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FORUM

The Trump Administration and International Law
International Law and Institutions in the Trump Era

JACK GOLDSMITH AND SHANNON TOGAWA MERCER

ABSTRACT: This paper has two goals. First, it documents President Donald Trump’s primary influences on international law and institutions in his first two years in office. Second, it seeks to assess the medium- and long-term impact of those influences. The vast majority of international law and institutions remains untouched by Trump’s actions. He has brought significant change to high-profile international treaties and institutions such as the Paris Agreement, the Iran deal, and the global trade system. His verbal attacks on U.S. allies and international institutions that traditionally garnered U.S. support (such as NATO) promote disharmony among these allies, diminish trust in the institutions, and make it easier for leaders in other nations to adopt a similarly disdainful attitude. Trump’s influence has been significant. But other U.S. presidents have assaulted international institutions only to be followed by a president who embraces those institutions and dims the impact of the assaults. Trump’s ultimate impact will depend on who succeeds him in office. It will also depend on larger trends in international affairs, such as the rise of China and the re-ascendancy of Russia as global powers, the many failures of liberal internationalism, and the general disenchantment in liberal democracies with distant, elite, global institutions. These factors were operating before and independent of Trump, many of them were pushing in the same general direction as Trump, and they will make it challenging to return to anything like the pre-Trump international status quo.


This paper examines the widespread belief that the Trump administration’s attacks on international law and institutions are significantly harming the international legal order. Part I describes the actions Trump has taken. That is the relatively easy part. It is much harder to figure out the medium- and long-term impact of Trump’s actions. For the reasons offered in Part II, we think that in most respects it is still too early to

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tell. But we speculate that Trump’s biggest impact is likely to come as much from his verbal attacks on international law and institutions as from the material changes he has brought to them.

I. The Trump Onslaught

President Trump treats international laws and institutions with disdain, and frequently issues threats with respect to them. He did this during the presidential campaign, in his Inaugural speech in January 2017, and persistently ever since. ‘America will always choose independence and cooperation over global governance, control, and domination,’ he told the General Assembly in September 2018, in a recent, typical formulation.¹ ‘We will never surrender America’s sovereignty to an unelected, unaccountable, global bureaucracy,’ he added, in the course of excoriating the World Trade Organization (WTO), the International Criminal Court (ICC), and the United Nations (UN) Human Rights Council.² President Trump’s anti-internationalist bark has been very loud, and must be included in any assessment of his impact, which we do in Part II. But first, in this Part I, we assess his bite.

A. Trade

Trump has disrupted the international trade regime along many dimensions.

During the presidential campaign, Trump said that he would renegotiate the North American Free Trade Agreement with Canada and Mexico ‘to get a better deal for our workers,’ and that if he could not get a better deal, he would withdraw from it.³ The renegotiations began in January 2018. In late September 2018, the United States, Canada, and Mexico announced that they had reached a deal on a new treaty,

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² Ibid.

called the United States-Mexico-Canada Agreement.\textsuperscript{4} It remains unclear whether this new agreement will receive the necessary ratifications.

Trump has been similarly disdainful of the WTO, which he views as biased against the United States.\textsuperscript{5} But his attacks on it have taken a different form. He has significantly ramped up the Obama-era practice of vetoing appointments to the WTO’s Appellate Body (AB).\textsuperscript{6} The AB consists of seven ‘judges’ appointed for four-year terms who resolve appeals from WTO panel decisions.\textsuperscript{7} AB appointments are made by consensus. In declining to approve candidates, the United States is thus exercising a veto.\textsuperscript{8} This veto impacts the AB because it requires three members to decide a case.\textsuperscript{9} On September 30, 2018, the AB was reduced to three members; and by December 10, 2019, when two of those three reach their term limits, there will be only one.\textsuperscript{10} That will leave the AB inquorate and the WTO functionally unable to resolve appellate disputes.\textsuperscript{11}

The Trump administration has also sparked a global trade war by engaging in an exchange of tariffs with China, Turkey, the European Union (EU), and Canada based on a number of justifications.\textsuperscript{12} The extent to which these actions violate the WTO


\textsuperscript{7} Ibid.


\textsuperscript{9} Art. 17.1 DSU.

\textsuperscript{10} See Payasova et al., supra note 6.


\textsuperscript{12} China and the United States have engaged in a tit-for-tat exchange of tariffs and threats since January 2018. As of 19 September 2018, 85 to 95 percent of United States exports to China are under