Trade Sanctions and the Division of Federal-State Power over International Trade

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The Administration of President Donald J. Trump has promised to impose trade sanctions in the form of higher tariffs on imports from nations that engage in unfair trade practices against the United States. Trump argues that increased tariffs will help the states that have suffered losses from international trade and was able to propel himself to victory in the 2016 presidential election based at least in part on these claims. However, tariffs are a blunt instrument and ill-suited to achieve domestic policy goals. Imposing higher tariffs on imports can actually harm the states because (1) U.S. trading partners might impose retaliatory tariffs on U.S. imports; (2) states may rely on imports as raw materials for use in manufacturing exports; and (3) jobs lost to overseas locations will not return to the United States and more job losses may result. As the states cannot evade the harmful effects of federal trade sanctions on their own, there is the need for a federal-state consultative mechanism through which the states can provide input to the federal government. With input from the states, the federal government can adjust federal policies to mitigate the unpredictable harms that the states may suffer as a result of those policies.

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I. INTRODUCTION

The Administration of President Donald J. Trump has announced that it will pursue international trade policies that "[p]ut[] America [f]irst."[1] To pursue this

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1 *President Donald J. Trump's Foreign Policy Puts America First*, WHITEHOUSE.GOV (Jan. 30, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-foreign-policy-puts-america-first/ (last visited Aug. 7, 2018) [https://perma.cc/HHD7-L755].

goal, President Trump has announced that he may withdraw the United States from trade agreements, such as the North American Free Trade Agreement, that are unfavorable to U.S. interests.[2] He has also stated that he intends to impose trade sanctions, such as higher tariffs, on countries such as China and Mexico that engage in unfair trade practices with the United States.[3] The additional tariffs could decrease the massive influx of imports from these countries[4] and may cause jobs that have been moved overseas to return to the United States.[5] Eliminating unfair trade practices will also lead to the creation of new jobs.[6] Those states that have lost jobs and suffered as a result of unfair international trade practices will see direct economic benefits from the President's trade policies.[7] Trump's trade policies appealed to a wide segment of the population that felt unfairly harmed by international trade and helped to propel him to victory in the 2016 presidential election.[8]

While Trump's policies may have an appeal at first glance, there are some serious flaws with using trade sanctions to achieve domestic policy goals, such as creating new jobs. Tariffs and other trade sanctions have historically proven to be dull and imprecise instruments that cannot be finely calibrated to achieve domestic policy goals.[9] While Trump may have won the 2016 election based at least in part on his aggressive trade policies,[10] his policies based on the use of

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[2] *See* Matt Ford, *How Easily Could Trump Withdraw the U.S. from NAFTA?*, THE ATLANTIC (Apr. 26, 2017), https://www.theatlantic.com/politics/archive/2017/04/trump-nafta-withdrawal-order/524463/ [https://perma.cc/X24B-8AVL].

[3] *See* Jason Margolis, *Trump's Trade Policies Worry Economists*, USA TODAY (July 25, 2016), https://www.usatoday.com/story/news/world/2016/07/25/donald-trump-trade-policies-china-mexico/87521852/ [https://perma.cc/5C67-3P5Q].

[4] In 2016, the United States had a nearly$347 billion trade deficit with China and $64 billion trade deficit with Mexico. *See Trade in Goods with China*, U.S. CENSUS BUREAU, https://www.census.gov/foreign- trade/balance/c5700.html#2016 [https://perma.cc/4RYJ-W8H9]; *Trade in Goods with Mexico*, U.S. CENSUS BUREAU, https://www.census.gov/foreign-trade/balance/c2010.html#2016 [https://perma.cc/F94P-J97F].

[5] *See* Matt O'Brien, *Donald Trump's Plan to Bring Jobs Back to America Comes with One Giant Asterisk*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/01/30/donald-trumps-big-plan-to-bring-jobs-back-to-america-has-one-giant-astericks/?utm_term=.573d954af1df [https://perma.cc/U3WA-S7AB].

[6] *See* Robert E. Scott et al., *Reducing U.S. Trade Deficits Will Generate a Manufacturing-Based Recovery for the United States and Ohio*, ECON. POL'Y INST. (Feb. 7, 2013), http://www.epi.org/publication/bp351-trade-deficit-currency-manipulation/ [https://perma.cc/Q8UN-5P8K].

[7] *See* Heather Long, *Rust Belt Voters Made Trump President. Now They Want Jobs*, CNN MONEY (Mar. 3, 2017), http://money.cnn.com/2017/03/03/news/economy/donald-trump-manufacturing-jobs/index.html [https://perma.cc/R4W6-7WJ5].

[8] *See id.*

[9] *See infra* Part III.

[10] According to Pew Research, 67%of Trump supporters had a negative view of free trade. Bruce Stokes, *Republicans, Especially Trump Supporters, See Free Trade Deals as Bad for U.S.*, PEW (Mar. 31, 2016), http://www.pewresearch.org/fact-tank/2016/03/31/republicans-especially-trump-supporters-see-free-trade-deals-as-bad-for-u-s/ [https://perma.cc/YA84-SLJV].

tariffs and other trade sanctions are too crude to achieve his promised results. As set forth below, the effect on particular states of higher tariffs and other commonly used trade sanctions such as anti-dumping duties, countervailing duties, quotas, and trade embargoes cannot be predicted with any certainty.[11] Trump's trade policies may benefit some states while hurting others, and it is not possible to predict which states will fall into which category.[12] It is also possible that some states will be worse off under Trump's trade policies. To further complicate matters, the states themselves are largely powerless to alter the effects of Trump's trade policies.[13] Under current U.S. constitutional law and jurisprudence, the federal government today exercises the bulk of power over international trade.[14] Given Trump's commitment to using trade sanctions, what is needed is a federal-state consultation mechanism through which the states can communicate directly to the federal government how trade policies are affecting their interests.[15] For example, if federal trade policy is actually leading to further loss of jobs, the states should be able to communicate this directly to the federal government so it can adjust the policy. There is no indication, however, that the current Administration is interested in using such a process.[16] The current Administration appears intent on moving forward with its trade policies with little input from the states even though some states could suffer serious harm from the implementation of these policies.[17]

This Article will demonstrate why trade sanctions are blunt instruments that have unpredictable effects on the states.[18] Although many economists question the usefulness of trade sanctions, many politicians find them to be useful political tools because they have historically enjoyed popular support.[19] If the current Administration is intent on using them to achieve domestic policy objectives, then using such blunt instruments could be more effective if the

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11 These trade sanctions are further discussed and defined in notes 30–43. The arguments why Trump's trade policies will lead to unpredictable results are set forth in Part III *infra*.

12 *See infra* Part III.

13 *See infra* Part IV.

14 *See infra* Part IV.

15 *See infra* Part V.

16 *See infra* Part V.

17 *See* Jeff Daniels, *Trump's Trade and Immigration Policies Could Trip up California's Growing Economy*, CNBC (Mar. 16, 2018), https://www.cnbc.com/2018/03/16/trumps-trade-policies-could-hurt-californias-economy-say-economists.html [https://perma.cc/NL6E-GYJW]; Heather Long & Andrew Van Dam, *In a U.S.-China Trade War, Trump Voters Likely Get Hurt the Most*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/22/in-a-u-s-china-trade-war-trump-voters-likely-get-hurt-the-most/?utm_term=.95e080f3cf79 [https://perma.cc/PR6V-CSG3] (discussing how states who export pork and soybeans could feel retaliatory effects of Trump's trade policy).

18 *See infra* Part III.

19 *See infra* Part V.

current Administration were willing to work together with the states to adjust these policies as their effects on the states become evident.[20]

II. TRADE SANCTIONS AND THE WORLD TRADE ORGANIZATION

The current Administration has promised to impose tariffs on imports to punish countries that trade unfairly with the United States.[21] A tariff is a tax or duty imposed and collected on an import at a customs port of entry before the import is allowed to enter the internal market of the importing country.[22] In the United States, the U.S. Customs Service, part of the U.S. Department of Homeland Security, imposes and collects the tariff.[23] All World Trade Organization (WTO) countries impose tariffs on imports.[24] Tariffs serve different purposes, but one common policy objective is to protect vulnerable domestic industries from import competition.[25] The tariff increases the price of the import vis-à-vis the domestic product, which thereby gains a competitive advantage.[26]

The United States imposes its tariffs under the Harmonized Tariff Schedule of the United States[27] in accordance with its obligations under the General Agreement on Tariffs and Trade (GATT),[28] a major discipline of the World Trade Organization.[29] U.S. tariffs are "bound" under GATT Article II:1(a) and

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[20] *See infra* Part V.

[21] *See* Margolis, *supra* note 3.

[22] *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 200 (3d ed. 2017) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW].

[23] *See* JEFFREY F. BEATTY & SUSAN S. SAMUELSON, ESSENTIALS OF BUSINESS LAW 186 (3d ed. 2008).

[24] *See, e.g.*, WORLD TRADE ORG., WORLD TARIFF PROFILES 2017 3 (2017), https://www.wto.org/english/res_e/booksp_e/tariff_profiles17_e.pdf [https://perma.cc/N3X9-KM2Y] (detailing tariff parameters for the 164 WTO member-countries); THE WORLD BANK, *Tariff Rate, Most Favored Nation, Weighted Mean, All Products (%)*, https://data.worldbank.org/indicator/TM.TAX.MRCH.WM.FN.ZS (last visited Oct. 26, 2018) [https://perma.cc/B7YV-PGCB] (providing tariff rates for 264 trading economies).

[25] *See* Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 253 (2011).

[26] *See* David John Marotta, *Do Tariffs Protect an Infant Industry?*, FORBES (May 5, 2013), https://www.forbes.com/sites/davidmarotta/2013/05/05/do-tariffs-protect-an-infant-industry/#74aed61d6371 [https://perma.cc/TA3M-2M23].

[27] *See* U.S. INT'L TRADE COMM'N, OFFICIAL HARMONIZED TARIFF SCHEDULE 2018, https://www.usitc.gov/tata/hts/index.htm (last visited Oct. 26, 2018), [https://perma.cc/E2BR-E2T2].

[28] *See* Katherine Gustafson, Note, *Boosting the Private Space Industry: Extending NASA's Duty-Free Import Exemption to Commercial Space Companies*, 6 WM. & MARY BUS. L. REV. 325, 334 (2015).

[29] During the first half of the twentieth century, nations were free to impose tariffs without any constraints. Left to their own devices, nations erected trade barriers through high tariffs and viewed each other with suspicion and deep mistrust. By the 1930s, trade tensions erupted that ultimately contributed to the Second World War. It became clear to the United States that discipline had to be injected into the process of setting tariffs or else conflicts

II:1(b),[30] that is, subject to a legal ceiling above which the tariff cannot be lawfully imposed.[31] All U.S. tariffs, along with all other WTO countries' tariffs, are set forth in the U.S. GATT Schedule, reached after lengthy mutual negotiations with all other WTO members, and annexed to the GATT.[32] Just as the United States cannot exceed its GATT commitments and impose higher tariffs on imports from other WTO members, no WTO member can impose tariffs on U.S. imports higher than its commitments under its GATT Schedule.[33] A second important GATT obligation is the prohibition against quotas or quantitative restrictions.[34] GATT Article XI:1 prohibits the United States from imposing quotas on imports from other WTO members.[35] For example, under Article XI:1, the United States cannot limit the amount of imported steel from

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would arise again. To instill a much-needed discipline into international trade, the United States led a group of nations at a conference in Bretton Woods, New Hampshire that led to the establishing of the General Agreement on Tariffs and Trade (1947), the first multilateral trade treaty designed to reduce tariffs. The General Agreement on Tariffs and Trade was a resounding success and is now known as the GATT (1994) and part of the WTO formally established in 1995. The GATT is responsible for historically low tariffs on most products in the world. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 22, at 18–19, 26.

[30] GATT Articles II:1(a) and II:1(b) provided in relevant part:

> Article II
> Schedules of Concessions
>
> (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate schedule annexed to this Agreement.
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates . . . be exempt from ordinary customs duties in excess of those set forth and provided therein . . . .

General Agreement on Tariffs and Trade, art. II:1(a)–(b), Oct. 30, 1947, 55 U.N.T.S. 194, 200 [hereinafter GATT].

[31] *See id.*

[32] *See id.* at 204.

[33] *See id.* at 200.

[34] *See id*. art. XI at 224, 226.

[35] GATT Article XI states in relevant part:

> Article XI
> General Elimination of Quantitative Restrictions
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> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

See id. art. XI:1 at 224, 226.

Brazil or China or ban the import of steel entirely.[36] A trade ban or embargo is a quantitative restriction of zero and is unlawful under Article XI:1.[37]

Although GATT Article II:1(b) binds tariffs and Article XI:1 creates a "no quotas" rule, the GATT also contains exceptions that permits both measures if certain criteria are met.[38] GATT Article XX is a general exceptions provision that permits trade sanctions in the event of certain special trade situations.[39] For example, Article XX(b) permits trade sanctions when "necessary to protect human, animal or plant life or health."[40] If the United States found that a certain food product was unsafe for human consumption, the United States could impose a total trade ban (i.e., an embargo) on all imports of the product under Article XX(b).[41] Article XX contains a total of twelve exceptions.[42] Article XIX creates an additional exception for emergency action on imports.[43] This is the so-called "safeguards" provision that allows a country to impose trade sanctions to deal with a putative trade emergency caused by a sudden and unexpected increase in imports flooding the domestic market and harming domestic industries.[44] A nation is allowed to impose higher tariffs or quotas as a "safeguard" on a temporary basis.[45]

In addition, several other GATT provisions and related WTO agreements allow a nation to unilaterally impose trade sanctions to deal with unfair trade practices by the exporting nation.[46] If a country is "dumping" its products in the United States, the WTO permits the United States to impose an anti-dumping duty, which is an additional tariff above the normal GATT rate.[47] Dumping

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[36] *Id.*

[37] *See* GATT, *supra* note 30, art. XI at 224.

[38] *Id.* at art. II:1(b) at 200 and art. XI:1–2 at 224, 226.

[39] *See id.* art. XX at 262.

[40] *See id.* art. XX(b) at 262.

[41] *See id*. art. XX at 262.

[42] *See id.* art. XX at 262, 264. The original safeguards provision in the GATT has been amplified by the WTO Agreement on Safeguards (1994). Most questions related to safeguards are now resolved in accordance with the WTO Safeguards Agreement, not GATT XIX. The United States has implemented the relevant provisions of the WTO Safeguards Act in Section 201 of the Trade Act of 1974. Trade Act of 1974, 19 U.S.C. 12, §§ 2151–55 (2017).

[43] *See* GATT, *supra* note 30, art. XIX at 260.

[44] *See id*.

[45] *See id*. art. XII:1 at 228.

[46] *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 22, at 467. The nation that is the object of the trade sanctions can challenge the sanctions in the WTO as unjustified. *Id*. If the complaining nation wins, the WTO asks the offending nation to remove the offending trade measures. *See id*. at 84.

[47] *See* GATT, *supra* note 30, art. VI at 212. The original anti-dumping provision in the GATT has been amplified by the WTO Antidumping Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994). Most questions related to dumping and anti-dumping duties are now resolved in accordance with the WTO Anti-dumping Agreement, not GATT Article XVI. CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 22, at 467. The United States has implemented the relevant

occurs when a country sells a product in the United States (or any target market) at artificially low prices (i.e., below cost) in order to obtain a market niche.[48] Once the niche is obtained, the exporter can raise its price or lower the quality of its product, causing harm to the domestic market.[49] An anti-dumping duty that equals the margin of dumping is imposed to offset the low price.[50] The margin of dumping is the difference between the low price currently charged for the export and a fair market value for the import.[51] A second unfair trade practice is subsidization.[52] If the government of an exporting country gives a subsidy, i.e., a makes a financial contribution, to an exporter, the exporter can then charge a lower price for the export.[53] The lower priced export becomes more competitive in the target market but causes harm to local competitors because the competitive advantage is due to government intervention not market efficiency.[54] To offset the harmful effects of the subsidy, the importing country imposes an additional tariff above the GATT rate called a countervailing duty.[55] The additional tariff countervails the subsidy by neutralizing its effects.[56]

The United States has been a frequent user of safeguards, anti-dumping, and countervailing duties on imports.[57] President Trump's bold announcements of his trade policies signal to the rest of the world that the United States might be even more aggressive in using these trade sanctions to counter what Trump believes are unfair trade practices targeting the United States and trade agreements that harm U.S. interests.[58]

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provisions of the WTO Anti-dumping Agreement as part. of the Tariff Act of 1930. 19 U.S.C. 4, §§ 1673–1673i (1994).

48 *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 22, at 467.

49 *See id.* at 469.

50 *See id.* at 467.

51 *See id.*

52 *See* GATT, *supra* note 30, art. XVI at 250. The original subsidies provision in the GATT has been amplified by the WTO Agreement on Subsidies and Countervailing Measures (1994). Most questions related to subsidies are now resolved in accordance with the WTO Subsidies Agreement, not GATT Article XVI. *See* WORLD TRADE ORG., *Understanding the WTO: The Agreements*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (last visited Oct. 1, 2018). The United States has implemented the relevant provisions of the WTO Subsidies Agreement as part of the Tariff Act of 1930. 19 U.S.C. 4, §§ 1673–1673i (1994).

53 *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 22, at 518–19.

54 *See id*. at 519.

55 *See id.* at 517.

56 *See id.*

57 *See* Don Lee, *Limited Success of Chinese Tire Tariffs Show Why Donald Trump's Trade Prescription May Not Work*, L.A. TIMES (July 24, 2016), http://www.latimes.com/business/la-fi-tariffs-trade-analysis-20160724-snap-story.html [https://perma.cc/6HFW-5YRH].

58 *See* Frances Coppola, *President Trump's Trade Tariffs Signal a New Global Trade War*, FORBES (Mar. 11, 2018), https://www.forbes.com/sites/francescoppola/2018/03/11/president-trumps-trade-tariffs-signal-a-new-global-trade-war/#5581f68552f6 [https://perma.cc/PF93-N9SP].

III. EFFECTS OF TRADE SANCTIONS ON THE STATES

The effect of President Trump's threatened trade sanctions against U.S. trading partners on the states is unpredictable. As further discussed below, tariffs are a blunt instrument where some states may benefit while other states may receive no benefits or even suffer serious harm.[59] As a measure to help the states that suffer harms from international trade, sanctions are an unwise choice. Harm to states can occur under at least three different scenarios.

A. *Retaliatory Trade Response to Tariffs*

If the current Administration imposes higher tariffs on imports from a trading partner as a sanction for unfair trade practices (such as dumping or subsidization), the trading partner might retaliate with an increase of tariffs on U.S. imports. In a recent case, the United States imposed higher tariffs on imported tires from China as a safeguard.[60] China responded with a tit-for-tat increase in tariffs on chicken parts imported from the United States.[61] While the increased tariff on tires created a benefit for the U.S. tire industry, the increased tariff on chicken parts harmed the farmers in states that depend on agricultural exports.[62]

This case represents the unpredictable nature of tariff sanctions and the possibility of a trade war that can result. When the United States imposes trade sanctions on a powerful trading nation such as China, it is quite possible that the trading partner will respond in kind.[63] In the case of China, for example, China's leaders feel political pressure to respond in kind and not simply suffer the sanctions in meek silence.[64] Such a response would not be politically acceptable in China today as it could be seen as capitulation to bullying by the United States.[65] The tit-for-tat response means that when the Trump Administration uses trade sanctions, the response could be to increase tariffs on U.S. imports, which will cause harm to the U.S. industries and the states in which they are located. The response chosen by China was to impose increased tariffs on imported chicken parts, but China could have picked any number of other

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59 *See infra* notes 60–62 and accompanying text.

60 Thomas J. Prusa & Edwin Vermulst, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States: How the Chickens Came Home to Roost*, 14 WORLD TRADE REV. 287, 332 (2015).

61 *Id.* at 332–33.

62 *See id.* at 333, 335.

63 *See, e.g.*, Keith Bradsher, *China Moves to Retaliate Against U.S. Tire Tariff,* N.Y. TIMES (Sept. 13, 2009), https://www.nytimes.com/2009/09/14/business/global/14trade.html [on file with *Ohio State Law Journal*]; Prusa & Vermulst, *supra* note 60, at 332–33.

64 *See* Wang Cong, *China Will Resist if US Starts Trade War: Experts*, GLOBAL TIMES (Aug. 3, 2017), http://www.globaltimes.cn/content/1059575.shtml [https://perma.cc/SVH9-FT9K].

65 *See id.*

imports to target.[66] China's response is not limited to imposing higher tariffs on imports of U.S. tires into China.[67] Rather, China could have chosen to impose higher tariffs on any U.S. imports.[68] China can be quite strategic in choosing to impose new tariffs in an area that will inflict the most pain on the United States.[69] Since it is not possible to predict with certainty the target of the trading partner's retaliatory measures, the United States cannot know ahead of time which states will suffer harm as a result of the United States' use of trade sanctions against its trading partners.

Trade sanctions imposed by the United States on a powerful trading country like China that refuses to acquiesce can easily escalate into a trade war. If the pattern of U.S. trade sanctions being met with retaliatory measures is repeated across different products and industries, the United States could find itself in a full-scale trade war with its trading partners that could spill over into a global trade crisis. If the United States and China do not trade with each other because of high tariffs, then products from each country will be immediately diverted to other markets. Other countries might then raise their tariffs to avoid having their domestic markets flooded with products from the United States and China. The erection of trade barriers by many countries could lead to a slowdown and bottleneck in global trade and trigger a global economic crisis. Such a trade war could harm the United States, its trading partner, and the world economy.

B. *Increased Tariffs on Imports Could Harm U.S. Exports*

Many products today are part of a global manufacturing chain.[70] A product can be made from raw materials accessed in one nation, processed in another,

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[66] China did not frame the increased tariffs on chicken parts as a response to the U.S. tariffs on tires. Rather, China treated the chicken parts as a separate and independent trade case that had nothing to do with the tires. Of course, in reality, China imposed the tariffs to send the clear message to the United States that any new U.S. tariffs on Chinese imports will be met with new Chinese tariffs on U.S. imports. *See* Bradsher, *supra* note 63.

[67] *See* Prusa & Vermulst, *supra* note 60, at 334; *see also* Minghao Li et al., *Lessons from Previous U.S.-China Trade Disputes*, AGRIC. POL'Y REV. 1–3 (2018).

[68] *See* Prusa & Vermulst, *supra* note 60, at 334; *see also* Li, *supra* note 67, at 1 (explaining how China responds to U.S. tariffs with list of 128 U.S. products that are targets of retaliatory tariffs).

[69] Agricultural exports are a sensitive area as they are very important to many states. China is the largest export market for U.S. agriculture with 2017 reaching seventeen percent of U.S. total agricultural products with a state such as Minnesota exporting 1.5 billion annually. Su Ye, *China: Top Market for U.S. Ag Exports*, MINN. DEPT. AGRIC. (2018), https://mda.state.mn.us/sites/default/files/inline-files/profilechina.pdf [https://perma.cc/VR4M-WDR3].

[70] Rising trade in intermediate input content (traded goods that are consumed as part of a manufacturing process) represents more than half of goods imported by OECD economies. PETER DRAPER ET AL., THE SHIFTING GEOGRAPHY OF GLOBAL VALUE CHAINS: IMPLICATIONS FOR DEVELOPING COUNTRIES AND TRADE POLICY 4 (World Economic Forum 2012), http://www3.weforum.org/docs/WEF_GAC_GlobalTradeSystem_Report_2012.pdf [https://perma.cc/DCE6-7FSY].

and finished in a third nation.[71] Industries in the United States are part of this global chain.[72] Many products in the United States are made using some imported materials.[73] Raising tariffs on imports can affect those industries in the United States that make products for export using imported materials. Suppose, for example, that a manufacturing plant in the mid-western United States makes industrial equipment for export to countries in Europe and Asia. The U.S. manufacturing plant uses steel imported from Brazil to manufacture the equipment. In response to perceived unfair trade practices, the United States imposes new tariffs on imported steel from Brazil. The cost of the new tariff is passed on to the manufacturing plant by the importer who raises the U.S. sales price of the steel. As the U.S. manufacturing plant pays more for the steel, the manufacturing plant must raise the price of its exports to all countries. Raising the price of its exports may result in lower sales to its overseas customers who can obtain similar equipment from European competitors at lower prices because their countries did not impose an extra tariff on steel imports from Brazil. A related scenario is that when Brazil finds that the United States has raised tariffs on its steel, Brazil may divert its steel to other markets that have not raised their tariffs. Local producers of steel in the United States might then raise their prices because of the short supply of steel.[74] Local manufacturers might be harmed because they might not be able to obtain enough steel to make their products or might have to pay much higher prices to buy U.S.-made steel due to the short supply. This is only one example of how an integrated global manufacturing chain can result in a country creating a self-inflicted harm when it imposes new tariffs on imports. The same pattern can be seen in many different products across many different industries.

The additional tariffs imposed on the imports could have the ultimate effect of harming exporting industries located in the United States.[75] If the U.S. export industries lose sales, then the industries might have to lower wages or lay off workers. These are the exact types of harms that the trade sanctions are supposed to remedy, not create. The complexities of global manufacturing make it difficult to predict all of the consequences that flow from imposing a tariff on imports.

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[71] DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 141 (3d ed. 2015) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS].

[72] *See* Emily Jane Fox, *What It Takes to Be 'Made in USA,'* CNN MONEY (Sept. 18, 2012), http://money.cnn.com/2012/09/18/smallbusiness/made-in-usa-label/index.html [https://perma.cc/S9EV-Z7V6].

[73] *See id.*

[74] The tariff has the effect of a subsidy given to domestic producers. Both efficient and inefficient domestic producers of the competing domestic good will raise their prices in response to a tariff on imports. CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 22, at 201.

[75] *See* Prusa & Vermulst, *supra* note 60, at 333, 335.

C. *Repatriation of Jobs and Job Losses*

The Trump Administration claims that its trade policies will result in the repatriation back to the United States of jobs outsourced or relocated to foreign countries.[76] U.S. companies have moved some of their operations overseas in order to take advantage of lower manufacturing costs created by lax labor and environmental conditions.[77] Some of these companies find that costs are so low overseas that it is more efficient to manufacture their products overseas and export them back to the United States.[78] The imposition of additional tariffs on imported products manufactured by U.S. companies overseas will neutralize the cost advantages of low cost overseas manufacturing creating a disincentive to locate operations overseas.[79] While some companies have moved their operations back to the United States, their reasons are complex and seem to have little to do with sanctions.[80]

Imposing trade sanctions seems to be an ineffective way to encourage U.S. companies to repatriate jobs back to the United States. If U.S. companies find that the costs of manufacturing in China, for example, have now been offset by increased tariffs, these companies could relocate their operations to countries that are even more low cost, such as Vietnam, and then from Vietnam to another location. In fact, this relocation from China has been underway for a number of years.[81] As an alternative to relocating jobs back to the United States, U.S.

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[76] *See* Paul Wiseman, *Economists Dump on Donald Trump's Boast to Bring Jobs Back from China*, WASH. TIMES (Aug. 5, 2015), http://www.washingtontimes.com/news/2015/aug/5/donald-trump-boast-bring-jobs-back-china-gets-dump/ [https://perma.cc/PF5N-Q33U].

[77] *See id.*

[78] *See id.* Suppose that a U.S. company that has relocated its manufacturing operations overseas and then makes the product and exports it back to the United States. For this to be cost effective, the cost of manufacturing the product overseas plus the cost of shipping the product back to the United States must be less than just the cost of manufacturing the product in the United States.

[79] *See, e.g.*, Patrick Gillespie, '*Those Jobs Are Gone and They're Not Coming Back*,' CNN MONEY (Nov. 11, 2016), http://money.cnn.com/2016/11/11/news/economy/trump-trade-jobs-mexico-china/index.html [https://perma.cc/7AE8-BHFS] (showing how Trump threatens to use tariffs with the argument that companies will bring jobs back if it is too expensive to do business overseas).

[80] *See, e.g.*, Michael B. Sauter & Samuel Stebbins, *Manufactures Bringing the Most Jobs Back to America*, USA TODAY (Apr. 23, 2016), https://www.usatoday.com/story/money/business/2016/04/23/24-7-wallst-economy-manufacturers-jobs-outsourcing/83406518/ [https://perma.cc/32SQ-UEV8] (higher overseas labor and international shipping costs creating less incentive to have jobs and production overseas).

[81] *See, e.g.*, David Nakamura, *Buoyed by U.S. Firms, Vietnam Emerges as an Asian Manufacturing Powerhouse*, WASH. POST (May 21, 2016), https://www.washingtonpost.com/politics/buoyed-by-us-firms-vietnam-emerges-as-an-asian-manufacturing-powerhouse/2016/05/21/6f117876-1b6a-11e6-b6e0-c53b7ef63b45_story.html?utm_term=.29322ceca36b [https://perma.cc/W2CR-RH5S] (describing a Michigan-based shoe company taking advantage of lower labor production costs in Vietnam).

companies might hire firms to lobby Congress to change trade policies[82] or seek to install a different administration in the White House in the next election cycle.[83] Even if U.S. companies were to repatriate jobs to the United States, there is no guarantee that they will reopen shuttered factories in the original location where the jobs were lost. U.S. companies that closed operations in Indiana that decide to repatriate jobs might open a new factory in Alabama instead.[84] Only a far more sophisticated and coordinated plan involving state input can funnel jobs to the states where they were lost. Tariff sanctions alone cannot achieve this result.

The Trump Administration's imposition of trade sanctions on imports might have the opposite effect of causing job losses in the United States.[85] To the extent that U.S. trading partners retaliate against the United States by imposing sanctions of their own on U.S. imports, certain U.S. export industries might be harmed.[86] As a cost cutting measure, these industries might have to lower wages or eliminate jobs.[87] U.S. export industries that import raw materials might experience similar types of losses due to higher tariffs on their imported materials, also leading to the elimination of jobs. The complexity of modern manufacturing chains makes it difficult to predict where all the harmful effects of tariffs on imports will ultimately fall.

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82 *See* Alice J.-H. Wohn, Comment, *Towards GATT Interrogation: Circumventing Quantitative Restrictions on Textiles and Apparel Trade Under the Multi-Fiber Arrangement*, 22 U. PA. J. INT'L ECON. L. 375, 386–87 (2001) (providing an example of an industry lobbying Congress for beneficial trade policies).

83 Trump, for example, has threatened "retribution" and a 35% tariff on goods U.S. companies produce outside the United States. Christi Parsons, *Trump Again Threatens Massive Tariffs for American Corporations that Export Jobs*, L.A. TIMES (Dec. 4, 2016), http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-trump-threatens-massive-tariffs-for-1480869101-htmlstory.html# [https://perma.cc/98W8-MMZU]. This could certainly incentivize companies to back an administration with a different position.

84 *See* Hugh Bailey, *State Looks to Take Advantage of 'Reshoring' Trend*, CONN. POST (May 7, 2017), http://www.ctpost.com/business/article/State-looks-to-take-advantage-of-reshoring-11124583.php [https://perma.cc/C9T8-HEVR].

85 Jim Tankersley, *Donald Trump's Trade War Could Kill Millions of U.S. Jobs*, WASH. POST (Mar. 25, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/25/donald-trumps-trade-war-could-kill-millions-of-u-s-jobs/?utm_term=.fd656781026f [https://perma.cc/4NTC-RM2A] (projected loss of up to four million jobs).

86 *Id.*

87 For example, U.S. sanctions on Iran resulted in lost potential export revenue of between $135 billion and $175 billion between 1995 and 2012. As a result, between 50,000 and 66,000 job opportunities were lost each year. *See* Press Release, Nat'l Iranian Am. Council, Report: Iran Sanctions Cost US Economy up to $175 Billion (July 14, 2014), https://www.niacouncil.org/report-iran-sanctions-cost-us-economy-175-billion/ [https://perma.cc/B95R-E6R3].

IV. THE STATES' LIMITED POWER OVER INTERNATIONAL TRADE

The ability of states to affect federal trade policies depends mainly on the willingness of the federal government to accept state input. The states are largely powerless to affect change on federal trade laws any other way. The states are subject to significant legal constraints on how they can affect federal trade laws on their own.[88] These limitations on the power of the states are due to constitutional constraints created both by the text of the Constitution and Supreme Court jurisprudence.[89]

Article I, Section 8 of the U.S. Constitution grants Congress the power to "regulate commerce with foreign states."[90] Thus, Congress has the final say on legislation affecting U.S. trade law and policy. Over the years, Congress has delegated significant legislative authority over international trade to the President of the United States.[91] In addition, the President has other constitutional sources of power over international trade. Article II of the U.S. Constitution vests the President with particular responsibilities over foreign affairs and the power to negotiate and make international agreements.[92] The President also has inherent power over international trade created by the Supreme Court's interpretation of the Constitution.[93]

Under the federal system, the states are free in theory to act in areas of international trade that have not been affected by the exercise of federal power.[94] If President Trump were to impose trade sanctions that adversely affect the states, however, the states would be significantly limited in their ability to circumvent the harmful effects of those sanctions.

The Supreme Court explained these constraints in *Crosby v. National Foreign Trade Council*.[95] In that case, the Commonwealth of Massachusetts passed a law that barred state entities from buying goods and services from a list of any persons or entities doing business with Burma.[96] Subsequently, Congress enacted a statute imposing a set of mandatory and conditional trade sanctions on Burma.[97] The Supreme Court held that the Massachusetts law was

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[88] *See* Amol Mehra, Note, *Federalism and International Trade: The Intersection of the World Trade Organization's Government Procurement Act and State "Buy Local" Legislation*, 4 BYU INT'L L. & MGMT. REV. 179, 192–96 (2008).

[89] *See infra* notes 90–107 and accompanying text.

[90] U.S. CONST. art. I, § 8, cl. 2.

[91] CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 2–3 (2016), https://fas.org/sgp/crs/misc/R44707.pdf [https://perma.cc/H2UG-SNKQ].

[92] U.S. CONST. art. II, § 2, cl. 2.

[93] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

[94] *But see* Mehra, *supra* note 88, at 179, 185.

[95] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[96] *Id.* at 366–67.

[97] *Id.* at 368.

void because it was in conflict with the federal statute.[98] The Court held that Congress had preempted the field.[99] Preemption can occur when (1) Congress intends federal law "to occupy the field"[100] or (2) when the state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[101] The Massachusetts state law was an obstacle because it created a set of mandatory and inflexible trade sanctions whereas the federal scheme gave the President flexibility in being able to withdraw sanctions to reward Burma when he certified that Burma had made progress on human rights.[102] The state scheme had no mechanism to remove sanctions as a reward for progress.[103] The Supreme Court found the inflexibility of the state scheme to be an obstacle to the achievement of the federal goal of pressuring Burma to improve its human rights record.[104]

Crosby and other facets of U.S. constitutional law indicate that in matters of international trade, the states are powerless to evade or vary the effects of trade sanctions. Suppose, for example, that a foreign nation retaliates against higher U.S. tariffs on its imports by imposing a higher tariff on U.S. agricultural imports. A state that depends on agricultural exports might be disproportionately affected by the tariff but the state cannot evade the tariff by entering into negotiations directly with the foreign nation to reduce the tariffs. Federal law has preempted the field.[105] Or suppose that the United States imposes a punitive tariff on imports from a foreign nation that a state needs as raw materials to manufacture products for exports. The state cannot reimburse the foreign nation for the amount of the higher tariff to encourage imports as this would create an obstacle to the achievement of the federal statute's goal of punishing the foreign trading nation for unfair trade practices.[106] In these cases, the way forward for the states is to work with the federal government to adjust trade policies that harm their interests. A state can ask the federal government to negotiate with the foreign nation to reduce its tariffs on agricultural imports or to impose a tariff-rate quota[107] instead of a plain tariff on imports of raw materials that it needs to manufacture exports.

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[98] *Id.* at 388.
[99] *Id.* at 373–88.
[100] *Id.* at 372.
[101] *Crosby*, 530 U.S. at 372–73 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[102] *Id.* at 373–74, 377.
[103] *Id.* at 375–77.
[104] *Id.* at 380–81.
[105] The WTO agreements negotiated by the federal government occupy the field of international trade. *See, e.g.*, Uruguay Round Agreements Act (URAA) § 102(a)(1), 19 U.S.C. § 3512 (a)(1) (2017) (mandating that U.S. law prevail in case of conflict).
[106] *See Crosby*, 530 U.S. at 380–81.
[107] A tariff-rate quota imposes one tariff up to a certain quantity and then another higher tariff above that quantity. An example of a tariff-rate quota would be 10%ad valorem tariff imposed on the first 10,000 tons of bananas (the in-quota amount) and 80%ad valorem tariff imposed on all quantities above this amount (the out-of-quota amount). An ad valorem tariff

Since the present Administration has shown a firm commitment to using trade sanctions, it should complement the use of trade sanctions by creating a federal-state consultative procedure dealing specifically with the effects of trade sanctions on the states. Such a procedure will allow the states to have input on federal trade policies that directly affect their interests. In fact, a similar federal-state consultative procedure was created in the Uruguay Round Agreements Act (1994),[108] the legislation that implemented the WTO agreements into U.S domestic law. Under the URAA, the states were allowed to directly raise issues with the federal government on the effect of the implementation of the WTO agreements on the states.[109] A similar consultation process should be created by the Trump Administration in conjunction with any program of trade sanctions that it intends to impose. This Article has argued that the need for such a consultation procedure is clear. The impact of trade sanctions on the states is unpredictable and can result in more harm than good for some states. Since the states are mainly powerless to evade the effects of federal trade policies under the U.S. constitutional scheme, the states can affect trade only by working through the federal government. Such a federal-state consultation procedure will allow the states to make their interests known and avoid or mitigate the harms to the states that can be the indirect consequences of imposing trade sanctions on other countries. At present, the current administration has shown no indication that it intends to create such a mechanism or any other means to consult with the states.

V. CONCLUSION

The Trump Administration has announced its intentions to use trade sanctions where necessary to achieve political goals. This Article has argued that trade sanctions are a poor vehicle to implement domestic policies. Tariffs are a crude and cumbersome instrument and their effects on the states are unpredictable. For decades, economists have argued against using tariffs because they create more harm to the nation imposing them than benefits.[110] Yet, nations continue to use tariffs and other trade sanctions because they serve important political purposes—trade sanctions are popular among industries harmed by imports and create political support even though trade sanctions are a self-inflicted harm overall.[111] In the case of President Trump's proposed trade sanctions, they can inflict unpredictable harms on the states.

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is expressed as a percentage of the value of the import. *See* CHOW & SCHOENBAUM, INTERNATIONAL TRADE LAW, *supra* note 22, at 200.

[108] URAA, 19 U.S.C. §§ 3501–3624.

[109] *Id.*

[110] *See, e.g.*, *Dumping and Tub-Thumping: Free Exchange*, THE ECONOMIST (Apr. 9, 2016), https://www.economist.com/news/finance/21696325-throwing-up-tariffs-counter productive-response-economic-weakness-why-no [https://perma.cc/STK2-5QJT].

[111] *See* Tim Worstall, *US Imposes More Sanctions on Venezuela-Politics, Yes, Little Economic Effect Expected*, FORBES (Aug. 26, 2017), https://www.forbes.com/sites/timwors

One way to address these potential harms is to create a federal-state consultative process on the effects of trade sanctions. The states need such a procedure because constitutional constraints prevent them from effectively avoiding the harmful effects of federal trade policies through their own actions. There is precedent for such a procedure as a similar procedure was created for the implementation of the WTO agreements into federal and state law.[112] At present, the Trump Administration has not indicated any interest in establishing such a procedure.[113] Some type of catalyst, either in the form of calls by the states or in the form of calls within the Trump administration, seems needed to create such a procedure. The need for such a procedure is pressing since trade sanctions are too blunt an instrument to effectively achieve domestic policies and can create unintended harms to the states.

tall/2017/08/26/us-imposes-more-sanctions-on-venezuela-politics-yes-little-economic-effect-expected/#158e87470740 [https://perma.cc/9KQK-2LZB].

[112] URAA, 19 U.S.C. §§ 3501–3624.

[113] *See* Peter S. Goodman, *Trump Just Pushed the World Trade Organization Toward Irrelevance*, N.Y. TIMES (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/business/trump-world-trade-organization.html [on file with *Ohio State Law Journal*]; *see also* Natasha Bach, *The Trump Administration Drafted a Bill That Basically Pulls the U.S. Out of the WTO. Here's What It Says*, FORTUNE (July 2, 2018), http://fortune.com/2018/07/02/trump-wto-exit-bill-trade-agreements/ [https://perma.cc/FD4D-4Z72].