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The Trade Policy of the United States under the Trump Administration

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I. Introduction*

Even the most casual observer will readily see that the international trading system is now in great turmoil, and that much of the uncertainty emanates from the United States. This is not the product of a single presidency. The country that had taken the lead after the Second World War, and whose economy helped to usher in a lengthy period of peace and prosperity, began to devote less attention to trade issues at least a full decade before Donald Trump took office in 2017. Even when the Obama administration took up major initiatives such as the Transatlantic Trade and Investment Partnership (TTIP) and a greatly expanded Trans-Pacific Partnership (TPP), it was reluctant to treat these negotiations with much urgency or to invest significant political capital in them. Trump's election nevertheless marked an important inflection point, with the American posture rapidly turning from benevolent indifference to outright hostility. The trading partners of the United States, including erstwhile allies as well as potential adversaries, continue to puzzle over how we got to this juncture, how long we will be here, and where we may next be headed.

While only time and experience can fully answer the latter questions, we can make a good start by focusing on the first. The principal purpose of this paper is to place in context these upheavals in U.S. policy so as to assess what may come next. It argues that the evolution of American trade policy is best understood over the long run as a function of the international distribution of power and wealth, and especially the rise and fall of the country's leadership role, but that in the short run policy is dominated by the exigencies of domestic politics. That latter point is especially relevant in these times, when the specific preferences of one man and his political base overwhelm all other considerations.

These twin foci on the international and domestic levels are not contradictory, as they coincide on a few critical points. They are each set in motion by the relative decline of the United States, which is in turn the consequence of two related economic processes. The first of these is the Law of Uneven Growth, that observed tendency of leading economies to grow at a slower rate than others — and especially the countries that vie for hegemony. That almost inescapable process of asynchronous growth is complemented at the domestic level by Creative Destruction, in which once-dominant industries are gradually displaced by competitors abroad and by new industries at home. While it is theoretically possible for the United States to navigate between these two hazards, making compensatory adjustments in its own policies and (if its partners consent) the structure of the international system, such accommodations require clear vision and a deft hand.

Relative decline may be all but inescapable, but still leaves wide scope for the responses of U.S. policymakers. Had the American electorate made a more conventional choice in 2016, we would now be reviewing the continued attempts of orthodox statesmen to tweak the existing domestic and international system. The public instead opted for a man who promised to overturn that system altogether. Many outside observers hoped, and some may even have believed, that Trump's threats were mere campaign rhetoric that he would disavow once in office. The events of 2017 and especially 2018 have put those comforting thoughts to rest.

Viewed at a reasonably high level of abstraction, the arc of trade policy thus far in the Trump administration appears as a series of year-long phases by which almost inchoate sentiments have been progressively transformed into ever more concrete policy. The first such phase lasted throughout 2016, which was dominated by the first presidential campaign in nearly a century to center on blatant appeals to protectionism, nationalism, and isolationism. The key slogans "Make America Great Again" and "America First" offered a glimpse of what Trump aimed to do in office. The principal theme of 2017 was the transliteration of these messages into somewhat more precise principles of governance. That

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started with an unapologetically protectionist inaugural address, and continued through successive executive orders espousing such principles as "Buy American and Hire American." It was not until 2018, however, that this disquieting ideology gave way to truly provocative action. That year began with the granting of protectionist petitions that had been filed the previous year by producers of solar panels and washing machines, and then turned to broader confrontations over intellectual property rights, steel, aluminum, and automobiles. By year's end, the United States had incited a full-fledged trade war in which China is the principal adversary but few countries can preserve their neutrality.

The question now is what sort of phase we will enter in 2019, which is the last year in which policymaking will not be fully embroiled in another presidential election. The answer will be determined in part by how the Trump administration conducts several negotiations that it initiated in 2018, including retaliation-based talks with China and renewed bargaining with its former TTIP and TPP partners. Both the adversaries and the allies of the United States face fundamental questions: To what extent should Brussels, London, Tokyo, and Beijing be prepared to confront Washington, and condition any deals on an end to unilateral threats, and to what extent should they seek to reduce frictions through judicious accommodations? That choice between conflict and appeasement may be shaped not just by the pugnacity of the United States, and by the strategies that its negotiating partners adopt, but also by the rising stakes of a declining economy. There are growing signs that the lengthy (if uneven) economic recovery that has been underway since 2009 may be coming to an end, although analysts differ on when that might happen and how much of the blame might be assigned to the resurgence of protectionism. The prospects for the near term are also clouded by growing concerns over security abroad and political stability at home, as well as the possibility that disruption in the one sphere might be exploited in the other.

The analysis that follows is primarily focused on how current developments in U.S. policy may affect the international trading system, with particular emphasis on four challenges. It is bracketed at both ends by "big picture" reviews of the environment in which that system operates, starting with competition between the United States and China and ending with the impact of domestic politics. The middle sections review the challenges posed by the revival of mercantilism and protectionism in U.S. policy, as well as the proliferation of discriminatory programs and agreements. Taken together, these challenges put at risk a multilateral system in which the United States and its partners had collectively sought to rid the world of trade barriers and discrimination.

II. The Challenge of Global Governance and the Rise of China

This is not the first time that the United States has faced a challenge to its leadership, nor the first time that a precipitous American response seemed to endanger the multilateral trading system. There are several respects in which the current dynamics replicate those of the 1980s, when U.S. trade policy was dominated by rivalry with Japan over industrial supremacy, but there are also some key differences. Chief among them is the conflation of international struggles. American policymakers of a generation ago faced down one rival that was militarily strong but economically weak (i.e., the Soviet Union), and another with just the opposite characteristics (i.e., Japan). By contrast, U.S. concerns over both power and wealth are today combined in competition with China. The past and present melees are nonetheless alike in the collateral damage that they inflict on third parties. Just as the prior fight with Japan cast doubt on U.S. support for the old General Agreement on Tariffs and Trade (GATT), so too has the current clash undermined the World Trade Organization (WTO). In fact, some of the most provocative measures imposed by the Trump administration have a more serious impact on neighbors and allies than they do on China.

The causes and consequences of Sino-American competition can best be understood by way of the theory of hegemonic stability, a paradigm that explains why global markets are often closed but sometimes open. It rests upon the assertion that an open world market is a public good from which every country benefits, but it is in the nature of public goods to invite free-riding. Open markets therefore tend

to be historically underprovided, with each country reserving the right to determine its own levels of protection, unless one especially influential country steps forward to provide leadership. A hegemon will do so both because open markets are in its economic interest and because it has the necessary power to convince — or even to compel — others to cooperate. This theory suggests that markets would not have been open in the nineteenth century without British hegemony, and that the leadership role passed to the United States in the Second World War. The actions of the hegemon are both self-serving and self-defeating: A leader must establish an open world market to reap the rewards of its own competitiveness, but the system that it fosters will also create opportunities for its challengers. Just as the British-sponsored trade regime aided Germany, so too has China's growth been enabled by the current system.[1] Much of the Trump administration's policies may be seen as an attempt to correct for the policies of preceding administrations that, in the view of current officeholders, actively contributed to the challenger's ascendance.

We may reasonably expect the state of relations between the United States and China to influence — and perhaps to determine — the future evolution of the global trading system. Size alone makes this obvious: These two countries jointly account for 21% of world exports, 23% of its imports, 23% of the population, and 39% of the global economy.[2] More to the point, they also comprise 100% of the contenders for hegemony. And while it cannot be taken for granted that China will continue to grow at the levels it has achieved in recent decades, nor that the relative position of the United States will steadily and irreversibly fall behind, the trends are undeniable. They prompt leaders in these two countries, and in all others, to anticipate a changing global environment in which Beijing's influence will rival or even surpass that of Washington.

II.A The Impact of Relative U.S. Decline on the Multilateral System

The last transfer of global leadership was deceptively easy. It was fortunate for the outgoing and incoming hegemons, and for the world, that London and Washington were on the same side in the most destructive war in history. The cousins worked closely during 1942-1947 to design the post-war global system, and devoted especially close attention to the trade component of that regime. It would be particularly ironic if it were the United States, and not China, that were to dismantle the remnants of that system — or at least require it to get on without the old leader. There is a better-than-even chance that sometime in the Trump tenure the United States will explicitly threaten to leave the WTO. Would it actually follow through with such a threat? That is a tactical matter that may be affected by any number of unforeseeable factors, but no one should doubt the Trump administration's eagerness to undo global deals. Skeptics need look no farther than the president's immediate disavowal of the TPP, followed by withdrawals from other agreements on such diverse topics as climate change and Iran nuclear weapons. There is a growing number of global bodies from which the United States has already departed, from the Human Rights Council and UNESCO to the Universal Postal Union, and it should shock no one if the WTO were to join the list of jilted institutions.

This is not to say that a withdrawal is inevitable, nor that leadership by just one country is the only option. There is a chance that the United States and China could become next Group of Two (G-2) that manages the multilateral trading system. The original G-2 of the immediate post-war era was strictly Anglo-American, but over the next few decades the European Union (and its predecessor bodies) took the British place. It long seemed that agreement between Washington and Brussels was both the necessary and sufficient condition for bringing any round of multilateral trade negotiations to a successful conclusion. Other countries frequently objected to a restricted, "green room" approach in

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1 For an elaboration on this argument see the author's *Trade and American Leadership: The Paradoxes of Power and Wealth from Alexander Hamilton to Donald Trump* (Cambridge University Press, 2019). The book is cited hereinafter as *Trade and American Leadership.*

2 All shares calculated from World Bank data accessed at https://data.worldbank.org/.

which the major GATT decisions were made chiefly by the Quad (i.e., the G-2 plus Canada and Japan) plus a few other developed and developing countries, but the arrangement was undeniably productive. That all changed with the dawn of a new century, as became apparent at the failed WTO ministerial meetings of 1999 (which dissolved into chaos) and 2003 (where a transatlantic proposal epically failed to win over the rest of the WTO membership). Those episodes, especially the latter one, underlined the point that transatlantic concordance is no longer a sufficient basis for concluding multilateral deals. Some wonder if it will even be necessary in a new order where the post-Brexit European Union holds third place.

The decay of multilateralism may be traced in part to a diluted sense of a shared strategic purpose. WTO members are not divided by the old antagonisms of the Cold War, but neither are they united by them. The rising powers include some original GATT contracting parties that had already been influential in the old order, especially Brazil and India, as well as others that did not accede until after the WTO was established. In addition to China, the new entrants include Russia, Saudi Arabia, Taiwan, and Vietnam. Universality, diversity, and democracy come at a cost, as there is an inverse relationship between the number of decision-makers in a system and the efficiency with which it can act. No objective observer could say that the nearly all-encompassing WTO has executed its legislative function as effectively as did the smaller, more cohesive GATT club. It did produce some results in the immediate post-Uruguay Round period, such as the Information Technology Agreement and several protocols on trade in services, but the launch of the new round in 2001 marked the start of an especially fruitless run. Modest accomplishments such as the Trade Facilitation Agreement are only a pale shadow of what the WTO members might achieve if they animated the moribund Doha Round with as much ambition as its GATT-era predecessor.

II.B How the Sino-American Rivalry Affects the Multilateral System

There are strong reasons to doubt that the same torch that London handed to Washington might be passed just as easily, and with the same effect, from Washington to Beijing. Even if the United States were willing to make the hand-off, and China were prepared to exercise leadership in the multilateral system, the results might be quite different. The British and American versions of hegemony were at least rhetorically committed to the concept of a first among equals, and while they each were known to throw their weight around they typically favored persuasion over coercion. Future Chinese leaders may find inspiration in other, less inclusive and cooperative archetypes. The models in China's own past, whether one looks to the imperial period or the second half of the twentieth century, suggest a preference for hierarchical relations and a readiness to exert authority. Much depends on whether China is truly committed to a global market economy, or instead prefers a quasi-imperial system with more top-down direction. One may find plenty of contradictory evidence in a country that is at once home to the world's largest Communist system, yet may soon host the world's largest market.

In the near term, the more pressing issue is how China's WTO membership alters the U.S. perception of that institution and its willingness to make concessions on a most-favored-nation (MFN) basis. This situation is similar in one respect to how Congress approached MFN treatment early in the Cold War, when critics charged (however implausibly) that any tariff reductions made in the GATT might redound to the benefit of Moscow. That problem was easily solved in 1951, when legislators obliged the Truman administration to strip the Soviet bloc of its MFN privileges; this affected very little actual trade, and was uncomplicated by these countries' GATT status (apart from the special case of Czechoslovakia). Now that China is a WTO member, and eschews the Soviet-style autarky that it had once emulated, no such easy solutions are available. The only ways to ensure that China does not benefit from any agreements reached in the WTO are to negotiate them only on a plurilateral basis (which China opposes), or to abstain from multilateral negotiations altogether. The United States appears to have pursued that second option, albeit in a purely informal and unacknowledged manner, for the better part of a decade. Even after Trump leaves office, there may be considerable reluctance in Washington to negotiate new liberalization on a non-discriminatory and multilateral basis.

Unless the United States and China settle on some formula that permits them to move ahead together in the WTO, they may allow that institution to go slack while they each concentrate instead on free trade agreements (FTAs) or other bilateral approaches. To the extent that the United States freezes its current levels of MFN treatment, and liberalizes its tariffs and other trade barriers only on a discriminatory basis, it will treat any countries outside its FTA circle — China above all — as the least-favored nations. It is easy to imagine policymakers imposing entirely new barriers so as to widen the difference between how China and other countries are treated. One theory has it that the Trump administration aims to do precisely that with its current retaliatory measures against China, intending to keep them in place indefinitely. If so, that could prove to be a very costly strategy. The already close links between the U.S. and Chinese economies raise the price that the United States pays whenever it imposes restrictions, and the inevitable counter-sanctions merely add to the butcher's bill in this trade war.

III. The Challenge of Resurgent Mercantilism and Protectionism

The economic nationalism that underpins the Trump administration's policies is quite obvious, but should not be mistaken for mere protectionism. That narrow policy, which might most simply be defined as the imposition of border barriers to the entry of foreign goods and services so as to benefit domestic suppliers, can clearly be seen in both the rhetoric and the actions of this president. The true essence of this administration's approach to trade and foreign policy, however, is more properly characterized as mercantilism. This entails not merely a commercial objective, but a full-fledged doctrine of statecraft that is founded upon a specific view of the relationship between power and wealth.

III.A The Reversion to Mercantilism

Classical mercantilism encompassed a mixed bag of thinkers and practitioners, but its adherents nevertheless shared some fundamental assumptions about the nature of conflict and the proper aim of economic statecraft. The doctrine's essentials can be reduced to a simple syllogism that is embraced just as enthusiastically in the new Washington of Donald Trump as it was in the old Versailles of Jean-Baptiste Colbert:

- **Major Premise**: All political and economic relations are hierarchical dealings in which one either dominates or is subordinate. The state is the dominant domestic institution, and the stronger, richer states dominate weaker, poorer states.
- **Minor Premise**: Power and wealth are inextricably linked, being both interchangeable and equal in importance. Each of these desiderata is zero-sum, such that any state's gains in power and wealth necessarily come at the expense of other states.
- **Conclusion**: Trade is an essential component in the power relations between states, and to that end the state should intervene to maximize exports (especially of finished goods), minimize imports (except for raw materials), and promote a positive trade balance.

The current reversion to mercantilism can be explained by both long-term international trends (especially the Law of Uneven Growth) and by the short-term political events within the United States. Where these two trends meet is in the process of Creative Destruction, a phenomenon that has been especially disruptive for labor-intensive U.S. industries that face competitive challenges from lower-wage countries. Competition killed some of those firms, but the economy as a whole adjusted by becoming more services-intensive. The remaining manufacturers coped by outsourcing their inputs, moving operations off shore, or investing in labor-saving machinery. This worked well for employers and policymakers, but not for all workers. Whatever job-shedding strategy management might favor, every option other than bankruptcy will always be more disruptive for labor than for management. Some displaced hands can find work in more competitive industries, but many others suffer either declining wages or permanent joblessness. And while the rising trade deficit is not solely responsible for the secular decline in manufacturing, it is the cause most visible to the general public.

This economic transition was complemented by a political process through which dying industries and displaced workers were temporarily placated in the 1980s and 1990s by a resurgence of protectionism, but by the turn of the century they had lost much of their influence in Washington. One reason why Donald Trump managed to secure the nomination of the supposedly pro-trade party, and then to win in the industrial states he needed to win the presidency, was that he mobilized a reserve army of the formerly employed that other, more conventional politicians had long ago abandoned.[3]

One of the more notable aspects of the current administration's priorities is a sharp focus on manufactures. This is all the more remarkable when one considers that virtually all of the president's own successes have been in service sectors (especially real estate and entertainment). That has not prevented Trump and others around him from treating steel, automobiles, and other heavy industries as somehow more "real" and masculine undertakings that are worthier of attention. That may be partly explained by political calculations, with policymakers having an eye to how their actions today may affect the electoral map in 2020, but it also seems rooted in strongly nostalgic notions that find Creative Destruction easier to deny than to reverse. That sentiment takes concrete form in the revival of the trade-remedy and reciprocity laws.

III.B The Revival of Trade-Remedy and Reciprocity Laws

When the Trump administration turned in 2018 from rhetoric to action it did so primarily by resuscitating older trade laws that were largely forgotten but not gone. One such instrument is a long-dormant "reciprocity" statute (Section 301 of the Trade Act of 1974) that gives the president broad powers to define and enforce U.S. rights. Trump used this law in a complaint against Chinese intellectual property policies, with the retaliatory measures that he imposed in July being the most precisely targeted shot in a spreading trade war. He also resurrected another provision of that 1974 law (Section 201) when in January he granted global safeguards protection to producers of washing machines and solar panels. These represented the first U.S. invocations of this statute, and its counterpart in international law, since the Bush administration used it to protect steel in 2002. The Trump administration's preferred instrument for protecting the steel and aluminum industries is an even more obscure trade law that is based upon claims of national security law. The White House announced in March that it would use the president's authority under Section 232 of the Trade Expansion Act of 1962 to restrict steel and aluminum imports from nearly all sources.

These were only the most high-profile manifestations of a broader trend in which the United States has reverted to trade laws as a means of managing competition. The characteristics of these laws are summarized in Table 1, and Table 2 shows their evolving use since 1975. The United States pursued an average of 39.5 cases per year under these laws during the decade that followed enactment of the Trade Act of 1974. Curiously enough, that was precisely the same rate at which they were invoked in the first two years of the Trump administration. The more notable comparison is to the first two decades of the WTO era, when the United States was only half as prone to employ these laws as it was in either 1975-1985 or 2017-2018. The data also show important shifts in the relative emphasis that U.S. petitioners and policymakers have placed on distinct trade-remedy and reciprocity laws. As a general rule, the antidumping (AD) and countervailing duty (CVD) laws have become both the most frequently invoked and the least provocative of these statutes. By contrast, three other statutes each raise concerns over U.S. fealty to the multilateral system. The renewed U.S. reliance on safeguards and reciprocity implies that the Trump administration is prepared to flout WTO norms and rules; those concerns are even more severe in the case of Section 232, for reasons that are more fully discussed in the next section.

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[3] The author explores the domestic political economy of protectionism at greater length in chapter 6 of *Trade and American Leadership.*

Table 1: The Principal U.S. Trade-Remedy Laws

Listed in Order of Political Discretion

Law	Purpose and Process	How Affected by Trump
Antidumping Duties (§731, Trade Act of 1930)	If the ITA finds that imports are dumped (i.e., sold at less than fair value), and the USITC finds that they cause or threaten material injury to U.S. industries, the products are subject to duties equal to the dumping rate	In a potentially precedential action, the Department of Commerce self-initiated a case in 2017 against common alloy aluminum sheet imported from China
Countervailing Duties (§701, Tariff Act of 1930)	If the ITA finds that imports benefit from prohibited subsidies, and the USITC finds that they cause or threaten material injury to a U.S. industry, the products are subject to duties equal to the subsidy rate	The Department of Commerce complemented the self-initiated AD case against Chinese aluminum with a CVD case against the same product
Global Safeguards (§201, Trade Act of 1974)	The USITC can recommend to the president that duties, quotas, or other remedies be granted, to aid an industry that is found to suffer serious injury from increasing imports	The administration revived this dormant law when in 2018 it granted petitioners' requests for protection against imports of washing machines and solar panels
National Security Clause (§232, Trade Expansion Act of 1962)	The secretaries of Commerce and Defense can recommend that limits be imposed on imports that impair national security (e.g., by suppressing U.S. production of strategic goods)	The administration invoked this rarely employed statute to impose restrictions on steel and aluminum, and threatens to do the same for automotive imports
Unfair Trade Practices (§337, Tariff Act of 1930)	If the USITC finds that imports violate patents, trademarks, or copyrights, or are otherwise unfairly traded, it can issue cease-and-desist order and/or exclude these products from the U.S. market	[No change in policy; this is a technical statute administered entirely by the USITC]
Market Disruption by Communist Countries (§406, Trade Act of 1974)	The USITC can recommend to the president that duties, quotas, or other remedies be pursued, to aid an industry that is found to suffer serious injury from increasing imports from a nonmarket economy	[No change in policy; this law has not been invoked since 1993]
Agricultural Imports (§22, Agricultural Adjustment Act of 1933)	The USITC can recommend that the president imposed duties or quotas on imports that threaten to interfere with farm price-support programs	[No change in policy; this law has not been invoked since 1994]

ITA: International Trade Administration of the U.S. Department of Commerce.
USITC: U.S. International Trade Commission.

Table 2: Trade-Remedy and Reciprocity Cases Initiated in the United States, 1975-2018

Total Cases Initiated and Annual Averages

	Late GATT (1975-1985)	Uruguay Round (1986-1994)	Early WTO (1995-2016)	Early Trump (2017-2018)
Antidumping	184 (16.7/year)	234 (26.0/year)	268 (12.2/year)	39 (19.5/year)
Countervailing Duty	130 (11.8/year)	109 (12.1/year)	130 (5.9/year)	33 (16.5/year)
§232 National Security	9 (0.8/year)	7 (0.8/year)	2 (0.1/year)	4 (2.0/year)
§201 Safeguards	59 (5.4/year)	4 (0.4/year)	10 (0.5/year)	2 (1.0/year)
§301 Reciprocity	52 (4.7/year)	44 (4.9/year)	20 (0.9/year)	1 (0.5/year)
Total Cases	**434 (39.5/year)**	**398 (44.2/year)**	**430 (19.5/year)**	**79 (39.5/year)**

Note: AD and CVD cases are based on products rather than partners (e.g., if petitions affecting the same product are simultaneous filed against three countries that is counted as one petition rather than three).

Sources: Compiled from U.S. International Trade Commission at https://www.usitc.gov/trade_remedy/documents/historical_case_stats.pdf, https://usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm, and https://www.usitc.gov/trade_remedy/documents/historical_case_stats.pdf; World Bank at http://siteresources.worldbank.org/INTTRADERESEARCH/Resources/544824-1272916036631/7031714-1273097663359/7045138-1465854420750/GAD-USA.xls and http://siteresources.worldbank.org/INTTRADERESEARCH/Resources/544824-1272916036631/7031714-1273097858474/7045167-1465917411576/GCVD-USA.xls; USTR at https://ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/asset_upload_file985_6885.pdf; and U.S. Department of Commerce at https://www.bis.doc.gov/index.php/forms-documents/section-232-investigations/86-section-232-booklet/file.

The AD statute is the oldest and most frequently used of the trade-remedy laws. Dumping is an unfair trade practice by which imported goods are sold at less than fair value, which may be below the cost of production, the price in the exporting country, or the price in third-country markets. The CVD law shares much in common with its AD counterpart, and cases under these twin laws are often prosecuted in tandem. The most important difference is that CVD investigations are based on allegations of government subsidies rather than the pricing practices of firms. Petitioners used to resort less frequently to the CVD law than to its AD counterpart, but that changed after nonmarket economies such as China lost their legal immunity to CVD cases in 2007. The pace of AD/CVD filing picked up sharply in the first year of the Trump administration, which also saw government's first self-initiation of cases since the Reagan administration. The pace was somewhat slower in 2018 than in 2017, however, perhaps because prospective petitioners decided it might be less costly to rely upon the administration's use of other statutes (especially Section 232) than to foot the considerable costs of filing their own AD and CVD petitions. It is also possible that protectionist industries hope to see the Trump administration utilize more aggressively its authority to self-initiate AD/CVD cases.

While the AD and CVD laws are treated as quasi-judicial statutes that are theoretically not subject to policymakers' whims, decisions to invoke the safeguards law are quite explicitly a matter of policy. The global safeguards law is a mechanism that allows domestic industries to petition for relief when import competition causes injury, even if those imports are fairly traded. The safeguard law requires that the U.S. International Trade Commission (USITC) determine whether increasing imports are a substantial cause of serious injury to the domestic industry. If its injury determination is positive, the

commission will recommend a remedy (e.g., quotas or tariffs). The president then has wide discretion to accept, reject, or modify the commission's recommendations. In actual practice, these tests are significant hurdles that many petitioners fail to clear. That is the chief reason why the number of petitions filed during 1986-1994 (far below one per year) was so much lower than in the first decade since enactment of the Trade Act of 1974 (more than five per year). The action under this law dropped still further after the WTO came into effect. Although that institution's Safeguard Agreement sought merely to reform this mechanism, and not to outlaw it, an unbroken series of dispute-settlement cases invariably found that the countries employing this mechanism have violated their obligations. Ever since the Bush administration was required in 2003 to reverse the steel restrictions that it had imposed in 2002, Washington treated Section 201 as a dead letter.

That all changed when producers of washing machines and solar panels filed safeguard petitions in 2017, leading the Trump administration to impose import restrictions in 2018. Both orders are now subject to challenges in the WTO's Dispute Settlement Body, and we may reliably anticipate that these safeguard actions will be found to violate WTO obligations.[4] This will set up a potentially hazardous confrontation. Past administrations have felt legally obliged to lift the restrictions they imposed under the safeguards law, but Trump seems far less intent on trimming his policies to meet the terms of international agreements and the rulings of dispute-settlement panels. In the event that the United States fails to remove protections that are found to contravene the rules of the Safeguard Agreement, it will reinforce the impression that U.S. policymakers no longer respect the role of the WTO.

The revival of the reciprocity law raises that same concern. American policymakers use the term "reciprocity" to mean a policy in which objectives are pursued by threatening or imposing sanctions unilaterally rather than either negotiating mutually beneficial agreements or bringing the disputes to a neutral court. Laws of this sort have been around since the first decades of independence, and have been of recurring importance throughout U.S. history, but were rarely invoked in the first generation of hegemony. The principal exception to this rule was the Chicken War that the United States fought with the European Community in the 1960s. Following a revamping of the laws in 1974, the Section 301 authority became a major element in U.S. trade policy during the Reagan administration. It used the threat of retaliation in both a tactical and a strategic fashion, and Congress encouraged this move by enacting an entire family of related laws. Several of them were included in the Omnibus Trade & Competitiveness Act of 1988, such as one that focuses on countries' intellectual property practices (known as "Special 301") and others dealing with government procurement, telecommunications trade, and foreign shipping practices. Still more reciprocity laws aim precisely at countries' practices on longshoremen services, international air transportation practices, and wine.

The reciprocity laws returned to their former obscurity after the Uruguay Round. This was the product of a grand bargain by which other countries made significant (if incomplete) concessions to the substance of Washington's demands on what were then called the "new issues," producing agreements on services, intellectual property rights, and investment. In return, the United States agreed to the creation of a stronger dispute-settlement system that differed from its GATT predecessor in several respects. The new trade court does not allow any country to block a case by abusing the rule of consensus, it covers the full range of WTO agreements with a unified system, and is backed by an Appellate Body that provides greater consistency to the interpretation of the rules. In short, this compromise gave Washington recourse to international rules on the new issues, but required that disputes be adjudicated in the WTO rather than by national fiat.

It is in this environment that the Trump administration initiated a Section 301 case against China, charging that the country's intellectual property policies harm U.S. interests. The tariffs that the United

[4] It is worth noting that such findings might prove moot if the United States and its WTO partners do not resolve a long-running disagreement that has blocked the appointment of new members to the institution's Appellate Body. If that body is unable to replace its retiring members, it will soon lack the quorum needed to take up appeals from WTO dispute-settlement panels. This could leave any decisions that are adverse to the United States in a kind of legal limbo.

States imposed as retaliation against China, and Beijing's counter-retaliation, clearly represent a reversion to a pre-WTO pattern in U.S. trade policy.

III.C The Abuse of the GATT National Security Provision

The Section 232 cases pose an even graver danger to the trading system than the Trump administration's revival of the safeguard and reciprocity laws. Beyond the direct presidential imprimatur that these cases bear, and the presumably greater implied resistance to an unfavorable ruling in the WTO dispute-settlement system, the products involved are inherently important and the law is more politically sensitive. It has also been something of a taboo. Prior to Donald Trump, American presidents used this law quite sparingly and almost exclusively as an instrument of energy policy.[5] One of the first acts of the Trump administration was to self-initiate a pair of Section 232 investigations in 2017 against steel and aluminum. It also received a petition that year from uranium producers, and in 2018 it self-initiated yet another case in the automotive sector.

As can be appreciated from the data in Table 3, it was absurd for the administration to base this most protectionist action on a spurious claim of national security. More than two-thirds of U.S. automotive imports, and well over half of steel and aluminum imports, come either from NATO countries or other partners that past presidents have formally designated as Major Non-NATO Allies. Uranium is the only item subject to a Section 232 investigation for which a potential adversary (Russia) is a major supplier, and also the only one for which an appeal to national security seems plausible, and yet it is the sole item in the Section 232 docket for which the administration shows little enthusiasm.

This indiscriminate use of the national security law, and the implied willingness to abuse the corresponding exceptions clause in the WTO, poses an existential threat to the multilateral trading system. WTO rules are far more deferential toward claims of national security than they are toward other types of concerns that might collide with trade. In more than 70 years of GATT and WTO history, no country invoking the national security exception of GATT Article XXI has ever been obliged to justify its claim before a dispute-settlement panel. The near-automatic acceptance of invocations is generally seen as a politically necessary norm, founded upon the recognition that countries might prefer to leave the system altogether if the actions they take in pursuit of national security were subject to review by trade lawyers.

What is most remarkable about Article XXI is not the abuse that this virtual get-out-of-jail-free card invites, but the infrequency with which countries have succumbed to the temptation. Prior to the advent of Donald Trump, there were just three occasions in which the United States either explicitly invoked Article XXI or publicly implied that it was prepared to do so; all three involved countries that had affiliated with the Soviet Union only after joining the GATT.[6] Only a handful of other WTO members have availed themselves of the security exception. The European Union did so twice during the GATT

[5] Past presidents used this law and its predecessor statute to impose restrictions on oil imports five times, but invoked it only twice on behalf of other industries. President Reagan resorted to Section 232 in a 1981 ferroalloys case, and again in a 1986 machine tools case.

[6] The United States invoked Article XXI in 1949 in order to apply the newly enacted embargo on exports of strategic goods against Czechoslovakia, and did the same in 1985 when Nicaragua objected to an embargo imposed by President Reagan. The Kennedy administration was prepared to cite this article in defense of its embargo on Cuba, but that was rendered moot by Cuba's failure to lodge a formal complaint.

Table 3: Origins of U.S. Imports Subject to National Security Investigations, 2017

Shares of Total U.S. Imports; Bottom-Line Values Based on Imports for Consumption

	Automobiles	Iron & Steel	Aluminum	Uranium
NATO Allies and Related	**43.2%**	**38.3%**	**45.9%**	**70.3%**
Canada	20.8%	15.5%	40.2%	32.6%
European Union*	22.0%	18.6%	5.4%	35.9%
Norway	<0.1%	0.5%	<0.1%	1.8%
Turkey	0.4%	3.7%	0.3%	—
Major Non-NATO Allies	**27.8%**	**19.8%**	**10.7%**	**0.7%**
Argentina	<0.1%	0.7%	3.2%	—
Australia	<0.1%	1.1%	2.1%	0.7%
Japan	20.4%	4.7%	1.0%	<0.1%
Korea	7.4%	8.3%	0.6%	<0.1%
Taiwan	<0.1%	3.7%	0.2%	<0.1%
All Other MNNAs	<0.1%	1.3%	3.6%	<0.1%
Potential Adversaries	**0.8%**	**10.5%**	**19.0%**	**25.4%**
China	0.8%	2.6%	9.6%	0.6%
Russia	<0.1%	7.9%	9.4%	24.8%
Rest of World	**28.2%**	**31.4%**	**24.4%**	**3.6%**
Mexico	27.1%	7.1%	1.5%	—
All other	1.1%	24.3%	22.7%	3.6%
Value of Total 2017 Imports	*$212.6 billion*	*$33.7 billion*	*$16.9 billion*	*$2.6 billion*

** : Note that the European Union* per se *is not a NATO ally, but the overlap of NATO and European Union membership is so large as to blur the distinction.*

Automobiles are defined here as NAICS category 3361; iron and steel as NAICS category 3311; aluminum as NAICS category 3313; and uranium as HTS item 2844.

Sources: Compiled from U.S. International Trade Commission DataWeb at https://dataweb.usitc.gov/. Major Non-NATO Allies are listed at http://samm.dsca.mil/glossary/major-non-nato-allies; "all other" MNNAs include Bahrain, Egypt, Israel, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, and Thailand.

period,[7] and developing countries repaired to this article a few times.[8] That leaves just one pre-2017 case in which a country's invocation was unambiguously abusive. This came in 1975, when Sweden imposed restrictions on footwear. Stockholm justified this measure by claiming that the country needed a viable

[7] The first EU invocation came in a 1982 defense of the import restrictions that it (together with Australia and Canada) imposed on Argentina during the Falklands/Malvinas war. Brussels also invoked Article XXI in 1991 to justify its withdrawal of preferential treatment from Yugoslavia; the breakup of that country made a panel moot.

[8] On the accession of Portugal in 1961, for example, Ghana stated that its boycott of Portuguese goods was justified under Article XXI because Angola posed a constant threat to peace on the African continent. Honduras and Colombia settled a dispute in 1999 over their maritime boundaries, but Nicaragua objected and imposed a 35% tariff on all imports from Honduras and Colombia. Nicaragua then invoked Article XXI when those countries sought a panel. The parties eventually agreed to take the issue up in the International Court of Justice, and no WTO panel was formed.

industry to produce boots for its soldiers. The trade community shamed Sweden into removing the offending measures within two years, but did so without formally demanding a legal justification for its action.

This is just one of many ways in which the norms of the WTO are drifting away from those of the GATT. That may be a natural consequence of an expanding membership, with some of the newer entrants having less familiarity and commitment to the long-established traditions of this institution. That was apparent in two other sets of disputes that arose in 2017. Bahrain invoked Article XXI to justify actions that it took — together with Egypt, Saudi Arabia, and the United Arab Emirates — in a conflict with Qatar. Russia likewise invoked the article in one of a series of disputes with Ukraine. Perhaps the most notable aspect of that last case was not Moscow's decision to employ this legal loophole, but the full-throated support that it subsequently received from Washington.[9] That declaration was in keeping with established U.S. positions, but also took on new urgency in light of the Trump administration's conflation of trade and security issues.

The graver threat comes from the readiness with which the Trump administration has trampled upon the old norm in its own Section 232 cases. We may only speculate on the depth of the administration's motives. Its decision to pursue these cases may have been only a cynical attempt to game the system by taking advantage of matching loopholes in domestic law (Section 232 being the most discretionary trade-remedy law) and the WTO (Article XXI being the most discretionary exceptions clause). It may alternatively have been intended as a deliberate incitement. Major WTO countries proved quite ready to carry out counter-retaliatory threats in mid-2018, plunging the United States into a full-fledged conflict not just with China, but also such allies as the European Union, Canada, and Japan. Smaller countries such as Argentina preferred to bargain for exemptions by agreeing to impose WTO-illegal export restrictions. The more worrisome sign, from a regime perspective, was the willingness of the Chinese to contemplate that same route and to seek a settlement in which outcomes are determined more by states than by markets. If the current Sino-American negotiations produce a deal that involves precise Chinese commitments to import certain quantities of American goods, that could set a highly unwelcome precedent. In a worst case, it could be the first manifestation of a new pattern whereby actual trade flows are determined just as much by governmental dictate as by impersonal market forces.

III.D Concentration on China and Collateral Damage on Third Parties

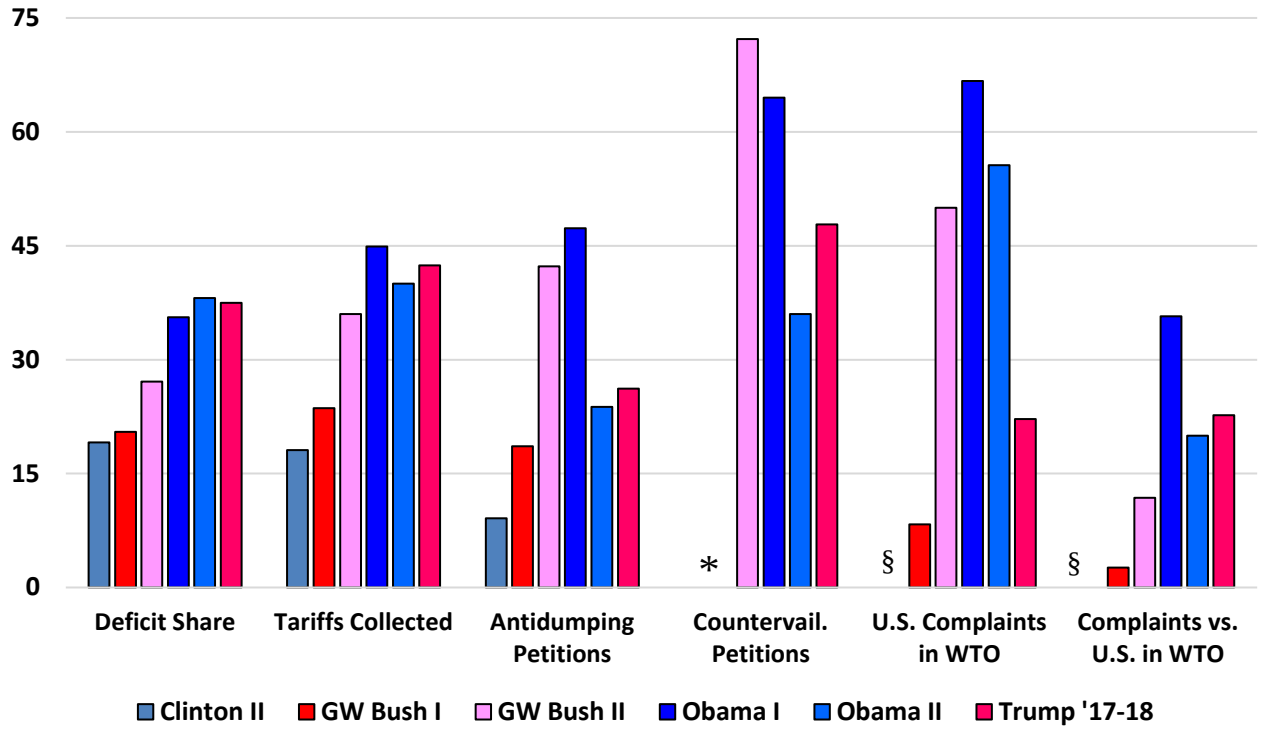
The resurrection of the old reciprocity law is yet another area where the Trump administration revisited what seemed to have been a settled matter of law and policy. The United States appeared to have discontinued its use of Section 301 in 1997, but exactly twenty years later the USTR initiated an investigation under this law into Chinese acts, policies, and practices related to technology transfer, intellectual property, and innovation. The announcement of this Section 301 case made no mention of the relevant WTO agreement or the rationale by which the U.S. Trade Representative decided not to bring the matter to the multilateral system. It instead implied that, in a throwback to pre-Uruguay Round practices, the United States would define and enforce its rights via domestic law rather than international institutions. That was the clear implication of the sequence by which the retaliatory measures announced in 2018 preceded, rather than followed, the initiation of a formal U.S. complaint in the WTO.

Predictably, retaliation against China was quickly followed by Chinese counter-retaliation against U.S. exports. While the conflict remains a live issue, early results suggest that Beijing is just as capable as Washington of engaging in trade warfare and sustaining its economic costs. The most consequential outcome of the dispute may not be which side is ultimately deemed the winner or the loser, or how much

[9] See the November 7, 2017 statement of the United States in support of Russia as posted by the USTR at https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.Re.GATT.XXI.fin.%28public%29.pdf.

Figure 1: The Concentration of U.S. Trade Instruments on China, 1997-2018

Share of Totals in Each Presidential Term



** : CVD petitions against China were not legally possible prior to a revised interpretation of the law in 2007.*

§ : Dispute-settlement complaints in either direction were not legally possible prior to China's WTO accession in 2001.

Shares of AD and CVD petitions calculated on the basis of total countries and products named in petitions. For example, if in a given year there is one AD petition filed against imports of Product X from China and one other country, plus another AD petition filed against imports of Product Y from only one other country, China accounts for 33.3% of all AD petitions.

Sources: AD and CVD petitions calculated from World Bank data at http://data.worldbank.org/data-catalog/temporary-trade-barriers-database and U.S. International Trade Commission data at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/completed/index.htm. WTO complaints calculated from WTO data at http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. Tariff data calculated from USITC DataWeb data at http://dataweb.usitc.gov/scripts/INTRO.asp.

short-term damage they do to one another and to third parties in the interim, but the extent to which they each prove willing — and perhaps even eager — to reach a settlement that amounts to managed trade. That would not portend well for the trading system.

The Section 301 case is emblematic of a trend whereby the United States now has a two-speed approach to the conduct of trade disputes, reserving the higher gear for China. This can be appreciated from the data in Figure 1, which summarizes the shares of the main policy instruments that are directed at China. The surge in AD cases can be attributed not just to the rising share of U.S. imports originating in China, but to special rules. China is subject to the unique methodology employed for nonmarket economies (NMEs), in which price comparisons are made not against the exporting country but instead against a market-oriented "surrogate" country (typically India). This makes it much easier for petitioners to show high rates of dumping. It is thus more attractive for petitioners to bring cases against China and Vietnam than any other country. The concentration of trade-remedy laws on China was further abetted by a decision in which the country lost its earlier exemption from CVD investigations. The Department

of Commerce had previously read the law to mean that NMEs were immune from CVD investigations, based on the theory that it is impossible to isolate and assess the impact of subsidies in an economy that amounts to one big subsidy. The department reversed this doctrine in 2007, and in 2012 Congress approved legislation that reinforced this interpretation.

It is interesting to note that while the concentration of trade instruments on China increased from the second Clinton term (1997-2000) through the first Obama term (2009-2012), it then tapered off in the second Obama term. The years 2013-2016 saw a decline in the shares of AD and CVD cases that targeted China, as well as the percentage of WTO disputes brought by Washington against Beijing and *vice versa*. The preliminary data suggest that this declining trend was only partially arrested under Trump, with the shares of AD and CVD cases in 2017-2018 still being lower than what we saw in the first Obama term. Interpreting the data on disputes in the WTO is somewhat more complicated, as that depends on just how complex a game this new administration may be playing.

WTO dispute settlement is one area where the Trump administration has thus far shown little inclination to take full advantage of the opportunities to bring maximum pressure on China. This is a departure from the recent past. During the Obama administration, the United States brought six cases against China but Beijing responded with just one complaint against the United States. Those numbers were reversed in the first two years of the Trump administration, when China brought five complaints against the United States but was targeted by just two U.S. complaints. A conspiracy theorist might see in these numbers part of a larger strategy by which the Trump administration intends to argue that the WTO's dispute-settlement system presents more of a risk than an opportunity for the United States. That argument could be bolstered if the administration were simply to sit out the game. The larger trends in U.S. disputes support this contention. In the years preceding the Trump administration, the United States brought nearly as many complaints against other countries in the WTO (114) as those countries brought against the United States (129). With the United States being the respondent in 22 complaints since Trump's inauguration, but bringing just nine of its own, it now answers every two complaints with less than one.

IV. The Challenge of Discrimination

One systemic challenge that predates the election of Donald Trump concerns the rise of discriminatory trade agreements. The creation of the WTO in 1995, which culminated a half-century of progress toward a comprehensive and multilateral trade regime, came just when many of its most prominent members began negotiating discriminatory agreements in earnest. As an ideal, the trading system has long sought to achieve two seemingly complementary objectives: the reduction or elimination of trade barriers and an end to discrimination. The recent proliferation of FTAs implies that countries are willing to sacrifice non-discrimination in pursuit of liberalization. The net results have been dubious, with the political capital that countries invest in FTAs coming at the expense of efforts that might otherwise preserve and rebuild the multilateral system.[10]

As can be seen from the data in Table 5, most of the FTAs that the United States currently has in place are with relatively small partners. Canada, Mexico, and (to a much lesser degree) Korea are the only significant exceptions to that general rule. Discrimination is likely to grow under the Trump administration, which began to turn in late 2018 from the destruction of old policies to the negotiation of new agreements. It is perhaps not surprising that the administration chose to negotiate with the three largest economies with which the United States does not yet have FTA relations, notwithstanding its frequent expressions of disdain for the European Union. Assuming that the new talks with Brussels, London, and Tokyo are successfully completed, the magnitude of the goods trade covered by

[10] For a more thorough examination of preferences in U.S. trade policy see chapters 13-15 of *Trade and American Leadership*.