

CAN INTERNATIONAL TRADE LAW RECOVER?

INTRODUCTION

*Rachel Brewster**, and *Sergio Puig†*

The last year has seen the greatest challenges for the World Trade Organization (WTO)—and international trade in general—in its two decades’ history. The key facets of these challenges are: the return to unilateralism in addressing trade disputes between the United States and China; the use of national security rationales to impose trade barriers; the U.S. block on the appointment or reappointment of WTO Appellate Body Members with the aim of “asphyxiating” the organization; the termination or renegotiation of regional trade agreements (e.g., NAFTA, Brexit); and a general attack by a nationalistic right that sees too much international redistribution and a populist left that sees too little national redistribution.

The substantive and procedural onslaught on international trade law and its institutions has created an “existential crisis” for the system. It also raises the real possibility that international law might be moving towards a post-2018 set of norms for handling economic relationships. It is not that the WTO, or, for that matter, other international organizations dealing with international economic law will cease to exist, but the institution may no longer act as the meaningful constraint on countries’ actions that it once did.

This symposium provides an expert analysis of the different aspects of the international trade crisis, how these challenges could or should be resolved, what the prospects are for new negotiations to solve the disagreements on trade policy, and how the international system may be evolving as a result of the most recent disputes and challenges. This timely symposium also aims to be accessible to scholars, practitioners, and commentators who may not always follow the intricacies of this technical field, as well as to elucidate what the current crisis and possible transformation may mean for the future of international law and international relations.

First, Kathleen Claussen from the University of Miami discusses how the Trump Administration has used Section 301 of the Trade Act of 1974 as a tool to impose additional tariffs on foreign products.¹ Section 301 permits the president to impose tariffs or take other measures when the U.S. Trade Representative determines that an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts U.S. commerce. After describing the history of Section 301 and the criticism surrounding it, she explains the application of this section by the Trump Administration. As Claussen explains, the use of this section need not be to the detriment of the multilateral system. Instead, it may force trading partners back to the negotiating table to improve and expand WTO rules.

Tania Voon from the University of Melbourne discusses how the text and history of the security exception within the General Agreement on Tariffs and Trade is highly sensitive.² Members have traditionally refrained

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¹ Kathleen Claussen, *Forgotten Statutes: Trade Policy’s Domestic (Re)Turn*, 113 AJIL UNBOUND 40 (2019).

² Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45 (2019).

from bringing legal challenges against security-based measures and from invoking the security exception as a defense. Current disputes involving not only recent tariffs imposed by the United States but also other trade restrictions imposed by the United Arab Emirates and Russia break with this culture of restraint, raising the question of the extent to which the security exception is “self-judging.” In her view, rather than forcing a WTO panel to rule on this contentious question, WTO members should collaborate politically to avoid the deep consequences of these cases and to improve the international trading system. The question is how to convince key WTO members to retreat from their expansive positions.

Staying within the topic of the challenges to international legal adjudication, Cossette Creamer from the University of Minnesota explains the unprecedented challenges to the Appellate Body (AB).³ These challenges result from different actions aimed at debilitating the dispute settlement process, including procedural objections to the (re)appointment of AB members. Yet, as she explains, the sources of this crisis are not new. The organization has ignored some long-standing discontent on the part of member countries and institutional actors, but we have now reached a boiling point. In her contribution, Creamer advocates for a more responsive judicial system and explains how this may increase support for dispute resolution without sacrificing too much judicial independence.

Sergio Puig from the University of Arizona explains how the recently signed United States-Mexico-Canada Agreement relates to the overall challenges facing the WTO.⁴ In his view, the Agreement reveals a glimpse of a changing world order characterized by great power rivalry between the United States and China. In this new era, international law will see a diminished role for legal adjudication. This more transactional view of international trade law implies a limit on the role of law and an increase in the use of power. It may force a retrenchment of international interdependence and a revival of zones of influence prevalent during the Cold War era, exemplified by clauses in the Agreement aimed at limiting deals with China.

Rachel Brewster from Duke University puts all these recent events into context to highlight the damage caused to international enforcement norms of the trading system, and how this might irreparably harm the operation of the WTO going forward.⁵ In her view, the recent departure from enforcement norms is potentially devastating because it goes to the heart of what has endowed the WTO with such influence in global economic affairs: the willingness of member countries to accept the WTO legal system as a binding constraint on state action, even when it can be costly domestically. This raises the question of whether countries will be able to return to a rule-of-law system at the WTO and, if not, how this destabilizes economic relations going forward.

Overall, the picture that emerges from these five essays is that of a more contentious and complicated new era, one in which powerful states will more easily disregard rules or avoid international dispute settlement frameworks and fight for discretion to implement commercial policies once considered controversial, under the guise of national security. It may signal the decline—for now—of well-established legal norms and processes to address economic conflicts. It also demonstrates how the geopolitical tensions between the United States and China have challenged the most important economic institution of the post-Cold War era. Given recent events, the WTO is unlikely to remain the same potent force in international trade law that it has been for the last two decades.

³ Cosette D. Creamer, *From the WTO's Crown Jewel To Its Crown Of Thorns*, 113 AJIL UNBOUND 51 (2019).

⁴ Sergio Puig, *The United States-Mexico-Canada Agreement: A Glimpse into the Geoeconomic World Order*, 113 AJIL UNBOUND 56 (2019).

⁵ Rachel Brewster, *WTO Dispute Settlement: Can We Go Back Again?*, 113 AJIL UNBOUND 61 (2019).