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**STRESSED IN AN AGE OF POPULISM:  
Recommendations for Changes in U.S. Trade Law and Policy**

*Alan Wm. Wolff\**

I am very pleased and honored to deliver the first lecture dedicated to the memory of John Greenwald.

His career and my own intersected at various key inflection points for each of us.

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Ambassador Wolff delivered these remarks on the occasion of the inaugural John D. Greenwald Memorial International Trade Lecture at Georgetown Law's 2017 International Trade Update, on March 9, 2017. This lecture series is made possible by a generous donation from Cassidy Levy Kent, in honor of their former partner and friend, John D. Greenwald, and in recognition of his many contributions to the field of international trade law.

When I was Deputy General Counsel of what was then called the Office of the Special Trade Representative (now known as USTR), the GC's office at the time had only two lawyers, John Jackson, later a Georgetown Law professor, and myself. We were intent on building it to meet the USTR's statutory responsibilities and to deal effectively with growing U.S. international rights and obligations. John's father, Joe Greenwald, then-U.S. Ambassador to what was then called the European Communities, happened to visit. Joe told me that he had a son who was ready to begin his legal career. So it was that I subsequently interviewed John and, to the benefit of the U.S. government, John accepted my offer.

During his time at USTR, John left his mark on the world trading system. I moved up from General Counsel to be Deputy Trade Representative, and John became a key negotiator of the GATT and now WTO Agreement on Subsidies and Countervailing Measures, which continues to play a central role in WTO jurisprudence to this day.

When John left USTR, he joined the Commerce Department as the Deputy Assistant Secretary (now an Assistant Secretary position) who administered the antidumping and countervailing duty laws. When he was ready to leave government, I recruited John to join me in private practice at Verner Liipfert Bernhard and McPherson as our group's chief trade litigator. In that role, he brought an innovative case to the Commerce Department, one that proved to be before its time – a case against China's multiple currency practices as a countervailable subsidy. It did not succeed, but it was brilliant, and it was correct on both the law and policy.

I suspect that it is unusual to have a talk in honor of someone who proceeds to recite court submissions testifying to the honoree's character and talent, but that is exactly what we have in the case of John, as he not-uncharacteristically procrastinated on what turned out to be an important bureaucratic matter, and so we have the benefit of a decision of the DC Court of Appeals permitting his admission to practice some 21 years after he first began, in the court's view, practicing law in the District: Here is the relevant part of the record:

*The evidence demonstrates several positive aspects of Mr. Greenwald's character. First, both those who practice with him and those who have been his adversaries describe him as scrupulously honest. Discovery in many international trade proceedings is limited, and parties may be presented with opportunities to conceal material information that may not favor their position. Mr. Greenwald has always instructed his clients and the other lawyers who work with him that all legally required information must be disclosed to the government agencies with authority over a case, regardless of whether that information is favorable or unfavorable. Adversaries also describe him as dedicated to civility in litigation even in an area of the law characterized by hard-fought disputes. He teaches international trade law at Georgetown University Law School, and often spends extra time with his students, both helping them understand the law and discussing careers in the field. Both the witnesses who testified and others*

*who sent written recommendations to this Committee spoke highly of his integrity, professionalism and character.*<sup>1</sup>

John brought not only intelligence and ingenuity to the practice of trade law, but also wit. Representing an Indian steel producer in a hearing before the ITC, a Commissioner asked him whether there was any precedent to cite for a novel theory he was advancing on behalf of his client. It was a mark of his quick thinking and grace under pressure, as well as his basic integrity, that he answered: "Well, I don't think that we should dwell too much on precedent." Unless you have the credibility that John did, I do not recommend light-hearted responses to those conducting hearings.

There are legal and policy debates today and ones that we can anticipate arriving soon for which we would welcome John's lively intelligence. My purpose this morning is to list some of those key issues.

I need to add a disclaimer at the beginning. I chair the Board of the National Foreign Trade Council, and I am engaged in private practice with Dentons LLP as well as working with clients in my Alan Wolff PLLC, but the views expressed here are personal and do not necessarily represent any position of any other entity, unless expressly stated that they do.

## **Introduction**

### **The Rule of Law**

What I want to do this morning, given the level of interest in this room in international trade law, is talk about the structure of the legal system governing international trade, both the rules set by international agreements and those set by statute, point out what are in my view some major deficiencies, and suggest how they might be remedied.

Having been an unwilling witness to some of the recent developments in trade agreements, I realize that, given the temper of the times, as represented by the trade positions taken by Bernie Sanders, Hillary Clinton, and more importantly Donald Trump and his closest advisors, my suggestions are not going to be adopted this year or next, and may not be given consideration for some time after that. And perhaps they will no longer be necessary by then. But I commend the specific changes that I will propose in these remarks for your consideration, and to those in the Congress who value the international trading system, recognizing that it has shortcomings that also need attention. There will at some point be trade legislation, whether to implement an agreement under "fast track" procedures under Trade Promotion Authority (TPA)

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<sup>1</sup> R. 135-36, 146 (Mr. Levy); R. 174-75 (Mr. Pickering); R. 186, 192 (Commissioner Marsha Miller of the International Trade Commission); r. 225-227 (Mr. Wilner); R. 323, 330-31 (Thomas Ehrgood, Esq.); R. 342-44, 340 (Mr. Cassidy); R. 489-90 (Susan G. Esserman, Deputy United States Trade Representative); R. 61 -71 (responses to questionnaires from the initial character investigation). District of Columbia Court of Appeals. In re John Doyle GREENWALD, Respondent. No. 02-BG-297. Decided: October 24, 2002.  
<http://caselaw.findlaw.com/dc-court-of-appeals/1377369.html>.

or freestanding, as regular legislation. The most likely is the latter – in the extension of the Generalized System of Preferences (GSP) which expires at the end of this year or in a Miscellaneous Tariff Bill (MTB). Whichever course presents itself, at that point serious debate should take place as to the most appropriate course for U.S. trade policy and its implementation, with appropriate changes in law adopted.

## **The Legal System Governing International Trade**

The origins of America's approach to constructing the modern framework for international trade can be found in the Reciprocal Trade Agreements Act of 1934<sup>2</sup>, and in the vision for world trade contained in the Atlantic Charter, issued by President Franklin Roosevelt and Prime Minister Winston Churchill in August 1941.<sup>3</sup>

The 1934 Act gave authority to the President to begin the process of chipping away the 1930 tariff wall through trade agreements. The tariffs imposed by the United States and its trading partners had deepened and lengthened the Great Depression. The 1934 Act was used as authority to conclude bilateral agreements which would have been very limited in effect had Secretary of State Cordell Hull not put in an unconditional most-favored-nation (MFN) clause in the agreements -- the benefits would not be limited to the signatories other than through dealing primarily with products of chief interest to the two parties. Note that this differs profoundly from a series of bilateral and regional free trade agreements that are preferential in nature -- the opposite of MFN. It may be that Secretary Hull's use of an MFN clause in bilateral agreements helped stimulate a recognition that a multilateral approach was essential if trade was to be liberalized, otherwise these bilateral deals would always be constrained by the need to avoid giving away too much in the way of trade benefits to free rider third countries.<sup>4</sup>

The Second World War interrupted progress on the bilateral agreements, but it also gave rise to post war planning. An early glimpse of what was to come can be found in the two economic paragraphs contained in the Atlantic Charter. Churchill and Roosevelt pledged their countries to endeavor “to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity; and stated their desire “to bring about the fullest collaboration between all nations in the economic field.”

From these beginnings, parallel tracks continued to be taken over the next three quarters of a century -- with enactment of a number of statutory compacts between the President and the Congress loosely termed “trade negotiating authority”<sup>5</sup> and in an iterative process of multilateral

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<sup>2</sup> Enacted June 12, 1934, ch. 474, 48 Stat. 943, 19 U.S.C. § 1351.

<sup>3</sup> <http://avalon.law.yale.edu/wwii/atlantic.asp>.

<sup>4</sup> <https://www.brookings.edu/wp-content/uploads/2016/06/20041010dam.pdf>.

<sup>5</sup> The President needs no authority to negotiate, but he does need a means to implement trade agreements, as the Commerce Power lies with the Congress under Article I of the Constitution.

negotiations to construct a rules-based world trading system -- first in the Havana Charter for an International Trade Organization (the ITO, that the U.S. did not ratify), but then in the General Agreement on Tariffs and Trade (GATT) which the Executive Branch forged ahead with without the express approval of Congress until the 1970s, and finally the creation of the World Trade Organization (WTO) in the Uruguay Round in 1994.

These two elemental legal foundations, domestic statutes and multilateral rules, with the addition of some free trade agreements -- most prominently NAFTA, are the legal framework for America's conduct of international trade.

There is no more important subject to be addressed in this two-day conference than the rule of law. The rule of law must govern what our government can and should do in the field of international trade. It must be a key purpose of the international trade bar to assure in matters large and small that this is what in fact happens -- through our interventions before administrative and policy agencies of the Executive Branch, through appearances before Congress and the International Trade Commission, before U.S. courts and international tribunals, and in the press. Everything that we do should be viewed through this lens.

The new administration is not fully staffed yet and its policies are not fully formed. But in various remarks, as well as in one action in particular, we should be prepared for current norms, institutions, international arrangements and domestic process, like large financial institutions under Dodd-Frank, to be stress-tested. But as opposed to Dodd-Frank, the tests may be conducted through adoption of trade measures and not as an academic exercise.

- **Stress Test Case #1. Is it good legal policy for the President to terminate international trade agreements unilaterally without the consent of Congress and without due process?**

With the stroke of a pen<sup>6</sup>, President Trump, as one of his first acts, removed the signature of the United States from the largest trade agreement of modern times -- the Trans Pacific Partnership Agreement (TPP). Realistically, that action will not be easily undone, not soon in any event.

TPP was to cover the trade of twelve nations whose economies account for 40% of world economic activity. To my knowledge, no one holds that President Trump did not have the legal authority to take this step<sup>7</sup>. He had repeatedly pledged to take this action when he was a candidate and it was no surprise when he did so.

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<sup>6</sup> Presidential memorandum dated January 23, 2017.

<sup>7</sup> There is no debate on whether the President had the legal authority to terminate U.S. participation in TPP. TPP had not gone into effect yet, as the Congress had not voted to approve and implement the agreement. Had it done so, the President could have invoked statutory trade agreement termination authority. (Section 125 of the Trade Act of 1974).

I was asked before the election whether the United States had ever failed to implement an international agreement that it had signed. I replied that this was very rare. The most prominent examples that came to mind were the League of Nations and the Havana Charter establishing an International Trade Organization. But there have been other noteworthy examples: the Kyoto Protocol to the United Nations Framework Convention on Climate Change (President George W. Bush acted to erase President William Jefferson Clinton's signature from the agreement) and the United Nations Convention on the Law of the Sea (UNCLOS). In all four cases, the Congress had failed to approve the agreements. There is only one case, as far as I know, in modern times where the United States signed an agreement but did not intend to submit it for ratification without further amendment, the Rome Treaty establishing the International Court of Justice.<sup>8</sup>

There is little doubt that President Trump had the authority to pull the plug on TPP under his constitutional foreign affairs power (TPP not having gone into effect, the statutory termination authority is instructive but not directly applicable). As for NAFTA, there is a termination provision in the agreement that the President by law can invoke. If the President invokes this authority, there is a modicum of process involved:

- A public hearing must be held "during the course of which interested persons shall be given a reasonable opportunity to be present, to produce evidence, and be heard, unless the President determines that such prior hearings will be contrary to the national interest, because of the need for expeditious action, in which case he shall provide for a public hearing promptly after he takes action."<sup>9</sup>
- The President is authorized to proclaim increased duties or other import restrictions, to the extent, at such times, and for such periods as he deems necessary or appropriate, in order to exercise the rights or fulfill the obligations of the United States.
- Duties or other import restrictions shall not be affected by the withdrawal of the United States from the agreement and shall remain for 1 year, unless the President by proclamation provides that such rates shall be restored to the level at which they would be but for the agreement.

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<sup>8</sup> With respect to the Treaty of Rome establishing the International Criminal Court, William Jefferson Clinton stated at the time: "In signing, however, we are not abandoning our concerns about significant flaws in the treaty." The U.S. delegation had in fact been one of seven nations to vote against it. <http://news.bbc.co.uk/2/hi/1095580.stm>. On May 6, 2002, the United States notified the United Nations that it did not intend to become a party to the Statute of Rome establishing the International Criminal Court, UN Doc. No. A/CONF.183/9 (July 17, 1998) ("Rome Statute"), 41 I.L.M. 1014 (2002), and that there were therefore no legal obligations arising from its signature of December 31, 2000. The full text of the letter to UN Secretary General Kofi Annan from John R. Bolton, Under Secretary of State for Arms Control and International Security, is available at [www.state.gov/r/pa/prs/ps/2002/9968.htm](http://www.state.gov/r/pa/prs/ps/2002/9968.htm). <https://www.state.gov/documents/organization/139638.pdf> at p. 148.

<sup>9</sup> Section 125(f), Trade Act of 1974.

- Unless he has acted to provide new duties, within 60 days after the date of any withdrawal, the President is to transmit to the Congress his recommendations as to the appropriate rates of duty for all articles that were affected by the withdrawal.<sup>10</sup>

Is this process sufficient for either the scrapping of TPP or potentially for NAFTA?

There is an odd asymmetry in the law: by statute, there is an elaborate procedural process for entering into trade agreements under TPA: (1) consultations with Congress, which will hold its own committee hearings and issue its own committee reports; (2) reports from the International Trade Commission, which will hold hearings and accept written comments; (3) reports from private sector advisory bodies; as well as (4) opportunity for public comment including executive branch hearings prior to signature of any agreement. This has become trade agreement “due process.”<sup>11</sup> But when it comes to erasing America’s signature from an un-ratified agreement (i.e., TPP), there was a nearly absolute vacuum of process. All those consulted, including Congress, in the long 7-year process to the signing of TPP were relegated to the institutional status of being “potted plants.”<sup>12</sup> One hopes that there will be serious debate in Congress once hearings are held on trade policy and that one element for serious consideration by Congress and the public will be the wisdom of America’s disengagement from a major trade agreement being solely a Presidential decision made in a procedural vacuum.

Were the President to terminate NAFTA, which I do not expect but which was mentioned during the campaign,<sup>13</sup> the situation is really not much better: USTR would be required to hold hearings on the resulting tariff rates before or after they are imposed, but the President would not be required to take into account testimony thus heard. This is not much of a consolation prize to a business destroyed – which was relying on its supply chain built up over 22 years under NAFTA free trade, which with the loss of NAFTA becomes uneconomic.

This raises a question of due process. We have the two cases -- TPP and NAFTA. We can be dismissive of property losses due to a bet made by a private company and its workers that there would in the end be implementation of TPP, despite years of negotiation, extensive involvement of the private sector in that process, and a largely consistent 83-year history of the

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<sup>10</sup> Sec. 125(e) of the Trade Act of 1974.

<sup>11</sup> *Chapter 39 of King John’s Magna Carta provides that no freeman will be seized, dispossessed of his property, or harmed except “by the law of the land,” an expression that referred to customary practices of the court. The phrase “due process of law” first appeared as a substitute for Magna Carta’s “the law of the land” in a 1354 statute of King Edward III that restated Magna Carta’s guarantee of the liberty of the subject. The Fifth and Fourteenth Amendments to the Constitution, which guarantee that no person shall “be deprived of life, liberty, or property, without due process of law,” incorporated this model. See: <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html>.*

<sup>12</sup> “During the hearings in front of the Joint House-Senate Iran-Contra Committee, Chairman Daniel Inouye suggested that Oliver North speak for himself, admonishing North’s attorney, Brendan Sullivan for constantly objecting to questions posed to North. Sullivan famously responded, ‘Well, sir, I’m not a potted plant. I’m here as the lawyer. That’s my job.’” [https://en.wikipedia.org/wiki/Brendan\\_Sullivan](https://en.wikipedia.org/wiki/Brendan_Sullivan).

<sup>13</sup> This refers to a statement made by then presidential candidate Trump a year ago as to his intention as president, and clearly not current policy. <https://geopoliticalfutures.com/the-american-presidents-power-over-nafta/>.

U.S. entering into and implementing trade agreements it had negotiated and signed. But there was in fact no guaranty that TPP would enter into force. The margin in Congressional votes in favor of trade agreements had narrowed. It might never have commanded majority support in Congress absent some changes that members of Congress sought. Nevertheless, TPP was near completion when TPA was passed, and it was widely assumed that the TPA vote was a proxy for a future vote on TPP.

What of businesses that have been structured in reliance on NAFTA or the WTO or the GATT rounds of tariff agreements? An example given in press reports is that of Boeing, among the largest of America's exporters, that is competitive due in part to its global supply chain built no doubt on the assumption that existing trade agreements would stay in place. NAFTA was not only signed by the President, it was implemented by statute. At what point is there some property right? When can a firm and its workers be justified in relying on the *status quo* governed by international trade agreements and their implementation under domestic law?

Granted that there is no current property right to a trade-agreement-based rate of tariff, no matter how long it is in place, if the President withdraws the United States from the agreement, is this good policy?

**PROPOSALS: Congress can and should at a minimum provide for a process for exit from a trade agreement, expedited if necessary, which is as extensive as the procedures for entering into a trade agreement.**

**Congress should also consider creation of a limited due process right for interested U.S. persons in trade agreement-based U.S. tariff rates and other trade agreement bound treatment of imports more generally.**

In the case of TPP, interested parties, Congress and the International Trade Commission were consulted for seven years but under current law, notice consisted of watching the president sign a memorandum on the evening news, and the right to be heard restricted to shouting at the television.<sup>14</sup>

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<sup>14</sup> It could be argued that there was plenty of notice and the people were consulted, as the Presidential election could be argued to have been a referendum on TPP. There was certainly popular sentiment against TPP – no small portion of it reinforced in varying degrees by the three leading candidates for the Presidency – Clinton, Sanders and Trump. Was there a popular vote tantamount to a referendum on TPP? I think that Bruce Stokes might tell you that the Pew poll showed that a majority of the young, who were a core part of the support for Bernie Sanders, favor liberal trade agreements. So their support of Mr. Sanders cannot be taken as a wholesale endorsement of the exit from TPP. More broadly, both the wisdom and utility of popular votes is certainly worth questioning. The most famous instance in the field of international economic relations is that of Brexit. Prime Minister May took the popular vote to be binding, not in law but as a matter of politics. The Prime Minister's view cast aside the notion of representative government meaning that the people delegated to their elected officials authority to make decisions on their part. (See Federalist No. 10, by James Madison). The Prime Minister took that one step further, claiming executive power not requiring participation by Parliament, until the UK courts ruled otherwise. At least the UK



An interesting constitutional question is whether Congress could in a future case by statute provide that it must be consulted prior to Executive action to withdraw from a trade agreement. It can do so, I would think, if it is a condition for utilizing TPA mandated procedures. There might be a Supreme Court challenge based on a conflict of the Commerce Power and the Foreign Affairs Power, but chances are the Congress would prevail.

- **Stress Test Case #2. What are the future costs of bailing out of TPP? How can they best be estimated?**

The costs fall into several categories (this is a non-exhaustive list):

- Loss of anticipated gains from TPP's trade agreement concessions received from the original TPP parties.
- Loss of anticipated gains from concessions from additional parties that had been contemplating joining TPP.
- Reluctance on the part of other countries to trust the U.S. to be able to conclude a future trade agreement.
- Abandoning leadership in international trade to China in the Pacific Region and certainly in Asia.
- Undermining the U.S. role in the WTO.
- Suffering discrimination that cannot be remedied due to others entering into bilateral and regional preferential trading arrangements (euphemistically called “free trade agreements”) that would have one common characteristic, excluding the United States.
- Reinforcing U.S. public opposition to any trade agreement.

The first of these costs -- loss of anticipated gains from TPP's trade agreement concessions from the other parties -- has already been estimated by the International Trade Commission and various think tanks, including the Peterson Institute for International Economics, as these institutions had estimated potential gains from TPP. The loss from those nations left in the queue at the door of TPP is more speculative.

The third measure of loss -- reluctance on the part of other countries to trust the U.S. to be able to conclude and implement future trade agreements -- is also not easily quantified, but it is possible to sample opinion. At what point does the United States become seen as an unreliable negotiating partner such that other countries may choose not to enter into subsequent trade agreements? How often can the U.S. walk away from a deal before there are adverse

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Supreme Court forced the May government to obtain a Parliamentary vote endorsing her action. There was no such formal expression of support from our legislature for ditching TPP.

consequences?<sup>15</sup> On the other hand, even a country defaulting on its debts can eventually find willing lenders. The U.S. is not in quite that low a state. The United States is a large global economic power and countries have their own reasons for continuing to negotiate with us. Thus the governments of the UK (looking to its future after Brexit), Canada and Mexico (each seeing the risks and rewards of NAFTA renegotiation) have already said they would negotiate with the U.S., despite the recent unpleasantness of the lack of TPP follow-through. In the visit of the Prime Minister of Japan --who is strongly committed to TPP -- with President Trump, Mr. Abe did not rule out a future bilateral U.S.-Japan FTA, but presumably was not pressed in this meeting to agree to explore having one.

Does the U.S. dropping out of TPP have any lessons for relations with the European Union? The effect may be limited for a number of reasons: There are enough issues internal to Europe that TPP withdrawal probably has little effect at this time on the near term prospects for a cross-Atlantic agreement. Mr. Trump does not clearly support America's seven decade long project to use economic ties to stabilize Europe. In addition, it is hard to slow further the momentum, if any, of the already stalled Trans-Atlantic Trade and Investment Partnership (TTIP), although there is selective progress being made as evidenced by the recent agreement for the mutual recognition of testing for pharmaceuticals.

Other factors militating against an early comprehensive agreement with the EU: it could be considered by the Administration to be multi-party and therefore shunned in light of the Trump bilateral trade doctrine; Europe also suffers from the rise of populism in Europe with near term national elections looming. All of these factors make the question of pursuing a Trans-Atlantic deal at best moot for the present. TPP-withdrawal is just another straw on the Trans-Atlantic Economic Partnership's camel's back. Not clearly the last straw.

The costs in terms of U.S. leadership in the Pacific Rim and Asia will be felt over time, but cannot be quantified yet in trade terms. With the U.S. absence from the Asian Infrastructure Development Bank (AIIB), and with China's One Belt-One Road initiative, the loss of TPP just accelerates the rise of China's leadership in the region.

What will happen in the WTO to the environmental goods agreement and the nearby Trade in Services Agreement (TiSA) -- both multi-party agreements? Only time will tell. The example of TPP does not help any other initiative. The WTO is suspiciously not bilateral. It would not be a safe bet that the U.S. will be leading trade liberalization efforts in the WTO in the next few years. Rather, it will be testing that system.

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<sup>15</sup> In the comic strip "Peanuts," Charlie Brown will always be tempted to try to kick the football that Lucy has positioned for him to kick, although he knows that she always pulls it away before he tries to kick it. *See*: <https://www.youtube.com/watch?v=055wFyO6gag>. Caution: This may not be a reliable precedent for the conduct of trade relations.

The most serious problem is not that others will avoid negotiating with the United States sometime in the future, but that pulling the plug on TPP has accelerated the efforts of many countries to negotiate agreements that do not include the United States. A primary example is the 16-nation Regional Comprehensive Economic Partnership (RCEP) led by China, which has gotten a major boost from U.S. withdrawal of its signature from TPP. And there are also a plethora of bilateral trade agreements under negotiation. Most do not involve the United States.

Judge Morris, the creator and animator of the Global Business Dialogue, has suggested, and I whole-heartedly endorse, the following proposal:

**PROPOSAL:**

**The Chairmen of the Senate Finance Committee and of the House Ways and Means Committee should ask the International Trade Commission for a report on the likely effects on the U.S. economy of trade agreements to which the U.S. is not a party, starting immediately with the free trade agreement (FTA) that our neighbor, Canada, has with the EU (the Comprehensive Economic Partnership Agreement – CETA).**

**This report should then be required by statute to be updated at least annually.**

The number of current and potential preferential (and therefore discriminatory) agreements being negotiated is large and growing. One very large stimulus for this activity is U.S. withdrawal from TPP. TPP was seen at least by some, including me, as a path back to multilateralism and therefore the WTO through competitive improvements in regional trading relationships. In the meantime, a proliferation of preferential trading arrangements can create a drag on trade by making it far more complicated. Rules of origin are either a killer, or, to the extent businesses can, they will not base their trade and investment patterns on bilateral agreements. This does not remove all discrimination. Some preferences cannot be worked around -- such as U.S. beef exports suffering disadvantage relative to Australian shipments entering the Japanese market, or U.S. businesses competing with European companies for provincial government procurement in Canada.

Validating anti-trade sentiment is a government/general public feedback loop. This can be overcome, but it would take leadership that may not be readily forthcoming.

**Stress Test Case #3 -- Abandoning a Multilateral or Plurilateral (multi-party) Approach and Relying Instead on Bilateral Agreements.**

There is no efficient, sensible or even feasible way to craft rules governing world trade through every major trading country pursuing bilateral agreements. The EU, China, Japan and the U.S. in particular, but also Canada, New Zealand, Australia, and the ASEAN nations all putting differing positions on rules into bilateral agreements leads to some degree of confusion at

best. It does not serve creation of a rules-based, coherent international trading system. And as for trade liberalization, no longer a happy phrase politically in an era of populism, it is very hard to put together a bilateral deal where the trade-offs are limited to the two parties, although some important issues that concern primarily two countries only can be settled bilaterally. One way forward would be the creation of interdependent bilaterals, or more rationally, a multi-party agreement. Cross-product and cross-sectoral trade-offs are best achieved in multiparty (plurilateral or multilateral) agreements.

In at least the case of the U.S, there is a domestic obstacle to bilateral agreements, as well.<sup>16</sup> Getting a flock of bilateral trade agreements individually through the Congress seriatim is a recipe for overtaxing TPA, with the potential for various train robberies (paying for each key vote) and, simply, accidental de-railings.

The arc of U.S. trade agreements -- from the 1930s which took small steps toward improving world trade, through the creation of the World Trade Organization, a grand multilateral endeavor, then falling back on plurilateral agreements and to now reverting to bilaterals -- would be somewhat symmetrical in a geometric, parabolic sense, but a major step backward.

TPA, cited formally as the "Bipartisan Trade Priorities and Accountability Act of 2015,"<sup>17</sup> enacted just two years ago, marked a high point in Congressional support of multilateralism. As noted previously, President Truman could not get Congress to approve the International Trade Organization (ITO), and thus the GATT, a contract among trading nations was quietly eased into being as a non-official U.N. organization, studiously ignored by Congress but for appropriations until 1975 when it was first acknowledged as the legitimate child of United States trade policy. The WTO, its successor, was formally approved by Congress in the Uruguay Round Agreements Act. TPA 2015 went further: It included in the list of "Principal Negotiating Objectives" of the United States the following -- stunning, in view of past Congressional reluctance for a long time to acknowledge multilateral trade agreements -- preamble in a paragraph entitled *WTO and multilateral trade agreements*:

***Recognizing that the World Trade Organization is the foundation of the global trading system . . .***

*the principal negotiating objectives of the United States regarding the World Trade Organization, the Uruguay Round Agreements, and other multilateral and plurilateral trade agreements are--*

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<sup>16</sup> But also: the long and arduous process of getting the EU-Canada FTA, the Comprehensive Economic and Trade Agreement called "CETA" into place as well.

<sup>17</sup> P.L. 114-26, Jan. 6, 2015.

*(A) to achieve full implementation and extend the coverage of the World Trade Organization and multilateral and plurilateral agreements to products, sectors, and conditions of trade not adequately covered,<sup>18</sup>*

This statute did not anticipate an incoming administration that had no announced plans to work with and improve the multilateral trading system (outside of its criticism of dispute settlement as it dealt with trade remedies).

**PROPOSAL:**

**Congress should enact a specific requirement that in order to utilize the TPA's Congressional approval procedures for a bilateral agreement, the President must make a finding that a multi-party (multilateral or plurilateral) approach was not feasible or not in the best interests of the United States and consult before issuing this finding with the Senate Finance Committee and the House Ways and Means Committee.**<sup>19</sup>

**Stress Test Case #4. Unilateral Imposition of Increased Tariffs by the United States.**

While not every campaign statement should be taken at face value, and it is far from clear that any campaign statement is current policy, the statements by candidate Trump threatening the imposition of across-the-board tariffs on goods from China (45%) and selective increased tariffs on products from U.S. plants relocating to Mexico (35%) got a lot of attention. These statements gave rise to a quick dive into the statute books and a resulting flurry of legal memoranda to discern what authority the President had to take steps along these lines, given the fact that the Constitution vests the Commerce Power in Congress. The answers, not explored in detail here, were that the President had a substantial amount of authority to do so.<sup>20</sup>

I do not anticipate the U.S. will impose an across-the-board import levy against the trade of one country (China) as this would destroy one of the world's largest trading relationships and undoubtedly trigger a trade war, damaging the American, Chinese and world economies, with a resulting collapse in stock markets and sharp downturn in economic activity. Nor do I find specific tariff authority to single out an American company's products produced in Mexico for additional tariffs. However, it is fair to assume that in this Administration, "open-carry" will be the rule, that is, U.S. trade negotiators will be packing trade-related side-arms at the negotiating

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<sup>18</sup> Sec. 102(b)(13) of the Bipartisan Trade Priorities and Accountability Act of 2015.

<sup>19</sup> The National Foreign Trade Council (NFTC) had, prior to Congressional consideration of TPA, published its own recommended draft TPA that included a Congressional finding that multilateral and plurilateral agreements were to be preferred to bilateral agreements.

<sup>20</sup> Among the authorities cited were trade agreement termination authority (section 125 of the Trade Act of 1974), section 301 of the Trade Act of 1974, action against unjustifiable or unreasonable foreign government practices, section 338 of the Tariff Act of 1930 against discriminatory foreign measures, section 122 of the Trade Act of 1974 containing balance of payments related authority, section 201 of the Trade Act of 1974 regarding safeguard actions, and the International Economic Emergency Act (IEEPA).

table, whether in Geneva at the WTO or in bilateral settings. The rest of the world, having thought that U.S. unilateralism had a wooden stake driven through its heart in the Uruguay Round with the adoption of binding WTO dispute settlement, and through U.S. commitments in the settlement of a WTO case against use of section 301, will be understandably uneasy. Past trade agreements have been denigrated by the current President. That clearly has given rise to a concern that the rule of law in the form of trade agreement commitments is not, perhaps, to be relied on to the extent that it once has been, as a restraint on American unilateral trade measures. (Of course, this may be part of the Art of the Deal, positioning for a better negotiating position, and nothing more. The fact is, however, that foreign governments cannot be fully reassured in this regard.)

A further caveat: It would be an error to condemn wholesale the new American Administration's trade policy before the trade side of the U.S. government has been staffed and the policies have been enunciated. However, we can assume from the persons named that U.S. trade policy is going to be made more muscular. Further, being muscular does not necessarily mean acting contrary to international trade rules. There will be a number of instances in which, when the U.S. Administration is being more assertive, it is addressing real problems that require adjustment in the rules of the world trading system, the conduct of other nations, or both.

It is likely that when Congress adopted section 301 trade retaliatory authority, it believed that Presidents would, if anything, be too restrained (timid) in its use. Broad authority was vested in the President and in the USTR without much concern that it would be over-used. As with trade agreement termination authority dealt with above, the implicit assumption was that Congress and not the President would want out of an agreement (therefore every agreement by statute had to have a termination clause with a fuse that could not be longer than 3 years). There was no thought when the retaliatory authority in section 301 was enacted that a U.S. President might make this a centerpiece of his trade policy, arrogating to the Executive Branch a larger part than intended of the Congress' Commerce Power. Quite the reverse: the statute is drafted on the basis that "the President shall take action" if faced with foreign government measures that are WTO inconsistent or burden U.S. commerce. Congress was pushing the President to act.

While there are extensive requirements in sections 301-10 for consultation with the Senate Finance Committee and House Ways and Means Committee on prioritization and use of retaliatory authority, and there are a number of reporting requirements to keep the Congress informed of use of the statute, the thrust of the authority is to be poised for action. Going forward, the concerns in Congress may be geared toward restraining an overly aggressive Administration rather than engaging in its traditional role of complaining about executive branch passivity.

## PROPOSALS:

**Congress should review the authorities it has delegated to the President to increase tariffs or take other trade or trade-related action against foreign unfair trade policies, practices and measures, to make sure that they are sufficient but not unlimited to advance U.S. national interests.**

**Congress should consider enacting: (1) a specific requirement analogous to that contained in the 1974 Act's balance of payments authority that a section 301 measure shall remain in place for no more than 12 months absent Congressional approval by Joint Resolution under TPA "fast track procedures" for extension of the measure; and (2) a provision for a joint resolution of disapproval available under those procedures at any time after U.S. retaliatory measures are announced or made effective, such resolution to have the effect of preventing a U.S. measure from going into effect or terminating the U.S. measure.** <sup>21</sup>

Enacting these provisions would move in the direction of restoring Congress' constitutional role over U.S. tariffs.<sup>22</sup>

### **Stress Test Case #5. A U.S. Border Adjustable Tax.**

As of the date that this talk is being prepared, there are no details available of the exact form the Brady proposal will take for an adjustable portion of U.S. federal taxes.<sup>23</sup> The WTO/GATT rule is that direct taxes (taxes on corporations and individuals) are not border

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<sup>21</sup> I was made aware after drafting these remarks that Senator Mike Lee (R-UT) introduced a bill on January 20, 2017, which would require Congressional approval of tariff increases under certain statutory authorities – not including clearly section 125 (termination authority). See: [https://www.scribd.com/document/337115013/The-Global-Trade-Accountability-Act#from\\_embed](https://www.scribd.com/document/337115013/The-Global-Trade-Accountability-Act#from_embed). In addition, Section 307 (19 USC 2417, <https://www.law.cornell.edu/uscode/text/19/2417>) provides that if a Section 301 retaliation is in effect for 4 years, it expires unless the petitioner or a representative of the domestic industry concerned asks for it to be extended, during the last 60 days of the 4-year period. This statute recognizes that retaliation should not be on autopilot and it should not be forever, but it lets the domestic industry control whether the retaliation is extended, after a review by the USTR.

<sup>22</sup> I was the primary proponent within the Executive Branch (as first Deputy General Counsel at STR and then General Counsel) for the original section 301 when participating in the drafting of the Trade Act of 1974. The resulting statute was the work of the two committees of Congress and has become more elaborate with subsequent amendments. This grew out of U.S. government frustration with the many nontariff barriers U.S. exports faced abroad. I also later proposed to the Ways and Means Committee that the USTR could act as well as the President, in order to strengthen the negotiating hand of the USTR within the U.S. government and with U.S. trading partners. This was before the WTO dispute settlement system was in place. An examination is now needed of the appropriate place of section 301 given current problems the U.S. faces and in light of two decades of experience under the WTO's Dispute Settlement Understanding.

<sup>23</sup> I am not taking a position with respect to the WTO aspects of inclusion of border adjustability as part of a tax reform package. I do favor changes in the U.S. tax system to make the United States as good a place as any in which to produce products and services for the world market as any other place. Whether there is a border adjustable tax as part of the package, and whether to favor it, depends very much on what the entire tax package contains. As to WTO compatibility, it would be idle to speculate on that aspect until a proposal is made.

adjustable, and indirect taxes (taxes imposed on products, such as a VAT or sales tax) are adjustable -- meaning rebatable or not charged on exports of goods, and charged on imports of goods. Under the WTO rules, rebate of a direct tax is countervailable; charging a direct tax on imports runs into claims of violations of national treatment and tariff binding commitments. This artificial division has no economic basis. Whether it is the consumer or producer that bears a tax has to do with the income elasticity of demand, not how the tax is structured. For a producer, it is a cost. The market will determine prices and therefore determine how much of the tax eats into profit and how much is simply passed on to the purchaser.

Why the WTO and GATT distinction? It was apparently a simple rule of thumb in a much earlier era when VAT taxes were low, comparable to U.S. state sales taxes, and import duties were high. Now, with the reduction of tariffs, the VAT has much more impact than tariffs, at least in industrialized countries for most products. Where a government relies heavily today on a VAT as compared with income taxes for a substantial part of its revenues, imports bear part of the social costs of the importing country, while its exports are relieved of a like amount of that burden.

The U.S. has questioned the GATT rule since at least the late 1960s. It has not found it possible to adopt a VAT as a political matter, whether due to its unpopularity with American voters, or because it could impinge on the ability of states to raise revenues with sales taxes. The U.S. has tried repeatedly to enact a tax provision to diminish the disadvantage its producers face in competing with the exports of its trading partners. It therefore enacted the Domestic International Sales Corporation (DISC) in 1971, the Foreign Sales Corporation (FSC) in 1984 and the Extraterritorial Income Act in 2000. None of these measures survived challenge under the GATT (later WTO) rules.<sup>24</sup>

The Congress has for at least fifty years urged the President to change the international trading rules:

*(18) Border taxes.--The principal negotiating objective of the United States regarding border taxes is to obtain a revision of the rules of the World Trade Organization with respect to the treatment of border adjustments for internal taxes to redress the disadvantage to countries relying primarily on direct taxes for revenue rather than indirect taxes.*<sup>25</sup>

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<sup>24</sup> In 1969, when I was at the U.S. Treasury, I was asked by then Under Secretary for International Monetary Affairs, Paul Volcker, to find a way through the GATT rules to achieve more even-handed treatment for U.S. goods with respect to border adjustments of taxes. In 1970, I was sent to Geneva to explain why adoption of the Domestic International Sales Corporation (DISC) would be consistent with U.S. GATT obligations. I was not persuasive. In 1971, the DISC as enacted. I was active in the initial stages of its defense before a GATT panel, before leaving Treasury for the Office of the Special Trade Representative.

<sup>25</sup> The Bipartisan Congressional Trade Priorities and Accountability Act of 2015. Sec. 102(b).



WTO Director General Roberto Azevêdo is reported as saying that "the WTO has a lot of 'gray areas' on tax policy, leaving open the possibility that the House Republicans' border adjustability tax plan could be constructed to align with U.S. international obligations while not commenting on the specifics of the proposal."<sup>26</sup> I hope that he is talking with House Ways and Means Chair Kevin Brady about this matter.

There is more than one precedent for U.S. action that forced changes in international trade rules. One example: On August 15, 1971, President Nixon imposed an import surcharge of 10% on dutiable imports for balance of payments reasons.<sup>27</sup> The GATT rule at the time was that only import quotas, not surcharges, could be used for balance of payment reasons. The U.S. defense before a working party was "we could have done worse and imposed quotas," a result no one wanted. The U.S. was roundly condemned by the working party. The U.S. devalued the dollar and removed the surcharge in light of conclusion of the Smithsonian Agreement on exchange rates on December 18, 1971 (together with a commitment from America's major trading partners to multilateral trade negotiations -- which became the Tokyo Round). When the next major negotiation came along, the WTO rule that was adopted favored the use of surcharges as the approved measure for balance of payments reasons.<sup>28</sup>

2. *Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. . . .*

3. *Members shall seek to avoid the imposition of new quantitative restrictions for Balance-of-Payments purposes unless, because of a critical Balance-of-Payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position.*

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<sup>26</sup> Azevêdo was asked in a Feb. 22 interview with CNBC if the House GOP plan to tax U.S. imports while exempting exports would run afoul of WTO rules. "There are certain types of taxes which you are allowed to deduct, for example on exports -- other types of taxes that are not," he said. "There are taxes in between. There are a lot of gray areas here. So I don't know and I don't want to speculate before we see an actual law or bill or legislation in place. At this point in time, it would be speculating."

<https://insidetrade.com/daily-news/azevedo-leaves-open-possibility-house-gop-tax-plan-can-be-wto-compliant>.

<sup>27</sup> Domestic process: Treasury drafted the Presidential proclamation in secret without consulting or informing any other agency (except for a blessing from William Rehnquist, then Assistant Attorney General). I included in the proclamation as authority for imposition of the surcharge the trade agreement termination authority in the 1974 Trade Act. My boss at the time inserted the Trading with the Enemy Act as additional authority. My recollection is that Treasury consulted with Antonin Scalia, successor at DOJ to Rehnquist on the domestic legal defense of the surcharge. The U.S. Supreme Court refused to take the case, leaving the U.S. Court Appeals for the Federal Circuit decision in favor of the surcharge in place. *Alcan v. U.S.*,

[http://www.leagle.com/decision/19821782693F2d1089\\_11570/ALCAN%20SALES,%20DIV.%20OF%20ALCAN%20ALUMINUM%20CORP.%20v.%20U.S.](http://www.leagle.com/decision/19821782693F2d1089_11570/ALCAN%20SALES,%20DIV.%20OF%20ALCAN%20ALUMINUM%20CORP.%20v.%20U.S.).

<sup>28</sup> *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994.*

This experience is instructive provided that one is certain that it has the right side of the argument and convinces other WTO members that it is in their interest to change the rules. Absent being convincing, there are only so many issues that can be resolved through an unwelcome rolfing<sup>29</sup> of the international trading system by the United States.

**PROPOSAL:**

**If the United States adopts a tax package that makes taxation a neutral factor in international trade and investment (that removes the current disadvantage that U.S.-based production has in international trade), and it includes a border adjustable feature that is challenged by America's trading partners, an international conference should be convened consisting of both finance and trade ministers as well as WTO and IMF participants.**

**Independent expert advice should be sought from economists and tax specialists on the neutrality of the U.S. approach to taxation as compared with the tax systems of its major trading partners.**

**The WTO rules should be adjusted if necessary to accommodate the outcome of the conference.**

**Stress Test Case #6. Addressing Currency Manipulation.**

Frankly, I do not think, in light of other pronouncements and withdrawal from TPP by the incoming Administration, that this is much of a stress test at present. It will only become so if action is taken against a major U.S. trading partner.

There is no debate that there have been in the not too distant past serious instances of currency manipulation to the detriment of the United States economy. There is disagreement about whether it exists at present and to what extent. There is also concern about blowback – other countries finding that actions such as the Federal Reserve Board’s quantitative easing resulted in a lower foreign exchange value for the dollar and therefore an incentive for U.S. exports and a burden on U.S. imports. Treasury has been reluctant to label a major trading partner of the United States a currency manipulator.

The WTO/GATT condemns currency manipulation:

*Art. XV: 4. Contracting parties [WTO Members] shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.*

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<sup>29</sup> "Rolfing" a technique of deep tissue manipulation aimed at the release and realignment of the body, and the reduction of muscular and psychic tension. (Term adapted from commentary on a different subject by A. Porges).

This has to be amongst the saddest of all international trade rules, as it is completely ignored.

The Articles of Agreement of the International Monetary Fund provide:

*Art. IV. . . . In particular, each member shall:*

*(iii) avoid manipulating exchange rates . . . in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members;*

Economists agree that undervaluation of a currency acts like an additional tariff on imports and a subsidy on exports. Industrial tariffs being for the most part low in developed countries, the exchange rate can be more important in determining trade flows than a country's tariffs.

Trade ministers are not in charge of this issue. Since the WTO is member-driven, and trade ministers determine what will take place in that body, one can assume that trade ministers will continue to defer to finance ministers and that the WTO will continue to defer to the IMF which is run by finance ministers. Finance ministers, including U.S. Treasury secretaries, are averse to turmoil in financial markets. They are concerned with stability, and for this, we in the trade community are generally thankful. However, there are exceptions. When currency misalignments distort trade flows to an intolerable extent, domestic constituency pressures build for action. These ultimately prove irresistible, and change takes place. This does not happen often. The Smithsonian Agreement of December 18, 1971 arranged by Paul Volcker for President Nixon and the Plaza Accord of 1985 negotiated by Jim Baker during the Reagan Administration are the two leading examples of the rectification of currency misalignments.

One cause of the current structural imbalance of the U.S. trade relationship with China stems from the earlier action taken by the Government of China to depress the value of the RMB. What should be done going forward? I have little doubt that the Department of Commerce will consider any future undervaluation of its currency by China (or any other country) an export subsidy, and apply countervailing duties when there is injury. This is a product-specific mechanism, but the problem from a misalignment would affect all products from that exporting country. In addition, countervailing duties only work to insulate the U.S. market, without countering adverse effects on U.S. exports destined for that country's home market or any third country market in which U.S. goods and services and those of the country with the undervalued currency compete.

#### **PROPOSAL:**

**The Congress should consider creating a legislative framework for determining and countering undervaluation of the currency of any significant trading partner. Elements that would have to be addressed: (1) how to measure undervaluation; (2) the trigger for action; (3) who makes the determination – the Secretary of the Treasury, Treasury and Commerce jointly, Commerce with the advice of Treasury, an independent agency, or a body of experts; (4) what measures are taken – the**

**Bergsten countervailing intervention in the foreign exchange markets,<sup>30</sup> countervail, or retaliation; and (5) the relationship to the WTO – should there be fast track dispute settlement or a ‘shoot first and pay costs later if in error’ approach?**

**Stress Test Case #7. Do the WTO and the U.S. live up to their WTO obligations?**

We do not generally talk in terms of the “WTO’s obligations.” Nevertheless they exist. The lead item in the USTR’s March 1, 2017 release of *The President’s 2017 Trade Policy Agenda* cites one in a section of the *Agenda* entitled “Defending Our National Sovereignty Over Trade Policy.” The particular concern is with WTO dispute settlement panels curbing the use by the U.S. of remedies against unfair or injurious trade practices. USTR cites Articles 3 and 19 of the WTO Dispute Settlement Understanding. Article 19 reads in relevant part:

*2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.*

The U.S. has a list of cases in which it holds that WTO panels and the Appellate Body did exactly that – diminished U.S. rights and expanded U.S. obligations. One instance was a decision that the United States acted inconsistently with its international obligations in creating a fund from antidumping duties to provide assistance to firms injured by the dumping.<sup>31</sup> More generally, it is the view in USTR and Commerce and the U.S. plaintiffs’ bar that the WTO’s philosophical commitment to trade liberalization infects WTO dispute settlement panel and Appellate Body decisions reviewing the imposition of trade remedies.

When the United States entered the WTO and accepted binding dispute settlement, there was already a strong concern that panel and Appellate Body decisions would exceed their authority. Senators Dole and Moynihan proposed the creation of a WTO Dispute Settlement Review Commission,<sup>32</sup> which the Administration agreed to support. Senator Hatch was strongly in favor of it as was Senator Grassley, who was a co-sponsor. In light of the emphasis put on this issue in the *President’s Agenda*, this idea is worth renewed consideration:

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<sup>30</sup> The basic idea is that if a trading partner is buying dollars to depress its currency value in dollar terms, then counter-intervention would consist of the U.S. Treasury buying that country’s currency and selling dollars to the same extent, neutralizing that country’s intervention.

<sup>31</sup> The Byrd Amendment. WTO Dispute DS217, *United States — Continued Dumping and Subsidy Offset Act of 2000*.

<sup>32</sup> <https://www.finance.senate.gov/imo/media/doc/Hrg104-124.pdf>. The Dole-Moynihan bill also provided for deputizing knowledgeable private lawyers to deepen the USTR bench at WTO panel proceedings. Very often foreign governments are represented by U.S.-based counsel during argument before WTO panels. The current imbalance, having private counsel who are steeped in the facts and law in the particular matter from their participation in domestic proceedings only on the foreign side, is disadvantageous to U.S. interests.

## **PROPOSAL:**

**The Congress should establish a WTO Dispute Settlement Review Commission composed of retired federal judges to review WTO panel and Appellate Body decisions adverse to the United States in order to render an independent opinion as to whether in the Commission's view the decision was correct. The Commissioners should give detailed reasons for their findings.**

**The President should take into account the Commission's findings in taking any action in response to a Panel or Appellate Body Report including where he determines to make a recommendation to Congress to change U.S. law.**

**The President by statute should inform Congress of any disagreement that he may have with the findings of the Commission.**

At first look this might seem like a recommendation to favor the maintenance of trade remedies. It is in fact neutral. If the Commission finds that WTO dispute settlement was justified under the WTO rules to which the U.S. subscribed, it would be politically difficult for the President, and where relevant, the Congress, to ignore both the WTO dispute settlement result and the supporting Commission finding. If the Commission found that the WTO had overstepped its mandate, the President would have additional support for any action or lack thereof that he decided was the appropriate course.

At the hearing on the Dole-Moynihan WTO Dispute Settlement Review Commission bill, I gave extensive testimony in favor of the bill. There is one aspect that should be reconsidered. I do not believe that the U.S. should threaten to leave the WTO if three cases in a five year period are found by the Commission to be instances in which the dispute settlement panel and Appellate Body exceeded their role as stipulated in the WTO Dispute Settlement Understanding. I would suggest that Congress and the Executive undertake their own review if this occurs, and consider appropriate options, including reform of the WTO dispute settlement process.

### **Stress Test Case #8. Whither (wither?) the WTO Absent U.S. leadership.**

Markets at times need a guarantor – JP Morgan in the U.S. panic of 1893, Nathan Rothschild for the UK during the Napoleonic War. The U.S., at an early stage in partnership with Great Britain and later with the European Union, has used its influence to create the GATT in 1947 and with a number of others, the WTO in 1995. It was the indispensable party. What happens when this Atlas shrugs, tiring of carrying the burden of underwriting the world trading system? I do not foresee a collapse unless the U.S. bolts (withdraws from the WTO), which I do not see happening. So the system continues. If you believe in the bicycle theory of trade liberalization – namely that without forward movement, there is no stability, in fact there is backsliding. That is one possibility. This could come in the form of a mare's nest of substandard preferential regional trading arrangements. This is exactly what U.S. policy was trying to avoid going into the post-World War II period. Part of the U.S. motivation for the GATT was to eliminate Britain's Imperial Preferences, from the perspective of the United States a major adverse factor in world trade before the Second World War.

Some nations are now actively collaborating in setting new regional arrangements – the China-led RCEP for example. RCEP may constitute a low-grade version of TPP. The result: world trade would be governed in part by the WTO and in part, to an as yet indeterminate degree, by a rival set of preferential trading arrangements, with their common element being discrimination against U.S. exports, all with the tacit blessing of the WTO (which has proved inert in the face of free-trade agreements that do not cover substantially all the trade of the participants.)

### **PROPOSAL:**

**Japan and the EU, with Australia, Canada and New Zealand, with any other like-minded nation (from Latin America, from Southeast Asia) should explore taking a greater part of the burden of driving the WTO agenda forward. This would entail being more adventurous than what some of these countries are used to.**

Japan proved in the TPP negotiations that it could exercise leadership alongside the United States and several other countries in crafting rules, as well as engaging in its own needed liberalization. An unknown factor with respect to the EU is the degree to which populism in major remaining EU members undermines the possibility of exercising dynamic global leadership for trade liberalization. (Brussels would strongly deny that it is impaired at all in this regard.)

What could be gained if others -- a coalition of countries interested in open trade -- stepped forward? In the offing are an environmental goods agreement (EGA), a Trade in Services Agreement (TiSA), and just a new initiative for liberalization of world trade to the benefit of small and medium enterprises through rules to serve the expansion of the global digital economy. The U.S. and the UK could join in later, if they could not join at the outset – the U.S. when its internal pendulum starts to return to center with respect to the multilateral trading system, and the UK once it gets over its preoccupation with Brexit and resists a potential nativist aversion to Geneva (the WTO) of the sort that plagued its relationship with Brussels.

**Lastly, not a stress test for the trading system: a technical correction re: removing the statutory ban from serving as USTR for those having represented a foreign government.**

Trade was front and center of this past presidential election. Nevertheless, it is still unclear when the full Senate will consider confirmation for the President's nominee for the position of U.S. Trade Representative. In the meantime, the Commerce secretary has been told to lead the NAFTA re-negotiation, other countries' trade ministers are gathering in Chile next week to discuss what to do after TPP,<sup>33</sup> and other countries are accelerating their efforts to sound each other out for possible trade agreements that will have the effect of discriminating against U.S. commerce. The chief trade policy spokesperson, the chief negotiator for the United States, is an office that is vacant save for an acting, not-Congressionally affirmed individual. A waiver has been considered to be in order for the President's nominee due to section 141(b) of the Trade Act

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<sup>33</sup> The United States will be represented at this potentially crucial meeting of trade ministers by the U.S. Ambassador to Chile. That person cannot possibly lead the meeting, or even participate fully and effectively to advance U.S. interests.

of 1974:

*(4) A person who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of title 18, United States Code [a foreign government or a foreign political party]) in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative.*

This sounds like a very serious offense warranting a waiver. But why can't the Senate be trusted -- through the confirmation process which entails a vote of a majority of the United States Senate after a full Committee hearing and vetting -- to be a sufficient screen for the office of USTR. This was a well-meaning amendment, but so far it has caught in its process two persons, one Democrat who was a Deputy Trade Representative and one Republican who held that same office. The Democrat, Charlene Barshefsky, duly got the waiver and the Republican, Robert Lighthizer, undoubtedly will, once the nomination process is cleared of non-germane matters. There is, however, no need for a waiver process, requiring two votes rather than one to fill this office. Indeed, I have not found a similar provision in the statutes setting up any Cabinet department, not even in the law establishing the Director of National Intelligence. This provision seems to stand alone.

**PROPOSAL: Repeal the lifetime ban on service as a USTR or Deputy USTR after having represented a foreign entity.**

**If it is too much to repeal this provision, clarify it so that representing a foreign client which is a government ministry or other government entity in a trade proceeding, such as antidumping, countervailing duties, or safeguard case, is not an action covered by this provision.**

This type of administrative proceeding is not in reality "a dispute or negotiation with the United States." These are adjudications in which the United States is not an adverse party, it is an adjudicator, administering law and finding facts.

## **Conclusion**

I have consciously left out in this recitation of current and future stress tests for the international trading system some of the largest. I could say that this omission was for reasons of space, but it is more because the contours of likely or appropriate responses to the challenges posed are insufficiently clear at present. I forecast in 2007 at an OECD meeting in Beijing that China could take one of two paths -- one more liberal, and the other more state-directed that would lead to friction with its trading partners. While there has been a mixture of approaches, the chances for untroubled trade relations with China do not give rise to optimism.

At the same time, we hear the declaration of the Trump Administration's chief strategist in a meeting two weeks ago that the withdrawal from TPP was a turning point for America in the context of his talking of America's new move toward "economic nationalism." I did not see any

reference in the reports of this event any mention by the Administration's representatives of U.S. international leadership.

Both the United States and China are entering uncharted waters, in which a collision may take place.

The ties that bind sovereign nations to a rules-based international order are exceptionally fragile. The multilateral trading system is at risk when the United States, one of its prime architects and leading proponents, rejects its three-quarters of a century history, and cannot endorse a “multilateral” or “multi-party” approach. This is occurring at a time when the world’s largest exporting and largest manufacturing country, China, is still not taking consequential steps to assure its trading partners that it embraces the implicit foundation for the World Trade Organization – the concept that market forces will determine competitive outcomes without the heavy thumb of the state being placed on the scale. These two major deficiencies in the policies of the world’s two largest trading nations are a recipe for a very troubled global economic outlook, and must be changed.