

Written Testimony for the USTR Concerning Reviewing and Identifying Unfair Trade Practices and Initiating All Necessary Actions to Investigate Harm From Non-Reciprocal Trade Arrangements

Submitted by Shanker Singham, CEO Competere LLC

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Trade Policy Recommendations on Foreign Country Unfair Trade Practices

On January 20, President Trump issued a [Memorandum on America First Trade Policy](#). The AFTP Memo directed executive departments and agencies to issue reports to him by April 1 on actions the new administration could take to address specific international trade problems.

One major problem highlighted by the Memo is unfair foreign government practices that harm U.S. trade. These have been particularly pervasive in China and existing trade remedies such as anti-dumping and countervailing duty law are not designed to deal with systemic distortions on the China scale.

This Memorandum has now been supplemented by the President's memorandum and executive order regarding reciprocal tariffs.

These two memoranda outline the emergence of a Trump Trade Doctrine which recognises that trade policy must now take into consideration not only border measures and tariffs but also conditions of domestic competition, regulatory barriers, property rights protection, in short measures internal or external that have an adverse impact on US firms. President Trump intends to calibrate the US tariff based on all these factors.

This memo responds to the request for public comment on those two memoranda and provides a legal and economic underpinning for the emerging Trump Trade Doctrine and suggests how US trade openness can be calibrated to take account of market distortions in the US' trading partners. This memo also suggests how any reciprocal tariff might be arrived out. It also suggests a new remedy for ongoing complaints that US firms have regarding practices in other countries that have an adverse effect on trade.

Anti-Competitive Market Distortions are an Unfair Trade Practice

The US maintains anti-dumping laws to deal with goods that have lower prices in the US market than the home country or other appropriate market. It maintains countervailing duty laws to deal with specific subsidies but this mechanism was really designed where governments give money to a specific firm. Many of the market distortions which are promulgated by the US's trade partners are not specific and apply across whole sectors. They also have damaging effects on competition in relevant markets which is important given the proven effect on GDP per capita of anti-competitive regulatory

systems. Many of these measures are therefore outside the scope of traditional trade remedy laws.

We have provided a framework in a number of papers and books which could be useful to the Trump administration in examining these issues.¹ The framework posits that there are a series of anti-competitive market distortions or ACMDs which include the following relevant to the Trump administration's Executive Order:

1. A country charges higher tariffs than the US does (i.e. is less open to trade than the US); or
2. Distorts its market with regulatory barriers that keep US goods out or artificially lowers the costs of competing firms (a measure of domestic competition); or
3. A country does not protect property rights including intellectual property rights

We believe that it is necessary to differentiate between government actions, policies and practices that distort markets in ways that artificially reduce the costs of US trading partner firms exporting to the US or third countries, such as those above from the ordinary working out of the laws of comparative advantage. It is only ACMDs that should be actionable by US firms or by the US government.²

ACMDs have an undeniable impact on trade. They damage competition and thus lower GDP per capita in the home market as well as export and global markets. Left to proliferate, they threaten the ability of US producers to be successful around the world. Our proposal aims to take away any trade advantage they offer, and also to give an incentive for their promoters to lower their use.

What is an Anti-Competitive Market Distortion (ACMD)?

Anticompetitive market distortions analysis provides a lens and potential framework for combating unfair trade practices.

ACMDs are described in [a November 2024 report](#) by the nonpartisan Growth Commission, presenting economic policy advice for President-Elect Trump:

“ACMDs involve government actions that empower certain private interests to obtain or retain artificial competitive advantages over their rivals be they foreign or domestic. In particular, ACMDs may flow from government regulations that eliminate or lessen

¹ See for example Shanker A. Singham and Alden F. Abbott, Trade, Competition and Domestic Regulatory Policy (Routledge, 2023); Shanker A. Singham, Trading Up, The National Interest Vol 90 (2007); Alden F. Abbott and Shanker A. Singham, Enhancing Welfare by Attacking Anti-Competitive Market Distortions, Concurrences No 4-2011; Shanker A. Singham and D. Daniel Sokol, Public Sector Restraints: Behind the Border Trade Barriers, Texas International Law Journal, Summer, 2004; Shanker Singham, U. Srinivasa Rangan and Robert F. Bradley, The Effect of Anti-Competitive Market Distortions (ACMDs) on Global Markets, Law and Economics, Concurrences No.4 (2014)

² An example is in the area of labor. Labor cost advantage is the comparative advantage of developing countries with respect to developed countries, unless the developing country is deliberately deviating from agreed norms (e.g. using prison labor in contravention of international trade rules)

competition, regulations that apply differently to different firms, and regulations that exempt certain favoured firms from coverage.”

ACMD analysis may yield precise cost estimates that are helpful to the U.S. in bilateral trade negotiations centered on unfair practices, as well as in the implementation of any unilateral remedy.

A Tariff (and/or other measures) may be justified in the case of an Anti-Competitive Market Distortion

ACMDs damage trade, and harm US producers and the wider US economy because of their wealth destructive impacts. A tariff to remove the advantage conferred on foreign producers in the US and other markets is therefore a needed corrective to deliver a level playing field for competition.

Addressing Unfair Trade Practices

Section 2(c) of the AFTP Memo directs the U.S. Trade Representative to “undertake a review of, and identify, any unfair trade practices by other countries and recommend appropriate actions to remedy such practices under applicable [legal] authorities.”

One key legal authority (19 U.S.C. section 2411) authorizes the Trade Representative to impose duties, fees, or other restrictions on imported goods and services in response to unfair practices.

It also empowers the Trade Representative to enter into foreign agreements with offending countries to: (1) eliminate, or phase out, an unfair act, policy, or practice; (2) eliminate any burden or restriction on U.S. commerce resulting from such act, policy, or practice; or (3) provide the harmed U.S. industry with satisfactory compensatory trade benefits.

Unfair trade practices (referred to as “unreasonable” under the statute) are defined to include a broad set of foreign government practices that distort competitive trade. These include, for example, actions that artificially favour foreign exports, deny non-discriminatory market access for U.S. firms, harm U.S. competitors’ IP rights, and otherwise involve foreign government toleration of systematic anticompetitive activities.

The US should also include a tariff response to ACMDs in foreign markets by enhancing the existing trade remedy bodies to include an ACMD mechanism (currently ITA in Commerce and the International Trade Commission). Additionally, the views of the FTC should be solicited regarding the competition harm.

Tariffication of ACMDs

Tariffication of ACMDs is possible using the ACMD Economic Model developed for use by the Growth Commission which assigns a pillar score to each country under the three areas which the Trump administration is investigating (i.e. trade openness, domestic

competition in regulation and property rights protection). These allow us to estimate the impact of changes in this area. For example if we increase these scores to optimised levels we can identify the GDP per capita gains a country might gain, as a result of improving these to levels where there is no trade effect on the US. It is in the country's own interests to do this, but as long as their scores are not optimal, they are having a negative impact on trade with the US. The percentage change could be correlated to a suitable tariff the US could charge.³ The rationale for this is that these ACMDs damage a domestic economy but also have impacts on international trade.

To achieve a truly reciprocal result, the exercise could be repeated optimising the country's scores to US levels. In cases where a country is already at US levels, no tariff would apply.

We now consider two worked examples including China, Germany and a small developing country. The methodology we use is to compare countries scores from the ACMD index which allows us to correlate changes in pillar scores with GDP per capita.⁴ Since these pillars all have an impact on trade we correlate these with a tariff that would be needed, if the domestic GDP per capita impact is correlated with the damage.⁵

Optimising China's pillar scores to US levels leads to 28% gain in GDP per capita system wide.

Optimising Germany's pillar scores to US levels yields a 15% gain in GDP per capita.

A tariff could be introduced to reflect these losses and could be reduced when these losses are reduced. If a country committed to lower their ACMDs (for example in a subsequent trade agreement with the US), then the US could also agree to lower the tariff. Since in this case, Germany and China are distorting their markets in ways that damage GDP per capita, a US tariff is justified as their actions can be seen to be destroying wealth from the global market. US corrective action is needed to reduce these distortions and thus create wealth for citizens in the US (and indeed in Germany and China).

The downside of this approach is that the US is lowering its own trade openness in order to persuade countries to improve their own trade openness, competitive markets and property rights protection. If the tariff is wrongly calibrated and/or has no effect on the distortions in the rest of the world, then the net result could be a reduction of trade

³ See www.growth-commission.com for a series of papers that show how the three different pillar scores impact GDP per capita.

⁴ See the ACMD model used by the Growth Commission (www.growth-commission.com) drawn from the work of Shanker Singham and Alden Abbott in Footnote 1, and the SRB ACMD model available at <https://shankersingham.com/wp-content/uploads/2023/08/LIACMDIndia.pdf> and more generally at www.shankersingham.com

⁵ We use the SRB-y model as discussed in the Growth Commission reports (see generally at www.growth-commission.com) to evaluate the impact of pillar scores on GDP per capita.

openness, competition and property rights protection globally resulting in a reduction of global GDP per capita.

A Defensive Trade Remedy

In addition, individually affected firms should be given a remedy, as the landscape on these kinds of barriers is constantly changing. The core defensive trade remedy is to apply a tariff that is linked to the impact of the ACMD (“ACMD Tariffication”), and thus penalise the producer who benefits from unfair advantage in its export markets.

With respect to services, the trade remedy must provide the equivalent of an ACMD Tariffication, understanding that services cross borders in a very different way from goods. The US already has trade laws that with some adaptation could be used to combat distortions.

The anti-distortion trade remedy measure should operate in the following way:

1. An injured party would bring a complaint to the trade remedy agency;
2. The injured party would have to prove that there was an ACMD in a relevant market; this would include proving the following elements: a. A distortion; b. An anti-competitive effect with respect to consumer welfare; c. Harm to the injured party caused by the distortion.
3. The defendant would be allowed to adduce exculpatory evidence;
4. A decision would be made on ACMDs and tariffication (or equivalent for services) of distortion;
5. An appellate process would follow;
6. Finally, there would be a review process in which the defendant could prove that the distortion had been eliminated at any time.

There are many industries which benefit from ACMDs that damage competition. One example is large scale commercial aircraft production. Damaged US producers could bring cases to address China’s ACMDs by applying for a tariff linked to the scale of the ACMD. The US producer could adduce evidence of the distortion and its effect on the market for the production of large scale commercial aircraft. Given the limited number of producers, the impact of the China ACMD in this area is likely to significantly lessen competition. Causation and damage could then be proved. The advantage of this type of remedy is that affected parties are motivated to gather the evidence and prove the case.

The difference between this and traditional trade remedies is that the focus here is the impact on competition of the ACMD. This is important because it is this competition harm which destroys wealth and lowers GDP per capita in the relevant market.

Translating this into Trade Policy

We have envisaged a unilateral remedy which the US could adopt. The US should also include an ACMD chapter in its trade agreements building on the competition and SOE chapters in the USMCA for example. The attached link contains a sample chapter in an FTA ([Competere-Sample-Chapter-Report-Final.pdf](#)). Other countries with whom the US has trade deals with should be required to adopt similar approaches to China as the US does.

Shanker A. Singham

CEO, Competere LLC