

Contemporary *Revolutions* in International Trade Law

The Restructuring of Global Trade Amidst
the COVID-19 Pandemic and Beyond:
A Matrix of Challenges and Opportunities

This presentation critically analyzes the *revolutionary* developments in international trade law and policy since January 2018, but particularly in the last roughly one year amidst the COVID-19 pandemic.

What changes are occurring in the global economy associated with the COVID-19 pandemic? How are global economic relationships that developed in the post-Second World War Era being affected during this pandemic?

How have these changes *revolutionized* international trade law and policy?

What Does “Revolution” Mean?

Oxford English Dictionary (OED):

- (1) “Alteration, change, mutation.”
- (2) “Period or instance of significant change or radical alteration of a particular condition, state of affairs, etc.”
- (3) “The complete overthrow of an established government or social order by those previously subject to it.”

Is there a “**revolution**” in international trade law?

Yes!

The revolutions have occurred, and are occurring, at each of the three levels at which international trade law and policy is negotiated, drafted, textualized, and applied:

Multilateral, regional, and bilateral.

Analysis:

COVID-19 is a catalyst for some of the changes. However, most of the changes are caused by forces indirectly related or entirely unrelated to the pandemic – forces that pre-date and will outlast the pandemic.

Level 1: Multilateral

The General Agreement on Tariffs and Trade (GATT) and other World Trade Organization (WTO) treaties.

Revolutionary developments include:

The death of the WTO Appellate Body.

Creation of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).

A notable WTO Panel Report implicating national security exceptions in the GATT-WTO treaties, the 2020 *Saudi-Qatari IP* case, and the 2012 Russia Traffic in Transit case.

Retaliation and counter-retaliation following the 2011 Airbus and 2012 Boeing Appellate Body Reports

Level 2: Regional

Regional trade agreements (RTAs), both free trade agreements (FTAs) and customs unions (CUs):

Revolutionary developments include:

July 2020: *United States-Mexico-Canada Agreement (USMCA)*, especially the unprecedented rules of origin (ROOs) for autos and auto parts, plus selected other revisions to the first iteration (1994) of the *North American Free Trade Agreement*. Related bilateral Section 232 Steel and Aluminium cases and the U.S. threat to reimpose 10% tariffs on Canadian aluminium.

December 2018: *Comprehensive and Progressive Agreement for a Trans Pacific Partnership (CPTPP)*.

September 2017: The Canadian-EU *Closer Economic and Trade Agreement (CETA)*, especially its positioning of Canada more favourably than the U.S. in world trade.

Possible post-Brexit U.K. FTAs.

Possible China-led *Regional Comprehensive Economic Partnership (RCEP)*.

Level 3: Bilateral

U.S. trade measures directly targeting certain countries, as well as Japanese support for reconfiguring its supply chains.

Revolutionary developments include:

Section 301 of the Trade Act of 1974, as amended (19 U.S.C. 2411 et seq.). The Sino-American trade war, including the 15 January 2020 *Phase One Agreement*. Export restrictions coupled with use of the 1950 *Defense Production Act (DPA)* to safeguard supply chains of merchandise, such as personal protective equipment (PPE), to fight the Covid-19 pandemic.

Termination of Hong Kong's special trade status following the Chinese Communist Party's (CCP) imposition of a national security law on the Hong Kong Special Administrative Region (SAR).

Section 301 *Digital Services Tax (DST)* case.

Heightened U.S. trade sanctions against Iran following the January 2020 targeted killing of Iranian Revolutionary Guards Corps (IRGC) Commander Qasem Soleimani.

Implications for major third world countries such as India and Vietnam?

Plus, Japan's "China Exit" Subsidies.

Bottom Line:

Is trade, national security, and public health essentially indistinguishable in terms of international trade law and policy? Is the equation of trade with national security and public health set in the wider context of a new "Cold War"?

Yes!

That equivalence and context is the heart of the revolution.

Bottom Line (continued):

To explain:

The core argument is that now, and for the foreseeable future, regardless of the outcome of the November 2020 U.S. presidential election, the post-Second World War consensus in favour of free trade theory pioneered by Adam Smith and David Ricardo and the concomitant sense of security in multilateralism is dead.

COVID-19 and the political proponents of economic nationalism has attacked this sense of security in multilateralism.

Trade no longer is about generating greater global output through production specialization to yield greater consumer choice at lower prices. Efficiency is not the principal driver of international trade law and policy. Rather, national security is the principal driver. National security includes self-judged threats which can also include pandemics. To manage those threats, trade rules and practices are being deployed to manage trade itself, including where necessary, import substitution measures, onshore production, and securing supply chains.

Bluntly, trade is about national security, which encompasses public health, and if import, export, and investment patterns need to be torqued to enhance that security, so be it. That's the **revolution**.

However, how will developing and least developed countries deal with this **revolution**?

SUMMARY MATRIX: **REVOLUTIONS AT THREE LEVELS**

Topic Level	Directly Related to the Pandemic	Indirectly Related to the Pandemic	Unrelated to the Pandemic	Implications for Canadian Businesses
Multilateral (GATT-WTO)	<ul style="list-style-type: none"> ● WTO Report on Trade Barriers Against Medical Goods. Examples: PPE 	<ul style="list-style-type: none"> ● Moribund status of all WTO negotiations because of diminution of faith in multilateralism and resurgence of protectionism. Examples: Farm Trade EGA Fishing Subsidies 	<ul style="list-style-type: none"> ● Death of WTO Appellate Body as of December 2019. ● April 2020 Plurilateral MPIA (Canada included). ● Two significant WTO Appellate Body Reports on SPS: 2019 <i>Korea Radionuclides</i>; 2020 <i>Australia Plain Packaging</i> ● Two significant WTO Panel Reports on National Security: 2019 <i>Russia Traffic in Transit</i>; 2020 <i>Saudi-Qatari IP</i> 	<ul style="list-style-type: none"> ● Do not rely on the WTO for significant negotiating outcomes regarding market access. ● Consider use of MPIA.

SUMMARY MATRIX (continued)

Topic/ Level	Directly Related to the Pandemic	Indirectly Related to the Pandemic	Unrelated to the Pandemic	Implications for Canadian Businesses
(FTAs and CUs)	Within certain FTAs or CUs. Examples: Australia-New Zealand <i>Closer Economic Relationship (CER)</i> travel bubble. Post-Brexit EU open borders.	Certain FTAs. Example: U.S.-Canada border closing notwithstanding the <i>USMCA</i> .	Entry into force key provisions: ● Auto ROOs (RVC and LVC). Labour dispute settlement. ISDS and related Section 232 Steel and Aluminium Trade War. ● Post-Brexit FTAs: U.K.-EU; U.K.-U.S.; U.K.-Australia; U.K.-New Zealand. ● CPTPP expansion: Indonesia? Thailand? U.K. In between <i>RCEP</i> and <i>CPTPP</i> : India?	Canada is perfectly positioned to take advantage of Sino-American economic decoupling because of its network of FTAs: <i>USMCA</i> ; <i>CETA</i> ; <i>CPTPP</i> . Canadian-origin merchandise enjoys duty free, quota free (DFQF) treatment across North America, Europe, and the Far East. ● Risk: Canada's East-West trade relations are disrupted by the Sino-American trade war.

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SUMMARY MATRIX (continued)

Topic/ Level	Directly Related to the Pandemic	Indirectly Related to the Pandemic	Unrelated to the Pandemic	Implications for Canadian Businesses
Bilateral	● Sino-American Trade. China cannot meet purchase targets in 15 January 2020 <i>Phase One Agreement</i> because of recession caused by pandemic. China's spring-summer 2020 invocation of force majeure clauses in purchase contracts for U.S.-origin goods. China's June 2020 requirement of SPS certification on Tyson Foods poultry. ● Japan's "China Exit" Subsidies.	● Sino-American Trade. Economic incentives to avoid Section 301 Waves One, Two, Three, and Four (List A) tariffs on Chinese-origin merchandise by shifting supply chains out of China are reinforced by political pressures to do so on merchandise used to fight pandemic, <i>i.e.</i> , PPE and active pharmaceutical ingredients (API) and invocation by Presidential Executive Order of 1950 <i>DPA</i> . Linkage of trade policy to national security and public health.	● Sino-American Trade. Section 301 trade war over Made in China 2025 industrial policy (including subsidies), SOE reform (including privatization), IP misappropriation (including hacking and cybertheft). ● Hong Kong Special Trade Status termination in response to CCP <i>National Security Law</i> . June 2020 Strategic Competition Report – Cold War? ● Iran sanctions.	● Stay out of Dodge City? That is, follow the secondary boycott of Iran and avoid the crossfire (sanctions). ● Already doing so with respect to China.

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Multilateral Level Revolutions

Directly Related to the Pandemic

WORLD TRADE ORGANIZATION, TRADE IN MEDICAL GOODS IN THE CONTEXT OF TACKLING COVID-19 (3 APRIL 2020)

https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf

Key Points:

- (1) Germany, the United States (US), and Switzerland supply 35% of medical products;
- (2) China, Germany and the U.S. export 40% of personal protective products;
- (3) Imports and exports of medical products totalled about \$2 trillion, including intra-EU trade, which represented approximately 5% of total world merchandise trade in 2019;
- (4) Trade of products described as critical and in severe shortage in COVID-19 crisis totalled about \$597 billion, or 1.7% of total world trade in 2019;
- (5) Tariffs on some products remain very high. For example, the average applied tariff for hand soap is 17% and some WTO Members apply tariffs as high as 65%;
- (6) Protective supplies used in the fight against COVID-19 attract an average tariff of 11.5% and goes as high as 27% in some countries;
- (7) The WTO has contributed to the liberalization of trade medical products in three main ways:
 - (a) The results of tariff negotiations scheduled at the inception of the WTO in 1995;
 - (b) Conclusion of the plurilateral sectoral Agreement on Pharmaceutical Products ("Pharma Agreement") in the Uruguay Round and its four subsequent reviews;
 - (c) The Expansion of the Information Technology Agreement in 2015.

Analysis:

Considerable barriers to trade on COVID-19-related products, with no prospect in sight for free or freer trade of them through a multilateral or even plurilateral agreement.

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Multilateral Level Revolutions

Indirectly Related to the Pandemic

Moribund status of all WTO negotiations across all goods and services sectors.

Examples:

- (1) Farm trade (market access and subsidies).
- (2) *Environmental Goods Agreement (EGA)*.
- (3) Fishing subsidies.
- (4) *Trade in Services Agreement (TISA)*.

Analysis:

The cause is a diminution, or indeed loss, of faith in multilateralism and resurgence of protectionism borne of economic nationalism.

Demise of the WTO's negotiating function. Note search for new Director-General.

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Multilateral Level Revolutions

Unrelated to the Pandemic

(1) Death of WTO Appellate Body as of December 2019

Standing seven-member adjudicatory forum since 1 January 1995. Issued over 150 Reports adopted by the Dispute Settlement Body (DSB).

Killed by U.S. criticisms (bipartisan) that led to blockage of appointment of new members after terms (4 years, renewable once) of existing members expired, and Appellate Body fell below the minimum three members needed to hear a case.

America's criticisms?

See Office of the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, Executive Summary, 1-14 (FEBRUARY 2020)

<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body>

Key Points:

Judicial activism

Obiter dicta

Stare decisis

Analysis:

U.S. revenge for zeroing antidumping (AD) losses?

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Multilateral Level Revolutions

Unrelated to the Pandemic (continued)

(2) April 2020 Plurilateral *Multi-Party Interim Arbitration Agreement (MPIA)* (Canada and Mexico, but not U.S., included)

By 30 April 2020, 46 Members notified the WTO they had agreed to the *MPIA*. They were Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, Hong Kong, ... Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Uruguay and the EU (with its 27 member states, plus the U.K. on a temporary basis amidst Brexit). Together, they accounted for over 50% of global merchandise trade.

Under it, *MPIA* Members selected 10 arbitrators to sit on Panels consisting of three of them to decide appeals following procedural rules modelled on those of the Appellate Body. For example, the *MPIA* set a maximum 90-day deadline for completion of appeals, stated that findings rendered by arbitrators would be enforceable under *Dispute Settlement Understanding (DSU)* procedures, and affirmed that a Member failing to bring into compliance a measure that was found inconsistent with GATT-WTO obligations would be subject to retaliation.

The *MPIA* was structured as an open plurilateral arrangement. *MPIA* Members agreed not to appeal their disputes to the non-operational Appellate Body, *i.e.*, they committed to using only the *MPIA* mechanism.

Yet, the extent to which an arbitration playing field would be level if a litigant were a developing, much least developed, country was questionable. Could poor countries prosecute and/or defend GATT-WTO cases as well under a *DSU* Article 25 procedure as they could under the normal *DSU* procedures?

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Multilateral Level Revolutions

Unrelated to the Pandemic (continued)

- (3) Two significant WTO Appellate Body Reports on sanitary and phytosanitary (SPS) measures:

2019 *Korea Radionuclides*

See WTO Appellate Body Report, *Korea – Import Bans and Testing and Certification Requirements for Radionuclides*, WT/DS495/AB/R (adopted 26 April 2019)

Holding:

Yes, Korea acted consistently with the WTO SPS Agreement Article 5:7 (the so-called “precautionary principle”) in restricting imports from Fukushima nuclear power plant disaster area. That is, the Appellate body held the Panel findings, as to the inconsistency of Korea’s measures with Article 5:7, to be exceeding the Panel’s mandate. (On the second and third of three issues, the Appellate Body set aside the Panel’s findings, declaring them to be moot and have no legal effect.)

2020 *Australia Plain Packaging*

See WTO Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R (adopted 29 June 2020)

Holding:

Yes, Australia can mandate plain package cigarette containers; doing so is not a trademark violation under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) Articles 16:1 and 20 (concerning, respectively, protection of the distinctiveness through use of a trademark right, and unjustifiable encumbrances on the use of trademarks).

Analysis:

Deference to local concerns about, respect for sovereign choices about risk assessments associated with, foreign imports.

Multilateral Level Revolutions

Unrelated to the Pandemic (continued)

- (4) Two significant WTO Panel Reports on National Security:

2019 *Russia Traffic in Transit* Panel Report

Holding:

Russia would have violated GATT Article V:2 (requiring freedom of goods transiting through a third country, Russia, en route from the exporting country, Ukraine, to importing countries, such as Kazakhstan and Kyrgyz Republic), but for the international emergency (conflict with Ukraine) to invoke Article XXI(b)(iii) national security exception.

See https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm

2020 *Saudi-Qatari IP* Panel Report

Holding:

Saudi Arabia violated Qatar’s copyrights under Articles 41:1, 42, and 61 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), concerning, respectively, obtaining legal counsel, civil enforcement, and criminal penalties, but successfully invoked the Article 73(b)(iii) national security exception to justify its violations of Articles 41:1 and 42 (but not 61).

Analysis:

Explicit link of trade liberalization obligations to national security, yet ceding of sovereignty about national security to WTO Panels.

See https://www.wto.org/english/tratop_e/dispu_e/567r_e.pdf

Multilateral Level Revolutions

Unrelated to the Pandemic (continued)

- (5) “Air Wars” with EU worsen

“Air Wars” reference the WTO Appellate Body Reports in the 2011 *Airbus* and 2012 *Boeing* cases.

Each side scored a partial victory in persuading the Appellate Body that the other side’s subsidies – those of the EU for Airbus and those of the U.S. for Boeing – were illegal under the *WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)*.

The U.S. won the right to retaliate in the amount of \$7.5 billion against EU imports. The United States Trade Representative (USTR) commenced “Carousel Retaliation” in spring 2020 in the amount of roughly \$3 billion. The theory is to induce pressure on the EU by rotating every 6-18 months the products subject to retaliation. It has announced plans to spread and deepen the pain effective August 2020, covering more products and boosting retaliatory tariffs up to 100%.

The EU has asked for the right to retaliate against \$11 billion of U.S. imports.

Analysis:

Largest amounts in GATT-WTO history.

Multilateral Level Revolutions

Analysis

- (1) Do not rely on the WTO for significant negotiating outcomes regarding market access.
- (2) Consider use of *MPIA*
- (3) Expect the “UNCTAD-ization” of the WTO
- (4) Hope for constructive solutions from Organization for Economic Cooperation and Development (OECD), for example, on large civil aircraft (LCA) subsidies and digital services taxation (discussed below).

Regional Level Revolutions

Directly Related to the Pandemic

Strengthened bonds within certain FTAs or CUs, and among trusted trading partners.

Examples:

- (1) Australia-New Zealand Cloer-Economic Relationship (CER) travel bubble
- (2) Possible Singapore-Malaysia corridor
- (3) Post-Brexit EU open borders

Regional Level Revolutions

Indirectly Related to the Pandemic

Increased barriers within certain FTAs and between otherwise trusted trading partners.

Examples:

- (1) U.S.-Canada border closing notwithstanding *USMCA*
- (2) Exclusion by EU of U.S. from travel entry

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

1 July 2020 *USMCA* Entry into Force

Key Provisions:

(1) Auto ROOs

Regional Value Content (RVC) + Labor Value Content (LVC) + Steel + Aluminum

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

Regional Value Content (RVC) + Labor Value Content (LVC) + Steel + Aluminum

Conceptually, the formula for RVC is:

$$\text{RVC} = \frac{(\text{Total Value of the good}) - (\text{Value of Non-originating Materials in the good})}{(\text{Total Value of the good})} \times 100$$

Analysis:

Growing protectionism —

1989 *Canada-U.S. FTA* threshold?
50%

1994 *NAFTA* 1.0 RVC threshold?
62.5% - highest in world

2020 *USMCA* RVC threshold?
75% - highest in world

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

Or, expressed more simply using variables to show the two possible computational methodologies, where:

TV = Transaction Value (price paid or payable)
VNM = Value of Non-originating Materials
NC = Net Cost (to produce)

$$RVC = \frac{(TV) - (VNM)}{(TV)} \times 100$$

and

$$RVC = \frac{(NC) - (VNM)}{(NC)} \times 100$$

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

Or, expressed more simply using variables to show the two possible computational methodologies, where:

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and

$$RVC = \frac{(NC) - (VNM)}{(NC)} \times 100$$

So, not only did Mexico agree to an 12.5% increase in the RVC, from 62.5% to 75%, but also:

Mexico agreed that at least 40% of the value of a car, and 45% of the value of a truck, would have to be manufactured by high-wage labor, specifically, by workers paid at least U.S. \$16 per hour – the LVC ROO (discussed below),

plus

Mexico further agreed to enforce International Labor Organization (ILO) rights rules, and to eliminate labor contracts signed by employers and union leaders without the consent of workers.

Regional Level Revolutions

Unrelated to the Pandemic: USMCA

(1) Auto ROOs (continued)

There are special ROOs for four categories of auto parts used in passenger vehicles and light trucks:

17 Core Parts (*USMCA* Automotive Appendix, Table A.1)

Examples: gear box, lithium ion battery

7 Super Core Parts (and their components) (*USMCA* Automotive Appendix, Table A.2)

Examples: engine, transmission, battery

38 of Principle Parts (*USMCA* Automotive Appendix, Table B)

Examples: fuel pump, fan, seat

27 Complementary Parts (*USMCA* Automotive Appendix, Table C)

Examples: tubes, catalytic converters, valves

Each of these 89 parts must satisfy a Product Specific Rule of Origin (PSRO), which may take the form of RVC or "Tariff Shift." In other words, not only must the passenger vehicle or light truck "originate" within the U.S.-Mexico-Canada region according to the RVC + LVC + Steel + Aluminum ROOs, but so also must each of these 89 parts under the PSRO relevant to each part.

Analysis:

Keep out non-North American (especially Chinese) auto parts from the supply chain.

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Regional Level Revolutions

Unrelated to the Pandemic: USMCA

(1) Auto ROOs (continued)

LVC ROO is a Minimum Wage Test:

At least least 40% of the value of a car, and 45% of the value of a truck, must be made by labor paid at least U.S. \$16.00 per hour.

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Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

Analysis:

How might an LVC affect the division of labor in the auto industry across North America?

The average hourly pay (as of September 2018) in the U.S. for auto and auto parts workers is \$20.

In Canada, the average hourly wage rate in the auto sector is about \$1 higher than in the U.S., and the base pay range is \$20.70-\$28.98. In Mexico, the average is about \$2, with a base pay range of \$3.41-\$7.34 per hour.

(A different estimate suggests the average Mexican auto sector wage rate in 2017 was \$8 per hour, exclusive of benefits.)

Mexico is the world's sixth largest automaker, and 112,000 Mexicans work in the auto, auto parts, assembly, and vehicle-related sectors – a seven-fold increase since *NAFTA* 1.0 entered into force on 1 January 1994.

Might the LVC (Minimum Wage Test) shift production of higher-value added parts to Canada and the U.S., and out of Mexico? Would it lead to rising wages in Mexico, or confine Mexico to low-end production?

Might it encourage more skilled automotive work in Mexico, such as design and R&D, where the average hourly wage is between \$10-\$22?

The average Mexican earns \$19 per day, 46.2% of Mexicans live below the poverty line and the Gini coefficient is 0.48 (essentially unchanged between 2008 and 2014). Yet, Mexico is the 11th largest economy and 13th largest exporting nation in the world. The juxtaposition of these two sets of statistics suggests Mexico is a highly unequal society, in terms of income distribution, and the benefits of *NAFTA* 1.0 have been captured by elites. Would the Minimum Wage Test help address the socioeconomic disparities?

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Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

In addition to the RVC and LVC ROOs, there are Steel and Aluminum ROOs:

As per Article 4-B.6(1)(a) in Chapter 4 of the Appendix to Annex 4-B, *i.e.*, the Automotive Appendix, at least 70% of the steel used in a vehicle must be sourced from North America. The measurement for this percentage is based on the vehicle producer's purchases by value in the U.S.-Mexico-Canada region during a defined period (namely, under Article 4-B.6(2), FY, calendar year, or quarter or month to date during which the vehicle is exported).

However, this extraordinary threshold did not satisfy the AFL-CIO or Democrats in Congress. Unless the steel ROO specified a process that mandated production in North America, semi-finished metals made in China, or elsewhere, could be shipped to Mexico, qualify as "North American" within the 70% threshold, and thereby count as originating material in the overall auto ROO. That outcome would allow vehicles with essentially Chinese-origin steel to receive *USMCA* DFQF treatment – and undermine efforts at a renaissance in the U.S. steel industry. So, in November-December 2019, following intense negotiations, the U.S., Canada, and Mexico agreed to add a specified production process criterion to the 70% steel ROO: steel could qualify as "North American" only if it were "melted and poured" in one of the three Parties. But, to accommodate Mexican concerns about supply chain practicalities, the Parties agreed to mandate compliance with this criterion after at least 7 years from implementation of the *USMCA*.

There also is the same 70% rule for aluminum, set out in Article 4-B.6(1)(b). The Parties rejected a proposal that they would consider after 10 years whether they ought to insert an aluminum ROO.

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Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

What did the U.S. give up to get the LVC (as per a 21 August 2018 Bilateral Agreement with Mexico)?

1st: The U.S. agreed it would not impose a cap on the number of vehicles shipped from Mexico that would qualify for DFQF treatment (*i.e.*, that would be exempt from America's 2.5% and 25% tariffs on cars and trucks, respectively).

2nd: In a *Side Letter* to the 27 August 2018 Bilateral Agreement, the U.S. agreed to lock its 2.5% tariff on cars imported from Mexico, that is, to provide Mexico with certainty and predictability that any potential increase above 2.5% in the American car tariff would not apply to Mexican-origin cars.

3rd: In that *Side Letter*, the U.S. preserved its ability to take a Section 232 national security trade remedy against autos and auto parts (a move it was simultaneously contemplating). But, the U.S. agreed Mexican-made vehicles would benefit from a duty-free quota of 2.4 million car and SUV shipments (a threshold roughly 40%-50% above the 2017 total of such exports from Mexico to the U.S.), before the U.S. imposed any Section 232 remedy. And, the U.S. pledged this cap would be revised upward in keeping with expansion of production in Mexico.

4th: The U.S. agreed to exempt Mexican washing machine and solar panel exports from the Section 201 general safeguard tariffs America had imposed in January 2018.

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

What did the U.S. give up to get the LVC (as per a 21 August 2018 Bilateral Agreement with Mexico)?

5th: The U.S. agreed to drop its demand for a five-year *Sunset Rule*. It settled on a rule (in *USMCA* Article 34:7) whereby every six years, *NAFTA* would be reevaluated, and any problems fixed, and then renewed for a further 16 years. That is, the FTA would be in force for 16 years – a baseline 16-year lifespan. But, every six years it would be re-evaluated. The Parties would make any changes they deemed necessary, and then renew the deal for another 16 years.

Analysis:

The *Sunset Clause* arrangement is problematical. What would happen if the Parties, following a six-year review, were at loggerheads? Would the FTA terminate? These uncertainties suggested businesses could not plan any investment beyond a payback period of 16 years.

6th: The U.S. also agreed to drop its demand for a special seasonal trade barrier remedy (namely, tariffs) to protect American fruit and vegetable farmers against Mexican competition. Thus, year-round DFQF treatment on all farm products would continue.

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(1) Auto ROOs (continued)

Will these ROOs – the most restrictive of any FTA in International Trade Law history – bring jobs back to the U.S. ("on shore")? No!

"The new North American free trade agreement ... was touted by U.S. President Donald Trump as an engine of American job creation. But Japan's automakers are largely opting instead to keep operations in place and pay Mexican workers more or even just pay tariffs.

...
However, this looks to be wishful thinking. The ratio of U.S.-Canada parts among Mexican-assembled vehicles sold in the U.S. was 13.5% in 2018.... Trump's theory was that U.S. production would inevitably increase to meet the 40% requirement, but Japanese automakers, which had already positioned their production bases according to the old NAFTA regime, are not simply willing to pull up stakes and redeploy.

One reason is the cost of moving production. Honda Motor-affiliated parts maker Keihin will raise the hourly wage of employees at a factory in Mexico to \$16 by next month – triple the average rate of a parts factory in Mexico, but still cheaper than making a move. ...

Auto component maker Piolax, will also raise the hourly wage at its Mexican plant to \$16 within the year. The company is also installing robots to mitigate rising labor costs....

Toyota Motor, which built a new plant in Mexico in 2015, is not finding it easy to change plans either. The new plant started full-scale production of pickup trucks in February. The trucks are popular in the U.S. and would be subject to a 25% tariff if they do not meet the content requirements of the *USMCA*. But if Toyota does not operate the factory, it cannot recover its investment.

...
Consumers will ultimately pay the price for inefficient production and increased component flow. U.S. research agency Center for Automotive Research estimates that *13% to 24% of all cars sold in the U.S. will be subject to tariffs.* If automakers pass these costs on, prices will rise by \$470 to \$2,200."

Shuji Nakayama & Ryo Asayama, Japan Auto Companies Triple Mexican Pay Rather than Move to U.S., NIKKEI ASIAN REVIEW, 28 June 2020, <https://asia.nikkei.com/Business/Automobiles/Japan-auto-companies-triple-Mexican-pay-rather-than-move-to-US> emphasis added).

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Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(2) Dairy

Canada insisted on an allowance for Canada to protect its dairy industry under its Supply Management System (SMS) regime.

In *TPP* negotiations, Canada agreed to give the then-other 11 *TPP* countries access to the following shares of its domestic market (using 2015 as the base year to measure domestic consumption): 3.25% for dairy products; 2.3% for eggs; 2.1% for chicken; 2% for turkey; and 1.5% for broiler hatching eggs. When, in January 2017, America withdrew from *TPP*, roughly 60% of the GDP of the original *TPP* market was lost. Canadian farm sectors asked why Canada should continue to grant the same concession in *CPTPP* to fewer Parties (10 instead of 11 other countries), when there was less in return (in respect of export opportunities to the U.S.)?

The answer was that if each *CPTPP* Party withdrew one or more previous concessions, the entire FTA would unravel. The carefully crafted balance of rights and obligations from *TPP* would not carry through to *CPTPP*, thus better for all Parties to agree to keep the market access concessions, across all goods and services sectors, and so they did. Moreover, Canada appreciated that among the *TPP* 11, Japan, Vietnam, and Malaysia were large markets, not only for Canadian farm products, but industrial goods and services, too.

However, that answer did not satisfy the U.S. in *NAFTA* 2.0 negotiations. It demanded SMS concessions from Canada that were at least as good as those Canada preserved from *TPP* into *CPTPP* for the remaining Parties. And, the Administration also sought the same concessions from Canada on cheese as Canada had granted to the EU in *CETA*, even though it had abandoned the *Trans Atlantic Trade and Investment Partnership (T-TIP)* negotiations.

Essentially, Canada won – it preserved its SMS regime.

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Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(3) UF Milk Classification

The U.S. insisted on market access for “ultra-filtered” milk.

It reached a reasonable accommodation with Canada on Canada’s Class 7 “ultra-filtered” milk classification.

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(4) Dispute Settlement in Antidumping and Countervailing Duty (AD-CVD) Cases

Canada insisted on continuation of a dispute settlement mechanism by which Canada can challenge, as it had in the past under *NAFTA* Chapter 19, U.S. trade remedies against its exports of softwood lumber, and generally in AD and CVD cases. Canada had brought and won several cases, ironically using Chapter 19, which the U.S. had championed in the original *NAFTA* negotiations (both to avoid local courts, especially in Mexico, which it perceived as dubious if not corrupt, and as a way to harmonize trade law upwards across the Parties). Eliminating the mechanism was not acceptable to Canada, nor were limits, possibly an expiry clause, on the mechanism.

Essentially, Canada won.

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(5) Cultural Protections

Canada sought continuation of the *NAFTA* 1.0 exemption (in Article 2106 and Annex 2106) to allow Canada to protect its cultural industries from what it perceived as a threat posed to its sovereignty and identity by the pervasive invasion of U.S. media and entertainment exports, and the prospect of acquisitions by U.S. companies of Canadian broadcasters.

Essentially, Canada won.

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(6) Section 232 Steel and Aluminum Tariffs

Canada insisted on a commitment from the U.S. to exempt permanently Canada from the existing Section 232 25% steel and 10% aluminum tariffs, and to not impose any Section 232 tariffs on autos or auto parts. The latter could include a passive import cap (e.g., 40% above Canadian shipments to the U.S.) that would be flexible (i.e., allow for growth in Canadian auto production and exports).

Essentially, Canada won. However, the U.S. is threatening to invoke the import surge provision concerning aluminum, and re-impose its 10% Section 232 tariff on Canadian-origin aluminum.

Regional Level Revolutions

Unrelated to the Pandemic: *USMCA*

(7) Threshold for Sales Tax Exemption

The U.S. sought a *de minimis* level for online retail shopping that would be exempt from sales taxes, up from the \$20 in *NAFTA* 1.0 to at least \$100 as agreed by Mexico (in its 27 August 2018 bilateral deal with the U.S.), though still lower than the \$800 U.S. level.

A reasonable accommodation was reached preserving the \$800 figure.

Regional Level Revolutions

Unrelated to the Pandemic: Other FTAs

(1) Post-Brexit FTAs?

U.K.-EU
U.K.-U.S.
U.K.-Australia
U.K.-New Zealand

(2) *CPTPP* Expansion?

Indonesia?
Thailand?
U.K.?

(3) In between *CPTPP* and *RCEP*?

India?

Bilateral Level Revolutions

Directly Related to the Pandemic: Sino-American Trade

(1) China cannot meet purchase targets in 15 January 2020 *Phase One Agreement* because of recession caused by pandemic. Under this *Agreement*, China pledged to purchase \$200 billion worth of American agricultural, industrial, and energy products across two years (2020 and 2021), as well as liberalize market access for U.S. financial services suppliers.

(2) China's Spring-Summer 2020 invocation of *force majeure* clauses in purchase contracts for U.S.-origin goods. Throughout this period, commercial parties declared (or attempted to declare) the pandemic as within the *force majeure* clause of their import-export contracts, thus making performance impossible – and casting doubt on the ability of China to meet its *Phase One Agreement* purchase targets.

(3) China's June 2020 requirement of SPS certification on Tyson Foods poultry. These restrictions cast further doubt that China will meet its purchase obligations.

(4) Invocation by U.S. of 1950 *Defense Production Act* to safeguard supply chains on merchandise, such as personal protective equipment (PPE), to fight the coronavirus.

See *DPA*, Public Law Number 81-774, 64 Stat. 798 (8 September 1950), codified at 50 U.S.C Sections 4501 *et seq.*

Bilateral Level Revolutions

Directly Related to the Pandemic: Sino-American Trade

The President can:

Under *DPA* Title I, order firms to elevate priority on merchandise necessary for national defense to government-determined uses, (i.e., establish contractual priorities, and identify goods) that must not be hoarded, and on which there must be no price gouging.

Under *DPA* Title III, issue regulations and orders to allocate resources (goods, including natural resources, services, and facilities) for national defense purposes, including ordering a business to expand production or requisition property from a business, and provide incentives for them to do so through, for instance, loans and loan guarantees, purchases, and procuring and installing equipment in private factories.

Under *DPA* Title VII, impose controls on the private sector to ensure materials necessary for national defense are available for defense purposes, including wages, prices, and consumer and real estate credit, settle (i.e., set the terms to resolve) disputes between labor and management, and block proposed or pending foreign mergers and acquisitions that threaten national security.

See *DPA*, Public Law Number 81-774, 64 Stat. 798 (8 September 1950), codified at 50 U.S.C Sections 4501 *et seq.*

Bilateral Level Revolutions

Directly Related to the Pandemic: Sino-American Trade

And so the President has done so ...

On 18 March 2020, amidst the COVID-19 pandemic, President Trump issued an Executive Order in which he defined “ventilators and productive equipment” as “essential to the national defense” under the *DPA*. After initial reluctance to invoke the *DPA* and effectively break private-sector contracts to accelerate production, and direct the use, of medical merchandise to fight the coronavirus, he took action.

On 23 March 2020 he issued another Executive Order listing “health and medical resources necessary to respond to the spread of COVID-19” as subject to the *DPA* rules against price gouging and hoarding.

On 27 March 2020, he invoked the *DPA* to order General Motors to prioritize contracts for as many ventilators as his Administration deemed appropriate to fight the virus. And, on 2 April, he ordered 3M, General Electric, and Medtronic to boost output of protective masks (specifically, N-95 respirators), which he said were essential to protect healthcare workers in the U.S., and these companies obtain parts they need to make ventilators.

On 3 April 2020, he ordered 3M to cease all exports to Canada and Latin America of N-95 respirators that it makes in the U.S.

President Trump's *DPA* moves amounted to an export ban on certain items.

Analysis:

What about GATT Article XI:1 ban on quantitative restrictions (QRs)? U.S. could invoke GATT Article XI:2(a) exception for QRs “temporarily” applied to relieve “critical shortages of foodstuffs or other products essential to the exporting” WTO Member.

Bilateral Level Revolutions

Directly Related to the Pandemic: Japan's “China Exit” Subsidies

Ministry of Economy, Trade, and Industry (METI) announcement, reported in:

Japan Starts Paying Firms to Cut Reliance on Chinese Factories, BLOOMBERG, 18 July 2020,
www.bloomberg.com/news/articles/2020-07-18/japan-to-pay-at-least-536-million-for-companies-to-leave-china?sref=7sxn9SxI

“Fifty-seven companies including privately-held facemask-maker Iris Ohyama Inc. or Sharp Corp. will receive a total of 57.4 billion yen (\$536 million) in subsidies from the government to invest in production in Japan, the Ministry of Economy, Trade and Industry said Another 30 firms will receive money for investments in Vietnam, Myanmar, Thailand and other Southeast Asian nations....

While the METI statement doesn't explicitly state the money is to move production out of China, Prime Minister Shinzo Abe said in March that Japan needed to bring production back home or diversify output to ASEAN nations and elsewhere to cut reliance on any one country such as China.

...

As U.S.-China relations deteriorate and the trade war worsens, there's been increasing discussions in the U.S. and elsewhere about how to “decouple” economies and firms from China. Japan's decision is similar to a Taiwanese policy in 2019, which was aimed at bringing investment back home from China. So far, no other country has enacted a concrete policy to encourage the shift.”

Bilateral Level Revolutions

Directly Related to the Pandemic: Japan's "China Exit" Subsidies

Ministry of Economy, Trade, and Industry (METI) announcement, reported in:

Japan Reveals 87 Projects Eligible for "China Exit" Subsidies, NIKKEI ASIAN REVIEW, 17 July 2020, <https://asia.nikkei.com/Economy/Japan-reveals-87-projects-eligible-for-China-exit-subsidies>

Among the 57 Japanese firms receiving "China Exit Subsidies" to relocate to Japan are:

"Household goods maker Iris Ohyama [, which] currently produces face masks at Chinese plants in the port city of Dalian, Liaoning Province, and Suzhou, west of Shanghai, with nonwoven fabric and other main materials procured from Chinese companies.

With the help of subsidies, the company will begin producing face masks at its Kakuda factory in its home base in Miyagi Prefecture in northern Japan. All material will be prepared locally, independent of overseas suppliers.

Hygiene products maker Saraya, whose offerings include alcohol-based sanitizer, also qualifies for the subsidy.

Eligible companies include producers of aviation parts, auto parts, fertilizer, medicine and paper products, with the roster incorporating such big names as Sharp, Shionogi, Terumo and Kaneka."

Bilateral Level Revolutions

Directly Related to the Pandemic: Japan's "China Exit" Subsidies

Ministry of Economy, Trade, and Industry (METI) announcement, reported in:

Japan Reveals 87 Projects Eligible for "China Exit" Subsidies, NIKKEI ASIAN REVIEW, 17 July 2020, <https://asia.nikkei.com/Economy/Japan-reveals-87-projects-eligible-for-China-exit-subsidies>

As for the 30 Japanese companies eligible for support to move to Indochina, they included:

"Hoya, which produces hard-drive parts and will move to Vietnam and Laos.

[In addition,] Sumitomo Rubber Industries will make nitrile rubber gloves in Malaysia, while Shin-Etsu Chemical will shift production of rare-earth magnets to Vietnam."

Japan's scheme comes despite – or, rather, because of – the large investments Japanese companies have made in China, the fact China is Japan's largest trading partner, anti-Japanese riots across China in 2012, and a long-standing territorial dispute concerning islands and natural gas fields in the East China Sea. The COVID-19 pandemic, which spotlighted vulnerabilities in the resilience and robustness of Japan's public health good supply chains, underscored the need for Japan to fund unilaterally its efforts to scale down its risk exposures in China.

Bilateral Level Revolutions

Indirectly Related to the Pandemic: Sino-American Trade

Economic incentives to avoid Section 301 Waves One, Two, Three, and Four (List A) tariffs on Chinese-origin merchandise by shifting supply chains out of China are reinforced by political pressures to do so on merchandise used to fight pandemic, *i.e.*, PPE and API.

Analysis:

See Table below.

Plus, explicit linkage of trade policy to national security and public health.

Bilateral Level Revolutions

Indirectly Related to the Pandemic: Sino-American Trade

	Wave One	Wave Two	Wave Three	Wave Four
Date U.S. Imposed Retaliatory Tariffs	6 July 2018	23 August 2018	24 September 2018 Also: On 5 August, U.S. labels China a "currency manipulator." On 23 August, President Trump tweets: "Our great American companies are hereby ordered to immediately start looking for an alternative to China, including bringing your companies HOME."	List 4A: 15 October 2019 (deferred from 1 September and 1 October) List 4B: Deferred indefinitely from 15 December 2019

Bilateral Level Revolutions

Indirectly Related to the Pandemic: Sino-American Trade

	Wave One	Wave Two	Wave Three	Wave Four
Retaliatory Tariff Rate (in addition to MFN rate)	25%	25%	Initially 10%, raised on 3 August to 25%	List 4A: 15% (increased from 10% as initially announced in August 2019), but reduced (effective 14 February 2020) to 7.5% as part of 15 January 2020 <i>Phase One Agreement</i> List 4B: 15% (scheduled for imposition on 15 December 2019, but not imposed in connection with <i>Phase One Agreement</i>)

Bilateral Level Revolutions

Indirectly Related to the Pandemic: Sino-American Trade

	Wave One	Wave Two	Wave Three	Wave Four
Value of Chinese Imports Affected	\$34 billion	\$16 billion	\$200 billion	Remaining roughly \$300 billion of \$550 billion worth of Chinese imports into U.S. List 4A: \$120 billion List 4B: \$160 billion
Examples of Chinese Imports Affected				Consumer products (e.g., Christmas decorations, computer monitors, iPhones, T&A, toys, video game consoles)

Bilateral Level Revolutions

Indirectly Related to the Pandemic: Sino-American Trade

	Wave One	Wave Two	Wave Three	Wave Four
Did China Counter-Retaliates?	Yes	Yes	Yes	Yes
Nature of Chinese Counter-Retaliations?	Tit-for-tat	Tit-for-tat	<p>When U.S. raised tariff rates from 10% to 25% in May 2019, China expanded its retaliatory list and raised its tariffs from 5% or 10% on \$60-\$75 billion worth of U.S. exports in two batches</p> <p>Effective 1 September 2019, China increased tariffs on first batch, by 5% or 10%, on expanded number of U.S. imports</p>	<p>CCP orders halt of purchases by SOEs of all U.S. agricultural goods</p> <p>China publishes two lists subject to levy of additional 5% or 10%, effective 1 September and 15 December, respectively.</p> <p>First list encompassed 1,717 products, including 695 different U.S. agricultural tariff lines</p> <p>Second list covers 3,361 product categories, plus China announces it will re-impose 25% tariffs on U.S. autos and auto parts</p>

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Bilateral Level Revolutions

Indirectly Related to the Pandemic: Sino-American Trade

	Wave One	Wave Two	Wave Three	Wave Four
Examples of American Exports Affected	697 agricultural product tariff lines	Agriculture-related products (animal by-products, cotton waste, fishmeal, and wood products)	<p>For first batch, additional agricultural products, including beef, pork, soybeans, plus chemicals, crude oil</p> <p>For second batch, agricultural products such as corn and wheat, plus rare earth magnets and small aircraft, as well as re-imposition of 25% tariff on vehicles, and re-imposition of 5% tariff on auto parts (both of which China had suspended since early 2019)</p>	Most products already covered by previous rounds of retaliation

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Bilateral Level Revolutions

Indirectly Related to the Pandemic: Sino-American Trade

	Wave One	Wave Two	Wave Three	Wave Four
Did U.S. Grant Product Exclusions?	Yes, for one year	Yes, for one year	Yes, for one year	Yes, for one year However: The likelihood of success of winning an exclusion from Wave Four, List A tariffs was so-so. As of 7 July 2020, the USTR had denied 4,471 such requests, which was 50.9% of the 8,780 such requests.
Did China Grant Product Exclusions?	Yes, for one year	No	No	Yes, for one year, following <i>Phase One Agreement</i> and coronavirus outbreak, on 696 products.

Bilateral Level Revolutions

Unrelated to the Pandemic: Sino-American Trade

Section 301 Trade War over *Made in China 2025* industrial policy (including subsidies), state enterprise (SOE) reform (including privatization), IP misappropriation (including hacking and cybertheft). That is, per the 215-page March 2018 Section 301 Investigation Report by the USTR:

- (1) "China uses joint venture requirements, foreign investment restrictions, and administrative review and licensing processes to force or pressure technology transfers from American companies." That is, China compels American firms to reveal and/or transfer their technology to Chinese entities by mandating as a condition of market access a joint venture (JV) with, and technology transfer to, a Chinese partner.
- (2) "China uses discriminatory licensing processes to transfer technologies from U.S. companies to Chinese companies." China limits the foreign direct investment (FDI) activities of American firms by restricting the terms of technology licenses.
- (3) "China directs and facilitates investments and acquisitions which generate large-scale technology transfer." The CCP essentially orders its companies to invest in American firms with the aim of obtaining technology the CCP decides is strategic for Chinese industries.
- (4) "China conducts and supports cyber intrusions into U.S. computer networks to gain access to valuable business information" Arguably, this conclusion was the most ominous one: the Chinese government directs, or itself conducts, cyberattacks on the computer networks of American companies to steal their trade secrets. (The National Counterintelligence and Security Center "estimated the theft of American trade secrets by China costs the United States 'anywhere from \$300 to \$600 billion' a year.")

See United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (22 March 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>

Bilateral Level Revolutions

Unrelated to the Pandemic: Sino-American Trade

Plus:

U.S. June 2020 Strategic Competition Report –
Cold War?

See:

Raj Bhala, *Are The U.S. And China In A “Cold War” Or Not?*, Bloomberg Quint (Mumbai), 30 May 2020,
www.bloombergquint.com/opinion/are-the-us-and-china-in-a-cold-war-or-not

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Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

30 June 2020 *National Security Law*.

Criminalizes, with maximum penalty of life imprisonment:

- (1) Secession (Article 20), i.e., any effort to create independence for Hong Kong from the Mainland. Secessionist acts may be non-violent. Thus, for example, the authorities declared chants such as “Hong Kong independence,” “Liberate Hong Kong, the revolution of our times!,” “Hong Kongers build a nation,” waving a flag about Hong Kong’s independence, or likewise “waving of flags that advocate independence of Tibet, Taiwan, Shanghai and East Turkestan,” were offenses.
- (2) Sedition (Article 22), or subversion of state power, that is, of China’s central or regional government, i.e., undermining CCP authority over Hong Kong, including hatred of either the central or SAR government, per Article 29. So, for instance, the aforementioned chants and banners were examples of altering the legal status of Hong Kong and subverting state power. Similarly, media commentary or picketing could be considered seditious acts.
- (3) Terrorism (Articles 24 and 26), such as perpetrating or inciting violence or acts of intimidation, including damaging public transportation facilities, and mass protests. Also included were support (e.g., transport, labor, venue assistance) for such acts, yet unclear was whether an alleged “supporter” had to know whether a person receiving that support was a terrorist.
- (4) Foreign interference, namely, collusion with foreign forces (Article 29), e.g., foreign governments or their agents, the media, NGOs, or academics. This offense included direct or indirect acceptance of support from a foreign organization with a view to performing an act hostile to Hong Kong.

See James Ockenden, *National Security Law English Translation*, TRANSIT JAM, 30 June 2020,
<https://transitjam.com/2020/06/30/national-security-law-english-translation/>

Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

Did the way in which the CCP acted contravene the *Basic Law* of Hong Kong?

(The *Basic Law* is Hong Kong's "mini-Constitution" that implements the 1984 Sino-British *Joint Declaration* under which the U.K. handed back Hong Kong to China on 30 June 1997)

Yes, says the Hong Kong Bar Association and leading Hong Kong lawyers.

Changes to the *Basic Law* require (under its own terms) public debate and passage by Hong Kong's Legislative Council ("LegCo").

The CCP did not allow for such a debate, and bypassed LegCo.

Moreover, the *Basic Law* guaranteed "freedom of speech, the press, assembly, association, procession and demonstration."

The *National Security Law* threatens these freedoms.

See 1 July 2020 Hong Kong Bar Association *Statement*, www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20%20Security%20in%20HKSAR.pdf

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Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

U.S. Response – Theory:

1992 *United States – Hong Kong Policy Act*, 22 U.S.C. § § 5701-5732:

Allows for "different" treatment for Hong Kong than the People's Republic of China (PRC) with respect to trade and other economic issues, and political matters, but only if Hong Kong remains "sufficiently autonomous" from the Mainland.

Secretary of State Mike Pompeo:

"No reasonable person can assert today that Hong Kong maintains a high degree of autonomy from China, given facts on the ground."

"It is a different Chinese Communist Party today than it was 10 years ago," Pompeo said. The Party is "intent upon the destruction of Western ideas, Western democracies, Western values."

"If the Chinese are going to treat Hong Kong the same way they treat Mainland China, there's no basis for the United States to treat it differently as well," Pompeo said.

Quoted in Yueqi Yang & Jordan Robertson, *U.S. Has No Basis to Give Hong Kong Special Treatment, Pompeo Says*, BLOOMBERG, 31 May 2020, www.bloomberg.com/news/articles/2020-05-31/pompeo-says-u-s-now-has-no-basis-to-treat-hong-kong-specially?sref=7sxw9Sxl.

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大成 DENTONS

Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

U.S. Response – Practice:

First:

Termination of Special Trade Status

Effective 29 June 2020, no longer was Hong Kong a separate customs or travel territory for purposes of U.S. law. Because the U.S. deemed Hong Kong indistinguishable from the Mainland, it imposed export restrictions on sales of sensitive technology and weapons to Hong Kong, just as it did to China.

The State Department said America was “end[ing] exports of U.S.-origin defense equipment and ... tak[ing] steps toward imposing the same restrictions on U.S. defense and dual-use technologies to Hong Kong as it does for China.” Likewise, the Department of Commerce (DOC) suspended preferential treatment that exempted U.S. companies from needing to apply for an export license for exports to Hong Kong – they would need to do so, as they did for shipments to the Mainland. The DOC said its “regulations affording preferential treatment to Hong Kong over China, including the availability of export license exceptions, are suspended.” This change affected, for example, cameras, processors, microprocessors, surveillance equipment – and even carbon fiber, a dual use item that could be used in golf clubs and missile components.

Moreover, with respect to all U.S. trade remedies (antidumping, countervailing duty, and safeguard actions), subject merchandise from China no longer was differentiated from goods shipped from Hong Kong. All exports – from the Mainland or Hong Kong – was considered subject merchandise under the appropriate trade remedy action. This inclusion covered all four Waves of Section 301 tariffs.

Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

U.S. Response – Practice:

Second:

Individual Sanctions

The President said the U.S. would “impose sanctions on individuals seen as responsible for ‘smothering – absolutely smothering – Hong Kong’s freedom,’” i.e., the U.S. took “necessary steps to sanction PRC ... and Hong Kong officials directly or indirectly involved in eroding Hong Kong’s autonomy.”

Such sanctions could include freezes of assets subject to U.S. reach, of such persons, and even restricting access of Chinese banks who do business with those persons to U.S. dollar payments and transactions with U.S. banks. On 26 June 2020, the State Department followed through, “impos[ing] visa bans on unspecified Chinese Communist Party officials accused of infringing the freedom of Hong Kong citizens....”

Specifically, Secretary of State Mike Pompeo said the ban targeted CCP officials “responsible for, or complicit in, undermining Hong Kong’s high degree of autonomy.”

Analysis:

Concomitantly, the U.S. took action against CCP officials involved in human rights violations with respect to Uyghurs, under the *Uyghur Human Rights Policy Act of 2020*. On 9 July 2020, the first such sanctions were imposed. Accused of complicity in China’s mass detentions (one million in re-education camps, which the CCP says are “vocational training” centers essential to combat extremism and separatism) and religious persecution of Uyghur Muslims, the U.S. targeted CCP Politburo member Chen Quanguo and three others (Wang Mingshan, Director, Xinjiang Public Security Bureau, Zhu Hailun, CCP member, Xinjiang; and Huo Liujun, former security official). Mr. Chen, says the U.S., is the “architect” of China’s Uyghur policies. Consequently, their U.S.-based assets were frozen, and any financial transaction with them became a crime under U.S. law. Likewise, the U.S. imposed sanctions on the entire Xinjiang Public Security Bureau.

Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

U.S. Response – Practice:

Third:

Student Visa Denials

President Trump issued a *Proclamation* “to better safeguard vital university research by suspending the entry of foreign nationals from China identified as potential security risks,” meaning that the U.S. would deny visas to “3,000 to 5,000 Chinese graduate students.”

That is, “the U.S. would restrict Chinese nationals with ties to the People’s Liberation Army from obtaining student and work-exchange visas, in an effort to target China’s ‘military-civil fusion strategy.’”

Analysis (and Professorial Insight):

The value of overseas students in the U.S. law school classroom is the (1) free exchange of ideas across different legal cultures, and (2) creation of professional networks for the future. If foreign students from a particular country are fearful to speak openly in an American law school classroom because they fear one of them in their midst is a spy who reports back to the home country government, then both benefits are lost. This concern has been expressed with respect to China and Saudi Arabia. And yet, the exchanges outside of the classroom, and development of informal networks, are not on the “radar screen” of the Professor. Further, across the 20th century, among America’s best exports traditionally have been the students it educates. They are Ambassadors for America and its values.

Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

U.S. Response – Practice:

Fourth:

Delisting

President Trump announced the U.S. “would examine the practices of Chinese companies listed on U.S. exchanges, in order to protect American investors,” because (as he put it) “[i]nvestment firms should not be subjecting their clients to the hidden and undue risks associated with financing Chinese companies that do not play by the same rules.”

Analysis:

Delisting Chinese companies injects political risk into initial public offerings (IPOs) and secondary market trading on U.S. stock exchanges. Foreign (including Chinese) stock markets may look relatively more attractive. And, a Cold War-like division of the world into a “Dollar Bloc” and a “Yuan Bloc” may ensue.

Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

U.S. Response – Practice:

Fifth:

Phase Two Trade Agreement to address issues of Chinese structural economic reforms?

Forget about it.

President Trump:

“The relationship with China has been severely damaged.”

See:

Quoted in Jennifer Jacobs, Trump Says Phase 2 China Trade Deal Unlikely at This Point, Bloomberg, 10 July 2020, <https://www.bloomberg.com/news/articles/2020-07-10/trump-says-phase-2-china-trade-deal-unlikely-at-this-point?sref=7sxn9SxI>

Analysis:

The trajectory of the Chinese economy, namely, towards a market economy, no longer is what was anticipated when China acceded to the WTO on 11 December 2001. China will continue to be a state-dominated economy, arguably a non-market economy (NME). With no *Phase Two Agreement*, there is no external pressure for fundamental changes. They will come, if at all, at the pleasure of the CCP. So, no end to the Trade War in sight.

Bilateral Level Revolutions

Unrelated to the Pandemic: Hong Kong

U.S. Response – Practice:

Sixth:

Undermine Hong Kong's longstanding currency peg?

H.K.\$ 7.8 = U.S. \$1.00

U.S. banks would be barred from lending foreign currency to Hong Kong banks (e.g., Hong Kong Shanghai Banking Corporation and Standard Chart), or purchasing currency from them. The cut-off in U.S. dollars to those Hong Kong banks would impede their purchase and sale operations (buying and selling Hong Kong against U.S. dollars) to maintain the peg.

Analysis:

However, the People's Bank of China (PBOC) could step in and lend U.S. dollars to Hong Kong banks. Likewise, third country banks also could step in and take the foreign currency purchase-lending positions that U.S. banks held. In the long term, the political risk associated with dollar holdings would increase, making the dollar less attractive as a reserve currency, giving the Chinese *yuan* a boost – and hastening the likelihood of a “Dollar” versus “Yuan” Bloc.

Bilateral Level Revolutions

Unrelated to the Pandemic: Section 301 Digital Services Tax Investigation

France's DST –

A levy of 3% on the sales revenues (as distinct from profits) earned in that country (that is, on sales transactions occurring in France) by any digital company with:

- (1) annual world-wide revenue of more than € 750 million,
- (2) of which at least € 25 million was generated by digital sales in France.

These two thresholds, global and French, respectively, pertain to turnover as distinct from profits.

The DST applies to digital services providers based not on their corporate presence in France, but rather on their provision of digital services to persons in France from anywhere in the world – in effect, digital activity, not physical location.

France justifies this approach stating that companies book earnings in low-tax jurisdictions, such as Ireland, and now multilateral solution, such as through the OECD, had been found to update existing international tax rules that allowed these companies to minimize, if not evade, paying taxes in jurisdictions in which they enjoyed robust sales earnings.

Many other countries have similar DST regimes: Austria, France, Indonesia, Italy, Kenya, Malaysia, Mexico, Pakistan, Taiwan, Turkey, Uruguay

Analysis:

- (1) U.S. versus the World?
- (2) Maybe this issue is related to the COVID-19 pandemic. Consumers around the world are relying ever-more on GAFA.

Bilateral Level Revolutions

Unrelated to the Pandemic: Section 301 Digital Services Tax Investigation

December 2019 USTR Conclusion:

France's DST –

“discriminates against U.S. companies, is inconsistent with prevailing principles of international tax policy, and is unusually burdensome for affected U.S. companies. Specifically, USTR's investigation found that the French DST discriminates against U.S. digital companies, such as Google, Apple, Facebook, and Amazon [GAFA]. In addition, the French DST is inconsistent with prevailing tax principles on account of its retroactivity, its application to revenue rather than income, its extraterritorial application, and its purpose of penalizing particular U.S. technology companies.”

See Office of the United States Trade Representative, Conclusion of USTR's Investigation Under Section 301 into France's Digital Services Tax (2 December 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/conclusion-ustr's-investigation>.

Bilateral Level Revolutions

Unrelated to the Pandemic: Section 301 Digital Services Tax Investigation

What's Next?

- (1) USTR Section 301 investigation of DSTs of nine other countries plus the EU.
- (2) Ceasefire for now, until (maybe) an OECD solution in 2020, otherwise ...
- (3) 25% Tariff on \$1.3 billion worth of French products!

See Office of the United States Trade Representative, Notice of Action in the Section 301 Investigation of France's Digital Services Tax (10 July 2020), https://ustr.gov/sites/default/files/enforcement/301Investigations/France_Digital_Services_Tax_Notice_July_2020.pdf

Targets on this retaliation list are beauty products (e.g., lip and eye makeup preparations and other cosmetics) luxury items (e.g., handbags with an "outer surface of reptile leather"), and soap. The USTR is taking aim at "France's ubiquitous beauty and luxury companies such as LVMH, Kering SA, Hermes International and L'Oreal SA." See Angelina Rascouet, *U.S. Targets French Luxury, Beauty Giants in Tariff Retaliation*, BLOOMBERG, 11 July 2020, www.bloomberg.com/news/articles/2020-07-11/u-s-targets-french-luxury-beauty-giants-in-tariff-retaliation?sref=7sxn9Sx.

"Notably absent from the tariff list" were initially-threatened items: cheese, champagne, cookware, and wine. See Jim Tankersley, *U.S. Will Impose Tariffs on French Goods in Response to Tech Tax*, THE NEW YORK TIMES, 10 July 2020, www.nytimes.com/2020/07/10/business/us-will-impose-tariffs-on-french-goods-in-response-to-tech-tax.html?referringSource=articleShare

However, under a carousel retaliation strategy, the USTR could rotate these items on after 6-18 months of an initial round of actual retaliation, and thus ratchet up the pressure on France.

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Bilateral Level Revolutions

Unrelated to the Pandemic: Iran Sanctions

Following the 3 January 2020 targeted assassination of IRGC *Al Quds* Force Commander Major General Qasem Soleimani at Baghdad International Airport by a U.S. drone strike, the U.S. imposed additional sanctions on Iran:

Analysis:

For nearly 50 years since the 1978-1979 Islamic Revolution in Iran, the relationship between the U.S. and Iran has been fraught with mutual animosity. The July 2015 *Joint Comprehensive Plan of Action (JCPOA)* was a revolution. The May 2018 withdrawal from this *Iran Nuclear Deal* was a counter-revolution. The increased sanctions on Iran are a continuation of the revolutionary measures – the most comprehensive against any nation in history.

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Enough of *Revolution* for now!



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Born in Toronto and raised partly in Edmonton, Raj now keeps busy with three fun jobs.

First, Raj is the inaugural Leo. S. Brenneisen Distinguished Professor (2017-present) at the University of Kansas School of Law, before which he held the Rice Distinguished Professorship (2003-2017). Both are university-level chairs, the highest accolade for scholarship and research in Kansas. He served as KU's Associate Dean for International and Comparative Law (2011-2017).

Second, Raj is Senior Advisor to Dentons U.S. LLP, the world's largest law firm, focusing on international and comparative legal matters.

Third, Bloomberg Quint (Mumbai) publishes Raj's "On Point" column, which is distributed to approximately 2.9 million readers worldwide, plus an additional 400,000 financial market professionals through Bloomberg's trading terminals.
(www.bloomberquint.com/author/92714/raj-bhala)

Raj also is a member of the Speaker Program of the U.S. Department of State. And, in June 2020, Ingram's Business Magazine designated him as one of "50 Kansans You Should Know." (<https://ingrams.com/article/50-kansas-you-should-know-the-class-of-2020/>)

A Harvard Law School (J.D., cum laude, 1989) graduate, Raj completed Master's degrees at LSE, in Economics (1985), and Oxford (Trinity College), in Management (1986), as a Marshall Scholar. His undergraduate degree (in Economics, Summa Cum Laude, Phi Beta Kappa, 1984) is from Duke, where he was an Angier B. Duke Scholar.

Raj is author of one of the world's leading textbooks in international trade law, *International Trade Law: A Comprehensive Textbook* (5th edition, 2019) and the first treatise on GATT in nearly 50 years, *Modern GATT Law* (2nd edition, 2013). He is the first non-Muslim American scholar to write a textbook on Islamic Law, *Understanding Islamic Law (Shari'a)* (2nd edition, 2016). His newest book is on the Trans Pacific Partnership, *TPP Objectively* (2nd edition, 2019). His current book projects *Principles of Law, Literature, and Rhetoric* and *Law of Post-Partition India*.

He is an avid distance runner and has completed four of the "World's Major Marathons" (Boston twice, New York twice, Chicago, and Berlin), but now worries about slower times. He loves, but is a poor student of, Shakespeare and French.

Please see https://en.wikipedia.org/wiki/Raj_Bhala

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Thank you ...

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For making this Presentation a part of your day! Please stay healthy!

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