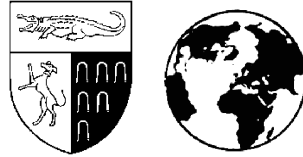


# The Yale Journal of International Law Online



## Introduction to the Yale Symposium on Trade Law Under the Trump Administration

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There could not be a better time to publish this Symposium, which is devoted to an examination of how international trade law has changed under the Trump administration. It comes at the halfway point in the administration's first term, on the eve of the signing of a revised North American trade agreement, and at the height of a tit-for-tat tariff escalation between the United States and its major trading partners. It comes at a moment when the future of the multilateral trading system conceived in the second half of the twentieth century seems unclear, with the possibility of its decline or eclipse now very real. And it addresses critical questions concerning the impact of globalization on major economies with differently oriented market structures. In one form or another, each of the essays in this collection responds to these and related issues at this crucial juncture.

The ten contributors to this Symposium have spent many years participating in and observing the development of trade law as practitioners and as academics. They have contributed to the practical workings and intellectual evolution of international economic policy both in the United States and abroad. Their essays highlight the achievements, shortcomings, challenges, changing narratives, legal innovations, economic consequences, and social repercussions of recent developments in trade.

The authors first examine the World Trade Organization (WTO), which, despite the failure of the Doha Round, remains the central institution in international trade law and policy. It has dominated international trade lawmaking and trade law scholarship for the last twenty years. Alongside

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regional free trade agreements, the WTO has been the focal point for norm development and global regulatory cooperation. Its reach has extended beyond traditional ideas of trade to intellectual property law, investment law, environmental issues, and domestic administrative rulemaking.

In her essay, Rachel Brewster reviews what she calls the Trump administration's "attack" on the WTO.<sup>1</sup> She explores the consequences of a weakened WTO, particularly the precedent set by the United States in undermining the institution's norms. She argues that revisions to the WTO's institutional structure may help resolve the crisis as well as provide a credible demonstration of WTO Members' commitment to multilateralism during this turbulent time.

Padideh Ala'i also examines the U.S. confrontation with the WTO, focusing in particular on the work of the Appellate Body.<sup>2</sup> Using *U.S.-Shrimp* as a case study,<sup>3</sup> she defends the work of the Appellate Body. She sees the Appellate Body's rulings as positively contributing to the growth of international trade law and criticizes the U.S. position, noting the occasions on which the United States has benefitted from the decision-making in Geneva.

Gregory Shaffer contextualizes the U.S. position at the WTO in historical perspective, drawing parallels with prior occasions when the United States took a view averse to multilateral cooperation.<sup>4</sup> He concludes that the greatest challenge to the present multilateral crisis is the U.S. relationship with China. He assesses different proposals that have been made to address that challenge in the face of what he perceives to be a revival of power politics, with the potential to upend the established order of international law. Shaffer characterizes this trend as a reversal of John Jackson's famous claim that the WTO's Dispute Settlement Understanding moved international economic law from "power-oriented technique" to a "rule-oriented" regime.<sup>5</sup>

Andrew Lang similarly focuses on the systemic dynamics at play in the present moment.<sup>6</sup> Drawing on John Ruggie's earlier analysis of the "new protectionism" of the 1970s and early 1980s,<sup>7</sup> Lang draws lessons for better understanding the Trump administration's trade ideology in light of longer-running questions concerning the United States' place in the global economy. Ruggie had argued that the "new protectionism" did not signal a fundamental unravelling of the post-war international economic order; instead, it signaled a moderation of the pace and scope of liberalization in line with demands of social

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1. Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE 6 (2019).

2. Padideh Ala'i, *The Vital Role of the WTO Appellate Body in the Promotion of Rule of Law and International Cooperation: A Case Study*, 44 YALE J. INT'L L. ONLINE 86 (2019).

3. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

4. Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. ONLINE 37 (2019).

5. *Id.* at 37 n.1 (2019) (citing JOHN JACKSON, *THE WORLD TRADING SYSTEM* 111 (2d ed. 1997)).

6. Andrew Lang, *Protectionism's Many Faces*, 44 YALE J. INT'L L. ONLINE 54 (2019).

7. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

protection, a Polanyian reaction that could ultimately comport with continued multilateralism. Lang's view is that the current turbulence in international trade is neither a straightforward rejection of globalization nor a repeat of what Ruggie identified in the 1970s. Rather, it is closer to what the United States achieved as against its industrial rivals in the 1980s: a rebalancing of international trade in its favor.<sup>8</sup> However, Lang argues that the anchor of the present global order is the complex U.S.-China trade relation, which takes place not among trusted allies (as in the case of Japan or Germany in the 1980s) but among geopolitical rivals. Lang's view is ultimately more pessimistic than some of the other commentators to the Symposium, in the sense that he foresees a possible end to the institutional compromises that have so far enabled the post-war order to accommodate new powers and changing circumstances.

Picking up the same theme, Chantal Thomas considers two phenomena emergent within international trade law and policy: multipolarity, meaning the rise of new powers outside the framework of U.S. economic hegemony, and the resurgence of economic nationalism, or what she calls "reterritorialization."<sup>9</sup> She sees this moment as creating potential opportunities for developing States in both economic and political relations—even if the moment is fraught with risks to developing States' relative fragility. She argues that the "world trading order is now confronting perhaps the clearest existential crisis it has faced since the establishment of its foundational treaty regime,"<sup>10</sup> which could provide new possibilities for reform of the trading regime that developing countries have sought for decades.

In a similar vein, David Singh Grewal argues that a new research agenda for understanding trade law under the Trump administration should focus on three structural dynamics in economic globalization underlying the changing policy landscape today: the relationship between international trade and economic inequality, the relationship between international trade and global finance, and the relationship between international trade and national security.<sup>11</sup> In contrast to the present, the immediate post-war period—the "*trente glorieuses*"—saw relatively high and widely shared economic growth across the industrial world, a sustainable relationship between trade and finance, and economic liberalization as a buoy for a broad geopolitical alliance. While each of these dynamics have changed—and in ways that threaten the viability of the post-war order—many of the assumptions about trade law and policy remain caught in an earlier era. Grewal calls on scholars and practitioners to consider these changing dynamics in their critical assessments and institutional responses

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8. Lang, *supra* note 6, at 56. For an account that supports Lang's interpretation, see Quinn Slobodian, *You Live in Robert Lighthizer's World Now*, FOREIGN POL'Y (Aug. 6, 2018), <https://foreignpolicy.com/2018/08/06/you-live-in-robert-lighthizers-world-now-trump-trade/> (suggesting U.S. Trade Representative Robert Lighthizer's aim with respect to China is to achieve what occurred with Japan and other rivals in the 1980s).

9. Chantal Thomas, *Trade and Development in an Era of Multipolarity and Reterritorialization*, 44 YALE J. INT'L L. ONLINE 77, 77 (2019).

10. *Id.* at 85.

11. David Singh Grewal, *A Research Agenda for Trade Policy Under the Trump Administration*, 44 YALE J. INT'L L. ONLINE 69, 69 (2019).

to the present turbulence.

Timothy Meyer takes up the Trump administration's imposition of tariffs, which he notes is the "central issue" in controversies over present U.S. international trade policy.<sup>12</sup> He argues that one reason for the president's deployment of tariff authority is the tight hold over the president maintained by the constituency that put him in office—and that can keep him there. He contends that the president's imposition of tariffs is questionable under U.S. law and harmful for the U.S. economy, including for those the tariffs are intended to help. He proposes a better way to address economic redistribution: include mechanisms in trade agreements that take liberalization's impact on workers into account.

Joel Trachtman likewise examines the consequences of purported changes to international trade governance under the Trump administration from the perspective of workers.<sup>13</sup> He makes the case that trade liberalization is, in fact, good for workers worldwide. Seeing this as a fundamental achievement of global trade liberalization, he argues that the multilateral system must be preserved, and the Trump administration's attempts to dismantle it discouraged. He argues that instead of protectionism, alternative approaches linking trade adjustment assistance and social welfare goals to liberalization would better sustain the global system.

Kathleen Claussen reviews the collective compendium of essays presented as part of this Symposium, identifies additional debates in the public and scholarly domain, and responds to certain points in contention.<sup>14</sup> She examines whether what has occurred in the first half of the Trump administration's first term is novel, or if it is merely "old wine in new bottles." Concluding that there is little novel in what is occurring now, she argues that what makes the administration's actions different from past actions of a similar variety is their occurrence in the shadow of a robust international governance system. For this reason, she makes the case that a reconciliation between international and domestic lawmaking is urgently needed.

Finally, Harold Koh draws the Symposium to a close, reflecting on the views of these commentators as well as his own experience in government and as a scholar of international law and foreign relations for more than four decades.

Each of the contributors has a different angle on trade law in the Trump administration, as well as differing views on how best to move forward. All agree, however, that we are now at a critical juncture. At a moment when U.S. trade policy seems to fluctuate dramatically—and is often announced first on Twitter—academic analysis and sober criticism are sorely needed. We hope this Symposium helps to prompt such discussion in the legal academy and beyond, and wish to close by thanking the contributors and the editors of the *Yale Journal*

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12. Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT'L L. ONLINE 16, 16 (2019).

13. Joel P. Trachtman, *A World Trade Organization for Workers?*, 44 YALE J. INT'L L. ONLINE 28 (2019).

14. Kathleen Claussen, *Old Wine in New Bottles? The Trade Rule of Law*, 44 YALE J. INT'L L. ONLINE 61 (2019).

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