Volume 21 Number 1 2020/pp.1-17 www.usask.ca/esteyjournal

The Estey

Journal of International Law and Trade Policy

"Aggressive Unilateralism" – The New Focus of US Trade Policy

William A. Kerr
Associate Member, College of Law, University of Saskatchewan, Canada

Abstract

The administration of President Donald Trump has changed the focus of the international trade policy of the United States from fostering trade liberalization through multilateral reciprocity to countering unfair and nefarious trade practices of foreign firms, state owned enterprises and governments. Concerns of countries regarding unfair and nefarious international trade practices has a long trade policy history and actions to deal with it are known in the United States Congress as aggressive unilateralism. This paper argues that in the period between the two world wars the focus of trade policy concerns shifted to trade restrictions imposed by governments. After the Great Depression and the Second World War those putting in place multilateral institutions to deal with trade problems focused exclusively on tariffs and trade barriers imposed by governments and made no provisions for governments to act against what they perceive as unfair and nefarious international trade practices of trading partners. Trade liberalization through multilateral reciprocity became the ruling paradigm of international trade policy and was accepted by most governments and all US administrations from Truman through to Obama – although aggressive unilateralism was manifest in the United States Congress. The Trump administration eschews the ruling paradigm and actively practices its own brand of aggressive unilateralism, although it does not use the term but rather wishes to make it part of the president's brand. Multilateral trade institutions need to find the means to retain the benefits of liberalization based on multilateral reciprocity while incorporating mechanisms to allow governments to deal with unfair and nefarious international trade practices.

Keywords: aggressive unilateralism, multilateral, Trump administration, unfair trade, WTO

Introduction

> [N]ations have been taught that their interest consisted in beggaring all their neighbours. Each nation has been made to look with an invidious eye upon the prosperity of all the nations with which it trades, and to consider their gain as its own loss. Commerce, which ought naturally to be, among nations, as among individuals, a bond of union and friendship, has become the most fertile source of discord and animosity.
>
> Nothing, however, can be more absurd than this whole doctrine of the balance of trade, upon which, not only these restraints, but almost all the other regulations of commerce are founded. When two places trade with one another, this doctrine supposes that, if the balance be even, neither of them either loses or gains; but if it leans in any degree to one side, that one of them loses and the other gains in proportion to its declension from the exact equilibrium. Both suppositions are false. A trade which is forced by means of bounties and monopolies may be and commonly is disadvantageous to the country in whose favour it is meant to be established ... But that trade which, without force or constraint, is naturally and regularly carried on between any two places is always advantageous, though not always equally so, to both.
>
> Adam Smith, Chapter 3, Book IV, *The Wealth of Nations*, 1776

As with many aspects of governance, responsibility for trade policy in the United States is divided between the administrative branch (Executive) and the legislative branch (Congress). The Administration is responsible for negotiating trade agreements and the day-today implementation of trade policy. The Congress has the power to approve trade agreements and legislate on other aspects of trade policy. Since the end of the Second World War and the negotiation of the multilateral General Agreement on Tariffs and Trade (GATT) in 1947, successive administrations have been committed to the multilateral approach to trade policy. Congress, on the other hand, has tended to focus on ensuring that firms in the United States do not suffer from any nefarious practices of foreign competitors. There has long been tension between the administrative branch and the legislative branch over trade policy. The administration is the public face of trade policy, which has engaged in negotiating trade agreements although Congress has attempted to constrain the administrative branch through the use of *trade promotion authority* legislation – often termed *fast track authority* – and putting boundaries on what can be negotiated. Working more in the background, Congress has engaged in passing, for example, legislation targeted at what it considers foreign unfair trade practices – Section 301 of the Trade Act of 1974. This legislation gives the administrative branch the authority to retaliate against countries that are engaged in

unfair trade practices, but the administration desires flexibility in choosing when it wishes to retaliate. The Congressional approach to trade policy has been termed *aggressive unilateralism*. There had been long-standing tension between the two approaches to trade policy.

This all ended with the election of Donald Trump as President of the United States in 2016. The Trump administration eschews multilateralism and has been following a path of *aggressive unilateralism* since taking office (Kerr, 2018) – although to put the President's personal stamp on the administration's trade policy, they do not use that term. Thus, for the first time since 1947 the administrative branch and the Congress have the same view and objectives for trade policy. This has had major ramifications for the trade policy of the United States and global international trade. This paper explores the origin of *aggressive unilateralism* and its ramifications for trade policy globally.

Aggressive Unilateralism Versus Multilateralism

The origins of claims of nefarious and *unfair* business practices of foreign competitors likely dates back to the dawn of international commerce. Adam Smith was well aware of it in 1776. Writing in the early 1920s, Notz (1920-1921, pp. 389-391) provided a long list of *unfair* business practices that were of international including:

> Misbranding of fabrics and other commodities respecting the materials or ingredients of which they are composed, their quality, origin, or source.
>
> Adulteration of commodities, misrepresenting them as pure or selling them under such names and circumstances that the purchaser would be misled into believing them to be pure.
>
> Bribery of buyers or other employees of customers and prospective customers to secure new customers or induce continuation of patronage. …
>
> Procuring the business or trade secrets of competitors by espionage, by bribing their employees, or by similar means. …
>
> False claims to patents or misrepresenting the scope of patents. …
>
> Passing off of products or business of one manufacturer for those of another by imitation of product, dress of goods, or by simulation of advertising or of corporate or trade names.

> Unauthorized appropriation of the results of a competitors ingenuity, labor and expense, thereby avoiding costs otherwise necessarily involved in production. …

Notz (1920-1921) and Thompson (1920) both outlined a number of international initiatives attempting to deal with *unfair* trade practices in the immediate post-World War I period. German firms had been perceived as particularly egregious in their use of nefarious business practices in the pre-war period.[1] According to (Day, 1922, p. 415) the German:

> … government so far as possible freed the export industries from the burden of the tariff, which weighed heavily on some classes in the country, and beyond that, gave actual bounties to stimulate exports.[2] These were commonly concealed, for instance in the form of special rates in transportation, but had nevertheless to be paid out of the pockets of the German taxpayer and business man. Furthermore, private organizations followed substantially the same practice. The great "cartels" kept prices high at home to gain resources with which they might finance their fight against competitors in foreign markets.[3] They won much trade, but they won it at costs, borne sometimes by Germans and sometimes by outsiders … Finally, there must be put on the debit side of the account some gains which Germans made in commerce, not by greater efficiency but by less honesty: by the imitation of trade marks, by bribery of agents, etc. … Their departures from accepted standards of commercial morality were, at least sufficient to establish for German trade methods an unenviable reputation.

As a result, one of the first international attempts to deal with such nefarious commercial practices internationally was in the 1919 *Treaty of Versailles* between the Allied Powers and Germany whereby in Article 274:

> Germany undertakes to adopt all the necessary legislative and administrative measures to protect goods the produce or manufacture of anyone of the Allied and Associated Powers from all forms of unfair competition in commercial transactions.
>
> Germany undertakes to prohibit and repress by seizure and by other appropriate remedies the importation, exportation, manufacture, distribution, sale or offering for sale in its territory of all goods bearing upon themselves or their usual get-up or wrappings any marks, names, devices, or description whatsoever which are calculated to convey directly or indirectly a false indication of the origin, type, nature, or special characteristics of such goods.

Further, in Article 275 Germany undertook to recognize and protect appellations for wines and spirits – a precursor to current protections for geographical indications (Kerr, 2006a).

With the establishment of the League of Nations, international cooperation on international trade moved to its economic section. The focus began to change from the *unfair* international trade practices of firms to the interventions of governments to restrict trade. In May 1927 the League convened the World Economic Conference billed as "the biggest, most ambitious and obviously the most successful attempt so far made to achieve economic co-operation among nations (Anon, 1927, p. ix). The conference was a major undertaking with fifty countries (including non-League members, the US, the USSR and Turkey), 194 delegates, considerable preparatory work and the preparation of background papers and studies. The clear focus was on government intervention. Economist Bertil Ohlin (1927, p. 123) writing of the Conference made this shift in emphasis clear:

> There has been a surprising amount of agreement among those who have commented on the resolutions that the most important sentence is the following: "The Conference declares that the time has come to put an end to the increase in tariffs and to move in the opposite direction."

The Conference did deal with dumping and trade distorting subsidies received by firms. In the forty-seven page final official report of the conference (Economic Committee of the League of Nations 1927), however, there was only one sentence that dealt with other unfair business practices:

> The Conference recognises that it is important that the work of the Economic Committee of the League of Nations and the International Chamber of Commerce in connection with the simplification of Customs formalities, the assimilation of laws on bills of exchange, the international development of commercial arbitration and the *suppression of unfair commercial practices* should be continued with a view to obtaining rapid and general solutions (pp. 169-170, emphasis added).

Following on the success of the 1927 conference another World Economic Conference was convened in London in 1933 – although not under the auspices of the League of Nations. The global economy was in the grip of the Great Depression and the intervention of governments in international trade was top of mind along with devaluations and other facets of currency stability. According to Layton (1933a, p. 406):

> Nearly every government in the world, for example, has tried to protect its national economy by a restriction of its imports. The more countries take such action, the stronger is the inducement for others to do so; and the more futile it becomes for all together, since every nation's imports are some other nation's exports. The process is obviously a suicidal one; yet none of the countries caught in the cycle dares singly to step outside it for fear of becoming a dumping ground for other countries' exports, without being able to expand its own. For this reason, the progressive decline in the trade and production of the world can only be halted by cooperative agreement

> between nations. To achieve this not only in commercial matters, but in financial and monetary policy also, is the task of the Conference.

The London Conference ended in failure (Layton, 1933b). The stage was set for further efforts at international cooperation on limiting government intervention in international trade. According to Layton (1933b, p. 22):

> Hence, though the danger that nations may turn their attention to yet more extreme experiments in economic nationalism is a very real one, it is something gained that the Conference broke up in an atmosphere of good will and with the conviction that its task would have to be taken up again. If the good ship was prevented by a cyclone from getting very far on its voyage, it at least was saved from becoming a total wreck and was towed back safely in to port.

As the conference ended in disagreement, no consensus document was produced but it seems clear that *unfair* international trade practices had fallen off the agenda. After 1933 international relations began to deteriorate with the League of Nations losing effectiveness internationally and eventually some major powers exited the organization. Eventually, the world descended into war and any attempts at international economic cooperation put on hold. The idea that the focus of future economic cooperation should be on government interventions in international trade was, however, widely accepted.

With a clear road to victory for the Allies, their thoughts turned to post-war arrangements. The victors had concluded that the failure to prevent a second world conflict in half a century was, at least in part, the result of the absence of strong international organizations. Four sources of international conflict were identified: (1) political conflict; (2) strategic devaluations; (3) the economic difference between rich and poor countries;[4] and (4) international trade disputes. Under the leadership of the United States and the United Kingdom, they set about to rectify the deficiency (Kerr, 2000). For political conflict, while the League of Nations was perceived as a good idea it was seen as too weak and needed to be strengthened. It was re-formulated as the United Nations. At Bretton Woods, two new organizations were negotiated. The International Monetary Fund (IMF) was put in place to deal with strategic devaluations. The International Bank for Reconstruction and Development (IBRD) – commonly called the World Bank – would deal with initially transferring funds to help countries devastated by the Second World War and then to assisting in closing the gap in levels of development.

The fourth international organization, which was to deal with international trade problems, was to be the International Trade Organization (ITO). Importantly, in parallel an agreement to deal with government imposed trade barriers – primarily tariffs – was also being negotiated. This was the General Agreement on Tariffs and Trade (GATT).

The United States took the lead regarding the ITO with the release of a proposal document in 1945 (US Department of State, 1945). The emphasis was on government intervention with only dumping, trade distorting subsidies and the activities of cartels included – there was no mention of other *unfair* trade practices.

Following these proposals, the ITO was negotiated, primarily in Havana between 1945 and 1948, resulting in the Havana Charter. The emphasis of the Havana Charter was on dealing with government interventions in international trade but its Chapter V did deal with Restrictive Business Practices. The emphasis was on the trade restricting activities that could be undertaken by international cartels. The list of practices to be dealt with under the ITO were:

> 3. The practices referred to in paragraph 2 are the following:
>
> (a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product:
>
> (b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
>
> (c) discriminating against particular enterprises;
>
> (d) limiting production or fixing production quotas;
>
> (e) preventing by agreement the development or application of technology or invention whether patented or unpatented;
>
> (f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants;
>
> (g) any similar practices which the Organization may declare, by a majority of two thirds of the Members present and voting, to be restrictive business practices (Havana Charter, 1948, pp. 63-64).

There is no mention of other nefarious trade practices although Chapter V, Section 3 (g) does appear to leave a door open for additional practices to be added. The Havana Charter also dealt with dumping and trade distorting subsidies.

In any case, the ITO was stillborn as it was not expected to garner sufficient support in the US Congress and, hence, was never put forward. As a result, the already negotiated GATT became the de-facto organization to deal with international trade issues multilaterally. It was conceived as a mechanism solely to reduce tariffs. Latterly, after the demise of the ITO initiative, some wider aspects of trade policy were *bolted on to* the GATT prior to it coming into effect and in subsequent negotiating rounds. The GATT was to be a temporary organization until an acceptable replacement for the ITO could be negotiated.[5]

The GATT had nothing specific to say about the *unfair* international trade practices of private firms other than dumping, recipients of trade distorting subsidies and nefarious marks of origin. The anti-dumping clauses are badly flawed and open to criticism (Kerr, 2006; Kerr and Loppacher, 2004). Trade distorting subsidies are dealt with through classifying subsidies into those that may be subject to countervailing duties and those which cannot. Both anti-dumping and countervailing duties actions are, in the first instance, dealt with through domestic mechanisms in the member state with international oversight through the GATT and subsequently WTO disputes system. Beyond these provisions the GATT/WTO is silent on other private sector *unfair* trade practices.

International trade lawyers have looked to less direct provisions in the GATT/WTO to bring *unfair* trade practices within the ambit of international trade law (Taylor, 1997; Hudec, 1974) – but the tie is tenuous at best. The text of Article XXIII of the GATT on Nullification and Impairment of benefits expected from the GATT is vague:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
> (*a*) the failure of another contracting party to carry out its obligations under this Agreement, or
> (*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (*c*) the existence of any other situation,
>
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it (GATT, Article XXIII).

Article XXIII, 2 goes on to say that if a satisfactory result cannot be achieved in what is laid out in Article XXIII, 1 then the complaint can move to dispute settlement.

The wording in (b) – *any measure* and in (c) – *any other situation* are all encompassing and, it has been argued, could include nefarious international trade practices of private firms (Hudec, 1974; Taylor, 1997). Beyond these vague commitments, the focus of the GATT and subsequent WTO documents has been on constraining the ability of politicians to intervene in international trade through the imposition of tariffs, quantitative restrictions and latterly other non-tariff barriers. It was not to facilitate economic responses to counteract or punish the *unfair* and nefarious international trade practices of foreign firms, which may or may not receive assistance from foreign governments.

Under the GATT/WTO more open trade is seen as positively contributing to global economic welfare. The long run objective of the negotiations under the agreements' framework is to reduce trade barriers put in place by governments. Strong rules of trade are sought to limit the ability of politicians to intervene in international trade matters. The mechanism is reciprocity achieved through negotiation. There is a recognition that protectionism cannot be easily or quickly overcome and that liberalization will be a long-run project. Over the years since the GATT was agreed in 1947 it has become the *ruling paradigm* of international trade policy (Kerr and Viju-Miljusevic, 2019). All US administrations until that of Donald Trump have accepted the *paradigm* – admittedly with varying degrees of enthusiasm – and, of course, the United States was the major force behind the creation of the multilateral system and often its greatest supporter (Kerr and Hobbs, 2006). Acceptance of the paradigm has been widespread with GATT/WTO membership rising from its original twenty-three members to 164 in 2020 (Kerr, 2010). As with the rise and acceptance of any ruling paradigm, other international trade paradigms became relatively obscure (Kerr, 2018).

The US Congress and Unilateralism

While the United States administrative branch of government largely established its trade policy based on the ruling paradigm in the long period after WWII, the US Congress, in part, was espousing unilateralism. Congress wished to use the economic power of the United States unilaterally to deter, threaten and punish what it determined to be unfair and nefarious international trade practices of foreign firms and governments. It believed the constraints on unilateral action accepted under the GATT/WTO to be unacceptable limits on the ability of the United States to protect its businesses from unfair foreign practices. According to Hudec (1974, p. 510):

> The United States Congress has generally regarded itself as the final (and only true) protector of reciprocity in foreign trade commitments. The Congress harbors a lingering suspicion that the Executive Branch can be persuaded on occasion to sacrifice United States economic interests for the sake of friendly political relations.

The major legislative initiative in this area is what is known as Section 301 of the Trade Act of 1974, although Section 252 of the Trade Expansion Act of 1962 is generally recognized as its progenitor (Hudec, 1974). Section 301 has been amended and expanded a number of times. Section 301 allows for two types of activities that can bring forth unilateral retaliation: (1) *unjustifiable* means and, (2) *unreasonable* means. *Unreasonable* means is the category that pertains to nefarious international trade practices. Congress has never defined *unreasonable* in this context thus leaving the President the flexibility to determine activities that it entails. Congress has, however,

given guidance as to which activities are covered by Section 301. According to Taylor, 1997, pp. 215-217):

> "Unreasonable has been defined as covering practices that are "not necessarily in violation of or inconsistent with U.S. legal rights," but which are "deemed to be unfair and inequitable." …
>
> … illustrative list of "unreasonable" acts or practices … going from the denial of intellectual property rights and opportunities for the establishment of an enterprise … *to government toleration of systematic anti-competitive activities of private firms*, export targeting and the denial of labor rights. …
>
> With respect to anti-competitive activities (antitrust issues) a foreign government may be found to be acting unreasonably if it: (1) tolerates systematic anti-competitive activities by state-owned enterprises as well as private firms; (2) denies market access for U.S. services as well as goods; or (3) restricts the sales of U.S. goods or services to a foreign market.

In some cases, the Congress has tried to mandate that the administration take action against *unjustifiable* and *unreasonable* activities of foreign firms and in others it has left it to presidential discretion. The administrative branch has always wanted the right to exercise discretion in the application of Section 301 remedies. Until the administration of President Trump the administrative branch largely used Section 301 retaliatory sanctions, or the threat thereof, to force foreign governments to the bilateral bargaining table rather than directly retaliating through its application. According to Taylor (1997, p. 235):

> The U.S. experience with … 301 suggests that a strategy developed around coercing negotiations under threats of retaliatory trade sanctions is more effective for obtaining multilateral negotiations and agreements than for producing concrete enforcement results.

In the case of direct retaliation justified under Section 301, the United States could be challenged through the dispute mechanism of the WTO. It could, however, attempt to use GATT Article XXIII 1 (c) as a shield. According to Taylor (1997, pp. 286-287):

> Article XXIII, Section 1 (c) cases are not offered the same enforcement measures available under either of the other two categories of claims. The DSU process is followed in an Article XXIII, section 1(c) case only until a panel report has been circulated to the Member States. After that, the old GATT system for implementation – which required consensus adoption, and thus allowed a country to block adoption of a report unfavorable to it – takes over. …
>
> If anything, the reversion to the old GATT system underscores all of its inadequacies for U.S. purposes of forcing open foreign markets. If the WTO is incapable of policing Article XXIII, section 1(c) cases, then the United States could pursue "and other situation" on its own.

Given that previous US administrations have accepted the ruling *paradigm* and the tenuous connection between Section 301 actions and GATT Article XXIII, *aggressive unilateralism* has not been directly pursued, although as indicated previously, it was used as a threat to induce foreign governments to the bargaining table. That has changed with the arrival of the administration of President Trump.

Aggressive unilateralism and the trade policy agenda of the Trump administration

Aggressive unilateralism is not a new idea. Gero and Lannan (1995, p. 82) discussed it in the mid-1990s:

> Of particular distaste to the international community was the self-appointed authority of the United States to unilaterally retaliate in response to foreign trade practices, which it deemed to be "unfair" regardless of whether they violate any international agreements, The United States' resort to such tools has been "aggressive unilateralism." Of course, the double entendre of the term "aggressive unilateralism" refers both to the unilateral decision of the United States regarding what is "unfair" and the subsequent unilateral demand for trade concessions to rectify the "cheating."

This is clearly the policy path being followed by the Trump administration. They do not use the term, presumably to give the President ownership of the policy – a new and bold trade policy strategy. In fact, it is simply a change in paradigm. As suggested above, de facto aggressive unilateralism has a long history dating back at least a hundred years. The development of the trade paradigm based on multilateral institutions over that period made no provision for aggressive unilateralism. The efforts of international law scholars to have Article XXIII of the GATT stretch to encompass the retaliation embedded in Section 301 is proof that unfair and nefarious trade practices were not considered major impediments to international trade by the time the multilateral system was being negotiated.

The unfair trade practices identified by the Trump administration hark back to the era prior to multilateralism becoming ruling paradigm for international trade policy. The trade practices of Chinese private firms, state owned enterprises and governments has been one focal point of the Trump administration's trade policy. On May 29, 2018 the White House released a fact sheet entitled President Donald J. Trump is Confronting China's Unfair Trade Policies which outlines the administration's concerns regarding Chinese international trade practices (White House, 2018):

> YEARS OF UNFAIR TRADE PRACTICES: China has consistently taken advantage of the American economy with practices that undermine fair and reciprocal trade.

- For many years, China has pursued industrial policies and unfair trade practices—including dumping, discriminatory non-tariff barriers, forced technology transfer, over capacity, and industrial subsidies—that champion Chinese firms and make it impossible for many United States firms to compete on a level playing field. …

UNDERMINING AMERICAN INNOVATION AND JOBS: China has aggressively sought to obtain technology from American companies and undermine American innovation and creativity.

- The cost of China's intellectual property theft costs United States innovators billions of dollars a year, and China accounts for 87 percent of counterfeit goods seized coming into the United States.
- United States Trade Representative's (USTR) Section 301 investigation identified four of China's aggressive technology policies that put 44 million American technology jobs at risk:
  - Forced technology transfer;
  - Requiring licensing at less than economic value;
  - Chinese state-directed acquisition of sensitive United States technology for strategic purposes; and
  - Outright cyber theft.
- China uses foreign ownership restrictions, administrative review, and licensing processes to force or pressure technology transfers from American companies.
  - China requires foreign companies that access their New Energy Vehicles market to transfer core technologies and disclose development and manufacturing technology.
  - China imposes contractual restrictions on the licensing of intellectual property and technology by foreign firms into China, but does not put the same restrictions on contracts between two Chinese enterprises.
- China directs and facilitates investments in and acquisitions of United States companies to generate large-scale technology transfer.

China conducts and supports cyber intrusions into United States computer networks to gain access to valuable business information so Chinese companies can copy products. …

While the administration's list of *unfair* and nefarious practices reflects aspects of modern technology, it differs little from those of Notz (1920-1921) cited earlier in this paper. The spirit is certainly the same. Retaliation as outlined in aggressive unilateralism is the policy solution. The Chinese practices outlined in the White House fact sheet, with the exception of dumping, subsidies and protection of foreign intellectual property are not encompassed in the WTO agreements, except possibly Article XXIII. This is clearly a source of considerable frustration for the Trump administration.

Members of the multilateral community have been surprised and appalled at what they perceive as the Trump administration's blatant disregard for the institutions of the ruling paradigm. As the congressional framers of Section 301 in its various incarnations intended, the *aggressive unilateralism* of the Trump administration has been used to bludgeon countries to the bargaining table, not just China but its North American Free Trade Agreement partners, Mexico and Canada. Once having successfully brought China and the NAFTA partners to the table through *aggressive unilateralism*, the results of the subsequent agreements have fallen short of the rebalancing of trade relations to the benefit of the US (Kerr, 2019a; Kerr, 2019b).

The use of threats against trade partners under a policy of aggressive unilateralism has not been the only thrust of trade policy for the Trump administration. It has worked actively to remove constraints on aggressive unilateral action imposed by its WTO obligations by refusing to cooperate in the appointment of new appellate judges to hear appeals of dispute panels. Without sufficient numbers of judges to hear cases, dispute panel rulings are not valid and, hence, the constraint of international oversight of dumping, countervail and actions under *aggressive unilateralism* no longer exists (Kerr, 2018). Without dispute settlement, the question of the appropriateness of Section XXIII becomes moot. The Trump administration has, however, been careful to stay within its multilateral obligations, choosing rather to find loopholes to loosen the constraints (Kerr, 2019c). Its imposition of tariffs on steel and aluminum is justified under Article XXI national security concerns – which while a questionable justification nevertheless cannot be formally contested by other Member States. When trading partners retaliated against the imposition of those tariffs, the Trump administration duly initiated cases at the WTO. The tactic of imposing tariffs under *aggressive unilateralism* has played out within the WTO rules because of the time it takes to see a dispute at the WTO through to fruition. The tariffs are expected to lead to a change of behaviour or an agreement to negotiate before a case can work its way through the disputes system. If the desired change in behaviour is achieved, the complaint will be withdrawn and the United States would not face WTO sanctions. The administration may also have been betting that its strategy of not cooperating in appointing appellate judges would invalidate the disputes system before a judgement was rendered. A defense through Article XXIII might also have been attempted. While such activities are not within the *Spirit of the GATT* they are within the WTO rules. Hence, while working to lift the constraints on *aggressive unilateralism* imposed by the WTO, the administration has been careful not to abandon the organization entirely through a major direct confrontation or by withdrawing from it. It wants space for dealing with *unfair* and nefarious trade practices within the

multilateral system – something those who were instrumental in the creation of international trade institutions did not allow for.

Conclusions

The international governance of trade is experiencing a period when its ruling paradigm is being challenged by the country that did the most to have its institutions established and is the world's major trading country. The problems at the heart of the issue are long standing – at least one hundred years. These pertain to *unfair* and nefarious trade practices. While, to some extent, what is considered *unfair* and nefarious is in the *eye of the beholder*, they have been long recognized as problems in international trade and commerce. There is no international commercial law. Hence, the rules of trade are the outcome of negotiated agreements. The framers of the current international trade institutions chose to ignore such concerns in their rush to find a way to reduce the harmful effect of protectionist measures put in place by governments. Over time, multilateralism became the ruling paradigm of international trade. Alternative paradigms such as *aggressive unilateralism* continued to exist but received little official recognition. In the United States, however, it has had a long history, particularly in the Congress.

The Trump administration has directly challenged the ruling paradigm making what it considers *unfair* and nefarious trade practices the centrepiece of its trade policy – with a major focus on China. The practices of some Chinese private sector firms, state owned enterprises and governments appear to fit within what has historically been perceived as *unfair* trade. The Chinese government has been able to shield these activities from international discipline due to the absence of provisions to deal with them in the WTO. Whatever the merits of the Trump administration's policy toward international trade, its challenging of multilateral trade institutions points out their deficiency in the area of *unfair* and nefarious international trade practices. While in the past limiting government intervention in international trade matters has been the sole priority of these institutions, it may be time for Member States to entertain broadening the remit of the WTO to encompass this facet of trade friction. At the moment, the only way for the United States to push its agenda is to weaken the multilateral system. Weakening multilateral trade institutions is a mistake. The problems that arise in the absence of such institutions were well understood by those who pushed for their establishment in the wake of the Great Depression and WWII. The way forward is to find a way to deal with the problems created by *unfair* and nefarious international trade practices within the multilateral system.

References

Anon (1927) Preface. In R.W. Boyden (ed.), *The Economic Consequences of the League – The World Economic Conference*, ix. London: Europa Publishing Company.

Day, C. (1922) *A History of Commerce*. New York: Longmans, Green and Co.

Economic Committee of the League of Nations (1927) Report of the Conference. reprinted in R.W. Boyden (ed.), *The Economic Consequences of the League – The World Economic Conference*, 169-207. London: Europa Publishing Company.

GATT (1947) Article XXIII – General Agreement on Tariffs and Trade. Geneva: World Trade Organization, https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXIII.

Gero, J. and K. Lannan (1995) Trade and Innovation: Unilateralism v. Multilateralism, *Canada-United States Law Journal* 21: 81-98.

Havana Charter (1948) *Final Act and Related Documents*. United Nations Conference of Trade and Development, Lake Success: Interim Commission for the International Trade Organization.

Hudec, R.E. (1974) Retaliation Against Unreasonable Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment. *Minnesota Law Review* 59(3): 461-540.

Kerr, W.A. (2019a) China, the United States and the Rules of Trade. *Journal of International Law and Trade Policy* 20(1): 1-14, https://ageconsearch.umn.edu/record/290526?ln=en.

Kerr, W.A. (2019b) Agriculture in the United States, Mexico, Canada Agreement: Agreeing to Keep Things Pretty Much the Same. *Canadian Journal of Agricultural Economics*, https://doi.org/10.1111/cjag.12212.

Kerr, W.A. (2019c) Loopholes, Legal Interpretations and Game Playing: Whither the WTO without the *Spirit of the GATT*? *Journal of International Law and Trade Policy* 20(2): 49-60, https://ageconsearch.umn.edu/record/299755?ln=en.

Kerr, W.A. (2018) Eliminating the Constraints on Trade Policy – The Strategy that Underpins US Negotiations in the Trump Administration. *Journal of International Law and Trade Policy* 19(2): 75-84, https://ageconsearch.umn.edu/record/281336?ln=en.

Kerr, W.A. (2010) GATT-1947: A Living Legacy Fostering the Liberalization of International Trade. *Journal of International Law and Trade Policy* 11(1): 1-11, https://ageconsearch.umn.edu/record/272582?ln=en.

Kerr, W.A. (2006a) Enjoying a Good Port with a Clear Conscience: Geographic Indicators, Rent Seeking and Development. *Journal of International Law and Trade Policy* 7(1): 1-14, https://ageconsearch.umn.edu/record/23827?ln=en.

Kerr, W.A. (2006b) Dumping: Trade Policy in Need of a Theoretical Make Over *Canadian Journal of Agricultural Economics* 54(1): 11-31.

Kerr, W.A. (2000) A New World Chaos? – International Institutions in the Information Age. *Journal of International Law and Trade Policy* 1(1): 1-10, https://ageconsearch.umn.edu/record/23831?ln=en.

Kerr, W.A. and J.E. Hobbs (2006) Bilateralism – A Radical Shift in US Trade Policy: What Will it Mean for Agricultural Trade? *Journal of World Trade* 40(6): 1049-1058.

Kerr, W.A. and L.J. Loppacher (2004) Antidumping in the Doha Negotiations: Fairy Tales at the World Trade Organization. *Journal of World Trade* 38 (2): 211-244.

Kerr, W.A. and C. Viju-Miljusevic (2019) European Union Adapting to an Era of No Ruling Trade Paradigm. *European Foreign Affairs Review* 24(3): 387-404.

Layton, W. (1933a) The Task of the World Economic Conference. *Foreign Affairs* 11(3): 406-419.

Layton, W. (1933b) After the World Economic Conference. *Foreign Affairs* 12(1): 20-29.

Notz, W. (1920-1921) New Phases of Unfair Competition and Measures for Its Suppression: National and International. *Yale Law Journal* 30(4): 384-394

Ohlin, B.G. (1927) Plea for Freer Trade. In R.W. Boyden (ed.) *The Economic Consequences of the League – The World Economic Conference,* 123-128. London: Europa Publishing Company.

Smith, A. (1776) An Inquiry into the Nature and Causes of the *Wealth of Nations. Carmel: Online Library of Liberty*, https://oll.libertyfund.org/titles/smith-an-inquiry-into-the-nature-and-causes-of-the-wealth-of-nations-cannan-ed-vol-1.

Taylor, C. (1997) The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System. Vandenberg Journal of Transnational Law 30(2): 209-348.

Thompson, H. (1920) Unfair Competition in International Trade and Commerce. The Advocate of Peace 82(2): 60-62.

Treaty of Peace between the Allied and Associated Powers and Germany (1919), https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf.

US Department of State (1945) *Proposals for the Expansion of World Trade and Employment*. publication 241, Washington: Department of State.

White House (2018) *President Donald J. Trump is Confronting China's Unfair Trade Policies*. Fact Sheets, https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-confronting-chinas-unfair-trade-policies/.

Endnotes

[1] This was written just after WWI when anti-German sentiment was particularly high.
[2] *Unfair* and potentially countervailable subsidies in current parlance.
[3] Dumping in current parlance.
[4] No one was yet using the terms *third world*, *underdeveloped* or *developing*.

[5] By the mid-1980s the limitations of the narrow scope of the GATT were becoming increasingly apparent and its members agreed to a new round of negotiations in 1986 – the Uruguay Round – whereby a new organization would be negotiated. It became the WTO.