
Introduction

Trade, Trade Rules, and Economic Development

1.1 What Is International Trade Law?

This book discusses international trade law and the world trading system from the perspective of economic development. It has been six decades since the beginning of the international trading system, initially under the auspices of the General Agreement on Tariffs and Trade (GATT) and then the World Trade Organization (WTO), and there is still ambiguity about the substance, nature, and scope of international trade law. Thus it would be appropriate to begin this book with a clarification of the constituent elements of international trade law and the subject of its regulation.¹ International trade law is a body of law that concerns conduct of state² on international trade of goods and services. International trade law is a public law, rather than a private law because it does not in principle concern conduct of individuals or private corporations. The conduct of the latter, such as making a contract on the international sale of goods, is regulated by other bodies of law, such as international commercial law.³

International trade law includes rules of international law on international trade as well as domestic regulations of international trade. In other words, international trade law includes a body of international law that applies to sovereign states on the issues of international trade and domestic laws, such as statutory provisions on dumping, to regulate

The statistics and data, as well as websites, cited in this book are generally current as of December 2015 unless indicated otherwise.

¹ The history of the world (international) trading system and the status of the current system are discussed in Sections 1.2 and 1.3 *infra*, respectively.

² “Conduct of state” denotes conduct of government or quasi-government entities exercised in sovereign capacity such as government measures to limit imports from other countries.

³ At law schools in some countries, such as the United States, both international trade law and international commercial law traditionally have been covered by a single course, entitled “International Business Transactions,” although a recent trend is to separate one from the other into different courses.

international trade which may be adopted by a state. These domestic laws and regulations also constitute the rules of international trade law for the state. Conduct of state on international trade, including one arising from domestic legislation, is regulated by the rules of international law on trade where the state is a signatory of multilateral and/or regional treaties on international trade. Currently, the WTO adopts a set of rules on international trade (referred to as WTO disciplines/rules or GATT/WTO disciplines/rules) in the form of an international treaty.⁴ The member states of the WTO (“Members”)⁵ are required by the provisions of the WTO Agreement⁶ to ensure the conformity of their laws, regulations, and administrative procedures with their obligations under the Agreement.⁷ Thus, WTO legal disciplines, also called “WTO Law,” represent the multilateral legal framework on international trade applying to the entire WTO membership which currently includes all major economies and trading nations in the world. Hundreds of regional trade agreements (RTAs)⁸ coexist with the multilateral legal framework of the WTO, mandating legal terms of trade with respect to their signatory countries.

International trade law is distinguished from other disciplines of international law on economic activities, such as international economic law or international investment law. International economic law, considered by many as synonymous with international trade law, has a wider scope in coverage, including international monetary issues that are not the

⁴ Marrakesh Agreement Establishing the World Trade Organization (“WTO Agreement”), text available on the WTO website at www.wto.org/english/docs_e/legal_e/04-wto.pdf.

⁵ WTO membership currently includes all major trading nations in the world, 162 countries as of November 30, 2015, making the WTO the “United Nations” of international trade. WTO, *Members and Observers*, list available online at www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. The member states of the previous GATT (“contracting parties”) became WTO Members after the implementation of the WTO in 1995. WTO Agreement Article XI:1. The “Explanatory Notes of the General Agreement on Tariffs and Trade 1994” stipulates that the references to the term “contracting party” used in the GATT shall be deemed to read “Member” and those to “CONTRACTING PARTIES” acting jointly in the various articles of the GATT shall be deemed to be references to the WTO. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Cambridge University Press, 2003), p. 14.

⁶ *Supra* note 4.

⁷ The WTO Agreement, art. XVI:4, *supra* note 4; cf. “WTO agreement” refers to an individual agreement found in the annexes of the WTO Agreement, settled by the UR.

⁸ GATT Article XXIV authorizes the formation of RTAs under certain conditions. The current RTA data are available on the WTO website at www.wto.org/english/tratop_e/region_e/rta_pta_e.htm. RTAs are often called “FTAs” (free trade agreements), and in this book, the two terms are used interchangeably without distinction.

regulatory subject of the WTO.⁹ International investment law, such as the rules of bilateral investment treaties, is also outside the ambit of international trade law. Public international law, as understood in the general sense, is also distinguished from international trade law as the former regulates non-economic relations among sovereign states such as territorial issues and conduct of war. Generally speaking, international trade law concerns the subject areas that are covered by the WTO, as set out in its legal provisions.¹⁰

Notably WTO provisions extend beyond the ambit of trade in goods and services. They include seemingly non-trade issues per se that can be considered “trade-related” such as intellectual property rights (IPRs) as stipulated in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)¹¹ and government investment measures¹² as regulated in the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement).¹³ There is controversy as to whether these issues should be covered by WTO disciplines, but the justification seems to be that they affect international trade or are “trade related,” as discussed in Chapter 5, and thus should also be addressed by the WTO. Another important issue in international trade law today is its relevance to economic development,¹⁴ as reflected in the development agenda of

⁹ International monetary affairs are regulated by the International Monetary Fund (IMF), which has an even greater membership of 188 countries (as of November 2015), under the terms of the “Articles of Agreement,” text available on the IMF website at www.imf.org/external/pubs/ft/aa/.

¹⁰ WTO provisions are comprised of the rules of trade set by the annexes of the WTO Agreement. Additional discussions on the structure of the WTO and the rules are provided in Section 1.3 *infra* and in subsequent chapters.

¹¹ Annex 1C, WTO Agreement, text available online at www.wto.org/english/docs_e/legal_e/27-trips.pdf.

¹² The term “measure” is broadly defined so as to cover a wide spectrum of governmental action and omission. The Appellate Body thus opined in *US – Corrosion-Resistant Steel Sunset Review* that “[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.” WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R (December 15, 2003), para. 81.

¹³ Annex 1A, WTO Agreement, text available online at www.wto.org/english/docs_e/legal_e/18-trims.pdf.

¹⁴ “Economic development” or “development” refers to a process of economic growth and improvement which is considered to be the solution to prevalent poverty issues. These terms are used interchangeably throughout this book without distinction.

the current Doha Round.¹⁵ WTO disciplines include provisions related to development facilitation as further discussed in subsequent chapters. Section 1.4 provides a discussion of trade and development issues.

1.2 Historical Perspective

Mankind has been engaged in trade across borders since ancient times.¹⁶ While conventional rules on international commerce emerged and regulated merchants,¹⁷ international law did not regulate conduct of state on international trade, such as imposition of tariffs and quotas, which was considered an integral part of state's sovereignty. Bilateral treaties were formed between states which provided terms to allow trade between them,¹⁸ but there was no multilateral legal framework applicable to sovereign states regulating their conduct on international trade. States, therefore, could, for example, impose high tariffs and quotas on imports to raise customs revenue and protect their domestic industries particularly during times of recession. The latter in fact took place during the Great Recession in the 1930s, reducing international trade, invoking trade protective measures, and, as a result, spreading and worsening the recession throughout the world.

Today's multilateral framework for international trade is a development that occurred after the Second World War, which was first contemplated at the Bretton Woods Conference during the war.¹⁹ Trade protectionism,

¹⁵ The Doha Round is the latest round of trade negotiations in the WTO which began in 2001 and has been continuing for over fourteen years. The Doha Round is signified by its development agenda (Doha Development Agenda or "DDA") which is to advance the interest of developing countries in the current negotiation areas including agriculture, non-agricultural market access, services, intellectual property, trade and development, trade and environment, trade facilitation, rules, and Dispute Settlement Understanding. WTO, *The Doha Round*, available online at www.wto.org/english/tratop_e/dda_e/dda_e.htm#development.

¹⁶ A Greek travel manuscript, *Periplus Maris Erythraei*, written in the first century AD, records the existence of extensive trade between the Romans and the Indians.

¹⁷ "Lex mercatoria" (in Latin, "merchant law"), which evolved in Medieval Europe as international conventional law on international commerce, is an example.

¹⁸ Bilateral treaties of friendship, commerce, and navigation addressed a range of trade and investment issues. John Coyle described these treaties as "a staple of international diplomacy" for centuries. John F. Coyle, "The Treaty of Friendship, Commerce, and Navigation in the Modern Era" (2013) 51 *Columbia Journal of Transnational Law* 301–359.

¹⁹ John H. Jackson, *The World Trading System* (2nd ed., MIT Press, Cambridge, MA, 1997), Section 2.1.

INTRODUCTION

7

which had been prevalent during the 1930s, led to exclusive trade blocs and contributed to the outbreak of this tragic war.²⁰ Lessons were learned from this experience, and efforts were made to create a new trading system that would promote open trade so that arbitrary trade restrictions and exclusions would not cause yet another major conflict. The Charter for the International Trade Organization (ITO) was drawn up after the war with the objective of establishing a new trading system. However, political support for the new trading system began to wane after the war, and the United States failed to ratify the ITO because of congressional objection.²¹ Without the participation of the United States, the ITO could not come into existence. Instead, the General Agreement on Tariffs and Trade (GATT), a set of rather brief disciplines on the trade in goods that was initially intended to be part of the ITO system, was adopted in 1947 and began to function as a de facto international organization of international trade with the twenty-three founding member countries.²²

The GATT system lasted for five decades and achieved significant success in lowering both tariff and non-tariff barriers to trade, particularly among industrialized nations, despite its initial lack of status and structure as a formal trade organization.²³ International trade expanded exponentially, by as much as sixty-nine times between 1950 and 1994, under the GATT regime.²⁴ Over the years, however, the limited applicability of GATT disciplines and its incompleteness as a trade institution caused problems. For instance, as international trade expanded rapidly during the postwar periods,²⁵ some of the new trade issues that were not governed by GATT disciplines, such as trade in services and trade-related aspects of intellectual property rights (TRIPS), became significantly important. In

²⁰ For the economic causes of the Second World War, refer to Andrew J. Crozier, *The Causes of the Second World War* (Blackwell Publishers, Oxford, 1997).

²¹ For the political issues regarding the United States' failure to ratify ITO charters, see Jackson (1997), *supra* note 19, Sections 2.1 and 2.2.

²² For the process of founding the GATT system, see "The GATT years: from Havana to Marrakesh," available online at WTO website, www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

²³ There were eight multilateral trade negotiations ("rounds") during the GATT era (1947–1994). The first round (the "Doha Round") in the WTO regime began in November 2001. During the previous GATT rounds, tariffs were reduced by an average of 35 percent at each round. As a result, the tariff rates of non-primary products of industrial countries fell to a mere 3.9 percent after the Uruguay Round in 1994. Jackson (1997), *supra* note 19, p. 74.

²⁴ WTO statistics database, available online at <http://stat.wto.org/StatisticalProgram/WSDStatProgramSeries.aspx?Language=E>.

²⁵ *Ibid.*

addition, exporters of agricultural products demanded that the rules of international trade should also be applied to agricultural products, which had largely been excluded from the application of GATT disciplines.²⁶ The dispute settlement system also needed to be reinforced.

All these needs called for extensive reforms of the GATT and, eventually, the creation of a new international institutional apparatus to address these new trade issues and to incorporate newly evolving areas of trade, such as services, in the multilateral trading system.²⁷ A series of efforts had been made to augment the existing GATT provisions, providing new rules for international trade, particularly in the areas of dumping and subsidies.²⁸ Yet the initial constraint of the GATT system with its application limited to the trade in goods made it difficult to expand the regulatory apparatus of international trade into those new areas. In the Uruguay Round (UR, 1986–1994), the final round of trade negotiations in the GATT regime, discussions began to address the need for a new, comprehensive trade organization to replace the GATT regime.

The UR began in 1986 and continued for eight years. The long and complicated negotiations finally gave birth to the WTO. The institutional apparatus of the GATT was replaced with the WTO, but GATT rules were preserved and adopted as part of the WTO disciplines.²⁹ The provisions of the GATT still constitute the disciplines of the trade in goods, augmented by the new “agreements” settled during the UR.³⁰ For this reason, the current WTO system is also called the “GATT/WTO system.”³¹ Since the

²⁶ In 1955, the United States obtained a broad waiver for its measures restricting imports of agricultural products. This waiver led other members of the GATT, who did not receive such a waiver, to believe that they were also entitled to the same under the notion of reciprocity and subsequently refused to comply with GATT rules with respect to their agricultural trade.

²⁷ Jackson (1997), *supra* note 19, Section 2.3.

²⁸ Additional rules and regulations were added to GATT disciplines. For instance, new “codes” on anti-dumping measures and countervailing measures were adopted at the end of Tokyo Round negotiations (1973–1979).

²⁹ “GATT 1994” is composed of GATT provisions dated October 30, 1947, as subsequently amended or modified, protocols, decisions, understandings with respect to the GATT provisions, and the Marrakesh Protocol to GATT 1994. GATT 1994 is part of Annex 1 of the WTO Agreement titled “Multilateral Agreements on Trade in Goods.”

³⁰ The text of the WTO provisions has been reprinted in various sources, including WTO (2003), *supra* note 5. The text is also available online at the WTO website, www.wto.org. As WTO rules are easily searchable on the WTO website, no page reference is given for the WTO rules cited in this book.

³¹ Throughout this book, the terms “WTO system” or “WTO rules” are understood to include GATT disciplines as incorporated in the WTO Agreement.

socialist bloc was dismantled in the 1980s, WTO membership has been extended to include former communist countries that did not originally participate in the GATT, making the WTO truly the “United Nations of International Trade.”³² By the end of the twentieth century, China and Russia were the only major economies left out of this world trade club. China obtained WTO membership in 2001, followed by Russia in 2012.

1.3 The WTO System

The WTO is a member-driven organization which functions as the rule-setter for international trade, a forum for global trade negotiations (“rounds”), and an adjudicator for international trade disputes. It also administers and monitors the application of WTO provisions and reviews the trade policies of Members through the Trade Policy Review Mechanism.³³ The recent proliferation of regional trade agreements (RTAs)³⁴ and the long delays in the conclusion of the Doha Round³⁵ have caused many to have doubts as to the status and future viability of the WTO, but the WTO remains as the only global, multilateral trading system in existence. Thus much of this book discusses the substantive aspects of WTO provisions with an assessment of their implications for economic development.

The highest decision-making body in the WTO is the Ministerial Conference, composed of the trade ministers of all membership, which meets approximately every two years.³⁶ The WTO makes decisions generally by consensus of the Members, but in exceptional cases by vote.³⁷ A General

³² As of November 30, 2015, WTO membership reached 162 nations. Developing countries constitute three-quarters of WTO membership. *Supra* note 5.

³³ For the details of the Trade Policy Review Mechanism, see WTO website, www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

³⁴ See Chapter 6 *infra* for further discussion on RTAs.

³⁵ *Supra* note 15. ³⁶ *Ibid.*

³⁷ The WTO Agreement provides, “The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting” (footnote omitted). WTO Agreement, art. IX:1. The consensus practice has generally worked well, but it creates the risk of deadlock, as witnessed during the Doha Round, and also allows Members with stronger influence to dominate the process. See Claus-Dieter Ehlermann and Lothar Ehring, “Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?” (2005) 8(1) *Journal of International Economic Law* 51–75.

Council, which is also comprised of all Members, is assigned to conduct WTO business in the intervals between Ministerial Conferences. Under the General Council, three separate Councils are organized, including the Council for Trade in Goods, Council for Trade in Services, and Council for Trade-Related Intellectual Property Rights, also comprising all Members. There are additional subsidiary bodies, including committees and subcommittees, that administer and monitor the application of relevant WTO disciplines. The organizational chart of the WTO is shown in Figure 1.1.

Unlike its predecessor, the WTO requires Members to comply with *all* provisions in the WTO disciplines, except for a small number of plurilateral trade agreements. This principle of mandatory compliance with all WTO provisions is called “single undertaking.”³⁸ WTO provisions are extensive and cover a variety of subject areas that are relevant to international trade. These areas include tariffs, quantitative trade restrictions (quotas), sanitary and phytosanitary (SPS) measures, subsidies, anti-dumping (AD) measures, customs valuations, rules of origin, import licensing, intellectual property issues, and investment rules.³⁹ WTO provisions are organized as Annexes to the WTO Agreement,⁴⁰ including Multilateral Agreements on Trade in Goods (Annex 1A), which include GATT rules and UR agreements,⁴¹ the General Agreement on Trade in Services (Annex 1B), the Trade-Related Aspects of Intellectual Property Rights (TRIPS, Annex 1C), the Dispute Settlement Understanding (Annex 2), the Trade Policy Review Mechanism (Annex 3), and the Plurilateral Trade

³⁸ In contrast, the Protocol of Provisional Application of the GATT allowed its members to block the application of GATT provisions to their trade that is not consistent with the existing legislation at the time of their entry into the GATT (“grandfather” rights). Such grandfather rights are not granted to WTO Members. Members are required to comply with all provisions included in the WTO Agreement except Annex 4, the Plurilateral Trade Agreements, including the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement (terminated in 1997), and the International Bovine Meat Agreement (terminated in 1997), which are applied only to the Members specifically agreed to these agreements.

³⁹ There are fourteen agreements concluded in the UR and a number of decisions. The texts of the agreements and decisions are available online at the WTO website, www.wto.org/english/docs_e/legal_e/legal_e.htm.

⁴⁰ *Supra* note 4.

⁴¹ UR agreements (or WTO agreements) in Annex 1A comprise Agreements on Agriculture; SPS Measures; Textiles and Clothing (expired on January 1, 2005); Technical Barriers to Trade; Trade-Related Investment Measures (TRIMs); Anti-dumping; Customs Valuation; Preshipment Inspection; Rules of Origin; Import Licensing; Subsidies and Countervailing Measures; and Safeguards.

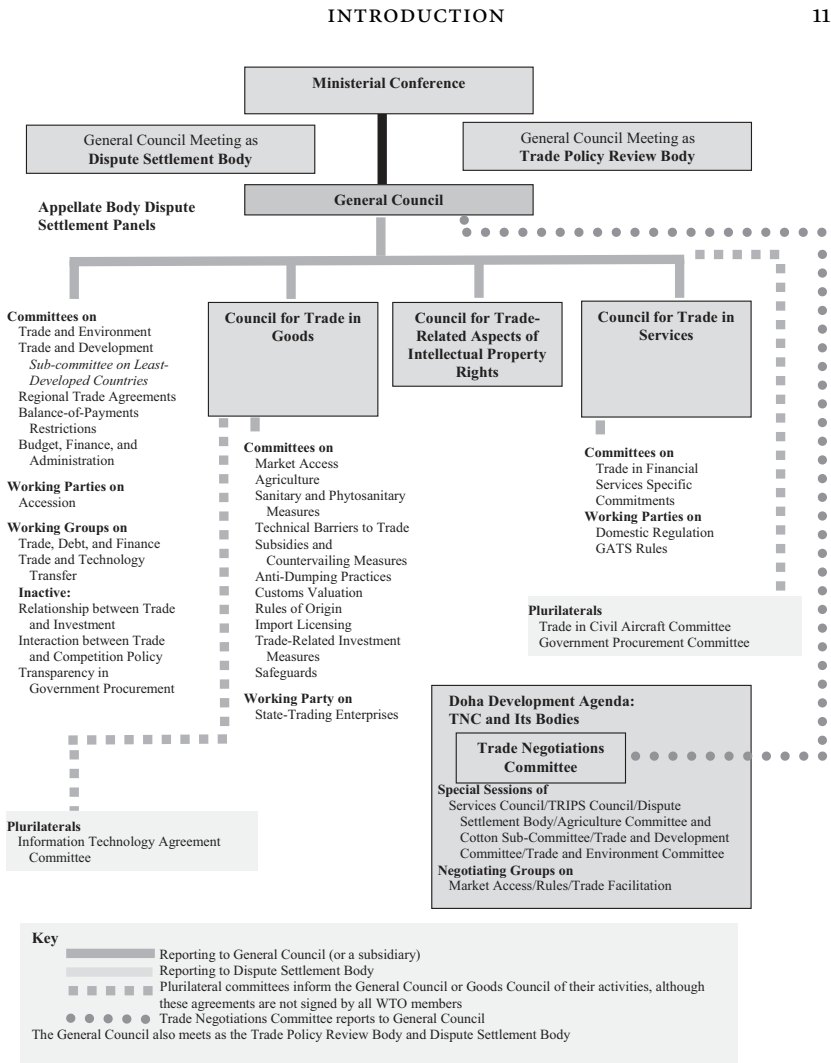


Figure 1.1 WTO Organizational Chart (Source: www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm)

Agreements (Annex 4). Together with a number of ministerial decisions and declarations,⁴² they comprise the WTO legal disciplines.

WTO rules are considered more effective than the previous GATT disciplines due to improved monitoring and enforceability. The WTO imposes a number of reporting requirements on Members concerning their

⁴² *Supra* note 39.

compliance with relevant WTO provisions. Councils and various committees established within the WTO oversee the functioning of WTO rules and monitor Members' compliance with WTO requirements. For example, the Committee on Safeguards and the Committee on Anti-Dumping Practices monitor the application of safeguard measures and anti-dumping measures, respectively. The Trade Policy Review is mandatory: the Trade Policy Review Body reviews the trade policies of all Members on a regular basis.⁴³ The WTO Secretariat also produces "trade monitoring reports,"⁴⁴ including joint reports with the OECD and the UNCTAD. These reports form a basis for further consultations with Members: the WTO-wide reports are discussed at Trade Policy Review Body meetings, and reports are also sent to G-20 emissaries for submission to the summit meetings of the G-20 leaders.⁴⁵ All this monitoring and the consultations work systematically to put pressure on Members to comply with WTO rules and procedures.

The enforcement mechanism has also been improved by the WTO system. The WTO has adopted a judicial approach to the enforcement of WTO disciplines, as opposed to a more diplomatic approach taken by the previous GATT, creating the dispute settlement panel (hereinafter "the panel") and the standing Appellate Body which adjudicate trade dispute cases in proceedings resembling judicial process.⁴⁶ On a suspect violation of WTO rules causing damage to the trade of a Member, the affected Member may bring a complaint to the WTO for adjudication through the WTO dispute settlement mechanism.⁴⁷ The decision by the

⁴³ Annex 3 of the WTO Agreement mandates that the four Members with the largest shares of world trade (currently the European Communities, the United States, Japan, and China) be reviewed every two years, the next sixteen be reviewed every four years, and others be reviewed every six years. A longer period may be fixed for least-developed-country Members.

⁴⁴ The trading monitoring reports include WTO-wide reports on trade-related developments as well as joint reports on G-20 trade and investment measures. For further details, see WTO website, www.wto.org/english/tratop_e/tpr_e/trade_monitoring_e.htm. This G-20, which consists of Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, and the United States of America, is distinguished from a bloc of twenty developing countries (also called "G-20") who appeared at the 2003 Cancún Ministerial Conference. For the latter G-20, see *infra* note 1847.

⁴⁵ *Ibid.*

⁴⁶ The WTO Understanding on Rules and Procedures Governing the Settlement of Dispute (Dispute Settlement Understanding) provides the rules for the settlement of disputes among WTO Members (Annex 2, the WTO Agreement).

⁴⁷ See Chapter 8 *infra* for further discussion on the WTO dispute settlement process.