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O Brave New World: Where Angels Fear to Trade

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O Brave New World: Where Angels Fear to Trade

by Mark L. Jones*

O brave new world,
That has such people in't![1]

Fools rush in where Angels fear to tread.[2]

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.[3]

It has been my distinct privilege and pleasure to serve once again as the Faculty Coordinator for the Mercer Law Review Symposium.[4] This year the Symposium was held at Mercer University Law School on Friday, October 11, 2013 on the topic "Current Trends in International Trade and Their Impact on Multinational Business." Co-sponsors with the Law School included the Mercer School of Business and Economics,

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I would like to express my special appreciation to Gary Simson for his time, support, and wise counsel as dean, colleague, and friend throughout the complex and often challenging process of planning the Symposium that is introduced here. I would also like to thank Christopher McDaniel and Karissa O'Keefe, as well as Gary Simson, for their helpful comments during the preparation of this Introduction.

1. WILLIAM SHAKESPEARE, THE TEMPEST act 5 sc. 1.

2. Alexander Pope, Pope's Essay On Criticism, 25 (John Sargeaunt ed., Oxford at the Clarendon Press 1909) (1711) (emphasis omitted).

3. The Federalist 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

4. In 2011, I served as the Faculty Coordinator for the Mercer Law Review Symposium on "Citizenship and Civility in a Divided Democracy: Political, Religious, and Legal Concerns." For the published results of that Symposium, see 63 MERCER L. REV. 793-913 (2012).

the law firm of Bryan Cave LLP, and the Institute of Continuing Legal Education (ICLE) of Georgia. It was also my great privilege and pleasure to work with the members of the Symposium planning committee in developing the program and securing the speakers for this ambitious interdisciplinary event.[5]

The reader with expertise in the area of international trade[6] may perhaps respond with a roll of the eyes and an "Oh no, not another law review symposium issue devoted to international trade." Such a reaction is understandable.[7] Therefore, when one of our distinguished alumni, Joel Williams, who is a partner with the law firm of Bryan Cave LLP, approached Mercer Law School with the idea of organizing a symposium on the topic of international trade, we knew that we would have to offer something different from the standard fare. This is reflected in the text we drafted to publicize the Symposium:

> It is a truism that law must be practiced nowadays in an increasingly "globalized" environment. Whatever one may think of the use of such terminology, it is an undeniable fact that goods, services, capital, people, information, and ideas cross national borders at an ever-increasing and accelerating rate and that legal practitioners and their business clients in the United States must take account of this fact. To help them do so, the Symposium organizers have brought together a group of expert academics, practitioners from private practice and business, and government officials to address key issues in the area of international trade.[8]

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5. The planning committee included Monica Armstrong, Jeremy Kidd, David Ritchie, Gary Simson, and Scott Titshaw (representing Mercer Law School); Robert Johnson, Lead Articles Editor; Jennifer Findley, Editor in Chief; and Yonna Windham Shaw, Law Review Publishing Coordinator (representing Mercer Law Review); Kimberley Freeman, Allen Lynch, Geoffrey Ngene, and Roger Tutterow (representing the Mercer School of Business and Economics); and Evan Chuck and Joel Williams (representing the law firm of Bryan Cave LLP). I am grateful to all of them, but special thanks are due to Evan Chuck and Joel Williams for their pivotal role in developing the program and securing speakers from business, legal practice, and government, and to Gary Simson and Roger Tutterow for their pivotal role in securing speakers from academia.

6. "International trade" may be defined broadly or narrowly. *See* Eric C. Chaffee, *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulation in Fighting Corruption in International Trade*, 65 MERCER L. REV. 701, 705-07, 723 (2014).

7. A cursory perusal of the tables of contents of recent law reviews and journals, especially the numerous specialized journals focused on the areas of international and comparative law, will illustrate this point.

8. This text was included in the Symposium program. We used various versions to publicize the Symposium, for example, on the ICLE website, Mercer Law School's website, and Bryan Cave's website.

The Symposium, then, had a number of distinctive features and was even more distinctive in combining these features. First, the Symposium was interdisciplinary, addressing topics in the area of law as well as business and economics. This feature is reflected both in the intended audience as well as in the background and expertise of the various speakers. Second, the Symposium was targeted at an audience of faculty, students, and practitioners, and at both novices and experts, offering something for everyone. Third, the Symposium combined both theoretical and practical perspectives in its selection of topics and speakers from academia, business, legal practice, and government. The description of the program in the Appendix, at the end of this Introduction, will demonstrate each of these features more clearly.

As the reader can see from this program description, five panels addressed salient issues involving both inbound and outbound trade:

- Panel 1: The Broader Context: Changing Patterns of International Trade
- Panel 2: Exporting from the United States and Doing Business in Emerging Markets: What You Need To Know
- Panel 3: Trends in International Trade in the Southeastern United States
- Panel 4: Globalization and Impact on Global Supply Chain Solutions
- Panel 5: Transactional Issues for the International Trade Lawyer

The first two Parts below are intended primarily for newcomers to the world of international trade. In the third Part, I will discuss the materials generated by the Symposium, including the five articles collected here.

I. O BRAVE NEW WORLD OF INTERNATIONAL TRADE: BUSINESS FORMS, ACTORS, AND LEGAL ORDERING

To help orient the newcomer, the authors of a leading casebook on international business transactions, Ralph Folsom, Michael Gordon, John Spanogle, Peter Fitzgerald, and Michael Van Alstine, identify three main forms and progressive stages of international business: trading goods across borders, that is, exports and imports; licensing production abroad; and foreign direct investment.[9] All three forms fall under a

9. RALPH H. FOLSOM, MICHAEL WALLACE GORDON, JOHN H. SPANOGLE, JR., PETER L. FITZGERALD & MICHAEL P. VAN ALSTINE, INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED CASEBOOK 20-25 (11th ed. 2012) [hereinafter FOLSOM ET AL., BUSINESS

broad definition of "international trade."[10] The authors also identify three types of actors involved in these transactions: individuals or corporations,[11] national governments,[12] and international economic organizations.[13] These actors generate the law that regulates transnational trading, licensing, and investment transactions and related market activities at three levels of legal ordering: the private level, the national level, and the international level.[14] As the Symposium program suggests, in an era of "globalization," "emerging markets," and "global supply chains," many of these transactions and market activities occur within a multinational corporate structure or web of corporate relationships in which different stages of the production process are performed in different countries.[15] I will employ these typologies of international business forms, actors, and legal ordering to help organize the remainder of the discussion.

TRANSACTIONS]. Licensing of production abroad typically involves the licensing of intellectual property (such as trademarks, copyrights, and patents) and thus the transfer of technology. *See id.* at 22-24 (discussing licensing). Although the authors' focus is on goods, their analysis and treatment of these three forms or stages of international business can be extended to services as well.

10. *See* Chaffee, *Legalized Business Ethics, supra* note 6, at 723 (adopting the definition of international trade offered by Chow and Schoenbaum: "International trade refers broadly to economic and commercial activities that cross national boundaries or that have an effect across national boundaries. In the modern world, there are four major channels of international trade: (1) trade in goods, (2) trade in services, (3) technology transfer, and (4) foreign direct investment." (quoting DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 2 (2008)).

11. FOLSOM ET AL., BUSINESS TRANSACTIONS, *supra* note 9, at 7-9. This includes "multinational" corporations, of course. *Id.* at 8. Given the focus of the Symposium on multinational business, the discussion will generally refer to "businesses" instead of "individuals or corporations."

12. *Id.* at 9-10. Not only may governments act as a direct party to trading and investment transactions, government also acts "as a third party establishing and regulating the framework within which trade and investment transpires." *Id.* at 9. Something similar can be said about licensing. *See also infra* note 16 and accompanying text (discussing national legal ordering).

13. *See* FOLSOM ET AL., BUSINESS TRANSACTIONS, *supra* note 9, at 11-15.

14. *See generally* RALPH H. FOLSOM, MICHAEL WALLACE GORDON, JOHN H. SPANOGLE, JR., PETER L. FITZGERALD & MICHAEL P. VAN ALSTINE, INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED CASEBOOK (11th ed. 2012); *see generally* RALPH H. FOLSOM ET AL., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS (3d ed. 2013) [hereinafter FOLSOM ET AL., PRINCIPLES].

15. *See, e.g.*, Alfred C. Aman, Jr., *Globalization: Legal Aspects, in* INTERNATIONAL ENCYCLOPEDIA FOR THE BEHAVIORAL AND SOCIAL SCIENCES (forthcoming 2014) (manuscript at 5, 6, 10) (on file with the Author) (discussing global "value chains" or "supply chains" in which a multinational corporation "may locate Research & Development in one country, component assembly in another, final assembly in another, and distribution networks in yet another").

Businesses engage in private legal ordering of their transnational transactions and related market activities when they regulate their legal relations using the private law framework, for example the law of contracts, provided by national legal systems. National governments engage in national legal ordering of these transactions and activities when they supply this private law framework and procedures for settling legal disputes in national courts and when they effect public regulation of the market. In a federal system, state governments may also participate in national legal ordering and thus are included within the meaning of "national governments" in the present context.[16] International organizations engage in international legal ordering of these transactions and activities when they regulate what national governments may, may not, or must do in national legal ordering; when they provide procedures for settling legal disputes (typically between states); and in the case of "supranational" international organizations such as the European Union (EU), when they also effect public regulation of the market and provide procedures for settling disputes involving businesses.[17]

Lawyers and their business clients in the United States are familiar with trade in goods, licensing of production, and direct investment that crosses state borders within the United States market.[18] Here, again, there are three types of actors involved in these transactions: individuals or corporations, states, and the federal government. And here, again, these actors generate the law that regulates such cross-border trading, licensing, and investment transactions and related market activities at three different levels of legal ordering: the private level, the state level, and the federal level.

Thus, businesses engage in private legal ordering of their interstate transactions and related market activities when they regulate their legal relations using the private law framework, for example the law of contracts, provided by the state legal systems. State governments engage in state legal ordering of these transactions and activities when

16. In the United States, for example, state governments are primarily responsible for the first element, that is, for supplying the private law framework and judicial procedures for settling legal disputes. State governments may also be involved in the second element to some extent. For example, state governments may engage in export promotion efforts or offer incentives to attract inward direct foreign investment. *See infra* notes 41-44 and accompanying text (discussing Georgia).

17. The term "supranational" and the EU are discussed *infra* in note 37 and accompanying text.

18. As in the case of international business, the analysis should be extended to include services as well. *See supra* note 9 and accompanying text (discussing three main forms and stages of international business).

they supply this private law framework and procedures for settling legal disputes in state courts and when they effect public regulation of the market. The federal government engages in federal legal ordering of these transactions and activities when it regulates what state governments may, may not, or must do in state legal ordering (including through enforcement of the United States Constitution), when it provides procedures for settling legal disputes in federal courts, and when it effects public regulation of the market.[19]

There is a rough structural analogy, then, between cross-border trading, licensing, and direct investment within the world market and cross-border trading, licensing, and direct investment within the United States market. However, the contextual differences are dramatic and daunting. In the United States, businesses and their lawyers are in a familiar business and legal environment. They transact with people who share the same business culture and language and operate in a "common market."[20] Also, they encounter domestically oriented law generated by fifty very similar state legal systems as well as a federal legal system within the same common law tradition. By contrast, in dealing with the rest of the world, United States businesses and their lawyers are in an unfamiliar business and legal environment. They transact with people from foreign business cultures who may speak a different language and they operate in a market that reflects various degrees of "liberalization" at best.[21] Moreover, they encounter complex internationally oriented

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19. The features of the United States legal system discussed in this paragraph are readily apparent from reading any introductory text on the United States legal system. *See, e.g.*, E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES (4th ed. 2010).

20. *See, e.g.*, ERIC STEIN & TERRANCE SANDALOW, *On the Two Systems: An Overview, in* COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 1-45 (Terrance Sandalow & Eric Stein eds., 1982) (comparing the United States and the European Economic Community (EEC), in particular with regard to the respective contributions of the Supreme Court of the United States and the European Court of Justice to the creation of a continent-wide common market). *See also* Potter Stewart, *Foreword, in* COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE, at vii ("A major impetus for the adoption of our Constitution was the desire to establish a 'common market' among the newly independent states. But [because] the Constitution contains only a few general provisions directed to that end, it fell to the Supreme Court to transform the document's 'great outlines' into working principles that would give expression to the aspirations of the framers"). The EEC has, of course, since evolved into the EU. For discussion of the EU, see *supra* note 17 and accompanying text and *infra* note 37 and accompanying text.

21. Organizations aimed at regional economic integration may go further, of course, with regard to "internal" international trade within the area, as opposed to "external" international trade with economic operators outside the area. *See infra* notes 34-37 and accompanying text (for a listing of relevant organizations). *See also* Mark L. Jones, *The*

United States law as well as law generated by over two hundred very different foreign national legal systems, many of which belong to another legal tradition altogether, and an international legal order inhabited by a myriad of arcane international organizations.[22]

More specifically, at the level of private legal ordering, United States businesses engaged in transnational trading, licensing, or investment, and their lawyers, often must negotiate and conclude agreements with other parties who may be acting under very different, sometimes radically different, cultural assumptions and values.[23] They may also encounter specialized private law regimes supplying possible terms for their agreement. These specialized regimes may be generated at the level of international legal ordering (and then implemented within national legal systems), such as the 1980 Convention on the International Sale of Goods (CISG);[24] at the level of national legal ordering, such as the Uniform Commercial Code (UCC);[25] or at the level of private legal ordering itself by nongovernmental organizations, such as the

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GATT-MTN System and the European Community as International Frameworks for the Regulation of Economic Activity: The Removal of Barriers to Trade in Government Procurement, 8 MD. J.INT'L L. & TRADE 53, 58 n.13 (1984) (discussing various stages on a "continuum of economic integration").

22. As will be seen below, *infra* note 28 and accompanying text, they also encounter law generated by various specialized nongovernmental organizations. For a good discussion of many of the new business and legal issues that must be faced by United States businesses and their lawyers, see FOLSOM ET AL., BUSINESS TRANSACTIONS, *supra* note 9, at 20-25; *see also id.* at 17-18 (reproducing Donald Wilson's description of "a typical office day for an international counsel to a multinational corporation" (citing DONALD WILSON, INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 13 (2d ed. 1984))). For a very useful survey of how law generated at the three levels of private legal ordering, national legal ordering, and international legal ordering addresses these issues, see FOLSOM ET AL., PRINCIPLES, *supra* note 14.

23. For a classic discussion of this point, see Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 444-54 (1989). Although Goebel's discussion is now perhaps somewhat dated in its details, it still makes the basic point clearly and well.

24. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF. 97/18 (1980), *reprinted in* I.L.M. 671 (1980). *See* FOLSOM ET AL., PRINCIPLES, *supra* note 14, at 1-112 (discussing the CISG and comparing its provisions with those of the UCC).

25. *See* FOLSOM ET AL., PRINCIPLES, *supra* note 14, at 2 (explaining that the UCC may apply to contracts for the international sale of goods, although the CISG preempts the UCC regarding transactions falling within its scope), 215-16 (discussing the applicability of the UCC to international letters of credit and its relation to the UCP); *see also id.* at 154-73 (discussing the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. § 30701 (2006), and the Federal Bills of Lading Act (FBLA), 49 U.S.C. §§ 80101-80116 (2006), and their relationship to the UCC).

International Commercial Terms (Incoterms)[26] and Uniform Customs and Practice for Documentary Credits (UCP)[27] promulgated by the International Chamber of Commerce (ICC).[28] These businesses and their lawyers must also choose a governing law and a forum for possible dispute settlement, including alternative dispute settlement (such as private ad hoc or institutional arbitration), or be prepared to accept the relevant default rules and the resulting substantive law and dispute settlement procedures of what may turn out to be a very different type of national legal system regarding these matters.[29]

At the level of national legal ordering, in addition to the private law regimes and dispute settlement procedures supplied by national legal systems as discussed above, United States businesses engaged in transnational trading, licensing, or investment, and their lawyers, may encounter highly complex United States statutes and administrative regulations implemented by a bewildering array of federal government departments, agencies, and other bodies, including the U.S. Customs Service (within the Department of Homeland Security); the Departments of Agriculture, Commerce, Defense, Energy, State, and Treasury; the Nuclear Regulatory Commission; the U.S. Arms Control and Disarmament Agency; the Department of Justice; the Securities and Exchange Commission; the International Trade Commission; the Court of International Trade; the Office of the U.S. Trade Representative; and the Overseas Private Investment Corporation.[30] To illustrate, Joel Wil-

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26. INCOTERMS 2010 (ICC Publ. No. 715, 2010).

27. ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS – UCP 600 (ICC Publ. No. 600, 2007).

28. *See* FOLSOM ET AL., PRINCIPLES, *supra* note 14, at 113-36 (discussing Incoterms), 215-44, 251-53 (discussing the UCP). Incoterms and the UCP are part of the modern *lex mercatoria*. Reza Dibadj, *Panglossian Transnationalism*, 44 STAN. J. INT'L L. 253, 269 (2008). For discussion of some other matters relevant to generation of law by the parties at the level of private legal ordering, see FOLSOM ET AL., PRINCIPLES, *supra* note 14, at 179-89 (sales agent and distributorship agreements), 191-202 (countertrade). It should be noted that although the parties can often vary the terms of the specialized private law regimes generated by governments, sometimes these terms may be mandatory and the parties cannot agree otherwise. The reader will notice that all these illustrations of private law regimes focus on the first form or stage of international business, trading across frontiers. However, to some extent, something analogous may be said with regard to licensing and foreign direct investment.

29. For a good sense of some of the complexities involved, see FOLSOM ET AL., PRINCIPLES, *supra* note 14, at 911-37 (international business litigation), 939-57 (international commercial arbitration).

30. For discussion of all these entities, see generally Joel C. Williams, *Navigating Compliance Pitfalls and Requirements in International Trade, in* RECENT DEVELOPMENTS IN INTERNATIONAL TRADE LAW: LEADING LAWYERS ON UNDERSTANDING LEGAL AND CULTURAL INTRICACIES OF INTERNATIONAL BUSINESS DEALS (2012) *passim* and FOLSOM ET

liams describes some of the perils, pitfalls, and challenges that exist at this level:

> As international trade lawyers, we advise clients, in our regular course of work, on various aspects of trade, such as customs, export controls, economic sanctions, and negotiations in the World Trade Organization (WTO) or related to a free trade agreement (FTA). In the last few years, we have also seen a dramatic increase from clients requesting advice on anti-bribery and the Foreign Corrupt Practices Act.[31] These clients range from large multilateral [sic][32] companies that have been engaged in international trade for decades to relatively small companies that are seeking to export their goods or services for the first time.
>
> Often, clients call on us because they have been informed by the government, a customer, a third-party intermediary, or an internal compliance officer that their goods have been stopped by Customs, a required document for import [or] export is missing, a foreign government is imposing a measure that is adversely affecting their goods or services, or a service provider engaged by the client is found to have done something suspicious . . . .
>
> [A] company that engages in international trade can easily run afoul of government restrictions or regulations. The penalties for violations can be quite high, and in some cases, criminal prosecutions can result.[33]

The above excerpt suggests that the perils, pitfalls, and challenges presented by United States government regulation are compounded by counterpart regulatory regimes enacted by foreign governments. It suggests, too, that United States businesses engaged in transnational trading, licensing, or investment, and their lawyers, may also encounter various kinds of international agreements, such as an FTA, and arcane international economic organizations and their legal regimes, such as the WTO.

Folsom and his colleagues convey a sense of the bewildering complexity that also exists at the level of international legal ordering. Thus, they

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AL., PRINCIPLES, *supra* note 14 *passim*.

31. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1 to -2 (1982)).

32. This should probably be "multinational" companies.

33. Williams, *supra* note 30, at 8, 68. Williams emphasizes that companies should consult with legal counsel to establish a robust compliance program. *Id.* at 8. Williams's chapter contains a good overview of international trade regulation in the United States, focused mostly on the first form or stage of international business, trading across frontiers. For a more detailed survey of United States regulation of all three forms or stages of international business, see FOLSOM ET AL., PRINCIPLES, *supra* note 14, at 297-909 *passim*.

discuss the following international economic organizations with broad membership: The United Nations (U.N.) (as an economic institution), including the Economic and Social Council, the U.N. Conference on Trade and Development (UNCTAD), the U.N. Commission on International Trade Law (UNCITRAL), the U.N. Commission on Transnational Corporations, and the U.N. Industrial Development Organization (UNIDO); the International Monetary Fund (IMF); the World Bank, including the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), the International Center for the Settlement of Investment Disputes (ICSID), and the Multilateral Investment Guarantee Agency (MIGA); the failed International Trade Organization (ITO); the General Agreement on Tariffs and Trade (GATT);[34] the World Trade Organization (WTO); and the Organization for Economic Cooperation and Development (OECD).[35]

With respect to international economic organizations with more limited membership, the authors discuss the following organizations aimed at regional economic integration: the European Economic Community (EEC or EC), now the European Union (EU); the European Free Trade Association (EFTA); the North American Free Trade Agreement (NAFTA); the failed Free Trade Agreement of the Americas (FTAA); the Central American Common Market (CACM); the Latin American Free Trade Association (LAFTA); the Andean Common Market; the Southern Common Market (MERCOSUR); the Caribbean Common Market (CARICOM); the Asia-Pacific Economic Cooperation (APEC) group; and the Association of Southeast Asian Nations (ASEAN).[36]

There is considerable variation in the nature and force of the types of law generated by these international economic organizations, ranging from "the extremely limited impact of a U.N. General Assembly Resolution," through "the binding decision of a WTO or NAFTA tribunal," to the measures of a "supranational entity" such as the European Union.[37]

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34. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Technically, the GATT may not be an "international organization."

35. FOLSOM, ET AL., BUSINESS TRANSACTIONS, *supra* note 9, at 11-15.

36. *Id.* at 14-15. For a detailed survey of international and regional organizations, see generally PHILIPPE SANDS Q.C. & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS (6th ed. 2009) [hereinafter SANDS & KLEIN].

37. Dibadj, *supra* note 28, at 268. Dibadj notes that "[t]he [EU] is arguably the only supranational entity in that it mimics a government. It includes executive, judicial, and legislative organs; operates, at least ostensibly, by majoritarianism, rather than simple consent; and perhaps most pragmatically, its laws are, at least in theory, binding on its

II. STEPPING INTO THE BRAVE NEW WORLD: WHERE ANGELS FEAR TO TRADE

Prudent United States businesses and lawyers will be very cautious about stepping into the world depicted above and will only seek to do so proactively, purposefully, and with considerable forethought. They will want to be angels rather than fools. Sometimes, however, businesses and lawyers take this step reactively through force of circumstances, and with little or no forethought. Folsom and his colleagues explain that it is not only "the lawyer in the international law department of a large multinational enterprise . . . involved in drafting licensing agreements for foreign joint ventures or negotiating the sale of products with foreign governments" or "lawyers with large private law firms . . . work[ing] exclusively in international business law" who have to be concerned with the world of international trade.[38] In addition:

> The lawyer in the small rural community whose practice appears to be limited exclusively to local issues may suddenly have need for knowledge of some element of international business law. A client on a two week tour of Europe ordered a set of china from an Amsterdam store and the goods have not arrived. The rural attorney has thus become engaged in an international business transaction. Although the attorney may seek additional advice, what is important is to be aware that there are significant problems that may mandate that additional advice.[39]

Folsom and his colleagues provide additional illustrations of this point:

> Few lawyers engaged in commercial or corporate law, even those located in the most remote corners of the United States, are likely to pass their careers without confronting one or more issues of international business. A farm client in Iowa learns that the President has imposed export controls on grain, or that the European Union has established a substantial levy on grain imports for the year because of unexpectedly high European farm production. A Texas manufacturer of tennis racquets discovers the market is flooded with a patent-infringing copy made in the Far East. A New Hampshire grocery store

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constituent nations." *Id.* at 267 (footnotes omitted). In addition, EU laws are often directly binding on individuals. For an introduction to the EU legal system, see SANDS & KLEIN, *supra* note 36, at 168-85, 409-17. For a discussion of dispute settlement under the WTO and NAFTA, see *id.* at 385-89 (WTO), 420-21 (NAFTA). For a survey of regulation of all three forms of international business at the level of international legal ordering, see FOLSOM ET AL., PRINCIPLES, *supra* note 14, at 297-909 *passim*.

38. FOLSOM ET AL., BUSINESS TRANSACTIONS, *supra* note 9, at 17.

39. *Id.*

> chain, which wants to purchase a new line of chocolates directly from Belgium, is introduced to letters of credit in the international context. A North Carolina fast food franchisor is asked by a group of Canadians for the franchise rights for Canada. The list could go on.
>
> Of particular importance is that clients may never be directly engaged in international commerce, but nevertheless may have a serious international business problem. The tennis racquet manufacturer was satisfied with the United States market. But it now confronts the pirating of its patents and must consider whether imports of those tennis racquets may be stopped, and if any action might be taken in the foreign nation where the racquets are being illegally made. A manufacturer of dictating machines discovers the market flooded with machines from abroad at a price which must be well below cost. Was that government subsidizing the production or was the company dumping its products in the United States?[40]

On the other hand, United States businesses may be enticed, and indeed vigorously encouraged by those promoting economic development, to pursue the opportunities afforded by international trade.[41] In these cases, businesses and their lawyers step into this world proactively, purposefully, and with considerable forethought. For example, the Georgia Department of Economic Development (GDEcD) explains how businesses may benefit from exporting:

> Exporting helps a good company become a better, stronger, more competitive company. Selling to multiple international markets allows a company to prosper during fluctuations in the U.S. market. Companies who export discover many benefits including:
> •Increased sales and profits
> •Reduced risk by selling to diverse markets
> •Lower production costs through additional sales volume
> •Increased product life cycle by selling to new markets

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40. *Id.* at v.

41. In the case of businesses in Georgia, see, for example, the Business Roundtable website, *How Georgia's Economy Benefits from International Trade and Investment*, BUSINESS ROUNDTABLE, http://businessroundtable.org/sites/default/files/legacy/uploads/studies-reports/trade-relations/BRT-State-Study_Georgia.pdf (last visited Apr. 10, 2014) (explaining the economic benefits for Georgia of exporting, importing, and inward foreign direct investment, and providing a wealth of statistical data on these matters) [hereinafter BUSINESS ROUNDTABLE]; GEORGIA DEPARTMENT OF ECONOMIC DEVELOPMENT, EXPORTING: A WORLD OF OPPORTUNITIES (2010), *available at* http://www.georgia.org (explaining the business advantages and economic benefits of exporting and the assistance available to Georgia businesses that want to pursue exporting opportunities) [hereinafter GDEcD BROCHURE].

•Gaining a competitive edge through exposure to new technology, innovations and competition around the world.[42]

The GDEcD also seeks to support businesses in their export efforts by offering various kinds of resources and assistance.[43]

Similarly, the Business Roundtable, in addition to addressing the benefits of exporting, explains the different ways in which businesses, workers, and consumers benefit from importing and how foreign investment in Georgia benefits workers through job creation.[44]

III. TAKING A CLOSER LOOK: THROUGH ANGEL EYES?

Whether exporting, licensing production abroad, pursuing a foreign direct investment, or transacting with foreign businesses seeking to do these things in the United States market, United States businesses stepping into the world of international trade will need legal assistance. To provide such assistance, lawyers must develop the necessary expertise. The Symposium organizers hope that the video recording of the Symposium proceedings, as well as the articles collected here, will provide the newcomer—whether business person, lawyer, or student—with a tantalizing look into the exciting world of challenges and opportunities that beckons.[45] It is also hoped that the Symposium

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42. GDEcD BROCHURE, *supra* note 41, at 3. To entice businesses further the brochure gives some salient statistics, including that "97% of U.S. exports are generated by small and medium-sized companies." *Id.* In addition to the business advantages that result from exporting, the brochure also identifies several other economic benefits, including creating jobs and raising the level of job quality, wages, and living standards, and again gives relevant statistics. *Id.* at 1. For many additional useful and illuminating statistics regarding exports from Georgia, see BUSINESS ROUNDTABLE, *supra* note 41.

43. This includes "research, export assistance, partner resources, and in-country partner searches and market assessments," as well as "information regarding trade shows, international trade missions, export training, in-country matchmaking, connections with international buyers and trade opportunity alerts." GDEcD BROCHURE, *supra* note 41, at 1. For additional details regarding these points as well as contact information, see *id.* Interestingly, the type of information a GDEcD International Trade Manager can provide Georgia companies even includes "background profiles on foreign companies" and "tips on how to negotiate and interact with . . . foreign customers and partners." *Id.* at 4. For further discussion of the work of the GDEcD, see Kathy Oxford's Panel 3 presentation. Kathy Oxford, Senior International Trade Manager, Georgia Department of Economic Development, Presentation on The Economic Impact of Exports on the Southeast and the Role of the Georgia Department of Economic Development (Oct. 11, 2013), https://www.youtube.com/watch?v=KwQMazXrvWO (14:55).

44. BUSINESS ROUNDTABLE, *supra* note 41. Once again, this website gives many useful and illuminating statistics regarding all these matters.

45. The video recording of the Symposium panels and lunchtime keynote address is accessible at https://www.youtube.com (Search "Mercer Law School Channel," select "MercerLawSchool," select "Symposiums & Special Events," select "Videos"). Muna Ndulo's

materials will interest those who are more seasoned as well. As indicated above, the substantive Symposium program is reproduced in the Appendix. Two of the articles collected here were generated from Panel 1 (Linarelli and Williams), one from Panel 2 (Prime), and two from Panel 4 (Benson and Chaffee), although they are printed in this issue and discussed below in a slightly different order.[46]

All five articles have both a descriptive and a normative dimension. We begin with John Linarelli's *How Trade Law Changed; Why It Should Change Again*,[47] because it provides an excellent account of the historical evolution of the institutions governing world trade, from antiquity to the present day.[48] Linarelli describes the different stages in this historical evolution and their culmination in the multilateral trading system that began with the GATT in 1947 and developed through the conclusion of further multilateral trade agreements in various GATT-sponsored negotiating rounds. The last successful GATT-sponsored round was the Uruguay Round, which resulted in several multilateral agreements that extended the scope of the GATT regime and created the WTO in 1995. Linarelli also examines the economic principles or premises underlying these various historical stages. These include mercantilism, protectionism, and the principle of progressive trade liberalization that underlies the current multilateral trading system, including the efforts undertaken in the latest and currently stalled Doha Round. He maintains that these stages and principles are all associated with coercion, although the coercion associated with the

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Panel 5 presentation was delivered as the lunchtime keynote address after the invited keynote speaker had to cancel due to the federal government shutdown that coincided with the Symposium. *See* Muna Ndulo, Professor of Law & Director of the Institute for African Development, Cornell University Law School, Presentation on Bilateral Investment Treaties and the Settlement of Investment Disputes (Oct. 11, 2013), https://www.youtube.com/watch?v=rVyGrpIMks (2:20). The organizers are most grateful to Professor Ndulo for graciously agreeing to deliver the keynote address on very short notice. At the presenter's request, Roger Tutterow's Panel 3 presentation is omitted from the accessible video recording.

46. Readers should note that the articles collected here address topics at the levels of national legal ordering and international legal ordering but not at the level of private legal ordering. This level is addressed in the video recording, however, especially in Panel 5. *See* Elizabeth Silbert, Associate, King & Spalding, Presentation on Arbitration Clauses in Trans-Border Contracts: Common Pitfalls and Tips for the International Lawyer (Oct. 11, 2013), https://www.youtube.com/watch?v=8X3QyaUGZdc (17:30).

47. John Linarelli, *How Trade Law Changed: Why It Should Change Again*, 65 MERCER L. REV. 621 (2014).

48. Linarelli defines a society's "institutions" as "social practices constructed by the members of society [which] distribute the burdens and benefits of society" and "are coercive in that members of a society have to comply with their commands." *Id.* at 623. He also states that "the law, for example," is such an institution. *Id.*

contemporary era, including the bilateral and regional trade agreements that have proliferated after the faltering of the Doha Round in July 2008, takes a more subtle form than in the past.

After surveying various theories of global justice, Linarelli draws the normative conclusion that the legitimacy of international trade agreements should be determined by how they affect the least well off. We will revisit Linarelli's normative position below after discussing the remaining articles in this collection.

Linarelli's focus is on the first form and stage of international business, that is, trading goods or services across national frontiers. The next two articles in the collection, those by Joel Williams and Todd Benson, have the same focus. However, whereas Linarelli discusses the current era of multilateral trade only at the level of international legal ordering, Williams and Benson also discuss national legal ordering. Williams does so with regard to the United States and Benson does so more globally.

Although Joel Williams's article is entitled *A Historical Look at International Trade, Then and Now*,[49] its historical time frame is much shorter than Linarelli's. It focuses only on developments during the era of multilateral trade that began with establishment of the GATT in 1947. Williams addresses several important matters. First, he introduces the foundational GATT principle of unconditional most-favored-nation treatment and the exceptions to that principle represented by the Generalized System of Preferences (GSP) and by bilateral and regional trade agreements such as the NAFTA. Second, Williams reviews various national remedies under United States trade law, such as anti-dumping and countervailing-duty proceedings to defend against unfair foreign dumping and subsidization, as well as "safeguard" procedures to protect domestic industries against even fair competition. Third, he discusses certain central achievements of the GATT-sponsored Uruguay Round of multilateral trade negotiations and associated subsequent developments, including the availability of the WTO dispute settlement procedures to challenge foreign unfair trade practices, updated rules of origin, and the protection of intellectual property rights, especially trademarks. Finally, Williams discusses current pressures on the multilateral trading system represented by the proliferation of bilateral trade agreements and trade restrictions aimed at the protection of national industries, local brokers, and sales agents following the breakdown of the Doha Round. Normatively, Williams regards the

49. Joel C. Williams, *A Historical Look at International Trade, Then and Now*, 65 MERCER L. REV. 669 (2014).

breakdown of the Doha Round as "unfortunate[]"[50] and seems to support its revival so that the multilateral trading system can be further "significantly improved." [51]

Todd Benson's article on *Globalization, Trade, and the Impact of Customs Initiatives on Global Supply Chains*[52] explains how trade is impeded both directly and indirectly by "[t]he policies, administrative procedures, and regulatory measures adopted by customs administrations. . . ."[53] Examples of direct impediments include "import or export restrictions, tariffs, or the need to supply information and documents;"[54] examples of indirect impediments include "[p]rocedual delays . . . that can result from well-meaning efforts to address security concerns, overly complicated laws and regulations, or the commercial objectives and vested interests of strong local actors."[55] These impediments to trade can significantly impact global supply chains by increasing the costs of doing business and by affecting market access and the ability to obtain trade financing.

Normatively, Benson identifies several economic benefits that could be realized by eliminating or reducing these impediments while, at the same time, putting in place measures that effectively address legitimate regulatory concerns such as "[s]ecurity concerns, product safety, food safety and quality, hazardous waste, and . . . [intellectual property right] infringement. . . ."[56] To help realize these benefits, customs administrations and border agencies should recognize several guiding principles—balancing security and trade facilitation, simplifying border regulations and procedures, leveraging automation and technology capabilities, harmonizing and standardizing procedures and product categories, reducing paperwork, and seeking growth, service improvement, and cost reduction. They should adopt strategic objectives and measures consistent with these principles. This would include establishing meaningful *de minimis* thresholds, separating security and commercial trade compliance, "Single Window" processing, consolidating functions into one agency, reviewing electronic information in advance, streamlining border clearances, and promoting mutual recognition.

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50. *Id.* at 680.
51. *Id.* at 682.
52. Todd R. Benson, *Globalization, Trade, and the Impact of Customs Initiatives on Global Supply Chains*, 65 MERCER L. REV. 683 (2014).
53. *Id.* at 685.
54. *Id.* at 684.
55. *Id.*
56. *Id.* at 689.

Like the articles by Williams and Benson, the fourth article in the collection, Eric Chaffee's *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulation in Fighting Corruption in International Trade*,[57] addresses both national and international legal ordering. Like Williams, Chaffee discusses national legal ordering almost exclusively in terms of the United States. Unlike both Williams and Benson, however, Chaffee addresses legal regulation of all three forms or stages of international business, not only the first form or stage of trading goods or services across national frontiers.[58]

Chaffee describes the provisions of the United States Foreign Corrupt Practices Act (FCPA), enacted in 1977. He also traces the subsequent development of "the current international architecture of transnational anti-corruption law"[59] through the adoption, from the mid-1990s onward, of international agreements and other measures by the Organization of American States, the European Union, the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the Economic Community of West African States, the South African Development Community, the African Union, and the General Assembly of the United Nations. Noting the "dramatic globalization that has occurred in the past few decades and the rapid development of transnational anti-corruption law around the world,"[60] Chaffee maintains that the justifications for the FCPA and other transnational anti-corruption regulation have shifted from "an attempt to legalize business ethics by mandating transparency for purposes of protecting investors and regulating domestic securities markets to international trade regulation for purposes of promoting economic efficiency and the rule of law. . . ."[61]

Chaffee draws four normative conclusions from this shift and from the fact that the FCPA and other transnational anti-corruption regulations are now clearly part of international trade law. First, the WTO should play a greater role in combatting corruption. Second, in the United States, civil enforcement of the anti-bribery provisions of the FCPA should be relinquished by the Securities and Exchange Commission

57. Chaffee, *Legalized Business Ethics, supra* note 6.

58. This is reflected in Chaffee's adoption of Chow and Schoenbaum's broad definition of "international trade." *See* Chaffee, *Legalized Business Ethics, supra* note 6 & 10 (discussing this definition and Chaffee's adoption of it).

59. *Id.* at 708.

60. *Id.* at 713.

61. *Id.* at 726. Chaffee also explains that in the case of the FCPA the original justifications also included addressing foreign policy concerns.

(SEC) and taken over by the Department of Justice, which is already responsible for criminal enforcement of these provisions. Third, the international community should consider establishing an international organization for the creation, monitoring, and enforcement of anti-corruption regulation. And fourth, the legal academy should more clearly acknowledge the importance of anti-corruption law as international trade regulation and the need for the three preceding improvements.

In the final article, Penelope Prime's *Emerging Market Challenges: Moving Beyond Trade to Promote the Middle Class and Avoid the Middle Income Trap,*[62] the focus shifts from law to economics. Prime defines the "middle income trap" as "a slowing or stalling of increases in income and productivity during specific periods of time, especially for countries once they reach a middle-income range."[63] She analyzes and compares data from three countries that have recently become high-income countries (Singapore, Ireland, and Chile) and from "three middle-income countries . . . that are finding it increasingly difficult to move ahead" (Malaysia, Peru, and China).[64] Prime acknowledges that openness to trade and investment may be necessary in today's global business environment, especially for smaller economies. She argues, however, that it is not sufficient to sustain growth. This is because a country can only increase productivity and "move up the value chain in production and exports" if it also develops underlying social and firm capabilities.[65]

Prime draws the normative conclusion from her analysis and findings that countries wishing to sustain growth in incomes must establish social capabilities that "encompass the basic infrastructure and educational systems required for a nation to compete as well as the ability of government agencies to formulate and coordinate the implementation of productive policy."[66] These social capabilities include the element of health care. Countries must also establish firm capabilities, including "the ability to produce a range of products with varying technological sophistication; . . . to move up the value chain within a sector, diversify across sectors, and sell products competitively in the global marketplace; . . . to conduct research and develop new products and services; and . . . to productively employ increasingly more skilled

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62. Penelope B. Prime, *Emerging Market Challenges: Moving Beyond Trade to Promote the Middle Class and Avoid the Middle Income Trap*, 65 MERCER L. REV. 733 (2014).

63. *Id.* at 734.

64. *Id.*

65. *Id.*

66. *Id.* at 736-37.

labor."[67] To build both types of capabilities, governments must adopt targeted policies while attracting foreign firms and promoting competition in the domestic economy by maintaining an open business environment.

Penelope Prime's article should perhaps give us pause. How exactly are countries going to be able to build the social and firm capabilities she describes in order to move up the value chain in production and exports? Useful lessons regarding possible policies and strategies can, of course, always be drawn from the comparative experiences of various countries. Beyond this, however, do we need to view the world of international trade with a more critical eye and, as Linarelli proposes, to engage in a more fundamental critique of global economic institutions, including law?[68] Indeed, do we need to question the very premise of progressive trade liberalization upon which these institutions rest or at least question whether we have over-emphasized this principle at the expense of other important values, whether or not these institutions can be improved in an operational sense? Specifically, given certain salient features of the global economic order, including especially the continuing exercise of coercion, do we need to ask, as Linarelli insists, how global economic institutions should be reformed so as to achieve a greater degree of distributive justice (in particular for the least well off)? According to Linarelli, we may need to do this because:

> If it is the case that markets cannot exist without institutions, or cannot exist to the extent that they do as national and global economies without institutions, then we might want to know why economic inequality might be justified. We also want to know how power in trade negotiations may be exercised legitimately, and what sorts of institutional structures are fair. These are questions about political morality and the role of morality at the level of institutions. These are important questions. We want the institutions we create to comply with our moral convictions about freedom, autonomy, justice, rights, and equality. Moral legitimacy tells us whether these institutions make claims on us to comply with their mandates. If we ignore such questions, we risk harm to others, we become too deferential to power when deference is unwarranted, and we become prone to ideological manipulation. Too much is at stake in international economic law.[69]

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67. *Id.* at 737.

68. For Linarelli's definition of an "institution," see *supra* note 48.

69. *Id.* at 660. We should think about such inequality and the impact of global institutions on the least well off in broad terms and attend to many different types of consequences and implications. For illustration of this point, see Aman, *supra* note 15, at 10-12 (noting human rights issues involving labor relations and employment conditions for workers abroad arising as a result of labor outsourcing), 12-15 (explaining the effect on

Moreover, to do this well requires an interdisciplinary approach. Thus:

> The philosopher, the social scientist, and the lawyer each have their respective roles to play in understanding and evaluating international economic law. While the political philosopher facilitates our understanding of what we value, the lawyer provides an essential tool kit to understand how institutions actually operate, and the social scientist tells us about cause and effect, incentives, and costs and benefits.[70]

Interestingly, Linarelli himself writes as a philosopher as well as a lawyer; Williams, Benson, and Chaffee write as lawyers; and Prime writes as a social scientist. As a philosopher, then, perhaps Linarelli is challenging us to look at the world of international trade, watch the video recording of the Symposium proceedings, and read the articles collected here through the eyes of an angel. But, also like angels, perhaps we should proceed cautiously as we do so.

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vulnerable domestic populations of privatizing social services such as prisons and welfare, including welfare for immigrants, into the hands of multinational corporations pursuant to "market driven reforms [which] reflect a particular conception of globalization as global economic competition").

70. Linarelli, *How Trade Law Changed*, *supra* note 47, at 660.

Appendix

Symposium Program[71]

Panel 1: The Broader Context: Changing Patterns of International Trade

A Historical Look at International Trade, Then and Now by Joel Williams, Partner, Bryan Cave LLP

Impact of Changing Investment Flows and Cutting Edge Technologies (3D Printing) by Greg Desautels, International Consultant & Former Executive Director, Superior Essex, Inc.

How Trade Law Changed; Why It Should Change Again by John Linarelli, Professor of Law and Legal Theory, Dean, Swansea Law School, United Kingdom

•Moderated by Scott Titshaw, Associate Professor of Law, Walter F. George School of Law, Mercer University

Panel 2: Exporting from the United States and Doing Business in Emerging Markets: What You Need to Know

Emerging Market Challenges: Moving Beyond Trade to Promote the Middle Class and Avoid the Middle Income Trap by Penelope Prime, Professor, Institute of International Business & Director, China Research Center, J. Mack Robinson College of Business, Georgia State University

Manufacturing in Emerging Markets Using U.S. Components: Business Risks of Transferring Know-how, Technology, and Specialty Equipment by James Reed, Senior Vice President & Chief Legal Counsel, YKK Corporation

What You Need to Know About U.S. Export Control Regulations by Lynn Van Buren, Counsel, Bryan Cave LLP

•Moderated by Christopher N. Smith, Attorney at Law, Macon, Georgia

Panel 3: Trends in International Trade in the Southeastern United States

On the Economic Climate and the Foundations of Trade by Roger Tutterow, Professor of Economics, Mercer University Stetson School of Business and Economics

The Economic Impact of International Shipping and the Role of the Georgia Ports Authority by Curtis Foltz, Executive Director, Georgia Ports Authority

The Economic Impact of Exports on the Southeast and the Role of the Georgia Department of Economic Development by Kathy Oxford, Senior International Trade Manager, Georgia Department of Economic Development

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71. Some of the presentations had no title. In these cases, I have supplied a title.

•Moderated by David T. Ritchie, Professor of Law and Philosophy, Walter F. George School of Law, Mercer University

Luncheon Keynote Address

Bilateral Investment Treaties and the Settlement of Investment Disputes by Muna Ndulo, Professor of Law & Director of the Institute for African Development, Cornell University Law School

Panel 4: Globalization and Impact on Global Supply Chain Solutions

Globalization, Trade, and the Impact of Customs Initiatives on Global Supply Chains by Todd Benson, Assistant General Counsel, International Trade, United Parcel Service

Free Trade Agreements, E-Commerce, and Cargo Security in the Global Supply Chain by David Stepp, Partner, Bryan Cave LLP

From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulation in Fighting Corruption in International Trade by Eric Chaffee, Professor of Law, University of Toledo College of Law

•Moderated by Jeremy Kidd, Assistant Professor of Law, Walter F. George School of Law, Mercer University

Panel 5: Transactional Issues for the International Trade Lawyer

Business and Legal Transactional Issues in Trade with China by Evan Chuck, Partner and International Trade Leader, Bryan Cave LLP, Atlanta, Georgia; Managing Partner, Bryan Cave LLP, Shanghai Office and China Practice

Arbitration Clauses in Trans-Border Contracts: Common Pitfalls and Tips for the International Lawyer by Elizabeth Silbert, Associate, King & Spalding

Bilateral Investment Treaties and the Settlement of Investment Disputes by Muna Ndulo, Professor of Law & Director of the Institute for African Development, Cornell University Law School [delivered as Lunchtime Keynote Address]

•Moderated by Gary J. Simson, Dean, Walter F. George School of Law, Mercer University