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New York State Bar Association: 2018 Regional Meeting
Seoul, Republic of Korea
April 23-24, 2018
Panel 1: Developments in International Trade and Investment: KORUS and the Looming Trade Wars

I. **President Trump's Stated Trade Policy**. *See generally* Office of the United States Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program.

A. Five Pillars—apparently on the foundation of "America first."

1. Supporting Our National Security.

(a) "A strong economy protects the American people, supports, our way of life, and sustains American power."

(b) "The United States will no longer turn a blind eye to violations, cheating, or economic aggression."

2. Strengthening the U.S. Economy.

(a) Improving the competitiveness of American business in the worldwide arena.

(b) Corporate tax reduction enacted in December.

(c) Aggressive effort to eliminate regulations said to hamper business activity.

3. Negotiating Better Trade Deals.

(a) "For too long, the rules of global trade have been tilted against American workers and businesses.

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(b) The U.S. "will alter – or terminate – old trade deals that are not in our national interest."

4. Aggressive Enforcement of U.S. Trade Laws.

(a) The trade enforcement agenda is "designed to prevent countries from benefiting from unfair trading practices."

(b) "Will use all tools available – including unilateral action where necessary – to support this effort."

5. Reforming the Multilateral Trading System. Skeptical of the activity of the World Trade Organization (WTO).

(a) "The WTO has not always worked as expected."

(b) "The WTO has been used by some Members as a bulwark in defense of market access barriers, dumping, subsidies, and other market distorting practices."

(c) U.S. "will not allow the WTO – or any other multilateral organization – to prevent us from taking actions that are essential to the economic well-being of the American people."

B. But what about retaliation?

1. The President says that "trade wars are good, and easy to win."

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2. If imports exceed exports with any given country, "just stop trading."
    (a) History does not tend to support this view.
    (b) The U.S. Smoot-Hawley Tariff Act of 1930 sought to protect U.S. industries, but is widely-believed to have deepened the Great Depression worldwide.

II. **Significant Sources of U.S. Executive Authority**

A. Section 301 of the Trade Act of 1974 (19 USC § 2411): unjustified, unreasonable, or discriminatory burdens or restrictions on U.S. commerce.

1. Covers violations of trade agreements, international law, or "an act, policy, or practice of a foreign country."
2. Proceedings may be initiated by the United States Trade Representative (USTR) based on the filing of a petition by any interested party—or self-initiated after consulting with private sector advisory committees.
    (a) Upon finding a violation, the USTR has broad remedial authority, including imposing tariffs on imports.
    (b) USTR has discretionary authority to take all appropriate and feasible action, subject to the specific direction of the

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President, to obtain the elimination of the act, policy or practice, including:

(i) suspending benefits of trade agreement concessions;

(ii) imposing duties or other import restrictions;

(iii) withdrawing preferential duty treatment; and

(iv) entering into binding agreements to eliminate or phase out the act, policy or practice, eliminate the burden on U.S. commerce, or provide compensatory and satisfactory trade benefits.

3. However, 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.

4. Challenges in the WTO, as well as in U.S. courts, may be brought to USTR orders.

B. Section 201 of the Trade Act of 1974 (19 USC § 2251): Safeguards.

1. Temporary import relief to domestic industry through higher tariffs or other measures if U.S. industry is seriously injured, or threatened with serious injury by increased imports.

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(a) Imports must be a "substantial cause of" the serious or threatened injury.

(b) Tariffs and other remedies can be ordered.

2. Safeguards apply to ***all*** imports from ***all*** countries—not country specific.

3. The ITC administers the process.

(a) Before this administration, last used by President Bush in 2002.

(b) Other nations successfully challenged the measures before the WTO.

4. The U.S. Court of International Trade (U.S. CIT) reviews these cases under 19 U.S.C. § 1581(i) (residual jurisdiction).

C. Title IV of the Tariff Act of 1930, as amended: Anti-dumping (19 USC § 1673 *et seq*.) (AD) and Counter-vailing Duties (19 USC § 1671 *et seq.*) (CDV): imports sold at less than fair value or that benefit from government subsidies.

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1. Industries can petition the Department of Commerce (DOC) for relief. Also, the DOC can self-initiate an investigation, although under past practice, this is unusual.
2. The DOC determines:
   (a) whether either dumping or government subsidies exist, and
   (b) if so, the margin (dumping) or amount (subsidy); or
3. The ITC determines:
   (a) whether there is material injury or threat of material injury to domestic industry; or
   (b) whether ***establishment*** of an industry is being materially retarded.
4. Failure of foreign companies to cooperate in the investigation can be considered in ordering relief and potential penalties. (19 U.S.C. § 1677e allows for the application of adverse inferences. This section was modified under the Trade Preferences Extension Act of 2015.)
5. "Circumvention," typically by shipment through a third country for minor processing, can also be investigated and remedied. (19 USC § 1677j)

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6. The U.S. CIT reviews appeals of AD/CVD determinations from the DOC and the ITC under 19 U.S.C. § 1581(c).

D. Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862): "national security".

1. A proceeding can be initiated by a U.S. department or agency head, or by an interested party (industry member)—or self-initiated by the DOC.

   (a) A unit of the DOC—the Bureau of Industry and Security (BIS)—investigates an allegation of threat to national security.

   (b) After BIS investigation, the DOC Secretary issues a report and recommendations to the President.

   (c) President then can negotiate to limit or restrict imports, or take action to adjust imports, so that they don't threaten or impair the national security.

2. Prior to the Trump administration, there were only two such BIS investigations since the U.S. joined the WTO in 1995—involving crude oil (1999) and steel (2001). In each case, BIS declined to recommend action.

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3. Although a complaint before the WTO could be made, GATT Article 21 exempts national security actions.

4. Authority for U.S. CIT to review appeals of these cases is under 19 U.S.C. § 1581(i) (residual jurisdiction).

E. Section 337 of the Tariff Act of 1930 (19 USC § 1337): unfair acts or methods of competition, and commonly involving intellectual property (IP) rights.

1. Overseen by the ITC.

(a) Industries or companies may petition the ITC to investigate.

(i) The procedure is regularly used by patent holders to challenge importation of infringing goods. Also used by trademark and copyright holders.

(ii) If the ITC decides to bring a case, the petitioning party's claims is heard by an ITC administrative law judge (ALJ).

(iii) An ITC staff attorney typically participates in the case hearing, along with the petitioning and responding parties.

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(b) The ALJ issues and initial determination, which is subject to review by the ITC.

(c) The ITC review considers the public interest taking account of factors:

(i) public health and welfare;

(ii) competitive conditions in the U.S. economy;

(iii) the production of similar or directly competitive U.S. products; and

(iv) U.S. consumers.

(d) Remedial authority includes an exclusion order barring importation, or a cease and desist order prohibiting the unlawful activity.

(e) The President, acting through the USTR, is authorized to disapprove the remedy (60 days to review). Disapproval is unusual.

(f) Temporary relief, such as exclusion, may also be ordered before the hearing is held.

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2. Proceedings can be challenged before the WTO, by arguing that Section 337 and any remedy imposed constitutes a violation of GATT/WTO rules or obligations. ITC determinations can also be reviewed in the U.S. courts.

3. A recent example of a Section 337 case is a petition by U.S. Steel, alleging that Chinese steel manufacturers maintained a government-supported price-fixing cartel. The ITC began an investigation, and the case was heard by an ALJ.

   (a) The ALJ ruled against U.S. Steel on the ground that U.S. Steel did not suffer "antitrust injury."

   (b) Under U.S. antitrust law, for a competitor to show "antitrust injury," there must be proof of lost sales due to below cost pricing (predatory pricing). The complaining party must also show that it and other U.S. steel competitors would be driven out of business, thereby allowing the predator to recoup the losses on the below cost pricing. U.S. Steel conceded it could not show antitrust injury.

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(c) On appeal to the ITC, the Commission affirmed the ALJ's ruling. *In the Matter of Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002 (ITC Mar. 19, 2018).

4. Under 19 U.S.C. § 1337(c), determinations made pursuant to investigations commenced under § 1337 are reviewed at the Court of Appeals for the Federal Circuit. The standard of review is pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (arbitrary and capricious).

F. Section 182 of the Trade Act of 1974, as amended: "Special 301" for IP rights.

1. USTR must identify countries that deny adequate IP rights protection or fair access for persons relying on IP.

2. Those countries with the most onerous "acts, policies or practices" or with the greatest adverse impact on U.S. products are "Priority Foreign Countries," and may be investigated under Section 301.

3. A "Priority Watch List" and a "Watch List" are issued.

G. International Emergency Economic Powers Act of 1977 (IEEPA) (50 U.S.C. § 1701 *et seq*.)

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1. Authorizes the President to deal with "unusual or extraordinary" threats to the national security, foreign policy, or the economy, which originate "in whole or in substantial part from outside the United States.".
2. A pre-condition to use of the IEEPA is a declaration of a national emergency under the National Emergencies Act. The emergency must be renewed yearly.
3. Under IEEPA, the President can block transactions and freeze assets.
   (a) IEEPA has been used in the past to impose embargoes and sanctions.
   (b) If construed to authorize tariffs, that would be an expanded reading of Presidential power.
4. Periodic reporting by the President to Congress is required, although congressional approval of action taken is not.

H. Authority of the U.S. Court of International Trade (U.S. CIT). *See* 28 U.S.C. §§ 1581-1585.

1. The U.S. CIT has exclusive jurisdiction to reviews decisions of the DOC, the ITC, and U.S. Customs and Border Patrol under the trade laws.

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(a) The U.S. CIT has exclusive jurisdiction to reviews decisions of the DOC and the ITC under the trade laws. 28 U.S.C. § 1581 specifically grants U.S. CIT with jurisdiction to review determinations made under the Tariff Act of 1930, *i.e.*, § 1581(a) addresses denial of protests (classification cases); § 1581(c) AD/CVD determinations; § 1581(i) residual jurisdiction.

(b) Also has exclusive jurisdiction as the trial level court for specified trade and customs cases (*i.e.*, civil penalty cases under 28 U.S.C. § 1582.).

(c) The jurisdictional grant is intended to centralize all cases involving international trade in one specialized court with national U.S. jurisdiction.

2. The U.S. CIT is composed of nine judges.

(a) Currently as of April 2018, two judicial positions are vacant.

(b) Judges are appointed for life under Article III of the U.S. Constitution.

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3. The U.S. CIT has nationwide jurisdiction, and is empowered to hear cases anywhere in the U.S., as well as in foreign countries.
4. The U.S. CIT has full powers in law and equity. *See* 28 U.S.C. § 1585.
5. Appeals from the U.S. CIT are to the United States Court of Appeals for the Federal Circuit, and from that Court to the U.S. Supreme Court.

I. Committee on Foreign Investment in the United States ("CFIUS"). *See also* Section VI.

1. CFIUS is an inter-agency committee, chaired by the Secretary of the Treasury, which consists of 16 agencies, including the Departments of Commerce, Defense, Homeland Security, and State, as well as the USTR.
2. Transactions in which a U.S. company is involved in an acquisition by a foreign entity are subject to review by CFIUS to determine whether the transaction could affect national security interests.
   (a) CFIUS can review the transaction before or after it closes.
   (b) Transaction participants can provide notice of the transaction to CFIUS prior to closing the transaction, although they are not required to do so.

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(c) If CFIUS reviews and permits the transaction, that is a "safe harbor" against any subsequent review.

(d) CFIUS can also self-initiate review, but tends to do so only where there may be national security concerns.

(e) CFIUS does not investigate every transaction of which it is notified.

3. Upon completion of its review, CFIUS can recommend to the President that the transaction be ordered blocked.

4. To block the transaction, the President must find "credible evidence" that the transaction will impair national security and that existing laws are insufficient to protect national security.

5. Presidential action is not subject to legislative or judicial review.

6. CFIUS can also condition favorable review on modification of the transaction by the parties.

7. Transactions may be reviewed even though the acquiring foreign entity would not own a majority or a controlling interest, in the U.S. company, or a majority of its board of directors.

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8. Congress is currently considering changes that would likely confer greater review authority on CFIUS.

III. **Korea-U.S. Free Trade Agreement (KORUS)**

A. Korea is important.

1. The world's 11th largest market.

2. The 6th largest U.S. trading partner. Over $119 B in 2017.

3. And the U.S. is Korea's second largest trading partner, after China.

B. Lengthy, controversial negotiation of the original agreement.

1. KORUS was initially approved April 2007.

2. Then, went through significant negotiations and opposition in both countries before taking effect in March 2012.

C. US exports to Korea have since increased ~5% per year during the period of the treaty, with US exports of services up far more.

D. However, the Korea-US trade deficit in goods has also increased—from $13.2 B. in 2011 to $27.6 B. in 2016. However, in 2017—Trump's first year—the goods deficit declined to about $22.9 B (down 17%). *See* https://www.census.gov/foreign-trade/balance/c5800.html (2017: U.S. trade in goods with Korea, South).

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1. But these numbers do not tell the full story. Since 2012, consumption in Korea has declined generally, and imports likewise have declined, while exports to the U.S. have increased.
2. Korean imports globally declined 20% in 2015-16. Increased imports from the U.S. are an exception.
3. In 2016, the U.S. had a $10.7 B. surplus in services. Banking, finance, communications, equipment leasing and express delivery have benefited.
4. In terms of dollar, the deficit for Korea is small compared to China ($350 B. in 2016) or Germany or Japan.
    (a) The bulk of the deficit with Korea is in the auto industry (70-80%).
    (b) Beef and pork show a surplus, Large tariff reduction for beef (40% to 24%). US exports of other agricultural products have also increased (potatoes and cherries, for example).
5. Also, under KORUS, Korean foreign direct investment (FDI) has increased significantly, creating US jobs. From ~ $25B (2012) to ~41B

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(2016). *See* https://www.bea.gov/international/factsheet/factsheet.cfm?Area=626.

6. Moreover, KORUS greatly enhances protection of intellectual property. The agreement is intended to establish the "gold standard" for this hugely important economic sector.

E. Yet, according to President Trump, "We have a very, very bad trade deal with Korea . . . . For us it produced nothing but losses."

1. Renegotiation of KORUS became a priority for the administration.

   (a) In September, Trump hinted at withdrawal. Thereafter, contacts leading to formal negotiating sessions began (October).

   (b) The U.S. delegation reportedly brought a list of 50 demands.

2. Formal renegotiation began several months ago (January).

   (a) Very harsh rhetoric from the President: "It was a very, very bad deal. The deal is a disaster. We are negotiating, but we will scrap the deal if we don't see any progress."

3. The role that Congress may play remains to be seen. Thus far, the President has not invoked the provisions of the U.S. Trade Promotion

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Authority (TPA), which requires the President to consult with Congress.

(a) Gives Congress a seat at the U.S. table.

(b) Congress has not engaged the President pro-actively.

F. As of late March, negotiations reportedly had been produced an agreement in principle, seemingly in connection with negotiation of an exemption for Korea from the announced steel and aluminum tariffs. *See* Section IV below. Points said to be resolved:

1. Steel exports by Korea to the U.S. will be reduced by roughly 30%.
2. Yearly exports of autos by the U.S. will be doubled, from 25,000 to 50,000, without having to meet Korean emissions standards. However, the impact of this change may be minimal because US exports in 2017 were only about 20,000 autos—below the then-existing 25,000 quota.
3. Application of Korean environmental regulations for autos will be eased.
4. The current US tariff on trucks exported by Korea to the U.S. will be extended by 20 years to 2041.

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5. Korea will be exempt from the steel and aluminum tariffs announced by the President in March. *See* Section IV below.

6. There apparently is also a "side" agreement designed to prevent currency "manipulation" to influence the trade balance.

G. Nonetheless, within days of the announced resolution, the President dialed back: "I may hold it up until after a deal is made with North Korea . . . . You know why? Because it's a very strong card."

H. How much of the U.S. position on KORUS is intended to send a message to Canada and Mexico? NAFTA seems to be the bigger target.

IV. **Recent Tariffs on Steel and Aluminum.**

A. February 16, 2018: DOC Secretary Ross issued a report to President Trump. Action on imports was said to be justified on "national security" grounds. Triggered a 60-day period within which to act.

B. March 1, 2018: The President met with Steel industry representatives, after which the President announced a 25% tariff on steel and 10% on aluminum

1. NYSE fell more than 400 points.

2. Many Republicans were critical. Tariffs typically run counter to Republican principles.

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3. The President's top economic adviser, Gary Cohn, reportedly resigned in response.

C. Ironically, the proposed tariffs would fall heavily on US allies, particularly Canada, Brazil, Korea and Japan—the four largest steel exporters to the U.S.

1. Canada called the tariff "unacceptable".
2. EU officials announced there would be retaliation.
3. Trump responded that the U.S. would retaliate against EU exports of cars to the U.S.

D. The process leading to the announcement seemed irregular. Cabinet level departments were not consulted, and afterwards administration officials left open the notion that the eventual decision could change.

E. China produces and exports a lot of steel, but not to the U.S.—on the order of 2.5% of US steel imports yearly. However, with production from China flooding the global market, other nations receiving Chinese imports turn to exports of their own internal production in response.

F. March 8, 2018: Tariffs formally ok'd, effective in 15 days.

1. Canada and Mexico are exempt—presumably to encourage the two to renegotiate NAFTA along lines acceptable to the President.

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2. The President's proclamation states: "Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country."
3. Therefore, the door is open for US allies to negotiate for their own exemptions. But this approach undercuts the "national security" underpinning for the tariffs.

G. March 23: The President announces that various countries, along with Canada and Mexico, are temporarily exempted until May 1, 2018.
1. Korea is among those included.
2. Japan is not.
3. What the criteria or objectives are for any of the exempted countries to remain exempted past May 1 is unclear. Similarly unclear is what any non-exempt country might do to become exempt.

H. Congress has the authority to over-rule the tariffs. But that seems unlikely.

I. Legal action in the U.S. courts challenging the tariffs is also possible.
1. However, action taken by the President and other Executive branch officials is generally afforded deference under the "*Chevron*"

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doctrine—and that is particularly so where "national security" is invoked as a justification. Still, the Supreme Court has reminded that "national security", as used in Section 232, is "narrower" that the term "national interest." *Federal Entergy Administration v. Algonquin SNG, Inc.* 426 U.S. 548, 569 (1976). *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Nevertheless, US trial (district) courts and courts of appeals have tended to give close scrutiny, and to invalidate, actions by the President nominally taken on national security grounds.

3. Thus far, the U.S. Supreme Court has not ruled on the merits of any of these lower court decisions.

J. WTO challenges are also a possibility.

1. Korea or the EU could bring a case before the WTO's Dispute Settlement Body.

2. In 2002, President Bush imposed tariffs on steel.

(a) The WTO ruled against the U.S.

(b) Facing tariffs from Europe, the U.S. accepted the ruling and removed the steel tariffs.

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3. Here, however, the U.S. claims to be acting to protect national security, and there is a WTO exemption:

   (a) Article 21—"Security Exceptions"—exempts action that a signatory "considers necessary for the protection of its essential security interests", including that "taken in time of war or other emergency in international relations . . . ."

   (b) But this exemption has never been tested in any case. Countries may wish to not to open up this subject before the WTO.

   (c) A favorable ruling for the U.S. could result in other countries using the same justification. An unfavorable ruling could be ignored by the U.S.

   (d) Either way, the WTO's legitimacy would suffer. Furthermore, in Qatar's recent case before the WTO challenging the UAE blockade, the U.S. has asserted that a country is entitled to decide for itself whether to invoke Article 21, and if it does, there is no role for the WTO to play.

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4. The exemptions from the tariff for selected countries might also violate the WTO's most-favored-nations (MFN) provision.

K. Can the tariffs be "gamed? Legislation from the time of the 1930's Depression created "Foreign Trade Zones" (FTZs).

1. Various features of this program give importers opportunities to reduce tariff burdens.

2. If the tariffs stay in place on a widespread basis, we can expect use of FTZ provisions.

L. The seeming rashness of it all: what does this say about the President's approach not only to world trade, but also to world trade as a means to peaceful global order, going forward?

V. **Presidential Action Blocking Broadcom's Attempted Acquisition of Qualcomm**

A. In November 2017, Broadcom, a Singapore technology company announced its intent to acquire Qualcomm, another tech company, located in San Diego, California.

1. Qualcomm's chip and semiconductor technology is used a wide variety of products, including ones used in the defense industry.

2. Qualcomm is also a leader in developing 5G cell phone technology.

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B. This was a non-consensual transaction—in effect a "hostile" takeover of Qualcomm.

1. Pending completion of the acquisition, Broadcom sought to elect directors to Qualcomm's board at the company's January meeting.
2. Qualcomm opposed the efforts, and notified the proposed takeover to CFIUS.
3. In an unusual order, CFIUS ordered that Qualcomm's annual meeting be postponed while it conducted its review.

C. March 2018: Invoking CFIUS authority, the President blocks Broadcom's proposed $117 B. acquisition of Qualcomm.

1. The President's executive order finds that:
   (a) "There is credible evidence" that Broadcom, " through exercising control of Qualcomm . . . might take action that threatens to impair the national security of the United States"; and
   (b) Other laws "do not . . . provide adequate and appropriate authority . . . to protect the national security in this matter."
2. This was an unusual CFIUS proceeding in several respects.

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(a) The CFIUS review proceeded very quickly. And there was more public visibility into the proceedings that generally occurs.

(b) As proceedings evolved, CFIUS appeared, at least publicly, to assume a more adversarial posture to Qualcomm than exists in a more typical review.

(c) This is the first time that CFIUS has been used to block a transaction that did not involve a Chinese buyer. However, a consideration was that Broadcom might retard Qualcomm's research and development of 5G technology and thus disadvantage the company against competitors in China.

3. This is the second technology acquisition blocked by the President under CFIUS.

(a) In September 2017, the President also blocked the sale of Lattice Semiconductor to a Chinese-backed investor.

(b) Prior to the Trump administration, only three transactions were ordered blocked by the President under CFIUS.

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VI. Action Directed to China

A. March 22, 2018: President Trump orders the USTR to take action against China in response to "unreasonable" and "discriminatory" policies and practices relating to intellectual property restrictions imposed on US companies seeking to operate in China.

1. The President's action is based on an investigation under Section 301, ordered in August 2017.

2. After conducting its investigation, the USTR concluded that "China's technology transfer regime continues, notwithstanding repeated bilateral commitments and government statements . . . ."

3. The President's order also directed the USTR to pursue dispute settlement in the WTO, as required by Section 301.

B. In response to both this U.S. announcement and the earlier U.S. announcement on steel and aluminum, China stated that it would imposed its own tariffs.

1. As of April 2, China had announced tariffs on roughly $3 billion of U.S. exports of 128 products, covering such items as pork and other meat, fruit and nuts, sparkling wine, ethanol, and steel pipes.

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2. The increase on ethanol is said to be so steep and to eliminate any cost advantage to Chinese buyers from U.S. imports, thus amounting to an effective cut-off, at least for the short-term.

VII. **Other Examples of US Action Thus Far**

A. January 2017: Withdrawal from Trans-Pacific Partnership (TPP)

1. One of the President's first official acts
2. After other nations proceed in modified form, President suggests possible revisiting of US position.
3. Some argue that withdrawal is very short-sighted. Significant Asian trading partners are left to focus on regional economic integration, with China poised to take on an increasing important role. Meanwhile, the U.S. looks on from the outside.
4. In response, earlier this year Asian-Pacific nations entered their own version of a multi-national agreement, to which the U.S. is not a party.
5. President Trump has said the U.S. could consider a return to TPP if there were terms more favorable to the U.S. That scenario does not seem very likely.

B. 2017: Renegotiation of North American Free Trade Agreement (NAFTA)

New York State Bar Association: 2018 Regional Meeting

Seoul, Republic of Korea

April 23-24, 2018

Panel 1: Developments in International Trade and Investment: KORUS and the Looming Trade Wars

1. "We've had a very bad deal with Mexico, we've had a very bad deal with Canada—it's called NAFTA."
2. Negotiations have begun with Canada and Mexico

C. January 2018: Section 201 "safeguards" on washing machines and solar panels.

1. Directed at China and South Korea.
2. Could hinder expansion by Samsung in US (South Carolina).

D. Mid-February 2018: DOC Secretary Ross said there were 94 AD and CVD cases filed since inauguration—an 81% increase from the prior year.

VIII. **The role of the U.S. in the Asia-Pacific Area: Where are we going?**

A. A hugely important area—economically dynamic and politically sensitive.

B. Actions by the President seem, however, to be reducing the U.S. role and interest in leadership.

C. Who will gain? This is China's backyard.

1. China already accounts for a greater percentage of Korea's imports than does the U.S.

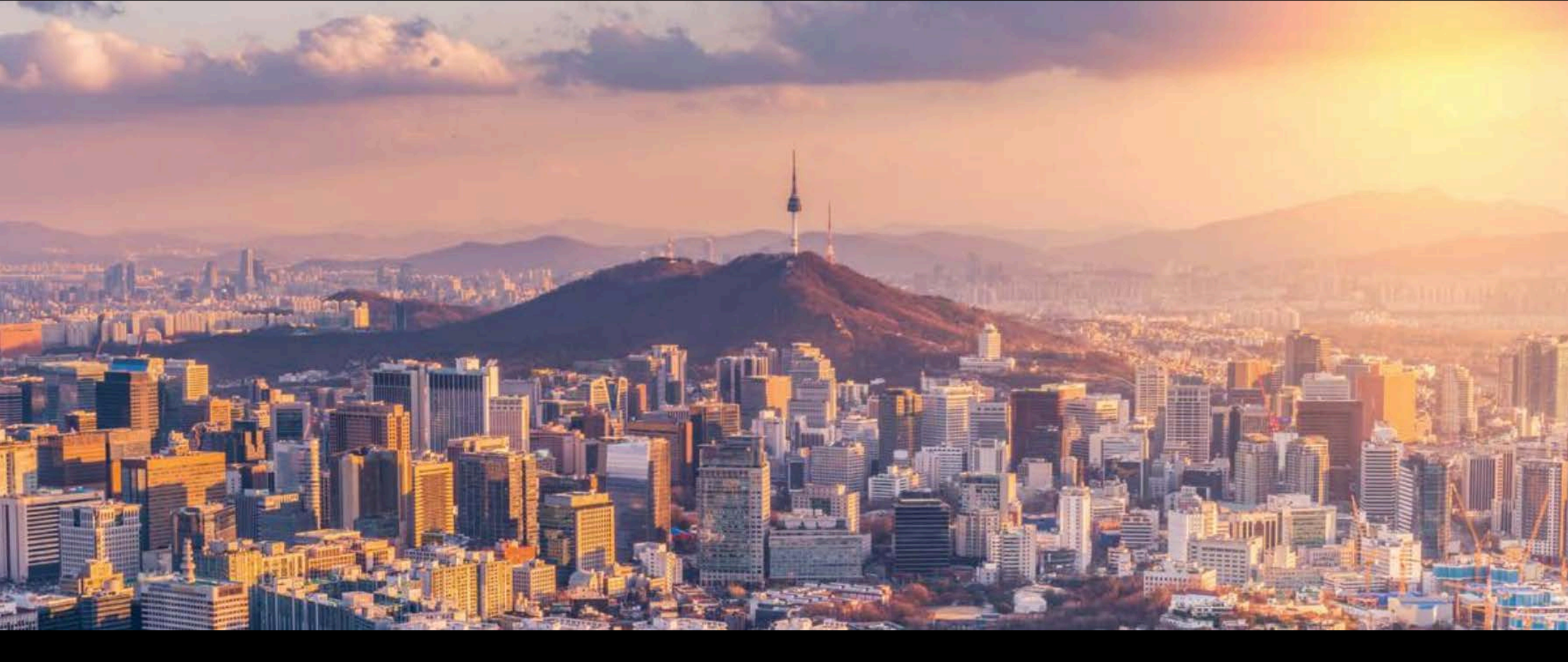
New York State Bar Association: 2018 Regional Meeting

Seoul, Republic of Korea

April 23-24, 2018

Panel 1: Developments in International Trade and Investment: KORUS and the Looming Trade Wars

2. A similar relationship is found throughout countries throughout the Asia-Pacific region Australia, Indonesia, Japan, Singapore, New Zealand, for example: imports from China exceed those from the U.S.



KORUS FTA & Korean Courts
(Focus on Intellectual Property Protection)

2018. 4. 24.

YOUNG-HILL LIEW
(JUDGE, SEOUL CENTRAL DISTRICT COURT)

Table of Contents

1. Importance of the KORUS FTA

One of the fifteen FTAs

[Korea's fifteen FTAs (ratified)]

Unrivaled importance of the KORUS FTA

[Korea-U.S. Trade / 2016]

$80B

$64B

Total: $144B

- *Korea is the world's **11th** largest market& the **6th** largest goods trade partner of the US*
- *US is Korea's **second** largest trading partner, after China*

Trade deficit w/South Korea

-$27B

+$10B

- $17B

Much time & efforts invested

commensurate with its importance

June 30, 2007

First signed

March 15, 2012

Entered into effect

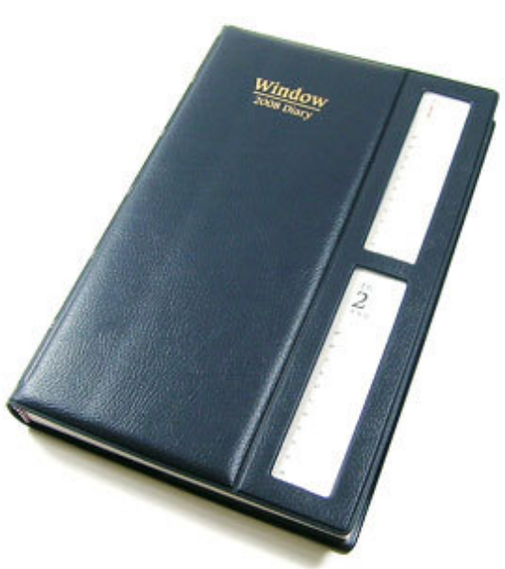
2. Korean Courts & KORUS FTA

KOREAN SUPREME COURT

Is a court related to trade or FTA?

[Trade issues embedded in a court decision]

My personal experience in a HCCH meeting (Ottawa February, 2000) – unexpected comment by a lawyer from the U.S. Department of Commerce



WINDOW

Registration Holder: Yang-Jee Corp.

Registration Number:40-0452133

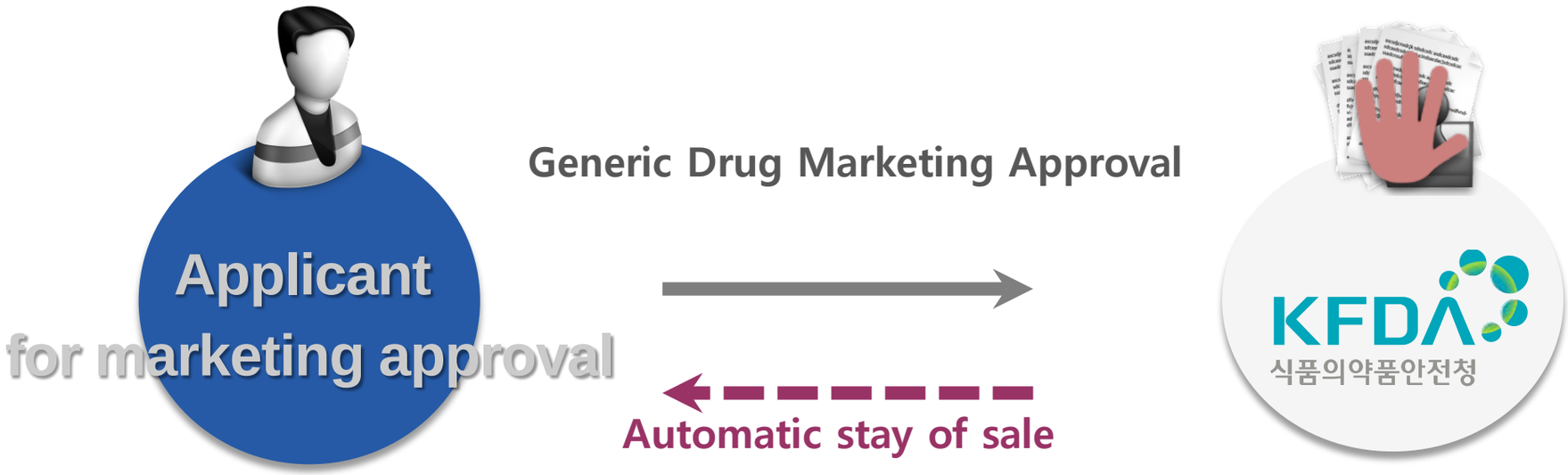
vs

Drastic change KORUS FTA brought to Korean courts

Pharmaceutical patent litigations resulted from FTA

Drug Approval – Patent Linkage System

- *Implemented on March 15, 2015, pursuant to KORUS FTA*
- *Similar to US Hatch-Waxman Act*
- *Goal: Lower prices of pharmaceutical drugs for the Korean public by encouraging earlier market entry by Generics with generic versions of original drugs while protecting the patent rights of Originators*



<when a patent owner files a patent litigation after receiving notification>

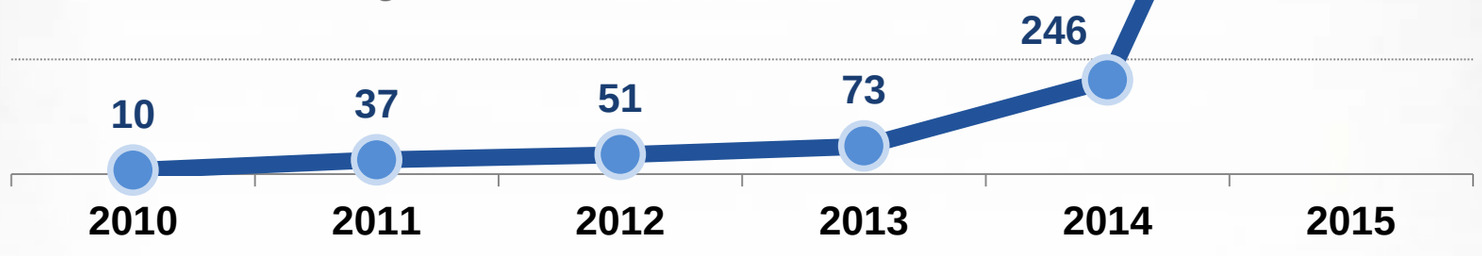
Sharp increase. What next ?

(2015. 5. including court of 1st instance, 2nd instance and 3rd instance)

Patent term extension invalidation : 30%

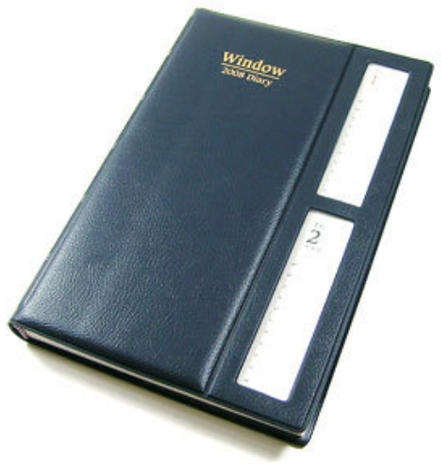
Patent scope trials : 9%

Invalidation Proceeding : 61%



KIPO statistics

Balanced protection of IP in practice



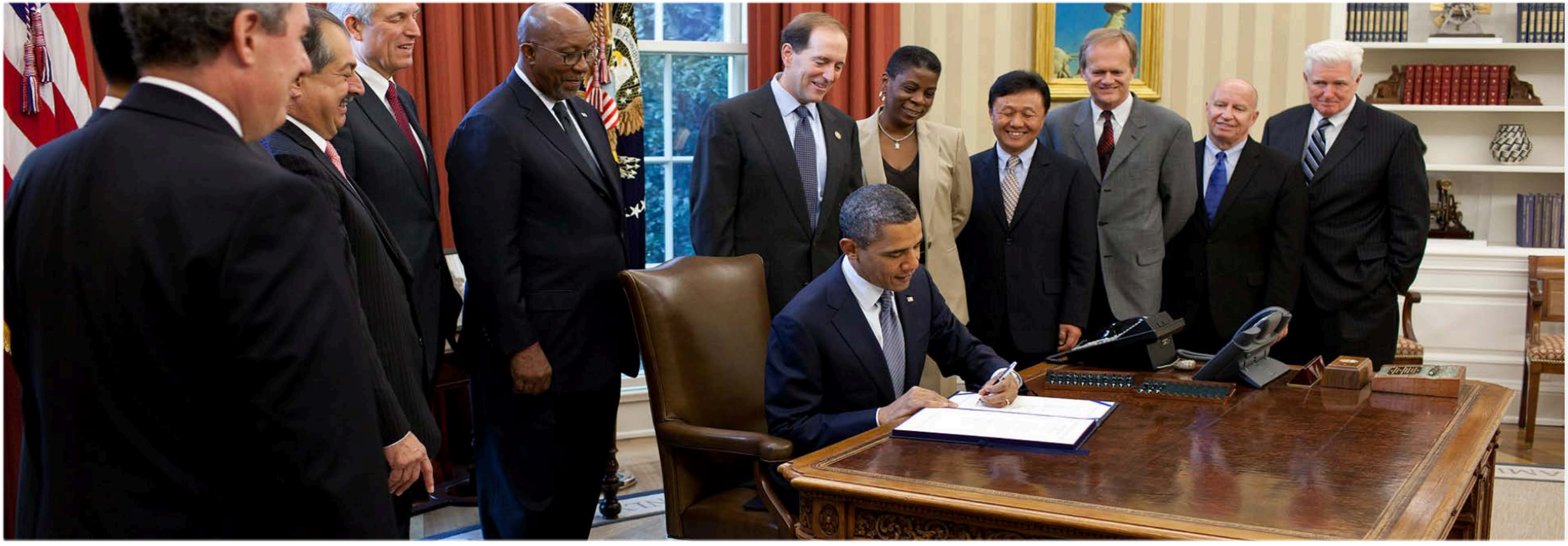
Infringement complaint against MS was dismissed

The role of Korean courts in KORUS FTA

- As one of the dispute resolution bodies, domestic court is responsible for the enforcement of KORUS FTA
- Fair and reasonable interpretation of KORUS FTA and the relevant domestic law is important.
- How courts apply invalidity test of pharmaceutical patent is critical in striking a balance between generics and originators.

Korean court's decision may have significant impact on KORUS FTA

3. Enhanced Level of IP Protection – Law and Practice of the KORUS FTA



“The agreement we’re announcing today includes several important improvements and achieves what I believe trade deals must do. It’s a win-win for both our countries.

Former President Barack Obama,
Remarks at the Announcement of US-Korea FTA(2010)

IP Chapter of KORUS FTA – Positive progress

- Statutory remedies for copyright infringements(Art18.4~18.6)
  - frequently used in judicial practice

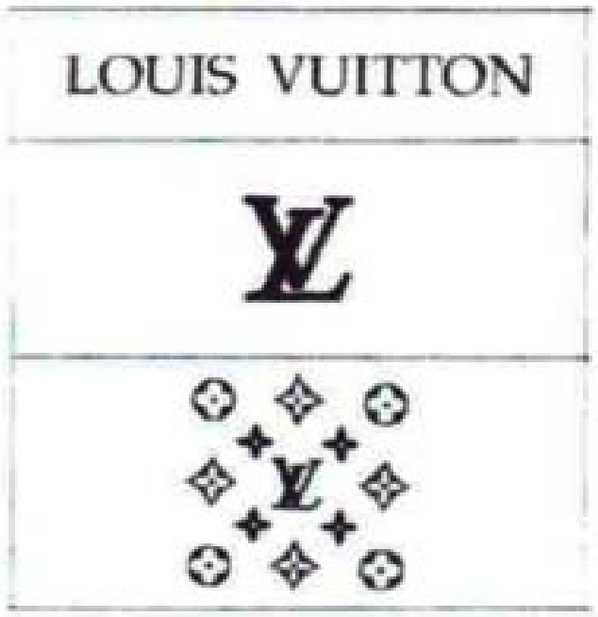
- No limitation on claimant's standing in certain IP litigations(Art 18.10.)

> *4. Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right.*

**__a federation or an association__ having the legal standing and authority to assert such rights, and also includes a person that exclusively has any one or more of the intellectual property rights encompassed in a given intellectual property*

- Drug Approval-Patent Linkage System (Art 18. 9.)

Enhanced level of IP protection



LOUIS VUITON

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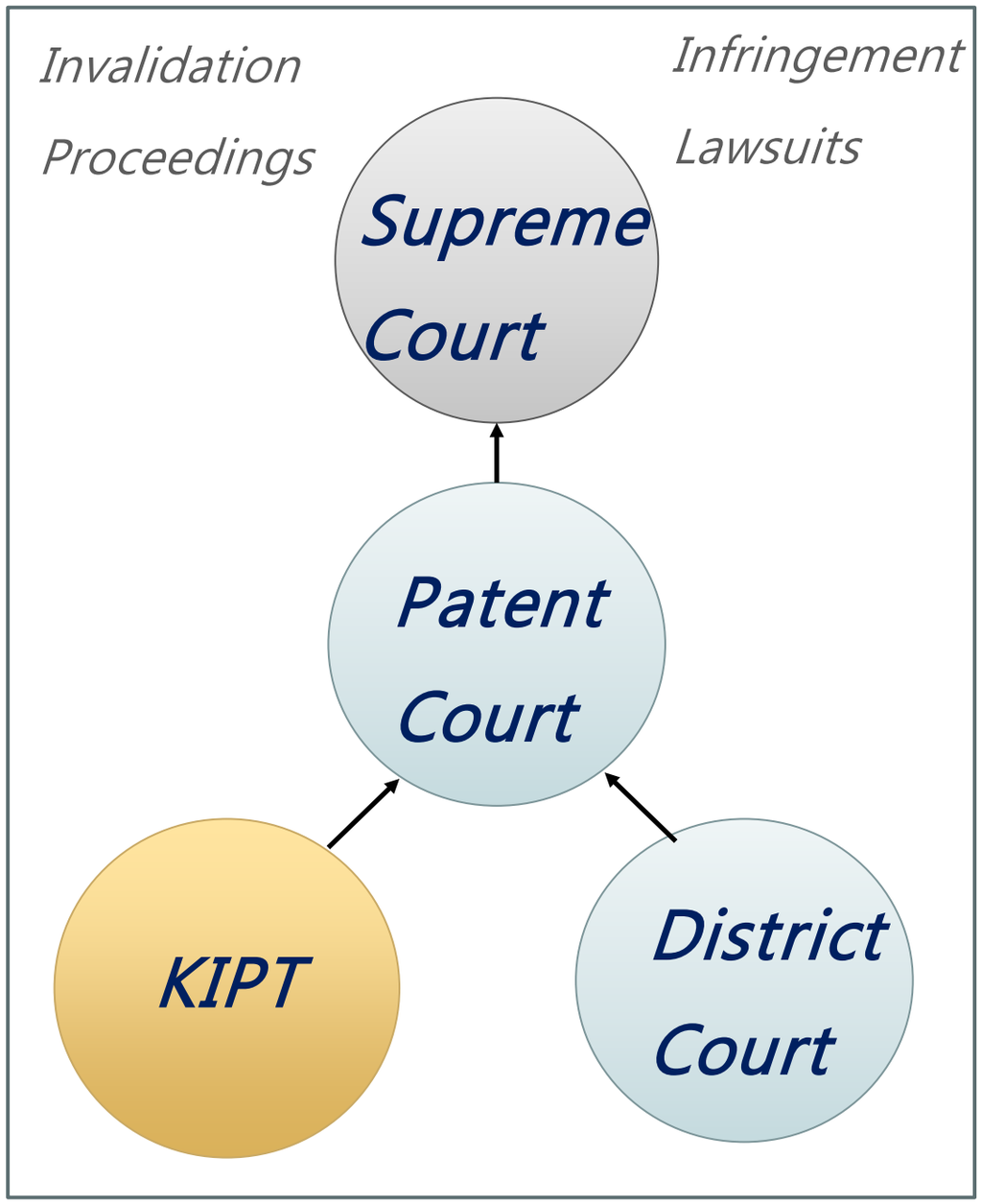
Enhanced level of IP protection



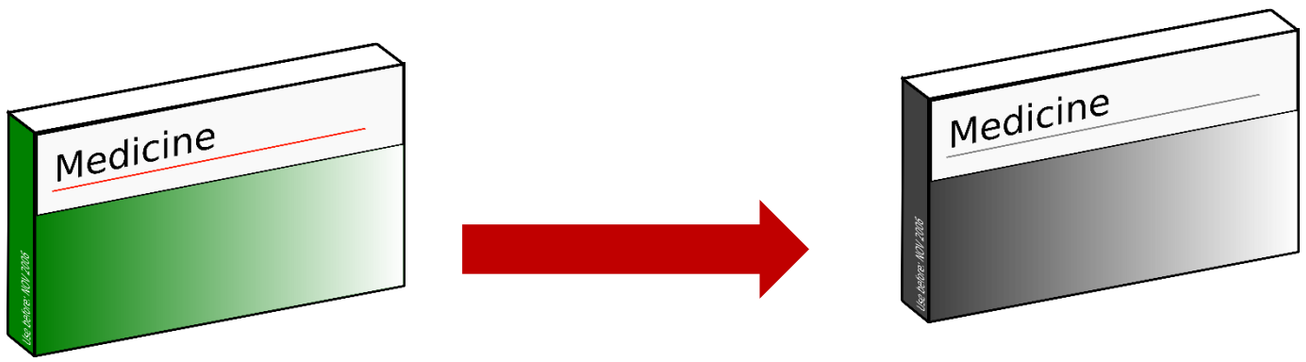
Jan 1, 2016

May 29, 2017

Feb 5, 2018

Enhanced level of IP protection

[A recent case decided by the Patent Court]



Originator *Generic manufacturer*

The Korean Patent Court found a generic manufacturer liable for selling generic pharmaceutical drugs prior to the expiration of the patent term of the original pharmaceutical product, which reduced the pharmaceutical prices of the original pharmaceutical product in accordance with pharmaceutical pricing registration procedures, thereby causing an originator harm(Patent Court 2017Na2332).

Proposed amendements
(Information submission order, Punitive damages)

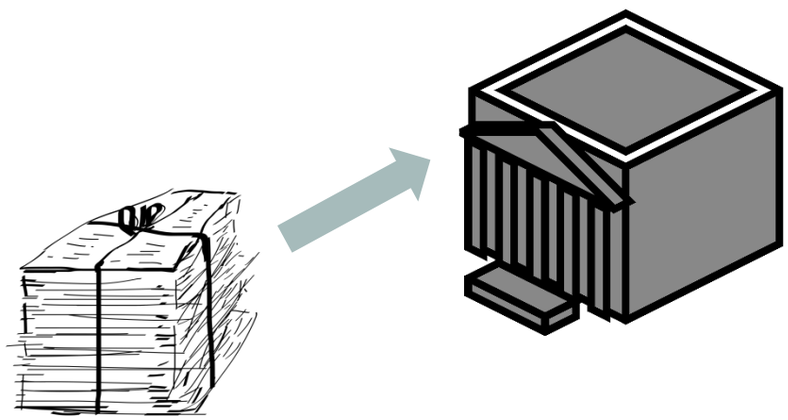
[Proposed amendment]

Reinforcement of Information Submission Order

(「Unfair Competition Prevention and Trade Secret Protection Act」, 「Act on the promotion of collaborative cooperation between large enterprises and small-medium enterprises」, 「Act on prevention of divulgence and protection of industrial technology」)

Patent Act: Article 132 (Submission of Information)

(1) In litigation for patent rights or exclusive license, upon the request by one of the parties, the court can order the opposing party to submit the information relevant to proof of the alleged infringement or assessment of the damages incurred from the alleged infringement. However, if a person in possession of such information has any reasonable grounds to refuse submission thereof, the court's order for submission of information is no longer enforceable.



[Proposed amendment]

Introduction of punitive damages in laws and regulations related to technology protection

- Impose punitive damages up to 10 times the actual damages

4. Control of Unfair Trade Acts

- Trade Commission & Courts

International transaction of goods infringing IP rights

➢TRIPs Agreement strictly regulates **international transaction of goods infringing IP rights**

➢As a member of WTO, Korea abides by TRIPs Agreement.

Protection of IP rights in Korea's export and import market	
Korea Customs Service	Withhold a customs clearance for the relevant goods (Art 235, Customs Act)
KTC	Investigations of unfair international trade practices (Art 4, Act on the investigation of unfair international trade practices and remedy against injury to industry)

Korea Trade Commission

⚖ Article 4 (Prohibition of Unfair International Trade Practices)

(1) No one shall engage in any of the following acts (hereinafter referred to as "unfair international trade practices")

1. The following acts related to goods, etc. which violate patent rights, utility model rights, design rights, trademark rights, copyrights, neighboring copyrights, program copyrights, lay-out design rights of semiconductor integrated circuits, geographical indications, or trade secrets protected by the statutes of the Republic of Korea or the treaties signed by the Republic of Korea as a party concerned (hereinafter referred to as "goods, etc. violating intellectual property rights"):

(a) Supplying goods, etc. violating intellectual property rights into Korea from overseas, or importing goods, etc. violating intellectual property rights or selling such imported goods domestically;

(b) Exporting goods, etc. violating intellectual property rights, or manufacturing such goods domestically for export;

Korea Trade Commission

[Special Oversight Mechanism_Trade Commission]

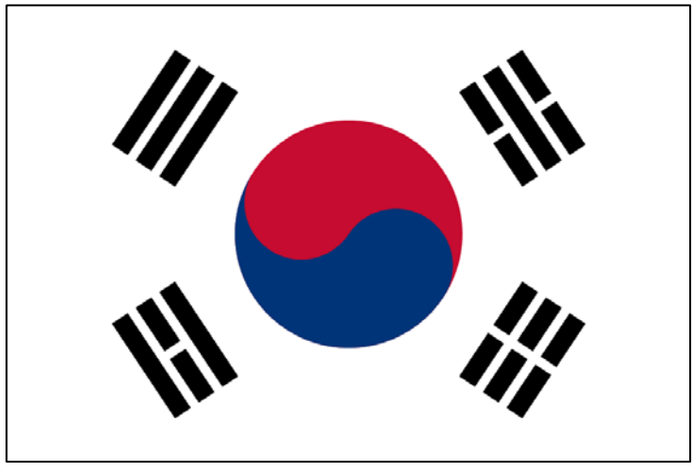
KOREA TRADE COMMISSION

- ➢ Act on the Investigation of Unfair International Trade Practices and Remedies Against Injury to Industry
- ➢ KTC may issue measures to prohibit import, export, sale or manufacture of the goods violating IP rights
- ➢ KTC made some meaningful decisions (e.g. **Canon case**), and adopted an expedited investigation procedure to enhance its effectiveness

KTC becomes an affordable mechanism to solve IP disputes in the context of int'l trade

Comparison with ITC

[Special Oversight Mechanism_ Trade Commission]



KTC KOREA TRADE COMMISSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation Procedure(Unfair Trade Practice)

Complaint

Initiation of Investigation

Investigation & Determination

Corrective Measures including penalties

- Infringement on intellectual property rights, Other unfair international trade practices that threaten to disturb exp ort and import accords

Recommendation for Corrective Measures

Number of investigations instituted by year

Item	~'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	'13	'14	'15	'16	'17	Total
Trademark	62	2			4		1		2	3	1	3	3					**19**
Patent	4	1	4	3	1	4	1	1	1	5	3	5	1	3	5	9	5	**56**
Utility Model								1	1	1	1							**4**
Design	6			1	1		1	1	2	1			1			1	1	**16**
Copyright	6																	**6**
Trade Secrets	4	1	1										2			1		**9**
subtotal	82	**4**	**5**	**4**	**6**	**4**	**3**	**3**	**6**	**10**	**5**	**8**	**6**	**4**	**5**	**13**	**10**	**178**

http://www.ktc.go.kr/statsUnjust.do

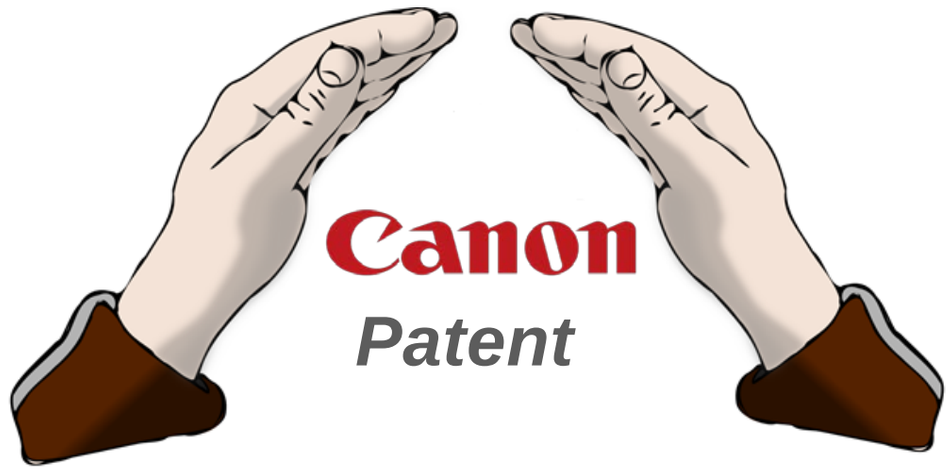
Court has a final say on infringement
(Recent reversal of Trade commission's ruling)

On September 22, 2011, Korea Trade Commission dismissed Canon's claim against local laser printer parts companies, alleging infringement of patents regarding gears for photoconductor drums used in toner cartridges

Supreme Court 2013Du5180

Seoul High Court 2012Nu22821

Seoul Administrative Court 2011GuHap44471



2017 International
IP Court Conference
2017 국제 특허법원 콘퍼런스

2017 국제 특허법원 콘퍼런스

2017 International IP Court Conference:

court, IP and business

2017. 9. 6(수) 10:00~18:00 특허법원

- 제1세션 특허법원의 조화와 협력(법원장 세션)
- 제2세션 비즈니스의 관점에서 본 특허소송의 새로운 도전
- 제3세션 의약 및 생명공학 특허의 최신 이슈
- 제4세션 ICT산업을 중심으로 본 특허요건과 권리구제

특허법원

IP hub court

5. IP & Antitrust Cases in Courts

Need for limitation on exclusivity of IPR

Exclusivity vs. Competition

IP Rights vs. Innovation

Antitrust law issues

Key Issues

- ***Acquisition of Patent Rights***

- Acquisition of Patent Right relevant to the Major Part of Business

- Grant-back

- ***Exercise of Patent Rights by Filing Suits***
- ***Grant of License in General***
- ***Patent Pool and Cross-License***
- ***Exercise of Patent Rights related to Technology Standard***
- ***Settlement made in the process of patent disputes***
- ***Exercise of Patent Rights by NPEs***

Baseless lawsuits in IP

➢ *Abuse of Rights*

- *Review Guidelines on Unfair Exercise of Intellectual Property Rights*
- *Supreme Court 2010da95390*

*"In patent litigations, even when the defendant's execution of technology falls under the scope of the plaintiff's patented invention**, if the plaintiff's patent is manifestly likely to be invalidated, the plaintiff's infringement prohibition claim or damage claim based on that patent right is not allowed as abuse of rights"***

➢ *Sham Litigation*

- *Antitrust Guidelines for the licensing of Intellectual Property*
- *SUPREME COURT OF THE UNITED STATES, PROFESSIONAL REAL ESTATE INVESTORS, INC., et al., PETITIONERS v. COLUMBIA PICTURES INDUSTRIES, INC.*

*"First, **the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits** . . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor'. . . ."*

Samsung v. Apple

- *Apple alleged that Samsung's injunction claims based on the standard patents after the FRAND declaration is in violation of the principle of estoppel, and it is an abuse of rights for Samsung to claim injunction with demand for excessive royalty rates contrary to the FRAND terms and without complying with the obligation of good faith negotiation.*

- *Apple also alleged that Samsung's claim for injunction against infringement based on the standard patents corresponds to an unfair trade practice or an abuse of market dominant position. Since the claim constitutes an abuse of rights that violates the Fair Trade Act, it cannot be accepted.*

⇒ *In late August 2012, the court issued the judgment finding Apple's infringement of two Samsung technology patents(The court denied Apples' estoppel or anti-trust allegations). The court issued injunction preventing sales of the infringing products in South Korea and awarded damages for violated patents (Seoul District Court 2011gahap39552)*

Pay for delay agreement in pharmaceutical industry

GSK/Dong-A: Pay for delay agreement(2011)

GSK **Dong-A**

Pay for delay agreement

- ✓ *Withdrawal of a generic drug from the market*
- ✓ *Restrict the development and sales of medicine that can compete against GSK*
- ⇒ *In return, GSK offered financial benefits to Dong-A*

Supreme Court
(201Du24498)

Ondansetron: O
Valtrex: X

SEOUL HIGH COURT
(2012Nu3028)

SEOUL HIGH COURT
(2012Nu3035)

KFTC

Remedial measures & a total fine of 5.2 billion won

6. Concluding Remarks

Thank you for your attention

감사합니다.

2018 Trade Policy Agenda

and

2017 Annual Report

of the President of the United States on

the Trade Agreements Program

Office of the United States Trade Representative

FOREWORD

The 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program are submitted to the Congress pursuant to Section 163 of the Trade Act of 1974, as amended (19 U.S.C. 2213). Chapter V and Annex II of this document meet the requirements of Sections 122 and 124 of the Uruguay Round Agreements Act with respect to the World Trade Organization. In addition, the report also includes an annex listing trade agreements entered into by the United States since 1984. Goods trade data are for full year 2017. Services data by country are only available through 2016.

The Office of the United States Trade Representative (USTR) is responsible for the preparation of this report and gratefully acknowledges the contributions of all USTR staff to the writing and production of this report and notes, in particular, the contributions of Benjamin B. Christensen, Molly L. Foley, Garrett Kays, and Susanna S. Lee. Thanks are extended to partner Executive Branch agencies, including the Departments of Agriculture, Commerce, Health and Human Services, Justice, Labor, State, and Treasury.

March 2018

LIST OF FREQUENTLY USED ACRONYMS

AD	Antidumping
AGOA	African Growth and Opportunity Act
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BOP	Balance of Payments
CAFTA-DR	Dominican Republic-Central America-United States Free Trade Agreement
CBERA	Caribbean Basin Economic Recovery Act
CBI	Caribbean Basin Initiative
CTE	Committee on Trade and the Environment
CTG	Council for Trade in Goods
CVD	Countervailing Duty
DDA	Doha Development Agenda
DOL	Department of Labor
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
FOIA	Freedom of Information Act
GATT	General Agreement on Tariffs and Trade
GATS	General Agreements on Trade in Services
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
GPA	Government Procurement Agreement
HS	Harmonized System
IPR	Intellectual Property Rights
ICTIME	Interagency Center on Trade Implementation, Monitoring, and Enforcement
ITA	Information Technology Agreement
LDBDC	Least-Developed Beneficiary Developing Country
MFN	Most Favored Nation
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
SME	Small and Medium Size Enterprise
SPS	Sanitary and Phytosanitary Measures
TAA	Trade Adjustment Assistance
TBT	Technical Barriers to Trade
TIFA	Trade & Investment Framework Agreement
TPRG	Trade Policy Review Group
TPSC	Trade Policy Staff Committee
TRIMS	Trade Related Investment Measures
TRIPS	Trade Related Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
URAA	Uruguay Round Agreements Act
USDA	U.S. Department of Agriculture

USITC	U.S. International Trade Commission
USTR	United States Trade Representative
WTO	World Trade Organization

TABLE OF CONTENTS

THE PRESIDENT'S
2018 TRADE POLICY AGENDA

I. THE PRESIDENT'S TRADE POLICY AGENDA

EXECUTIVE SUMMARY

In 2016, President Trump told Americans, "Ladies and Gentlemen, it's time to declare our economic independence once again." Less than two years later, the Trump Administration has begun fulfilling that promise.

President Trump's trade agenda rests on principles as old as the Republic itself. President Washington, in his Farewell Address, warned his fellow citizens that when it comes to trade negotiations, "There can be no greater error than to expect, or calculate upon, real favors from nation to nation." He also advised that trade agreements should be "temporary," and "abandoned or varied, as experience and circumstances shall dictate." These statements laid the groundwork for an American trade policy that is pragmatic, flexible, and steadfastly focused on our national interest.

For most of our history, Americans generally followed President Washington's advice. Even after joining the General Agreement on Tariffs and Trade, not only did the United States retain its sovereign power to act in defense of its national interest – it repeatedly undertook such actions. The result was a trade policy capable of maintaining popular support at home, while promoting more efficient markets around the world.

More recently, however, the United States has backed away from these successful principles. Instead of asserting its sovereign authority to act in response to changing circumstances, the United States continued to passively adhere to outdated and under performing trade deals and allowed international bureaucracies to undermine U.S. interests. This has left U.S. workers and businesses at a disadvantage in global markets, as unfair trading practices flourish in the absence of a strong U.S. response. Countries benefiting from market-distorting practices had no incentive to seriously engage with the United States. Wages for many Americans came under pressure from threats of outsourcing.

For a long time, American politicians promised to do something about these problems – and for a long time, very little changed. Now, under the leadership of President Trump, the United States Government is finally beginning to act. Consider the following examples:

- During the 2016 Presidential campaign, President Trump told Americans that he would end U.S. participation in the Trans-Pacific Partnership. He said that "{t}here is no way to 'fix' the TPP," and that "We do not need to enter into another massive international agreement that ties us up and binds us down." After the campaign, President Trump fulfilled his promise, withdrawing the United States from the Trans-Pacific Partnership soon after taking office.

- For years, American politicians have promised to renegotiate the North American Free Trade Agreement (NAFTA) – even if they had to threaten withdrawal to do so. President Trump fulfilled this promise, launching new negotiations to revise NAFTA last August. He has also begun efforts to update a flawed free trade agreement between the United States and South Korea.

- Politicians of both parties have long promised strong enforcement of U.S. trade laws. Last year the Trump Administration self-initiated a Section 301 investigation into another country's unfair trading practices. This year – for the first time in 16 years – the Trump Administration granted safeguard relief under Section 201 of the Trade Act of 1974 to domestic industries suffering serious injury by reason of imports.

In short, President Trump has launched a new era in American trade policy. His agenda is driven by a pragmatic determination to use the leverage available to the world's largest economy to open foreign markets, obtain more efficient global markets and fairer treatment for American workers. This policy rests on five major pillars:

Supporting Our National Security. Last December, President Trump issued a new National Security Strategy for the United States. This document plainly states that, "A strong economy protects the American people, supports, our way of life, and sustains American power." It also makes clear that "the United States will no longer turn a blind eye to violations, cheating, or economic aggression." Our trade policy will fulfill these goals by using all possible tools to preserve our national sovereignty and strengthen the U.S. economy.

Strengthening the U.S. Economy. Last year, President Trump signed a new tax bill designed to make U.S. companies and workers more competitive with the rest of the world. The Trump Administration has also begun an aggressive effort to eliminate wasteful and unnecessary regulations that hamper business. These and other efforts to strengthen the U.S. economy will make it easier for American companies to succeed in global markets.

Negotiating Better Trade Deals. For too long, the rules of global trade have been tilted against American workers and businesses. This will change. Already our trading partners know that the United States will alter – or terminate – old trade deals that are not in our national interest. We have launched aggressive efforts to revise our trade agreements with our NAFTA partners and with South Korea. Furthermore, we intend to actively pursue new and better trade deals with potential partners around the world.

Aggressive Enforcement of U.S. Trade Laws. The Trump Administration strongly believes that all countries would benefit from adopting policies that promote true market competition. Unfortunately, history shows that not all countries will do so voluntarily. Accordingly, we also have an aggressive trade enforcement agenda designed to prevent countries from benefiting from unfair trading practices. We will use all tools available – including unilateral action where necessary – to support this effort.

Reforming the Multilateral Trading System. The Trump Administration wants to help build a better multilateral trading system and will remain active in the World Trade Organization (WTO). At the same time, we recognize that the WTO has not always worked as expected. Instead of serving as a negotiating forum where countries can develop new and better rules, it has sometimes been dominated by a dispute settlement system where activist "judges" try to impose their own policy preferences on Member States. Instead of constraining market distorting countries like China, the WTO has in some cases given them an unfair advantage over the United States and other market based economies. Instead of promoting more efficient markets, the WTO has been used by some Members as a bulwark in defense of market access barriers, dumping, subsidies, and other market distorting practices. The United States will not allow the WTO – or any other multilateral organization – to prevent us from taking actions that are essential to the economic well-being of the American people. At the same time, as we showed in last year's WTO Ministerial, we remain eager to work with like-minded countries to build a global economic system that will lead to higher living standards here and around the world.

These are exciting times for U.S. trade policy. Much work remains to be done – but we have already begun implementing a new trading agenda that will reward hard work and innovation instead of government planning and unfair subsidies. As our policies continue to take effect, we are confident that American workers, ranchers, businesses and farmers will all benefit from the chance to compete in a fairer world.

PUTTING AMERICA FIRST:

THE PRESIDENT'S 2018 TRADE POLICY AGENDA

To establish a trade policy that promotes America's security and prosperity, the Trump administration will focus on five major priorities: (1) adopting trade policies that support our national security policy; (2) strengthening the U.S. economy; (3) negotiating better trade deals that work for all Americans; (4) enforcing U.S. trade laws and U.S. rights under existing trade agreements; and (5) reforming the multilateral trading system.

A. Trade Policy that Supports National Security Policy

For the Trump Administration, trade policy is intended to advance our national interest. Thus, our trade policy should be consistent with, and supportive of, our national security strategy. It makes no sense to promote trade deals that strengthen our adversaries, or otherwise leave the United States weaker on the national stage. Accordingly, the President's trade agenda is intended to support the President's broader efforts to build a stronger and more secure country.

Last December, the Trump Administration issued a new National Security Strategy of the United States of America. As described below, several aspects of that strategy are particularly relevant to trade policy:

Building a Strong America. According to the National Security Strategy, "A strong America is in the vital interests of not only the American people, but also those around the world who want to partner with the United States in pursuit of shared interests, values, and aspirations." This principle applies to trade policy as well. For decades, the United States has played a unique role in promoting and encouraging true market competition all around the world. Many other countries have benefited from this policy, which has contributed to peace and prosperity on every continent. But the United States cannot fulfill this role without a strong domestic economy at home and without strong domestic support for open markets. Thus, we reject the notion that the United States can strengthen the global trading system – or promote efficient markets worldwide – by agreeing to trade policies that weaken our economy and undermine Americans' faith in global trading rules. Indeed, recent history shows that when the United States grows weaker, cheaters flourish and global markets grow less efficient.

Preserving National Sovereignty. The National Security Strategy reminds us that, "All political power is ultimately delegated from, and accountable to, the people." That includes the power to make rules of trade. The American people have the right to hold their elected officials responsible for any decisions they make with respect to trade policy. When international bureaucrats improperly set the terms of trade for Americans, they deny the American people this fundamental right. Obviously, there may be benefits to an agreed upon multinational system to resolve trade disputes, but any such system must not force Americans to live under new obligations to which the United States and its elected officials never agreed. Consistent with these principles, our trade policy will aggressively defend U.S. national sovereignty.

Responding to Economic Competitors. The National Security Strategy states that "China and Russia challenge American power, influence, and interests, attempting to erode American security and prosperity." These challenges are not limited to the national security realm but also impact trade policy. Both China and Russia have been unwilling to comply with many of their obligations as members of the WTO.

China has a statist economic model with a large and growing government role. The scope of China's economy means its economic practices increasingly affect the United States and the overall global economic and trade system. China has now been a member of the WTO for more than sixteen years and has yet to adopt the market economy system expected of all WTO Members. Indeed, if anything, China has appeared to be moving further away from market principles in recent years. Furthermore, as the world's second largest economy, China has an enormous capacity to distort markets worldwide. China's policies are contributing to a dramatic misallocation of global resources that leaves everyone – including the Chinese people – poorer than they would be in a world of more efficient markets.

Of course, as a sovereign nation, China is free to pursue whatever trade policy it prefers. But the United States, as a sovereign nation, is free to respond. Under President Trump's leadership, we will use all available tools to discourage China – or any country that emulates its policies – from undermining true market competition. We will resist efforts by China – or any other country – to hide behind international bureaucracies in an effort to hinder the ability of the United States to take robust actions, when necessary, in response to unfair practices abroad. In short, our trade policy – like our national security policy – will seek to protect U.S. national interests.

Recognizing the Importance of Technology. The National Security Strategy states that, "The United States must preserve our lead in research and technology and protect our economy from competitors who unfairly acquire our intellectual property." Our trade policy will support these efforts. In fact, as discussed in more detail below, we have already launched an investigation pursuant to Section 301 of the Trade Act of 1974 into allegations that China is engaged in unreasonable and discriminatory efforts to obtain U.S. technologies and intellectual property. If necessary, we will take action under Section 301 to prevent China from obtaining the benefit of this type of unfair practice. Our trade policy will also promote innovation in the digital economy. For example, we will take steps to promote a thriving global marketplace for online platforms.

Working with Others. The National Security Strategy states that, "Together with our allies, partners, and aspiring partners, the United States will pursue cooperation with reciprocity. Cooperation means sharing responsibilities and burdens." These same principles apply to our trade policy. Under President Trump, the United States remains committed to working with like-minded countries to promote fair market competition around the world – but we will not pay for cooperation with trade deals that put U.S. workers and businesses at an unfair disadvantage. Countries that are committed to market-based outcomes and that are willing to provide the United States with reciprocal opportunities in their home markets will find a true friend and ally in the Trump Administration. Countries that refuse to give us reciprocal treatment or who engage in other unfair trading practices will find that we know how to defend our interests.

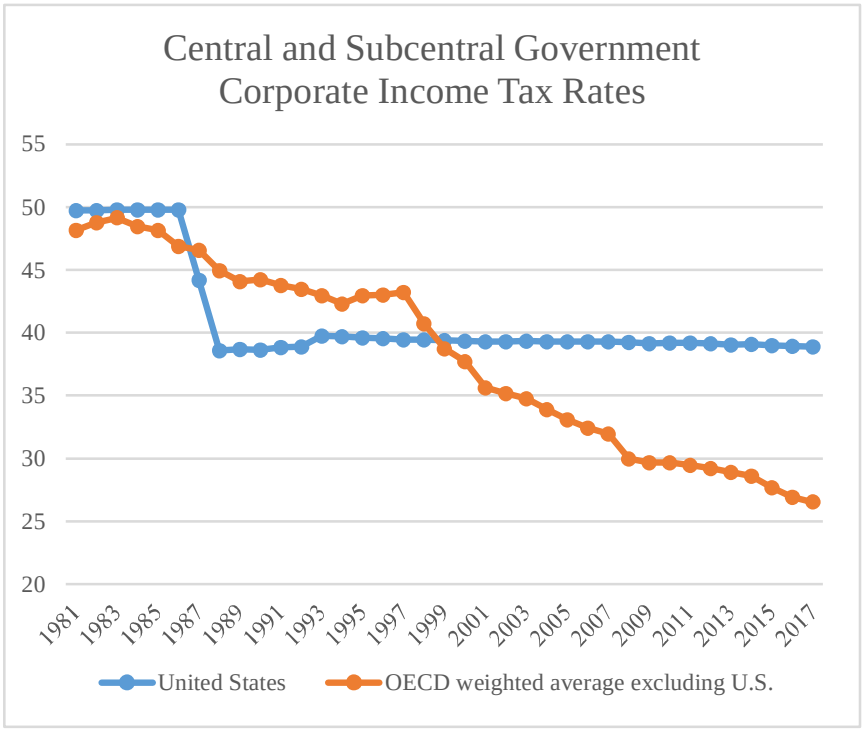
B. Strengthening the U.S. Economy

Improving competitiveness through tax cuts and reforms. In December 2017, President Donald J. Trump signed the legislation commonly known as the *Tax Cuts and Jobs Act (TCJA)* – the most significant tax cut and reform law in more than 30 years. The law was designed to achieve four goals: tax relief for middle-income families, simplification for individuals, repatriation of offshore income, and

economic growth by improving competitiveness. The Council of Economic Advisers (CEA) estimates that the business tax provisions in the new law will increase economic output by 2 to 4 percent in the long term and raise wage and salary income for households by an average of approximately $4,000.

Reducing business tax rates to make American companies and workers more competitive. The centerpiece of the business tax reforms in the TCJA is a reduction in the top statutory corporate tax rate from 35 percent to 21 percent, making the United States competitive with our major trading partners.

The last major business tax reform was achieved in 1986 when Ronald Reagan cut the top statutory corporate tax rate from 46 percent to 34 percent, making American businesses among the most competitive in the developed world. Since then, other countries aggressively cut their tax rates in an effort to compete with the United States and attract business investment. The average corporate tax rate in the OECD countries fell from 47 percent in 1986 to approximately 24 percent in 2017 – well below the U.S. rate. The United States went from having a competitive corporate tax rate to having the highest statutory corporate tax rate in the developed world. American businesses responded by offshoring jobs, moving factories, shifting profits to low tax jurisdictions, and moving their headquarters through corporate inversions. Cutting the statutory corporate tax rate to 21 percent will align the United States with our major trading partners, allowing our businesses and workers to compete on a more level playing field. The TCJA also cut taxes for pass through businesses by reducing individual tax rates and creating a 20 percent deduction for qualified business income.



Source: Organisation for Economic Cooperation and Development
*The combined statutory tax rate includes the average subnational rate

Repatriation of offshore income. Another critical business tax reform in the TCJA was switching from a worldwide system of taxation to a territorial tax system that does not penalize companies for incorporating in the United States. Under a worldwide system, a country taxes businesses on profits earned anywhere in the world. In contrast, under a territorial system, countries impose tax only on profits earned inside that country's borders. Prior to enactment of the TCJA, the United States was one of only six OECD countries to tax companies on their worldwide profits.[1] The combination of a high corporate tax rate and worldwide system resulted in one of the least competitive tax systems in the developed world. American

[1] PWC, "Evolution of Territorial Tax Systems in the OECD," April 2, 2013. http://www.techceocouncil.org/clientuploads/reports/Report%20on%20Territorial%20Tax%20Systems_20130402b.pdf

companies responded by reinvesting their foreign earnings offshore to avoid paying the higher taxes that would be due if those profits were repatriated to the United States. By the end of 2015, U.S. multinationals invested an estimated $2.5 trillion of income in other countries.[2] The TCJA reformed the tax treatment of U.S. companies by switching from a worldwide tax system to a territorial tax system, thereby ending the penalty on companies that headquarter in the United States. A territorial system will help to level the playing field for American businesses and allow them to repatriate earnings back to the United States without incurring high tax penalties.

As a transition to the territorial system, earnings that have already accumulated offshore will be subject to a one-time tax of 15.5 percent (for cash) or 8 percent (for non-cash assets). This transition tax will eliminate the U.S. tax incentive for keeping these accumulated earnings offshore, resulting in more money being available to invest in the United States.

Reforms to protect the U.S. tax base. The TCJA also implemented important reforms to discourage profit shifting and protect the U.S. tax base. Under the new law, excess returns earned overseas are subject to an effective minimum tax of 10.5 percent (increasing to 13.125 percent after 2025).

In addition, the TCJA seeks to minimize profit shifting through a new base erosion anti abuse tax or "BEAT." The BEAT is an alternative minimum tax applicable to certain corporations that make deductible related-party payments (other than cost of goods) to a foreign entity. The BEAT prevents companies from eliminating their U.S. taxable income through payments to related parties in a low tax jurisdiction.

Impact of tax reform on the trade deficit. The combination of a competitive corporate tax rate and new anti-base erosion provisions has the potential to reduce the U.S. trade deficit by reducing artificial profit shifting. By reducing incentives to engage in artificial profit shifting, the new tax law should lead to more efficient markets here and abroad.

Reducing Regulatory Burdens. The Trump Administration has taken seriously the need to reduce regulatory burdens imposed on American businesses and citizens through trade policy. President Trump issued two executive orders last spring, which direct agencies to meet these goals. Agencies are in the process of systematically evaluating existing regulatory actions to determine whether they are unnecessary, ineffective, duplicative, or inconsistent with legal requirements and Administration policy. The Administration's regulatory policy has resulted in the repeal of twenty-two regulations for every new regulation issued and over $8.1 billion in net present value regulatory cost savings in FY 2017. The Administration's commitment to deregulation has contributed to a strong investment environment which should excite the United States' allies and trading partners.

C. Negotiating Trade Deals That Work for All Americans

The Trump Administration will aggressively negotiate trade deals designed to benefit all Americans. We have already begun efforts to improve NAFTA and KORUS. We intend to ask the Congress to extend the President's Trade Promotion Authority – also known as "fast track" authority – to obtain an up or down vote on new trade agreements submitted to Congress. Based on our discussions with Congressional leaders, we believe that there is strong support for such an extension, which would mean that fast-track authority will remain in place until 2021.

[2] Audit Analytics, *Indefinitely Reinvested Foreign Earnings Still On the Rise*. July 25, 2016. http://www.auditanalytics.com/blog/indefinitely-reinvested-foreign-earnings-still-on-the-rise/

As shown in more detail below, President Trump will use this authority to obtain better trading terms for American workers, farmers, businesses, and ranchers. But we must address an obstacle that could significantly undermine our efforts. The Administration has nominated four outstanding people to serve in the Office of the U.S. Trade Representative. Three of these nominees would serve as Deputy U.S. Trade Representatives and a fourth would be Chief Agricultural Negotiator. They would have the rank of Ambassador and are essential to successfully concluding the negotiations described below. These four nominees – each of whom is willing and eager to work for this country – have been before the Senate for at least seven months. Every President since Ronald Reagan has had at least one Deputy USTR in place within 45 days of the nomination. This President has been waiting since June 15, 2017 – 260 days – and none of his nominees has even been given the courtesy of a floor vote. We urge the Senate to quickly confirm all four nominees.

1. NAFTA

NAFTA went into force on January 1, 1994, nearly a quarter of a century ago. At the time, pundits and policymakers in the United States assured concerned workers across the country that the new agreement would create hundreds of thousands of jobs, and that the United States would enjoy expanding trade surpluses with Mexico upon implementation. The Institute for International Economics epitomized this thinking when it forecast in 1993 that NAFTA would lead directly to the creation of 170,000 U.S. jobs and that the trade surplus with Mexico would expand well into the 2000s. President Bill Clinton, who signed the bill that approved NAFTA, declared further that the NAFTA's side agreements on the environment and labor would make it a "force for social progress as well as economic growth."

Unfortunately, these promises were not fulfilled. While NAFTA has had positive effects for some, notably American farmers and ranchers and those living in border communities dependent on trade flows, for many others, NAFTA has failed. For these Americans, NAFTA has meant job losses, especially in the manufacturing sector, and the closing down and relocation of factories from American towns and cities across both borders. Our goods trade balance with Mexico, until 1994 characterized by reciprocal trade flows, almost immediately soured after NAFTA implementation, with a deficit of over $15 billion in 1995, and over $71 billion by 2017.

Looking back, it is not hard to understand how this all happened.

First, NAFTA provided thousands of American companies with the opportunity to pay far lower wages to workers in Mexico. Indeed, while NAFTA adopted aspirational language on the importance of labor rights and environmental protections, both issues are addressed only in "side agreements" to the current NAFTA that are subject to an essentially toothless dispute settlement mechanism. Importantly, the labor side agreement provides limited protections for rights recognized internationally, including freedom of association and collective bargaining.

Back in 1993, NAFTA proponents reassured skeptics that the agreement would lead to leaps in productivity and wages in Mexico. That year President Clinton even asserted that NAFTA "means that there will be an even more rapid closing of the gap between" U.S. and Mexican wages. Instead, since NAFTA went into effect, the gap in Mexican wages and labor productivity with the United States has widened. The OECD even reports that the average annual wage in Mexico *fell* from $16,008 in 1994 to $15,311 in 2016.

While it is true that workers in the manufacturing sector in Mexico earn higher wages than those in other sectors, the gap between Mexican workers and U.S. workers is still striking. Mexican manufacturing workers receive an average of $20 per day, and workers in automotive manufacturing reportedly make approximately $25 per day. By comparison, manufacturing workers in the United States make an average

of $160 per day. Further, NAFTA contained terms that fell short for the American people by incentivizing – intentionally or not – companies across America to outsource production, especially to Mexico. In the case of Canada, the NAFTA failed to address longstanding and unfair Canadian trade practices across several industries, from the agricultural sector to high tech industries.

The flaws in NAFTA became apparent soon after implementation. Since that time, politicians have called for it to be renegotiated. Nevertheless, when President Trump was elected, there had been no major changes to NAFTA since it entered into force more than two decades ago.

In 2016, during his campaign, President Trump made clear that, in its current form, NAFTA was not acceptable. In June 2016, he said the following: "I'm going to tell our NAFTA partners that I intend to immediately renegotiate the terms of that agreement to get a better deal for our workers. And I don't mean just a little bit better, I mean a lot better. If they do not agree to a renegotiation, then I will submit notice under Article 2205 of the NAFTA agreement that America intends to withdraw from the deal."

Almost immediately after inauguration, President Trump began to fulfill this promise. For months, high-ranking Administration officials consulted with Congress on plans to renegotiate. In May 2017, within a few days after confirmation as the U.S. Trade Representative, Ambassador Lighthizer provided Congress with the 90-day notice required under Trade Promotion Authority to launch renegotiations. On August 16, 2017 – the 91st day after Congressional notification – those renegotiations began. They are currently ongoing.

In the renegotiations, USTR is committed to getting the best possible deal for all Americans. While NAFTA is certainly a bad deal for the United States, USTR recognizes that many Americans have benefited from it. Accordingly, USTR has moved rapidly in an effort to allow for a seamless transition to an updated version of NAFTA:

- USTR reviewed more than 12,000 public comments received with respect to the renegotiations.
- USTR prepared a complete new text, replete with new ideas and fresh approaches.
- USTR and other U.S. Government agencies have participated in seven separate negotiating rounds since August 2017 with their counterparts from Mexico and Canada.
- USTR has published its objectives for the renegotiation directly on its website, and updated these objectives in November 2017 to reflect the full scope of U.S. proposals.
- Since launching negotiations, Ambassador Lighthizer and USTR Staff have met personally with dozens of Members of Congress, and have spent more than 1,400 man-hours in consultation with Members and their staffs.
- During this process, USTR has also held extensive consultations with members of the private sector, representatives of labor, ranchers, farmers, and members of the Non-Government Organizations (NGO) community. There have been dozens of scheduled briefings to official advisory committees, hundreds of hours of stakeholder consultations, and a continuing open door policy.
- In fact, at each negotiating round, USTR chapter leads brief Congressional staff and members of advisory committees. These advisory committees cover agricultural, industry, small and medium-sized business, and labor and environmental concerns.

All of this work is being done to comply with Congressional rules, build support for a new version of NAFTA, and encourage a smooth transition to the updated agreement. In short, the Administration has not simply sought to eliminate NAFTA but has made great efforts to alleviate uncertainty for those Americans who rely on it.

In the renegotiations, the Administration has two primary goals.

First, it wants to update NAFTA with modern provisions representing a high standard agreement for the 21st century – including strong provisions on digital trade, intellectual property, cybersecurity, good regulatory practices, and treatment of state-owned enterprises. All parties agree that NAFTA is outdated – it was signed before most Americans had ever heard of the Internet. The Administration believes it is time to bring NAFTA up to date.

Second, the Administration seeks to rebalance NAFTA. The purpose of an agreement like NAFTA is to create special rules – to give certain countries unique access to this market, access that other countries lack. Instead, NAFTA encourages companies seeking to serve the U.S. market to put their facilities elsewhere – thereby putting American workers and businesses at an unfair disadvantage.

With this in mind, USTR has set as its primary objective for these renegotiations to: "Improve the U.S. trade balance and reduce the trade deficit with the NAFTA countries." To accomplish this, we are focusing our efforts on tightening rules of origin for products imported into the United States from Canada and Mexico for which we have significant trade imbalances, like automobiles and automotive parts. Our proposals seek to strengthen the rules of origin for such products, and make them more enforceable through stricter tracing requirements, to ensure that they contain considerable regional, and U.S specific, content.

We are also determined to avoid provisions that will encourage outsourcing. If a company decides to build a factory in Mexico – and it has legitimate, market based reasons for doing so – then it should act as the market dictates. But we reject the notion that the U.S. Government should use NAFTA – or any other trade deal – to *encourage* outsourcing. The point of a trade deal is to create increased opportunities for market efficiency, not to encourage foreign investments that are otherwise not viable.

It should also be noted that we have made serious proposals in the labor and environment chapters that will help level the playing field for American workers and businesses and raise standards in these areas. For both chapters, we are insisting that all of the provisions be subject to the same dispute settlement mechanism that applies to other obligations in the agreement.

If we succeed in achieving these core objectives, a renegotiated NAFTA would certainly prove a fairer deal for all Americans. This includes those manufacturing workers across the country whose hold on their jobs has been tenuous due to a flawed trade agreement.

2. KORUS

The overall benefits to the United States of KORUS have fallen well short of initial expectations. Prior to passage of the agreement, the U.S. International Trade Commission estimated that U.S. merchandise exports to Korea would be approximately $9.7 to $10.9 billion higher with KORUS fully implemented, and Korea's exports to the United States would be an estimated $6.4 to $6.9 billion higher. Many pointed to other benefits, including anticipated substantial improvements to Korea's regulatory environment, which would significantly level the playing field for U.S. exporters and businesses.

The record after nearly six years of KORUS, however, has been disappointing.

After six rounds of tariff cuts under the KORUS, and with over 90 percent of two way trade in goods currently free of tariffs, U.S. exports of goods to Korea rose modestly from $43.5 billion in 2011 to $48.3 billion in 2017. In contrast, Korea's goods exports to the United States have grown rapidly, rising from $56.7 billion in 2011 to $71.2 billion in 2017. U.S. services exports showed early gains, but growth has since slowed substantially. In sum, the U.S. goods deficit with Korea has increased by 73 percent since the KORUS came into effect through 2017.

In addition, concerns have only risen with respect to Korea's preparedness to faithfully implement its obligations under KORUS. In far too many cases, Korea continues to fall short of adequately meeting key commitments in areas such as labor, competition, customs, and pharmaceuticals and medical devices. In other cases, Korea has introduced additional measures since the FTA came into effect – including in the area of autos – that have directly undermined the benefits of the agreement and limited U.S. export potential.

Faced with these facts, President Trump directed USTR to address these outstanding problems, as well as to seek fairer, more reciprocal trade with Korea. Accordingly, in July 2017 Ambassador Lighthizer called for a Special Session of the KORUS Joint Committee to initiate the process of seeking modifications and amendments to the agreement. In October 2017, Korea agreed to pursue discussions on modifications and amendments, and completed necessary domestic procedures in December in order to initiate such discussions.

USTR remains engaged in ongoing negotiations with Korea to improve KORUS in order to deliver more reciprocal outcomes for U.S. workers, exporters, and businesses. The Administration will continue to vigorously pursue U.S. objectives with the Korean government on an expedited timetable.

USTR's ongoing discussions and negotiations aim to achieve a range of objectives, including:

- Outcomes that improve U.S. export opportunities and facilitate more balanced, two way trade;
- Resolution of outstanding implementation issues that continue to harm or undermine U.S. interests and U.S. export potential;
- Rebalancing of commitments on tariffs necessary to maintain a general level of reciprocal and mutually advantageous commitments under the agreement;
- Reducing and eliminating non-tariff barriers to exports of U.S. made motor vehicles and motor vehicle parts; and
- Improvement of other terms to ensure the benefits of the agreement are more directly supportive of job creation in the United States.

Achieving these objectives would make KORUS a fairer deal for Americans.

3. Other Negotiations

The Trump Administration intends to reach other agreements designed to promote fair, balanced trade and support American jobs and prosperity. The Administration has already begun discussions and processes to achieve these goals.

a. Expanding Trade and Investment with the United Kingdom

The United States and the United Kingdom (UK) have a deep, long-standing trade and investment relationship. The UK is America's seventh largest goods trading partner and largest partner in services trade. In 2016, (most recent date available for full-year services trade) total two-way goods and services trade was $227 billion, with a goods surplus of $1 billion and a services surplus of $14 billion. The United States and the UK have directly invested more than $1 trillion in each other's economies. We share a common language, business culture, support for good regulatory practices and transparency, and respect for intellectual property rights. Our economies are diversified, and technology and innovation drive our growth.

In 2016, the UK voted in a referendum to leave the European Union (EU), and the UK is in the process of negotiating the terms of that departure (commonly called "Brexit"). The Trump Administration seeks to maintain and deepen our economic relationships with both the UK and the EU. The UK's negotiations with the EU on the terms both of its exit and its future relationship with the EU will likely have significant consequences for U.S. trade with both the UK and the EU.

In March 2017, the UK initiated a two year process to negotiate the terms of its withdrawal from the EU. In December 2017, the UK and EU issued a Joint Progress Report that laid out their agreement on issues related to the exit, referred to as the first phase of negotiations. During the second phase of negotiations, which has already begun, the UK and EU are discussing a transitional arrangement that would govern their relationship for a period of time following UK withdrawal from the EU, which is expected to start March 29, 2019, and last at least through 2020. We anticipate that during such a transition period, the UK would no longer be part of the EU and free to negotiate trade agreements with other countries, but it would remain unable to implement any agreements until the end of the transition period.

President Trump and UK Prime Minister Theresa May met in January 2017 and agreed to deepen current U.S.-UK trade and investment and lay the groundwork for a future trade agreement. While U.S.-UK trade is already substantial, and our economies are highly integrated, there is a range of areas where one could expect an ambitious FTA to be mutually beneficial. These include trade in industrial and agricultural goods, where tariff and other barriers still impede trade; differences in regulatory systems, which impose extra burdens on exporters, especially small- and medium-sized enterprises, without improving health and safety outcomes; and commitments in services, investment, and intellectual property that can foster deeper trade and innovation.

In July 2017, the United States and the UK established a Trade and Investment Working Group, under the auspices of the broader U.S.-UK Steering Group, which is focused on providing commercial continuity for U.S. and UK businesses, workers, and consumers as the UK leaves the EU and exploring ways to strengthen trade and investment ties ahead of the exit. The Working Group will also begin to lay the groundwork for a potential free trade agreement, once the UK has left the EU, and explore areas in which the two countries can collaborate to promote open markets around the world. The Working Group is examining a range of trade related areas, including industrial and agricultural goods; services, investment, financial services, and digital trade; intellectual property rights and enforcement; regulatory issues related to trade; labor and environment; and small- and medium-sized enterprises.

The Trade and Investment Working Group will guide sustained engagement by the United States and UK trade teams during 2018 and beyond. The Group is planning quarterly meetings, and trade policy officials from both sides will be advancing the work in between the quarterly meetings throughout the year. One of the U.S. priorities for this work will be to respond to evolving issues in the UK-EU negotiations, which could potentially impact the American business community. In addition, another area of our work with the UK will be to preserve market access of U.S. stakeholders as the UK begins to establish its World

Trade Organization schedules. The Working Group will also work with the U.S.-UK Economic Working Group, also established as part of the broader U.S.-UK Steering Group, to ensure that U.S.-UK agreements and other arrangements are in place once the UK leaves the EU. The United States will maintain commercial continuity in areas where UK and U.S. obligations to each other had previously been set out in U.S.-EU agreements or arrangements, and to identify ways we can enhance our trade and investment relationship prior to Brexit.

UK and the WTO. The UK will need to create its own distinct WTO schedules by the time it separates from the European Union at the end of March 2019. These schedules will need to include commitments and concessions on tariffs, tariff rate quotas (TRQs), services, and levels of agricultural domestic support. Similarly, the UK will need to negotiate a separate schedule for the WTO Government Procurement Agreement (GPA) to which the United States is also a Party. The UK accounts for 25 percent of the EU's $330 billion government procurement covered under the GPA, representing the largest EU public procurement market for U.S exports.

The Trump Administration intends to ensure that the equities of U.S. stakeholders are taken fully into account as the UK begins this year to create its WTO schedules and negotiate its entry into the WTO GPA.

b. Countries of the Trans-Pacific Partnership

One of President Trump's first decisions was to withdraw the United States from the proposed Trans-Pacific Partnership. In doing so, he not only fulfilled a campaign promise – he avoided wasting further time on a proposed deal that faced major opposition from both parties in this country. In the 2016 campaign, Secretary Clinton had also promised to oppose the TPP if she had been elected.

The U.S. withdrawal from TPP allows the United States to pursue better and fairer trade relationships with the 11 other countries in the TPP. It should be noted that the United States already has free trade agreements with six TPP countries: Canada, Australia, Mexico, Chile, Peru, and Singapore. In 2017, these countries accounted for 47 percent of the total gross domestic product (GDP) of the 11 TPP countries. As discussed above, the United States is currently in talks to update our free trade agreement with Mexico and Canada.

The five remaining TPP countries are Japan, Vietnam, Malaysia, New Zealand, and Brunei. Japan is by far the largest of these economies – it accounts for 87 percent of their combined GDP. Since President Trump's visit with Japan's Prime Minister Shinzo Abe in February 2017, the United States has made clear that it seeks a closer trade relationship with Japan. President Trump has also indicated a willingness to engage with the other TPP countries – either individually or collectively – on terms that will lead to significantly improved market outcomes. In 2018, the Trump Administration will continue efforts to build stronger, better, and fairer trading relationships with these countries.

c. Seeking Bilateral Market Access for U.S. Agriculture

As highlighted in the *Report to the President of the United States from the Task Force on Agriculture and Rural Prosperity*, America's farmers and ranchers rely on exports to generate and sustain economic growth for rural America. In 2016, 20 percent of farm income was generated by exports to the 96 percent of the world's consumers that live outside the United States. In 2017, U.S. farmers, ranchers

and businesses exported $159 billion of agriculture and agriculture related products, an increase of four percent over 2016.[3]

The day-to-day work of the Office of the U.S. Trade Representative and the U.S. Department of Agriculture to monitor actions by trading partners and eliminate unfair trade barriers is a central and vitally important part of our strategy to expand U.S. food and agricultural exports. The 2017 Annual Report highlights key successes in eliminating unfair and protectionist barriers to U.S. agricultural exports in 2017, but we can and will do better.

The Trump Administration will use all tools to ensure America's farmers are treated fairly. The Administration will use a whole of government approach to resolve barriers under our Trade Investment Framework Agreements, free trade agreement committees and other dialogues. This work also includes the daily engagement of USDA's overseas staff in 93 offices covering 171 countries and U.S. Department of State officers in over 180 countries to prevent and quickly resolve trade issues and port of entry problems. Further, building coalitions with other like-minded countries will multiply the Administration's effectiveness to advance science and risk-based regulatory policies for new technologies, animal health and plant health.

To combat the myriad of unfair trade barriers facing U.S. food and agricultural exports, the Trump Administration is also prioritizing its efforts for 2018 and will be working to resolve unfair trade barriers around the world for the full range of commodities, food, beverages, and agriculture products used for industrial inputs. For example, building on work completed in 2017, we will seek to open Argentina to U.S. pork and fruit; achieve science based standards for U.S. beef to Australia; resolve barriers to American lamb, beef, horticultural products and processed foods to Japan; establish year round markets for U.S. rice to Colombia, Nicaragua and China; resolve access issues with the European Union for U.S. high quality beef; reopen the Indian market to U.S. poultry and open it to pork; work with Middle Eastern countries, China and elsewhere on food certificates, where necessary, based on science; open Vietnam to meat offal; and resolve barriers to U.S. corn and soybeans derived from agricultural biotechnology in various countries. The Administration has prioritized removing barriers to U.S. exports to China, our second largest market in 2017 and the market with immediate and substantial potential to provide more sales or America's farmers, ranchers, and agribusiness. These are only a few of the Administration's priorities to provide America's farmers and ranchers expanded opportunities to market their products around the world.

d. Other Negotiations

As shown above, the United States currently has a very ambitious negotiating agenda. The scope of our current activity – as well as our lack of confirmed deputies – necessarily limits our ability to engage in other negotiations. Furthermore, any trade deal to be approved by the Trump Administration must be consistent with the principles discussed throughout this Agenda. Nevertheless, we remain interested in efforts to develop new trade rules that will promote efficient markets around the world. With this background in mind, we continue to analyze negotiations undertaken by the prior administration, including negotiations for a proposed Trade in Services Agreement, as well as the proposed Trans-Atlantic Trade and Investment Partnership between the United States and the European Union, in which the European Union has expressed little interest so far. If we see opportunities to use prior negotiations like these to advance the President's Agenda, and to build stronger markets for American workers and businesses, we will not hesitate to seize them.

[3] Based on the WTO Agriculture Sectors, data from the USDA Foreign Agricultural Service's Global Agricultural Trade System.

C. Enforcing and Defending U.S. Trade Laws

The Trump Administration understands that there are no successful trade agreements without enforcement. It will continue to use U.S. trade laws and international enforcement mechanisms to ensure that other countries treat America fairly and play by the rules of existing international trade agreements. The United States has for years expressed serious and growing concerns that the WTO dispute settlement system is diminishing U.S. rights to combat unfair trade, effectively rewriting WTO rules. The Trump Administration shares those long-standing concerns and is determined to ensure the WTO remains a rules based system, with WTO disputes handled according to the rules as agreed by the United States.

1. Section 301

Section 301 of the Trade Act of 1974 (Trade Act) is designed to address foreign unfair trade practices. Section 301 may be used to enforce U.S. rights under bilateral and multilateral trade agreements and also may be used to respond to unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict U.S. commerce. For example, Section 301 may be used to obtain increased market access for U.S. goods and services, to provide more equitable conditions for U.S. investment abroad, and to obtain more effective protection worldwide for U.S. intellectual property.

The Section 301 provisions of the Trade Act provide a domestic procedure whereby interested persons may petition the USTR to investigate a foreign government act, policy, or practice that may be burdening or restricting U.S. commerce and take appropriate action. USTR also may self-initiate an investigation.

In each investigation, USTR must seek consultations with the foreign government whose acts, policies, or practices are under investigation. If the acts, policies, or practices are determined to violate a trade agreement or to be unjustifiable, USTR must take action. If they are determined to be unreasonable or discriminatory and to burden or restrict U.S. commerce, USTR must determine whether action is appropriate and if so, what action to take.

Actions that USTR may take under Section 301 include to: (1) suspend trade agreement concessions; (2) impose duties or other import restrictions; (3) impose fees or restrictions on services; (4) enter into agreements with the subject country to eliminate the offending practice or to provide compensatory benefits for the United States; and/or (5) restrict service sector authorizations. After a Section 301 investigation is concluded, USTR is required to monitor a foreign country's implementation of any agreements entered into, or measures undertaken, to resolve a matter that was the subject of the investigation. If the foreign country fails to comply with an agreement or USTR considers that the country fails to implement a WTO dispute panel recommendation, USTR must determine what further action to take under Section 301.

China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. On August 14, 2017, the President issued a Memorandum (82 FR 39007) to the U.S. Trade Representative instructing USTR to determine, consistent with section 302(b) of the Trade Act of 1974 (19 U.S.C. 2412(b)), whether to investigate any of China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.

Pursuant to the President's Memorandum, on August 18, 2017, USTR initiated an investigation under section 302(b) of the Trade Act (19 U.S.C. 2412(b)) to determine whether acts, policies, and practices of the government of China related to technology transfer, intellectual property, and innovation are unreasonable or discriminatory and burden or restrict U.S. commerce.

The acts, policies, and practices of the government of China directed at the transfer of U.S. and other foreign technologies and intellectual property are an important element of China's strategy to become a leader in a number of industries, including advanced technology industries, as reflected in China's "Made in China 2025" industrial plan, and other similar industrial policy initiatives. The Chinese government's acts, policies, and practices take many forms. The investigation initially will consider the following specific types of conduct:

First, the Chinese government reportedly uses a variety of tools, including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, and other mechanisms to regulate or intervene in U.S. companies' operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies. Moreover, many U.S. companies report facing vague and unwritten rules, as well as local rules that diverge from national ones, which are applied in a selective and nontransparent manner by Chinese government officials to pressure technology transfer.

Second, the Chinese government's acts, policies, and practices reportedly deprive U.S. companies of the ability to set market based terms in licensing and other technology related negotiations with Chinese companies and undermine U.S. companies' control over their technology in China. For example, the Regulations on Technology Import and Export Administration mandate particular terms for indemnities and ownership of technology improvements for imported technology, and other measures also impose non-market terms in licensing and technology contracts.

Third, the Chinese government reportedly directs or unfairly facilitates the systematic investment in, or acquisition of, U.S. companies and assets by Chinese companies to obtain cutting edge technologies and intellectual property and generate large scale technology transfer in industries deemed important by Chinese government industrial plans.

Fourth, the investigation will consider whether the Chinese government is conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber enabled theft of intellectual property, trade secrets, or confidential business information, and whether this conduct harms U.S. companies or provides competitive advantages to Chinese companies or commercial sectors.

In addition to these four types of conduct, USTR also will consider information on other acts, policies, and practices of China relating to technology transfer, intellectual property, and innovation described in the President's Memorandum that might be included in the investigation or might be addressed through other applicable mechanisms.

Pursuant to section 302(b) (1) (B) of the Trade Act (19 U.S.C. 2412(b) (1) (B)), USTR has consulted with appropriate advisory committees. USTR also has consulted with members of the interagency Section 301 Committee. On the date of initiation, USTR requested consultations with the government of China concerning the issues under investigation, pursuant to section 303(a) (1) of the Trade Act (19 U.S.C. 2413(a) (1)).

USTR held a public hearing on October 10, 2017 and two rounds of public written comment periods. USTR received approximately 70 written submissions from academics, think tanks, law firms, trade associations, and companies.

Under section 304(a)(2)(B) of the Trade Act (19 U.S.C. 2414(a)(2)(B)), the U.S. Trade Representative must make his determination within 12 months from the date of the initiation whether any

act, policy, or practice described in section 301 of the Trade Act exists and, if that determination is affirmative, what action, if any, to take.

2. Section 201

Modern U.S. trade agreements rest on the expectation that reducing barriers to trade will increase opportunities for U.S. exporters and decrease costs to consumers. But they have also recognized that sometimes these expectations do not bear out, and that domestic industries facing increased imports will come under unusual competitive stress. To address these possibilities, all of our trade agreements have provisions, known as "escape clauses" or "safeguards" that allow the United States and its partners to impose temporary trade restrictions when increased imports of a product harm domestic producers of that product.

Section 201 of the Trade Act of 1974 provides one such mechanism. It allows domestic producers to request the U.S. International Trade Commission ("ITC") to conduct an investigation of increased imports and their effects on the U.S. market. If the ITC finds that imports have increased such that they are a substantial cause of serious injury, or the threat thereof to a domestic industry producing an article like or directly competitive with the imported articles, the President shall take all appropriate and feasible action within his authority he considers necessary to facilitate efforts by the domestic industry to make a positive adjustment to import competition, as long as the economic and social benefits of such action are greater than the costs.

The last time the United States used Section 201 was in 2002, when President Bush imposed temporary tariff increases on a number of steel products. Steel producers used the respite to restructure their operations, emerging from the process stronger and more competitive than before. During the campaign, President Trump committed to use Section 201 to remedy trade disputes and get a fair deal for the American people.

In May and June 2017, U.S. producers filed petitions with the ITC requesting investigations of imports of solar cells and modules, and of large residential washing machines. The ITC conducted thorough investigations and determined in both cases that increased imports were a substantial cause of serious injury to U.S. producers. President Trump used his authority under Section 201 to increase tariffs on solar cells and modules by 30 percentage points, and to impose a 50 percent additional tariff on imports of washing machines beyond historic levels.

a. Large residential washing machines

During the 2012-2016 period, following an investigation initiated at the request of U.S. producers Whirlpool and General Electric ("GE"), the United States imposed antidumping and countervailing duties on washer imports from Korea and Mexico. However, the main Korean producers, LG and Samsung, frustrated the remedial purpose of these tariffs by shifting production to China. Whirlpool and GE then obtained antidumping duties on imports from China, which prompted LG and Samsung to shift their production operations again. The U.S. producers then turned to Section 201, which provides for application of trade restrictions against all countries, limiting foreign producers' availability to evade duties by moving operations from one country to another.

The ITC investigation revealed that the volume of imported washing machines nearly doubled from 2012 to 2016. Samsung and LG engaged in significant underselling and aggressive pricing, forcing Whirlpool and GE to reduce prices to defend their market share. The domestic producers' financial condition – already harmed by earlier dumping and subsidization – worsened, and they had to cut capital

and research and development spending. The ITC determined that the injury to the domestic industry was serious, and that increased imports were the most important cause of that injury.

U.S. producers stated that if the President imposed robust import restrictions on increased imports, they would maximize capacity utilization to expand production, reconsider curtailed projects in development, and invest in product line improvements. The Korean producers announced that they would expedite their plans to locate washing machine production in the United States, with Samsung in Newberry, South Carolina, and LG in Clarksville, Tennessee. They set a goal of producing the large majority of their washing machines for the United States market in the United States before 2020.

The President responded to the ITC's findings by imposing a tariff-rate quota ("TRQ") on imports of finished washing machines, with an additional 20 percent ad valorem tariff for the first 1.2 million units and 50 percent ad valorem for subsequent imports. There is also a TRQ for certain large parts of washing machines, with an additional 50 percent ad valorem tariff on imports beyond historic levels. The tariffs should result in the quantity of imports decreasing. These developments should allow domestic producers' prices to recover, and provide the revenue they need to improve their facilities and introduce new features on their products. The tariffs will also encourage Samsung and LG to move quickly to transfer production to the United States, bringing more new, well-paying jobs. To ease the transition from importing to domestic production, limited quantities of washing machines and parts are exempt from the additional duties.

b. Solar cells and modules

The situation with crystalline silicon photovoltaic ("CSPV") solar cells and modules followed a pattern similar to washers, with the added dimension of trade distorting effects from Chinese state industrial planning that targeted the solar industry. Over the last ten years, China has used state incentives, subsidies, and tariffs to dominate the global solar supply chain. Its' share of global cell production skyrocketed from 7 percent in 2005 to 61 percent in 2012. It now produces 60 percent of the world's solar cells, and 71 percent of solar modules.

U.S. producers sought relief from these trade practices through application of unfair trade remedies. In 2011 and 2013, they successfully petitioned for antidumping duties, first against China and then against Taiwan. But in both cases, CSPV solar goods from other countries – mainly produced by Chinese owned operations – entered the U.S. market in place of goods subject to trade remedies. The two remaining large-scale U.S. producers then turned to Section 201, which results in application of trade restrictions against all countries, limiting foreign producers' ability to evade duties by moving operations from one country to another.

The ITC investigation revealed that from 2012 to 2016, U.S. imports of CSPV solar cells and modules grew nearly six-fold, and prices fell dramatically. Most U.S. producers ceased production entirely, or moved their facilities to other countries. Despite very favorable demand conditions, prices fell. Those producers who remained were operating at below full capacity and employment levels, and suffered consistently negative financial performance. These conditions forced them to reduce capital investment and research and development expenditures. The ITC determined that the injury to the domestic industry was serious, and that increased imports were the most important cause of that injury.

U.S. producers of both cells and modules made commitments that, if import relief were granted, they would increase capacity and capacity utilization, and invest in research and development. They also believed that import relief would create favorable market conditions that would incentivize other producers to build new facilities in the United States.

The President responded to the ITC's findings by imposing additional tariffs of 30 percent on both cells and modules. He exempted 2.5 gigawatts of cell imports from the measure, which will ensure supply of cells to U.S. producers who make modules using imported cells. These measures will increase production of solar cells and related manufacturing employment, and help to ensure a vibrant solar energy industry in the United States in the long term.

3. Antidumping and Countervailing Duties

The U.S. Department of Commerce (USDOC), through its Enforcement and Compliance Unit, rigorously enforces U.S. trade laws by conducting antidumping and countervailing duty investigations in response to U.S. industry petitions alleging that imports are being dumped (sold at less than fair value) or unfairly subsidized. The independent U.S. International Trade Commission (USITC) then determines whether those imports are materially injuring, or threatening material injury to, the competing U.S. industry. Investigations vary widely in scope and complexity, and will result in an antidumping and countervailing order upon affirmative determinations by both USDOC and the USITC. These orders direct Customs and Border Protection to collect duties on dumped or unfairly subsidized goods coming into the country, giving relief to domestic industry harmed by unfair trading practices. USDOC continues to monitor and enforce its antidumping and countervailing orders through various proceedings and defends its determinations in U.S. courts and before WTO and NAFTA dispute settlement panels.

a. Increase in Investigations

In the first year of President Trump's Administration, the Administration initiated 84 antidumping and countervailing duty investigations -- a 59 percent increase from the last year of the previous administration. Eighty-two of those investigations were initiated in response to petitions from domestic industries. These investigations have covered a wide range of products from steel to chemicals to agricultural products from across the globe.

b. Self-Initiation of Investigations

While unfair pricing and government subsidies are most often addressed through the filing of antidumping and countervailing duty petitions by the affected U.S. industry, USDOC also possesses the statutory authority to self-initiate antidumping and countervailing duty investigations. In November 2017, for the first time in over 25 years, USDOC self-initiated two investigations, an antidumping investigation and a countervailing duty investigation, on common alloy aluminum sheet from China. Self-initiation can shield potential U.S. petitioners that may face retaliation by the exporting country, and can provide small or fragmented U.S. industries with needed assistance. It is also a potentially valuable tool to address attempts to circumvent our existing antidumping and countervailing duty orders. Going forward, the Administration intends to fully utilize all the tools available under U.S. law, including self-initiation of antidumping and countervailing duty investigations, to help address unfair trade practices.

4. Section 232

In 2017, the USDOC launched investigations into the effect of steel and aluminum imports on U.S. national security under Section 232 of the Trade Expansion Act of 1962, as amended. In reports submitted to the President in January 2018, the USDOC found that these imports threaten to impair the national security. In the case of steel, six basic oxygen furnaces and four electric furnaces have closed since 2000 and employment has dropped by 35 percent since 1998. For certain types of steel, such as for electrical transformers, only one U.S. producer remains. In the case of aluminum, employment fell by 58 percent from 2013 to 2016, six smelters shut down, and only two of the remaining five smelters are operating at

capacity, even though demand has grown considerably. To curb these imports and protect national security, USDOC proposed three options to the President in the form of global tariffs, targeted tariffs with global quotas, and global quotas. The President may choose to adopt or modify these recommendations or may take no action under Section 232.

5. Defending U.S. Trade Remedy Laws at the WTO

For decades, Congress has maintained a series of laws designed to prevent foreign governments or companies from injuring U.S. companies and workers through unfair practices such as dumped or subsidized imports, or by harmful surges of imports. These laws have been a critical aspect of the bargain between the U.S. Government and American workers, farmers, ranchers, and businesses (large and small) that has long supported the free and fair trade system in this country. These laws have also reflected the core principles and legal rights of the multilateral trading system since its founding in 1947 with the General Agreement on Tariffs and Trade (GATT). It is notable that Article VI of the GATT in the strongest language possible, states that injurious dumping "is to be condemned." Similarly, the WTO Agreement on Subsidies and Countervailing Measures specifically permits Members to impose countervailing duties in response to another Member's injurious subsidies under specified circumstances. Trade remedies are a foundation to the implementation of the WTO agreements, and to avoid market distortions. It is critical that WTO members fully recognize their centrality to the international trading system.

Accordingly, efforts by the United States to defend U.S. trade remedy laws at the WTO are critical to ensure that the United States maintains its right to respond to unfair trade practices and maintains a fundamental basis for U.S. support for the WTO. Accordingly, the United States vigorously defends the use of U.S. trade laws against challenges in a number of WTO disputes as a top Administration priority.

For instance, in an ongoing dispute,[4] China is challenging the ability of the United States to reject and replace non-market prices or costs in the context of anti-dumping investigations involving Chinese producers and exporters. China asserts that WTO Members agreed in China's Accession Protocol to set a time period after which market economy conditions would automatically be deemed to exist in China (or a Chinese industry or sector), no matter what the actual facts in China revealed.

That is wrong.[5] The expiry of one provision of China's Accession Protocol, Section 15(a) (ii), does not mean that WTO Members no longer have the ability to reject and replace non-market prices or costs for purposes of antidumping comparisons. Rather, the legal authority to reject prices or costs not determined under market economy conditions flows from GATT 1994 Articles VI:1 and VI:2 and the need to ensure comparability of prices and costs when establishing normal value. This authority exists in Articles VI:1 and VI:2 and is reflected in legal text and consistent practice spanning decades: the proposal to amend Article VI:1 and eventual adoption of the Second Note Ad Article VI:1 (1954-55), confirming the legal authority existed in Articles VI:1 and VI:2; the GATT Secretariat review of Contracting Parties' application of Articles VI:1 and VI:2, demonstrating a subsequent, common practice rejecting non-market prices or costs in determining normal value (1957); the Accessions to the GATT of three non-market economies – Poland (1967), Romania (1971), and Hungary (1973) – in which the GATT contracting parties affirmed their existing ability to reject non-market prices or costs in situations other than "the case" described in the Second Note; Article 2 of the WTO Anti-Dumping Agreement (1995), bringing forward the key concepts from Article VI:1 and reinforcing (through terms such as "proper comparison") that market determined prices or costs are necessary for antidumping comparisons; and Section 15 of China's Accession Protocol

[4] United States – Measures Related to Price Comparison Methodologies (WT/DS515).

[5] *See, e.g.*, the shared U.S. / EU legal interpretation submitted in *EU – Measures Related to Price Comparison Methodologies* (WT/DS516), found at https://ustr.gov/sites/default/files/enforcement/WTO/US.Legal.Interp.Doc.fin.percent28publicpercent29.pdf.

(2001), which clarifies that domestic prices or costs will be used when "market economy conditions prevail" for the industry under investigation, but domestic prices or costs may be rejected when market economy conditions do not prevail. The evidence is overwhelming that WTO Members have not surrendered their longstanding rights in the GATT and WTO to reject prices or costs that are not determined under market economy conditions in determining price comparability for purposes of antidumping comparisons.

And the facts demonstrate that China, over 16 years after it joined the WTO, still has not transitioned to an economy that operates based on market economy principles. China's government continues to intervene heavily in the market and significantly distort prices and costs to the advantage of domestic industries. This is leading to severe stresses in the international trading system, including significantly distorted prices and severe excess capacity and overproduction, with the resulting surplus product dumped all over the world. China does not have the right to engage in government interference and intervention in market mechanisms, distorting market outcomes and undermining WTO rules, without consequence. The United States will vigorously defend this position at the WTO along with a strong and growing group of Members who share this position.

Another important dispute is one brought by Canada challenging various purported "measures" maintained by the U.S. Department of Commerce and the International Trade Commission in antidumping and countervailing duty proceedings.[6] Canada is seeking to invent new obligations not reflected in the text of the WTO Agreement. This is a broad and ill-advised attack on the U.S. trade remedies system. U.S. trade remedies ensure that trade is fair by counteracting dumping or subsidies that are injuring U.S. workers, farmers, and manufacturers. Moreover, Canada's claims threaten the ability of all countries to defend their workers against unfair trade, and Canada's complaint is thus bad for Canada as well. The United States will vigorously defend against Canada's unfounded claims.

In another example, the United States successfully defended against a challenge Indonesia brought against U.S. countervailing duties. Indonesia has been subsidizing its domestic pulp and paper industry for years. The U.S. Department of Commerce (USDOC) has conducted three investigations of alleged subsidy programs benefitting Indonesian paper producers, most recently with respect to uncoated paper in 2016. Pursuant to the USDOC's 2010 investigation of coated paper, USDOC found that Indonesia provided standing timber to domestic logging companies at less than adequate remuneration; banned log exports, which kept log prices to domestic producers artificially low; and forgave debt by permitting an affiliate of the respondent paper producer to purchase hundreds of millions of the latter's debt for pennies on the dollar. The United States International Trade Commission (USITC) then made an affirmative threat of injury determination. Almost five years later, Indonesia brought a challenge at the WTO, claiming that the United States acted inconsistently with its WTO obligations.

The WTO rejected all of Indonesia's claims in a complete and resounding victory for the United States.[7] The WTO found that the USDOC and USITC determinations with respect to coated paper from Indonesia fully comply with WTO rules. The WTO also rejected Indonesia's challenge to a U.S. law relating to the USITC's handling of tie votes. The United States will continue to administer its trade remedy laws to ensure that U.S. workers and industries receive relief when there is injury or threat of injury from dumped or subsidized imports.

6. Protecting U.S. Rights under International Trade Agreements

The United States is committed to strong enforcement of U.S. rights under international trade agreements. To that end, we are using all of the enforcement tools at our disposal. The United States has

[6] *US – Certain Systemic Trade Remedies Measures* (WT/DS535).
[7] WT/DS491/R, adopted January 22, 2018 (WT/DS491/6).

moved forward with a number of dispute settlement matters where the United States is challenging the measures of other WTO Members that are denying the United States the benefits it was promised under the WTO Agreement. In addition to trade remedy disputes discussed above, the United States has vigorously defended challenges to U.S. measures. The following are some examples that demonstrate U.S. efforts to protect U.S. rights.

a. Offensive Enforcement Actions

The United States, working together with New Zealand, challeng
regimes for horticultural products and animals and animal products. Indonesia maintains a complex web of import licensing requirements that restrict or prohibit imports of horticultural products and animal products from the United States. These restrictions cost U.S. farmers and ranchers millions of dollars per year in lost export opportunities in Indonesia.

The WTO found that all 18 Indonesian measures challenged by the United States are inconsistent with Indonesia's WTO obligations and are not justified as legitimate public policy measures.[8] This is a complete victory for the United States and New Zealand.

The United States has challenged the excessive government support China provides for production of rice, wheat, and corn.[9] In 2015, China's "market price support" for these products was estimated to be nearly $100 billion in excess of the levels China committed to during its accession. China's excessive market price support for rice, wheat, and corn inflates Chinese prices above market levels, creating artificial government incentives for Chinese farmers to increase production. The United States is challenging China's government support on behalf of American rice, wheat, and corn farmers to help reduce distortions for rice, wheat, and corn, and help American farmers to compete on a more level playing field. This dispute presents issues of systemic importance. USTR had a panel established in 2017 and will pursue this case aggressively.

The United States has also challenged China's administration of tariff-rate quotas (TRQs) for rice, wheat, and corn.[10] The United States Department of Agriculture (USDA) estimates that China's TRQs for these commodities were worth over $7 billion in 2015. If the TRQs had been fully used, China would have imported as much as $3.5 billion worth of additional crops last year alone. China's TRQ policies breach their WTO commitments and limit opportunities for U.S. farmers to export competitively priced, high-quality grains to customers in China. USTR had a panel established in 2017 and will also aggressively pursue this challenge.

In another dispute, the United States successfully challenged India's ban on various U.S. agricultural products. India's ban on products such as poultry meat, eggs, and live pigs was allegedly maintained to protect India against avian influenza. The WTO agreed with U.S. claims that, for example, India's ban was not based on international standards or a risk assessment, India discriminated against U.S. products in favor of Indian products, India's measures were more trade restrictive than necessary because it is safe to import U.S. products meeting international standards, and India's restrictions were not adapted to the characteristics of U.S. exporting regions.[11]

[8] WT/DS477/AB/R, WT/DS478/AB/R, adopted November 22, 2017.
[9] *China – Domestic Support for Agricultural Producers* (WT/DS511).
[10] *China – Tariff Rate Quotas for Certain Agricultural Products* (WT/DS517).
[11] WT/DS430/11.

This victory helps address barriers to the Indian market for U.S. farmers, including those in the U.S. poultry industry in particular, and also signals to other WTO Members that they must ensure that any avian influenza restrictions they impose are grounded in science, such as by taking into account the limited geographic impact from outbreaks, and are not simply a disguise for protectionism. After India failed to comply with the WTO recommendations and rulings within the agreed reasonable period of time, the United States requested WTO authorization to suspend over $450 million in concessions or other obligations with respect to India per year,[12] and that request is in arbitration. India requested the WTO to review India's claim of subsequently having complied, and that proceeding is also underway. The United States is vigorously working to protect U.S. rights in these simultaneous proceedings.

The United States also is challenging Canada's regulations regarding the sale of wine in grocery stores. Canada's regulations discriminate against U.S. wine by allowing only British Columbia wine to be sold on regular grocery store shelves while imported wine may be sold in grocery stores only through a so-called "store within a store." The United States will vigorously work to protect U.S. rights through this dispute.

b. Defensive Enforcement Actions

The United States has also achieved significant successes in defense of other Members' challenges to U.S. actions. As noted above, USTR prevailed in a challenge brought by Indonesia against U.S. countervailing measures on paper products.

The United States also achieved a complete victory in an EU challenge involving aircraft. The EU challenged "conditional tax incentives established by the State of Washington in relation to the development, manufacture, and sale of large civil aircraft," alleging that seven such tax incentives were prohibited subsidies. The EU approach would have had far-reaching implications for the ability of Members to provide incentives based on where a product was produced. The United States however explained why the EU arguments were in error and that the WTO did not prevent the United States from maintaining the measures at issue. The WTO agreed with the United States, finding that none of the seven challenged programs were prohibited import substitution subsidies.

The WTO also found in favor of the United States in a panel report rejecting almost all claims by the European Union (EU) that U.S. subsidies to Boeing harmed Airbus's ability to sell large civil aircraft. The EU challenged 29 U.S. state and federal programs that allegedly conferred $10.4 billion over six years in subsidies to Boeing, but the panel found that 28 of the 29 programs were consistent with WTO rules. The panel found only one state-level program, which had an average value of $100 to $110 million in the 2013-2015 period, to be contrary to WTO rules. The United States disagrees, the panel report is currently on appeal, and the United States is vigorously defending against the EU's claims on appeal.

c. U.S. Concerns with WTO Dispute Settlement

The United States considers that, when the WTO dispute settlement system functions according to the rules as agreed by the United States and other WTO Members, it provides a vital tool to enforce WTO rights and uphold a rules based trading system. However, the United States has been raising its concerns for well over a decade that a number of WTO dispute settlement reports have not followed those rules.

The most significant area of concern has been panels and the Appellate Body adding to or diminishing rights and obligations under the WTO Agreement. In 2002 and again in 2015, the U.S. Congress mandated that the Executive Branch consult with it on strategies to address concerns that WTO

[12] WT/DS430/16.

dispute settlement reports were adding to or diminishing U.S. rights or obligations by not applying the WTO Agreement as written. Detailing numerous examples and concerns raised in U.S. statements to the Dispute Settlement Body, the Bush and Obama Administrations stated that they would pursue reforms and seek to ensure in each dispute that WTO adjudicators follow the rules and perform their functions appropriately.[13] In 2005 the United States also proposed formal guidance for Members to adopt to reaffirm that "WTO adjudicative bodies must take care that any interpretive approach they may use results neither in supplementing nor in reducing the rights and obligations of Members under the covered agreements."[14]

These efforts have not yielded significant results. Concerns abound that dispute reports have added to or diminished rights or obligations in varied areas, such as subsidies, antidumping duties, and countervailing duties;[15] standards (under the TBT Agreement); and safeguards.[16] For example:

- The United States and several other Members have expressed significant concerns with a number of Appellate Body interpretations that would significantly restrict the ability of WTO Members to counteract trade-distorting subsidies provided through SOEs, posing a significant threat to the interests of all market-oriented actors.[17]

- In a number of disputes, the United States has expressed concerns with the Appellate Body's interpretation of the non-discrimination obligation under the TBT Agreement[18] which calls for reviewing factors unrelated to any difference in treatment due to national origin. The United States has pointed out that this approach could find that identical treatment of domestic and imported products could nonetheless be found to discriminate against imported products due to differences in market impact. There is nothing in the text or negotiating history of the TBT Agreement to support that Members had ever negotiated or agreed to such an approach.[19]

- The United States disagreed with panel and Appellate Body reports in the *US – FSC* dispute, which resulted in an interpretation under which WTO rules do not treat different (worldwide vs. territorial) tax systems fairly. This dispute disregarded the broader

[13] *See, e.g.*, the 2015 Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body – Report to the Congress Transmitted by the Secretary of Commerce, at 2: "At the same time, however, certain findings resulting from the dispute settlement system have raised significant concerns, including in connection with reports involving U.S. trade remedies. The U.S. experience with these issues in the period since the previous report to Congress, along with the focus on trade remedies experienced in WTO dispute settlement overall, has amplified certain of these concerns. The Executive Branch is committed to addressing these concerns through our participation in the current dispute settlement system as well as the ongoing WTO negotiations."

[14] TN/DS/W/82/Add.1 and Corr.1.

[15] See examples given in 2015 Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body -- Report to the Congress Transmitted by the Secretary of Commerce, at 9-14.

[16] *See, e.g.*, Minutes of the March 8, 2002 DSB meeting (WT/DSB/M/121), para. 35.

[17] For example, the United States and several other Members have criticized the Appellate Body findings on "public body" (can an SOE be deemed to confer a subsidy) and on simultaneous application of countervailing duties and antidumping duties under a non-market economy methodology in the DS379 dispute. Dispute Settlement Body, Minutes of Meeting Held on March 25, 2011, WT/DSB/M/294, at 18 (U.S.), 21 (Mexico), 22 (Turkey), 24 (EU), 25 (Canada), 25 (Australia), 26 (Japan), 29 (Argentina). See also 2015 Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body -- Report to the Congress Transmitted by the Secretary of Commerce, at 12-13.

[18] WTO Agreement on Technical Barriers to Trade (TBT Agreement).

[19] *See, e.g.*, Minutes of the June 13, 2012 DSB meeting (WT/DSB/M/317), para. 13 et seq., and July 23, 2012 DSB meeting (WT/DSB/M/320), para. 94 et seq.

perspective that, in the GATT, Members had agreed to an understanding that a country did not need to tax foreign income, and there was no evidence that the U.S. FSC distorted trade or was more distortive than the territorial tax system used by most other WTO Members.

- In a number of disputes, the United States has expressed concerns that the Appellate Body's non-text-based interpretation of Article XIX of the GATT 1994 and the Safeguards Agreement has seriously undermined the ability of Members to use safeguards measures. The Appellate Body has disregarded the agreed WTO text and read text into the Agreement, applying standards of its own devising.[20]

- Another area of concern is that the Appellate Body in effect created a new category of prohibited subsidies that was neither negotiated nor agreed by WTO Members (*US – CDSOA*).[21] The U.S. Congress had made a policy decision to assist industries harmed by illegal dumping and subsidization, and no provision in the WTO Agreement limits how a WTO Member might choose to make use of the funds collected through antidumping and countervailing duties.

It has been the longstanding position of the United States that panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements, as negotiated and agreed by its Members. Over time, U.S. concerns have increasingly focused on the Appellate Body's disregard for the rules as set by WTO Members. Successive Administrations and the Congress have voiced those concerns, and the United States called for WTO adjudicators to follow their role as laid out in the DSU. But the problem has been growing worse, and not better. Following are some examples of concerns with the approach of the Appellate Body that the United States has raised in the WTO over many years.

i. Disregard for the 90-day deadline for appeals

Since at least 2011, the United States and other Members have been expressing concern regarding the Appellate Body's decision to ignore the mandatory 90-day deadline for deciding appeals set out in WTO rules. Instead, the Appellate Body has assumed the authority to take whatever time it considers appropriate for individual appeals. However, WTO Members agreed in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) that for each appeal "[i]n no case shall the proceedings exceed 90 days."[22] The 90-day deadline helps ensure that the Appellate Body focuses its report on the issue on appeal. The Appellate Body has never explained on what legal basis it could choose to breach a clear and categorical rule set by WTO Members.

Until 2011, the Appellate Body respected this deadline, including where necessary consulting with and obtaining the agreement of the parties to an appeal to extend the deadline for that appeal. However, the Appellate Body has changed its approach. It no longer consults with the parties, but simply informs the Dispute Settlement Body that it will not comply with the DSU deadline. In recent years, the Appellate

[20] *See, e.g.*, Minutes of the May 16, 2001 DSB meeting (WT/DSB/M/105), para. 41 et seq., and March 8, 2002 (WT/DSB/M/121), para. 35 et seq.
[21] *See* Minutes of the January 27, 2003 DSB meeting (WT/DSB/M/142), para. 55 et seq.
[22] Article 17.5 of the DSU.

Body has also declined to comply with the requirement in the DSU to provide, within 60 days, an estimate of the period within which it will submit its report.[23]

Two examples of the Appellate Body's approach are the recent appeals in the compliance proceedings involving the United States and the European Union concerning large civil aircraft. In one appeal, the notice of appeal was filed on October 13, 2016, and the Appellate Body informed Members by letter of December 21, 2016 (more than 60 days after the notice of appeal was filed) that: "The circulation date of the Appellate Body report in this appeal will be communicated to the participants and third participants in due course."[24] Over a year after the appeal began, the Appellate Body has still not informed the DSB of an estimate of the period within which it will submit its report. Similarly, in another appeal, the notice of appeal was filed on June 29, 2017, and the Appellate Body informed Members by letter of September 18, 2017 (more than 60 days after the notice of appeal was filed) that: "The circulation date of the Appellate Body report in this appeal will be communicated to the participants and third participants in due course."[25] But the Appellate Body has still not informed the DSB of an estimate of the period within which it will submit its report.

The United States and other Members, including Argentina, Australia, Canada, Chile, Costa Rica, Guatemala, Japan, Mexico, Norway, and Turkey, have repeatedly expressed their concerns with the Appellate Body's departure from its earlier approach and its breach of an explicit obligation imposed on it by the DSU.[26] One concern expressed regards the lack of transparency in the Appellate Body's approach. Another concern is how the Appellate Body's approach, and the resulting delay to resolve a dispute, accords with Members' agreement that the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."[27] Other concerns expressed include that "any uncertainty connected to whether a report was deemed to be an Appellate Body report circulated pursuant to Article 17.5, and hence the adoption procedure for that report, would be unfortunate."[28]

ii. Continued service by persons who are no longer AB members

Another example of a failure by the WTO to follow the rules that apply to it arises from continued service deciding appeals by persons who are not Appellate Body members. Recent decisions by the Appellate Body to, in its words, "authorize" a person who is no longer a member of the Appellate Body to continue hearing appeals created a number of very serious concerns, which the United States has expressed.[29]

First, and foremost, the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. The Appellate Body purports to find in Rule 15 of its

[23] Article 17.5 of the DSU: "When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."
[24] WT/DS316/31.
[25] WT/DS353/29.
[26] *See, e.g.*, Minutes of the DSB meetings of July 15, 2011 (WT/DSB/M/299), para. 11 et seq., July 28, 2011 (WT/DSB/M/301), para. 11 et seq., October 11, 2011 (WT/DSB/M/304), para. 4 et seq., July 31, 2012 (WT/DSB/M/317), paras. 17 and 30, and June 19, 2015 (WT/DSB/M/364), paras. 7.8, 7.16, and 7.17.
[27] DSU Article 3.3.
[28] Statement by Norway, Minutes of the DSB meeting of June 19, 2015 (WT/DSB/M/364), para. 7.16.
[29] *See, e.g.*, Minutes of the DSB meeting of August 31, 2017 (WT/DSB/M/400), para. 5.4 et seq.

Working Procedures[30] the authority to "deem" as an Appellate Body member one of its own members whose term has expired. However, under the WTO Agreement, it is the Dispute Settlement Body, not the Appellate Body, that has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving. Indeed, Rule 15 itself acknowledges that it applies to "a person who [has] cease[d] to be a member of the Appellate Body".[31]

Before 2017, Rule 15 was invoked sparingly and was used to cover relatively short extensions. This changed significantly in 2017, as the Appellate Body invoked Rule 15 in a number of disputes, for indefinite and extended periods of time, and even on appeals where work had not begun before the member's term expired.

The United States is resolute in its view that Members need to resolve this issue before moving on to the issue of replacing former Appellate Body members. The United States has noted that it is an important issue of principle whether WTO Members are going to respect their own rules and take appropriate action.

iii. Issuing Advisory Opinions on Issues Not Necessary to Resolve a Dispute

The United States has been increasingly concerned by the tendency of WTO reports to make findings unnecessary to resolve a dispute or on issues not presented in the dispute. Article 3.4 of the DSU provides that: "Recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements." Similarly, Article 3.7 provides that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute." And pursuant to Articles 7.1 and 11 of the DSU, panels and the Appellate Body are charged with making those findings "as will assist in making" the DSB in making a recommendation, pursuant to Article 19.1, to a Member to bring a measure that has been found to be WTO-inconsistent into conformity with WTO rules. Accordingly, WTO panels and the Appellate Body are not to make findings that cannot "assist the DSB in making [its] recommendations."

The purpose of the dispute settlement system is not to produce reports or to "make law," but rather to help Members resolve trade disputes among them. WTO Members have not given panels or the Appellate Body the power to give "advisory opinions" as some national or international tribunals have. Indeed, both the Dispute Settlement Understanding and the WTO Agreement expressly provide that WTO Members, acting in the Ministerial Conference or General Council, have the "exclusive authority" to render an authoritative interpretation of the WTO agreements.[32]

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[30] Rule 15 of the Working Procedures for Appellate Review (WT/AB/WP/6)("Rule 15").

[31] Rule 15 provides: "A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body."

[32] Article IX:2 of the WTO Agreement (*Marrakesh Agreement Establishing the World Trade Organization*) makes clear that the Ministerial Conference and the General Council "have the exclusive authority to adopt interpretations" of the covered agreements. Article 3.9 of the Dispute Settlement Understanding provides that "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement."

The United States has repeatedly raised concerns for more than 16 years on this issue.[33] In 2006, the United States proposed formal guidance for Members to adopt to reaffirm that WTO adjudicative bodies should avoid making findings that are not aimed at resolving the dispute before them.[34] Yet there are numerous occasions when a panel or the Appellate Body has made unnecessary findings or rendered "advisory opinions." Increasingly, the United States has noted that the Appellate Body is reaching issues not necessary to resolve the dispute, which contributes to delays in concluding an appeal.[35] In one egregious instance, the United States noted that *more than two-thirds* of the Appellate Body's analysis – *46 pages* – was in the nature of *obiter dicta*.[36] The Appellate Body had reversed one finding by the panel and itself said that this reversal rendered moot all the panel's findings on all other issues covered in the panel report. Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS.[37] These interpretations served no purpose in resolving the dispute – they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body's analysis comprised simply advisory opinions on legal issues. This is not only contrary to WTO rules as agreed by the United States and WTO Members, but raises concerns about the quality and purpose of such unnecessary findings.

iv. Appellate Body Review of facts and review of a Member's domestic law de novo

Another significant concern is the Appellate Body's approach to reviewing facts. Article 17.6 of the DSU limits an appeal to "issues of law covered in the panel report and legal interpretations developed by the panel." Yet the Appellate Body has consistently reviewed panel fact-finding under different legal standards, and has reached conclusions that are not based on panel factual findings or undisputed facts.[38]

The United States has also noted with concern the Appellate Body's review of the meaning of Member's domestic law that is being challenged.[39] In a WTO dispute, the key fact to be proven is what a Member's challenged measure does (or means), and the law to be interpreted and applied are the provisions

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[33] *See, e.g.*, Minutes of the DSB meetings of August 23, 2001 (WT/DSB/M/108), paras. 43 et seq. (*e.g.*, at para. 50: "One such boundary had been crossed in this case, an extremely important one. That boundary was the well - established principle that the GATT, and now the WTO, dispute settlement system was designed to resolve disputes, not to generate advisory opinions on abstract, theoretical legal questions."), November 14, 2008 (WT/DSB/258), para. 8 et seq. (*e.g.*, at para. 8: "In its Report, unfortunately, the Appellate Body had undertaken unnecessary analyses of provisions of the DSU and invented rules, procedures, and even obligations that were simply not present in the DSU. The United States referred Members to the communication that it had circulated that explained the US concerns in more detail."), and May 23, 2016 (WT/DSB/M/379), para. 6.4 et seq. (*e.g.*, at para. 6.4: "The Appellate Body was not an academic body that may pursue issues simply because they were of interest to them or may be to certain Members in the abstract. Indeed, as the Appellate Body itself had said many years ago, it was not the role of panels or the Appellate Body to 'make law' outside of the context of resolving a dispute, in effect, to use an appeal as an occasion to write a treatise on a WTO agreement. But that was what the report had done in this appeal."). *See also* the concerns raised in the November 7, 2008 Communication from the United States on concerns regarding the Appellate Body's Report (WT/DS320/16).

[34] TN/DS/W/82/Add.2.

[35] *See, e.g.*, U.S. statement at the September 29, 2017, DSB meeting (https://geneva.usmission.gov/2017/09/29/statements-by-the-united-states-at-the-september-29-2017-dsb-meeting/) and November 22, 2017 DSB meeting (https://geneva.usmission.gov/wp-content/uploads/2017/11/Nov22.DSB_.pdf).

[36] *Statement by the United States at 9 May 2016 DSB Meeting*, https://geneva.usmission.gov/wp-content/uploads/2016/05/May-9-DSB.pdf, involving the dispute *Argentina – Measures Relating to Trade in Goods and Services* (DS453).

[37] General Agreement on Trade in Services ("GATS").

[38] *See, e.g.*, Minutes of the DSB meeting of April 24, 2012 (WT/DSB/M/315), para. 74.

[39] Minutes of the DSB meeting of October 26, 2016 (WT/DSB/M/387), para. 8.9 et seq. The Appellate Body uses the term "municipal law" in referring to domestic law.

of the WTO agreements. But the Appellate Body consistently asserts that it can review the meaning of a Member's domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for Appellate Body review. Furthermore, when the Appellate Body reviews the meaning of a Member's domestic measure, it does not provide any deference to a panel's findings of fact. As other commentators have noted:

> [T]he logic of the Appellate Body's finding [that panel findings on municipal law are issues of law under DSU Article17.6] is difficult to understand. Just because a panel assesses whether a domestic legal act – which represents a fact from the perspective of WTO law – is consistent or inconsistent with WTO law does not suddenly turn the meaning of the domestic legal act into a question of WTO law . . . . [T]here must . . . be a discernible line between issues of fact and issues of law. After all, the Appellate Body's jurisdiction is circumscribed precisely by this distinction.[40]

The Appellate Body's approach is therefore not only contrary to WTO rules but again raises concerns about the purpose of insisting on an unnecessary and erroneous approach.

v. The Appellate Body claims its reports are entitled to be treated as precedent

Without basis in the DSU, the Appellate Body has asserted its reports effectively serve as precedent and that panels are to follow prior Appellate Body reports absent "cogent reasons." However, this is not consistent with WTO rules. WTO Members established one and only one means for adopting binding interpretations of the obligations that they agreed to: Article IX: 2 of the WTO Agreement. While Appellate Body reports can provide valuable clarification of the covered agreements, Appellate Body reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed. Indeed, the Appellate Body's approach means that panels are simply to abdicate their responsibility to conduct an objective assessment of the matters before them and just follow prior Appellate Body reports.

D. Strengthening the Multilateral Trading System

The WTO is an important institution, and the United States has a strong track record of building coalitions of like-minded Members to use the WTO committee system, in particular, to pressure non-complying economies to bring measures into conformity with WTO rules, to advance transparency and predictability in global trade rules, and to avert the need to resort to dispute settlement. The Trump Administration believes that the WTO has achieved positive results and has the potential to achieve even more in the future. However, for the past two decades, the United States has been concerned that the WTO is not operating as the contracting parties envisioned. As a result, the WTO is undermining our country's ability to act in its national interest.

This is not a new problem. Multiple administrations have voiced various concerns with the WTO system and the direction in which it has been headed. First among those concerns is that the WTO dispute settlement system has appropriated to itself powers that the WTO Members never intended to give it. As discussed above, the United States has been expressing its concerns regarding WTO dispute settlement for many years. Those concerns include where panels or the Appellate Body have, through their findings, sought to add to or diminish rights and obligations of Members under the WTO Agreement and encompass a broad range of areas. The United States has grown increasingly concerned with the activist approach of the Appellate Body on procedural issues, interpretative approach, and substantive interpretations. These

[40] Jan Bohanes & Nick Lockhart, "Standard of Review in WTO Law," *The Oxford Handbook of International Trade Law* 42 (2009), quoted in the Minutes of the October 26, 2016 DSB meeting (WT/DSB/M/387), para. 8.14.

approaches and findings do not respect WTO rules as written and agreed by the United States and other WTO Members. WTO Members need to address these concerns, and the United States stands ready to work with Members in this regard.

Second, there is also longstanding concern in the United States about the WTO's inability to reach agreements that are of critical importance in the modern global economy.

After spending close to 15 years attempting to conclude the Doha Development Agenda (DDA) negotiations, Ministers at the WTO's Tenth Ministerial Conference in December 2015 collectively acknowledged that there was no consensus to reaffirm the DDA's mandates. Consequently, the Trump Administration will not negotiate off the basis of the DDA mandates or old DDA texts and considers the Doha Round to be a thing of the past.

However, some WTO Members continue to cling to the DDA mandates because the associated draft texts would have exempted their economies from meaningful new commitments and placed the burden of new trade rules and liberalization on a small number of Members, including the United States. Positive, future oriented work at the WTO remains severely constrained by the few Members demanding that no new work can be achieved until the DDA mandates are fulfilled. This stance of a few Members has stymied new initiatives that could benefit today's trading system. Due to these few Members, the focus remains largely on how trade worked in 2001, at the launch of the DDA, and not on today's realities. This is unacceptable.

For the WTO to be successful going forward, its membership will need to break from the failures of the last decade, and base future work on lessons learned, but also current data and up to date notifications. Moving on entails a focus on issues that are affecting our stakeholders today and into the future. The Trump Administration seeks to work with those Members who are ready and able to negotiate free, fair and reciprocal agreements, with the expectation that participants to these agreements will contribute commensurate with their status in the global economy.

Third, we note the acute need for the WTO to change how it approaches questions of development. While "least developed countries" (LDCs) are defined in the WTO using the United Nations criteria, there are no WTO criteria for what designates a "developing country." Any country may "self-declare" itself as a developing country, thus entitling itself to all "special and differential" treatment afforded to developing countries under the WTO Agreements, as well as any new flexibilities afforded to developing countries under current or forthcoming negotiations. In practice, this means that more advanced countries like Brazil, China, India, and South Africa receive the same flexibilities as very low-income countries, despite these more advanced countries' very significant role in the global economy. Such disparities, where countries that some institutions categorize as high- or high-middle-income receive the same flexibilities as low- or low-middle-income, makes it challenging to find balance in the application of existing obligations or the development of new commitments.

Finally, there is significant concern that the WTO is unable to manage the rise of countries – notably China – that pay lip service to the values of free trade but intentionally avoid, circumvent, or violate the commitments accompanying those values.

The Trump Administration will work with other like-minded countries to address these concerns.

1. The WTO as a Forum for Trade Negotiations

At its heart, the WTO is supposed to be a Member driven organization that should perform or fail based on the choices made by its Members. Some Members have become too rigid in perceiving that new

agreements and other forms of outcomes can only occur at Ministerial Conferences, and that all work must be tied back to the DDA mandate, with very few exceptions. Additionally, the ability of any country to self-declare "developing country" status to avail itself of flexibilities under the WTO agreements ultimately undermines the predictability of the WTO rules and diminishes the certainty of negotiated outcomes under new liberalization agreements.

If the WTO is to reclaim its credibility as a vibrant negotiating and implementing forum, Members must take advantage of every opportunity to advance work and seize results as they present themselves. In looking ahead to the period before the twelfth Ministerial Conference in 2019, the United States seeks to work with other WTO Members to begin the process of identifying opportunities to achieve accomplishments, even if incremental ones, and avoid buying into the predictable, and often risky, formula of leaving everything to a package of results for Ministerial action. Whether the issue is agriculture or digital economy, the WTO will impress capitals and stakeholders most by simply doing rather than posturing for the next Ministerial Conference.

To remain a viable institution that can fulfill all three pillars of its work, the WTO must find a means of achieving trade liberalization between Ministerial Conferences, must adapt to address the challenges faced by traders today, and – most importantly – must ensure that the flexibilities a country may avail itself of are commensurate to that country's role in the global economy. We look to discussions on agriculture, fisheries subsidies and e-commerce, among other issues and opportunities, to work with other WTO Members on these goals.

a. WTO Agriculture Negotiations

In 1994, America's farmers and ranchers entered into a new world in trade with countries around the world, as the United States for the first time agreed to reduce import tariffs on food and agricultural products and concomitantly reduce trade distorting domestic support and export subsidies. U.S. food and agricultural exports since then have expanded nearly 200 percent providing important additions to American farmer's incomes and supporting our rural communities. Since 1994, however, we have witnessed a failure of the WTO to make significant headway in further negotiations to eliminate trade distortions in agricultural trade. As import tariffs faced by U.S. exporters declined with the implementation of the Uruguay Round commitments, our farmers and ranchers have experienced an increase in other unwarranted barriers imposed on our exports. As we embark in 2018, the Trump Administration will renew efforts at the WTO in two key areas to help America's farmers and ranchers compete on an even playing field: a reset of the agriculture WTO negotiations and enabling farmer access to safe tools and technologies.

The WTO is the critical institution to eliminate unfair policies and promote a market-based trading system for agricultural producers around the world. The Trump Administration strongly supports the continuation of the reform process as agreed to in the 1994 Uruguay Round to eliminate unfair trade policies and pursue the long-term objective of substantial, progressive reductions in support and protection.

Unfortunately, the recent negotiating history at the WTO has focused on creating exceptions for new unfair and protectionist measures that run counter to what is best for America's, and the world's, farmers and ranchers. With the failure of the Doha Round, the Trump Administration in December 2017 called for WTO countries to reset and reinvigorate the agriculture negotiations to tackle the real-world international trade concerns facing agriculture today. To reset the negotiations, the United States advocates for countries to improve the transparency of their policies and programs by providing mandated notifications on a timely basis. The United States also calls on countries to embrace the role that fair and liberalized trade plays in advancing farmer welfare in all countries and to support market-oriented reforms as the primary objective of the WTO.

The Administration's major focus at the WTO on agriculture in 2018 will be to enhance notifications and transparency to inform discussions about the problems that face agricultural trade today and to begin consideration of new ways forward in negotiations on agriculture. For productive discussions in Geneva, the United States plans to work with WTO Members to:

- Identify, analyze and agree on the issues facing agricultural trade today;
- Identify unfair agricultural trade policies that the WTO could address such as high tariffs, trade distorting subsidies, and the application of non-tariff measures;
- Identify the reasons for WTO agriculture negotiations failure in recent years;
- Identify a new trade approach to address these problems in the WTO.

b. Enabling Farmer Access to Safe Tools and Technologies

Regulatory barriers in foreign markets increasingly limit American farmers' access to safe tools and technologies to enhance production and provide for economic well-being in rural communities. Regulatory approaches of our trading partners that lack sufficient scientific justification, are unnecessarily burdensome, and are not in line with international standards result in unwarranted barriers to U.S. trade and innovation. At the WTO 11th Ministerial Conference, the United States joined with 16 other WTO Members[41] in a joint ministerial statement outlining our concerns that these barriers are having a substantial negative impact on production of, and trade in, safe food and agricultural products, and we made recommendations for how to address those barriers. In 2018, the Trump Administration will build on this work to reduce regulatory barriers to exports of food and agriculture products. Specifically, working with a coalition of WTO countries, the United States will advance implementation of the recommendations found in the ministerial statement to address pesticide-related issues that impede and disrupt agricultural production and trade:

(1) WTO Members should work together to increase the capacity and efficiency of the Codex Alimentarius Commission to set international, risk-based standards on pesticide maximum residue levels (MRLs);

(2) WTO Members should improve the transparency and predictability of their regulatory systems in the setting of national MRLs.

(3) WTO Members should achieve greater harmonization in MRL setting at the national regional and international level; and,

(4) WTO Members should collaborate on ways to enable greater access to lower-risk alternative pesticides and pesticides for minor-use crops, particularly in developing countries.

This initiative reaffirms the central role of risk analysis in assessing, managing and communicating risks associated with pesticide use to protect public health while enabling farmers around the world to have access to the safe use of pesticides and technology and facilitating trade in food and agricultural products. Through science based decision-making and countries' abiding by the rules of the WTO on food safety, we can reduce unfair regulatory barriers in foreign markets to America's wholesome and healthful agriculture bounty.

[41] Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Guatemala, Japan, Kenya, Madagascar, Panama, Paraguay, Peru, Uganda, and Uruguay.

c. Fisheries Subsidies

WTO Members began work to discipline harmful fisheries subsidies in 2001, when global trade in seafood totaled approximately $57 billion. At the time, approximately 15-18 percent of global fish stocks were estimated to be in an overfished condition and about half of the stocks were considered to be in a fully fished condition (meaning no room to expand catches).

Today, the situation has significantly worsened for the fish, the legitimate fishermen trying to support their families by catching them, and the millions of developing country consumers who rely on fish as a key source of protein. As of 2016, global trade in seafood had grown to $126 billion, and China alone exported nearly as much seafood annually as the next three largest exporters combined. Global fishing capacity has increased approximately 50 percent from 2001 to a level that some have estimated is 250 percent greater than what is needed to fish at sustainable levels.

Harmful global subsidies to support fishing are estimated to total up to $20 billion annually. These harmful fisheries subsidies are considered to be a major contributing factor in the unsustainable exploitation of fisheries resources. The Food and Agriculture Organization (FAO) most recently estimated that approximately 31 percent of global fish stocks are now in an overfished condition and almost 60 percent are fully fished and therefore are at risk of overexploitation without effective management.

Urgent action is needed to address the overexploitation of fisheries resources. WTO Members can make a significant contribution to ending these destructive subsidy programs that are exacerbating overfishing and overcapacity by agreeing to new prohibitions on the most harmful fisheries subsidies. The Trump Administration supports strong prohibitions on subsidies that contribute to overfishing and overcapacity and those that support illegal fishing activities. The Administration will continue to press for an ambitious agreement on fisheries subsidies that includes enhanced transparency and notifications of fisheries subsidies programs, which has been lacking in the WTO for years. To be meaningful, we will insist that an agreement must not exempt the largest subsidizers, producers, and exporters of seafood, including China and India. The United States will continue to work with like-minded WTO Members to achieve new WTO rules that can help our oceans and our law-abiding fishermen.

d. Digital Trade

Digital trade provides enormous value to all sectors of the U.S. economy, and U.S companies face significant challenges when foreign governments impose restrictions on digital trade. In December, the United States joined 70 other WTO Members in initiating exploratory work on possible future negotiations on these issues. The Trump Administration intends to use these discussions as a valuable forum to develop commercially meaningful rules that address restrictions on digital trade, and will work with like-minded WTO Members who share the Administration's interest in moving forward on digital trade issues within the WTO.

3. Development at the WTO

The Trump Administration intends to contribute to a new discussion on trade and development at the WTO, now that Members are no longer laboring under the framework of the Doha Round. We will work with like-minded Members to advance a deeper understanding of the relationship between trade rules and development and to break the cycle of an insistence that exceptions to trade rules be negotiated before new trade rules themselves. It is the view of the United States that the full implementation of WTO rules is a building block for sustainable development, and that the role of special and differential treatment is, on

a case-by-case basis, to enable a specific WTO Member to fully implement a specific commitment in a specific WTO agreement.

4. Countering Members that Flout WTO Rules

Another instance where the United States continues to work with like-minded countries to ensure that the WTO as an institution enforces rules of fair trade liberalization as agreed by Members and address the rise of countries that flout those rules involves dispute settlement. For example, as discussed above, the United States is working with other concerned WTO Members against China's position that importing Members must ignore the extensive distortions in China's economy and grant China special rights and privileges under the anti-dumping rules that are not accorded any other WTO Member. We will aggressively continue pursuing these and other issues to ensure that the WTO promotes true market competition that rewards hard work and innovation – not market-distorting practices in countries like China.

CONCLUSION

President Trump was elected in part due to his commitment to reform the global trading system in ways that would lead to fairer outcomes for U.S. workers and businesses, and more efficient markets for countries around the world. In 2017, the Trump Administration began to fulfill that commitment. Already we have begun to revise outdated and unfair trade deals, build a stronger U.S. economy, pursue an aggressive enforcement agenda, and press for significant reform of the WTO. In 2018, we will continue these efforts.

Ambassador Robert E. Lighthizer
March 2018

2017 ANNUAL REPORT
OF THE
PRESIDENT OF THE UNITED STATES
ON THE
TRADE AGREEMENTS PROGRAM

NAFTA and the Environment

The North American Agreement on Environmental Cooperation (NAAEC), a supplemental agreement to the NAFTA, promotes effective enforcement of environmental laws and supports regional environmental cooperation initiatives. The NAAEC established the Commission for Environmental Cooperation (CEC), comprised of a Council, a Secretariat, and a Joint Public Advisory Committee (JPAC). The Council is the CEC governing body, and is comprised of environmental ministers from the United States, Canada and Mexico. The Secretariat facilitates cooperation activities and receives public submissions. The JPAC advises the Council on matters within the scope of the NAAEC, and serves as a source of information for the Secretariat. As part of the NAFTA renegotiation, the United States is seeking to modernize the existing NAAEC framework by bringing the environmental obligations into the core of the Agreement, and ensure they are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the Agreement.

On June 27-28, 2017, the Council met in Prince Edward Island, Canada. The Council approved the Operational Plan 2017-18 and outlined a new trilateral work program focused on strengthening the nexus between trade and environment, such as projects related to supporting the legal and sustainable trade in select North American species and improving industrial energy efficiency. In 2017, the CEC Parties continued the practice of reporting on actions taken on public submissions on enforcement matters concluded over the previous year.

Since 1993, Mexico and the United States also have helped border communities with environmental infrastructure projects in furtherance of the goals of the NAFTA. The Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADB) are working with communities throughout the United States-Mexico border region to address their environmental infrastructure needs.

2. Korea-U.S. Free Trade Agreement

Overview

The United States-Korea Free Trade Agreement (KORUS FTA), which came into force on March 15, 2012, has been a major disappointment overall. Since the agreement has been in effect, U.S. imports of goods from Korea rose from $56.7 billion in 2011 to $71.2 billion in 2017, while U.S. exports of goods to Korea only rose from $43.5 billion in 2011 to $48.3 billion in 2017. Thus, the U.S. trade deficit in goods with Korea increased by 73 percent since the entry-into-force of the Agreement, and the goods and services deficit with Korea nearly tripled between 2011 and 2016 (latest data available).

These statistics are particularly troubling given President Obama's claim that "the tariff reductions in this agreement alone are expected to boost annual exports of American goods by up to $11 billion. And all told, this agreement … will contribute significantly to achieving my goal of doubling U.S. exports over the next five years."[45]

The United States did see initial gains from services trade in the early years of implementation; however, services export growth has since stalled. In 2011, the U.S. benefited from $16.7 billion in services exports, which grew to $21.0 billion in 2013. But exports have remained virtually flat since then. In 2016, the U.S. only exported $21.1 billion of services to Korea.

[45] "Remarks by the President on the U.S.-Korea Free Trade Agreement," President Barack Obama, December 4, 2010, https://obamawhitehouse.archives.gov/the-press-office/2010/12/04/remarks-president-announcement-a-us-korea-free-trade-agreement.

While six rounds of tariff cuts have taken place under the KORUS FTA, Korea has still fallen short on faithful implementation of the agreement. As a candidate, President Trump described the KORUS FTA as a "job-killing deal." As President, he has acted – directing USTR to seek changes to rebalance the KORUS FTA in ways that will be more favorable to American workers and businesses. These efforts are ongoing.

Operation and Improvement of the Agreement

In recent years, stakeholders have voiced increasing concern that Korea has not fully implemented commitments in too many areas or has taken actions that undermined benefits that the United States had expected under the FTA.

On paper, the KORUS FTA resulted in improvements in market access to Korea's goods and services market. For example, it was supposed to improve market access and regulatory transparency for U.S. service suppliers in Korea's roughly $760 billion services market, including in the areas of financial services, business and professional services, telecommunications, and audiovisual services.

Too often, however, Korea has undermined these improvements in access to its market in a number of areas by introducing counter-measures and through other practices. Examples include:

- targeted efforts to provide preferential treatment within Korea's market to domestic firms,
- the introduction of new non-tariff barriers,
- and the denial of adequate procedural fairness by Korean enforcement authorities for U.S. companies.

The Agreement's central oversight body is the Joint Committee, chaired by the U.S. Trade Representative and the Korean Trade Minister. Meetings of Senior Officials are typically held just prior to the Joint Committee meetings to coordinate and report on the activities of the committees and working groups established under the Agreement. The U.S. Government also addresses the KORUS FTA compliance and other trade issues on a continual basis through regular inter-sessional consultations, through respective embassies, and through other engagements with the Korean government (including at senior levels) in order to resolve issues in a timely manner.

Using these FTA committees and working groups, certain issues related to Korea's implementation of the agreement have been resolved. These include ensuring that Korea established and implemented regulations to allow the outsourcing of data offshore, the inclusion of biologics in Korea's new patent linkage system, and the resolution of a series of technical automotive regulatory issues, such as testing protocols for vehicle sunroofs.

However, it became clear that traditional engagement with the government of Korea had not been enough. Despite years of effort, Korea failed to adequately address a number of implementation and related concerns that continue to undermine benefits of the agreement that should be available to U.S. exporters and companies.

In July 2017, USTR called for a special session of the Joint Committee under the KORUS FTA to initiate bilateral negotiations to address serious concerns regarding the persistent, significant trade deficit with Korea and the asymmetric benefits that the Agreement has generated. This first-ever special session of the Joint Committee was held on August 22, 2017, in Seoul, Korea. At the second special session of the Joint

Committee, held in Washington, D.C. on October 4, 2017, USTR continued to seek improvements to the Agreement to achieve more reciprocal benefits for American exporters, as well as resolution of a number of outstanding implementation concerns, including in the areas of customs, competition policy, automobiles, medical device and pharmaceutical pricing, labor and services.

Following the special session of the Joint Committee on October 4, 2017, Korea initiated its domestic procedures to allow the Korean government to engage in negotiations with the United States on potential amendments to the Agreement. Korea completed these procedures in December, and the United States and Korea held negotiations on amendments and modifications to improve the Agreement on January 5 and again on January 31-February 1, 2018.

In addition to these efforts, throughout last year, committees and working groups established under the KORUS FTA met to discuss issues related to the Agreement. These included the Automobiles Working Group, the Committee on Sanitary and Phytosanitary Matters, the Committee on Services and Investment, the Committee on Trade in Goods, the Committee on Technical Barriers to Trade, the Professional Services Working Group, and the Committee on Trade Remedies. USTR consults closely with Congress and stakeholders regarding the work of the KORUS FTA committees.

For a discussion of environment related activities in 2017, see chapter IV.D.2.

B. Free Trade Agreements

1. Australia

The United States-Australia Free Trade Agreement (FTA) entered into force on January 1, 2005. The United States met regularly with Australia throughout the year to review the FTA, which was described by the Vice President during his April 2017 visit to Australia as a model for what a mutually beneficial trade agreement can be. The United States and Australia held a meeting of the United States-Australia Joint Committee in December 2017 to review the operation of the FTA and to address priority issues related to goods, services, investment, plant and animal health, and intellectual property. Since the FTA entered into force, U.S.-Australia goods and services trade have increased, with bilateral U.S.-Australia trade in services nearly tripling. In 2017, the United States had a $14.6 billion goods trade surplus with Australia and in 2016, a $14.7 billion services trade surplus, relative to $12.6 billion and $15.1 billion, respectively, in the year before. In 2017, the United States had a $1.8 billion deficit in agricultural trade with Australia.

2. Bahrain

The United States-Bahrain Free Trade Agreement (FTA), which entered into force on August 1, 2006, continues to generate export opportunities for the United States. Upon entry into force of the Agreement, 100 percent of the two-way trade in industrial and consumer products, and trade in most agricultural products, immediately became duty free. Duties on other products were phased out gradually over the first ten years of the Agreement. In 2017, the United States exported $907 million worth of goods to Bahrain, relative to $899 million the year before, and imported $996 million worth of goods from Bahrain, relative to $768 million the year before. In addition, Bahrain opened its services market, creating important new opportunities for U.S. financial services providers and U.S. companies that offer telecommunication, audiovisual, express delivery, distribution, health care, architecture, and engineering services. The United States-Bahrain Bilateral Investment Treaty, which took effect in May 2001, covers investment issues between the two countries.

to insist that Russia implement its WTO obligations and will use all available tools of the WTO, as appropriate, to enforce those obligations. The United States will also continue to follow and evaluate the actions of the Eurasian Economic Commission (EEC), the administrative arm of the Eurasian Economic Union (EAEU; comprising Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Russia), on Central Asian states and, where appropriate, work with the individual EAEU member states to ensure compliance with WTO rules.

3. Japan, Republic of Korea, and the Asia-Pacific Economic Cooperation Forum

Japan

The Trump Administration is committed to achieving a fair and reciprocal trading relationship with Japan. It seeks equal and reliable access for American exports to Japan's markets in order to address chronic trade barriers, imbalances, and deficits with Japan.

In February 2017, President Trump and Prime Minister Shinzo Abe agreed to the United States-Japan Economic Dialogue when the two leaders met in Washington, D.C. In April 2017, Vice President Mike Pence and Deputy Prime Minister Taro Aso launched the United States-Japan Economic Dialogue in Tokyo, Japan. They agreed to structure the Economic Dialogue along three policy pillars, including one focused on trade and investment rules and issues. In October 2017, Vice President Pence and Deputy Prime Minister Aso met for the second round of the Economic Dialogue, where they affirmed the importance of strengthening bilateral economic, trade, and investment ties.

Some initial progress was achieved on bilateral trade issues in the October meeting, including the lifting of Japan's restrictions on U.S. potatoes from Idaho. In the area of automobiles trade, Japan agreed to streamline noise and emissions testing procedures for U.S. automobile exports certified under Japan's Preferential Handling Procedure (PHP). Japan committed to ensure meaningful transparency and fairness in its system for geographical indications (GIs) in accordance with its domestic law and procedures, including those receiving protection through international agreements. Japan also committed to ensure meaningful transparency continuously with respect to reimbursement policies related to life sciences innovation.

In November 2017, during President Trump's trip to Japan and meeting with Prime Minister Abe, the leaders discussed promoting balanced trade, including by taking additional steps bilaterally to advance these objectives. Building on outcomes under the Economic Dialogue, President Trump recognized further steps taken by Japan in the areas of automotive standards and governmental financial incentives for motor vehicles, as well as efforts to strengthen the transparency of deliberations affecting the life sciences industry, as signs of continuing progress on bilateral trade issues. President Trump and Prime Minister Abe decided to accelerate engagement on trade in ways that expand the potential of the bilateral trade relationship.

The United States continues to engage with Japan to seek further progress on bilateral trade issues, in order to secure better access and fair treatment for U.S. exporters seeking to expand exports and other opportunities in the market of the United States' fourth largest trading partner.

The United States also worked closely with Japan in various fora in 2017 to address trade issues of common interest, including those in third-country markets. This work included closely coordinating on certain World Trade Organization (WTO) dispute settlement cases. In addition, on the sidelines of the WTO ministerial meeting in December 2017, the United States, Japan, and the EU agreed to strengthen their

commitment to ensure a global level playing field by tackling unfair practices which have led to global overcapacity and other unfair market distorting and protectionist practice by third countries. The United States and Japan also worked closely together in the Asia-Pacific Economic Cooperation (APEC) forum to advance issues such as digital trade.

Republic of Korea (Korea)

(*See Chapter II.A.2 for discussion of the United States-Korea Free Trade Agreement.*)

In addition to close engagement with counterparts in the Korean government through committee meetings and working groups established under the United States-Korea Free Trade Agreement (KORUS FTA), USTR continues to hold bilateral consultations with Korea in a variety of formats to address bilateral trade issues, as well as other emerging issues. These meetings are augmented by senior-level engagement. In 2017, the United States and Korea held a number of bilateral trade consultations, in which the United States addressed a substantial number of outstanding issues, including those related to automobiles, customs, competition policy, medical device/pharmaceutical reimbursement pricing, agriculture, labor, and services.

APEC

Overview

According to its Secretariat, the 21 member economies of the Asia-Pacific Economic Cooperation (APEC) Forum collectively account for approximately 40 percent of the world's population, approximately 57 percent of world GDP and about 45 percent of world trade (if intra-EU trade is included in world trade, or 59 percent if intra-EU trade is excluded). In 2017, United States-APEC total trade in goods was $2.6 trillion. Total trade in services was $458 billion in 2016 (latest data available). The significant volume of U.S. trade in the Asia-Pacific region underscores the importance of the region as a market for U.S. exports.

Since its founding in 1989, U.S. participation in the APEC forum has substantially contributed to lowering barriers across the Asia-Pacific to U.S. exports.

In 2017, Vietnam hosted APEC under the theme "Creating New Dynamism, Fostering a Shared Future." At the November APEC Leaders and Ministers' meetings in Danang, Vietnam, APEC economies reported progress and identified areas for future work in areas such as removing trade barriers, creating more transparent and open regulatory regimes, and reducing trade costs. The activities below describe the key outcomes that advance the U.S. trade and investment agenda in the region.

2017 Activities

Digital Trade: APEC continues to advance a U.S.-led initiative to identify building blocks to facilitate digital trade. These building blocks will promote policies to prevent barriers to digital trade that negatively affect U.S. competitiveness, as well as help APEC economies take advantage of the rapidly growing digital economy. In 2018, APEC will continue development of this initiative through policy dialogues. The United States also will seek to expand participation in its initiative with 11 other APEC economies to support a permanent customs duty moratorium on electronic transmissions, including electronically transmitted content.

Trade Facilitation: In 2017, APEC adopted the second phase of an action plan that aims to continue to improve trade facilitation efforts by APEC economies into 2018, including supply chain performance and implementation of the WTO Trade Facilitation Agreement. APEC's work in these areas help make it significantly cheaper, easier, and faster for U.S. exporters to access markets across the Asia-Pacific region.

KORUS

USTR is working to modify and amend our existing free trade agreement with the Republic of Korea to rebalance and reduce the large trade deficit in manufactured goods, including autos and auto parts. In addition, USTR is engaged in efforts to resolve implementation concerns with the agreement that have hindered U.S. goods export growth and opportunities in Korea.

Bilateral Market Access Barriers

Over the past year, USTR sought to address a broad range of manufactured goods market access barriers and non-tariff barriers through extensive engagement with our trade partners, including through formal Trade and Investment Framework Agreement (TIFA) meetings, FTA meetings, and various bilateral trade policy initiatives and activities. Among such activities in 2017 were efforts to address: Indian barriers to U.S. manufactured goods exports, including medical devices and high-technology products through the Trade Policy Forum (TPF); Vietnamese barriers to U.S. autos exports; and a range of China's industrial policies, such as Made in China 2025, designed to create or accelerate artificially China's ability to become a manufacturing leader in several high technology, high value-added industries, including information technology, aviation, electric vehicles, and medical devices. USTR is utilizing the full range of U.S. trade tools to address China's strategic plans.

Excess Capacity in Key Industrial Sectors

Industrial policies in some trading partners, particularly China, have led to growth in select industry sectors, including steel and aluminum that is far out of line with market realities. These policies have adversely affected U.S. industry and workers as well as global trade. USTR is working with like-minded trading partners to build international consensus on excess capacity by negotiating commitments in the Global Forum on Steel Excess Capacity (GFSEC), OECD Steel Committee, and the North American Steel Trade Committee. The Administration also is working to address the root causes of this problem through mechanisms under U.S. law.

Strong Enforcement

Throughout all these policy activities relating to manufacturing and trade, the Trump Administration is already aggressively standing up for American interests and protecting American economic security by taking tough enforcement action against countries that break the rules, and applying the full range of tools, including WTO rules, negotiations, litigation, and other mechanisms under U.S. law. *(See, Chapter III: Trade Enforcement Activities.)*

B. Protecting Intellectual Property

One of the top trade priorities for the Trump Administration is to use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property (IP) rights. Toward this end, a key objective for the Administration's trade policy is ensuring that U.S. owners of IP have a full and fair opportunity to use and profit from their IP around the globe. IP rights include copyrights, patents, trademarks, and trade secrets. IP-intensive industries directly or indirectly account for 45.5 million jobs in the United States, nearly one third of all U.S. employment, in 2014.

To protect U.S. innovation and employment, the Administration is prepared to call to account foreign countries and expose the laws, policies, and practices that fail to provide adequate and effective IP

Agreement (CTPA) and to discuss the development of a new Environmental Cooperation Work Program. The United States provided capacity building assistance under the United States-Colombia Environmental Cooperation Work Program 2014-2017 in support of Colombia's implementation of its environmental obligations under the CTPA. The U.S. Agency for International Development (USAID) supports the bulk of this environmental cooperation and in 2017 invested more than $14 million in a broad portfolio of environmental programs throughout Colombia. Activities included support for biodiversity conservation in the Amazon, Orinoquia and Caribbean regions, and sharing of U.S. experience with integrating large-scale private investment in wind and solar energy into the U.S. electrical system. This work was done in close partnership with relevant Colombian government entities, the private sector, and civil society. The State Department's Bureau of International Narcotics and Law Enforcement Affairs also provided over $1 million in programs to improve the Colombian government's law enforcement capacity to counter illegal mining, wildlife trafficking, and other environmental crimes perpetrated by organized criminal groups.

Jordan Free Trade Agreement

In 2017, USTR officials and other experts continued to engage with officials from Jordan to monitor implementation of the FTA Environment Chapter and, in accordance with the United States-Jordan FTA and the United States-Jordan Joint Statement on Environmental Technical Cooperation, the two governments worked closely together on a range of environmental matters under the 2014-2017 Work Program for Environmental Cooperation, including: institutional strengthening; effective enforcement of environmental laws; conservation; cleaner production processes; and increased public participation and transparency in environmental decision making and enforcement. In 2017, the U.S. Forest Service (USFS) continued to support improved natural resource management, including watershed restoration with native seedlings and tree nursery management for increased seedling survival rates through partnership with Jordan's Ministry of Agriculture-National Center for Agriculture Research and Extension, the International Center for Agricultural Research in Dry Areas, and local communities. Also in 2017, the Environmental Protection Agency (EPA) worked with Jordan's Ministry of Environment, Jordan Valley Authority, and local municipal officials to enhance capacity for integrated solid waste management through training on public participation and management of solid waste including the development of municipal solid waste management strategies and plans for the Jordan Valley. Finally, in 2017 the United States and Jordan began work on preparing a new Work Program for 2018-2021.

Korea Free Trade Agreement

The United States and Korea continued efforts to strengthen environmental protection and review implementation of the KORUS Environment Chapter. In accordance with the United States-Republic of Korea FTA and the United States-Republic of Korea Environmental Cooperation Agreement, the United States and South Korea have worked closely together on a range of environmental matters under the 2016-2018 Work Program, which includes cooperation on strengthening implementation and enforcement of environmental laws, protecting wildlife and sustainably managing ecosystems and natural resources, promoting sustainable cities, and sharing best practices on the development and application of cleaner sources of energy and the use of innovative environmental technology. In 2017, the United States also reviewed and provided input on the implementation of amendments to Korea's Act on the Sustainable Use of Timber, which includes provisions to prevent the import of illegally logged timber products.

In May 2017, the National Oceanic and Atmospheric Administration's (NOAA) Office of Law Enforcement held a workshop and peer exchange for personnel from South Korea's Ministry of Oceans and Fisheries, Coast Guard, and National Police, and the nongovernmental organization Environmental Justice Foundation at the NOAA Western Regional Center in Seattle, Washington on effective means to combat IUU fishing using monitoring, control, and surveillance tools or technologies. The U.S. Fish and Wildlife Service, Washington State Department of Fish and Wildlife, and the U.S. Coast Guard were also in attendance.

In July 2017, the Korean National Institute of Environmental Research (NIER) and the U.S. National Aeronautics and Space Administration presented the preliminary scientific results of a joint study on air quality based on data collected during a six-week field study during the summer of 2016. The study included air quality testing, ground aerial observation, air quality modeling, and satellite data analysis, and the joint study identified strategies for South Korea to reduce ozone and particulate matter levels in the Seoul metropolitan area and rural sections of the country. NIER and South Korea's Ministry of Environment expect that the information derived from the joint research will help South Korea to improve its air pollution analysis and policy formulation.

Morocco Free Trade Agreement

The United States and Morocco met under the Joint Cooperation Committee under the FTA to discuss a range of issues, including environment, signaling a mutual interest in continuing to enhance bilateral environmental cooperation and affirm a commitment to environmental protection through free and fair trade. The United States and Morocco are planning a meeting of the Subcommittee on Environmental Affairs, chaired by USTR, to review implementation of the FTA environment chapter, and of the Working Group on Environmental Cooperation, chaired by the U.S. Department of State, in early 2018. The United States and Morocco have begun working on preparation of a new Plan of Action for 2018-2021, which will be reviewed in early 2018.

In accordance with the United States-Morocco FTA and the United States-Morocco Joint Statement on Environmental Cooperation, the United States and Morocco worked closely together in 2017 on a range of environmental matters under the 2014-2017 Plan of Action. A key accomplishment in 2017 under the U.S. – Morocco Joint Statement on Environmental Cooperation was the establishment of protocols for implementing Morocco's new legislation to support CITES. The CITES Secretariat concluded that the new law fully satisfies Morocco's CITES implementation commitments.

The USFS continued to work with the High Commission for Water and Forests and the Fight Against Desertification (HCEFLCD) to provide technical assistance and training on improved fire management coordination and response. The USFS assisted in establishing a national fire training center in Rabat to provide training on incident command systems. The USFS also provided technical support to the High Commission on tree nursery management and training for High Commission experts on forest landscape restoration and disaster management.

Also in 2017, the U.S. EPA worked with the Moroccan Ministry of Energy, Mines, Water and Environment and the Ministry of Interior to improve solid waste management through capacity building on municipal solid waste management planning, public participation, and crisis communication. In addition, the NOAA worked with the Moroccan National Agency for Development of Aquaculture (ANDA) in 2017 to review the aquaculture siting guidelines, environmental models, and monitoring standards that were prepared through support and training to a Moroccan expert. NOAA also provided technical assistance to ANDA and aquaculture cooperative members on the operation of the mussel longline demonstration farms.

Oman Free Trade Agreement

USTR has continued to review implementation of the U.S.-Oman FTA Environment Chapter, and in accordance with the FTA and the United States-Oman Memorandum of Understanding (MOU) on Environmental Cooperation, the United States and Oman have worked closely together on a range of environmental matters, such as the priority areas for cooperation identified in the 2014-2017 Plan of Action. As a part of this effort, the U.S. Department of Interior provided training and technical assistance to build capacity in the Oman Ministry of Climate Affairs (MECA) on protected area management, understanding

On July 7, 2014, the Appellate Body issued its report. The Appellate Body found that the panel erred in its legal interpretation of Article X:2 of the GATT, and reversed the Panel's findings with respect to P.L. 112-99. The Appellate Body was unable to complete the analysis to determine the consistency of P.L. 112-99 with Article X:2 due to the lack of undisputed facts on the record. The Appellate Body found that China's panel request complied with Article 6.2 of the DSU.

On July 22, 2014, the DSB adopted its recommendations and rulings in the dispute. On August 21, 2014, the United States stated its intention to comply with the DSB recommendations and rulings, and that it would need a RPT to do so. The United States and China initially agreed to a RPT of 12 months. The United States and China subsequently agreed to extend the RPT, so as to expire on August 5, 2015. At the DSB meeting on August 31, 2015, the United States notified the DSB that it had implemented the recommendations and rulings of the DSB in the dispute.

United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)

On August 29, 2013, the United States received from Korea a request for consultations pertaining to antidumping and countervailing duty measures imposed by the United States pursuant to final determinations issued by Commerce following antidumping and countervailing duty investigations regarding large residential washers (washers) from Korea. Korea claimed that Commerce's determinations, as well as certain methodologies used by Commerce, were inconsistent with U.S. commitments and obligations under Articles 1, 2, 2.1, 2.4, 2.4.2, 5.8, 9.3, 9.4, 9.5, 11, and 18.4 of the AD Agreement, Articles 1.1, 1.2, 2.1, 2.2, 10, 14, and 19.4 of the SCM Agreement; Articles VI, VI:1, VI:2, and VI:3 of the GATT 1994; and Article XVI:4 of the WTO Agreement. Specifically, Korea challenged Commerce's alleged use of "zeroing" and application of the second sentence of Article 2.4.2 of the AD Agreement, as applied in the washers antidumping investigation and "as such." Korea also challenged Commerce's determinations in the washers countervailing duty investigation that Article 10(1)(3) of Korea's Restriction of Special Taxation Act (RSTA) is a subsidy that is specific within the meaning of Article 2.1 of the SCM Agreement, Commerce's determination of the amount of subsidy benefit received by a respondent under Article 10(1)(3) of the RSTA, Commerce's determination that Article 26 of the RSTA is a regionally specific subsidy, and Commerce's imposition of countervailing duties on one respondent that were attributable to tax credits that the respondent received for investments that it made under Article 26 of the RSTA.

The United States and Korea held consultations on October 3, 2013. On December 5, 2013, Korea requested that the DSB establish a panel. On January 22, 2014, a panel was established. On June 20, 2014, the Director General composed the panel as follows: Ms. Claudia Orozco, Chair; and Mr. Mazhar Bangash and Mr. Hanspeter Tschaeni, Members. The panel held meetings with the parties on March 10-11, 2015, and on May 20-21, 2015.

The panel circulated its report on March 11, 2016. The panel found that aspects of Commerce's antidumping determination were inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, including the determination to apply an alternative, average-to-transaction comparison methodology and the application of that methodology to all transactions rather than just to so-called pattern transactions. The panel rejected other claims asserted by Korea, including Korea's argument that Commerce acted inconsistently with Article 2.4.2 by determining the existence of a pattern exclusively on the basis of quantitative criteria.

The panel found that aspects of Commerce's differential pricing methodology are inconsistent "as such" with the second sentence of Article 2.4.2 of the AD Agreement. The panel also found that the United States' use of zeroing when applying the average-to-transaction comparison methodology is inconsistent

with the second sentence of Article 2.4.2 and Article 2.4, both "as such" and as applied in the washers antidumping investigation.

In addition, the panel made several findings on the CVD issues raised by Korea. The Panel found that Commerce's disproportionality analysis, in its original and remand determinations, was inconsistent with Article 2.1(c) of the SCM Agreement. But the panel rejected Korea's remaining claims – i.e., its claim that Commerce's regional specificity determination was inconsistent with Article 2.2 of the SCM Agreement, and its claims concerning the proper quantification of subsidy ratios.

On April 19, 2016, the United States appealed certain of the panel's findings. Korea filed another appeal on April 25, 2016. The oral hearing in the appeal was held on June 20-21, 2016, in Geneva.

On September 7, 2016, the Appellate Body circulated its report. The Appellate Body upheld several of the panel's findings under the AD Agreement, including the panel's finding that the average-to-transaction comparison methodology should be applied only to so-called pattern transactions, the panel's finding that the use of zeroing is inconsistent with the second sentence of Article 2.4.2 and Article 2.4, both "as such" and as applied, and the panel's finding that the differential pricing methodology is inconsistent "as such" with the second sentence of Article 2.4.2 of the AD Agreement. The Appellate Body reversed other findings made by the panel. For instance, the Appellate Body found that an investigating authority must assess the price differences at issue on both a quantitative and qualitative basis, and the Appellate Body mooted the panel's finding concerning systemic disregarding, finding instead that the combined application of comparison methodologies is impermissible. With respect to the CVD issues, the Appellate Body upheld the panel's rejection of Korea's regional specificity claim, but found that certain aspects of Commerce's calculation of subsidy rates were inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

On September 26, 2016, the DSB adopted the panel and Appellate Body reports. On October 26, 2016, the United States stated that it intends to implement the recommendations of the DSB in this dispute in a manner that respects U.S. WTO obligations, and that it will need a reasonable period of time in which to do so. On April 13, 2017, an Article 21.3(c) arbitrator determined that the RPT for implementation would expire on December 26, 2017.

On December 15, 2017, USTR requested that Commerce initiate a proceeding under section 129 of the *Uruguay Round Agreements Act* to address the DSB's recommendations relating to Commerce's CVD investigation of washers from Korea. On December 18, 2017, Commerce initiated a section 129 proceeding. The section 129 proceeding is expected to be completed in 2018.

United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)

On December 3, 2013, the United States received from China a request for consultations pertaining to antidumping measures imposed by the United States pursuant to final determinations issued by Commerce following antidumping investigations regarding a number of products from China, including certain coated paper suitable for high-quality print graphics using sheet-fed presses, certain oil country tubular goods, high pressure steel cylinders, polyethylene terephthalate film, sheet, and strip; aluminum extrusions; certain frozen and canned warm water shrimp; certain new pneumatic off–the-road tires; crystalline silicon photovoltaic cells, whether or not assembled into modules; diamond sawblades and parts thereof; multilayered wood flooring; narrow woven ribbons with woven selvedge; polyethylene retail carrier bags; and wooden bedroom furniture. China claimed that Commerce's determinations, as well as certain methodologies used by Commerce, are inconsistent with U.S. obligations under Articles 2.4.2, 6.1, 6.8, 6.10, 9.2, 9.3, 9.4, and Annex II of the AD Agreement; and Article VI:2 of the GATT 1994. Specifically,

On November 28, 2016, the panel report was circulated to the Members finding only the Washington State B&O tax incentive to be a prohibited subsidy. Six other tax incentives were found to be subsidies, but they were not deemed to be illegal under WTO rules.

Findings against the EU

- The EU failed to demonstrate that the aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods with respect to the First Siting Provision in Washington State's Engrossed Substitute Senate Bill (ESSB 5952) considered separately.

- The EU failed to demonstrate that the reduced B&O tax rate for the manufacture and sale of commercial airplanes is *de jure* contingent upon the use of domestic over imported goods with respect to the Second Siting Provision in ESSB 5952 considered separately.

- The EU failed to demonstrate that the aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods with respect to the First Siting Provision and the Second Siting Provision considered jointly.

Findings against the United States

- The seven aerospace tax measures at issue constitute a subsidy within the meaning of Article 1 of the SCM Agreement.

- The Washington State B&O tax rate for the manufacturing or sale of commercial airplanes under the 777X program is inconsistent with Article 3.1(b) of the SCM Agreement.

- The United States acted inconsistently with Article 3.2 of the SCM Agreement.

On November 28, 2016, the panel report was circulated to the Members finding only the Washington State B&O tax incentive to be a prohibited subsidy. Six other tax incentives were found to be subsidies, but they were not deemed to be illegal under WTO rules.

The United States appealed certain aspects of the Panel's findings on December 16, 2016. The EU filed a notice of other appeal on January 17, 2017. The Division assigned to hear the appeal consisted of Mr. Thomas R. Graham (Presiding Member), Mr. Shree B.C. Servansing, and Mr. Peter Van den Bossche. The Appellate Body held an oral substantive hearing with the parties and third parties on June 6, 2017.

The Appellate Body circulated its report on September 4, 2017. The Appellate Body found that none of the seven challenged programs were prohibited import-substitution subsidies, as alleged by the EU. Accordingly, the United States had no compliance obligations, and the dispute ended with a complete U.S. victory.

United States — Anti-Dumping Measures on Oil Country Tubular Goods from Korea (DS488)

On December 22, 2014, the United States received from Korea a request for consultations pertaining to antidumping duties imposed on oil country tubular goods from Korea. Korea claimed that the calculation by Commerce of the constructed value profit rate for Korean respondents was inconsistent with U.S. obligations under Articles 2.2, 2.2.2, 2.4, 6.2, 6.4, 6.9, and 12.2.2 of the Antidumping Agreement and Articles I and X:3 of the GATT 1994. Korea also claimed that Commerce's decision regarding the affiliation of a certain Korean respondent to a supplier, and the effects of that decision, was inconsistent

with Articles 2.2.1.1 and 2.3 of the Antidumping Agreement and that its selection of two mandatory respondents was inconsistent with Article 6.10, including Articles 6.10.1 and 6.10.2. Korea further claimed that Commerce's methodology for disregarding a respondent's exports to third-country markets was inconsistent "as such" and "as applied" in the investigation at issue with Article 2.2 of the Antidumping Agreement.

The United States and Korea held consultations on January 21, 2015. On February 23, Korea requested the establishment of a panel. The DSB established a panel on March 25, 2015, and the Parties agreed to the composition of the panel on July 13 as follows: Mr. John Adank, Chair; and Mr. Abd El Rahman Ezz El Din Fawzy and Mr. Gustav Brink, Members. Subsequently, Mr. Adank withdrew as Chair prior to the second substantive meeting of the Panel, and the Parties agreed that Mr. Crawford Falconer would replace Mr. Adank as Chair. The panel met with the parties on July 20-21, 2016, and November 1-2, 2016.

The panel circulated its report on November 14, 2017. The panel found that the United States had acted inconsistently with the chapeau of Article 2.2.2 of the Antidumping Agreement because Commerce did not determine profit for constructed value based on actual data pertaining to sales of the like product in the home market. The panel also found that the United States had acted inconsistently with Articles 2.2.2(i) and (iii) because Commerce relied on a narrow definition of the "same general category of products" in concluding it could not determine profit under Article 2.2.2(i) and in concluding it could not calculate a profit cap under Article 2.2.2(iii). The panel further found that the United States had acted inconsistently with Article 2.2.2(iii) because Commerce failed to calculate and apply a profit cap. The panel exercised judicial economy with respect to Korea's claims that the United States acted inconsistently the chapeau of Article 2.2.2 because Commerce did not determine profit for constructed value based on actual data pertaining to sales of the like product in third-country markets and with respect to Articles 1 and 9.3 as a consequence of substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii). Finally, the panel found two of Korea's claims with respect to profit for constructed value to be outside its terms of reference, specifically its claim that the United States had violated Article 2.2.2(iii) because Commerce had determined the profit rate based on a certain company's financial statements and its claim that the United States had violated Article X.3(a) of the GATT 1994, because Commerce had purportedly acted contrary to its agency practice of determining profit.

The panel otherwise rejected the remaining claims asserted by Korea with respect to the investigation at issue, including claims regarding the use of constructed export price and the selection of costs for calculation of constructed normal value; found such claims to be outside its terms of reference; or exercised judicial discretion. For example, the panel specifically found that Korea failed to demonstrate that the United States acted inconsistently with Articles 6.10 and 6.10.2 of the Antidumping Agreement in its selection of mandatory respondents. The panel also specifically rejected Korea's claims that Commerce's methodology for disregarding a respondent's exports to third-country markets was inconsistent "as such" and "as applied" in the investigation with Article 2.2 of the Antidumping Agreement. Finally, the panel exercised judicial economy with respect to Korea's claim that the United States had acted inconsistently with Article 2.4.

On January 12, 2018, the DSB adopted the panel report in this dispute.

United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia (DS491)

On March 13, 2015, Indonesia requested consultations concerning antidumping and countervailing duty measures pertaining to certain coated paper suitable for high-quality print graphics using sheet-fed presses. Indonesia alleged inconsistencies with Article VI of the GATT 1994, Articles 1, 3.5, 3.7 and 3.8 of the Antidumping Agreement, and Articles 2.1, 12.7, 10, 14(d), 15.5, 15.7 and 15.8 of the SCM Agreement.

THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY

AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED

U.S. Department of Commerce
Bureau of Industry and Security
Office of Technology Evaluation

January 11, 2018

THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY

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I. EXECUTIVE SUMMARY

Overview

This report summarizes the findings of an investigation conducted by the U.S. Department of Commerce (the "Department") pursuant to Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. §1862 ("Section 232")), into the effect of imports of steel mill products ("steel") on the national security of the United States.

In conducting this investigation, the Secretary of Commerce (the "Secretary") noted the Department's prior investigations under Section 232. This report incorporates the statutory analysis from the Department's 2001 Report[1] with respect to applying the terms "national defense" and "national security" in a manner that is consistent with the statute and legislative intent.[2] As in the 2001 Report, the Secretary in this investigation determined that "national security" for purposes of Section 232 includes the "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government."[3]

As required under Section 232, the Secretary examined the effect of imports on national security requirements, including: domestic production needed for projected national defense requirements; the capacity of domestic industries to meet such requirements; existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense; the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries; and the capacity of the United States to meet national security requirements.

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1 Department of Commerce, Bureau of Export Administration; *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security*; Oct. 2001 ("2001 Report").

2 *Id.* at 5.

3 *Id.*

The Secretary also recognized the close relation of the economic welfare of the United States to its national security; the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills, or any other serious effects resulting from the displacement of any domestic products by excessive imports, without excluding other factors, in determining whether a weakening of the U.S. economy by such imports may impair national security. In particular, this report assesses whether steel is being imported "in such quantities" and "under such circumstances" as to "threaten to impair the national security."[4]

Findings

In conducting the investigation, the Secretary found:

A. Steel is Important to U.S. National Security

1. National security includes projected national defense requirements for the U.S. Department of Defense.

2. National security also encompasses U.S. critical infrastructure sectors including transportation systems, the electric power grid, water systems, and energy generation systems.

3. Domestic steel production is essential for national security applications. Statutory provisions illustrate that Congress believes domestic production capability is essential for defense requirements and critical infrastructure needs, and ultimately to the national security of the United States.[5] U.S. Government actions on steel across earlier Administrations

[4] 19 U.S.C. § 1862(b)(3)(A).

[5] *See,* e.g., 15 U.S.C. § 271(a)(1)("The future well-being of the United States economy depends on a strong manufacturing base…"); 50 U.S.C. § 4502(a)("Congress finds that – (1) the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services… (2)(C) to provide for the protection and restoration of domestic critical infrastructure operations under emergency conditions…"; and American Recovery and Reinvestment Act, P.L. 111-5, §1605, 123 Stat. 303 (Feb. 17, 2009) (providing that none of the funds appropriated or made available by the act may be used for the construction, alteration, maintenance, or repair of a public building or public work unless the iron, steel, and manufactured goods are produced in the United States).

further demonstrate domestic steel production is vital to national security.[6]

4. Domestic steel production depends on a healthy and competitive U.S. industry. The principal types of mills that produce steel are integrated mills with basic oxygen furnaces (BOFs); mini-mills using electric arc furnaces (EAFs); re-roller/converter; and metal coater facilities. Basic oxygen furnaces convert raw materials into steel, and remain critical for continued innovation in steel technology. Covered in this report are five categories of steel products that are used for national security applications: flat, long, semi-finished, pipe and tube, and stainless.

5. The Department found that demand for steel in critical industries has increased since the Department's last investigation in 2001. The 2001 Report determined that there was 33.68 million tons of finished steel consumed in critical industries per year in the United States based on 1997 data.[7] The Department updated that analysis for this report using 2007 data (the latest available) and determined that domestic consumption in critical industries has increased significantly, with 54 million metric tons of steel now being consumed annually in critical industries.

B. *Imports in Such Quantities as are Presently Found Adversely Impact the Economic Welfare of the U.S. Steel Industry*

1. The United States is the world's largest steel importer. In the first ten months of 2017 steel imports have increased at a double-digit rate over 2016, accounting for more than 30 percent of U.S. consumption. Notwithstanding numerous anti-dumping and countervailing duty orders, which are limited in scope, imports of most types of steel continue to increase.

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[6] *See infra,* section V(A)(3) and Appendix J.

[7] 2001 Report at 14. The 2001 Report is not clear whether it used short tons or metric tons. If short tons were used then the metric ton equivalent is 30.56 million metric tons.

2. Import penetration levels for flat, semi-finished, stainless, long, and pipe and tube products continue on an upward trend above 30 percent of domestic consumption.

3. Imports are nearly four times U.S. exports.

4. Imports are priced substantially lower than U.S. produced steel.

5. Excessive steel imports have adversely impacted the steel industry. Numerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies illustrate the decline of the U.S. steel industry.

C. *Displacement of Domestic Steel by Excessive Quantities of Imports has the Serious Effect of Weakening our Internal Economy*

1. As steel imports have increased, U.S. steel production capacity has been stagnant and production has decreased.

2. Since 2000, foreign competition and the displacement of domestic steel by excessive imports have resulted in the closure of six basic oxygen furnace facilities and the idling of four more (which is more than a 50 percent reduction in the number of such facilities), a 35 percent decrease in employment in the steel industry, and caused the domestic steel industry as a whole to operate on average with negative net income since 2009.

3. The declining steel capacity utilization rate is not economically sustainable. Utilization rates of 80 percent or greater are necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector.

D. *Global Excess Steel Capacity is a Circumstance that Contributes to the Weakening of the Domestic Economy*

1. In the steel sector, free markets globally are adversely affected by substantial chronic global excess steel production led by China. The world's nominal crude steelmaking capacity reached about 2.4 billion metric tons in 2016, an increase of 127 percent compared to the capacity

level in 2000, while steel demand grew at a much smaller rate. In 2016 there was a 737 million metric ton global gap between steelmaking capacity and steel crude demand, which means there is unlikely to be any market-driven reduction in steel exports to the United States in the near future.[8]

2. While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined. This overhang of excess capacity means that U.S. steel producers, for the foreseeable future, will face increasing competition from imported steel as other countries export more steel to the United States to bolster their own economic objectives and offset loss of markets to Chinese steel exports.

Conclusion

Based on these findings, the Secretary of Commerce concludes that the present quantities and circumstance of steel imports are "weakening our internal economy" and threaten to impair the national security as defined in Section 232. The Secretary considered the Department's narrower investigation of iron ore and semi-finished steel imports in 2001, which recommended no action be taken, and finds that several important factors – the broader scope of the investigation, the level of global excess capacity, the level of imports, the reduction in basic oxygen furnace facilities since 2001, and the potential impact of further plant closures on capacity needed in a national emergency, support recommending action under Section 232. In light of this conclusion, the Secretary has determined that the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity.

[8] Source: Global Forum report; http://www.bmwi.de/Redaktion/EN/Downloads/global-forum-on-steel-excess-capacity-report.pdf

Recommendation

Prior significant actions to address steel imports using quotas and/or tariffs were taken under various statutory authorities by President George W. Bush, President William J. Clinton (three times), President George H. W. Bush, President Ronald W. Reagan (three times), President James E. Carter (twice), and President Richard M. Nixon, all at lower levels of import penetration than the present level, which is greater than 30 percent.

Due to the threat, as defined in Section 232, to national security from steel imports, the Secretary recommends that the President take immediate action by adjusting the level of these imports through quotas or tariffs. The quotas or tariffs imposed should be sufficient, even after any exceptions (if granted), to enable U.S. steel producers to operate at an 80 percent or better average capacity utilization rate based on available capacity in 2017 (*see* Figure 1).

Figure 1. Import Levels and U.S. Steel Mill Capacity Utilization Rates*		
Steel Market Snapshot (millions of metric tons)	**2011-2016 Average**	**2017 Annualized**
Total Demand for Steel in U.S. (production + imports-exports)	**105.5**	**107.3**
U.S. Annual Capacity	**114.4**	**113.3**
U.S. Annual Production (liquid)	**84.6**	**81.9**
Capacity Utilization Rate (percentage)	**74.0**	**72.3**
Imports and Exports (millions of metric tons)		
Imports of Steel to U.S. (including semi-finished)	**31.8**	**36.0**
Exports of Steel from the U.S.	**10.8**	**10.1**
Percent Import Penetration	**30.1**	**33.8**
Production at Various Utilization Rates (millions of metric tons)		
Maximum Capacity	**114.4**	**113.3**
Production at 75% Capacity Utilization	**85.8**	**85.0**
Production at 80% Capacity Utilization	**91.5**	**90.6**
Production at 85% Capacity Utilization	**97.2**	**96.3**
Import Levels and Domestic Production Targets Based on 80% Capacity Utilization		
General Equilibrium (GTAP Model – Includes Reduction in Exports and Demand)		
Maximum Import Level (mmt)	**22.7**	
Estimated Import Penetration	**22%**	
Estimated Production (mmt)	**90.6**	
Alternative 1A: Quota Applied to 2017 Import Levels	**63%**	
Alternative 1B: Tariff Rate Applied to All Imports	**24%**	

*Numbers may differ slightly due to rounding.
Sources: United States Department of Commerce, Bureau of the Census; American Iron and Steel Institute. Calculations based on industry and trade data.

The Secretary recommends that the President impose a quota or tariff on all steel products covered in this investigation imported into the United States to remove the threatened impairment to national security.

Alternative 1 – Global Quota or Tariff

1A. Global Quota

Impose quotas on all imported steel products at a specified percent of the 2017 import level, applied on a country and steel product basis.

According to the Global Trade Analysis Project (GTAP) Model[9], produced by Purdue University, a 63 percent quota would be expected to reduce steel imports by about 37 percent (13.3 million metric tons) from 2017 levels. Based on imports from January to October, import levels for 2017 are projected to reach 36.0 million metric tons. This action would result in imports equaling about 22.7 million metric tons, which will enable an 80 percent capacity utilization rate at 2017 demand levels (including exports).

1B. Global Tariff

Apply a tariff rate on all imported steel products, in addition to any antidumping or countervailing duty collections applicable to any imported steel product.

According to the Global Trade Analysis Project (GTAP) Model, produced by Purdue University, a 24 percent tariff on all steel imports would be expected to reduce imports by 37 percent (i.e., a reduction of 13.3 million metric tons from 2017 levels of 36.0 million metric tons). This tariff rate would thus result in imports equaling about 22.7 million metric tons, which will enable an 80 percent capacity utilization rate at 2017 demand levels (including exports).

Alternative 2 – Tariffs on a Subset of Countries

Apply a tariff rate on all imported steel products from Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica, in addition to any antidumping or countervailing duty collections applicable to any steel products from those countries. All other countries would be limited to 100 percent of their 2017 import level.

According to the Global Trade Analysis Project (GTAP) Model, produced by Purdue University, a 53 percent tariff on all steel imports from this subset of countries would be expected to reduce imports by 13.3 million metric tons from 2017

[9] The standard GTAP Model is a static multiregional, multisector, computable general equilibrium model, with perfect competition and constant returns to scale. The model is based on optimizing behavior by economic agents. The standard GTAP closure allows all prices and wages in the economy to adjust so as to ensure supply equals demand in all markets including the labor market. The estimates in this report were made using the GTAP 10 model which has a 2014 base.

import levels from the targeted countries. This action would enable an increase in domestic production to achieve an 80 percent capacity utilization rate at 2017 demand levels (including exports). The countries identified are projected to account for less than 4 percent of U.S. steel exports in 2017.

Exemptions

In selecting an alternative, the President could determine that specific countries should be exempted from the proposed 63 percent quota or 24 percent tariff by granting those specific countries 100 percent of their prior imports in 2017, based on an overriding economic or security interest of the United States. The Secretary recommends that any such determination should be made at the outset and a corresponding adjustment be made to the final quota or tariff imposed on the remaining countries. This would ensure that overall imports of steel to the United States remain at or below the level needed to enable the domestic steel industry to operate as a whole at an 80 percent or greater capacity utilization rate. The limitation to 100 percent of each exempted country's 2017 imports is necessary to prevent exempted countries from producing additional steel for export to the United States or encouraging other countries to seek to trans-ship steel to the United States through the exempted countries.

It is possible to provide exemptions from either the quota or tariff and still meet the necessary objective of increasing U.S. steel capacity utilization to a financially viable target of 80 percent. However, to do so would require a reduction in the quota or increase in the tariff applied to the remaining countries to offset the effect of the exempted import tonnage.

Exclusions

The Secretary recommends an appeal process by which affected U.S. parties could seek an exclusion from the tariff or quota imposed. The Secretary would grant exclusions based on a demonstrated: (1) lack of sufficient U.S. production capacity of comparable products; or (2) specific national security based considerations. This appeal process would include a public comment period on each exclusion request,

and in general, would be completed within 90 days of a completed application being filed with the Secretary.

An exclusion may be granted for a period to be determined by the Secretary and may be terminated if the conditions that gave rise to the exclusion change. The U.S. Department of Commerce will lead the appeal process in coordination with the Department of Defense and other agencies as appropriate. Should exclusions be granted the Secretary would consider at the time whether the quota or tariff for the remaining products needs to be adjusted to increase U.S. steel capacity utilization to a financially viable target of 80 percent.

II. LEGAL FRAMEWORK

I. Section 232 Requirements

Section 232 provides the Secretary with the authority to conduct investigations to determine the effect on the national security of the United States of imports of any article. It authorizes the Secretary to conduct an investigation if requested by the head of any department or agency, upon application of an interested party, or upon his own motion. *See* 19 U.S.C. § 1862(b)(1)(A).

Section 232 directs the Secretary to submit to the President a report with recommendations for "action or inaction under this section" and requires the Secretary to advise the President if any article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." *See* 19 U.S.C. § 1862(b)(3)(A).

Section 232(d) directs the Secretary and the President to, in light of the requirements of national security and without excluding other relevant factors, give consideration to the domestic production needed for projected national defense requirements and the capacity of the United States to meet national security requirements. *See* 19 U.S.C. § 1862(d).

Section 232(d) also directs the Secretary and the President to "recognize the close relation of the economic welfare of the Nation to our national security, and …take into consideration the impact of foreign competition on the economic welfare of individual domestic industries" by examining whether any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports, or other factors, result in a "weakening of our internal economy" that may impair the national security. *See* 19 U.S.C. § 1862(d).

Once an investigation has been initiated, Section 232 mandates that the Secretary provide notice to the Secretary of Defense that such an investigation has been initiated. Section 232 also requires the Secretary to do the following:

(1) "Consult with the Secretary of Defense regarding the methodological and policy questions raised in [the] investigation;"

(2) "Seek information and advice from, and consult with, appropriate officers of the United States;" and

(3) "If it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation."[10] *See* 19 U.S.C. § 1862(b)(2)(A)(i)-(iii).

As detailed in Parts III and V of this report, each of the legal requirements set forth above has been satisfied.

In conducting the investigation, Section 232 permits the Secretary to request that the Secretary of Defense provide an assessment of the defense requirements of the article that is the subject of the investigation. *See* 19 U.S.C. § 1862(b)(2)(B).

Upon completion of a Section 232 investigation, the Secretary is required to submit a report to the President no later than 270 days after the date on which the investigation was initiated. *See* 19 U.S.C. § 1862(b)(3)(A). The required report must:

(1) Set forth "the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security;"

(2) Set forth, "based on such findings, the recommendations of the Secretary for action or inaction under this section;" and

(3) "If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security . . . so advise the President." *See* 19 U.S.C. § 1862(b)(3)(A).

[10] Department regulations (i) set forth additional authority and specific procedures for such input from interested parties, *see* 15 C.F.R. §§ 705.7 and 705.8, and (ii) provide that the Secretary may vary or dispense with those procedures "in emergency situations, or when in the judgment of the Department, national security interests require it." Id., § 705.9.

All unclassified and non-proprietary portions of the report submitted by the Secretary to the President must be published.

Within 90 days after receiving a report in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall:

(1) "Determine whether the President concurs with the finding of the Secretary;" and

(2) "If the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *See* 19 U.S.C. § 1862(c)(1)(A).

II. Discussion

While Section 232 does not contain a definition of "national security", both Section 232, and its implementing regulations at 15 C.F.R. Part 705, contain non-exclusive lists of factors that Commerce must consider in evaluating the effect of imports on the national security. Congress in Section 232 explicitly determined that "national security" includes, but is not limited to, "national defense" requirements. *See* 19 U.S.C. § 1862(d). The Department in 2001 determined that "national defense" includes both defense of the United States directly and the "ability to project military capabilities globally."[11]

The Department also concluded in 2001 that "in addition to the satisfaction of national defense requirements, the term "national security" can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements that are critical to the minimum operations of the economy and government." The Department called these "critical industries."[12] This report once again uses these reasonable

[11] Department of Commerce, Bureau of Export Administration; *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security*; Oct. 2001 ("2001 Report").

[12] *Id.*

interpretations of "national defense" and "national security." However, this report uses the more recent 16 critical infrastructure sectors identified in Presidential Policy Directive 21[13] instead of the 28 critical industry sectors used by the Bureau of Export Administration in the 2001 Report.[14]

Section 232 directs the Secretary to determine whether imports of any article are being made "in such quantities or under such circumstances" that those imports "threaten to impair the national security." *See* 19 U.S.C. § 1862(b)(3)(A). The statutory construction makes clear that either the quantities or the circumstances, standing alone, may be sufficient to support an affirmative finding. They may also be considered together, particularly where the circumstances act to prolong or magnify the impact of the quantities being imported.

The statute does not define a threshold for when "such quantities" of imports are sufficient to threaten to impair the national security, nor does it define the "circumstances" that might qualify.

Likewise, the statute does not require a finding that the quantities or circumstances are impairing the national security. Instead, the threshold question under Section 232 is whether those quantities or circumstances "threaten to impair the national security." *See* 19 U.S.C. § 1862(b)(3)(A). This formulation strongly suggests that Congress expected an affirmative finding under Section 232 would occur before there is actual impairment of the national security.[15]

Section 232(d) contains a considerable list of factors for the Secretary to consider in determining if imports "threaten to impair the national security"[16] of the United States, and this list is mirrored in the implementing regulations. *See* 19

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[13] Presidential Policy Directive 21; Critical Infrastructure Security and Resilience; February 12, 2013 ("PPD-21").

[14] See Op. Cit. at 16.

[15] The 2001 Report used the phrase "fundamentally threaten to impair" when discussing how imports may threaten to impair national security. *See* 2001 Report at 7 and 37. Because the term "fundamentally" is not included in the statutory text and could be perceived as establishing a higher threshold, the Secretary expressly does not use the qualifier in this report. The statutory threshold in Section 232(b)(3)(A) is unambiguously "threaten to impair" and the Secretary adopts that threshold without qualification. 19 U.S.C. § 1862(b)(3)(A). The statute also uses the formulation "may impair" in Section 232(d). *Id.* at 1862(d).

[16] 19 U.S.C. § 1862(b)(3)(A).

U.S.C. § 1862(d) and 15 C.F.R. § 705.4. Congress was careful to note twice in Section 232(d) that the list they provided, while mandatory, is not exclusive.[17] Congress' illustrative list is focused on the ability of the United States to maintain the domestic capacity to provide the articles in question as needed to maintain the national security of the United States.[18] Congress broke the list of factors into two equal parts using two separate sentences. The first sentence focuses directly on "national defense" requirements, thus making clear that "national defense" is a subset of the broader term "national security." The second sentence focuses on the broader economy, and expressly directs that the Secretary and the President "shall recognize the close relation of the economic welfare of the Nation to our national security."[19] *See* 19 U.S.C. § 1862(d).

Two of the factors listed in the second sentence of Section 232(d) are most relevant in this investigation. Both are directed at how "such quantities" of imports threaten to impair national security. *See* 19 U.S.C. § 1862(b)(3)(A). In administering Section 232, the Secretary and the President are required to "take into consideration the impact of foreign competition on the economic welfare of individual domestic industries" and any "serious effects resulting from the displacement of any domestic products by excessive imports" in "determining whether such weakening of our internal economy may impair the national security."

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[17] *See* 19 U.S.C. § 1862(d) ("the Secretary and the President shall, in light of the requirements of national security and without excluding other relevant factors…" and "serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors… ").

[18] This reading is supported by Congressional findings in other statutes. *See, e.g.,* 15 U.S.C. § 271(a)(1)("The future well-being of the United States economy depends on a strong manufacturing base…") and 50 U.S.C. § 4502(a)("Congress finds that – (1) the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services… (2)(C) to provide for the protection and restoration of domestic critical infrastructure operations under emergency conditions… (3)… the national defense preparedness effort of the United States Government requires – (C) the development of domestic productive capacity to meet – (ii) unique technological requirements… (7) much of the industrial capacity that is relied upon by the United States Government for military production and other national defense purposes is deeply and directly influenced by – (A) the overall competitiveness of the industrial economy of the United States; and (B) the ability of industries in the United States, in general, to produce internationally competitive products and operate profitably while maintaining adequate research and development to preserve competitiveness with respect to military and civilian production; and (8) the inability of industries in the United States, especially smaller subcontractors and suppliers, to provide vital parts and components and other materials would impair the ability to sustain the Armed Forces of the United States in combat for longer than a short period.").

[19] *Accord* 50 U.S.C. § 4502(a).

See 19 U.S.C. § 1862(d). Since the 2001 investigation, foreign competition and the displacement of domestic steel by excessive imports have resulted in the closure of six basic oxygen furnace facilities and the idling of four more (which is more than a 50 percent reduction in the number of such facilities), a 35 percent decrease in employment in the steel industry, and caused the domestic steel industry as a whole to operate on average with negative net income since 2009.

Another factor, not on the list, that the Secretary finds to be a relevant is the presence of massive excess capacity for producing steel. This excess capacity results in steel imports occurring "under such circumstances" that they threaten to impair the national security. *See* 19 U.S.C. § 1862(b)(3)(A). The circumstance of excess global steel production capacity is a factor because, while U.S. production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much as the rest of the world combined. This overhang of global excess capacity means that U.S. steel producers, for the foreseeable future, will continue to lose market share to imported steel as other countries export more steel to the United States to bolster their own economic objectives and offset loss of markets to Chinese steel exports.

It is these three factors – displacement of domestic steel by excessive imports and the consequent adverse impact on the economic welfare of the domestic steel industry, along with global excess capacity in steel – that the Secretary has concluded create a persistent threat of further plant closures that could leave the United States unable in a national emergency to produce sufficient steel to meet national defense and critical industry needs. The Secretary finds this "weakening of our internal economy may impair the national security" as defined in Section 232. *See* 19 U.S.C. 1862(d).

The Secretary also considered whether the source of the imports affects the analysis under Section 232. In the 2001 Report, "the Department found that iron ore and semi-finished steel are imported from reliable foreign sources" and concluded that "even if the United States were dependent on imports of iron ore and semi-finished steel, imports would not threaten to impair national security." 2001 Report at 27. However, because Congress in Section 232 chose to explicitly direct the Secretary to consider whether the "impact of foreign competition" and "the

displacement of any domestic products by excessive imports" are "weakening our internal economy" but made no reference to an assessment of the sources of imports, it appears likely that Congress recognized adverse impacts might be caused by imports from allies or other reliable sources.[20] As a result, the fact that some or all of the imports causing the harm are from reliable sources does not compel a finding that those imports do not threaten to impair national security.[21]

After careful examination of the facts in this investigation, the Secretary has concluded that excessive imports of steel in the present circumstances do threaten to impair national security under Section 232. Several important factors – the broader scope of the investigation,[22] the level of global excess capacity, the level of imports, the reduction in basic oxygen furnace facilities since 2001, and the potential impact of further plant closures on capacity needed in a national emergency – support a recommendation different from the one adopted in the 2001 Report.

[20] When Congress adopted Section 232(d) in 1962 the immediately preceding section was Section 231, 19 U.S.C. § 1861, which required the President, as soon as practicable, to suspend most-favored-nation tariff treatment for imports from communist countries. Given the bipolar nature of the world at the time, the absence of a distinction between communist and non-communist countries in Section 232 suggests that Congress expected Section 232 would be applied to imports from all countries—including allies and other "reliable" sources.

[21] To the extent that the 2001 Report or other prior Department reports under Section 232 can be read to conclude that imports from reliable sources cannot impair the national security when the Secretary finds those imports are causing "substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports", the Secretary expressly rejects such a reading.

[22] This investigation examines the import of a broad range of steel products – flat, long, pipe and tube, semi-finished, and stainless – whereas the 2001 Report addressed only semi-finished steel products and iron ore, which is not part of this investigation. As the 2001 Report noted, at the time semi-finished imports accounted for "a small percentage (approximately 7 percent) of total U.S. semi-finished steel consumption." 2001 Report at 31. The 2001 Report also stated that "whether imports have harmed or threaten to harm U.S. producers writ large is beyond the scope of the Department's inquiry, and need not be resolved here." *Id.* at 37. This investigation is focused on the larger inquiry that the 2001 Report expressly did not reach.

III. INVESTIGATION PROCESS

A. Initiation of Investigation

On April 19, 2017, U.S. Secretary of Commerce Wilbur Ross initiated an investigation to determine the effect of imported steel on national security under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862).

Pursuant to Section 232(b)(1)(B), the Department notified the U.S. Department of Defense with an April 19, 2017 letter from Secretary Ross to Secretary James Mattis.[23]

On April 20, 2017, President Donald Trump signed a Presidential Memorandum directing Secretary Ross to proceed expeditiously in conducting his investigation and submit a report on his findings to the President.[24]

On April 21, 2017, the Department published in the Federal Register a notice about the initiation of this investigation to determine the effect of imports of steel on the national security. The notice also announced the opening of the public comment period as well as a public hearing to be held on May 24, 2017.[25]

B. Public Hearing

The Department held a public hearing to elicit further information concerning this investigation in Washington, DC, on May 24, 2017. The Department heard testimony from 37 witnesses at the hearing. A full list of witnesses and copies of their testimony are included in Appendices E and F.

C. Public Comments

On April 21, 2017, the Department invited interested parties to submit written comments, opinions, data, information, or advice relevant to the criteria listed in

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[23] 19 U.S.C. § 1862(b)(1)(B). *See* Appendix A: Section 232 Investigation Notification Letter to Secretary of Defense James Mattis (April 19, 2017) ; Department of Defense Response to Notification (May 8, 2017)

[24] *See* Appendix B: Presidential Memorandum for the Secretary of Commerce - Steel Imports and Threats to National Security (April 20, 2017)

[25] *See* Appendices C and D for Federal Register Notice Federal Register, Vol. 82, No. 79, 19205-19207 and *See* Federal Register, Vol. 82, No. 98, 23529-23530.

Section 705.4 of the National Security Industrial Base Regulations (15 C.F.R. § 705.4) as they affect the requirements of national security, including the following: (a) Quantity of the articles subject to the investigation and other circumstances related to the importation of such articles; (b) Domestic production capacity needed for these articles to meet projected national defense requirements; (c) The capacity of domestic industries to meet projected national defense requirements; (d) Existing and anticipated availability of human resources, products, raw materials, production equipment, facilities, and other supplies and services essential to the national defense; (e) Growth requirements of domestic industries needed to meet national defense requirements and the supplies and services including the investment, exploration and development necessary to assure such growth; (f) The impact of foreign competition on the economic welfare of any domestic industry essential to our national security; (g) The displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects; (h) Relevant factors that are causing or will cause a weakening of our national economy; and (i) Any other relevant factors. *See* Federal Register, Vol. 82, No. 79, 19205-19207.

The public comment period ended on May 31, 2017. The Department received 201 written public comment submissions concerning this investigation. All public comments were carefully reviewed and factored into the investigation process. For a listing of all public comments, *see* Appendix G.

D. Interagency Consultation

In addition to the required notification provided by the April 19, 2017 letter from Secretary Ross to Secretary Mattis, Department staff carried out the consultations required under Section 232(b)(2).[26] Staff consulted with their counterparts in the Department of Defense regarding any methodological and policy questions that arose during the investigation. Discussions were held with the U.S. Army Materiel Command, the Defense Logistics Agency, the U.S. Navy/Naval Air

[26] 19 U.S.C. § 1862(b)(2)

Systems Command, and the Under Secretary of Defense for Acquisitions & Logistics, Manufacturing and Industrial Base Policy.

Discussions were also held with "appropriate officers of the United States," including the Department of State, Department of the Treasury, Department of the Interior/U.S. Geological Survey, the Department of Homeland Security/U.S. Customs and Border Protection, the International Trade Commission, and the Office of the United States Trade Representative.[27]

[27] *Id.*

IV. PRODUCT SCOPE OF THE INVESTIGATION[28, 29]

For this report, the product scope covers steel mill products ("steel") which are defined at the Harmonized System ("HS") 6-digit level as: 720610 through 721650, 721699 through 730110, 730210, 730240 through 730290, and 730410 through 730690, including any subsequent revisions to these HS codes. The following discontinued HS codes have been included for purposes of reporting historical data (prior to 2007): 722520, 722693, 722694, 722910, 730410, 730421, 730610, 730620, and 730660.

These steel products are all produced by U.S. steel companies and support various applications across the defense, critical infrastructure, and commercial sectors. Generally, these products fall into one of the following five product categories (including but not limited to):

(1) Carbon and Alloy Flat Product (Flat Products): Produced by rolling semi-finished steel through varying sets of rolls. Includes sheets, strips, and plates.

Flat products are covered under the following 6-digit HS codes: 720810, 720825, 720826, 720827, 720836, 720837, 720838, 720839, 720840, 720851, 720852, 720853, 720854, 720890, 720915, 720916, 720917, 720918, 720925, 720926, 720927, 720928, 720990, 721011, 721012, 721020, 721030, 721041, 721049, 721050, 721061, 721069, 721070, 721090, 721113, 721114, 721119, 721123, 721129, 721190, 721210, 721220, 721230, 721240, 721250, 721260, 722511, 722519, 722530, 722540, 722550, 722591, 722592, 722599, 722611, 722619, 722691, 722692, 722693, 722694, 722699

(2) Carbon and Alloy Long Products (Long Products): Steel products that fall outside the flat products category. Includes bars, rails, rods, and beams.

Long products are covered under the following 6-digit HS codes: 721310, 721320, 721391, 721399, 721410, 721420, 721430, 721491, 721499,

[28] The scope includes steel products.

[29] Note that import data for steel products includes what are believed to be very small amounts of iron as well as steel, both of which are included in the HS codes covered in the scope.

721510, 721550,721590, 721610, 721621, 721622, 721631, 721632, 721633, 721640, 721650, 721699, 721710, 721720, 721730, 721790, 722520, 722620,722710, 722720, 722790, 722810, 722820, 722830, 722840, 722850, 722860, 722870, 722880, 722910,722920, 722990, 730110, 730210, 730240, 730290

(3) Carbon and Alloy Pipe and Tube Products (Pipe and Tube Products): Either seamless or welded pipe and tube products. Some of these products may include stainless as well as alloy other than stainless.

Pipe and Tube products are covered under the following 6-digit HS codes: 730410, 730419, 730421, 730423, 730429, 730431, 730439, 730451, 730459, 730490, 730511, 730512, 730519, 730520, 730531, 730539, 730590, 730610, 730619, 730620, 730629, 730630, 730650, 730660, 730661, 730669, 730690

(4) Carbon and Alloy Semi-finished Products (Semi-finished Products): The initial, intermediate solid forms of molten steel, to be re-heated and further forged, rolled, shaped, or otherwise worked into finished steel products. Includes blooms, billets, slabs, ingots, and steel for castings.

Semi-finished products are covered under the following 6-digit HS codes: 720610, 720690, 720711, 720712, 720719, 720720, 722410, 722490

(5) Stainless Products: Steel products, in flat-rolled, long, pipe and tube, and semi-finished forms, containing at minimum 10.5 percent chromium and, by weight, 1.2 percent or less of carbon, offering better corrosion resistance than other steel.

Stainless steel products are covered under the following 6-digit HS codes: 721810, 721891, 721899, 721911, 721912, 721913, 721914, 721921, 721922, 721923, 721924, 721931, 721932, 721933, 721934, 721935, 721990, 722011, 722012, 722020, 722090, 722100, 722211, 722219, 722220, 722230, 722240, 722300, 730411, 730422, 730424, 730441, 730449, 730611, 730621, 730640

V. FINDINGS

A. Steel is Important to U.S. National Security

As discussed in Part II, "national security" under Section 232 includes both (1) national defense, and (2) critical infrastructure needs.

1. Steel is Needed for National Defense Requirements

Steel articles are critical to the nation's overall defense objectives.[30] The U.S. Department of Defense (DoD) has a large and ongoing need for a range of steel products that are used in fabricating weapons and related systems for the nation's defense.[31] DoD requirements – which currently require about three percent of U.S. steel production – are met by steel companies that also support the requirements for critical infrastructure and commercial industries.

The free market system in the United States requires commercially viable steel producers to meet defense needs. No company could afford to construct and operate a modern steel mill solely to supply defense needs because those needs are too diverse. In order to supply those diverse national defense needs, U.S. steel mills must attract sufficient commercial (i.e., non-defense) business. The commercial revenue supports construction, operation, and maintenance of production capacity as well as the upgrades, research and development required to continue to supply defense needs in the future. *See* Appendix H for examples.

2. Steel is Required for U.S. Critical Infrastructure

Steel also is needed to satisfy requirements for "those industries that the U.S. Government has determined are critical to minimum operations of the economy and government."[32] In the 2001 Report the Department identified 28 "critical industries."[33] The Critical Infrastructure Assurance Office that identified the

[30] *Accord*, 2001 Report at 1, 12.

[31] AISI 2017 public policy agenda, available from http://www.steel.org/~/media/Files/AISI/Reports/AISI-2017-Public-Policy-Agenda.pdf?la=en

[32] 2001 Report at 14. *See also,* 2001 Report at 16, Table 2, for a listing of the 28 critical industries.

[33] *Id.*

"critical industries" is no longer in existence, so for this investigation the Department instead relied on the industries identified by the U.S. Government in the 2013 Presidential Policy Directive 21 (PPD-21).[34] The Secretary believes that the range of industries identified in PPD-21 is comparable to the range of critical industries analyzed in the 2001 Report.

Pursuant to PPD-21, there are 16 designated critical infrastructure sectors in the United States, many of which use high volumes of steel (*see* Appendix I).[35] The 16 sectors include chemical production, communications, dams, energy, food production, nuclear reactors, transportation systems, water, and waste water systems.

Increased quantities of steel will be needed for various critical infrastructure applications in the coming years. The American Society of Civil Engineers estimates that the United States needs to invest $4.5 trillion in infrastructure by 2025, and a substantial portion of these projects require steel content.[36]

3. Domestic Steel Production is Essential for National Security Applications

Domestic steel production is essential for national security. Congress, in Section 232(d), directed the Secretary of Commerce and the President to consider domestic production and the economic welfare of the United States in determining whether imports threaten to impair national security.

In the case of steel, the history of U.S. Government actions to ensure the continued viability of the U.S. steel industry demonstrates that, across decades and Administrations, there has been consensus that domestic steel production is vital to national security.

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[34] PPD-21 can be viewed at https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil

[35] Department of Homeland Security, "Critical Infrastructure Sectors," https://www.dhs.gov/critical-infrastructure-sectors#

[36] 2017 Infrastructure Report Card, American Society of Civil Engineers, https://www.infrastructurereportcard.org/wp-content/uploads/2016/10/2017-Infrastructure-Report-Card.pdf

Prior significant actions under various statutory authorities to address steel imports using quotas or tariffs were taken by President George W. Bush, President William J. Clinton (three times), President George H. W. Bush, President Ronald W. Reagan (three times), President James E. Carter (twice), and President Richard M. Nixon, all at lower levels of import penetration than at present. In the 1970s, action was taken to limit import penetration to approximately 19 percent. In the 1980s, import penetration had reached 21 percent and the U.S. Government enacted correcting measures. In the 1990s and 2000s import penetration again reached up to 23 percent, which prompted the U.S. Government to take additional actions.[37] In 2016, import penetration averaged 30 percent and for the first nine months of 2017 imports have consistently averaged over 30 percent of U.S. domestic demand.

4. Domestic Steel Production Depends on a Healthy and Competitive U.S. Industry

U.S. steel producers would be unable to survive purely on defense or critical infrastructure steel needs. In the steel industry, it is commercial and industrial customer sales that generate the relatively steady production needed for manufacturing efficiency, and the revenue volume needed to sustain the business. Sales for critical infrastructure and defense applications are often less predictable, cyclical, and limited in volume.

Steel manufacturers operating in the United States, however, have seen their commercial and industrial business steadily eroded by a growing influx of lower-priced imported product from countries where steel manufacturing often is subsidized, directly or indirectly. The Department of Commerce currently has 164 antidumping and countervailing duty determinations in effect, and has 20 additional cases under investigation, to address specific cases. *See* Appendix K.

5. Steel Consumed in Critical Industries

In this investigation, the issue before the Department is whether steel imports "threaten to impair" national security. *See* 19 U.S.C. § 1862. As discussed in Part II, the Secretary has determined that in the present case the relevant factors are the

[37] *See* Appendix J for additional detail on U.S. Government actions on steel in the past.

"serious effects resulting from the displacement of … domestic [steel] products by excessive imports" and the "impact of foreign competition on the economic welfare of individual domestic [steel] industries" that, when combined with the circumstance of massive global excess capacity, causes a "weakening of our internal economy" that "may impair the national security."[38]

In a free market system, the ability of the domestic steel industry to continue meeting national security needs depends on the continued capability of the U.S. steel industry to compete fairly in the commercial marketplace and maintain a financially viable domestic manufacturing capability. This includes the need to have an adequately skilled workforce for manufacturing as well as to conduct research and development for future products.[39] A continued loss of viable commercial production capabilities and related skilled workforce will jeopardize the U.S. steel industry's ability to meet the full spectrum of national security requirements.

The Department in 2001 determined that the "critical industries" sector, which is analogous to the more robust critical infrastructure sectors identified pursuant to PPD-21, would require "no more than 33.68 million tons of finished steel per year,"[40] based on 30.88 percent of domestic consumption being used in industries related to critical infrastructure. The Department has now updated the "critical industries" calculation from the 2001 Report[41] using Census Bureau steel usage figures from 2007, which are the latest available. *See* Appendix I for more detailed information on steel needs for critical infrastructure.

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[38] 19 U.S.C. § 1862(d).

[39] *See* 50 U.S.C. § 4502(a)("Congress finds that – … (7) much of the industrial capacity that is relied upon by the United States Government for military production and other national defense purposes is deeply and directly influenced by – (A) the overall competitiveness of the industrial economy of the United States; and the ability of industries in the United States, in general, to produce internationally competitive products and operate profitably while maintaining adequate research and development to preserve competitiveness with respect to military and civilian production…").

[40] 2001 Report at 14. The report is not clear whether it is referring to short tons or metric tons. While not crucial to the analysis, if the figure is in short tons then the equivalent amount in metric tons would be 30.56 million metric tons.

[41] 2001 Report at 16 (Table 2).

The updated analysis in Appendix I shows that 49.1 percent of domestic steel consumption in 2007 was used in critical industries. Domestic production in 2007 was 110 million metric tons. The 49.1 percent of domestic consumption used in critical industries equals 54 million metric tons, compared to 30.56 million metric tons (or 33.68 million short tons) used in critical industries in 1997. Thus in 10 years the demand for steel in critical industries increased by 63 percent.

B. Imports in Such Quantities as are Presently Found Adversely Impact the Economic Welfare of the U.S. Steel Industry

In the steel sector, foreign competition is characterized by substantial and sustained global overcapacity and production in excess of foreign domestic demand.

1. Imports of Steel Products Continue to Increase

The United States is the world's largest steel importer. The top 20 sources of U.S. imports of steel products accounted for approximately 91 percent of the roughly 36 million metric tons of steel the United States is expected to import in 2017 (*see* Figure 2).

Total U.S. imports rose from 25.9 million metric tons in 2011, peaking at 40.2 million metric tons in 2014 at the height of the shale hydrocarbon drilling boom. For 2017 (first ten months) imports are increasing at a double-digit rate over 2016, pushing finished steel imports consistently over 30 percent of U.S. consumption.

Figure 2. Top U.S. Imports of All Steel Products				
Imports for Domestic Consumption, Quantity In Metric Tons, Ranked By 2017				
2017 Rank	**Country**	**2011**	**2017 (Annualized)**	**% Change 2011 2017 (Annualized)**
	World	25,994,621	35,927,141	38%
1	Canada	5,539,448	5,800,008	5%
2	Brazil	2,820,927	4,678,530	66%
3	South Korea	2,572,981	3,653,934	42%
4	Mexico	2,625,104	3,249,292	24%
5	Russia	1,269,717	3,123,691	146%
6	Turkey	665,303	2,249,456	238%
7	Japan	1,824,393	1,781,147	-2%
8	Germany	978,230	1,370,669	40%
9	Taiwan	588,036	1,251,767	113%
10	India	735,802	854,026	16%
11	China	1,132,292	784,393	-31%
12	Vietnam	120,134	727,643	506%
13	Netherlands	517,773	589,930	14%
14	Italy	276,809	515,459	86%
15	Thailand	72,183	417,389	478%
16	Spain	195,907	403,091	106%
17	United Kingdom	400,244	354,389	-11%
18	South Africa	123,001	350,425	185%
19	Sweden	267,685	299,170	12%
20	United Arab Emirates	63,316	290,221	358%
	Top 20 Total	**22,789,285**	**32,744,630**	**44%**

Source: United States Department of Commerce, Bureau of the Census, Foreign Trade Division, IHS Global Trade Atlas Database: Revised Statistics for 2011 - 2017. 2017 data is annualized based on YTD 2017 through October.

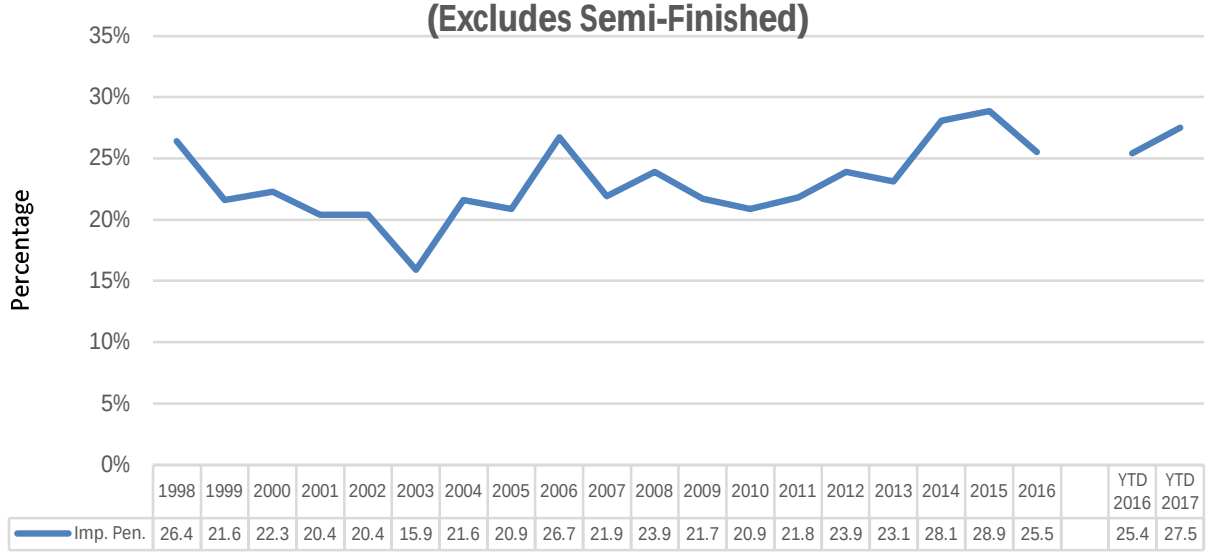
As shown in Appendix K, antidumping and countervailing duty actions can address specific instances of unfairly traded steel products. However, given the large number of countries from which the United States imports steel and the myriad of different products involved, it could take years to identify and investigate every instance of unfairly traded steel, or attempts to transship or evade remedial duties.

Moreover, U.S. industry has already spent hundreds of millions of dollars in recent years on AD/CVD cases, with seemingly no end in sight to their outlays. Smaller steel manufacturers are financially unable to afford these type of cases, or are hesitant to file cases in light of possible market entry retaliation in foreign markets for finished steel products.[42]

2. High Import Penetration

In contrast to the situation in the 2001 Report, where imports of semi-finished steel represented approximately 7 percent of domestic consumption,[43] imports of finished steel products (i.e. not including semi-finished steel) currently represent over 25 percent of U.S. consumption (*see* Figure 3).[44] If imports of semi-finished products are included, the import penetration level has been above 30 percent for the first ten months of 2017. Import penetration of steel pipe and tube was 74 percent in 2016 and further increased in 2017

Figure 3. U.S. Import Penetration of Finished Steel Products (Excludes Semi-Finished)



	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016		YTD 2016	YTD 2017
Imp. Pen.	26.4	21.6	22.3	20.4	20.4	15.9	21.6	20.9	26.7	21.9	23.9	21.7	20.9	21.8	23.9	23.1	28.1	28.9	25.5		25.4	27.5

Source: American Iron and Steel Institute. YTD data source is through October 2016 and October 2017. Excludes semi-finished imports.

[42] Congress has specifically expressed concern about the need to maintain small suppliers and the potential adverse impact on military readiness caused by the loss of small suppliers. *See* 50 U.S.C. § 4502(a)(8).

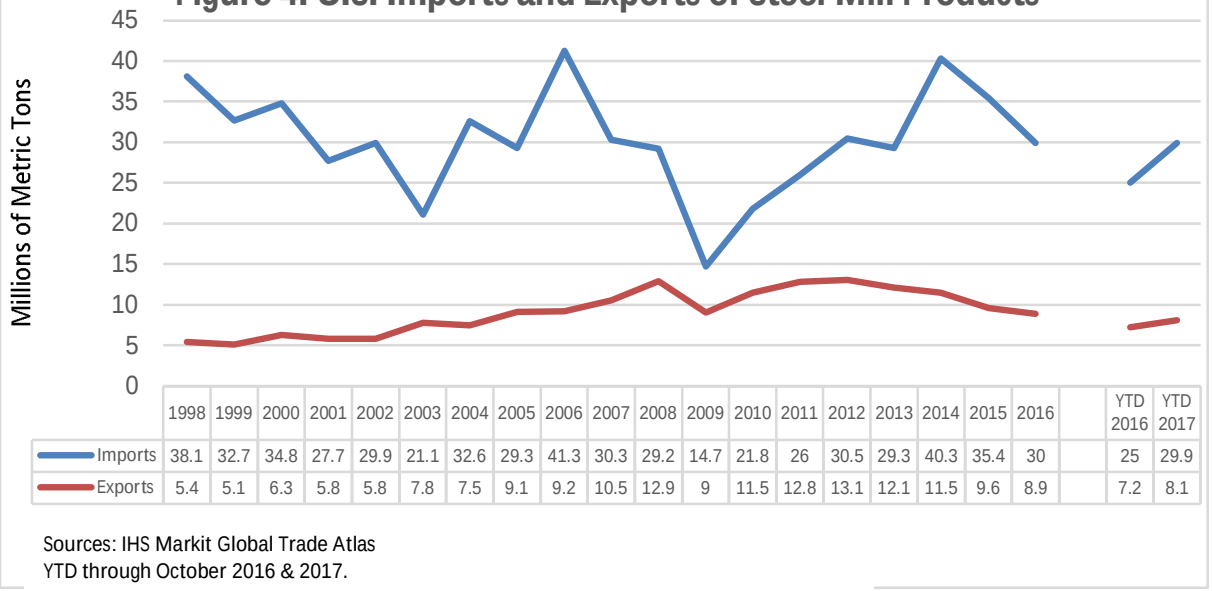
[43] 2001 Report at 31.

[44] AISI's statistical yearbook reports that about 8 percent of U.S. shipments are made of imported substrate.

3. High Import to Export Ratio

U.S. imports of steel products, which displace demand for domestic steel and lower production at U.S. plants, reached nearly four times the level of exports of U.S. steel products in 2016 (*see* Figure 4). The expansion of steel production capacity outside of the United States in the last decade (Asia, the Middle East, and South America), much of it subsidized by national governments, continues to depress world steel prices while making it increasingly difficult for U.S. companies to export their steel products. While U.S. steel producers saw a mild increase in steel exports from 2005 to 2013, more recently sales to foreign customers have been declining. Exports fell to nine million metric tons in 2016 from a 20-year high of 12 million metric tons annually from 2011 to 2013. Most U.S. steel exports are auto industry related and are sent to Canada (50 percent by weight in 2016) and Mexico (39 percent by weight in 2016). Flat products represent the majority of these exports – 57 percent of U.S. steel exports for

Figure 4. U.S. Imports and Exports of Steel Mill Products



	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016		YTD 2016	YTD 2017
Imports	38.1	32.7	34.8	27.7	29.9	21.1	32.6	29.3	41.3	30.3	29.2	14.7	21.8	26	30.5	29.3	40.3	35.4	30		25	29.9
Exports	5.4	5.1	6.3	5.8	5.8	7.8	7.5	9.1	9.2	10.5	12.9	9	11.5	12.8	13.1	12.1	11.5	9.6	8.9		7.2	8.1

Sources: IHS Markit Global Trade Atlas
YTD through October 2016 & 2017.

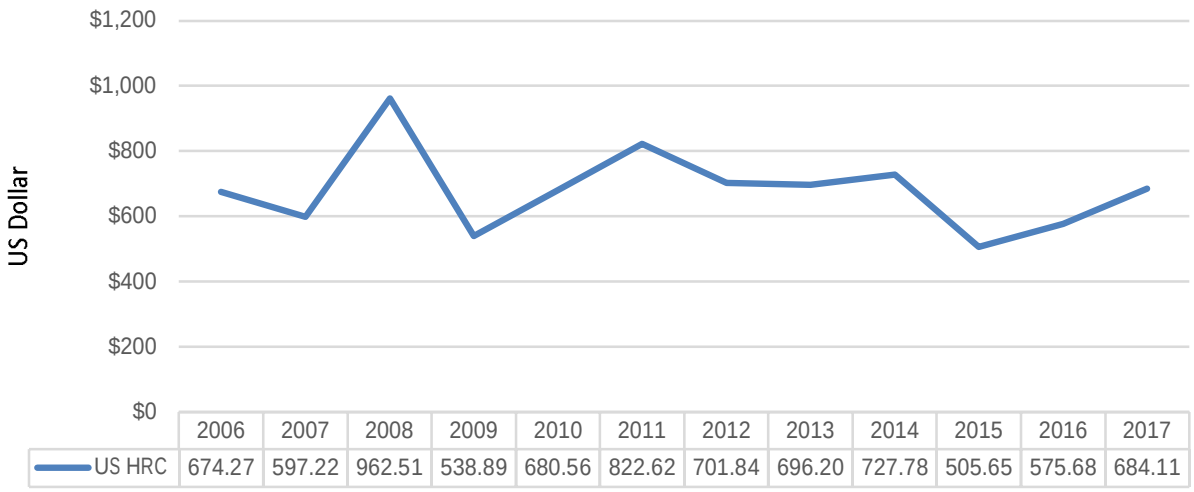
The same is true in the line pipe sector. The United States exports a minimal amount of line pipe. Exports of line pipe reached a recent peak of 525 thousand metric tons in 2013 before declining significantly. Exports totaled just 60 thousand metric tons in 2016, a decrease of 89 percent from 2013, and were less than one-

twentieth of the size of line pipe imports. Canada represents the largest destination for U.S. line pipe exports, with 39 percent of 2016 exports going to Canada, followed by Mexico with 13 percent.

4. Steel Prices

Hot-rolled coil prices are a benchmark price indicator for a common type of steel (*see* Figure 5). Hot rolled coil is considered a "benchmark" because it is a commodity product with a fairly common definition globally

Figure 5. Hot Rolled- USA Domestic Hot Rolled Coil (FOB Midwest Mill) $/mt



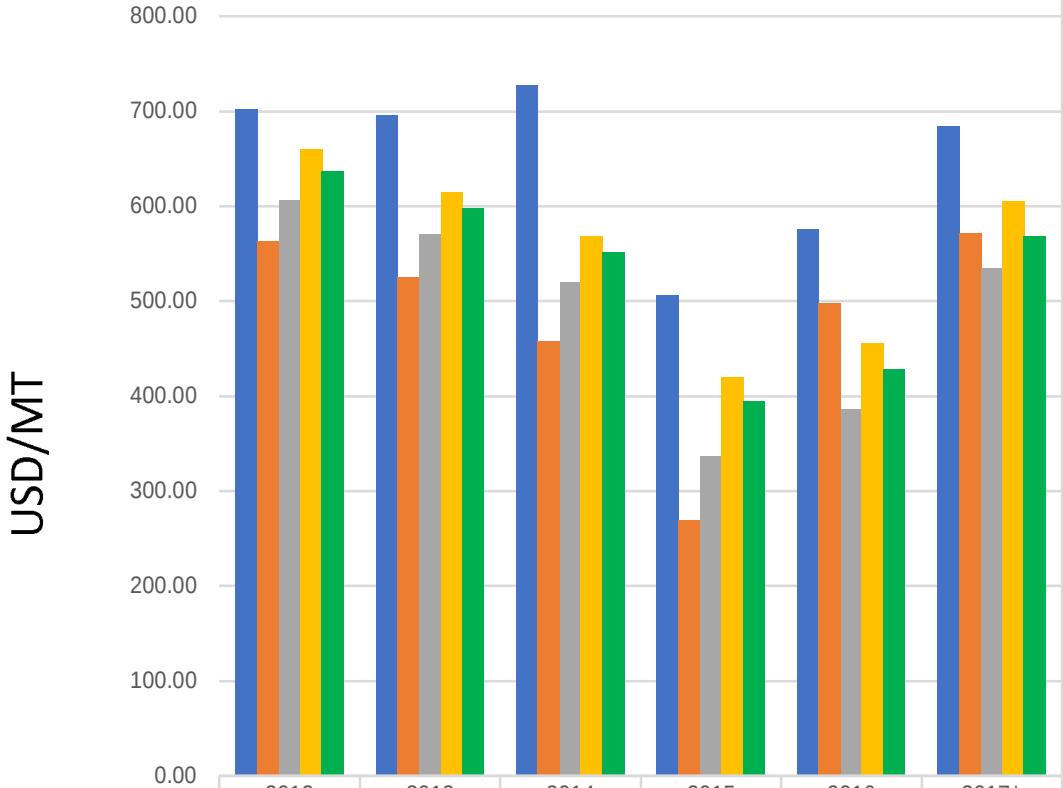
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
US HRC	674.27	597.22	962.51	538.89	680.56	822.62	701.84	696.20	727.78	505.65	575.68	684.11

Source: Platts (accessed from Bloomberg Financial) 2017 reflects the price through December (as of December 21, 2017.

U.S. prices for hot-rolled steel coil have been higher than in other countries since 2010. U.S. domestic benchmark prices for this product class dipped especially low in 2015 at $505.65/metric ton before recovering in 2016 to $575.68/metric ton. In 2016, the price of freight-on-board stowed China port steel hot-rolled coil was 14 percent lower than U.S. domestic hot-rolled coil. In the case of ASEAN nations, import prices for hot-rolled coil were 33 percent lower and North Europe domestic hot-rolled coil was 21 percent lower. Each region saw a price decline in 2015 (*see* Figure 6). U.S. prices remained higher than other regions' prices for this commodity level product throughout the period. Such higher prices are attributable to higher taxes, healthcare, environmental standards,

and other regulatory expenses. Moreover, lower prices in steel producing regions backed by state-subsidized enterprises adds pressure on U.S. competitors to export their steel products to the U.S. Again in 2016, all categories of steel in all countries continued to experience pressure to lower prices compared to what could be charged in 2012.

Figure 6. Regional Comparison of Hot Rolled Coil Bench Mark Prices (USD/MT)



	2012	2013	2014	2015	2016	2017*
USA Domestic Hot Rolled Coil	701.84	696.20	727.78	505.65	575.68	684.11
Steel Hot Rolled Coil (FOB Stowed China Port)	562.50	525.00	457.50	269.50	497.50	572.00
Asean Import Hot Rolled Coil	605.66	570.43	519.89	336.55	386.81	534.75
North Europe Domestic Hot Rolled Coil	659.54	614.41	568.41	420.19	455.29	604.90
South Europe Domestic Steel Rebar	636.59	598.34	551.66	394.11	427.68	568.53

Source: Bloomberg, Platts, Antaike. 2017 prices are through December 20, 2017.

In 2015, steel prices fell globally. As the OECD noted, the combined effect of weakening global steel demand, including in the United States, growing exports in many economies, and decreases in steelmaking costs led to a very sharp decline

in steel prices in 2015. Notwithstanding these effects, prices for steel in the U.S. remained substantially higher than in any other area. However, relative to prices between 2010 and 2013, prices are still relatively depressed.

Global excess steel production weakens the pricing power of U.S. steel producers. U.S. steel producers' costs are higher than the costs for producers in other regions due to higher taxes, healthcare, environmental, and other regulatory expenses. Higher U.S. steel prices incentivize importing lower-cost foreign steel. Moreover, excess production and lower prices in regions proximate to state subsidized enterprises displace purchases from market based steel exporters and add pressure on those market based suppliers to export to the U.S. The effect of global excess steel production on U.S. steel prices and import levels is discussed in greater detail in Appendix L.

5. Steel Mill Closures

U.S. steel mill closures continue eroding overall U.S. steel mill capacity and employment. Many U.S. steel mills have been driven out of business due to declining steel prices, global overcapacity, and unfairly traded steel. Since 2000, the United States has lost over 25 percent of its basic oxygen furnace facilities with the closure of six facilities: RG Steel in Sparrows Point, Maryland; RG Steel in Steubenville, Ohio; RG Steel in Warren, Ohio; ArcelorMittal in East Chicago, Indiana; ArcelorMittal in Weirton, West Virginia; and U.S. Steel in Fairfield, Alabama.

In addition, four electric arc furnace steel facilities have closed: Evraz in Claymont, Delaware; ArcelorMittal in Georgetown, South Carolina; Gerdau in Sand Springs, Oklahoma; and Republic Steel in Lorain, Ohio. Most recently, ArcelorMittal has announced the closure of its plate rolling mill in Conshohocken, Pennsylvania, because of sagging commercial sales attributed to surging imports of low-cost steel product and flat defense demand.[45]

The closures of these facilities have had a significant impact on the U.S. industrial workforce and local economies. RG Steel suffered three closures:

[45] Cowden, M. "Arcelor Mittal to Shut PA Plate Mill," American Metal market, September 18, 2017.

Sparrows Point, Maryland; Steubenville, Ohio; and Warren, Ohio. After filing for bankruptcy in 2012, more than 2,000 employees were displaced in Maryland alone and another 2,000 in the Midwest. The company cited weak demand in the steel industry as well as lack of financing as key contributors to the closure.[46]

Closures of smaller steel mills have had equally devastating impacts on employment. Gerdau Sand Springs in Oklahoma lost 300 employees after closing in 2009 because of a long-term drop in demand for steel.[47] Sand Springs was the last remaining steel plant in Oklahoma and had been in production since the 1920s.

In 2013, at least 345 employees were laid off in response to the closure of the Claymont steel mill in Delaware. The Governor of Delaware, Jack Markell, attributed the financial difficulties of the facility to "subdued market demand and the high volume of imports."[48]

Similar difficulties were cited by the ArcelorMittal's Georgetown, South Carolina facility and U.S. Steel's location in Fairfield, Alabama, both of which closed in 2015. Layoffs for these two corporations totaled 226 and more than 1,100 employees, respectively. Both companies attributed the layoffs to financial losses and ultimately, to facility closures due to the rise in competition from inexpensive imports.[49]

Even temporary idling of steel plants threatens the U.S. steel industry as there are significant financial costs with re-opening a steel mill. Multiple U.S. facilities remain idled: there are four idled basic oxygen furnace facilities, two each in Kentucky and Illinois, representing almost one third of the remaining basic oxygen

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[46] Business Journal, "'Unforeseen Conditions' Closes Warren Steel Holdings," January 12, 2016, http://businessjournaldaily.com/utilities-cut-to-warren-steel-holdings/; Baltimore Brew, "Six reasons why the Sparrows Point steel mill collapsed," May 25, 2012, https://baltimorebrew.com/2012/05/25/six-reasons-why-the-sparrows-point-steel-mill-collapsed/.

[47] News on 6, "Sand Springs Steel Plant May Close," June 9, 2009, http://www.newson6.com/story/10500785/sand-springs-steel-plant-may-close.

[48] Business Insider, "Shutdown of Russian Steel Mill in Delaware Could Send a Message About US Trade," October 17, 2013, http://www.businessinsider.com/evraz-closes-claymont-steel-2013-10.

[49] AL.com, "U.S. Steel lays off 200 more workers in Fairfield," March 18, 2016, http://www.al.com/business/index.ssf/2016/03/us_steel_lays_off_200_more_wor.html.

furnace facilities in United States.[50] In addition, there are idled pipe and tube mills in Texas, Ohio, and Alabama. Once production is halted at these facilities it is not always possible to bring back the highly skilled workforce needed to operate them. When steel mill restarts do occur, additional costs are often incurred for specialized worker training and production ramp-up.

In addition, when a steel mill closes at a given location, the workers find other occupations, move to other steel mills, or remain indefinitely unemployed. After a significant period of unemployment, much of the specialized skill required by steel mill workers is forgotten. Furthermore, it is typically not easy to find and recruit displaced workers who may live hundreds or thousands of miles away.

6. Declining Employment Trend Since 1998

U.S. steel industry employment has declined 35 percent (216,400 in 1998 to 139,800 in January 2016 - December 2016), including 14,100 lost jobs between 2015 and 2016. While employment numbers increased slightly in certain years, the trend is dramatically downward (*see* Figure 7). Layoffs defer formal plant closings but are an indication of financial distress. Layoffs in the last two years have been particularly acute in steel producers with pipe and tubular facilities. In addition to layoffs, there are permanent closures and bankruptcies in the industry.[51]

The loss of skilled workers is especially detrimental to the long-term health and competitiveness of the industry. The unstable and declining employment outlook for the industry also dissuades younger workers from wanting to participate in the future U.S. steel industry. The inability to rapidly add skilled workers to the industry negatively affects current manufacturing capabilities. This is especially problematic in the event of a major production surge or mobilization.

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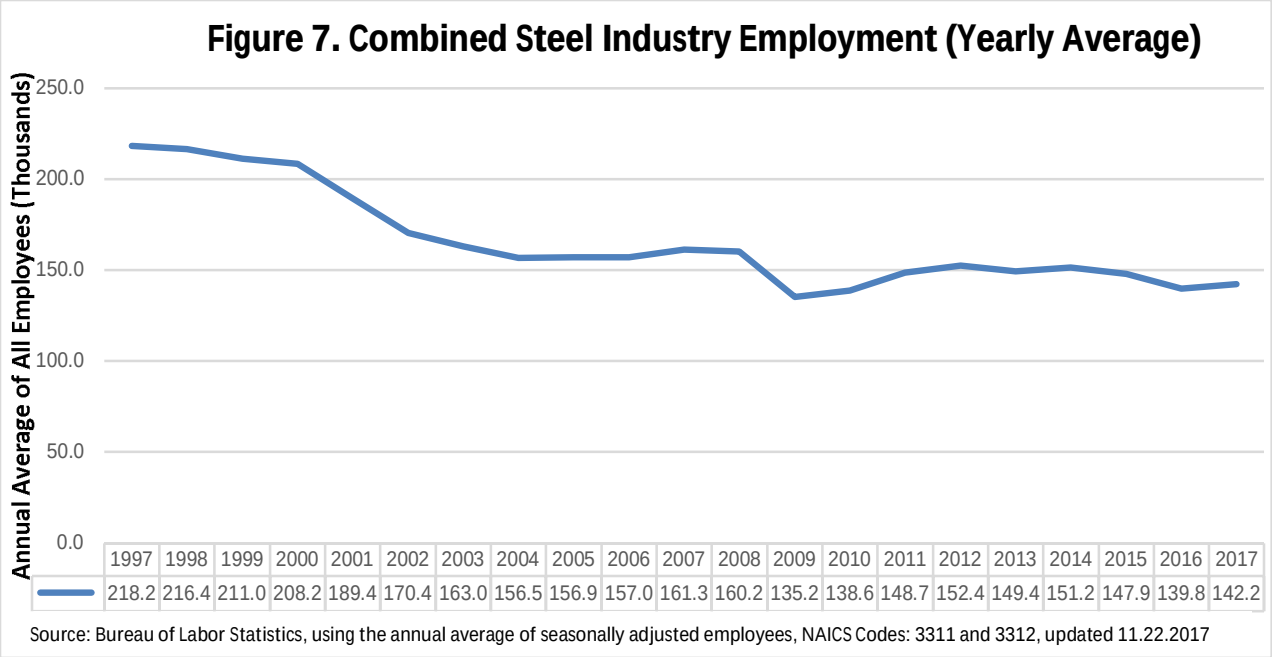
[50] *See* Figure 13.

[51] *See infra,* section V(C)(1).



7. Trade Actions – Antidumping and Countervailing Duties

The number of U.S. antidumping and countervailing duty measures in effect illustrates the scope of the problem confronting the U.S. steel industry. In 1998, at the height of that periods steel crisis, there were just over 100 antidumping and countervailing duty cases against finished steel products.[52] Today there are 164 antidumping and countervailing duty orders in effect for steel, with another 20 steel investigations currently ongoing and another waiting to take effect through publication in the Federal Register (*see* Appendix K for a full listing of Steel Antidumping and Countervailing Duty Orders in Effect). This represents a 60 percent increase in cases since the last time the Department investigated steel in 2001.

8. Loss of Domestic Opportunities to Bidders Using Imported Steel

Despite efforts to level the playing field through AD/CVD orders, there are numerous examples of U.S. steel producers being unable to fairly compete with foreign suppliers, including the lack of ability to bid on some critical U.S. infrastructure projects. Due to unfair competition, particularly from foreign state-

[52] Global Steel Trade: Structural Problems and Future Solutions; Department of Commerce; July, 2000.

owned enterprises, U.S. steel producers have lost out on U.S. business opportunities. Some examples include Chinese companies providing steel for the eastern span of the San Francisco-Oakland Bay Bridge as well as the Alexander Hamilton Bridge over the Harlem River in New York.[53]

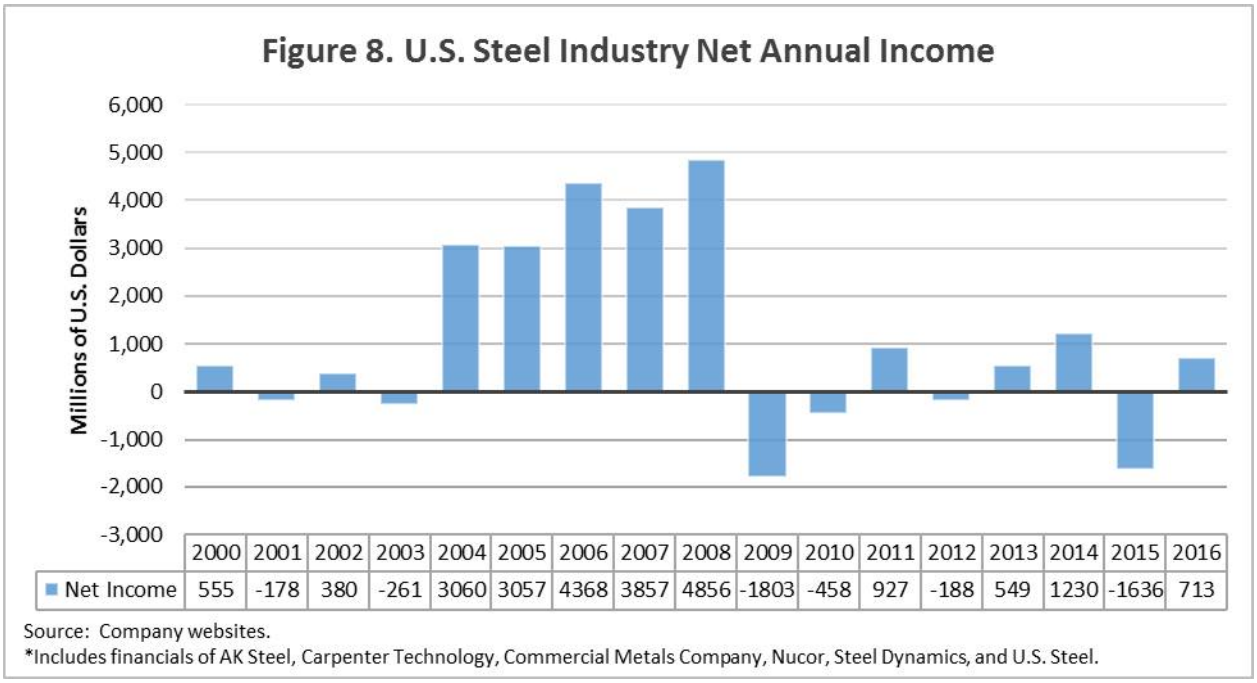
The Alliance for American Manufacturing's statement before the Congressional Steel Caucus (March 2017) identified three other recent infrastructure projects in New York that have used or will use heavily subsidized or possibly dumped foreign steel: the Verrazano-Narrows Bridge, LaGuardia Airport, and the Holland Tunnel. Two major U.S. cities – Boston and Chicago – have contracted with Chinese companies to build new subway cars, primarily constructed with imported steel, for their respective transportation systems.[54]

9. Financial Distress

Rising levels of imports of steel continue to weaken the U.S. steel industry's financial health. Years of running on low-profit margins or at a loss have weakened an industry that continues to face an ever-increasing wave of steel imports. The U.S. industry, as a whole, has operated on average with negative net income from 2009-2016. Net income for U.S.-owned steel companies has averaged only $162 million annually since 2010, challenging the financial viability of this vital industry (*see* Figure 8).

[53] New York Times, "Bridge Comes to San Francisco With a Made-in-China Label," June 25, 2011, http://www.nytimes.com/2011/06/26/business/global/26bridge.html

[54] Reuters, "China's CRRC lands $1.3 billion China rail car project," March 10, 2016, http://www.reuters.com/article/us-crrc-usa-idUSKCN0WC17I



The Stern School of Business at New York University calculates that U.S. steel industry participants in the last five years experienced negative net income of 17.8 percent. Compounded growth in revenue for the past five years in the steel industry has been a negative 7 percent.[55] The loss of revenue has caused U.S. steel manufacturers, both large and small, to defer or eliminate production facility capital investments and funding for research and development. Even though there was a slight uptick in net income for the first quarter in 2017 over the fourth quarter of 2016 margins remain poor compared to historic levels.

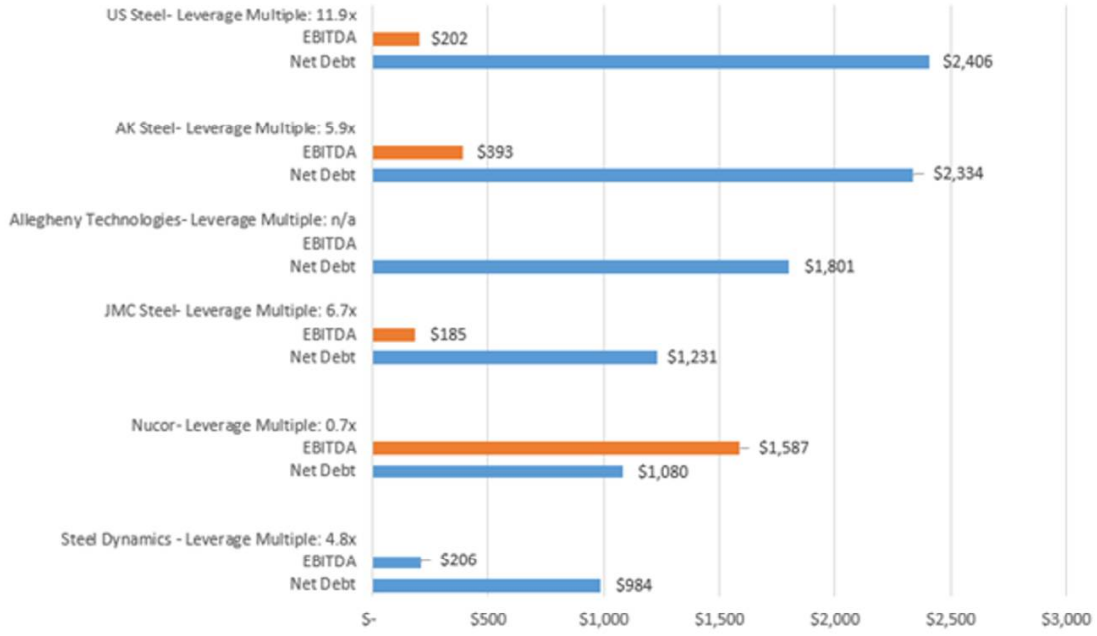
Not only have earnings before interest, taxes, depreciation, and amortization (EBITDA) been shallow for steel producers in the United States, many of them are burdened with high levels of debt, as much as 11.9 times of earnings for one major producer (*see* Figure 9).[56] While some companies are starting to pay down debt,

[55] "Historical (Compounded Annual) Growth Rates by Sector," Aswath Damodaran, New York University Stern School of Business, January 2017. (*see* http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile /histgr.html)

[56] Nucor operates mini-mills that use electric arc furnaces to produce high demand steel products primarily with recycled steel scrap. From a financial perspective, this business model allows Nucor to be highly price competitive, but the company produces a narrower range of flat steel products than integrated steel mills. The mini-mills can weather bad economic times because they have lower energy costs and can regulate production

others have not been able to do so primarily because of slack demand for domestically produced steel in the face of competition from imported products. Absent increases in steel production volume and pricing, one leading law firm specializing in insolvency, White & Case, observes that some steelmakers in the United States may soon have to renegotiate loan agreements to extend maturities; those that are not able to may have to consider Chapter 11 bankruptcy.[57]

Figure 9. U.S. Steel Industry Leverage Analysis (FY 2015)



Source: Debtwire, Bloomberg, NYSE, White & Case LLP
*EBITDA unavailable; debt is estimated

Note: Nucor has only electric arc furnaces (EAF). EAFs can be quickly stopped (or used for fewer shifts) and then restarted more easily than blast furnaces, where the furnace must be kept hot. This attribute makes Nucor slightly more flexible to adapt their production to demand and likely more profitable than large BOF producers. Nucor's key end-markets include nonresidential construction and energy.

JMC Steel is now part of Zekelman Industries

No capital intensive industry can survive with such poor margins over the longer term. The extensive leverage in the industry shown in Figure 9 adds to the

more easily. Basic oxygen furnace plants have higher fixed operating costs because they directly convert iron ore and other raw materials along with scrap into steel using more energy-intensive processes.

57 "Losing Strength: U.S. Steel Industry Analysis," Scott Griesman, White & Case, April 16, 2016 (*see* https://www.whitecase.com/publications/article/losing-strength-us-steel-industry-analysis).

likelihood of further closures if the present high level of imports continues to force U.S. steel mills to operate well below profitable capacity utilization rates.

10. Capital Expenditures

The ability of U.S. manufacturers of iron and steel products to fund capital expenditures for new production plants as well as facility modernization and advanced manufacturing equipment has been limited by falling revenue and reduced profits. As shown in Figure 10, annual capital expenditures for companies making iron and steel ingot, bars, rods, plate and other semi-finished products wavered from $5.7 billion to $5.1 billion for 2010-2012, before ramping to $7.1 billion in 2013.

Figure 10. Annual Capital Expenditures

	Iron, Steel, and Ferroalloys Steel NAICS Codes 3311 and 3312 Combined	Millions of Current Dollars					
	Annual Capital Expenditures Survey	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
A.	Structures [New & Used Structures Combined]	1,026	1,322	1,564	1,157	724	580
B.	Equipment [New & Used Equipment Combined]	4,634	4,572	3,592	5,954	3,139	2,531
C.	Total Capital Expenditures	5,661	5,894	5,157	7,111	3,863	3,110
D.	(Unweighted) Payroll of Reporters / Total Payroll of Firms Classified in Industry group	86%	84%	80%	61%	86%	84%

Source: U.S. Census Bureau, Annual Capital Expenditures Survey, www.census.gov/programs-surveys/aces.html

Confronted with receding orders for products and declines in income in 2013, iron and steel companies operating production facilities in the United States started curtailing capital investments. Total capital spending dropped to $3.87 billion in 2014 and slid further to $3.11 billion in 2015 – 32 percent below 2010 levels of $5.66 billion.

The decline in capital expenditures reflected similar drops in net sales, which plummeted from $129.6 billion in 2014 to $102 billion in 2015. Income after taxes

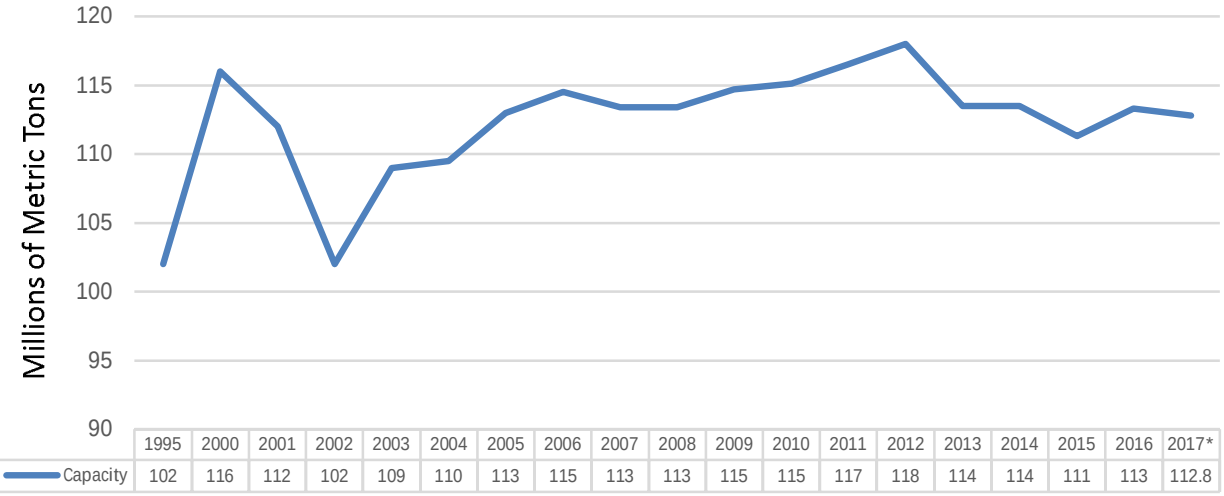
for U.S. iron and steel manufacturers fell from $2.48 billion in the same two-year period to a massive loss of $3.5 billion in 2015.

C. *Displacement of Domestic Steel by Excessive Quantities of Imports has the Serious Effect of Weakening Our Internal Economy*

1. Domestic Steel Production Capacity is Stagnant and Concentrated

According to the OECD, U.S. steel production capacity has remained stagnant at an average of approximately 114.3 million metric tons for more than a decade from 2006-2016 (*see* Figure 11). For 2016, the rated maximum capacity was 113 million metric tons for existing basic oxygen furnace and electric arc furnace

Figure 11. U.S. Annual Steel Production Capacity



	1995	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017*
Capacity	102	116	112	102	109	110	113	115	113	113	115	115	117	118	114	114	111	113	112.8

Source: Organization for Economic Cooperation and Development (OECD), 2017 capacity is a forecast

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The present situation with respect to basic oxygen furnace production is significantly worse than the situation assessed by the Department in the 2001 Report. As shown in Figure 13 below, the number of basic oxygen furnace facilities and units has declined precipitously since 1995. In 2000, there were 105 companies that produced raw steel at 144 locations,[59] while today there are only 38 companies producing steel at 93 locations, a 64 percent and 36 percent reduction, respectively.

Most importantly, in 2000 thirteen companies "operated integrated steel mills, with an average of 35 blast furnaces in continuous operation during the year"[60] while today there are only three companies operating 13 basic oxygen furnaces. These are 77 percent and 60 percent reductions, respectively. As a result, today only 26 percent of domestic steel is produced from raw materials in the United States, as compared to 53 percent in 2000.

As noted earlier, since 2000 there has been over a 25 percent reduction in the number of basic oxygen furnaces operating in the United States, and 33 percent of the remaining basic oxygen furnaces are currently idled. In the Secretary's view, a further reduction in basic oxygen furnace capacity, which is especially important to the ability of domestic industry to meet national security needs, is inevitable if the present imports continue or increase.

[redacted] This would be a serious "weakening of our internal economy" and place the United States in a position where it is unable to be certain

[59] 2001 Report at 21.

[60] *Id.*

it could meet demands for national defense and critical industries in a national emergency.[61]

Figure 13. Basic Oxygen and Electric Arc Facilities and Units Located in the United States, 1975 - 2016

Year	Basic Oxygen Furnace Facilities	Basic Oxygen Furnace Units	Electric Arc Furnace Facilities	Electric Arc Furnace Units
1975	38	90	--	--
1980	33	78	--	--
1985	27	66	--	--
1990	24	61	127	246
1995	22*	56*	116	218
2000	19*	50*	122	174
2005	17	46	115*	169*
2010	16	44	108	164
2015	13	31	98	154
2016	13	31	98	154

Source: U.S. Department of Commerce/BIS, American Iron and Steel Institute, Association for Iron & Steel Technology, Steel Manufacturers Association, August 2017. *Estimated.

Basic Oxygen Furnace: Basic Oxygen Furnaces (BOF) are the dominant steelmaking technology globally, accounting for 74% of the world's total output of crude steel in 2016. BOF share of production in the U.S. was 33% in 2016 and has been slowly declining, due primarily to the advent of the "Greenfield" electric arc furnace (EAF) flat-rolled mills. The primary raw materials for the BOF are liquid hot metal (iron) from the blast furnace and steel scrap. [1] These are charged into the BOF vessel. Oxygen (>99.5% pure) is "blown" into the BOF at supersonic velocities. It oxidizes the carbon and silicon contained in the hot metal, liberating great quantities of heat, which melts the scrap. Source: Steel.org.

Electric Arc Furnace: The Electric Arc Furnace (EAF) operates as a batch melting process, producing batches of molten steel known "heats". The EAF process uses steel scrap and iron units, melting them using electricity to make new steel. EAF output accounted for 66% of U.S. steel production in 2016. Source: Steel.org.

[1] The Blast Furnace chemically reduces and physically converts iron oxides into liquid iron called "hot metal". The blast furnace is a huge steel stack lined with refractory brick, where iron ore, coke, and limestone are dumped into the top, and preheated air is blown into the bottom. The raw materials require six to eight hours to descend to the bottom of the furnace, where they become the final product of liquid slag and liquid iron. Source: Steel.org.

In contrast to the situation in the United States, the leading global producers of steel (Brazil, South Korea, Japan, Russia, Germany, and especially China) primarily rely on basic oxygen furnace capacity rather than electric arc furnace capacity (*see* Figure 14). Each of these economic competitors to the United States possess critical research, development and production capabilities that the United

[61] *See infra*, sections C4 and C5, for a further discussion of the inability to meet surge requirements in an emergency.

States is in danger of losing if imports continue to force U.S. steel producers to operate at uneconomic capacity utilization levels.

A further reduction in domestic basic oxygen furnace capacity would put the United States at serious risk of becoming dependent on foreign steel to support its critical industries and defense needs. Allowing this decline to continue represents a "weakening of our internal economy that may impair national security" which the Congress has directed the Secretary to advise the President of under the Section 232. *See* 19 U.S.C. § 1862(d).

Figure 14. The Top 20 Countries Exporting to the U.S. – BOF vs. EAF Capacity

Rank	Top Import Sources in 2016 in Tonnage Terms	2015 BOF Share	2015 EAF Share	2015 Other Share	Approx. Country s Average Capacity Utilization in 2016 (OECD)
	World	74.20%	25.20%	0.50%	67%
1	Canada	53.80%	46.20%		62%
2	Brazil	78.20%	20.20%		57%
3	South Korea	69.60%	30.40%		80%
4	Mexico	29.70%	70.30%		75%
5	Turkey	35.00%	65.00%		65%
6	Japan	77.10%	22.90%		80%
7	Russia	66.30%	30.50%	3.10%	76%
8	Germany	70.40%	29.60%		72% (EU 28)
9	Taiwan	62.30%	37.70%		75%
10	Vietnam	25.00%	59.90%	15.20%	32%
11	China	93.90%	6.10%		69%
12	Netherlands	98.60%	1.50%		72% (EU 28)
13	Italy	21.30%	78.20%		72% (EU 28)
14	United Kingdom	83.00%	17.00%		72% (EU 28)
15	France	65.60%	34.40%		72% (EU 28)
16	India	42.90%	57.10%		75%
17	Australia	77.60%	22.40%		63%
18	Spain	31.70%	68.30%		72% (EU 28)
19	Sweden	66.10%	33.90%		72% (EU 28)
20	South Africa	56.50%	43.50%		58.5%

Source: World Steel- Production Share Figures for 2015, US Census Bureau (Accessed Via HIS) – Import Growth Rates, OECD 2017 Q2 Market Assessment – Approximate Capacity Utilization

This is not a hypothetical situation. The Department of Defense already finds itself without domestic suppliers for some particular types of steel used in defense

products, including tire rod steel used in military vehicles and trucks.[62] While the United States has many allies that produce steel, relying on foreign owned facilities located outside the United States introduces significant risk and potential delay for the development of new steel technologies and production of needed steel products, particularly in times of emergency. The Secretary notes that the authority for the Department of Defense to place its order ahead of commercial orders on a mandatory basis does not extend to foreign-owned facilities outside the United States.[63]

In the case of critical infrastructure, the United States is down to only one remaining producer of electrical steel in the United States (AK Steel – which is highly leveraged). Electrical steel is necessary for power distribution transformers for all types of energy – including solar, nuclear, wind, coal, and natural gas – across the country. If domestic electrical steel production, as well as transformer and generator production, is not maintained in the U.S., the U.S. will become entirely dependent on foreign producers to supply these critical materials and products.[64] Without an assured domestic supply of these products, the United States cannot be certain that it can effectively respond to large power disruptions affecting civilian populations, critical infrastructure, and U.S. defense industrial production capabilities in a timely manner.

2. Production is Well Below Demand

Demand for steel products in the United States (*see* Figure 15), increased from 100.1 million metric tons in 2011 to 117.5 million metric tons in 2014, then declined to 99.8 million metric tons in 2016. Demand in 2017 is projected to rebound to 107.7 million metric tons. During the 2011 to 2016 period, U.S. production of steel products dropped from 86.4 million metric tons in 2011 to 78.6 million metric tons in 2016, with a four percent increase expected in 2017.

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[62] Letter from Defense Logistics Agency, Columbus, OH to BIS/OTE, August 1, 2017.

[63] *See* Defense Priorities and Allocations System Program (DPAS), www.dcma.mil/DPAS

[64] United States Congress, Congressional Steel Caucus. Statement of Roger Newport, CEO, AK Steel Corporation (on behalf of the American Iron and Steel Institute). March 29, 2017.

For the six-year period, U.S. domestic steel production supplied only 70 percent of the average demand, even though available U.S. domestic steel production capacity during that period could have, on average, supplied up to 100 percent of demand (U.S. steel producers would be running at 92 percent capacity utilization for this period) with approximately 13 million metric tons of additional capacity remaining.

Figure 15. U.S. Steel Market Snapshot (millions of metric tons)

	2011	2012	2013	2014	2015	2016	2017 YTD	*2017 Annualized*
Total Demand for Steel in U.S. (Production + Imports - Exports)	100.1	106.6	104.6	117.5	104.9	99.8	80.7	***107.3***
U.S. Annual Capacity	116.5	118.0	113.5	113.5	111.3	113.3	---	**---**
U.S. Annual Production (Liquid)	86.4	88.7	86.9	88.2	78.8	78.6	61.5	***81.9***

Sources: United States Department of Commerce, Bureau of the Census. American Iron and Steel Institute. Calculations based on industry and trade data.

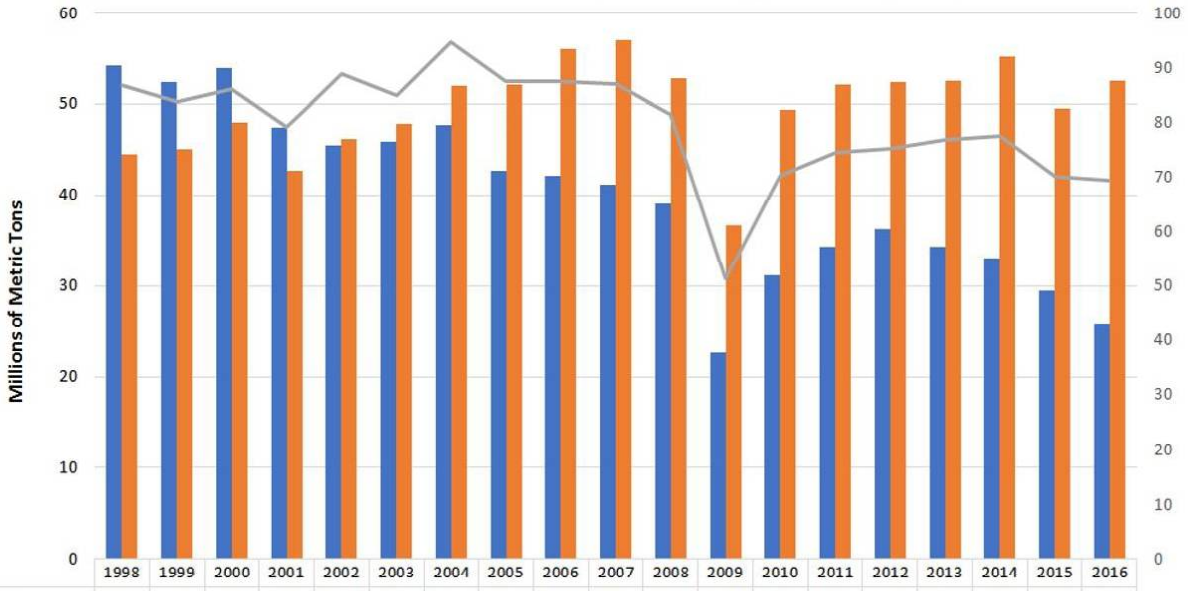
3. Utilization Rates are Well Below Economically Viable Levels

Overall, steel mill production capacity utilization has declined from 87 percent in 1998, to 81.4 percent in 2008, to 69.4 percent in 2016 (*see* Figure 16). For the most recent six-year period (2011- 2016), the average utilization rate was 74 percent.

Industry analysts note that utilization of 80 percent or more is typically necessary for sustained profitability, among other factors.[65] For most capital and energy-intensive U.S. steel producers, capacity levels of 80 percent or higher are required to maintain facilities, carry out periodic modernization, service company debt, and fund research and development.

[65] Market Realist, "Why steel investors are mindful of capacity utilization rates," October 2, 2014, http://marketrealist.com/2014/10/investors-mindful-capacity-utilization-rate/. *See also* http://marketrealist.com/2015/09/upstream-exposure-impact-steel-companies/

Figure 16. U.S. Crude Steel Production by Furnace Type and Capacity Utilization



	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Basic Oxygen	54.2	52.3	54.0	47.4	45.4	45.9	47.7	42.7	42.1	41.1	39.1	22.7	31.1	34.3	36.3	34.3	33.0	29.4	25.9
Electric Arc Furnace	44.5	45.1	47.9	42.7	46.1	47.8	52.0	52.2	56.1	57.0	52.8	36.7	49.4	52.1	52.4	52.6	55.2	49.4	52.6
Capacity Utilization (%)	86.8	83.8	86.1	79.2	88.8	84.9	94.6	87.5	87.5	87	81.4	51.2	70.4	74.4	75.2	76.7	77.5	70.1	69.4

Source: American Iron and Steel Institute

When steel factory utilization falls, costs per unit of steel product rises, reducing profit margins and product pricing flexibility. Higher capacity utilization usually results in lower per-unit product costs and higher overall profit.[66] Over 80 percent is a healthy capacity utilization rate and a rate at which most companies would be profitable.

The U.S. steel industry uses 80 percent as a benchmark for minimum operational efficiency. Moreover, the steel industry is capable of reaching and sustaining 80 percent capacity utilization or higher. During the 2002-2008 period, U.S. steel companies operated at an average 87.4 percent level.[67]

These industry assessments are consistent with a 1983 report on "Critical Materials Requirements in the U.S. Steel Industry" in which the Department

66 Houston Chronical, "Capacity Utilization and Effects on Product and Profit," http://smallbusiness.chron.com/capacity-utilization-effects-product-profit-67046.html; steel industry sources.

67 http://marketrealist.com/2015/09/upstream-exposure-impact-steel-companies.html ("It's important to note how changes in capacity utilization rates impact a company's earnings. For example, we see a big jump in earnings when utilization rates improve from 80 percent to 85 percent. However, incremental benefits are lower when utilization rates increase from 90 percent to 95 percent.").

explained that "[c]apability utilization or capacity use, which in effect describes the efficiency of an industry's use of capital, is a prime determinant of profitability. Domestic steel producers were operating at about 55 percent capability for the first half of 1982. The comparable rate for the first half of 1981 was 85 percent. This current rate is probably well below a breakeven point for most producers, whereas 1981 was profitable for nearly all producers."[68]

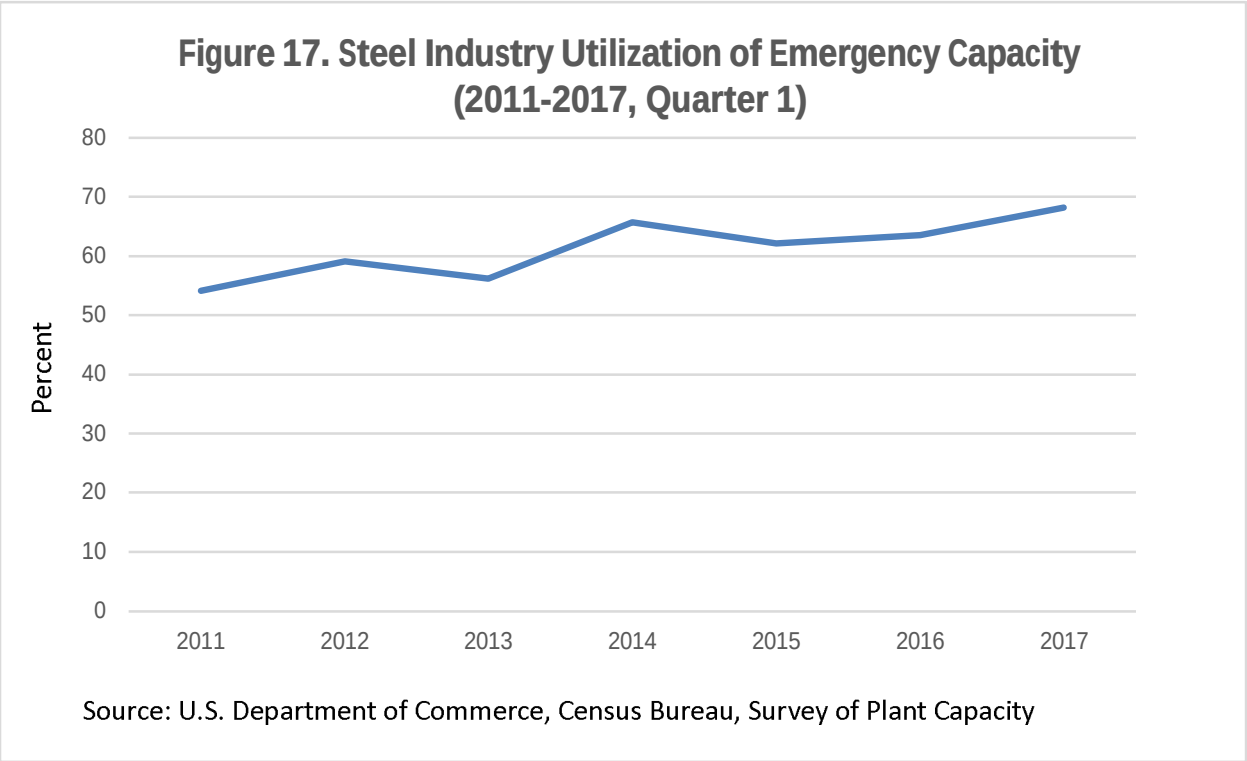
4. Declining Steel Production Facilities Limits Capacity Available for a National Emergency

The number of steel production facilities located in the U.S. continues to decline. As shown earlier in Figure 13, from 1975 to 2016 the number of basic oxygen furnace facilities decreased from 38 to 13. Similarly, from 1990 to 2016, the number of electric arc furnace facilities decreased from 127 to 98.

Due to this decline in facilities, domestic steel producers have a shrinking ability to meet national security production requirements in a national emergency. The U.S. Department of Commerce, Census Bureau regularly surveys plant capacity, and has found that steel producers are quickly shedding production capacity that could be used in a national emergency. The Census Bureau defines national emergency production as the "greatest level of production an establishment can expect to sustain for one year or more under national emergency conditions."[69] From 2011 to 2017, steel producers increased the utilization of the surge capacity they would have during a national emergency from 54.2 percent to 68.2 percent (*see* Figure 17). As steel producers use more of this emergency capacity, there is an increasingly limited ability to ramp up steel production to meet national security needs during a national emergency.

[68] Department of Commerce, "Critical Materials Requirements in the U.S. Steel Industry", March 1983, at 16-17.

[69] U.S. Dept. of Commerce, Census Bureau, Survey of Plant Capacity. 2011-2017.



The ability to increase steel production during a national emergency continues to diminish as the number of steel production facilities continues to decline. If the U.S. requires a similar increase in steel production as it did during previous national emergencies, domestic steel production capacity may be insufficient to satisfy national security needs. If a national emergency were to occur at present utilization levels, domestic steel producers would be able to increase production by 146 percent.

For comparison, from 1938 through 1946 the U.S. increased the production of pig iron and ferro-alloys by 217 percent and increased the production of steel ingots and castings by 210 percent to meet the demands of fighting a global war.[70] From 1960 through 1973, during the Vietnam era, the U.S. increased steel production by 152 percent.[71] Should the U.S. once again experience a conflict on the scale of the Vietnam War, steel production capacity may be slightly insufficient

[70] U.S. Dept. of Commerce, Census Bureau. Statistical Abstract of the United States, 1948. Page 876.

[71] U.S. Dept. of Commerce, Census Bureau. Statistical Abstract of the United States, 1978. Page 830.

to meet national security needs. But if the U.S. were to experience a conflict requiring the production increase seen during the Second World War, the existing domestic steel production capacity would be unable to meet national security requirements.

Increasing steel production capacity once a large-scale national emergency has arisen would take a significant amount of time. According to the American Iron and Steel Institute, the replacement of a basic oxygen furnace facility takes more than a year to complete. Therefore, the lack of spare domestic steel production capacity and the possible inability to sufficiently increase production during a national emergency may impair the national security of the United States.

D. Global Excess Steel Capacity is a Circumstance that Contributes to the Weakening of the Domestic Economy

1. Free markets globally are adversely affected by substantial chronic global excess steel production led by China

Numerous studies, reports, and investigations have documented the global excess steel capacity, with China having the largest installed capability (*see* Figure 18).[72,73,74] OECD analyses show that the world's nominal crude steelmaking capacity reached about 2.4 billion metric tons in 2016, an increase of 127 percent compared to the 2000 level. Most of the capacity expansion was planned for construction and manufacturing activities, and to help build the infrastructure necessary for economic development – most in non-OECD countries. Furthermore, the OECD reports that while steel capacity increased at a steady rate, world steel demand contracted sharply in the aftermath of the global economic and financial crisis of 2008. Global demand for steel recovered slowly in the years following 2008. However, since 2013, global steel demand has flattened thereby widening the capacity/demand gap. By 2015, the gap reached over 700 million metric tons.

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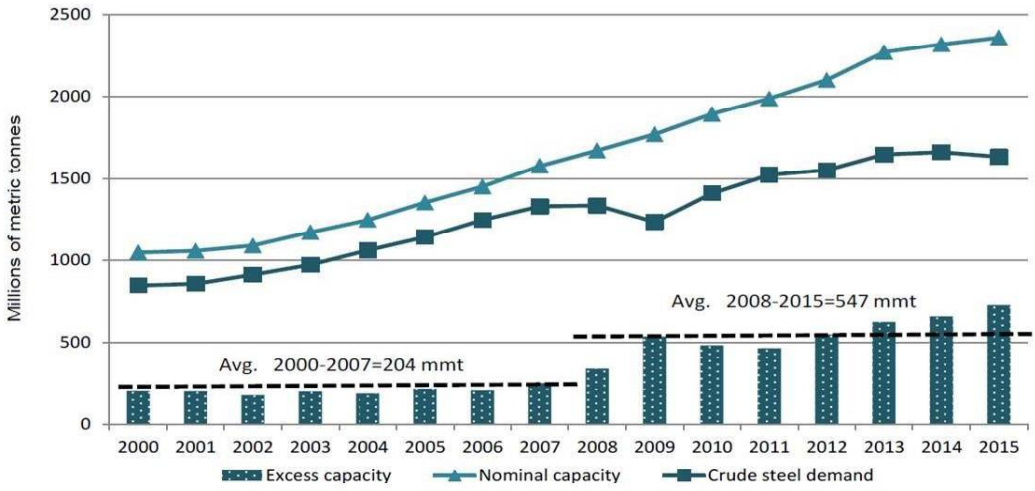
[72] Brun, L. (2016). *Overcapacity in Steel, China's Role in a Global Problem.* Washington, DC: Alliance for American Manufacturing. http://aamweb.s3.amazonaws.com/uploads/resources/OvercapacityReport2016_R3.pdf

[73] Price, A., Weld, C., El-Sabaawi, L., & Teslik, A. (2016). Capacity Runs Riot. Washington, DC: Wiley Rein LLP.

[74] OECD Reports. (2016). http://www.oecd.org/industry/ind/82nd-session-of-the-steel-committee.htm

Figure 18. Nominal Steel Capacity Exceeded Demand in 2015



Note: Steel demand in 2015 is an estimate by the OECD, calculated using the same percentage change from 2014 as forecast by the World Steel Association for finished steel in October 2015.

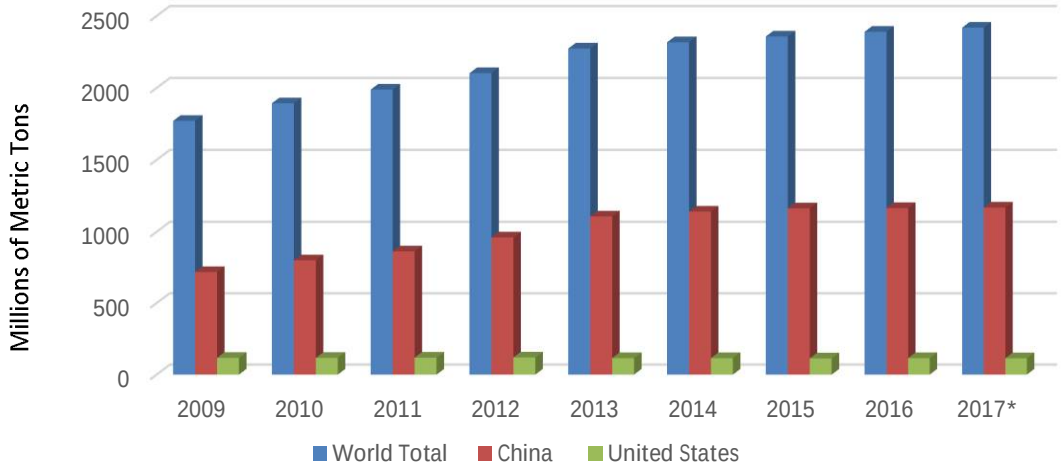
Source: OECD for capacity and the World Steel Association for demand.

The vast size of the capacity/demand gap means that steel demand alone cannot increase enough to balance the global overcapacity problem, which is particularly prevalent in China. Chinese excess capacity, estimated at more than 300 million metric tons, dwarfs total U.S. production capacity (*see* Figure 19).[75]

The effect of global overcapacity and excess steel production on U.S. steel prices and import levels is discussed in greater detail in Appendix L. While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined.

[75] OECD, "High Level Meeting: Excess Capacity and Structural Adjustment in the Steel Sector," April 2016, http://www.oecd.org/sti/ind/Background%20document%20No%202_FINAL_Meeting.pdf

Figure 19. Steelmaking Capacity



Source: OECD

Several countries (India, Iran, and Indonesia) in addition to China continue to add production capacity despite slack global demand. According to the OECD Steel Committee Chair's statement from March 2017, "New data suggest that nearly 40 million metric tons of gross capacity additions are currently underway and could come on stream during the three-year period of 2017-19, while an additional 53.6 million metric tons of capacity additions are in the planning stages for possible start-up during the same time period."[76] This additional global steel capacity coming online represents over 80 percent of existing U.S. steelmaking production capacity, demonstrating that the import challenge to U.S. industry is continuing to grow.

2. Increasing global excess steel capacity will further weaken the internal economy as U.S. steel producers will face increasing import competition

These additions to worldwide steelmaking capacity will only exacerbate the situation because they will further lower global operating utilization rates, including in the United States. Growth in foreign government-subsidized steel production is progressively weakening the financial health of the U.S. steel industry as other steel

[76] OECD, "82nd Session of the OECD Steel Committee – Chair's Statement," March 2017, http://www.oecd.org/sti/ind/82-oecd-steel-chair-statement.htm

producing countries export more steel to the U.S. to in part to offset the loss of regional markets to Chinese steel (*see* Appendix L).

The U.S. share of global production continues to steadily decline. In the year 2000, when President Clinton signed into a law a statute granting China permanent normal trade relations status,[77] the U.S. share of global steel production stood at 12 percent.[78] Since that point in time, the U.S. share of global steel production continued an inexorable decline as other countries, and especially China, began to increase production. The U.S. share of global steel production fell to 8 percent in 2005,[79] 5 percent in 2009,[80] and 4.8 percent in 2015.[81] In contrast, China commanded a 49.7 percent share of global steel production in 2015.[82]

If even half of the planned additional global capacity identified by the OECD Steel Committee is built, and the related new production finds its way into the U.S., it will drive the operating rate of U.S. steel mills to less than 50 percent of capacity. This will cause a substantial and unsustainable negative cash situation that will ultimately result in multiple corporate bankruptcies due to heavy debt loads and related declines in steel production capacity and employment levels.

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[77] Public Law 106-286. An act to authorize extension of nondiscriminatory treatment (normal trade relations treatment) to the People's Republic of China, and to establish a framework for relations between the United States and the People's Republic of China. October 10, 2000. https://www.gpo.gov/fdsys/pkg/PLAW-106publ286

[78] U.S. Dept. of Commerce, Census Bureau. Statistical Abstract of the United States, 2012. Page 574.

[79] *Id.*

[80] *Id.*

[81] Steel Statistical Yearbook, 2016. World Steel Association. https://www.worldsteel.org/en/dam/jcr:37ad1117-fefc-4df3-b84f-6295478ae460/Steel+Statistical+Yearbook+2016.pdf

[82] Steel Statistical Yearbook, 2017. World Steel Association. https://www.worldsteel.org/en/dam/jcr:3e275c73-6f11-4e7f-a5d8-23d9bc5c508f/Steel+Statistical+Yearbook+2017.pdf

VI. CONCLUSION

The Secretary has determined that the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel, are "weakening our internal economy" and therefore "threaten to impair" the national security as defined in Section 232.

The continued rising levels of imports of foreign steel threaten to impair the national security by placing the U.S. steel industry at substantial risk of displacing the basic oxygen furnace and other steelmaking capacity, and the related supply chain needed to produce steel for critical infrastructure and national defense.

In considering "the impact of foreign competition on the economic welfare of individual domestic [steel] industries" and other factors Congress expressly outlined in Section 232, the Secretary has determined that the continued decline and concentration in steel production capacity is "weakening of our internal economy and may impair national security." *See* 19 U.S.C. § 1862(d).

Global excess steel capacity is a circumstance that contributes to the "weakening of our internal economy" that "threaten[s] to impair" the national security as defined in Section 232. Free markets globally are adversely affected by substantial chronic global excess steel production led by China. While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined. This overhang of excess capacity means that U.S. steel producers, for the foreseeable future, will face increasing competition from imported steel as other countries export more steel to the United States to bolster their own economic objectives.

Since defense and critical infrastructure requirements alone are not sufficient to support a robust steel industry, U.S. steel producers must be financially viable and competitive in the commercial market to be available to produce the needed steel output in a timely and cost efficient manner. In fact, it is the ability to quickly shift

production capacity used for commercial products to defense and critical infrastructure production that provides the United States a surge capability that is vital to national security, especially in an unexpected or extended conflict or national emergency. It is that capability which is now at serious risk; as imports continue to take business away from domestic producers, these producers are in danger of falling below minimum viable scale and are at risk of having to exit the market and substantially close down production capacity, often permanently.

Steel producers in the United States are facing widespread harm from mounting imports. Growing global steel capacity, flat or declining world demand, the openness of the U.S. steel market, and the price differential between U.S. market prices and global market prices (often caused by foreign government steel intervention) ensures that the U.S. will remain an attractive market for foreign steel absent quotas or tariffs. Excessive imports of steel, now consistently above 30 percent of domestic demand, have displaced domestic steel production, the related skilled workforce, and threaten the ability of this critical industry to maintain economic viability.

A U.S. steel industry that is not financially viable to invest in the latest technologies, facilities, and long-term research and development, nor retain skilled workers while attracting a next-generation workforce, will be unable to meet the current and projected needs of the U.S. military and critical infrastructure sectors. Moreover, the market environment for U.S. steel producers has deteriorated dramatically since the 2001 Report, when the Department concluded that imports of iron ore and semi-finished steel do not "fundamentally threaten" the ability of U.S. industry to meet national security needs.[83]

The Department's investigation indicates that the domestic steel industry has declined to a point where further closures and consolidation of basic oxygen furnace facilities represents a "weakening of our internal economy" as defined in Section 232. The more than 50 percent reduction in the number of basic oxygen furnace

[83] 2001 Report at 28 – 37. As noted, *supra* note 16, the 2001 Report added the qualifier "fundamentally" which is not found in the statutory text. The Secretary in this report uses the statutory standard of "threatens to impair" without such qualification.

facilities – either through closures or idling of facilities due to import competition – increases the chance of further closures that place the United States at serious risk of being unable to increase production to the levels needed in past national emergencies. The displacement of domestic product by excessive imports is having the serious effect of causing the domestic industry to operate at unsustainable levels, reducing employment, diminishing research and development, inhibiting capital expenditures, and causing a loss of vital skills and know-how. The present capacity operating rates for those remaining plants continue to be below those needed for financial sustainability. These conditions have been further exacerbated by the 22 percent surge in imports thus far in 2017 compared with 2016. Imports are now consistently above 30 percent of U.S. domestic demand.

It is evident that the U.S. steel industry is being substantially impacted by the current levels of imported steel. The displacement of domestic steel by imports has the serious effect of placing the United States at risk of being unable meet national security requirements. The Secretary has determined that the "displacement of domestic [steel] products by excessive imports" of steel is having the "serious effect" of causing the "weakening of our internal economy." *See* 19 U.S.C. § 1862(d). Therefore, the Secretary recommends that the President take corrective action pursuant to the authority granted by Section 232. *See* 19 U.S.C. § 1862(c).

VII. RECOMMENDATION

Prior significant actions to address steel imports (quotas and/or tariffs) were taken under various statutory authorities by President George W. Bush, President William J. Clinton (three times), President George H. W. Bush, President Ronald W. Reagan (three times), President James E. Carter (twice), and President Richard M. Nixon, all at lower levels of import penetration than the present level, which is above 30 percent.

Due to the threat of steel imports to the national security, as defined in Section 232, the Secretary recommends that the President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States, as well as direct additional actions to keep the U.S. steel industry financially viable and able to meet U.S. national security needs. The quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the U.S. steel producers to be able to operate at about an 80 percent or better of the industry's capacity utilization rate based on available capacity in 2017.

In 2016, U.S. steel production was 78.6 million metric tons and U.S. capacity was 113.3 million metric tons, which represents a 69.4 percent capacity utilization rate. If current import trends for 2017 continue, continued imports without any action are projected to be 36.0 million metric tons, an increase over 2016 of 6.0 million metric tons. Even with U.S. demand projected to increase to 107.3 from 99.8 million metric tons, increased imports mean U.S. capacity utilization is forecast to rise only to 72.3 percent, a non-financially viable and unsustainable level of operation.

By reducing import penetration rates to approximately 21 percent, U.S. industry would be able to operate at 80 percent of their capacity utilization. Achieving this level of capacity utilization based on the projected 2017 import levels will require reducing imports from 36 million metric tons to about 23 million metric tons. If a reduction in imports can be combined with an increase in domestic steel demand, as can be reasonably expected rising economic growth rates combined with the increased military spending and infrastructure proposals that the Trump Administration has planned, then U.S. steel mills can be expected to reach a capacity

utilization level of 80 percent or greater. This increase in U.S. capacity utilization will enable U.S. steel mills to increase operations significantly in the short-term and improve the financial viability of the industry over the long-term.

Recommendation to Ensure Sustainable Capacity Utilization and Financial Health

Impose a Quota or Tariff on all steel products covered in this investigation imported into the United States to remove the threatened impairment to national security. The Secretary recommends adjusting the level of imports through a quota or tariff on steel imported into the United States.

Alternative 1 – Global Quota or Tariff

1A. Global Quota

Impose quotas on all imported steel products at a specified percent of the 2017 import level, applied on a country and steel product basis.

According to the Global Trade Analysis Project (GTAP) Model, produced by Purdue University, a 63 percent quota would be expected to reduce steel imports by 37 percent (13.3 million metric tons) from 2017 levels. Based on imports from January to October, import levels for 2017 are projected to reach 36.0 million metric tons. The quotas, adjusted as necessary, would result in imports equaling about 22.7 million metric tons, which will enable an 80 percent capacity utilization rate at 2017 demand levels (including exports). Application of an annual quota will reduce the impact of the surge in steel imports that has occurred since the beginning of 2017.

1B. Global Tariff

Apply a tariff rate on all imported steel products, in addition to any antidumping or countervailing duty collections applicable to any imported steel product.

Similar to what is anticipated under a quota, according to the Global Trade Analysis Project (GTAP) Model, produced by Purdue University, a 24 percent tariff on all steel imports would be expected to reduce imports by 37 percent (i.e., a

reduction of 13.3 million metric tons from 2017 levels of 36.0 million metric tons).[84] This tariff rate would thus result in imports equaling about 22.7 million metric tons, which will enable an 80 percent capacity utilization rate at 2017 demand levels (including exports).[85]

Alternative 2 –Tariffs on a Subset of Countries

Apply a tariff rate on all imported steel products from Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica, in addition to any antidumping or countervailing duty collections applicable to any steel products from those countries. All other countries would be limited to 100 percent of their 2017 import level.

According to the Global Trade Analysis Project (GTAP) Model, produced by Purdue University, a 53 percent tariff on all steel imports from this subset of countries would be expected to reduce imports by 13.3 million metric tons from 2017 import levels from the targeted countries. This action would enable an increase in domestic production to achieve an 80 percent capacity utilization rate at 2017 demand levels (including exports). The countries identified are projected to account for less than 4 percent of U.S. steel exports in 2017.

Exemptions

In selecting an alternative, the President could determine that specific countries should be exempted from the proposed 63 percent quota or 24 percent tariff by granting those specific countries 100 percent of their prior imports in 2017, based on an overriding economic or security interest of the United States. The Secretary recommends that any such determination should be made at the outset and a corresponding adjustment be made to the final quota or tariff imposed on the

[84] Due to general equilibrium effects, the overall import level would need to decrease by more than the corresponding increase in domestic production to offset the negative effects of price or exchange rate changes on export demand.

[85] The elasticity factor is an estimate, not a certainty. A variation of 0.1 in the elasticity factor would change the tonnage reduction by about 375,000 tons. For example, imports would fall by an additional 375,000 tons under a demand elasticity of -1.7 instead of -1.6 and a 25 percent tariff.

remaining countries. This would ensure that overall imports of steel to the United States remain at or below the level needed to enable the domestic steel industry to operate as a whole at an 80 percent or greater capacity utilization rate. The limitation to 100 percent of each exempted country's 2017 imports is necessary to prevent exempted countries from producing additional steel for export to the United States or encouraging other countries to seek to trans-ship steel to the United States through the exempted countries.

It is possible to provide exemptions from either the quota or tariff and still meet the necessary objective of increasing U.S. steel capacity utilization to a financially viable target of 80 percent. However, to do so would require a reduction in the quota or increase in the tariff applied to the remaining countries to offset the effect of the exempted import tonnage.

Exclusions

The Secretary recommends an appeal process by which affected U.S. parties could seek an exclusion from the tariff or quota imposed. The Secretary would grant exclusions based on a demonstrated: (1) lack of sufficient U.S. production capacity of comparable products; or (2) specific national security based considerations. This appeal process would include a public comment period on each exclusion request, and in general, would be completed within 90 days of a completed application being filed with the Secretary.

An exclusion may be granted for a period to be determined by the Secretary and may be terminated if the conditions that gave rise to the exclusion change. The U.S. Department of Commerce will lead the appeal process in coordination with the Department of Defense and other agencies as appropriate. Should exclusions be granted the Secretary would consider at the time whether the quota or tariff for the remaining products needs to be adjusted to increase U.S. steel capacity utilization to a financially viable target of 80 percent.

Presidential Proclamation on Adjusting Imports of Steel into the United States

Issued on: March 8, 2018

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles (steel articles) on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. The Secretary found and advised me of his opinion that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are "weakening our internal economy," resulting in the persistent threat of further closures of domestic steel production facilities and the "shrinking [of our] ability to meet national security production requirements in a national emergency." Because of these risks and the risk that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency," and taking into account the close relation of the economic welfare of the Nation to our national security, see 19 U.S.C. 1862(d), the Secretary concluded that the present quantities and circumstances of steel articles imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

3. In reaching this conclusion, the Secretary considered the previous U.S. Government measures and actions on steel articles imports and excess capacity, including actions taken under Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush. The Secretary also considered the Department of Commerce's narrower investigation of iron ore and semi-finished steel imports in 2001, and found the recommendations in that report to be outdated given the dramatic changes in the steel industry since 2001, including the increased level of global excess capacity, the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the potential impact of further plant closures on capacity needed in a national emergency.

4. In light of this conclusion, the Secretary recommended actions to adjust the imports of steel articles so that such imports will not threaten to impair the national security. Among those recommendations was a global tariff of 24 percent on imports of steel articles in order to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. The Secretary has also recommended that I authorize him, in response to specific requests from affected domestic parties, to exclude from any adopted import restrictions those steel articles for which the Secretary determines there is a lack of sufficient U.S. production capacity of comparable products, or to exclude steel articles from such restrictions for specific national security-based considerations.

5. I concur in the Secretary's finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

6. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

7. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

8. In the exercise of these authorities, I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles, as defined below, imported from all countries except Canada and Mexico. In my judgment, this tariff is necessary and appropriate in light of the many factors I have considered, including the Secretary's report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense. Under current

circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security.

9. In adopting this tariff, I recognize that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

10. I conclude that Canada and Mexico present a special case. Given our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security, see 19 U.S.C. 1862(d), I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt steel articles imports from these countries from the tariff, at least at this time. I expect that Canada and Mexico will take action to prevent transshipment of steel articles through Canada and Mexico to the United States.

11. In the meantime, the tariff imposed by this proclamation is an important first step in ensuring the economic viability of our domestic steel industry. Without this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs — a situation that is fundamentally inconsistent with the safety and security of the American people. It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten to impair the

national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

Now, Therefore, I, Donald J. Trump, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, section 604 of the Trade Act of 1974, as amended, and section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim as follows:

(1) For the purposes of this proclamation, "steel articles" are defined at the Harmonized Tariff Schedule (HTS) 6-digit level as: 7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90, including any subsequent revisions to these HTS classifications.

(2) In order to establish increases in the duty rate on imports of steel articles, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation. Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018. This rate of duty, which is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from all countries except Canada and Mexico.

(3) The Secretary, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the United States Trade Representative (USTR), the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and such other senior Executive Branch officials as the Secretary deems appropriate, is hereby authorized to provide relief from the additional duties set forth in clause 2 of this proclamation for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and is also authorized to provide such relief based upon specific national security considerations. Such relief shall be provided for a steel article only after a request for exclusion is made by a directly affected party located in the United States. If the Secretary determines that a particular steel article should be excluded, the Secretary shall, upon publishing a notice of such determination in the Federal Register, notify Customs and Border Protection (CBP) of the Department of Homeland Security concerning such article so that it will be excluded from the duties described in clause 2

of this proclamation. The Secretary shall consult with CBP to determine whether the HTSUS provisions created by the Annex to this proclamation should be modified in order to ensure the proper administration of such exclusion, and, if so, shall make such modification to the HTSUS through a notice in the Federal Register.

(4) Within 10 days after the date of this proclamation, the Secretary shall issue procedures for the requests for exclusion described in clause 3 of this proclamation. The issuance of such procedures is exempt from Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

(5) (a) The modifications to the HTSUS made by the Annex to this proclamation shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(b) The Secretary shall continue to monitor imports of steel articles and shall, from time to time, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the USTR, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Director of the Office of Management and Budget, and such other senior Executive Branch officials as the Secretary deems appropriate, review the status of such imports with respect to the national security. The Secretary shall inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President under section 232 of the Trade Expansion Act of 1962, as amended. The Secretary shall also inform the President of any circumstance that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary.

(6) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this

eighth day of March, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-second.

DONALD J. TRUMP

Presidential Proclamation Adjusting Imports of Steel into the United States

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel mill articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and decided to adjust the imports of steel mill articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of this proclamation (steel articles), by imposing a 25 percent ad valorem tariff on such articles imported from all countries except Canada and Mexico.

3. In proclaiming this tariff, I recognized that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognized our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. I further determined that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel

articles imports from that country and, if necessary, adjust the tariff as it applies to other countries as the national security interests of the United States require.

4. The United States is continuing discussions with Canada and Mexico, as well as the following countries, on satisfactory alternative means to address the threatened impairment to the national security by imports of steel articles from those countries: the Commonwealth of Australia (Australia), the Argentine Republic (Argentina), the Republic of Korea (South Korea), the Federative Republic of Brazil (Brazil), and the European Union (EU) on behalf of its member countries. Each of these countries has an important security relationship with the United States and I have determined that the necessary and appropriate means to address the threat to the national security posed by imports from steel articles from these countries is to continue these discussions and to exempt steel articles imports from these countries from the tariff, at least at this time. Any country not listed in this proclamation with which we have a security relationship remains welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports of steel articles from that country.

5. The United States has an important security relationship with Australia, including our shared commitment to supporting each other in addressing national security concerns, particularly through our security, defense, and intelligence partnership; the strong economic and strategic partnership between our countries; our shared commitment to addressing global excess capacity in steel production; and the integration of Australian persons and organizations into the national technology and industrial base of the United States.

6. The United States has an important security relationship with Argentina, including our shared commitment to supporting each other in addressing national security concerns in Latin America, particularly the threat posed by instability in Venezuela; our shared commitment to addressing global excess capacity in steel production; the reciprocal investment in our respective industrial bases; and the strong economic integration between our countries.

7. The United States has an important security relationship with South Korea, including our shared commitment to eliminating the North Korean nuclear threat; our decades-old military

alliance; our shared commitment to addressing global excess capacity in steel production; and our strong economic and strategic partnership.

8. The United States has an important security relationship with Brazil, including our shared commitment to supporting each other in addressing national security concerns in Latin America; our shared commitment to addressing global excess capacity in steel production; the reciprocal investment in our respective industrial bases; and the strong economic integration between our countries.

9. The United States has an important security relationship with the EU and its constituent member countries, including our shared commitment to supporting each other in national security concerns; the strong economic and strategic partnership between the United States and the EU, and between the United States and EU member countries; and our shared commitment to addressing global excess capacity in steel production.

10. In light of the foregoing, I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from these countries is to continue ongoing discussions and to increase strategic partnerships, including those with respect to reducing global excess capacity in steel production by addressing its root causes. In my judgment, discussions regarding measures to reduce excess steel production and excess steel capacity, measures that will increase domestic capacity utilization, and other satisfactory alternative means will be most productive if the tariff proclaimed in Proclamation 9705 on steel articles imports from these countries is removed at this time.

11. However, the tariff imposed by Proclamation 9705 remains an important first step in ensuring the economic viability of our domestic steel industry and removing the threatened impairment of the national security. Without this tariff and the adoption of satisfactory alternative means addressing long-term solutions in ongoing discussions with the countries listed as excepted in clause 1 of this proclamation, the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs — a situation that is fundamentally inconsistent with the safety and security of the

American people. As a result, unless I determine by further proclamation that the United States has reached a satisfactory alternative means to remove the threatened impairment to the national security by imports of steel articles from a particular country listed as excepted in clause 1 of this proclamation, the tariff set forth in clause 2 of Proclamation 9705 shall be effective May 1, 2018, for the countries listed as excepted in clause 1 of this proclamation. In the event that a satisfactory alternative means is reached such that I decide to exclude on a long-term basis a particular country from the tariff proclaimed in Proclamation 9705, I will also consider whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to the tariff set forth in clause 2 of Proclamation 9705 as it applies to other countries. Because the current tariff exemptions are temporary, however, I have determined that it is necessary and appropriate to maintain the current tariff level at this time.

12. In the meantime, to prevent transshipment, excess production, or other actions that would lead to increased exports of steel articles to the United States, the United States Trade Representative, in consultation with the Secretary and the Assistant to the President for Economic Policy, shall advise me on the appropriate means to ensure that imports from countries exempt from the tariff imposed in Proclamation 9705 do not undermine the national security objectives of such tariff. If necessary and appropriate, I will consider directing U.S. Customs and Border Protection (CBP) of the Department of Homeland Security to implement a quota as soon as practicable, and will take into account all steel articles imports since January 1, 2018, in setting the amount of such quota.

13. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

14. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

Now, Therefore, I, Donald J. Trump, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) Imports of all steel articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of this proclamation, from the countries listed in this clause shall be exempt from the duty established in clause 2 of Proclamation 9705 until 12:01 a.m. eastern daylight time on May 1, 2018. Further, clause 2 of Proclamation 9705 is amended by striking the last two sentences and inserting the following two sentences: "Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered, or withdrawn from warehouse for consumption, as follows: (a) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the European Union, and (b) on or after 12:01 a.m. eastern daylight time on May 1, 2018, from all countries. This rate of duty, which is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding sentence.".

(2) Paragraph (a) of U.S. note 16, added to subchapter III of chapter 99 of the HTSUS by the Annex to Proclamation 9705, is amended by replacing "Canada and of Mexico" with "Canada, of Mexico, of Australia, of Argentina, of South Korea, of Brazil, and of the member countries of the European Union".

(3) The "Article description" for heading 9903.80.01 of the HTSUS is amended by replacing "Canada or of Mexico" with "Canada, of Mexico, of Australia, of Argentina, of South Korea, of Brazil, or of the member countries of the European Union".

(4) The exemption afforded to steel articles from Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the EU shall apply only to steel articles of such countries entered, or withdrawn from warehouse for consumption, through the close of April 30, 2018, at which time Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the EU shall be deleted from paragraph (a) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS and from the article description of heading 9903.80.01 of the HTSUS.

(5) Any steel article that is admitted into a U.S. foreign trade zone on or after 12:01 a.m. eastern daylight time on March 23, 2018, may only be admitted as "privileged foreign status" as defined in 19 CFR 146.41, and will be subject upon entry for consumption to any ad valorem rates of duty related to the classification under the applicable HTSUS subheading. Any steel article that was admitted into a U.S. foreign trade zone under "privileged foreign status" as defined in 19 CFR 146.41, prior to 12:01 a.m. eastern daylight time on March 23, 2018, will likewise be subject upon entry for consumption to any ad valorem rates of duty related to the classification under applicable HTSUS subheadings imposed by Proclamation 9705, as amended by this proclamation.

(6) Clause 3 of Proclamation 9705 is amended by inserting a new third sentence reading as follows: "Such relief may be provided to directly affected parties on a party-by-party basis taking into account the regional availability of particular articles, the ability to transport articles within the United States, and any other factors as the Secretary deems appropriate.".

(7) Clause 3 of Proclamation 9705, as amended by clause 6 of this proclamation, is further amended by inserting a new fifth sentence as follows: "For merchandise entered on or after the date the directly affected party submitted a request for exclusion, such relief shall be retroactive to the date the request for exclusion was posted for public comment.".

(8) The reference to "7304.10" in clause 1 of Proclamation 9705, is amended to read "7304.11".

(9) The Secretary, in consultation with CBP and other relevant executive departments and agencies, shall revise the HTSUS so that it conforms to the amendments and effective dates directed in this proclamation. The Secretary shall publish any such modification to the HTSUS in the Federal Register.

(10) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of March, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-second.

DONALD J. TRUMP

I. Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation

Issued on: March 22, 2018

MEMORANDUM FOR THE SECRETARY OF THE TREASURY

THE UNITED STATES TRADE REPRESENTATIVE

THE SENIOR ADVISOR FOR POLICY

THE ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY

THE ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

THE ASSISTANT TO THE PRESIDENT FOR HOMELAND

SECURITY AND COUNTERTERRORISM

SUBJECT: Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation

On August 14, 2017, I directed the United States Trade Representative (Trade Representative) to determine whether to investigate China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development. On August 18, 2017, the Trade Representative initiated an investigation under section 301 of the Trade Act of 1974, as amended (the "Act") (19 U.S.C. 2411).

During its investigation, the Office of the United States Trade Representative (USTR) consulted with appropriate advisory committees and the interagency section 301 Committee. The Trade Representative also requested consultations with the

Government of China, under section 303 of the Act (19 U.S.C. 2413). The USTR held a public hearing on October 10, 2017, and two rounds of public written comment periods. The USTR received approximately 70 written submissions from academics, think tanks, law firms, trade associations, and companies.

The Trade Representative has advised me that the investigation supports the following findings:

First, China uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. China also uses administrative review and licensing procedures to require or pressure technology transfer, which, inter alia, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms.

Second, China imposes substantial restrictions on, and intervenes in, U.S. firms' investments and activities, including through restrictions on technology licensing terms. These restrictions deprive U.S. technology owners of the ability to bargain and set market-based terms for technology transfer. As a result, U.S. companies seeking to license technologies must do so on terms that unfairly favor Chinese recipients.

Third, China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.

Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions provide the Chinese government with unauthorized access to intellectual property, trade secrets, or confidential business information, including technical data, negotiating positions, and sensitive and proprietary internal business communications, and they also support China's strategic development goals, including its science and technology advancement, military modernization, and economic development.

It is hereby directed as follows:

Section 1. Tariffs. (a) The Trade Representative should take all appropriate action under section 301 of the Act (19 U.S.C. 2411) to address the acts, policies, and practices

of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce. The Trade Representative shall consider whether such action should include increased tariffs on goods from China.

(b) To advance the purposes of subsection (a) of this section, the Trade Representative shall publish a proposed list of products and any intended tariff increases within 15 days of the date of this memorandum. After a period of notice and comment in accordance with section 304(b) of the Act (19 U.S.C. 2414(b)), and after consultation with appropriate agencies and committees, the Trade Representative shall, as appropriate and consistent with law, publish a final list of products and tariff increases, if any, and implement any such tariffs.

Sec. 2. WTO Dispute Settlement. (a) The Trade Representative shall, as appropriate and consistent with law, pursue dispute settlement in the World Trade Organization (WTO) to address China's discriminatory licensing practices. Where appropriate and consistent with law, the Trade Representative should pursue this action in cooperation with other WTO members to address China's unfair trade practices.

(b) Within 60 days of the date of this memorandum, the Trade Representative shall report to me his progress under subsection (a) of this section.

Sec. 3. Investment Restrictions. (a) The Secretary of the Treasury (Secretary), in consultation with other senior executive branch officials the Secretary deems appropriate, shall propose executive branch action, as appropriate and consistent with law, and using any available statutory authority, to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.

(b) Within 60 days of the date of this memorandum, the Secretary shall report to me his progress under subsection (a) of this section.

Sec. 4. Publication. The Trade Representative is authorized and directed to publish this memorandum in the Federal Register.

DONALD J. TRUMP

OFFICE *of the* UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT

FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974

March 22, 2018

Abbreviations and Acronyms

Acronym	Definition
3PLA	People's Liberation Army, Third Department
4WD	four-wheel drive
AAFA	American Apparel & Footwear Association
ABA	American Bar Association
ABC	Agriculture Bank of China
ABPIA	American Bridal & Prom Industry Association
ACC	American Chemistry Council
AEI	American Enterprise Institute
AGIC	Asia-Germany Industrial Promotion Capital
AI	artificial intelligence
AmCham	American Chamber of Commerce Shanghai
AML	Anti-Monopoly Law
AMSC	American Superconductor Corporation
APEC	Asia-Pacific Economic Cooperation
APT	advanced persistent threat
AQSIQ	Administration of Quality Supervision, Inspection and Quarantine
ATI	Allegheny Technologies, Inc
AVIC	Aviation Industry Corporation of China
AVICEM	ACIF Electromechanical Systems Co., Ltd
AWD	all-wheel drive
BCM	Bank of Communications
BEA	U.S. Bureau of Economic Analysis
BGI	Shenzhen Beijing Genomics Institute
BIO	Biotechnology Innovation Organization
BIS	Bureau of Industry and Security
BoC	Bank of China
BRI	Belt and Road Initiative
BRIC	Brazil, Russia, India, and China
C&C	command-and-control
CAAC	Civil Aviation Administration of China
CAIGA	China Aviation Industry General Aircraft Co.
CAST	China Association of Science and Technology
CCBC	China Construction Bank Corporation
CCC	China Compulsory Certification
CCCME	China Chamber of Commerce for Import & Export of Machinery and Electronic Products
CCOIC	China Chamber of International Commerce
CCP	Chinese Communist Party
CCXR	China Chengxin Securities Rating Company
CDB	China Development Bank
CFIUS	Committee on Foreign Investment in the United States
CG	Complete Genomics
CGCC	China General Chamber of Commerce
CIC	China Investment Corporation
CIGS	copper indium gallium selenide
CIPL	China Intellectual Property Law Society

CJV	contractual joint venture
CMG	Continental Motors Group Limited
CMOS	complementary metal-oxide semiconductor
CNOOC	China National Offshore Oil Corporation
CNY	Chinese yuan
COMAC	Commercial Aircraft Corporation of China, Ltd
CompTIA	Computing Technology Industry Association
CPPCC	Chinese People's Political Consultative Conference
CSI	Coalition of Services Industries
CSIS	Center for Strategic and International Studies
CSP	cloud service providers
CTA	Consumer Technology Association
DHH	DHH Washington Law Office
DHS	U.S. Department of Homeland Security
DOJ	U.S. Department of Justice
DRC	Development and Reform Commission
EJV	equity joint venture
EXIM	China Export-Import Bank
FADEC	full authority digital engine control
FAW	First Automotive Workers
FDI	foreign direct investment
FIE	foreign-invested entities
FYP	Five-Year Plan for National Economic and Social Development
GA	general aviation
GAC	General Administration of Customs
GDP	gross domestic product
GMO	genetically modified organism
HNA	Hainan Airlines
IaaS	infrastructure as a service
IAM	International Association of Machinists and Aerospace Workers
IATA	International Air Transport Association
IC	integrated circuit
ICBC	Industrial and Commercial Bank of China
ICT	information and communications technology
ICTSD	International Center for Trade and Sustainable Development
IDAR	introduce, digest, absorb, and re-innovate
IDC	internet data center
IDDS	innovation-driven development strategy
IGBT	insulated-gate bipolar transistors
IGCC	University of California Institute on Global Conflict and Cooperation
IMF	International Monetary Fund
iML	Integrated Memory Logic Limited
IP	intellectual property
IPIRA	Intellectual Property and Industry Research Alliances
ISS	Imaging Solutions and Services
ISSI	Integrated Silicon Solutions, Inc.
IT	information technology
ITAR	International Traffic in Arms Regulations
ITI	Information Technology Industry Council

ITIF	Information Technology & Innovation Foundation
JCCT	U.S.-China Joint Commission on Commerce and Trade
JV	joint venture
M&A	merger and acquisitions
MCF	military-civil fusion
MCM	multi-chip module
MEMA	Motor & Equipment Manufacturers Association
MEMS	micro-electromechanical systems
MERICS	Mercator Institute for China Studies
METI	Ministry of Economy, Trade, and Industry
MIIT	Ministry of Industry and Information Technology
MLP	National Medium- and Long-Term Plan for the Development of Science and Technology
MLPS	Multi-level Protection Scheme
MLR	Ministry of Land and Resources of the People's Republic of China
MNE	multinational enterprise
MOA	Ministry of Agriculture of the People's Republic of China
MOF	Ministry of Finance of the People's Republic of China
MOFCOM	Ministry of Commerce of the People's Republic of China
MOST	Ministry of Science and Technology of the People's Republic of China
MPS	managed print services
MRO	maintenance, repair, and overhaul
MSS	China's Ministry of State Security
MW	megawatt
NAM	National Association of Manufacturers
NBC	National Bureau of Statistics of the People's Republic of China
NDRC	National Development and Reform Commission
NEA	National Energy Administration
NEV	new-energy vehicle
NFTC	National Foreign Trade Council
NHI	Northern Heavy Industries Group
NPC	National People's Congress (China)
NTE	National Trade Estimate
OCTG	oil country tubular goods
ODI	overseas direct investment
OECD	Organization for Economic Cooperation and Development
OFDI	outbound foreign direct investment
PaaS	computer platform as a service
PBOC	People's Bank of China
PERC	Passivated Emitter Rear Contact
PLA	China's People's Liberation Army
PMA	parts manufacturing and authorization
PMDD	Permanent-Magnet Direct Drive
PPD-28	Presidential Policy Directive 28
PPP	private-public partnership
PRC	People's Republic of China
PWM	pulse width modulation
R&D	research and development
RMB	renminbi (official currency of China)
S&ED	U.S.-China Strategic & Economic Dialogue

S&T	science and technology
SaaS	computer software as a service
SAFE	State Administration of Foreign Exchange
SAIC	State Administration of Industry Commerce
SASAC	State-owned Assets Supervision and Administration Commission
SASTIND	State Administration for Science, Technology, and Industry for National Defense
SAT	State Administration of Taxes
SEI	strategic and emerging industries
SIA	Semiconductor Industry Association
SIGINT	Signals intelligence
SIPO	State Intellectual Property Office
SMIC	Semiconductor Manufacturing International Corporation
SNPTC	State Nuclear Power Technology Corporation
SOE	state-owned enterprise
SSLP	seamless standard line pipes
TIA	Telecommunications Industry Association
TIER	*Regulations of the PRC on Administration of Import and Export Technologies*
TRB	technical reconnaissance bureau
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UAV	unmanned aerial vehicle
UNCTAD	United Nations Conference on Trade and Development
USC	United States Constitution
USCBC	U.S.-China Business Council
USCIB	U.S. Council for International Business
USD	U.S. dollars
USITC	U.S. International Trade Commission
USPTO	U.S. Patent and Trademark Office
USW	United Steel Workers
UT	United Turbine
VAT	value-added tax
VC	venture capital
WFOE	wholly foreign-owned entity
WIPO	UN's World Intellectual Property Organization
WNA	World Nuclear Association
ZGC	Zhongguancun

CONTENTS

I. Overview

A. Core Elements of Section 301

This investigation has been brought under Section 301 of the Trade Act of 1974, as amended (the Trade Act).[1] Section 301 is a key enforcement tool that may be used to address a wide variety of unfair acts, policies, and practices of U.S. trading partners. Section 301 sets out three categories of acts, policies, or practices of a foreign country that are potentially actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and that burden or restrict U.S. Commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. Commerce.[2] The third category of conduct is most relevant to this investigation.

Section 301 defines "discriminatory" to "include, when appropriate, any act, policy, and practice which denies national or most-favored nation treatment to United States goods, service, or investment."[3] An "unreasonable" act, policy, or practice is one that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable."[4] The statute further provides that in determining if a foreign country's practices are unreasonable, reciprocal opportunities to those denied U.S. firms "shall be taken into account, to the extent appropriate."[5]

If the USTR determines that the Section 301 investigation "involves a trade agreement," and if that trade agreement includes formal dispute settlement procedures, USTR may pursue the investigation through consultations and dispute settlement under the trade agreement. Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

Moreover, if the USTR determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, the USTR must also determine what action, if any, to take.[6] For example, if the USTR determines that an act, policy or practice is unreasonable or discriminatory and that it burdens or restricts U.S. commerce,

> The Trade Representative shall take all appropriate and feasible action authorized under [Section 301(c)], subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may

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[1] Unless otherwise specified, "Section 301" refers generally to Chapter 1 of Title III of the Trade Act of 1974 (codified as amended in 19 U.S.C. §§ 2411-2417). Furthermore, for ease of reference, full citations are used throughout this report.

[2] Trade Act of 1974, 19 U.S.C. § 2411(a)-(b).

[3] 19 U.S.C. § 2411(d)(5). Section III describes discriminatory acts, practices, and policies of the Chinese government.

[4] 19 U.S.C. § 2411(d)(3)(A).

[5] 19 U.S.C. § 2411(d)(3)(D).

[6] For example, in 2014, USTR determined that action against Ukraine was not appropriate due to the political situation. *See Notice of Determination in Section 301 Investigation of Ukraine*, 79 Fed. Reg. 14,326-27 (Mar. 13, 2014).

> direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice.[7]

Actions specifically authorized under Section 301(c) include: (i) suspending, withdrawing or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country for such time as deemed appropriate; (iii) withdrawing or suspending preferential duty treatment under a preference program; (iv) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (v) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States.[8] In addition to these specifically enumerated actions, the USTR may take any actions that are "within the President's power with respect to trade in goods or services, or with respect to any other area of pertinent relations with the foreign country."[9]

B. Background to the Investigation

On August 14, 2017, the President issued a Memorandum to the Trade Representative stating *inter alia* that:

> China has implemented laws, policies, and practices and has taken actions related to intellectual property, innovation, and technology that may encourage or require the transfer of American technology and intellectual property to enterprises in China or that may otherwise negatively affect American economic interests. These laws, policies, practices, and actions may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation.[10]

The President instructed USTR to determine under Section 301 whether to investigate China's law, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.[11]

Concerns about a wide range of unfair practices of the Chinese government (and the Chinese Communist Party (CCP)) related to technology transfer, intellectual property, and innovation are longstanding. USTR has pursued these issues multilaterally, for example, through the WTO dispute settlement process and in WTO committees, and bilaterally through the annual Special 301 review. These issues also have been raised in bilateral dialogues with China, including the U.S.-China Joint Commission on Commerce and Trade (JCCT) and U.S.-China Strategic & Economic Dialogue (S&ED), to attempt to address some of the U.S. concerns.

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[7] 19 U.S.C. § 2411(b).
[8] In cases in which USTR determines that import restrictions are the appropriate action, preference must be given to the imposition of duties over other forms of action. 19 U.S.C. §§ 2411(c).
[9] 19 U.S.C. § 2411(b)(2).
[10] *See Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007 (Aug. 17, 2017).
[11] *Id.*

1. Initiation of the Investigation

USTR initiated this investigation on August 18, 2017 after consultation with the interagency Section 301 committee and private sector advisory committees.[12] On that same date, USTR also requested consultations with the Government of China.[13] China's Minister of Commerce responded to this letter on August 28, opposing the initiation of a Section 301 investigation.[14]

The *Federal Register Notice* described the focus of the investigation as follows:

> **First**, the Chinese government reportedly uses a variety of tools, including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, and other mechanisms to regulate or intervene in U.S. companies' operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies. Moreover, many U.S. companies report facing vague and unwritten rules, as well as local rules that diverge from national ones, which are applied in a selective and non-transparent manner by Chinese government officials to pressure technology transfer.
>
> **Second**, the Chinese government's acts, policies and practices reportedly deprive U.S. companies of the ability to set market-based terms in licensing and other technology-related negotiations with Chinese companies and undermine U.S. companies' control over their technology in China. For example, the *Regulations on Technology Import and Export Administration* mandate particular terms for indemnities and ownership of technology improvements for imported technology, and other measures also impose non-market terms in licensing and technology contracts.
>
> **Third**, the Chinese government reportedly directs and/or unfairly facilitates the systematic investment in, and/or acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.
>
> **Fourth**, the investigation will consider whether the Chinese government is conducting or supporting unauthorized intrusions into U.S. commercial computer networks or cyber-enabled theft of intellectual property, trade secrets, or confidential business information, and whether this conduct harms U.S. companies or provides competitive advantages to Chinese companies or commercial sectors.

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[12] *See Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 82 Fed. Reg. 40,213-14 (Aug. 24, 2017) (Appendix A).

[13] *See* Appendix A.

[14] *See* Letter from Minster of Commerce Zhong Shan to Ambassador Robert Lighthizer (Aug. 28, 2017) (on file with author).

In addition to these four types of conduct, interested parties could submit for consideration information on other acts, policies and practices of China relating to technology transfer, intellectual property, and innovation for potential inclusion in this investigation or to be addressed through other applicable mechanisms.[15]

The terms "technology" and "technology transfer" are key concepts in this investigation. They are defined in Box I.1.

Box I.1: Technology and Technology Transfer Defined

Technology is defined broadly in this investigation to include knowledge and information needed to produce and deliver goods and services, as well as other methods and processes used to solve practical, technical or scientific problems. In addition to information protected by patents, copyrights, trademarks, trade secrets, and other types of intellectual property (IP) protections, the term also includes "know-how", such as production processes, management techniques, expertise, and the knowledge of personnel.

Technology and innovation are critical factors in maintaining U.S. competitiveness in the global economy. Among all major economies, the United States has the highest concentration of knowledge- and technology-intensive industries as a share of total economic activity. And in high-tech manufacturing, the United States leads the world with a global share of production of 29 percent, followed by China at 27 percent.

Technology transfers made on voluntary and mutually-agreed terms, and without government interference or distortion, are critical to the U.S. economy. In fact, U.S. companies are global leaders in the transfer of technology through legal mechanisms such as trade in high-tech goods and services; the licensing of technology to companies and persons abroad; and foreign direct investment (FDI).

Sources: OECD, *Glossary of Statistical Terms;* Keith E. Maskus, UNCTAD-ICTSD, Encouraging International Technology Transfer 9 (2004); U.S. Dept. of Commerce, Intellectual Property and the U.S. Economy 1 (2012); National Science Board, Science & Engineering Indicators 4, 4-17 (2016); OECD, *Main Science and Technology Indicators*: Technology Balance of Payments: Receipts (Current Prices), 2016; UNCTAD, World Investment Report, 2017, 14.

2. China's Bilateral Commitments to End its Technology Transfer Regime and to Refrain from State-Sponsored Cyber Intrusions and Theft

In the bilateral relationship, China repeatedly has committed to eliminate aspects of its technology transfer regime. On at least eight occasions since 2010, the Chinese government has committed not to use technology transfer as a condition for market access and to permit technology transfer decisions to be negotiated independently by businesses. China has further committed not to pressure the disclosure of trade secrets in regulatory or administrative

[15] *See* Appendix A.

proceedings. The evidence adduced in this investigation establishes that China's technology transfer regime continues, notwithstanding repeated bilateral commitments and government statements, as summarized in Table I.1, below, and discussed in the remainder of this report.

Table I.1 China's Bilateral Commitments Relating to Technology Transfer, 2010 - 2016

Year	Mechanism	Commitment
2010	S&ED	China reaffirmed that the terms and conditions of technology transfer, production processes, and other proprietary information will be determined by individual enterprises.
2011	JCCT	China confirmed that it does not and will not maintain measures that mandate the transfer of technology in the New Energy Vehicles Sector. China further clarified that "mastery of core technology" does not require technology transfer for NEVs.
2012	S&ED	China reaffirmed its commitment that technology transfer is to be decided by firms independently and not to be used by the Chinese government as a pre-condition for market access.
2012	Xi Visit Commitment	China reiterated that technology transfer and technological cooperation shall be decided by businesses independently and will not be used by the Chinese government as a pre-condition for market access.
2012	JCCT	China reaffirmed that technology transfer and technology cooperation are the autonomous decisions of enterprises. China committed that it would not make technology transfer a precondition for market access.
2014	JCCT	China committed that enterprises are free to base technology transfer decisions on business and market considerations, and are free to independently negotiate and decide whether and under what circumstances to assign or license intellectual property rights to affiliated or unaffiliated enterprises.
2014	JCCT	China confirmed that trade secrets submitted to the government in administrative or regulatory proceedings are to be protected from improper disclosure to the public and only disclosed to government officials in connection with their official duties in accordance with law.
2015	Xi Visit Commitment	China committed not to advance generally applicable policies or practices that require the transfer of intellectual property rights or technology as a condition of doing business in the Chinese market.
2015	Xi Visit Commitment	China committed to refrain from conducting or knowingly supporting cyber-enabled theft of intellectual property cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors.
2016	Xi Visit Commitment	China committed not to require the transfer of intellectual property rights or technology as a condition of doing business.

Source: USTR, CATALOGUE OF JCCT AND S&ED COMMITMENTS (2016); 2016 USTR REP. TO CONG. ON CHINA'S WTO COMPLIANCE 7.

3. Input from the Public

USTR provided the public and interested persons with opportunities to present their views and perspectives on the issues highlighted in the *Federal Register Notice*, including through a public hearing on October 10, 2017.[16] Witnesses with varied interests and perspectives testified and responded to questions from the interagency Section 301 committee including representatives of U.S. companies and workers, trade and professional associations, and think tanks, as well as law firms and representatives of trade and professional associations headquartered in China.[17] Interested persons also filed approximately 70 written submissions in the public docket for this investigation.[18]

As U.S. companies have stated for more than a decade,[19] they fear that they will face retaliation or the loss of business opportunities if they come forward to complain about China's unfair trade practices. Concerns about Chinese retaliation arose in this investigation as well. Multiple submissions noted the great reluctance of U.S. companies to share information on China's technology transfer regime, given the importance of the China market to their businesses and the fact that Chinese government officials are "not shy about retaliating against critics."[20]

For example, a representative of the Commission on the Theft of American Intellectual Property testified at the hearing: "American companies are intimidated and reticent over the issue, especially in China. There they risk punishment by a powerful and opaque Chinese regulatory system."[21] In addition, according to the U.S. China Business Council, their member companies do not presently have "reliable channel[s] to report abuses and to appeal adverse decisions…without fear of retaliation."[22] Similarly, a representative of SolarWorld stated that "many other companies face the same issues of cyberhacking and technology theft that [it] has faced, but are unwilling to come forward publicly due to fear of lost sales or retaliation by China."[23]

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[16] The transcript of the hearing is available on the Federal eRulemaking Portal, https://www.regulations.gov and on USTR's website, https://ustr.gov.

[17] The following individuals participated in the public hearing: Richard Ellings, Commission on the Theft of American Intellectual Property; Stephen Ezell, Information Technology and Innovation Foundation; Erin Ennis, US-China Business Council; Owen Herrnstadt, International Association of Machinists and Aerospace Workers; Juergen Stein, SolarWorld; Daniel Patrick McGahn, American Superconductor Corporation; William Mansfield, ABRO Industries; Scott Partridge, American Bar Association Intellectual Property Law Section; Scott Kennedy, Center for Strategic and International Studies; Jin Haijun, China Intellectual Property Law Society; Chen Zhou and Liu Chao, China Chamber of International Commerce; XU Chen, China General Chamber of Commerce; John Tang, DHH Washington Law Office; Wang Guiqing, China Chamber of Commerce for Import and Export of Machinery and Export Products. *See* Appendix B.

[18] *See* Appendix C for a summary of the public submissions. The submissions can be viewed on the Federal eRulemaking Portal, https://www.regulations.gov.

[19] U.S. CHINA BUSINESS COUNCIL [*hereinafter* "USCBC"], *Submission*, *Section 301 Hearing* 4 (Sept. 28, 2017); *see also* SOLARWORLD, *Submission*, *Section 301 Hearing* 2 (Oct. 20, 2017).

[20] James Lewis, CENTER FOR STRATEGIC & INT'L. STUDIES [*hereinafter* "CSIS"], *Submission*, *Section 301 Hearing* 6 (Sept. 27, 2017); *see also* Lee Branstetter, *Submission, Section 301 Hearing* 4 (Sept. 28, 2017); Stephen Zirschky, *Submission*, *Section 301 Hearing* 2 (Sept. 28, 2017).

[21] USTR, *Hearing Transcript*, *Section 301 Hearing* 13 (Oct. 10, 2017); *see also* COMM'N. ON THE THEFT OF AM. IP [*hereinafter* "IP Commission"], *Submission*, *Section 301 Hearing* 8 (Sept. 28, 2017).

[22] USCBC, *Submission*, *Section 301 Hearing* 4 (Sept. 28, 2017).

[23] SOLARWORLD, *Submission*, *Section 301 Hearing* 2 (Oct. 20, 2017).

Because USTR self-initiated this action, no particular company or group of companies was required to step forward and file a Section 301 petition to initiate this investigation. Moreover, in making this determination, USTR and the interagency Section 301 committee took into account not just investigation submissions and testimony but also public reports, scholarly articles, and other reliable information. In addition, business confidential information has been provided and considered as part of the record in this investigation, so that companies could share sensitive information without the threat of business loss or retaliation.

C. China's Technology Drive

Official publications of the Chinese government and the CCP set out China's ambitious technology-related industrial policies. These policies are driven in large part by China's goals of dominating its domestic market and becoming a global leader in a wide range of technologies, especially advanced technologies. The industrial policies reflect a top-down, state-directed approach to technology development and are founded on concepts such as "indigenous innovation" and "re-innovation" of foreign technologies, among others. The Chinese government regards technology development as integral to its economic development and seeks to attain domestic dominance and global leadership in a wide range of technologies for economic and national security reasons.[24] China accordingly seeks to reduce its dependence on technologies from other countries and move up the value chain, advancing from low-cost manufacturing to become a "global innovation power in science and technology."[25] In pursuit of this overarching objective, China has issued a large number of industrial policies, including more than 100 five-year plans, science and technology development plans, and sectoral plans over the last decade.[26] Some of the most prominent industrial policies include the *National Medium- and Long-Term Science and Technology Development Plan Outline (2006-2020)* (*MLP*),[27] the *State Council Decision on Accelerating and Cultivating the Development of Strategic Emerging Industries* (*SEI Decision*)[28], and, more recently, the *Notice on Issuing "Made in China 2025"* (*Made in China 2025 Notice*).[29]

The *MLP*, issued in 2005 and covering the period 2006 to 2020, is the seminal document articulating China's long-term technology development strategy. The *MLP* recognizes the country's "relatively weak indigenous innovation capacity," its "weak core competitiveness of enterprises," and the fact that the country's high-technology industries "lag" those of more developed nations."[30]

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[24] *See* James Lewis, *Submission*, *Section 301 Hearing* 1 (Sept. 2017).
[25] *CCP State Council Releases the "National Innovation-Driven Development Strategy Guidelines* §2(3) [Chinese], XINHUA NEWS, May 19, 2016, http://news.xinhuanet.com/politics/2016-05/19/c_1118898033.htm.; *see also* TAI MING CHEUNG ET AL., U.S.-CHINA ECON. & SEC. REV. COMM'N, PLANNING FOR INNOVATION: UNDERSTANDING CHINA'S PLANS FOR TECHNOLOGICAL, ENERGY, INDUSTRIAL AND DEFENSE DEVELOPMENT [*hereinafter* "IGCC REPORT"] xiii (2016).
[26] IGCC REPORT at 30.
[27] *Notice on Issuing the National Medium- and Long-Term Science and Technology Development Plan Outline (2006-2020)* [*hereinafter* "MLP"] (State Council, Guo Fa [2005] No. 44, issued Dec. 26, 2005).
[28] *Decision on Accelerating the Cultivation and Development of Strategic Emerging Industries* (State Council, Guo Fa [2010] No. 32, issued Oct. 10, 2010).
[29] *Notice on Issuing "Made in China 2025"* (State Council, Guo Fa [2015] No. 28, issued May 8, 2015).
[30] *MLP* §1.

As its focus, the *MLP* identifies 11 key sectors, and 68 priority areas within these sectors, for technology development.[31] It also designates eight fields of "frontier technology," [32] within which 27 "breakthrough technologies" will be pursued, and highlights four major scientific research programs.[33] The *MLP* also establishes the cross-cutting goal of reducing the rate of dependence on foreign technologies in the identified sectors to below 30% by the year 2020.[34]

The *MLP* strategy for securing sought-after technology development includes several key elements, which continue to have a negative impact on U.S. and other foreign companies:

- A top-down national strategy, in which implementation requires the mobilization and participation of all sectors of society[35] and the integration of civil and military resources;[36]

- Prioritization of certain industries and technologies for development,[37] particularly those that can advance "sustainable development," "core competitiveness," "public service," and "national security" objectives.[38]

- Leveraging state resources and regulatory systems;[39]

- Import substitution to be achieved through "indigenous innovation"[40] and re-innovation based on assimilation and absorption of foreign technologies;[41] and

- Promoting Chinese enterprises to become dominant in the domestic market[42] and internationally competitive enterprises[43] in key industries.

The *MLP* set in motion a web of policies and practices intended to drive innovation and re-innovation. For example, Section 8(2) of the *MLP* calls for "enhancing the absorption, digestion,

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[31] The sectors include energy, water and mineral resources, environment, agriculture, manufacturing, transportation, information and services, population and health, urbanization, public security and national defense.
[32] The areas include biotech, information technology, advanced materials, advanced manufacturing, advanced energy technology, marine technology, laser technology and aerospace technology.
[33] The fields include protein science, nanotechnology, quantum physics and developmental and reproductive science.
[34] *MLP* § 2(2) ¶ 3, *Guiding Directives, Development Targets, and Comprehensive Arrangements*.
[35] *MLP* § 2(1). ("In sum, we must make enhancing indigenous innovation capacity our national strategy, and implement it in all aspects of modernization construction and in every industry, sector and region."). §8(5) also guides "all types of financial institutions and private funds to participate in science and technology development."
[36] *MLP* § 8(7).
[37] *MLP* § 3 sets out the "Key Sectors and their Priority Issues."
[38] *MLP* § 3, *Preamble*.
[39] *MLP* § 9.
[40] *MLP* § 2(1).
[41] *MLP* §§ 2(1), 8(2). The term "introduce" used throughout *MLP* refers to introduction of technology through foreign investment. This is made more explicit in the measures defining and discussing IDAR below.
[42] *MLP* § 2(2) states dependence on foreign technology should be reduced to only 30% by 2020.
[43] *See* IGCC REPORT at 157. *See also MLP* § 2.

and re-innovation of introduced technology."[44] Following the issuance of the *MLP*, China detailed these policies in the *Several Supporting Policies for Implementing the "National Medium- and Long-Term Science and Technology Development Plan Outline (2006-2020)"* (*MLP Supporting Policies*)[45] and the *Opinions on Encouraging Technology Introduction and Innovation and Promoting the Transformation of the Growth Mode in Foreign Trade* (*IDAR Opinions*),[46] which articulate the concept of **I**ntroducing,[47] **D**igesting,[48] **A**bsorbing,[49] and **R**e-innovating[50] foreign intellectual property and technology (IDAR). The IDAR approach involves four steps, each of which hinges on close collaboration between the Chinese government and Chinese industry to take full advantage of foreign technologies:

- Introduce: Chinese companies should target and acquire foreign technology. Methods of "introducing" foreign technology that are specifically referenced include: technology transfer agreements, inbound investment, technology imports, establishing foreign R&D centers, outbound investment, and the collection of market intelligence by state entities for the benefit of Chinese companies.[51] Technology to be "introduced" from overseas includes "major equipment that cannot yet be supplied domestically", as well as "advanced design and manufacturing technology";[52] conversely, the government discourages imports of technologies for which China is already deemed to "possess domestic R&D capabilities."[53]

- Digest: Following the acquisition of foreign technology, the Chinese government should collaborate with China's domestic industry to collect, analyze, and disseminate the information and technology that has been acquired.[54]

- Absorb: The Chinese government and China's domestic industry should collaborate to develop products using the technology that has been acquired. The Chinese government should provide financial assistance to develop products using technology obtained through IDAR, including foreign trade development funds, government procurement, and fiscal incentives.[55] To absorb foreign technologies, authorities have established engineering research centers, enterprise-based technology centers, state laboratories, national technology transfer centers, and high-technology service centers.[56]

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[44] *MLP* §§ 2(1), 8(2).
[45] *Several Supporting Policies for Implementing the "National Medium- and Long-Term Science and Technology Development Plan Outline (2006-2020)"* (State Council, Guo Fa [2006] No. 6, issued Feb. 7, 2006).
[46] *Several Opinions on Encouraging Technology Introduction and Innovation and Promoting the Transformation of the Growth Mode in Foreign Trade* (MOFCOM, NDRC, MOST, MOF, GAC, SAT, SIPO, SAFE, Shang Fu Mao Fa [2006] No. 13, issued July 14, 2006).
[47] English translation of Chinese term *yinjin*.
[48] English translation of Chinese term *xiaohua*.
[49] English translation of Chinese term *xishou*.
[50] English translation of Chinese term *zai chuangxin*.
[51] *IDAR Opinions* § 7-9, 11-12. *See also* IGCC REPORT at 118-119.
[52] *MLP Supporting Policies* § 28, 29.
[53] *MLP Supporting Policies* § 29.
[54] *IDAR Opinions* § 7; *MLP Supporting Policies* § 31.
[55] *IDAR Opinions* § 15, 18; *MLP Supporting Policies* § 30, 32.
[56] IGCC REPORT at 118.

- Re-innovate: At this stage, Chinese companies should "re-innovate" and improve upon the foreign technology. The ultimate objective is to develop new, home-grown products that are competitive internationally, so as to "allow enterprises to possess more indigenous intellectual property for core products and core technologies."[57]

The IDAR approach embraces a strong role for the Chinese government in guiding and assisting Chinese industry in technology development and has had profound implications, in particular, for the way in which China has sought to introduce foreign technologies into China over the last decade. It has spurred Chinese government ministries and government officials to pursue an array of aggressive implementing acts, policies, and practices, including those that are the subject of this investigation.

China has continued to emphasize the IDAR approach since it was first articulated in 2006 in broad-ranging five-year plans and technology development plans issued by China's State Council, central government ministries and provincial and municipal governments, and the CCP. The IDAR approach also has been incorporated into numerous economic development plans for specific sectors, such as integrated circuits.[58]

In 2010, the Chinese government announced another seminal technology development strategy, which calls for the accelerated development of seven so-called "strategic emerging industries" (SEIs): (1) energy efficient and environmental technologies, (2) next generation information technology, (3) biotechnology, (4) high-end equipment manufacturing, (5) new energy, (6) new materials, and (7) new energy vehicles.[59] The *12th Five-year National Strategic Emerging Industries Development Plan* (*12th Five-year SEI Plan*)[60] subsequently recommended specific fiscal and taxation policy support and set a target for SEIs to account for 8% of China's economy by 2015 and 15% by 2020. The *12th Five-year SEI Plan* also aims to foster a group of Chinese enterprises – including state-owned enterprises – into "backbone enterprises" that can become

[57] *IDAR Opinions* § 5.

[58] *E.g.*, *12th Five-year Development Plan for the Integrated Circuit Industry* (Ministry of Industry and Information Technology, published Feb. 24, 2012) § 3(1), ¶ 3: "Maintain innovation drivers. Combine implementation of national science and technology major special projects and megaprojects, using innovation in technologies, modes, mechanisms, and systems as the impetus to make breakthroughs in a group of shared core technologies. Strengthen *introduce, digest, absorb, and re-innovate*, to stride down the path of open-type innovation and internationalized development." (emphasis added).

[59] *State Council Decision on Accelerating the Development of Strategic Emerging Industries* (State Council, Guo Fa [2010], No. 32, issued Oct. 10, 2010).

[60] *Notice on Issuing the 12th Five-year National Strategic Emerging Industries Development Plan* (State Council, Guo Fa [2012] No. 28, issued July 9, 2012).

market leaders domestically and compete globally.[61] The Chinese government later reaffirmed and refined this strategy in its *13th Five-year Strategic Emerging Industries Development Plan*.[62]

Notably, support for the IDAR strategy was reiterated in the CCP's 2013 *Third Plenum Decision*[63] (*Third Plenum Decision*) released in connection with the Third Plenary Session of the 18th National Congress of the CCP. IDAR's inclusion in the *Third Plenum Decision* is significant because the document was widely seen as setting forth the priorities of President Xi Jinping's new administration with respect to China's future economic development path.[64] By reaffirming that China should "establish and perfect a mechanism to encourage original innovation, integrated innovation, and introduce, absorb, digest, and re-innovate,"[65] the *Third Plenum Decision* signaled the CCP's continued high-level support for the IDAR approach to technology innovation.

In 2015, the State Council released the *Made in China 2025 Notice*,[66] which is China's ten-year plan for targeting ten strategic advanced technology manufacturing industries for promotion and development: (1) advanced information technology; (2) robotics and automated machine tools; (3) aircraft and aircraft components; (4) maritime vessels and marine engineering equipment; (5) advanced rail equipment; (6) new energy vehicles; (7) electrical generation and transmission equipment; (8) agricultural machinery and equipment; (9) new materials; and (10) pharmaceuticals and advanced medical devices.[67]

While the *Made in China 2025 Notice* references market-oriented principles, it closely resembles China's other state-led, technology-related plans, such as the *MLP*, issued a decade earlier, in that it:

- Reaffirms the Chinese government's central role in economic planning;[68]

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[61] For example, the *12th Five-year National Economic and Social Development Plan Outline* (adopted by the NPC on Mar. 14, 2011) calls for the cultivation of a group of backbone enterprises within strategic emerging industries. Ch. 10, §2 "Fostering the Development of Strategic Emerging Industries". The *12th Five-year SEI Plan* further specifies that backbone enterprises are to have "relatively strong indigenous innovation capacity and a technological leadership effects." § 2(3), "Guiding Thoughts, Fundamental Principles, and Development Targets". At the sectoral level, the *Guidelines for the Development and Promotion of the Integrated Circuit Industry* (State Council, issued June 24, 2014) laud the fact that China has established "a group of backbone enterprises with significant international competitiveness." § 1, ¶ 1. The *Guiding Opinion on Promoting International Industrial Capacity and Equipment Manufacturing Cooperation* (State Council, Guo Fa [2015] No. 30, issued May 13, 2015) provides that a "main target" of the policy is to "establish a group of backbone enterprises that possess international competitiveness and the ability to open up markets." § 2(6).

[62] *Notice on Issuing the 13th Five-year National Strategic Emerging Industries Development Plan* (State Council, Guo Fa [2016] No. 67, issued Nov. 29, 2016).

[63] *CCP Central Committee Decision on Several Major Issues for Comprehensively Deepening Reform* (CCP Central Committee, issued Nov. 12, 2013) [*hereinafter* "*Third Plenum Decision*").

[64] Third Plenums have historically been used to announce major economic reforms, such as the adoption of reform and opening during the Third Plenary Session of the 11th National Congress of the CCP in 1978, and the endorsement of the socialist market economy following the 14th National Congress of the CCP in 1993.

[65] *Third Plenum Decision* § 13.

[66] *Decision on Issuing "China Manufacturing 2025"* (State Council, Guo Fa [2015] No. 28, issued May 8, 2015).

[67] *Made in China 2025 Notice* § 3(6).

[68] *Made in China 2025 Notice* § 2(2).

- Calls on all facets of society to mobilize behind the plan;[69]
- Seeks technological breakthroughs in key areas for economic and security purposes;
- Promotes further civil-military integration and the two-way transfer and conversion of military and civilian technologies;[70]
- Leverages state resources,[71] policy support,[72] and regulatory systems;[73]
- Continues to promote import substitution and rely on indigenous products to meet growing demand in China;[74]
- Reaffirms the leading role of backbone enterprises in technology development;[75] and
- Promotes Chinese enterprises to become dominant in the domestic market and internationally competitive in key industries.[76]

The *Made in China 2025 Notice* expressly calls for China to achieve 40% "self-sufficiency" by 2020, and 70% "self-sufficiency" by 2025, in core components and critical materials in a wide range of industries, including aerospace equipment and telecommunications equipment.[77] The *"Made in China 2025" Key Area Technology Roadmap* (*Made in China Roadmap*) sets explicit market share targets that are to be filled by Chinese producers both domestically and globally in dozens of high-tech industries.[78]

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[69] *Made in China 2025 Notice* § 1(3).
[70] *Made in China 2025 Notice* § 3(1).
[71] *Made in China 2025 Notice* § 4.
[72] *Made in China 2025 Notice* § 1(3).
[73] *See generally Made in China 2025 Notice*. This is particularly the case in quality standard regulations as described in §§ 2(1) and 3(4).
[74] *Made in China 2025 Notice* § 1(2) describes the growing demand for new equipment, consumption, and safety, while § 1(3) calls for China to "rely more on Chinese equipment and Chinese brands."
[75] *Made in China 2025 Notice* § 3(1).
[76] *Made in China 2025 Notice* § 1(3).
[77] *Made in China 2025 Notice*, Box 3.
[78] *Made in China 2025 Key Area Technology Roadmap*, (National Strategic Advisory Committee on Building a Powerful Manufacturing Nation, issued Oct. 10, 2015); *see also* U.S. CHAMBER, MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS 8 (2017). The *Made in China Roadmap* was released by the National Strategic Advisory Committee on Building a Powerful Manufacturing Nation (also known as the "National Manufacturing Strategy Advisory Committee") which was established pursuant to the *Made in China 2025 Notice* with responsibility to provide advice and assessments on China's major manufacturing policies. In August 2015, Vice Premier Ma Kai, who leads the Strong Manufacturing Country Leading Small Group, spoke at the Committee's first meeting and lauded its establishment as a way to "strongly promote Made in China 2025." National Strategic Advisory Committee on Building a Powerful Manufacturing Nation Established; Chaired by Ma Kai [Chinese], XINHUA (Aug. 26, 2015), *available at* http://www.xinhuanet.com/info/2015-08/26/c_134556815.htm (last visited Mar. 16, 2018). *See also Notice on the Establishment of the Strong Manufacturing Country Leading Small Group*, (General Office of the State Council, Guo Ban Fa [2015] No. 48, published June 24, 2015) (last visited March 16, 2018); and *National Strategic Advisory Committee on Building a Powerful Manufacturing Nation Established*, STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C. (Aug. 26, 2015), *available at* http://www.sipo.gov.cn/yw/2015/201508/t20150826_1165829.html (last visited Dec. 21, 2017).

For example, indigenous new energy vehicles are to achieve an 80% domestic market share[79] with foreign sales accounting for 10% of total sales by 2025.[80] Similarly, domestically produced energy equipment is to achieve 90% domestic market share, with exports accounting for 30% of production, by 2020,[81] and renewable energy equipment with indigenous IP is to achieve 80% domestic market share by 2025.[82] In comparison to previous plans, *Made in China 2025* expands its focus to capturing global market share, not just dominance in the China market, and is part of a "broader strategy to use state resources to alter and create comparative advantage in these sectors on a global scale."[83]

The *Made in China 2025 Notice* sets forth clear principles, tasks, and tools to implement this strategy, including government intervention and substantial government, financial and other support to the targeted Chinese industries.[84] Domestic dominance and global competitiveness are to be achieved by upgrading the entire research, development, and production chain, with emphasis on localizing the output of components and finished products.[85] Foreign technology acquisition through various means remains a prime focus under Made in China 2025 because China is still catching up in many of the areas prioritized for development, and as U.S. companies are front-runners in many of these areas.[86]

China's Ministry of Industry and Information Technology (MIIT) has explained that Made in China 2025 is part of a three-step strategy for China to become a world leader in advanced manufacturing. Under the first step, by 2025, China should "approach the level of manufacturing powers Germany and Japan during the period when they realized industrialization." In the second step, China should "enter the front ranks of second tier manufacturing powers" by 2035. In the final step, China should "enter the first tier of global manufacturing powers" by 2045, at which point China will have "innovation-driving capabilities," "clear competitive advantages," and "world-leading technology systems and industrial systems."[87]

In recent years, China also issued policies specific to advanced technologies in which U.S. firms are market leaders. Information and communications technologies have been a focal point, with more and more strategies emanating from the *National Informatization Development Strategy* (2006-2020), such as the *National Integrated Circuit Industry Development Outline*, the *Internet*

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[79] *Made in China 2025 Key Area Technology Roadmap* § 6.2.2.
[80] *Made in China 2025 Key Area Technology Roadmap* § 6.2.2.
[81] *Made in China 2025 Key Area Technology Roadmap* § 7.1.2.
[82] *Made in China 2025 Key Area Technology Roadmap* § 7.1.2.
[83] U.S. CHAMBER, MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS 6 (2017).
[84] *See* AM. CHAMBER OF COMMERCE IN SHANGHAI, *Submission*, *Section 301 Hearing* 2 (Sept. 28, 2017); NAT'L. ASS'N OF MANUFACTURERS [*hereinafter* "NAM"], *Submission, Section 301 Hearing* 3 (Sept. 28, 2017); WILEY REIN LLP, *Submission, Section 301 Hearing* 3-4 (Sept. 28, 2017); BJÖRN CONRAD, ET AL., MERCATOR INST. FOR CHINA STUDIES [*hereinafter* "MERICS"], MADE IN CHINA 2025 7, 11 (2016); and U.S. CHAMBER OF COMMERCE, MADE IN CHINA 2025: GLOBAL AMBITIONS BUILT ON LOCAL PROTECTIONS 7, 15, 18 (2017).
[85] IGCC REPORT at 121.
[86] IGCC REPORT at 121.
[87] *Made in China 2025 Explanation 6: The Manufacturing Power 'Three-Step' Strategy*, MINISTRY OF INDUSTRY AND INFORMATION TECHNOLOGY (May 19, 2015), http://www.miit.gov.cn/n1146295/n1146562/n1146655/c3780688/content.html; *see also* IGCC REPORT at 47-48.

Plus Plan, the "Broadband China" strategy and corresponding implementation plan, and the designation of next-generation information technology as a "strategic emerging industry."[88]

In addition, China recently announced that it will pursue an "innovation-driven" development strategy[89] and that it has made breakthroughs in higher-end innovation a top priority.[90] At the 19th National Congress of the CCP, held in October 2017, President Xi Jinping's remarks specifically referenced the goal of building China into a "powerful nation [*or* power] in science and technology, quality, aerospace, the Internet, and transportation" and called for "accelerating the construction of [China as] a manufacturing power" by "accelerating the development of advanced manufacturing industry" and "promoting the deep integration of the Internet, big data, and artificial intelligence with the real economy."[91]

Like the *MLP* a decade ago, newer plans such as the *Made in China 2025 Notice* and the various plans focused on information and communications technologies call for a wide array of Chinese government intervention and financial and other support designed to transform China into a world leader in technology. While these policies and practices are not necessarily new, their actual and potential effects on foreign companies and their technologies have become much more serious. As James Lewis of CSIS explained in his submission to USTR:

> What is new is that unfair trade, security and industrial policies, tolerable in a smaller developing economy, are now combined with China's immense, government-directed investment and regulatory policies to put foreign firms at a disadvantage…China now has the wealth, commercial sophistication and technical expertise to make its pursuit of technological leadership work. The fundamental issue for the U.S. and other western nations, and the IT sector is how to respond to a managed economy with a well-financed strategy to create a domestic industry intended to displace foreign suppliers.[92]

As detailed in Sections II through VI of this report, a key part of China's technology drive involves the acquisition of foreign technologies through acts, policies, and practices by the Chinese government that are unreasonable or discriminatory and burden or restrict U.S. commerce. These acts, policies, and practices work collectively as part of a multi-faceted strategy to advance China's industrial policy objectives. They are applied across a broad range of sectors, overlap in their use of policy tools (*e.g.*, the issuance of planning documents and guidance catalogues), and are implemented through a diverse set of state and state-backed actors, including state-owned enterprises.

- Section II describes the Chinese government's use of foreign ownership restrictions, such as joint venture (JV) requirements and foreign equity limitations, other foreign

[88] IGCC REPORT at 44.
[89] IGCC REPORT at 41 ("This innovation-driven development strategy (IDDS) was officially promulgated by the Chinese authorities in May 2016 and provides a 'top-level design and systemic plan' for China's innovation over next 30 years.").
[90] IGCC REPORT at xiii-xiv.
[91] Xi Jinping, Speech at the 19th CPC National Congress: Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era (Oct. 18, 2017), *available in Chinese at* http://www.gatj.gov.cn/html/6/wjjh/17/10/3257-6.html.
[92] James Lewis, CSIS, *Submission, Section 301 Hearing* 1 (Sept. 27, 2017).

investment restrictions, and the administrative licensing and approvals process to require or pressure the transfer of technology from U.S. companies to Chinese entities.

- Section III describes how U.S. companies seeking to license technologies to Chinese entities must do so on non-market-based terms that favor Chinese recipients.

- Section IV describes how the Chinese government directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese entities, to obtain cutting-edge technologies and intellectual property and generate large-scale technology transfer in industries deemed important by state industrial plans.

- Section V describes how the Chinese government has conducted or supported cyber intrusions into U.S. commercial networks targeting confidential business information held by U.S. firms. Through these cyber intrusions, China's government has gained unauthorized access to a wide range of confidential business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications.

- Section VI describes other acts, policies, and practices of by the Chinese government to acquire foreign technologies, including measures purportedly related to national security or cybersecurity, inadequate intellectual property protection, the *Antimonopoly Law of the People's Republic of China*, the *Standardization Law of the People's Republic of China*, and talent acquisition.

I. Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited

Issued on: March 12, 2018

Upon review of a recommendation from the Committee on Foreign Investment in the United States and consideration, as appropriate, of the factors set forth in the Defense Production Act of 1950, as amended, the President has made relevant findings and issued the following Order:

ORDER

REGARDING THE PROPOSED TAKEOVER OF QUALCOMM INCORPORATED BY BROADCOM LIMITED

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 721 of the Defense Production Act of 1950, as amended (section 721), 50 U.S.C. 4565, it is hereby ordered as follows:

Section 1. Findings. (a) There is credible evidence that leads me to believe that Broadcom Limited, a limited company organized under the laws of Singapore (Broadcom), along with its partners, subsidiaries, or affiliates, including Broadcom Corporation, a California corporation, and Broadcom Cayman L.P., a Cayman Islands limited partnership, and their partners, subsidiaries, or affiliates (together, the Purchaser), through exercising control of Qualcomm Incorporated (Qualcomm), a Delaware corporation, might take action that threatens to impair the national security of the United States; and

(b) Provisions of law, other than section 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), do not, in my judgment, provide adequate and appropriate authority for me to protect the national security in this matter.

Sec. 2. Actions Ordered and Authorized. On the basis of the findings set forth in section 1 of this order, considering the factors described in subsection 721(f) of the Defense Production Act of 1950, as appropriate, and pursuant to my authority under applicable law, including section 721, I hereby order that:

(a) The proposed takeover of Qualcomm by the Purchaser is prohibited, and any substantially equivalent merger, acquisition, or takeover, whether effected directly or indirectly, is also prohibited.

(b) All 15 individuals listed as potential candidates on the Form of Blue Proxy Card filed by Broadcom and Broadcom Corporation with the Securities and Exchange Commission on February 20, 2018 (together, the Candidates), are hereby disqualified from standing for election as directors of Qualcomm. Qualcomm is prohibited from accepting the nomination of or votes for any of the Candidates.

(c) The Purchaser shall uphold its proxy commitments to those Qualcomm stockholders who have returned their final proxies to the Purchaser, to the extent consistent with this order.

(d) Qualcomm shall hold its annual stockholder meeting no later than 10 days following the written notice of the meeting provided to stockholders under Delaware General Corporation Law, Title 8, Chapter 1, Subchapter VII, section 222(b), and that notice shall be provided as soon as possible.

(e) The Purchaser and Qualcomm shall immediately and permanently abandon the proposed takeover. Immediately upon completion of all steps necessary to terminate the proposed takeover of Qualcomm, the Purchaser and Qualcomm shall certify in writing to the Committee on Foreign Investment in the United States (CFIUS) that such termination has been effected in accordance with this order and that all steps necessary to fully and permanently abandon the proposed takeover of Qualcomm have been completed.

(f) From the date of this order until the Purchaser and Qualcomm provide a certification of termination of the proposed takeover to CFIUS pursuant to subsection (e) of this

section, the Purchaser and Qualcomm shall certify to CFIUS on a weekly basis that they are in compliance with this order and include a description of efforts to fully and permanently abandon the proposed takeover of Qualcomm and a timeline for projected completion of remaining actions.

(g) Any transaction or other device entered into or employed for the purpose of, or with the effect of, avoiding or circumventing this order is prohibited.

(h) If any provision of this order, or the application of any provision to any person or circumstances, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby. If any provision of this order, or the application of any provision to any person or circumstances, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

(i) This order supersedes the Interim Order issued by CFIUS on March 4, 2018.

(j) The Attorney General is authorized to take any steps necessary to enforce this order.

Sec. 3. Reservation. I hereby reserve my authority to issue further orders with respect to the Purchaser and Qualcomm as shall in my judgment be necessary to protect the national security of the United States.

Sec. 4. Publication and Transmittal. (a) This order shall be published in the Federal Register.

(b) I hereby direct the Secretary of the Treasury to transmit a copy of this order to Qualcomm and Broadcom.

DONALD J. TRUMP

THE WHITE HOUSE,

March 12, 2018.

CPI's North America Column Presents:

The Chinese Vitamins Case: Who Decides Chinese Law?

By Daniel A. Crane [1]

CPI COMPETITION POLICY INTERNATIONAL

March 2018

The U.S. Supreme Court is about to decide who decides what Chinese law is.[2] The answer seems obvious: the Chinese do! Nonetheless, there is a serious possibility that the Court will interpret Rule 44.1 of the Federal Rules of Evidence to mean that, even when the highest responsible authority of a foreign state asserts that *x* is true of that state's law, a U.S. court might interpret the law differently. Such a holding would be problematic theoretically, practically, and politically.

The Dispute, In Brief

Since the 1970s, when China began to transition from a command-and-control economy to a more market-oriented one, the Chinese government has maintained export controls in the Vitamin C market in order to maintain a competitive edge over producers from other countries. In part due to the regulatory activities of the Chinese government, Chinese companies control about 60% of the worldwide Vitamin C market. A class of vitamins purchasers alleged that the defendant Chinese vitamins companies conspired to fix the price of Vitamin C sold to U.S. companies, in violation of Section 1 of the Sherman Act. Rather than contest the facts, the defendants enlisted the aid of the Ministry of Commerce of the People's Republic of China ("MOFCOM"), which describes itself as the "highest administrative authority in China authorized to regulate trade between China and other countries, including all export commerce."[3] MOFCOM submitted an *amicus curiae* brief in the district court asserting that defendants' output reduction agreements were directed by MOFCOM itself and were mandatory.

The defendants filed a motion for summary judgment, arguing that, under principles of international comity, the court was obliged to accept the Chinese government's formal representation that Chinese law required defendants to engage in the challenged activities. Relying on the testimony of an expert on Chinese law, plaintiffs argued that defendants actually were not compelled by Chinese law to engage in collusion, and hence that international comity principles did not preclude application of U.S. antitrust law. The district court agreed with the plaintiffs, declining to defer to MOFCOM's interpretation of Chinese law because it "failed to address critical provisions" of the "price verification and chop" policy that undermined MOFCOM's interpretation of Chinese law. A jury found for the class at trial and the district court awarded $147 million in damages and issued a permanent injunction.

On appeal, the U.S. Court of Appeals for the Second Circuit sided with defendants, finding that a U.S. court is "bound to defer" to a foreign government's legal statement as a matter of international comity. The court also recognized the existence of a circuit split. The U.S. Supreme Court had seemingly required adherence to a foreign government's interpretation of its own law in 1942 in *U.S. v. Pink*,[4] where the Court found that a 1918 declaration by the Russian Government regarding the extraterritorial effect of the Bolsheviks' decree

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[1] Frederick Paul Furth Sr. Professor of Law at University of Michigan.

[2] *Animal Science Prods., Inc. v. Hebei Welcome Pharmaceutical Co., 138 S.Ct. 734 (Mem 2018).*

[3] *In re Vitamin C Antitrust Litig.*, Brief for Amicus Curiae Ministry of Commerce of the People's Republic of China in Support of Defendants-Appellants, 2014 WL 1509344.

[4] 315 U.S. 203.

nationalizing the Russian insurance industry was conclusive as to the decree's extraterritorial effect. In the intervening years, however, some lower courts—most notably the Seventh Circuit[5]—had held that, while U.S. courts owe deference to the interpretations of foreign governments, such interpretations need not be conclusive. The Supreme Court granted certiorari to resolve the circuit split.

Theoretical Problems

At the outset, we may put aside a set of circumstances that may describe some of the lower court decisions in which U.S. courts have not deferred to the interpretation of another nation's laws by its own regulatory authorities—circumstances where there are conflicting or ambiguous interpretations of law by the foreign nation's authorities. In *Chinese Vitamins*, by contrast, there seems to be no doubt what the Chinese government thinks the relevant Chinese law to be: the highest responsible organ of the Chinese government intervened directly in the case unambiguously to express its views. (If MOFCOM had misrepresented its competence to speak authoritatively for the Chinese government, then perhaps *that* issue could be litigated in a U.S. court, but that is not what the district court ruled here). The district court essentially held that the Chinese government is wrong about the interpretation of its own laws.

At one level, there is nothing problematic about saying that a government can misinterpret its own laws. There are countless cases in which U.S. courts reject the U.S. government's interpretation of U.S. law. Following *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[6] If the Supreme People's Court of the PRC had ruled directly on point, it would seem obvious that its judgment unassailably embodied Chinese law. That did not happen here. One could imagine a regime in which only the pronouncements of foreign courts—not other branches of government—counted as conclusive on the meaning of foreign law. But there are two problems with applying such a judiciary-centric approach to international comity questions.

First, courts generally lack the ability to speak directly in a foreign judicial proceeding. To my knowledge, there is no analogue in international law for the practice followed by some federal and state courts of one court certifying a legal question to a different court. In the international sphere, when states speak to states they generally do so through the instrumentality of their executive branches. It would be unrealistic to follow domestic law institutional norms when managing the relationship of sovereign states.

Second, it would be presumptuous to apply *Marbury* reasoning to foreign nations, many of whom do not share the American penchant for judicial supremacy on matters of legal interpretation. I can offer no opinion on whether MOFCOM's interpretation of Chinese trade law is normatively conclusive in China, or whether a Chinese court has the authority to overrule it. As a practical matter, however, it seems likely that companies operating in China *experience* MOFCOM's interpretations of Chinese law as authoritative. Indeed, the same is

[5] *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

[6] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

true of companies operating in regulated industries in the United States, where agency decision making is accorded substantial deference by courts, and hence is often functionally conclusive. Oliver Wendell Holmes famously described law as a prediction of what courts will do.[7] Holmes, however, was writing in the common law tradition, before the rise of the administrative state. In the administrative state both home and abroad, it would be more accurate to say that law is a prediction of what *regulators* will do.

Practical Problems

Holding that U.S. courts can second guess the highest administrative authority of a foreign state on interpretations of that state's law would raise serious practical problems. Most obviously, it would create difficulties for the regulated entities, who face the possibility of being told by a foreign regulator that they must do *x* and then being told by a U.S. court that the foreign regulator misunderstood its own domestic law and that they should not have done *x*.

At a minimum, an entity that follows the command of a foreign regulator should have a good faith reliance defense to charges that it acted improperly—a defense allowed under U.S. domestic law.[8] If such a good faith defense would be allowed, why allow a challenge to the foreign regulator's interpretation of its own law for purposes of the comity doctrine? The ultimate question is whether an entity that complies with a foreign government's interpretation of its own laws should be held liable under U.S. antitrust law. Whether we call it comity or good faith reliance, the result should be no liability.

Political Problems

Declining to defer to the foreign government's interpretations of its own laws when unambiguously expressed in U.S. court also creates the potential for serious political problems. The goal of the comity doctrine is to maintain "good neighbourliness, common courtesy, and mutual respect" among co-equal states.[9] In the sensitive world of international relations, there is something unseemly about a domestic court telling a foreign government that it is wrong about the meaning of its own law. Imagine a Chinese court telling the Department of Commerce that it misunderstands the Webb-Pomerene Act. That surely would not be interpreted as courteous or respectful.

The potential for embarrassment and provocation goes beyond a suggestion by the domestic court that the foreign government is incompetent. When a government takes the time to intervene through counsel in a foreign court to express its interpretation of its own laws, it is unlikely to be acting carelessly or inconsiderately. If MOFCOM's assertion to the district court that defendants' conduct was compelled by Chinese law was erroneous, the obvious inference is that MOFCOM was deliberately distorting Chinese law in order to protect Chinese companies

[7] OLIVER W. HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 173 (1920).

[8] *International Union v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986).

[9] *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 423 (2d Cir. 2005).

from damages claims abroad. To be certain, that may be what actually happened here. (I have no idea what actually happened here—my statement is purely hypothetical). It is nonetheless provocative and discourteous for a domestic court to imply it about a foreign sovereign. The comity doctrine directs a solicitous judicial deportment with respect to foreign countries. In the same way that I may sharply criticize my own country but feel my hackles rise when hearing the same criticisms levelled by a foreigner, so too are judges not supposed to say things about foreign agencies that they might say about their own domestic agencies.

To those accustomed to thinking about judicial processes as pristine searches for truth, it may rankle to hear that judges should defer to foreign governments' interpretations of law even when those interpretations may be sloppy, erroneous, or even self-serving and deceptive. But it is through such temperance that the international order perseveres. The Chinese government may not be infallible on the meaning of Chinese law as a general matter, but it should be considered infallible in a U.S. court for purposes of comity analysis.

Although comity questions should be decided under general principles, it cannot escape our attention that this case involves the challenging and particularly important trade relationship between the United States and China. The respect or disrespect that U.S. courts accord the Chinese government will doubtlessly have repercussions for the international order. The comity doctrine presumes an equality of sovereigns, a principle often observed in its breach. A Supreme Court decision affirming the dignity of the Chinese government in U.S. courts—and of course an expectation of reciprocity—could provide some modest positive reinforcement to the world's most important trading relationship.

CPI's North America Column Presents:

China, Export Cartels and Vitamin C: American Second?

By Eleanor M. Fox [1]

March 2018

Introduction

The Supreme Court will soon decide an unusual price-fixing case: *In re Vitamin C Antitrust Litigation.*[2] It is unusual because the defendants – Chinese manufacturers – do not deny they fixed prices; because China claims it ordered them to do so, but this is a controversial fact; because the jury rendered a verdict for the plaintiffs (direct US buyers) but the appellate court dismissed on comity grounds; and because the Supreme Court certified only a narrow question: Must a court treat as conclusive a nation's statement to the court interpreting its own law?

The case raises a series of fascinating issues apart from the certified question. In this essay, I do not engage directly with the certified question; but if my narrative has traction, it provides a powerful policy reason for the Supreme Court to hold that the trial court properly considered all of the evidence, not just China's word.

The Case

Chinese manufacturers fixed the prices at which they would export vitamin C to the United States. When sued by US direct purchasers, they said: foreign sovereign compulsion; the government made us do it. The Chinese government, by MOFCOM,[3] exceptionally appeared in the US court and said: yes, we compelled the price fixing. We ordered the firms to coordinate ("industry self-discipline" facilitated by the trade association)[4] "to forestall potential market disorders that might have limited the development of a healthy vitamin C export industry during China's transition from a command economy to a market-driven economy."[5] China wished to avoid anti-dumping sanctions and to avoid "what the government feared could be destructive export competition before the foundation for a healthy industry could be laid ...."[6]

The case went to the jury, which returned a verdict for the buyers. The Court of Appeals for the Second Circuit reversed the judgment entered on the verdict and remanded the case with instructions to dismiss, stating that China's word on compulsion should have been conclusive on the court; thus, China compelled the price fixing. The Chinese manufacturers, said the

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[2] In re Vitamin C Antitrust Litigation (Animal Science Products Inc. v. Hebei Welcome Pharmaceutical Co.), 810 F. Supp.2d 522 (E.D.N.Y. 2011)(denying defendants' motion for summary judgment); 837 F.3d 175 (2d Cir. 2016)(reversing judgment on jury verdict for plaintiffs), cert. granted, 138 S. Ct. 734 (mem. 2018).

[3] Ministry of Commerce of the People's Republic of China.

[4] The Chinese trade associations, or Chambers of Commerce, are not entirely private like US trade associations. They have, or at least have had, a deep government presence.

Under the self-discipline system for export price fixing of Vitamin C, the manufacturers would (and MOFCOM says must) decide on the export price. When they wished to export they would submit their export plans to the Chamber. The Chamber would verify that the price was at or above the agreed price, and if so the Chamber would affix a seal called a "chop." Customs was charged with reviewing the contracts and at least notionally permitting export only if the contract bore a chop. This system was put into place by the 2002 PVC (price verification and chop) Notice.

[5] Brief for Amicus Curiae Ministry of Commerce for the People's Republic of China (06-MD-1738), text following note 12, Pet. App. 207a.

[6] Id., Pet. App. 207a-208a.

court, therefore faced a true conflict (follow US law: don't fix prices in the United States, or China's law: fix prices in the United States); and China's interest in protecting its firms from US law so clearly outbalanced America's interest in enforcing its law that the district court abused its discretion as a matter of law in deciding not to abstain on comity grounds. The question certified by the Supreme Court is whether China's word on compulsion was in fact conclusive on the trial court or whether the trial court properly took other evidence into account.

What is the answer to this technical question? Is a foreign sovereign's statement to the court interpreting its own law conclusive on the court? An answer to this abstract question requires a deep contextual response, and that is a purpose of this essay.

My essay proceeds as follows. First, resetting the stage. Second, distinguishing this case from extraterritoriality cases. Third, distinguishing private price fixing from state action. Fourth, examining the scope of the US foreign sovereign compulsion defense. Fifth, questioning whether *Vitamin C* is better understood as a case of characterization under US law rather than as centrally about interpreting foreign law. Sixth, asking, after foreign sovereign compulsion analysis, is there any work left for comity?

Resetting the Stage

When reading the opinion of the Court of Appeals of the Second Circuit, one can lose sight of the facts that this is a case of a naked cartel, and China's whole role in the picture is to free its manufacturers from the consequences of violating the clear and notorious rule of US law forbidding price fixing. The US rule is in line with virtually every one of the 130 antitrust nations of the world including China.[7] It is understood that price fixers have to pay for their offense.

Can a country step forward and say to its exporting price fixers: "Not to worry. I can immunize you. I just have to say the word."

If the answer is no, the question of who interprets foreign law is irrelevant. If the answer is sometimes, and even if China gets to say that its regulation and scheme amounted to an order to its firms to fix prices, then we should ask whether China's command and the manufacturers' behavior surrounding it amounted to foreign sovereign compulsion under US law.

Extraterritoriality

The Second Circuit opinion centrally invokes *Timberlane*[8] and *Mannington Mills,*[9] presenting the problem in *Vitamin C* as one of extraterritoriality requiring a comity balancing as an initial screen. But *Vitamin C* is quintessentially territorial in today's shared understanding of the

[7] The law in place in China at the time of the price-fixing was the 1997 Price Law. "That law technical outlaws, inter alia, price fixing … and seeking exorbitant profits." Harris, Wang, Zhang, Cohen and Evrard, Anti-Monopoly Law and Practice in China 12 (2011).

[8] Timberlane Lumber Co. v. Bank of America, 549 F2d 597 (9th Cir. 1976).

[9] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

reach of a nation's law. It does not raise territorial issues. The only, and the only intended, effects were in the United States, not in China (except as the home of extra profits). The offense in *Vitamin C* is the converse of the offense in *Mannington Mills,* which was fraudulent procurement of foreign patents blocking Mannington Mills from foreign markets. It has no resemblance to *Timberlane*, in which plaintiff lost a chance to buy a Honduran lumber mill because of a conspiracy in Honduras between Honduran rivals and a bank. The territorial grounding in *Vitamin C* is the reverse of *Empagran*,[10] where buyers in South America and Australia sued cartelists from Europe and Asia in the US under US law. In short, in *Vitamin C*, the Sherman Act clearly applies.

Can private price fixing ever be immunized by foreign state action?

Is private price fixing in or into a country that forbids it ever a proper subject on which a foreign sovereign can grant immunity to its own firms?

I shall turn to the content of the foreign sovereign compulsion defense in the next section. It is narrow. It does not reach a command *to conspire in the United State*s to fix prices in the United States.[11] I will argue that there is no practical difference whether the price fixers meet in China or in the US; the place of the effect is what matters. In this section, I concentrate on the "ownership" of the conduct that is the offense.

The United States has a domestic state action defense.[12] Under US law, action of a state of the United States can shield private conduct from the federal antitrust laws when certain conditions are met. But one category of conduct is out of bounds and cannot be shielded: A state may not order private price fixing and declare the conduct immune from the federal antitrust laws.[13] Why? Because the fixed price is still a privately fixed price, and firms have the incentive to maximize their profits at the expense of consumers. The privately-set price does not qualify as state action. A "gauzy cloak" of the state will not do.[14]

China goes one big step farther than the United States under its new Anti-Monopoly Law (adopted after the conduct in *Vitamin C*). Not only is state action not a cover for price fixing in China. It is a violation of China's Anti-Monopoly Law for any organ of government in China to compel price fixing. Such an order would constitute an abuse of administrative monopoly.[15]

The law of the European Union has a compatible doctrine. European law governs whether and when Member States can justify their anticompetitive acts that affect the Community. When Italy set the price of matches and ordered the Italian match producers to collectively parcel out quotas among the manufacturers, and the Italian producers gave very low quotas

[10] F. Hoffmann-LaRoche Ltd. v. Empagram S.A., 542 U.S. 155 (2004).

[11] US DOJ and FTC 2017 Antitrust Guidelines for International Enforcement and Cooperation, §4.2.2.

[12] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

[13] Id.; Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[14] Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Midcal, *supra* note 12.

[15] Agencies and government bodies in China "shall not abuse their administrative powers to compel undertakings to engage in monopolistic activities that are prohibited under this Law." Anti-monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug 30, 2007, effective Aug. 1, 2008), art. 36. Price-fixing is a monopolistic activity prohibited by Article 13 of China's Anti-monopoly Law.

to the Germans and Swedes and large ones to themselves, the Italian firms were liable for setting the quotas *in an anticompetitive way.* [16]

Two observations follow: 1) Private price fixing, even if ordered by the state, remains private price fixing. 2) Even compelling firms to fix prices does not compel them to do so most exploitatively, and there is no reason – in comity or fairness – to exempt the extra windfall profits; and there were such extra profits in *Vitamin C*.[17]

A third observation is called for. Allowing a *foreign* state to override the law of the target territory is even more dangerous than allowing a state within that territory to do so. In the latter case there are checks and balances: voting, commerce clause offenses, and federal legislative preemption. But in the case of a nation ordering its firms to price fix to the foreigners, the victims are at the will of the foreigners' power and have no recourse.

What does the foreign sovereign compulsion defense require?

The foreign sovereign compulsion defense has been litigated in only a handful of cases. The Supreme Court has never grappled with its scope and the lower court cases are of old vintage. Much has happened in the global economy in the past 40 years, and there is room and opportunity for shaping the doctrine to modern needs.

In any event, the contours of the foreign sovereign compulsion defense as understood by the US antitrust agencies are stated in the 2017 US Antitrust Agencies' Antitrust Guidelines for International Enforcement and Cooperation (sec. 4.2.2.).[18] The Guidelines state:

> "[When] persons find themselves subject to foreign legal requirements that conflict with the laws of the United States …, courts have recognized a limited defense against application of the U.S. antitrust laws when a foreign sovereign compels the very conduct that the U.S. antitrust laws would prohibit."

A foreign jurisdiction's approval or encouragement of the conduct does not bar application of the US law "even when the foreign jurisdiction has a strong policy in favor of the conduct in question."

The defense requires 1) a command of a foreign state; 2) "the foreign government's command would give rise to the imposition of penal or other severe sanctions"; and 3) "the compelled conduct can be accomplished entirely within the foreign sovereign's own territory."

Does China's conduct meet the foreign sovereign compulsion defense according to the Guidelines? There are several reasons why it may not (and perhaps for this reason the Second Circuit did not reach the issue; it decided the case solely on comity grounds). There was room

[16] Consorzio Industrie Fiammiferi (Italian matches), case C-198/01, EU:C:2003:430.

[17] The defendants sometimes charged more than the agreed price they reported to the government and on which the seal and verification were based.

[18] The Guidelines identify two rationales that underlie "the limited defense." First, under certain circumstances the defense "serves to accommodate equal sovereigns." Second, fairness requires "a predictable rule of decision."

for the jury to find that the manufacturers did not "find themselves" caught in a conflict; that they wanted to fix prices and may have sought their government's blessing; that they did not *have to* agree on prices with their rivals and indeed some did not; that even if they were part of the consortium that negotiated the agreed price, they could charge less with impunity; they were not compelled to agree to more than a competitive price, and they surely were not compelled to charge more than the "formally" agreed price. They, through the Chamber (the trade association), could suspend the regime requiring the Chamber to verify the export price and affix a seal to the export documents (verification and chop). The manufacturers, if at all sophisticated, must have known of the notorious US law and they took the risk.

Moreover, I would argue that the offending conduct could not be accomplished entirely in China. It was not over until the sales were made. Fixing prices in China for delivery to the United States is surely as severe in its effect and as unlinked to home country regulatory choices as is fixing prices in the United States for delivery to the United States. The only differences are that it is easier and more convenient for Chinese firms to conspire in China and the offense is less likely to be detected. The time has come to erase the rule that would make the place of conspiracy so consequential. Casting off this rule for purposes of a compulsion justification would correspond with casting it off for purposes of jurisdiction, as in the *Wood pulp* case,[19] wherein the Court of Justice of the European Union adopted a version of the effects doctrine: What matters is not where the conspirators met, but where the conspiracy was "implemented." The foreign sovereign compulsion defense should simply not be available to naked cartel conduct implemented and intended to be implemented in the United States.

Who says whether China's acts constitute foreign sovereign compulsion under US law?

There is a missing link in the arguments concerning whether the price fixing was compelled. The Court of Appeals opinion says: China told the court that the applicable regulation – the 2002 PVC Notice – which on its face and in its context appears to create a voluntary system, in fact created a mandatory system. China's word on interpretation of Chinese law is conclusive (the court held); therefore China compelled the price fixing.

But the district court took on board exactly how (as MOFCOM described), the price fixing came about. It specified the facts of the Chamber meetings and the notices and regulations, as well as the manufacturers' and officials' acts. Even if the Notice and export control conduct amounted to a command, there was a serious question whether the circumstances amounted to "compulsion" under the US law. Is the answer a matter of interpreting Chinese law or a matter of characterizing the facts to determine if the US doctrine of foreign sovereign compulsion applies? Characterization of China's behavior and the manufacturers' response under all of the circumstances would seem to be a question involving mixed questions of fact and law under the Sherman Act.

[19] A. Ahlstrom Osakeyhtio v. Commission (Wood pulp), cases C-89, 104, 114, 116-117, 125-129/85 EU:C:1988:447.

What work is left for comity?

The foreign sovereign compulsion defense is a focused application of comity. While the unavailability of the defense may or may not preclude dismissal on plenary comity grounds,[20] it surely sets the compass, with US enforcement as the default. Credible candidates for general comity dismissal may be rare. If Country A was experiencing a shortage of a critical medicine needed at home, and strongly requested its manufacturers to agree to allocate sales at home and limit exports, and the manufacturers did so, that would be a credible case for justification. It would, in turn, be a good case for expanding the foreign sovereign compulsion/action defense and turning the issue into one of law (interpretation of the defense) and not one of discretion. Indeed, the cases one can imagine as credible for deference would probably be dismissed in any event under *Empagran* as not covered by the Sherman Act in the first instance.

The above discussion suggests that the proper order of analysis regarding foreign sovereign compulsion and general comity should be foreign sovereign compulsion first and general comity second, with the latter as an unlikely but possible residual category. The Second Circuit took the opposite route.

If one reaches the general comity issue, the right questions are: Does the US antitrust law, in this application, unduly interfere with China's choices in regulating its own economy, outweighing the US interest in freeing its economy of price fixing and compensating the victims? Second, because the doctrine is based on reciprocity, would the courts of China probably grant a similar favor to the United States? Suppose, for example, that the United States emphatically urges or even compels Qualcomm and a competing intellectual property (IP) owner to fix their royalty rates on chips for handsets into the Chinese market; and that the US does so to preserve the integrity of American IP by assuring that its firms will realize the true value of their IP, and thus to preserve the firms' and the nation's competitiveness in the world. Would China reciprocally withhold antitrust enforcement against Qualcomm and its competitor?

An affirmative answer to the undue interference question would be strained. An affirmative answer to the reciprocity question would be naive.

Conclusion

In this globalized world, sovereigns must accommodate themselves to the legitimate interests of one another. *Vitamin C* is one of several cases guiding the search for appropriate norms of accommodation.

There are times when the United States must fit into China's system, as when China applies

[20] See US International Antitrust Guidelines, at Example E.

We know from *Hartford Fire Ins. Co.* (509 U.S. 764, 1993), that where foreign defendants' conduct has an effect in the United States and was intended to affect the United States and defendants face no direct conflict, dismissal for comity is not available. In the spirit of *Hartford*, taking account of the fact that the foreign sovereign compulsion defense is a tool for comity, it can be argued that in cases of a naked price-fixing cartel under the cloak of foreign state direction, where the conduct does not qualify for foreign sovereign compulsion, comity dismissal is not available.

its Anti-Monopoly Law to sales and licenses by Americans into China.[21] There are times when China must fit into the US system, as when the United States applies its antitrust law to sales by Chinese firms into the United States.[22] *Qualcomm (China)*[23] is a paradigmatic case for the first proposition. *Vitamin C* should be a paradigmatic case for the second. Unless the Second Circuit decision is reversed, China wins, both ways.

[21] This proposition is debated. US officials have expressed concern about the aggressive reach of China's law, for example, to limit royalty rates on Qualcomm's intellectual property. See Michael Martina and Matthew Miller, As Qualcomm decision looms, U.S. presses China on antitrust policy, Reuters (Dec. 15, 2014). Critics argue that the Chinese anti-monopoly law is innovation-chilling in its application to intellectual property and is actually Chinese industrial policy, not true antitrust. See International Competition Policy Expert Group, Report and Recommendations (United States Chamber of Commerce, March 2017), *available at* https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

[22] This proposition too is debated, as witnessed by the *Vitamin C* case. China asserts that the US should respect the industrial policy of China to help its firms ease into a market system.

[23] See Noel Randewich and Matthew Miller, Qualcomm to pay $975 million to resolve China antitrust dispute, Reuters (Feb. 9, 2015).

Slip Op. 18-37

UNITED STATES COURT OF INTERNATIONAL TRADE

SEVERSTAL EXPORT GMBH, and SEVERSTAL EXPORT MIAMI CORPORATION, Plaintiffs, v. **UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, ACTING COMMISSIONER KEVIN K. MCALEENAN, DEPARTMENT OF COMMERCE, SECRETARY WILBUR ROSS, and PRESIDENT DONALD J. TRUMP,** Defendants.	**Before: Jane A. Restani, Judge** **Court No. 18-00057** **PUBLIC VERSION**

OPINION

[Motion for preliminary injunction denied]

Dated: April 5, 2018

Mark Lunn, Thompson Hine LLP, of Washington, DC, argued for Plaintiffs Severstal Export GmbH and Severstal Export Miami Corp. With him on the brief were David Wilson and Sarah Hall, Thompson Hine LLP, of Washington, DC.

Tara Hogan, Commerical Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With her on the brief were Joshua Kurland and Stephen Tosini, Commerical Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC.

Restani, Judge: Severstal Export GMBH ("Severstal Export") and Severstal Export Miami Corporation ("Severstal Miami") (collectively, "plaintiffs") seek to enjoin the enforcement of Presidential Proclamation No. 9705, as subsequently amended. Proclamation No. 9705, 83 Fed. Reg.

11,625 (Mar. 8, 2018); Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 22, 2018) (collectively, the "Steel Tariff").

BACKGROUND

On April 19, 2017, the Secretary of Commerce opened an investigation into the impact of steel imports on U.S. national security. OFFICE OF TECH. EVALUATION, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED, at 18 (Jan. 11, 2018) ("Steel Report"). After notifying the Secretary of Defense, id. at App'x A, the investigation was conducted and the U.S. Department of Commerce ("Commerce") issued its report on January 11, 2018, see generally id.

The Steel Report stated that: (A) "Steel is Important to U.S. National Security," (B) "Imports in Such Quantities as are Presently Found Adversely Impact the Economic Welfare of the U.S. Steel Industry," (C) "Displacement of Domestic Steel by Excessive Quantities of Imports has the Serious Effect of Weakening our Internal Economy," and (D) "Global Excess Steel Capacity is a Circumstance that Contributes to the Weakening of the Domestic Economy." Steel Report at 2–5. The report recommended a range of alternative actions, including global tariffs, each of which had the objective of maintaining 80 percent capacity utilization for the U.S. steel industry. Steel Report at 58–61. In response to the Secretary of Commerce's report, however, the Secretary of Defense indicated an absence of any steel-related threat to national military supply chains: "[T]he U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production. Therefore, [the U.S. Department of Defense ("DoD")] does not believe that the findings in the reports impact the ability of DoD programs to

acquire the steel or aluminum necessary to meet national defense requirements." Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 16, at Ex. D. The Secretary of Defense further indicated his "concern[] about the negative impact on our key allies regarding the recommended options within the reports . . . among these reports' alternatives, targeted tariffs are more preferable than a global quota or global tariff." Id.

Proclamation No. 9705 was issued on March 8, 2018. Invoking Commerce's Steel Report and the authority granted by 19 U.S.C. § 1862 to enact trade measures to counter import-related threats to national security, the proclamation imposed a 25 percent ad valorem tariff on steel imports from every country except Canada and Mexico, effective March 23, 2018. Proclamation No. 9705, 83 Fed. Reg. at 11,625 and 11,627. The original proclamation also provided that:

> Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

Id. at 11,627. No formal procedure or standards were ever promulgated for making such changes,[1] but Proclamation No. 9705 was nevertheless amended on March 22, 2018, to extend

[1] On March 19, 2018, Commerce issued instructions on how to request exemptions for steel articles "not produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality," as well as exclusions "based upon specific national security
(continued . . .)

additional exemptions to Australia, Argentina, Brazil, the member countries of the European Union, and South Korea. Proclamation No. 9711, 83 Fed. Reg. at 13,363. All exemptions were furthermore made temporary, lasting until May 1, 2018. Id. at 13,363–64. With these modifications, the Steel Tariff was implemented as scheduled on March 23, 2018. Proclamation No. 9711 continued to allow for nation-to-nation negotiations on exemptions and adjustments. Id. South Korea's temporary exemption was ultimately made permanent, in exchange for an agreement which, inter alia, limited South Korean steel imports to 70 percent of South Korea's average steel exports to the U.S. over the period from 2015 to 2017. South Korean Ministry of Trade, Energy and Industry, Korea, US reach agreement on trade deal and steel tariff exemption (Mar. 26, 2018), available at english.motie.go.kr/en/ (last visited Mar. 27, 2018).

Severstal Export is a Swiss company that negotiates and arranges sales of steel products with foreign customers. Pl. Br. at Ex. A, ¶1, 4. Severstal Miami is a Florida corporation that assists in negotiating sales and acts as Severstal Export's importer of record for steel products entering the U.S. Id. at Ex. B, ¶4. Plaintiffs are both wholly-owned subsidiaries of a Russian steel producer, PAO Severstal. Id. at Ex. A, ¶1, 4. The steel being imported by plaintiffs is shipped from Russia and is thus subject to the 25 percent tariff levied by Proclamation No. 9705. Pursuant to

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considerations." Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, 83 Fed. Reg. 12,106, 12,107 (Dep't Commerce Mar. 19, 2018) ("Exemption Regulations"). These regulations, however, apply only to domestic parties, Proclamation No. 9705, 83 Fed. Reg. at 11,625, defined as "individuals or organizations using steel articles identified in Proclamation 9705 in business activities (e.g., construction, manufacturing, or supplying steel to users) in the United States." Exemption Regulations, 83 Fed. Reg. at 12,110. The Federal Register notice announcing these regulations indicated that country-wide exclusions were to be negotiated separately. Id. at 12,108.

contracts entered prior to announcement of the Steel Tariff, plaintiffs expect to enter steel goods affected by Proclamation No. 9705 after March 23, 2018. Id. at Ex. A, ¶17. Plaintiffs challenge the lawfulness of Proclamation No. 9705, as applied to plaintiffs' expected steel imports, and seek a preliminary injunction to prevent the government from collecting the additional 25 percent tariff pending a decision on the merits of its action.[2]

JURISDICTION

The court has jurisdiction of any justiciable claim raised by plaintiff under 28 U.S.C. § 1581(i)(2), which grants the Court of International Trade ("CIT") "exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue[.]" This is a civil action commenced against the United States, challenging the government's imposition of tariffs under 19 U.S.C. § 1862 for reasons of national security.[3] Cf. Motion Systems Corp. v. Bush, 437 F.3d 1356, 1357 and 1362

[2] Although plaintiffs' initial filing sought a temporary restraining order, Pl. Br. at 1, it was agreed during a telephone conference that, as plaintiffs' goods had yet to enter the United States, the court would afford the government an opportunity to respond by March 28, 2018, hold a hearing on March 29, 2018, and thereafter issue an opinion as to the propriety of a preliminary injunction. Teleconference held on 3/23/2018 at 11:00 a.m., ECF No. 9.

[3] To the extent the government asserts that plaintiffs have no standing because 28 U.S.C. § 2631(i) limits standing to persons "adversely affected or aggrieved by agency action within the meaning of section 702 of title 5," see Def. Br. at 15 (citing 28 U.S.C. § 2631(i)) (emphasis added), while jurisdiction over the matters set forth in 28 U.S.C. § 1581 is exclusive to the CIT, the statutory standing provision is not so expressly limited. Further, at the time 28 U.S.C. § 2631 was passed in 1980, the broad wording of 5 U.S.C. § 702 had not been narrowed by Franklin v. Massachusetts. See 505 U.S. 788, 796 (1992). The court must conclude that, whatever narrow right of action exists for review of a Presidential Proclamation on tariffs under 28 U.S.C. § 1581(i), standing to assert such a right is not limited by the term "agency" action in 28 U.S.C. § 2631(i). Otherwise, while standing would only exist in the District Court, jurisdiction for the

(continued . . .)

(Fed. Cir. 2006) (on appeal of denial of claim against the President and U.S. Trade Representative under 19 U.S.C. § 2451, instead of reversing or remanding with a direction to dismiss for lack of subject matter jurisdiction, the Federal Circuit affirmed the CIT's judgment in favor of defendants). Elsewhere, however, the Federal Circuit has held that 28 U.S.C. § 1581(i) does not authorize proceedings directly against the President. Corus Group PLC v. Int'l Trade Comm'n, 352 F.3d 1351, 1359 (Fed. Cir. 2003) ("Corus Group v. ITC"). Nonetheless, the United States remains a defendant as do any other relevant officers or employees in their official capacities.

DISCUSSION

The court employs a four factor test to determine whether a preliminary injunction should be granted, considering: (1) whether plaintiffs will suffer irreparable harm absent the requested relief; (2) plaintiffs' likelihood of success on the merits; (3) whether the balance of hardships favors plaintiffs; and (4) whether the public interest would be served by granting the relief. Titan Tire Corp. v. Case New Holland, Inc., 566 F.3d 1372, 1375–76 (Fed. Cir. 2009). "[N]o one factor, taken individually, is necessarily dispositive, because the weakness of the showing regarding one factor may be overborne by the strength of the others." Ugine & ALZ Belg. v. United States, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (internal quotation marks omitted). Nevertheless, "[c]entral to the movant's burden are the likelihood of success and irreparable harm factors." Qingdao Taifa Group Co., Ltd. v. United States, 581 F.3d 1375, 1378 (Fed. Cir. 2009). Having had the benefit of oral argument and submissions from plaintiffs and defendants,

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action would only lie in the CIT. Congress would not have intended such an absurd result. Cf. Humane Soc. Of U.S. v. Clinton, 236 F.3d 1320, 1328 (Fed. Cir. 2001) ("Unless the grant of jurisdiction [under 28 U.S.C. § 1581] carries with it a coextensive waiver of sovereign immunity,
(continued . . .)

the court now will weigh these four factors.

I. Whether Plaintiffs will Suffer Irreparable Harm Absent a Preliminary Injunction

Irreparable harm constitutes potential harm that cannot be redressed by a legal or equitable remedy at the conclusion of the proceedings, so that a preliminary injunction is the only way of protecting the plaintiffs. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). In evaluating irreparable harm, the court considers: "the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief." CannaKorp, Inc. v. United States, 234 F. Supp. 3d 1345, 1350 (Ct. Int'l Trade 2017). "Of these three factors, 'immediacy [of the injury] and the inadequacy of future corrective relief' may be weighed more heavily than magnitude of harm." Id. (alteration in original).

After Commerce's Steel Report was issued, plaintiffs halted all U.S. contract-making in the reasonable expectation of some tariff action targeting, inter alia, Russian steelmakers. See Oral Argument at Morning Session, 40:32–41:03, Afternoon Session, 17:47–17:51, ECF No. 32, Severstal Export GmbH v. United States, No. 18-00057 (Ct. Int'l Trade Mar. 29, 2018) ("Oral Arg."). See also Pl. Br. at Ex. A, ¶15, 22, Ex. B, ¶16. Plaintiffs state that, should the Steel Tariff continue with exceptions granted for other significant steel-producing nations, plaintiffs will continue to suspend U.S. contracting. See Oral Arg. at Morning Session, 52:00–52:17, Afternoon Session, 17:51–18:32.

Pursuant to contracts concluded prior to the issuance of Proclamation No. 9705, plaintiffs will soon be entering Russian-made steel into the United States. Pl. Br. at Ex. A, ¶7, 17 (noting,

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the Congressional grant would be a hollow act, with no significant consequences to the
(continued . . .)

at the time of plaintiffs' motion, [[ ]][4] of steel en route to the United States from St. Petersburg and [[ ]] scheduled to ship soon). Pursuant to the Proclamation, as amended, plaintiffs' imports are prima facie subject to the 25 percent tariff. See Proclamation No. 9705, 83 Fed. Reg. at 11,627; Proclamation No. 9711, 83 Fed. Reg. at 13,363–64. Steel being shipped to the U.S. falls into two categories, [[ ]] is under contract with traders. Oral Arg. at Morning Session, 56:06–56:43. The traders, not plaintiffs, will pay duties on those entries. Oral Arg. at Morning Session, 22:18–23:28. See id. at Afternoon Session, 15:46–15:56. [[ ]] of the steel, however, is under contract with end users. Id. at Morning Session, 56:06–56:43. Plaintiffs' standard practice in contracting with end users is to deliver the goods "duties paid," and under the original terms of the contracts in question, plaintiffs were indeed responsible for paying tariffs on these imports. See Pl. Br. at Ex. B, ¶18; Oral Arg. at Morning Session, 24:51–25:30, Afternoon Session, 14:10–14:34. As the tariffs were announced after [[ ]] these shipments were already on the water, plaintiffs were able to renegotiate tariff payments with their customers, such that plaintiffs anticipate a total tariff bill of about [[ ]], to be paid by Severstal Miami as the importer of record, of which about [[ ]] will subsequently be reimbursed by customers. Oral Arg. at Morning Session, 47:20–48:54, 50:11–50:24, Pl. Ex. 3 (a spreadsheet breaking down these figures); Pl. Br. at Ex. 1 (containing renegotiation correspondence between Severstal Miami and certain U.S. customers). For comparison, the total tariff bill after reimbursement is expected to nearly [[ ]] Severstal Miami's annual budget. Compare Pl.

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sovereign, and no significant benefits to the sovereign's subjects.").

Br. at Ex. B ¶4, 17, with Oral Arg. at Morning Session, 47:30–48:54, 50:11–50:24. As Severstal Miami is unable to cover the increased cost on its own, it has obtained a loan from its parent company, brokered through Severstal Export. See Pl. Br. at Ex. B, ¶17; Oral Arg. at Morning Session, 1:33:23–1:33:50.

Plaintiffs first contend that, absent a preliminary injunction, once plaintiffs pay the tariffs, no legal mechanism exists for them to seek return of the funds if it is later determined the tariffs were unlawful. Pl. Br. at 11. Plaintiffs' contention is unfounded. While the relevant statutory authority may not spell out a clear procedure applicable to such refund requests, precedent reveals that an aggrieved party may secure the refund of a tax or tariff ultimately found to be unconstitutionally levied. See, e.g., U.S. Shoe Corp. v. United States, 114 F.3d 1564, 1577 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998). See also Defendants' Motion to Dismiss and, in the Alternative, Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 30, at 36 ("Def. Br.") (agreeing to the same).

The court will discuss the remainder of plaintiffs' alleged harms as current harm and future harm. Pl. Br. at 11–12. Plaintiffs' January decision to suspend U.S. sales, in reasonable anticipation of future tariffs, has resulted in current harm in the form of contracts foregone. Nevertheless, to the extent contracts have already been foregone, this will not be redressed by a preliminary injunction (or a favorable verdict at trial). An injunction could alter the business calculus to permit future contracts; however, the remedial value would be limited because, once a customer has been identified, plaintiffs' sales process requires roughly 4 months. See Pl. Br. at Ex. A ¶6, Ex. B ¶8. As success at trial would necessarily be uncertain, plaintiffs would likely

[4] Confidential information is indicated by double brackets.

have to again suspend contracting several months beforehand. The court does not find the opening of this brief window through a preliminary injunction to offer much additional relief, especially considering that if plaintiffs miscalculate the window and ultimately lose at trial, their customer relations stand to suffer further.

Plaintiffs further allege that, in anticipation of having to repay the loan from PAO Severstal, negotiations regarding tariff splitting with end user customers have damaged those customer relationships. Pl. Br. at Ex. B, ¶18, 24. Furthermore, plaintiffs argue that business relationships with trader customers have been damaged vis-à-vis foreign steel producers from countries currently exempted from the Steel Tariff, as the necessity of paying an additional tariff to import plaintiffs' goods has soured traders' assessments of plaintiffs as potential suppliers. Oral Arg. at Afternoon Session, 14:30–15:29. These harms would be redressed, plaintiffs contend, if the tariffs were withdrawn. Id. at 15:46–15:56.

The Federal Circuit has suggested that loss of customers may support an irreparable harm finding. Qingdao Taifa, 581 F.3d at 1381 ("[T]his court acknowledges the distinct probability that Taifa will ultimately incur the charge or lose customers. Thus, the trial court did not clearly err in determining that Taifa would suffer immediate and irreparable harm without an injunction"). The magnitude of the current damage to plaintiffs' customer base, however, is not itself sufficient to constitute "irreparable harm" for preliminary injunction purposes.

As for future harm, there is a substantial likelihood that plaintiffs will ultimately have to pay increased tariff duties once their goods have landed. Because plaintiffs' goods are custom-made, Pl. Br. at Ex. A, ¶11, the court finds it unlikely that plaintiffs could simply reroute the shipments elsewhere to avoid the duties. Even if this were feasible, the damage to plaintiffs'

U.S. customer relationships would only grow. Regardless of whether Severstal Miami pays the tariffs using money loaned by its parent company, it must still pay the tariffs, and is liable to its parent company for the loan balance. See Pl. Br. at Ex. B, ¶17. The court thus finds the impending tariff payments sufficiently certain to constitute harm, but notes that courts may typically redress economic harms of this sort through the normal litigation process. See 28 U.S.C. § 2643(a)(1) ("The Court of International Trade may enter a money judgment (1) for or against the United States in any civil action commenced under section 1581 . . . .").

Severstal Miami contends, however, that normal litigation will not redress its harm because either the loan will bankrupt it, or a prolonged, tariff-induced contracting freeze will extinguish its customer relationships and drive it out of business. Pl. Br. at 11–12. If Severstal Miami is shuttered, this will cost two people their jobs. Pl. Br. at Ex. B, ¶4. Defendants contend that the court must consider the resources of plaintiffs' parent company in assessing the likelihood of Severstal Miami's closure. In support, defendants cite an employment contract case from the District Court of the District of Columbia. Def. Br. at 37 (citing Econ. Research Servs., Inc. v. Resolution Econ., LLC, 140 F. Supp. 3d 47 (D.D.C. 2015)). The court, however, does not find Econ. Research Servs. instructive. There, the District Court based its holding on both the financial strength of the plaintiff corporation itself, and its subsidiary relationship with a global parent corporation. Id. at 53. In general, the parties relevant to an irreparable harm determination are the plaintiffs themselves. Including the resources of plaintiffs' parent corporation in this assessment is akin to piercing the corporate veil. As the Federal Circuit has stated, "the corporate form is not to be lightly cast aside." 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373, 1380 (Fed. Cir. 1998). Severstal Miami is a Florida corporation with annual

revenue of [[ ]] and a single U.S. office. Pl. Br. at Ex. B ¶4, 17. Assuming, arguendo, that a parent corporation's resources may be relevant in assessing irreparable harm in some cases, defendants nevertheless fail to provide evidence that PAO Severstal intends to incur financial liabilities on the scale necessary to keep Severstal Miami open, and the court finds no record evidence to command such an inference.[5] Rather, that the parent company has not, for several months, intervened so that Severstal Miami could resume U.S. contract solicitation, raises serious doubts as to whether such intervention might be forthcoming.

Damage which supports a finding of irreparable harm cannot be speculative. See Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983). Given the magnitude of the tariff and the import-curbing purpose of measures taken under Section 1862, plaintiffs can clearly expect a reduction in U.S. sales. See Proclamation No. 9705, 83 Fed. Reg. at 11,626; 19 U.S.C. § 1862(c)(1)(A)(ii). The question is, however, can plaintiffs reasonably expect a significant enough reduction in U.S. sales, such that Severstal Miami will have to close its doors? Plaintiffs estimate that the countries exempted by Proclamation No. 9711 account for over 60% of steel imports to the United States for the year 2017. Pl. Br. at 8 (citing calculations based on U.S. Dep't of Commerce, Enforcement & Compliance Table: US Imports of Steel Mill Products (last modified Mar. 7, 2018), available at https://enforcement.trade.gov/ (last visited Mar. 26, 2018) ("Commerce Compliance Table")). While the Steel Tariff is of an indefinite duration,

[5] Furthermore, even if Severstal Miami's parent corporation were willing to continue paying the two employees' salaries to keep Severstal's doors open, unless it were also willing to mitigate the tariff costs such that contracts can be delivered, the loss of customers could nevertheless be expected to cripple Severstal Miami's business.

Proclamation No. 9711 only granted exemptions to other states for roughly five weeks, until May 1, 2018. Proclamation No. 9711, 83 Fed. Reg. at 13,363. The Proclamation further provides: "In the event that a satisfactory alternative means is reached such that [the President] decide[s] to exclude on a long-term basis a particular country from the tariff proclaimed in Proclamation 9705, [the President] will also consider whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to the tariff . . . as it applies to other countries." Id. at 13,362.

One such "alternative means" has apparently been arrived at for South Korean steel imports, granting tariff exemptions in favor of an annual quota equaling roughly 73.9 percent of Korea's 2017 steel imports.[6] Overall, plaintiffs must compete on a substantially unequal footing with both U.S. producers and the countries responsible for most U.S. steel imports. The full breadth of harm anticipated by Severstal Miami is not definite, but given the concrete action already taken by the corporation to remove itself from the U.S. market in reaction to the

[6] South Korean steel imports accounted for roughly 10 percent of steel imports to the United States in 2017. Under the most recent agreement, Korean imports are heretofore exempt from the tariff, but subject to quantity limitations set at 70 percent of the average imports for the past three years. See South Korean Ministry of Trade, Energy and Industry, Korea, US reach agreement on trade deal and steel tariff exemption (Mar. 26, 2018), available at english.motie.go.kr/en/ (last visited Mar. 27, 2018). Commerce's report to the President contained two alternatives of universal application: a 24 percent tariff or a quota of 63 percent of 2017 import figures. See Steel Report at 7. According to Commerce's statistics, 70 percent of South Korea's 2017 figures would be 2,534,550.2. Commerce Compliance Table (2017 Annual Total Quantity for Korea, multiplied by 0.7). According to the same, 70 percent of the 2015 to 2017 average would be 2,678,977.23, or 73.9 percent of South Korea's 2017 figures. Commerce Compliance Table (Average of the 2015–2017 Annual Total Quantities for Korea, multiplied by 0.7). If, according to Commerce's recommendation, a 24 percent tariff achieves a limiting effect roughly equal to that of a 63 percent quantity limitation, then Korea's terms appear somewhat more advantageous than those currently applicable to plaintiffs' imports.

recommendations contained in Commerce's Steel Report, and continued after the promulgation of Proclamations No. 9705 and 9711, the court does not find it to be merely speculative.[7] All versions of the Steel Tariff have hewn close to global tariff levels recommended by Commerce, and have furthermore included significant exemptions for other countries, but not Russia. This is a close case, but the sum total of plaintiffs' harm, both current and future, which a preliminary injunction might redress exceeds the threshold necessary to constitute "irreparable harm."[8]

II. Plaintiffs' Likelihood of Success on the Merits

Plaintiffs must demonstrate "at least a fair chance of success on the merits for a preliminary injunction to be appropriate." Qingdao Taifa, 581 F.3d at 1381 (internal quotation marks omitted). "[T]he greater the potential harm to the plaintiff, the lesser the burden on Plaintiffs to make the required showing of likelihood of success on the merits." Ugine & ALZ Belg., 452 F.3d at 1293 (internal quotation marks omitted).

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[7] Defendants analogize this situation to that in Corus Group PLC v. Bush. Def. Br. at 38–39 (citing 217 F. Supp 2d 1347, 26 C.I.T. 937 (2002) ("Corus Group v. Bush")). Although the CIT's irreparable harm analysis was not discussed on appeal, see generally Corus Group v. ITC, 352 F.3d 1351, Severstal Miami's ongoing suspension of business activities is a critical distinction between this case and Corus' argument that sound business principles would require it to close its Bergen, Norway plant rather than operate at an anticipated tariff-induced loss. See Corus Group v. Bush, 217 F. Supp. 2d at 1354, 26 C.I.T. at 943. It remains true that "[e]very increase in duty rate will necessarily have an adverse effect on foreign producers and importers," id., 217 F. Supp. 2d at 1355, 26 C.I.T. at 944, but unlike Corus Group v. Bush, which concerned anticipated revenue shortfalls that might force "closure at some future date," id., Severstal Miami has produced evidence of an ongoing loss critical enough to threaten its very existence. The harm under consideration in this case thus differs materially, in terms of magnitude and immediacy, from that under consideration in Corus Group v. Bush.

[8] A significant change in the nature or character of exemptions granted to other nations, as compared with the tariff terms applicable to plaintiffs, may strengthen or weaken plaintiffs' claims of irreparable harm.

A. The Justiciability of the Challenged Actions

Plaintiffs raise a constitutional challenge to the actions of the executive branch under Section 1862.[9] Plaintiffs concede that Section 1862 constitutes a constitutional delegation of authority. See Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559–60 (1976) (holding a previous version of Section 1862, which did not include any legislative override, and was in other relevant respects the same as the current version, to be a constitutional delegation of authority). See also Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 877, § 232, as amended by Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1993, § 127(d) (current version at 19 U.S.C. § 1862 (1988)). Furthermore, plaintiffs do not challenge the procedure followed by Commerce and the President in enacting the Steel Tariff. Oral Arg. at Afternoon Session, 13:00–13:06. Instead, acknowledging that this court lacks the power to review the President's lawful exercise of discretion, see, e.g., Dalton v. Specter, 511 U.S. 462, 474 (1994); United States v. George S. Bush & Co., Inc., 310 U.S. 371, 380 (1940), plaintiffs argue that in proclaiming steel tariffs under Section 1862 the President seriously misapprehended, and thus exceeded, his statutory authority. Oral Arg. at Afternoon Session, 9:15–9:38.

Defendants contend that plaintiffs' claim nevertheless is non-justiciable. Def. Br. at 14–19. As defendants observe, Def. Br. at 16, in this situation, "the President's findings of fact and the motivations for his action are not subject to review," Corus Group v. ITC, 352 F.3d at 1361. Nonetheless, that a statute grants the President some discretionary decision-making authority

[9] Plaintiffs do not argue that the President's actions are reviewable under the standards of the Administrative Procedure Act. See Franklin, 505 U.S. at 801.

does not automatically insulate all aspects of executive branch action taken under that statute from judicial review. See Dalton, 511 U.S. at 474 (assuming "that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA"). Rather, "[f]or a court to interpose, there has to be a clear misconstruction of the governing statute . . . or action outside delegated authority." Corus Group v. ITC, 352 F.3d at 1361 (quoting, with approval, from Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985)) (alteration in original). Relevant to this case, therefore, where statutory language limits the President, the court may review the executive's actions for "clear misconstruction" of such limiting language. See Corus Group v. ITC, 352 F.3d at 1359 ("The statute only gives the President authority to impose a duty if the Commission makes 'an affirmative finding regarding serious injury' . . . Therefore, the President's action was not discretionary, and the validity of the proclamation is dependent on whether three commissioners in fact found serious injury with respect to tin mill products.") (internal citations omitted).

As the Federal Circuit held in Corus Group v. ITC, this level of review is consistent with the Supreme Court's holdings in Franklin and Dalton. Corus Group v. ITC, 352 F.3d at 1357–60 (citing Dalton, 511 U.S. at 469–70, 476; Franklin, 505 U.S. at 797–800).[10] Defendants themselves implicitly recognize the distinction between reviewing the substance of an exercise of discretion and reviewing an action for clear misconstruction of the statute, so that the authority

[10] Unlike Dalton, wherein plaintiffs challenged the President's ability to act based upon procedural flaws attributable to the agencies which prepared prerequisite recommendations, 511 U.S. at 474, plaintiffs in this case allege substantive, rather than procedural flaws attributable to both the President and defendant agencies.

delegated by Congress is exceeded. That is, defendants contend that the President's exercise of discretion is unreviewable, and separately argue that the President acted in conformity with Section 1862. See Def. Br. at 16. Accordingly, the court turns to the issue of the bounds of Presidential authority under the relevant statute.[11]

B. Whether the President Exceeded his Authority under Section 1862

As a preliminary matter, defendants argue that, to the degree plaintiffs' claim is justiciable, it is barred because plaintiffs have failed to exhaust administrative remedies. Def. Br. at 19–20. See 28 U.S.C. § 2637(d) (in cases brought under 28 U.S.C. § 1581(i), exhaustion is required where appropriate). Specifically, they argue that defendants could have invoked the administrative process promulgated by Commerce on March 19, 2018, to request a product-specific exclusion from the Steel Tariff. Id. (citing Exemption Regulations, 83 Fed. Reg. at

[11] Defendants likewise contend this dispute is not ripe, alleging it is not fit for judicial decision, and that resolution of this matter by the court would impose a greater hardship on defendants than deferral would impose upon plaintiffs. Def. Br. at 20–21 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), abrogated on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977)). The court is unpersuaded. Contrary to defendants' suggestion, the Steel Tariff is not a matter of "case-by-case" application. Def. Br. at 21 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967)). Rather, it is a tariff of broad application to which Commerce may grant limited exceptions following applications by aggrieved domestic parties. See Proclamation No. 9705, 83 Fed. Reg. at 11,625; Exemption Regulations, 83 Fed. Reg. at 12,111–12. Furthermore, as discussed above, the hardship imposed upon plaintiffs by delaying resolution of this matter is significant, far exceeding "mere uncertainty as to the validity of a legal rule," and outweighs any hardship wrought by defendants' inability to review an administrative exclusion request under the terms provided by 83 Fed. Reg 12,107 et seq. Def. Br. at 21 (quoting Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 811 (2003)). No such request has been filed by plaintiffs, Oral Arg. at Morning Session, 49:17–49:55, and as discussed below, whether plaintiffs themselves might be afforded such an exemption is irrelevant to whether the Steel Tariff was issued in contravention of the authority granted by Section 1862. Defendants, therefore, would gain little, if anything, by reviewing such a request. Accordingly, the court finds this matter ripe for judicial decision.

12,110–12). Commerce's argument fails for two reasons. First, as Commerce implies, see Def. Br. at 20, Severstal Export, as a foreign entity, is likely not eligible for relief under the regulation. Second, plaintiffs are not arguing that their product should be excluded from the reach of the new tariffs because it "is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration." 83 Fed. Reg. at 12,110. Rather, plaintiffs argue that the Steel Tariff itself is invalid, as it was promulgated in clear misapprehension of the President's statutory authority under Section 1862. See Pl. Br. at 23. To the degree it is available to plaintiffs, the aforementioned regulatory process is not an appropriate forum for adjudicating plaintiffs' specific claim. Accordingly, no unexhausted administrative remedies bar consideration of plaintiffs' claim.

Plaintiffs argue that the President has misconstrued Section 1862 by over-reading what can constitute a threat to national security, in finding that steel imports currently represent such a threat. Pl. Br. at 18–19. Defendants appear to argue, on the other hand, that under Section 1862, as long as the President has received Commerce's report, the court can look no further. Oral Arg. at Afternoon Session, 32:29–33:09. See also Def. Br. at 16–17. The report is certainly a precondition, see Fed. Energy, 426 U.S. at 559, albeit one not challenged in this case, but the relevant statutory language indicates that the following additional conditions exist.[12] The

[12] Defendants rely upon Motion Systems in arguing that the court is precluded from reviewing the action challenged in this case. See Def. Br. at 15–16. Motion Systems concerned a challenge to Presidential action under 19 U.S.C. § 2451(k). Motion Systems, 437 F.3d at 1359 (citing 19 U.S.C. § 2451 (since repealed)). How instructive Motions Systems is in the light of Fed. Energy, 426 U.S. at 559, 571, which involved the same statute at issue here, and later

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President is limited to "action . . . to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). See also Fed. Energy, 426 U.S. at 559 ("Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The President can act only to the extent 'he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.'"); id. at 571 ("[O]ur conclusion here . . . that the imposition of a license fee is authorized by [§] 232(b) in no way compels the further conclusion that [a]ny action the President might take, as long as it has even a remote impact on imports, is also authorized.").

Plaintiffs do not argue that a tariff or quota on steel imports is not authorized by Section 1862 where a threat to the national security encompassing the entire U.S. steel industry has been identified. The court agrees that such import-targeting actions are exactly the sort of actions authorized by Section 1862. Plaintiffs instead argue that the Section 1862 Steel Tariff is being used in trade negotiations to draw concessions from other countries unrelated to steel imports. Pl. Br. at 17–18. Such a mismatch – harm to domestic industry (A) threatens to impair national security, import-restricting actions favoring domestic industry (A) are taken under Section 1862, such restrictions are then lifted in exchange for concessions favoring unrelated domestic industry (B) – would raise a credible question as to whether the President misapprehended the authority granted by Section 1862. See 19 U.S.C. § 1862(c)(1)(A)(ii) ("action . . . to adjust the imports of

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Supreme Court cases need not be resolved for purposes of the present motion. To the extent the court may review the action of the President, it is unlikely that the President has exceeded his statutory authority.

the article and its derivatives") (emphasis added). As support, plaintiffs quote a statement by the President indicating that "Tariffs on Steel and Aluminum will only come off if new & fair NAFTA agreement is signed." Pl. Br. at 17–18. But the NAFTA trading parties are high on the list of exporters of steel to the United States and plaintiffs have not demonstrated that the Steel Tariff has been lifted in favor of measures only, or even mostly, benefitting unrelated industries.[13]

The statute contains more specific limitations as follows:

> [T]he Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

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[13] Likewise, the magnitude of the exemptions currently granted by Proclamation No. 9711, by itself, does not place the Steel Tariff outside the bounds of Section 1862. See Pl. Br. at 17 n.12 (arguing these exemptions undercut the President's national security rationale). These exemptions have been granted temporarily, and in a stated effort to negotiate alternative measures beneficial to the steel industry. See Proclamation No. 9711, 83 Fed. Reg. at 13,362. Furthermore, record evidence indicates the desirability of exceptions for certain "key allies." Pl. Br. at Ex. D.

19 U.S.C. § 1862(d). See also Fed. Energy, 426 U.S. at 559 ("232(c) [a]rticulates a series of specific factors to be considered by the President in exercising his authority under [§] 232(b)." (internal citations omitted)). Regarding this limitation, plaintiffs argue that the aforementioned statement regarding NAFTA, as well as related statements made in conjunction with a Congressional campaign in Pennsylvania, reveal that the President's stated national security motives were pretextual, and the President has clearly read Section 1862 as granting authority to adopt tariffs for purely economic reasons, including to bolster his position in trade renegotiations. See Pl. Br. at 12–16.

The factors listed in Section 1862(d) are required, but not exclusive. Commerce's Steel Report refers to each of these factors. Steel Report at 1 (recounting the factors generally), 23–25. 47–49 (describing domestic production needed for national defense requirements, the percentage of domestic capacity needed to cover national defense requirements, and overall economic requirements, including those related to growth, necessary for such production); 27–33 (surveying the importation of steel goods), 33–40 (explaining the effect of steel mill closures on employment, revenue generation, and investment), 41–46 (analyzing the effect of steel production stagnation on the availability of facilities and research relevant to national security needs). See also Pl. Br. at Ex. D (the Secretary of Defense's assessment of certain Section 1862(d) factors). Proclamation Nos. 9705 and 9711 likewise recite findings in terms of the Section 1862(d) factors. See Proclamation No. 9705, 83 Fed. Reg. at 11,625, ¶2 (reciting to the Secretary of Commerce's findings with reference to Section 1862(d)), 11,626, ¶5 (concurring in the Secretary's findings), 11,626, ¶8 (recounting factors considered), 11,626, ¶10 (explaining exemptions for Canada and Mexico with reference to Section 1862(d)); Proclamation No. 9711,

83 Fed. Reg. at 13,361, ¶2 (referring to the relevant paragraphs of Proclamation No. 9705), 13,361–62, ¶5–9 (explaining the U.S. "security relationship" with each of the exempted countries). The latter Section 1862(d) factors are economic in nature. The language therein is quite broad and permissive, and apparently not limited to production necessary for national defense purposes.[14] Plaintiffs have pointed to neither statutory authority nor legislative history which suggest that Section 1862(d) clearly forecloses the President from finding a threat to national security due to the overall economic situation of the steel industry. Where, as here, an industry is found to produce goods vital to U.S. national security, see Steel Report at 23–26, the court finds it highly unlikely that Presidential statements indicating an overarching economic rationale for Section 1862 tariffs are clearly inconsistent with that statute's grant of authority. Section 1862(d) furthermore requires consideration of "other relevant factors." The aforementioned statements regarding renegotiations of NAFTA, a trade agreement with two of the United States' largest foreign steel sources, are not wholly unrelated to the factors listed in Section 1862(d). Assuming arguendo that these types of statements could affect the analysis, the

[14] Defendants are wrong, however, that "Congress has never attempted to narrow the President's Section [1862] authority." Def. Br. at 31. Prior to Proclamation No. 9705, Section 1862 had only been used to adjust imports of oil. See, e.g., Proclamation No. 3279, 24 Fed. Reg. 1,781 (Mar. 12, 1959); Proclamation No. 3290, 24 Fed. Reg. 3,527 (May 2, 1959); Proclamation No. 3693, 30 Fed. Reg. 15,459 (Dec. 16, 1965); Proclamation No. 3794, 32 Fed. Reg. 10,547 (July 19, 1967); Proclamation No. 4543, 42 Fed. Reg. 64,849 (Dec. 27, 1977). In 1980, Commerce specifically added a legislative override for oil-related action taken under this section. Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229, § 402. At minimum, this suggests that prior Presidential action under Section 1862 gave Congress reason to believe such an override might be desirable. Since this amendment, Section 1862 has been invoked rarely. Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 2, 1980); Proclamation No. 4748, 45 Fed. Reg. 25,371 (Apr. 11, 1980); Proclamation No. 4762, 45 Fed. Reg. 39,237 (June 6, 1980); Proclamation No. 4766, 45 Fed. Reg. 41,899 (June 19, 1980); Proclamation No. 4907, 47 Fed.

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court does not find such statements sufficient on their own to underpin a credible case that the President has clearly misconstrued his authority under Section 1862. Accordingly, plaintiffs' likelihood of success on the merits is very low.

III. Whether the Balance of Hardships Favors Plaintiffs

Regarding the balance of hardships, plaintiffs simply argue that the hardships described above "far outweigh the Defendants' interests in enforcing an unlawful Steel Proclamation." Pl. Br. at 23. It is almost impossible to analyze the harm to the Government of halting the tariffs, if the merits of the tariffs are not reviewable. Thus, without addressing the balance of hardships specifically, defendants cite an immigration case for the proposition that the balance of hardships and public interest "merge when the Government is the opposing party." Def. Br. at 40 (citing Nken v. Holder, 556 U.S. 418, 435 (2009)). The Federal Circuit has not, however, adopted this approach in subsequent trade cases. Am. Signature, Inc. v. United States, 598 F.3d 816, 829–30 (Fed. Cir. 2010). Defendants go on to analogize a tariff injunction in this case, to enjoining the Navy from conducting training exercises. Def. Br. at 40–41 (citing Winter v. Nat. Res. Def. Council, 555 U.S. 7 (2008)). First security for a stay is required. See U.S. Ct. Int. Trade Rule 65(c). Second, temporary lifting of some tariffs intended to have some economic effects down the road is not the same as causing disruption and expense in connection with exercises directly linked to national defense; at most, the United States would be harmed by a delay. Qingdao Taifa, 581 F.3d at 1382. On the other hand, as described above, if plaintiffs are ultimately successful, but no injunction is provided, they will suffer at least some degree of irreparable

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Reg. 10,507 (Mar. 10, 1982); Proclamation No. 5141, 48 Fed. Reg. 56,929 (Dec. 22, 1983).

harm. The balance of hardships likely favors plaintiffs.

IV. Whether the Public Interest would be Served by Granting a Preliminary Injunction

Finally, plaintiffs contend that the remedying of constitutional violations and ensuring the President's compliance with the law always serves the public interest. Pl. Br. at 23–24. See Am. Signature, 598 F.3d at 830 ("The public interest is served by ensuring that governmental bodies comply with the law, and interpret and apply trade statutes uniformly and fairly."). Defendants contend that permitting Commerce to collect the tariffs serves the public interest because it is in the interest of national security. Def. Br. at 41–43 (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986)). Both the rule of law and our nation's security are foundational to the public good. The court concludes that this factor favors neither party more than the other.

In sum, the court finds that plaintiffs have made a showing, but not a particularly strong showing, of irreparable harm. The degree of potential harm is thus insufficient to overcome plaintiffs' low likelihood of success on the merits. The balance of hardships and public interest are insufficiently weighted in plaintiffs' favor to overcome the deficiencies in the first two factors, which are central to the court's analysis. Therefore, a preliminary injunction will not issue.

CONCLUSION

Plaintiffs' motion for a preliminary injunction is **DENIED**. The parties will proceed to further brief the Government's motion to dismiss according to the Rules of the Court.

/s/ Jane A. Restani
Jane A. Restani, Judge

Dated: April 5, 2018
New York, New York

CHAPTER ELEVEN
INVESTMENT

Section A: Investment

ARTICLE 11.1: SCOPE AND COVERAGE

1. This Chapter applies to measures adopted or maintained by a Party relating to:

   (a) investors of the other Party;

   (b) covered investments; and

   (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party.

2. For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

3. For purposes of this Chapter, **measures adopted or maintained by a Party** means measures adopted or maintained by:

   (a) central, regional, or local governments and authorities; and

   (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

ARTICLE 11.2: RELATION TO OTHER CHAPTERS

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Thirteen (Financial Services).

ARTICLE 11.3: NATIONAL TREATMENT

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

ARTICLE 11.4: MOST-FAVORED-NATION TREATMENT

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT[1]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

[1] Article 11.5 shall be interpreted in accordance with Annex 11-A.

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding Article 11.12.5(b), each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, or revolt, insurrection, riot, or other civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with paragraphs 2 through 4 of Article 11.6, *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 11.3 but for Article 11.12.5(b).

ARTICLE 11.6: EXPROPRIATION AND COMPENSATION[2]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law and Article 11.5.1 through 11.5.3.

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

[2] Article 11.6 shall be interpreted in accordance with Annexes 11-A and 11-B.

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Eighteen (Intellectual Property Rights).

ARTICLE 11.7: TRANSFERS[3]

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital, including the initial contribution;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

[3] For greater certainty, Annex 11-G applies to this Article.

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Article 11.5.4 and 11.5.5 and Article 11.6; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

ARTICLE 11.8: PERFORMANCE REQUIREMENTS

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, impose or enforce any requirement or enforce any commitment or undertaking:[4]

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

[4] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for purposes of paragraph 1.

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.[5]

[5] For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement or enforcing a commitment or undertaking to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory, provided that such activity is consistent with paragraph 1(f).

(b) Paragraph 1(f) does not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[6]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or

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[6] The Parties recognize that a patent does not necessarily confer market power.

requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement. For purposes of this Article, private parties include designated monopolies or state enterprises, where such entities are not exercising delegated governmental authority.

ARTICLE 11.9: SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

ARTICLE 11.10: INVESTMENT AND ENVIRONMENT

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

ARTICLE 11.11: DENIAL OF BENEFITS

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain normal economic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise. If, before denying the benefits of this Chapter, the denying Party knows that the enterprise has no substantial business activities in the territory of the other Party and that persons of a non-Party, or of the denying Party, own or control the enterprise, the denying Party shall, to the extent practicable, notify the other Party before denying the benefits. If the denying Party provides such notice, it shall consult with the other Party at the other Party's request.

ARTICLE 11.12: NON-CONFORMING MEASURES

1. Articles 11.3, 11.4, 11.8, and 11.9 do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at

(i) the central level of government, as set out by that Party in its Schedule to Annex I,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I,[7] or

(iii) a local level of government;[8]

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 11.3, 11.4, 11.8, or 11.9.

2. Articles 11.3, 11.4, 11.8, and 11.9 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 11.3 and 11.4 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 18.1.6 (General Provisions) as specifically provided in that Article.

5. Articles 11.3, 11.4, and 11.9 do not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

ARTICLE 11.13: SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS

[7] For greater certainty, Annex 12-C (Consultations Regarding Non-Conforming Measures Maintained by a Regional Level of Government) is incorporated into and made part of this Chapter.

[8] For Korea, **local level of government** means a local government as defined in the *Local Autonomy Act*.

1. Nothing in Article 11.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that covered investments be legally constituted under its laws or regulations, provided that such formalities do not materially impair the protections afforded by the Party to investors of the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 11.3 and 11.4, a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

ARTICLE 11.14: SUBROGATION

1. If the Korea Export Insurance Corporation or the Overseas Private Investment Corporation makes a payment to an investor of the Party in which the respective Corporation is established under a guarantee or a contract of insurance it has entered into in respect of an investment, the Corporation shall be considered the subrogee of the investor and shall be entitled to the same rights that the investor would have possessed under this Chapter but for the subrogation, and the investor shall be precluded from pursuing such rights to the extent of the subrogation.

2. For greater certainty, nothing in this Article shall be construed to be incompatible with the rights and obligations of any Party under the *Investment Incentive Agreement Between the Government of the United States of America and the Government of the Republic of Korea* (July 30, 1998).

Section B: Investor-State Dispute Settlement

ARTICLE 11.15: CONSULTATION AND NEGOTIATION

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

ARTICLE 11.16: SUBMISSION OF A CLAIM TO ARBITRATION

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (notice of intent). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of, or request for, arbitration (notice of arbitration):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

ARTICLE 11.17: CONSENT OF EACH PARTY TO ARBITRATION

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the New York Convention for an "agreement in writing."

ARTICLE 11.18: CONDITIONS AND LIMITATIONS ON CONSENT OF EACH PARTY

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 11.16.1 and knowledge that the claimant (for claims brought under Article 11.16.1(a)) or the enterprise (for claims brought under Article 11.16.1(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 11.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 11.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 11.16.1(a)) and the claimant or the enterprise (for claims brought under Article 11.16.1(b)) may initiate or

continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

ARTICLE 11.19: SELECTION OF ARBITRATORS

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. If a tribunal has not been constituted within 75 days of the date a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either Party as the presiding arbitrator unless the disputing parties otherwise agree.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 11.16.1(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 11.16.1(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

ARTICLE 11.20: CONDUCT OF THE ARBITRATION

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 11.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. At the request of a disputing party, and unless the disputing parties otherwise agree, the tribunal may determine the place of meetings, including consultations and hearings, taking into consideration appropriate factors, including the convenience of the parties and the arbitrators, the location of the subject matter, and the proximity of evidence. The preceding sentence is without prejudice to any appropriate factors a tribunal may consider under paragraph 1.

3. Unless the disputing parties otherwise agree, English and Korean shall be the official languages to be used in the entire arbitration proceedings, including all hearings, submissions, decisions, and awards.

4. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement. On the request of a disputing party, the non-disputing Party should resubmit its oral submission in writing.

5. After consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

(a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;

(b) the *amicus curiae* submission would address a matter within the scope of the dispute; and

(c) the *amicus curiae* has a significant interest in the proceeding.

The tribunal shall ensure that the *amicus curiae* submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the *amicus curiae* submission.

6. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 11.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection

consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 7.

7. In the event that the respondent so requests within 45 days of the date the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

8. When it decides a respondent's objection under paragraph 6 or 7, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

9. A respondent may not assert as a defense, counterclaim, or right of set-off, or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract, except with respect to any subrogation as provided for in Article 11.14.

10. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 11.16. For purposes of this paragraph, an order includes a recommendation.

11. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60

days after the date the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the date the 60-day comment period expires.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 12 or Annex 11-D.

12. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 11.26 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

ARTICLE 11.21: TRANSPARENCY OF ARBITRAL PROCEEDINGS

1. Subject to paragraphs 2, 3, and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 11.20.4 and 11.20.5 and Article 11.25;

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 23.2 (Essential Security) or Article 23.4 (Disclosure of Information).

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1;

(d) The tribunal shall decide any objection by a disputing party regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information; and

(e) At the request of a disputing Party, the Joint Committee shall consider issuing a decision in writing regarding a determination by the tribunal that information claimed to be protected was not properly designated. If the Joint Committee issues a decision within 60 days of such a request, it shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Committee does not issue a decision within 60 days, the tribunal's determination shall remain in effect only if the non-disputing Party submits a written statement to the Joint Committee within that period that it agrees with the tribunal's determination.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

ARTICLE 11.22: GOVERNING LAW

1. Subject to paragraph 3, when a claim is submitted under Article 11.16.1(a)(i)(A) or Article 11.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 11.16.1(a)(i)(B) or (C), or Article 11.16.1(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed,

(i) the law of the respondent, including its rules on the conflict of laws;[9] and

(ii) such rules of international law as may be applicable.

3 A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 22.2.3(d) (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

ARTICLE 11.23: INTERPRETATION OF ANNEXES

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Joint Committee on the issue. The Joint Committee shall submit in writing any decision declaring its interpretation under Article 22.2.3(d) (Joint Committee) to the tribunal within 60 days of delivery of the request.

2. A decision issued by the Joint Committee under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Committee fails to issue such a decision within 60 days, the tribunal shall decide the issue.

ARTICLE 11.24: EXPERT REPORTS

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

[9] For purposes of clause (i), the **law of the respondent** means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

ARTICLE 11.25: CONSOLIDATION

1. Where two or more claims have been submitted separately to arbitration under Article 11.16.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 11.16.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 11.19 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 11.16.1 and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 11.19 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 11.19 be stayed, unless the latter tribunal has already adjourned its proceedings.

ARTICLE 11.26: AWARDS

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

2. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. Subject to paragraph 1, where a claim is submitted to arbitration under Article 11.16.1(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

4. A tribunal may not award punitive damages.

5. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

6. Subject to paragraph 7 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

7. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention,

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 11.16.3(d),

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

8. Each Party shall provide for the enforcement of an award in its territory.

9. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a panel shall be established under Article 22.9 (Establishment of Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) in accordance with Article 22.11 (Panel Report), a recommendation that the respondent abide by or comply with the final award.

10. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph 9.

11. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

ARTICLE 11.27: SERVICE OF DOCUMENTS

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 11-C.

Section C: Definitions

ARTICLE 11.28: DEFINITIONS

For purposes of this Chapter:

Centre means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;

claimant means an investor of a Party that is a party to an investment dispute with the other Party;

disputing parties means the claimant and the respondent;

disputing party means either the claimant or the respondent;

enterprise means an enterprise as defined in Article 1.4 (Definitions), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;

ICSID Additional Facility Rules means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

ICSID Convention means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965;

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[10]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[11] [12] and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.[13]

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[10] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

[11] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

[12] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

[13] For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.

For purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment.

investment agreement means a written agreement[14] between a national authority[15] of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;

investment authorization means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party;[16] [17]

investor of a non-Party means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;

[14] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 11.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

[15] For purposes of this definition, **national authority** means an authority at the central level of government.

[16] For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

[17] The Parties recognize that, as of the date of signature of this Agreement, neither Party has a foreign investment authority that grants investment authorizations.

New York Convention means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958;

non-disputing Party means the Party that is not a party to an investment dispute;

protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law;

respondent means the Party that is a party to an investment dispute;

Secretary-General means the Secretary-General of ICSID; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

ANNEX 11-A
CUSTOMARY INTERNATIONAL LAW

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 11.5 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

ANNEX 11-B
EXPROPRIATION

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.

2. Article 11.6.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

3. The second situation addressed by Article 11.6.1 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:

(i) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;[18] and

(iii) the character of the government action, including its objectives and context. Relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.

(b) Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the

[18] For greater certainty, whether an investor's investment-backed expectations are reasonable depends in part on the nature and extent of governmental regulation in the relevant sector. For example, an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector.

environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.[19]

[19] For greater certainty, the list of "legitimate public welfare objectives" in subparagraph (b) is not exhaustive.

ANNEX 11-C
SERVICE OF DOCUMENTS ON A PARTY UNDER SECTION B

Korea

Notices and other documents in disputes under Section B shall be served on Korea by delivery to:

Office of International Legal Affairs
Ministry of Justice of the Republic of Korea
Government Complex, Gwacheon
Korea

United States

Notices and other documents in disputes under Section B shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C. 20520
United States of America

ANNEX 11-D
POSSIBILITY OF A BILATERAL APPELLATE MECHANISM

Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 11.26 in arbitrations commenced after they establish the appellate body or similar mechanism.

ANNEX 11-E
SUBMISSION OF A CLAIM TO ARBITRATION

Korea

1. Notwithstanding Article 11.18.2, an investor of the United States may not submit to arbitration under Section B a claim that Korea has breached an obligation under Section A either:

(a) on its own behalf under Article 11.16.1(a); or

(b) on behalf of an enterprise of Korea that is a juridical person that the investor owns or controls directly or indirectly under Article 11.16.1(b),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in any proceedings before a court or administrative tribunal of Korea.

2. For greater certainty, where an investor of the United States or an enterprise of Korea that is a juridical person that the investor owns or controls directly or indirectly makes an allegation that Korea has breached an obligation under Section A before a court or administrative tribunal of Korea, that election shall be final, and the investor may not thereafter allege that breach, on its own behalf or on behalf of the enterprise, in an arbitration under Section B.

ANNEX 11-F
TAXATION AND EXPROPRIATION

The determination of whether a taxation measure, in a specific fact situation, constitutes an expropriation requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including the factors listed in Annex 11-B and the following considerations:

(a) The imposition of taxes does not generally constitute an expropriation. The mere introduction of a new taxation measure or the imposition of a taxation measure in more than one jurisdiction in respect of an investment generally does not in and of itself constitute an expropriation;

(b) A taxation measure that is consistent with internationally recognized tax policies, principles, and practices should not constitute an expropriation. In particular, a taxation measure aimed at preventing the avoidance or evasion of taxation measures generally does not constitute an expropriation;

(c) A taxation measure that is applied on a non-discriminatory basis, as opposed to a taxation measure that is targeted at investors of a particular nationality or at specific taxpayers, is less likely to constitute an expropriation; and

(d) A taxation measure generally does not constitute an expropriation if it was already in force when the investment was made and information about the measure was publicly available.

ANNEX 11-G
TRANSFERS

1. Nothing in this Chapter, Chapter Twelve (Cross-Border Trade in Services), or Chapter Thirteen (Financial Services) shall be construed to prevent Korea from applying measures pursuant to Article 6 of the *Foreign Exchange Transactions Act*, provided that such measures:[20]

(a) are in effect for a period not to exceed one year; however, if extremely exceptional circumstances arise such that Korea seeks to extend such measures, Korea will coordinate in advance with the United States concerning the implementation of any proposed extension;

(b) are not confiscatory;

(c) do not constitute a dual or multiple exchange rate practice;

(d) do not otherwise interfere with investors' ability to earn a market rate of return in the territory of Korea on any restricted assets;[21]

(e) avoid unnecessary damage to the commercial, economic, or financial interests of the United States;

(f) are temporary and phased out progressively as the situation calling for imposition of such measures improves;

(g) are applied in a manner consistent with Articles 11.3, 12.2, and 13.2 (National Treatment) and Articles 11.4, 12.3, and 13.3 (Most-Favored-Nation Treatment) subject to the Schedules of Korea to Annex I, Annex II, and Annex III; and

(h) are promptly published by the Ministry of Finance and Economy or the Bank of Korea.

2. Paragraph 1 does not apply to measures that restrict:

(a) payments or transfers for current transactions, unless:

[20] Korea shall endeavor to provide that such measures will be price-based.

[21] For greater certainty, the term "restricted assets" in subparagraph (d) refers only to assets invested in the territory of Korea by an investor of the United States that are restricted from being transferred out of the territory of Korea.

(i) the imposition of such measures complies with the procedures stipulated in the *Articles of Agreement of the International Monetary Fund*;[22] and

(ii) Korea coordinates any such measures in advance with the United States; or

(b) payments or transfers associated with foreign direct investment.

[22] **Current transactions** shall have the meaning set forth in Article 30(d) of the *Articles of Agreement of the International Monetary Fund* and, for greater certainty, shall include interest pursuant to a loan or bond on any restricted amortization payments coming due during the period that controls on capital transactions are applied.

The New York Times | https://nyti.ms/2E068QR

POLITICS

Trump Secures Trade Deal With South Korea Ahead of Nuclear Talks

By MICHAEL D. SHEAR and ALAN RAPPEPORT MARCH 27, 2018

Update: The United States and South Korea formally announced the trade agreement in a joint statement on Wednesday, and said that it "represents important progress in improving U.S.-Korea trade and economic relations."

WASHINGTON — President Trump scored his first significant trade deal this week, securing a pact with South Korea that represents the type of one-on-one agreement that Mr. Trump says makes the best sense for American companies and workers.

The deal, which is expected to be formally announced on Wednesday, opens the South's market to American autos by lifting existing limits on manufacturers like Ford Motor and General Motors, extends tariffs for South Korean truck exports and restricts, by nearly a third, the amount of steel that the South can export to the United States. Mr. Trump used his threat of stiff steel and aluminum tariffs as a cudgel to extract the concessions he wanted, helping produce an agreement that had stalled amid disagreements this year.

But winning the deal may have had more to do with the geopolitical realities confronting the United States and South Korea as America embarks on tricky nuclear discussions with North Korea. The United States cannot afford a protracted trade standoff at a moment when it needs the South as an ally.

The trade deal came as the Chinese state news media reported that North Korea's leader, Kim Jong-un, made an unannounced visit to Beijing to meet with President Xi Jinping weeks before planned summits with American and South Korean leaders.

The political success of the trade agreement — and its ability to be replicated in other negotiations — is not guaranteed. Many countries have reacted coolly to Washington's pugilistic approach to trade, viewing the president's preference to punch first and negotiate later as counter to global interests.

President Emmanuel Macron of France lashed out at the approach on Tuesday, saying he was frustrated by the seemingly coercive negotiation tactics coming from Washington.

"We talk about everything, in principle, with a friendly country that respects the rules of the W.T.O.," Mr. Macron said. "We talk about nothing, in principle, when it is with a gun to our head."

The implications in the United States will depend on how well Mr. Trump and his allies are able to sell the deal's direct benefits to voters in midterm elections in the fall. They did not succeed in doing so in a recent special election in Pennsylvania, where a Democrat won in a district that should have been especially receptive to Mr. Trump's argument about trade and tariffs.

Stephen K. Bannon, Mr. Trump's former chief strategist, said the president's political team "must get on the ground and make sure working people understand the direct economic benefits that come from these measures — get it from being academic to simple."

The deal with South Korea, he said, "is a big victory resulting from the president's smart tariff policies."

The agreement is also a victory for a president whose most ardent campaign supporters were animated in part by a promise that Mr. Trump would fight for them against an international free-trade establishment that they believe had robbed them of jobs and depressed their wages.

As a candidate, Mr. Trump had repeatedly threatened to withdraw from trade deals he said were unfair to the United States and its workers — or even rip them up. Even as recently as last September, associates of the president made it clear that he was willing to withdraw from trade negotiations with South Korea if he thought the result would be unfair.

Mr. Trump has also made clear his disdain for the multicountry trade agreements that the United States has long championed. One of his first moves as president was to pull out of what was then the 12-nation Trans-Pacific Partnership, an agreement that President Barack Obama had helped solidify.

On Tuesday, supporters of Mr. Trump's protectionist approach to trade cheered the new pact as a victory for American workers and the dawn of a new era in globalization.

"The agreement with South Korea to better level the playing field on steel and autos is an encouraging sign that the administration's trade strategy is achieving results," said Scott N. Paul, the president of the Alliance for American Manufacturing. "We believe the deal's steel provision will be as effective as a tariff in achieving the goals of strengthening our domestic industry and ensuring it can supply America's security needs."

Through the agreement, South Korea — the third-biggest exporter of steel to the United States in 2016 — is permanently exempt from the White House's global tariffs of 25 percent on steel. In return, South Korea agreed to adhere to a quota of 2.68 million tons of steel exports to the United States a year, which it said was roughly equivalent to 70 percent of its annual average sent to the United States from 2015 to 2017.

The deal also doubles the number of vehicles the United States can export to South Korea without meeting local safety requirements to 50,000 per manufacturer. However, trade experts said that American companies had not come close to meeting their existing quota last year, and that American carmakers had not done enough to tailor their products for South Korean consumers, who prefer smaller vehicles. The revised agreement does ease environmental regulations that American carmakers

face when selling vehicles in South Korea and makes American standards for auto parts compliant with South Korean regulations.

Importantly for the Trump administration, the agreement extends tariffs on imported South Korean trucks by 20 years to 2041. Those tariffs were set to phase out in 2021, which officials said would have harmed American truck makers.

The deal will also establish a side agreement between the United States and South Korea that is intended to deter "competitive devaluation" of both countries' currencies — which can artificially lower the cost of imports bought by consumers — and to create more transparency on issues of monetary policy. Administration officials suggested that this new type of arrangement was likely to be replicated in other trade deals, though they acknowledged that it was not enforceable.

Senior White House officials trumpeted the addition of the currency provision to the negotiations, which would seek to prevent South Korea from reducing the value of its currency to make its goods cheaper abroad and export more to the United States. In a report published in October, the Treasury Department declined to label South Korea a currency manipulator, but placed it on a "monitoring list" for its currency practices and large trade surplus with the United States.

However, the effect of the currency agreement may be mostly symbolic, since it was signed in a side deal to the pact to avoid a lengthy legislative approval process. Unlike other provisions of the official agreement, the currency provision is not enforceable through panels that typically settle disputes, or through officially sanctioned retaliation, the usual method for policing trade deals.

The Obama administration had fought for a similar currency provision to be included in the Trans-Pacific Partnership.

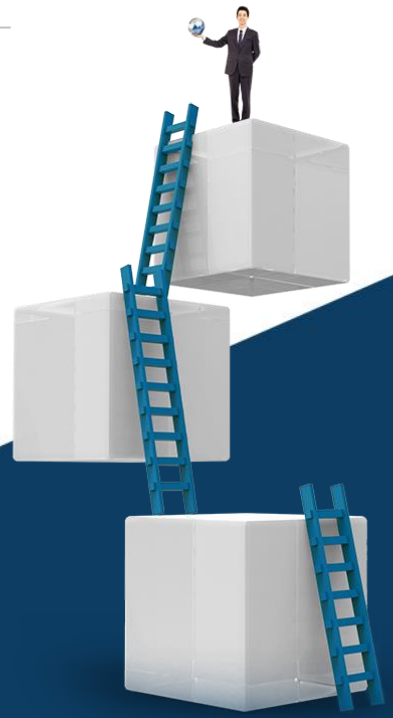
On automobiles, the biggest source of trade tensions between the countries, the negotiation delivered modest victories that were likely to be welcomed by American carmakers who have long sought to sell more cars in South Korea. It also smoothed customs and regulatory procedures that American businesses say have made it harder to sell goods in the country.

Ana Swanson contributed reporting.

A version of this article appears in print on March 28, 2018, on Page A1 of the New York edition with the headline: Trump Backers See Trade Deal As a Validation.

Recent Development of Kim Young Ran Act

Bae, Kim & Lee LLC
Compliance Team
Jeena Kim
(jeena.kim@bkl.co.kr)



Act on Prohibition of Improper Requests and Receipt of Money or Valuables

"Kim Young Ran Act"

Anti-Corruption and Civil Rights Commission ("**ACRC**")

국민권익위원회
Anti-Corruption &
Civil Rights Commission

- Expands scope of "**Public Officials**" – includes media and academia
- Prohibits "**Improper Requests**" categorically – even without giving of any money, valuables or benefit
- Limits giving of "**Money, Valuables or Benefits**", even absent connection to duties
- Provides for corporate liability for employee, agent or sub-contractor violation

Statistics

Total Number of Reports: 4000 +

Total Number of Administrative Fine: 46 persons in 29 cases

- For Improper Request, 1 person in 1 case
- For Receipt of Valuables, 45 persons in 28 cases

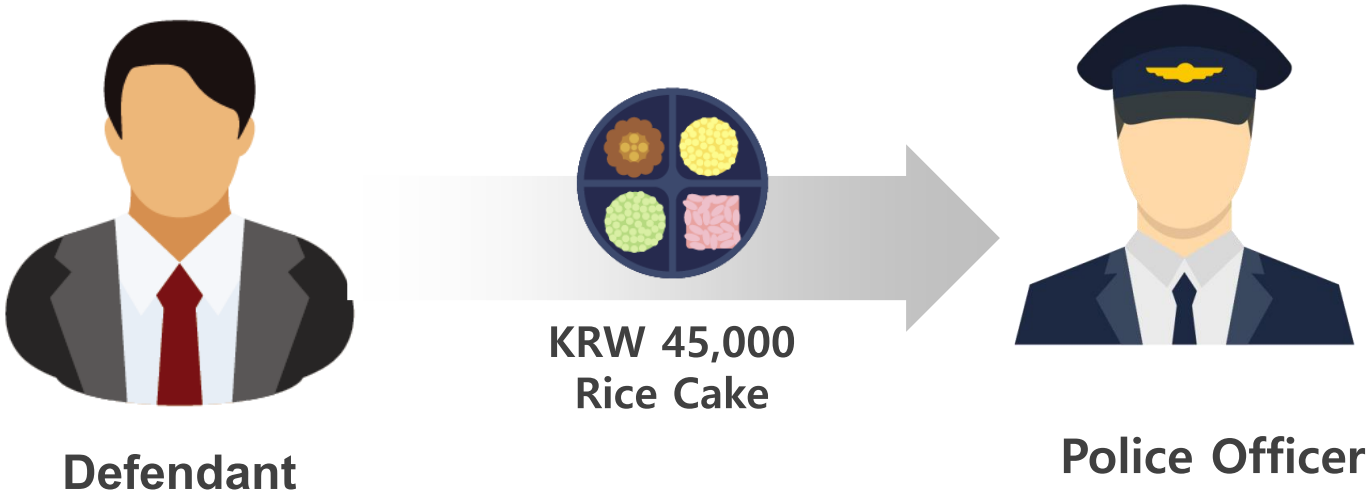
Total Number of Criminal Penalties : 48 persons in 11 cases

- For Improper Request, 1 person in 1 case
- For Receipt of Valuables, 47 persons in 10 cases

ACRC, Sep 28, 2016 – July 31, 2017 (10 months)

First Court Decision

Administrative Fine
KRW 90,000



Police Sent the Case to Prosecutors with guilty opinion

Police Closed the Case for not-guilty opinion

Local Companies
& Hometown
Alumni

Public Officials
Included

Who Should be Concerned ?

Receiving / Accepting	Giving / Requesting
Public Officials: • Qualified Government Officers • Executives and Employees of Public Enterprises and Entities • School Principal, Teachers, Officers and Employees • Media Enterprise Executives and Employees	• Korean nationals • All persons and entities within Korean Territory
Others Regarded as Public Officials: • Committee Member of Certain Administrative Agency • Persons or Entities Authorized or Contracted by Public Institutions to Perform Public Service/Duty • Persons or Entities Seconded to Public Institutions • Persons or Entities Performing Public Assessment or Evaluation	
Spouses: • Spouses (“***legal***”, not “***de facto***”)	

Trans-border Application

KOREA

Foreign Embassy

Not Applicable

Korean Company

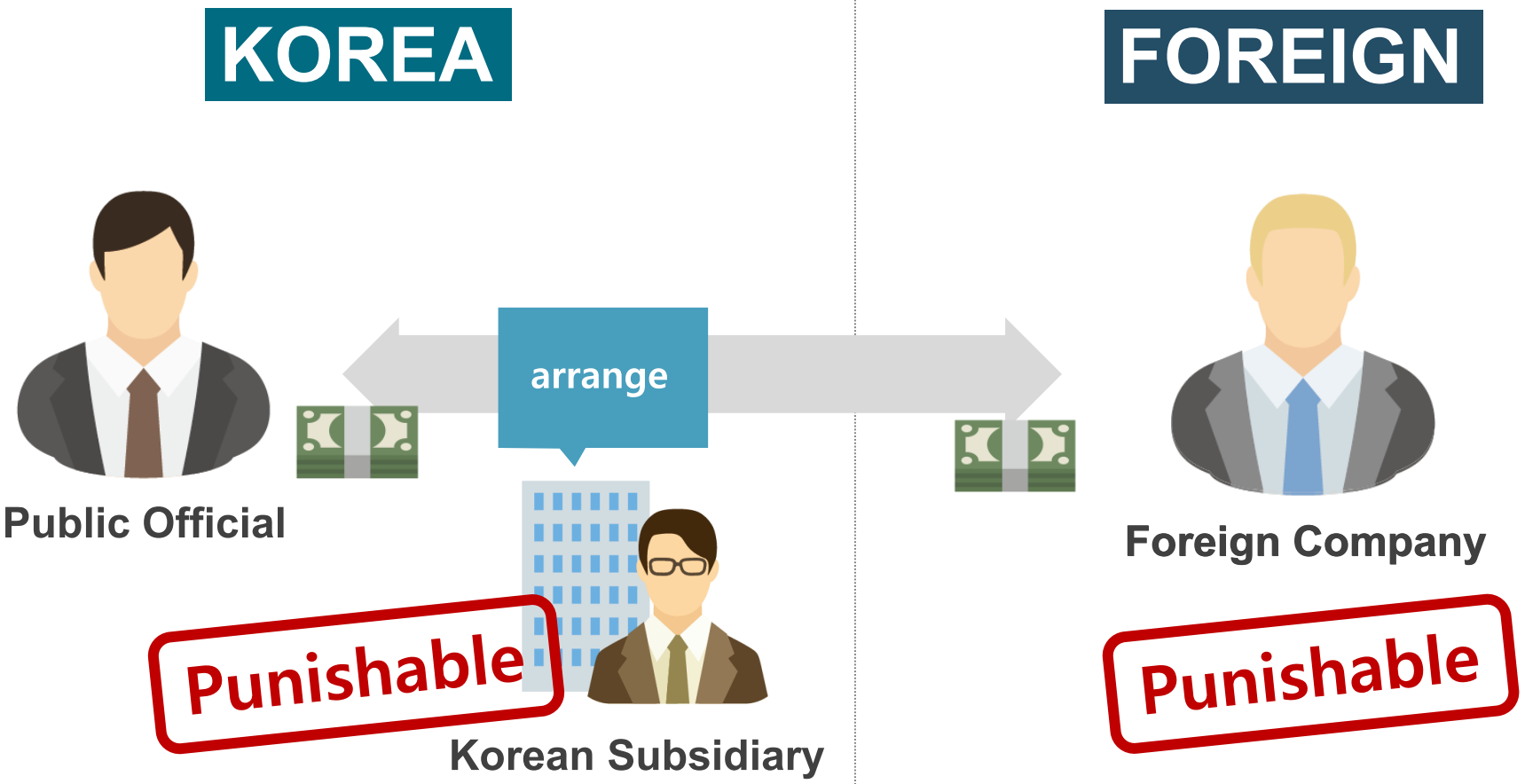
FOREIGN

Korean Embassy

Applicable

Foreign Company

Trans-border Application

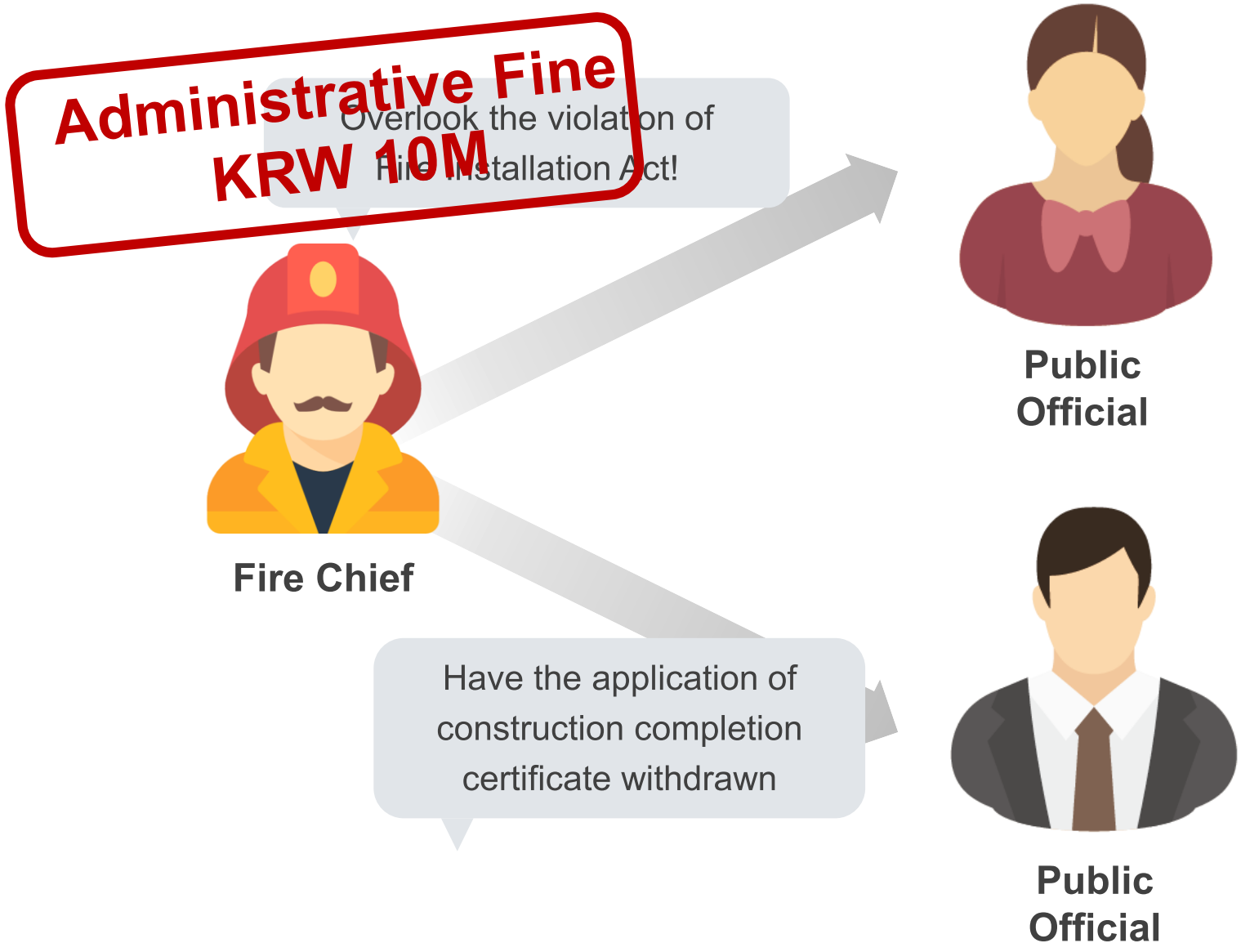


Improper Requests

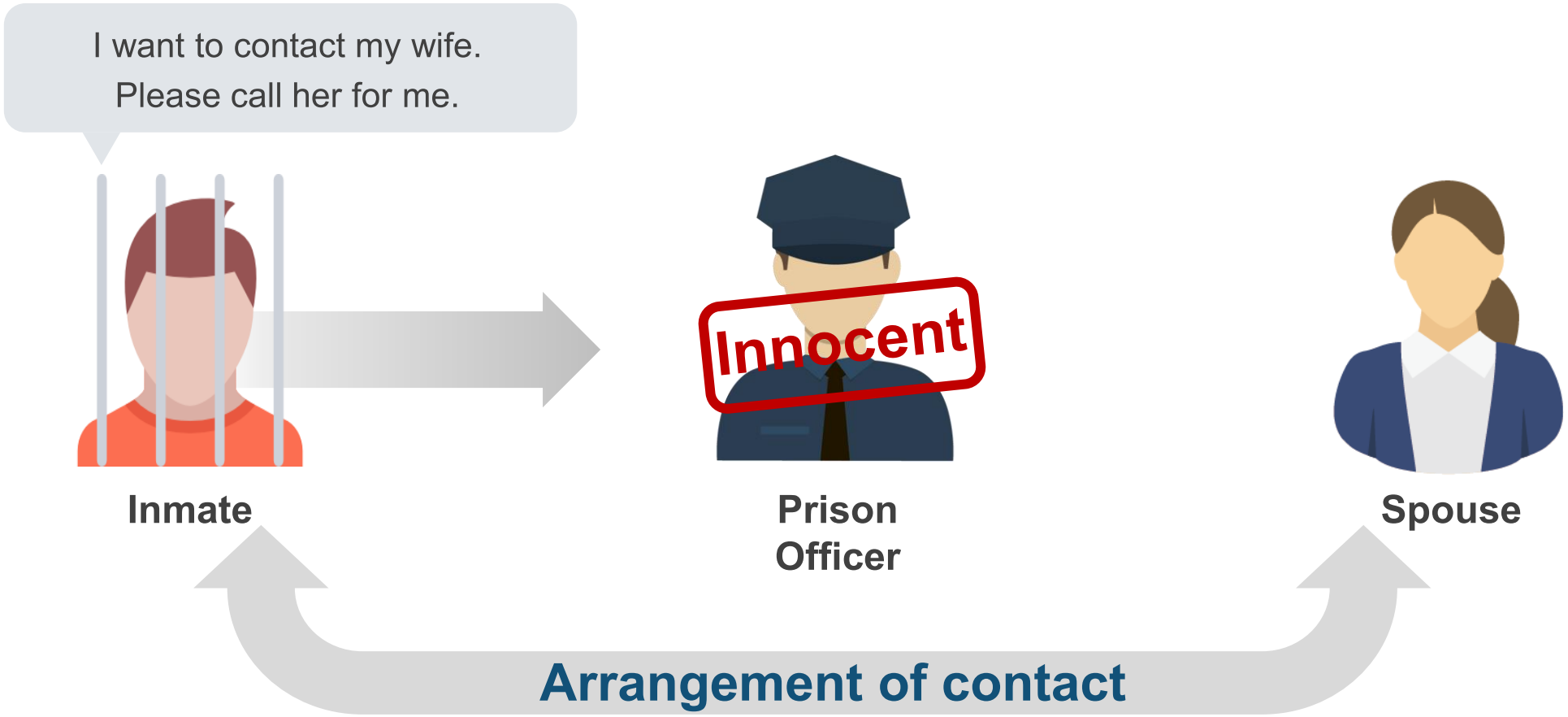
Accepting	Requesting
Who: • Public Officials	***Who:*** • By anyone in Korea or Korean nationals; • Directly or via a Third Person
What: • Perform Duty Pursuant to Improper Requests	***What:*** • Make Improper Requests – 15 Types

15 types of Improper Requests & 7 Exceptions

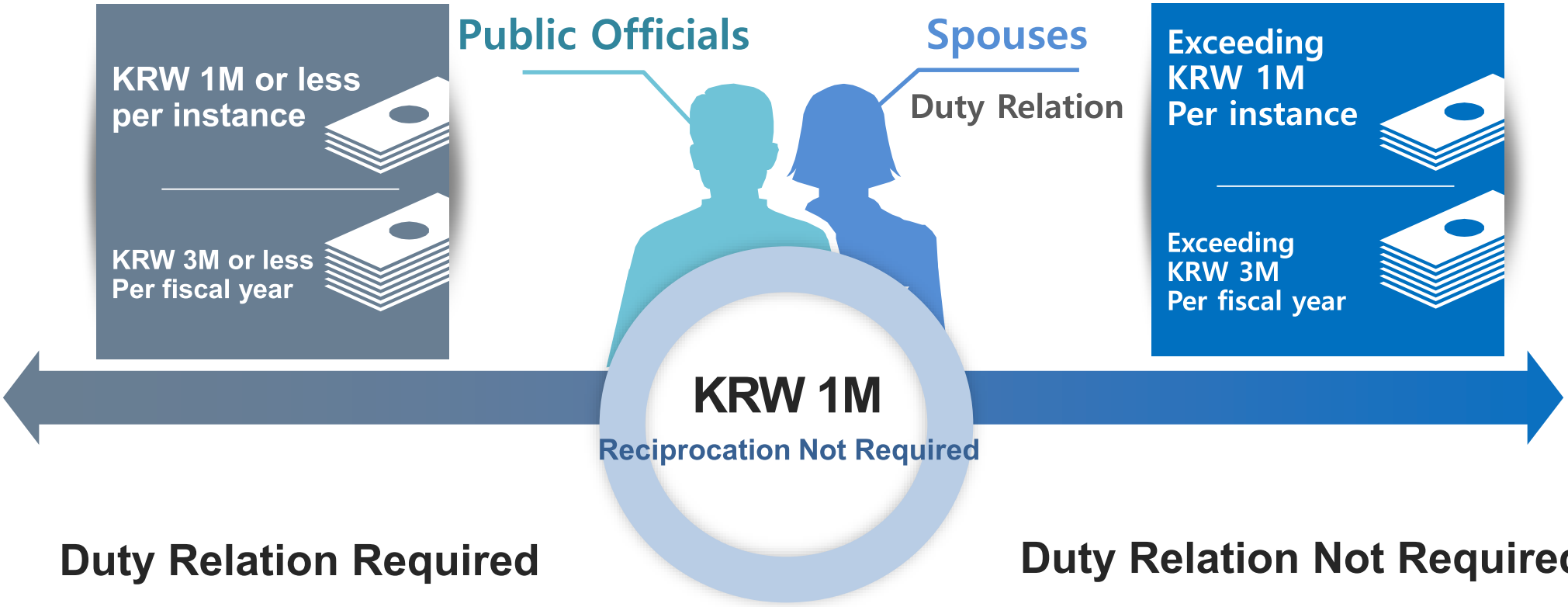
[Case] Fire Chief's Order of Connivance & Withdrawal



[Case] Prison Officer's arranging contact b/w inmate and his wife



Money, Valuables or Benefits



Duty Relation Required
(administrative fine)

Duty Relation Not Required
(criminal penalty)

Money, Valuables or Benefits

9 Exceptions:	
1	Award, Encouragement, Condolence within Public Institution
2	Food, Gifts and Offerings (Congratulatory or Condolence) for Smooth Conduct of Work, Socializing, Social Gesture, Congratulatory/Condolence Offerings Limits: Food (KRW 30K), Gift (KRW 50K), Offering (KRW 50K)
3	Pursuant to Legitimate Right or Cause e.g., paying off debt, getting paid for work, insurance proceeds, etc.
4	Between Relatives – "Within Certain Family Tree Range"
5	Religious, Social, Alumni, or Private Associations to which a Public Official is a member; and in accordance with set standards, or Based on long term relationship to assist with hardship (e.g., disease, disaster)
6	Travel, Accommodation, Food, and Other Benefits - Uniformly Provided at an Official Event within Ordinary Range to participants
7	Memorabilia, Promotional Materials, Etc., Offered to the General Public; Award or Prize from Contest or Lottery
8	Others permitted under any law, standard or social norms
9	Compensation for lectures, seminar, contributed writings Limits: KRW 200K to KRW 1M per hour or case (depending on ranks/type of public officials)

Recent Amendment on monetary threshold for gifts and congratulatory or condolence money

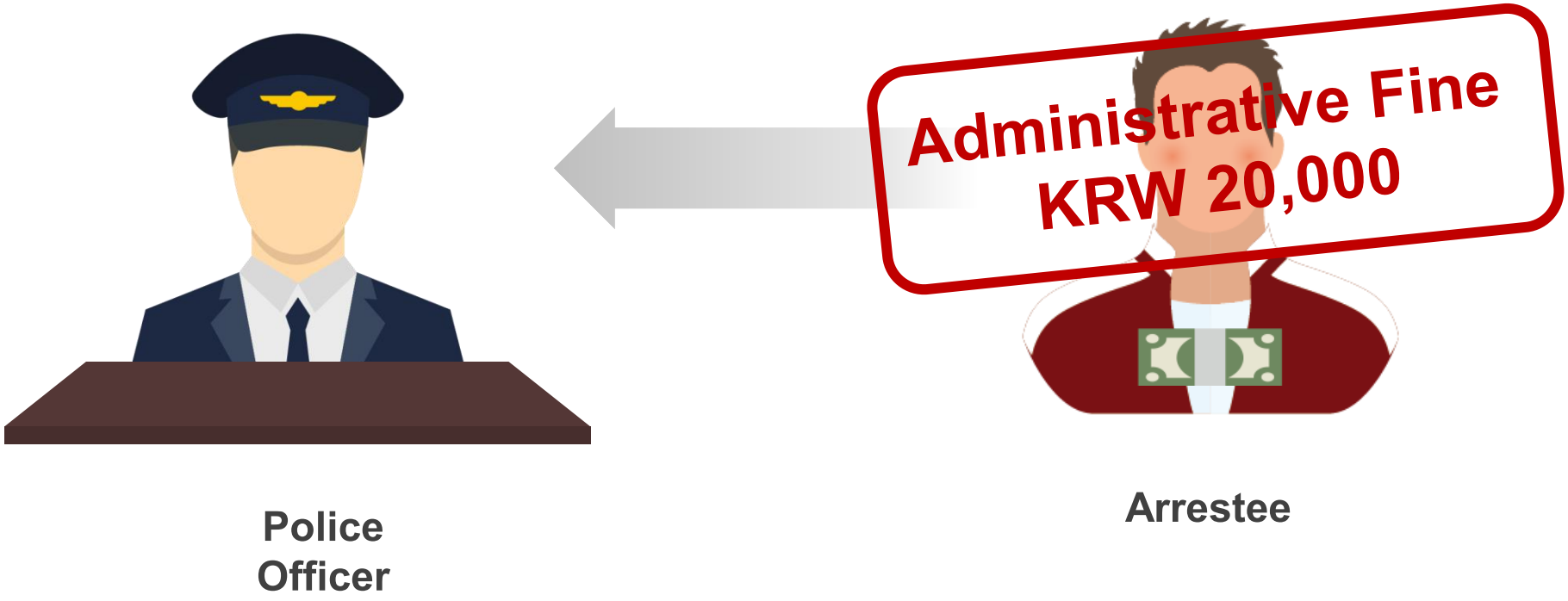
	Previous (3·5·10)	Now (3·5·5)
Food & Drink	KRW 30,000	KRW 30,000
Gifts	KRW 50,000	KRW 50,000 (KRW 100,000 for agricultural products and processed goods)
Congratulatory or condolence money	KRW 100,000	**KRW 50,000** (KRW 100,000 for wreath & condolence flowers)

[Case] KRW 1M to Police Officer

Police Officer

Arrestee

[Case] KRW 10,000 to Police Officer



[Case] Gift of Agricultural Product

[Case] Payment of Golf Fee

Payment of Golf Fee (KRW 250,000)

Traffic Impact Assessment Company

Ex-Public Official of Construction/Traffic Department

[Case] Payment of Meal

Payment of Meal
(KRW 28,000)

Attorney-at-law
in District A

Judge
in District A

Money, Valuables or Benefits

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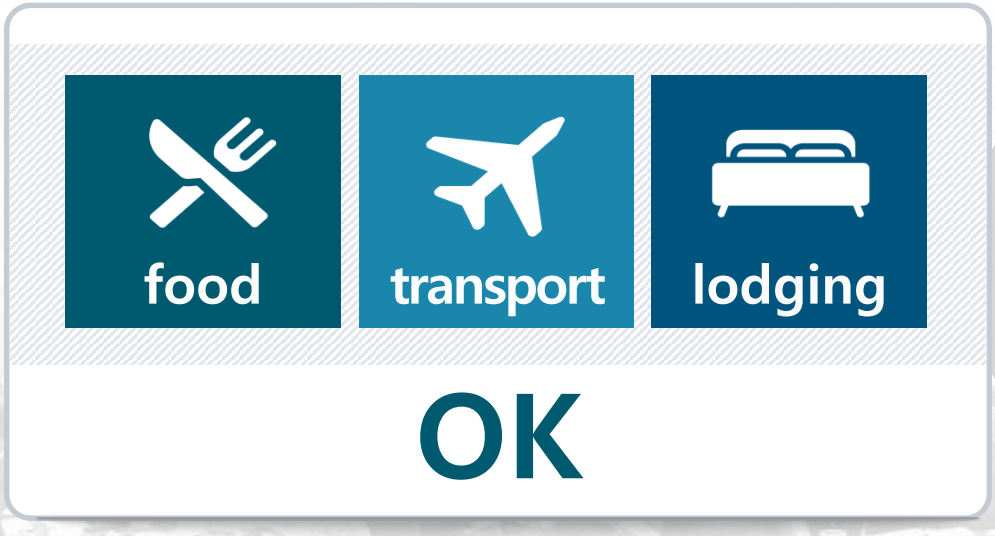
8	Others permitted under any law, standard or social norms
9	Compensation for lectures, seminar, contributed writings Limits: KRW 400K to KRW 1M per hour or case (depending on ranks/type of public officials)

Recent ACRC Guideline on Official Event

food, transportation and lodging provided to press at official PR event



"No Preferential Treatment"

- Participant
- Benefit

[Case] Movie Seminar

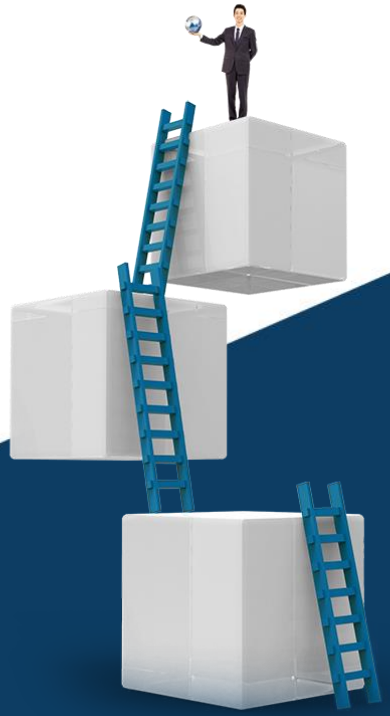
Public Officials

Movie (KRW 20,000)
Meal (KRW 30,000)

IT Company

BAE, KIM & LEE LLC

Thank you



ALSTON & BIRD

Investor-State Disputes Under KORUS Chapter 11

Carlos Ramos-Mrosovsky
April 22, 2018

Introduction

- Trade and investment go hand-in-hand
- What do recent events in the bilateral economic relationship between U.S. and Korea mean for Chapter 11 of KORUS?
- What is the significance of Chapter 11 of KORUS for Korean investors in the U.S.?

KORUS Chapter 11 establishes reciprocal protections for U.S. and Korean investors

- National Treatment (Art. 11.3)
- Most-Favored Nation Treatment (Art. 11.4)
- Minimum Standard of Treatment (Art. 11.5)
- Protection against Expropriation (Art. 11.6)
- Protection against Performance Requirements (Art. 11.8)

KORUS Chapter 11 protections are enforceable through investor-state arbitration

- Consent of the United States and Korea to arbitrate disputes arising under KORUS Chapter 11 with one another's investors (Art. 11.17)
- Arbitration to be final and binding, presumably before World Bank's International Centre for Settlement of Investment Disputes (ICSID)
  - Tribunal of 3 arbitrators, one arbitrator appointed by each of the disputing parties and the presiding arbitrator, appointed by agreement of the disputing parties (Art. 11.19)
  - Award enforceable in the courts of any ICSID Member State as though it were a final judgment of that State's courts (ICSID Convention Art. 54)

KORUS renegotiation: implications for Chapter 11

- President Trump denounced a “horrible deal” in April of 2017
- “Agreement in Principle” on KORUS renegotiations announced by U.S. and Korean negotiators on March 28, 2018
  - Among other changes, “agreement in Principle” reportedly contains revisions to Chapter 11 intended to help prevent “abuse” of the arbitration system and better protect the “right to regulate”
  - *Will the U.S. and Korea retreat from their earlier commitment to investor-state arbitration?*
- Negotiations are ongoing

KORUS renegotiation: U.S. attitude toward Chapter 11

- Current U.S. administration may be less committed to investment protection than predecessors
- U.S. recently proposed to strip investor-state arbitration provisions from NAFTA, resisted by Canada and Mexico
- In testimony to U.S. Congress, U.S. Trade Representative Lighthizer recently dismissed investor-state arbitration "as the United States ceding sovereignty in order to encourage people to outsource jobs"

KORUS renegotiation: Korean concerns about Chapter 11

- Chapter 11 highly controversial in Korea during original negotiation of KORUS, prompting prolonged debate over ratification
  - Infringement on sovereignty
  - "Special rights" for foreign corporations?
  - Regulatory chill?
  - Perceived lack of "transparency"
  - Disproportionate benefit to U.S. investors?
- Chapter 11 may be perceived as an area where Korea feels able to "push back" in renegotiation with U.S.
  - *To what extent is this in Korea's interests?*

KORUS renegotiation: specific concerns addressed

- Sovereignty – identical consent to arbitration by U.S. and Korea
- Effect on regulation – Chapter 11 contains provisions protecting both government's "right to regulate"
- "Special rights" for foreign corporations – Chapter 11 provides same rights to U.S. and Korean investors in either country
- Transparency? – Chapter 11 provides for public hearings and amicus participation

KORUS renegotiation: economic context

- Korea is a net exporter of capital to the United States
  - Korean companies employ more than 75,000 Americans,
  - Korean direct investment into the U.S. in 2016 (US $60 bn) was roughly **double** U.S. direct investment into Korea (US$ 31 bn) according to the IMF
- Korean investment in the U.S. has doubled since KORUS

KORUS renegotiation: do Korean investors need Chapter 11's protections?

- Chapter 11 is designed to protect investors from political risk.
- Korean investors in the U.S. likely now face increased political risk:
  - Protectionist measures may unfairly advantage U.S. competitors
  - "captive" investors may be subjected to measures designed to extract concessions on trade in goods
  - Danger of adverse policy swings that disrupt investment-backed expectations (e.g., non-renewal of steel tariff exemption, performance requirements)
  - There is no real knowing when or how "renegotiations" may end.
- Korean investors should be mindful of their rights under Chapter 11.

THANK YOU

Trump Administration's Trade Policy and Korea

April 2018

KIM & CHANG

CONTENTS

Trump Trade Policies

Trade Policy under Trump

- Key Personnel: “Trade hawks”
  - Robert Lighthizer (USTR)
  - Peter Navarro (Director, White House National Trade Council)
  - Wilbur Ross (Commerce)
  - Steve Mnuchin (Treasury)

- 5 Major Pillars of Trump Trade Policy (2018 President’s Trade Policy Agenda)
  - Supporting the US National Security
  - Strengthening the US Economy
  - Negotiating Better Trade Deals
  - Aggressively Enforcing US Trade Laws
  - Reforming the World Trade Organization

Key Trade Measures under the Trump Administration

- Measures against China
  - Technology Transfer: Section 301 Investigation and the resulting tariffs
    - Tariffs over $5B on China's technology goods
    - Investment restriction
    - WTO complaint
  - National Security: Section 232 tariffs on steel and aluminum
  - Series of "Threats" to impose tariffs

➔ China is also retaliating: Tit-for-tat trade tension ongoing

- Renegotiation of Trade Agreements: NAFTA, KORUS, etc.

- Strengthening Trade Remedies: AFA, PMS, etc.

Section 232 Tariffs

- The most visible example of Trump's trade policy
  - Tax rate: 25% (steel); 10% (aluminum) ad valorem
  - Rationale: National security (critical infrastructure and weapons production)
  - "Temporary" Country exemption (until May 1): Canada, Mexico (NAFTA members), EU Member States, Korea, Argentina, Australia, Brazil
    - The US agreed to maintain the country exemption for Korea in return for steel import quota
- Challenges before the WTO
  - China filed consultation request on April 5, 2018. (WT/DS544)
  - Legal basis
    - Articles XIX:1(a), XIX:2 of the GATT 1994 and Articles 2.1, 2.2, 4.1, 4.2, 5.1, 7, 11.1(a), 12.1, 12.2 and 12.3 of the Agreement on Safeguards (No explanation of the requirements to impose safeguards)
    - Article II:1(a) and (b) of the GATT 1994 (Violation of the US Schedule of Concessions)
    - Article I:1 of the GATT 1994 (MFN)
    - Article X:3(a) of the GATT 1994 (Failure to administer the laws and decisions in a uniform, impartial and reasonable manner)
  - Can the measure constitute "Safeguard"? That is a question.

II. KORUS Renegotiations

KORUS FTA Renegotiation – Timeline and Goal

- Timeline of Negotiation
  - Mar 15, 2012: Entry into force of the KORUS FTA
  - July 2017: USTR called for a special session to “rebalance” the KORUS FTA
  - March 28, 2018: An agreement in principle was announced
  - May 1: Expected date of disclosure of final text

- Goal of the Negotiation
  - United States
    - Low expectation: No TPA → the US wanted to make a “workable” agreement.
  - Korea
    - Redline: Agriculture!
    - Auto: Willing to bargain

Korus FTA Renegotiation – Results on Automobiles

- Auto
  - Double annual number of American automobiles – from 25,000 to 50,000 per manufacturer per year – that can enter its market using U.S. safety standards.
  - Environment and emissions standards
    - U.S. gasoline engine vehicle exports will be able to show compliance with Korea's emission standards as long as they use the same tests they conduct to show compliance with U.S. regulations.
    - Recognition of U.S. Standards for Auto Parts: Korea will recognize U.S. standards for auto parts necessary to service U.S. vehicles, and reduce labeling burdens for parts.
    - Improvements to CAFE Standards: Korea will expand the amount of "eco-credits" available to help meet fuel economy and greenhouse gas requirements under the regulations currently in force, while also ensuring that fuel economy targets in future regulations will take U.S. regulations into account and will continue to include more lenient targets for small volume manufacturers.
  - Customs duty on pickup trucks: South Korea will extend the phase out of the 25 percent U.S. tariff on trucks until 2041

KORUS Renegotiation in Other Issues / 2018 NTE Report

- Regulatory issues
  - Customs procedures
    - Korea will address long-standing concerns with origin verification procedures.
    - Korea and the US will establish a working group to monitor and address future issues.
  - Pharmaceuticals: Korea will amend its Premium Pricing Policy for Global Innovative Drugs to make it consistent with Korea's commitments under KORUS

- 2018 NTE Report
  - Although the report was positive about the KORUS renegotiation, there are other issues in the report
    - SPS Issues: bans on apple and pears
    - Digital trade: USTR pointed out that Korea is the only market which restricts the export of location-based data for national security reasons.
    - Other barriers for motor vehicles: Repair history reporting, amber turn signal lights, etc.

III. Issues Ahead

US and Korea's Role in the WTO System

- WTO on the brink?
  - USTR still recognizes the WTO as a forum for negotiation and dispute settlement
  - However, there is a precondition: "Reform" the system, but how?

- Things to do
  - Resolving Crisis in the Appellate Body: Only 3 Members with huge workload and case backlogs…
  - The world still hopes for the US' leadership in the WTO system
    - Trade war and inward-looking politics play only negative forces
  - Korea: May play "balancing" role between developing and developed States

Joining TPP

- US side
  - Initially, Trump denounced TPP as “rape to the country”
  - However, US realized that TPP may be useful to align the allies against China
  - Farm states also support TPP
  - But, will other TPP parties agree with additional concession to the US? That is the question….
- Korea side
  - Initially, Korea was not very interested in TPP
  - However, after signature of CPTPP, Korean government plans to start negotiation in early 2018
  - But, what are the prices to join? Depends on the bilateral deals with the CPTPP members

Korean Domestic Procedure to negotiate and Implement Trade Agreements

- ACT ON THE CONCLUSION PROCEDURE AND IMPLEMENTATION OF COMMERCIAL TREATIES
  - "Commerce treaty": any treaty subject to consent of the National Assembly… whose purpose is to opening to overseas markets.
  - National Assembly's Control
    - Request to receive reports/documents on ongoing commerce treaty negotiations or commercial treaties
    - Government must set up plans to conclude a commerce treaty and report to the Parliament
    - Government must report to the National Assembly if there is major change in existing treaty
    - Once the Government signs a commerce treaty, the MOTIE must report to the National Assembly
  - Accepting Stakeholder Inputs
    - Information disclosure obligation: Imposes FOIA obligation on trade agreement negotiation
    - Government must organize public hearings/consultation for commerce treaties
  - Regular evaluation and reporting of the status of implementation of the Commerce treaties for 10 years after conclusion

➔ "Democratic" control over the trade agreement negotiation

Thank you

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