

What Does 'Fair' Trade Mean for United States Trade Policy and the World Trade Organisation?

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Introduction

United States trade policy under the Trump Administration is centered on the concept of 'fair' trade. Unfortunately, the Trump Administration's trade policy is not 'fair'. The author argues that the Trump Administration's concept of 'fair' trade puts 'America first' and has increased the importance of enforcement and national trade sovereignty. As a result, the Trump Administration has destabilised the multilateral, rules-based trading system of the World Trade Organisation (WTO).

This paper first explores developments in United States trade policy under the Trump Administration (Part I). The author then focuses on the Trump Administration's national security measures. This paper examines how the national security measures and the subsequent trade war challenge the WTO (Part II).

I United States Trade Policy

On 1 March 2017, the Office of the United States Trade Representative (USTR) released the President's 2017 Trade Policy Agenda (Agenda).¹ The Agenda stated that the overarching purpose of the Trump Administration's trade policy is to expand trade in a way that is 'fairer for all *Americans*.'² This concept of 'fair' trade is central to the Trump Administration's trade policy.

¹ Office of the United States Trade Representative, *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program* (March 2017) ('*Agenda*'). This report was submitted in order to meet the statutory deadline of 1 March 2017 pursuant to *Trade Act of 2002*, 19 USC § 2213(a).

² *Ibid* 1 (emphasis added).

This author suggests 'fair' trade may have two limbs.³ First, trade must put 'America first'. Second, 'fair' trade suggests that United States trade decisions must be rigorously enforced and defended. This section outlines both limbs and examines implications for United States trade policy.

A *America First*

In his inauguration address, President Trump proclaimed that '[f]rom this day forward, it's going to be only America first'.⁴ This message has permeated through United States trade policy and is at the foundation of the Trump Administration's advancement of (1) national security measures, (2) treaty reviews and (3) Buy American laws.

1 *National Security Measures*

The Trump Administration's recent use of national security measures under s 232 of the Trade Expansion Act aims to put American producers first.⁵ On 19 April 2017, the Department of Commerce self-initiated investigations of steel and aluminum imports under s 232(b) of the Trade Expansion Act. This allows the Secretary of Commerce to investigate the effects of imported goods on national security.⁶ Where an investigation concludes that imports threaten to impair national security,⁷ and the President concurs,⁸ the President may take actions to adjust imports so they do 'not threaten to impair national security'.⁹ The investigation considered whether steel and aluminum imports 'cause American workers to lose jobs which are needed to meet security

³ Certain United States' trade policies have been abandoned by the Trump Administration while writing this paper. Two may be noted. First, the Trump Administration has not labelled China a currency manipulator, despite then President-elect Trump's promise to do so on day one of his presidency. Second, the Trump Administration has moved away from the border tax adjustments proposed in the Ryan/Brady Blueprint. On 26 April 2017, the Trump Administration unveiled a one-page outline of changes to the United States tax code. Border tax adjustments were not included.

⁴ President Donald J. Trump, 'The Inauguration Address' (Speech delivered at the Inaugural Address, Washington D.C., 20 January 2017) <<https://www.whitehouse.gov/inaugural-address>>.

⁵ *Trade Expansion Act of 1962*, 19 USC § 232(b).

⁶ *Ibid.*

⁷ *Ibid* § 232(c)(1)(A).

⁸ *Ibid* § 232(c)(1)(A)(i).

⁹ *Ibid* § 232(c)(1)(A)(ii).

requirements of the domestic' industries.¹⁰ It further considered the effect of imports on government revenue and economic welfare.¹¹ The steel and aluminum investigations were prioritised by executive orders signed on 20 and 27 April 2017 respectively.¹²

The steel and aluminum reports were completed on 11 and 17 January 2018 respectively.¹³ The reports concluded that steel and aluminum imports 'threaten to impair the national security' of the United States.¹⁴ National security measures were subsequently imposed on 23 March 2018.¹⁵ Initially, the United States imposed tariffs on steel (25 per cent) and aluminum (10 per cent) products to all member States except Canada, Mexico, EU, Argentina, Australia, Brazil and South Korea.¹⁶ On 28 March, Korea agreed to quantitative restrictions on its steel exports in return for an exemption from steel tariffs.¹⁷ On 1 May 2018, the United States and South Korea also agreed to quantitative restrictions on both steel and aluminum products.¹⁸ Argentina also entered into quantitative restrictions on steel and aluminum products.¹⁹

¹⁰ Office of the Press Secretary, *President Donald J. Trump: Standing up to Unfair Steel Trade Practices* (20 April 2017) <<https://www.whitehouse.gov/the-press-office/2017/04/20/president-donald-j-trump-standing-unfair-steel-trade-practices>>.

¹¹ Office of the Press Secretary, *Remarks by President Trump at Signing of the Memorandum Regarding the Investigation Pursuant to Section 232 (B) of the Trade Expansion Act* (Presidential Remarks, 20 April 2017) ('*Remarks of section 232*') <<https://www.whitehouse.gov/the-press-office/2017/04/20/remarks-president-trump-signing-memorandum-regarding-investigation>>.

¹² President Donald J. Trump, 'Memorandum for the Secretary of Commerce: Steel Imports and Threats to National Security' (Presidential Memorandum, 20 April 2017) <<https://www.whitehouse.gov/the-press-office/2017/04/20/presidential-memorandum-secretary-commerce>>; President Donald J. Trump, 'Memorandum for the Secretary of Commerce: Aluminum Imports and Threats to National Security' (Presidential Memorandum, 27 April 2017) <<https://www.whitehouse.gov/the-press-office/2017/04/27/presidential-memorandum-secretary-commerce>>.

¹³ US Department of Commerce, 'The Effect of Imports of Steel on the National Security: An investigation conducted under section 232 of the Trade Expansion Act of 1962, as amended' (11 January 2018); US Department of Commerce, 'The Effect of Imports of Aluminum on the National Security: An investigation conducted under section 232 of the Trade Expansion Act of 1962, as amended' (17 January 2018).

¹⁴ Office of Public Affairs, 'Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House' (Department of Commerce, 16 February 2018).

¹⁵ Chad Bown and Melina Kolb, 'Trump's trade War Timeline: An Up-to-Date Guide' (Peterson Institute for International Economics, 24 September 2018).

¹⁶ *United States - Certain Measures on Steel and Aluminium Products (Request for Consultations By China)* WTO Doc. WT/DS544/1 (9 April 2018).

¹⁷ Bown and Kolb, above n 15, 4.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

The exemptions ended on 1 June 2018. The United States imposed the national security measures on Canada, Mexico, Brazil and the European Union.²⁰ Australia remains the only country that is still exempt from the national security measures with no quantitative restrictions.²¹ These measures have resulted in a series of retaliatory measures.²²

The Trump Administration's use of national security measures marks an important turn in United States trade policy for three reasons. First, trade investigations initiated by the Administration itself (self-initiated investigations) are not common practice. Over 2,000 investigations have been initiated in the United States since 1980.²³ Prior to the steel and aluminium investigation, the United States had self-initiated trade investigation in only 19 instances.²⁴ All other investigations (over 99 per cent) were commenced by industry action. The Bush Administration commenced the last self-initiated investigation into steel imports in 2001.²⁵

Chad Bown, Senior Fellow at the Peterson Institute of International Economics, suggests that the Trump Administration's use of self-initiated investigations aims to achieve 'political credit for protecting US firms and jobs'.²⁶ Political credit may also be responsible for two further s 232 investigations that have been announced in 2018. On 23 May 2018, the Department of Commerce initiated s 232 investigations on US automobile and automobile parts.²⁷ On 18 July 2018, it launched a s 232 investigation into uranium ore and product imports.²⁸

²⁰ Ibid. However, Brazil entered into quota restriction for aluminium products.

²¹ Congressional Research Service, 'Section 232 Investigations: Overview and Issues for Congress' (CRS Report, 11 September 2018) <<https://fas.org/sgp/crs/misc/R45249.pdf>>.

²² Examined in Part II.

²³ Chad Bown, 'Trump's Threat of Steel Tariffs Heralds Big Changes in Trade Policy' (2017) Peterson Institute for International Economics ('Trump's Threat') <<https://piie.com/commentary/oped/trumps-threat-steel-tariffs-heralds-big-changes-trade-policy>>.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Office of Public Affairs, 'U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports' (Department of Commerce, 23 May 2018) <<https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>>.

²⁸ Office of Public Affairs, 'U.S. Department of Commerce Initiates Section 232 Investigation into Uranium Imports' (Department of Commerce, 18 July 2018) <<https://www.commerce.gov/news/press-releases/2018/07/us-department-commerce-initiates-section-232-investigation-uranium>>.

Second, the Trump Administration's imposition of national security measures takes a 'U.S.-only' approach to the global issue of steel overcapacity.²⁹ The national security measures were imposed in response to concerns of overcapacity in the steel industry.³⁰ World crude steel-making capacity data demonstrates that overcapacity concerns are related to China. China's capacity rose 176 per cent between 2005-17.³¹ OECD and non-OECD growth over this period is 13 and 74 per cent respectively.³² This suggests that growth in capacity is related to China, not OECD countries. Despite this, the Trump Administration imposed tariffs on OECD countries, thereby punishing countries that are not contributing to overcapacity. This 'US-only approach'³³ has isolated the United States. A recent statement by the President of the European Commission demonstrates this isolationism: 'by targeting those who are not responsible for overcapacities, the US is playing into the hands of those who are responsible for the problem.'³⁴

Third, comments from the Secretary of Commerce suggest that the national security measures are a disguised trade remedy tool to reduce imports. The Secretary of Commerce stated that the problem with traditional anti-dumping and countervailing duty remedies is that 'they're very, very limited in nature to a very, very specific product for a very, very specific country'.³⁵ The Secretary of Commerce suggested that a national security approach might better address steel imports, as it 'would deal with a very wide range of steel products and a very wide range of countries'.³⁶ It would offer a 'broader [solution] both geographically and product-wise'.³⁷ This

²⁹ Chad Bown, 'Testimony before the U.S.-China Economic and Security Review Commission: Hearing on U.S. Tools to Address Chinese Market Distortions' (8 June 2018) 2 ('Testimony before Commission').

³⁰ United States Department of Commerce (Bureau of Industry and Security Office of Technology Evaluation) 'The Effect Of Imports Of Steel On The National Security: An Investigation Conducted Under Section 232 Of The Trade Expansion Act Of 1962, As Amended' (11 January 2018) <<https://www.bis.doc.gov/index.php/forms-documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file>>.

³¹ Bown, *Testimony before the Review Commission*, above n 29, 2.

³² *Ibid.*

³³ *Ibid.*

³⁴ European Commission, 'European Commission reacts to the US restrictions on steel and aluminium affecting the EU' (Brussels, Press Release, 31 May 2018).

³⁵ Office of the Press Secretary, *Remarks by President Trump at Signing of the Memorandum Regarding the Investigation Pursuant to Section 232 (B) of the Trade Expansion Act* (Presidential Remarks, 20 April 2017) ('Remarks of section 232').

³⁶ *Ibid.*

³⁷ *Ibid.*

explanation suggests that the Trump Administration views national security measures as an efficient means of restraining imports, as compared to traditional tools (anti-dumping or countervailing duties). The scope of the national security measures, which were placed on nearly all countries, reflects the Secretary of Commerce's underlying goal. These measures may therefore form part of the Trump Administration's tools to reduce trade deficits. The legality of the national security measures will be discussed in Part II.

2 *Review of Trade Agreements*

The Trump Administration has advanced a policy of reviewing trade agreements that do not put 'America first'. This continues the United States' global pivot away from multilateral trade negotiations, to a bilateral focus. This policy was first witnessed in President Trump's withdrawal from the Trans Pacific-Partnership (TPP) negotiation on 23 January 2017. This was President Trump's first executive action.³⁸ The policy was reinforced by an executive order on 31 March 2017, whereby the Trump Administration requested the Secretary of Commerce prepare a report on significant trade deficits with United States trading partners.³⁹

By executive order on 29 April 2017,⁴⁰ the Trump Administration further indicated that it would renegotiate or terminate trade agreements that, on net, harm the United States economy.⁴¹ This executive order tasked a comprehensive performance review of trade agreements, including trade relations with countries governed by the WTO with which the United States runs significant trade deficits.⁴² It is not clear what constitutes net 'harm' under the executive order. On one interpretation, a trade agreement may 'harm' the United States where it runs a trade deficit with

³⁸ President Donald J. Trump, 'Omnibus Report on Significant Trade Deficits' (Executive Order, 31 March 2017) <<https://www.whitehouse.gov/the-press-office/2017/03/31/presidential-executive-order-regarding-omnibus-report-significant-trade>>.

³⁹ *Ibid.*

⁴⁰ President Donald J. Trump, 'Addressing Trade Agreement Violations and Abuses' (Executive Order, 29 April 2017) <<https://www.whitehouse.gov/the-press-office/2017/05/01/presidential-executive-order-addressing-trade-agreement-violations-and>>.

⁴¹ *Ibid.*

⁴² *Ibid.*

the partner country. The United States has 14 bilateral and regional free trade agreements with 20 countries.⁴³

President Trump also promised to renegotiate the North American Free Trade Agreement (NAFTA) during his presidential campaign and during his first year in office.⁴⁴ President Trump publicly described NAFTA as the 'worst trade deal ever made'.⁴⁵ On 1 October 2018, the United States, Mexico and Canada completed negotiations on the US-Mexico-Canada Agreement (USMCA).⁴⁶ President Trump's remarks in the Rose Garden on 1 October 2018 indicate that USMCA negotiations were driven by President Trump's principle of 'fair' trade:

[W]e have negotiated this new agreement based on the principle of fairness and reciprocity. To me, it's the most important word in trade because we've been treated so unfairly by so many nations all over the world.⁴⁷

The Trump Administration's review of 'unfair' trade agreements tries to put 'America first'. Importantly, the Trump Administration has placed an increased emphasis on bilateral trade relations. This emphasis may reflect the '[v]ery slow progress' made in 'multilateral trade negotiations since the initiation of the Doha Development Round in November 2001'.⁴⁸ A focus on bilateral trade agreements was stressed in the Presidential Memorandum of 23 January

⁴³ United States free trade agreement partners: Australia; Bahrain; Chile; Colombia; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Nicaragua; Israel; Jordan; Korea; Morocco; Canada; Mexico; Oman; Panama; Peru; Singapore; See <<https://ustr.gov/trade-agreements/free-trade-agreements>>.

⁴⁴ White House, 'Remarks by President Trump on the United States-Mexico-Canada Agreement' (1 October 2018) <<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-united-states-mexico-canada-agreement/>>; Simon Lester and Inu Manak, 'A Framework for Rethinking NAFTA for the 21st Century: Policies, Institutions, and Regionalism' (CTEI Working Papers, CTEI-2017-10) 2.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Rashmi Banga, 'Emerging 'New Issues' in Multilateral Trade Agreements' (Briefing Paper, No. 2017/02, Commonwealth Trade Competitiveness, April 2017) <<http://www.oecd-ilibrary.org/docserver/download/53b84333-en.pdf?expires=1496885258&id=id&accname=guest&checksum=7CEAEDE427081E34555090040975F3CF>>.

2017.⁴⁹ The Memorandum stated that ‘future trade deals’ would ‘deal directly with individual countries on a one-on-one (or bilateral) basis’.⁵⁰ Peter Navarro, head of the White House National Trade Council, suggested that multilateral trade agreements ‘reduce [U.S.] bargaining power and ... surrender [U.S.] sovereignty’.⁵¹ The underlying rationale is that multilateral negotiations ‘require the United States make more concessions than trade negotiations with only one partner’.⁵² The Trump Administration may continue this global trend away from multilateral to bilateral negotiations.

3 *Buy American*

The Trump Administration’s emphasis on Buy American laws is consistent with pursuing ‘fair’ trade that puts American producers first. However, it also marks an outwardly protectionist tone in United States trade policy.

The Trump Administration directed agencies to ‘scrupulously monitor, enforce, and comply with Buy American laws’ by executive order on 18 April 2017.⁵³ The United States Congress passed the Buy American Act in 1933.⁵⁴ It aims to give preferential treatment to domestic sources of unmanufactured goods and materials for public use.⁵⁵ The executive order requests heads of all agencies develop and propose policies that ‘maximize the use of materials produced in the United

⁴⁹ President Donald J. Trump, ‘Withdrawal of the United States from the trans-Pacific Partnership Negotiations and Agreement’ (Presidential Memorandum, 23 January 2017) <<https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>>.

⁵⁰ Ibid.

⁵¹ FOX News, ‘Peter Navarro: Trump’s trade policy will be great for the world’, *FOX Business* (online), 25 January 2017 (Peter Navarro) <<http://video.foxbusiness.com/v/5297394198001/?#sp=show-clips>>; AAP ‘Donald Trump set to negotiate new trade deal with Australia’, *The Australian* (online), 30 January 2017 <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/donald-trump-set-to-negotiate-new-trade-deal-with-australia/news-story/dfd7a3c37e03642ded9b1f9aa373b559>>.

⁵² Jacqueline Varas, *Assessing Bilateral and Multilateral Trade Agreements* (American Action Forum, 14 February 2017) <<https://www.americanactionforum.org/research/assessing-bilateral-multilateral-trade-agreements/>>.

⁵³ President Donald J. Trump, ‘Buy American and Hire American’ (Executive Order, 18 April 2017) s 3 <<https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american>>.

⁵⁴ *Buy American Act of 1933*, 41 USC §§8301-8305.

⁵⁵ Ibid.

States'.⁵⁶ The executive order requests reports on compliance of Buy American laws within agencies, and the use of waivers and exceptions under these laws.⁵⁷

It further requests an assessment of whether commitments in United States' free trade agreements and the WTO Government Procurement Agreement (GPA) 'weaken' or circumvent Buy American laws.⁵⁸ This review of the GPA is consistent with conclusions of the United States Government Accountability Office (GAO) in February 2017.⁵⁹ The GAO found that the United States had opened more opportunities for foreign firms than any other member state under the GPA.⁶⁰

The Trump Administration's commitment to 'Buy American' is consistent with the 'America first' rhetoric. However, the executive order underscores a pivot to outwardly protectionist policy. This was displayed through language at the signing ceremony, with President Trump stating that the executive order would 'protect our workers, defend our jobs, and finally put America first'.⁶¹

This protectionist message was also witnessed at the G20 Ministerial and Deputies Meetings held in Baden Baden.⁶² The post-meeting Communiqué underwent numerous drafts, with different emphasis on trade messages. The final trade text in the Communiqué states:

⁵⁶ President Donald J. Trump, 'Buy American and Hire American' (Executive Order, 18 April 2017) s 3(b)(iii) <<https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american>>.

⁵⁷ Ibid s 3(b)(i).

⁵⁸ Ibid s 3(e).

⁵⁹ United States Government Accountability Office 'United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed' (February 2017) <<https://www.gao.gov/assets/690/682664.pdf>>.

⁶⁰ Ibid.

⁶¹ Office of the Press Secretary, *Remarks by President Trump on Buy American, Hire American Executive Order* (Presidential Remarks, 18 April 2017) <<https://www.whitehouse.gov/the-press-office/2017/04/18/remarks-president-trump-buy-american-hire-american-executive-order>>.

⁶² Balazs Koranyi and Gernot Heller, 'G20 financial leaders acquiesce to U.S., drop free trade pledge', *Rueters* (online), 18 March 2017 <<http://www.reuters.com/article/us-g20-germany-trade-idUSKBN16P0FN>>.

We are working to strengthen the contribution of trade to our economies. We will strive to reduce excessive global imbalances, promote greater inclusiveness and fairness and reduce inequality in our pursuit of economic growth.⁶³

The United States successfully removed a previous pledge to ‘resist all forms of protectionism’,⁶⁴ underscoring the United States outwardly protectionist trade policy.

The United States’ protectionist pivot is further supported by a 2017 survey of research and practitioners conducted by the South Asia Economic Policy Network.⁶⁵ 88 per cent of those who responded expected more protectionism from the United States. 43 per cent expected protectionism policies would be directed towards China and Mexico, and 45 per cent expected a rise in protectionism across the board.⁶⁶

B *Enforcement and Sovereignty*

In the Agenda, the Trump Administration stated it would strictly enforce United States trade remedy law and defend national sovereignty over trade policy.⁶⁷ By ‘United States trade remedy law’, the author refers to the domestic trade remedy regime in the United States. This includes the United States safeguards, anti-dumping duties, countervailing measures and duty collection scheme. The Agenda appropriately frames the Trump Administration’s actions with regards to (1) enhanced collection and enforcement of trade remedy law and (2) continued treatment of China as a non-market economy.

⁶³ G20 Finance Ministerial Meetings, ‘Communiqué’ (G20 Finance Ministers and Central Bank Governors Meeting Baden Baden, Germany, 18 March 2017) <<http://www.g20.utoronto.ca/2017/170318-finance-en.html>>.

⁶⁴ G20 Finance Ministerial Meetings, ‘Communiqué’ (G20 Finance Ministers and Central Bank Governors Meeting Chengdu, China, 24 July 2016) s 3 <<http://www.g20.utoronto.ca/2016/160724-finance.html>>.

⁶⁵ World Bank, ‘Globalization backlash: Should Asia Worry?’ (Report, South Asia Economic Focus Spring 2017, 16 April 2017) 27-8.

⁶⁶ *Ibid* 27-8.

⁶⁷ *Agenda*, above n 1, 2.

1 *Enhanced Collection and Enforcement*

Enhanced collection and enforcement of United States trade remedy law is at the foundation of the Trump Administration's concept of 'fair' trade. The Trump Administration advanced this policy through executive order on 31 March 2017.⁶⁸

A strong stance on duty collection is consistent with ensuring that trading partners do not undermine United States trade remedy law. To enhance collection, President Trump's executive order requested that the Secretary of Homeland Security develop a plan requiring importers that pose a risk to United States revenue to provide greater security for antidumping and countervailing duty liability. This may be achieved through bonds and other legal measures.⁶⁹ At the signing ceremony, President Trump emphasised that the executive order would ensure the United States collected 'all duties imposed on foreign importers that *cheat*'.⁷⁰ In the 2016 financial year, imported goods into the United States were subject to \$14 billion in anti-dumping and countervailing duties.⁷¹ At the end of 2016, \$2.8 billion of duties were owed to the United States for imports going back to 2001.⁷²

Trade enforcement is also central to the Trump Administration's achievement of 'fair' trade. President Trump's executive order requested that the Secretary of Homeland Security develop and implement a strategy that combats violations of United States trade and customs laws for

⁶⁸ President Donald J. Trump, 'Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws' (Executive Order, 31 March 2017) ('Established Enhanced Collection and Enforcement') <<https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>>.

⁶⁹ *Ibid* s 3.

⁷⁰ Office of the Press Secretary, *Remarks by President Trump et al. at Signing of Trade Executive Orders* (Presidential Remarks, 31 March 2017) (emphasis added) <<https://www.whitehouse.gov/the-press-office/2017/03/31/remarks-president-trump-et-al-signing-trade-executive-orders>>.

⁷¹ Department of Homeland Security, *Q&A: Establishing Enhanced Collection and Enforcement of Dumping and Countervailing Duties and Violations of Trade and Customs Laws* (31 March 2017) <<https://www.dhs.gov/news/2017/03/31/qa-enhanced-collection-and-enforcement-antidumping-and-countervailing-duties-and>>.

⁷² *Ibid*.

goods.⁷³ The executive order further requires the Attorney General to develop prosecution practices, and allocate appropriate resources, to ensure that Federal prosecutors prioritise prosecuting trade law offences.⁷⁴

2 *China's Non-Market Economy Status*

The second principle that flows from the Agenda is a desire to defend national sovereignty over United States trade policy. The Trump Administration's decision not to grant China market economy status reflects this desire to protect and preserve its trade-related decisions.

Under United States domestic law, the Department of Commerce determines a country's market economy status.⁷⁵ A non-market economy is defined as a foreign country that does not 'operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.'⁷⁶ The Department of Commerce considers a range of factors in its determination.⁷⁷ This includes the extent of government ownership or control over means of production. China has been treated as a non-market economy in all past United States antidumping investigations and administrative reviews.⁷⁸

A country's status is important in the calculation of anti-dumping duties. The United States may only impose anti-dumping duties on goods that are imported at less-than-fair-value (LTFV).⁷⁹ To make this assessment, the Department of Commerce may compare the export price⁸⁰ of the good

⁷³ President Donald J. Trump, 'Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws' (Executive Order, 31 March 2017) s 4 <<https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>>.

⁷⁴ *Ibid* s 5.

⁷⁵ *Tariff Act of 1930*, 19 USC § 1677(18).

⁷⁶ *Ibid* § 771(18)(A).

⁷⁷ *Ibid* § 1677(18).

⁷⁸ Department of Commerce International Trade Administration, *Certain Aluminum Foil From the People's Republic of China: Notice of Initiation of Inquiry Into the Status of the People's Republic of China as a Nonmarket Economy Country Under the Antidumping and Countervailing Duty Laws* (29 March 2017) 3 ('*Notice of Initiation of Inquiry*') <<http://enforcement.trade.gov/download/prc-nme-status/prc-nme-status-initiation-notice-032917.pdf>>.

⁷⁹ *Tariff Act of 1930*, 19 USC §1673(1). They must also injure an import-competing United States industry, see *Tariff Act of 1930*, 19 USC §1673(2)(A)(i).

⁸⁰ *Ibid* § 772(a).

with either (1) the price of the same good in the exporter's home market;⁸¹ (2) the price of the imported good in a third-country;⁸² or (3) a constructed value of the firm's costs.⁸³ However, the Department of Commerce will not use these comparison methods where it considers that the exporter is a non-market economy.⁸⁴ Instead, the Department of Commerce constructs a price comparison based on data from surrogate countries.⁸⁵ The rationale is that observed prices of non-market economies are not reliable indicators due to 'misleading ... supply and demand forces'.⁸⁶ Calculations using surrogate country data often lead to higher dumping margins.⁸⁷

China has requested consultation with the United States at the WTO concerning its status as a non-market economy.⁸⁸ China seeks market economy status for the purpose of United States anti-dumping investigations.⁸⁹ This is important for China, as the use of surrogate data often leads to higher dumping margins imposed on its exports.

The dispute centres on differing interpretations of s 15(a)(ii) of China's accession protocol to the WTO.⁹⁰ China alleges that WTO members (including the United States) were required to automatically treat China as a market economy in anti-dumping methodology when s 15(a)(ii) expired on 16 December 2016.⁹¹ The United States hold that the expiration of s 15(a)(ii) does not

⁸¹ Ibid § 773(a)(1)(B)(i).

⁸² Ibid §§ 773(a)(1)(B)(ii), 773(a)(1)(C).

⁸³ Ibid § 773(a)(4).

⁸⁴ Ibid § 773(c)(1).

⁸⁵ Ibid § 773(c)(4).

⁸⁶ Chad Bown, *Should the United States Recognize China as a Market Economy* (2016) Peterson Institute for International Economics, 3 <<https://piie.com/system/files/documents/pb16-24.pdf>>.

⁸⁷ Economic and Security Review Commission, 'U.S.-China Economic and Security Review Commission' (Issue Brief, 18 April 2017).

⁸⁸ *United States – Measures Related to Price Comparison Methodologies*, WTO Doc WT/DS515/1 (15 December 2016) (Request for Consultations by the Peoples Republic of China).

⁸⁹ Ibid.

⁹⁰ *Accession of the People's Republic of China*, WTO Doc WT/L/432 (23 November 2001) (Decision of 10 November 2001) 8.

⁹¹ *United States – Measures Related to Price Comparison Methodologies*, WTO Doc WT/DS515/1 (15 December 2016) (Request for Consultations by the Peoples Republic of China).

lead to automatic market economy treatment.⁹² Instead, China's status depends on a review of the Department of Commerce.⁹³

The Trump Administration's continued treatment of China as a non-market economy is consistent with its policy of defending its sovereignty over its trade policy. It is further consistent with President Trump's tough stance on China, voiced during the presidential election. On 8 December 2016, then president-elect Donald Trump stated that 'China is not a market economy'.⁹⁴

However, the Trump Administration could use market-economy status as a future concession in negotiations with China. This would be consistent with the Trump Administration's decision not to label China a currency manipulator.⁹⁵ President Trump reversed his presidential commitment on 14 April 2017. The Treasury Department did not label China a currency manipulator in its twice-yearly currency review.⁹⁶ President Trump stated this was part of a strategic plan to work with China against North Korean missile stockpiling.⁹⁷

⁹² Economic and Security Review Commission, 'U.S.-China Economic and Security Review Commission' (Issue Brief, 18 April 2017) <<https://www.uscc.gov/sites/default/files/Research/Non%20Market%20Economy%20Issue%20Brief.pdf>>.

⁹³ Ibid.

⁹⁴ Jeff Mason, 'Trump says U.S. – China relationship must improve', *Reuters* (online), 8 December 2016 <<http://www.reuters.com/article/us-usa-trump-china-idUSKBN13Y085>>.

⁹⁵ United States Department of the Treasury Office of International Affairs, 'Foreign Exchange Policies of Major Trading Partners of the United States' (April 14, 2017) <<https://www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/2017-04-14-Spring-2017-FX-Report-FINAL.PDF>>.

⁹⁶ Ibid.

⁹⁷ Rachael Revesz, 'Donald Trump reverses campaign pledge to label China 'currency manipulator' in light of North Korea', *The Independent* (online), 16 April 2017 <<http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-china-currency-manipulator-treasury-department-report-manufacturers-xi-jinping-meeting-a7686261.html>>; President Donald J. Trump, 'Why would I call China a currency manipulator when they are working with us on the North Korean problem?' on *Twitter* (16 April 2017) <<https://twitter.com/realdonaldtrump/status/853583417916755968?lang=en>>.

II National Security Measures and the Multilateral, Rules-Based

Trading System of the WTO

This part focuses on the Trump Administration's national security measures. These measures have been President Trump's primary tool to achieve 'fair' trade for the American people. The measures pose two major challenges to the multilateral, rules-based trading system established of the WTO. First, the national security measures have resulted in a trade war that has undermined the WTO system. Second, the national security measures present an important interpretative challenge for WTO adjudicative bodies.⁹⁸

A Trade War

The Trump Administration's national security measures have resulted in a trade war that continues to destabilise the multilateral, rules-based trading system of the WTO. Trade wars undermine the WTO system by fostering a culture of tit-for-tat retaliation that is non-compliant with the WTO Agreements. A trade war is considered as an 'intense international conflict' in which countries 'interact, bargain, and retaliate primarily over economic objects directly related to the traded goods or service sectors of their economies'.⁹⁹ This paper will first examine retaliatory responses in the trade war, and then ask how it may be resolved.

1 Retaliation

This section focuses on the retaliatory behaviour that has resulted from the national security measures.¹⁰⁰ The following member States have threatened or imposed retaliatory measures

⁹⁸ Two adjudicative bodies are established under the *Dispute Settlement Understanding*. These are the Panel and the Appellate Body. See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*).

⁹⁹ John A. C. Conybeare, *Trade Wars: The Theory and Practice of International Commercial Rivalry* (New York, Columbia University Press, 1987) 3.

¹⁰⁰ China and the United States are also engaged in another heated trade dispute concerning s 301 of the *Trade Act of 1974*.

against the United States national security measures: Canada;¹⁰¹ China;¹⁰² European Union;¹⁰³ India;¹⁰⁴ Japan;¹⁰⁵ Mexico;¹⁰⁶ Russia;¹⁰⁷ Turkey.¹⁰⁸

The author suggests that member State behaviour can be characterised under two categories. The first category is 'WTO-non-compliant retaliation'. This covers retaliation with no asserted justification under WTO Agreements. Mexico and Canada are included in this category. These member States have not provided any justification for their retaliation. It must be recalled that member States cannot simply impose retaliatory measures under the WTO Agreements. Member States must first bring the dispute through the WTO, which must find that a trade measure is inconsistent with a WTO Agreement.¹⁰⁹ The Dispute Settlement Body (DSB) will then recommend

¹⁰¹ Department of Finance, 'Countermeasures in Response to Unjustified Tariffs on Canadian Steel and Aluminum Products' (29 June 2018) <<https://www.fin.gc.ca/access/tt-it/cacsap-cmpcaa-1-eng.asp>>; Chad Bown, Euijin Jung and Zhiyao Lu, 'Canada Strikes Back! Here is a Breakdown' (Peterson Institute of International Economics, 2018) <<https://piie.com/blogs/trade-investment-policy-watch/canada-strikes-back-here-breakdown>>.

¹⁰² *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards (China)* WTO Doc G/L/1218 (3 April 2018); Zhiyao Lu and Jeffrey Schott, 'How is China Retaliating for US National Security Tariffs on Steel and Aluminum' (Peterson Institute for International Economics, 2018) <<https://piie.com/research/piie-charts/how-china-retaliating-us-national-security-tariffs-steel-and-aluminum>>.

¹⁰³ *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards (European Union)* WTO Doc G/L/1237 (18 May 2018).

European Commission, 'Eu adopts rebalancing measures in reaction to US steel and aluminium tariffs' (Press Release, Brussels, 20 June 2018) <http://europa.eu/rapid/press-release_IP-18-4220_en.htm>.

¹⁰⁴ *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards (India)* WTO Doc. G/L/1239 (18 May 2018).

¹⁰⁵ *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards (Japan)* WTO Doc. G/L/1240 (22 May 2018).

¹⁰⁶ John Brew, Spencer Toubia and Edward Goetz, 'U.S. and Other Countries to Raise Additional Tariffs this Week' (Crowell Moring, 2 July 2018) <<https://www.cmtradelaw.com/category/mexico-retaliatory-tariffs/>>.

¹⁰⁷ *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards (Russian Federation)* WTO Doc. G/L/1241 (22 May 2018).

¹⁰⁸ *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards (Turkey)* WTO Doc. G/L/1242 (22 May 2018).

¹⁰⁹ See Robert Read, 'Dispute Settlement, Compensation and Retaliation Under the WTO' in William A. Kerr and James D. Gaisford (eds), *Handbook on International Trade Policy* (Edward Elgar, 2007).

that the member state bring its domestic law into conformity.¹¹⁰ If member States continue to pursue measures that breach WTO Agreements, then an injured member may have recourse to retaliatory action.¹¹¹

The second category is 'WTO-purported-compliant retaliation'. This second category includes China, EU, India, Japan, Russia and Turkey. Unlike Mexico and Canada, these member States rely on the *Agreement on Safeguards* to justify their retaliation.¹¹² The EU has provided the most comprehensive response to the national security measures. The retaliatory arm of the EU's 'three-pronged' response imposes rebalancing measures on a list of United States products worth € 2.8 billion.¹¹³ The EU suggests that rebalancing measures are justified under Article 8.2 of the *Agreement on Safeguards*.¹¹⁴ The legal basis of this retaliation is explored below.

Retaliatory behaviour presents a major challenge for the rules-based trading system. Roberto Azvêdo, Director-General of the WTO, stressed that the 'rules-based trading system was the world's response to the chaos of the 1930's'.¹¹⁵ This era, known for 'rising protectionist, rival trade blocs, and beggar-they-neighbour policies',¹¹⁶ harmed global economic growth and laid the foundations for the Second World War. The WTO's rules-based trading system depends on the active participation of member States in compliance with its rules.

¹¹⁰ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*') 1869 UNTS 401, art 19(1) ('*DSU*').

¹¹¹ Rachel Brewster and Adam Chilton, 'Supplying Compliance: Why and When the United States Complies with WTO Rulings' (2014) 39 *Yale Journal of International Law* 201, 206; Warren F. Sykes and Alan O. Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT Systems (2002) 31 *Journal of Legal Studies* 179.

¹¹² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) annex 1A, *Agreement on Safeguards* 1869 UNTS 154.

¹¹³ European Commission, 'EU adopts rebalancing measures in reaction to US steel and aluminum tariffs' (Press Release, Brussels, 20 June 2018).

¹¹⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) annex 1A, *Agreement on Safeguards* 1869 UNTS 154.

¹¹⁵ Roberto Azvêdo, 'Making Trade Work for All: Trade Liberalization and Inclusiveness' (Speech delivered at B20 Summit, Berlin, 3 May 2017)

<https://www.wto.org/english/news_e/spra_e/spra168_e.htm>.

¹¹⁶ *Ibid.*

Both categories of retaliation may also be explained with respect to the recent WTO Appellate Body (AB) crisis. The United States continues to block the appointment of judges to the Appellate Body of the WTO.¹¹⁷ If the Appellate Body ceases to function, then member States will be unable to have recourse to WTO-compliant retaliation. Therefore, member States are either retaliating without any justification (the first category), or finding ways to justify retaliation under the WTO Agreements (the second category).

2 *Resolving the Trade War*

How could the trade war be resolved? In recent testimony before the U.S.-China Economic and Security Review Commission, Bown suggests that the underlying cause of the trade war must be addressed.¹¹⁸ As discussed in Part I, the national security measures attempt to address the global problem of steel overcapacity from China. This is an issue that all steel exporting States face. Unfortunately, the Trump Administration's 'U.S.-only approach' has side-stepped the rules-based trading system as a means of resolving this dispute.¹¹⁹

Bown suggests that the Trump Administration should commence consultations with China under Article 4 of the *Dispute Settlement Understanding*.¹²⁰ These consultations must focus on the underlying causes of steel overcapacity. A major cause of steel overcapacity is state-owned enterprise (SOE) behaviour in China. SOEs are an 'ensemble of organizational forms with property rights exercised and controlled by government entities'.¹²¹ Bown suggests that consultations should expose all areas of the WTO Agreement which do not adequately consider SOE behaviour. This approach has transparency benefits. It will '[shine] an international spotlight

¹¹⁷ Tom Miles, 'U.S. seen likely to win in effort to shut down WTO's appeals Court' *Reuters* (online), 5 October 2018.

¹¹⁸ Bown, *Testimony before Commission*, above n 29.

¹¹⁹ *Ibid.*

¹²⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*).

¹²¹ F Z Y Hu, 'State-owned Enterprises' (2017) <<https://doi.org/10.1002/9781118786352.wbieg0180>>.

on the Chinese policies that are at the heart of the underlying distortion'.¹²² The Trump Administration might also encourage third countries to enter into consultations with China. Building a coalition of effected member States is critical to integrating China into the WTO. Bown suggests this approach has historically been used by the United States.¹²³ Third parties, such as the EU, Japan and Mexico, have joined the United States in 'at least a half dozen different disputes against China'.¹²⁴

Bown suggests that the Trump Administration should also engage in multilateral negotiations to resolve the underlying issue of steel overcapacity. The Trump Administration could engage in negotiations with China to develop enforceable rules on SOE behaviour.¹²⁵ These negotiations may be informed by previously negotiated materials on SOE behaviour. For example, Chapter 12 of the *US-Singapore FTA*¹²⁶ includes provisions that are applicable to 'government enterprises'. The recently negotiated USMCA also includes a Chapter on SOEs. This largely mirrors the language of the TPP.¹²⁷

B *Interpretive Questions*

The Trump Administration's national security measures present important interpretative challenges for WTO adjudicative bodies. The following countries have lodged requests for consultation with the United States concerning the national security measures (in chronological

¹²² Bown, *Testimony before Commission*, above n 29, 10.

¹²³ *Ibid* 11.

¹²⁴ *Ibid*.

¹²⁵ *Ibid* 13.

¹²⁶ *United States and Singapore Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2004).

¹²⁷ 'SOE Chapter in USMCA broadens definitions, mirrors scope of TPP' *World Trade Online* (4 October 2018) <<https://insidetrade.com/daily-news/soe-chapter-usmca-broadens-definitions-mirrors-scope-tpp>>.

order): China;¹²⁸ India;¹²⁹ EU;¹³⁰ Canada;¹³¹ Mexico;¹³² Norway;¹³³ Russia;¹³⁴ Switzerland;¹³⁵ and Turkey.¹³⁶ Three interpretive issues arise from the requests for consultation.

1 *Art XXI(b) GATT*

Communications from the United States indicate that the dispute will hinge on the interpretation of the national security defence under Art XXI(b) of the GATT.¹³⁷ Under Article XXI(b), member States may take measures that are inconsistent with their obligations where they are necessary for the 'protection of its essential security interests'.¹³⁸ Sub-paragraphs (i), (ii), and (iii) of Art XXI(b) outline what constitutes an essential security interest. Actions must relate to (i) fissionable materials; (ii) traffic in arms, ammunition and implements of war or other goods directly or indirectly for the purpose of supplying a military establishment; or (iii) must be taken in time of war or other emergency in international relations. Sub-paragraph (i) has never been invoked.¹³⁹ Sub-paragraph (ii) has been invoked once.¹⁴⁰ Members have preferred to rely on sub-paragraph (iii) because of the 'controversial and ambiguous wording'¹⁴¹ of the phrase 'emergency in international relations'.

¹²⁸ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS544/1 (5 April 2018) (Request for Consultations by China).

¹²⁹ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS547/1 (18 May 2018) (Request for Consultations by India).

¹³⁰ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS548/1 (1 June 2018) (Request for Consultations by European Union).

¹³¹ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS550/1 (1 June 2018) (Request for Consultations by Canada).

¹³² *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS551/1 (5 June 2018) (Request for Consultations by Mexico).

¹³³ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS552/1 (12 June 2018) (Request for Consultations by Norway).

¹³⁴ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS554/1 (29 June 2018) (Request for Consultations by the Russian Federation).

¹³⁵ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS556/1 (16 July 2018) (Request for Consultations by Switzerland).

¹³⁶ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS564/1 (15 August 2018) (Request for Consultations by Turkey).

¹³⁷ See, eg, *United States - Certain Measures on Steel and Aluminium Products* WTO Doc WT/DS550/10 (6 July 2018) (Communication from the United States).

¹³⁸ *GATT*, art XXI(b).

¹³⁹ *Ibid* art XXI(b)(i).

¹⁴⁰ *United States - Issue of Export Licenses*, GATT Doc CP3/SR22.

¹⁴¹ Ji Yoeng Yoo and Dukgeun Ahn, 'Security Exceptions in the WTO System: Bridge or Bottle-neck for Trade and Security?' (2016) 19(2) *Journal of International Economic Law* 417.

WTO jurisprudence offers little insight into how Art XXI(b) might be interpreted by a WTO adjudicative body. Art XXI(b) has escaped detailed interpretation by the WTO Appellate Body and its predecessor the GATT Council. Art XXI has only been invoked as a defence before the WTO in three disputes.¹⁴² However, all disputes were settled during negotiations. In the pre-WTO era, the GATT Council was unable to offer detailed analysis of Art XXI(b). This was for two reasons. First, as in *United States – Imports of Sugar from Nicaragua* and *United States – Trade measures affecting Nicaragua*, the United States only agreed to establishing an adjudicative panel if it did not have the authority 'to examine or judge the validity of or the motivation for the invocation of Article XXI(b)(iii)'.¹⁴³ Second, the institutional fragility of the GATT fostered a fear that 'mishandling of a politically controversial case might cause its contract parties, especially ... the United States and European Union, to turn their back on the institution.'¹⁴⁴

Communications to complainant States indicate that the United States will argue that Art XXI is 'not susceptible to review or capable of resolution by WTO dispute settlement'.¹⁴⁵ The United States position is that:

Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994.¹⁴⁶

This is consistent with Professor John Jackson's fear that the broad and self-judging nature of Article XXI would lead to abuse.¹⁴⁷ Such a broad interpretation of Art XXI may proliferate the use

¹⁴² *United States – The Cuban Liberty and Democratic Solidarity Act*, WTO Doc WT/DS38; *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WTO Doc WT/DS188.

¹⁴³ Panel Report, *United States – Trade measures affecting Nicaragua*, GATT Doc L/6053 (13 October 1986) (un-adopted) [5.1]-[5.3].

¹⁴⁴ Yoo and Ahn, above n 141, 432.

¹⁴⁵ *United States - Certain Measures on Steel and Aluminium Products* WTO Doc WT/DS550/10 (6 July 2018) (Communication from the United States).

¹⁴⁶ *Ibid.*

¹⁴⁷ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (The MIT Press, 2nd edition, 1997) 230.

of national security measures by other member States.¹⁴⁸ It would become a 'nuclear option in trade law'.¹⁴⁹ However, a narrow reading of Art XXI(b) may restrict member State's capacity to rely on national security investigation as a defence to unlawful trade. A narrow interpretation is supported by member States' comments before the GATT in *Sweden – Import Restrictions on Certain Footwear*. Sweden argued that a decline in domestic production of certain footwear had 'become a critical threat to the emergency planning of Sweden's economic defense'.¹⁵⁰ WTO members expressed strong opposition to Sweden's invocation of Art XXI.¹⁵¹ Unfortunately, a GATT panel decision was not established to challenge the measure.¹⁵²

2 *Safeguards Agreement*

The second legal question posed by the national security measures is whether they may be considered 'safeguard measures' under the *Agreement on Safeguards* and Article XIX GATT. Member States engaging in 'WTO-purported-compliant' retaliation have characterised the United States' national security measures as safeguards. This characterization is principally strategic. It may allow these member States to impose immediate rebalancing measures under the *Agreement on Safeguards*.

Under Article 8.1 of the *Agreement on Safeguards*, a State seeking to impose safeguard measures must, on the request of any affected State, enter into consultations with affected member States to offer 'adequate means of trade compensation'. Under Article 8.2, where no agreement is reached within 30 days, the affected State may suspend the 'application of substantially equivalent concessions or other obligations under GATT 1994' against the State imposing the

¹⁴⁸ Daniel J. Ikenson, 'The Danger of Invoking National Security to Rationalize Protectionism' (2017) Cato Institute <<https://www.cato.org/publications/commentary/danger-invoking-national-security-rationalize-protectionism>>.

¹⁴⁹ Bown, 'Trump's Threat', above n 23.

¹⁵⁰ *Sweden – Import Restrictions on Certain Footwear*, GATT Doc L/4250, 3; Council of Representatives, *Report on Work Since the Thirtieth Session*, 17-18 (25 November 1975).

¹⁵¹ Council of Representatives, *Report on Work Since the Thirtieth Session*, 18 (25 November 1975); Minutes of Meeting, at 8-9, GATT Doc C/M1109 (31 October 1975).

¹⁵² *Ibid.*

safeguard measure. However, under Article 8.3, such action can only be taken where the safeguard measure was taken without an absolute increase in imports.¹⁵³

The WTO-purported-complaint member States (China, the European Union, India, Japan, Russia and Turkey) have lodged notification to the Council for Trade in Goods for their rebalancing measures under Article 8(2).¹⁵⁴ Ultimately, the legal question is whether the national security measures are safeguards measures at all. If the national security measures are not safeguards measures, the rebalancing measures are not justified under the Agreement on Safeguards. The United States' position is that the 'tariffs imposed pursuant to Section 232 are not safeguard measures but rather tariffs on imports of steel and aluminum articles that threaten to impair' national security.¹⁵⁵ The United States' have suggested that the tariffs cannot be safeguards measures because the United States did not take action pursuant to its domestic safeguard legislation.¹⁵⁶

3 *Non-Violation Claim*

The final question raised by the national security measures concerns non-violation claims under Article XXIII. Non-violation claims have been brought by Switzerland,¹⁵⁷ Mexico,¹⁵⁸ and India¹⁵⁹ against the United States. Non-violation claims cover situations where nullification or impairment of benefits has resulted from GATT-consistent measures.¹⁶⁰ GATT drafters intended

¹⁵³ Matthew R. Nicely and David T. Hardin, 'Article 8 of the WTO Safeguards Agreement: Reforming the Right to Rebalance' (2008) 23:3 *Journal of Civil Rights and Economic Development* 699, 704.

¹⁵⁴ Pursuant to Article 12 of the Agreement on Safeguards.

¹⁵⁵ *United States - Certain Measures on Steel and Aluminium Products* WTO Doc WT/DS550/10 (6 July 2018) (Communication from the United States).

¹⁵⁶ *Trade Act of 1974*, s 201.

¹⁵⁷ *United States - Certain Measures on Steel and Aluminium Products* WT/DS556/1 (Request for Consultations by Switzerland).

¹⁵⁸ *United States - Certain Measures on Steel and Aluminium Products* WT/DS551/1 (Request for Consultations by Mexico).

¹⁵⁹ *United States - Certain Measures on Steel and Aluminium Products*, WTO Doc WT/DS547/1 (Request for Consultations by India).

¹⁶⁰ Robert Staiger and Alan Sykes, 'Non-violations' (2013) 16 *Journal of International Economic Law* 741, 744.

Article XXIII to be a 'broad and flexible mechanism to ensure that the balance of negotiated concessions would not be upset by unforeseen circumstances.'¹⁶¹

Bown suggests that non-violation claims are a 'risky strategy' and have been largely unsuccessful.¹⁶² If the non-violation claim is accepted by the WTO, this may open a Pandora's Box, enabling member States to claim compensation on the basis of any GATT-consistent measures.¹⁶³

III Conclusion

The Trump Administration has framed its trade policy by the phrase 'fair' trade. Unfortunately, United States trade policy could not be further from 'fair'. It aims to put 'America first', has increased the importance of enforcement and pursues trade sovereignty at the expense of other member States.

The Trump Administration's national security measures have led to a trade war. The 'tit-for-tat' retaliation that has ensued poses significant challenges for the WTO. The only way forward is to address the underlying problems that sparked this trade war. To do so, member States must re-engage with the multilateral, rules-based trading system.

¹⁶¹ Ibid.

¹⁶² Bown, *Testimony before Commission*, above n 29, 12; *Australia – Subsidy on Ammonium Sulphate*, II BISD 188 (1952); *Germany – Treatment of Imports of Sardines*, 1st Supp. BISD 53 (1953).

¹⁶³ Staiger and Sykes, above n 160, 744.