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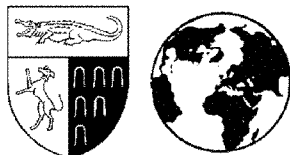
Kathleen Claussen

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Old Wine in New Bottles? The Trade Rule of Law

By Kathleen Claussen[†]

As the essays in this Symposium demonstrate, the “trade wars” that have characterized the Trump administration’s trade policy to date are manifestations of a multilayered tapestry of geoeconomic concerns. While central to this tapestry is China and its economic rise, there are other irritants in the mix, each of which has caused ripple effects of its own. But is this moment unique? Or are the policies implemented in the last year just “old wine in new bottles”?

The tools are not new. Past presidents have invoked the same tariff authorities used by the Trump administration to combat perceived overdependence on oil from U.S. trading partners, for example.¹ Likewise, on different occasions in recent history, the United States has appeared to reject international institutions in favor of a unilateral stance in trade and other areas of foreign affairs.² Even many of the specific U.S. complaints at the World Trade Organization (WTO) are not new. The United States and others have been making these complaints for many years.³

Despite these similarities, at least three institutional elements make this moment noteworthy.⁴ First, the United States today is imposing widespread tariffs against the backdrop of a reasonably successful and sophisticated multilateral system designed to curb the use of tariffs. In earlier days, when the multilateral system was more limited in scope and efficacy, one might have

[†] Associate Professor, University of Miami School of Law. My sincere thanks to the members of the *YJIL* editorial team for taking up this Symposium and for their collaboration. Thanks also to Rachel Brewster, Lili Levi, Bernie Oxman, Sergio Puig, Steve Schnably, Tom Schoenbaum, and Brian Soucek for comments and conversations that informed earlier drafts.

1. See, e.g., RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 3-4 (2018) (detailing past Section 232 investigations and actions taken by other presidents).

2. For a catalogue of such moves including those by other countries, see Joost Pauwelyn & Rebecca J. Hamilton, *Exit from International Tribunals*, 9 J. INT’L DISP. SETTLEMENT 679 (2018).

3. See Kathleen Claussen, *The Other Trade War*, 103 MINN. L. REV. HEADNOTES 1 (2018).

4. I describe these in brief only as these three institutional elements are skillfully elaborated by others in the Symposium.

acknowledged the need to take unilateral actions outside the system. But in recent years, the general view is that the WTO dispute settlement system does a relatively good job of resolving the wide berth of disputes within its purview.⁵

Second, to the extent that China is the focus of concern and action,⁶ China is specially situated compared to other U.S. trading partners, like Japan,⁷ that have posed threats to U.S. economic hegemony in years past. China's State-centric economy presents unique challenges that the WTO rules and governance mechanisms are not well designed to accommodate.⁸

Third, the U.S. Trade Representative has made clear that he intends to change the "paradigm" of international trade law.⁹ In so doing, he seeks to upend the trade law framework in ways unseen in prior episodes. Thus, notwithstanding that the tariff authorities—primarily, Section 201 of the Trade Act of 1974,¹⁰ Section 232 of the Trade Expansion Act of 1962,¹¹ and Section 301 of the Trade Act of 1974¹²—have been used on dozens of occasions by industry and occasionally also by government,¹³ and notwithstanding that the United States has long expressed concerns about certain aspects of the multilateral trading system and about the behavior of particular trading partners, the intended outcome of the Trump administration's tariff impositions and its obstruction at the WTO now stands apart.

Given these differences, what are the possible futures for the trade rule of law as we have come to know it? That is, what rules-based frame can accommodate these new challenges, if any? One starting place might be to rethink the rhetoric commentators have used to capture this trend. The trade "war" vocabulary suffers from a number of flaws.¹⁴ Above all, it exacerbates the perceived dichotomy between unilateral and multilateral action when in fact, they could be complementary or cooperative. This binary representation inhibits dialogue on constructive institutional designs.

Trade law is among the legal regimes that are "too complex to be reduced to a simple choice between unilateralism and multilateralism."¹⁵ As the

5. See, e.g., Andrew L. Stoler, *The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?*, 3 WORLD TRADE REV. 99 (2004).

6. See, e.g., Adam Behsudi, *Lighthizer: 'Made in China 2025' a Threat to Global System*, POLITICO (Nov. 6, 2017), <https://www.politico.com/tipsheets/morning-trade/2017/11/06/lighthizer-made-in-china-2025-a-threat-to-global-system-223188>.

7. See, e.g., Chad P. Bown and Rachel McCulloch, *U.S.-Japan and U.S.-China Trade Conflict: Export Growth, Reciprocity, and the International Trading System*, 20 J. ASIAN ECON. 669 (2009).

8. See, e.g., Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261 (2016); see also Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 2018 U. ILL. L. REV. 115 (2018).

9. Jakob Hanke, *Charge of the Lighthizer Brigade*, POLITICO (Oct. 2, 2018), <https://www.politico.eu/article/the-charge-of-the-robert-lighthizer-brigade-trade-war-us-donald-trump/>.

10. 19 U.S.C. § 2251 (2012).

11. 19 U.S.C. § 1862 (2012).

12. 19 U.S.C. § 2411 (2012).

13. See FEFER ET AL., *supra* note 1; see also WAYNE M. MORRISON, CONG. RESEARCH SERV., IF10708, ENFORCING U.S. TRADE LAWS: SECTION 301 AND CHINA (2018); VIVIAN C. JONES, CONG. RESEARCH SERV., IN10856, SECTION 201 SAFEGUARDS ON SOLAR PRODUCTS AND WASHING MACHINES (2018).

14. Claussen, *supra* note 3.

15. José E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of*

prototypical intermestic policy area,¹⁶ trade requires outward as well as inward-looking strategies. A reasonable trade policy from the perspective of a single State might invoke many different approaches to global trade flows. And, although its approach can be much improved (as I argue below), the Trump administration does just that: it maintains both strategies—using domestic tools (tariffs, among others) as well as international tools (such as by bringing new dispute settlement proceedings at the WTO¹⁷ or concluding new international instruments¹⁸).

Rather than adopt a “lateral” vernacular that emphasizes powerful seemingly competing interests, I propose that commentators and participants in the trade law regime seek to adopt language that recognizes the past use, present demonstration, and greater future potential of institutional design for trade law. According to this approach, a better tactic than decrying this disparity of views or seeking their reconciliation is to adjust our collective understanding of an appropriate balance of international and domestic trade policy devices. My proposal is motivated by the lack of fit between the existing language and the way trade policy plays out. Viewing the U.S. policy as a shift toward this type of syncretism recasts unilateral tools and multilateral rules as complementary parts of a resilient and adaptive trade law system. The Trump administration’s moves are not all about taking unilateral steps without regard to the multilateral infrastructure; rather, its strategy draws from both domestic and international mechanisms. The challenge is finding a legal, legitimate, and sustainable balance between them.

To achieve that balance, the Trump administration could better capitalize on this moment in recrafting the paradigm, as the U.S. Trade Representative wishes to do, with realistic expectations and thoughtful policy contributions. The following sections set out three ways in which the administration could make better use of its approach.

I. BEYOND PRETEXT

A first step to a revised understanding of the trade rule of law is for policymakers to articulate a coherent and consistent inward and outward policy. At present, the U.S. policy suffers from a lack of normative legitimacy among both trading partners and observers. Certain parts of the policy exacerbate this

Empire’?, 24 AM. U. INT’L L. REV. 811, 815 (2009).

16. See Bayless Manning, *The Congress, the Executive, and Intermestic Affairs: Three Proposals*, FOREIGN AFF. (Jan. 1977), <https://www.foreignaffairs.com/articles/1977-01-01/congress-executive-and-intermestic-affairs-three-proposals> (identifying trade as an intermestic issue, between international and domestic affairs).

17. *United States Files WTO Complaint on China’s Protection of Intellectual Property Rights*, WORLD TRADE ORG. (Mar. 26, 2018), https://www.wto.org/english/news_e/news18_e/ds542ffc_26mar18_e.htm.

18. United States-Mexico-Canada Agreement, Nov. 30, 2018, OFF. U.S. TRADE REPRESENTATIVE, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>; see also David Shepardson, *Trump Administration Says to Open Trade Talks with EU, UK, Japan*, REUTERS, Oct. 16, 2018, available at <https://www.reuters.com/article/us-usa-trade-talks/trump-administration-says-to-open-trade-talks-with-eu-uk-japan-idUSKCN1MQ2P2>.

problem more than others, such as the administration's use of national security as a justification for imposing tariffs, which it did for foreign imports of steel and aluminum in March 2018.¹⁹ U.S. trading partners and commentators quickly rejected the administration's position as a thinly veiled pretext for protectionist intervention on behalf of U.S. manufacturing, exacerbated by inconsistent messaging from various parts of the executive.²⁰ There was no *true* national security threat, they argued. The pretext was even more evident, they maintained, in the U.S. government's subsequent investigation into whether automobile and automobile part imports also threaten U.S. national security.²¹ To critics, these moves demonstrated that the president would stop at nothing to protect U.S. industries.

The widespread rejoinder that the president was acting disingenuously in light of his statutory delegation has precipitated several legal claims. Of these, two stand out: first, that the tariff imposition is a violation of international trade law;²² and second, that the president's action is impermissible under domestic law because the delegating statute is unconstitutional.²³ According to both claims, the president was acting unlawfully, but it is not just the unlawfulness of his actions that is motivating concern: the perceived pretextual element makes these tariffs more dangerous than other trade measures. The administration has invoked carefully negotiated and narrow exceptions to the ordinary rules in a way that appears to flout and disregard those exceptions. This use of the national security exception may or may not be a violation of the rules, but its invocation, understood by many as incredible and shielding a protectionist measure, suggests a departure from the agreed system. Thus, the domestic tariff policy poses a unique risk to the multilayered rules-based frame that undergirds trade law.

Similar criticism has followed the White House's choice to replace the North American Free Trade Agreement with a minor variation on what the Obama administration had negotiated as the Trans-Pacific Partnership Agreement (TPP), despite the Trump administration's prior strong objections to the TPP.²⁴ Likewise, the Trump administration's use of Section 301 of the Trade

19. Press Release, The White House, President Trump Approves Section 232 Tariff Modifications (Mar. 22, 2018), available at <https://www.whitehouse.gov/briefings-statements/president-trump-approves-section-232-tariff-modifications/>.

20. See Damian Paletta, *Top Trump Trade Officials Still at Odds After Profane Shouting Match in Beijing*, WASH. POST (May 16, 2018), https://www.washingtonpost.com/news/business/wp/2018/05/16/top-trump-trade-officials-still-at-odds-after-profane-shouting-match-in-beijing/?utm_term=.38e3c3e91f97; Logan Pauley, *Consistent Inconsistency Crippling Trump's China Trade Ambitions*, THE HILL (May 31, 2018), <https://thehill.com/opinion/finance/390085-consistent-inconsistency-crippling-trumps-china-trade-ambitions>.

21. See, e.g., Anthony Esposito & David Ljunggren, *Global Auto Powers Plotting Response to Trump Auto Tariff Threats*, REUTERS, July 28, 2018, available at <https://www.reuters.com/article/us-usa-trade-coordination/global-auto-powers-plotting-response-to-trump-auto-tariff-threats-idUSKBN1K10NI>.

22. See Kathleen Claussen, *Trade War Battles: The International Front*, LAWFARE (July 27, 2018), <https://www.lawfareblog.com/trade-war-battles-international-front> (listing several dispute settlement requests brought by U.S. trading partners at the WTO).

23. Complaint, *Am. Inst. for Int'l Steel Inc. v. United States*, No. 18-00152 (Ct. Int'l Trade June 27, 2018), available at http://www.aiis.org/wp-content/uploads/2018/06/EMBARGOED_June_27_AIIS_-_Plaintiffs-Complaint.pdf.

24. See, e.g., Catherine Rampell, *Trump's 'Historic' Trade Deal Doesn't Look So Historic After All*, WASH. POST (Oct. 1, 2018), <https://www.washingtonpost.com/opinions/trump-didnt-blow-up-our->

Act of 1974 to impose tariffs on China suffers from seemingly disingenuous and conflicting aims: the tariffs seek to prompt China to open its market to U.S. investors and producers while the administration continually emphasizes its interest in maintaining investment and production in the United States.²⁵

For at least two decades now, the entrenchment of a rule of law system in trade governance characterized by the regulation of arbitrary government power, the concept of equality among sovereigns, and a reasonably effective dispute settlement system has facilitated market liberalization and orderly resolution of economic and regulatory conflicts. The WTO, free trade agreements, and even domestic trade instruments (where they were used) were largely founded on principles of procedural fairness and transparency. These efforts were successful because governments at least appeared to work genuinely within those terms. By contrast, in the first half of the Trump administration, competitiveness among U.S. executive branch agencies²⁶ and seemingly pretextual policymaking have impeded any coherent commitment to a rule-based trade law system. For the trade rule of law to be sustainable, U.S. trade policy (including its use of domestic tools) must be perceived internally and externally to be legitimate and exercised in good faith.

II. INSTITUTIONAL REBUILDING

The future of the robust international institutional structure for the maintenance of global economic stability now hangs in doubt.²⁷ In the last twenty years, the WTO dispute settlement mechanism has facilitated more than 500 disputes.²⁸ According to James Bacchus: “the GATT-based trading system has been establishing the international rule of law in international trade, rule by rule, and case by case.”²⁹ International rules and rulings were both made and enforced. Today, however—as described by other contributors to this Symposium³⁰—some WTO members, especially the United States, have voiced concerns about the WTO Appellate Body (AB) regarding both the substance of its decision-making and the procedures it has applied. The United States has for several years criticized the AB for overreaching its authority by filling gaps, construing silences, selectively choosing definitions, and creating obligations not agreed to.

trade-system-whoop-de-doo/2018/10/01/2137be18-c5b7-11e8-9b1c-a90f1daae309_story.html?utm_term=.c2ddf0c3b7b.

25. See *USTR Updates Section 301 Investigation*, OFF. U.S. TRADE REPRESENTATIVE (Nov. 20, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/november/ustr-updates-section-301>.

26. See, e.g., Paletta, *supra* note 20; Pauley, *supra* note 20.

27. See generally Claussen, *supra* note 3 (describing the pressure on the WTO dispute settlement system).

28. *Chronological List of Disputes Cases*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 6, 2019).

29. James Bacchus, *Groping Toward Grotius: The WTO and the International Rule of Law*, 44 HARV. INT'L L.J. 533, 539 (2003); see also *id.* at 542 (describing the compulsory jurisdiction and enforcement power of the WTO dispute settlement system).

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

It is on some of these bases that the United States opposed reappointment of an AB member in May 2016 and again in August 2018.³¹ And now the United States has refused to work toward resolving one of the most salient procedural difficulties: identifying a process for the appointment of new AB members.

Further, we find ourselves at a moment in which an increasingly complex institutional design governs what we think of as trade. The concept of trade has expanded and become more integrated and less siloed; as a result, the trade instruments are more like omnibus instruments than ever before. Today, trade law not only encompasses measures such as traditional border measures like tariffs, but it also involves legal mechanisms that would not have fallen under the trade umbrella at all in prior decades.

To take account of these changing needs, the United States and its trading partners ought to engage meaningfully in a reform process. At this point, there is widespread agreement that WTO reform is necessary and beneficial.³² Still, the United States has rejected all serious proposals, even when the proposals are responsive to at least some of its concerns. In fact, the United States has continued to call for reforms even while criticizing trading partners' proposed reforms for the fact that they are reforms.³³ In December 2018, the United States took the floor at the WTO General Council to again make the point that the proposals advanced to modify the existing rules are insufficient because they would require changes to the system.³⁴ Rather, the United States wishes to see the AB abide by the rules as written. The United States also called for further "discussion" on why the AB "depart[ed]" from the rules in the first place.³⁵

A better way forward for the United States would be to engage in the reform process at the WTO, especially given the extent to which the United States relies on the WTO for its own economic success.³⁶ So far, the United States has continued to participate actively in the WTO and in the creation of new agreements, while diminishing the strength of binding dispute settlement in both contexts.³⁷ Rather than capitalize on the chance to recast the balance between international and domestic authorities, so far the Trump administration

31. Bryce Baschuk, *U.S. Blocks Korean Judge from WTO Appellate Body*, BLOOMBERG (May 24, 2016), <https://www.bna.com/us-blocks-korean-n57982072872/>.

32. Philip Blenkinsop, *EU Trade Chief Urges U.S. to Join Talks on WTO Reform*, REUTERS, Nov. 27, 2018, available at <https://ca.reuters.com/article/businessNews/idCAKCN1NW1G1-OCABS>.

33. Dennis Shea, U.S. Trade Representative, Remarks at the Center for Strategic and International Studies (Oct. 12, 2018) (transcript available at <https://www.c-span.org/video/?452885-1/deputy-us-trade-representative-world-trade-organization>).

34. Brett Fortnam, *Shea: Appellate Body Reform Proposals Fail to Address U.S. Concerns*, INSIDE U.S. TRADE (Dec. 12, 2018), <https://insidetradetrade.com/daily-news/shea-appellate-body-reform-proposals-fail-address-us-concerns>.

35. *Id.*

36. See generally Stephen J. Silvia, *What the World Trade Organization Actually Is and Why It Would Matter If the U.S. Leaves It*, BUS. INSIDER (July 7, 2018), <https://www.businessinsider.com/why-it-matters-if-us-leaves-world-trade-organization-2018-7>. Further, as discussed elsewhere in this Symposium, the United States has the highest win rate in the WTO dispute settlement system.

37. In the President's 2018 Trade Policy Agenda, the administration laid out its view on the importance of strengthening the multilateral system generally, *The President's Trade Policy Agenda*, OFF. U.S. TRADE REPRESENTATIVE 28 (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf>, but it has repeatedly rejected enhancing or advancing dispute settlement.

has stalled on the question of institutional design.

III. TRANSPARENCY AND LONG-TERM VISION

Third, the effectiveness and credibility of U.S. trade policy would improve if the United States articulated a long-term vision for its engagement with China.³⁸ The administration's current Section 301 tariff action highlights complicated and well entrenched concerns, some of which past administrations never fully confronted. It is in the solutions, however, where transparency and clear goals are lacking.³⁹ If the administration has a strategy with planned outcomes, it should at least make that strategy and those outcomes clear to Congress and to interested stakeholders.

Moreover, to the extent that trade policy remains closely linked to the concept of a trade rule of law, such goals should be consistent with international norms, and be made public on that basis. The goals should incorporate the needs and concerns of U.S. trading partners, and the United States should garner their support. The administration's mixed approach—part engagement, part containment—has not yielded significant returns. Many more constructive steps are needed.

CONCLUSION

Despite President Trump's assertion that "[t]rade wars are . . . easy to win,"⁴⁰ the current "trade war" has shown no sign that it is close to a ceasefire. The prevailing view among trade commentators is that the conflict is dangerous, not just economically but also geopolitically and legally.⁴¹ According to this view, a tit-for-tat tariff trade war constitutes a return to unilateralism that threatens the multilateral trade governance system.⁴² While fear of U.S. unilateralism in trade law is not unprecedented,⁴³ the structural elements surrounding this moment have given rise to exceptional alarm.

38. The Office of the U.S. Trade Representative has noted some demands and concerns in the extensively documented China WTO compliance report. *USTR Releases Annual Reports on China's and Russia's WTO Compliance*, OFF. U.S. TRADE REPRESENTATIVE (Jan. 19, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/ustr-releases-annual-reports-china>. This report is prepared pursuant to the U.S.-China Relations Act of 2000 which requires the U.S. Trade Representative to report annually to Congress on China's compliance with commitments made in connection with its accession to the WTO. However, this report does not set out any longer-term vision or context for the Trump administration's many policy choices in relation to China's economic growth.

39. See Isabelle Hoagland, *Senate Finance Members in the Dark About Trump's China Plans*, INSIDE U.S. TRADE (Dec. 11, 2018), <https://insidetrade.com/daily-news/senate-finance-members-dark-about-trump%E2%80%99s-china-plans>.

40. Thomas Franck, *Trump Doubles Down: "Trade Wars Are Good, and Easy to Win"*, CNBC (Mar. 2, 2018), <https://www.cnbc.com/2018/03/02/trump-trade-wars-are-good-and-easy-to-win.html>.

41. See, e.g., Ala'i, *supra* note 30; Brewster, *supra* note 30.

42. See, e.g., Mark Wu, *Trump vs. International Law: Trade Unilateralism in Pursuit of What?*, OPINIO JURIS (Oct. 10, 2018), <https://opiniojuris.org/2018/10/10/trump-vs-international-law-trade-unilateralism-in-pursuit-of-what/> (referring to "resurgent trade unilateralism").

43. See An Chen, *The Three Big Rounds of U.S. Unilateralism Versus WTO Multilateralism During the Last Decade: A Combined Analysis of The Great Sovereignty Debate, Section 301 Disputes (1998-2000), and Section 201 Disputes (2002-Present)*, 17 TEMP. INT'L & COMP. L.J. 409 (2003) (examining successive rounds of unilateralism).

This essay has set out three interrelated ways in which the United States could make better use of the environment it has created: (1) by articulating a more coherent and credible trade policy, (2) by engaging in reform to address its concerns in the international system, and (3) by making transparent its intentions and interests, particularly with respect to China. At the same time, commentators as well as trading partners would benefit from meeting the administration along the way. Rather than reject the Trump administration's policies outright, a better approach would be to view the administration's assorted trade moves as potentially complementary to the operation of a successful multilateral trading system. One need not be overly optimistic about their success to try to make the most of them in the present.

In the most favorable light, the Trump administration's trade policy takes a potentially productive step in reconciling domestic and international tools, but it has yet to capitalize on that potential in a useful way. What is needed is a hard look by all the required players—the executive, Congress, the international community, and others—to resolve the perceived clashing binary. Our collective task should be to reconsider international and domestic institutions so as to allow them to be resilient and responsive, and to explore the potential of a plurifaceted trade law system that accommodates diverse trade policy actions.