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sovereign authority to act in response to changing circumstances, the United States continued to passively adhere to outdated and under performing trade deals and allowed international bureaucracies to undermine U.S. interests.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.

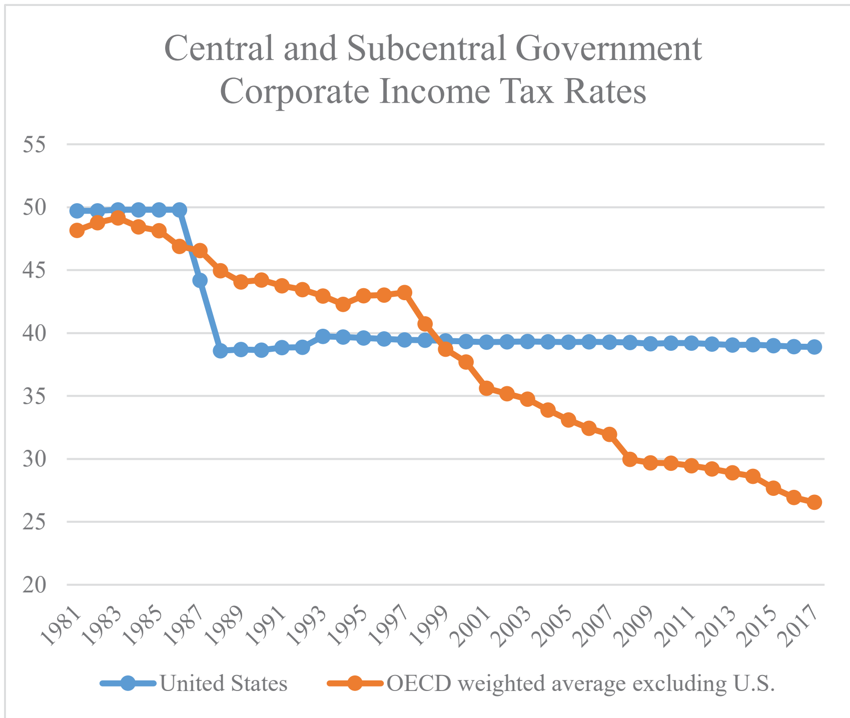
Working with Others. The National Security Strategy states that, "Together with our allies, partners, and aspiring partners, the United States will pursue cooperation with reciprocity. Cooperation means sharing responsibilities and burdens." These same principles apply to our trade policy. Under President 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.

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[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

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[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, challenged Indonesia's import licensing 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]

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[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

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[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

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[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

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[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

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[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.

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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
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