

AN INTRODUCTION TO THE TRUMP EFFECT ON THE FUTURE OF GLOBAL DISPUTE RESOLUTION

KIRAN NASIR GORE*

Following World War II, the international community crafted a new worldview. Driven by a philosophy of *transnationalism*, States designed a modern framework for international relations.¹ They collectively agreed to no longer tolerate unilateral tactics, such as coercion, sanctions, or sheer force, to compel submission to individual ambitions and desires.² Instead, States adopted transnational rules, derived from multilateral and bilateral agreements, systems of global trade, established international norms, and decisions by international tribunals.³ U.S. leadership was key to establishing and encouraging acquiescence to this system.⁴ On many levels this transnational legal system has been a success. It informs approaches to international affairs, human rights, foreign policy, business transactions, and related disputes.

Yet recent years have seen an increasing return to *unilateralism* and “go it alone” attitudes. Perhaps history will show that the U.S.

* Kiran Nasir Gore focuses her practice on U.S. and transnational dispute resolution. She specializes in complex litigation, international commercial and investment arbitration, and global investigations. Her experience spans a variety of industries, including non-profits, luxury goods, medical devices and pharmaceuticals, natural resources, energy, shipping, and transport. Kiran obtained her J.D. at Brooklyn Law School (2009) and her B.A. *magna cum laude* at New York University’s Gallatin School of Individualized Study (2006). She is admitted to practice in New York and the District of Columbia and also before the U.S. Supreme Court and the Southern and Eastern Districts of New York. Kiran has previously served as a Senior Associate in the Washington, DC office of Three Crowns LLP and as an Associate in the New York office of DLA Piper LLP. She is Counsel in the Law Offices of Charles H. Camp, PC in Washington, DC, Professorial Lecturer in Law at The George Washington University Law School, and Lecturer at New York University’s Global Study Center in Washington, DC. She can be reached at kiran.gore@gmail.com.

1. See generally Barry E. Carter, *Making Progress in International Institutions and Law*, in *PROGRESS IN INTERNATIONAL LAW* 51–68 (Russell A. Miller & Rebecca M. Bratspies ed., 2008).

2. See generally Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 *YALE L.J.* 771 (1958). See also Thomas G. Weiss, *The United Nations: Before, During and After 1945*, 91 *INT’L AFF.* 1221, 1226–29 (2015).

3. See Harold Hongju Koh, *The Trump Administration and International Law*, 56 *WASHBURN L.J.* 413, 413 (2017). See also John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 *GEO. L.J.* 535, 537–38 (1992-1993).

4. Barton & Carter, *supra* note 3, at 535.

has also been a leader in this area.⁵ Since January 2017, the policies and ideologies of the Trump Administration have consistently challenged the modern transnational legal system and the future of global dispute resolution.⁶

This is best exemplified by the 73rd Session of the U.N. General Assembly in New York City during Fall 2018. Among the highlights of this program is the annual General Debate, where world leaders gather to discuss compelling global issues.⁷ Leaders of 34 Member States presented remarks, many emphasizing the need for global cooperation and harmony. For example, President Temer of Brazil encouraged world leaders to respond to increasing “isolationism, intolerance, and unilateralism . . . with the best of ourselves.”⁸ President Erdoğan of Turkey encouraged Member States to refrain from trade wars, which he characterized as “harmful to humanity,” stressing that spreading protectionism and the use of economic sanctions as a weapon may damage the world trade regime.⁹ And President Macron of France, echoing post-World War II sentiments, spoke optimistically of a “new world balance . . . crafted together [through] forums of international and regional cooperation.”¹⁰

President Trump, however, had a different message for world leaders: “America will always choose independence and cooperation over global governance, control and domination . . . We will never surrender America’s sovereignty to an unelected, unaccountable global bureaucracy. America is governed by Americans. *We reject the ideology of globalism. And we embrace the doctrine of patriot-*

5. See generally Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT’L L. 208 (2013).

6. See Koh, *supra* note 3, at 414. See also Harold Hongju Koh, *Trump Change: Unilateralism and the “Disruption Myth” in International Trade*, 44 YALE J. INT’L L. ONLINE 96, 97–98 (2019), https://campuspress.yale.edu/yjil/files/2019/02/Koh_YJIL-Symposium_Trump-Change_02.05.19-2amriyq.pdf [<https://perma.cc/9Z7K-53RW>].

7. See Past Generally Assembly Debates: General Debate of the 73rd Session: 25 September to 01 October 2018, <https://gadebate.un.org/en/sessions-archive/73> (last visited Jan. 24, 2020); 6 *Things to Know About the General Assembly as UN Heads into High Level Week*, UN NEWS (Sept. 20, 2018), <https://news.un.org/en/story/2018/09/1019842> [<https://perma.cc/WQX8-ZK4K>].

8. See H.E. Mr. Michel Temer, President of Brazil, Remarks to the 73rd Session of the U.N. G.A. 1 (Sept. 25, 2018), https://gadebate.un.org/sites/default/files/gastatements/73/br_en.pdf [<https://perma.cc/M5Z3-Y7L7>].

9. See Statement Summary of H.E. Mr. Recep Tayyip Erdoğan, President of Turkey, Remarks to the 73rd Session of the U.N. G.A. (Sept. 25, 2018), <https://gadebate.un.org/en/73/turkey> [<https://perma.cc/RAX8-HAZ6>].

10. See Statement Summary of H.E. Mr. Emmanuel Macron, President of France, Remarks to the 73rd Session of the U.N. G.A. (Sept. 25, 2018), <https://gadebate.un.org/en/73/france> [<https://perma.cc/P62V-VU7Z>].

ism.”¹¹ These were not mere words. They carried the weight of actions taken by the Trump Administration since early 2017.

The North American Free Trade Agreement between the U.S., Mexico and Canada (NAFTA) enabled the free flow of goods between the economies of the U.S., Canada, and Mexico for more than two decades.¹² It existed unchanged since 1994, until mere weeks into President Trump’s term, when he delivered on his campaign promise and announced his intention to renegotiate NAFTA.¹³ By May 2017, the Trump Administration formally launched the clock on a 90-day waiting period, after which renegotiations with Canadian and Mexican counterparts could officially begin.¹⁴

In the following months, the Trump Administration applied aggressive import tariffs on both Canadian and Mexican goods to influence renegotiation.¹⁵ In October 2018, soon after President Trump’s speech to the U.N., he delivered what many have dubbed “NAFTA 2.0.” But of course, the treaty has a new name and a new approach to dispute resolution to match.¹⁶

Under the U.S.-Mexico-Canada Trade Agreement (USMCA), Canada has withdrawn from the Investor-State Dispute Settlement

11. See President Donald Trump, Remarks by President Trump to the 73rd Session of the U.N. G.A. (Sept. 25, 2018) (emphasis added), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/> [<https://perma.cc/9UWY-S2BN>].

12. See generally N. AM. FREE TRADE AGREEMENT, <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement> [<https://perma.cc/5S64-DE4B>] (last visited June 24, 2019).

13. See Press Release, Office of the U.S. Trade Representative, USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement (May 18, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces> [<https://perma.cc/QD2L-G2V7>].

14. See Megan Cassella, *Trump Launches NAFTA Renegotiation*, POLITICO (May 18, 2017), <https://www.politico.com/story/2017/05/18/trump-administration-formally-kicks-off-renegotiation-of-nafta-238552> [<https://perma.cc/JQ26-CSKC>].

15. See Max Bouchet & Joseph Parilla, *How Trump’s Steel and Aluminum Tariffs Could Affect State Economies*, BROOKINGS (Mar. 6, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/06/how-trumps-steel-and-aluminum-tariffs-could-affect-state-economies/> [<https://perma.cc/J84H-RX9Z>].

16. See generally Robert Landicho & Andrea Cohen, *What’s in a Name Change? For Investment Claims Under the New USMCA Instead of NAFTA, (Nearly) Everything*, KLUWER ARB. BLOG (Oct. 5, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/10/05/whats-in-a-name-change-for-investment-claims-under-the-new-usmca-instead-of-nafta-nearly-everything/> [<https://perma.cc/274J-CGSP>].

(ISDS) regime.¹⁷ Its consent for legacy claims will expire three years after NAFTA's termination, a currently undetermined date.¹⁸

ISDS survives for the benefit of U.S. and Mexican investors, but the types of disputes investors may pursue—and the procedural means to do so—have been limited. For example, the USMCA's Chapter 14 provides for arbitration for claims involving: (i) direct (but not indirect) expropriation,¹⁹ (ii) violations of national treatment,²⁰ or (iii) violations of the most-favored-nation (MFN) provision of the USMCA.²¹ There is also a carve-out for national treatment or MFN claims “with respect to the establishment or acquisition of an investment.”²² All this stands in stark contrast to

17. For more information on the U.S.-Mexico-Canada Trade Agreement (USMCA), see *Agreement between the United States of America, the United Mexican States, and Canada*, OFF. U.S. TRADE REPRESENTATIVE (MAY 30, 2019), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/6H3G-MLNJ>] (signed November 30, 2018). Chapter 14 of the USMCA covers investments specifically. *Chapter 14 (Investment)*, in USMCA (2019), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14_Investment.pdf [<https://perma.cc/7D76-RL43>] [hereinafter *Chapter 14*, USMCA]. Canada has expressly withdrawn from dispute resolution mechanisms for Chapter 14 investments. See *Chapter 14*, USMCA at annexes 14-D and 14-E.

18. *Chapter 14*, USMCA at annex 14-C, ¶ 3. A “legacy investment” is defined as “an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry of force of this agreement.” *Id.* at annex 14-C, ¶ 6(a).

19. “Direct expropriation” occurs when “an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.” *Id.* at annex 14-B, ¶ 2.

20. “National treatment” means “treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” *Id.* at art. 14.4, ¶ 1.

21. A MFN claim arises when a State's treatment of an investor is “less favorable than the treatment it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” *Id.* at art. 14.5, ¶ 1. Footnote 22 to this Article provides that:

the ‘treatment’ referred to in Article 14.5 (Most-Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; . . . the ‘treatment’ . . . only encompasses measures adopted or maintained by the other Annex Party, which . . . may include measures adopted in connection with the implementation of substantive obligations in other international trade or investment agreements.

Id. at n.22.

This reflects a departure from the language of similar provisions in other investment agreements.

22. *Id.* at annex 14-D, art. 14.D.3. USMCA Annex 14-E grants additional ISDS rights for investors who are parties to government contracts in identified “covered sectors,” which includes oil and natural gas, power generation, telecommunications, transportation, and infrastructure, each a highly regulated industry involving significant government involve-

the former NAFTA regime, which allowed investors greater procedural and substantive rights for possible claims.²³

After the November 30, 2018 signing ceremony at the G-20 Summit in Buenos Aires, President Trump tweeted that the USMCA represents “one of the most important, and largest, Trade Deals in U.S. and World History.”²⁴ Now that the USMCA has been ratified by both Mexico and the United States, and ratification by Canada is expected soon, the deal is anticipated to go into force within the next few months and will account for more than \$1.2 trillion in trade in one of the world’s largest free trade zones.²⁵ Aside from how the USMCA will affect the future of North American trade specifically, there will no doubt be reverberations at a global scale. ISDS practitioners are closely watching for similar changes to the dispute resolution provisions of other bilateral and multilateral agreements.

The Trump Administration’s policies also threaten the viability of the World Trade Organization (WTO) as a forum for resolution of international trade disputes. Several countries have asserted claims to the WTO’s Dispute Settlement Body arising from the Trump Administration’s import restrictions under Section 232 of

ment. *Id.* at annex 14-E, art. 6. The additional rights include the option to assert claims for violations of the minimum standard of treatment under customary international law, claims of indirect expropriation, or claims about the establishment or acquisition of an investment. *Id.*

23. See generally Kiran Nasir Gore, *From NAFTA to USMCA: Providing Context for a New Era of Regional Investor-State Dispute Settlement*, *YOUNG ARB. REV.*, July 2019, at 4 (critically analyzing NAFTA’s objectives and ISDS protections and USMCA’s revised approach to ISDS).

24. See Donald Trump (@realDonaldTrump), TWITTER (Nov. 30, 2018, 6:45 AM) <https://twitter.com/realDonaldTrump/status/1068516326010830849> [<https://perma.cc/A5ZB-K6BJ>]. The USMCA is not yet the law of the land. Each country must now follow its domestic procedures for ratification, and in the U.S., this will mean Congressional approval. See Bob Bryan, *Trump is About to Play a Dangerous Game of Chicken with Democrats to Try to Ram Through His Trade Deal with Mexico and Canada*, *BUS. INSIDER* (Dec. 3, 2018), <https://www.businessinsider.com/trump-nafta-congress-usmca-mexico-canada-trade-deal-2018-12> [<https://perma.cc/26Y3-365C>].

25. Mary Beth Sheridan, *Mexico Becomes First Country to Ratify New North American Trade Deal*, *WASH. POST* (June 19, 2019), https://www.washingtonpost.com/world/the_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38_story.html [<https://perma.cc/R3E4-ZAW3>]; William Mauldin & Alex Leary, *USMCA: The Deal’s Been Signed, but the Debate Continues*, *WALL STREET J.* (Jan. 29, 2020), <https://www.wsj.com/articles/usmca-the-good-the-bad-and-the-unknown-11580319768>; George Petras, *From NAFTA to USMCA: Key Changes on Trilateral Trade Pact*, *USA TODAY* (Oct. 1, 2018), <https://www.usatoday.com/story/news/2018/10/01/comparison-nafta-and-usmca-trade-agreements/1487163002/> [<https://perma.cc/5QML-45N3>].

the Trade Expansion Act of 1962.²⁶ At the core of these disputes is the Trump Administration's claim, under Article XXI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), that "the dispute is non-justiciable" because the trade measures are necessary for national security.²⁷

In April 2019, the panel report for *Russia – Measures Concerning Traffic in Transit* became the first WTO decision interpreting Article XXI of the GATT 1994 and it rejected the Trump Administration's non-justiciability argument.²⁸ Going forward, this decision limits WTO Members' range of defenses before the WTO and allows for more scrutiny of their actions. This may have an impact on Member States' commitments to the Dispute Settlement Body specifically, and the WTO generally.

Separately, the Dispute Settlement Body faces systemic stressors. Because of the U.S.'s refusal to fill vacancies, it has been more than two years since the Appellate Body has had a full roster of seven members.²⁹ These vacancies exacerbated delays, but the Appellate Body was still able to function.³⁰ However, as of December 10, 2019, the only remaining judge of the Appellate Body is Hong

26. Challenges have been brought by China, India, the European Union, Canada, Mexico, Norway, Russia, Switzerland and Turkey. Several other countries have joined these disputes as Third Parties.

27. Third-Party Oral Statement of the United States, *Russia – Measures Concerning Traffic in Transit*, WT/DS512, at 4 (Jan. 25, 2018), <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf> [<https://perma.cc/6X94-MY2S>]; Third-Party Executive Summary of the United States, *Russia – Measures Concerning Traffic in Transit*, WT/DS512, at 2 (Feb. 27, 2018), <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Exec.Summ.fin.%28public%29.pdf> [<https://perma.cc/NDJ8-6G26>].

28. See Panel Report, *Russia – Measures Concerning Traffic in Transit*, ¶ 7.103, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) ¶ 7.103, https://www.wto.org/english/tratop_e/dispu_e/512r_e.pdf [<https://perma.cc/H422-8BKG>].

29. Jennifer A. Hillman, *How to Make the Trade War Even Worse*, N.Y. TIMES (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/opinion/trade-war-china-wto.html> [<https://perma.cc/M3JD-6NX6>]. See also Joost Pauwelyn, WTO Dispute Settlement Post 2019: What To Expect? What Choice To Make? 1 (July 6, 2019) (Georg. Univ. L. Ctr.) (unpublished working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415964 [<https://perma.cc/6RJE-LBTV>] ("The last time the AB was fully composed (seven ABMs) is now two years ago (June 2017).").

30. *Id.* See also WTO Members Intensify Debate Over Resolving Appellate Body Impasse, INT'L CTR. TRADE & SUSTAINABLE DEV. (June 28, 2018), <https://www.ictsd.org/bridges-news/bridges/news/wto-members-intensify-debate-over-resolving-appellate-body-impasse> [<https://perma.cc/9ZRE-NAD7>]; Tom Miles, *Trump Threats, Demands Spark Existential Crisis' at WTO*, REUTERS (Oct. 24, 2018), <https://www.reuters.com/article/us-usa-trade-wto-insight/trump-threats-demands-spark-existential-crisis-at-wto-idUSKCN1MY12F> [<https://perma.cc/66SV-64G3>].

Zhao, and it is impossible for Ms. Zhao to decide appeals alone.³¹ Many Member States remain committed to the WTO and have issued a “joint call” to launch the selection process for the appointment of further Appellate Body members.³² This is coupled with a recent challenge by China to its status as a “non-market economy,” which has incited the U.S. to remark that a future ruling in China’s favor would be “cataclysmic for the WTO.”³³ Some have interpreted this as a reckless threat by the U.S. to withdraw from the WTO.³⁴ Many leaders believe that the key to resolution is increasing cooperation and dialogue.³⁵ This may be the only way to preserve the future of this global dispute resolution forum.

With the U.S. at the helm of increased trade wars, and adopting an “America First” ideology, the U.S. will likely turn to coercive measures to achieve its foreign policy goals. In its most recognizable form, this approach involves the use of embargos and economic sanctions, but it is evolving to include the long-arm extraterritorial application of a nation’s sanctions regime.³⁶ The so-called “secondary sanctions” approach adopted by the U.S. is simple: those who do not follow the U.S. mandate for sanctions are cut off from the U.S. financial system.³⁷ In our globalized

31. A minimum of three panel members are required to hear an appeal. The international community has begun speculating how, without action to ensure a functional Appellate Body, the WTO may continue to oversee and adjudicate trade disputes going forward. See generally Pauwelyn, *supra* note 29.

32. Press Release, World Trade Organization, Members Reiterate Joint Call to Launch Selection Process for Appellate Body Members (Nov. 22, 2019), https://www.wto.org/english/news_e/news19_e/dsb_22nov19_e.htm [<https://perma.cc/KH94-D2YR>].

33. David Lawder, *U.S. Formally Opposes China Market Economy Status at WTO*, REUTERS (Nov. 30, 2017), <https://www.reuters.com/article/us-usa-china-trade-wto/u-s-formally-opposes-china-market-economy-status-at-wto-idUSKBN1DU2VH> [<https://perma.cc/YG6E-QA36>].

34. See Claude Barfield, *Robert Lighthizer and the ‘Cataclysmic’ Threat to the WTO*, AEI IDEAS BLOG (June 23, 2017), <http://www.aei.org/publication/robert-lighthizer-and-the-cataclysmic-threat-to-the-wto/>.

35. See World Trade Organization, Informal WTO Ministerial Gathering of 25 January 2019, Personal Concluding Remarks by the Chair, Federal Councillor Guy Parmelin (2019), https://www.wto.org/english/news_e/news19_e/chdgra_25jan19_e.pdf [<https://perma.cc/X4WK-EADW>].

36. See Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN REL. (Aug. 7, 2017), <https://www.cfr.org/backgrounder/what-are-economic-sanctions> [<https://perma.cc/H7UV-YVWT>]; Brahma Chellaney, *The Challenge of America’s New Extraterritorial Sanctions*, JAPAN TIMES (June 5, 2018), <https://www.japantimes.co.jp/opinion/2018/06/05/commentary/world-commentary/challenge-americas-new-extraterritorial-sanctions/#.XLemLuhKhPY> [<https://perma.cc/J9C5-K4AT>].

37. See generally Jeffery Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT’L L. 905 (2008) (explaining the impact of “secondary sanctions” on non-U.S. citizens and corporations).

world, resolving disputes with the added complexity of the U.S.'s secondary sanctions regime presents unprecedented and muddy waters for both courts and international tribunals.

Regardless of one's own view of the matter, if a world leader overtly rejects the "ideology of globalism," the most likely outcome is a race to the bottom. A return to unilateralism means States will increasingly resort to coercive measures, sanctions, and overt threats to achieve their goals. This is troubling. Since World War II, the world's nations have collectively worked to design and establish our global legal system and its norms.³⁸ Building these institutions and structures is harder than degrading them. And cracks in their foundation create the risk of instability and conflict. While long-term implications remain to be seen, this trend, as exacerbated by the Trump Administration, undermines the future of global dispute resolution.

Developing a discourse about a global shift in international affairs, as it unfolds, is no easy feat. But the George Washington University Law School (GW Law), for its part, has emerged as a leader in this conversation.

GW Law's Annual Brand-Manatt Lecture in Fall 2018, organized by the International and Comparative Law Program, featured Professor Harold Hongju Koh of Yale Law School discussing his new book *The Trump Administration and International Law*.³⁹ Weeks later, student leaders of the International Arbitration Student Association and the International Law Society presented a panel program, "International Dispute Settlement in the Trump Era," which served as the incubator for the ideas in this series of essays.⁴⁰

Separately, in Spring 2019, *The George Washington International Law Review* presented its annual symposium, "SHIFT: Global Consequences of U.S. Administration Change" (Symposium).⁴¹ Its central tenet was that transitions between U.S. presidential administrations are peaceful, but not immune from impacting international law and policy. The Symposium thus focused on what many call the "Trump Effect"—the gravity of the intended and unintended effects of this particular change in control of the

38. See Barton & Carter, *supra* note 3, at 536–38.

39. Harold Hongju Koh, Fall 2018 Brand-Manatt Lecture at The George Washington University Law School: The Trump Administration and International Law (Sept. 25, 2018).

40. Farshad Ghodoosi, Kiran Nasir Gore, Ting-Ting Kao, Eloise Obadia, & M. Arsalan Suleman, Panel Presentation at The George Washington University Law School: International Dispute Settlement in the Trump Era (Oct. 31, 2018).

41. The George Washington International Law Review Symposium: SHIFT: Global Consequences of U.S. Administration Change (Mar. 19, 2019).

U.S. executive branch on the international community, including changes in environmental policy, migration, trade, financial technologies, and healthcare.

Placed in this broader context, it is no surprise that the global community is watching the Trump Administration and its international policy decisions closely. Perhaps everyone is waiting to see where history leads us.

