Introduction to a Special Issue on the Contemporary Practice of the United States at the Outset of President Trump's Second Term in Office
doi:10.1017/ajil.2025.10128

The beginning of President Donald J. Trump's second term in office has been marked by dramatic changes in the U.S. government's approach to foreign policy, international law, and international organizations. That, at least, is the predominant view both in the United States and abroad. At the same time, President Trump's executive orders and other policy directives have come so quickly, addressed so many issue areas, taken so many forms, and been so disruptive that they are nearly impossible for any single person to document, let alone to evaluate comprehensively and carefully. Much coverage of them to date has been piecemeal, superficial, or politically charged.

In response, we invited our Board of Editors to analyze the events that have unfolded in their areas of expertise. Our goal is to provide an introduction and overview of the U.S. government's actions across a wide range of international legal issues since the beginning of President Trump's second term. The result is this special issue of the *American Journal of International Law* dedicated to the Contemporary Practice of the United States. It documents and analyzes U.S. practice across a broad range of issue areas, from immigration to international organizations to climate and the environment, tariffs, immunities, war powers, and outer space, with perspectives from Africa, Asia, Europe, and Latin America. Each essay analyzes the core legal issues involved, including by discussing whether or how the U.S. practice at issue is unprecedented.

We believe that the U.S. practice during this period is contributing to broader trends that together will alter the trajectory of international law. We hope that the clear and sharp analysis in these essays provides the foundation for efforts to understand and shape what comes next.

INGRID BRUNK
JACOB KATZ COGAN
MONICA HAKIMI

INTERNATIONAL ECONOMIC LAW

The "America First Trade Policy" in Practice
doi:10.1017/ajil.2025.10107

Tariffs are at the center of President Donald J. Trump's "America First Trade Policy" in his second term.[1] Citing emergency and national security concerns, the Trump administration has imposed double- and triple-digit percent tariffs on imports from nearly every country in the world.[2] By April 2025, the Trump tariffs had increased the average weighted U.S. tariff to 23 percent—a ten-fold increase from a year prior.[3] In addition to the economic and business ramifications of this policy, two major legal and political moves have followed the president's

[1] *See* America First Trade Policy, 90 Fed. Reg. 8471 (Jan. 20, 2025).
[2] *See* Chad P. Bown, *Trump's Trade War Timeline 2.0: An Up-to-Date Guide*, PIIE REALTIME ECON., *at* https://www.piie.com/blogs/realtime-economics/2025/trumps-trade-war-timeline-20-date-guide.
[3] *See* Gordon Smith, *Q&A: Donald Trump's First 100 Days*, FIN. TIMES (Apr. 26, 2025), *at* https://www.ft.com/content/33eedc54-bcb5-4905-a970-b999e3244cc9.

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

threats and unpredictable tariff policies: first, importers and other groups have sought relief from these policies in the U.S. courts, alleging that the president's wholesale remaking of tariff rates violates U.S. law; and second, governments across the globe have entered into negotiations with the United States, pursuing agreements to shield them from the worst of the tariffs. Both moves have prompted questions about the reach of the president's foreign commerce authority and the separation of trade law powers in U.S. foreign relations and constitutional law.

Article I, Section 8 of the U.S. Constitution grants the Congress the power to regulate commerce with foreign nations and to levy duties.[4] By contrast, the president's power over commerce and taxes is purely statutory.[5] Over the last century, Congress has delegated authority to the executive branch to increase tariff rates under certain circumstances, and has typically subjected those regulatory changes to judicial review.[6] For instance, U.S. trade remedies statutes allow importers to petition the U.S. Department of Commerce and the U.S. International Trade Commission to counteract unfair trade practices or address import surges that harm domestic industries by increasing tariff rates to those imports.[7] Each year, dozens of importers use these highly technical tools to pursue relief on products from roughly thirty different countries in more than twenty different industries.[8] Apart from trade remedies, a handful of statutes, such as Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974, grant the president discretion to impose trade restrictions, including tariffs, if he finds certain conditions are met. However, the executive branch has rarely relied on these authorities to impose tariffs of any significance on imports to the United States in the last fifty years, and especially over the last thirty years since the creation of the World Trade Organization (WTO). That historical fact makes the Trump administration's implementation of new tariffs on most products from nearly every country especially striking.

The Trump 2.0 tariffs raise legal questions under both U.S. and international law, but the nature of the evaluation under each legal system is different. The issues facing U.S. courts include whether the administration has satisfied the prerequisites in the statutes it has invoked, as well as any applicable administrative procedures; whether those statutes are both capacious enough to authorize President Trump's actions and sufficiently constrained to satisfy constitutional limits on congressional delegations; and whether any concerns about statutory limits are overridden by the president's national security and foreign affairs prerogatives. These are issues of *authority* and *method*: does U.S. law authorize the president to impose these tariffs, and if so, has the president satisfied the preconditions set out in U.S. law to impose them? By contrast, the issue under international law is whether the tariff increases are consistent with WTO rules and rules set out in U.S. free trade agreements

[4] U.S. CONST. Art. I, § 8, cls. 1, 3.

[5] CONG. RSCH SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES 1–2 (2016) ("Thus, because the President does not possess express constitutional authority to modify tariffs, he must find authority for tariff-related action in statute.").

[6] *See* Kathleen Claussen & Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. PA. L. REV. 1955, 1965 (2024).

[7] *See generally* 19 U.S.C. §§ 1671–1671h (countervailing duties), §§ 1673–1673i (anti-dumping duties).

[8] *See* Zachary Walker & Nathaniel Maandig Rickard, *Filing of New Antidumping and Countervailing Duty Petitions Surge in Fiscal Year* 2024, PICARD KENTZ & ROWE NEWS & INSIGHTS (Nov. 8, 2024), *at* https://pkrllp.com/news-insights/filing-of-new-antidumping-and-countervailing-duty-petitions-surge-in-fiscal-year-2024.

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

(FTAs). That evaluation is one focused on the *substance* of the laws and the tariff measures. This Essay addresses the former while another contribution to this special issue addresses the latter.[9] Additional contributions discuss how nations, especially in Africa and Asia, have responded to the tariffs.[10]

The president's most impactful tariff action in his first six months in office has been his imposition of what have been called "worldwide tariffs."[11] On April 2, the president announced a 10 percent tariff on products from all countries and additional tariffs that vary by country of origin.[12] The president has claimed that these all-encompassing tariffs are authorized under the 1977 International Emergency Economic Powers Act (IEEPA).

IEEPA provides the president with certain extraordinary authorities that he may use to "deal with any unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."[13] In this instance, the president declared an emergency regarding the "lack of reciprocity in our bilateral trade relationships, disparate tariff rates and non-tariff barriers, and U.S. trading partners' economic policies that suppress domestic wages and consumption, as indicated by large and persistent annual U.S. goods trade deficits."[14]

Having made an emergency declaration, IEEPA empowers the president, in relevant part, to:

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.[15]

In addition to these global measures, the administration has implemented tariffs that are country- and product-specific. In February, also relying on IEEPA, President Trump announced the imposition of so-called "trafficking" tariffs on products from some of the United States' biggest trading partners: Canada, China, and Mexico, referring to an "unusual and extraordinary threat" from those governments' failures to take sufficient actions to

[9] *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Trump Administration's Trade Policy and the International Trading System*, 119 AJIL 680 (2025).

[10] *See* Henry Gao, *From Great "Liberator" to "Landlord Seeking Rent": The Implications of United States Reciprocal Tariffs Policy in Asia and Beyond*, 119 AJIL 711 (2025); Olabisi D. Akinkugbe, *Entrenching Inequality or Opportunities to Forge New Pathways: Implications of U.S. Foreign Aid Reductions and Reciprocity Tariffs for African Countries*, 119 AJIL 735 (2025).

[11] V.O.S. Selections, Inc. v. United States, No. 25-00066, slip op. at 14 (Ct. Int'l Trade May 28, 2025) (per curiam) (noting that "the worldwide tariffs remain[ed] in place at 10 percent" at the time of writing).

[12] *See* Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits, Exec. Order 14257, 90 Fed. Reg. 15041 (Apr. 7, 2025) (excepting articles encompassed by 50 U.S.C. 1702(b); steel, aluminum, automobiles, and automotive parts subject to current or future duties imposed pursuant to Section 232 of the Trade Expansion Act of 1962; other products enumerated in Annex II of the order, including copper, pharmaceuticals, semiconductors, lumber, critical minerals, energy products; and articles from a trading partner subject to the rates set forth in Column 2 of the Harmonized Tariff Schedule of the United States).

[13] International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701(a).

[14] Exec. Order 14257, *supra* note 12.

[15] 50 U.S.C. § 1702(a)(1)(B).

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

address unlawful migration to the United States and to prevent the entry of illicit drugs into the United States.[16] Similarly, the White House in March issued an executive order in which it authorized the secretary of state to determine whether imports to the United States from any third country found importing oil from Venezuela ought to be subject to a 25 percent tariff.[17] In August, President Trump proclaimed an additional 25 percent tariff on most imports from India in response to India's continued purchase of oil and gas from Russia, with Russia's invasion of Ukraine serving as the predicate emergency.[18] The Trump administration has also imposed an additional 40 percent tariff under IEEPA (on top of the 10 percent tariff applicable to all countries) on goods from Brazil due to Brazil's prosecution of its former president Jair Bolsonaro under IEEPA.[19]

IEEPA is exceptional in that it does not allocate any role to executive branch agencies or require any procedure apart from a declaration of an emergency by the president, a discretionary determination.[20] As a consequence, the president can act immediately under IEEPA.

By contrast, the special tariffs imposed during President Trump's first term were based on delegations that first require an investigation and findings by an agency. These statutes enable the executive branch to raise tariffs when an agency identifies a threat to the U.S. economy from another government's actions or a threat to U.S. national security arising from the imports of a particular product.[21] The administration has deployed these powers again in its second term, in addition to its IEEPA-premised actions. For example, the administration has relied on Section 232 of the Trade Expansion Act of 1962 to increase the duties on imports of steel and aluminum and their derivative products from all countries, as well as to impose new duties on automobiles and certain automobile parts and copper.[22] Section 232 permits the president to "adjust imports" of an article where the secretary of commerce finds that the article is being imported "in such quantities or under such circumstances as to threaten to impair the national security."[23] Additionally, in the first six

[16] *See* Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border, Exec. Order 14193, 90 Fed. Reg. 9113 (Feb. 1, 2025); Imposing Duties to Address the Situation at Our Southern Border, Exec. Order 14194, 90 Fed. Reg. 9117 (Feb. 1, 2025); Imposing Duties to Address the Synthetic Opioid Supply Chain in the People's Republic of China, Exec. Order 14195, 90 Fed. Reg. 9121 (Feb. 1, 2025). The tariffs announced in Executive Order 14193 and Executive Order 14194 were suspended until March 2025. *See* Progress on the Situation at Our Northern Border, Exec. Order 14197, 90 Fed. Reg. 9183 (Feb. 3, 2025); Progress on the Situation at Our Southern Border, Exec. Order 14198, 90 Fed. Reg. 9185 (Feb. 3, 2025).

[17] *See* Imposing Tariffs on Countries Importing Venezuelan Oil, Exec. Order 14245, 90 Fed. Reg. 13829 (Mar. 24, 2025); *see also* Jacob Katz Cogan, Contemporary Practice of the United States, 119 AJIL 573, 586 (2025).

[18] *See* Addressing Threats to the United States by the Government of the Russian Federation, Exec. Order 14329, 90 Fed. Reg. 38701 (Aug. 6, 2025).

[19] *See* Addressing Threats to the United States by the Government of Brazil, Exec. Order 14323, 90 Fed. Reg. 37739 (July 30, 2025); *see also* Initiation of Section 301 Investigation: Brazil's Acts, Policies, and Practices Related to Digital Trade and Electronic Payment Services, 90 Fed. Reg. 34069 (July 18, 2025).

[20] *See* National Emergencies Act, 50 U.S.C. § 1621 (providing the president power to declare a national emergency without defining the terms).

[21] *See* Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1117–23 (2020).

[22] *See* Adjusting Imports of Steel into the United States, Proclamation 10896, 90 Fed. Reg. 9817 (Feb. 10, 2025); Adjusting Imports of Automobiles and Automobile Parts into the United States, Proclamation 10908, 90 Fed. Reg. 14705 (Apr. 3, 2025); Adjusting Imports of Copper into the United States, Proclamation 10962, 90 Fed. Reg. 37727 (July 30, 2025).

[23] The steel, aluminum, and auto duties are based on Commerce Department investigations from President Trump's first term that the Biden administration elected not to close, thus allowing President Trump to act immediately upon resuming office. *See* Trade Expansion Act of 1962, Sec. 232, 19 U.S.C. § 1862.

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

months of the second Trump term, the administration has turned to Section 232 as the basis for ongoing investigations into imports of timber and lumber, semiconductors, pharmaceuticals, trucks, critical minerals, commercial aircraft, jet engines, polysilicon, and unmanned aircraft systems.[24]

Relying on Section 301 of the Trade Act of 1974, the Trump administration has threatened additional tariffs on products from countries imposing digital services taxes [25] and on countries engaged in unfair trade practices regarding fishing.[26] Section 301 permits the Office of the U.S. Trade Representative (USTR) to impose duties or other import restrictions where the USTR finds that an act, policy, or practice of a foreign country "is unreasonable or discriminatory and burdens or restricts [U.S.] commerce."[27] The Trump administration relied on Section 301 during his first term to impose tariffs on most imports from China, tariffs that the Biden administration continued and even increased with respect to some products.[28]

The Trump administration's use of these so-called "three-digit tariffs"—such as those premised on Sections 232 and 301—are representative of U.S. trade law's structural dichotomy that the first Trump term laid bare: on the one hand, well-established statutory authorities enable the president to eliminate trade barriers through negotiations with U.S. trading partners;[29] on the other hand, different, previously lesser-used authorities allow the president to erect trade barriers on an exceptional basis where the government deems doing so is necessary for U.S. economic security.[30] To date the courts have largely rejected the challenges brought to the president's tariff actions under Sections 232 and 301, a testament to the limited role for judicial review that the courts have seen with respect to the exceptional, security-driven authorities.[31]

The president's reliance on IEEPA in his second term has pushed this dichotomy to the breaking point. Although IEEPA has long been used as a basis for economic sanctions against

[24] *See* Addressing the Threat to National Security from Imports of Timber, Lumber, and Their Derivative Products, Exec. Order 14223, 90 Fed. Reg. 11359 (Mar. 6, 2025).

[25] *See* Defending American Companies and Innovators from Overseas Extortion and Unfair Fines and Penalties, 90 Fed. Reg. 10685 (Feb. 21, 2025).

[26] *See* Restoring American Seafood Competitiveness, Exec. Order 14276, 90 Fed. Reg. 16993 (Apr. 22, 2025); *see also* Notice of Action and Proposed Action in Section 301 Investigation of China's Targeting the Maritime, Logistics, and Shipbuilding Sectors for Dominance, 90 Fed. Reg. 17114 (Apr. 23, 2025) (instituting fees on Chinese maritime transport vessels); Colin Grabow, *New Shipping Fees and Requirements Pose Fresh Threat to US Economy*, CATO INST. (May 19, 2025), *at* https://www.cato.org/blog/new-shipping-fees-requirements-pose-fresh-threat-us-economy.

[27] *See* 19 U.S.C. § 2411(b)–(c).

[28] *See* Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47974 (Sept. 21, 2018) (increasing duties on select imports from China by 10 percent, with a future increase to 25 percent for the relevant imports) (Trump administration); Notice of Modification: China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation, 89 Fed. Reg. 76581 (Sept. 18, 2024) (increasing duties on select imports from China, including electric vehicles, battery parts, solar modules, and critical minerals) (Biden administration); *see also* Jacob Katz Cogan, Contemporary Practice of the United States, 118 AJIL 717, 727 (2024).

[29] *See* Bipartisan Trade Promotion Authority Act of 2002, Pub. L. 107-210, Div. B, 116 Stat. 933, 993 (Aug. 6, 2002) (codified at 19 U.S.C. §§ 3801–3813).

[30] *See* Claussen, *supra* note 21, at 1117–23.

[31] *See* Claussen & Meyer, *supra* note 6, at 1974–78 ("While courts are free to reject the government's litigating position on the subject of foreign commerce power, circuit courts have largely acquiesced in the executive branch's efforts to securitize, and thus constitutionalize, foreign commerce.").

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

foreign actors, it has not been a mainstay of the foreign commerce regulatory artillery. IEEPA does not expressly refer to duties and prior to 2025 no president had ever relied on it to impose duties.[32] Moreover, President Trump's use of IEEPA has highlighted the lack of limits of the kind that accompanies delegated tariff-setting authority. IEEPA requires no factfinding by administrative agencies, no opportunity to comment on proposed tariff rates, no time limits on the duration of the tariffs, no limits on the tariffs that can be imposed, and imposes no time limit on the president's ability to proclaim any changes in tariffs. Other tariff delegations include at least one, if not more, of these checks.[33] Moreover, in taking these actions, the president has relied on IEEPA to rewrite economy-wide tariff rates to which Congress consented in implementing statutes for numerous trade treaties, including the WTO Agreements and FTAs.[34]

This extraordinary claim of tariff-setting power, far beyond anything Congress has delegated elsewhere, has been the basis for more than a dozen lawsuits in U.S. courts. These cases focus primarily on the scope of the president's authority under IEEPA. At the time of writing, two trial courts have enjoined the tariffs as unlawful (or likely unlawful).[35] The U.S. Court of Appeals for the Federal Circuit heard an appeal in one of these cases *en banc*, on an expedited basis. On August 29, 2025, that court held by a vote of 7–4 that the tariffs are unlawful, although it remanded the case to the lower court to consider the proper scope of injunctive relief.[36] Shortly thereafter, the U.S. Supreme Court agreed to hear the case on an expedited basis, granting review of two questions: (1) whether IEEPA authorizes the tariffs; and (2) if it does authorize the tariffs, whether IEEPA unconstitutionally delegates legislative authority to the president in violation of the nondelegation doctrine. The Court also granted certiorari before judgment in the other case, which had been scheduled for argument at the U.S. Court of Appeals for the D.C. Circuit in September, setting both cases for argument in November.[37]

The plaintiffs in these cases have leveled three kinds of challenges to President Trump's IEEPA tariffs. First, the plaintiffs in the two cases that have been decided—small businesses and a group of U.S. states—have argued that the term "regulate" in IEEPA does not include the power to levy duties through taxes or tariffs.[38] As noted above, IEEPA does not use the words "tariffs," "taxes," or "duties."[39] The plaintiffs point out, also, that the Congress does not appear to have ever used the term "regulate" to encompass the power to tax and that interpreting it to do so would radically change the understanding of regulatory delegations

[32] *See* 50 U.S.C. §§ 1701–1710 (omitting tariffs and other duties from the authorities delegated to the president under the Act). Additionally, IEEPA is not codified under Title 19 of the Code of Federal Regulations, which houses most trade-related delegations to the president. *See, e.g.*, 19 U.S.C. §§ 2411–2420 (granting the president authority to negotiate trade agreements, providing procedures for implementing them, and empowering the executive to impose trade remedies).

[33] *See, e.g.*, 19 U.S.C. § 1862(b) (requiring a Commerce Department investigation before the president may act under Section 232).

[34] *See, e.g.*, Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501–3624).

[35] *See* V.O.S. Selections, Inc. v. United States, No. 25-00066, Op. (Ct. Int'l Trade May 28, 2025); Learning Resources Inc. v. United States, No. 25-1248, Memorandum Op. (D.D.C. May 29, 2025).

[36] V.O.S. Selections, Inc. v. United States, No. 25-1812, Op. (Fed. Cir. Aug. 29, 2025).

[37] *See* Docket, Trump v. V.O.S. Selections, Inc., No. 25-250 (Sup. Ct. Sept. 9, 2025).

[38] Brief for Plaintiffs-Appellees, at 19–20, V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. July 8, 2025).

[39] *See* 50 U.S.C. §§ 1701–1710.

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

throughout the U.S. Code. Because "regulate" in IEEPA also modifies actions such as "holding," "use," and "transfer," the government's interpretation would also allow the president to impose sales taxes, wealth taxes, and property taxes under IEEPA.[40] Moreover, taxes work through incremental changes, while in IEEPA "regulate" appears in a string of verbs—such as "prohibit," "prevent," "nullify," and "void"—that carry more absolute meaning. Under the doctrine of *noscitur a sociis*, ambiguous words in a list are typically interpreted in light of the list's other contents.[41] Finally, the plaintiffs have pointed out that the president has a wealth of other statutory authorities he can use to impose tariffs in response to a range of situations if he stays within the limits set in those statutes. The existence of those specific authorities would be superfluous if the president could use IEEPA to impose any tariffs he wants.

Second, the plaintiffs have invoked the Supreme Court's new "major questions doctrine." In a series of rulings, mostly involving emergency powers deployed in response to the COVID-19 pandemic, the Court has relied on that doctrine to strike down government action that arguably falls within the scope of a broad statute but is not specifically authorized.[42] The doctrine has two parts. First, the courts must determine whether the government action in question is of "economic and political significance," that is, whether it is a major question.[43] If it is a major question, of the kind "that Congress would likely have intended for itself," then Congress must have clearly authorized the government's action.[44] The plaintiffs have argued that the president's tariff actions easily meet these criteria.[45] Finally, the plaintiffs have also maintained that IEEPA should be read not to authorize tariffs to avoid constitutional concerns. Specifically, interpreting IEEPA to authorize tariffs would, in the plaintiffs' view, lead to an unconstitutional delegation of Congress's power to levy duties and regulate foreign commerce—a violation of the nondelegation doctrine—given the lack of any limits on the president's actions under IEEPA.[46]

Third, the plaintiffs have raised several other alleged defects with President Trump's orders imposing the tariffs. Some have argued that the emergencies the president has declared do not arise from an "unusual and extraordinary threat."[47] The United States has had a trade deficit every year since 1976, making it difficult to argue that the trade deficit is either unusual or extraordinary in any ordinary sense of those terms.[48] Plaintiffs in these lawsuits

[40] "Regulate" also applies to "exportation," but export taxes are unconstitutional, making it even less likely that Congress intended the term "regulate" to carry the power to tax. *See* Erik M. Jensen, *The Export Clause*, 6 FLA. TAX. REV. 1, 16–17 (2003).

[41] For an illustration of the *noscitur a sociis* canon of construction, see *United States v. Williams*, 553 U.S. 285, 294 (2008) (instructing that the *noscitur a sociis* canon "counsels that a word is given more precise content by the neighboring words with which it is associated").

[42] *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011 (2023).

[43] West Virginia v. EPA, 597 U.S. 697, 700 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[44] *See id.* at 730.

[45] Brief for Plaintiffs-Appellees, *supra* note 38, at 46.

[46] *Id.* at 54–55.

[47] *Id.* at 40–42.

[48] Maurice Obstfeld, *The U.S. Trade Deficit: Myths and Realities*, BROOKINGS PAPERS ECON. ACTIVITY (Mar. 26, 2025), *at* https://www.brookings.edu/articles/the-us-trade-deficit-myths-and-realities [https://perma.cc/GM4N-SX6Z].

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

also have maintained that the tariffs have no nexus to the underlying emergencies.[49] It is unclear, for instance, how tariffs on goods from Canada will reduce drug smuggling.

The Trump administration has three principal counterarguments. First, the government has argued that IEEPA's authorization to "regulate . . . importation" implicitly authorizes tariffs because tariffs have the effect of changing, or "regulating," behavior.[50] The government has also argued that the diplomatic leverage created by tariffs creates the necessary nexus with the underlying emergency by allowing it to negotiate a resolution to the underlying emergency.[51]

Second, the government notes that in 1971 President Nixon relied on the Trading with the Enemy Act (TWEA), which also authorized the president to "regulate . . . importation," to impose a 10 percent surcharge on imports.[52] In *United States v. Yoshida International, Inc.*, the predecessor court to the Federal Circuit Court of Appeals upheld that use of authority, albeit with the caveat that "[t]o uphold the specific surcharge imposed . . . is not to approve in advance any future surcharge of a different nature, or any surcharge differently applied or any surcharge not reasonably related to the emergency declared."[53] The Trump administration has maintained that the president's IEEPA-based actions ought to be upheld, citing the Nixon case as applicable precedent.[54]

The Trump administration's third response has been that courts should uphold the president's tariffs because of their relationship to foreign affairs. Under an approach to judicial review known as "foreign affairs exceptionalism," courts often suspend the normal rules of interpretation that apply in the domestic context when foreign affairs are implicated.[55] Applied here, the administration has sought to characterize the president's actions as having constitutional underpinnings that should trigger deferential review by the judiciary.[56]

The majority opinion of the Federal Circuit Court of Appeals stopped short of saying that tariffs are never authorized under IEEPA. The majority pointed out that IEEPA does not mention tariffs,[57] does not include the kinds of limitations found in statutes delegating tariff authority,[58] and had never previously been used to impose tariffs.[59] The court rejected the government's assertion of any constitutional power for the president to set tariff rates, holding that "[a]bsent a valid delegation by Congress, the President has no authority to impose taxes."[60] Likewise, the court interpreted *Yoshida*'s holding to rest "on the limits of President Nixon's Proclamation" and concluded that, in passing IEEPA, Congress had at most incorporated *Yoshida*'s limited understanding of the power conferred by the term

[49] Brief for Plaintiffs-Appellees, *supra* note 38, at 40–42.

[50] Opening Brief for Defendants-Appellants, at 32, V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. June 24, 2025).

[51] *Id.* at 4–5.

[52] *Id.* at 9–10; Proclamation 4074, 36 Fed. Reg. 15724 (Aug. 17, 1971).

[53] United States v. Yoshida Int'l, Inc., 526 F.2d 560, 583 (C.C.P.A. 1975).

[54] Brief for Defendants-Appellants, *supra* note 50, at 9–10.

[55] *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1900 (2015).

[56] Brief of Defendants-Appellants, *supra* note 50, at 59 ("Such determinations [about what constitutes an 'extraordinary and unusual threat'] are not susceptible to meaningful judicial review because of both their discretion-laden nature and the lack of judicially manageable standards.").

[57] V.O.S. Selections, Inc. v. Trump, No. 25-1812, slip op. at 26-27 (Fed. Cir. Aug. 29, 2025).

[58] *Id.* at 30.

[59] *Id.* at 35.

[60] *Id.* at 38.

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

"regulate … importation."[61] The court also relied on the major questions doctrine, concluding that Congress would have had to clearly authorize tariffs of the size and scope of the challenged tariffs and had not done so.[62]

The court's opinion was accompanied by two separate opinions. Expressing "additional views," four members of the majority would have gone further and held that IEEPA never authorizes tariffs, for the reasons discussed above.[63] The four dissenters would have held that IEEPA does authorize tariffs—accepting the government's textual argument about the scope of the term "regulate"—and that it does so without violating the nondelegation doctrine.[64] Common ground across all of the opinions was that the Court of International Trade (CIT) has exclusive jurisdiction over cases challenging the imposition of tariffs and that the case should be remanded to the CIT to reconsider whether its injunction against the government collecting the tariffs from any importer, not only the plaintiffs, is appropriate in light of a recent Supreme Court decision significantly narrowing the circumstances in which courts may grant so-called "universal injunctions."[65]

In the other case consolidated for argument before the Supreme Court, the district court granted a preliminary injunction to two small businesses, concluding that the plaintiffs were likely to succeed because IEEPA does not authorize the president to impose tariffs in light of the law's text and context, and in view of nondelegation and major questions concerns. That conclusion was also the basis for the court's decision that it had subject matter jurisdiction. The CIT has exclusive jurisdiction over cases "aris[ing] out of any law of the United States providing for … tariffs."[66] As noted above, the Federal Circuit Court of Appeals concluded that the CIT has exclusive jurisdiction over cases challenging tariffs, and other district courts had concluded that the Harmonized Tariff Schedule of the United States is itself a statute providing for tariffs, thus affording the CIT exclusive jurisdiction over challenges to IEEPA tariffs even if IEEPA itself did not authorize tariffs. The D.C. district court disagreed, though, holding that if IEEPA does not authorize tariffs at all, then the CIT would not have exclusive jurisdiction over challenges to actions taken under that statute (even if such unauthorized actions took the form of tariffs).

Even if the courts were to conclude that IEEPA does not permit the president to levy tariffs, the president need only pivot to other statutes that would allow him to do so, such as Section 122 of the Trade Act of 1974, or Section 338 of the Tariff Act of 1930, or back to Section 232 and Section 301.[67] Although those statutes have additional guardrails and limitations, and thus tend to impose greater accountability, a president could likely leverage them to achieve a similar outcome.[68] Only Congress can close off these pathways.

[61] *Id.* at 41.

[62] *Id.* at 36–38.

[63] V.O.S. Selections, Inc. v. Trump, No. 25-1812 (Fed. Cir. Aug. 29, 2025) (Cunningham, J., expressing additional views).

[64] V.O.S. Selections, Inc. v. Trump, No. 25-1812, dissenting op. at 4 (Fed. Cir. Aug. 29, 2025) (Taranto, J., dissenting).

[65] *Id.* at 3; V.O.S. Selections, Inc. v. Trump, No. 25-1812, slip op. 24, 44 (Fed. Cir. Aug. 29, 2025).

[66] 28 U.S.C. § 1581(i).

[67] *See* Claussen, *supra* note 21, at 1117–23.

[68] *See* Warren Maruyama, Lyric Galvin & William Alan Reinsch, *Making Tariffs Great Again: Does President Trump Have Legal Authority to Implement New Tariffs on U.S. Trading Partners and China?*, CTR. STRATEGIC &

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

Thus, a more all-inclusive approach to ending or limiting the Trump administration's heavy use of tariffs would require congressional action to amend the statutory scheme it set out during the Cold War to clarify the scope of the president's tariff-related authority through legislation, as some commentators have advocated.[69] Such an intervention from Congress is unlikely, though. In April, the Senate delivered a rare rebuke to the president's trade program by passing, by a vote of 51–48, a measure that would terminate the national emergency on illicit drugs with respect to Canada—a first step to reining in one set of tariffs.[70] The resolution did not make further progress, however, and no comprehensive legislation has been introduced.

While the courts have considered the president's authority under IEEPA, President Trump has demanded that countries commence negotiations with the United States in the hopes of avoiding higher tariff rates for their exporters, claiming in April that his administration would negotiate "90 deals in 90 days."[71] According to the administration, such trade-related agreements would be necessary to eliminate the national emergency concerning the U.S. trade deficit by extracting tariff and non-tariff concessions from these countries.[72] The United States and the United Kingdom announced the reciprocal implementation of certain trade-related guarantees in June.[73] Shortly thereafter, the administration said that the United States and China agreed to a de-escalation of tariffs and other retaliatory measures, after President Trump had raised tariffs as high as 145 percent on Chinese imports and China had imposed tariffs of up to 125 percent and begun restricting exports on goods like critical minerals.[74] As the administration's self-imposed deadline of August 1 approached, President Trump also announced that his administration had concluded agreements with the European Union, Indonesia, Japan, the Philippines, South Korea, and Vietnam.[75] At the

INT'L STUD. (Oct. 10, 2024), *at* https://www.csis.org/analysis/making-tariffs-great-again-does-president-trump-have-legal-authority-implement-new-tariffs [https://perma.cc/EA8C-UEWF].

[69] *See* Claussen & Meyer, *supra* note 6, at 1979–81.

[70] *See* Frank Thorp V, Scott Wong & Sahil Kapur, *Senate Passes Measure to Revoke New Canada Tariffs as Four Republicans Break with Trump*, NBC NEWS (Apr. 2, 2025), *at* https://www.nbcnews.com/politics/congress/senate-republicans-vote-rebuke-trump-tariffs-canada-rcna199336.

[71] Megan Messerly, Daniel Desrochers & Ari Hawkins, *Trump Wanted "90 Deals in 90 Days." Instead, He's Finding Wins Where He Can*, POLITICO (June 12, 2025), *at* https://www.politico.com/news/2025/06/12/trump-wanted-90-deals-in-90-days-instead-hes-finding-wins-where-he-can-00403638.

[72] U.S. Senate Committee on Finance, The President's 2025 Trade Policy Agenda 23 (Apr. 8, 2025), *at* https://www.finance.senate.gov/imo/media/doc/responses_to_questions_for_the_record_to_jamieson_greer2.pdf [https://perma.cc/J7EP-9UB9] [hereinafter 2025 Agenda Hearing] (responses of Jamieson Greer, U.S. Trade Representative, to questions for the record).

[73] *See* White House Press Release, Implementing the General Terms of the U.S.-U.K. Economic Prosperity Deal (June 17, 2025), *at* https://www.whitehouse.gov/fact-sheets/2025/06/fact-sheet-implementing-the-general-terms-of-the-u-s-uk-economic-prosperity-deal [https://perma.cc/B8D4-FQJE]. At the time of writing, no written binding international agreement had been completed.

[74] *See* Kevin Breuninger, *U.S.-China Trade Talks End Without Extension of Tariff Truce, as Trump Weighs Options*, CNBC (July 29, 2025), *at* https://www.cnbc.com/2025/07/29/trump-china-trade-tariffs-bessent.html; Arendse Huld, *Trump Raises Tariffs on China to 145% – Overview and Trade Implications*, CHINA BRIEFING (Apr. 11, 2025), *at* https://www.china-briefing.com/news/trump-raises-tariffs-on-china-to-145-overview-and-trade-implications; Lewis Jackson & Amy Lv, *China's Export Controls Are Curbing Critical Mineral Shipments to the World*, REUTERS (Apr. 21, 2025), *at* https://www.reuters.com/world/china/chinas-export-controls-are-curbing-critical-mineral-shipments-world-2025-04-20.

[75] *See* White House Press Release, President Donald J. Trump Further Modifies the Reciprocal Tariff Rates (July 31, 2025), *at* https://www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-president-donald-j-trump-further-modifies-the-reciprocal-tariff-rates [https://perma.cc/7BD7-CML2].

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

same time, President Trump announced a new round of "reciprocal" tariffs on a range of other countries.[76] The terms of the deals announced varied based on the country. As of writing, no final agreement text has been made publicly available, negotiations appear to be ongoing with respect to the details, and the nations involved have made sometimes contradictory statements about what has been agreed.[77] Consequently, the status of the "deals" announced thus far as legally binding agreements in any sense is doubtful.

The current U.S. approach to trade agreements raises significant separation of powers concerns. U.S. Trade Representative Jamieson Greer has said that the administration would not seek congressional approval and implementation of the agreements; rather, they would be "negotiate[d] and conclude[d] . . . as executive agreements."[78] Ambassador Greer justified this position by asserting that the agreements would include few if any commitments by the United States, and he "[did] not foresee that any U.S. law would need to be changed."[79] The Office of the U.S. Trade Representative has long argued that trade agreements that do not make changes to U.S. law are within the constitutional authority of the president and not Congress.[80] But the more widely accepted view,[81] as reiterated by a bipartisan Congress,[82] is that, regardless of the form of agreement and regardless of whether an agreement requires changes to U.S. law, the executive branch does not have independent power to enter into a trade-related agreement without that authorization. Moreover, these agreements do appear to involve changes to U.S. law that require congressional authorization. Specifically, they contemplate that the United States will raise duties on partner countries permanently, a change that conflicts with trade agreements implemented by statute.[83]

To be sure, Congress has delegated its trade agreement power to the executive in several statutes. Most familiar to the trade policy world is the detailed statutory scheme for FTAs known as Trade Promotion Authority (TPA).[84] Under this framework, the executive can

[76] *See id.*

[77] *See, e.g.*, Alice Hancock, *EU-US Trade Pact Causes Peak Confusion in Brussels*, FIN. TIMES (Aug. 4, 2025), *at* https://www.ft.com/content/c6389de3-3f6b-4522-8a0b-e430600a1928. Details of and joint statements regarding so-called "framework agreements" have been released by some governments, though the legal status of these agreements remains unclear as of the time of writing. *See, e.g.*, Memorandum of Understanding Between the Government of Japan and the Government of the United States of America with Respect to Strategic Investments (Sept. 4, 2025), *at* https://www.cas.go.jp/jp/seisaku/tariff_measures/houmon/pdf/250905oboegaki.pdf [https://perma.cc/495X-MN9B]; Joint Statement on a United States-European Union Framework on an Agreement on an Agreement on Reciprocal, Fair and Balanced Trade (Aug. 21, 2025), *at* https://policy.trade.ec.europa.eu/news/joint-statement-united-states-european-union-framework-agreement-reciprocal-fair-and-balanced-trade-2025-08-21_en [https://perma.cc/KT6Q-KYWP].

[78] 2025 Agenda Hearing, *supra* note 72, at 23.

[79] *Id.*

[80] *See* Claussen & Meyer, *supra* note 6, at 1956–58.

[81] *See* Written Testimony of Professor Kathleen Claussen, United States House of Representatives Committee on Ways and Means, Trade Subcommittee 3 (Mar. 25, 2025), *at* https://www.congress.gov/119/meeting/house/118047/witnesses/HHRG-119-WM04-Wstate-ClaussenK-20250325.pdf [https://perma.cc/YF7C-HT7T] ("Congress retains the final word to review, provide input on, and ultimately, to approve and implement into U.S. law the trade agreement that the executive negotiates.").

[82] *See* United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, Sec. 2(7), Pub. L. 118-13, 137 Stat. 63, 63 (codified at 19 U.S.C. § 2112 note).

[83] *See, e.g.*, 19 U.S.C. § 3521(c) (limiting duty increases to countries that are not members of the World Trade Organization and limiting the increases to the base or bound tariff rates listed in Schedule XX).

[84] *See* U.S.C. §§ 3801–3813.

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

seek expedited legislative approval of an FTA so long as the FTA covers congressionally approved objectives, among other legislative requirements. In addition to TPA, the three-digit tariff authorizations, discussed above, give the president latitude to make agreements to resolve investigations initiated under their terms. Section 301 authorizes the executive branch to enter into an agreement in the context of a Section 301 investigation to eliminate any burden or restriction on U.S. commerce that results from a trading partner's actions.[85] Section 232 likewise authorizes the president to negotiate an agreement that limits or restricts certain imports.[86] Congress asserted its trade agreement authority recently by approving the Biden administration's trade agreement with Taiwan after that agreement had been signed.[87] That post hoc legislation was exceptional, although members of Congress have introduced bills that would have a similar effect with respect to the United Kingdom, among other trading partners.[88]

Even apart from the separation of powers issues, reaching agreement with the Trump administration presents significant difficulties. First, some trading partners are reluctant to enter into these agreements because they may violate WTO rules.[89] Second, the Trump administration's decision to violate its own past agreements, including the United States-Mexico-Canada Agreement it negotiated during its first term, has severely undermined the credibility of its promises. Third, although the United States is a party to hundreds of small trade-related agreements,[90] there is no particular template for these tariff-linked agreements, so negotiators lack a model text that could expedite their work. Fourth, given the lack of a template, negotiators have both greater flexibility and greater uncertainty in the substance of their agreements. Already in the U.S.-UK negotiations, the parties have covered considerable regulatory territory beyond tariffs. They have also addressed longstanding non-tariff barriers to their trade relationship, and they have expanded their discussions to cover economic security and "commercial considerations."[91] Other agreements could include commitments to make purchases like the so-called China Phase-One Deal did in 2020, or they could seek to mix and match from other areas of foreign affairs like defense, or debt relief, or they may even include guarantees regarding specific private or private-public transactions.[92] For

[85] *See* Trade Act of 1974, Sec. 301, 19 U.S.C. § 2411 (authorizing the Trade Representative to circumvent mandatory action under subsection (a) upon finding that the foreign country has "agreed to an imminent solution to the burden or restriction on United States commerce that is satisfactory to the Trade Representative").

[86] *See* Trade Expansion Act of 1962, Sec. 232(c)(3)(A)(i), 19 U.S.C. § 1862 (noting that the president may negotiate "an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security").

[87] *See* Jacob Katz Cogan, Contemporary Practice of the United States, 117 AJIL 702, 707 (2023).

[88] *See, e.g.*, Undertaking Negotiations on Investment and Trade for Economic Dynamism (UNITED) Act, H.R. 1743, 119th Cong., 1st Sess. (2025).

[89] *See* Kathleen Claussen, *What Just Happened: The Tariff Litigation Advances*, JUST SECURITY (June 4, 2025).

[90] *See* Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315, 326 (2022).

[91] *See* White House Press Release, General Terms for the United States of America and the United Kingdom of Great Britain and Northern Ireland Economic Prosperity Deal (May 8, 2025), *at* https://www.whitehouse.gov/briefings-statements/2025/05/general-terms-for-the-united-states-of-america-and-the-united-kingdom-of-great-britain-and-northern-ireland-economic-prosperity-deal [https://perma.cc/35SW-26KT] (committing to leverage "government policies, licenses, and programs and private-sector participation to facilitate" strategic commercial integration).

[92] *See* Chad P. Bown, *U.S.-China Phase One Tracker: China's Purchases of U.S. Goods*, PIIE (July 19, 2022), *at* https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods [https://perma.cc/7M8D-9KKJ]; *see also* David LaRoss, *Could Nippon Steel-U.S. Steel "Investment" Deal Ease Trade Talks With*

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press

instance, the administration has touted its arrangement with Japan according to which Japan will invest more than $500 billion in the United States and will purchase $8 billion of U.S. goods.[93] In the end, these agreements may not resemble modern trade agreements at all. That complexity muddies the relationship between foreign affairs and foreign commerce in an already fraught legal environment.

Over the last several years, the executive branch has sought to take advantage of what some see as blurry lines between international commerce, national security, and foreign policy to defend broad actions by agencies and by the president in international trade. The government was successful in the litigation that challenged President Trump's first-term trade actions. The president has blurred the lines even further in his second term by invoking IEEPA to institute a major global economic program. The lawfulness of using IEEPA to impose tariffs remains in doubt, as challenges to several of the president's recent actions wind their way through the courts. For the moment, however, the trade posture of the United States increasingly resembles a vortex of escalating and often unpredictable tariffs, punctuated by occasional informal agreements with particular trading partners.

Julian Arato
University of Michigan

Kathleen Claussen
Georgetown University

Timothy Meyer
Duke University

International Economic Law

The Trump Administration's Trade Policy and the International Trading System
doi:10.1017/ajil.2025.10108

President Donald J. Trump entered his second term determined to dramatically reshape United States trade policy. In his inaugural address, he vowed to "immediately begin the overhaul of our trade system,"[1] and on his first day in office the administration released a memorandum directing multiple federal departments and the Office of the U.S. Trade Representative (USTR) to "investigate the causes of our country's large and persistent annual trade deficits in goods, as well as the economic and national security implications and risks resulting from such deficits, and recommend appropriate measures,

Japan?, Inside Trade (May 30, 2025), *at* https://insidetrade.com/daily-news/could-nippon-steel-us-steel-investment-deal-ease-trade-talks-japan.

[93] *See* White House Press Release, President Donald J. Trump Secures Unprecedented U.S.-Japan Strategic Trade and Investment Agreement (July 23, 2025), *at* https://www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-president-donald-j-trump-secures-unprecedented-u-s-japan-strategic-trade-and-investment-agreement [https://perma.cc/RZ85-PVAK]; *see also* Ana Swanson & River Akira Davis, *U.S. and Japan Reach Trade Deal*, N.Y. Times (July 22, 2025), *at* https://www.nytimes.com/2025/07/22/us/politics/trump-japan-trade-deal.html.

[1] White House Press Release, The Inaugural Address (Jan. 20, 2025), *at* https://www.whitehouse.gov/remarks/2025/01/the-inaugural-address [https://perma.cc/U6SW-U3NK].

https://doi.org/10.1017/ajil.2025.10107 Published online by Cambridge University Press