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# How Trade Law Changed: Why It Should Change Again

by John Linarelli\*

## I. INTRODUCTION

One of the most enjoyable moments I have as an academic lawyer is when students, who have had limited exposure to the law on international economics and commerce, have the profound moment when they realize how many rules and institutions are at work in these fields. Students seem to come into the course thinking international exchange occurs in a Hobbesian state of nature. A few weeks into the course, I start to ask for the students' views on whether the law is more developed internationally than domestically. Their attempts to answer this question become an opportunity to reflect on the law and its aims. I hope they leave my course with an appreciation of the substantial public and private law institutions at work in the global order. We all have some form of "ownership" of these institutions, not in the form we find in states, but clearly something.

The United States Department of State annually publishes a list of treaties and international agreements to which the United States is a party.<sup>1</sup> The most recent publication is 501 pages long.<sup>2</sup> These are the

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1. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JAN. 1, 2013 [hereinafter

treaties and international agreements entered into by one state (albeit a powerful one) with another state or group of states. The list ranges from multilateral treaties of enormous significance, such as the United Nations Charter<sup>3</sup> and the World Trade Organization (WTO) Agreements,<sup>4</sup> to bilateral treaties of limited scope.<sup>5</sup> The list obviously increases if treaties to which the United States is not a party are examined. Many of these treaties have to do with economic relations and international trade. Historian Eric Hobsbawm tells us,

[T]he major fact about the nineteenth century is the creation of a single global economy, progressively reaching into the most remote corners of the world, an increasingly dense web of economic transactions, communications and movements of goods, money and people linking the developed countries with each other and with the undeveloped world.<sup>6</sup>

Globalization persists into the twenty-first century, but with a pervasive multilateral and institutional architecture added to an increasingly intricate bilateral and regional one. This architecture includes hundreds of inter-governmental organizations with real power over global governance. While the most sophisticated and developed of these institutions is still at the level of the state,<sup>7</sup> the sovereignty of states is becoming a quaint and outdated idea. International lawyers are well aware that state sovereignty is eroded by this “dense web” of treaty commitments, some of which have produced bureaucracies surpassing those of some states in terms of size, budget and authority.<sup>8</sup>

This Article does three things. First, it outlines the historical evolution of trade institutions. My aim in the first part is to make the point that institutions have been at work in international trade for some time and that these institutions evolved after 1945 into a complex system of multilateral cooperation with substantial organizational and administrative characteristics. A few caveats are in order. I am not a historian, and a proper historical account of this kind cannot be accomplished in

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TREATIES IN FORCE], available at <http://www.state.gov/documents/organization/2128912.pdf>.

2. *Id.*

3. U.N. Charter (Oct. 24, 1945).

4. *WTO Legal Texts*, WORLD TRADE ORG., [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (last visited Feb. 22, 2014) [hereinafter *WTO Legal Texts*].

5. TREATIES IN FORCE, *supra* note 1, at iii-vii.

6. E.J. HOBBSAWM, *THE AGE OF EMPIRE: 1875-1914*, at 62 (1987).

7. SASKIA SASSEN, *TERRITORY. AUTHORITY. RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 18 (2006).

8. JOHN LINARELLI, *Introduction*, RESEARCH HANDBOOK ON GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW x (John Linarelli ed., 2013).

a law review article.<sup>9</sup> In addition, the historical survey I set forth is no doubt incomplete and focuses almost wholly on the West or its contact with non-Westerners. Moreover, the distinction between interpreting and describing can be elusive. For example, an economist might see trade along the lines of liberal or “free” trade versus protectionism and associate protectionism with a form of nationalism or mercantilism. Actually, history is full of examples in which the promotion of free trade goes hand-in-hand with nationalism, aggression, offensive war, and colonialism.<sup>10</sup>

Second, the Article examines whether normative political theory supports the extension of duties of justice beyond nation-states. Theories that disagree with this proposition usually do so because of a lack of coercive institutions or a political community, features which, in Mathias Risse’s words, render states “normatively peculiar” and “morally relevant.”<sup>11</sup> Given the substantial institutions identified in the first part of the Article, with their history rooted in coercion, I argue that limiting the domain of justice only to states and their citizens is open to doubt.

Justice in trade is about a particular kind of justice known as distributive justice. Distributive justice is about how a set of things in a society (social primary goods for Rawls, for example) should be distributed within it.<sup>12</sup> These theories look for moral reasons to distribute things in a particular way. The distribution is usually to be accomplished through institutions (such as the law, for example). The institutions of a society—social practices constructed by the members of a society—distribute the burdens and benefits of society. These institutions affect the lives of people in significant ways. They are coercive in that members of a society have to comply with their commands. The qualities of these institutions require that they be justifiable to all members of society.

In the second part of the Article, I look at how political philosophers have sought to extend arguments for distributive justice beyond the state. A great deal has been written on the subject, and it can only be introduced here. But I also suggest that the relevance of trade institutions to people’s lives, and the mandatory and intrusive features of these institutions, becomes evident when the institutions’ history is examined.

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9. Because I am not a historian, I heavily rely on secondary sources, written mainly by historians, in the first part of this Article.

10. See generally JAMES THUO GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW* (2010).

11. MATHIAS RISSE, *ON GLOBAL JUSTICE* 10, 289 (2012) (emphasis omitted).

12. JOHN RAWLS, *A THEORY OF JUSTICE* 60-61 (1971).

This suggests that the case for extending duties of justice beyond the state may be a strong one.

Finally, in the third part of the Article, I briefly examine the future of trade institutions. This third part summarizes the underlying principles that have been at work in the General Agreement on Tariffs and Trade (GATT)<sup>13</sup> and subsequent WTO Agreements. It deals with some ways to improve the moral legitimacy of trade agreements in future trade negotiations. It explores, very briefly, how justice ought to become an underlying principle, though the prospects of this occurring are remote at this time.

## II. THE EVOLUTION OF INSTITUTIONS GOVERNING WORLD TRADE

Institutions of trade during four historical periods are investigated here. First, we look at the period from antiquity to the era of modern colonialism. This takes us to the year 1500. We then explore the institutions of trade through the period of colonization up to the beginning of the twentieth century. While colonization continued beyond this point, I want to make a clear separation as we get closer to the period that prompted the move to the contemporary period leading to the development of multilateral trade institutions. We then move into discussion of the GATT, the failed International Trade Organization (ITO), and the successive rounds of the GATT leading to the Uruguay Round, which created the World Trade Organization (WTO) and its set of agreements.<sup>14</sup>

### A. *From Antiquity to Modern Colonialism*

International trade has a long and rich history and so do its institutions.<sup>15</sup> Long-distance trade dates from the earliest civilizations,

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13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

14. See *WTO Legal Texts*, *supra* note 4.

15. The term "international" is used imprecisely in this Article. The concept of the state evolved over time and takes its current manifestation from the treaties of Westphalia of 1648. *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHIL. (June 8, 2010), <http://plato.stanford.edu/entries/sovereignty/>. What we understand to be *international law* today was known primarily as *the law of nations* until some time in the eighteenth century and terminology has been unsettled throughout history. The term *international law* was likely first used, at least in English, by Jeremy Bentham in 1780. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION xxviii (Hafner Publ'g Co. 1948) (1789). H.L.A. Hart wrote that Bentham was "the inventor of the expression 'international law.'" H.L.A. HART, THE CONCEPT OF LAW 231 (1961); see also Philip Bobbitt, *Public International Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 96, 103 (Dennis Patterson ed., 1996); M.W. Janis, Comment, *Jeremy Bentham and the Fashioning of*

predating the rise of the modern state and even the civilizations of classical antiquity.<sup>16</sup> With the decline of the Roman Empire, long-distance trade declined, particularly in the Dark Ages, but increased in the eleventh and twelfth centuries as a result of population growth in Europe.<sup>17</sup> From the eleventh and twelfth centuries and into the fourteenth and fifteenth centuries merchants of the Italian city-states, the Hanseatic League, and, later, the English merchants, dominated long-distance trade on the European continent.<sup>18</sup>

In medieval times, merchants themselves traveled with their goods and directed the voyages.<sup>19</sup> Merchants in the Middle Ages traded in fairs.<sup>20</sup> The Champagne fairs, for example, which existed in the twelfth and thirteenth centuries, became significant markets for merchants from all across Europe to trade.<sup>21</sup> Six fairs in the Champagne area of France evolved into a major center for trade between Northern and Southern

"*International Law*," 78 AM. J. INT'L L. 405, 408-09 (1984).

For a discussion of trade institutions existing prior to the rise of the modern state, it may be inaccurate to refer to trade as "international" versus "domestic" or even to "states." Geographical descriptions, such as "long distance," are thus used when appropriate in the text to avoid the description of historical events with possibly misleading or inappropriate contemporary terminology and concepts. However, we have to accept that it is not possible or desirable to remove oneself from one's own era entirely. We must necessarily *interpret* in these exercises.

16. See, e.g., 1 *Kings* 10:1-13 (recounting the gold, spices, wood, and precious stones brought to King Solomon by the Queen of Sheba).

17. DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 26 (1973). North and Thomas explain:

An expanding population in a local area would eventually encounter diminishing returns to further increases in the size of the labor force. Part of the increased labor force would as a consequence migrate to take up virgin land in the wilderness, thus extending the frontiers of settlement. However, the density of habitation would still be greater in the older areas than on the frontier, and this differential, resulting in a variation of land-to-labor ratios between areas, when coupled with regional differences in natural resource endowments, would lead to different types of production. Such variances would allow profitable exchanges of products between regions. . . . [T]he development and expansion of a market economy during the Middle Ages was a direct response to the opportunity to gain from the specialization and trade made feasible by population growth. The growth in towns facilitated local and regional exchanges, and the expansion of these markets made it profitable to specialize functions, to introduce new technologies, and to adjust the production processes to altered conditions.

*Id.*

18. R. de Roover, *The Organization of Trade*, in III *THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE: ECONOMIC ORGANIZATION AND POLICIES IN THE MIDDLE AGES* 42-44 (M.M. Postan, E.E. Rich & Edward Miller eds., 1979).

19. *Id.* at 42.

20. *Id.*

21. *Id.*

Europe.<sup>22</sup> For the Champagne fairs, the King of France and the Count of Champagne guaranteed safe passage of merchants to and from the fairs.<sup>23</sup> Foreign merchants were given trading privileges.<sup>24</sup> Many French towns guaranteed freedom to trade.<sup>25</sup> The system of merchant protection signaled a shift in protection of merchant activity from local manors and individuals to regional courts and barons, as well as to kings.<sup>26</sup> In the 1300s, permanent markets in urban areas eventually replaced fairs.<sup>27</sup>

As trade flows grew so did institutions to facilitate trade and to deal with the risks inherent in long-distance trade. The *lex mercatoria*, the root of commercial law in both the civilian and common law legal traditions, evolved, though whether it did so from the customs of merchants or more conventionally in courts of sovereigns seems to be an open question.<sup>28</sup> In the thirteenth century, various institutions arose to deal with the ever-increasing flow of trade. Deposit banking, an institution that perhaps has been in existence since Roman times, was revived.<sup>29</sup> Insurance began sometime in the 1200s or 1300s, with the first known example of insurance dating from 1287.<sup>30</sup> Insurance, started by the Italians, was conceptualized at the time mainly in conjunction with the rise of maritime commerce to and from the Italian city-states.<sup>31</sup> Insurance thus started as an institutional device to facilitate international trade. Traders in the fairs developed various institutions for exchanging currencies, prototype bills of exchange, and other institutions designed to lower the costs of trade transactions.<sup>32</sup>

The history of the regulation of long-distance trade has its foundations in the protection of traders from the excesses and predations of pirates and in the securing of concessions, preferences, and privileges for one's traders in foreign ports.<sup>33</sup> The Italian city-states set up a regular

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22. C. Verlinden, *Markets and Fairs*, in III THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE: ECONOMIC ORGANIZATION AND POLICIES IN THE MIDDLE AGES 119, 127 (M.M. Postan, E.E. Rich & Edward Miller eds., 1979).

23. *Id.* at 130-31.

24. *See id.* at 130 (noting that Genoa obtained privileges in 1190).

25. *See id.* at 131.

26. *See id.*

27. *See de Roover, supra* note 18, at 42-43.

28. *See* J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295, 299-300 (1979).

29. *See de Roover, supra* note 18, at 66.

30. *Id.* at 56-57.

31. *See id.*

32. *See id.* at 95 (highlighting the importance of the money market to trading and banking).

33. *See id.* at 59-60.

practice of sending ambassadors to other states, often to negotiate trade agreements.<sup>34</sup> The Italian republics sought to enhance security along sea routes by agreeing to treaties of amity and commerce with powers along the Mediterranean Sea.<sup>35</sup> This first step was usually taken together with (or closely followed by) agreements for trading privileges (if possible on terms more favorable than those granted to other cities) and often resulted in the establishment of colonies or enclaves in a foreign port.<sup>36</sup> International-trade policy of the Middle Ages was thus a curious mixture of treaties seeking to maintain physical security for one's traders and treaties seeking protection for traders in the form of monopolies or preferences from foreigners. As for the seeking of protection, medieval trade policy is analogous to the contemporary notion of a beggar-thy-neighbor policy.<sup>37</sup> The Italian city-states took these treaties seriously.<sup>38</sup> They considered any serious breach of the treaties' provisions to be an act of aggression and did not hesitate to use force if the offending party failed to provide prompt redress.<sup>39</sup>

To implement trade concessions and privileges in the trade agreements of the Middle Ages, a detailed customs administration was required. Customs duties were often regulated by treaty, and some treaties contained provisions for resolution of customs disputes.<sup>40</sup> Customs fraud was also a concern because it tended to negate any preferences granted to traders of the preferred nationality. For example, from about 1261, Genoese traders were exempt from customs duties in Greece.<sup>41</sup> At the time, one of the most important branches of Genoese administration in Greece was the *officium mercantiae*, or commercial bureau.<sup>42</sup> One of the tasks of the *officium mercantiae* was to cooperate with Greek customs authorities to stop goods not of Genoese origin from entering into Greece as if they were Genoese goods.<sup>43</sup> Both the Genoese and the Greek authorities imposed severe penalties on merchants who tried to commit customs fraud in this manner.<sup>44</sup>

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34. *See id.* at 42-43.

35. *Id.* at 59.

36. *See id.* at 60.

37. *Id.* at 59-60.

38. *Id.* at 63.

39. *Id.*

40. *See id.* at 60-61.

41. *Id.* at 61-62.

42. *Id.* at 62.

43. *Id.*

44. *Id.*; *see also* Avner Greif, *Self-Enforcing Political Systems and Economic Growth: Late Medieval Genoa*, in *ANALYTIC NARRATIVES* 23 (Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal & Barry R. Weingast eds., 1998).



While the Italian republics maintained hegemony into the fourteenth and fifteenth centuries in Mediterranean trade, the Hanseatic League maintained an even more dominant hegemony over Baltic trade.<sup>45</sup> Unlike the Italian cities, the German towns were united into a strong league, a cartel able to impose boycotts and blockades and engage in privateering.<sup>46</sup> The Hanseatic League consisted of 200 towns, led by Lübeck, Cologne, and Danzig.<sup>47</sup> The members of the League enjoyed concessionary trading privileges in many ports, including London, Bruges, Bergen, and Novgorod.<sup>48</sup> The League held its last diet in 1669; although, by that year it had already been in decline for a long time.<sup>49</sup>

One of the more interesting phenomena in the regulation of international trade between England and the Hanseatic League was that various English kings granted League merchants special privileges to trade in England, resulting in lower customs duties than those paid by English merchants.<sup>50</sup> Why would a country's ruler make an international agreement that results in substantial prejudice to his own nationals? Tax revenues. The English monarchy funded their administration by taxing overseas traders.<sup>51</sup> For example, the Hanse took advantage of the War of the Roses by financing and equipping King Edward IV in his war against the Lancastrians.<sup>52</sup> The Hanseatic League and King Edward entered into the Treaty of Utrecht in 1474, which granted the Hanse extensive trading privileges in England while granting virtually no rights to English traders in the Baltic.<sup>53</sup> Rulers promoted trade when it was in their interest to do so (such as in the protection of foreign merchants participating in trade fairs), but also restricted trade when it was in their interest to do so, often to raise revenue (such as in the proliferation of tolls, confiscation of goods, and other devices).<sup>54</sup>

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45. See de Roover, *supra* note 18.

46. *Id.*

47. See JOHN CANNON, A DICTIONARY OF BRITISH HISTORY 309 (2009).

48. See de Roover, *supra* note 18, at 106.

49. BALTIC CONNECTIONS: ARCHIVAL GUIDE TO THE MARITIME RELATIONS OF THE COUNTRIES AROUND THE BALTIC SEA (INCLUDING THE NETHERLANDS) 1450-1800, VOL. 1: DENMARK, ESTONIA, FINLAND, GERMANY 733 (Lennart Bes, Edda Frankot & Ianno Brand eds., 2007).

50. de Roover, *supra* note 18, at 113.

51. See Edward Miller, *France and England*, in III THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE: ECONOMIC ORGANIZATION AND POLICIES IN THE MIDDLE AGES 290, 304 (M.M. Poston, E.E. Rich & Edward Miller eds., 1979).

52. JOHN A.C. CONYBEARE, TRADE WARS: THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL RIVALRY 105 (1987); CHARLES ROSS, EDWARD IV 353-55 (1998).

53. *Id.*

54. See Miller, *supra* note 51, at 309; Verlinden, *supra* note 22, at 131.

### B. Trade and Colonial Expansion

Historians widely recognize the year 1500, and the sixteenth century, as “the watershed between the medieval world and the modern world.”<sup>55</sup> During the sixteenth century, the volume of international trade expanded globally.<sup>56</sup> Ventures across oceans, to the New World and Asia, increased dramatically during this period, and by the end of the sixteenth century, “the ocean had become a king’s highway.”<sup>57</sup> In their influential work on new institutional economics, Douglass North and Robert Thomas characterize the regularization of trade between Europe and the rest of the world in the sixteenth century as a “major achievement.”<sup>58</sup> The Italian cities and the Hanseatic League dominated trade, but the Dutch and the English in the seventeenth century eventually supplanted the Italians and the Hanse.<sup>59</sup>

We need to be careful when explicating this account. We could place too much emphasis on a particular economic frame as dividing along the lines of whether trade policies were “free trade” or “protectionist.” Much of the economic history of trade institutions is framed along these lines.<sup>60</sup> I may employ this line of thinking at times, following the lead of economic historians. However, another narrative should be explored in recounting this history, and it is a very well-grounded account that we should not dismiss: we can connect trade institutions to violence and oppression and conceptualize colonization as an officially directed commercial enterprise.<sup>61</sup>

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55. NORTH & THOMAS, *supra* note 17, at 102.

56. *Id.* at 113.

57. *Id.*

58. *Id.* It is fair to question this characterization if we consider the levels of exploitation through colonialism that occurred during the period. The philosophers of the time justified European colonialism for reasons we would consider dubious today. See generally RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* (reprint 2001).

59. See generally DAVID ORMROD, *THE RISE OF COMMERCIAL EMPIRES: ENGLAND AND THE NETHERLANDS IN THE AGE OF MERCANTILISM, 1650-1770* (2003); de Roover, *supra* note 18, at 70-118.

60. See generally DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* (1998); see also Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT’L & COMP. L. 257 (2000).

61. See generally ARCHIVES OF EMPIRE (Barbara Harlow & Mia Carter eds., 2003) (providing four volumes of primary source material); J.H. ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492-1830* (2006); FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* (1975); RICHARD L. MORTON, *COLONIAL VIRGINIA* (1960); EDWARD W. SAID, *ORIENTALISM* (Penguin Books 25th anniversary ed. 2003); SHOGO SUZUKI, *CIVILIZATION AND EMPIRE: CHINA AND*

On the regulation of international trade in the sixteenth century, North says:

During the sixteenth century the commerce of Western Europe evolved not within a peaceful, orderly, free-trade world, but against all the obstacles that could be reared by war, hostility, and jealousy between the rival nation-states. The heads of state were certain that they could extend their influence only at the expense of some other sovereign, and they were equally persuaded that an economy could extend its commerce only at the expense of another nation.<sup>62</sup>

This approach to state involvement in international trade reflects the dominance of mercantilism as an economic school of thought, into the seventeenth and eighteenth centuries. Mercantilism sought the maximization of the trade surplus for a country in order to maximize the circulation of monetary gold in that country.<sup>63</sup> Wealth was associated solely with the magnitude of circulating gold in a country.<sup>64</sup> To produce wealth through gold, industry was protected and subsidized, and trade was regulated in a manner to benefit home producers and traders.<sup>65</sup> Mercantilism fed into imperial rivalries, which led to concerns about transfers of specie to foreign competitors.<sup>66</sup> The mercantilist search for bullion was in part the reason for colonization. Colonies were viewed as sources of raw materials and markets for goods manufactured at home.<sup>67</sup>

The European encounter with the so-called East Indies provides a telling example of the way trade was accomplished in the sixteenth and seventeenth centuries. In 1603, an admiral of the Dutch East India Company attacked a Portuguese carrack, the *Santa Catarina*, anchored near Singapore Island.<sup>68</sup> After a lengthy battle, the Portuguese surrendered and forfeited their ship and their cargo so that their lives

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JAPAN'S ENCOUNTER WITH EUROPEAN INTERNATIONAL SOCIETY (1st ed. 2009).

62. NORTH & THOMAS, *supra* note 17, at 115.

63. MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 2 (3d ed. 2005).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 510 (2002); MARTINE JULIA VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES 1595-1615* (2006), reprinted in 139 BRILL'S STUDIES IN INTELLECTUAL HISTORY; Peter Borschberg, *Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)* 4-5 (Inst. for Int'l L. & Just., Working Paper Rev. Aug. 2006).

would be spared.<sup>69</sup> The carrack was loaded with cargo, which the United Netherlands East India Company took back to Europe and sold for a substantial profit.<sup>70</sup> The attack and seizure was a prominent example of freebooting by the Dutch in southeast Asian seas in the early seventeenth century.<sup>71</sup> The Company retained Hugo Grotius to write a legal opinion defending the attack, and his *De Jure Praedae*<sup>72</sup> was the result, a precursor to *De Jure Belli et Pacis*,<sup>73</sup> his work of broader significance to international law.<sup>74</sup> After this attack and its legal justification by Grotius, the Dutch stepped up their attacks against Iberian interests in the Straits of Singapore.<sup>75</sup> This example only highlights the force European powers of the time used against each other. Much more can be said about the colonization of southeast Asia and how the Europeans disrupted trade, networks, and institutions in what are now modern Malaysia, Indonesia, and Singapore.<sup>76</sup>

In the eighteenth century, we begin to see some movement by European powers towards policies more familiar to the contemporary period.<sup>77</sup> The Anglo-French Commercial Treaty of 1786,<sup>78</sup> which took two years to negotiate (1784-1786), represented a substantial change in the trade policy of both the United Kingdom and France.<sup>79</sup> Prior to the treaty, these two countries embargoed each other's goods, and the only trade carried on between the two states was by smuggling.<sup>80</sup> The treaty focused on liberalizing trade in French wines and silks and British textiles and manufactures.<sup>81</sup> Import duties were reduced to levels between ten and twelve percent, and the treaty contained an uncon-

69. Borschberg, *supra* note 68, at 4-5.

70. *Id.* at 5.

71. *Id.*

72. HUGO GROTIUS, *De Iure Praedae Commentarius: COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (Gwladys L. Williams & Walter H. Zeydel trans., Oxford: Clarendon Press 1950) (1604).

73. HUGO GROTIUS, *DE JURE BELLI ET PACIS* (William Whewell trans., Cambridge: John W. Parker 1853) (1625).

74. BOBBITT, *supra* note 68, at 510.

75. Borschberg, *supra* note 68, at 6.

76. See generally C.H. ALEXANDROWICZ, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES* (1967).

77. See PAUL BAIROCH, *ECONOMICS AND WORLD HISTORY: MYTHS AND PARADOXES* 17 (1993) [hereinafter BAIROCH, *ECONOMICS AND WORLD HISTORY*].

78. For more on the treaty, see W.O. Henderson, *The Anglo-French Commercial Treaty of 1786*, 10 *ECON. HIST. REV.* 104 (1957).

79. See Daniel J. Whiteneck, *Creating British Global Leadership: The Liberal Trading Community from 1750 to 1792*, 4 *J. WORLD-SYS. RES.* 76, 87 (1998); BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 17.

80. Whiteneck, *supra* note 79, at 87.

81. *Id.*

ditional most-favored-nation provision.<sup>82</sup> The most-favored-nation obligation is a fundamental discipline of non-discrimination in contemporary trade agreements.<sup>83</sup>

The United States, from its first years in the latter eighteenth century, pursued a protectionist tariff policy, with the United States government imposing moderate to high levels of tariffs beginning with its first in 1789.<sup>84</sup> The United States has historically been protectionist.<sup>85</sup> In contrast to the unconditional most-favored-nation clause found in the Anglo-French Commercial Treaty of 1786,<sup>86</sup> the United States developed the conditional clause.<sup>87</sup> The first trade treaty that the United States entered was with France, the Treaty of Amity and Commerce<sup>88</sup> which came into effect on February 6, 1778.<sup>89</sup> This treaty contained the conditional most-favored-nation clause.<sup>90</sup> By the end of the nineteenth century, the United States was transformed from a fledgling new country into the largest economy in the world, comprising a vast internal common market with ten to twenty percent of world trade flows.<sup>91</sup>

With the wars of the French revolution marring Europe from 1790 to 1815, European governments were still protectionist as a matter of policy.<sup>92</sup> In addition, there was a new style of post-mercantilist protectionism on its way based on the writings of the Austrian Friedrich List, the American Alexander Hamilton, and others.<sup>93</sup> The new protectionism was founded on economic nationalism—the idea of stimulating economic development by protecting local industry.<sup>94</sup>

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82. *Id.*

83. Henrick Horn & Petros C. Mavroidis, *Economic and Legal Aspects of the Most-Favored-Nation Clause*, 17 EUR. J. POL. ECON. 233, 234 (2001).

84. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 33.

85. *Id.* at 32-33.

86. Henderson, *supra* note 78, at 104.

87. See S.K. HORNBECK, *THE MOST-FAVORED-NATION CLAUSE IN COMMERCIAL TREATIES: ITS FUNCTION IN THEORY AND PRACTICE AND ITS RELATION TO TARIFF POLICIES* (1910); G.C. Hufbauer, J. Shelton Erb & H.P. Starr, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 LAW & POL'Y INT'L BUS. 59 (1980).

88. Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 7 U.S.T. 763, available at [http://avalon.law.yale.edu/18th\\_century/fr1788-1.asp](http://avalon.law.yale.edu/18th_century/fr1788-1.asp).

89. *Id.*

90. *Id.* at art. 2.

91. Paul Bairoch, *European Trade Policy, 1815-1914*, in VIII THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE, THE INDUSTRIAL ECONOMIES: THE DEVELOPMENT OF ECONOMIC AND SOCIAL POLICIES 137 (Peter Mathias & Sidney Pollard eds., Susan Burke trans., 1989) [hereinafter Bairoch, *European Trade Policy*].

92. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 17.

93. *Id.*

94. *Id.*

In 1815, after the wars with France had ended, the landed gentry in Britain were able to influence Parliament to enact a trade law, the Corn Law of 1815,<sup>95</sup> to protect local agriculture against foreign grain imports.<sup>96</sup> The Corn Law was at the center of a political battle between the declining landed interests of Britain, who sought to promote agriculture, and the rising industrial interests brought into existence by the Industrial Revolution, which occurred first in Britain.<sup>97</sup> In the three decades between 1815 and 1846, Britain moved significantly to a liberal trade policy.<sup>98</sup> The British Parliament repealed the Corn Laws in May 1846.<sup>99</sup> In addition, in 1849, Parliament repealed the Navigation Acts<sup>100</sup> effective in 1850. The Navigation Acts required the use of British ships for the maritime transportation of British goods, and because Britain was the largest trading nation, the Acts had a significant effect on the development of commercial maritime capability and contributed to British supremacy on the seas in the eighteenth century.<sup>101</sup> This was at a time when Britain was forty to sixty years ahead of its neighbors in technological development.<sup>102</sup> A few small countries, such as the Netherlands, also tended to be economically liberal, but the rest of Europe remained highly protectionist, developing regimes of protection to shield their industry from international competition, particularly from British competition.<sup>103</sup> Between the years 1846 and 1861, the United States, based on tariff levels, was liberal to moderately protectionist.<sup>104</sup>

It is impossible to cover the trade policies of all countries in this Article, but two major trading nations of eastern Asia deserve mention—China and Japan. The western powers forced these (and other) countries to liberalize their domestic markets to open their markets to trade from the West.<sup>105</sup> From 1757 until about 1840, China maintained

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95. *Id.* at 18.

96. *Id.*

97. *Id.*

98. *Id.* at 21.

99. *Id.* at 20.

100. *Id.* at 40-43; J.H. Clapham, *The Last Years of the Navigation Acts*, 25 *ENG. HIST. REV.* 480 (1910).

101. See F.L. HOLT, *A SYSTEM OF THE SHIPPING AND NAVIGATION OF GREAT BRITAIN AND OF THE LAWS RELATIVE TO MERCHANT AND SEAMEN AND MARITIME CONTRACTS* 78 (2d ed. 1824).

102. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 81.

103. *Id.* at 25.

104. *Id.* at 34.

105. See *HISTORICAL ENCYCLOPEDIA OF AMERICAN BUSINESS: JAPANESE TRADE WITH THE UNITED STATES* (Richard L. Wilson ed., 2009), available at [http://www.salempress.com/store/samples/american\\_business/american\\_business\\_japanese.htm](http://www.salempress.com/store/samples/american_business/american_business_japanese.htm).

significant restrictions on international trade.<sup>106</sup> The purpose of the British-instigated Opium War (1839-1842) was to force China to open its markets to British trade.<sup>107</sup> The Opium War ended with the signing of the Treaty of Nanking,<sup>108</sup> signed on August 29, 1842.<sup>109</sup> China lost its ability to set its own tariffs, and it did not regain this power until 1929.<sup>110</sup> Treaties opening trade with other western countries followed.<sup>111</sup> As for Japan, it was forced to liberalize in response to the military expedition of the American Commodore Matthew C. Perry.<sup>112</sup> Prior to the compelled liberalization, Japan was a tightly controlled and closed society, with negligible levels of cross-border trade.<sup>113</sup> In the nineteenth and early twentieth centuries, Japan and China entered into "unequal treaties" with western countries.<sup>114</sup> These treaties typically contained a most-favored-nation clause, which was unilateral in nature—the clause required only one party to the treaty to grant most-favored-nation benefits to the other party, but not vice versa.<sup>115</sup> For example, Article 9 of the Kanagawa Treaty<sup>116</sup> between Japan and the United States provided:

It is agreed, that if at any future day the government of Japan shall grant to any other [n]ation or [n]ations privileges and advantages which are not herein granted to the United States, and the [c]itizens thereof, that these same privileges and advantages shall be granted likewise to the United States, and to the [c]itizens thereof, without any consultation or delay.<sup>117</sup>

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106. Peter C. Perdue, *Rise & Fall of the Canton Trade System-I*, MIT.EDU, [ocw.mit.edu/ans7870/21f/21f.027/rise\\_fall\\_canton\\_01/pdf/cw\\_essay.pdf](http://ocw.mit.edu/ans7870/21f/21f.027/rise_fall_canton_01/pdf/cw_essay.pdf) (last visited Mar. 10, 2014).

107. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 42.

108. Treaty of Nanking, U.K.-China, Aug. 29, 1842, *available at* <http://china.usc.edu/ShawArticle.aspx?articleID=403&AspxAutoDetectCookieSupport=1>.

109. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 42.

110. *Id.*

111. *E.g.*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, *The Opening to China Part I: The First Opium War, the United States, and the Treaty of Wangxia, 1839-1844*, <http://history.state.gov/milestones/1830-1860/china-1>.

112. HISTORICAL ENCYCLOPEDIA OF AMERICAN BUSINESS: JAPANESE TRADE WITH THE UNITED STATES, *supra* note 105.

113. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 31.

114. *Id.* at 41. I do not address relations between Asian countries, such as between China and Japan.

115. *E.g.*, Shinya Murase, *The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905*, 70 *AM. J. INT'L L.* 273, 274-76 (1976).

116. Peace and Amity Treaty, U.S.-Japan, Mar. 31, 1854, 9 U.S.T. 351 [hereinafter *Kanagawa Treaty*], *available at* <http://avalon.law.yale.edu/19thcentury/japan002.asp>.

117. *Id.* at 353.

The Kanagawa Treaty, entered into on March 31, 1854, was the treaty that resulted from Commodore Perry's military expedition.<sup>118</sup> Substantially similar clauses appeared in treaties entered into by other western powers with Asian countries—some entered into well prior to the date of the Kanagawa Treaty.<sup>119</sup> The United States did not invent the unilateral clause.<sup>120</sup>

As for the European countries, most of them did not follow Britain's liberal-trade lead until 1860.<sup>121</sup> Until that year, the major continental European countries adhered to defensive protectionist policies in attempts to catch up with Britain.<sup>122</sup> Other than Britain, only four European countries followed a liberal-trade policy.<sup>123</sup> These countries—Denmark, the Netherlands, Portugal, and Switzerland—comprised four to five percent of the European population at the time; although, with the exception of Switzerland, these countries historically engaged in trade and colonialism.<sup>124</sup> The remaining continental European countries focused on economic nationalism.<sup>125</sup> Although nationalist approaches are protectionist, they do show a shift away from mercantilist approaches. Mercantilism is offensive and focuses on getting the largest share of the total pie,<sup>126</sup> while economic nationalism is defensive in approach and focuses on developing a separate, larger domestic pie.<sup>127</sup>

The European free-trade period could be said to begin in 1860, with the Anglo-French Treaty of 1860,<sup>128</sup> which was signed on January 23, 1860, and lasted ten years.<sup>129</sup> In that agreement, after a hiatus of thirty to forty years, the unconditional most-favored-nation clause once again appeared in an international trade treaty.<sup>130</sup> During the hiatus, countries had instead used what was in the nineteenth century called

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118. Murase, *supra* note 115, at 274.

119. *Id.* at 273-74.

120. *See id.*

121. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 22.

122. *Id.*

123. *Id.*

124. *Id.*

125. STEVEN BRYAN, *THE GOLD STANDARD AT THE TURN OF THE TWENTIETH CENTURY: RISING POWERS, GLOBAL MONEY, AND THE AGE OF EMPIRE* 21 (Columbia Univ. Press ed., 2010), available at <http://cup.columbia.edu/book/978-0-231-15252-5/the-gold-standard-at-the-turn-of-the-twentieth-century/excerpt>.

126. *See* IRWIN, *supra* note 60, at 26-44.

127. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 21.

128. *Id.* at 22-23.

129. *Id.*

130. *See id.* at 23.



the “American clause”—a conditional most-favored-nation clause.<sup>131</sup> France very quickly followed the Anglo-French Treaty of 1860 with many other countries.<sup>132</sup> This led to what has been described as “tariff ‘disarmament’” in Europe, mainly as a result of the unconditional most-favored-nation clauses contained in the treaties.<sup>133</sup> Unlike the liberalization occurring in Europe, the United States maintained strict protectionist policies based on extremely high tariff levels from 1861 to the end of World War II.<sup>134</sup>

The liberal trade period in Europe did not last very long, and protectionism returned starting in 1879 with the passage of a new tariff policy by the German government.<sup>135</sup> As historian Paul Bairoch explains:

In Continental Europe the triumph of protectionist ideas was very largely the result of the coalition between agricultural interests and those of industry. Farmers, who were disappointed by the slow growth in sales to the United Kingdom and seriously handicapped by the imports of grain and other foodstuffs from overseas, thus supported those manufacturers who had never really been convinced of the advantage of free trade.<sup>136</sup>

It was in the latter part of the nineteenth century that the trade treaties of the 1860s and 1870s began to expire in accordance with their terms.<sup>137</sup> In 1892, the French adopted the Méline tariff at a time when most treaties were expiring and this was widely understood as ending the prior period of liberalized trade.<sup>138</sup>

### C. *The Twentieth Century—Before GATT*

Many tariff wars involving many countries occurred from 1892 to 1914.<sup>139</sup> This period has been described as an age of protectionism in

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131. See Olivier Accominotti & Marc Flandreau, *Bilateral Treaties and the Most-Favored-Nation Clause: The Myth of Trade Liberalization in the Nineteenth Century*, 60 *WORLD POL.* 147, 152 (2008), available at [http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international\\_history\\_politics/shared/history\\_course\\_support\\_2013-2014/HI002/accominotti\\_flandreau.pdf](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_history_politics/shared/history_course_support_2013-2014/HI002/accominotti_flandreau.pdf).

132. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 23.

133. *Id.*

134. *Id.* at 36.

135. *Id.* at 24-25. “Just as the Anglo-French treaty of 1860 was the beginning of the European free trade period, this new German tariff marked its end and the beginning of a gradual return to protectionism on the Continent.” *Id.* at 24.

136. *Id.* at 25.

137. *Id.*

138. *Id.*

139. Bairoch, *European Trade Policy*, *supra* note 91, at 70.

continental Europe.<sup>140</sup> Tariff wars typically occurred during renegotiation of trade treaties that had expired or were about to expire.<sup>141</sup> The game played in this period involved commitment to punitive tariff policy and retaliation. A country—usually for reasons relating to trade negotiations—would increase import duties on goods imported from its trading partner.<sup>142</sup> The country against whom the tariffs were directed would then engage in reprisal.<sup>143</sup> In some cases, the parties would enter into a treaty that would reflect the market or bargaining power of the treaty parties.<sup>144</sup> One author writing at the time found, “As a matter of fact tariff policy is being considered by various countries at the present day from the point of view of ‘Retaliation.’”<sup>145</sup>

The period between the first and second World Wars was an era of protectionism and economic decline.<sup>146</sup> Punitive tariffs, economic instability, and depression led to substantial shrinkages of international trade flows, leading one prominent economist in 1938 to ask, will international trade “ever play again the same dominant part in the economic life of the world that it played in the nineteenth century?”<sup>147</sup> Woodrow Wilson’s third of fourteen points, made in his famous speech to the United States Congress in 1918 regarding the conditions for a sustainable peace after World War I, called for “removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.”<sup>148</sup> This is far from what actually occurred, however, and international trade during the interwar years provides a number of lessons on the significance of institutions to international co-operation in the area of trade.

Although by no means a complete identification of issues spanning the globe and a significant time period, the following four problems characterize the interwar years:

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140. *Id.* at 72.

141. *See id.* at 70.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (quoting H. DIETZEL, *RETALIATORY DUTIES* 10 (D.W. Simon & W. Osborne Brigstocke trans., 1906)).

146. Joan R. Rosés & Nikolaus Wolf, *Prosperity and Depression in the European Economy during the Interwar Years (1913-1950): An Introduction*, UNIVERSIDAD CARLOS III DE MADRID (June 2008), [http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/wolf/wp\\_08-10.pdf](http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/wolf/wp_08-10.pdf).

147. *See* D.H. Robertson, *The Future of International Trade*, 48 *ECON. J.* 1, 1 (1938).

148. President Woodrow Wilson, *President Woodrow Wilson’s Fourteen Points* (Jan. 8, 1918), available at [http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp) (last visited Feb. 7, 2014).

*The Use of Trade as Warfare.* Charles P. Kindleberger describes international trade relations between countries in the interwar years as follows: "As the world economy slowly settled down, the pre-war system of trade treaties was resumed, with extension of the principle of high legislative tariffs so-called 'bargaining' or 'fighting' tariffs which would be reduced through mutual tariff concessions agreed in bilateral treaties, and extended through the most-fav[or]ed-nation clause."<sup>149</sup>

A League of Nations report issued in 1942—looking back at the interwar years—found that "[t]rade was consistently regarded as a form of warfare, as a vast game of beggar-my-neighb[or], rather than as a [cooperative] activity from the extension of which all stood to benefit."<sup>150</sup> In the interwar years, France and other countries developed the contemporary version of the quota or quantitative restriction.<sup>151</sup> There was an increase in the use of domestic regulation to restrict trade.<sup>152</sup> Canada promulgated the first anti-dumping legislation in 1904, which was subsequently amended in 1921.<sup>153</sup> Australia, Britain, New Zealand, and the United States also promulgated anti-dumping legislation in 1921, and Japan did so one year earlier, in 1920.<sup>154</sup>

In addition to using tariffs in the 1930s, countries also used ingenious non-tariff barriers.<sup>155</sup> The popular claim that non-tariff barriers are a phenomenon of the latter twentieth century may be unfounded. In the 1930s, there was an increasing use of sophisticated quotas and licensing restrictions.<sup>156</sup>

*The Disastrous Smoot-Hawley Tariff Regime.* On June 17, 1930, United States President Herbert Hoover signed the Smoot-Hawley Tariff Act of 1930<sup>157</sup> into law.<sup>158</sup> As a result of the Smoot-Hawley Act, Unit-

149. Charles P. Kindleberger, *Commercial Policy Between the Wars*, in VIII THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE: THE INDUSTRIAL ECONOMICS: THE DEVELOPMENT OF ECONOMIC AND SOCIAL POLICIES 161, 164 (Peter Mathias & Sidney Pollard eds., 1989).

150. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 6 (2d ed. 1990).

151. CHARLES P. KINDLEBERGER, *THE WORLD IN DEPRESSION, 1929-1939*, at 169, 262-77 (rev. & enlarged ed. 1986).

152. See *The Economics and Political Economy of International Trade Cooperation*, WTO, [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/wtro07-2b\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/wtro07-2b_e.pdf) (last visited Mar. 11, 2014).

153. Kindleberger, *supra* note 149, at 163.

154. *Id.*

155. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 9.

156. *Id.*

157. 19 U.S.C. § 1202 (1930).

158. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 5.

ed States protectionism “reached an unprecedented height.”<sup>159</sup> The Act raised customs duties on manufactured goods by more than sixty percent, with an average tariff rate around forty-five to fifty percent for manufactured goods.<sup>160</sup> According to Kindleberger, “[a] groundswell of resentment spread around the world and quickly led to retaliation.”<sup>161</sup> By the latter half of 1931, twenty-five countries retaliated by increasing their duties on goods of United States origin.<sup>162</sup> At the time, the entire globe was in the throes of the Great Depression, and this exacerbated the effects of the tariff war.<sup>163</sup> The value and volume of world trade declined substantially.<sup>164</sup> Between 1929 and 1932, the value of world trade declined by about sixty percent, which was a decline of about thirty-five percent in the volume of world trade.<sup>165</sup>

The effects of the Smoot-Hawley tariff regime went much farther than the data would suggest. Kindleberger explains:

The significance of the [Smoot-Hawley] tariff goes far beyond its effect on American imports and the balance of payments to the core of the question of the stability of the world economy. President Hoover let Congress get out of hand and failed to govern . . . ; by taking national action and continuing on its own course through the early stages of the depression, the United States served notice on the world that it was unwilling to take responsibility for world economic stability.<sup>166</sup>

The tariff war resulting from the Smoot-Hawley Act did not abate until passage of the Reciprocal Trade Agreements Act of 1934<sup>167</sup> by the U.S. Congress.<sup>168</sup> In June 1934, the U.S. Congress granted the President the authority to enter into trade agreements with other countries.<sup>169</sup> Congress extended presidential authority several times, and the

159. *Id.*

160. *Id.*

161. Kindleberger, *supra* note 149, at 170.

162. BAIROCH, *ECONOMICS AND WORLD HISTORY*, *supra* note 77, at 5.

163. *Id.* Bairoch states that the Smoot-Hawley measures and the retaliation that followed were a result of the depression, but the depression was not the result of the tariff war, “as is too often claimed.” *Id.*

164. *Id.* at 9.

165. *Id.*

166. Kindleberger, *supra* note 149, at 171.

167. Reciprocal Trade Agreement of 1934, Pub. L. No. 73-316, ch. 474, 48 Stat. 943 (1934); *see also* The Reciprocal Trade Agreement Act of 1934, *available at* <http://history.house.gov/HistoricalHighlight/Detail/S6918>.

168. Kindleberger, *supra* note 149, at 186.

169. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT 37* (1969) [hereinafter JACKSON, *WORLD TRADE*].

President entered into thirty-two trade agreements between 1934 and 1945.<sup>170</sup>

In 1931 and 1932, the United Kingdom initiated the Imperial Preference, based on the principle of "home producers first, empire producers second, and foreign producers last."<sup>171</sup> The British imperial preference was negotiated at the Imperial Economic Conference in Ottawa, Canada in 1932.<sup>172</sup> As a result of this conference, Britain entered into a series of bilateral agreements with Commonwealth countries and other entities of the British Empire.<sup>173</sup> The British imperial preference survived the initiation of the GATT in 1947, however at reduced margins, and eventually the preference was abandoned.<sup>174</sup> In the early twentieth century, most countries with colonies used imperial preferences; although, the British imperial preference was perhaps the most significant in terms of the markets to which it applied.<sup>175</sup>

*The Vacuum of Superpower Status.* The interwar years were a period of transition. Great Britain was the nineteenth century superpower, but in the early twentieth century—after World War I—British hegemony ended, and no other country was ready to take Britain's place.<sup>176</sup> The United States was not ready to assert itself, despite having the largest economy in the world by the end of the nineteenth century.<sup>177</sup> As explained by Richard Gardiner in his classic exposition of British-American initiatives to implement a multilateral trade regime,

[t]he dominant tradition . . . of American [trade] policy had been a compound of economic isolation and economic nationalism. Before the mid-1930's the United States paid little attention to international economic problems; on the occasions when it was forced to do so it played a lone hand without much regard for the interests of other countries.<sup>178</sup>

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170. *Id.*

171. See The Cabinet Papers 1915-1984, Policy, Protectionism and Imperial Preference, [www.nationalarchives.gov.uk/cabinetpapers/themes/policy-protectionism-imperial-preference.htm](http://www.nationalarchives.gov.uk/cabinetpapers/themes/policy-protectionism-imperial-preference.htm); Herbert Feis, *The Future of British Imperial Preferences*, FOREIGN AFFAIRS, 5 July 1946.

172. *Id.*

173. *Id.*

174. See *id.*

175. *Id.*

176. Kindleberger, *supra* note 149, at 167 ("Britain lost the will and lacked the power to enforce international cooperation as she had done in the nineteenth century.").

177. *Id.* at 171.

178. RICHARD N. GARDINER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* 1 (rev. ed.

According to Kindleberger, at least one prominent British policy maker at the beginning of World War II believed that restoration of an international system required an "American-dominated system, rooted in *Pax Americana*."<sup>179</sup>

*Failed Attempts to Create a Multilateral Trading System.* Ostensibly, governments in the interwar years espoused liberal trade.<sup>180</sup> There was a dramatic divergence, however, between what governments said and what they actually did.<sup>181</sup> Countries convened many international conferences, many under the auspices of the League of Nations, ostensibly to take action to halt the rise of trade restrictions, but what usually happened at these conferences was that they "papered the record," meaning they provided evidence of the problem but nothing else.<sup>182</sup> The 1942 League of Nations report, quoted *supra*, concluded that a normative preference for liberalized trade was "accepted by all in theory but repudiated by almost all in practice. It was repudiated in practice because, as the issue presented itself on one occasion after another, it seemed only too evident that a [g]overnment that did not use its bargaining power would always come off second-best."<sup>183</sup> Robert Hudec is of the view that the interwar conferences "produced at least one accomplishment of substance. They gave trade policy officials from the major trading nations an opportunity to come together and work out their ideas."<sup>184</sup>

During World War II, the U.S. government undertook to formulate its postwar policy.<sup>185</sup> One of the major tenets of that policy was a multilateral approach to trade liberalization.<sup>186</sup> During the war, U.S. policy makers started to realize that their leadership was required to establish a liberal world trade order.<sup>187</sup> A liberal world trade order was viewed, moreover, as an integral part of American foreign policy because free trade was linked to the prevention of war.<sup>188</sup> Cordell Hull, Secretary of State during the Roosevelt Administration, was one of the principal proponents of a liberal multilateral trade order based on reduction of

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1969).

179. Kindleberger, *supra* note 149, at 196.

180. *See id.* at 166.

181. *See id.*

182. *See id.* at 166-67.

183. HUDEC, *supra* note 150, at 6-7.

184. *Id.* at 7-8.

185. GARDINER, *supra* note 178, at 23.

186. *Id.*

187. *See id.*

188. *See id.*

trade barriers and non-discrimination, a style of trade liberalization the U.S. government promoted in its pre-war bilateral trade agreements with other countries.<sup>189</sup> As one British author of the time stated:

The post-war planners in the United States were determined to break with the unhappy legacy of economic isolationism and economic nationalism which had been inherited from the past. They were united in seeking the reconstruction of a multilateral trading system which could form the basis for prosperity and peace. Their planning toward this end reflected courage, generosity, and a large amount of genuine idealism.<sup>190</sup>

There was a mixed response from the British government to the American idea of a liberal multilateral trade order.<sup>191</sup> Many in government at the time were free traders, but there were pressures for maintenance of the imperial preference and for socialist policies that would be based on autarky.<sup>192</sup>

During the war, the British and American governments tried to set forth common objectives in the international economic arena, which laid the groundwork for the GATT and the ITO.<sup>193</sup> The first British-American foray into setting the postwar international-trade-policy agenda occurred at the Atlantic Conference in August 1941.<sup>194</sup> The Atlantic Charter<sup>195</sup> stated that the United States and Great Britain "desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security."<sup>196</sup> The British and American governments also agreed that "they will endeavor, with due respect for their existing obligations, to further the enjoyment by all [s]tates, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity."<sup>197</sup>

Informal, non-binding discussions between United States and United Kingdom commercial-policy officials in 1943 further laid the foundation

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189. *See id.* at 13, 20.

190. *Id.* at 23.

191. *Id.* at 39.

192. *See id.* at 33-34, 36.

193. *See id.* at 40.

194. *Id.* at 40.

195. Atlantic Charter, U.S.-U.K., Aug. 14, 1941, available at <http://avalon.law.yale.edu/wii/atlantic.asp>.

196. *Id.*

197. *Id.*

for the 1946-1948 negotiation of the GATT and the ITO Charter.<sup>198</sup> The two countries took complementary views of how the postwar trading system should take shape. The parties agreed on the need for a multilateral agreement on trade policy and an international organization that could interpret the agreement, investigate complaints, and settle trade disputes between countries.<sup>199</sup> The participants agreed that the rules of the agreement should be very precise.<sup>200</sup> The 1943 seminar sowed the seeds for a rule-based multilateral trade regime.

In 1944, Britain and the United States held a conference in the town of Bretton Woods, New Hampshire.<sup>201</sup> This now famous conference, known as the Bretton Woods Conference, laid the foundation for the postwar international economic order.<sup>202</sup> The Bretton Woods Conference envisioned the creation of three international institutions, each of which would deal with an important aspect of the international economy.<sup>203</sup> The result of the conference was the drafting of the charter for the International Bank for Reconstruction and Development, also known as the World Bank, and the International Monetary Fund (IMF).<sup>204</sup> The initial purpose of the IMF was to maintain the stability of exchange rates and to assist countries with balance-of-payments difficulties through access to special drawing rights at the IMF.<sup>205</sup> The macroeconomic policy goal of the IMF was intended to alleviate the need for countries to rely on trade restrictions in order to improve their balance-of-payments accounts.<sup>206</sup> The initial purpose of the World Bank was to provide financing for the reconstruction of war-torn economies in Europe and Asia; the Bank in the 1960s interpreted its Articles of Agreement to permit the Bank to finance development in developing countries.<sup>207</sup>

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198. HUDEC, *supra* note 150, at 9.

199. GARDINER, *supra* note 178, at 104.

200. *Id.*

201. JACKSON, *WORLD TRADE*, *supra* note 169, at 40.

202. *See id.*

203. TREBILCOCK & HOWSE, *supra* note 63, at 23.

204. JACKSON, *WORLD TRADE*, *supra* note 169, at 40; TREBILCOCK & HOWSE, *supra* note 63, at 23.

205. TREBILCOCK & HOWSE, *supra* note 63, at 23.

206. *Id.*

207. *See* MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 23-24 (4th ed. 2013).



#### D. *The GATT*

The Bretton Woods Agreement contemplated a third international institution to deal with trade policy—the ITO.<sup>208</sup> The GATT was only intended to be an adjunct to the ITO—a provisional international agreement with no real institutional framework.<sup>209</sup> What happened was the opposite of what the trade negotiators from the twenty-three countries that negotiated the GATT intended. The GATT became the major constitutional document for international trade relations between countries, and the ITO never came into existence.<sup>210</sup>

The GATT, which still applies today in the context of the WTO agreements, was negotiated in a series of conferences that occurred between 1946 and 1948.<sup>211</sup> The governments involved in these conferences sought to produce two international agreements—the ITO Charter and the GATT.<sup>212</sup> In 1945 and 1946, the United States government composed a draft charter for the ITO.<sup>213</sup> The 1946 document, entitled a “Suggested Charter for an International Trade Organization of the United Nations,”<sup>214</sup> formed the basis for the “Havana Charter”<sup>215</sup> of 1948.<sup>216</sup>

A total of four preparatory conferences took place.<sup>217</sup> In 1946, interested governments formed a preparatory committee and met in London in what is now known as the London Conference.<sup>218</sup> The second meeting was in Lake Success, New York.<sup>219</sup> Although the second meeting was brief, it did result in the consideration of the initial draft

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208. *Id.*

209. See JACKSON, *WORLD TRADE*, *supra* note 169, at 42-43 (describing the proposal of the GATT as necessary to the functioning of the ITO).

210. See generally DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, *THE GENESIS OF THE GATT* (2008) (providing a comprehensive history of the GATT negotiations).

211. JACKSON, *WORLD TRADE*, *supra* note 169, at 42.

212. *Id.*

213. *Id.* at 41.

214. U.S. DEPT OF STATE, *SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS* (1946), available at <http://www.worldtradelaw.net/misc/Suggested%20Charter.pdf>.

215. United Nations Conference on Trade and Employment, Nov. 21, 1947 - Mar. 24, 1948, *Final Act of the United Nations Conference on Trade and Employment*, U.N. Doc. E/Conf. 2/78, available at [http://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/havana_e.pdf).

216. JACKSON, *WORLD TRADE*, *supra* note 169, at 41.

217. *Id.* at 42.

218. *Id.*

219. *Id.* at 43.

of the GATT.<sup>220</sup> The third and most important meeting was held in Geneva from April to November 1947, and the fourth meeting, which resulted in the completion of the ITO Charter, was held in Havana in 1948.<sup>221</sup> Hence, the final ITO Charter is referred to as the "Havana Charter."<sup>222</sup>

The history of the drafting of the GATT and the ITO Charter are intertwined.<sup>223</sup> The Geneva meeting that occurred in 1947 was divided into three parts.<sup>224</sup> One part considered the creation of an institution—the ITO. Another part dealt with tariff reductions, and another part with "general clauses" to be included in the GATT, which would apply to the detailed tariff bindings.<sup>225</sup> The general clauses were intended to be international legal obligations that would protect the value of tariff concessions granted in the negotiations.<sup>226</sup> They would apply to the detailed schedules of tariff reductions appended to the GATT, which were the product of "thousands of individual tariff commitments that resulted from numerous bilateral meetings of negotiators."<sup>227</sup> The GATT was intended primarily as an agreement to reduce tariffs and to deter countries from taking actions that would circumvent their promises to reduce tariffs.<sup>228</sup> It was a trade agreement intended to memorialize tariff concessions made in a conference that was seen at the time as the first of a number of such conferences to be conducted with the ITO in place as the organizer of such conferences.<sup>229</sup> The GATT was not intended to provide an international institution to govern international trade relations between nation-states. Rather, it was supposed to work within the ITO structure and under the ITO's institutional framework.<sup>230</sup>

The ITO Charter never came into effect.<sup>231</sup> Although the U.S. executive branch took the lead, along with the British government, in the idea for an international trade institution and in drafting the ITO

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220. *Id.*

221. *Id.* at 43-45.

222. KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 10 (1970).

223. JACKSON, *WORLD TRADE*, *supra* note 169, at 35.

224. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 37 (2d ed. 1997) [hereinafter JACKSON, *WORLD TRADING SYSTEM*].

225. *Id.*

226. *See id.*

227. *Id.* at 38.

228. *See id.* at 37.

229. DAM, *supra* note 222, at 11.

230. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 38.

231. *See id.*

Charter, Congress refused to approve it.<sup>232</sup> Ultimately, in 1950, President Harry Truman decided not to submit the Charter to Congress for approval.<sup>233</sup> With the failure of the United States to accept the Charter, other countries also declined, likely because the United States was a dominant economic power with the largest economy in the world.<sup>234</sup> The Charter was not approved by the British Parliament either.<sup>235</sup> The United States never approved the Charter, and the ITO was not born from the negotiations.<sup>236</sup>

Some have argued that the ITO Charter failed because it was too detailed.<sup>237</sup> The drafters sought to take a code-like approach, setting forth detailed obligations for members. As Kenneth Dam explains:

The code that the United States sought could, however, only be put into effect by common agreement. Consequently, the U.S. draft of this code was shot full of holes, first at home by the need to permit continuation of certain U.S. protectionist policies, then abroad by the British insistence on continuing the imperial preference arrangement (which involved discrimination by Commonwealth countries in favor of one another) and on retaining the right to use quantitative restrictions to protect the shaky pound sterling, and finally at the drafting conferences by countries that differed profoundly from the United States in their view of the role of the state in international trade. The result was a grotesquely complicated document that included a multitude of detailed compromises and that all too often saw a free-trade principle followed immediately by an exception authorizing trade restrictions.<sup>238</sup>

Gardiner puts it this way:

The two major sponsors of the [ITO] sought to incorporate in the Charter a detailed statement of their fav[or]ite economic doctrines. The United States pressed formal undertakings for the elimination of Imperial Preference, quantitative restrictions, and discrimination of all kinds. The United Kingdom pressed equally detailed undertakings to protect domestic policies of full employment. The result was an elaborate set of rules and counter-rules that offered imperfect standards for national policy. These rules and counter-rules satisfied nobody and alienated nearly everybody. They grew into such a

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232. *See id.*

233. *Id.*

234. *See id.*

235. ELIZABETH BORWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* (paperback ed. 2007).

236. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 38.

237. *See, e.g.,* DAM, *supra* note 222, at 14.

238. *Id.*

mountain of complexity that the [ITO] finally collapsed of its own weight.<sup>239</sup>

The irony of the ITO's failure is that the parties that really pushed for its adoption—Britain and the United States—were responsible for its failure.

The GATT, however, survived. The GATT was completed in late 1947 at the Geneva preparatory conference, well before the ITO Charter was finalized in Havana.<sup>240</sup> On October 30, 1947, eight of the twenty-three original contracting parties to the GATT, including Britain, approved the GATT on a provisional basis, to come into effect as of January 1, 1948, in accordance with a "Protocol of Provisional Application."<sup>241</sup> It remains in force today.<sup>242</sup> There were a number of political and economic reasons for the provisional application. It provided the original contracting parties with the ability to agree to the GATT with only executive or administrative authority rather than legislative authority because Part II of GATT 1947, which contained the predominant substantive obligations, was subject to the "grandfather rights" or an "existing legislation" exception that is contained in the Protocol of Provisional Application.<sup>243</sup> The relevant provision provided that Part II of GATT 1947 was to be implemented "to the fullest extent not inconsistent with existing legislation."<sup>244</sup> Provisional application was not a risky venture at the time because the negotiators planned to submit the GATT for definitive application along with the ITO Charter.<sup>245</sup> From an economic standpoint, the negotiators preferred the GATT to come into force as soon as it was negotiated to deter harmful strategic behavior by exporters and importers.<sup>246</sup> Although GATT negotiations were conducted in secret, leaks were inevitable, and the governments negotiating the GATT wanted to avoid the disruption of world trade as traders might withhold sales in anticipation of a tariff reduction.<sup>247</sup> The contracting parties agreeing to the provisional GATT

239. GARDINER, *supra* note 178, at 379.

240. See JACKSON, *WORLD TRADE*, *supra* note 169, at 43-45 (discussing the Geneva Conference).

241. See *WTO Legal Texts*, *supra* note 4 (follow "Explanations," located under "Must be read with GATT 1947").

242. *Id.*

243. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 40.

244. MARY E. FOOTER, *AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION* 99 (2006).

245. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 40.

246. JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO: INSIGHTS ON TREATY LAW & ECONOMIC RELATIONS* 24 (2007) [hereinafter JACKSON, *JURISPRUDENCE*].

247. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 39.

did not know that the ITO Charter was doomed to fail. Given the Charter's failure, GATT 1947 became the constitutional instrument of the post-war multilateral trade order.

The main provisions of GATT 1947 are set forth in three parts. Part I contains the most-favored-nation obligation (Article I) and tariff concession obligations (Article II). Part II is comprised of Articles III through XXIII and includes substantive obligations on national treatment of taxation (Article III), customs (Article VII), quantitative restrictions (Articles XI & XIII), transparency (Article X), subsidies (Article XVI), anti-dumping (Article VI), and GATT exceptions (Article XX). Part III is mainly procedural and contains articles on amending GATT 1947 (Article XXX) and accession by countries to GATT 1947 (Article XXXIII).<sup>248</sup>

A key institutional feature of GATT 1947 was its lack of a formal apparatus to establish an international organization. This was supposed to be accomplished by the ITO Charter.<sup>249</sup> GATT, however, since its founding and for the approximately fifty years during which it was the only multilateral trade agreement between countries, became a *de facto* international organization with a GATT Secretariat and a staff.<sup>250</sup> Under the auspices of the GATT, the GATT contracting parties conducted eight rounds of negotiations up to the Uruguay Round in 1994, the last completed round.<sup>251</sup> The purpose of these rounds was to liberalize trade progressively, and they resulted in gradual expansion of GATT coverage, sometimes through separate codes or agreements.<sup>252</sup>

This overview of the history of trade regulation brings us through the immediate post-World War II period. This period marks the beginning of a multilateral institutional framework for regulating international trade. Prior to World War II, and going back many centuries into recorded history, the dominant approach to trade relations was in the form of bilateral or at most modest regional agreements.

The GATT was progressively changed through negotiating rounds in which GATT Contracting Parties sought further concessions in various areas of trade.<sup>253</sup> Its operation complied with a norm of what is widely

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248. GATT 1947, *supra* note 13, at art. III-XXIII.

249. *Cf.* JACKSON, *WORLD TRADE*, *supra* note 169, at 44 (describing GATT as auxiliary to the ITO Charter).

250. *See id.* at 3, 12 (comparing GATT to the rolling ruins of a bicycle and discussing the effects of organization on GATT staff).

251. *See Understanding the WTO*, WORLD TRADE ORG., [www.wto.org/english/thewto\\_what\\_is\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_what_is_e/tif_e/fact4_e.htm) (last visited Mar. 12, 2014).

252. *See id.*

253. *See id.*

known as progressive trade liberalization.<sup>254</sup> Markets are what we make of them in the form of rules. It is these rules, as they existed in the public realm, which were the subject of the GATT negotiating rounds and the WTO rounds as well.<sup>255</sup> The later rounds are probably the most important for our short institutional history here: the Kennedy (1964-67), Tokyo (1973-79), and Uruguay (1986-94) rounds.<sup>256</sup> The Uruguay Round established the World Trade Organization and set the framework for the contemporary normative order governing world trade.<sup>257</sup>

### *E. The World Trade Organization and the WTO Agreements*

I can only provide a summary of the World Trade Agreements here. Table 1, *infra*, sets forth what is essentially the table of contents for the WTO Agreements in their current form.<sup>258</sup> They were agreed to during the Uruguay Round, and consequently are sometimes referred to as the “Uruguay Round Agreements.” Omitted from Table 1 are virtually all of the “Decisions” and “Declarations” taken in the Uruguay Round.<sup>259</sup> Also omitted are the approximately 25,000 pages of schedules that are part of the Agreements, which reflect agreements on tariff concessions.

The “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations”<sup>260</sup> is what it says it is. It is the final act of the ministers who met from 1986 through 1994 and concluded the Uruguay Round agreements.<sup>261</sup> The terminology here—“Final Act”—is somewhat misleading because it uses a word—“Act”—usually used to refer to domestic legislation. In the WTO context, however, “Final Act” refers to the agreement that government officials made to put the WTO Agreements through the process of approval and ratification under the

254. See, e.g., Speech by EU Trade Commissioner Mandelsohn: Progressive Trade Liberalisation in a Globalised World, [www.eu-un.europa.eu/articles/en/article\\_5960\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_5960_en.htm); Thomas Cottier, *From Progressive Liberalization to Progressive Regulation in WTO Law*, 9 J. INT'L ECON. L. 77 (2006); Daniel J. Ikenson, *Protectionist Pandemics?: The Durability of Free Trade*, 10 GEO. J. INT'L AFF. 15, 18 (2009).

255. See *id.*

256. *Understanding the WTO*, *supra* note 251.

257. See *The Uruguay Round*, WORLD TRADE ORG., [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited Mar. 12, 2014).

258. See *infra* Table 1.

259. The concept of decisions in the WTO context is discussed *infra*.

260. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 [hereinafter Final Act], available at [http://www.wto.org/english/docs\\_e/legal\\_e/03-fa.pdf](http://www.wto.org/english/docs_e/legal_e/03-fa.pdf).

261. See *WTO Legal Texts*, *supra* note 4.

domestic laws of the individual WTO members and to adopt Ministerial Declarations and Decisions.<sup>262</sup>

The Agreement Establishing the World Trade Organization<sup>263</sup> is the "umbrella" instrument, sometimes known as the "WTO Charter."<sup>264</sup> Only ten pages long, it is a significant instrument because it establishes the institutional framework for the WTO and sets up the WTO as an official international organization on international trade matters.<sup>265</sup> Under the Charter, "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."<sup>266</sup> The WTO is an international legal personality and it and its officials enjoy the privileges and immunities typically accorded international organizations and their agents.<sup>267</sup> The WTO Charter contains an order of precedence clause, which provides that "[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict."<sup>268</sup>

The annexes to the Charter are the "meat and potatoes" of the WTO Agreements. In distinction from the WTO Charter, they are quite

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262. See generally Final Act, *supra* note 260, at para. 2.

263. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement], available at [http://wto.org/english/doc\\_e/legal\\_e/04-wto.pdf](http://wto.org/english/doc_e/legal_e/04-wto.pdf).

264. JACKSON, WORLD TRADING SYSTEM, *supra* note 224, at 47.

265. See Marrakesh Agreement, *supra* note 263, at art. I.

266. *Id.* at art. II, para. 1.

267. *Id.* art. VIII. Article VIII of the Marrakesh Agreement provides in pertinent part as follows:

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.
2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.
3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.
4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

*Id.* at art. VIII, paras. 1-4.

268. *Id.* at art. XVI, para. 3.

lengthy. Annex 1 contains the multilateral agreements.<sup>269</sup> Annex 1 is divided into three parts to cover the three major divisions of substantive regulation at the WTO level. Annex 1A contains the multilateral agreements on trade in goods.<sup>270</sup> Goods have been the core area of GATT coverage since the founding of the GATT in 1947.<sup>271</sup> Annex 1B contains the General Agreement on Trade in Services (GATS).<sup>272</sup> GATT covers goods and GATS covers services. Services were dealt with for the first time in the Uruguay Round.<sup>273</sup> Given the system of progressive liberalization that is used in the WTO system, GATS is in its nascent stages and is not nearly as developed as GATT in liberalizing markets. Annex 1C contains the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>274</sup> Intellectual property rights were addressed for the first time in the Uruguay Round.<sup>275</sup>

WTO members are also required to accept the Dispute Settlement Understanding (DSU), set forth in Annex 2,<sup>276</sup> and the Trade Policy Review Mechanism (TPRM), set forth in Annex 3.<sup>277</sup> Annex 4 contains the plurilateral agreements: the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement.<sup>278</sup>

A WTO agreement that is *multilateral* is mandatory, which means that all WTO members must accept and comply with it.<sup>279</sup> Multilateral agreements are to be distinguished from *plurilateral* agreements, which are agreements that WTO members may in their discretion agree to.<sup>280</sup> The authority for these distinctions and definitions is found in three places in the WTO agreements. The Final Act provides that the WTO agreements "shall be open for acceptance as a whole," and that acceptance of the so-called plurilateral agreements included in Annex 4 are to be governed by the provisions of the particular plurilateral

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269. See *WTO Legal Texts*, *supra* note 4.

270. *Id.*

271. See GATT 1947, *supra* note 13, at 1 (recognizing that trade should be conducted with the aim of "expanding the production and exchange of goods").

272. General Agreement of Trade in Services, Apr. 15, 1994, Annex 1B, 1869 U.N.T.S. 183.

273. *The Uruguay Round*, *supra* note 257.

274. *WTO Legal Texts*, *supra* note 4.

275. *The Uruguay Round*, *supra* note 257.

276. *WTO Legal Texts*, *supra* note 4.

277. *Id.*

278. *Id.*

279. See Marrakesh Agreement, *supra* note 263, at art. II, para. 2.

280. See *id.* at para. 3.



agreement in issue.<sup>281</sup> Furthermore, Article II of the WTO Charter provides in pertinent part as follows:

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.<sup>282</sup>

Finally, the last possible authority for the distinction between multilateral and plurilateral agreements can be found in Article XVI of the WTO Charter. Article XVI prohibits reservations by WTO members to multilateral agreements except as allowed in the agreements themselves, and provides a looser standard for plurilateral agreements, simply saying that reservations to plurilateral agreements are to be governed by the provisions of the particular agreement.<sup>283</sup>

There is a historical context for the "single-package" concept bound up in the term "multilateral." One of the main criticisms of the Tokyo Round of trade negotiations was that GATT contracting parties were able to choose which "code" they would comply with, creating in essence a "GATT *à la carte*."<sup>284</sup> The problems with an *à la carte* GATT were that it was very complex and costly to administer and violated the spirit of the basic GATT non-discrimination principles.<sup>285</sup> In the Uruguay Round, the WTO agreements are for the most part a take-it-or-leave-it package.

One of the more notable features of the Final Act and the Uruguay Round was that it was not an amendment of existing GATT instruments, but the provision of an entirely new set of agreements.<sup>286</sup> The General

281. Final Act, *supra* note 260, at para. 4.

282. Marrakesh Agreement, *supra* note 263, at art. II, paras. 2-3.

283. *Id.* at art. XVI, para. 5.

No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

*Id.*

284. See JACKSON, WORLD TRADING SYSTEM, *supra* note 224, at 47.

285. *Id.* at 70.

286. *Id.* at 47.

Agreement on Tariffs and Trade 1994 (GATT 1994)<sup>287</sup> was another smaller umbrella instrument covering the set of multilateral agreements that resulted from the Uruguay Round dealing with trade in goods.<sup>288</sup> These agreements are “legally distinct” from “GATT 1947,” the original GATT.<sup>289</sup> It was thus unnecessary to adhere to amendment procedures set forth in the GATT.<sup>290</sup> Having said this, the Uruguay Round agreements do continue to enforce the GATT as it was conceived in 1947, as well as a good deal of what evolved in the years thereafter. The WTO Charter provides that, except as otherwise provided, “the WTO shall be guided by the decisions, procedures and customary practices followed by the [contracting parties] to GATT 1947 and the bodies established in the framework of GATT 1947.”<sup>291</sup> In addition, GATT 1994 provides that it includes GATT 1947 and the protocols and certifications relating to tariff concessions, protocols of accession, decisions on waivers, and other decisions made by contracting parties to GATT 1947.<sup>292</sup>

Table 1: The WTO Agreements<sup>293</sup>

## ANNEX 1: FINAL ACT — AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

### ANNEX 1A: MULTILATERAL AGREEMENTS ON TRADE IN GOODS

- General Agreement on Tariffs and Trade 1994
- General Agreement on Tariffs and Trade 1947
- Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 (*on regional trade agreements*)
  - Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994
- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade

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287. General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter GATT 1994].

288. See *WTO Legal Texts*, *supra* note 4.

289. Marrakesh Agreement, *supra* note 263, art. II, para. 4.

290. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 47.

291. Marrakesh Agreement, *supra* note 263, art. XVI, para. 1.

292. GATT 1994, *supra* note 287, at para. 1.

293. *WTO Legal Texts*, *supra* note 4.

- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (*antidumping*)
- Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (*customs valuation*)
- Agreement on Preshipment Inspection
- Agreement on Rules of Origin
- Agreement on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards

#### ANNEX 1B: GENERAL AGREEMENT ON TRADE IN SERVICES

#### ANNEX 1C: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

#### ANNEX 2: UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

#### ANNEX 3: TRADE POLICY REVIEW MECHANISM

#### ANNEX 4: PLURILATERAL TRADE AGREEMENTS

##### ANNEX 4(a) AGREEMENT ON TRADE IN CIVIL AIRCRAFT

##### ANNEX 4(b) AGREEMENT ON GOVERNMENT PROCUREMENT

##### ANNEX 4(c) INTERNATIONAL DAIRY AGREEMENT

##### ANNEX 4(d) INTERNATIONAL BOVINE MEAT AGREEMENT

##### UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

The original GATT, now known as "GATT 1947" in the post-Uruguay-round context, was not an organization, nor did it have an organization to administer it, at least in a formal legal sense.<sup>294</sup> The ITO failed to come into existence.<sup>295</sup> Consequently, the GATT had "contracting parties" instead of members.<sup>296</sup> But in fact, the GATT operated as an international organization, complete with various committees and working parties.<sup>297</sup>

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294. See JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 59.

295. See *id.* at 38.

296. *Id.* at 59.

297. JACKSON, *WORLD TRADE*, *supra* note 169, at 157-62.

The WTO, by contrast, is a full-fledged intergovernmental organization, meeting the requirements in international law for such status.<sup>298</sup> The WTO has “members” in a formal legal sense and not simply as a matter of practice. The original membership of the WTO consists of the GATT 1947 contracting parties as of the date of entry into force of the WTO Charter and the European Communities.<sup>299</sup>

The date of entry into force for the WTO is January 1, 1995, the date when the WTO came into existence under the WTO Charter.<sup>300</sup> It is also the date when the WTO Multilateral Agreements set forth in the Annexes came into force.<sup>301</sup> The agreements should be reviewed, however, for their effective dates because some obligations are phased in, particularly obligations of developing countries.<sup>302</sup> Procedures also exist in the WTO Charter for members to accept an agreement after its entry into force, which may be needed in the event that an original member has to delay acceptance pending approval by its legislature or other governmental authority, or for new members who accede to the WTO.<sup>303</sup> The entry into force of plurilateral agreements is governed entirely by the terms of those agreements.<sup>304</sup>

WTO membership is not limited to “countries” or “nations.” WTO membership hinges on an economic definition of a “customs territory,”

298. See BERNARD HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 69 (2001) (“The WTO is an inter-governmental organization. Only government representatives have legal standing.”).

299. Marrakesh Agreement, *supra* note 263, art. II, para. 1.

300. See Final Act, *supra* note 260, at para. 3. The WTO Charter provides that “[t]his Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.” Marrakesh Agreement, *supra* note 263, art. XIV, para. 1. Paragraph 3 of the Final Act provides:

The representatives *agree* on the desirability of acceptance of the WTO Agreement by all participants in the Uruguay Round of Multilateral Trade Negotiations (hereinafter referred to as “participants”) with a view to its entry into force by 1 January 1995, or as early as possible thereafter. Not later than late 1994, Ministers will meet, in accordance with the final paragraph of the Punta del Este Ministerial Declaration, to decide on the international implementation of the results, including the timing of their entry into force.

Final Act, *supra* note 260, at para. 3.

301. Cf. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 224, at 4.

302. See *Who are the Developing Countries in the WTO?*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Mar. 12, 2014).

303. Marrakesh Agreement, *supra* note 263, art. XIV, para. 2.

304. *Id.* at art. XIV, para. 4. (“The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.”).

rather than on a political definition of a state.<sup>305</sup> The eligibility criteria are discussed *infra* in the context of accessions to the WTO and the WTO agreements, because it is in accessions that the issue arises.<sup>306</sup> With the exception of the European Union (EU), the determination of original membership depends on an entity's status as a GATT contracting party.<sup>307</sup> The EU was added as a member because it is a "customs territory" as that term is defined in the WTO Charter and because all of its members were original GATT 1947 contracting parties.<sup>308</sup>

Outside of original membership in the WTO, the predominant way to become a member of the WTO is through accession. The WTO Charter provides that "[a]ny [s]tate or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO."<sup>309</sup> A "customs territory" is defined in GATT as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories."<sup>310</sup> Decisions on accession are to be taken at Ministerial Conferences, and a two-thirds majority of current WTO members must approve.<sup>311</sup> This can take many years. China's WTO accession took fifteen years (though China may not be a typical case, given the size and complexity of its economy).<sup>312</sup>

#### F. *The Rise of Regionalism*

After seven years, the WTO Doha Round stalled in July 2008.<sup>313</sup> While multilateral negotiations faltered, bilateral and regional trade agreements proliferated in what have become known as a "spaghetti bowl of criss-crossing arrangements."<sup>314</sup> The 2013 U.S. Trade Policy

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305. See *id.* at *Explanatory Notes*.

306. See *infra* text accompanying notes 309-12.

307. See Marrakesh Agreement, *supra* note 263, art. II, para. 1.

308. Cf. *id.* at art. XII, para. 1; GATT 1947, *supra* note 13, at art. 24, para. 2.

309. Marrakesh Agreement, *supra* note 263, at art. XII, para. 1.

310. GATT 1947, *supra* note 13, at art. XXIV, para. 4.

311. Marrakesh Agreement, *supra* note 263, at art. XII, para. 2.

312. See *WTO Ministerial Conference Approves China's Accession*, WORLD TRADE ORG. (Nov. 10, 2001), [http://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr252_e.htm).

313. Alan Beattie, *WTO Keeps Faith with Stalling Doha Talks*, FIN. TIMES, May 1, 2011, available at <http://www.ft.com/cms/5/0/CC024fea-740a-11e0-b788-00144feabd0.htm#axzz2vm6q2qjX>.

314. WORLD TRADE ORG., MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 1, 1 (Richard Baldwin & Patrick Low eds., 2008) [hereinafter WTO, MULTILATERALIZING].

Agenda and 2012 Annual Report makes the case for continuing with the Doha Round, but it also spends many pages explaining United States regional and bilateral initiatives.<sup>315</sup> Recent years have seen a dramatic rise in regional trade agreements (RTAs).<sup>316</sup> As of January 31, 2014, the WTO (and its predecessor GATT) received 583 notifications of RTAs, of which 377 are in force.<sup>317</sup> There are two kinds of RTAs relevant to this discussion: customs unions and free trade agreements.<sup>318</sup> About ninety percent of RTAs are free trade agreements, and the other ten percent are customs unions.<sup>319</sup> A prominent example of a customs union is the European Union (EU), though outside of world trade law the EU is more than that.<sup>320</sup> The North Atlantic Free Trade Agreement (NAFTA)<sup>321</sup> is a prominent example of a free trade agreement.<sup>322</sup> The EU and the United States are currently negotiating another form of super-agreement, the Transatlantic Trade and Investment Partnership,<sup>323</sup> which is a combination of both a trade and an investment agreement.<sup>324</sup>

The GATT and GATS contain provisions for evaluating the consistency of RTAs with the WTO agreements.<sup>325</sup> I will not get into these provi-

315. See 2013 TRADE POLICY AGENDA AND 2012 ANNUAL REPORT 9, 138-60, available at <http://www.ustr.gov/sites/default/files/AnnualReportFinal2013.pdf>.

316. *Regional Trade Agreements*, WORLD TRADE ORG., available at [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (last visited Mar. 12, 2014).

317. *Id.*

318. Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHI. J. INT'L L. 597, 601 (2011). Leal-Arcas identifies a third kind, preferential trade agreements, but these are usually considered to be relevant to trade and development and not referenced in the regionalism discussion. *Id.*

319. *Id.*

320. See Daniel Hannan, *The EU Is Not a Free Trade Area but a Customs Union: Until We Understand the Difference, the Debate About Our Membership Is Meaningless*, TELEGRAPH.CO.UK, <http://blogs.telegraph.co.uk/news/danielhannan/100186074/the-eu-is-not-a-free-trade-area-but-a-customs-union-until-we-understand-the-difference-the-debate-about-our-membership-is-meaningless/> (last updated Oct. 23, 2012).

321. North Atlantic Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

322. *Id.*

323. *Transatlantic Trade and Investment Partnership (TTIP)*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/in-focus/ttip/> (last updated Feb. 20, 2014).

324. *Id.*

325. GATT art. XXIV, paras. 4-5(a-b), available at [http://www.wto.org/english/tratop\\_e/region\\_e/regatt.htm](http://www.wto.org/english/tratop_e/region_e/regatt.htm); GATS art. V. GATT article XXIV provides in pertinent part:

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of

sions here in detail. They are designed to determine whether RTAs are trade diverting rather than trade creating.<sup>326</sup>

In February 1996, the WTO established the Committee on Regional Trade Agreements.<sup>327</sup> The purposes of the Committee “are to examine individual regional agreements; and to consider the systemic implications of the agreements for the multilateral trading system and the relationship between them.”<sup>328</sup>

What are the issues here? First, the transaction costs of cooperation in the WTO are very high.<sup>329</sup> There are a number of reasons for the failure of the Doha Round. One is the substantial effort needed to get WTO members to agree in the large, complex, multilateral context in which the WTO must operate.<sup>330</sup> Second, if RTAs become the dominant institution for trade liberalization, questions arise as to the role of the WTO and its agreements.<sup>331</sup> Third, with regionalism, fewer parties

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other contracting parties with such territories.

5. Accordingly, the provisions of this [a]greement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each [of] the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be. . . .

GATT art. XXIV, paras. 4-5(a-b).

326. See GATT art. XXIV, paras. 4-5(a-b); GATS art. V.

327. *Work of the Committee on Regional Trade Agreements (CRTA)*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/region\\_e/regcom\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regcom_e.htm) (last visited Mar. 12, 2014).

328. *Id.*

329. See *Trade Facilitation*, WORLD TRADE ORG., [http://www.wto.org/english/news\\_e/brief\\_tradefa\\_e.htm](http://www.wto.org/english/news_e/brief_tradefa_e.htm) (last visited Mar. 12, 2014).

330. There is an interdisciplinary literature on transaction cost economics of treaties and multilateral agreements. For an influential account, see JOEL TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008).

331. See *id.*

participate in narrowly gauged trade negotiations.<sup>332</sup> The concern arises whether developing countries will lose the ability to leverage their power together at the bargaining table, as they did in the Doha Round.<sup>333</sup> The result of the rise of RTAs just might be “divide-and-conquer neoliberalism,” a situation in which countries with asymmetrical bargaining power agree to unequal trade agreements that promote the agendas of powerful multinational enterprises whose headquarters happen to be in the territory of the country with the stronger bargaining power.<sup>334</sup> In some respects, RTAs could make the world start to look like it did during the bad old days of colonialism but with subtler forms of exercise of power.

### III. THEORIES OF GLOBAL JUSTICE

Trade requires institutions. Institutions are human-created social practices. Markets are not natural entities like planets or trees. They do not exist in a state of nature.<sup>335</sup> Their structure is not inevitable, existing outside the reach of any government. In fact, their structure depends on government. The inequality that comes from markets is within our control. A market is determined by a set of human-constructed rules about who owns what and on what conditions, what is a public versus a private function, and how to pay for things. So, a “free market” is not something the government intrudes upon with regulation. Rather, it is government regulation, in the form of law, that makes markets of any sufficient scale possible. Markets do not exist without societies. How we design markets is up to us, based on what we value as a society. We might emphasize economic efficiency or economic liberty alone, but that is rarely the case. We usually want some form of fairness established in a market. Many would not accept a strictly egalitarian approach, but recent research on American attitudes about economic inequality suggests that Americans highly disfavor inequality, and when asked to

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332. *See id.*

333. *See id.*

334. *See* James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421, 462, 464, 471 (2011).

335. *See* Robert Reich, [RobertReich.org/post/61406074983](http://RobertReich.org/post/61406074983) for an accessible discussion. There may be limited cases in which markets exist based purely on personal interactions that can be understood as an infinitely repeating game. These cases are rare, and the conditions in which they are successful cannot sustain the sort of large-scale cooperation or coordination we are talking about with international trade and global supply chains.



rank unlabeled wealth distributions, Americans actually preferred that of Sweden to that of their own country.<sup>336</sup>

Institutions necessary to make large-scale markets possible, at either the national or global level, have both mandatory and coercive features.<sup>337</sup> This is true now and throughout history. Institutions comprising a global order for economics and commerce create what Mathias Risse calls “shared membership” in this global order.<sup>338</sup> We have moved from colonialism to multilateralism, and now many are speculating about the rise of regionalism. We no longer have the immediacy of force as in the case of the *Santa Catarina*, or appropriation of lands and opening of trade routes by brute force. Today, sovereign and corporate power determines the structure of institutions allocating the benefits and burdens of international trade.

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. The philosopher, the social scientist, and the lawyer each have their respective roles to play in understanding and evaluating international economic law.<sup>339</sup> 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.

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336. Michael I. Norton & Dan Ariely, *Building a Better America—One Wealth Quintile at a Time*, 6 PERSP. ON PSYCHOL. SCI. 9, 10 (2011).

337. See RISSE, *supra* note 11, at 25.

338. *Id.*

339. The discussion in this section is based partly on John Linarelli, Book Review, *Mathias Risse, On Global Justice*, 16 J. INT'L ECON. L. 959 (2013). See generally GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: OPPORTUNITIES AND PROSPECTS (Chios Carmody, Frank J. Garcia & John Linarelli eds., 2011); LINARELLI, *supra* note 8.

Distributive justice tends to be the main focus of discussions of the institutional morality of trade institutions. We are also concerned here with human rights, but I will focus on justice with the understanding that justice and human rights go hand-in-hand in these discussions. In addition, economic and social rights are contested terrain. In the United States, for example, we do not talk of human rights of an economic and social kind, but rather focus on our constitutional principles relating to civil rights or civil liberties.<sup>340</sup> Political philosophy on global distributive justice tends to refer to itself principally as a discussion about global justice.<sup>341</sup>

A cosmopolitan theory will hold state borders to be morally arbitrary.<sup>342</sup> In cosmopolitan accounts, citizenship is a birth lottery.<sup>343</sup> We owe each other moral duties by virtue of our humanity. Because each person is morally equal, duties of justice extend to everyone. We should be impartial to every person regardless of nationality. There are a number of variants on cosmopolitanism, but these institutional, moral, political, and legal variants on cosmopolitanism are beyond our scope here.<sup>344</sup> Accounts that are broadly described as liberal nationalist or statist contend that states matter, and we should be partial to our

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340. See, e.g., *Human Rights*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/hr/> (last visited Mar. 13, 2014).

341. See, e.g., *infra* note 344.

342. See, e.g., GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* (2009) (surveying accounts and providing her own).

343. See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

344. See, e.g., BROCK, *supra* note 342; ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2004); SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* (2005); *CURRENT DEBATES IN GLOBAL JUSTICE* (Gillian Brock & Darrel Moellendorf eds., 2005); FRANK J. GARCIA, *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES* (2013); *GLOBAL INSTITUTIONS AND RESPONSIBILITIES: ACHIEVING GLOBAL JUSTICE* (Christian Barry & Thomas W. Pogge eds., 2005); DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* (2007); RICHARD W. MILLER, *GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER* (2010); DARREL MOELLENDORF, *GLOBAL INEQUALITY MATTERS* (2009); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); DENNIS PATTERSON & ARI AFILALO, *THE NEW GLOBAL TRADING ORDER: THE EVOLVING STATE AND THE FUTURE OF TRADE* (2008); THOMAS POGGE, *POLITICS AS USUAL: WHAT LIES BEHIND THE PRO-POOR RHETORIC* (2010); KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* (2004); *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDEY* (Deen K. Chatterjee ed., 2004); IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* (2011); RISSE, *supra* note 11. My apologies to any authors and their works I have omitted. I have not included the recent human rights and international trade literature, which is also vast. For interdisciplinary edited works, see Carmody, Garcia & Linarelli, *supra* note 339, and LINARELLI, *supra* note 8.

compatriots.<sup>345</sup> Distributive justice in these accounts is a matter for political communities.<sup>346</sup> We can get more specific within these perhaps overly broad labels. Some have tried to account for global justice on the basis of a plural set of grounds for justice, as Mathias Risse does in his account of pluralist internationalism.<sup>347</sup>

In his recent book, Risse uses two opposing concepts to explain these accounts: relational versus non-relational and statist versus globalist.<sup>348</sup> A relationist contends that principles of justice make demands on persons who share a relationship mediated by social practices, whereas a non-relationist contends that principles of justice make demands on each person regardless of what relationship they might share.<sup>349</sup> Statists are relationists; they contend that the only morally relevant relationship for the demands of justice to apply is the state.<sup>350</sup> Globalists can be either relationists or non-relationists.<sup>351</sup> A globalist who is a non-relationist might ground justice in common humanity or some other ground that has nothing to do with a social practice like an institution.<sup>352</sup> A cosmopolitan contends that we all owe each other duties of justice by virtue of being human.<sup>353</sup> From what has been said so far, my account might be classified as a global relationist view, where relationships among peoples come to be as a result of both the structure of a global society and also from the coercive qualities of that structure.<sup>354</sup> It is morally relevant that persons, groups, and states cannot choose to be exempt from the exercise of power by trade institutions.

How would a global relationist morally justify trade institutions? Consider the following equality principle: Do the least well-off who may be affected by a trade agreement have reason to reject the agreement? This connects to impartiality and reciprocity. The argument here is essentially, "You are asking me to bear a disproportionate burden or hardship. I have moral standing to claim these burdens or hardships are unjustified and should be prevented or mitigated in some way in the

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345. See Yael Tamir, *Liberal Nationalism* (1995).

346. This is addressed throughout the literature. See, e.g., *infra* note 354.

347. Risse, *supra* note 11, at 2.

348. *Id.* at 7-8.

349. *Id.* at 7.

350. *Id.* at 8.

351. *Id.* at 8-9.

352. *Id.* at 9.

353. *Id.* (citing Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, in *Political Restructuring in Europe: Ethical Perspectives* 89, 89 (Chris Brown ed., 1994)).

354. On the moral relevance of coercion, see generally Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 *PHIL. & PUB. AFF.* 257 (Summer 2001); Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113 (2005).

international economic order.” A full-blown account is beyond our scope here. It would take a lot of work to develop an account, but let’s take some tentative steps towards doing so.

#### IV. THE FUTURE OF TRADE INSTITUTIONS

Three underlying principles seem to be, or have been, at work in the world trading system, depending on the era. The first was a set of ideas coming from colonialism and mercantilism. The second is progressive trade liberalization, which came about with the GATT and its negotiating rounds—though many economists would claim that this is simply mercantilism in another form. When the GATT began in 1947, the aim of the GATT contracting parties was trade liberalization, mainly for tariffs.<sup>355</sup> This was accomplished through successive rounds of trade negotiations.<sup>356</sup> The operating principle for these trade negotiating rounds was progressive trade liberalization, structured around the political influence of producers in national governments and the power of governments in trade negotiations.<sup>357</sup> What happens in trade negotiations is governed by politics. Governments want to close markets in which their country lacks comparative advantage and open markets in which it has such advantage. If the WTO process fails to deliver, regional arrangements are sought.

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355. See GATT 1947, *supra* note 13. For a discussion of the issues in this section, see John Linarelli, *Redesigning Global Trade Institutions*, 18 SOUTHWESTERN J. INT’L L. 75 (2012).

356. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 46 (2002).

357. See generally R. Sharma, *Agriculture in the GATT: A Historical Account*, FAO CORP. DOCUMENT REPOSITORY, [www.fao.org/docrep/003/x7352e/x7352e04.htm](http://www.fao.org/docrep/003/x7352e/x7352e04.htm) (last visited Mar. 12, 2014). As Paul Krugman explains,

[i]f economists ruled the world, there would be no need for a World Trade Organization. The economist’s case for free trade is essentially a unilateral case: a country serves its own interests by pursuing free trade regardless of what other countries may do. . . . Fortunately or unfortunately, however, the world is not ruled by economists. The compelling economic case for unilateral free trade carries hardly any weight among people who really matter.

Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. ECON. LIT. 113, 113 (1997).

Krugman elaborates:

Anyone who has tried to make sense of international trade negotiations eventually realizes that they can only be understood by realizing that they are a game scored according to mercantilist rules, in which an increase in exports—no matter how expensive to produce in terms of other opportunities foregone—is a victory, and an increase in imports—no matter how many resources it releases for other uses—is a defeat.

*Id.* at 114.

The third is production sharing, in which trade policy is no longer a matter of trade liberalization along nationalist lines, but a matter of production sharing and global supply chains.<sup>358</sup> The mercantilist and progressive liberalization operating principles could be said to have transformed into a production-sharing norm after the Uruguay Round. As Richard Baldwin and Patrick Low explain:

This is a world in which production processes are spread through multiple jurisdictions across the world. The political economy effects of this fragmentation have been significant—blunting the old distinctions between “us” and “them” that used to drive trade policy. Producer interests that previously sought to protect their local markets from outsiders now worry about market access conditions and trade costs in a range of other markets as well. Hence the growing political economy forces that favor more open markets.<sup>359</sup>

Two results (and no doubt more) likely derive from these principles. First, in the drive to open markets to facilitate production sharing, producers lobby national governments to open more markets. This is not new. Second, producer interests are now more disconnected from citizen interests than ever before, if they were ever aligned very much to begin with, even more than in the era of progressive trade liberalization. We are in a time of the state-less multinational enterprises. But the politicians, subject to the usual public-choice ills, still promote the interests of these enterprises as if their interests aligned with the interests of the polity and its citizens.<sup>360</sup> Whether the interests of multinational enterprises align with those of citizens, labor, and consumers is really quite accidental, and often in conflict.

This is where justice enters the discussion. A fourth underlying principle should be justice. “Should be,” as opposed to “is,” is the right language because justice ought to be a goal for the world-trade order in this decade and the decades to come, but it is by no means certain that it will be. The WTO is built on the opposite lexical priority for what might be seen as an institutional order based on justice: economic power and economic efficiency trump rights and justice. This is so even though trade rules today go beyond the border, to the regulatory autonomy of a state, the core of domestic constitutional order.<sup>361</sup>

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358. WTO, MULTILATERALIZING, *supra* note 314, at 2.

359. *Id.*

360. See generally NATHAN M. JENSEN, NATION STATES AND THE MULTINATIONAL CORPORATION (2006), available at [press.princeton.edu/chapters/s8207.html](http://press.princeton.edu/chapters/s8207.html) (discussing the intersection of multinational corporations and politics).

361. See Joel P. Trachtman, *Developing Countries, the Doha Round, Preferences, and the Right to Regulate*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 111, 117

My point is not to be critical of the WTO. It was established with limited purposes. It cannot be asked to do what it was not designed to do. Rather, the point is to suggest that what is needed in the coming decade and thereafter is reform of global economic institutions. Consider the following four features of the global economic order and ask what values they should be built upon to have legitimacy. First, global economic institutions affect life prospects in dramatic ways.<sup>362</sup> They affect benefits and burdens people are expected to accept.<sup>363</sup> They substantially affect poverty and inequality.<sup>364</sup> The rules are often designed to make the rich richer and the poor poorer, something akin to a priority for the better off or a reverse difference principle. Second, multinational enterprises benefit from inequality. Production sharing means that products can be reduced to components that can be made anywhere in the world where labor is cheapest, safety standards are lowest, and environmental standards are the most lax. Intra-industry and intra-firm trade comprises a larger percentage of trade flows than ever before.<sup>365</sup> Third, the world is interdependent, in substantial part because of global economic institutions, and national borders do not realistically determine the limits of social cooperation.<sup>366</sup> Fourth, the long history of trade involves coercion by various means. In the past, that coercion was in the form of offensive war and explicit use of force. In the contemporary era it is subtler, but coercion still exists in the exercise of political and legal power and by the lack of choice that states and their people have to either play the game, or not.<sup>367</sup> In any such scheme of social cooperation, it is difficult to argue that justice should not be required for these institutional arrangements to have legitimacy.

Given that states hold the power and effectively operate as legislators when it comes to negotiating trade agreements, by which standards should they be required to legislate? Go back to the equality principle of

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(Chantal Thomas & Joel P. Trachtman eds., 2009) (discussing the “right to regulate” of WTO members).

362. TAN, *supra* note 344, at 173.

363. *See id.* at 172.

364. There is substantial literature on trade and inequality. For an accessible introduction to the economics of the subject, see Nobel Laureate Paul Krugman’s pieces in the *Economists View* and *Vox*, particularly, “Divided Over Trade,” available at [http://economistsview.typepad.com/2007/05/paul\\_krugman\\_di.html](http://economistsview.typepad.com/2007/05/paul_krugman_di.html); “Winners and Losers From Trade,” available at [http://economistsview.typepad.com/2007/05/paul\\_krugman\\_wi.html](http://economistsview.typepad.com/2007/05/paul_krugman_wi.html); “Trade and Inequality,” available at [http://economistsview.typepad.com/2007/06/trade\\_and\\_inequ.html](http://economistsview.typepad.com/2007/06/trade_and_inequ.html).

365. 2002 ORG. FOR ECON. COOPERATION & DEV. ECONOMIC OUTLOOK 161.

366. CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 149 (1979).

367. *See* TAN, *supra* note 344, at 173 (discussing how coercion affects the need for reciprocity).

the prior section: Do the least well off who may be affected by a trade agreement have reason to reject the agreement? This is a test based on impartiality and reciprocity all the way down for each state participating in the global economic order. From here we can develop robust difference principles to avoid provisions in trade agreements that make worse-off groups worse off, that deprive people of equal opportunities to gain from trade, and that benefit some at the expense of others.<sup>368</sup> These are the sorts of aims that trade negotiators should negotiate about in addition to progressive trade liberalization and production sharing.

## V. CONCLUSION

World trade law exists within a fragmented international legal system. The latter parts of this Article have focused mainly on constraining trade regimes with principles of distributive justice. Think of how we regulate commerce inside the borders of a state. Domestic legal systems do not suffer the limits imposed by fragmentation in international law. Still other areas in need of coverage have to do with trade and the environment and trade and human rights. The challenges ahead will be in regulating these important areas of cooperation in a way that does not privilege one set of considerations over another. It is a demanding task. WTO members found consensus impractical in the Doha Development Round of trade negotiations, which does not deal with the sort of very demanding commitments discussed in this Article.

The future for the sort of justice-oriented approaches offered in this Article seems dim. With the high transaction costs associated with the WTO agenda, states are resorting to large-scale RTAs, which, while not multilateral in the WTO sense, nevertheless have many potential signatories. Two major examples are the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership.<sup>369</sup> There has been some press arguing that these agreements do not promote free trade but simply make rules to entrench the power of multinational enterprises.<sup>370</sup> Examining these claims is beyond the scope of this Article. What seems clear, however, is that we will likely see more trade institutions and more institutional complexity governing trade. The

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368. See generally GARCIA, *supra* note 344; RISSE, *supra* note 11.

369. *Trans-Pacific Partnership (TPP)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Feb. 22, 2014).

370. See, e.g., Bob Burnett, *Problems with the Trans Pacific Partnership*, HUFFINGTON POST (Dec. 20, 2013, 9:17 AM), [http://huffingtonpost.com/bob-burnett/trans-pacific-partnership\\_b\\_4479420.html](http://huffingtonpost.com/bob-burnett/trans-pacific-partnership_b_4479420.html); George Monbiot, *The Lies Behind This Transatlantic Trade Deal*, THE GUARDIAN (Dec. 2, 2013, 3:31 PM), <http://www.theguardian.com/commentisfree/2013/dec/02/transatlantic-free-trade-deal-regulation-by-lawyers-eu-us>.

questions raised in this Article seem ever more pressing. This might be a good time to reflect on how we wish to proceed.



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