LEGAL FRAMEWORK AND ECONOMIC CRITIQUE: TRUMP’S TRADE AUTHORITY AND POLICY

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A LOOK AT THE LEGALITY, PRACTICALITY,
PROBABILITY, AND RATIONALITY OF PRESIDENT
TRUMP’S PROPOSED TRADE-RELATED ACTION

Noah Glazier*

I. INTRODUCTION

President Donald Trump made a wide array of comments regarding trade during his campaign and time as President. These comments’ tones range from extremely protectionist and unconventional to more modest and in-line with past administrations. Trump declared most of his more extreme trade-related comments during his time on the campaign trail. For example, Trump claimed he would “rip up” existing trade agreements, label China a “currency manipulator,” eliminate or renegotiate the North American Free Trade Agreement (NAFTA),1 and impose 45 percent and 35 percent tariffs on imports from China and Mexico respectively.2 President Trump even suggested an intention to “pull out” of the World Trade Organization (WTO) altogether.3 However, Trump moved away from

* Mr. Glazier would like to give a special thanks to UC Hastings Professor Joel Paul, who provided him with invaluable assistance on this article. He is deeply grateful for Professor Paul’s tremendous efforts as both a teacher and a mentor.

3 See e.g., William Mauldin, Trump Threatens to Pull U.S. Out of World Trade Organization, WALL ST. J.: WASHINGTON WIRE (June 24, 2016),
these more extreme positions since becoming President. Instead, he has taken a slightly more cautious approach, while still reserving the option to “act [as] aggressively as needed to discourage” trade practices that harm American citizens.\(^4\) Trump’s trade envoy is finally complete with the confirmation of United States Trade Representative (USTR) Robert Lighthizer, allowing the Administration to pursue “Trump’s strategy for reversing a trade dynamic that he believes hurts the average American worker” at full speed.\(^5\)

The goal of this paper is to assess the legality, practicality, probability, and rationality of the President Trump’s proposed and threatened trade measures. Part II.A of the paper discusses the legal framework surrounding Trump’s authority to engage in unilateral trade actions, including his ability to impose tariff and other non-tariff barriers to trade, such as quotas on imports from foreign countries. This part of the paper will also provide an assessment of the legal challenges, practical constraints, and likelihood of each unilateral trade measure, including an overview of the following: the relevant historical application of certain measures, how other countries or aggrieved parties might respond, and what the Trump administration has already done. Part II.B discusses Trump’s legal capacity to unilaterally withdraw from or terminate NAFTA. Part III.C critiques Trump’s trade policy approach and highlights some of his flawed economic logic.


II. LEGAL FRAMEWORK
AND ECONOMIC CRITIQUE: TRUMP’S TRADE AUTHORITY AND POLICY

A. THE PRESIDENT’S LEGAL AUTHORITY TO IMPOSE UNILATERAL TRADE MEASURES

This section reviews the laws that President Trump may rely on to make his threatened unilateral trade actions a reality. There are over nine statutory sections from various trade-related legislations that could allow the President, often in conjunction with the USTR and other executive agencies, such as the Department of Commerce (DOC) and International Trade Commission (ITC), to impose unilateral trade measures like duties or quotas on imports from foreign countries. The available U.S. laws are divided into two different groups—those that are conventional or more commonly used and those used much less frequently (if at all) in the past. Given President Trump’s approach since taking office, it is more likely that his Administration will utilize the more conventional group of unilateral trade mechanisms, although he will likely use a more aggressive manner than past administrations. On the other hand, given Trump’s unpredictable and unconventional nature, it is also possible that he will utilize some of the more rare legislation, which will likely spark more serious legal and economic concerns.

1. COMMONLY-USED STATUTORY PROVISIONS PERMITTING UNILATERAL TRADE ACTIONS

There are several U.S. trade laws that have been commonly utilized by past presidents to help curb unfair foreign trade practices and to protect American workers, consumers, and producers. The Trump Administration is already pursuing unilateral trade actions under some of these statutory provisions and will likely continue to

7 Id. at 6.
8 See id. at 2-3.
aggressively do so throughout the presidency. These commonly-used statutory provisions, which primarily involve agency proceedings and investigations, are further categorized into three different forms of measures: (1) Antidumping (AD) and Countervailing Duty (CVD) measures; (2) Section 337 measures; and (3) Section 201 safeguard measures. These measures have been commonly used by Presidents of the past, so their usage will likely cause little legal concern. However, such measures are likely to play a crucial role in Trump’s trade policy and may be used more aggressively than ever before. Thus, review of these measures is due.

a. AD and CVD Measures

AD (antidumping duties) and CVD (countervailing duties) are unilateral trade actions aimed at leveling the international trade playing field that are commonly used by Presidential administrations. AD duties protect against countries that are exporting goods at a price that is less than the fair or normal value. CVD provide relief from foreign imports that benefit from government

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9 See e.g., U.S. DEPARTMENT OF COMMERCE ISSUES AFFIRMATIVE PRELIMINARY ANTIDUMPING DUTY DETERMINATIONS ON BIODIESEL FROM ARGENTINA AND INDONESIA, Oct. 23, 2017 https://www.commerce.gov/news/press-releases/2017/10/us-department-commerce-issues-affirmative-preliminary-antidumping-duty-1 (for example, from January 20, 2017, through October 23, 2017, the Department of Commerce initiated 73 antidumping and countervailing duty investigations, which represents a 52 percent increase from the previous year.).


11 CLINTON ET AL., supra note 6, at 6.

12 Id.

13 Id.; see also U.S. INT’L TRADE COMM’N, UNDERSTANDING ANTIDUMPING & COUNTERVAILING DUTY INVESTIGATIONS, USITC Pub. 4540 (June 2015).

14 ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK, supra note 13, at 10.
subsidies. Title VII of the Tariff Act of 1930 is the authority implementing such duties.

President Obama’s administration imposed over fifty individual AD and CVD orders on various products and countries in 2016, many of which involved steel imports. As of the end of April 2017, the Trump Administration imposed 16 individual AD and CVD orders on products including “artist canvas, large residential washers, off-the-road tires and stainless steel sheet and strip.” For example, the Administration implemented AD duties on Japanese steel imports ranging from 206.43% to 209.46% and on Turkish steel imports ranging from 5.39% to 8.17%. Turkish steel imports were also subject to CVDs of 16.21%. Due to the regularity of such measures, it is unlikely that the use of AD and CVD orders by the Trump administration will cause any significant legal concerns because the law behind the implementation of such unilateral trade measures is well established and tested. As a result, the mechanics behind calculating AD duties and CVDs, which is a very onerous process, are only briefly discussed here.

Two separate government agencies, the DOC and the ITC, are involved in setting and administering AD duties and CVDs. The DOC determines whether dumping or actionable subsidizing exists, and if so, determines the respective duties based on the dumping margin or amount of subsidy. The ITC determines whether such dumped or subsidized imports “materially injure, or threaten with

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15 Id. at 11.
18 Id.
20 Id.
21 CLINTON ET AL., supra note 6, at 2.
22 Id. at 6.
23 Id.
material injury, an industry in the United States….”24 Material injury is “harm which is not inconsequential, immaterial, or unimportant.”25

It should be noted that the Obama administration implemented a series of significant changes to the DOC’s AD and CVD determination processes, including measures regarding China’s non-market economy (NME) status and its state-owned enterprises.26 These changes have led to an overall increase in AD duties on Chinese imports, specifically where Chinese authorities refused to cooperate with the DOC.27 Despite Trump’s criticisms of Obama-era trade policies, it is likely that his Administration will continue pro-duty actions and potentially utilize or implement other techniques that would broaden the scope and impact of current AD and CVD measures.28 Other techniques include: maintaining China’s NME status, incorporating currency manipulation into AD duty or CVD calculations, utilizing a “self-initiation” process for AD and CVD investigations, and increasing the reliance on and impact of the “anti-circumvention” statute.29

When a country has a non-market economy, normal value cannot be determined by looking at the country’s home market.30 Instead, the normal value is calculated either by a constructed value of a like product based on the cost of factors in a market economy at the same level of development or, if such information is not available, by using the price of a comparable good exported to the U.S. from another market economy at the same level of development.31 This process for calculating a non-market economy-based product’s normal value has ultimately led to higher AD duties being imposed on imports from China.32 China joined the World Trade Organization (WTO) in 2001

26 CLINTON ET AL., supra note 6, at 6.
27 Id.
28 Id.
29 Id. at 6-7.
and in the process of doing so, it agreed to carry out a series of steps designed to open its markets to global trade to act more like a market economy.\textsuperscript{33} In return, China was “led to believe” that other countries, including the U.S., would officially revoke China’s NME status on December 11, 2016.\textsuperscript{34} However, the Trump Administration has made no efforts to remove China’s NME status and will likely continue to recognize the country as a NME because it allows for higher AD duties, which in turn \textit{ceteris paribus} leads to a decrease in Chinese imports; thus, helping to mitigate the U.S.’s bilateral merchandise account deficit with China.\textsuperscript{35}

Also with regards to China, it is possible that the Trump Administration may direct the DOC to treat deliberate currency (undervaluation) manipulation as an actionable export subsidy or as grounds to modify the constructed value determination mentioned above, which would lead to even higher AD duties.\textsuperscript{36} However, if this approach were implemented unilaterally, it would likely face a plethora of legal challenges, both internationally and domestically.\textsuperscript{37} Additionally, as discussed in more detail below,\textsuperscript{38} China is not deliberately undervaluing its currency at the moment and Trump, for the time being, has completely backed away from his initial threats of labeling China as doing such.\textsuperscript{39}

Another way the Trump administration may attempt to sharpen the teeth of the AD and CVD investigation provisions is by utilizing a self-initiation process whereby Trump would encourage the DOC to instigate such investigations \textit{sua sponte}.\textsuperscript{40} Currently, allegedly injured domestic partners file petitions at the DOC to initiate AD and CVD

\textsuperscript{33} Id. at 1.
\textsuperscript{34} Id.
\textsuperscript{35} Id. (stating that the reduction in AD duties that would result from recognizing China as a market economy would likely be a modest increase in imports due in part to the CVDs that simultaneously accompany most AD duties on Chinese imports).
\textsuperscript{36} See CLINTON ET AL., \textit{supra} note 6, at 7.
\textsuperscript{37} Id.
\textsuperscript{38} See \textit{infra}, Section “Labeling China a Currency Manipulator.”
\textsuperscript{39} See \textit{e.g.}, Uri Dadush, \textit{Will America Trigger a Global Trade War}, at 2, OCP POLICY CTR. (Feb. 2017).
\textsuperscript{40} See CLINTON ET AL., \textit{supra} note 6, at 6.
investigations; however, the DOC’s regulations also technically allow for investigations to be instigated sua sponte, or at the direction of the Secretary of Commerce. This allows the current Secretary, Wilbur Ross, to target specific imports from specific countries and subject them to investigations without having to wait for injured parties to file petitions. Notwithstanding the provision that allows for such self-initiation in the DOC’s regulations, the U.S. has not utilized such a process, and doing so will likely be highly controversial. In fact, in 2012, the European Union (EU) attempted to self-initiate AD and CVD investigations in a similar fashion against Chinese imports, but ultimately decided otherwise in the face of immense domestic and international opposition.

Lastly, the Trump Administration could take a more aggressive approach to existing AD duty and CVD enforcement by relying more heavily on the anti-circumvention statute. This statute prohibits the circumvention of existing AD and CVD orders where there is insignificant processing of a good or completion of a good in a third country, or where there is further assembly in the U.S. A recent case involving the anti-circumvention statute was brought near the end of Obama’s presidency by a group of domestic steel producers who argued that China was exporting steel to Vietnam for insignificant processing to circumvent AD and CV duties that exist on certain Chinese steel imports. A final determination on the matter has yet to be issued, but within 300 days of publication of the initiation decision, the DOC will determine whether China circumvented the existing duty orders. This time frame may seem long, but it is more expeditious

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41 See 19 C.F.R. § 351.201(a) (2005).
42 Id.
43 Clinton et al., supra note 6, at 6.
44 Id.
45 Id. at 7.
46 19 U.S.C. § 1677j (2016); see also Clinton et al., supra note 6, at 7.
48 Estelle Tran, Anti-circumvention probes on Vietnamese steel already benefitting US mills, S&P Global (Nov. 2016),
than the typical AD duty investigations, which last anywhere from 280-420 days. Additionally, U.S. steel mills already realized benefits since this initiation, as fearful importers faced with long lead times continue to cancel orders of the steel from Vietnam currently under investigation. An affirmative determination of circumvention in this case by the DOC will likely signal a more aggressive approach to existing AD and CV duty enforcement. It is likely that the Trump Administration will continue to utilize this anti-circumvention statute, perhaps even more aggressively, to ensure that existing AD and CVD orders are effectively enforced and not subject to regulatory arbitrage by foreign exporters.

b. Section 337 Measures

Section 337 of the Tariff Act of 1930 prohibits the use of unfair competition methods and is arguably the most powerful, cheap, and expeditious anti-import tool. It allows for the broad remedy of excluding imports that benefit from such unfair methods of competition. Section 337 has three primary uses: to protect intellectual property rights, to thwart anti-competitive activities such as collusion, price fixing, tying, and other forms of predatory pricing, and to promote consumer fraud protection. Under Section 337, an ITC administrative judge finds a violation has occurred if a foreign country used unfair methods of competition and unfair acts and “the threat or effect of which is to destroy or substantially injure” a U.S. industry or to “restrain or monopolize” U.S. trade and commerce. The administrative judge then sends his findings to the ITC, which


49 Id.
50 Id.
51 Id. CLINTON ET AL., supra note 6, at 7.
52 Id.
53 See 19 U.S.C. § 1337 (2016); see also lecture notes from Professor Joel Paul, UC Hastings (April 2017).
54 CLINTON ET AL., supra note 6, at 9.
55 See 19 U.S.C. § 1337 (2016); see also lecture notes, supra note 53.
takes the findings and makes a recommendation to the President. 57 So long as the President does not veto the findings and recommendation, they will take effect (i.e., no express presidential approval is needed). 58

The average length of all Section 337 investigations completed in 2017 was just 10.3 months, rendering Section 337 a powerful and expeditious tool. 59

However, because of the way this process is designed, President Trump has little to no control over the Section 337 process, especially in the short term. 60 The entire process is in the hands of the ITC’s administrative judges and the agency itself, which is independent and bipartisan. 61 That being said, Trump is likely to take credit for any successful Section 337 actions, such as the potential outcome of a case filed in April 2016 by U.S. Steel against almost all Chinese carbon and alloy steel products. 62 Trump may also attempt to influence the Section 337 process in the long-run by appointing sympathetic ITC administrative judges and commissioners. 63 Additionally, it should be noted that if the ITC does indeed find a violation of Section 337 in the Chinese carbon and steel alloy products case and imposes the broad remedy of excluding such imports, such action will almost certainly be met by opposition from China. 64 China will likely claim inter alia that the action constitutes an impermissible non-tariff barrier to trade in violation of General Agreement on Tariffs and Trade (GATT) Article XI, or that the action otherwise violates the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement. 65

60 CLINTON ET AL., supra note 6, at 8.
61 Id.
62 Certain Carbon and Alloy Steel Products; Institution of Investigation, 81 FR 35381 (June 2, 2016); see also CLINTON ET AL., supra note 6, at 8 (for a further discussion of recent section 337 cases and their outcomes).
63 See CLINTON ET AL., supra note 6, at 9.
64 Id. at 6-7.
65 Id. at 9.
c. Section 201 Safeguard Measures

Another option available to the Trump Administration is to actively pursue the safeguard investigation measures permitted under Section 201 of the Trade Act of 1974. While theoretically as potent as Section 337 measures, these safeguard measures have rarely resulted in any type of enforcement action or effective remedy. Section 201, which is also administered by the ITC, allows for the temporary imposition of higher tariffs based on the finding that a surge or increase in imports is a “substantial cause of serious injury” to a domestic producer of “a like or directly competitive” product. However, Section 201 investigations are problematic and difficult, particularly with regard to the “substantial cause” prong. As such, some definitions and explaining are in order.

The requisite increase in imports must be shown by evidence that net imports have increased by at least a certain nominal amount or that they have increased by a certain threshold percentage relative to domestic production. “Substantial cause” is cause that is important and not less important than any other cause. This is a problematic standard similar to the Tellabs pleading standard whereby, e.g., a cause contributing to 33% of the injury along with two other causes each contributing equally will be considered “substantial.” As it is difficult to compare different inferences of scienter in the Tellabs context, it is also very difficult to compare different causes of domestic producer injury, particularly because economic causes and factors are often inexorably intertwined and cannot be disaggregated.

The “serious injury” standard means something more serious than

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66 Id. at 8.
67 Id.
68 Id. at 8.
69 Id.
73 See Scalia’s dissent in Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (discussing the problems with the “at least as compelling as” standard and the difficulties of making determinations re inferences of scienter).
74 See lecture notes, supra note 53.
“material” injury and is thus subject to a higher standard than the injury that must be proven in AD and CVD cases.\footnote{75}{CLINTON ET AL., supra note 6, at 8.}

Additionally, Section 201 safeguard measures are subject to significant limitations.\footnote{76}{Id.} Unlike the AD and CVD orders or Section 337 violation remedies, the Section 201 safeguard measures apply to all imports from all countries.\footnote{77}{Id.} Thus, the safeguard measures could not be used to target individual products (e.g. steel) or countries (e.g. China) and may therefore be seen as less desirable to Trump, who is primarily considered with bilateral merchandise account deficits.\footnote{78}{See id.} Furthermore, as is the case with Section 337 investigations, Section 201 safeguard measures are implemented and administered by the ITC, an independent and bipartisan agency, which limits Trump’s ability to influence the safeguard process especially in the short-term.\footnote{79}{Id.}

Most Section 201 cases are filed in election years because, in many ways, Section 201 is ultimately a political tool that allows the U.S. government to escape the political pressures imposed by industries seeking protection from a surge of imports.\footnote{80}{See lecture notes from Professor Joel Paul, UC Hastings (April 2017).} For example, the petition filed by the U.S. steel industry in the important election year of 2000 was the last Section 201 safeguard imposed on steel.\footnote{81}{CLINTON ET AL., supra note 6, at 8.} The complaint led to President Bush’s infamous steel tariff, which was imposed in 2002.\footnote{82}{Kevin K. Ho, Trading Rights and Wrongs: The 2002 Bush Steel Tariffs, 21 BERKELEY J. OF INT’L LAW 825, 832 (2003).} However, this tariff was promptly terminated in 2003 after the WTO’s Dispute Settlement Body (DSB) held that the U.S. failed to show that the Section 201 safeguard measures had complied with GATT Article XIX’s escape clause.\footnote{83}{Id. at 839.}

This serves as a salient indication that any usage of Section 201 by the Trump Administration will likely be met by immediate WTO
challenges from other countries. In order to survive such challenges, the U.S. would have to prove to the DSB that, “as a result of unforeseen developments,” there has been such an increase in imports “as to cause or threaten serious injury to domestic producers . . . of like or directly competitive product.”

B. LESS COMMONLY-USED STATUTORY PROVISIONS PERMITTING UNILATERAL TRADE ACTIONS

In contrast to the more commonly-used statutory provisions mentioned above, other less used U.S. laws potentially allow Trump to take broad (and sometimes virtually unfettered) unilateral trade action against foreign imports. However, because they are infrequency used, these statutory provisions will likely cause a wide range of both legal and economic concerns and will be faced with stark opposition from foreign countries and U.S. industry groups alike. Additionally, to achieve his trade goals using these statutes, the Trump Administration would likely have to apply a “liberal interpretation of the relevant legal standards,” which would defy past agency practice. As a result, it is more likely that the Trump administration will opt to utilize the aforementioned more common and conventional statutes.

That being said, the more infrequently-used statutes enumerated below arguably have a higher chance of being utilized under Trump than under any president before, which is exemplified in part by Trump’s decision to instigate two separate Section 232 investigations

84 See Binyamin Appelbaum, Experts Warn of Backlash in Donald Trump’s China Trade Policies, N.Y. TIMES (May 2, 2016), https://www.nytimes.com/2016/05/03/us/politics/donald-trump-trade-policy-china.html; see also CLINTON ET AL., supra note 6, at 8.
87 See CLINTON ET AL., supra note 6, at 6.
88 See id.
89 Id.
in his first one-hundred days as President.\textsuperscript{90} The less commonly-used statutory provisions permitting unilateral trade actions discussed below include: (1) Section 232 national security measures; (2) Section 122 balance-of-payments measures; (3) Section 338 measures; (4) Section 301 measures; and (5) Trading with the Enemy Act (TWEA) and International Emergency Economic Powers Act (EIIPA) measures.\textsuperscript{91} This section concludes with a brief discussion of the relative likelihoods of each of these measures.

1. \textit{Section 232 National Security Measures}

Section 232 of the Trade Expansion Act of 1962 authorizes Secretary of Commerce Wilbur Ross to investigate whether certain classes of imports pose a national security threat to the U.S.\textsuperscript{92} In determining a national security threat, the Secretary and the President consider the “domestic production needed for projected national defense requirements...[and] the importation of goods in terms of their quantities and use.”\textsuperscript{93} They must also recognize the close relation between national economic welfare and national security, and consider “the impact of foreign competition on the economic welfare of individual domestic industries.”\textsuperscript{94} The DOC is required to instigate Section 232 investigations “upon request of the head of any department or agency, upon application of an interested party”, or sua

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\textsuperscript{91} Clinton et al., supra note 6, at 9-13.

\textsuperscript{92} 19 U.S.C. § 1862(b)(1)(A) (2012); id. at 10.

\textsuperscript{93} 19 U.S.C. § 1862(d) (2012).

sponte. Based on a Section 232 report from Secretary Ross, which is prepared within 270 days of initiation, Trump is then authorized to take “actions as the President deems necessary to adjust the imports...so that such imports will not threaten to impair the national security.” Thus, Section 232 provides President Trump with a tool that is potentially very powerful, as the statute provides no limit on the amount of tariffs or nature of restrictions.

However, utilization of Section 232 in the past has been somewhat rare, especially since the U.S. joined the WTO in 1995. Since 1980, the DOC has conducted 14 Section 232 investigations, but none of them resulted in the imposition of significant tariffs or other non-tariff barriers to trade. Since 1995, only two Section 232 probes, one on steel in 2001 and one on crude oil in 1999, resulted in DOC reports declining to recommend that the president take action. However, two notable 1970s Section 232 actions are worth mentioning—those of Presidents Nixon and Ford. Nixon used his authority under Section 232(b) to impose an across-the-board 10 percent surcharge tariff program in 1971. Ford, pursuant to his Section 232(b) powers, issued a proclamation in 1975 raising licensing fees on petroleum products and imposing $1-$3/barrel fees on oil entering the U.S.

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96 Id. at (3)(A)(ii)(II).

97 Id.; see CLINTON ET AL., supra note 6, at 10; see also Noland et al., Assessing Trade Agendas in the US Presidential Campaign, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, Sept. 2016, at 9.

98 See A National Security Argument on Trade, STRATFOR ENT., LLC (Apr. 21, 2017, 12:45 PM), https://www.stratfor.com/node/279276 (stating, “In fact, since the WTO came into force in 1995, the United States has conducted only two Section 232 investigations.”).


101 Noland et al., supra note 97, at 9-10; see also, CLINTON ET AL., supra note 6, at 10.

102 CLINTON ET AL., supra note 6, at 10.
However, after Ford’s actions, Congress passed a statute limiting the President’s ability to set minimum prices for crude oil absent congressional approval.103

So far in his time as President, Trump has directed Secretary Ross to begin two separate Section 232 investigations—one on steel imports and one on aluminum imports, both were initiated in April 2017.104 “Many have criticized such actions, arguing that they [will] encourage other countries to block U.S. exports on national security grounds.”105 According to Chad Brown, a senior fellow at the Peterson Institute, “When you go down this path of reverting to the national security exception, it really is the nuclear option in trade law...”106 Trump’s decisions to instigate these probes were made about a week apart in late April, just as he was approaching the 100-day mark of his presidency, perhaps as the result of political and internal pressure to live-up to some of his campaign promises to get tough on trade.107 Secretary Ross’s reports on the matter will not be completed until early 2018 based on the 270 day timeline, so any Section 232(b) action by President Trump will not occur until that time.108

Trump’s use of Section 232 probes will be subject to significant practical and legal constraints, especially if they result in the imposition of tariffs or other non-tariff barriers.109 The biggest

105 See Doug Palmer, Matthew Nussbaum, supra note 104.
106 Id.
107 Id.
108 Section 232 Fact Sheet supra note 94; see also, Ana Swanson, Will 2018 Be the Year of Protectionism? Trump Alone Will Decide, New York Times (Jan. 3, 2018), https://www.nytimes.com/2018/01/03/us/politics/2018-trump-protectionism-tariffs.html (as of January 6, 2018, the reports have not been filed, but the deadlines are soon approaching; the Commerce Department must submit its reports on January 15, 2018 and January 21, 2018 for the steel and aluminum investigations, respectively).
109 Clinton et al., supra note 6, at 2.
practical constraint, as alluded to above, is the risk that such measures will result in retaliatory actions from other countries. This risk is especially salient with regard to China, who has demonstrated both the willingness and ability to effectively retaliate in the past (e.g., in response to President Obama’s AD duties on Chinese tires). The perverse economic repercussions that may result serve as significant practical limitations to such action, and will likely deter a mindful Trump Administration from engaging in overly aggressive unilateral Section 232 actions.

From a legal standpoint, Trump’s Section 232 actions will likely face challenges, both in U.S. courts and at the WTO. Notwithstanding the fact that U.S. courts strongly defer to the executive branch’s determinations on national security, it is unclear how such domestic cases may play out in the Section 232 context. For example, aggrieved parties bringing claims in U.S. courts might argue that President Trump’s unconstrained use of Section 232(b) to impose import restrictions violates the separation of powers principle and, more specifically, the non-delegation doctrine. While the non-delegation doctrine has not been explicitly applied by the Supreme Court since 1935, it is still good law. In essence, the doctrine states that whenever Congress delegates authority to the executive branch, such delegation is only permissible when Congress provides an accompanying intelligible principle to guide the executive branch on how to exercise such authority. Thus, it could be argued that Section 232 gives the President unfettered discretion and fails to

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110 Id. at 9.
111 Id. at 11.
112 Id. at 10.
113 Id. at 10.
114 Id. at 11.
117 A.L.A. Schechter Poultry Corp., at 530; Panama Refining Co., at 429-30.
provide the requisite intelligible principle; therefore, it unconstitutionally undermines the non-delegation doctrine.\footnote{See Tim Meyer, \textit{Trump’s threat to withdraw from NAFTA may hit a hurdle: The US Constitution}, The Conversation (Aug. 15, 2017), http://theconversation.com/trumps-threat-to-withdraw-from-nafta-may-hit-a-hurdle-the-us-constitution-81444}

Additionally, foreign countries targeted by any Section 232(b) actions will almost certainly file complaints with the WTO pursuant to GATT Article XXIII, claiming that their legitimate expectations of trade benefits have been nullified or impaired by the Section 232(b) action.\footnote{See Noland et al., \textit{supra} note 97, at 10.} However, the U.S. could cite to the national security exception, which allows contracting parties to take “any action which it considers necessary for the protection of its essential security interest…taken in time of war or other emergency in international relations.”\footnote{Id.} In turn, foreign countries would likely argue that the national security exception does not apply in this context, as there is no sufficiently “essential security interest” or national “emergency” at stake.\footnote{Id.} Taking aluminum as an example, such countries might argue that U.S. national security requirements for aluminum (i.e., the amounts of aluminum required by national defense and homeland security) are entirely supplied by U.S. domestic production, and therefore, imported aluminum simply does not impair U.S. national security.\footnote{See e.g., \textit{Testimony of the Ministry of Commerce of the People’s Republic of China}, U.S. Department of Commerce Section 232 Investigation on the Effect of Imports of Aluminum on U.S. National Security (June 22, 2017) (according to this testimony, the amount of aluminum required by national defense is small, accounting for only 1.7 percent of the U.S. total domestic consumption of aluminum and less than 4 percent of the U.S. total domestic supply of aluminum).}

They may also argue that international trade in aluminum products strengthens, rather than impairs, the U.S. economy; citing the fact that “the total value of U.S. exports of aluminum semi-finished products”

\footnote{See Noland et al., \textit{supra} note 97, at 10.}
\footnote{Id.}
\footnote{Id.}
\footnote{See e.g., \textit{Testimony of the Ministry of Commerce of the People’s Republic of China}, U.S. Department of Commerce Section 232 Investigation on the Effect of Imports of Aluminum on U.S. National Security (June 22, 2017) (according to this testimony, the amount of aluminum required by national defense is small, accounting for only 1.7 percent of the U.S. total domestic consumption of aluminum and less than 4 percent of the U.S. total domestic supply of aluminum).}
in 2016 alone amounted to $6.8 billion, “accounting for a $1.4 billion trade surplus.”

Moreover, the United States’ attempt to cite the GATT Article XXI national security exception, in this context, will likely face opposition from the WTO itself. Allowing this exception would both promote “tit-for-tat protectionism” under the subterfuge of “national security” and undercut the entire WTO dispute settlement process. That being said, the Trump administration emphasized that the U.S. would make its decision concerning the Section 232 aluminum probe case based on the administration’s internal determination; without considering any potential violation of WTO rules.

2. Section 122 Balance-of-Payments Measures

Section 122 of the Trade Act of 1974 authorizes the President to combat “large and serious United States balance-of-payments deficits” by imposing temporary import surcharges, quotas, or both. Such import surcharges cannot exceed fifteen percent, in proportion to the estimated value of the goods concerned. The surcharge and quota restrictions are limited to last 150 days, absent a congressionally approved extension. Pursuant to Section 122, the temporary quota restriction can only be exercised if “international trade or monetary agreements to which the United States is a party permit the imposition of quotas as a balance-of-payments measure,” and only to the extent that “the fundamental imbalance cannot be dealt with effectively” by

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123 Id.
124 See CLINTON, ET AL., supra note 6, at 11.
125 Id.
126 See Palmer and Nussbaum, supra note 104, (quoting Secretary Ross, “[w]e are going to act based on our view as to what are the proper rules and our view as to who’s violating those rules — and the WTO will do what they do.”).
128 Id.
129 Id.
the temporary fifteen percent surcharge, in proportion to the estimated value of the goods concerned.\textsuperscript{130}

Section 122 allows the President to impose such temporary restrictions on a non-discriminatory basis or “if the President determines that the purposes of this section will best be served.”\textsuperscript{131} Otherwise, the statute permits the President to specifically target countries which the U.S. has a large trade deficit with.\textsuperscript{132} Given President Trump’s overwhelming concern and seemingly exclusive focus on bilateral merchandise trade deficits, if he were to utilize Section 122, President Trump would likely opt for the latter option and target China, Germany, Mexico, and Japan specifically because these countries run the largest bilateral surpluses with the U.S. and are, therefore, his largest concerns.\textsuperscript{133} While President Trump could take action pursuant to Section 122, absent a finding of a threat to national security, the duration and size of the restrictions would be severely limited by the statutory constraints.

Additionally, as is this case with the less-commonly used statutory measures discussed herein, Section 122 actions would likely spur legal challenges in both the U.S. courts and in a WTO tribunal. Reading the face of the statute and relying on its plain meaning, potential plaintiffs could argue that it would be impossible for the U.S. to have a “large and serious balance-of-payments” deficit given the country’s floating exchange rate regime since current account deficits are offset by capital account surpluses.\textsuperscript{134} In turn, the U.S. would likely cite the historical origins of Section 122 and claim that the term “balance-of-payments deficits” should equate to the modern concept of current account deficits.\textsuperscript{135} Additionally, the U.S. would likely argue that the plaintiffs’ aforementioned line of reasoning would perpetually bar use of Section 122, which is not what Congress intended.

Section 122 actions would also likely encounter challenges from the WTO. Any use of Section 122, to specifically target countries

\textsuperscript{130} Id. at § 201(a)(3)(C).
\textsuperscript{131} Id.
\textsuperscript{132} Id. at § 201(d).
\textsuperscript{133} See Dadush, \textit{supra} note 39, at 2.
\textsuperscript{134} See Noland et al., \textit{supra} note 97, at 11; see also, CLINTON ET AL., \textit{supra} note 6, at 11.
\textsuperscript{135} See Noland et al., \textit{supra} note 97, at 11.
which the U.S. has a large trade deficit with, would almost certainly violate GATT Article I’s “most-favored nation” provisions.\textsuperscript{136} As a result, targeted countries would likely file GATT Article XXIII “nullification and impairment” complaints. However, the WTO’s dispute settlement process would take longer than the 150-day restriction.\textsuperscript{137} As a potential defense to a WTO challenge, the Trump administration may cite GATT Article XII, which, under certain circumstances, permits contracting parties to restrict imports in order to safeguard their balance-of-payments.\textsuperscript{138} However, the U.S. can only properly utilize this defense if the IMF finds that it is experiencing sufficient balance-of-payment difficulties, but countries are rarely found to experience these difficulties.\textsuperscript{139}

3. \textit{Section 338 Measures}

The “long-forgotten but still intact”\textsuperscript{140} Section 338 of the Tariff Act of 1930 provides the President with broad tariff-setting authority by permitting him or her to impose “new or additional duties” of up to fifty percent, in proportion to the estimated value of the goods concerned, on imports from countries that have “discriminated” against U.S. commerce.\textsuperscript{141} Section 338 authority is triggered when foreign imports are found to (1) impose an “unreasonable charge, exaction, regulation, or limitation” on U.S. goods which is “not equally enforced upon the like articles of every foreign country”; or (2) “[d]iscriminate in fact” against U.S. commerce by placing such commerce “at a disadvantage compared with the commerce of any

\textsuperscript{137} See Noland et al., \textit{supra} note 97, at 11; \textit{see also}, CLINTON ET AL., \textit{supra} note 6, at 11.
\textsuperscript{138} GATT art. 7, \textit{supra} note 85, at 12.
\textsuperscript{139} GATT art. 15, \textit{supra} note 85, at 24-25; \textit{see also}, Chapter 3 \textit{Quantitative Restrictions}, MINISTRY FOR ECON., TRADE AND INDUS., http://www.meti.go.jp/english/report/downloadfiles/gCT0003e.pdf.
\textsuperscript{141} The Tariff Act of 1930, 19 U.S.C. § 1338(b) (1930).
foreign country.” Section 338 also allows the President to completely block certain imports from countries that continue to “discriminate” in the face of the tariffs; up to fifty percent, in proportion to the estimated value of the goods concerned. Section 338 investigations may be instigated as deemed necessary or via private party petitions to the ITC.

Despite the theoretically immense tariff authority that Section 338 provides the President, its lack of use, coupled with substantial pragmatic and legal constraints, render it unlikely to be used as a tool for trade. Section 338 has never been used to impose duties on foreign imports. In fact, no public record relating to Section 338 was uncovered since a telegram from then-Secretary of State Dean Acheson mentioned it in 1949. As a result, there are currently no regulations regarding Section 338 presidential proclamations. The statutory provision appears functionally “defunct,” as it is “overshadowed by more recent enactments,” particularly Section 301 of the Trade Act of 1974. Even if President Trump utilized Section 338, despite the fact that it is functionally defunct and forgotten, such use would likely be met with immense pushback in American courts. Injured parties would likely, among other things, make non-delegation doctrinal arguments such as those discussed in the Section 232 context above. The injured parties may also argue that the Uruguay Rounds Agreements Act, which formally adopts the GATT, supersedes Section 1338 and, therefore, renders it void.

Additionally, WTO member states’ MFN obligations complicate Section 1338’s requirements. As mentioned above, Section 1338 requires a finding of intercountry trade-related discrimination that
results in an impact disparately effecting the U.S.\textsuperscript{151} GATT Article I obliges countries to treat each other on an MFN basis.\textsuperscript{152} Therefore, trade-related discrimination is difficult to prove whenever the target country is a WTO member.\textsuperscript{153} In fact, the principal idea and goal behind the GATT is twofold; countries both promote non-discrimination and facilitate comparative advantage by preventing purchasing decisions based on a good’s national origin.\textsuperscript{154} Thus, it seems that GATT currently serves the primary purpose of this antiquated statutory provision to thwart discriminatory foreign trade practices (and Section 301 of the Trade Act of 1974, discussed in the sub-section below).

Another limitation of the statute stems from the fact that Section 1338 authorizes the ITC, and not the President or any other agency, to determine whether the requisite “discrimination” occurred.\textsuperscript{155} Therefore, any unilateral actions by the President would arguably only be permissible only after such a determination by the ITC (which is an independent and bipartisan agency). Section 1338 is, in a way, similarly limited to the Sections 1337 and 2132 measures, as discussed earlier, which are also subject to ITC involvement.\textsuperscript{156} Finally, any Section 1338 actions will be met by immediate WTO challenges. Targeted countries could claim, among other things, that the U.S. violated GATT Article II by failing to bind itself to its tariff concessions.\textsuperscript{157} This Article II argument is available to targeted countries anytime the U.S. unilaterally raises tariffs.\textsuperscript{158} Absent some permissible exception, a WTO panel will likely hold adversely to the U.S.

\textsuperscript{151}See 19 U.S.C. § 1338(a)(2).
\textsuperscript{152}GATT art. 1, supra note 85.
\textsuperscript{153}See Clinton et al., supra note 6, at 9.
\textsuperscript{154}See generally GATT art. 1, supra note 85 (explaining that the treaty seeks mutually advantageous agreements, which reduce barriers to trade).
\textsuperscript{155}19 U.S.C. § 1338(g); see also Clinton et al., supra note 6, at 10.
\textsuperscript{156}19 U.S.C. § 1338 (2016).
\textsuperscript{157}See GATT, art. 2, supra note 85.
\textsuperscript{158}Id.
4. **Section 301 Measures**

Section 301 of the Trade Act of 1974 authorizes the United States Trade Representative (hereinafter USTR), at the direction of the President, to respond to unfair trade practices by taking a wide variety of retaliatory actions, including increasing tariffs or other import restrictions.\(^{159}\) Despite Section 301’s location among less-commonly cited statutes, the Trump administration referenced the statute in the 2017 National Trade Policy Agenda.\(^{160}\) Section 301(2411) prescribes both mandatory and discretionary USTR action.\(^{161}\) Section 301(a) involves “mandatory action” which the USTR must take when a state violates a U.S. trade agreement.\(^{162}\) Conversely, Section 301(b) involves “discretionary action” which the USTR may take if it is determined that a foreign country’s trade actions are “unreasonable or discriminatory” and “burden or restrict” U.S. commerce.\(^{163}\)

The statute defines “unreasonable” and “discriminatory” broadly.\(^{164}\) State actions can be considered “unreasonable” even if they are not “in violation of, or inconsistent with, the international legal rights of the United States,” but are “otherwise unfair and inequitable.”\(^{165}\) State actions are considered “discriminatory” if they “…den[y] national or most-favored-nation treatment to United States goods, services, or investment.”\(^{166}\) If the USTR finds such “unreasonable or discriminatory” conduct, Section 301(b) authorizes the USTR, subject to the direction of the President, to “take all appropriate and feasible action . . . to obtain the elimination of” such conduct.\(^{167}\) Thus, Section 301 gives the President, through the USTR, broad authority to retaliate against unfair foreign trade practices (e.g., market access restrictions or other U.S. export obstacles) by imposing

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\(^{160}\) See The President’s 2017 Trade Policy Agenda, *supra* note 4, at 3-4.


\(^{163}\) 19 U.S.C. § 2411(b) (2016).


\(^{167}\) 19 U.S.C. § 2411(b) (2016).
a wide range of retaliatory actions, including tariff increases or quotas.\footnote{168}{19 U.S.C. §§ 2411-2420; see also Clinton et al., supra note 6, at 12.}

The retaliatory actions, that Section 301(c) authorizes, include the ability to: withdraw or suspend the benefits of certain trade agreement concessions; impose duties or other import restrictions for as long as the USTR determines appropriate; withdraw, limit, or suspend preferential duty treatment; and enter into binding agreements that obligate offending foreign countries to eliminate or phase out their unfair foreign trade practices.\footnote{169}{19 U.S.C. § 2411(c).} These authorized actions may be taken on either a nondiscriminatory basis or solely against targeted foreign countries based on their unfair practices.\footnote{170}{See 19 U.S.C. § 2411(c)(3)(A).} Section 301 investigations may by instigated by the USTR in response to private party petitions or, “after consulting with the appropriate private sector advisory committees,” the USTR can initiate investigations by its own volition.\footnote{171}{See Clinton et al., supra note 6, at 12.} As a result, Section 301 has historically served as an effective way for private parties, who have no right of action under the WTO’s Dispute Settlement Understanding, to petition the U.S. government to take action. These petitions have resulted in WTO hearings instead of per se retaliation.\footnote{172}{See lecture notes, supra note 53 (noting that the establishment of the WTO, Section 301 has not produced any unilateral sanctions).}

While Section 301 potentially provides the USTR and the President with broad authority to respond to unfair trade practices, its historical usage and success rate suggest that the tool may be less powerful than it seems.\footnote{173}{See 19 U.S.C. § 2411(a).} Historically, the U.S. has been more successful using multilateral means to get trade concessions than using Section 301 as a retaliatory tool.\footnote{174}{See Krzysztof J. Pelc, “Will Trump’s unilateral trade approach work? History says no” Washington Post (Mar. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/07/will-trumps-unilateral-trade-approach-work-history-says-no/?utm_term=.34e5881b7ca0.} Based on a study comparing a total of 189 trade actions between 1975 and 2000, the U.S. was thirty-four
percent less likely to secure targeted country concessions when it utilized the unilateral Section 301 route over multilateral channels. This is primarily because targeted countries, particularly Japan, viewed resisting unilateralism as beneficial in the long-run. Japan, and other countries, feared that conceding to such retaliation would incentivize the U.S., and perhaps other well-established, developed nations, to impose similar threats and unilateral coercion in the future. On the other hand, when countries concede to legitimate multilateral challenges, it merely shows that the countries are “good global citizens” who may hope to achieve similarly beneficial concessions through the same legitimate multilateral means in the future. Thus, Section 301, despite providing a facially potent threat of retaliation, may prove to be less effective than it seems.

Additionally, Section 301’s practical and legal constraints make its utilization less likely and effective, even if it were utilized. The U.S. agreed, in the Statement of Administrative Action accompanying the Uruguay Agreements Act, not to unilaterally invoke Section 301 prior to an affirmative WTO determination. Therefore, the U.S. is precluded from imposing Section 301 actions without first filing a complaint with the WTO and receiving a favorable, merit-based determination from the WTO’s panel or Appellate Body; a time-consuming process. However, such a restriction only covers Section 301 actions taken in connection with claims covered by existing WTO agreements, and as a result the USTR could initiate Section 301 against “unreasonable or discriminatory” practices that are not covered by WTO agreements. That being said, this “exception” is rather weak.

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176 See generally, id.

177 Id.

178 Id.

179 H.R. 5110, 103rd Cong. (1994); see also CLINTON ET AL., supra note 6, at 13; Noland et al., supra note 97, at 11.

180 H.R. 5110, 103rd Cong. (1994); see also CLINTON ET AL., supra note 6, at 13.
in practice as the USTR has been disinclined to challenge any such practices that are not covered by WTO agreements.\footnote{181}{See CLINTON ET AL., \textit{supra} note 6, at 13.}

If President Trump and USTR Lighthizer were to unilaterally impose Section 301 actions, either by alleging that the targeted discriminatory practice was outside WTO agreements or by ignoring the WTO entirely, such actions would be subject to immediate legal challenge.\footnote{182}{Id.} For example, as discussed above vis-à-vis some of the aforementioned statutory provisions, targeted countries would bring GATT Article XXIII nullification and impairment claims to the WTO.\footnote{183}{Id.} In a 1999 case, the EU filed a WTO complaint against the U.S. for its use of Section 301. The WTO determined that the U.S. had violated its WTO commitments by failing to pursue WTO actions instead of engaging in Section 301 unilateralism.\footnote{184}{See DS 152, \textit{United States — Sections 301–310 of the Trade Act 1974}, WTO (1999), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm; see also, CLINTON ET AL., \textit{supra} note 6, at 13.} This case serves as important precedent and foreshadows the fact that the Trump administration will likely lose any WTO challenges to its unilateral use of Section 301, especially if the targeted action is covered by WTO agreements (which it almost certainly would be, given the breadth of contracting parties’ WTO commitments).\footnote{185}{Id.}

Aside from these legal hurdles and procedural limitations, a salient practical constraint on Section 301 is the risk of retaliatory action by targeted countries in lieu of legal challenges, and the deleterious economic consequences that would ensue. Section 301 actions may indeed spur a tit-for-tat retaliatory trade war as seen in the 1930s,\footnote{186}{See e.g., Enda Curran, \textit{Trump Rhetoric Raises Specter of 1930s-Style Trade War}, BLOOMBERG (January 6, 2017), https://www.bloomberg.com/news/articles/2017-01-06/trump-rhetoric-raises-specter-of-1930s-style-trade-war-with-asia.} as targeted countries decide to unilaterally retaliate back against the U.S. using the same arguments the Trump administration had offered toward WTO applicability.\footnote{187}{See CLINTON ET AL., \textit{supra} note 6, at 13.} This could potentially stimulate a dangerous self-perpetuating cycle that could plausibly
cripple the global economy. 188 While the Trump administration purportedly remains indifferent to adverse WTO rulings, it is certainly sensitive to retaliation, especially targeted at politically important goods such as Florida oranges. 189

5. TWEA AND IEEPA MEASURES 190

The Trading with the Enemy Act of 1917 (TWEA), enacted as the U.S. was entering World War I, delegates expansive authority to the President, allowing him to freeze and seize foreign assets, and “regulate” all forms of international commerce during times of war. 191 A significant limit on President Trump’s use of the TWEA is the “during the time of war” requirement. 192 While President Roosevelt was able to successfully invoke Section 5(b) of the TWEA during the heart of the Great Depression to declare a national emergency and order a bank holiday, 193 the scope of the statute has since been more limited by Congress. In 1976, Congress amended the TWEA to limit its application more directly to times of war. 194 Another significant constraint is that the TWEA does not specifically authorize the President to increase tariffs. Instead, it vaguely permits him to “regulate” foreign commerce. 195 Thus, invoking the TWEA to increase tariffs would generate a plethora of legal challenges. 196 These challenges would likely hinge in part on what “regulate” entails in this context and in part on an interpretation of whether Congress intended the TWEA to be used only during times of congressionally declared

188 See e.g., Curran, supra note 186.
189 Id.
191 Trading with the Enemy Act of 1917 §§ 5(a)-(b), as amend. (1976); see also, Noland et al., supra note 97, at 11-13; see also, CLINTON ET AL., supra note 6, at 14.
192 Chapter 5, supra note 190, at 251.
193 See Noland et al., supra note 97, at 12.
194 See CLINTON ET AL., supra note 6, at 14.
195 Trading with the Enemy Act of 1917 § 5(b), as amend, (1976).
196 See CLINTON ET AL., supra note 6, at 14.
war (as opposed to unauthorized military action, e.g., the ongoing ‘war’ on terrorism).\textsuperscript{197}

The International Emergency Economic Powers Act of 1977 (IEEPA), which further limits the applicability of the TWEA, similarly authorizes the President to freeze and seize foreign assets and “regulate” international commerce.\textsuperscript{198} However, unlike the TWEA, the IEEPA empowers the President to “regulate” accordingly in order to respond to “unusual or extraordinary [international] threat[s]” originating outside the U.S. and does not have a “during the time of war” requirement.\textsuperscript{199} Importantly, President Trump may only invoke his IEEPA authority if a national emergency has been declared under the National Emergencies Act.\textsuperscript{200} Therefore, in the IEEPA context, President Trump could \textit{not} declare an actionable national emergency sua sponte, which imposes a significant constraint on its usage. Additionally, while the IEEPA does not require consent from Congress, the act mandates that the President consult with Congress and provide periodic reports explaining and justifying his actions.\textsuperscript{201} As a result, if President Trump invokes his IEEPA powers to engage in actions adverse to politically important constituents, Congress will likely attempt to pass limiting legislation, which would require two-thirds of both houses to survive Trump’s veto.

Nevertheless, President Trump’s IEEPA powers remain extensive. Historically, the IEEPA has been invoked by Presidents to impose other export controls such as sanctions and embargoes.\textsuperscript{202} Since its inception, it has been utilized by past Presidents as a powerful tool at least sixteen times.\textsuperscript{203} For example, during the Iranian Hostage Crisis, President Carter called upon his IEEPA powers in Executive Order 12170 to freeze about $8 billion of Iranian government assets

\begin{footnotes}
\item[197] Id.
\item[198] The International Emergency Economic Powers Act of 1977; see also, Noland et al., supra note 97, at 11-13; see also, CLINTON ET AL., supra note 6, at 14.
\item[199] Id.
\item[200] See Chapter 5, supra note 190, at 251.
\item[201] Id. at 252.
\item[202] Id. at 252-63.
\item[203] Id.
\end{footnotes}
held in the U.S.\textsuperscript{204} The IEEPA was also used in 1985 by President Reagan to block all exports and imports to and from Nicaragua in response to its “aggressive activities in Central America.”\textsuperscript{205} In 1997, President Clinton used his IEEPA authority to block Sudan government property and prohibit certain transactions due in part to Sudan’s support for international terrorism.\textsuperscript{206} Importantly, the President’s IEEPA authority was further enhanced in 2001 by Section 106 of the USA Patriot Act, which permits the blocking of assets during the “pendency of an investigation.”\textsuperscript{207} That being said, IEEPA has never been used specifically to combat trade deficits.\textsuperscript{208}

Given its scope, applicability, and historical usage, President Trump could likely use the IEEPA provisions to prohibit trade with foreign nations actively involved in terrorism.\textsuperscript{209} In fact, Presidents Clinton, Bush, and Obama all used the IEEPA for that very purpose.\textsuperscript{210} However, President Trump’s usage of the IEEPA to target and stunt imports from China or Mexico on economic grounds, for example, would require a very liberal interpretation of the statute.\textsuperscript{211} Additionally, use of either the TWEA or IEEPA will probably be met by legal challenges filed at the WTO by targeted countries.\textsuperscript{212} Because these statutory provisions involve national security concerns, the U.S. would likely cite the GATT Article XXI national security exception in response to any nullification and impairment WTO challenges à la Section 232.\textsuperscript{213} However, depending on the circumstances of the national emergency, the WTO may be reluctant to recognize such an exception in this context due to the same institutional concerns discussed vis-à-vis Section 232 above.\textsuperscript{214} Furthermore, as is this case with utilization of any of the aforementioned unilateral trade action

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{204}
\item Id. at 254.
\item Id. at 255-56.
\item Id. at 261.
\item Id. at 251-52.
\item Id.
\item See id.
\item See id. at 241, 254.
\item See CLINTON ET AL., supra note 6, at 14.
\item See id. at 14.
\item See id.
\end{enumerate}
\end{footnotesize}
vehicles, the risk of retaliation and subsequent consequences serves as a significant practical constraint on such measures.215

6. RELATIVE LIKELIHOOD OF THE LESS-COMMONLY USED TRADE LAWS

Given the legal and practical constraints and framework analysis discussed above, the aforementioned less commonly used statutory provisions have the following relative likelihood of use by the Trump administration: Section 232 > Section 301 > IEEPA > Section 122 > TWEA > Section 338.216 As previously discussed, the Trump administration has already initiated two Section 232 probes, one on steel and one on aluminum.217 Additionally, after explicitly referencing Section 301 in the President’s March 2017 Trade Policy Agenda, which refers to Section 301 as “a powerful lever to encourage foreign countries to adopt more market-friendly policies,”218 the Trump administration officially instigated a Section 301 investigation of China in August 2017.219 President Trump or his administration have not yet meaningfully mentioned the other less common measures and laws.

C. OTHER THREATENED TRADE-RELATED ACTION

In addition to threatening other countries with duties and other import restrictions, Trump has repeatedly claimed, including in his Contract with the American Voter, that he would “direct the Treasury Secretary to label China a currency manipulator” and that President Trump would impose appropriate countervailing duties to combat such

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215 See CLINTON, ET. AL., supra note 6, at 14.
216 With Section 232 being the most likely and Section 338 the least likely.
218 The President’s 2017 Trade Policy Agenda, supra note 4, at 4.
practice.\textsuperscript{220} Since his time as President, Trump has completely reversed himself on this position.\textsuperscript{221} Nevertheless, the U.S. Treasury’s currency manipulation criteria and reporting processes are discussed below. These criteria and report determination mechanisms remain relevant issues due to President Trump’s high propensity to flip-flop on important issues.\textsuperscript{222}

1. **Labeling China a Currency Manipulator**

Two different U.S. laws, Section 3004 of the Omnibus Trade and Competitiveness Act of 1988,\textsuperscript{223} and Section 701 of the Trade Facilitation and Trade Enforcement Act of 2015,\textsuperscript{224} direct Secretary of the Treasury Steven Mnuchin to periodically analyze the macroeconomic and exchange rate polices of major U.S. trading partners. Section 3004 mandates annual reporting, and Section 701 mandates biannual reporting.\textsuperscript{225} The goal of the reports is to determine whether countries are deliberating to manipulate their currencies “for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade.”\textsuperscript{226}

Section 701 provides Secretary Mnuchin with three criterion for identifying currency manipulation by considering whether countries have: (1) a bilateral merchandise trade surplus with the U.S. exceeding $20 billion; (2) a net current account “surplus in excess of 3% of

\textsuperscript{220} Donald J. Trump, “Contract with the American Voter,” available at: https://assets.donaldjtrump.com/CONTRACT_FOR_THE_VOTER.pdf; see, e.g., Corasaniti, et. al., supra note 1; see also, CLINTON ET AL., supra note 6, at 15 (“Mr. Trump’s campaign 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.”).


\textsuperscript{222} See, e.g., id.


\textsuperscript{226} 22 U.S.C. § 5304(b) (2016).
GDP”; and (3) systematically intervened to depress their currencies. While China, running by far the greatest merchandise trade surplus with the U.S. of approximately $356 billion in 2015, certainly satisfies the first criterion, it fails to satisfy the other two criterion. China’s net current account surplus is approximately in excess of only 2.4% of its GDP, thus failing to meet the Treasury’s 3% benchmark. Additionally, regarding the third criterion, China is not systemically intervening to depress its currency at the moment. In fact, China recently has been selling U.S. treasury bonds at a record pace in an effort to prop up the yuan’s value. Currently, just two countries, Taiwan and Switzerland, are actively intervening to depress their currencies; however, they both fail to meet the $20 billion bilateral goods deficit benchmark.

Even if China were to satisfy the three criteria or Secretary Mnuchin otherwise labeled the country a currency manipulator, neither Section 3004 nor Section 701 authorize President Trump to impose countervailing duties, or any other import restrictions, as a response. Instead, Section 701 merely directs President Trump, through Secretary Mnuchin, to commence “enhanced bilateral engagement[s]” with any offending countries to “urge implementation of policies to address the causes of the undervaluation of its currency.” Under Section 701(c)(1), the President is entitled to engage in limited forms of remedial action if such offending countries fail to adopt appropriate corrective policies within one year of the

228 See Dadush, supra note 39, at 2.
229 Id.
230 See generally, id. (introducing China’s satisfaction of the elements of currency manipulation).
232 See Dadush, supra note 39, at 2.
233 See 22 U.S.C. § 5304(b) (2016); see also 19 U.S.C. § 4421(c)(1)(A)-(D) (2016); see also CLINTON ET AL., supra note 6, at 14.
commencement of the bilateral engagements.\textsuperscript{235} However, none of these remedial actions permit President Trump to increase tariffs or impose any other non-tariff barriers to trade.\textsuperscript{236} As a result, even if the Trump Administration were to label China a currency manipulator, it would not be able to increase duties or otherwise restrict Chinese imports as a response.\textsuperscript{237} To do so, President Trump would have to invoke one of the aforementioned U.S. laws permitting unilateral trade action.\textsuperscript{238}

2. **President’s Legal Authority to Terminate NAFTA**

President Trump has repeatedly publicly censured NAFTA calling it the “worst trade deal in the history of the world” and threatening to “tear it up.”\textsuperscript{239} Notwithstanding his purported dislike for the free trade agreement, President Trump has since announced that he will not be terminating the agreement but instead renegotiating it.\textsuperscript{240} The Trump Administration formally began this renegotiation process on May 18, 2017, when it sent a letter to Congress stating its intentions to do so.\textsuperscript{241} Despite this formal indication of intent to renegotiate, the discussion here focuses on whether President Trump has the authority to unilaterally withdraw from or terminate NAFTA.\textsuperscript{242}

\textsuperscript{236} For a list of permissible remedial actions under this section, see 19 U.S.C. §§ 4421(c)(1)(A)-(D) (2016).
\textsuperscript{237} See id.
\textsuperscript{238} See Trade Act of 1974 § 201.
\textsuperscript{239} For a list of all the negative statements Trump has said about NAFTA, see generally Meera Jagannathan, “Here are all the terrible things President Trump has said about NAFTA — before deciding to stick with it,” NY Daily News (Apr. 27, 2017), http://www.nydailynews.com/news/politics/terrible-president-trump-nafta-article-1.3107104.
\textsuperscript{240} See, e.g., id.
\textsuperscript{242} For a compressive discussion of the NAFTA termination process, see Jon R. Johnson, *The Art of Breaking the Deal: What President Trump Can and Can’t Do About NAFTA*, C. D. Howe Institute (Jan. 2017),
a. Terminating NAFTA

Although it no longer seems as relevant, President Trump’s ability to unilaterally terminate NAFTA is briefly reviewed first. NAFTA Article 2205 provides that a Party (i.e. the U.S., Canada, or Mexico) may withdraw from the agreement six months after providing sufficient notice. However, merely giving such notice does not give effect to such a withdrawal. Instead, such a withdrawal can be effectuated only if Congress concurs, since “the President and Congress have joint authority over trade agreements.”

U.S. trade agreements such as NAFTA are: (1) negotiated by the USTR, (2) signed and approved by the President through his foreign affairs power, and importantly (3) approved and implemented by Congress through congressionally enacted legislation. Congress’s involvement is constitutionally imperative, since trade agreements like NAFTA directly affect U.S. commerce, the regulation of which is expressly delegated to Congress in Article I’s Commerce Clause. Thus, withdrawal from NAFTA can only have effect if Congress contemporaneously repeals its implementing legislation, which is codified in the North American Free Trade Agreement Implementation Act. Therefore, President Trump could not unilaterally withdraw from NAFTA.

Some legal experts have argued that President Trump has the authority to unilaterally withdraw from NAFTA pursuant to the “termination and withdrawal authority” described in Section 125 of the Trade Act of 1974. However, this argument is misguided and


244 Johnson, supra note 242, at 1.
245 See id. at 4.
246 See id.
247 See id.
incorrect. Section 125(a) states that every trade agreement entered into by the U.S. must contain a provision allowing the U.S. to withdraw after giving appropriate notice. However, this sub-section is silent regarding the President’s authority to unilaterally withdraw from trade agreements. Section 125(b) reads “[t]he President may at any time terminate, in whole or in part, any proclamation made under this chapter” \(\text{emphasis added}\). Thus, pursuant to Section 125(b), President Trump may have the authority to unilaterally withdraw from certain NAFTA-related proclamations, but not from NAFTA as a whole.

Importantly, a number of NAFTA provisions were implemented through presidential proclamation rather than explicit enumeration in the North American Free Trade Agreement Implementation Act (Implementation Act). For example, Section 201(a)(1)(A) of the Implementation Act enables the President to proclaim “modifications or continuation of any dut[ies]” and Section 202(q) permits the President to proclaim certain matters respecting rules of origin. Pursuant to, \textit{inter alia}, the various sections of the Implementation Act authorizing NAFTA-related presidential proclamations, “President Clinton gave effect to various NAFTA provisions by issuing Proclamation 6641 on December 15, 1993,” including a number of duty-related provisions.

President Trump, invoking Section 125(b) of The Trade Act of 1974, \textit{may} be able to unilaterally terminate Proclamation 6641 in part or in whole. However, it is unlikely that the President has such authority, particularly regarding a termination in whole. Proclamation 6641 was invoked in part pursuant to the Implementation Act, which

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\(\text{249} \) See 19 U.S.C. § 2135(a) (2016).
\(\text{250} \) See id.
\(\text{251} \) Id. § 2135(b).
\(\text{252} \) See, e.g., Johnson, \textit{supra} note 242, at 5-6.
\(\text{254} \) 19 U.S.C. § 3332(q) (2016); see also Johnson, \textit{supra} note 242, at 5.
\(\text{255} \) Johnson, \textit{supra} note 242, at 6; see also Proclamation No. 6641, 58 Fed. Reg. 66867, 2596 (Dec. 15, 1993).
\(\text{256} \) See 19 U.S.C. § 2135(b) (2016).
specially provides for NAFTA-related tariff treatment. Notably, Section 125(b) only allows the President to unilaterally terminate “any proclamation made under this chapter”; thus, Section 125(b) only allows the President to terminate proclamations made pursuant to Title 19, Chapter 12 of the U.S. Code. Therefore, Section 125(b) does not apply to the Implementation Act, which is found in 19 U.S.C. 21. As a result, Section 125(b) cannot be used to terminate any parts of Proclamation 6641 made pursuant to the Implementation Act, an Act found in 19 U.S.C., Chapter 21 and not Chapter 12.

Furthermore, Proclamation 6641 was made pursuant to a number of different U.S. Acts in addition to the Implementation Act, including Sections 201 and 203 of the Automotive Products Trade Act of 1965 (19 U.S.C. 8) and Sections 1102(a) and 1204 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 18). As discussed above, Section 125(b) does not apply to either of these Acts because they are enumerated outside 19 U.S.C. 12. Therefore, Section 125(b) cannot be used to terminate the parts of Proclamation 6641 that were made pursuant to Acts found in 19 U.S.C. Chapters 21, 18, and 8, and not in Chapter 12.

Conceivably, President Trump could invoke Section 125(b) to terminate the parts of Proclamation 6641 that were made pursuant to Sections 504 and 604 of The Trade Act of 1974, which are found in 19 U.S.C. 2464(c) and 2483. However, this would be highly impractical as it would frustrate the administration of NAFTA, anger Canada and Mexico, and “provoke a major confrontation with Congress.” Additionally, such in part termination of Proclamation

259 See, e.g., Johnson, supra note 242, at 6.
263 Johnson, supra note 242, at 6.
6641 would ultimately have an insignificant effect on NAFTA as a whole, especially regarding NAFTA-related tariff treatment.

3. Critique of Trump’s Trade Policy Approach and Flawed Trade-Economics Logic

President Trump’s trade rhetoric, which has been largely aimed at instigating a resurgence of protectionist policies, is motivated primarily by his exclusive focus on the bilateral merchandise account trade deficits that the U.S. runs with other countries.264 This exclusive focus makes little sense in an integrated globalized economy, putting the rationality of President Trump’s trade policy approach into question. Additionally, President Trump’s trade-economics logic is simply flawed, as he fails to take into account (1) the negative consequences that increased trade barriers can have on American companies that operate as part of international production chains and (2) the portion of foreign country exports consisting of American made component parts.265

President Trump erroneously sees bilateral merchandise account deficits as the result of unfair foreign trade practices and not the result of systemic economic forces.266 According to Trump, these deficits are the primary cause of U.S. manufacturing job loss and economic disadvantage.267 As such, Trump also believes that reversing these trade deficits will re-open abandoned or transformed U.S. manufacturing facilities and create a substantial volume of jobs.268 In reality, trade deficits merely reflect a low savings rate relative to consumption and investment rates, and are a function of these rates more than of trade policy.269 Additionally, reversing trade deficits will likely have little to no effect on manufacturing-sector employment rates due to automation.270 Furthermore, despite what President

264 See Dadush, supra note 39, at 5.
265 See id. at 5-7.
266 See id. at 2.
268 Id.
269 Id.
270 Id.
Trump has suggested, international trade is not a “zero-sum affair,” and “expanded trade has historically tended to support economic growth.”271

The Trump administration should be focused more on the size and sustainability of global (i.e., not bilateral) current account balances, which depend more on domestic spending than on trade policies.272 Nevertheless, the administration remains fixed on bilateral merchandise account deficits.273 As a result, it appears President Trump is primarily concerned with the trade practices of four countries in particular—China, Germany, Japan, and Mexico—because of the large goods account surpluses they run with the U.S. (see Figure 1 below).274 However, as previously discussed, bilateral goods deficits are only one of the important factors used by the Department of the Treasury to identify unfair foreign trade practices. Neither China nor Mexico have global current account surpluses in excess of 3 percent of their GDPs. Additionally, none of these four countries is actively intervening to decrease the value of its currency.275

Based on his trade-related discourse, it appears President Trump’s chief concern is to bring jobs, especially manufacturing jobs, back to the U.S. However, the U.S. economy is near full employment as the current unemployment rate has dropped to 4.4 percent, a 10-year low.276 Furthermore, President Trump’s proposed tax cuts and increases to infrastructure spending will increase domestic spending and demand for goods further exacerbating the current account deficit issue.277 Regardless, the U.S.’s global current account deficit is only at 2.5% of GDP and is no longer as big of a concern as it once was (in

272 See Dadush, supra note 39, at 2.
273 See id.
274 See id.; see also, Lee, supra note 267 (explaining that trade deficits should not be the only benchmark for economic health).
275 See Dadush, supra note 39, at 2.
277 See Dadush, supra note 39, at 3.
2006, e.g., the U.S.’s current account deficit was at almost 6% of its GDP). In the short-term, such a deficit is likely sustainable due “in part to shale oil and gas.” In the long-run, President Trump’s plan to bring jobs back to America also “makes little sense.” Many economists believe that advances in information and communication technology and automation—and not trade practices abroad—are the main “source of job dislocation.” In fact, some have argued that as much as 88% of U.S. manufacturing job losses between 2000 and 2010 were the result of advances in technology. These technological advances allow manufacturing companies to produce more output with less people (see Figure 2). Thus, Trump’s goal to bring jobs back to America by targeting and deterring other countries’ “unfair” trade practices through unilateral trade action is based on irrational assumptions and will likely prove futile.

Additionally, President Trump fails to properly consider the negative consequences that will affect U.S. companies as a result of his decision to increase trade barriers via unilateral action. What Trump fails to see (or chooses to ignore) is that increasing tariffs or other non-tariff barriers to trade on foreign imports functionally represents a tax on U.S. exports and production, as about 50% “of U.S. imports consist of raw materials, parts, and components.” This is a particularly salient issue for companies like Boeing, whose supply chains are extremely globally integrated (see Figure 3 below).

Moreover, a significant portion of foreign countries’ exports is often made up of raw materials, parts, and components originating in the

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279 See Dadush, supra note 39, at 3.
280 Id.
281 E.g., id.; see also, Lee, supra note 267.
284 Dadush, supra note 39, at 2-3.
285 Id.
United States. For example, it is estimated that about 40% of the value of goods imported from Mexico is made in the U.S. (i.e., that 40 percent of imports from Mexico consist of parts and components produced by American companies in the U.S.). Similarly, various studies have shown that China’s bilateral merchandise account surplus with the U.S. is overstated by as much as 50% due to the significant portion of China’s exports that consist of assembled products produced from component parts originally made in the U.S. and imported by China. As a result of these economic realities, it is clear that President Trump’s trade-economics logic is simply flawed.

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286 See id.
287 Id.
288 Id.
Figure 1

Top U.S. trade surpluses and deficits in 2016 (In billions)

- Trade surplus
- Trade deficit

<table>
<thead>
<tr>
<th>Country</th>
<th>Trade Surplus</th>
<th>Trade Deficit</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>$347</td>
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<tr>
<td>Japan</td>
<td>$69</td>
<td>$24</td>
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<tr>
<td>Germany</td>
<td>$65</td>
<td>$19</td>
</tr>
<tr>
<td>Mexico</td>
<td>$63</td>
<td>$15</td>
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<tr>
<td>Australia</td>
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<td>$13</td>
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</tbody>
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Source: U.S. Census Bureau

@latimesgraphics

Figure 2

A renaissance in production, not jobs
Manufacturing production vs. employment, percentage change since the end of the most recent recession

Source: Federal Reserve, Bureau of Labor Statistics
Figure 3

Global Partners Bring the 787 Together

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