparison for AD and CVD investigations during the January to October period. But January to July data are available going back to 2000. In 2017, 54 investigations were launched in the latter period, compared with 40 in 2016 (Wall Street Journal 31-07-17). In the five years prior to 2010, a total of only 60 investigations were initiated during the period January-July each year. In 2011-15 there were a total of 106 during the same period (enforcement.trade.gov/stats/inv-initiations-2000-current.html accessed 3 Aug 2017).
- 46 enforcement.trade.gov/tlei/factsheet-tlei-20101108.pdf accessed 6 August 2017.
- 47 In 2002 for steel imports and in 2009 for tyre imports.
- 48 https://www.wto.org/english/news_e/news17_e/good_16nov17_e.htm accessed 20 November 2017.
- 49 The Russian Federation was granted eligibility for the US GSP in 1993.
- 50 www.smartasn.org/news/Post-hearing_NR_071717.pdf accessed 22 August 2017. The ban followed a 2016 decision by the East African Community. A third AGOA-eligible EAC member, Kenya, rescinded the ban prior to the review.
- 51 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/june/ustr-announces-new-trade-preference> accessed 8 July 2017. A private petitioning process in relation to preferential access was first provided for by the Obama administration in the 2015 Trade Preferences Extension Act, but not formally adopted by USTR until March 2017.
- 52 <https://ustr.gov/about-us/policy-offices/press-releases/2017/october/ustr-announces-new-enforcement> accessed 5 November 2017.
- 53 For a historical discussion, see Bhagwati, J. and Patrick, H. (1990) *Aggressive unilateralism: America's 301 trading policy and the world trading system*. University of Michigan Press.
- 54 In 2010, with implementation occurring in 2012.
- 55 Schott, J. 'Retuning the Korus FTA', Peterson Institute for International Economics 10-07-17. Bloomberg reported in October that, on autos, the US was seeking an increase in Korea's current quota of 25,000 US vehicles per year that are allowed into its market without having to comply with local safety and testing regulations. It further reported that the US wanted to accelerate Korea's current ten-year phased reduction of tariffs on US agricultural imports (05-10-17).
- 56 english.hani.co.kr/arti/English_edition/e_international/804240.html accessed 29 August 2017.
- 57 Mexican sugar has a naturally occurring high level of sucrose, meaning that prior to the 2014 agreement it mostly bypassed the need for further (US) refining (https://www.bakingbusiness.com/articles/news_home/Purchasing/2014/12/US_Mexico_sign_sugar_trade_agreement/ accessed 29 August 2017).
- 58 <https://www.commerce.gov/news/fact-sheets/2017/07/final-amendments-mexican-sugar-suspension-agreements-fact-sheets> accessed 27 August 2017. Wilbur Ross is a family friend of the Franjul brothers, the US's largest sugar refiners (Financial Times 31-05-17).
- 59 Morning Trade at politico.com 30.10.17.
- 60 www.cbc.ca/news/politics/trump-trudeau-softwood-lumber-dispute-threat-inappropriate/6May2017 accessed 28 August 2017.
- 61 The Canadian defence has been that any subsidy on softwood lumber is directed overwhelmingly to domestic end-users and that its softwood exports to the US are a negligible share of its total production.
- 62 CNN reported a memo to this effect circulating in the Trump team edition.cnn.com/2016/11/15/politics/donald-trump-trade-memo-transition/ accessed 15 February 2017.
- 63 https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm accessed 30 August 2017.
- 64 The only case brought by the US as a complainant since Trump's inauguration (DS 531) is a revival of a lapsed challenge against Canada over regulations governing the sale of wine in British Columbia, first made in the last days of the Obama administration (DS 520). Opening DS 531 means that Canada can no longer block the appointment of a panel to consider the case. In addition, the US has taken further steps in DS 517, which concerns China's tariff rate quotas for certain agricultural products. These steps again mean that a panel must be appointed. The cases joined by the US as a third party since Trump's inauguration are Brazil's complaint against Canada on trade in commercial aircraft (DS 522) and Indonesia's complaint against Australia over its AD measures on A4 copy paper (DS 529). A document lodged by Brazil in relation to DS 522 (WT/DS522/6) cites, inter alia, the subsidies to Bombardier for its C-series aircraft, which were to form the basis of the US's high-profile AD and CVDs on Canada and the UK's exports of Bombardier planes and parts in September 2017 (www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm accessed 9 Oct 2017; on the US-Canada-UK Bombardier case, see Reuters 26-09-17 and bbc.co.uk/news 06-10-17).
- 65 Speaking at the Centre for Strategic and International Studies in Washington on 18 September 2017, Lighthizer said that the US did not support filling the Appellate Body seats, as 'we're objecting to the process. (This is) because we don't agree with the way the AB has approached this. We think the AB has not limited itself to precisely what's in the agreement' (Bridges 21-29, 14-09-17 and 21-30, 21-09-17).
- 66 The US-Australia FTA.
- 67 This concerned the imposition of Canadian AD duties on imports of Gypsum board from the US. The request was withdrawn when, after forest fires in Canada, the Canadian International Trade Tribunal found that the duties were not in the national interest: <https://www.osler.com/en/resources/cross-border/2017/trade-case-alert-termination-of-the-nafta-chapter> accessed 30 August 2017.
- 68 USTR 'Summary of objectives for the NAFTA renegotiation' July 17 2017. <http://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf> accessed 18 July 2017. All quotes are from this document.
- 69 These would elevate the status of existing side agreements.
- 70 This is discussed in detail in Hufbauer, G. and E. Jung (2017) 'NAFTA mischief in fruit and vegetables', Peterson Institute for International Economics Trade & Investment Blog, 26-07-17. Note that Para 17 on Trade Remedies makes a complementary proposal to exempt perishable and seasonal products from AD/CVD proceedings.
- 71 Canada currently protects 140 EU geographical indications and agreed to continue to do so in the EU-Canada Comprehensive Economic and Trade Agreement.
- 72 NAFTA's Government Procurement chapter currently covers only 53 US government entities, whereas the US's commitments under the WTO government Procurement Agreement cover 85 entities www.gao.gov/assets/690/680044.pdf accessed 3 September 2017.

- 73 Reuters (16-08-17) nevertheless quoted Lighthizer on the day the negotiations started, saying that the US was seeking 'substantial US content for autos'. Current US vehicle imports from Mexico and Canada are estimated to have approximately 25% US content (Freund, C. 'A US content requirement in NAFTA could hurt manufacturing', Peterson Institute for International Economics Trade & Investment Policy Watch 14-09-17).
- 74 Because it was written in 1994, the current reference list does not include electronic components, which today make up around 30% of all autos by value and are largely imported from Asia.
- 75 For a comprehensive discussion see Hufbauer, G. and J. Schott (2003). 'NAFTA Dispute Settlement systems'. Institute for International Economics, Washington.
- 76 The Financial Times (19-10-17) later reported that the NAFTA content proposal's time frame was three, not two years.
- 77 worldtradelaw.typepad.com/ielpblog/2017/09/nafta-chapter-20-proposals accessed 3 October 2017.
- 78 Perhaps the only one of the new proposals to be applauded was that intended to weaken the Chapter 11 investor-state DS provision. This had long been opposed by US trade unions and figures such as Joseph Stiglitz and Jeffrey Sachs for its non-transparency, lack of oversight and establishing a parallel and privileged set of legal rights for extra-national economic actors.
- 79 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/closing-statement-ustr-robert> accessed 18 October 2017.
- 80 Mattoo, A. and A. Subramanian. (2009). 'Currency undervaluation and Sovereign Wealth Funds: a new role for the WTO.' *The World Economy*, 32, 1135-1164.
- 81 <https://www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/authorizing-statute.pdf> accessed 1 September 2017.
- 82 Department of the Treasury, Report(s) to the Congress on International Economic and Exchange Rate Policy, April 1989, April 1990 and April 1991, at <https://www.treasury.gov/resource-center/international/exchange-rate-policies/Pages/index.aspx> accessed 20-21 August 2017.
- 83 July 1994 and December 1994 Reports.
- 84 October 2003 Report.
- 85 Staiger, R. and A. Sykes (2008). "Currency Manipulation" and world trade'. NBER Working Paper 14600. The paper was republished in 2010 in *World Trade Review*, 9 (4): 538-627.
- 86 For example, high rates of domestic saving and constrained consumption.
- 87 For example, wider macroeconomic objectives such as low inflation, or wider domestic development objectives.
- 88 The authors also show that, if 'sticky' prices are assumed rather than flexible ones, the trade effects of devaluations will depend on whether the currency that exporters use to invoice importers is the exporting country currency, an international currency or the importing country currency. In one of these scenarios there are trade effects, but not ones corresponding to an export subsidy or a tax on imports. Formal demonstrations are provided in respect of both flexible and sticky prices.
- 89 The decision is reported on p. 609 of the 2010 version of Staiger and Sykes cited in footnote 85.
- 90 OPIC is a public loan and guarantee scheme for US foreign investors.
- 91 For a summary of the law, see 'Foreign Exchange policies of Major Trading Partners of the United States'. Department of the Treasury, Office of International Affairs, 29 April 2016.
- 92 The Obama administration resisted pressure from both sides of Congress and from leading trade economists to include a CM chapter in the TPP.
- 93 In a 2010 op-ed, Krugman called for a unilateral tariff of 25% on all Chinese imports to combat its alleged CM (New York Times 14-03-10).
- 94 Gagnon, J. (2012) 'Combating widespread currency manipulation', Peterson Institute for International Economics (PIIE) PB12-19; Bergsten, F. (2014) Addressing currency manipulation through trade agreements', PIIE PB14-2. Note that Gagnon (ibid.) inter alia labels Denmark an 'extreme currency manipulator'.
- 95 For Mattoo and Subramanian, see footnote 80; Hufbauer, G. and Schott, J. (2012) 'Will the WTO enjoy a bright future?' PIIE PB 12-11 ; Irwin, D. (2011) 'Esprit de currency', *Finance and Development* 48:27, 30-33. Note that the reasons the authors mentioned in this paragraph advance for doing so differ considerably, as do whether they also ascribe a role to the IMF in drawing up the relevant rules and whether they also believe such rules should encompass Sovereign Wealth Funds.
- 96 Reuters 23-02-17, *Financial Times* 02-04-17.
- 97 Some of these also cover exports of the same products from other countries.
- 98 https://www.usitc.gov/trade_remedy/731_ad_701cvd/investigations.htm accessed 31 October 2017.
- 99 Of the 205 new AD and CVD investigations launched between 29 July 2012 and 28 July 2016, sixty were targeted at China (29.3%) <https://enforcement.trade.gov/stats/inv-initiations-2000-current.html> accessed 2 Nov 2017. China's share of US merchandise goods imports in 2016 was just over 21%.
- 100 The EU has changed China's designation to a 'country with substantial market distortions', but substantively retained the old methodology (which it calls the 'analogue country' method).
- 101 <https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf> accessed 30 October 2017.
- 102 <https://www.whitehouse.gov/the-press-office/2017/04/07/briefing-secretary-tillerson-secretary-mnuchin-and-secretary-ross> accessed 3 May 2017.
- 103 In any event, the Chinese 'offer' only repackaged a decision taken by China's State Council in February 2017 following calls from the China Iron and Steel Association in December 2016. Surprisingly nobody in Trump's trade team appears to have picked up on this (www.bnamericas.com/en/features/metals/chinese-steel-industry-argues-for-output-cuts/ 23-12-16, accessed 3 October 2017.)
- 104 Brun, L. (2016) 'Overcapacity in steel: China's role in a global problem'. Centre on Globalization, Governance and Competitiveness, Duke University.
- 105 The defence industry is said to contribute only 3% of US steel demand.
- 106 See the Special 301 Reports for 2007, 2014 and 2015. A consolidated collection of all Special 301 Reports is available at <https://keionline.org/ustr/special301>.
- 107 Self-initiated investigations, including of trade partners' treatment of US IP, can be initiated by triggering Section 301 of the 1974 Trade Law independent of its 'Special 301' amendment in 1988.
- 108 At least one, the Report on Trade Abuses and Violations, was sent to the White House on time (Morning trade at politico.com 26-10-17). As this source stated, 'it is still unclear whether it will ever be released publicly'.
- 109 The earliest likely date for a Panel finding in this case is late April 2018.

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