

Trump's Tariff Wars and National Security: A Political and Historical Perspective*

Stuart S. Malawer**

With President Trump's recent imposition of USD 34 billion in new tariffs on imports from China and China's prompt retaliation, the US is now in its biggest trade war with China and other countries since the 1930s. President Trump's policies focusing on threats, trade deficits and bilateral trade, as well as the movement away from the postwar international system, have been historical aberrations since 1945. The US trade diplomacy ought to concentrate on building coalitions and viable proposals for addressing trade issues, including those concerning the World Trade Organization rule-making and dispute resolution. This would help to ensure a rules-based trading system.

Keywords: Trump's Tariffs, US-China Trade War, Trade and National Security, Article XXI, WTO Security Exception, Section 232 of Trade Expansion Act, Section 301 of Tariff Act

* An earlier version of this essay appeared as Trump's Trade Policies-A Broad Perspective, 4 NEW YORK LAW JOURNAL, July 5, 2018, available at <https://www.law.com/newyorklawjournal/2018/07/05/070618malawer> (last visited on July 9, 2018).

** Distinguished Service Professor of Law and International Trade at George Mason University's Schar School of Policy and Government. J.D. (Cornell), M.A./Ph.D.(UPenn), Diploma (Hague Academy of International Law). ORCID: <http://orcid.org/0000-0003-1304-5710>. He is a former member of the board of directors of the Virginia Economic Development Partnership and a recent Virginia gubernatorial appointee to its new Committee on International Trade. The author may be contacted at: StuartMalawer@msn.com; <http://www.GlobalTradeRelations.net> / Address: 3351 Fairfax Dr., MS 3B1, Arlington, Virginia 22201 USA.

1. Trump's Tariffs Onslaught

As President Trump recently imposed USD 34 billion in new tariffs on imports from China and China took prompt retaliation against them, the US is now in its biggest trade war with China and other countries since the 1930s.¹

The Trump administration previously imposed tariffs on washing machines, solar energy cells, aluminum and steel.² The president threatened to impose an additional USD 200 billion of new tariffs on China³ and threatened two days later to impose tariffs on as much of USD 500 billion of Chinese imports.⁴ He then proclaimed to increase the rate of the proposed tariffs. Yet even newer global tariffs have been threatened on automobiles and uranium imports. China has filed a novel World Trade Organization (“WTO”) complaint against the US without waiting for the imposition of the threatened tariffs.⁵ President Trump's actions escalate the tariff war with the grave possibility of expanding into other areas of trade, investment and international relations.

Trump has ended the phony war with China (or, as the Germans called the first eight months of World War II, the *sitzkrieg*) with his recent actions. He has finally started a real trade war. In the 1940s, both sides thought the war would be short. Of course, it was not, but horrendous and spanned continents, involving millions of people.

This trade war is already a tariff onslaught against not just China but a broad range of others, including the European Union (“EU”), Canada and Mexico. It is unlike earlier trade disputes under the General Agreement on Tariffs and Trade (“GATT”) and the WTO. An attack by the US, relying on national security rationale and the resurrection of trade retaliation, is aimed at restructuring the rules and institutions of the post-Cold War world of G2. While ostensibly addressing bilateral trade deficits and intellectual property rights, among other issues, Trump's trade war is intended to protect legacy industries.

Fortunately, not much actual impact on trade has been made except for some on the American agricultural exports and minimal increases in some domestic prices. The recent Yuan devaluation as well as the dollar's role as the major world currency have kept the US price increases limited. Only nascent opposition to Trump's trade actions by his supporters and by Republicans in Congress, as well as some newer opposition from the US Chamber of Commerce and the Koch

brothers have recently emerged.

2. Three Critics

At this point, taking a step back to assess Trump's tariff and trade policies from a broad historical and political perspective is a worthwhile and necessary undertaking. Fortunately, three books were published recently that help with this broad assessment. An economist, a historian, and a foreign policy expert wrote these books. Although they do not address Trump's policies directly, these works provide the broad context for where his policies fit into the US political and international history. This fit is not good.

These books are particularly important for the many lawyers serving in the trade offices throughout the federal government. They are especially informative for those from private practices who view trade primarily through the lens of industries impacted by imports. American lawyers populate almost all of the important trade policy positions, as the Office of the United States Trade Representative ("USTR")'s policy includes a great deal more than just narrow private and domestic interests. It increasingly includes the critical issues of foreign policy and national security.

In *CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY* (2017),⁶ economist Douglas Irwin makes the following three observations. First, the three main purposes of the US trade policy have historically been the three Rs: Revenue, Restrictions, and Reciprocity. The US first collected tariffs historically to increase national revenue. It then restricted imports with tariffs to help domestic industries before moving on to reciprocity as the basis of the modern trading system, as embodied in the GATT and the WTO. Second, tariff policy has always been the result of clashing economic interests, such as between manufacturers and consumers. Third, changes in trade and tariff policies have resulted from two great historical events: the American Civil War and the Great Depression. Irwin leaves an open question about whether President Trump's election will be another turning point in US trade policy.⁷

In *THE SOUL OF AMERICA* (2018),⁸ presidential historian Jon Meacham traces the various difficult aspects of the US history from slavery to the Civil War,

Reconstruction, Jim Crow laws, the Red Scare and the revival of the Ku Klux Klan of the 1920s, the internment of Japanese-Americans during World War II, McCarthyism of the 1950s and the ‘massive resistance’ throughout the 1960s. His thesis is simple: Bad things have happened in the US history, and combatting them is a constant. Retroactive forces are always present. However, the US has generally moved forward and has produced a better nation.⁹ Jon Meacham is not optimistic about whether President Trump can rise to the occasion of confronting the challenges facing the US this decade, but leaves the question open. He concludes his study by stating that understanding the past can be orienting.¹⁰

In *A WORLD IN DISARRAY* (2017),¹¹ foreign policy expert Richard Haas examines the domestic and international forces at work today and concludes that long-standing, deep divisions exist in the US and globally. These have resulted in part from globalization and rapid technological developments.

These divisions in the US, including cultural conflict, economic inequalities and immigration control, have been exacerbated by slow economic growth in the US and abroad since the Great Recession of 2008. Governments have simply not formulated effective domestic policies with which to address the economic and social consequences of this new era. Populism and nationalism have only increased. Haas argues that a new World Order 2.0 needs to be developed, taking into account a broad range of new forces and challenges. He also argues that frequent reversals of the US foreign policy are simply not helpful.¹²

These authors noted to varying degrees the long history of the delegation of congressional trade authority to the president and the growth of executive authority in foreign affairs.¹³ These developments simply cannot be understated. They need to be emphasized again. As trade and national security have grown in importance as domestic issues, President Trump has increasingly relied on both the broad delegation of trade authority and the past expansion of presidential authority in foreign affairs. His ever-growing reliance on national security as a rationale for trade actions is unprecedented.

3. US Section 232 Tariffs for National Security

The president’s reliance on Section 232 of the Trade Expansion Act and its

authorization for trade actions based on national security (aluminum and steel) has already been attacked in the WTO and the federal courts. Complainants in the WTO, including the EU, China,¹⁴ India, Canada, Mexico and most recently Russia,¹⁵ rely on Article XXI. They argue that US actions do not qualify as valid national security actions under global trade law. Even Switzerland has filed a rare WTO challenge.¹⁶ These countries contend that those actions are just a subterfuge for protectionist measures. The US has filed a bizarre WTO case contending that five of these countries have violated trade rules by retaliation against the US 232 tariffs.¹⁷ New domestic litigation filed in the US Court of International Trade in New York contends that the broad congressional delegation of trade authority to the president under Section 232 is unconstitutional.¹⁸ It contends that Congress has delegated away its legislative function by not establishing sufficient criteria for executive action. In fact, Congress is currently considering restricting the president's authority relying on Section 232.¹⁹

The president's request to broaden the coverage of the Committee on Foreign Investment in the US is being considered by Congress.²⁰ His frequent calls for action are unsettling under other US legislation authorizing presidential actions based on national emergencies (*e.g.*, the International Emergency Economic Powers Act as a basis for restricting foreign direct investment in the US)²¹ and export controls for regulating outward investment and technology transactions.²² This is inconsistent with the US demands for greater investment liberalization in China.

The president's reliance on unilateral retaliation concerning China's intellectual property policies (Section 301 of the Tariff Act of 1974)²³ and his recent request for new auto tariffs on national security grounds (Section 232 again) only add more fuel to the fire regarding Trump's tariff threats, professing reliance on national security, regardless of the reality.²⁴ His threats have continued by opening a new investigation concerning uranium imports under Section 232.²⁵ The use of tariffs to confront intellectual property practices is not a meaningful strategy. Section 232 was part of the broader legislation of 1962 that was intended to promote trade expansion, not retaliation. Trump's reliance on national security to impose tariffs, in fact, endangers real American national security interests. Trump's view of geopolitics as being analogous to real estate negotiations is quite unnerving. His ignorance of the global trading system and global supply chains is

astounding.

Today, only the federal courts can effectively check presidential actions. Congress has proved to be ineffective in providing oversight.²⁶ However, even the last resort of judicial review may prove ineffective. Although cases have looked through a president's claims of national security, others have upheld such claims. For example, take a look at the recent Supreme Court case upholding President Trump's immigration ban focused primarily on Muslims!²⁷ The majority of the court refused to look beyond the broad statutory language and the Trump administration's reliance on national security despite the president's many derogatory remarks concerning Muslims. The possible appointment of a new associate justice of the Supreme Court at this time raises even more concerns.²⁸

4. Multilateralism

Let's recall some of President Trump's actions relating to treaties and multilateral arrangements. He withdrew from the Trans-Pacific Partnership Agreement ("TPP"), the Paris Climate Accord, the Iran nuclear deal and the United Nations Human Rights Council. Further, Trump is renegotiating the North American Free Trade Agreement and is battering the WTO almost daily, especially its dispute resolution system, even though the US continues to win cases at the WTO.²⁹ The president has not offered any coherent proposals addressing newer issues of trade. Trump appears to be on the verge of quitting the WTO by proposing legislation to accomplish this.³⁰ President Trump even threatens our allies, including South Korea, Canada, Germany, the UK and the EU, almost daily over tariff issues. He threatens the NATO over illusory issues, as well.³¹ He reimposed broad economic sanctions on Iran in an apparent violation of international law, as the EU claims, and new sanctions on Russia, Venezuela, and Turkey. (Turkey just filed a new WTO case against the US contesting the validity of new tariffs on Turkish steel under Section 232 and its new security rationale.)

President Trump doubled down when he promised payments to the American farmers hurt by the retaliatory tariffs. Such payments would be illegal under WTO subsidy rules and would further damage the trading system. American and foreign firms in the US have begun to make plans to produce abroad to avoid retaliatory

tariffs.³² This despite the new tax legislation intended to foster greater domestic and international production within the US. The president has extended his threats recently to even deny eligibility for tariff reductions to developing countries under the Generalized System of Preferences (“GSP”). The president’s tariff threats and bullying have brought the international trading system to the verge of a trade war.³³ Under Article 52 of the Vienna Convention on the Law of Treaties, which is incorporated into the WTO law by Article 3 of the Dispute Settlement Understanding, duress and coercion is simply impermissible in treaty relations. Agreements resulting from illegal duress are void. Bullying led to the Opium Wars in the nineteenth century. Chinese resentment continues into this century. Duress in trade and treaty relations are simply not permissible today.

“These are dark days for the global trading system.”³⁴ The US delegation even refused to go along with the World Health Organization’s code on marketing breast milk, threatening other members and overturning nearly 40 years of consensus.³⁵ The president’s preference for bilateral deals and use of the US leverage are ominous.

So, what can be said about President Trump’s mercantilist and protectionist trade and tariff policies so far when placed in this broader political ecosystem of the US and international history?

5. Conclusion

My conclusion is simple. President Trump’s policies focusing on threats, trade deficits and bilateral trade, as well as the movement away from the postwar international system, have been historical aberrations since 1945. President Trump’s tariff tirade is theater, not policy. So far, President Trump has only accomplished a two-front trade war with the EU and China with local hostilities involving Canada and Mexico. His baseless attacks and contempt for rules and institutions simply do not inspire confidence. Trump’s attack on the WTO as well as his reliance on national security and unilateral retaliation are most regrettable.³⁶ It is China that has utilized the WTO’s dispute resolution system aggressively, not the US during the Trump years. (For example, China has just filed two new WTO cases against the US concerning safeguard duties on solar cells and state investment incentives

for domestic energy production.) Not only is global trade at risk, but also is the rule of law in trade relations.³⁷ Even the Iranian government has recently resorted to litigating differences over trade sanctions by filing an action against the US in the International Court of Justice.³⁸

The US trade diplomacy ought to concentrate on building coalitions and viable proposals to address trade issues, including those concerning the WTO rule-making and dispute resolution. This would help to ensure a rules-based trading system.³⁹

It is important to be careful. The president's actions are rooted in the clash of competing domestic interests, going back to the founding of the US. These may very well take hold for the remainder of his term and perhaps beyond. Destructive forces are always lurking below the surface. Even though things have been somewhat stable for the past 75 years, it does not mean they will remain so. It will require very hard and serious work by the US and foreign leaders to help to ensure a future in which we have not failed in overcoming our historical challenges.

As one final historical note, the Confederate forces fired the first shots of the American Civil War when they bombarded Fort Sumter on April 12, 1861. There were actually no fatalities during this battle. Each side thought the war was to be short. Four years later in April 1865, almost 620,000 American soldiers were dead, which is more US deaths than in all of the American wars fought over two centuries up through the Vietnam War. Wars, military and trade are unpredictable and usually very costly.

REFERENCES

1. H. Lockett, *US Imposes Tariffs of \$34bn of Imports from China*, FIN. TIMES, July 6, 2018, available at <https://www.ft.com/content/b77361c8-80b3-11e8-bc55-50daf11b720d>. See also A. Swanson, *Trump's Trade War with China is Officially Underway*, N.Y. TIMES, July 5, 2018, available at https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html?emc=edit_na_20180706&nl=breaking-news&nid=1146225ing-news&ref=cta (all last visited on Aug. 7, 2018).
2. Q. Bui & N. Irwin, *How Much Will the Trade War Cost a Typical American Family? Around \$60 (So Far)*, N. Y. TIMES, July 13, 2018, available at <https://www.nytimes.com/interactive/2018/07/12/upshot/trade-war-cost-families.html> (last visited on July 13, 2018).

3. A. Swanson & J. Tankersley, *U.S. Threatens Tariffs on \$200 Billion of Chinese Goods, From Tilapia to Handbags*, N. Y. TIMES, July 11, 2018, available at <https://www.nytimes.com/2018/07/10/us/politics/trump-china-trade-war.html> (last visited on July 12, 2018).
4. N. Timiraos & H. Torry, *Trump Continues Criticism of Fed, Renews Threat on China Imports*, WALL ST. J., July 20, 2018, available at <https://www.wsj.com/articles/trump-says-hes-ready-to-impose-tariffs-on-500-billion-in-chinese-imports-1532085168> (last visited on Aug. 7, 2018).
5. Lily Kuo, *China Files Complaint to WTO over Trump's \$200bn Tariff Plan*, GUARDIAN, July 16, 2018, available at <https://www.theguardian.com/business/2018/jul/16/china-files-complaint-to-wto-over-trump-tariff-plan> (last visited on July 21, 2018).
6. D. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY (2017).
7. *Id.* at 687.
8. *See generally* J. MEACHAM, THE SOUL OF AMERICA—THE BATTLE FOR OUR BETTER ANGELS (2018).
9. *Id.* at 28.
10. *Id.* at 439.
11. *See generally* R. HAAS, A WORLD IN DISARRAY: AMERICAN FOREIGN POLICY AND THE CRISIS OF THE OLD ORDER (2017).
12. *Id.* at 306.
13. *See Congress vs. Trump on Tariffs*, WALL ST. J. (Editorial), June 28, 2018, available at <https://www.wsj.com/articles/congress-vs-trump-on-tariffs-1528414368> (last visited on July 1, 2018).
14. *See* China initiates WTO dispute complaint against US tariffs on steel, aluminum products, WTO News, Apr. 9, 2018, available at https://www.wto.org/english/news_e/news18_e/ds544rfc_09apr18_e.htm (last visited on July 1, 2018).
15. *See* Russia Initiates WTO dispute complaint against US steel, aluminium duties, WTO News, July 2, 2018, available at https://www.wto.org/english/news_e/news18_e/ds554rfc_02jul18_e.htm (last visited on July 2, 2018).
16. *See* Switzerland initiates WTO dispute complaint against US steel, aluminium duties, WTO News, July 12, 2018, available at https://www.wto.org/english/news_e/news18_e/ds556rfc_12jul18_e.htm (last visited on July 12, 2018).
17. *See* United States initiates dispute complaints against five members over duties on US products, WTO News, July 19, 2018, available at https://www.wto.org/english/news_e/news18_e/ds557_to_561rfc_19jul18_e.htm (last visited on July 21, 2018).
18. American Institute for International Steel, Inc., et al v. United States, et al. (U.S. Court of International Trade) (Case # 18-00151 filed June 27, 2018), available at http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED_June_27_AIIS_-_Plaintiffs-Complaint.pdf (last visited on July 1, 2018).
19. *See* Portman to Introduce Bill Aimed at ‘Reforming’ Section 232 Statute, World Trade

- Online, July 12, 2018, available at <https://insidetrade.com/daily-news/portman-introduce-bill-aimed-%E2%80%98reforming%E2%80%99-section-232-statute> (last visited on July 12, 2018).
20. Reuters, *Trump Signs Defense Policy Bill With Watered-Down China Meas*, N.Y. TIMES, Aug. 13, 2018, available at <https://www.nytimes.com/reuters/2018/08/13/world/asia/13reuters-usa-trump.html> (last visited on Aug. 15, 2018).
 21. S. Donnan, *Trump Targets Investments as Trade War Heats Up*, FIN. TIMES, June 25, 2018, available at <https://www.ft.com/content/c002dad6-766b-11e8-b326-75a27d27ea5f> (last visited on July 2, 2018).
 22. *See Trump's Bizarre U-Turn on Sanctions against ZTE*, FIN. TIMES (Editorial), May 15, 2018, available at <https://www.ft.com/content/55b8cab8-5764-11e8-b8b2-d6ceb45fa9d0> (last visited on July 1, 2018).
 23. *See* USTR Robert Lighthizer Statement on the President's Additional Section 301 Action, USTR News, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/ustr-robert-lighthizer-statement> (last visited on July 1, 2018).
 24. *See The National Security Tariff Ruse*, WALL ST. J. (Editorial), Mar. 13, 2018, available at <https://www.wsj.com/articles/the-national-security-tariff-ruse-1520897310> (last visited on July 1, 2018).
 25. Ed Crooks, *Trump Administration Weighs Tariffs on Uranium Imports*, FIN. TIMES, July 19, 2018, available at <https://www.ft.com/content/f23cc632-8ac2-11e8-b18d-0181731a0340> (last visited on July 21, 2018).
 26. S. Hughes, *U.S. Senate Takes Symbolic Step to Curb White House on Trade*, WALL ST. J., July 11, 2018, available at <https://www.wsj.com/articles/senate-takes-step-to-assert-power-on-trade-1531328759> (last visited on July 12, 2018).
 27. *Trump v. Hawaii* (U.S. Supreme Court decision on June 26, 2018), available at https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf (last visited on July 1, 2018).
 28. S. Stolberg, *Democrats Zero in on Kavanaugh's Defense of Presidential Power*, N. Y. TIMES, July 11, 2018, available at <https://www.nytimes.com/2018/07/11/us/politics/democrats-brett-kavanaugh-supreme-court.html> (last visited on July 12, 2018).
 29. *See, e.g.*, US Prevails in Showing US Subsidies to Airbus Continues to Break WTO Rules, USTR News, May 15, 2018, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/united-states-prevails-showing-eu> (last visited on July 1, 2018).
 30. G. Rushford, *Trump's War on the WTO*, WALL ST. J., July 5, 2018, available at <https://www.wsj.com/articles/trumps-war-on-the-wto-1530723098> *See also* J. Swan, *A Leaked Trump Bill to Blow up the WTO*, AXIOS, available at https://www.axios.com/trump-trade-war-leaked-bill-world-trade-organization-united-states-d51278d2-0516-4def-a4d3-ed676f4e0f83.html?utm_source=twitter&utm_medium=twsocialshare&utm_campaign=organic (last visited on July 2, 2018).

31. K. Rogers, *Trump's NATO Visit Marked by Stiff Handshakes and Uncomfortable 'Family Photos,'* N.Y. TIMES, July 12, 2018, available at <https://www.nytimes.com/2018/07/12/world/europe/trump-nato-body-language.html> (last visited on July 12, 2018).
32. P. Campbell, *Tariff Threat Forces Carmakers to Plan Switch from Global to Local Production,* FIN. TIMES, July 3, 2018, available at <https://www.ft.com/content/50e7bada-6a47-11e8-8cf3-0c230fa67aec> (last visited on July 4, 2018).
33. *See How Should Europe Respond to Trump's Bullying?*, N.Y. TIMES (Editorial), June 22, 2018, available at <https://www.nytimes.com/2018/06/21/opinion/europe-trump-bullying.html> (last visited on July 1, 2018).
34. *See A Measured Cheer for the EU-Japan Trade Deal,* FIN. TIMES (Editorial), July 17, 2018, available at <https://www.ft.com/content/3c44a364-85fd-11e8-a29d-73e3d454535d> (last visited on July 21, 2018).
35. A. Jacobs, *U.S. Delegation Disrupts Accord on Brest Milk,* N.Y. TIMES, July 9, 2018, available at <https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html> 5 (last visited on July 9, 2018).
36. S. Nixon, *Trump Puts the WTO on the Rope,* WALL ST. J., July 11, 2018, available at <https://www.wsj.com/articles/trump-puts-the-wto-on-the-ropes-1531340083> (last visited on July 12, 2018).
37. J. Bacchus, *America Needs the WTO,* WALL ST. J., July 12, 2018, available at <https://www.wsj.com/articles/america-needs-the-wto-1531435787> (last visited on July 13, 2018).
38. R. Gladstone, *Iran Takes U.S. to Court over Nuclear Deal and Reimposed Sanctions,* N. Y. TIMES, July 17, 2018, available at <https://www.nytimes.com/2018/07/17/world/middleeast/iran-sues-us-over-sanctions.html> (last visited on July 21, 2018).
39. The recent proposals by the EU to address the WTO is a useful start. *See* B. Baschuk & N. Chrysoloras, *EU Weighs Changes to WTO Rules to Appease U.S.,* BLOOMBERG, July 13, 2018, available at <https://www.bloomberg.com/news/articles/2018-07-13/eu-mulls-changes-to-wto-rules-to-appease-u-s-as-trade-war-looms> (last visited on July 21, 2018).

