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Rhetoric Versus Reality: U.S. Resistance to Global Trade Rules and the Implications for Cybersecurity and Internet Governance

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RHETORIC VERSUS REALITY:

U.S. RESISTANCE TO GLOBAL TRADE RULES AND THE IMPLICATIONS FOR CYBERSECURITY AND INTERNET GOVERNANCE

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I. INTRODUCTION

This article examines two parallel issues of vital importance to the United States and to the rest of the world—free trade and cybersecurity. In the free trade context, we argue that the U.S. government has voiced lofty ideals in theory, only to ignore and sometimes openly flout its international obligations in practice. Not only is this harmful to the balance sheets of U.S. consumers and exporters, but it simultaneously threatens to undermine the U.S. leadership on a host of global policy issues, including Internet governance.[1]

The developing world has long accused the United States and other advanced industrial nations of preaching free trade and forcing open markets in developing countries while concurrently protecting their domestic producers from foreign competition.[2] Former WTO Director-General Supachai Panitchpakdi suggested that the real blame for this divergence resided with private industry groups that were thwarting globalization efforts by pressuring their governments into filing

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[1] *See generally* Martin Wolf, *Era of a Diminished Superpower*, FIN. TIMES (May 15, 2012), http://www.ft.com/cms/s/0/5e8e3902-9db1-11e1-9a9e-00144feabdc0.html#axzz3BkOKFQUL (arguing that the U.S.'s role in global affairs is decreasing).

2. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 244 (2002).

frivolous complaints rather than making the adjustments necessary for survival in open and competitive markets.[3] This scene unfolds with increasing regularity in the United States. Political decision makers, while espousing free trade rhetoric, often replace globalization and the theory of comparative advantage with strategic intervention, whereby free trade policies are supplemented by varying combinations of export subsidies and import barriers.[4] One manifestation of this debate in the U.S. context is the American response to dumping claims[5] and their relevance to international trade law. When antidumping measures are used to offset the market distortions caused by unfairly traded imports, they are consistent with global trade law. However, U.S. trade partners and domestic importers long complained that the U. S. persistently employed protectionist mechanisms—zeroing and Byrd Amendment payments—that raised the price of foreign goods and domestic goods created with foreign inputs. Despite the fact that the World Trade Organization (WTO) found both devices to clearly violate international trade rules,[6] the U.S. government refused to dismantle the programs until forced to do so by a combination of domestic budgetary woes and economic retaliation by trading partners.

U.S. recalcitrance has serious implications for its role as a policy leader in free trade, cybersecurity, and Internet governance. After all, nearly two decades after its birth, the WTO is struggling to fulfill its promise of "an integrated, more viable and durable multilateral trading system."[7] As it labors to develop, administer, and protect a rule-based international trade regime, the organization has been assailed on two fronts.

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3. *See* Daniel Pruzin, *WTO Chief Blasts Private Sector for Efforts to Push Dispute Cases*, 21 INT'L TRADE REP. (BNA) 1780 (Nov. 4, 2004).

4. *See* Alan O. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. INT'L. ECON. L. 523, 564 (2004).

5. *See generally* ERIC RICHARDS & SCOTT SHACKELFORD, LEGAL AND ETHICAL ASPECTS OF INTERNATIONAL BUSINESS 161 (2014).

6. *See generally* Chad P. Bown & Thomas J. Prusa, *U.S. Antidumping Much Ado about Zeroing* (World Bank Pol'y Res. Working Paper No. 5352, 2010) (stating that zeroing violates the WTO Anti-Dumping Agreement); Appellate Body Report, United States—Continued Dumping and Subsidy Offset Act of 2000, ¶¶ 318–19 WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (stating that the U.S. violated the Anti-Dumping Agreement, the SCM Agreement, and the WTO Agreement).

7. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying Results of the Uruguay Round of Trade Negotiations, MTN/FA II, 33 I.L.M. 1125, 1144 (1994).

On one side, critics in the United States and leaders from other developed nations charge the WTO's dispute settlement bodies with overstepping their bounds and, ultimately, threatening national sovereignty.[8] On the other side, developing nations complain that free trade and economic globalization are not bringing about positive effects on their job markets and human rights protection.[9] They view the WTO as "the most obvious symbol of the global inequities and the hypocrisy of the advanced industrial countries."[10] Outcries against these alleged "bait-and-switch" practices have resonated in both the free trade and cybersecurity arenas.[11] This narrative has newfound resonance at a time of rapidly increasing interest in the multifaceted cyber threat facing the public and private sectors,[12] and is particularly relevant when discussing how the desire for protecting trade secrets for national industries from cybercriminals is impacting bilateral, regional, and multilateral trade negotiations.[13]

The dispute over U.S. antidumping practices illustrates the "collision course between the (largely) free trade principles the WTO implements and the (largely) protectionist U.S. trade laws."[14] As such, it showcases "a central problem for the future of the trading system—how to reconcile competing views about

8. It has been argued that the U.S., long accustomed to its dominance in international relations, cannot accept the hard realities of a rule-based system. WTO foes in the U.S. have long bemoaned this loss of sovereignty as they push the country toward a more isolationist and power-oriented trading posture. *See* Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 1008 (1996).

9. *See generally* THE CASE AGAINST THE GLOBAL ECONOMY (Jerry Mander & Edward Goldsmith eds., 1996) (analyzing and critiquing the effects of globalization).

10. Stiglitz, *supra* note 2, at 244.

11. *See id.*; Jeffrey Roman, *The Impact of Cybersecurity on Trade*, BANK INFO SECURITY (Nov. 25, 2013), http://www.bankinfosecurity.com/impact-cybersecurity-on-trade-a-6245/op-1.

12. *See generally* SCOTT J. SHACKELFORD, MANAGING CYBER ATTACKS IN INTERNATIONAL LAW, BUSINESS, AND RELATIONS: IN SEARCH OF CYBER PEACE 1-25 (2014) (analyzing the state of cybersecurity and its effect on global politics).

13. *See, e.g.*, David S. Levine, *Could Overreaction to Cybersecurity Threats Hurt Transparency at Home?*, SLATE (June 12, 2013), http://www.slate.com/blogs/future_tense/2013/06/12/trade_secret_law_reform_to_fight_cybersecurity_could_hurt_transparency.html.

14. Gregory Husisian, *When a New Sheriff Comes to Town: The Impending Showdown Between the U.S. Trade Courts and the World Trade Organization*, 17 ST. JOHN'S J. LEGAL COMMENT 457, 463 (2003).

the allocation of power between national governments and international institutions."[15] This same policy debate is playing out in the Internet governance context as more nations seek to assert their sovereignty online, threatening a conflict with U.S. ideals of free speech and free trade.

Part II of this article delves into the long-running debate over U.S. antidumping practices, focusing on the U.S. experience and the applicable global trade law. Part III then investigates the role of protectionist trade policies in the cybersecurity and Internet governance contexts. Finally, the article proposes next steps for bringing U.S. principles of free trade and free speech into alignment with U.S. policy at a time when emerging power centers are challenging U.S. leadership across a range of issues, including trade liberalization and Internet governance.

II. U.S. ANTIDUMPING PRACTICES

Historically, dumping was thought to occur when products were sold more cheaply abroad than they were sold at home. It was actionable—deserving of countervailing antidumping duties—if it injured an industry in the importing country.[16] However, the United States and the rest of the world have generally expanded the dumping definition to include instances where there are "sales below [the] fully allocated cost of production, even where the price charged for the merchandise was the same as that in the importing country."[17] Domestic producers in the importing country condemn dumping as a form of predatory pricing designed to drive them out of business.[18]

Nothing in the General Agreement on Tariffs and Trade (GATT)—the rules governing the international trade in goods—specifically proscribes dumping, although it does authorize WTO member nations to impose antidumping duties to offset

15. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194 (1996).

16. *See* Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109, 111 (2002).

17. *Id.*; *see also* Kevin K. Ho, *Trading Rights and Wrongs: The 2002 Bush Steel Tariffs*, 21 BERKELEY J. INT'L L. 825, 828 (2003).

18. *See generally* Ho, *supra* note 17, at 828.

the price advantage that dumped goods have in an import market.[19] In fact, the international trade regime provides an integrated set of rules governing the use of these offsetting tariffs in GATT Article VI, as well as in a subsequent WTO antidumping accord,[20] which establishes the international rules by which WTO members may determine the existence of dumping.[21]

A. INTERNATIONAL TRADE LAW AND ZEROING

Dumping investigations have long been the most commercially significant and frequently used weapons in the U.S. arsenal against unfairly traded imports.[22] International trade rules permit countries to impose special customs tariffs (antidumping duties) when dumped imports cause, or threaten to cause, material injury to competing industries in import markets.[23] The antidumping duties are permissible as long as they equal the difference between the home market sales price and the export sales price (the dumping margin).[24] Under U.S. law, antidumping duties equal to the dumping margin may be imposed if the Commerce Department determines that foreign merchandise is being sold in the United States for less than fair value and the International Trade Commission finds that a U.S. industry is either materially injured or threatened with material injury.[25]

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19. *See* Report of the Panel, *Japan—Trade in Semi-Conductors*, ¶ 121, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.) at 116 (1989) ("Article VI provided importing countries with the right to levy anti-dumping duties subject to certain specific conditions but was silent on actions by exporting countries.").

20. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

21. *See* Panel Report, *United States—Antidumping Act of 1916*, ¶ 6.208, WT/DS136/R (Mar. 31, 2000).

22. *See* James P. Durling, *Deference, But Only When Due: WTO Review of Anti-dumping Measures*, 6 J. INT'L ECON. L. 125, 125–26 (2003).

23. *See* RICHARDS & SHACKELFORD, *supra* note 5, at 161.

24. *Id.* at 161–62.

25. 19 U.S.C.S. § 1673 (1994). When reviewing zeroing cases, the courts apply the deferential two-part *Chevron* test that provides deference to agency interpretations of ambiguous Congressional statutes so long as they are reasonable. This largely explains judicial acceptance of zeroing methodology in the United States. The *Corus Staal* court believed that the *Chevron* test trumped even the *Charming Betsy* doctrine that arises when a court is "faced with an ambiguous statute and ambiguous international agreement." Corus Staal BV v. U.S. Dept. of Commerce, 259 F. Supp. 2d 1253, 1264 (Ct. Int'l

At first glance, the antidumping procedure might seem relatively straightforward: "determine an export price, find a comparable normal value—typically the price at which the product is sold domestically—and calculate the margin between them."[26] However, in practice, discovering an export price is often complicated. Article 2.4 of the WTO's Anti-dumping Agreement anticipates these problems, explaining how a "fair comparison" between export price and normal value is to be conducted.[27] Most countries, including the United States, interpret these rules as permitting a two-step, multiple-averaging process.[28] However, the U.S. practice of zeroing during the antidumping process has been a source of great controversy throughout the world.[29]

Zeroing occurred when the United States averaged a number of importations over a period of time in order to determine if they were sold below fair market value.[30] When examining each subgroup of imports, U.S. regulators assigned a positive value to those sold below fair market value.[31] However, they assigned a value of zero to subgroups that were sold at or above fair market value, which effectively foreclosed the possibility that those importations with negative values could offset importations with positive values.[32] In particular, zeroing methodology was criticized because it had the effect of inflating the margin of dumping and, as a consequence, the level of duties imposed.[33] The WTO agreed with this critique,

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Trade 2003).

26. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 ("[T]he margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country.").

27. *Id.* art. 2.4.

28. *See id.*

29. An investigating authority using zeroing methodology assigns a zero margin to subcategories with a negative dumping margin. There is a clear statistical bias inherent in this methodology. With zeroing, as long as one subcategory of export sales had a positive dumping margin, the aggregation always results in a finding that dumping occurred, even if the vast majority of subcategories have a negative margin. Bowe Passat Reinigungs-Und Waschereitechnik Gmbh. v. United States, 926 F. Supp. 1138, 1149 (Ct. Int'l Trade 1996).

30. *See* RICHARDS & SHACKELFORD, *supra* note 5, at 162.

31. *Id.*

32. *Id.*

33. Third Participant Notification and Written Submission by the

consistently striking "down zeroing employed in every different comparison context."[34]

Despite these setbacks, the United States continued to employ the zeroing methodology,[35] even though the WTO did not waiver in its condemnation of the practice. Finally, in the face of growing international pressure, the Commerce Department announced that it would cease the practice of zeroing in original investigations effective on February 22, 2007.[36] But that is not the end of the story. It took the United States another five years before it announced, on February 14, 2012, that it would eliminate zeroing in "future administrative reviews of existing antidumping orders."[37] However, this change seemed to be less of a capitulation to the authority of WTO law and more of a realization that reform was the only way to avoid retaliatory tariffs imposed on U.S. exports by major trade partners.[38] Still, the matter may not be over, as U.S. trade partners "have demanded that the United States

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European Communities, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/ DS344 (Feb. 25, 2008), *available at* http://trade.ec.europa.eu/doclib/docs/2008/june/tradoc_139369.pdf ("It is not contested that, all other things being equal, the use of zeroing in the computation of either the margin of dumping for cash deposit purposes or the amount of duty finally assessed systematically and inevitably inflates the dumping margin and amount of duty, compared to a computation without zeroing.").

34. Sungjoon Cho, *A WTO Panel Openly Rejects the Appellate Body's "Zeroing" Case Law*, ASIL INSIGHTS, Mar. 11, 2008, http://www.asil.org/insights/volume/12/issue/3/wto-panel-openly-rejects-appellate-bodys-zeroing-case-law#_edn1.

35. *See* Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) ("[T]he Court of International Trade was correct to find Commerce's zeroing methodology permissible in the context of administrative investigations."); *see also* Timken Co. v. United States, 354 F.3d 1334, 1343 (Fed. Cir. 2004) ("According Commerce its proper deference, we hold that it reasonably interpreted § 1677(35)(A) to allow for zeroing.").

36. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3,783 (Jan. 26, 2007).

37. Sungjoon Cho, *No More Zeroing?: The United States Changes Its Antidumping Policy to Comply with the WTO*, 16 AM. SOC'Y INT'L L. INSIGHTS (Mar. 9, 2012), *available at* http://www.asil.org/insights/volume/16/issue/8/no-more-zeroing-united-states-changes-its-antidumping-policy-comply-wto; *see also* Final Modification, 77 Fed. Reg. 8,181 (Feb. 14, 2012).

38. *See, e.g.*, JTEKT Corp. v. United States, 642 Fed. 3d 1378 (Fed. Cir. 2011); Dongbu Steel v. United States, 635 F.3d 1363 (Fed. Cir. 2011).

correct the results of past administrative reviews that calculated dumping margins using zeroing."[39]

One can only speculate as to what economic and political damage was wrought by U.S. refusal to comply with WTO decisions. The fact that its eventual, yet reluctant, compliance with international law was largely in response to the threat of economic sanctions by other countries suggests that the U.S.'s adherence to free trade and the rule of law is more rhetoric than reality. The next section examines another instance—the Byrd Amendment—where the U.S. commitment to free trade and international law has been called into question.

B. INTERNATIONAL TRADE LAW AND THE BYRD AMENDMENT

Even before the zeroing controversy raised the ire of U.S. trade partners, the very concept of antidumping relief was under fire from much of the developing world. In part, this is because the global antidumping rules were largely crafted by the United States, with assistance from the European Union (EU).[40] As the U.S. lowered its tariffs (hoping to spur its trading partners to reciprocate), it relaxed its antidumping laws "to protect domestic industries hurt by lowered tariffs."[41] Despite widespread criticism of antidumping remedies, the United States has a long history of "intransigence against reforming the international law governing antidumping."[42] For instance, in yet another bold protectionist move, the U.S. Congress enacted the *Continued Dumping and Subsidy Offset Act* (Byrd Amendment).[43] Before the Byrd Amendment, proceeds from antidumping duties were delivered to the general revenue fund of the U.S. Treasury Department.[44] "Under the Byrd Amendment, however, the proceeds from these duties . . . [were] diverted into the bank accounts of the U.S. companies

39. Tania Voon, *Orange Juice, Shrimp, and the United States Response to Adverse WTO Rulings on Zeroing*, 15 AM. SOC'Y INT'L L. INSIGHTS (July 20, 2011), *available at* http://www.asil.org/sites/default/files/insight110720.pdf.

40. Mark Wu, *Antidumping in Asia's Emerging Giants*, 53 HARV. INT'L L.J. 1, 3 (2012).

41. *Id.* at 9.

42. *Id.* at 6.

43. Byrd Amendment, 19 U.S.C. §1675(c) (2000).

44. U.S. GOV'T ACCOUNTABILITY OFFICE, ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT 1 (2005) *available at* http://www.gao.gov/assets/250/247929.pdf.

for whose protection the duties are imposed."[45]

In theory, the Byrd Amendment was "characterized as a 'victim's compensation fund' for those proving themselves materially injured, or threatened with material injury, by dumping."[46] However, the manner in which it was enacted suggests that its real purpose was to provide protectionist-motivated advantages to a few select firms. Because the amendment was attached "to a large appropriations bill, Senator Byrd was able to significantly reduce the possibility of a presidential veto."[47] When signing the legislation, former President Clinton complained that it "'provide[s] select U.S. industries with a subsidy above and beyond the protection level needed' and called on Congress to 'override this provision or amend it.'"[48] Senator John McCain also criticized the legislation "and predict[ed] that the provision would be found to violate the U.S.'s World Trade Organization . . . obligations.'"[49]

Senator McCain's prediction proved correct. Eleven U.S. trading partners challenged the provision and, ultimately, the WTO's Appellate Body held that it was a "non-permissible specific action against dumping."[50] Basically, the assessment of antidumping duties raises the price of the imports to a fair market value, resulting in a double remedy and acts, therefore, as an unfair subsidy.[51] Still, the U.S. government made no serious attempt to repeal or amend the statute until key trade partners such as the EU, Canada, Japan, and Mexico threatened to enact retaliatory trade sanctions.[52] Once the WTO approved the assessment of more than $150 million

45. Tudor N. Rus, *Recent Development: The Short, Unhappy Life of the Byrd Amendment*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 427, 431 (2006/2007).

46. Joseph M. Barbato, *Byrd Watching: Continuation of the Continued Dumping And Subsidy Offset Act*, 14 CURRENTS INT'L TRADE L.J. 45, 47 (2005).

47. *Id.* at 46–47.

48. Rus, *supra* note 45, at 434.

49. *Id.* at 433–34 (quoting 146 Cong. Rec. S10,669, S10,672 (2000)).

50. Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 274, WT/DS217/AB/R, (Jan. 16, 2003).

51. *See* Andrew Platt, *The Fate of Domestic Exporters Under The Byrd Amendment: A Case For Resuscitating the Last-In-Time Treaty Interpretation*, 3 BYU INT'L L. & MGMT. REV. 171, 171 (2007) (arguing a problem occurs "when the anti-dumping duties bring imports up to market value, because the subsequent payments subsidize the American producers that are no longer at an unfair disadvantage").

52. Barbato, *supra* note 46, at 49.

annual trade sanctions on U.S. exports,[53] the Byrd Amendment was repealed—five years after it was enacted.[54]

As with the zeroing debacle, the United States set a bad example with its passage of the Byrd Amendment, creating a pernicious effect on the country's ability to forge global solutions to transnational issues and problems. When speaking to Congress, former U.S. Trade Representative Robert Zoellick observed that, "it helps us to get others to follow the rules if we follow the rules (ourselves)."[55] If the U.S. hopes to maintain a leadership role on pressing global problems, such as free trade and Internet governance, it must work to repair its damaged reputation. Otherwise the consequences could be severe, as is explored in Part II.

III. IMPLICATION FOR CYBERSECURITY AND INTERNET GOVERNANCE

One thing is certain—much of the world believes that the U.S. has a bad track record when it comes to the protectionist demands of its domestic producers. For instance, citing Washington's poor compliance record with WTO rulings, the EU Commission has concluded that domestic protectionist pressures were "stronger than . . . [Washington's] willingness to seek 'internationally agreed solutions.'"[56] Similar debates are playing out with regard to enhancing cybersecurity, such as the U.S.'s worry over safeguarding critical infrastructure as seen in the commercial-off-the-shelf (COTS) program,[57] and the impact of the U.S. technology sector on reforming Internet governance, each of which is explored below.

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53. *See id.*

54. Deficit Reduction Act of 2005, Pub. L. No. 109-171, §7601, 120 Stat. 4, 154 (2006).

55. Rus, *supra* note 45, at 441.

56. Gary G. Yerkey, *Protectionist Pressures in U.S. Forcing Bush to Ignore WTO Obligations, EC Says*, 21 INT. TRADE REP. (BNA) No. 1, at 19 (Jan. 1, 2004).

57. *See, e.g.*, Scott J. Shackelford, *How to Enhance Cybersecurity and Create American Jobs*, HUFF. POST (July 16, 2012), http://www.huffingtonpost.com/scott-j-shackelford/how-to-enhance-cybersecurity_b_1673860.html.

A. USING INTERNATIONAL TRADE AND INVESTMENT LAW TO MITIGATE THE CYBER THREAT TO THE PRIVATE SECTOR

International trade and investment law offer an array of tools to mitigate the multifaceted cyber challenges faced by the private sector, including the threat posed by sophisticated cybercrime organizations, some of which are sponsored by states, which target the trade secrets and other valuable intellectual property of companies and countries alike.[58] Ongoing U.S.–EU trade talks have been shaped by concerns over NSA surveillance programs and intellectual property protections.[59] The proposed Trans-Pacific Partnership (TPP) also reportedly contains a cybersecurity component.[60] Even the WTO employs enforcement mechanisms that may be applicable to cyber attacks, if national security concerns could be overcome.[61]

However, the rise of bilateral investment treaties (BITs) may provide an even more useful vehicle to mitigate cyber attacks and better protect trade secrets, which according to some estimates "comprise an average of two-thirds of the value of firms' information portfolios."[62] By 2013, there were nearly 3,000 BITs, involving the vast majority of countries.[63] These agreements cover a large cross-section of industries and boast a

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58. For an extended discussion of this topic, *see* Scott J. Shackelford, Eric L. Richards, Anjanette H. Raymond, & Amanda N. Craig, *Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 AM. BUS. L.J. (forthcoming 2015).

59. *See, e.g.*, Doug Palmer, *U.S. EU Launch Free Trade Talks Despite Spying Concerns*, INS. J. (July 9, 2013), http://www.insurancejournal.com/news/international/2013/07/09/297817.htm.

60. *See* Kevin Collier, *Sen. Ron Wyden on the Problems with the Trans-Pacific Partnership*, DAILY DOT (Sept. 19, 2012), http://www.dailydot.com/politics/ron-wyden-trans-pacific-partnership/.

61. *See, e.g.*, Allan A. Friedman, *Cybersecurity and Trade: National Policies, Global and Local Consequences*, (Brookings Inst., Washington D.C.), September 2013, at 10–11; JAMES A. LEWIS, CTR. STRATEGIC & INT'L STUD., CONFLICT AND NEGOTIATION IN CYBERSPACE 49-51 (2013), *available at* https://csis.org/files/publication/130208_Lewis_ConflictCyberspace_Web.pdf.

62. KURT CALIA ET AL., ECONOMIC ESPIONAGE AND TRADE SECRET THEFT: AN OVERVIEW OF THE LEGAL LANDSCAPE AND POLICY RESPONSES, COVINGTON & BURLING LLP 3 (2013), *available at* http://www.gwumc.edu/hspi/policy/Economic%20Espionage%20and%20Trade%20Secret%20Theft%20-%20September%202013.pdf.

63. UNCTAD, WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT 101 (2013), *available at* http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

robust forum for resolving disputes in the form of investor–state arbitration.[64] At the July 2013 U.S.–China Strategic and Economic Dialogue, the U.S. and China publicized plans to negotiate an expansive BIT that could include the difficult issue of enhancing bilateral cybersecurity.[65] This deal, if finalized, may provide a roadmap to increase the effectiveness of trade and investment law in enhancing cybersecurity if difficulties such as the national security exemption and investor-state arbitration controversies are overcome.[66]

B. APPLICATION TO THE FUTURE OF INTERNET GOVERNANCE

As with promoting free trade, the future shape of Internet governance is increasingly intertwined with the role of the state in enhancing national cybersecurity. This evolution may be seen by considering the three eras of Internet governance that have culminated in contemporary debates pitting groups of nations preferring Internet sovereignty against those seeking greater Internet freedom.[67] In brief, the story of Internet governance begins when graduate students created ad hoc organizations, such as the Internet Engineering Task Force, to improve the functionality of the Internet.[68] This first phase of Internet governance arguably extended from roughly 1969 to the birth of the Internet Corporation for Assigned Names and Numbers (ICANN) in 1998.[69] Phase Two overlapped with the Internet's economic success and the rise of ICANN and other formal and informal Internet governance organizations that together sought to address, among other

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64. *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 6 (2007).

65. *See* Annie Lowrey, *U.S. and China to Discuss Investment Treaty, but Cybersecurity Is a Concern*, N.Y. TIMES, July 12, 2013, at A5, *available at* http://www.nytimes.com/2013/07/12/world/asia/us-and-china-to-discuss-investment-treaty-but-cybersecurity-is-a-concern.html?_r=0.

66. *See* Shackelford et al., *supra* note 58, at 4, 6, & 28.

67. *See, e.g.*, ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 183 (2011).

68. *See Internet History*, COMPUTER HISTORY MUSEUM, http://www.computerhistory.org/internet_history/ (last visited Dec. 3, 2013). For an extended treatment of this issue, *see* Scott J. Shackelford & Amanda N. Craig, *Beyond the New 'Digital Divide': Analyzing the Evolving Role of Governments in Internet Governance and Enhancing Cybersecurity*, 50 STAN. J. INT'L L. 119 (2014).

69. MILTON MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 89 (2002).

issues, the first global "digital divide" represented by the divergence of information and communication technology resources between developed and developing nations, and culminated with the creation of the Internet Governance Forum (IGF) in 2006.[70] Finally, Phase Three has been defined to date by an increased role for national governments in Internet governance, underscoring the potential for a "new 'digital divide'" to emerge not between the "haves and have-nots" but between "the open and the closed[." This notion was crystallized at the 2012 World Conference on International Telecommunications (WCIT).[71]

Revelations from former NSA contractor Edward Snowden have served to further entrench criticism of the U.S.-led status quo of Internet governance, much like the international response to zeroing and the Byrd Amendment. The Snowden incident arguably contributed to the U.S. decision to announce that the U.S. Department of Commerce would not renew its contract with ICANN.[72] Also, as with the Byrd Amendment saga, the U.S. private sector has played an important role in shaping the U.S. government's position on Internet governance, including WCIT, for example, challenging the case for expanding the International Telecommunication Union's mandate to cover Internet governance.[73] In this case, though, the minority is pushing a majority U.S. view as to the importance of protecting free speech in the "global networked commons" of cyberspace,[74] even as the U.S. technology sector is

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70. *See* ANDREW W. MURRAY, THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT 122 (2007).

71. Larry Downes, *Requiem for Failed UN Telecom Treaty: No One Mourns the WCIT,* FORBES (Dec. 17, 2012, 5:30 AM), http://www.forbes.com/sites/larrydownes/2012/12/17/no-one-mourns-the-wcit/. However, there is also evidence that the multi-stakeholder status quo of Internet governance may continue for the foreseeable future. *See NETmundial Multistakeholder Statement*, NETMUNDIAL (Apr. 24, 2014), http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf.

72. *See* Craig Timberg, *U.S. to Relinquish Remaining Control Over the Internet*, WASH. POST (Mar. 14, 2014), http://www.washingtonpost.com/business/technology/us-to-relinquish-remaining-control-over-the-Internet/2014/03/14/0c7472d0-abb5-11e3-adbc-888c8010c799_story.html.

73. *See, e.g.*, *ITU Phobia: Why WCIT Was Derailed*, INTERNET GOVERNANCE PROJECT (Dec. 18, 2012), http://www.Internetgovernance.org/2012/12/18/itu-phobia-why-wcit-was-derailed/.

74. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet

developing some of the most advanced censorship technologies in the world.[75] Yet there is also evidence that these U.S. practices are causing tensions with some of the trading partners hurt by U.S. trading practices, impacting the competitiveness of the U.S. industry, and threatening direct and indirect reprisals.[76]

IV. CONCLUSION

Continued resistance to WTO-mandated policies is likely to have long-lasting and far-reaching consequences. At one level, "America's commitment to freer trade looks laughable,"[77] reinforcing accusations from trading partners that Washington is backsliding on negotiated trade concessions because of its inability to resist the protectionist demands from domestic producers.[78] While most nations currently lack the economic might to restrain U.S. transgressions, the U.S. may soon be unable to strong-arm competitors in matters of trade or Internet governance. For instance, Mandarin could well be the dominant language on the Internet by 2017.[79] Of equal importance, recalcitrance poses a long-term threat to the worldwide economy. It also has immediate domestic ramifications—some visible, and many largely hidden from the public eye. Clearly, protectionist policies practiced by the U.S., such as zeroing and the Byrd Amendment, have imposed costs to both domestic and global welfare. They also have implications for pending trade agreements with other nations, including the TPP and the proposed U.S.-EU free trade area,

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Freedom (Jan. 21, 2010), *available at* http://www.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm.

75. The U.S. private sector also plays an important role in both enabling and frustrating national cyber censorship. *See Google Unveils Service to Bypass Government Censorship, Surveillance*, AL JAZEERA AM (Oct. 21, 2013, 9:47 PM), http://america.aljazeera.com/articles/2013/10/21/google-inc-unveilsservicetobypassgovernmentcensorshipsurveillanc.html; EVGENY MOROZOV, THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM 100 (2011).

76. *See, e.g.*, Claire Cain Miller, *Revelations of N.S.A. Spying Cost U.S. Tech Companies*, N.Y. TIMES (Mar. 21, 2014), http://www.nytimes.com/2014/03/22/business/fallout-from-snowden-hurting-bottom-line-of-tech-companies.html?_r=1.

77. Ho, *supra* note 17, at 845.

78. *See id.*

79. *See* Ronald Deibert, *Cybersecurity: The New Frontier*, *in* GREAT DECISIONS 2012, 45, 54 (2012).

the latter of which would represent more than forty percent of global GDP.[80] Surprisingly, relatively little has been written on the topic of the threat to the global trade regime of growing use of antidumping remedies (patterned after U.S. practices) by China.[81] And there has been even less appreciation of the link between U.S. antidumping transgressions and the related U.S. policy priorities of enhancing cybersecurity and shaping Internet governance.

Free trade and free speech are ideals that have been central to the success of U.S. industry and the rise of American soft power. It is vital that these tenets are protected by writing off the misguided practices in antidumping law; favoring domestic industry only insofar as it is essential to enhance national cybersecurity, such as by safeguarding critical infrastructure; and arguing for free speech online not because of the power of well-connected lobbies working both sides of the debate, but to ensure consistency with long held U.S. ideals. In order to fight the prevailing narrative of relative U.S. decline,[82] Congress and the Obama Administration should reinvigorate stalled bilateral, regional, and multilateral trade talks and actively shape a global, multi-stakeholder vision of Internet governance. Neither trade policy, nor the future of the Internet, need be zero sum games. It is time for U.S. rhetoric to match political realities.

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80. *See* Anthony Fensom, *EU-US Free Trade Agreement: End of the Asian Century?*, THE DIPLOMAT (Feb. 20, 2013), http://thediplomat.com/pacific-money/2013/02/20/eu-us-free-trade-agreement-end-of-the-asian-century/.

81. *But see* Wu, *supra* note 40 (arguing that two "emerging giants"—China and India—have become the leading users of antidumping remedies).

82. *See id.* at 58.