

THE TRUMP EFFECT: INTERNATIONAL NEGOTIATION AND DISPUTE RESOLUTION

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I. INTRODUCTION

President Trump has taken a starkly different and controversial approach to international affairs, as compared to his predecessors. His “America First,” nationalist approach to foreign policy—in contrast to a “globalist” or internationalist approach¹—has led to the wholesale abandonment and disparagement of several multilateral institutions and instruments, including the dispute resolution benefits that these institutions were designed to provide. This Essay discusses the Trump Administration’s approach to diplomacy and foreign policy and its impact on the global dispute resolution system, as demonstrated through several specific examples.

II. SEEING THE INTERNATIONAL SYSTEM AS A GLOBAL DISPUTE RESOLUTION SYSTEM

The international system as we know it today—including the United Nations (U.N.) and its institutions, multilateral and bilateral treaty regimes, and our system of global trade—is broadly a global dispute resolution system. The system, through specific institutions, agreements, and legal regimes, allocates rights and

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1. As discussed *infra* Section III, the Trump “America First” approach includes a rejection or deep skepticism of international law and institutions, a preference for bilateral over multilateral agreements and forms of engagement, and a zero-sum approach to international affairs, including international trade. A “globalist” or internationalist approach includes an acceptance of international law and institutions as means of pursuing national interests, a comfort with multilateral and bilateral forms of engagement, and a commitment to reducing barriers to international trade. Both approaches share a commitment to maximizing national interests, but they differ in the means to achieve that end. Neither approach is necessarily linked to any particular school of international relations theory.

responsibilities among actors and includes mechanisms to resolve disputes involving a variety of expressly covered subject matters.²

A. *Actors, Institutions, and Law*

The primary actors in this international system are sovereign States. After the devastation of World War II, these States created and agreed to international institutions, most importantly the U.N., to manage the conduct of international relations.³ These institutions were created through binding legal instruments among States that grant the institutions their own international legal personhood, along with mandates and structures for their governance and operations.⁴ This system influences the ways that States interact with each other and provides States with additional options for cooperating and resolving disputes.

B. *Means of Resolving Disputes with Other States*

States have many options at their disposal to pursue their national interests and resolve disputes with other States. The international system to which they have agreed shapes the contours of these options.

1. Negotiation / Mediation

An obvious means of dispute resolution is through negotiation, whether bilateral or multilateral. Third-party States or international actors may facilitate such dialogue, including performing a formal or informal mediation or facilitation role.

2. Arbitration / Litigation

Within the bilateral and multilateral regimes that States have created, they have also created mechanisms for pursuing legal recourse through litigation, arbitration, and/or mediation. Some of these mechanisms provide for jurisdiction to the International

2. For a discussion of the international dispute resolution system regarding nuclear nonproliferation, see Arsalan M. Suleman, *Bargaining in the Shadow of Violence: The NPT, IAEA, and Nuclear Non-Proliferation Negotiations*, 26 BERKELEY J. INT'L L. 206 (2008).

3. See Maintain International Peace and Security, United Nations, <https://www.un.org/en/sections/what-we-do/maintain-international-peace-and-security/> [<https://perma.cc/XZN3-4HU6>] (last visited July 20, 2019).

4. The U.N. Charter is one such binding instrument, which establishes the U.N.'s legal personality in Article 104 and ensures its privileges and immunities in Article 105, in order to ensure that the institution is able to effectively carry out its functions. Both of these provisions are further developed in the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15.

Court of Justice (ICJ), the primary judicial organ of the U.N.⁵ Others allow for various means of mediation or arbitration, for example, arbitration as provided under the United Nations Convention on the Law of the Sea (UNCLOS).⁶

3. Cooperation / Positive Incentives

States can offer positive incentives to achieve their dispute-resolution goals in the form of aid, trade, or other forms of cooperation in order to induce particular actions from other States and actors.

4. Coercive Options: Trade, Sanctions, Use of Force

States also have the option to use coercive means of achieving their desired goals. These can include sanctions or trade restrictions, the downgrading of diplomatic relations, or the use of force. Although Article 2(4) of the U.N. Charter prohibits the threat or use of force against other States,⁷ the shadow of violence is ever-present in the international system. Coercive options can be pursued unilaterally, or multilaterally through international organizations like the U.N.

III. THE TRUMP ADMINISTRATION'S DISRUPTION OF THE SYSTEM

The United States was a central player in creating most of the post-World War II international institutions that define the international system as we know it today.⁸ U.S. leadership within and through these institutions has been a hallmark of the post-World War II era.⁹ The Trump Administration's approach to foreign

5. For a list of treaties and other instruments that contain clauses relating to the jurisdiction of the ICJ in contentious proceedings, see *Treaties*, Int'l Court of Justice, <https://www.icj-cij.org/en/treaties> [<https://perma.cc/H5GG-H6PL>] (last visited June 23, 2019).

6. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

7. U.N. Charter art. 2(4) ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

8. See G. John Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFF. 7, 7 (2018) ("After the Second World War, the United States and its partners built a multifaceted and sprawling international order, organized around economic openness, multi-lateral institutions, security cooperation and democratic solidarity").

9. See *id.*

affairs and international institutions challenges and fundamentally alters this traditional role and practice.¹⁰

A. *Rejection of Multilateral Institutions and Approaches*

A core tenet of the Trump Administration's approach to foreign policy is the rejection, or at least deep skepticism, of multilateralism, international law, and international institutions. At the U.N. in 2018, President Trump stated, "America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism."¹¹ These are not idle words—they reflect an approach to foreign affairs that has been implemented. The Trump Administration has, *inter alia*:

- Abandoned/withdrawn the United States from the Trans-Pacific Partnership (TPP);¹²
- Withdrawn the United States from the Paris Agreement to deal with climate change;¹³
- Withdrawn the United States from the U.N. Global Compact on Migration;¹⁴
- Withdrawn the United States from the Joint Comprehensive Plan of Action to deal with Iran's nuclear program (JCPOA);¹⁵

10. See, e.g., David A. Lake & Peter Gourevitch, *Hundreds of Scholars have Signed a Statement Defending the International Institutions that Trump has Attacked*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/14/hundreds-of-scholars-have-signed-a-statement-defending-the-international-institutions-that-trump-has-attacked/?utm_term=.5ede0d2e50d8 [<https://perma.cc/Z9XZ-5UPM>].

11. President Donald Trump, Remarks by President Trump to the 73rd Session of the United Nations General Assembly (Sept. 25, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/> [<https://perma.cc/5V7B-B2JB>] [hereinafter Remarks by President Trump].

12. Press Release, Office of the U.S. Trade Representative, The U.S. Officially Withdraws from the Trans-Pac. Partnership (Jan. 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> [<https://perma.cc/UUV9-FQSJ>].

13. President Donald Trump, Statement by President Trump on the Paris Climate Accord (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> [<https://perma.cc/TZ52-AC44>].

14. United States Ends Participation in Global Compact on Migration, U.S. Mission to United Nations (Dec. 2, 2017), <https://usun.state.gov/remarks/8197> [<https://perma.cc/T8HA-SLVP>]. See also Remarks by President Trump, *supra* note 11 ("Migration should not be governed by an international body unaccountable to our own citizens.").

15. See Press Release, The White House, President Donald J. Trump is Ending United States Participation in an Unacceptable Iran Deal (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/> [<https://perma.cc/JVC9-K9FJ>].

- Withdrawn the United States from the U.N. Human Rights Council;¹⁶
- Eliminated U.S. funding for the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA);¹⁷
- Attacked the legitimacy of the International Criminal Court (ICC);¹⁸
- Announced the U.S. withdrawal from the Optional Protocol on Compulsory Jurisdiction to the Vienna Convention on Diplomatic Relations (VCDR), the 1955 U.S.-Iran Treaty of Amity, and the Universal Postal Union (UPU);¹⁹
- Withdrawn the United States from the United Nations Educational, Scientific and Cultural Organization (UNESCO);²⁰ and
- Violated U.N. Security Council Resolutions 242 (1967) and 497 (1981) by proclaiming that “the United States recognizes that the Golan Heights are part of the State of Israel.”²¹

16. See Remarks by President Trump, *supra* note 11 (“So the United States took the only responsible course: We withdrew from the Human Rights Council, and we will not return until real reform is enacted.”); Nikki Haley, U.S. Permanent Representative to the United Nations, Remarks on the UN Human Rights Council (June 19, 2018), <https://www.state.gov/remarks-on-the-un-human-rights-council/> [<https://perma.cc/PMV8-6XMG>].

17. See Karen DeYoung, Ruth Eglash, & Hazem Balousha, *U.S. Ends Aid to United Nations Agency Supporting Palestinian Refugees*, WASH. POST (August 31, 2018), https://www.washingtonpost.com/world/middle_east/us-aid-cuts-wont-end-the-right-of-return-palestinians-say/2018/08/31/8e3f25b4-ad0c-11e8-8a0c-70b618c98d3c_story.html [<https://perma.cc/89Z5-8JNP>].

18. See Remarks by President Trump, *supra* note 11 (“As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority.”); Fact Sheet, The White House, Protecting American Constitutionalism and Sovereignty from the International Criminal Court (Sept. 10, 2018), <https://www.whitehouse.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/> [<https://perma.cc/P96C-DTE6>].

19. See Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes n. 10, Nov. 13, 1961, 21 U.S.T. 77, 596 U.N.T.S. 261 (noting U.S. communication of withdrawal from the Optional Protocol); Edward Wong & David E. Sanger, *U.S. Withdraws From 1955 Treaty Normalizing Relations With Iran*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/world/middleeast/us-withdraws-treaty-iran.html> [<https://perma.cc/JC3X-AJSX>]; Press Release, The White House, Statement from the Press Sec’y (Oct. 17, 2018), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-38/> [<https://perma.cc/TJ5Y-FKSY>] (announcing U.S. withdrawal from the UPU).

20. See Press Statement, Heather Nauert, Spokesperson, U.S. Dep’t of State, The U.S. Withdraws From UNESCO (Oct. 12, 2017), <https://www.state.gov/the-united-states-withdraws-from-unesco/> [<https://perma.cc/YB5C-UVLW>].

21. Press Release, The White House, Proclamation on Recognizing the Golan Heights as Part of the State of Israel (Mar. 25, 2019), <https://www.whitehouse.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/> [<https://perma.cc/N2LH-F63E>]. See also Press Release, United Nations, Security Council Members Regret

B. *Transactional, Zero-Sum Worldview*

These actions have been supplemented by rhetoric attacking multilateralism and various international institutions, including alliance relationships like the North Atlantic Treaty Organization (NATO), as well as attacks on multilateral negotiations and institutions generally in contrast to bilateral arrangements. This approach is particularly salient in trade negotiations, where the Administration's zero-sum understanding of international relations is particularly evident: "We believe that trade must be fair and reciprocal. The U.S. will not be taken advantage of any longer . . . For this reason, we are systematically renegotiating broken and bad trade deals."²²

C. *A Changed Approach to Global Dispute Resolution*

The Trump Administration's foreign policy approach has also altered U.S. policy as applied to particular conflict resolution efforts. Regarding Israel-Palestine negotiations, rather than respecting the long-standing U.S. policy that Jerusalem's status would be determined through negotiations, and the U.N.-recognized international consensus of Jerusalem's contested status, the Trump Administration unilaterally moved the U.S. Embassy to Jerusalem and recognized it as Israel's capital.²³ On North Korea, rather than seeking to restart the six-party talks, the Administration has pursued direct, bilateral negotiations.²⁴ And on Iran, rather than adhere to U.S. commitments under the JCPOA, the Trump Administration withdrew from the agreement. All of these changes in policy reflect the broader unilateralist worldview of the Administration and have direct implications for these and other dispute resolution efforts.

Decision by U.S. to Recognize Israel's Sovereignty over Occupied Syrian Golan (Mar. 27, 2019), <https://www.un.org/press/en/2019/sc13753.doc.htm> [<https://perma.cc/7E4J-3R9K>] (arguing that the decision violated U.N. Security Council Resolutions).

22. Remarks by President Trump, *supra* note 11.

23. See David Nakamura, Loveday Morris & Anne Gearan, *Trump to Recognize Jerusalem as Israel's capital in Policy Shift that Could Spark Unrest*, WASH. POST (Dec. 5, 2017), https://www.washingtonpost.com/world/middle_east/uncertainty-anger-as-trump-keeps-alive-dispute-over-moving-us-embassy-to-jerusalem/2017/12/05/e514b852-d9ab-11e7-b859-fb0995360725_story.html [<https://perma.cc/W7UQ-66MG>]; Hady Amr & Arsalan Suleman, *The Global Fallout Over Trump's Jerusalem Decision*, BROOKINGS (Dec. 19, 2017), <https://www.brookings.edu/blog/markaz/2017/12/19/the-global-fallout-over-trumps-jerusalem-decision/> [<https://perma.cc/4XYA-6EW6>].

24. See Christopher R. Hill, *The U.S. Needs a New North Korea Strategy*, FOREIGN AFF. (Sept. 5, 2018), <https://www.foreignaffairs.com/articles/north-korea/2018-09-05/us-needs-new-north-korea-strategy> [<https://perma.cc/TBJ9-8Y94>].

IV. IMPLICATIONS FOR GLOBAL DISPUTE RESOLUTION EFFORTS

The U.S. rejection of multilateral institutions by the Trump Administration has narrowed the options available to the United States to pursue dispute resolution effectively. It has also prompted other countries to engage in unilateral actions or exercise their own dispute resolution rights within the international system.

A. *Limiting Tools Available*

By withdrawing from various institutions and agreements, the Trump Administration has led the United States toward limiting its tools for implementing policy, including dispute resolution. By withdrawing from the U.N. Human Rights Council, the United States has given up the opportunity to utilize that institution and its mechanisms to achieve policy goals and to resolve disputes with other States over human rights matters—for example, the ability to establish commissions of inquiry, fact-finding missions, and U.N. Special Rapporteur positions. Similarly, for other agreements and institutions like the Paris Agreement or UNESCO, the United States has unilaterally surrendered its ability to use those frameworks and platforms to achieve policy goals.

The U.S. withdrawal from the Optional Protocol on Compulsory Jurisdiction to the VCDR was motivated in part by a desire of the Trump Administration to avoid future claims under the Protocol before the ICJ, in reaction to Palestine's ICJ suit against the United States regarding the relocation to Jerusalem of the U.S. Embassy to Israel.²⁵ But that withdrawal also eliminates the option for the United States to ever use that same forum in case it has a dispute under the VCDR with another State party. The lack of the ICJ option could force the United States to use other means, including coercive measures, if faced with a VCDR dispute in the future.

B. *An Increased Recourse to Inter-State Litigation*

The Trump Administration's approach has disrupted international consensus and limited options and means for negotiated

25. See Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Application Instituting Proceedings, ¶ 2 (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf> [<https://perma.cc/VHY3-3SFJ>]; Roberta Rampton, Lesley Wroughton & Stephanie van den Berg, *U.S. Withdraws from International Accords, Says U.N. World Court 'Politicized'*, REUTERS (Oct. 3, 2018), <https://www.reuters.com/article/us-usa-diplomacy-treaty/u-s-withdraws-from-international-accords-says-u-n-world-court-politicized-idUSKCN1MD2CP> [<https://perma.cc/R2W3-48VG>].

outcomes. In response, some States have chosen to resort to litigation to protect their rights. In July 2018, Iran sued the United States before the ICJ under the 1955 Treaty of Amity for the re-imposition of sanctions in violation of the JCPOA.²⁶ In September 2018, Palestine filed an ICJ claim against the United States for violating the VCDR by moving to Jerusalem the U.S. Embassy to Israel.²⁷ Both of these States brought claims against the United States in response to unilateral U.S. actions that allegedly violated negotiated agreements or closed-off means of dispute resolution via negotiation. Other States may take similar actions when facing limited means for pursuing negotiated dispute resolution with the United States under the Trump Administration.

C. *Encouragement of the Use of Unilateral and Coercive Measures Rather than Diplomacy*

The Trump Administration's zero-sum approach and rhetoric has placed greater primacy on unilateral and coercive means of dispute resolution as compared to negotiated outcomes. We have seen some examples of this outcome from the United States, with the re-imposition of Iran sanctions rather than abiding by the JCPOA, and the unilateral withdrawals of the United States from various international agreements and institutions.

And the Administration may have encouraged other States to do the same. For example, the Trump Administration's unilateral decisions to move the U.S. Embassy to Israel to Jerusalem and recognize the Golan Heights as part of Israel may encourage Israel to unilaterally annex parts of the Occupied Palestinian Territories in the West Bank, as Prime Minister Netanyahu pledged to do prior to Israel's April 2019 elections.²⁸ And President Trump seemed to take credit for the imposition of coercive measures by Saudi Arabia, the U.A.E., Egypt, and Bahrain against Qatar in the immediate wake of his visit to Saudi Arabia in late May 2017.²⁹ Those mea-

26. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Application Instituting Proceedings, ¶¶ 1–2 (July 16, 2018), <https://www.icj-cij.org/files/case-related/175/175-20180716-APP-01-00-EN.pdf> [<https://perma.cc/63GE-RSJ4>].

27. Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), ¶ 36.

28. See Jeffrey Heller, *Netanyahu Plays Pre-Election Trump Card: Settlement Annexation*, REUTERS (Apr. 7, 2019), <https://www.reuters.com/article/us-israel-palestinians-settlements/netanyahu-plays-pre-election-trump-card-settlement-annexation-idUSKCN1RJ0FK> [<https://perma.cc/9BEQ-ZYZH>].

29. See Mark Landler, *Trump Takes Credit for Saudi Move Against Qatar, a U.S. Military Partner*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/world/middleeast/trump-qatar-saudi-arabia.html> [<https://perma.cc/F9U3-8LXX>].

tures have been challenged by Qatar in various forums, including in an ICJ case against the U.A.E. under the International Convention on the Elimination of All Forms of Racial Discrimination³⁰ as well as through proceedings before the International Civil Aviation Organization, whose Council decision upholding its jurisdiction to hear the dispute has been appealed to the ICJ by the adverse parties.³¹

V. WILL THE IMPACT LAST?

The Trump Administration's assault on multilateral institutions and international law is undeniable. But its long-term effects are uncertain. It is much easier to disrupt and degrade international norms and institutions than it is to build them up and reinforce them. And since other States react and internalize such actions, the second- and third-order effects are difficult to manage once the process of unravelling institutions and norms has begun. While the extent of the long-term impact will depend on many factors, including how soon President Trump's successor takes office and what foreign policy approach he or she adopts, the near-term effects are real and concerning.

Global dispute resolution mechanisms are under assault, and if the United States continues to be a critic of such mechanisms rather than one of its principal proponents, the trend of abandonment of such institutions might quickly spread globally. As legitimate options for dispute resolution narrow, States may increasingly resort to unilateral and coercive means of achieving their goals, increasing the risk of instability and conflict.

30. *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Int'l Ct. Just., <https://www.icj-cij.org/en/case/172> [<https://perma.cc/9TGZ-U7HP>] (last visited May 24, 2019).

31. *See* Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Int'l Ct. Just., <https://www.icj-cij.org/en/case/173> [<https://perma.cc/KSD9-2TW>] (last visited May 24, 2019); Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar), Int'l Ct. Just., <https://www.icj-cij.org/en/case/174> [<https://perma.cc/H9SN-MKNG>] (last visited May 24, 2019). The author and his law firm, Foley Hoag LLP, serve as counsel for Qatar in the aforementioned cases.

