

FOREWORD

THE YEAR IN INTERNATIONAL TRADE LAW: CHALLENGES AND REFORM

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It has been another tumultuous year for international trade policy. In the United States, an aggressively mercantilist Trump Administration has been replaced by a new, more internationalist Biden Administration. This regime change has been received hopefully by many, both in the United States and elsewhere, who feared that Trump's confrontational and unilateralist approach to trade policy might deal a fatal blow to the rules-based multilateral trading system.

Despite the more diplomatic tone in Washington, the underlying conditions that fueled the Trump trade agenda—the rise of China, growing income inequality and economic insecurity in the West, and doubts about the benefits of an open trading system—remain unchanged.¹ Further, the dissatisfaction in many developed nations about the operation of the current trading system, and the populism which accompanies it, finds a counterpart in much of the developing world, even if the diagnosis of the problems differs significantly.

In these circumstances, the debate now raging about the future of the international trading system has two dimensions. First, trade policy-makers, and of course international trade lawyers, are wrestling with the fallout from decisions taken over the past few years and their implications. Can ongoing U.S.-China trade tensions be managed, and how? Will the increasing reliance on national security-justified measures be controlled, and what role can international rules play in this regard? What will Britain's role in the international trading community look like, post Brexit? What is the future of investor-state dispute settlement?

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1. See, e.g., Don Lee, *Trump and Biden on trade: Same diagnosis, different prescription*, L.A. TIMES (Oct. 5, 2020), <https://www.latimes.com/politics/story/2020-08-19/trump-biden-trade-policy>.

Second, policymakers are working towards a reform agenda that many consider necessary to revitalizing the rules-based international trading system. What reforms are required to restore the World Trade Organization (WTO) to its central place in the trading system? Here, WTO Members speak—with widely varying emphasis—about new rules in areas like digital trade, the restoration of a binding dispute settlement system, and changes to the rulebook to reflect the increased economic power and responsibilities of emerging economies like China.² If the WTO cannot rise to the task, what are the roles for plurilateral, regional, and bilateral agreements? And regardless of the forum, how can non-trade concerns, such as labor rights and environment, be fully reflected in a new system?

No single edition of a law journal, however ambitious, could begin to address the range of issues described above. However, all four of the articles in this edition of the *Georgetown Journal of International Law* dedicated to international trade law, and both of the remarkable student notes that won awards in this year’s John D. Greenwald Writing Competition, speak to aspects of these challenges.

Few trade experts would dispute that accommodating the rise of China to economic superpower status is one of the greatest, if not the greatest, challenges facing the trading system. As Chinese enterprises surge to prominence in one sector after another, international competitors, and the system as a whole, struggle to adapt. A debate rages between advocates of engagement and reform versus those who support “decoupling.”³ In this context, the late Professor Kevin J. Fandl’s article, *Is China’s Rise the WTO’s Demise?* is a plea to preserve the role of the WTO in international economic governance. Fandl makes a convincing case that neither the United States nor China would be well served by abandoning the WTO in favor a unilateral approach to international trade relations.

However compelling Professor Fandl’s arguments, the Trump Administration relied heavily on unilateral instruments, including the United States Trade Representative’s Section 301 investigations culminating in massive reciprocal sanctions between the United States and China, and frequently resorted to national security-based measures

2. See, e.g., *Annex to the Communication from the Commission, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final (Feb. 18, 2021), https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159439.pdf.

3. See, e.g., Keith Johnson & Robbie Gramer, *The Great Decoupling*, FOREIGN POLICY (May 14, 2020), <https://foreignpolicy.com/2020/05/14/china-us-pandemic-economy-tensions-trump-coronavirus-covid-new-cold-war-economics-the-great-decoupling/>.

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under Section 232 of the Trade Expansion Act. In a useful reminder that the world does not revolve around the United States, WTO standards for invoking the national security exception in Article XXI of GATT 1994 have been articulated first in disputes involving Russia/Ukraine⁴ and Qatar/Saudi Arabia.⁵ An insightful note by Georgetown Law student Jacob Gladysz, *The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction*, analyzes the outcomes in those disputes and seeks to apply the lessons learned to the U.S. invocation of Section 232.

While the Trump Administration's flirtation with unilateralism played out in the United States, across the Atlantic Britain's long process of disengagement from the European Union (EU) also reached its climax. Arguably, phenomena similar to those fueling U.S. behavior explain Brexit—populism fed by income inequality, discontent with the effects of economic integration, a desire to protect national sovereignty, and a general turning inward by people distrustful of international institutions—and perhaps of things foreign more generally. In any event, Girish Deepak's article on *Brexit – The Legal Intricacies in Rolling Over EU PTAs* picks apart just one of the many challenges faced by the United Kingdom as it seeks to chart its own course as an independent actor in international economic relations.

If trade agreements have been increasingly questioned, international investment agreements have arguably drawn greater skepticism. The frequency with which such agreements have been invoked with respect to countries' internal regulatory schemes, including in respect to health (*Australia—Plain Packaging*) and environment (such as with respect to the construction of the Keystone pipeline),⁶ has made them lightning rods for criticism. There have thus been numerous efforts to reform investor-state dispute settlement (ISDS), both multilaterally and in preferential trade agreements (PTAs) such as the EU-Canada Comprehensive Economic and Trade Agreement and other EU free trade agreements (FTAs), while in the United States-Mexico-Canada Agreement (USMCA), the United States has responded by scaling back access to ISDS altogether. In *Beyond State Freedom and International Discipline? Questioning the Place of International Investment Law in Conflict*

4. Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/7 (adopted Apr. 29, 2019).

5. Panel Report, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/8 (adopted June 16, 2020).

6. See Gavin Bade, *Keystone XL builder seeks \$15B in USMCA action*, POLITICO (July 6, 2021), <https://www.politico.com/newsletters/weekly-trade/2021/07/06/keystone-xl-builder-seeks-15b-in-usmca-action-796318>.

and Post-Conflict Settings, Joshua Poon digs deep into this debate in the specific context of conflict and post-conflict states.

Meanwhile, longstanding calls for international trade and investment rules to take greater account of non-trade values, such as labor rights and environmental protection, have gained traction.⁷ In the United States, substantially strengthened labor rights provisions were a condition for a new USMCA, while the EU now insists on Trade and Sustainable Development chapters in its new FTAs and, most recently, in its pending Comprehensive Agreement on Investment with China.⁸ Notably, labor rights provisions in FTAs, including critical scope provisions, have been subject to dispute settlement in both the United States (with Guatemala) and EU (with Korea)⁹ FTAs. In *Fit for Purpose? The Extent of International Trade Agreement Obligations After the Guatemala – Labor Obligations Decision*, Kevin Banks makes the case that USMCA may set normative ground rules for an integrated economic space to address systemic labor rights problems, rules that have implications for understanding other U.S. FTA provision in this area.

On the environmental front, meanwhile, efforts continue to demonstrate that international trade rules can not only accommodate, but also advance, the international environmental agenda. While climate change has risen to ever greater prominence, and related efforts to discipline fossil fuel subsidies gain greater attention, one of the world's longest-standing negotiations regarding harmful fisheries subsidies remains blocked nearly twenty years after its launch at the WTO's Doha Ministerial in 2001. In *Fishing for Answers: The WTO's Search for Fishing Disciplines and Sustainable Stocks*, John D. Greenwald Writing Competition first-place winner Stephen Floyd argues that, in the absence of a meaningful outcome in these negotiations, continued subsidies will further deplete global fish stocks, diminish confidence in the multilateral system, and contribute to a less secure world order.

However difficult these turbulent times may be, they make for interesting reading. I hope you will enjoy exploring this edition of the *Georgetown Journal of International Law* as much as I have.

7. See, e.g., Andrea Shalal, *USTR Tai calls for bold action to put climate at center of trade policy*, REUTERS (Apr. 15, 2021), <https://www.reuters.com/business/environment/us-trade-chief-tai-says-climate-key-priority-trade-policy-2021-04-15/>.

8. See GISELA GRIEGER, EUR. PARLIAMENTARY RES. SERV., PE 679.103, EU-CHINA COMPREHENSIVE AGREEMENT ON INVESTMENT: LEVELLING THE PLAYING FIELD WITH CHINA 6 (2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS_BRI\(2021\)679103_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679103/EPRS_BRI(2021)679103_EN.pdf).

9. Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement, *Report of the Panel of Experts* (Jan. 20, 2021), https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf.