International Trade Law

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International Trade Law

PROBLEMS, CASES, AND MATERIALS

Fourth Edition

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To my wife Ching and our son Alan.

—DC

To three inspirational teachers and scholars of this subject: John H. Jackson, Eric Stein, and Mitsuo Matsushita.

—TJS

To my parents and family that always encouraged me, and to all who seek to understand and explain the foundations and interrelationships that result from trade among nations.

—GD

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Preface to the Fourth Edition

Few legal topics are as volatile as the law of international trade. The Third Edition of this book, published during the Obama Administration, alluded to the fact that the United States and eleven Pacific Rim nations representing over 45 percent of global GDP had completed negotiation of the Trans-Pacific Partnership Agreement, and the European Union and the United States were negotiating an even more comprehensive trade deal. Of course, both these matters as well as many other international trade expectations fell by the wayside of economic and political events.

From the American perspective, International Trade Law is drawn from two different legal orders, on the one hand, the domestic laws and jurisprudence of the United States and, on the other hand, public international law, stemming from treaties and decisions of international tribunals. Over many years, the balance between these two legal orders shifts with the prevailing winds of economics and politics. In the period between the successful conclusion of the Uruguay Round of Trade of multilateral trade agreements and the Global Financial Crisis of 2007-2010, the international law of trade was paramount; domestic trade laws played only secondary roles.

As of 2022, however, this balance has clearly shifted so that U.S. domestic laws of international trade have taken center stage. The United States is wary of entering into new trade agreements, has changed its traditional support of the World Trade Organization (WTO) and the global, multilateral trading system, and has adopted a much more confrontational stance with respect to even its traditional trading partners. Domestic law trade remedies now are paramount, including national security tariffs, section 301 retaliation for unfair trade practices, antidumping and countervailing duties remedies, safeguard, and export controls and trade sanctions placed upon other nations.

This Fourth Edition of *International Trade Law: Cases, Problems and Materials*, fully takes account of these new developments in the law of international trade. We include extensive analysis of all domestic U.S. trade remedies, albeit against the background of the public international law rules of the multilateral trading system. Our goal is to provide a tool for teaching U.S. trade remedies against a full background of WTO law. Through judicious editing, our expanded coverage of U.S. domestic law remains within the context of a compact law casebook that can be profitably adopted and used to teach a one-semester law school course on International Trade.

Although polls show a majority of Americans support free and open international trade, protectionist policies have come to the fore in political discussions and sometimes in decisions taken by U.S. leaders. The Fourth Edition has been thoroughly revised to provide materials to understand the debate over "free trade," "fair trade," "globalization," and "protectionism." In Chapter 1 we present all sides of this debate, including materials that we think will enable students to decide for themselves the merits or demerits of the arguments presented.

When the previous edition of this book was published, China was America's largest international trading partner. During the past five years China for most Americans has now become an "enemy" nation with which the United States is famously locked into a "trade war." This Fourth Edition fully covers this change in perspective and the new confrontational nature of our relationship with China.

This Fourth Edition also covers the changed nature of the World Trade Organization, which is experiencing a crisis more profound than ever in its history. With the failure of the Doha Development Agenda, the WTO is no longer trusted as a forum for multilateral trade negotiations. Most nations, including the United States, now look to regional and bilateral trade negotiations rather than turning to the WTO. Dissatisfaction has also grown concerning the dispute resolution function of the WTO. For the past two years the WTO Appellate Body has not been able to function because of a U.S. boycott of membership appointments. The most important consequence of the U.S. boycott is that all WTO obligations have become, in effect, unenforceable. Ironically, however, the WTO dispute settlement mechanism is more popular than ever as measured by the number of pending trade disputes. This Fourth Edition covers the debate over the Appellate Body and the increasing criticism of U.S. policies on this issue.

For this new Fourth Edition we welcome a new coauthor, Gregory C. Dorris, a prominent trade law practitioner who has over 35 years' experience dealing with all-important issues of international trade law on behalf of a great variety of clients. Greg was the partner-in-charge of the international trade law practice for a major national and international law firm. He has vast experience in areas of trade policy, trade litigation, regulatory work, customs law, and export controls and economic sanctions.

Although this Fourth Edition has been thoroughly revised, we have kept what we believe are the strengths of this popular Casebook, which was first published in 2006. In this volume we present the law of international trade, which we differentiate from the complementary subject of International Business Transactions, which is the private law governing export/import transactions, international licensing and distribution agreements, international investment, and private international business litigation and arbitration. We have published a complementary Casebook on IBT: Chow and Schoenbaum, *International Business Transactions: Cases, Problems and Materials* (Aspen, 4th ed., 2020).

We believe that a "problem" oriented approach to teaching the law of international trade has merit. Accordingly, we include a variety of short problems that the instructor may find useful in assigning to students as classroom exercises. Of course, we realize that each instructor may wish to include his/her own problems or classroom exercises as well.

This Fourth Edition also covers comprehensively and thoroughly all the traditional topics of international trade, ranging from the "core obligations" of the

General Agreement on Tariffs and Trade (GATT) to "linkage" issues, such as trade and environment, trade and labor, and trade and human rights.

We are always glad to hear from colleagues who give us excellent suggestion about how they use this book.

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INTERNATIONAL TRADE LAW

Chapter 1

Political Economy and International Institutions

This chapter addresses several introductory topics:

(1) What is international trade law?
(2) How important is international trade to the world economy and to the United States?
(3) What is the multilateral trading system, and what are the roles of world economic institutions?
(4) How are trade agreements negotiated?
(5) Does free and open international trade benefit ordinary people and their countries?
(6) Are there special problems associated with U.S.-China trade?
(7) What is the role of bilateral and regional trade agreements, like the 2020 United States-Mexico-Canada Trade Agreement?

A. *WHAT IS THE LAW OF INTERNATIONAL TRADE?*

We come to the study of International Trade Law at a crucial time in its history. The World Trade Organization—and its predecessor, which established the legal framework for international trade for the past seven decades—is gripped in a crisis precipitated by the United States. Due to the actions of the Obama and Trump Administrations, the WTO has been crippled and is no longer able to fully function, a topic that we explore in further detail in Chapter 3. These developments could mean that the WTO will meet its demise or continue to exist but in a permanently diminished state. These events also suggest that U.S. domestic trade law, mostly federal statutes, may reach a new ascendancy in the law of international trade both for U.S. actors and other countries. For these reasons, our study assumes a new importance at this pivotal movement for international trade in world history.

Our first task, though, is to define the scope of our subject. As is the case with a related term, International Economic Law,[1] it is hard to find even two definitions of the subject that match. For purposes of analysis, it is helpful to consider how international business lawyers are called upon to serve their clients. For such lawyers, international trade law commonly involves a business matter involving one or more of four principal channels of international commercial activity: (1) the export or import of goods or products; (2) cross-border sales and delivery of services; (3) international technology transfer; and (4) inbound or outbound capital investments.

The first category involves the international sale of something tangible, such as bananas or medical devices; the second involves the international delivery of services, such as architectural plans or legal services; the third refers to a cross-border sale, assignment or licensing of intellectual property, such as a patent, trademark, or copyright; and the fourth, termed foreign direct investment (FDI), involves the establishment of a business entity either in the U.S. or in a foreign country through the investment of capital or sometimes through a merger or acquisition.

The complexities of these matters are such that the lawyer must be prepared to address three distinct levels of legal analysis.

First, the lawyer may be called upon to advise on *transactional matters* between her client and other parties. Such transactional matters at issue may include, for example, contract drafting or interpretation, arbitration, litigation, or arranging financing. This level of analysis concerns *private law* and is studied in most law schools in a course on International Business Transactions (known as IBT). The matter involved may arise under U.S. state or federal law, foreign law, or under an international agreement accepted as state or federal law.

Second, the lawyer may be called upon to advise her client on *public international law* matters, topics covered by *treaty*—an agreement between the United States and another nation or nations. For example, the client may have a question related to the most-favored nation rule or the national treatment rule of the multilateral trading system supervised by the World Trade Organization (WTO) in Geneva. The client may raise an issue covered under a bilateral or regional trade agreement to which the United States is a party, such as the 2020 United States-Mexico-Canada Trade Agreement. This level of analysis involves what is called treaty law, a part of Public International Law, which is the law in force between nation-states.

Third, the lawyer may wish to advise her client about a *public* law issue—a domestic trade law or regulation of the United States or a foreign country. The United States has myriad laws and regulations affecting—promoting or restricting—the movement of goods, services, technology, and investment across borders. This level of analysis is U.S. domestic law, federal law stemming from an act of Congress and/or an ancillary regulation. National laws from other States may be relevant, and, in such a case, it may be necessary to employ foreign counsel.

The international business lawyer (and her team) must be well-versed, experienced and prepared to handle legal problems that may arise with respect to each of these three levels of the law.

In this book, however, we take an important pedagogical decision in order to manage the complexity of our subject. We cover as *International Trade Law* only the

1. Steve Charnovitz, *What Is International Economic Law?*, 14 J. Int'l Econ. L. 3 (2011).

second and third levels of our topic as described above. In other words, this book covers as International Trade Law (1) the public international law of trade; and (2) the U.S. domestic law of trade. We rely on a separate course, International Business Transactions, to cover the important transactional matters involved in cross border commercial dealings. To this end we have authored a companion book, Chow and Schoenbaum, *International Business Transactions: Problems, Cases and Materials* (Aspen, 4th ed. 2020).

We stress the novel nature of our subject matter. Unlike other subjects of study, the Law of International Trade involves two quite distinct "universes" of law. On the one hand, we study laws passed by the Congress, U.S. (federal) domestic law. In this connection we read selective cases handed down by U.S. courts. On the other hand, we study the international trade laws concluded by treaty—agreements between the United States and other States and international organizations—part of the *corpus* of Public International Law. In this connection we read decisions handed down by international tribunals.

Of course, these two bodies of law are interrelated and are supposed to be consistent with one another. When the United States (or any nation-state) voluntarily agrees to a treaty, domestic laws are supposed to conform to the treaty obligations. We shall see, however, that this is easier said than done.

NOTES AND QUESTIONS

1. International Trade Law refers to domestic *regulatory* laws and rules that concern or affect international transactions touching upon sales of goods and services, technology, investment, and money flows between countries. In the United States such laws/rules are primarily enacted by the Congress, but sometimes delegated to the President and agencies of the Executive Branch of government, such as the Department of Commerce. Federal courts have jurisdiction in many cases to review government actions concerning such laws, especially the U.S. Court of International Trade that sits in New York City and the Federal Circuit Court of Appeals, which sits in Washington, D.C. Although international trade law is primarily federal law, U.S. states may exercise power over trade subject to limits imposed by the U.S. Constitution.

2. International Trade Law concerns the law of treaties. The term "treaty" in international law refers broadly to virtually any type of agreement between States—whether termed convention, charter, protocol, agreement, or understanding—or between a State and an international organization, or between international organizations. The public international law rules governing treaty interpretation and other aspects of treaties between States are found in the Vienna Convention on the Law of Treaties (VCLT), May 23, 1969, 1155 U.N.T.S. 331. Currently 116 States, but not the United States, are parties to the VCLT. The United States, however, accepts the key provisions of the VCLT as customary international law.[2]

3. Treaty law is an important source of the international law of trade. A less important source is customary international law, which generally consists of two

2. U.S. Department of State, Vienna Convention on the Law of Treaties, https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm.

elements: state practice (broadly defined) and *opinio juris sive necessitatis*, an expression of an intention to be bound. Secondary sources of international law include general principles of law, decisions of international tribunals, and writings of scholars. Although not precedential, decisions of international tribunals are quite important in the law of international trade.

4. *Treaties and the U.S. Constitution.* The Supremacy Clause of the U.S. Constitution recites that treaties accepted by the United States, along with federal statutes, are "the Supreme Law of the Land." U.S. Const., art. VI. The Supreme Court has ruled that "international law is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Treaties and customary international law are usually deemed equivalent to federal statutory law and are supreme over state law. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 326 (1796). Since international law and federal statutory law are on the same level, in the event of a conflict, the *last in time* prevails. However, the Supreme Court has ruled that the courts should construe both to avoid conflicts. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

5. In *Foster v. Nelson*, 27 U.S. 253 (1829), Chief Justice John Marshall ruled that a distinction exists between treaties that are "self-executing," and thus, once having received the advice and consent of the Senate, are directly applicable in the domestic legal order, on the one hand; and treaties that are "non-self-executing" and not immediately effective as domestic law, on the other hand. The latter type of treaty enters domestic law only when implemented by enactment of an appropriate statute by the U.S. Congress or by the states.

As to non-self-executing treaties, the implementing domestic statutory law, *not the treaty itself*, becomes an integral part of U.S. domestic law. The treaties of the multilateral trading system and the U.S. free trade agreements we consider in this book are all *non-self-executing* treaties. Furthermore, by longstanding political custom in the United States, international trade agreements are not submitted to the U.S. Senate for advice and consent as provided in the Treaty Clause of the U.S. Constitution.[3] Instead, trade treaties are commonly concluded as executive agreements of the President, who then submits implementing legislation, which, to become law, must pass both houses of Congress by majority vote. International trade treaties, therefore, are technically known as "Congressional Executive Agreements" in U.S. political parlance.

PROBLEM 1-1

A French company believes that a new sales tax on foreign products enacted by the State of Ohio is a blatant violation of the "national treatment" obligation contained in Article III of the General Agreement on Tariffs and Trade, one of the basic WTO agreements. The United States and France are parties to the GATT/WTO. The CEO of the French company asks you to file a lawsuit in federal court to invalidate the law upon which the tax is based. She assumes this to be an easy case. Is she correct?

3. U.S. Const., art. II, § 2, cl. 2.

PROBLEM 1-2

You now understand that international trade law exists on two levels, *domestic law and international law*. An important principle of international trade law (and international law generally) is that, when a State agrees to a treaty it assumes an international obligation; thus, domestic laws of States are supposed to conform to international obligations voluntarily assumed by States.

Suppose an international tribunal rules in a complaint filed by the United Kingdom that the methodology of the U.S. Department of Commerce concerning "dumping" of products (*i.e.*, selling at artificially low prices) in international trade is inconsistent with international treaty law rules. Does the United States have an obligation, either legally or politically, to change its methodology to conform to treaty law obligations?

Suppose an international tribunal rules in a complaint brought by the United States that the United Kingdom's domestic laws on subsidies are inconsistent with international treaty obligations assumed by the United Kingdom. Does the United Kingdom have an obligation to change its laws?

B. INTERNATIONAL TRADE AND INVESTMENT FLOWS

There are four main channels or categories of trade in the world economy—trade in goods; trade in services; investment trade; and technology trade. The rapid and sustained growth of all four of these channels of international trade is a hallmark of the post–World War II era. In this age of the internet, a fifth channel is digital trade, which is growing apace.

In the years since the end of World War II, both international trade and global GDP have burgeoned. In 1968, international trade in goods was about 22 percent of global GDP; in 2015, international trade in goods amounts to about 59 percent of global GDP, which stood at about $77 trillion.[4]

To put international trade into perspective, we note that in 2021, the United States enjoys the world's largest economy—US GDP is now over $20 trillion.[5] Yet the great percentage of U.S. economic activity is solely domestic in nature. Exports represent just over 12 percent of US GDP.[6] By contrast, many countries depend upon exports for over 50 percent of GDP.[7] And most countries are more dependent on exports and international trade than the United States. Germany: 47 percent;

4. Charles Fenton et al., TT Club & McKinsey & Co., *Brave New World? Container Transport in 2043*, at 17, 20 (2018).

5. The World Bank, GDP (Current US$), available at https://data.worldbank.org.

6. The World Bank, Exports of Goods and Services (% of GDP), available at https://data.worldbank.org.

7. *Id.*

Mexico: 39 percent; United Kingdom: 32 percent; Russia: 28 percent; China and Japan: 19 percent.[8] Although exports are only 12 percent of U.S. GDP, the United States every year ranks either first or second globally in the volume and value of exports. The U.S. is the leading trading nation in the world; in 2019, total exports and imports of goods and services totaled $5.6 trillion.[9]

Imports into the U.S. are also relatively small compared to other nations. Imported products constitute approximately 15 percent of US GDP.[10] Thus, the United States, which is relatively open to international trade, still looks to domestic sources for most economic activity.

1. Trade in Goods

International trade most commonly refers to the oldest form of cross-border trade, which is trade in merchandise or goods. International trade in goods is still the most important, but other forms of trade are catching up. International trade in goods has burgeoned: in 1965, total world merchandise trade was $189.6 billion; in 1980, $2.05 trillion; in 2000, $6.45 trillion; in 2018, $19.5 trillion, a major part of the global economy.[11] Since 2008, world merchandise trade and world GDP have risen in tandem, both rising 26 percent.[12] This growth has averaged about 2.3 percent per year.[13] In 2019, however, world merchandise trade was almost flat, reflecting global tensions over trade.[14] In 2020, global merchandise trade fell 5.3 percent because of the COVID-19 pandemic.[15] In 2021, trade in goods is expected to rebound, increasing about 8 percent.[16]

Trade in goods involves what is termed an export/import transaction. For example, if a U.S. buyer purchases IT (information technology) equipment in France, the sale is an export from France, the country of the seller, and an import into the United States, the country of the buyer. In France, this transaction might trigger the application of export controls or even an export tax. In the United States this transaction might trigger some form of import control, most commonly a tariff, which is a form of tax.

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8. *Id.*

9. U.S. Census Bureau, Monthly U.S. U.S. International Trade in Goods and Services, April 2021, at ex. 1, available at https://www.census.gov.

10. The World Bank, Imports of Goods and Services (% of GDP), available at https://data.worldbank.org.

11. World Trade Organization, World Trade Statistical Review 2019, at 143 (2019).

12. *Id.* at 10.

13. *Id.*

14. World Trade Organization, Press Release, WTO Lowers Trade Forecast as Tensions Unsettle Global Economy (Oct. 1, 2019), https://www.wto.org/english/news_e/pres19_e/pr840_e.htm.

15. World Trade Organization, Press Release, World Trade Primed for Strong but Uneven Recovery After COVID-19 Pandemic Shock (Mar. 31, 2021), https://www.wto.org/english/news_e/pres21_e/pr876_e.htm.

16. *Id.*

2. *Trade in Services*

International trade in commercial services world-wide totaled $5.9 trillion in 2019.[17] The United States leads the world in services exports; in 2019, U.S. service exports totaled $876 billion, more than twice that of any other country.[18] The next leading service exporting nations are United Kingdom, Germany, France, and China. Because of the COVID-19 pandemic, trade in services slumped in 2020 by 15.41 percent.[19] Global trade in services is forecast to rise to total $8.0 trillion by 2025.[20]

Services can involve a wide variety of matters, from travel to insurance and telecommunications. Since over 8 out of 10 people employed in the United States sell services for a living, trade in services is extremely important. The WTO General Agreement on Trade in Services, known as the GATS, which is the most important global trade agreement on services, recognizes four modes of international delivery of services.

First, services may be delivered to a buyer in a foreign country by a seller in another country even though both the provider and the recipient of services remain in its own country. For example, a lawyer may provide an opinion letter to a law firm in France. Second, services may be provided to a recipient who travels to the country of the service provider. For example, a woman from France may come to New York to see the sights. Third, a service provider from the United States may go to a foreign country to deliver her services. For example, an American architect may go to France to supervise a building project. Fourth, a service provider may establish a commercial presence in a foreign country in order to deliver services. For example, an American bank may establish a branch or subsidiary in France. In Chapter 11, we study the GATS in detail.

3. *Foreign Investment*

Foreign investment flows are categorized as commercial loans; official capital investment flows; portfolio (passive) investment; and foreign direct investment (FDI), usually through a capital infusion. The latter, FDI, is most closely associated with international trade. FDI encompasses new "greenfield" corporate projects, cross-border mergers and acquisitions, and international project financing. Total

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17. WTO, World Trade Statistical Review 2020, at 10 (2020).

18. United Nations Conference on Trade and Development, UNCTAD Handbook of Statistics 2020, at 35 (2020).

19. COVID-19 Drives Large International Trade Declines in 2020, UNCTAD (Dec. 9, 2020), https://unctad.org/news/covid-19-drives-large-international-trade-declines-2020.

20. Global Trade in Services to Increase by $2trn Over Next Five Years, According to New Report by Western Union and Oxford Economics, Business Wire (Aug. 11, 2020), https://www.businesswire.com/news/home/20200811005332/en/Global-Trade-in-Services-to-Increase-by-2trn-Over-Next-Five-Years-According-to-New-Report-by-Western-Union-and-Oxford-Economics.

world FDI totaled $1.54 trillion in 2019, an increase from $1.41 trillion in 2018.[21] The largest recipient of FDI in 2019 was the United States, where inbound FDI totaled $331.2 billion in 2019, increasing total FDI in the U.S. to $4.46 trillion.[22] With the COVID-19 pandemic, global FDI collapsed in 2020, falling to $859 billion. FDI growth is expected to resume in 2022 and beyond.[23]

FDI is usually the culmination of a process that started with using other channels of trade. For example, an exporter of goods may decide to establish a subsidiary manufacturing company in Europe to expand its sales. Or a U.S. company that is licensing its technology to a Chinese company may decide to form a joint venture with a Chinese partner company and to set up manufacturing in China.

4. Technology Trade

Trade in technology—sometimes called technology transfer—involves licensing or assigning technology protected by intellectual property rights. By "technology," we refer to intangible knowledge, usually protected by intellectual property laws, not a tangible object such as a computer. For example, a U.S. patent owner may decide to grant a license to a German company allowing that company to use the patented technology in return for an agreed royalty payment. Since intellectual property rights are territorial in nature, the U.S. patent holder will have (hopefully) registered its patent in Germany and in the European Union beforehand.

International export of technology and the use of intellectual property rights have dramatically increased. In 1960, international payments for the use of intellectual property rights totaled $6.6 billion.[24] In 2019, such payments amounted to $441.6 billion.[25]

The rise of China has increased the transfer of technology to that country. China's international transfers related to the use of intellectual property rights totaled about $1.4 billion in 1999; in 2018, China paid $27.2 billion total for the use of intellectual property rights, and $8.3 billion was paid to firms in the United States.[26] International payments for the use of technology decreased by about 7 percent in 2020, due to the COVID-19 pandemic, but they are predicted to resume their rise by 2022.

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21. Global Investment Flows Flat in 2019, Moderate Increase Expected in 2020, UNCTAD (Jan. 20, 2020), https://unctad.org/news/global-investment-flows-flat-2019-moderate-increase-expected-2020.

22. Direct Investment by Country and Industry, 2019, Bureau of Economic Analysis (July 23, 2020), https://www.bea.gov/news/2020/direct-investment-country-and-industry-2019.

23. UNCTAD, World Investment Report 2021, at xi (2021).

24. The World Bank, Charges for the Use of Intellectual Property, Payments (BoP, Current US$), available at https://data.worldbank.org.

25. *Id.*

26. Ana Maria Santacreu & Makenzie Peake, *A Closer Look at China's Supposed Misappropriation of U.S. Intellectual Property*, 2019(5) Econ. Synopses 1 (2019), https://doi.org/10.20955/es.2019.5.

International agreements such as the World Trade Organization Agreement on Trade Related Intellectual Property Rights (TRIPS) underlie technology trade; TRIPS establishes global minimum standards for intellectual property right protection.

5. Digital Trade

Digital trade encompasses various digitally enabled transactions of trade between consumers, businesses, and governments in goods, services, and technology that is delivered both digitally through electronic commerce and physically through cross order transactions. Underpinning digital trade is the production, sale, and movement of data, which is an asset that may be traded as well as employed as a means of transfer of products and services. Digitalization increases the scale, scope, and speed of trade. Digitalization also facilitates transfers of payments. Information and communication technologies form the backbone of digital trade. The growth of digital trade poses new issues, such as differing regulations between nations with relation to data flows. The principal trade issues are as follows:

- High tariffs; or low de minimis threshold;
- Discrimination against digital products/services;
- Localization requirements and cross-border data flow limits;
- Mandated use of local technology, content, or suppliers;
- Filtering and blocking;
- Infringements of intellectual property rights;
- Cybertheft;
- Requirements of source code disclosure, transfer of technology or proprietary cryptography information;
- Cross-border electronic card payment limitations.

As yet there is no WTO or global agreement on digital trade. Some 80 WTO members, including the United States, are negotiating a WTO E-Commerce plurilateral agreement. Important provisions on digital trade were agreed in the 2020 U.S.-Mexico-Canada Agreement and in the 2019 U.S.-Japan Digital Trade Agreement.

C. GLOBAL MULTILATERAL ECONOMIC INSTITUTIONS

The principal international institution we will study in this book is the World Trade Organization (WTO). To gain a more complete understanding of the multilateral, global trading system, however, we briefly study in this section two sister organizations to the WTO as well—the World Bank and the International Monetary Fund.

The first step toward creation of the modern multilateral trading system occurred in 1944, toward the end of World War II, when nations led by the United States convened a diplomatic conference in Bretton Woods, New Hampshire for the purpose of setting up a new international economic order in the post-war period.

Participants were keenly aware that economic rivalries and high tariffs had contributed to the enmity that caused the war. In 1930, the United States, in a futile attempt to fend off economic difficulties, enacted the Smoot Hawley Tariff Act, raising tariffs on Imports to an average of 53 percent.[27] Other countries retaliated, imposing their own high tariffs on imports. Key nations engaged in rounds of competing "beggar thy neighbor" currency devaluations. During the war international trade virtually ceased. With the end of the war, political leaders founded international institutions they hoped would provide a framework for post-war economic growth and prosperity.

The Bretton Woods conference produced two new institutions that began functioning in 1945, the World Bank and the International Monetary Fund (IMF), both located, even today, in Washington, D.C. These two institutions were conceived to have complementary missions. The World Bank would make funds available for economic development and poverty reduction; the IMF would establish monetary cooperation among nations in order safeguard the stability and convertibility of national currencies. At Bretton Woods, the idea of founding an institution to oversee the development of international trade was floated but was put off for later consideration.

After the founding of the United Nations in 1945, the problem of how to restart international trade was discussed in the UN Economic and Social Council, which in 1946 adopted a resolution in favor of establishing an International Trade Organization (ITO). Further negotiations in Geneva in 1947 produced three concrete actions. Negotiators agreed (1) to table national schedules of tariff reductions; (2) to prepare a multilateral treaty to serve as a framework for international trade; and (3) to draft the founding charter for the ITO. By the end of 1947, participating nations had completed the first two of these tasks.

Negotiators agreed to meet in Havana, Cuba in 1948 to complete work on the ITO charter. In addition, as restarting international trade was deemed urgent, twenty-three countries led by the United States decided to take immediate action. A round of extensive tariff reductions was agreed, and a Protocol of Provisional Application of a multilateral treaty on international trade was formally approved to go into force on January 1, 1948. This multilateral treaty is the landmark General Agreement on Tariffs and Trade (GATT) 1947, which, after its reenactment as GATT 1994, is still the principal multilateral treaty governing international trade in goods.

In Havana in 1948, negotiators completed work and adopted what is known as the Havana Charter, which was intended as the constituent document for the ITO, but this Charter never entered into force. When President Harry Truman submitted the Havana Charter to Congress for approval, Republicans in control of Congress rejected it. The effort to create an ITO thus failed.

After the failure of the ITO, the GATT, which was provisionally in force, functioned as a *de facto* international organization that served as a forum for multilateral trade negotiations and dispute resolution from 1948 to 1994. At the successful conclusion of the Uruguay Round of trade negotiations in 1994, the "contracting parties" of the GATT[28] adopted the Marrakesh Agreement, the Agreement Establishing the World Trade Organization (WTO). Article I of this Agreement formally establishes the WTO, which began functioning as such on January 1, 1995. The

27. Douglas A. Irwin, *Clashing Over Commerce: A History of US Trade Policy* 390–91 (2017).

28. The GATT, which is a treaty, has "contracting parties," while the WTO, an organization, has "members."

GATT, which was readopted as GATT 1994, is now relegated to its original function as a trade law treaty document.

The Marrakesh Agreement established the WTO as a full-fledged international organization, now among 164 members. In addition, by means of this Agreement, WTO members formally adopted a huge body of treaty law as the international law of trade. Marrakesh Agreement Article I, paragraph 2, formally adopts trade agreements listed in Annexes 1 and 2 of the Agreement as binding on all WTO members. Marrakesh Agreement Article I, paragraph 3, adopts additional trade agreements listed in Annex 3 as Plurilateral Agreements that are binding only on the WTO members that accept them.

The Marrakesh Agreement together with the annexed agreements on trade constitutes the international law of the multilateral trading system that we study in detail in this book.

Several additional international organizations are important players in international trade law. The United Nations Conference on Trade and Development (UNCTAD), located in Geneva, has 195 members, and was founded in 1964 to maximize trade, investment, and developmental opportunities for developing countries. UNCITRAL, the UN Commission on international Trade Law, with 60 members, has the mission of promoting the harmonization and unification of international trade laws, primarily through the negotiation and adoption of international conventions. UNCITRAL's work is primarily in the field of private international business law. The Organization of Economic Cooperation and Development (OECD), located in Paris, has 37 members. The OECD is a club of the developed countries of the world and operates on consensus principles; it deals with international economic legal and political issues important to its members.

Now we introduce the three main institutions of international economic law, the World Bank, the IMF, and the WTO.

1. The World Bank

The primary function of the World Bank is to assist developing countries in economic development. The World Bank Group has almost universal membership of 190 countries. The Bank is funded by contributions from members and loans from private banks backed by government bonds issued by its members. The various agencies of the World Bank hand out over $100 billion each year in loans, grants, equity investments to governments and private businesses, playing a vital role in the world economy. The World Bank takes decisions through its President (by tradition an American) and a Board of 25 Executive Directors. Each Executive Director represents a State-member, and voting is weighted according to each State's capital contribution to the Bank. The United States currently is the largest shareholder of the Bank and has voting power equal to 15.86 percent. Additional large shareholders are certain European countries and Japan. China has voting power of 5.06 percent.

The World Bank Group consists of five closely related entities. Each of the five plays a distinct role. The International Bank for Reconstruction and Development (IBRD) is the largest entity, providing loans to developing and middle-income countries. The International Development Association (IDA) provides loans and grants to the least-developed countries of the world. The International Finance

Corporation (IFC) promotes economic development by providing financing to private entities in markets that investors would commonly find too risky. The Multilateral Guarantee Agency (MIGA) promotes foreign direct investment in developing countries by providing insurance to investors against political risk—expropriation, war, and other disturbances—in developing countries. The International Center for the Settlement of Investment Disputes (ICSID) is a World Bank facility that provides a forum for conciliation and arbitration of international investment disputes between an investor (usually a private business entity or individual) and a State—a dispute resolution process known as "Investor-State Dispute Settlement" (ISDS).

These five entities have individual constitutive founding documents. The IBRD and the IDA were founded by Articles of Agreement. The MIGA and ICSID were founded by international conventions. The IFC operates under By Laws adopted by the Bank members. All these documents are available online.

World Bank institutions also provide general advisory services, analytics, and operates technical assistance networks around the world. The Bank also formulates and implements poverty reduction strategies on a country-wide or regional basis, especially in Africa and South America. Since World Bank supported projects often have a wide impact on social and economic life as well as on the environment, many are controversial. Since 1993, the World Bank Inspection Panel, an independent review agency, has operated to examine complaints against World Bank supported projects. This Panel may recommend changes or even ending a project. The Panel has examined scores of cases since 1993. A complete listing and review of the Panel's cases and actions is available at www.inspectionpanel.org.

The literature on the World Bank is vast. The World Bank itself publishes *A Guide to the World Bank* (2011). Each year the World Bank publishes a detailed *Annual Report.*

2. *The International Monetary Fund*

The International Monetary Fund (IMF) was founded to ensure the stability and convertibility of national currencies across national borders. A secondary purpose is to facilitate the balanced growth of international trade. The IMF—with 190 members—seeks to aid countries experiencing balance of payments difficulties (*i.e.*, payments to other countries usually in foreign currency) in order to assure the stability of the international monetary system. The constituent document of the IMF is the Articles of Agreement (1944).

The IMF is headed by a Managing Director, by tradition a European. Each member appoints a Director of the Board of Governors of the IMF. The IMF operates by means of a 24-member Monetary and Finance Committee and a 24-member Executive Board. The IMF is funded by contributions from members and from loans. Each IMF member has a "quota" which sets its contribution depending on its economic and financial clout. The U.S. has the largest quota. The total of IMF quotas amounts to 477 billion special drawing rights (SDRs),[29]

29. The SDR is a monetary unit employed by the IMF. The value of an SDR is pegged to a basket of five currencies: the US dollar, the UK pound sterling, the Chinese renminbi, the euro, and the Japanese yen.

approximately USD 677 billion. The borrowed "envelope" of funds available to the IMF amount to 693 billion SDRs (about USD 1 trillion). Voting power at the IMF, like the World Bank, is based upon each member's quota. The U.S. enjoys voting power amounting to 17.45 percent of the total.

When the IMF was founded, the preeminent world currency was the American dollar, and a fixed system of currency exchange rates was devised. In this system, the U.S. dollar was pegged to gold, and all other currencies were pegged to the U.S. dollar (not gold or any other store of value). A key goal of this fixed exchange rate system was to prevent competitive currency devaluations. Currency devaluation is one way a nation may seek to increase its exports. For example, if Nation A devalues its currency internationally, its exports will become less expensive on world markets, while prices for goods and services within the country will not change, except that imports will become more expensive. This will improve Nation A's balance of payments and may improve its economy, as there will be fewer imports and more exports. But note that the currency devaluation by Nation A will hurt its trading partners, who will see the value of their currencies rise. Thus, vis-à-vis Nation A, other States will see their exports fall and their imports rise. The IMF originally conceived fixed exchange rates as the best solution to this problem. Under a system of fixed exchange rates, Nation A theoretically could not devalue its currency.

Nevertheless, under this system of fixed exchange rates IMF member nations sometimes experienced balance of payments problems. Nation A would either borrow too much money internationally or run a chronic trade deficit (importing more than it exports). Nation A would then run short of the most valuable foreign currencies (U.S. dollars) it needed to repay loans or to pay for imported products. In such cases the IMF provided loan funds and technical assistance, but many times these aids were not enough, and Nation A, in the end, was permitted to devalue its currency. Despite these crises from time-to-time, the fixed exchange rate held until 1971. At that time, the United States experienced balance of payments problems and many countries were using the American pledge to redeem dollars for gold to their advantage. As a last resort, President Nixon in 1971, announced the end of the tie of the U.S. dollar to gold.

International economic chaos ensued after Nixon's announcement. The IMF member States attempted to save the international system of fixed-rate currency exchange by the Smithsonian Agreement of 1971, but ultimately this "fix" failed. In 1973, the Bretton Woods agreed system of fixed exchange rate was declared dead, and the IMF has lived and worked with the current system of floating international currency exchange rates. Pursuant to the floating system of currency exchange rates, the exchange values of national currencies fluctuate on world currency markets second-by-second according to supply and demand. The positive value of this system is that many "crisis" devaluations are avoided because floating rates allow the system to adjust to balance of payments problems. But the current system is what is termed a "dirty" float, as many national governments and central banks intervene in the system and/or attempt to peg the value of their national currencies to some artificial standard. Moreover, countries still experience balance of payments problems, now mainly caused by excessive international borrowing and unwise national economic policies.

The IMF Articles of Agreement divides countries into two groups: Article VIII countries are those that do not place any limits on payments and monetary transfers for their current accounts and do not apply any discriminatory currency arrangements. Such countries' currencies will be freely convertible on international markets. The IMF has long encouraged its members to comply with Article VIII. In contrast, IMF members may opt for Article XIV status, which permits certain exchange controls and restrictions on current account transfers. Article IV of the IMF Charter, however, allows Article VIII countries some flexibility in their exchange arrangements; members are allowed to adopt currency "pegs," benchmarks against which they value their currencies.

At present nations fall into several different classes considering their currency exchange arrangements. First, about 40 nations, including the United States, permit their currencies to float independently; currencies thus rise and fall based on supply and demand. For these nations, government intervention in the currency markets is not out of the question but is a relative rarity. Second, many nations employ a "managed" floating system of currency exchange rates. There are several varieties of managed float. Some nations employ managed float with no predetermined path; other nations peg the value of their currencies to a predetermined "peg," which may be one currency or a group of currencies. In some cases, there is a "crawling" peg; in other cases, the currency is managed by a currency board. The Chinese renminbi (RMB) is closely managed by the People's Bank of China (PBOC). In the past the RMB was pegged artificially low against the US dollar; then China allowed the RMB to appreciate, but during the trade war between the United States, the RMB lost some value against the dollar. Each day the PBOC pegs the value of the RMB in terms of a horizontal band of 2 percent. The PBOC states that this is to avoid wide fluctuations and that the long-term goal is a floating currency. Overall, the RMB has appreciated over 10 percent against the dollar since 2005.

One of the IMF's core functions under Article IV of the IMF Articles of Agreement is supervision, overseeing and monitoring the monetary and economic policies of members. To this end the IMF undertakes periodic inspection missions to members to evaluate each member's economic policies and to provide technical advice and assistance if needed. At this writing the last China Article IV IMF mission occurred in 2017. At that time the IMF determined that a major economic problem in China is excessive governmental borrowing. China runs an annual fiscal deficit of between 10 and 12 percent of GDP when the borrowing of both the central government and provincial government are taken into account. In terms of macroeconomics, such a fiscal deficit should result in a current account deficit of between 4 and 6 percent of GDP.[30] But China, far from running a current account deficit is running a huge current account surplus. The IMF determined that the reason for this state of affairs is China's massive saving rate of 45 percent of GDP. Thus, extraordinarily, China runs a sizable trade surplus despite irresponsible domestic fiscal economic policies.

Another core function of the IMF is to loan funds to countries experiencing balance of payments problems. As of 2020 the IMF has loans of over $200 billion outstanding to thirty-five countries. The purpose of these loans is to provide temporary relief so that the economy of the country can be stabilized and plan a return to economic growth. IMF loans are typically accompanied by strict conditions with respect to the country's future fiscal and monetary policies. This "conditionality" is often controversial because stringent fiscal discipline is required. See Daniel C.K. Chow,

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30. A 1% GDP fiscal deficit normally translates into a current account deficit of between 0.4 and 0.5% of a country's GDP.

Why China Established the Asia Infrastructure Investment Bank, 49 Vand. J. Transnat'l L. 1255, 1272–74 (2017) (explaining that China established a competitor to the World Bank in order to provide no strings attached loans to developing countries).

3. The World Trade Organization

a. The Law of the Global Multilateral Trading System

The World Trade Organization (WTO) was created in 1994 by the Marrakesh Agreement (Agreement Establishing the World Trade Organization). At this same time the treaty law of the global, multilateral trading system was updated and restated. See the "List of Annexes" appended to the Marrakesh Agreement. These Annexes list the trade treaties that constitute the substantive law of the WTO. The most important treaty in this list of trade agreements is the General Agreement on Tariffs and Trade 1994 (GATT), an updated version of GATT 1947.[31] In addition, each member of the WTO has adopted a Schedule of trade concessions (*i.e.*, negotiated tariff rates) pursuant to Article II of the GATT.

Read the Marrakesh Agreement including the List of Annexes, which are in the Documents Supplement and are also available online.

The World Trade Organization (WTO) began to function effective January 1, 1995. On this date as well, GATT 1994 officially went into effect.[32] GATT 1994 consists of GATT 1947 as amended and modified before the entry into force of the Marrakesh Agreement; certain Understandings on various GATT provisions; and the Marrakesh Protocol, some 22,500 pages of schedules and trade concessions previously agreed among WTO members.

Read GATT Articles XXV to XXXV in the Documents Supplement.

Certain articles of GATT 1994 are obsolete or superseded. Articles XXV, XXVI and Articles XXIX to XXXIV are superseded by the Marrakesh Agreement. Article XXVII has never been invoked since no contracting party withdrew from the GATT, and no WTO member has ever withdrawn from the organization.[33]

b. Trade Negotiations

In the early days of the GATT, contracting parties concentrated on tariff reductions. For this purpose, the GATT sponsored a series of negotiating "rounds" among the parties. The initial round took place in Geneva in 1947. "Rounds" were named for the place in which the negotiations started or after a person with whom the round was associated. Subsequently came the "Annecy Round" in 1949, the

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31. Before 1994, the GATT 1947 functioned as an international organization as well as substantive law.

32. GATT 1994 was adopted by reference in the Marrakesh Agreement, art. I.4. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

33. GATT Article XXXV [Non-Application of the Agreement Between Particular Contracting Parties] is virtually obsolete. Years ago, this provision was invoked against Japan, Portugal, and South Africa, but all of these invocations have been removed.

"Torquay Round" in 1951, and the "Geneva Round" in 1956. In order to facilitate multilateral tariff negotiations as the norm, the contracting parties adopted Article XXVIII *bis*[34] in 1955 to enter into force October 7, 1957. This provision was the basis for the "Dillon Round" of tariff reductions which concluded in 1961.

In 1967, the "Kennedy Round" of trade negotiations concluded successfully. This "round" changed the modalities of negotiations; instead of proceeding on a product-by-product basis, the parties negotiated across the board tariff cuts.

After the "Kennedy Round," multilateral trade negotiations took up non-tariff barriers to trade as well as tariffs. The negotiations were broader and took more time to complete. In 1979, the parties concluded the "Tokyo Round" after a six-year period of negotiations. In 1986, GATT members took on the most ambitious and broadest trade negotiation in history, the "Uruguay Round." As we have seen, the "Uruguay Round" successfully concluded in 1994, with the adoption of the Marrakesh Agreement and huge body of additional treaty law that established the WTO and began a new era in the law of international trade.

c. The WTO: Functions and Operations

The functions of the WTO are set out in Article III of the Marrakesh Agreement.

- The WTO shall facilitate the implementation, operation and objectives of the multilateral trade agreements.
- The WTO shall provide a forum for multilateral trade negotiations.
- The WTO shall administer the dispute settlement system set up in the WTO Dispute Settlement Understanding.
- The WTO shall administer the Trade Policy Review Mechanism, which is a consultation done periodically on the trade laws and policies of each WTO member.
- The WTO shall consult and cooperate with the IMF and the World Bank in order to achieve coherence in international economic policy.

The supreme authority in the WTO, located in Geneva, is the Ministerial Conference, consisting of all members, which normally meets every two years. When the Ministerial Conference is not in session, the General Council is the principal administrating body, consisting of a representative from each of the WTO's 164 members. The General Council also sits as the Dispute Settlement Body (DSB) and the Trade Policy Review Body. Unlike the World Bank and the IMF, the WTO takes decisions by "consensus," which means one member who registers an objection may prevent the adoption of a measure favored by the great majority.[35] The DSB settles trade disputes by adopting decisions made by WTO dispute Panels and the WTO Appellate Body.

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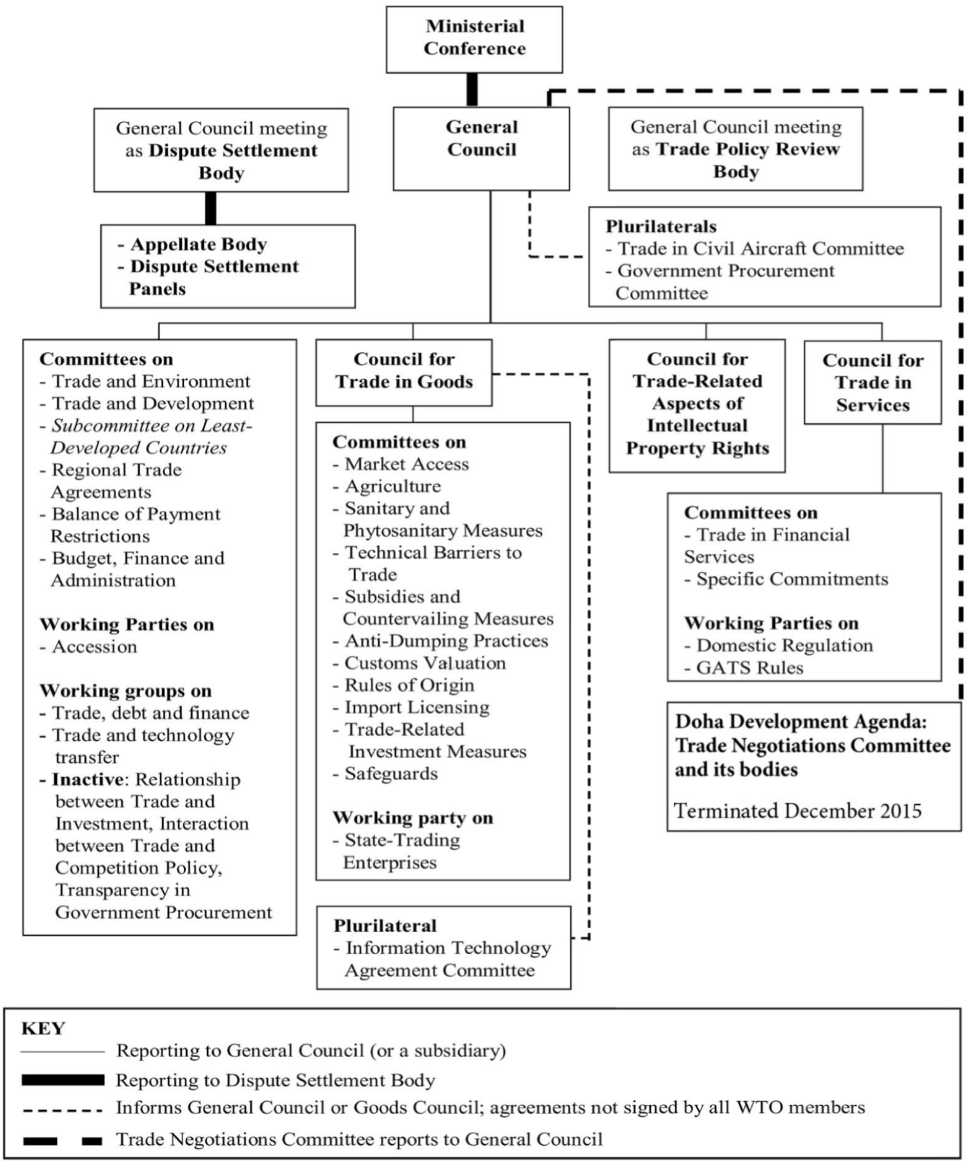
34. GATT Article XXVIII concerns the difficult issue of modification of trade concessions. Note that once a trade concession is made by a party to the GATT, it is very difficult and onerous to withdraw it. This difficulty in modifying or withdrawing a trade concession applies presently to WTO members. Note that Article XXVIII is supplemented by an Understanding—Ad Article XXVIII—that adds to the complexity. The lesson is—make original trade concessions with care as they are virtually impossible to modify once made.

35. The WTO Agreement, Article IX, provides for voting on the basis of one member one vote if a consensus is impossible, but this has not generally been implemented or used.

The DSB, however, takes decisions by "negative" consensus, which means a dispute decision is adopted unless there is a consensus of members against the adoption.

The structure of the WTO is organized around administration of the major WTO agreements, and there are numerous WTO councils, committees and working parties. The organizational structure of the WTO is set out in the following chart:



Unlike the GATT, the WTO has a rather poor record of negotiating new trade agreements. Since 1994, no new important multilateral trade agreements have been agreed. The WTO has sponsored certain negotiations among groups of members, such as an Information Technology Agreement, a Trade Facilitation Agreement, and an Environmental Goods Agreement.

With great fanfare the WTO in 2001 commenced a new multilateral trade negotiation known as the Doha Development Agenda. This negotiation was intended to benefit primarily developing countries, which now compose the majority of WTO members. In 2016, after over fifteen years of efforts, this negotiation was declared moribund and terminated.

It appears that the era of broad, multilateral trade negotiations has ended. Further economic integration seems not to be a priority now for most WTO members. Furthermore, as we explore in Chapter 3, the dispute settlement function of the WTO is now being blocked by actions of the United States. The failure of the Doha Round of trade negotiations and the blocking of the WTO Appellate Body by the United States raise fundamental questions: can the WTO continue to serve a central role in international trade? Is the multilateral, global trading system viable as the rule of law in international trade?

NOTES AND QUESTIONS

1. The World Bank and the IMF are located in Washington, D.C. on opposite sides of the same street. At one time, they were located on different floors of the same building. By tradition, the President of the World Bank is an American, and the Managing Director of the IMF is a European. Does this "cozy" arrangement raise any concerns? For whom?

2. *Developing countries*. The World Bank plays a key role in lifting developing countries out of poverty so that they can participate in the global trading order. According to the WTO, developing countries' share of world trade has increased from 29.7 percent in 2000 to about 44 percent today.[36] But which countries may claim the status of "developing?" There is no universally accepted definition. The WTO and most international organizations accept "self-designation" of developing country status. The U.S. and some other countries object to self-designation by China and certain other countries. Developing countries benefit from certain special advantages under the multilateral trading system. We cover developing countries in Chapter 15 of this book.

3. *Currency manipulation*. President Trump's administration frequently charged China and certain other countries with currency manipulation — artificially lowering the value of their currencies to gain a trade advantage. There are two international standards that prohibit currency manipulation in international trade. Article IV:1(iii) of the Articles of Agreement of the IMF states that IMF members must "avoid manipulating exchange rates . . . to gain an unfair advantage over other members." Article XV:4 of the GATT on Exchange Arrangements states that WTO members "shall not, by exchange action, frustrate the intent of this Agreement, nor . . . the intent of the provisions of the Articles of

36. International Trade in Developing Countries, UNCTAD: SDG Pulse (2020), https://sdgpulse.unctad.org/trade-developing-economies/; WTO, World Trade Statistical Review 2019, at 14 (2019).

Agreement of the International Monetary Fund." An addendum to Article XV, Ad Article XV, Paragraph 4, further defines the word, "frustrate," stating that infringements of the letter [of the Article] by exchange action shall not be regarded as a violation . . . if, in practice, there is no appreciable departure from the intent of the Article." Note that the wording of both of these provisions makes it very difficult to charge a member with a currency manipulation, since both require a showing of wrongful purpose or intent.[37] Thus, American administrations have found it productive to engage in direct negotiation with countries regarding their exchange arrangements. A famous example of this is the Plaza Accord of 1985, a landmark deal in which both Japan and Germany agreed on a major revaluation of their respective currencies against the U.S. dollar. In 2015, the U.S. enacted the Currency Undervaluation Investigation Act, 19 U.S.C. §§ 4421-22, which requires the Secretary of the Treasury to conduct annual reviews of U.S. trading partners to determine whether any are guilty of currency manipulation. Under this Act, a nation may be charged with currency manipulation remedied by sanctions if three conditions are met: (1) an overall large current account surplus (3% or more of GDP); (2) a large bilateral trade deficit with the United States ($20 billion or more); and (3) persistent and substantial intervention in the international currency markets. At this writing several countries are on the watch list, including China. Is China a currency manipulator?

4. *Promoting proper economic policies.* The World Bank, IMF and WTO constitute authoritative international bodies in positions to give advice to countries around the world and to promote economic policies to produce prosperity. In the 1990s, what was termed the *Washington Consensus* dominated economic thinking. The Washington Consensus promoted free market capitalism, fiscal discipline, tax reform (lower rates but a broader base), privatization, openness to international trade and investment, interest rate liberalization, and deregulation. Critics of the Washington Consensus argued that this mix of policies was too rigid and neglected social safety nets and job creation. *See,* e.g., Joseph Stiglitz, *Globalization and Its Discontents* (2002). During the Global Financial Crisis of 2007-2011, the G-20 group of nations adopted in 2010 what is termed the Seoul Development Consensus for Shared Growth, which advocated: (1) narrowing the wealth gap between developing and developed countries; and (2) action and reform to promote infrastructure, job creation, and human resource development.

5. *International cooperation.* The IMF and the World Bank are located across the street from each other in Washington DC, and these two organizations hold joint annual meetings and have many interactions. In 1996, the WTO and the IMF entered into an agreement to cooperate on a variety of trade and monetary matters. Agreement Between IMF and WTO (1996), available at www.imf.org. Should there be more cooperation between these three organizations?

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37. *See* Claus D. Zimmermann, *Exchange Rate Manipulation and International Law*, 105 Am. J. Int'l L. 423 (2011).