US & Multilateral Trade and Policy Developments

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Contents

US Trade Reports

Implications of the 2016 Presidential Election for US Trade Policy

Executive Summary

The election of Donald J. Trump as the 45th President of the United States will have important implications for US trade policy. Assessing these implications in the immediate aftermath of the presidential election is, however, a complicated task. Mr. Trump made many, often conflicting, trade policy promises on the campaign trail; since the election, the Trump transition team has not issued a formal, detailed statement outlining his trade policy agenda, nor has it announced nominees for key positions at the Office of the US Trade Representative (USTR). Moreover, during the campaign, Mr. Trump's interventionist positions on trade policy were often balanced by claims that he was a "free trader", and he and his advisors have recently begun to walk back some of his more hardline campaign positions. Thus, while it is likely that the Trump administration will take a more interventionist approach to trade policy than recent US administrations, the extent and precise direction of this shift is difficult to predict.

The Trump campaign's trade policy platform was almost entirely interventionist – some might say "protectionist", or at least nationalist, reflecting his "America first" theme. It included plans to (i) seek renegotiation of the North American Free Trade Agreement (NAFTA) and withdraw from the agreement if the NAFTA parties do not agree to such renegotiation; (ii) withdraw from the Trans-Pacific Partnership (TPP); (iii) direct the Secretary of Commerce to "identify every violation of trade agreements" by foreign countries and direct all appropriate agencies to take action to end such violations; (iv) "eliminate Mexico's one-side backdoor tariff through the VAT"; (v) instruct the Treasury Secretary to "label China a currency manipulator"; (vi) instruct USTR to bring trade cases against China both in the United States and at the World Trade Organization (WTO); and (vii) "use every lawful presidential power to remedy trade disputes if China does not stop its illegal activities…including the application of tariffs consistent with Section 201 and 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962." Mr. Trump also has threatened to withdraw the United States from the WTO Agreements and other US Free Trade Agreements (FTAs); however, such threats have only been made in passing and are not included in the Trump campaign's written statements on trade policy.

This report examines the legal and practical constraints that President Trump would face should he seek to implement these trade promises. We highlight in particular the provisions of US law that President Trump might rely on to unilaterally raise tariffs, otherwise restrict imports, or unilaterally modify or withdraw from US trade agreements. It is conceivable that the Trump administration could seek Congressional enactments to pursue broader reforms to US trade law, but Trump's campaign did not suggest new legislation. We also discuss the likely implications of a Trump presidency for the TPP, ongoing and future trade negotiations, foreign direct investment in the United States, and the United States' role in the WTO. Our views may be summarized as follows.

Possible Unilateral Actions under US Law

Current US law provides several mechanisms for the President to impose unilateral trade measures (*e.g.*, duties or quotas) on foreign imports. As with previous administrations, the Trump administration could continue to utilize several provisions of the Trade Act of 1974 and the Tariff Act of 1930, which involve agency investigations and proceedings. Most of these actions, notably trade remedies (anti-dumping (AD), countervailing duty (CVD) and safeguard measures), would raise few legal concerns outside of the investigations at issue. On the other hand, other, less-used US laws such as Section 232(b) of the Trade Expansion Act of 1962 and the International Emergency Economic Powers Act of 1977 (IEEPA) potentially authorize President Trump to take broad, unilateral trade actions against imports – actions that would raise far more serious economic and legal concerns among, and likely opposition from, US business groups, trading partners and even the US Congress. In order to achieve Mr. Trump's trade promises using these less-utilized statutory provisions, the Trump administration would likely need to apply an expansive interpretation of the relevant legal standards, thus defying past agency practice.

For these reasons, it is more likely that the Trump administration will utilize more traditional unilateral trade mechanisms under US law, albeit in a more aggressive and publicized manner than that utilized by recent US administrations. The most likely unilateral actions involve the increased use of trade remedies and enforcement mechanisms, including the AD/CVD laws, anti-circumvention proceedings, and safeguards. This may include measures to address alleged currency "manipulation" by China or other countries through changes to the Department of Commerce's (DOC) long-standing practice of not using a country's currency practices as grounds to apply countervailing duties or anti-dumping duties. In particular, DOC could begin to treat currency undervaluation as a countervailable export subsidy or as grounds to modify market economy exporters' record costs when calculating dumping. This change could be implemented unilaterally at the administrative level or through congressional legislation. In addition, it is likely that the Trump administration will make minor changes to the Committee on Foreign Investment in the United States' (CFIUS) process for reviewing proposed foreign investments in the United States. Such changes might involve increased scrutiny of investments by foreign state-owned enterprises (SOEs) in the United States.

It is also possible, though less likely than the aforementioned actions, that the Trump administration utilizes Section 301 of Trade Act of 1974, which would allow USTR to take specific and direct action to counter perceived unfair trade practices by foreign countries while a WTO dispute over those practices is pending. The least likely unilateral actions are those under Section 232(b) of the Trade Expansion Act of 1962, Section 122 of the Trade Act of 1974, IEEPA, and the Trading With the Enemy Act of 1917 (TWEA). Moreover, given various legal and practical constraints, it appears unlikely that President Trump will impose punitive taxes on specific US companies that outsource employment and manufacturing, despite his campaign promises to do so. Such issues might instead be resolved through changes to other policies – for example federal tax and regulatory reforms or state incentives – instead of punitive trade measures.

Termination or Modification of US Trade Agreements

US law provides the President with varying levels of, and in some cases uncertain, authority to modify, renegotiate, or withdraw from US trade agreements. This authority is uncertain for three reasons. First, there is almost no precedent governing the legal provisions at issue here. Second, US laws implementing and governing FTAs reflect the implicit assumption that the primary goal is trade liberalization, and that the President would seek to liberalize trade. Likely for this reason, the provisions of these laws that govern potential US withdrawal from FTAs contain almost no detail. Third, each US trade agreement is actually governed by three different US laws: the Trade Act of 1974; the specific version of trade promotion authority (TPA) in effect at the time of the agreement's implementation; and the act implementing the agreement's specific commitments into US law. In some cases, these laws contradict each other on the question at issue (*e.g.*, tariff modification), thus raising significant questions regarding the proper statutory interpretation.

The power of the President to terminate a US trade agreement or modify tariffs is weakest for the WTO Agreements, broader but ambiguous for regional FTAs (NAFTA and the United-States-Dominican Republic-Central America FTA (CAFTA-DR)), and strongest for bilateral FTAs such as those with Australia, Chile, Colombia, Korea, Panama, Peru, and Singapore. Regardless of this theoretical legal authority, however, President Trump's withdrawal from a US trade agreement without congressional consultation and consent would doubtless generate not only economic turmoil but also court challenges from the US business community, trading partners and even Congress itself.

Outside of terminating or modifying US trade agreements, President Trump also could seek to enter into negotiations to amend such agreements. The President has this authority under TPA, though in several cases it is unclear whether US law requires congressional approval of any such amendments. A strong argument may be made that, outside of certain tariff or "rules of origin" modifications, congressional approval would be required for any agreed changes to US trade agreements resulting from President Trump's renegotiation efforts.

For these reasons and based on recent Trump team statements, it appears likely that President Trump will seek to renegotiate certain US trade agreements, particularly NAFTA. The extent of these negotiations is currently unclear,

and could range from uncontroversial issues (*e.g.*, e-commerce or consultations) to contentious issues such as lumber trade, country of origin labeling, domestic taxes or bilateral trade balances. It is also possible, though much less likely, that President Trump will seek to unilaterally raise tariffs on US trade agreement partners under the tariff modification authority set forth in TPA and various FTA implementing bills, or that President Trump will seek to enter into negotiations to amend the WTO Agreements (something he and his advisors have mentioned with respect to value-added taxes (VATs)). Though Mr. Trump and his advisors have discussed publicly a potential withdrawal from the WTO Agreements, the NAFTA, and other US trade agreements, the Trump administration is highly unlikely to take such actions because of their serious legal and economic implications.

Implications for Current Trade Negotiations and the WTO

It appears unlikely that the Trump administration will pursue renegotiation of the TPP, given Mr. Trump's statement on November 21 that he intends to issue a notification of intent to withdraw the United States from the TPP on his first day in office. Consequently, if the TPP is ever to enter into force in its current (or slightly modified) form, it likely will not include the United States as a party. It is unclear whether President Trump will decide to continue the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement (TiSA), or the Environmental Goods Agreement (EGA) as he has not expressed an opinion on these issues publicly. However, President Trump may be reluctant to continue these negotiations given, *inter alia*, their association with President Obama and Mr. Trump's stated preference for negotiating smaller, bilateral agreements. Mr. Trump and his advisors have expressed interest in negotiating a bilateral FTA with the United Kingdom; however, such negotiations might not begin until the latter half of President Trump's term in office due to the complications associated with "Brexit".

Regarding the WTO, it appears likely that the Trump administration will be more active in bringing new disputes particularly against China. However, it is unclear what role, if any, Mr. Trump envisions the United States playing in the WTO's negotiating functions. As noted above, Mr. Trump's advisors have mentioned that they might seek to negotiate changes to the WTO Agreements to address VATs. However, given Mr. Trump's pledge to negotiate trade agreements on a bilateral basis, it seems unlikely that the Trump administration will be interested in pursuing trade liberalization through new multilateral or plurilateral negotiations within the WTO.

Outlook

At this juncture, it is important to reiterate that our analysis addresses all potential trade laws implicated by Mr. Trump's campaign promises, not concrete statements of policy from the new administration. Though much attention has been paid to the more extreme trade policy proposals made by Mr. Trump during the campaign, we presume that, absent formal, post-election policy statements, the Trump administration will not seek to implement the most extreme aspects of Mr. Trump's interventionist promises because of their likely legal and economic ramifications. As noted above, these include Mr. Trump's threats to withdraw the United States from the WTO or other trade agreements such as NAFTA, or to impose substantial tariffs on all Chinese imports through little-used national security statutes such as Section 232. These actions, if pursued unilaterally by the Trump administration, would raise serious legal questions and have significant economic implications for globally-integrated US companies (and their workers) and US trading partners. Such unilateralism would therefore likely encounter opposition from Congress, the US business community and other governments, thus leading to economic uncertainty, market turmoil and numerous court challenges. It is unlikely that President Trump would be willing to spend time and political capital defending such policies, nor would he wish to preside over (and be seen as responsible for) the severe legal and economic disruptions that would likely result from their implementation.

There are, however, less controversial actions that President Trump might take in an effort to fulfill his campaign promises. As noted above, these include (i) using trade remedies and enforcement mechanisms, including the AD/CVD laws, anti-circumvention proceedings, and safeguards more aggressively than recent administrations; (ii) designating China or another country as a "currency manipulator"; (iii) withdrawing the United States from the TPP; (iv) requesting renegotiation of NAFTA (and potentially doing the same for other US trade agreements); and (v)

making minor changes to the CFIUS review process, perhaps to target investments by foreign SOEs for additional scrutiny. The President might also take a more aggressive position in WTO dispute settlement on issues such as industrial subsidization, or amplify the Obama administration's efforts to enforce various provisions of our current bilateral and regional FTAs. Such actions would not require congressional approval, and could allow President Trump to claim that his campaign promises to tighten trade enforcement are being upheld, while avoiding more severe legal and economic consequences.

Possible Unilateral Actions under US Law

Current US law provides several mechanisms for the President to impose unilateral trade measures (*e.g.*, duties or quotas) on foreign imports. We discuss below each potential mechanism, its requirements and limitations, and an assessment of the likelihood the Trump administration ultimately utilizes the measure.

As with previous administrations, the Trump administration could continue to utilize several provisions of the Trade Act of 1974 or Tariff Act of 1930, which involve agency investigations and proceedings. Most of these actions, notably trade remedies, would raise few legal concerns outside of the investigations at issue. On the other hand, other, less-used US laws potentially authorize President Trump to take broad, unilateral trade actions against imports – actions that would raise far more serious economic and legal concerns among, and likely opposition from, US business groups, trading partners and even the US Congress. In order to achieve Mr. Trump's trade promises using these less-utilized statutory provisions, the Trump administration would likely need to apply a liberal interpretation of the relevant legal standards, thus defying past agency practice. For these reasons, it is more likely that the Trump administration will utilize more traditional unilateral trade mechanisms under US law, albeit in a more aggressive manner than that utilized by recent US administrations.

AD and CVD Measures, Customs Enforcement, and Other Trade Remedy Actions

AD and CVD Investigations

It is likely that the Trump administration will aggressively pursue actions taken under the US AD and CVD laws.

Under US law, domestic industries may petition the government for relief from imports that are sold in the United States at less than fair value (*i.e.*, "dumping") or that benefit from foreign government subsidies. Two separate government agencies are involved in administering US AD/CVD investigations. DOC determines whether dumping or subsidization exists, and if so, the margin of dumping or the amount of the subsidy.[1] The US International Trade Commission (ITC) determines whether there is material injury or threat of material injury to the domestic industry by reason of the dumped or subsidized imports. Material injury is loosely defined as "harm which is not inconsequential, immaterial, or unimportant."[2] For industries not yet established, the ITC also may be asked to determine whether the *establishment* of an industry is being materially retarded by the dumped or subsidized imports.

The United States currently enforces more than 370 AD/CVD orders on foreign imports. In 2015, more than 60 investigations were initiated. The Obama administration implemented significant regulatory changes to DOC's trade regulation practice regarding foreign exporters, including measures aimed at Chinese state-owned companies in non-market economy (NME) investigations. These measures have led to the application of high duties in AD investigations where Chinese companies have failed to cooperate in investigations. The Trump administration could continue these actions, as well as implement other policies that would amplify the scope and effect of US AD/CVD investigations:

- **Self-initiation.** While DOC's current practice is to initiate AD/CVD investigations as a result of a petition filed by a domestic interested party or parties, DOC's regulations also allow for initiation of AD/CVD investigations at the "Secretary's own initiative."[3] President Trump could encourage DOC to self-initiate AD/CVD investigations for particular products from particular countries in an effort to halt imports and impose high duties on these products and countries. However, self-initiation has not been utilized in the United States and is controversial: the European Union in 2012 sought to self-initiate AD and CVD investigations against China's telecommunication industry and mobile network equipment manufacturers, but ultimately did not go forward with the investigations due to industry and Chinese government pushback. Similar opposition would likely materialize in response to US self-initiations.

[1] 19 U.S.C. § 1671 (CVD); 19 U.S.C. § 1673 (AD).

[2] 19 U.S.C. § 1677(7)(a)

[3] 19 C.F.R § 351.201(a).

- **China NME status.** The Trump administration will have an important policy choice to make with respect to China's NME status under the US AD law. NME status permits DOC to use third country prices and costs to determine whether Chinese imports are dumped, thus leading to higher dumping margins and increased uncertainty. Certain provisions in China's WTO Accession Protocol that permit NME methodologies with respect to Chinese imports expire on December 11, 2016. Although the Chinese government has demanded that all WTO Members cease treating China as an NME, it is highly likely that DOC will continue to do so after December 11. It is also likely that the Trump administration will resist any changes to China's NME status, and that China will challenge this move at the WTO.
- **Currency undervaluation.** The Trump administration might also seek to address any alleged currency "manipulation" by China or other countries through changes to DOC's long-standing practice of not using a country's currency practices as grounds to apply countervailing duties or anti-dumping duties. In particular, DOC could begin to treat currency undervaluation as (i) a countervailable export subsidy or (ii) grounds to modify market economy exporters' record costs when calculating dumping (thus leading to higher anti-dumping duties). This change could be implemented through congressional legislation or unilaterally, though the latter approach would likely generate US court challenges. Either action also would almost certainly lead to a WTO challenge by China or other targeted countries.

Other methodological changes, for example with respect to state-owned exporters, might also be implemented to ensure higher duties.

Beyond AD/CVD investigations, several other provisions of the Trade Act of 1974 and Tariff Act of 1930 could permit the Trump administration to treat foreign imports more aggressively than its predecessors, or to take credit for independent agency decisions outside the President's control.

Anti-Circumvention Investigations

The anti-circumvention laws prohibit the circumvention of existing AD/CVD orders where there is further assembly or manufacturing in the United States, minor or insignificant processing of the merchandise, or completion of the merchandise in a third country.[4] In mid-September 2016, several domestic steel producers filed anti-circumvention petitions with DOC, arguing that Chinese-made steel inputs were being shipped to Vietnam for minor processing in order to circumvent existing AD and CVD orders on Chinese hot-rolled and corrosion-resistant steel products. The domestic industry's requests followed successful petitions resulting in AD/CVD orders on Chinese cold-rolled steel, hot-rolled steel and corrosion-resistant steel. DOC has initiated these anti-circumvention investigations, and will investigate whether the Chinese-origin inputs completed in Vietnam for export to the United States are circumventing the underlying AD/CVD orders on corrosion-resistant steel from China.

An affirmative determination of circumvention by DOC could signal stricter enforcement of AD/CVD orders. Moreover, the number of requests filed with DOC for circumvention investigations and rulings has increased in recent years. For example, the US aluminium industry recently requested that DOC investigate circumvention of existing Chinese AD and CVD orders on aluminium products.

The Trump administration could take a more aggressive approach to enforcement of existing AD/CVD orders under the anti-circumvention statute, but this approach is limited by the fact that each anti-circumvention investigation would be fact-intensive and require specific evidence of circumvention. For example, in the recently-initiated investigations on Vietnamese steel products, Vietnamese steel producers could successfully defend the allegations by establishing that the processing in Vietnam constitutes a "substantial transformation" of the merchandise in questions, and thus, no circumvention occurred. These investigations also require significant agency time and resources, though less so than new AD/CVD investigations.

[4] 19 U.S.C. § 1677j.

Safeguard Investigations

Given Mr. Trump's rhetoric regarding import restrictions, the Trump administration could also pursue safeguard measures under Section 201 of the Trade Act of 1974. Administered by the ITC, Section 201 allows for the temporary restriction of a product through higher tariffs or other measures if a domestic industry is seriously injured or threatened with serious injury by increased imports.[5] The increased imports must be a substantial cause of the serious injury or threat of serious injury. The serious injury and substantial cause standards for safeguard investigations are higher than the material injury and "by reason of" subject imports standards in AD/CVD investigations. Safeguard measures apply to all imports from all countries rather than a particular country (AD/CVD orders apply to a single country).

Safeguard measures are subject to significant limitations. First, they are temporary, apply to narrow product categories, and cannot be used to target individual countries (*e.g.*, China). Second, safeguards are administered by the ITC, which is an independent agency that is generally less susceptible to political pressures. Third, recent WTO jurisprudence has limited the terms under which safeguard measures are permitted under WTO rules. The last US safeguard measure on steel was imposed by President Bush in 2002, and was terminated in 2003 after a successful WTO challenge by the European Union, China and several other countries. Accordingly, target countries could challenge any safeguard measure taken by the Trump administration at the WTO, and the United States would have to demonstrate that there is an increase in imports, and that the increased imports are the result of "unforeseen developments" to survive a WTO challenge. Such challenges to new US safeguard measures are highly likely.

Furthermore, safeguard measures might elicit retaliation by other WTO Members. For example, China's Ministry of Commerce (MOFCOM) recently initiated safeguard investigations on sugar in what many believe is a retaliatory action in light of trade remedy actions on sugar taken by other countries around the world that have impacted China's domestic sugar industry.

Section 337 Investigations

Under Section 337 of the Tariff Act of 1930, the ITC has typically investigated claims of unfair trade practices pertaining to intellectual property rights, including patent infringement and trademark infringement of imported goods.[6] For the most part, this tool has been used by companies in the electronics and consumer goods sector – especially producers of cell phones and other personal devices – given the number of patents and other intellectual property used in the sector. However, Section 337 can be used effectively in other sectors also as a powerful legal and commercial tool. For example, in September 2014, an Indiana-based stainless steel producer and its Italian parent initiated a Section 337 proceeding against an Indian competitor based on trade secret misappropriation, a claim which led to the 2016 ITC Orders excluding the Indian company's products from entering the United States for 16.7 years.[7] Also, in April 2016, US Steel filed a Section 337 complaint against virtually all Chinese manufacturers and importers of carbon and alloy steel products. The ITC initiated the investigation on June 2, 2016.[8] While the ITC recently rejected one of the three claims brought by US Steel, the case will continue on the basis of the remaining claims. If the ITC finds a violation, the resulting remedy could bar from the US market all carbon and alloy steel products from the targeted Chinese producers. Thus, Section 337 is a powerful tool available to US industries, and recent cases may signal a move toward the use of the tool in sectors which have not been traditional users.

However, President Trump himself would have little, if any, control over the Section 337 process, particularly in the near term. The ITC is, as noted above, an independent, bipartisan agency that would not be beholden to President Trump, and Section 337 cases are adjudicated principally before the agency's Administrative Law Judges, who run

[5] 19 U.S.C. § 2251.

[6] 19 U.S.C. § 1337

[7] *Certain Stainless Steel Products, Certain Processes for Manufacturing or Relating to Same, and Certain Products Containing Same Commission's Final Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order and Cease and Desist Order,* 81 FR 35058 (June 1, 2016).

[8] *Certain Carbon and Alloy Steel Products; Institution of Investigation*, 81 FR 35381 (June 2, 2016).

the proceeding much more like a trial than the traditional trade administrative proceeding. The Trump administration thus could not, as official policy, promise or initiate additional Section 337 actions. However, the President could, and likely would, take credit for any significant Section 337 outcomes, including the pending steel case. He might also seek to influence the ITC's work over the longer term though his power to appoint sympathetic Administrative Law Judges and ITC Commissioners who oversee Section 337 actions, as well as AD/CVD and safeguards cases.

Furthermore, assuming the ITC found violations of Section 337 and imposed the broad remedy of excluding imports of Chinese carbon and alloy steel products, China would almost certainly challenge the decision at the WTO, arguing that Section 337 and any remedy imposed constitutes a non-tariff barrier in violation of GATT/WTO rules, or violates obligations provided for by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) regarding principles of national treatment and special requirements related to border measures.

Less-Used Statutory Provisions for Unilateral Trade Actions

Beyond the aforementioned traditional methods of imposing unilateral trade measures on imports, President Trump could seek unilateral action under other, less-used statutory provisions. Doing so, however, would likely require a liberal interpretation of the legal provisions at issue (and thus the power delegated to the President by Congress), thus generating domestic legal challenges and economic uncertainty. This approach also would very likely elicit unilateral retaliation by target countries or challenges under US trade agreements, most notably the WTO Agreements. For these reasons, we view President Trump's use of these measures to be unlikely.

Section 232 of the Trade Expansion Act of 1962

Section 232 authorizes the Secretary of Commerce to investigate whether imports pose a threat to "national security." In Section 232 investigations, the Bureau of Industry and Security (BIS) within DOC investigates the effects of certain imports on US national security. DOC is required to initiate an investigation to determine the effects on the "national security of imports" (i) upon the request of the head of any department or agency; (ii) upon application of an interested party; or (iii) on the Secretary's own motion (typically, these investigations are initiated at the request of a specific industry). The Secretary issues a report, based on which the President is authorized to negotiate agreements to limit or restrict imports, or to "take such actions as the president deems necessary to adjust the imports of such article so that such imports will not threaten or impair the national security." The statute places no limit on the nature of the restrictions or the height of tariffs.

The key requirement for action under Section 232 is a threat or impairment of "national security," which is not defined in the law or in its implementing regulations. BIS in the most recent (2001) Section 232 investigation found, based on the statutory language and congressional intent, that the standard would be met where imports of the product at issue threaten to impair US national security either: (i) "by fostering US dependence on unreliable or unsafe imports"; or (ii) "by fundamentally threatening the ability of US domestic industries to satisfy national security needs."

Historically, Section 232 has been invoked to limit imports of specific items. There have been only two Section 232 investigations since the United States joined the WTO in 1995 – on crude oil in 1999 and iron and steel in 2001 – and in both cases BIS declined to recommend that the President take action under Section 232.[9] However, Section 232 measures were imposed several decades ago. President Nixon imposed an across-the-board 10 percent surcharge program in 1971 pursuant to Section 232(b). In addition, by presidential proclamation in 1975, President Ford found that it was "necessary and consistent with the national security to discourage importation into the United States of petroleum, petroleum products, and related product . . .", and invoking Section 232(b), issued a proclamation to raise licensing fees on petroleum products.[10] The proclamation also imposed on all imported oil a supplemental $1 per barrel fee for oil entering the US after March 1, 1975, and a $3 fee for oil entering the US after April 1, 1975. However, following the imposition of these fees, on April 10, 1975, Congress passed the Emergency Petroleum Allocation Act

[9] https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/section-232-investigations

[10] *Federal Energy Administration v. Algongquin SNG, Inc.*, 427 U.S. 548 (1976).

of 1973 to prohibit the President from using Section 232(b) of the Trade Expansion Act of 1962 or any other provision of law to establish minimum prices for crude oil without congressional authority.

President Trump could instruct his administration to investigate the national security implications of specific imports (such as Chinese steel imports) under Section 232, but doing so would face significant legal and practical constraints. First, legal challenges to these unilateral actions are likely because such measures could contradict both past BIS practice and the original intent of the statute – indeed, it is difficult to imagine how BIS' current standard would be met today in the case of almost all globally-traded commodities. However, courts could decline to intervene given that this provision aims to safeguard national security interests, an area where courts have shown great deference to the executive branch.[11]

Second, the foreign target countries of a Section 232 action also would have recourse to bring a complaint to the WTO. In response, the US could cite to the little-used GATT Article XXI Security Exceptions, which permit a member country to depart from GATT obligations in "time[s] of war or other emergency in international relations."[12] However, the United States' use of Article XXI would be highly controversial and could encourage other WTO Members to rely thereupon, thus breeding tit-for-tat protectionism under the guise of "national security" and undermining the efficacy of WTO dispute settlement. hese concerns have historically acted as a check on WTO Members' invocation of Article XXI.

Third, President Trump's use of Section 232 could have severe economic repercussions. A target country would likely retaliate with equivalent measures on US goods, similar to when China initiated retaliatory AD investigations of imports of US cars and poultry in response to President Obama's imposition of new duties on imports of Chinese tries under Section 421 of the Trade Act of 1974. This risk may be even more serious for President Trump with respect to China, for example, as the country's AD enforcement agency has become more sophisticated and experienced in bringing an increasing number of trade cases against foreign products in recent years. The emergence of such actions would not only hurt US exporters and consumers, but also likely rattle financial markets that currently expect President Trump to pursue a far less aggressive US trade policy.

Section 122 of the Trade Act of 1974

Section 122 of the Trade Act of 1974 authorizes the President to deal with "large and serious United States balance-of-payments" deficits by imposing temporary import surcharges not to exceed 15 percent *ad valorem* on imported goods; impose temporary import quotas; or both.[13] The authority to impose temporary import quotas (including the authority to impose both a temporary import quota and a temporary import surcharge) can be exercised only if international trade or monetary agreements to which the US is a party permit the impost of quotas as a balance-of-payments measure, and only to the extent that the fundamental imbalance cannot be dealt effectively by a surcharge.[14] The duration of such restrictions is limited to 150 days unless Congress authorizes an extension of the restriction, and import restriction actions under Section 122 are to be "applied consistently with the principle of nondiscriminatory treatment."[15]

Unlike Section 232 of the Trade Expansion Act of 1962, President Trump could take action under Section 122 of the Trade Act of 1974 without making a finding of a threat to national security. However, such action would likely be

[11] In *FEA v. Alqonquin SNG, Inc.*, the Supreme Court held that the legislative history of Section 232(b) belies any suggestion that Congress intended to limit the President's authority to the imposition of quotas, and upheld the imposition of a license fee system. 426 U.S. at 571. However, the Court explicitly noted that its holding was a "limited one." *Id*. In no way did the Court's holding compel the conclusion that "any action the President might take, as long as it has even a remote impact on imports, is also authorized." *Id*.

[12] GATT Article XXI (a)(iii).

[13] 19 U.S.C. § 2132.

[14] *Id*. at § 2132(a).

[15] *Id*. at § 2132(d). In addition, Section 122 also provides the President authority to proclaim import liberalizing measures, such as temporary reductions (again, 150 days) in the rate of duty for an article, or temporary increases in the value or quantity that may be imported under an import restriction. *Id*. at § 2132(c).

challenged in US courts by plaintiffs who argue that the statutory standards for any such measures have not been met. For example, one could argue that the floating Dollar exchange rate prevents the United States from ever having a "large and serious balance of payment deficit," as capital inflow surpluses would offset any current account deficit. Furthermore, target countries could challenge any action under Section 122 at the WTO, but doing so would take far longer than the temporary 150-day duration of any restrictions under the law.

Section 301 of the Trade Act of 1974

Section 301 of the Trade Act of 1974[16] gives USTR broad authority to respond to unfair trade practices, at the direction of the President. Such "unfair trade practices" include violations of trade agreements, or "an act, policy, or practice of a foreign country that is unreasonable or discriminatory and burdens US commerce."[17] The types of action or foreign conduct subject to Section 301 include (i) trade agreement violations; (ii) unjustifiable actions (acts, policies or practices that violate or are inconsistent with US international legal rights, such as the denial of national treatment or normal trade relations treatment); and (iii) unreasonable acts (acts, policies or practices that are not necessarily in violation of or inconsistent with US international rights, but are otherwise unfair and inequitable). In other words, President Trump could pursue action under Section 301 if the purpose of tariffs is to retaliate for unfair trade practices, including currency manipulation, market access restrictions, or other obstacles to US exports.

Section 301 investigations may be initiated by USTR based on the filing of a petition by any interested party. USTR may also self-initiate an investigation after consulting with the appropriate private sector advisory committees. USTR is authorized to take two different types of action under Section 301, as the statute provides for both mandatory and discretionary action.

Section 301(a) involves "mandatory action" by which the USTR must take certain actions if USTR finds that unfair trade practices exist.[18] However, USTR is not required to act in instances where (i) a WTO panel report, or a dispute settlement ruling under a trade agreement, finds that the US trade agreement rights have not been denied or violated; (ii) USTR finds that the foreign country is taking satisfactory measures to grant US trade agreement rights or has agreed to eliminate or phase out the practice, there is an imminent solution to the burden or restriction on US commerce, or the country has provided satisfactory compensatory trade benefits; and (iii) USTR finds, in extraordinary cases, that action would have an adverse impact on the US economy substantially disproportionate to the benefits, or finds that action would cause serious harm to national security. Section 301(b) involves "discretionary action" by which USTR may take action if it finds an act, policy or practice of the foreign country is unreasonable or discriminatory and burdens US commerce.[19] USTR has discretionary authority to take all appropriate and feasible action, subject to the specific direction of the President, to obtain the elimination of the act, policy or practice.

USTR is authorized to take certain types of action under Section 301: suspend, withdraw or prevent the application of benefits of trade agreement concessions to carry out a trade agreement; impose duties or other import restrictions on the goods or services of the foreign country for such time as USTR deems appropriate; withdraw or suspend preferential duty treatment; or enter into binding agreements that commit the foreign country to eliminate or phase out the act, policy or practice, eliminate any burden on US commerce, or provide the United States with compensatory and satisfactory trade benefits. If USTR determines that import restrictions are the appropriate form of action, it must give preference to tariffs over other forms of import restrictions and consider substituting on an incremental basis an equivalent duty for any other form of import restriction imposed.

There are several limitations to taking action under Section 301. Any action taken must affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on US commerce. Section 301 also requires that the United States engage in international dispute resolution efforts, most notably at the WTO, in parallel with Section 301 procedures. USTR must on the same day as a determination to

[16] 19 U.S.C. §§ 2411-2420

[17] 19 U.S.C. § 2411.

[18] 19 U.S.C. § 2411(a).

[19] 19 U.S.C. § 2411 (b).

investigate also request consultations with the foreign country concerning the issues involved. For trade agreement violations, if the issues are not resolved through consultations, then USTR must promptly request formal dispute settlement under the agreement before the earlier of the close of the consultation period or 150 days after the consultation commenced. USTR must seek information and advice from the petitioner and from appropriate private sector advisory committees in preparing for consultations and dispute settlement proceedings.

Importantly, USTR has interpreted Section 301(a) to **require** it to take any potential violations to the WTO, and has been reluctant to challenge any "unreasonable" or discriminatory practices that are not covered by the WTO rules. This practice has been codified into US law in the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA). Thus, US law restricts USTR from taking action under Section 301 in connection with any claims covered by the WTO agreements without first bringing a challenge to the WTO and receiving panel or Appellate Body authorization to impose commensurate countermeasures.[20] However, the SAA does not restrict USTR's ability to challenge discriminatory practices that are not covered by the WTO agreements.[21]

The Trump administration USTR thus could more aggressively pursue Section 301 challenges to certain foreign government actions by claiming that the conduct in question is not covered by WTO rules, but almost all such actions - *i.e.*, all actions other than those expressly mentioned in the SAA ("government measures that encourage or tolerate private, anticompetitive practices") – could be challenged under both US law and WTO rules due to the breadth of the United States' WTO commitments.

The success of a potential US court challenge to a Section 301 action is unclear. When USTR entered into the Softwood Lumber Agreement between the United States and Canada in 2006, it did so in part pursuant to Section 301.[22] Domestic producers of softwood lumber in the United States filed suit challenging the decision of USTR to enter into the agreement in the US Court of International Trade. Thus, private litigants *could* potentially challenge any decision taken by USTR pursuant to Section 301(b) in US courts, but private parties could find it difficult to convince courts to consider such a challenge given that any action by USTR would likely be found by a court to be a non-justiciable "political question."[23] Nevertheless, any significant unilateral actions taken under Section 301 would almost certainly result in US court challenges, further complicating their implementation.

Aside from the risk of court challenges by private parties, target countries could claim a violation of GATT Article XXIII Nullification or Impairment at the WTO by arguing that the US is nullifying or impairing the benefits and objectives of the GATT by pursuing such action.[24] When Europe brought a WTO complaint against the United States regarding Section 301 in 1999, the WTO panel found that US failure to pursue WTO actions in lieu of unilateral trade measures would violate the United States' WTO commitments. For this reason, any unilateral Trump administration action under Section 301 would almost certainly result in a WTO challenge and eventual US loss where it also addressed a matter falling under the WTO Agreements.[25] USTR has therefore pursued Section 301 actions at the WTO, and with some success.[26] Moreover, since the establishment of the WTO dispute settlement process in 1995, Section 301 has rarely been invoked and has not produced any unilateral sanctions or WTO cases.

[20] SAA at 1034.

[21] SAA at 1035.

[22] *Almond Bros. Lumber Co. v. United States*, 651 F.3d 1343 (Fed. Cir. 2011).

[23] *See, e.g.*, *Almond Bros. Lumber Co. v. United States*, 2012 U.S. Ct. Int'l Trade LEXIS, No. 08-00036, slip op. 2012-51 (Ct. Int'l Trade 2012) (holding that the U.S. producers' challenge was not justiciable and dismissing the complaint).

[24] GATT Article XXIII.

[25] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm .

[26] When USTR accepted a petition filed by United Steel Workers under Section 301 in 2010 alleging that China had violated WTO commitments in connection with the development of its green technologies sector through unfair trade practices, USTR was able to achieve the elimination of Chinese domestic content subsidies for wind power equipment manufacturers through WTO consultations.

Instead of or concurrent with WTO disputes, target countries might also retaliate unilaterally against US exporters or investors – using the same justifications regarding WTO applicability that the Trump administration applied in its Section 301 actions. As discussed above, such retaliation is relatively common and would have serious economic and legal implications.

Trading with the Enemy Act of 1917 (TWEA) and International Emergency Economic Powers Act of 1977 (IEEPA)

TWEA authorizes the President to regulate all forms of international commerce and to freeze and seize foreign assets during times of war. However, President Trump's ability to impose tariffs or other trade-restrictive measures under TWEA appears limited because TWEA does not specifically authorize the President to raise tariffs. In addition, if President Trump were to seek action under TWEA, he would very likely face a court challenge where the United States was not at war with the target country. Whether a party could successfully challenge the President's action would likely turn on whether the 1976 amendments to TWEA limiting the act to times of war were intended to limit the scope of TWEA to wars declared by Congress or intended to include military action without prior congressional authorization.

IEEPA authorizes the President to regulate all forms of international commerce and to freeze assets. Congress delegated this authority under IEEPA to the President to deal with "unusual or extraordinary" international threats to the national security, foreign policy, or the economy. Thus, IEEPA is supposed to be limited to situations involving an "unusual or extraordinary threat." If "regulate" were interpreted broadly to include raising tariffs, President Trump could rely on IEEPA to impose tariffs on imports. However, the President may exercise authority under IEEPA in response to an external threat **only if** a national emergency under the National Emergencies Act has been declared. Such authority may not be exercised for any other purpose. IEEPA also imposes reporting and consultation requirements on the President. Although President Trump would be required to consult with Congress, submit a report, and provide periodic follow-up reports, IEEPA does not require congressional approval. In fact, the United States has maintained a system of export controls pursuant to IEEPA. In the past, IEEPA has provided the authority for various US embargoes and sanctions, including a prohibition on all imports of Nicaraguan goods and services and all export to Nicaragua, and the blocking of Iraqi and Kuwaiti government property and the prohibition on all transactions with Iraq. Using such provisions to target, for example, all Chinese imports on economic grounds would arguably require an expansive interpretation of the statute.

Target countries of any action under TWEA or IEEPA could challenge such action at the WTO. As with Section 232, the United States could defend a WTO challenge to both TWEA and IEEPA actions by citing to GATT Article XXI, but to do so would raise similar institutional concerns. Retaliation from targeted countries would also be likely, thus resulting in substantial economic distress for US exporters and consumers, as well as an adverse market response.

Declaring China (or Other Countries) a "Currency Manipulator"

The US Treasury Department currently addresses the foreign exchange policies of major trading partners under two US laws:

- Section 3004 of the Omnibus Trade and Competitiveness Act of 1988 directs the Secretary of the Treasury to analyze on an annual basis the exchange rate policies of foreign countries and consider whether countries manipulate the rate of exchange between their currency and the United States dollar "for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade."[27] If the Secretary considers that such manipulation is occurring with respect to countries that (i) have material global current account surpluses; and (ii) have significant bilateral trade surpluses with the United States, the Secretary may take action to initiate negotiations with such foreign countries for the purpose of ensuring that such countries adjust the rate of exchange between their currencies and the United States dollar to permit effective balance of payments adjustments and to eliminate the unfair advantage.

[27] 22 U.S.C. § 5305

- Section 701 of the Trade Facilitation and Trade Enforcement Act of 2015 directs the US Treasury Department to submit biannual reports to Congress containing analyses of the macroeconomic and exchange rate policies of major US trading partners – expanding on the existing biannual reporting requirement established by the Omnibus Trade and Competitiveness Act of 1988.[28] The new reports must provide "enhanced analyses" of the policies of any major US trading partner that: (i) has a significant bilateral trade surplus with the United States; (ii) has a material current account surplus; and (iii) has engaged in "persistent one-sided intervention in the foreign exchange market."

Mr. Trump's campaign has stated that "on day one of the Trump administration the US Treasury Department will designate China as a currency manipulator", and that "this will begin a process that imposes appropriate countervailing duties" on Chinese products. However, subsequent statements from Trump-aligned individuals, including Treasury Secretary nominee Steve Mnuchin, have softened this stance.

Furthermore, it is unclear whether China currency meets the aforementioned legal standards, and these laws do not authorize the President to impose countervailing duties in response to a finding of currency manipulation. Instead, Treasury is only required to initiate "enhanced bilateral engagement" with each country meeting the Section 701 criteria to express the concern of the United States, to urge policy reforms, and to advise the country that the United States may take remedial actions. If, within one year after enhanced bilateral engagement begins, Treasury determines that the country has failed to adopt appropriate policies to correct the alleged undervaluation and surpluses, the President is required to take one or more of the following actions: (i) prohibit the Overseas Private Investment Corporation (OPIC) from approving any new financing with respect to a project located in that country; (ii) prohibit the US federal government from procuring goods or services from that country (except where such action would be inconsistent with US obligations under international agreements); (iii) instruct the US Executive Director of the IMF to call for rigorous surveillance of the macroeconomic and exchange rate policies of that country (and, as appropriate, formal consultations on findings of currency manipulation); and/or (iv) instruct USTR to take into account the country's alleged failure to cooperate when assessing whether to enter into a bilateral or regional trade agreement with that country. (The President also may choose not to take any remedial action, however, if doing so would adversely impact the US economy or national security.)

Thus, the Trump administration would have to pursue countervailing duties on imports from countries designated as "currency manipulators" by the Treasury Department under the US CVD law, as noted above.

Measures to Combat Outsourcing

None of the above mechanisms or actions directly addresses one of the primary targets of Mr. Trump's campaign: American companies outsourcing jobs and manufacturing to other countries, in particular Mexico. It is unclear what mechanism could be used to combat outsourcing, as several of the proposals discussed on the campaign trail would face substantial legal hurdles. First, none of the statutory provisions discussed above permits the targeting of specific US companies, particularly on the grounds that they are investing overseas. Second, a punitive tax on specific corporations for outsourcing would likely be challenged as a bill of attainder, which is prohibited by the US Constitution. Third, determining whether a multinational company's day-to-day investment decisions constitute "outsourcing" would raise serious practical constraints. Finally, seeking to impose tariffs on a particular country's imports (such as China or Mexico, which have traditionally been destinations for outsourcing) would very likely violate US obligations under the WTO agreements and would face a WTO challenge by the target country.

For these reasons, any such measures would likely need to take the form of the revocation of various US tax law benefits pursuant to objective criteria, implemented as a new US law passed by Congress and signed by the President. The measures therefore appear unlikely, though President Trump might continue to make such threats in order to influence US companies' multinational investment decisions. President Trump and congressional Republicans might also claim to have "fixed" the United States' "outsourcing problem" through US corporate tax and regulatory reforms or state-level incentives that encourage investment in the United States.

[28] 19 U.S.C. § 4421

Likelihood of Unilateral Trade Measures

Although the course of Trump administration trade policy remains unclear, we see future unilateral actions falling into three categories:

- **Most likely.** The most likely unilateral actions involve the increased use of trade remedies and enforcement mechanisms, including the AD/CVD laws (though self-initiated AD/CVD investigations may be less likely), anti-circumvention proceedings, and safeguards. The President also would likely take credit for any significant measures imposed on imports of steel or other industrial goods via Section 337. These mechanisms are well-known and frequently utilized, though subject to significant legal and practical constraints that would limit their overall economic impact. In addition, the continued treatment of China as an NME country would allow DOC to continue to impose strict measures and exacting requirements on Chinese companies subject to AD/CVD investigations.

- **Less likely.** It is possible, though less likely than the aforementioned actions, that the Trump administration utilizes Section 301 of Trade Act of 1974, which would allow USTR to take specific and direct action to counter perceived unfair trade practices by foreign countries while a WTO dispute over those practices is pending. These unilateral actions, however, would require a shift in USTR's treatment of Section 301 and would almost certainly face WTO litigation and possible US court challenges. Section 301 sanctions might also be met with unilateral retaliation from countries like China, thus potentially rattling markets and inciting concerns from Congress. Declaring China or another country to be a "currency manipulator" also appears possible, as it would achieve a core Trump campaign promise while resulting in no new import barriers. On the other hand, key Trump officials appear to have walked-back this promise for China, and it may be difficult to justify such a designation under current market conditions.

- **Least likely.** The least likely unilateral actions are those under as Section 232(b) of the Trade Expansion Act of 1962, Section 122 of the Trade Act of 1974, TWEA and IEEPA. These provisions have not been utilized for decades, and doing so would require a broad, and in our view incorrect, interpretation of the law given the current market situation. Any such usage by the Trump administration would thus produce challenges either in domestic courts or at the WTO, unilateral retaliation by aggrieved trading partners, and serious market turmoil. It also would likely create frictions with the Republican-controlled Congress, thus jeopardizing other, more important policy priorities such as tax reform or infrastructure spending.

One additional possible outcome is that President Trump could seek changes to existing US trade laws or seek the passage of new US trade laws rather than acting unilaterally. For example, the President could seek to lower thresholds for successful AD/CVD investigations, or seek more robust trade enforcement by US Customs and Border Protection. The Obama administration was active in this regard, and in 2015, Congress passed the Trade Facilitation and Trade Enforcement Act of 2015, giving CBP significant power to enforce AD/CVD orders and prevent evasion. President Trump could pursue similar legislative initiatives to further strengthen the trade laws, and would likely find the Republican Congress amenable to his proposals.

Termination or Modification of US Trade Agreements

US law provides the President with varying levels of, and in some cases uncertain, authority to modify, renegotiate, or withdraw from US trade agreements. This authority is uncertain for three reasons. First, there is almost no precedent governing the legal provisions at issue here. Second, US laws implementing and governing FTAs reflect the implicit assumption that the primary goal is trade liberalization, and that the President would seek to liberalize trade. Likely for this reason, the provisions of these laws that govern potential US withdrawal from FTAs contain almost no detail. Third, each US trade agreement is actually governed by three different US laws: the Trade Act of 1974; the specific version of TPA in effect at the time of the agreement's implementation; and the act implementing the agreement's specific commitments into US law. In some cases, these laws contradict each other on the question at issue (*e.g.*, tariff modification), thus raising significant questions regarding the proper statutory interpretation.

We assess below the legal procedures for the United States' withdrawal from the NAFTA, the WTO Agreements, and other US trade agreements, as well as the procedures for potential modification of such agreements through either renegotiations or unilateral tariff increases.

General Principles Governing US Trade Agreements

Trade Agreements under US Law

Under US law, trade agreements are not treaties (which are typically "self-executing," require two-thirds approval by the Senate, and have the force of law upon ratification). They are "congressional-executive agreements" that, even after being signed by the President, have limited legal force in the United States until they are converted into implementing legislation (which would amend current law), passed by Congress, and signed into law by the President. This process reflects a critical compromise between the legislative and executive branches: Congress under a series of laws has delegated to the President some of its Article I, Section 8 powers to "regulate Commerce with foreign Nations" so that the President may efficiently execute our domestic trade laws and sign and implement trade agreements through his foreign affairs powers under Article II. At the same time, Congress has retained its ultimate constitutional authority over international trade, for example by approving or rejecting trade agreements and by amending US trade laws to implement them.

Trade Agreement Provisions on Termination or Withdrawal

All US trade agreements, including the WTO Agreements, contain provisions on termination of or withdrawal from the agreement. These provisions uniformly state that a Party may terminate or withdraw from the agreement six months after providing written notification to the other Parties.[29]

- **Withdrawal.** The President's constitutional authority over foreign affairs, as well as the "termination or withdrawal" authority granted to the President under Section 125 the Trade Act of 1974, would very likely permit the President to withdraw from a US trade agreement without formal congressional approval.[30] As such, President Trump could cite this authority, as well as the authority set forth in the legislation authorizing the negotiation (*i.e.*, the TPA), to withdraw the United States unilaterally and notify this action to the depository specified in the relevant trade agreement.
- **Termination.** Whether an FTA terminates upon the United States' withdrawal therefrom is unclear in some cases. Although the Trade Act of 1974 grants the President the authority to "terminate" a trade agreement, US trading partners would not be bound by these provisions and instead would be subject to the agreement itself and their own domestic laws. Thus, a US trade agreement would, unless otherwise specified therein, likely "terminate" upon US withdrawal only where there is only one other party to the agreement. Should the agreement remain in force (*i.e.*, not be "terminated"), the United States' withdrawal from an agreement would permit any remaining

[29] These termination and withdrawal provisions are listed in Annex I.

[30] Some legal scholars have questioned whether US TPA laws restrict this authority, but there are no specific provisions doing so.

party to withdraw immediately any and all trade concessions (*e.g.*, preferential tariff treatment) set forth therein with respect to the United States.

Effect of Termination or Withdrawal on US Implementing Act

Because implementing acts are passed by Congress and signed by the President, the clearest way to terminate the laws, and all trade concessions provided thereunder, would be through Congressional passage of another piece of repeal legislation. If the implementing act for a trade agreement remains in force following US withdrawal therefrom, US tariff and other commitments implemented by the act would arguably remain in force, even though other parties to the agreement could immediately abandon their commitments with respect to the United States.

As discussed below, however, US trade agreement implementing acts contain varying rules on the effect of US withdrawal on the act itself. Furthermore, Section 125(e) of the Trade Act of 1974 does appear to permit the President to modify "[d]uties or other import restrictions required or appropriate to carry out any trade agreement entered into pursuant to this Act" upon either the United States' termination of **or withdrawal from** a trade agreement. It requires that (i) these measures remain in place for one year following termination or withdrawal, "unless the President by proclamation provides that such rates shall be restored to the level at which they would be but for the agreement"; and (ii) the President within 60 days after termination or withdrawal transmit to the Congress "recommendations as to the appropriate rates of duty for all articles which were affected by the termination or withdrawal." This provision would arguably permit the President to unilaterally modify FTA tariff and other concessions via presidential proclamation regardless of whether a trade agreement was formally "terminated", but could conflict with trade agreement implementing act provisions, such as those discussed for the WTO Agreements below, that do not permit termination of an implementing act without congressional approval.

Modification or Amendment of Trade Agreements

Instead of withdrawing from the US trade agreements completely, the implementing acts for such agreements and other provisions of US law give the President unilateral but ambiguous authority to raise tariffs on imports from the other agreement signatories via presidential proclamation. It is an open question as to whether Congress intended to delegate to the President broad unilateral authority to raise tariffs on FTA partners, but the implementing acts and their accompanying SAAs provide little detail. Furthermore, as is explained below, the President's power to raise tariffs in this manner is subject to certain express limitations, some of which are set forth in the TPA legislation that governs each agreement.

Finally, Sections 125(b) and (c) of the Trade Act of 1974 grant the President the respective authority to revoke previous presidential proclamations reducing US tariffs under a trade agreement and to raise tariffs via proclamation "in order to exercise the rights or fulfill the obligations of the United States." Increased tariffs under Section 125(c) may not exceed the higher of (i) 50 percent above the general US tariff schedule rate on January 1, 1975; or (ii) 20 percent above the rate for the relevant country as of January 1, 1975. However, a legitimate argument may be made that these provisions have no operative force for modifying tariffs under current US trade agreements because they have been superseded by the specific provisions on tariff modification in the TPA laws and implementing acts governing each trade agreement.

Outside of raising tariffs, President Trump also could seek to enter into negotiations to amend US trade agreements. The President has this authority under TPA, though in several cases it is unclear whether US law requires congressional approval of any such amendments. As noted above, Mr. Trump's advisors have suggested that the Trump administration might seek to renegotiate US trade agreements to address bilateral trade balances (for example, through mechanisms such as tariffs) and the border-adjustment of VATs. Moreover, they have suggested that the Trump administration might seek to eliminate the investor-state dispute settlement provisions of US trade agreements.

Review of Specific US Trade Agreements

The power of the President to terminate a US trade agreement or modify tariffs thereunder varies under US law, depending on the agreement at issue. We assess below whether President Trump could (i) unilaterally withdraw from various US trade agreements; and (ii) claim that this withdrawal would automatically terminate the corresponding implementing acts, thereby undoing US commitments under those trade agreements. We also review whether President Trump could, absent complete withdrawal or termination, unilaterally raise tariffs on trade agreement partner countries or renegotiate the agreements. As discussed below, the President's authority under US law is weakest for the WTO Agreements, broader but ambiguous for regional FTAs (NAFTA and CAFTA-DR) and strongest for bilateral FTAs.

The conclusions set forth below merit caution, however, because there is no modern precedent relating to presidential termination of a trade agreement, and because in many cases the applicable legal text is minimal, overlapping and ambiguous.

WTO Agreements

Given the powers conferred through the Constitution and the Trade Act of 1974, President Trump would very likely have the authority to trigger US withdrawal from WTO without formal congressional approval, though withdrawal would not automatically terminate the legislation that implemented the WTO Agreements (*i.e.*, the URAA). Rather, formal congressional approval would be required to terminate the URAA. Though the URAA arguably gives President Trump the unilateral authority to raise applied tariffs on imports from WTO Members to the most-favored nation (MFN) "bound rates" set forth in the US goods schedule, there are strong legal arguments that such actions were not intended by Congress.

Withdrawal

Withdrawal from the WTO Agreements is governed by Article XV of the Marrakesh Agreement Establishing the World Trade Organization:

> *Article XV*
> *Withdrawal*
>
> *1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.*
>
> *2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.*

Although other WTO Members would be free to terminate immediately preferential treatment upon the United States' withdrawal from the WTO, it is likely that withdrawal would not automatically terminate the URAA. Unlike other US trade agreements discussed below, the URAA contains a detailed process in Section 125 for congressional termination of the act. In particular, subsection (b)(1) states: "The approval of the Congress, provided under section 101(a), of the WTO Agreement shall cease to be effective **if, and only if,** a joint resolution described in subsection (c) is enacted into law pursuant to the provisions of paragraph (2)" (emphasis added).[31] The remainder of Section 125 sets forth the procedures and substance governing any such "joint resolution," including the text thereof ("That the Congress withdraws its approval, provided under section 101(a) of the Uruguay Round Agreements Act, of the WTO Agreement as defined in section 2(9) of that Act.").

If the URAA remained in force following US withdrawal from the WTO under Article XV, US tariff and other WTO commitments implemented by the URAA would remain in force, even though other Members could immediately abandon their WTO commitments with respect to the United States. The President could claim that the URAA self-terminates after he withdraws the United States from the WTO under Article XV, or that withdrawal alone permits him

[31] 19 U.S.C. § 3535

to increase US tariffs and other import restrictions under Section 125(e) of the Trade Act of 1974 (see above), but these arguments could be countered by the fact that URAA expressly limits its termination through only the congressional "disapproval resolution" process.

Tariff Modification

Instead of withdrawing from the WTO completely, the URAA arguably gives President Trump the unilateral authority to raise tariffs on imports from WTO Members. Tariff reductions under the WTO Agreements are implemented via presidential proclamation pursuant to Section 111(a) of the Act.[32]

- Such tariff modifications were implemented for the original WTO Members on December 23, 1994 and published in the United States Federal Register.
- Section 111(a)(3) of the URAA grants the President the authority to issue another presidential proclamation imposing "such additional duties, as the President determines to be necessary or appropriate to carry out Schedule XX," which is defined in Section 2 of the URAA as "Schedule XX—United States of America annexed to the Marrakesh Protocol to the GATT 1994."
- The President could argue that these provisions give him the unilateral authority to undo some of the tariff reductions under the WTO Agreements, because the text of Section 111(a)(3) is sufficiently discretionary and ambiguous so as to provide the President with a wide array of justifications to raise tariffs.
- However, the President's power to impose these "additional duties" is not without limitation. First, the URAA SAA indicates that subsection (a)(3) is not intended to be used for retaliatory or other economic purposes. Instead, the SAA states that "[t]he authority to increase tariffs is necessary to take account of the fact that Schedule XX calls for an increase in tariffs on agricultural products whose importation into the United States is currently subject to quotas or other nontariff restrictions." Second, the language of Section 111(a)(3) would likely not permit duties to exceed the "bound" rates set forth in the US Goods Schedule ("Schedule XX"): it would be difficult to argue that "necessary or appropriate to carry out Schedule XX" meant to exceed the bound rates therein. Third, any such additional duties would need to be non-discriminatory (*i.e.*, they could not target a single Member or discrete group of Members) in order to comply with the MFN principle of the GATT.
- Additional duties are also permitted under Section 1102(a)(B)(iii) of TPA 1988 (which governs the URAA's implementation) "as [the President] determines to be required or appropriate to carry out any such trade agreement" concluded pursuant to TPA, but Section 1102(a)(2)(B) limits these increased duties to the rate that applies on August 23, 1988.[33] Section 1102(a)(6) further clarifies that a duty increase going beyond those permitted in paragraph (2)(B) may take effect "only if a provision authorizing such reduction or increase is included within an implementing bill provided for under section 2903 of this title and that bill is enacted into law."
- President Trump could therefore cite these provisions to issue a new proclamation or revoke earlier presidential proclamations, thus raising applied tariffs to the MFN bound rates set forth in the US goods schedule. As noted above, however, there are strong legal arguments, particularly the language of the SAA, that such actions were not intended by Congress.

Renegotiation

Outside of raising tariffs, President Trump also could seek to enter into negotiations to amend the WTO Agreements, something Trump and his advisors have mentioned with respect to VATs. This approach, however, would be limited by the WTO's rules requiring consensus among Members to amend the Agreements, as well as the general problems at the WTO with respect to future multilateral trade negotiations. These difficulties are addressed more fully in the WTO section below.

NAFTA

[32] 19 U.S.C. § 3521

[33] 19 U.S.C. § 2902

Given the powers conferred through the Constitution and the Trade Act of 1974, President Trump would very likely have the authority to trigger US withdrawal from the NAFTA without formal congressional approval; however, it is unclear whether withdrawal would automatically terminate the North American Free Trade Agreement Implementation Act ("the NAFTA Act").[34] Though the NAFTA Act arguably gives President Trump the unilateral authority to raise tariffs on imports from the NAFTA countries, it would likely prohibit him from raising such tariffs above the MFN bound rates set forth in the URAA.

Withdrawal

Withdrawal from the NAFTA is governed by Article 2205 of the Agreement:

> *Article 2205: Withdrawal*
>
> *A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.*

US withdrawal under Article 2205 might not automatically terminate the NAFTA Act. The President could claim that the NAFTA Act self-terminates after he withdraws the United States from the NAFTA under Article 2205. In particular, Section 109(b) of the Act ("Termination of NAFTA Status") states: "During any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country." The NAFTA Act itself does not clarify what constitutes "ceases to be a NAFTA country" (*i.e.*, withdrawal under Article 2205 or congressional legislation); it is also unclear whether the term "NAFTA country" was intended to apply to the United States; and there is no recent (post-WWII) precedent relating to US withdrawal from an FTA. Furthermore, the precise legal effect of repealing only Sections 101-106 of the Act – all falling under Title I ("Approval and Entry into Force of the North American Free Trade Agreement") is unclear.[35]

However, there are legitimate arguments that the President's withdrawal from NAFTA under Article 2205 would also repeal the NAFTA Act. First, Section 101(a) of the NAFTA Act, which would cease to have legal effect under Section 109(b), contains Congress' actual, express approval of the NAFTA and its SAA[36], and Section 101(b) governs the Agreement's entry into force. Moreover, Article 2205 of the NAFTA does imply that the Agreement would no longer be "in force" for the United States upon US withdrawal from the Agreement. If the NAFTA Act did indeed terminate upon US withdrawal from the agreement, the President would likely be free to unilaterally raise relevant duties or other import barriers through Section 125(e) of the Trade Act of 1974.

Tariff Modification

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[34] 19 U.S.C. § 3301 *et seq.*

[35] The sections are titled as follows:

- Sec. 101. Approval and entry into force of the North American Free Trade Agreement;
- Sec. 102. Relationship of the Agreement to United States and State law;
- Sec. 103. Consultation and layover requirements for, and effective date of, proclaimed actions;
- Sec. 104. Implementing actions in anticipation of entry into force and initial regulations;
- Sec. 105. United States Section of the NAFTA Secretariat;
- Sec. 106. Appointments to chapter 20 panel proceedings.

[36] (a) APPROVAL OF AGREEMENT AND STATEMENT OF ADMINISTRATIVE ACTION.—Pursuant to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 2903) and section 151 of the Trade Act of 1974 (19 U.S.C. 2191), the Congress approves—

> (1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and
>
> (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4,1993.

Section B.1.a of the SAA adds: "Section 101(a) of the bill provides Congressional approval for the NAFTA and this Statement."

The Act arguably gives President Trump the authority to raise zeroed tariffs on imports from the NAFTA countries to pre-FTA levels. Tariff reductions under NAFTA were implemented via presidential proclamation pursuant to Section 201(a) of the Act.

- Such tariff modifications were implemented for the NAFTA parties on December 15, 1993 and published in the United States Federal Register.[37]
- Section 201(b)(1)(D) of the Act grants the President, subject only to "consultation and layover"[38] provisions of the Act, the authority to issue a new presidential proclamation imposing "(D) such additional duties, as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Canada or Mexico provided for by the Agreement." The SAA accompanying the NAFTA Act simply reiterates this provision and does not address congressional intent.
- These provisions could give the President the unilateral authority to undo the tariff reductions under NAFTA because (i) "consultations" are non-binding on the President and may be relatively superficial; and (ii) the provision's text is sufficiently discretionary and ambiguous so as to provide the President with a wide array of justifications to raise tariffs.
- However, the President's power to impose these "additional duties" is not without limitation. Such action is also permitted under Section 1102(a)(B)(iii) of TPA 1988 (which governs NAFTA's implementation) "as [the President] determines to be required or appropriate to carry out any such trade agreement" concluded pursuant to TPA, but Section 1102(a)(2)(B) limits these increased duties to the "the rate that applies on August 23, 1988" (which has since been updated to the MFN rates under the URAA that implemented the WTO Agreements).[39] Section 1102(a)(6) further clarifies that a duty increase going beyond those permitted in paragraph (2)(B) may take effect "only if a provision authorizing such reduction or increase is included within an implementing bill provided for under section 2903 of this title and that bill is enacted into law."
- President Trump could therefore cite these provisions to issue a new proclamation or revoke President Clinton's earlier proclamations, thus raising tariffs to, for example, the MFN rates that superseded the 1988 rates cited in TPA 1988. As indicated above, however, it is far from certain that Congress intended these provisions to be used by the President in this manner.

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[37] "Proclamation 6641—"To Implement the North American Free Trade Agreement, and for Other Purposes" http://www.presidency.ucsb.edu/ws/?pid=62460

[38] Section 103(a) of the Act States that the President may issue a proclamation subject to consultation and layover provisions only if—

(1) the President has obtained advice regarding the proposed action from—

(A) the appropriate advisory committees established under section 135 of the Trade Act of 1974, and

(B) the International Trade Commission;

(2) the President has submitted a report to the Committee Reports on Ways and Means of the House of Representatives and the Committee on Finance of the Senate that sets forth—

(A) the action proposed to be proclaimed and the reasons therefor, and

(B) the advice obtained under paragraph (1);

(3) a period of 60 calendar days, beginning with the first day on which the President has met the requirements of paragraphs (1) and (2) with respect to such action, has expired; and

(4) the President has consulted with such Committees regarding the proposed action during the period referred to in paragraph (3).

[39] 19 U.S.C. § 2902

Renegotiation

Outside of raising tariffs, President Trump also could seek to enter into negotiations to amend NAFTA pursuant to Article 2202 of the Agreement.[40] Amendment may occur under Article 2202 between two or more parties and requires the fulfilment of their domestic legal procedures. US law (*i.e.*, the NAFTA Act or TPA), however, is silent as to whether congressional approval would be required for any such amendments. There also have been no amendments to the NAFTA. However, the aforementioned tariff modification language, as well as Section 202(q) of the NAFTA Act permitting presidential proclamations to modify certain rules of origin, implies that substantive modifications of the NAFTA outside of tariffs and rules of origin would require congressional authorization.

CAFTA-DR

Given the powers conferred through the Constitution and Trade Act of 1974, President Trump would very likely have the authority to trigger US withdrawal from the CAFTA-DR without formal congressional approval. However, it is unclear whether such withdrawal would automatically terminate the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act ("the CAFTA-DR Act"). The CAFTA-DR Act also arguably gives President Trump the unilateral authority to raise tariffs on imports from the CAFTA-DR countries, but a strong argument can be made that President Trump would only be able to increase duties on such imports to those levels that were in place on the date of enactment of the TPA law that authorized the CAFTA-DR (*i.e.*, August 6, 2002). These conclusions generally follow those above for NAFTA and thus are not repeated herein; the relevant legal text is provided in the Annex.

Outside of raising tariffs, President Trump also could seek to enter into negotiations to amend CAFTA-DR pursuant to Article 22.2 of the agreement. Amendment may occur under Article 22.2 between two or more parties and requires the fulfillment of their domestic legal procedures. US law (*i.e.*, the CAFTA-DR Act or TPA), however, is silent as to whether congressional approval would be required for any such amendments. The only previous amendment to CAFTA-DR occurred in 2004 before congressional passage of the agreement's implementing legislation.[41] However, the aforementioned tariff modification language, as well as Section 203(o)(1) of the CAFTA-DR Act permitting presidential proclamations to modify certain rules of origin, imply that substantive changes to CAFTA-DR outside of tariffs and rules of origin would require congressional authorization.

Bilateral FTAs with Australia, Chile, Colombia, Korea, Panama, Peru, and Singapore

Given the powers conferred through the Constitution and the Trade Act of 1974, President Trump would very likely have the unilateral authority to trigger the United States' termination of its bilateral trade agreements with Australia, Chile, Colombia, Korea, Panama, Peru, and Singapore. Moreover, a strong argument can be made that such termination would automatically terminate the implementing acts for these agreements, thereby undoing the United States' FTA commitments with respect to these countries.

Alternatively, President Trump would arguably have the unilateral authority to raise tariffs on imports from these countries to those levels that were in place on the date of enactment of the TPA law that authorized the relevant bilateral agreements (*i.e.*, August 6, 2002). The relevant legal text for each agreement is provided in the Annex; because these provisions are essentially the same, they are summarized together in the following sections.

[40] Article 2202: Amendments

1. The Parties may agree on any modification of or addition to this Agreement.

2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

[41] *See*, *e.g.*, http://www.sice.oas.org/TPD/USA_CAFTA/Implementation/ammend_22_e.pdf.

Termination

The United States' bilateral trade agreements with Australia, Chile, Colombia, Korea, Panama, Peru, and Singapore provide that such agreements will terminate six months after one party notifies the other that it wishes to terminate the agreement. For example, termination of the US-Korea Free Trade Agreement (KORUS) is governed by Article 24.5. (Entry Into Force and Termination), the relevant excerpt of which reads as follows:

> *2. This Agreement shall terminate 180 days after the date either Party notifies the other Party in writing that it wishes to terminate the Agreement.*

Upon the United States' termination of its bilateral FTA with Australia, Colombia, Korea, Panama, or Peru, the other party would be free to terminate immediately preferential treatment afforded to the United States under such agreement.

President Trump also would have a legitimate claim that the implementing acts for each of these FTAs actually self-terminate after he terminates the relevant FTA, because the implementing acts state that the provisions set forth therein have no legal effect upon termination of the relevant FTA. For example, Section 107(c) of the KORUS implementation act states:[42]

> *(c) TERMINATION OF THE AGREEMENT.—On the date on which the Agreement terminates, this Act (other than this subsection and title V) and the amendments made by this Act (other than the amendments made by title V) shall cease to have effect.*

The implementing acts for the Colombia, Korea, Panama, and Peru FTAs contain similar or identical language on termination. Thus, there is a strong argument that the implementing acts for each of these FTAs self-terminate after the President terminates the relevant FTA. Upon such termination, the President would likely be free to unilaterally raise relevant duties or other import barriers through Section 125(e) of the Trade Act of 1974.

Tariff modification

The implementing acts for these bilateral trade agreements grant to the President the same tariff modification authority as the NAFTA and CAFTA-DR implementation acts (*i.e.*, the authority to issue new presidential proclamations imposing "such additional duties" as the President determines to be necessary or appropriate to maintain the "general level of reciprocal and mutually advantageous concessions" with respect to the other party or parties provided for by the relevant agreement.) These provisions could give the President the unilateral authority to undo the tariff reductions under these agreements, subject only to consultation and layover requirements.

Imposing "additional duties" is further permitted under Section 2103(a)(1)(B)(iii) of TPA 2002 (which governed the implementation of the bilateral FTAs listed above, as well as the CAFTA-DR) "as the President determines to be required or appropriate to carry out any such trade agreement" concluded pursuant to TPA. However, Section 2103(a)(2) limits these increased duties to the "rate that applied on the date of enactment of this Act" (*i.e.*, August 6, 2002).

Renegotiation

Outside of raising tariffs, President Trump also could seek to enter into negotiations to amend these agreements pursuant to the provisions on amendment contained in each FTA. These provisions state that amendment may occur between the two parties and requires the fulfilment of each party's domestic legal procedures. For example, amendment of the KORUS is governed by Article 24.2:

[42] 19 U.S.C. § 3805 note.

ARTICLE 24.2: AMENDMENTS
The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures, on such date as the Parties may agree.

US law (*i.e.*, the implementing acts or TPA), however, is silent as to whether congressional approval would be required for any such amendments. However, the aforementioned tariff modification language implies that substantive modifications to these agreements outside of tariffs would require congressional authorization.

Potential for US Litigation

Given the ambiguity of the relevant legal texts, as well as the serious economic and constitutional questions at issue here, the actions mentioned above would, if pursued unilaterally by the Trump administration without congressional consent, very likely encounter opposition from Congress, the US business community and US trading partners, thus leading to numerous court challenges. However, corrective legislation or court rulings (especially those related to complex constitutional issues) would take significant time and create substantial economic uncertainty in interim. It is unclear whether the courts would enjoin the Executive Branch and President Trump from acting while any such litigation is pending. The economic implications of such uncertainty are significant.

Likelihood of Termination or Modification of US Trade Agreements

Although the course of Trump Administration trade policy remains unclear, we see future actions described in this section falling into three categories:

- **Most likely.** It appears likely that President Trump will seek to renegotiate certain US trade agreements. Indeed, it appears likely that he will seek the renegotiation of NAFTA shortly after taking office. It remains to be seen whether those negotiations will cover relatively uncontroversial updates to the agreement (*e.g.*, e-commerce or consultations) or contentious issues such as lumber trade, country of origin labeling, domestic taxes or bilateral trade balances. Canada and Mexico have appeared to be amenable to modest changes to the agreement, but have already expressed opposition to new trade barriers or trade balancing mechanisms. Furthermore, as noted above, significant changes to US FTAs would likely require congressional approval; this should act as another check on the Trump administration's FTA ambitions.

- **Less likely.** It is possible, though less likely than the aforementioned actions, that President Trump will seek to unilaterally raise tariffs on US trade agreement partners under the tariff modification authority set forth in TPA and various FTA implementing bills. President Trump might also seek to enter into negotiations to amend the WTO Agreements, something he and his advisors have mentioned with respect to VATs. This approach, however, would be limited by the WTO's rules requiring consensus among Members to amend the Agreements, as well as the general problems at the WTO with respect to future multilateral trade negotiations. In any renegotiation of the NAFTA, the WTO Agreements, or other FTAs, President Trump may use the threat of withdrawal to obtain concessions from the other parties, and that threat must be taken seriously given the President's constitutional authority over foreign affairs and the authority given to the President under US law.

- **Least likely.** Though Mr. Trump and his advisors have discussed publicly a potential withdrawal from the WTO Agreements, NAFTA, and other US trade agreements, the Trump administration is unlikely to take such actions because of their serious legal and economic implications. If the Trump administration were to pursue outright withdrawal from a US trade agreement, the President would very likely seek Congressional support to alter or repeal the relevant implementing legislation. Failure to do so would generate substantial legal and economic uncertainty and could raise serious constitutional issues. Congressional support cannot be guaranteed (despite the Republican Party having control of both houses of Congress, at least for the first two years), as various constituents would lobby to protect the relevant trade agreement commitments and their substantial investments based thereon. Moreover, withdrawal from major agreements such as the WTO Agreements and the NAFTA would have severe market consequences (and, in the case of the WTO Agreements, would conflict with Mr.

Trump's written campaign promise to initiate WTO disputes against US trading partners such as China). It is unlikely that President Trump will wish to take such economically disruptive actions, or be willing to spend significant time, effort, and political capital dealing with the litigation that would likely result from them.

Prospects for Completed FTAs, Current, and Future Negotiations

TPP

The chances that Congress will vote on the TPP during the lame-duck session are essentially nil. Mr. Trump campaigned against the deal as written, and Republican congressional leaders are very unlikely to pick a fight with the President-elect over the agreement. Without Congress, President Obama's anticipated gamble to move TPP during the lame duck session will fail – one or both chambers could (and likely would) simply dismantle TPA's "fast-track" rules by majority vote, thus making congressional consideration of the implementing legislation no longer necessary. Consequently, it is highly unlikely that President Obama will submit the TPP implementing bill during the lame duck session.

Mr. Trump stated on November 21 that he intends to issue a notification of intent to withdraw the United States from the TPP on his first day in office. Mr. Trump also stated that he will seek to negotiate bilateral trade agreements instead of pursuing the TPP. Given these statements, it appears highly unlikely that the Trump administration will pursue renegotiation of the TPP. Rather, if the TPP is ever to enter into force in its current (or slightly modified) form, it likely will not include the United States as a party. Indeed, the other TPP parties have already indicated that they will explore ways to implement the agreement without the United States. It is possible that President Trump will renege on his promise to withdraw from the TPP, thus opening the door to renegotiation, but this action would directly contradict his definitive November 21 statement.

TTIP

It is unclear whether President Trump will decide to continue the TTIP negotiations, as he has not expressed an opinion on the issue publicly. However, there are several reasons to expect that he could be reluctant to continue the negotiations. Given that TTIP is an Obama administration initiative, President Trump might wish to distance himself from the agreement for political reasons. Moreover, the TTIP negotiations have made far less progress after three years of negotiations than had initially been hoped, and they remain encumbered by multiple contentious issues. Such issues include, but are not limited to, agricultural market access, market access in government procurement, geographical indications, investor-state dispute settlement, cross-border data flows and data localization, and sanitary and phytosanitary measures. Bringing the negotiations to a successful conclusion would, therefore, require President Trump to invest significant time, effort, and political capital into the process, and might also require that the Trump administration make politically-sensitive concessions in some of the aforementioned areas.

On the other hand, Mr. Trump's stated preference for bilateral FTAs and recent statements by Commerce Secretary nominee Wilbur Ross – in particular noting Mexico's attractiveness to manufacturing investment because of its FTA with the EU – indicate that a Trump administration might be willing to explore TTIP. Thus, while the agreement faces serious hurdles, continued negotiations cannot be ruled out.

TiSA

Prior to the election, TiSA negotiators had come close to reaching a final agreement and the United States had pushed strongly for the agreement to be concluded by early December. That effort has now been abandoned, however, given the high likelihood that President Trump would reject any TiSA agreement that had been fully negotiated by the Obama administration. President Trump could decide to resume the TiSA negotiations, though it is unclear whether he will do so as he has not expressed an opinion on TiSA publicly. The TiSA negotiations are far more advanced than the TTIP negotiations and could likely be concluded quickly under a Trump administration; however, President Trump will likely be reluctant to resume them given their association with President Obama. Moreover, TiSA is likely to contain commitments regarding the supply of services via movement of natural persons ("Mode 4"). Even if the United States is not a party to such commitments, this feature would make the agreement controversial among the core group of Mr. Trump's supporters who are opposed to any increase in immigration into the United States.

Future FTAs

It is unclear whether the Trump administration will pursue new free trade agreements. Mr. Trump and his advisors have criticized President Obama's strategy of negotiating large regional and plurilateral trade agreements, and have instead expressed a preference for negotiating smaller, bilateral agreements. In particular, Mr. Trump and his advisors have expressed interest in negotiating a bilateral FTA with the United Kingdom (UK). However, it is unlikely that negotiations for a US-UK agreement could begin in the near term, given that the UK is prohibited from conducting trade negotiations while it is still a member of the European Union.[43] Moreover, until the terms of the "Brexit" arrangement between the UK and the European Union are finalized, the degree to which the post-Brexit UK will have sovereignty over issues such as tariffs and regulations will be unclear, making informal trade negotiations difficult to carry out. Thus, negotiations for a US-UK FTA might not begin until the latter half of President Trump's term in office.

[43] Article 3(1)(e) of the Treaty on the Functioning of the European Union provides that the common commercial policy falls under the exclusive competence of the EU.

Impact on the United States' Role in the WTO

Beneath the diplomatic welcome that Mr. Trump has received from key WTO Member governments and from WTO Director-General, Roberto Azevedo, there are deep currents of concern in the multilateral trade community about future US trade policy and the future of the WTO.

Already under the Obama administration there have been signs of US disenchantment with the failure of the WTO to deliver better market access and to update its rulebook through the Doha Round, and of US frustration about perceived shortcomings in the WTO's dispute settlement function. US leadership in the multilateral trading system is vital and peerless, so to see the United States turning increasingly to regional and plurilateral agreements to pursue its trade agenda over the past few years left many worried about the direction and long-term relevance of the WTO. However, no-one lost confidence in the United States' commitment to the core principles of the multilateral trading system, to enforceable WTO rules and to free and fair trade. Some of the election campaign remarks by Mr. Trump about trade policy have shaken that confidence.

Mr. Trump's campaign remarks on the WTO were minimal and ambiguous and are therefore difficult to interpret. Taking them at face value, Mr. Trump has described the WTO as a "disaster" and suggested the United States could withdraw if WTO rules proved to be an obstacle to his trade plans. Some have concluded from these remarks that the United States is prepared to destroy the multilateral trading system and to usher in a new era of protectionism. Such a conclusion seems excessive when the remarks are examined one-by-one away from the heat of campaign rhetoric:

- **Increase tariffs on imports from China.** WTO rules on market access and non-discrimination would stand in the way of the United States raising its applied tariffs above their bound (legal maximum) rate only for China. There are other ways, however, for the United States to legitimately protect its manufacturing industries under WTO rules from unfair trade. China's manufactured exports have been increasingly targeted by trade remedy measures in the past few years, not only by the United States but by other WTO Members too. The United States (and the European Union) is refusing to acknowledge China's demand that it be treated henceforth as a "market economy" for purposes of calculating anti-dumping duties and the United States is expected to continue to levy high duties on imports from China that are causing injury to its manufacturing sector. Those duties could be challenged by China in the WTO through dispute settlement, but the outcome of such a challenge is far from clear and it could in any case take years to resolve.

- **WTO actions on currency undervaluation**. Previous US administrations (Republican and Democrat) have regularly targeted the alleged undervaluation of China's currency but failed to make a finding that would warrant them following through with remedial trade measures. WTO rules have therefore never been tested on this issue, but legal analysis suggests that bringing a case of currency manipulation to the WTO under GATT Article XV could be particularly complicated (it would require a prior finding of currency manipulation by the International Monetary Fund, which the IMF has so far failed to deliver) and it would appear to fail the test of the "specificity" of subsidies that would have to be demonstrated if a case were to be made under the WTO Agreement on Subsidies and Countervailing Measures.

- **Impose taxes or tariffs on US firms that move their manufacturing activity abroad.** Taxes on firms are not covered by WTO rules. Taxes (such as VATs) or tariffs targeted at imports of goods manufactured abroad by US firms would appear to run afoul of WTO rules on non-discrimination (the discrimination would occur against countries where the US firms were located). Using trade policy more generally to raise tariffs on imported manufactured goods could be done within the limitations of the United States tariff bindings in the WTO; wherever that resulted in the bindings being exceeded would require renegotiation with other WTO Members under GATT Article XXVIII.

- **Treat the border adjustment of VATs by America's trading partners (*i.e.*, the imposition of VAT on imports and exemption of VAT on exports) as a WTO-illegal import tax or export subsidy.** Although there has been no definitive finding from WTO dispute settlement on this issue, WTO Member governments have long accepted

that WTO rules do allow VAT (or any other domestic tax applied directly to a product, such as a US state sales tax) to be levied on imports and to be rebated on exports as long as this is done in a way that does not discriminate between domestically produced and imported products. (Indirect taxes, such as those on corporate income, are not allowed the same treatment.) On the import side, WTO rules on border tax adjustment were elaborated by the 1970 report of the Working Party on Border Tax Adjustments (BISD 18S/100-101) which said "There was a convergence of views to the effect that taxes directly levied on products [including specifically VAT] were eligible for tax adjustment [at the border]". This was used as the basis of a GATT panel finding in 1987 on "United States – Taxes on Petroleum and Certain Imported Substances" (L/6175 - 34S/136) which concluded that a US sales tax on certain imported chemicals was eligible for border tax adjustment and that it met the National Treatment requirement of Article III:2 since it was levied without discrimination on imported and domestically manufactured products. On the export side, WTO rules on subsidies (the Ad Article to GATT Article XVI) state that "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties of taxes in amounts not in excess of those which have been accrued, shall not be deemed to be a subsidy".

- **Withdrawal from the WTO.** No Government has ever withdrawn from the WTO, nor from the GATT before it aside from a confused episode in 1950 when the Nationalist Chinese Government withdrew China's membership. Provisions for withdrawal do exist (Article XV of the Marrakesh Agreement Establishing the WTO). Withdrawal takes effect six months after notice of withdrawal is formally presented. As noted above, we view US withdrawal from the WTO to be extremely unlikely given the legal and economic implications, as well as formal Trump campaign promises to bring more WTO disputes on Chinese trade practices. Indeed, the effects of US withdrawal would be dramatic, including for the United States where finding overseas markets closing against its exports could wreak more damage on the US economy than could possibly be reversed through the protection of its manufacturing sector. The global economy also would suffer greatly, as would the WTO's legitimacy.

Loss of US interest in the WTO and the withdrawal of US leadership from the multilateral trade agenda may be a more pressing concern for the rest of the WTO's Member governments. Examples of potential difficulties are as follows:

- **The WTO's negotiating functions.** These cannot function without full US involvement and commitment. They have already been cut back significantly over the past few years as the Obama administration disengaged from the Doha Round and focused instead on sectoral and plurilateral deals with other like-minded countries. Two such deals, the TiSA and the EGA could, potentially, have been wrapped up before the end of this year, although in both cases significant obstacles still needed to be overcome to reach agreement. Their fate is now uncertain, even without a clear sign to that effect from the United States. Other participants may have little confidence that either agreement could get US congressional approval in the near future, and may therefore be unlikely to make the hard political choices and concessions of their own that would be needed to conclude the agreements.

- **China's NME status.** China's NME status in the WTO has allowed the United States and other Members (notably the EU) to levy high anti-dumping duties on certain Chinese exports because of the continued high degree of state intervention in China's economy. China considers that it should now be treated as a market economy under the terms of its WTO Accession. The United States appears to have concluded that China does not fulfil the conditions necessary to be treated as a market economy in this context. If that is the case, China is likely to react through WTO dispute settlement. Heavy-handed treatment of this issue by the United States or by China could have seriously de-stabilizing effects on the work of the WTO more generally.

- **WTO dispute settlement system.** The WTO's Dispute Settlement Understanding (DSU) has been the jewel in the WTO's crown, valued by all Member Governments, and Mr. Trump has said that he will use the DSU, notably against China. However, the DSU can only be as good as the rules that it adjudicates, and some Members argue that those rules are now looking dated in areas such as state subsidies and state-owned enterprises where trade tensions are highest between the United States and China. The United States has been a strong supporter and frequent user of the DSU, but it has also made apparent its concerns over the handling of some dispute

settlement cases, particularly recently by the Appellate Body. A high profile dispute settlement case next year, such as China's market economy status, could test US patience with WTO dispute settlement to the limit, and failure of either the United States or China to implement the dispute settlement findings could seriously undermine the DSU.

Potential CFIUS Implications for Foreign Direct Investment

In addition to direct trade matters, the election of Donald Trump may have implications for how the United States treats foreign direct investment. Under US law, the President has broad authority to suspend or prohibit any transaction resulting in a US business coming under foreign control if the President determines that the transaction threatens to impair the national security of the United States. National security reviews of covered transactions are conducted by CFIUS, which is Chaired by the Secretary of the Treasury and includes, among others, the Secretaries of Homeland Security, Commerce, Defense, State, and Energy, the US Attorney General, the USTR, and the Director of the Office of Science and Technology Policy. Very few cases reach presidential review—and less than a handful have been formally blocked in the history of CFIUS—as parties typically abandon their transaction if CFIUS indicates that it will recommend that the President prohibit the deal. CFIUS also has substantial power to impose mitigation requirements to address national security concerns for transactions that do not involve any presidential involvement but do require signoff at high levels within the CFIUS member agencies.

CFIUS historically has addressed national security issues but its powers could be expanded to trade and investment concerns. Given political concerns regarding increased foreign investment in US companies, a number of ongoing efforts to assess the sufficiency of the current CFIUS process, and some high-profile transactions that have been abandoned in the wake of CFIUS concerns, the current atmosphere seems open to changes to the CFIUS review process. For example, in September 2016 several members of the House of Representatives sent a letter to the Government Accountability Office (GAO) requesting that GAO review CFIUS to determine "whether its statutory and administrative authorities have effectively kept pace with the growing scope of foreign acquisitions in strategically important sectors in the U.S." The lawmakers expressed concern in particular that investments by foreign SOEs in the US telecommunications, media, and agriculture sectors may pose "a strategic rather than overt national security threat" for reasons related to food security, censorship, or economic issues. Consequently, they requested that GAO consider whether CFIUS' mandate needs to be expanded to address these and other related concerns, including by (i) requiring mandatory review of controlling transactions by Chinese SOEs; (ii) adding an economic benefit test on top of the existing national security test; and (iii) prohibiting investment in a US industry by a foreign company whose home government prohibits investment in the same industry. GAO is currently in the process of conducting this review. Moreover, the US-China Economic and Security Review Commission recommended in its 2016 annual report that Congress amend the CFIUS statute to authorize CFIUS to bar Chinese SOEs from acquiring or otherwise gaining effective control over US companies.

A Trump transition team memo suggests that the Trump administration might be sympathetic to at least some of these concerns, as it indicated that President Trump would order CFIUS to review food security as well as investment reciprocity, *i.e.*, how foreign countries treat US investment in their companies. Since economic security issues, which would likely include reciprocity considerations, go beyond the current national security-focused authority under the CFIUS statute, it is also possible that the Trump administration could support legislation seeking to expand CFIUS to consider these issues, even though economic security authority was explicitly rejected when the CFIUS statute was most recently overhauled in 2007.

In general, we expect that the policy of the United States will continue to be that it is open to foreign direct investment, but it seems plausible that the scope of CFIUS reviews may be expanded. Given the congressional concerns about foreign direct investment described above, however, that may well have been the case even if Hillary Clinton had been elected. While it is possible that President Trump may be more vocal than his predecessor regarding concerns about investments stemming from certain countries, we do not expect that President Trump will try to wall off the United States from foreign investment. Moreover, it is possible that his election may increase opportunities for investors from countries where he is seeking an improvement of diplomatic relations, such as Russia.

It is unlikely that President Trump will seek to unwind completed transactions that were previously approved by CFIUS. Although the President has extensive authority, the CFIUS statute states that completed reviews maybe reopened only in extraordinary cases such as when the parties omit, or submit false or misleading, material

information to CFIUS or intentionally materially breach a mitigation condition. With respect to pending deals, we expect CFIUS reviews to continue as they are now.

Overall, although there may be changes to the CFIUS process and the scope of CFIUS's review powers within the next couple of years (for example new limitations on transactions involving foreign SOEs), we do not expect the Trump administration to have a chilling effect on foreign direct investment.

Trade Personnel in the Trump Administration

Mr. Trump is expected to announce his appointees for various cabinet positions, including for the USTR, in the coming weeks. The announcement of Mr. Trump's appointee for USTR will be an important development, as it will provide an early indication of the Trump administration's trade policy priorities and the degree to which they might differ from those of previous administrations.

Mr. Trump's transition team has announced that the following individuals are overseeing the transition at USTR: (i) Mr. Daniel DiMicco, former Chief Executive Officer of Nucor Corporation; (ii) Mr. Robert Lighthizer, former Deputy USTR during the administration of President Ronald Reagan; (iii) Mr. Stephen Vaughn, a trade remedy litigator; (iv) Mr. Jeffrey Gerrish, a trade remedy litigator; (v) Mr. Nova Daly, former Deputy Assistant Secretary for Investment Security and Policy at the Department of the Treasury during the administration of President George W. Bush (a role in which Mr. Daly oversaw the CFIUS process); and (vi) Mr. Rolf Lundberg, a former Vice President for Congressional and Public Affairs at the US Chamber of Commerce. With the exception of Mr. Lundberg, all of these individuals have worked on behalf of the US steel industry (Mr. DiMicco in his former role as a steel company executive, Messrs. Lighthizer, Vaughn, and Gerrish in their current roles as trade remedy litigators for US steel producers, and Mr. Daly in his current role as a lobbyist for US steel producers). Moreover, Messrs. DiMicco, Lighthizer, and Vaughn have argued publicly for changes in US trade policy that would further shield the US manufacturing sector from import competition. Thus, their involvement in the transition process suggests that the next USTR might be less supportive of trade liberalization and more focused on trade enforcement than is typical for the USTR. On the other hand, their views remain inside the US trade policy mainstream (albeit on the interventionist side), and they very likely understand the severe legal and practical implications of some of the Trump campaign's more aggressive trade promises.

Mr. DiMicco has expressed the view that US trade policy should be aimed at reducing the US trade deficit in goods, and has stated that achieving such "balanced trade" would require "paying as much, if not more attention to imports driven by trade 'cheaters' as we do on increasing our export opportunities[.]" Among the forms of "trade cheating" that Mr. DiMicco alleges to be responsible for the US trade deficit are: (i) currency undervaluation; (ii) the border-adjustment of VATs (which he has described as "a tariff barrier for inbound goods and a subsidy mechanism for targeted export products"); (iii) the provision of government subsidies to export-related industries (and in particular to state-owned enterprises); and (iv) intellectual property theft. According to Mr. DiMicco, US trade agreements have been ineffectual at combating such practices, due both to the limitations of the agreements and the US government's lackluster enforcement thereof. Mr. Vaughn has expressed similar concerns about the US trade deficit, US free trade agreements, and China's "market-distorting policies", which he has cited as evidence that "American manufacturers are not well served by current U.S. trade policy". Mr. Lighthizer has echoed these concerns, arguing that China has used "currency manipulation, subsidies, theft of intellectual property and dozens of other forms of state-sponsored, government-organized unfair trade to run up a more than $270 billion trade surplus" with the United States.

Messrs. DiMicco and Lighthizer have suggested that the US government should be more willing to impose import restrictions in order to combat such alleged trading practices, citing as examples the import restrictions imposed by the Reagan administration on steel, motorcycles, semiconductors, and automobiles – actions that obviously pre-dated the WTO. Mr. DiMicco also has suggested that the US government should address unfair trading practices by, *inter alia,* bringing disputes more frequently at the WTO, treating undervalued currency as a prohibited export subsidy for purposes of countervailing duty investigations, renegotiating existing trade agreements, and finding a way to prevent the border-adjustment of taxes by US trading partners. More generally, Mr. DiMicco has stated that current US trade negotiations should be put on hold, and that "whether they go forward depends on whether we can return to balanced trade, and whether they add to GDP growth[.]"

Mr. Vaughn made similar policy prescriptions in a September 2016 white paper, in which he recommended that the next US President make the following changes to US trade policy, among others: (i) announce a pause on all ongoing trade negotiations for at least one year; (ii) include enforceable currency provisions in new trade agreements, apply the CVD law to currency manipulation, and consider using safeguard measures under Section 201 "to address

import surges resulting from undervalued currencies"; (iii) appoint "enforcement-minded" persons to key trade-related positions, including the USTR and members of the ITC; (iv) self-initiate trade remedy investigations; (v) consider not complying with WTO rulings in disputes that are "wrongly decided"; and (vi) strengthen CFIUS scrutiny of investments by foreign SOEs in the United States, and consider "potential new trade remedies" to address any market distortions that may result from such investments.

Mr. Daly, by contrast, has not publicly made such criticisms of US trade policy. He has, however, raised economic and national security concerns about inbound foreign direct investment by SOEs (and particularly Chinese SOEs) in the United States. He has recommended that the United States government address these concerns by, among other things: (i) establishing a "narrowly tailored" review mechanism for inbound investments by SOEs, such as an economic benefit test or a mechanism to ensure that SOEs investing in the United States act solely based on commercial considerations; (ii) entering into FTAs that contain strong SOE disciplines; and (iii) addressing the issue of SOEs through the WTO and US BITs (including with China). In this regard, he also has suggested that the United States seek more stringent SOE disciplines than those contained in the TPP.

Though the involvement of Messrs. DiMicco, Lighthizer, and Vaughn suggest that Mr. Trump's appointment for USTR might have similar views, this conclusion warrants caution. First, their opinions on trade were formulated through their roles as advocates for import-sensitive US industries, especially the US steel industry, not for the US economy as a whole. Furthermore, other economic advisors to Mr. Trump such as Steven Moore and David Malpass (who supervises DiMicco, Lighthizer, and Vaughn on the transition team) are known to have more mainstream economic views, as is Vice President-elect Mike Pence, who is overseeing the entire transition effort. These supervisors might temper DiMicco, Lighthizer, and Vaughn and encourage Mr. Trump to appoint a USTR who is more supportive of trade liberalization and a broader US trade and economic outlook. Finally, new Trump administration nominees Wilbur Ross (Commerce) and Steve Mnunchin (Treasury) have publicly walked-back some of the campaign's most aggressive trade stances, for example on across-the-board tariffs, currency manipulation and FTAs.

Outlook

Although the course of Trump administration trade policy remains unclear, we see the potential actions discussed in this report falling into three categories:

- **Most likely.** It appears likely that the Trump administration will (i) increase use of trade remedies and enforcement mechanisms, including the AD/CVD laws, anti-circumvention proceedings, and safeguards, while taking credit for high profile actions under Section 337; (ii) withdraw the United States from the TPP; (iii) request renegotiation of the NAFTA; (iv) bring WTO disputes more frequently, (v) eventually pursue bilateral FTAs; and (vi) make minor changes to the CFIUS review process, perhaps to target investments by foreign SOEs for additional scrutiny.

- **Less likely.** It is possible, though less likely than the aforementioned actions, that the Trump administration will: (i) utilize Section 301 of Trade Act of 1974 to take specific and direct action to counter perceived unfair trade practices by foreign countries; (ii) designate China as a "currency manipulator"; (iii) seek to unilaterally raise tariffs on US trade agreement partners under the tariff modification authority set forth in TPA and various FTA implementing bills; (iv) achieve a substantial renegotiation of the NAFTA; (v) continue US involvement in the TTIP, the TISA and/or the EGA; and (vi) seek to expand the scope of CFIUS's review powers beyond national security issues (to include, for example, economic security or reciprocity issues).

- **Least likely.** It is unlikely that the Trump administration will: (i) use statutes such as Section 232 of the Trade Expansion Act, TWEA, and IEEPA to impose across-the-board tariffs on imports or punish "outsourcers"; (ii) achieve major, substantive renegotiation of the WTO Agreements or withdraw the United States therefrom; (iii) achieve the inclusion of trade-balancing mechanisms in US FTAs through renegotiation thereof; or (iv) withdraw the United States from FTAs.

Given the legal and practical constraints that President Trump would face if he were to implement all of his primary campaign promises on trade, US trade policy under the Trump administration will likely turn more interventionist but avoid Mr. Trump's most extreme proposals. First, given that the extreme proposals would have serious adverse legal, political, and economic ramifications, there is a strong chance that the Trump administration will not seek to implement them. In lieu of implementing such proposals, it appears likely that the Trump administration will employ less controversial tactics – such as more aggressive use of US trade remedy laws and enforcement mechanisms – in an effort to live up to the interventionist rhetoric used by Mr. Trump during the campaign.

These conclusions merit caution, given that Mr. Trump has made conflicting statements on trade policy, has not outlined his trade policy agenda in detail, and has not announced his appointments for key trade-related positions. However, recent attempts by Mr. Trump's advisors to walk back candidate Trump's more extreme trade policy proposals lend support to this view. For example, Commerce Secretary nominee Wilbur Ross has repeatedly downplayed the Trump administration's desire to impose an across-the-board 45 percent tariff on imports from China. Rather, Mr. Ross has stated that President Trump would use the threat of such a tariff as a negotiating tactic, and would only do so as a last resort if negotiations fail. Ross has also hedged on dismantling US FTAs, even noting that Mexico's success in attracting foreign investment is due in part to the country's numerous trade agreements, including with the European Union. Treasury Secretary nominee Steve Mnuchin, meanwhile, refused to confirm that the Trump administration's would, as promised, declare China a currency manipulator and thereby impose countervailing duties on Chinese imports. Both men also have emphasized tax and regulatory reform over protectionism.

Mr. Trump also has shelved his most aggressive trade rhetoric, and has recently sought other means to achieve specific promises related to US companies engaged in outsourcing. For example, Mr. Trump took credit for deterring Ford Motor Co. from relocating its production of a line of sport utility vehicles from Louisville, Kentucky to Mexico – despite the fact that Ford reportedly planned to offset the impact of any such change by increasing production of other vehicles at the Kentucky plant. Mr. Trump also has announced that his incoming administration successfully

persuaded Carrier Corporation to keep approximately 800 factory jobs at the company's manufacturing plant in Indiana, as well as 300 engineering and headquarters jobs, rather than moving them to Mexico as the company had initially planned. As part of this agreement, the state of Indiana will afford the company up to USD 7 million in tax incentives over the next ten years.

These developments suggest that the Trump administration might seek more superficial policy "wins" in order to avoid the formal implementation of candidate Trump's most extreme trade promises. Similarly, while the Trump administration might be reluctant to withdraw outright from US trade agreements given the legal and economic ramifications discussed in this report, it might aim to renegotiate such agreements while using the threat of withdrawal to extract concessions from the other parties.

Even if the Trump administration does not pursue extreme protectionist measures, it appears poised to abandon major efforts at trade liberalization undertaken by the Obama administration, most notably the TPP. Given this pledge and Mr. Trump's general skepticism of trade agreements, it is also questionable whether the United States will continue to play a leading role in negotiations for new multilateral and plurilateral agreements, such as the TiSA and the EGA. If the Trump administration decides that the United States should no longer play a leading role in the negotiation of new trade agreements and limits US involvement in the WTO to the dispute settlement mechanism, this alone would represent a significant departure from long-standing US trade policy and a major change in the multilateral trading system.

Annex I: Provisions on Withdrawal, Termination, and Modification of Specific US Trade Agreements

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Section I: Agreements governed by TPA 1988[44]							
WTO Agreements (Signed on April 15, 1994)	*Article XV* *Withdrawal* *1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.* *2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.*	Section 125(b)(1) of the URAA states:[45] *"The approval of the Congress, provided under section 101(a), of the WTO Agreement shall cease to be effective if, and only if, a joint resolution described in subsection (c) is enacted into law pursuant to the provisions of paragraph (2).* The remainder of Section 125 sets forth the procedures and substance governing any such "joint resolution," including the text thereof: *"That the Congress withdraws its approval, provided under section 101(a) of the Uruguay Round Agreements Act, of the WTO Agreement as defined in section 2(9) of that Act."*)	Amendment of the WTO Agreements is governed by Article X of the Marrakesh Agreement Establishing the World Trade Organization.	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	Under GATT Article II, a WTO Member is free to raise MFN duties up to the "bound" rates listed in its Goods Schedule. Exceeding these bound rates would require renegotiation with other WTO Members under GATT Article XXVIII.	Section 111(a)(3) of the URAA grants the President the authority to issue a presidential proclamation imposing "*such additional duties, as the President determines to be necessary or appropriate to carry out Schedule XX*," which is defined in Section 2 of the URAA as "Schedule XX—United States of America annexed to the Marrakesh Protocol to the GATT 1994."[46] The Statement of Administrative Action for the URAA states that *"[t]he authority to increase tariffs is necessary to take account of the fact that Schedule XX calls for an increase in tariffs on agricultural products whose importation into the United States is currently subject to quotas or other nontariff restrictions."*	It is likely that US withdrawal under Article XV would <u>not</u> automatically terminate the URAA. Rather, termination of the URAA would require Congressional approval of a resolution pursuant to Section 125 of the URAA.

[44] Section 1102(a)(B)(iii) of TPA 1988 authorizes the President to impose "such additional duties; as [the President] determines to be required or appropriate to carry out any such trade agreement" concluded pursuant to TPA. Section 2902(a)(2)(B) of TPA 1988 limits these increased duties to the "the rate that applies on August 23, 1988".

[45] 19 U.S.C. § 3535

[46] This is the United States Goods Schedule, available at https://www.wto.org/english/tratop_e/schedules_e/usa.zip.

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
North American Free Trade Agreement (Signed on December 17, 1992)	*Article 2205: Withdrawal* *A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.*	Section 109(b) of the Act (Termination of NAFTA Status) states:[47] *"During any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country."*	*Article 2202: Amendments* *1. The Parties may agree on any modification of or addition to this Agreement.* *2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	A Party may take "bilateral emergency actions" (*i.e.*, by increasing a rate of duty to the MFN rate) against NAFTA imports under Article 801.3, but only with the consent of the exporting Party: *3. A Party may take a bilateral emergency action after the expiration of the transition period to deal with cases of serious injury, or threat thereof, to a domestic industry arising from the operation of this Agreement only with the consent of the Party against whose good the action would be taken.* Article 801.4 provides that the Party taking such action *"shall provide to the Party against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action."* Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 2202 governs the process for making such amendments.	Section 201(b) the Act[48] states: *(b) Other tariff modifications* *(1) In general* *Subject to paragraph (2) and the consultation and layover requirements of section 3313(a) of this title, the President may proclaim-* *(A) such modifications or continuation of any duty,* *(B) such modifications as the United States may agree to with Mexico or Canada regarding the staging of any duty treatment set forth in Annex 302.2 of the Agreement,* *(C) such continuation of duty-free or excise treatment, or* *(D) such additional duties, as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Canada or Mexico provided for by the Agreement.*	It is unclear whether US withdrawal under Article 2205 would automatically terminate the implementing act.

[47] 19 U.S.C. § 3311

[48] 19 U.S.C. § 3331

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Section II: Agreements governed by TPA 2002[49]							
CAFTA-DR (Signed on January 28, 2005)	*Article 22.7: Withdrawal* *1. Any Party may withdraw from this Agreement by providing written notice of withdrawal to the Depositary. The Depositary shall promptly inform the Parties of such notification.* *2. A withdrawal shall take effect six months after a Party provides written notice under paragraph 1, unless the Parties agree on a different period. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.*	Sections 107(c) and (d) of the Act (TERMINATION OF THE AGREEMENT) state:[50] *(c) Termination of CAFTA–DR Status.* *During any period in which a country ceases to be a CAFTA–DR country, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect with respect to that country.* *(d) Termination of the Agreement.* *On the date on which the Agreement ceases to be in force with respect to the United States, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to have effect."*	*Article 22.2: Amendments* *1. The Parties may agree on any amendment of this Agreement. The original English and Spanish texts of any amendment shall be deposited with the Depositary, which shall promptly provide a certified copy to each Party.* *2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, an amendment shall constitute an integral part of this Agreement to take effect on the date on which all Parties have notified the Depositary in writing that they have approved the amendment or on such other date as the Parties may agree.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a party may take agricultural safeguard measures pursuant to Article 3.15, and textile safeguard measures pursuant to Article 3.23. Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 22.2 governs the process for making such amendments.	Section 201(b) of the Act states:[51] *(b) Other tariff modifications* *Subject to the consultation and layover provisions of section 4014 of this title, the President may proclaim-* *(1) such modifications or continuation of any duty,* *(2) such modifications as the United States may agree to with a CAFTA–DR country regarding the staging of any duty treatment set forth in Annex 3.3 of the Agreement,* *(3) such continuation of duty-free or excise treatment, or* *(4) such additional duties,* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions provided for by the Agreement.*	It is unclear whether US withdrawal under Article 22.7 would automatically terminate the implementing act.

[49] Section 2103(a)(1)(B)(iii) of TPA 2002 authorizes the President to impose "such additional duties, as the President determines to be required or appropriate to carry out any such trade agreement" concluded pursuant to TPA. However, Section 2103(a)(2) of TPA 2002 limits these increased duties to the "rate that applied on the date of enactment of this Act" (*i.e.*, August 6, 2002).

[50] 19 U.S.C. § 4001

[51] 19 U.S.C. § 4031

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Korea (Signed on June 30, 2007)	*ARTICLE 24.5: ENTRY INTO FORCE AND TERMINATION* *1. This Agreement shall enter into force 60 days after the date the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures or on such other date as the Parties may agree.* *2. This Agreement shall terminate 180 days after the date either Party notifies the other Party in writing that it wishes to terminate the Agreement.* *3. Within 30 days after a Party provides notice under paragraph 2, either Party may request the other Party in writing to enter into consultations regarding whether any provision of this Agreement should terminate on a date later than that provided under paragraph 2. The consultations shall begin no later than 30 days after the Party delivers its request.*	Section 107(c) (TERMINATION OF THE AGREEMENT) states:[52] *On the date on which the Agreement terminates, this Act (other than this subsection and title V) and the amendments made by this Act (other than the amendments made by title V) shall cease to have effect.*	*ARTICLE 24.2: AMENDMENTS* *The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable legal requirements and procedures, on such date as the Parties may agree.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a Party may take bilateral emergency actions with respect to textile and apparel goods pursuant to Article 4.1, and agricultural safeguard measures pursuant to Article 3.3. Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 24.2 governs the process for making such amendments.	Section 201(b) of the Act states:[53] *(b) Other Tariff Modifications.-* *Subject to the consultation and layover provisions of section 104, the President may proclaim-* *"(1) such modifications or continuation of any duty,* *"(2) such modifications as the United States may agree to with Korea regarding the staging of any duty treatment set forth in Annex 2-B of the Agreement,* *"(3) such continuation of duty-free or excise treatment, or* *"(4) such additional duties,* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Korea provided for by the Agreement.*	It is likely that US withdrawal from the Agreement under Article 24.5 would automatically terminate the implementing act because withdrawal would terminate the FTA.

[52] 19 U.S.C. § 3805

[53] 19 U.S.C. § 3805

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Australia (Signed on May 18, 2004)	*ARTICLE 23.4 : ENTRY INTO FORCE AND TERMINATION* *1. This Agreement shall enter into force 60 days after the date on which the Parties exchange written notifications certifying that they have completed respective necessary internal requirements, or on such other date as the Parties may agree.* *2. A Party may terminate this Agreement by written notification to the other Party, and such termination shall take effect six months after the date of the notification.* *3. Within 30 days of delivery of a notification under paragraph 2, either Party may request consultations regarding whether any provision of this Agreement should terminate on a date later than that provided under paragraph 2. Consultations shall commence within 30 days after the Party delivers such a request.*	Section 106(c) (TERMINATION OF THE AGREEMENT) states:[54] *On the date on which the Agreement terminates, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective.*	*ARTICLE 23.3 : AMENDMENTS* *1. The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties complete any necessary internal requirements and on such date as the Parties may agree.*	US law (*i.e.*, the implementing or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a Party may take bilateral emergency actions with respect to textile and apparel goods pursuant to Article 4.1, and agricultural safeguard measures pursuant to Article 3.4 Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 23.3 governs the process for making such amendments.	Section 201(b) of the Act states:[55] *(b) Other Tariff Modifications.-Subject to the consultation and layover provisions of section 104, the President may proclaim-* *"(1) such modifications or continuation of any duty,* *"(2) such modifications as the United States may agree to with Australia regarding the staging of any duty treatment set forth in Annex 2–B of the Agreement,* *"(3) such continuation of duty-free or excise treatment, or* *"(4) such additional duties,* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Australia provided for by the Agreement.*	It is likely that US withdrawal from the Agreement under Article 23.4 would automatically terminate the implementing act because withdrawal would terminate the FTA.

[54] 19 U.S.C. § 3805

[55] 19 U.S.C. § 3805

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Chile (Signed on June 6, 2003)	*Article 24.4: ENTRY INTO FORCE AND TERMINATION* *1. The entry into force of this Agreement is subject to the completion of necessary domestic legal procedures by each Party.* *2. This Agreement shall enter into force 60 days after the date on which the Parties exchange written notification that such procedures have been completed, or after such other period as the Parties may agree.* *3. Either Party may terminate this Agreement by written notification to the other Party. This Agreement shall expire 180 days after the date of such notification.*	Section 107(c) (TERMINATION OF THE AGREEMENT) states:[56] *On the date on which the Agreement ceases to be in force, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective.*	*Article 24.2: AMENDMENTS* *1. The Parties may agree on any modification of or addition to this Agreement.* *2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a Party may take agricultural safeguard measures pursuant to Article 3.18, and bilateral emergency actions with respect to textile and apparel goods pursuant to Article 3.19. Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 24.2 governs the process for making such amendments.	Section 201(b) of the Act states:[57] *(b) Other Tariff Modifications.-Subject to the consultation and layover provisions of section 103(a), the President may proclaim-* *"(1) such modifications or continuation of any duty,* *"(2) such modifications as the United States may agree to with Chile regarding the staging of any duty treatment set forth in Annex 3.3 of the Agreement,* *"(3) such continuation of duty-free or excise treatment, or* *"(4) such additional duties,* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Chile provided for by the Agreement.*	It is likely that US withdrawal from the Agreement under Article 24.4 would automatically terminate the implementing act because withdrawal would terminate the FTA.

[56] 19 U.S.C. § 3805

[57] 19 U.S.C. § 3805

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Colombia (Signed on November 22, 2006)	*Article 23.4: ENTRY INTO FORCE AND TERMINATION* *1. This Agreement shall enter into force 60 days after the date on which the Parties exchange written notifications certifying that they have completed their respective legal requirements or on such other date as the Parties may agree.* *2. Any Party may terminate this Agreement by written notification to the other Party, and such termination shall take effect six months after the date of the notification*.	Section 107(c) (TERMINATION OF THE AGREEMENT) states:[58] *On the date on which the Agreement terminates, this Act (other than this subsection and titles V and VI) and the amendments made by this Act (other than the amendments made by titles V and VI) shall cease to have effect.*	*Article 23.2: AMENDMENTS* *1. The Parties may agree on any amendment to this Agreement.* *2. When so agreed, and approved in accordance with the legal requirements of each Party, an amendment shall constitute an integral part of this Agreement and shall enter into force on such date as the Parties may agree.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a Party may take agricultural safeguard measures pursuant to Article 2.18, and textile safeguard measures pursuant to Article 3.1. Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 23.2 governs the process for making such amendments.	Section 201(b) of the Act states:[59] *(b) Other Tariff Modifications.-Subject to the consultation and layover provisions of section 104, the President may proclaim-* *"(1) such modifications or continuation of any duty,* *"(2) such modifications as the United States may agree to with Colombia regarding the staging of any duty treatment set forth in Annex 2.3 of the Agreement,* *"(3) such continuation of duty-free or excise treatment, or* *"(4) such additional duties,* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Colombia provided for by the Agreement.*	It is likely that US withdrawal from the Agreement under Article 23.4 would automatically terminate the implementing act because withdrawal would terminate the FTA.

[58] 19 U.S.C. § 3805

[59] 19 U.S.C. § 3805

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Singapore (Signed on signed May 6, 2003	*ARTICLE 21.9 : ENTRY INTO FORCE AND TERMINATION* *1. This Agreement shall come into force 60 days after the date when the Parties have exchanged written notification that their respective internal requirements for the entry into force of this Agreement have been fulfilled, or such other date as the Parties may agree.* *2. Either Party may terminate this Agreement by written notification to the other Party, and such termination shall take effect six months after the date of the notification.* *3. Within 30 days of delivery of a notification under paragraph 2, either Party may request consultations regarding whether the termination of any provision of this Agreement should take effect at a later date than provided under paragraph 2. Such consultations shall commence within 30 days of a Party's delivery of such request.*	Section 107(c) (TERMINATION OF THE AGREEMENT) states:[60] *On the date on which the Agreement ceases to be in force, the provisions of this Act (other than this subsection) and the amendments made by this Act shall cease to be effective.*	*ARTICLE 21.8 : AMENDMENTS* *This Agreement may be amended by agreement in writing by the Parties and such amendment shall enter into force after the Parties have exchanged written notification certifying that they have completed necessary internal legal procedures and on such date or dates as may be agreed between them.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a Party may take bilateral textile and apparel safeguard actions pursuant to Article 5.9, and bilateral safeguard actions (for any originating good) pursuant to Article 7.1. Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 21.8 governs the process for making such amendments.	Section 201(b) of the Act states: *(b) Other Tariff Modifications.-Subject to the consultation and layover provisions of section 103(a), the President may proclaim-* *"(1) such modifications or continuation of any duty,* *"(2) such modifications as the United States may agree to with Singapore regarding the staging of any duty treatment set forth in Annex 2B of the Agreement,* *"(3) such continuation of duty-free or excise treatment, or* *"(4) such additional duties-* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Singapore provided for by the Agreement.*	It is likely that US withdrawal from the Agreement under Article 21.9 would automatically terminate the implementing act because withdrawal would terminate the FTA.

[60] 19 U.S.C. § 3805

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Peru (Signed on April 12, 2006)	*Article 23.4: ENTRY INTO FORCE AND TERMINATION* *1. This Agreement shall enter into force 60 days after the date on which the Parties exchange written notifications certifying that they have completed their respective legal requirements or on such other date as the Parties may agree.* *2. Any Party may terminate this Agreement by written notification to the other Party, and such termination shall take effect six months after the date of the notification.*	Section 107(c) (TERMINATION OF THE AGREEMENT) states:[61] *On the date on which the Agreement terminates, this Act (other than this subsection) and the amendments made by this Act shall cease to have effect.*	*Article 23.2: AMENDMENTS* *1. The Parties may agree on any amendment to this Agreement.* *2. When so agreed, and approved in accordance with the legal requirements of each Party, an amendment shall constitute an integral part of this Agreement and shall enter into force on such date as the Parties may agree.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a Party may take agricultural safeguard measures under Article 2.18, and textile safeguard measures under Article 3.1. Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 23.2 governs the process for making such amendments.	Section 201(b) of the Act states:[62] *(b) Other Tariff Modifications.-Subject to the consultation and layover provisions of section 104, the President may proclaim-* *"(1) such modifications or continuation of any duty,* *"(2) such modifications as the United States may agree to with Peru regarding the staging of any duty treatment set forth in Annex 2.3 of the Agreement,* *"(3) such continuation of duty-free or excise treatment, or* *"(4) such additional duties,* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Peru provided for by the Agreement.*	It is likely that US withdrawal from the Agreement under Article 23.4 would automatically terminate the implementing act because withdrawal would terminate the FTA.

[61] 19 U.S.C. § 3805

[62] 19 U.S.C. § 3805

Agreement	FTA Text on Withdrawal	US Law on Withdrawal	FTA Text on Renegotiation	US Law on Renegotiation	FTA Text on Tariff Modification	US Law on Tariff Modification	Effect of FTA Termination or Withdrawal on US Implementing Legislation
Panama (Signed on June 28, 2007)	*Article 22.5: ENTRY INTO FORCE AND TERMINATION* *1. This Agreement shall enter into force 60 days after the date on which the Parties exchange written notifications certifying that they have completed their respective legal requirements or on such other date as the Parties may agree.* *2. Either Party may terminate this Agreement by written notification to the other Party. This Agreement shall terminate 180 days after the date of such notification.*	Section 107(c) (TERMINATION OF THE AGREEMENT) states:[63] *On the date on which the Agreement terminates, this Act (other than this subsection and title V) and the amendments made by this Act (other than the amendments made by title V) shall cease to have effect.*	*Article 22.2: AMENDMENTS* *1. The Parties may agree in writing on any amendment of this Agreement.* *2. When so agreed, and approved in accordance with the legal requirements of each Party, an amendment shall constitute an integral part of this Agreement and shall enter into force on such date as the Parties may agree.*	US law (*i.e.*, the implementing act or TPA) is silent as to whether congressional approval would be required for any such amendments.	If certain conditions are met, a Party may take agricultural safeguard measures under Article 3.17, and textile safeguard measures under Article 3.24. Otherwise, tariff increases would only be permitted after amendment of a Party's schedule. Article 22.2 governs the process for making such amendments.	Section 201(b) of the Act states:[64] *(b) Other Tariff Modifications.-Subject to the consultation and layover provisions of section 104, the President may proclaim-* *"(1) such modifications or continuation of any duty,* *"(2) such modifications as the United States may agree to with Panama regarding the staging of any duty treatment set forth in Annex 3.3 of the Agreement,* *"(3) such continuation of duty-free or excise treatment, or* *"(4) such additional duties,* *as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Panama provided for by the Agreement.*	It is likely that US termination of the Agreement under Article 22.5 would automatically terminate the implementing act because withdrawal would terminate the FTA.

[63] 19 U.S.C. § 3805

[64] 19 U.S.C. § 3805

US General Trade Policy Highlights

United States and Argentina Discuss GSP and WTO Import Licensing Dispute at TIFA Council Meeting

On November 7, 2016, the United States and Argentina held the first meeting of their bilateral Council on Trade and Investment under the Trade and Investment Framework (TIFA) Agreement signed by the two countries in March 2016.[65] At the meeting, US Trade Representative (USTR) Michael Froman announced that USTR will initiate a review concerning the possible reinstatement of Argentina's tariff preferences under the Generalized System of Preferences (GSP) program. USTR Froman and Argentine officials also discussed Argentina's implementation of the WTO Dispute Settlement Body's (DSB) rulings and recommendations in *Argentina – Measures Affecting the Importation of Goods* (DS438/444/445).

Potential reinstatement of GSP benefits

President Obama suspended Argentina's designation as a GSP beneficiary developing country on March 26, 2012, after determining that Argentina had failed, in contravention of the GSP statutory eligibility criteria, to act in good faith in enforcing arbitral awards in favor of US-owned companies. The decision was prompted by two separate GSP country practice petitions in which US companies alleged that Argentina had failed to enforce arbitral awards rendered under the US-Argentina Bilateral Investment Treaty (BIT) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The subject awards, totaling about USD 300 million plus interest, were rendered by ICSID arbitral tribunals in 2005 and 2006 and were subsequently upheld against challenge by Argentina in ICSID annulment proceedings.

According to USTR, the government of Argentina has now requested that the United States consider re-designating Argentina as a beneficiary developing country under the GSP program. Consequently, USTR will initiate a public review process to determine whether Argentina meets the statutory eligibility criteria for GSP. Once initiated, such reviews can last for several years before USTR makes its determination. Indeed, a review of Laos' eligibility initiated in 2013 at the request of the Laotian government remains open, and a review of Burma's eligibility initiated during the same year was not concluded until September 14, 2016. In the latter case, the Obama administration chose to reinstate GSP benefits for Burma as of November 13, 2016.

Argentina was the ninth-largest source of imports under the GSP program in 2011 (the last year in which it was eligible), exporting USD 477 million worth of GSP-eligible articles to the United States during that year.

Implementation of DSB ruling in Argentina — Import Measures

At the Council meeting, USTR Froman raised concerns about Argentina's implementation of the DSB's recommendations and rulings in *Argentina — Import Measures*, noting that many US firms allegedly continue to face difficulties exporting to Argentina. Argentina in December 2015 repealed the Advance Sworn Import Declaration measure at issue in the dispute, but subsequently replaced the measure with a new "Integrated System of Import Monitoring" (ISIM) that continues to apply non-automatic import licensing requirements to approximately 1,200 "import-sensitive" items, such as automobiles, paper and cardboard, iron and steel, electrical materials and parts, textiles, and apparel. The United States has previously questioned whether the adoption of the ISIM brings Argentina into compliance with its WTO obligations. However, Argentine Minister of Foreign Affairs Susana Malcorra maintained during the Council meeting that Argentina has implemented the DSB's rulings and recommendations and will continue its dialogue with the three complainants (the United States, the European Union and Japan) to clarify the operation of the new ISIM.

[65] Click here to view USTR's press release regarding the Council meeting.

Petitions and Investigations Highlights

Department of Commerce Issues Preliminary Determination in AD Investigation of HEDP from China

On October 28, 2016, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty (AD) investigation concerning 1-hydroxyethylidene-1, 1-diphosphonic acid ("HEDP acid") from China.[66] In its investigation, DOC preliminarily determined that imports of the subject merchandise from China were sold in the United States at dumping margins ranging from 137.61 to 179.97 percent. Consequently, DOC will instruct US Customs and Border Protection (CBP) to collect cash deposits based on these preliminary rates.

DOC is scheduled to announce its final determination in this investigation on or around March 9, 2017. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) makes an affirmative final determination that imports of HEDP acid from China materially injure or threaten material injury to the domestic industry, DOC will issue an AD order. According to DOC, imports of HEDP acid from China were valued at an estimated USD 290.1 million in 2015.

[66] Click here to view the DOC fact sheet on this investigation.

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