Domestic Judicialization: Tariffs, Courts, and the Future of International Trade *

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Abstract

U.S. federal courts are emerging as the new arbiters of international trade, displacing international tribunals. Drawing on two-level game theory, this essay argues that tariff rulings during the second Trump administration reflect a broader shift in where and how trade policy is judicialized and negotiated. As a result, foreign counterparts have quickly internalized U.S. courts as endogenous constraints in two-level bargaining: escalating retaliation threats, amplifying international complaints with domestic-law arguments, or conditioning any market-access deal on statutory provisions sticky enough to withstand domestic judicial review. Paradoxically, the stabilizing force of domestic rule-of-law—judicial checks on presidential trade power—adds a layer of uncertainty that raises the cost of international cooperation. The essay concludes by outlining a new research agenda that treats domestic courts as independent veto players shaping credibility, limiting discretion, and restructuring bargaining environments.

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1 Domestic Judicialization of International Trade

Judicialization in IR has been long premised on international adjudication, analyzed primarily at the level of international tribunals or arbitral bodies.[1] In particular, international trade as a field of strong legalization and judicialization at the international level has received sustained scholarly attention, ranging from the WTO Dispute Settlement Body to the recent the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).[2]

This premise is consequentially incomplete. In a series of legal plot twists, two federal courts in the United States have halted much of the tariff policy of the Trump Administration. They did so on substance, ruling that the President has exceeded his delegated authority under the International Emergency Economic Powers Act (IEEPA).[3] On appeal, the Court of Appeals for the Federal Circuit (CAFC) stayed the rulings on procedure, prior to a full review of the lower courts' substantive decisions. This means that the President's tariff power has remained intact pending the appellate review, strengthening the President's hands.[4]

Although the case is frozen, the strategic interaction of U.S. trading partners has continued in various fashions. Domestically, over 4,000 Section 301 tariff cases are parked on the docket of the U.S. Court of International Trade (CIT), all stayed pending lead-case appeals.[5] Moreover, domestic litigation is also increasing with international litigation. China is pressing its panel on EV-related

[1] Maggi and Staiger (2011); Davis (2012); Alter, Hafner-Burton and Helfer (2019)

[2] See Busch and Pelc (2010); Pauwelyn and Pelc (2022); Shaffer and Weibel (2016). In lieu of the now-defunct WTO Appellate Body, the MPIA provides an appellate review mechanism for the coalition of the willing. Depending on if both parties of a dispute are participants of the MPIA, the appeals process at the WTO is now bifurcated into appealing to either the vacuum of the Appellate Body (thus not final) and the MPIA (final and binding). This bifurcated system thus creates heterogeneous forum-shopping incentives and the leverage of litigation threats. See Pauwelyn (2023); Pelc (2024).

[3] These two lower court rulings, however, have slightly different scopes and rationales. While the district court held that the IEEPA does not authorize the President to impose tariffs at all, the Court of International Trade adopted a narrower view, holding only that globally unlimited tariffs exceed the authority granted by the IEEPA.

[4] Remarkably, the temporary restraining orders were issued by trial-level courts like the Court of International Trade and the District Court for the District of Columbia. In a three-tier judicial system, the juxtaposition of first-instance courts and global tariff negotiation underscores the conceptual significance of this development for IR.

[5] Slip Op. 25-65, U.S. Court of International Trade, footnote 1. More than 4,000 importers have filed copy-cat suits against the Section 301 duties on China. The Court of International Trade consolidated them and designated four lead dockets (*HMTX Industries et al. v. United States*), and stayed every tag-along action until the common issues are resolved. The panel ruled in April 2022; the government appealed, so the stay persists while the case moves through the Federal Circuit. See Slip Op. 25-65 n.1 (23 May 2025); Administrative Order 21-02; *HMTX* merits opinion, 585 F. Supp. 3d 1338 (CIT 2022).

subsidies,[6] India has revived its steel-safeguard complaint,[7] and several other U.S. allies have also lodged new complaints that explicitly cite the new U.S. court rulings as evidence that the tariffs violate domestic as well as international law.[8] Within five weeks of the CIT's April-June rulings, the EU unveiled a €95 billion contingency list of U.S. goods – wine, seafood, aircraft, vehicles, chemicals – coupled with a threat to file a fresh WTO case if negotiations collapse before the 14 July standstill expires.[9] Behind closed doors, EU officials say the court's decision "strengthens our hand" because it exposes legal fissures inside the U.S. and raises the cost of Washington ignoring WTO law.[10]

In addition to direct legal challenges, U.S. trade partners are also increasingly to invoke domestic judicial constraints on at the negotiation table: In current EU-U.S. talks on critical-minerals supply chains, European negotiators insist that any preferential tariff be written into legislation that survives "major-questions" scrutiny. The major-questions doctrine (MQD) limits U.S. agency power in "cases of vast economic or political significance".[11] Even when a statute is ambiguous, courts refuse to apply Chevron deference – the traditional rule that agencies may reasonably interpret gaps Congress leaves – unless Congress has spoken with "clear congressional authorization".[12] In effect, Chevron deference delegates power to the executive, while the major-questions doctrine carves out an exception, demanding explicit textual authority before an agency can issue sweeping regulations. As a result of this perceived shift in U.S. legal doctrine, EU officials warn that purely executive agreements could be voided at home. Furthermore, their trade negotiators now press for commitments that are judicially reviewable, such as tariff-rate quotas with mandatory sunset reviews, rather than the open-ended national security clauses U.S. officials preferred.[13] In other words, judicialization is becoming a leverage in the negotiations and designs of international trade institutions: partners demand trade deals that are litigation-proof inside the United States before they will treat them as credible abroad.

[6] "China files revised dispute consultations request with U.S. on tariff measures, WTO says", *Reuters*, 6 March 2025.
[7] "Duty imposed on steel, aluminium not safeguard measures: U.S. on India's claim in WTO, *The Economic Times*, Jun 02, 2025.
[8] "US says ready to confer with China, Canada on WTO disputes", *Reuters*, March 19, 2025.
[9] "EU sets out possible 95-billion-euro response to US tariffs," *Reuters*, May 8, 2025.
[10] "EU Sees US Trade Talks Extending Beyond Trump's July Deadline", *Bloomberg*, June 11, 2025.
[11] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)
[12] Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014); West Virginia v. EPA, 597 U.S., slip op. at 18 (2022)
[13] "EU gains leverage in trade talks as U.S. court casts doubt on tariffs, officials say." *Reuters*, May 30th 2025.

Thus, the sudden prominence of U.S. judges in the space of international trade creates a two-level credibility dilemma. On the one hand, partners who value rule-of-law constraints – such as Canada, the EU, and Japan – are reassured that tariff spikes can be checked at home; on the other, they now confront uncertainties from both the executive and the judicial branch *within* the US. At stake is a form of institutional uncertainty long highlighted by IR scholars: when multiple domestic veto players can intervene at different points in time, foreign partners discount the expected value of any concession.[14] Recent work on trade-policy volatility shows that firms and governments respond to such uncertainty by delaying investment and by shifting negotiations into venues that offer thicker legal insulation.[15] The United States now presents an illustrative case: While it is costly for firms and governments to be caught unprepared in face of sudden tariff impositions, it is similarly burdensome if decisions made by U.S. courts end up overturning a schedule of rates negotiated or renegotiated based on issues deemed no longer within the preview of the executive.

2 The Anatomy of Trade Judicialization

To take pertinent domestic law seriously, several legal and institutional dimensions are notable. Here, power is contested and concretized through domestic law. Power is not only contested but institutionalized through domestic legal processes. Together, substantive doctrinal shifts and changes in political alignment have revived foundational debates over legislative delegation, executive authority, and judicial review. These sweeping transformations – what is litigated, how it is litigated, and by whom – generate several undercurrents that merit closer examination.

Substantively, the rise of textualism and the erosion of deference doctrines have become central to the interpretive battles in the United States. The Supreme Court's recent embrace of the major questions doctrine (MQD) – invoked, for instance, to strike down the Biden Administration's student debt relief—signals growing judicial skepticism toward broad delegations of authority on issues of sweeping economic and political consequence. Whether matters implicating national security or international relations – particularly the scope and scale of tariffs – automatically trigger the MQD

[14] Martin (2000)
[15] Bown and Crowley (2013); Handley and Limão (2017)

remains an open and important question.[16] Relatedly, the weakening of Chevron deference and the revival of non-delegation concerns mean that courts are not only empowered to interpret statutory text, but to declare when the text is insufficiently clear to authorize executive action. These doctrinal developments strike at the heart of inter-branch power struggles, fragmenting any unitary conception of the state. In the recent tariff case, the Court of International Trade (CIT) sidestepped MQD and non-delegation arguments, choosing instead to apply a strict textualist reading of the International Emergency Economic Powers Act (IEEPA).

Also, the litigation reveals a broader political realignment. Once championed by conservative legal scholars to challenge Biden-era policies, the major questions doctrine has now been strategically deployed by litigants across the ideological spectrum. One amicus brief in a recent tariff case exemplifies this shift: a coalition of liberal and progressive scholars and practitioners coalesced around the position that global tariffs – given their sweeping political and economic consequences – require "unmistakable" statutory clarity to justify any transfer of authority from the legislature to the executive.[17]

To zoom out, these legal developments have been hiding in plain sight. For long-time observers of American public law, the recent trade cases echo a deeper, ongoing constitutional struggle: the shifting balance of trade powers among the branches of government. Tariffs have played a central role in the American political economy for over 250 years. They helped spark the nation's independence in response to British duties. Functionally, tariffs have served three main purposes – revenue generation, protection of domestic industries, and reciprocity in international trade – each taking precedence at different historical moments.[18] Although their importance declined with the rise of non-tariff barriers like regulatory regimes and licensing requirements, tariffs are now making a marked return. This functional resurgence has been enabled by a paradigmatic constitutional shift that has conceptualized trade away from Congress's domestic commerce power and towards the executive's authority over

[16] Some scholars argue against invoking the major questions and nondelegation doctrines to constrain delegations related to international agreements. See, e.g., Eichensehr and Hathaway (2023)

[17] The amicus brief can be found at: https://storage.courtlistener.com/recap/gov.uscourts.cit.17080/gov.uscourts.cit.17080.29.1.pdf

[18] Taussig (1923); Irwin (2019)

foreign relations.[19] That conceptual and legal foundation is again in flux, as recent litigation –joined by twelve states and an amicus brief – invokes Congress's Article I power to "lay and collect Taxes, Duties, Imposts and Excises".[20]

3 Studying Trade Judicialization

What lessons can IR draw from the judicialization of trade politics? To be clear, we are not arguing that all technical details of legal developments are of import to IR scholars.[21] Moreover, the salience of individual and collective legal developments can be difficult to assess. However, this should not dissuade us from engaging with them. After all, as mentioned, strategic trade interaction already interfaces and internalizes them.

Instead, this essay invites IR scholars to upgrade the standard "two-level game" model by hard-wiring domestic courts into both the preference-formation and enforcement stages of trade negotiations. For long, scholars of institutional designs of trade policy have modeled domestic courts largely as a commitment device or the enforcement arm of treaties, rather than discretionary actors:[22] executives could pledge compliance abroad by pointing to the judiciary's ability to impose legal cost on future violations of their trade commitments. Studies examining the domestic constraints of international institutions often focus on legislative and partisan veto players in democratic settings,[23] omitting courts under the implicit assumption that, unlike their international counterparts, legal compliance with domestic courts is near-automatic.

Recent jurisprudence, however, has upended that logic by turning courts into active veto players whose expedited injunctions and doctrinal shifts do not merely certify agreement credibility but instead dictate the substantive design and timing of trade negotiation itself, compelling negotiators to

[19] Claussen (2018); Meyer and Sitaraman (2019)

[20] The amicus brief can be found at: https://storage.courtlistener.com/recap/gov.uscourts.cit.17080/gov.uscourts.cit.17080.29.1.pdf

[21] For instance, while textualism has as an interpretative and political movement, it is perhaps less consequential for IR scholars that the Supreme Court recently opined on the appropriate selection of legal versus lay dictionaries to ascertain the plain meaning of a text. See Medical Marijuana, Inc. v. Horn, slip opinion (2025).

[22] Simmons (2000)

[23] Mansfield and Milner (2012)

tailor tariffs, sunset clauses, and security exceptions to judicial preferences in real time. Executives now draft trade deals in the shadow ex post judicial review, which means any empirically grounded analysis of trade conflict must treat judges – not just Congress, lobbies, and voters[24] – as autonomous veto players with their own strategic logic. Current dynamics of separation of powers demonstrate that credibility hinges less on the mere presence of checks and balances than on the location of those checks – judicial versus executive – and whether their decisions appear certain and stable for outside observers. From a policy perspective, embedding this insight alters the calculus of institutional design for future trade instruments. Negotiators who recognize the new judicial constraint may prefer to front-load precision and sunset mechanisms into agreements, insist on explicit statutory bases, and build off-ramps that can accommodate an adverse court ruling without triggering uncontrolled retaliation.[25]

Skeptics may counter that U.S. trade judges, cognizant of potential political backlash, will preemptively refrain from asserting themselves as consequential veto players over trade policies. While existing literature on judicial behaviors, particularly at the international level, does predict a certain level of self-restraint,[26] it does not imply policy inertness.[27] Judges choose how, not whether, to intervene: they may narrow precedents, rely on procedural throttles, or issue preliminary stays that still freeze billions in duties and shift bargaining leverage abroad. Empirically, rather than abstract away from judicial activism, researchers are now in need of demographic information and partisan affiliations at the individual judge-level, as well as temporally granular data such as vote patterns, opinion length, citation to "major-questions" precedents, grant-rate of temporary restraining orders (TROs). to observe when and how individual CIT or CAFC judges balance legal principle against risk of backlashes. Building such datasets will allow us to model judicial capacity as a variable, not a constant, and to test whether legitimacy concerns merely modulate trade-court influence or fundamentally cap it.

In addition, future research in IR can profitably push the judicialization agenda in three directions. First, in addition to collecting empirical data on domestic U.S. judges, scholars should also examine

[24] Tsebelis (1995); Kim (2017); De Vries, Hobolt and Walter (2021)
[25] Putnam (1988); Tsebelis (2002); Mansfield, Milner and Pevehouse (2008); Pelc (2016)
[26] Clark (2009); Madsen et al. (2022)
[27] Epstein and Knight (1997)

whether countries' commitments on trade are justiciable both at home and in an international forum. Current quantitative work usually codes only one legal layer – either domestic ratification hurdles[28] or membership in the WTO dispute system[29] – yet the credibility of a concession depends on the aggregate constraint created by their interaction. Such data would allow us to test whether agreements protected by overlapping courts deliver lower tariff volatility or attract more foreign direct investment than those safeguarded by just one jurisdiction.

Second, the emerging role of U.S. domestic courts as a forum of trade judicialization means that foreign firms can now channel their preference and interest directly through litigation. In addition to their well-documented efforts to influence politicians [30] and international bureaucrats,[31] scholars could explore whether foreign firms are similarly motivated to engage in U.S. domestic litigation to challenge tariffs or trade barriers. These firms, especially those in industries most affected by tariff policy, could use U.S. courts as a venue to not only engage in legal action to protect their interests but also strategically mobilize legal forums as tools for advancing broader political and economic agendas.[32] Investigating the role of these foreign firms as litigants would shed light on how international actors can influence domestic trade law beyond traditional diplomatic or legislative channels.

Third, the active role in trade policy assumed by the U.S. courts invite researchers to examine how political attacks on one court may spill over to others. The fate of the WTO Appellate Body – still paralyzed since 2020 – shows that concentrated economic losers can immobilize an international tribunal.[33] Whether the same coalitions then target domestic trade judges, or whether cross-cutting constituencies mobilize to defend them, remains an open question. Examining advocacy groups with their judiciary engagement could reveal when overlapping jurisdictions dilute backlash by dispersing blame and when they magnify it by producing rule-based shifts in trade politics. Taken together, these avenues promise a richer, temporally sensitive account of how domestic courts reshape international trade.

[28] Sweet and Brunell (2012)
[29] Davis and Wilf (2017)
[30] Kim (2017); Thrall (2024)
[31] Brutger (2024)
[32] Li (2024)
[33] Walter (2021)

4 Conclusion

The central claim of this essay is that the United States has entered a phase in which the federal judiciary—not just presidents or congressional committees—define the outer fence of trade coercion. Recent court decisions on tariffs signal an ideological and interpretive swing toward statutory formalism: executive actions that once rode on elastic emergency powers must now survive textualist audits in trial and appellate courts. International partners have already internalized that shift. The European Union leverages domestic litigation to exact statute-bound concessions; countries such as China and India funnel their grievances through the WTO, betting that a converging line of domestic and international jurisprudence will limit the space for U.S. legal maneuver; others use both tracks, hedging their bets while the appellate process unfolds.

Looking ahead, the shift in U.S. legal doctrine on trade policy, coupled with the increasing involvement of domestic courts in tariff rulings, suggests a bifurcation in how foreign governments and firms approach trade agreements, balancing between executive authority and judicial constraints. Countries will likely internalize U.S. judicial review in their bargaining strategies, demanding statutory-based deals that can withstand domestic legal challenges. This could encourage more precise, legally enforceable commitments and create a more fragmented global trade environment, as countries hedge their bets by diversifying legal forums. Whether this new, layered, form of judicialization ultimately restrains or redirects American protectionism remains an open question. What is clear, however, is that any explanatory or predictive narratives of international trade in the coming decade must shed the unitary-actor assumption and treat U.S. trade policy as a three-player game of President, Congress, and Courts.

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