



Trade in the Time of Trump

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Trade Trends Under Trump

- ▶ Protectionism
- ▶ Movement from Multilateralism to Bilateralism
- ▶ WTO Dispute Resolution Near Collapse (“WTO”)
- ▶ What Can We Expect Ahead



Protectionism

- Trade protectionism in the name of national security
 - Section 232 of the Trade Expansion Act of 1962
 - Section 301 of the Trade Act of 1974
 - Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”)
 - Tariffs as a negotiating tool
- National security trade remedy tools and rationale allows greater control by the president and reduces the risk of judicial interference

Protectionism (cont'd)

▶ Section 232

- Before 2017, Section 232 investigations rarely occurred, and only two prior investigations led the president to restrict imports
 - 1979 - Crude Oil from Iran
 - 1982 - Crude Oil from Libya
- Today (2017 to Present)
 - Steel - 25% tariffs (initiated April 2017; remedy announced March 2018)
 - ❖ Imported steel from Argentina, Australia, Brazil, and South Korea are exempted from the tariffs. Steel imports from Argentina, Brazil, and South Korea are subject to quotas.
 - Aluminum - 10% tariffs (initiated April 2017; remedy announced March 2018)
 - ❖ Imported aluminum from Argentina, Australia, and Brazil are exempted from the tariffs. Aluminum imports from Argentina and Brazil are subject to quotas.
 - Automobile and Automobile Parts (initiated May 2018; remedy TBD)
 - Uranium Ore (initiated July 2018; remedy TBD)

Protectionism (cont'd)

- ▶ Section 301 Measures Against China (March 22, 2018)
 - Found concerns that China restricted U.S. investment, pressured technology transfers from U.S. companies, maintained unfair IP licensing practices, facilitates investments that result in technology and IP transfer, and supports cyber intrusions to gain valuable business information from U.S. companies.
 - Proposed Remedies:
 - Tariff increases on imports from China;
 - Initiation of WTO dispute settlement case against discriminatory technology licensing;
 - Investment restrictions on Chinese efforts to acquire sensitive U.S. technology.

Protectionism (cont'd)

- ▶ Congress Increases the Committee on Foreign Investment in the United States's ("CFIUS") Authority
 - Congress recently revised CFIUS's statutory authority through FIRRMA in August 2018
 - Overview of CFIUS
 - FIRRMA's Motivation: China
 - FIRRMA Procedural Changes and Increased Scope
 - Voluntary to Mandatory
 - Increased jurisdiction to include certain real estate transactions, U.S. businesses' with critical infrastructure and technologies, and U.S. businesses' with personal identifier information
 - Revised timing of reviews and introduction of potential filing fees

Protectionism (cont'd)

- ▶ Tariffs and threat of tariffs used as a motivating factor to bring U.S. trading partners to the table to renegotiate/negotiate better trade deals
 - NAFTA - Canada and Mexico initially exempted from steel tariffs as incentive to quickly renegotiate NAFTA
 - South Korea - first to cut deal to mitigate steel tariffs by agreeing to quota; threat of auto tariffs factor in speedy renegotiation of KORUS
 - Japan - threat of auto tariffs factor in bringing Japan to the table
 - EU - steel tariffs and threat of auto tariffs factors in launch of talks
 - China - tariff rate increase delayed indefinitely while talks continue
- ▶ U.S. exports subject to targeted retaliatory tariffs by other countries

Multilateralism to Bilateralism

- ▶ Withdrawal from Trans-Pacific Partnership
- ▶ Withdrawal from NAFTA
- ▶ Downgrade of E.U.'s Diplomatic Status
- ▶ As U.S. disengages, others engage and re-engage (e.g., TPP-11, China's Belt and Road Initiative or "New Silk Road")



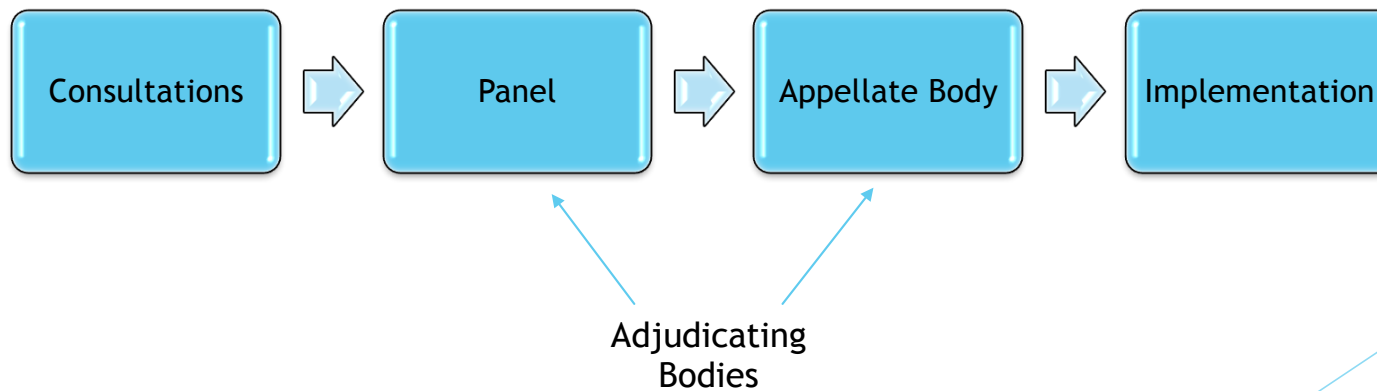
Multilateralism to Bilateralism (cont'd)

▶ Bilateral Trade Negotiations

- South Korea - what was renegotiated in KORUS?
- China - last best chance to address serious systemic issues
- Japan & EU Talks - what happens when Trump runs out of patience?
- United Kingdom - online because of Brexit, but it could be a while

WTO Dispute Resolution Near Collapse

- ▶ Issue: The legitimacy and continuation of the WTO dispute settlement system threatened by the breakdown of the Appellate Body
- ▶ Overview of WTO
- ▶ General Overview of WTO Dispute Settlement System



WTO Dispute Resolution Near Collapse (cont'd)

➤ Dispute settlement under the WTO

- Detailed procedures and deadlines in the Dispute Settlement Understanding (DSU)
- Two-tiered system: first instance review (*ad hoc* panels); and appellate review (Appellate Body)
- Negative / Reverse consensus: quasi-automaticity (establishment of panels; adoption of reports; authorization of countermeasures)
- Degree of dynamic interpretation: resolution of disputes through application of customary rules of interpretation of public international law
- Substantive jurisdiction: determine violations of the WTO agreements including, for example, agreements on goods, services, intellectual property rights, and trade remedies

WTO Dispute Resolution Near Collapse (cont'd)

➤ The Appellate Body (“AB”) - features

- Standing tribunal of 7 judges (“Appellate Body Members”)
- Appointed for 4-year terms, renewable once
- Hears appeals in “Divisions” of 3
- “Shall be broadly representative” of WTO Membership (*de facto* “seats” established in practice)
- Scope of appeal, in principle, limited to legal issues
- Decisions taken by consensus; institutional bias against dissenting opinions

WTO Dispute Resolution Near Collapse (cont'd)

▶ The Immediate Crisis

- 2016: no consensus to begin process to appoint new Appellate Body Members
- Appellate Body: Seven “Members”; minimum three Members required to hear an appeal
- Today: Three Appellate Body Members left
- 10 December 2019: One Appellate Body Member will remain