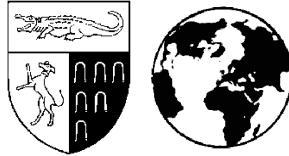


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Trump Change: Unilateralism and the “Disruption Myth” in International Trade

By Harold Hongju Koh[†]

As the third year of his presidency begins, Donald Trump continues to style himself as a “dealmaker” and “disrupter,” conscripting a modern management meme whereby iconoclasts who reject commonly accepted management practices achieve worse performance in the near-term, but in the longer term end up toppling conventional ways of doing business.¹ Rejecting the incrementalism of conventional lawyers, economists, and public policy analysts, Trump’s defenders say, his administration has similarly applied “disruptive innovation” to transform U.S. foreign policy in general and trade policy in particular.² By unilateral acts that liberate us from “bad deals” that have worsened America’s trade deficits with foreign economies, Trump has “shaken things up” so that member States of the World Trade Organization (WTO) can no longer take advantage of us. And because bilateral “[t]rade wars are good and easy to win,” according to Trump,³ trade unilateralism forces exploitative trading partners to choose between mutually destructive tit-for-tat tariff escalation and coerced renegotiations that end up “getting us a better deal” on such agreements as the North American Free Trade Agreement (NAFTA) and the Korean-U.S. Free Trade Agreement.

In justifying his unilateralist policies with the defense of “disruption,” Trump rejects in trade, as in other foreign policy realms, what I have called an approach based on “International Law as Smart Power” or “engage – translate –

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1. See generally CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS* xv (2011).

2. See Juan Williams, *The Trump ‘Disruption’ Con*, *THE HILL* (May 30, 2016), <https://thehill.com/opinion/juan-williams/281576-juan-williams-the-trump-disruption-con> (citing Bret Baier of Fox News).

3. Paul Krugman, *Bumbling into a Trade War*, *N.Y. TIMES* (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/opinion/trade-war-china-trump.html>.

leverage.”⁴ That time-tested approach—applied by most Democratic and Republican administrations before Trump—calls on the United States to invoke multilateral compliance with international law rules as a source of smart power and global leadership. By so doing, since World War II, the United States has traditionally: (1) engaged with allies around common values to forge a rules-based order for global governance; (2) translated from existing rules in situations where the legal rules are unclear, rather than pressing power-based solutions that rest on national interest; and (3) leveraged legal approaches with concerted multilateral diplomacy and hard and soft power tools to generate proactive solutions to challenging global problems.⁵ In his tumultuous two years, Trump has persistently pursued the opposite approach: toward “disengage – power politics – unilateralism.” Wherever possible, he seeks to (1) disengage from global alliances, (2) claim that no meaningful rules constrain or guide U.S. power, and (3) eschew cooperative diplomatic approaches that can leverage a blend of hard and soft power tools into enduring legal mechanisms for global governance.

This “disruptive” strategy rests on Trump’s belief—sloganized at populist rallies as “America First”—that the United States has lost competitiveness vis-à-vis other countries in what he perceives to be a zero-sum game. Globalization has left the American working class behind by allowing immigrants and foreigners to steal their jobs. Because America now bears too much of the burden of global leadership, to “make America great again,” the United States should offload much of it so that other nations pay their fair share. And because America has enough trouble dealing with its own problems, it should not waste energy judging or helping to solve the problems of others, particularly when other regional hegemony such as China and Russia are able and eager to take care of them.

This *Yale Symposium on International Trade in the Trump Era* debunks Trump’s claim of “disruptive unilateralism” as a myth. The essays in the Symposium prove that what Donald Trump has been offering in the trade field is not “innovative disruption” at all. Instead, it is his own brand of “chump change,” a policy whose illusory short-term returns are far outweighed by accompanying longer-term losses that only a chump could think had significant or enduring value. As important, the collected essays show that Trump’s counterproductive approach is largely failing because it cannot overwhelm what I call “transnational legal process.”⁶ “[E]ven as the world experiences its worst trade tensions since the Great Depression,” Mark Wu has written, “[o]n the surface, it may appear that faith in the utility of transnational legal process has collapsed in the domain of international trade. But if one examines beyond the headlines . . . the influence of transnational legal process is still very much at work”⁷ Although Trump would resign from global leadership, the United

4. HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 9 (2019).

5. *See generally id.*

6. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

7. Mark Wu, *Trump vs. International Law: Trade Unilateralism in Pursuit of What?*, OPINIO JURIS (Oct. 10, 2018), <http://opiniojuris.org/2018/10/10/trump-vs-international-law-trade-unilateralism->

States is so deeply enmeshed with the laws, norms, and institutions of international trade law that it can no more resign from the global trading system in an increasingly integrated world than a human being can resign from the human race.

As a result, under Trump, the new U.S. default has become what I call “resigning without leaving”: the United States remains inside the very multilateral institutions and alliances Trump derides but with vastly reduced influence and legitimacy because no one listens to a lame duck on its way out. And because Trump regularly threatens withdrawal without a backup plan, in circumstances such as the NAFTA renegotiation, the threatened exit simply leads to a hasty negotiation that shallowly repackages the status quo.⁸ In other cases, such as the Trans-Pacific Partnership (TPP), the United States exits, misjudging that the regime will collapse without its participation, then finds itself supplicating to re-enter a deal it never should have left in the first place.⁹ In an ironic twist, after loudly rejecting the TPP, the Trump administration ended up quietly accepting many of its provisions in the new NAFTA, previewing what might well happen in any future denuclearization negotiations with North Korea following the U.S. withdrawal from the Iran nuclear deal.

As this Symposium shows, there is no way to make a silk purse out of this sow’s ear. These essays illustrate how two long years of “Trump change” have damaged and threaten to destroy four fundamental features of the post-Bretton Woods multilateral trading system: (1) bilateral and regional diplomacy, (2) the “trade rule of law,” (3) the WTO and its system of multilateral dispute resolution, and (4) the effort to refocus the trade community’s attention from nationalistic security concerns to a twenty-first century focus on equality and redistribution. These are not just Democratic Party talking points. Rather, they grow out of an accepted bipartisan understanding of how and why the existing international trading system and law evolved in the first place.

The oft-told story begins with the debacle of the Smoot-Hawley Tariff Act of 1930 and the Great Depression. Over a six-month period, the Senate amended the House bill that became Smoot-Hawley more than 1,200 times, leading to an ad valorem rate on dutiable imports of nearly 53%. Within months, 26 countries had retaliated, and within two more years, world trade had fallen by \$22 billion, ushering in the Great Depression.¹⁰ Smoot-Hawley taught the world a painful historical lesson about reciprocal protectionism: namely, that—contrary to Trump’s boastful tweet—trade and tariff wars are in fact bad and very hard to win. For decades, this notion served as an article of faith for Republican free-traders. In addition, the tariff wars that Smoot-Hawley triggered created the enduring impression that protectionism more often results from *congressional* micromanagement of tariff levels, suggesting that more presidential control of

in-pursuit-of-what/.

8. Greg Ip, *New NAFTA Shows Limits of “America First”*, WALL ST. J. (Oct. 3, 2018), <https://www.wsj.com/articles/new-nafta-shows-limits-of-america-first-1538568001>.

9. KOH, *supra* note 4, at 54-55.

10. ROBERT PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 78-79 (1980).

trade policy is more likely to promote trade liberalization. Accordingly, over the balance of the twentieth century, Congress delegated most of its tariff-reducing authority to the president by statute, and successive presidents used that authority, as well as periodically delegated fast-track authority, to reduce both tariff and non-tariff barriers through multilateral trade rounds, bilateral free trade agreements, and regional pacts like NAFTA and the TPP.

In short order, the first two years of the Trump administration has exploded these basic elements of the late twentieth-century U.S. trade consensus. As Timothy Meyer's article notes, the president has wielded his delegated tariff power to restore tariff barriers to the center of the public debate.¹¹ Trump has exercised this power to promote presidential trade protectionism, which Andrew Lang dubs "the new protectionism."¹² Trump has reverted to destructive bilateral trade wars conducted outside agreed-upon diplomatic frameworks instead of trying to resolve disputes via multilateral cooperation within those agreed frameworks. And instead of objecting, the Republican Party has stood on its head, embracing a startlingly hypocritical abandonment of its long-standing commitment to trade liberalization as an engine of global and national economic growth.

These trends have culminated in the administration's frontal assault on the WTO: the primary multilateral institution for trade liberalization and stabilization and the GATT's successor mechanism. As Rachel Brewster recounts, these attacks "represent a shock to the norms and understandings essential to the agreement, not just a strike against certain trading partners or discrete policies."¹³ Of course, the WTO has been far from perfect. It failed to produce a Doha Round; it has no meaningful legislative body; and the Appellate Body has issued some questionable decisions. But as the essay by Padidh Ala'i documents, the WTO's crowning achievement has been the development of a binding standing system of dispute settlement that is unique in the world of international law.¹⁴ Trump's demonstrably false belief that "we lose . . . almost all of the lawsuits in the WTO"¹⁵ simply ignores the data indicating that the United States has arguably been the greatest beneficiary of that system, with the highest win rate, on some ninety percent of the adjudicated issues (while by the same measures, China has the lowest win rate).¹⁶ And Trump's blunderbuss policy of blocking all Appellate Body nominees, without regard to professional qualifications or accomplishment—akin to a threat to veto all nominees to the International Court of Justice—is a classically overbroad effort not just to curb

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

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

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

14. Padidh Ala'i, *The Trump Administration vs. the WTO Appellate Body: How the Appellate Body Can Help Maintain Global Economic Relations and Peace*, 44 YALE J. INT'L L. ONLINE __ (forthcoming 2019).

15. Robert Farley, *Trump Wrong About WTO Record*, FACTCHECK.ORG (Oct. 27, 2017), <https://www.factcheck.org/2017/10/trump-wrong-wto-record/>.

16. *Id.*; see also 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 __, __ n.14 (2019).

the excesses of judicial decision-making but to choke off third-party judicial-style dispute settlement altogether.

Most short-sighted, Trump’s administration has assaulted the WTO’s strongest component—its binding dispute-settlement system—with no visible substitute in mind. As Gregory Shaffer thoughtfully shows, the available dispute resolution alternatives are visibly inferior and would mark a dramatic and painful retreat from “the vision of an authoritative, quasi-constitutional international court to resolve conflicts and develop jurisprudence”¹⁷ that would almost surely damage the United States’ long-term interests. Most fundamentally, Trump’s opportunistic “pick-and-choose” approach to WTO rules—invoking its provisions when on the offensive, while disdaining WTO disciplines when on the defensive—sketches a chilling blueprint for China to follow, which asymmetrically embraces the gains of market competition without accepting neutral oversight over national compliance with the global trade rules.¹⁸ If China mimics Trump’s thuggish moves, the likely outcome will be a tragic “reverse watershed,” whereby—as Shaffer notes—just two decades after the “trade rule of law” advances of the mid-1990s, we witness a sharp regression from, and potentially the dismantling of, a rule-oriented trade system in favor of a power-oriented one.

In resurrecting the power-based system, Trump has relied disproportionately on false linkages between trade and national security. As the essays by Brewster and Grewal document,¹⁹ the Trump trade policy is only one of many administration policies that, in Justice Sotomayor’s words from the Travel Ban case, “now masquerades behind a façade of national-security concerns.”²⁰ After all, this is the same president who declared Canada to be a “national security threat,”²¹ separated infants from their parents at the U.S.-Mexico border in the name of “national security,”²² claimed national security justifications for expelling transgender individuals from the U.S. military,²³ and is now apparently contemplating emergency action in the name of national security under the Defense Production Act and Section 202 of the Federal Power

17. Shaffer, *supra* note 16, at 17.

18. See Brewster, *supra* note 13, at 7 (“[T]he Chinese government can simply copy the Trump administration’s precedent to disregard trade rules that it does not like[,] . . . impose unilateral sanctions and demand bilateral negotiations to resolve its concerns . . . [and] forbid entry into whole sectors of its economy by claiming broad national security rationales and rejecting WTO jurisdiction[,] . . . block Appellate Body members . . . [and] threaten to shut the system down if its preferred substantive interpretations are not met.”).

19. See *id.* at 3-6 (discussing Trump’s invocation of national security justification for trade measures); David Singh Grewal, *A Research Agenda for Trade Policy in the Trump Era*, 44 *YALE J. INT’L L. ONLINE* __ (forthcoming 2019).

20. *Trump v. Hawaii*, 585 U.S. __ (2018) (Sotomayor, J., dissenting).

21. Dov S. Zakheim, *Canada as a National Security Threat to the United States*, *THE HILL* (June 4, 2018), <https://thehill.com/opinion/national-security/390527-canada-as-a-national-security-threat-to-the-united-states>.

22. Dara Lind, *The Trump Administration’s Separation of Families at the Border, Explained*, *VOX* (Aug. 14, 2018), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents>.

23. Dave Phillips, *Judge Blocks Trump’s Ban on Transgender Troops in Military*, *N.Y. TIMES* (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/us/military-transgender-ban.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

Act to require grid operators to make “stop-loss” purchases from failing coal power plants.²⁴

Given the Supreme Court’s docile acceptance of Trump’s national security rationale in the Travel Ban case, coupled with the addition of an unabashedly pro-Executive Branch Justice in Brett Kavanaugh, we can expect the administration to supplement its actions imposing steel and aluminum tariffs on allies under Section 232 of the 1962 Trade Expansion Act²⁵ with other national-security masquerades. It will then be up to the lower courts, which have strongly rebuffed Trump’s adventurism in the immigration arena, to determine whether they should blindly defer to the administration’s national-security façade or exercise “the province and duty of the judicial department to say what the law is.”²⁶

As Chantal Thomas notes, Trump’s trade agenda threatens to trigger a resurgence of both multipolarity and reterritorialization: a splintering of the inclusive WTO framework, in which disagreements among trade stakeholders can be debated and resolved, in favor of a revival of the bitter North-South divides that characterized the calls in the 1970s for a New International Economic Order.²⁷ But the understandable temptation to react to Trump’s latest unilateralist disruption or his fetishizing of national security should not distract us from the main opportunity being lost during the early Trump years: the diversion of collective global energies from the mounting crisis of global inequality.

As Grewal notes, it is unsurprising that expansion of global trade has become an engine for growing inequality. Technology has unsettled production practices in advanced economies, triggering middle class anger against the globalist forces that workers believe froze their wages, stole their jobs, and forced migration of manufacturing. From country to country, the middle class has been left feeling betrayed and abandoned. The resulting resentment has led to an infectious nationalist and authoritarian counter-movement against such perceived liberal orthodoxies as diversity, inclusion, multiculturalism, and openness to immigration.

Both the Bush and Obama administrations sought to engage with like-minded trading partners to revamp the trade rules and update norms through the WTO where possible and through regional trade agreements where necessary. In so doing, they sought to demonstrate that trade expansion can make the U.S. working class better off, so long as America’s integration with other economies is carefully managed through smart diplomacy abroad and wise domestic policy at home. This complex management task recognizes that instead of resigning from global leadership, the U.S. should *intensify* its participation in global

24. Memorandum from U.S. Dep’t of Energy (May 29, 2018), *available at* <https://www.documentcloud.org/documents/4491203-Grid-Memo.html>.

25. *See Section 232 Tariffs on Aluminum and Steel*, U.S. CUSTOMS AND BORDER PROTECTION (Oct. 24, 2018), <https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel>.

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

27. Chantal Thomas, *Trade and Development in an Era of Multipolarity and Reterritorialization*, 44 YALE J. INT’L L. ONLINE __ (forthcoming 2019).

governance, because its relationship with its trading partners is synergistic, not zero sum.

But despite their best intentions, the Bush and Obama administrations failed to adequately address—or to convince a resentful middle class that they were adequately addressing—the distributional effects of trade liberalization. They did not sufficiently persuade the general public that immigrants are not a problem but an indispensable part of transnational solutions to labor gaps and national revitalization. Nor did they sufficiently outline a revamped U.S. trade policy that could ambitiously pursue free trade without accepting as inevitable to its potentially harmful distributional effects. Such a policy must be sensitive, as Grewal notes, to the “political consequences of concentrated ‘losses’ borne by some citizens without compensation from others—which will be determined by the different constitutional mechanisms of any affected country.”²⁸ And as Meyer warns, the United States must engage this process fully aware that the resurgence of presidential unilateralism and aggressive tariffs will have negative redistributive effects, moving America even further from a nation that achieves an equitable distribution of the “real and massive” economic gains that come from sustained trade liberalization.²⁹ In tackling these issues, a new Congress energized by a Democratic House should focus not just on clawing back its delegated tariff authorities, but also on such innovative ideas as imposing remedies on social dumping, adding collective bargaining and social safety net requirements to trade agreements, and pursuing Joel Trachtman’s ambitious and overdue concept of a “WTO for workers.”³⁰

In sum, while recent months echo past American trade tensions with the world, the net outcome is not just what Kathleen Claussen calls “old wine in new bottles.”³¹ It may well be that forging a more “plurifaceted” trade law system, as Professor Claussen suggests, is both inevitable and overdue.³² But breaking all the bottles is not a good way to make better wine. History teaches that in trade, as in other areas of international law, unilateralism does not breed enhanced cooperation, only reciprocal unilateralism and the erosion of collective norms. So in the end, Trump’s impetuous trade wars will not produce “constructive disruption,” only “Trump change”: the poisoning of the global trade atmosphere, deepening suspicion over the good faith and competence of U.S. trade policy, dilution of America’s legitimacy within the trading system, delay and obstruction of much-needed WTO reforms, and persistent undermining of the long-term framework for the trade rule of law.

28. Grewal, *supra* note 19.

29. Meyer, *supra* note 11.

30. Joel P. Trachtman, *A World Trade Organization for Workers?*, 44 YALE J. INT’L L. ONLINE __ (2019).

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

32. *Id.* at __.