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.

---


⁴ Barton & Carter, supra note 3, at 535.
has also been a leader in this area.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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-
ism.” 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. 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. 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.

In the following months, the Trump Administration applied aggressive import tariffs on both Canadian and Mexican goods to influence renegotiation. 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.

Under the U.S.-Mexico-Canada Trade Agreement (USMCA), Canada has withdrawn from the Investor-State Dispute Settlement


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

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, (ii) violations of national treatment, or (iii) violations of the most-favored-nation (MFN) provision of the USMCA. There is also a carve-out for national treatment or MFN claims “with respect to the establishment or acquisition of an investment.”

All this stands in stark contrast to


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
the Trade Expansion Act of 1962. 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.

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. 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. These vacancies exacerbated delays, but the Appellate Body was still able to function. 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.


Zhao, and it is impossible for Ms. Zhao to decide appeals alone.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{33} Some have interpreted this as a reckless threat by the U.S. to withdraw from the WTO.\textsuperscript{34} Many leaders believe that the key to resolution is increasing cooperation and dialogue.\textsuperscript{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.\textsuperscript{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.\textsuperscript{37} In our globalized

\begin{itemize}
  \item \textsuperscript{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. \textit{See generally} Pauwelyn, \textit{supra} note 29.
\end{itemize}
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. 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*. 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.

Separately, in Spring 2019, *The George Washington International Law Review* presented its annual symposium, “SHIFT: Global Consequences of U.S. Administration Change” (Symposium). 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

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.