Global Business Law

FOURTH EDITION

2023 SUPPLEMENT

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2023 Update-Supplement

for

GLOBAL BUSINESS LAW (4th edition, 2018)

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Introduction (to this 2023 Update-Supplement)

The 4th edition of GLOBAL BUSINESS LAW was designed to be both up-to-date and durable. In writing it, I tried to reflect the transactional, practitioner-oriented aspects of international business law as of 2018, when the book was published. On the other hand, I also tried to ensure that it reflected (as its subtitle promises) the *principles* underlying the rules, so that readers using the book could understand the broad contours of international business transactions well enough to keep pace with specific points, which naturally change over time.

Now, however, enough developments have emerged to warrant providing a brief addendum to the 4th edition of GLOBAL BUSINESS LAW. The specific points I have identified for this are few enough, though, to capture them in this short "2023 Update-Supplement" document rather than calling on readers to purchase an entirely new text. In the following 40-odd pages (not counting the two annexes), three colleagues and I have compiled information – current as of the latter part of 2022, when we completed our research – that we hope will serve both students and practitioners of international business law well for some time to come.

Two of my three colleagues in this project – Jacob Barefield and David Halliwell – have themselves recently completed detailed study of international business from several perspectives. Both have excelled in these studies, and one of them has supplemented his work in international business law with extensive study of public international law and comparative law, which are also deeply important for the effective practice of international business law. My third colleague in this project – Brien Stonebreaker – has also studied both public international law and international trade regulation and thus brings another welcome perspective to the work.

This Update-Supplement follows a straightforward pattern: for each chapter in GLOBAL BUSINESS LAW, we offer observations about new developments that we consider important enough to highlight, leaving the rest of the text undisturbed. Of course, some of that "undisturbed" text could also have been the subject of our update efforts – to check website addresses, for instance, or to draw from a newer edition of some source or another. Those efforts can await another edition of the book.

Here, in a nutshell, are the most important changes reflected in this 2023 Update-Supplement:

- The number of Contracting States to the Vienna Sales Convention has now reached 95, although the cluster of "big hitters" in global trade that have still not become parties to the CISG – namely the UK, India, Indonesia, South Africa, and a few others listed on page 125 – remain outside the CISG system. [See mainly the Chapter 3 references below.]

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- A new edition of Incoterms was issued in 2020, superseding the 2010 version. It introduced relatively few changes, but international business lawyers should now typically use the 2020 edition. [See mainly the Chapter 4 references below.]

- After many years without any "anchoring" US export-control legislation to support the Export Administration Regulations, a new statute – the Export Control Reform Act – was enacted in 2018. [See mainly the Chapter 6 references below.]

- A miasma of anti-globalist, or de-multilateralization, influences is growing in importance, and international business lawyers need to be prepared to advise their clients accordingly in respect of FDI adventures. To generalize: (a) the advantages of (and expansion in) FDI as a worldwide phenomenon should be regarded (by lawyers and their clients) with more skepticism, (b) the regulation (especially host-country regulation) of FDI should be expected to expand at the expense of the trend toward globalization we have seen over the past several decades, and (c) the protections available for foreign investors should be expected to narrow, leading their legal advisors to rely ever more heavily on insurance. [These and related points are covered mainly in the updates to Chapters 9 through 11, below.]

- The US Congress enacted the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018. The key aim of this legislation was to expand jurisdiction of the Committee on Foreign Investment in the United States over the review of proposed transactions involving foreign investors. [See mainly the Chapter 10 references below.]

- The NAFTA (North American Free Trade Agreement) was superseded by the USMCA (U.S.-Canada-Mexico Agreement). [See mainly the Chapter 11 references below.]

- The Overseas Private Investment Corporation (OPIC) was merged into the US International Development Finance Corporation (DFC). [See mainly the Chapter 11 references below.]

Lastly: an entirely new segment is being provided here for Chapter 6. Section B of that Chapter continues to provide a nuts-and-bolts reference to the calculation of tariffs payable on the importation of an article from Country X into the customs territory of Country Y. This very practitioner-oriented aspect of international trade regulation has now been joined by a roughly 20-page synopsis of international trade law principles. Why? Because I have found that many

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students taking my class on International Commerce and Investment do not take an accompanying course on International Trade Regulation. Hence, although this book still *does not* attempt anything close to a comprehensive survey of international trade regulation, it does now – with this 2023 Update-Supplement – provide a compact summary of the legal and institutional foundations of international trade that bear most directly on the practice of international business transactions.

In each of the sections that follow, we also mention several more minor updates, changes, and developments that seem noteworthy. We hope all these prove useful to those students and practitioners using GLOBAL BUSINESS LAW. Those students and practitioners should also bear in mind that numerous other resources – practitioners' manuals, "nutshell" series, law-firm briefings, and the like – are increasingly available. Several of these have of course been published in recent years since the publication of the 4th edition of *Global Business Law*. Just as an illustration, here are some "nutshell" treatments of some topics covered in the book:

- International Sales Law in a Nutshell (2d edition, 2018, Torsello)
- International Business Transactions in a Nutshell (11th edition, 2020, Folsom, Van Alstine, Ramsey)
- International Project Finance in a Nutshell (3rd edition, 2020, Niehuss)
- Foreign Investment Law in a Nutshell (3rd edition, 2022, Folsom)

As a final note, I offer some personal observations about two recent developments bearing on international business transactions – albeit in ways we cannot easily discern. The first is the early-2022 instance of lawlessness by Vladimir Putin's Russia in launching further territorial attacks on Ukraine. Even more than his 2014 invasion and land-grab there, this most recent and more brazen adventure probably nails the coffin shut on the system of collective security established after World War II. No effective response is in evidence; no successor regime for international security seems likely. These events have already deeply affected some aspects of international business, and we should anticipate more sweeping consequences in the coming months and years.

Second, the outcomes of recent climate-crisis negotiations, including those in Glasgow and Kigali in late 2021 and again in Egypt in late 2022, suggest that official action – that is, by national governments and public international organizations – will fail to address the need for our species to shift to a post-carbon world with equitable allocations of dramatically-reduced energy consumption. The dogged insistence by our species to wreak ecological havoc on the planet seems irrepressible. This promises to have profound effects on international business and the rules that govern it.

In the Preface to the 3rd edition to Global Business Law, which I completed in 2011, I wrote about the growing "normative maturity" I saw – "a growing concreteness and harmonization of the disparate rules and processes of

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international law as it applies to cross-cultural economic relations". I then made these observations about that "normative maturity":

> This is invigorating, of course, but I find it also worrisome — worrisome because the growing integration of the world economy makes it ever more susceptible to shock and collapse. The adage that comes to mind is this: "The bigger they are, the harder they fall." As enthusiastic as we might be about the growing ease and regularity of selling, licensing, or investment across borders — and about the benefits such transactions can indisputably bring — I would urge that we also be alert to the dangers that can come from global economic integration, or more precisely from the surrender of local and individual self-reliance that such integration makes possible and attractive.

Given the two specific threats I have mentioned above – (1) a collapse of international rules and institutions for suppressing the aggressive use of force (*à la* Putin in Ukraine) and (2) official paralysis in the face of accelerating global ecological collapse – international business lawyers and their clients should prepare themselves for drastic changes in the legal and operational environment of global business. The "normative maturity" I referred to eleven years ago might not stand a chance against the destructive forces that I now see on our horizon.

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Chapter 1

Key updates are as follows:

- The same **global trends** noted in Chapter 1 regarding the nation-state, the post-WWII cluster of key global institutions, and the move toward a "demultilateralization" have accelerated, not only in the USA (due to the Trump Administration of 2017-2021) but elsewhere in the world as well, and this is increasingly a matter to which international business lawyers must pay attention.

- An illustration of the slowness, or perhaps dysfunctionality, of international institutions addressing global issues comes in the form of the **climate crisis**, which has only grown worse – faster than expected, in fact – in the past few years.

In addition to (or elaborating on) those most important points, please note the following matters we consider noteworthy:

1) ***… regarding the G-7*** [page 27, note 6]: This footnote, in discussing the G-7, points out that the Russian Federation was involved for a time in the G-7 discussions – even to the extent of an informal re-naming of the group (to G-8), but that Russia's annexation of Crimea put a stop to that. Russia's invasion of Ukraine in early 2022 brought further, and more extreme, isolation of Russia from the rest of the world, so that Russian involvement in G-7 activities now seems jarring. Before that, US behavior under former President Donald Trump undermined solidarity within the G-7. For further information and updates on the G-7, see the following sources:

   - CFR.org Editors, *Where is the G7 Headed?*, https://www.cfr.org/backgrounder/where-g7-headed#chapter-title-0-4 (June 14th, 2021). Main point: While the G7 consists of some of the most powerful nation states, the G7 can face threats from internal division along with external pressure. President Trump's involvement within the G7 created internal division, as Trump and Macron consistently disagreed on issues of climate change and corporate. From an external point of view, China created pressure by increasing its economic involvement while simultaneously receiving condemnation for acts against Uighurs.

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- G7 Research Group, *The Road to Germany's G7 Elmau Summi*t, Univ. of Toronto, http://www.g8.utoronto.ca/summit/2022elmau/road.html. Main point: The issues often reflect the dynamic concerns of each member nation state, such as climate change, COVID-19, and human rights issues
- Kimberly Amadeo, *G7 Summit: Its Members, History, Purpose and Meeting Summaries*, https://www.thebalance.com/g8-summit-what-is-it-who-belongs-what-happens-3306112 (January 20, 2022). Main point: Other countries can also have an invitation extended to the G7 meeting, as the European Union, Brazil, China, and Mexico have all had invitations extended to them in the past. International Organizations such as the International Monetary Fund, World Bank, and United Nations have also had invitations extended to them.

2) ***… regarding the G-20*** [page 27, note 6]: This footnote, in addition to discussing the G-7, also mentions the G-20. For more recent information about the G-20, see https://g20.org/g20-presidency-of-indonesia/#priorities (2021), which points out that finance is not the only topic of importance at G-20 meetings. For instance, priority issues of the 2022 Bali Summit include Global Health Architecture, Digital Transformation, and Sustainable Energy Transition.

3) ***… regarding the future of the nation-state*** [page 30, lower third of the page]: The reference to "350 years or so" as the "age" of the nation-state as a concept might well be replaced with "350 or 400 years". As noted in this discussion, we usually take the Peace of Westphalia as the birth of the nation-state as an operational concept of international law. Its gestation period, though, dates back further – even to the work of Jean Bodin in the 1500s. Despite this long history, the final sentence in this long paragraph (ending on page 31, a third of the way down the page) remains valid: attorneys involved in advising clients on global business transactions should have some cognizance of the fact that fundamental political changes seem to be on the horizon. Some such changes are highlighted in the next point, below.

4) ***… regarding the withering of multilateralism*** [page 31]: Now that the Trump Administration of 2017-2021 has come and gone, the trends referred to here have accelerated. The entire four years of that Trump Administration brought an intense American disparagement of the suite of institutions created over several decades to facilitate international cooperation, and similar political developments also emerged in Hungary, Poland, Turkey, and elsewhere. Indeed, the trend applies not only to economic affairs but also to peace-and-security affairs. Russia's invasion of Ukraine in early 2022 put into sharp relief the dysfunctionality of the mutual-security system created after World War II,

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since Russia's veto power in the UN Security Council emasculated that entity as a multilateral peace-keeping force.

5) ***… regarding climate change and human population (and consumption) fueling it*** [pages 33-34, and footnote 9]: The October 2022 Glasgow meetings of the COP (conference of parties) for the UN Framework Convention on Climate Change did little to address climate issues, and many groups and individuals have lost any confidence that the current generation of global leaders and institutions can muster the wherewithal to grapple effectively with those issues. This loss of confidence was confirmed in the COP27 meetings in Egypt in late 2022. For a cry of alarm by the young Swedish climate activist Greta Thunberg, saying "[w]e've been greenwashed out of our senses" and that "[i]t's time to stand our ground" on climate action, see this column in the *Guardian*: https://nam10.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.theguardian.com%2Fenvironment%2F2022%2Foct%2F08%2Fgreta-thunberg-climate-delusion-greenwashed-out-of-our-senses%3FCMP%3DShare_iOSApp_Other&data=05%7C01%7Cjhead%40ku.edu%7Cf7a5a63490c94d61dbab08daa9fe5330%7C3c176536afe643f5b96636feabbe3c1a%7C0%7C0%7C638009207036676036%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=TgQfkvgyOsyWvGoMGHLmhj5cmkClGm7JqWwJx%2BX3v2Y%3D&reserved=0

Also: footnote 9 provides information about when the global human population reached seven billion – that was in about 2011. Now, only a dozen years later, the global human population has reached 8 billion … as announced by various US news outlets on 15 November 2022. See also United States Census Bureau: International Database, https://www.census.gov/data-tools/demo/idb/#/country?COUNTRY_YEAR=2022&COUNTRY_YR_ANIM=2022 (last visited June 5th, 2022).

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Chapter 2

Among other things, this chapter provides an "orienteering" exercise by surveying various legal traditions around the world. Perhaps the most important update in this respect concerns **China**, whose influence politically and economically has continued apace, notwithstanding a variety of global economic disruptions in recent years. The so-called "Belt and Road Initiative" provides an illustration of this trend. Details appear below, as part of the following points that we consider noteworthy as updates and additions to the Chapter 2 material:

1) ***… regarding the significance of Islamic law in today's world*** [pages 62-63]: The populations of Afghanistan, Pakistan, and Turkey – listed here as numbering 32 million, 190 million, and 80 million – have now risen to nearly 41 million, 230 million, and 85 million. (See https://www.unfpa.org/data/world-population/AF, https://www.unfpa.org/data/world-population/PK, and https://www.unfpa.org/data/world-population/TR, respectively.) These population increases (over 20% for Pakistan in less than a decade) reflect the rising influence of Islam in that region of the world. Whether this is bringing a rise in the influence of Islamic law, of course, turns in large part on the extent to which these burgeoning populations embrace Sharia principles in their legal systems. A worldwide growth in nationalism makes this increasingly likely.

2) ***… regarding China and international business*** [pages 69-72]: Now a full four decades have passed since the PRC – under the leadership of Deng Xiaoping, following Mao's death – embarked on a breathtaking campaign of economic reform, and the country's global economic influence continues to grow. As one illustration of this, a new initiative warrants inclusion in the bullet-point list on page 72:
   - 2013 – President Xi Jinping officially launches the Belt and Road Initiative to develop infrastructure that would resemble but vastly expand on the old Silk Road linking China to other countries. Current estimates predict the total outlay to exceed US$1 trillion (equivalent) in this multi-decade undertaking that increases the PRC's influence over many countries in Asia and Africa. (See https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative.)

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3) ***... regarding US government assistance for exporters*** [page 95, footnote 31; page 97, footnote 35]: The website address for the "U.S. Government Export Portal" – of use to international businesses and their legal advisors – is now https://www.trade.gov/export-solutions.

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Chapter 3

After examining "conflicts of law" issues, this chapter introduces the Vienna Sales Convention (or CISG). Perhaps the most important update in this respect concerns the steady **rise in number of CISG Contracting States**. The current number, as of mid-2022, is 95. Details on that appear below, along with some other points that we consider noteworthy as updates and additions to the Chapter 3 material:

1) ***… regarding the Second Restatement on Conflicts of Law*** [page 114]: Although a revised restatement (it would be the Third) is currently under preparation, no date for its release is projected. For an article expressing some enthusiasm for some principles expected to appear in a Third Restatement, see Joseph William Singer, *Choice of Law Rules*, 50 Cumberland Law Review 347 (2020). For further information, see https://www.ali.org/media/filer_public/62/26/62269cac-1b96-4b11-9c75-8f9f43d2be39/pages_from_conflict_of_laws_pd_2_online.pdf.

2) ***… regarding the Mexico City Convention*** [pages 115-116]: The website address in footnote 14 should be http://www.oas.org/juridico/English/sigs/b-56.html. There has evidently been no change in the number of parties to that treaty.

3) ***…. regarding the Contracting States to the CISG*** [pages 124-125]: The number of parties to the CISG continues to grow, reaching 95 as of mid-2022. Some of the countries that have recently ratified the treaty are Guatemala, Laos, North Korea, Portugal, and Liberia. The two countries named in footnote 24 as having signed but not ratified the CISG – Venezuela and Ghana – still have not ratified it. Moreover, the cluster of "big hitters" in global trade that have still not become parties to the CISG – namely the UK, India, Indonesia, South Africa, and a few others listed on page 125 – remain outside the CISG system.

4) ***… regarding how to access CISG caselaw*** [pages 154-155]: the pertinent website address for UNCITRAL (second bullet point near the bottom of page 154) is Uncitral.un.org. Also, the last bullet-point (Global Sales Law, near the top of page 155) can be deleted as no longer useful.

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5) ***… regarding updates to the UNIDROIT Principles*** [pages 158-159]: No further updates have been undertaken, but the website address in footnote 59 for the 2016 revisions should be this: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.

6) ***… regarding parties to the Limitation Period Convention*** [page 162]. No more countries have ratified either version of the treaty, but the website address (for future checking) is https://uncitral.un.org/en/texts/salegoods/conventions/limitation_period_international_sale_of_goods/status.

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Chapter 4

Chapter 4, on "Drafting the International Sales Contract", introduces Incoterms and then discusses a range of other terms typically found in international commercial contracts. The key update for Chapter 4 is that **in 2020 the ICC issued a new version of Incoterms**. Details on that appear below, along with some other matters we consider noteworthy. However, the 2020 version of Incoterms differs very little from the 2010 version of Incoterms. One of the 11 terms was renamed and refined slightly – the earlier "DAT" is now called "DPU", with some clarifications – but the main contours of Incoterms remain unchanged, so that with a few modifications all of the treatment of Incoterms in Chapter 4 still applies.

With that as background, we offer these updates and additions to the Chapter 4 material:

1) ***… regarding most of the references to Incoterms 2010*** [these start on page 167 (the first page of the chapter) and appear through about page 188]: In practically all cases, "Incoterms 2010" can simply be read as "Incoterms 2020", except on the specific points highlighted below. Accordingly, the sub-heading on page 174 about "getting to the 2010 version of Incoterms" can be read as "getting to the 2020 version of Incoterms" by taking into account the details mentioned in points 2) and 3) below. Likewise, Study Questions 4.3 through 4.8 can be read as asking about Incoterms 2020, not Incoterms 2010.

2) ***… regarding the shift from Incoterms 2010 to Incoterms 2020*** [pages 174-175]: Just as when the ICC has issued a new version of Incoterms roughly every for several decades (1980, 1990, 2000, 2010), the 2020 version of Incoterms reflects changes in technology and transportation methods. As explained on page 175 (just before a summary of the 11 Incoterms), four terms used in 2000 – DAF, DES, DEZ, and DDU – were consolidated into two terms in 2010 – DAP and DAT. The 2020 version of Incoterms changes the second of those with "DPU" … Delivered [at] Place Unloaded. Full details appear in the official Incoterms publication by the ICC, *Incoterms 2020: ICC Rules for the Use of Domestic and International Trade Terms* (ICC, 2019). Moreover, we can expect that another version of Incoterms will appear with further changes in technology and transport, so that the prediction on page 186 that Incoterms 2010 would be replaced by

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Incoterms 2020 can now be extended for another decade: an Incoterms 2030 can be anticipated.

3) ***…. regarding practitioner guides for the use of Incoterms*** [pages 124-125]: There is no "Guide to Incoterms 2020" prepared by Jan Ramberg, because Mr. Ramberg died in 2019. However, practitioner guidance for Incoterms 2020 can be found in *Practical Guide to Incoterms 2020*, Global Marketing Strategies, https://globalnegotiator.com/files/incoterms-2020-book.pdf. In addition, the ICC sells a resource called *ICC Handbook on Transportation and the Incoterms 2020 Rules*. The ICC also provides an academy and coursework bundle; see https://icc.academy/transport-incoterms-2020/."

4) ***… regarding the ICC's Model International Sales Contract*** [page 184, footnote 19]: The ICC issued a new version of its model contract, with some changes that do not affect the overall contours of the document. See https://2go.iccwbo.org/icc-model-contract-i-international-sale-manufactured-goods-config+book_version-Book/#details.

5) ***… regarding the Friedland book on international business law*** [page 192, footnote 27]: The Friedland book cited here has been issued in a new (fourth) edition: see Jerold A. Friedland, UNDERSTANDING INTERNATIONAL BUSINESS AND FINANCIAL TRANSACTIONS (4th ed. 2014).

6) ***… regarding the ICC's standard force majeure clause*** [pages 200-201]: An updated version of the ICC's standard clause on force majeure can be found at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf. A chart reflecting the changes made from 2003 to 2020 appears here:

Clause	2003 Version	2020 Version
3(a)	war (whether declared or not), **armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo)**, hostilities, invasion, act of a foreign enemy, extensive military mobilization;	war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilization;

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3(b)	civil war, riot rebellion and revolution, military or usurped power, insurrection, **civil commotion or disorder, mob violence, act of civil disobedience**;	civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;
3(c)	act of terrorism, sabotage or piracy;	Currency and trade restriction, embargo, sanction.
3(d)	act of authority whether lawful or unlawful, compliance with any law or governmental order, **rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition**, seizure of works, requisition, nationalization;	act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalization;
3(e)	Uses the following language ● Act of God ● Such as but not limited to Then goes on to include an elongated list of natural disaster	“Pandemic, epidemic, natural disaster or extreme natural event
3(f)	“Telecommunication or electric current”	“Information system or energy”
3(g)	Clause included the canon of construction “Includes but not limited to”	“General Labor disturbances such as boycott, strike and lock out, go slow, and occupation of factories and premises”

These details could be important for an international business lawyer to study carefully in designing a force majeure clause suitable for a specific commercial transaction.

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Chapter 5

Considering the length and complexity of Chapter 5 material, there have been surprisingly few changes in the overall landscape for documentary sales and letters of credit as mechanisms for facilitating exports. However, the following points do warrant quick reference:

1) ***… regarding the shift from Incoterms 2010 to Incoterms 2020***: As explained in the preceding section (of this Update-Supplement document), the ICC issued a new version of Incoterms in 2020. Because the changes were relatively minor, references in Chapter 5 to "Incoterms 2010" can be read as references to "Incoterms 2020".

2) ***… regarding the ICC's model international sales contract*** [page 225 and page 235, footnote 7]: As also noted above (in the preceding section of this Update-Supplement), the ICC has issued a new version of this model contract, with some changes that do not affect the overall contours of the document. See https://2go.iccwbo.org/icc-model-contract-i-international-sale-manufactured-goods-config+book_version-Book/#details.

3) ***… fixing a typo on Sample Document #5.7*** [page 228]: The sample Commercial invoice should have the name Marie Miles (or some other official from GeoStat) appearing in the bottom right corner, nt the name "Melanie Dunn". As shown in other sample documents (e.g., the confirming letter of credit on page 226), Melanie Dunn is a staff member of the confirming bank (Virginia National Bank). Obviously, the commercial invoice is issued by the seller … in this case GeoStat.

4) ***… regarding government-required preshipment-inspection rules*** [page 239, footnote 14]: Here is an updated website address for the US Department of Commerce information on this point … https://www.export.gov/logistics/eg_main_018120.asp.

5) ***… regarding references to NAFTA*** [page 239]: As explained in the section of this Update/Supplement relating to Chapter 11 of *Global Business Law*, the NAFTA was replaced during the Trump Administration with the USMCA. The passing reference in Chapter 5 to the NAFTA could be read as a reference to the USMCA.

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Chapter 6

Key updates are as follows:

- ***International Trade Regulations in a Nutshell.*** As noted at the outset of this Update-Supplement, we provide as an Annex to this document a survey of international trade-regulation law. That Annex concentrates on the definitions, history, rules, and institutions involved in international trade regulation, so that practitioners and students using the *Global Business Law* book can have a contextual synopsis for their use in studying and applying the practitioner-oriented points explained in the rest of Chapter 6 of the book.

- ***US Export Controls.*** In 2018, the USA adopted, after many years of debate and inaction, a new export control law – the Export Control Reform Act. It gave renewed statutory foundation for the Export Administration Regulations (which had been kept in force for many years via special emergency economic powers of the President) and gave special emphasis to emerging-technology exports. Here is how a law firm summarized the significance of the ECRA:
  - ECRA became law on August 13, 2018. It is the permanent statutory authority for the EAR, which is administered by the U.S. Department of Commerce's BIS. The new law codifies long-standing BIS policies and does not require changes to the EAR, such as to its country-specific licensing requirements.
  - However, as part of the larger effort to reform the authorities governing CFIUS, the law effectively requires BIS to lead an interagency, regular order process to identify and add to the EAR controls on "emerging" and "foundational" technologies that are "essential to the national security of the United States.

  [Source: https://www.akingump.com/en/news-insights/the-export-control-reform-act-of-2018-and-possible-new-controls.html.]

- ***Privacy issues – GDPR.*** The General Data Protection Regulation, referred to briefly on pages 334-335 of the text of *Global Business Law* text, came into force in 2018 following its adoption in 2016 by the European Parliament. Since coming into force, the GDPR has brought sweeping changes in the governance, monitoring, and strategic decision-making regarding the use of consumer data – not just in Europe but many other countries. By one account, more than 100 countries have now put privacy standards in place, inspired in part by the GDPR. The same goes for some states within the USA, including California (which adopted the California Consumer Privacy Act just a month after the GDPR took effect). For details, see https://www.ispartnersllc.com/blog/gdpr-one-year-later-impact/ and

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https://www.natlawreview.com/article/gdpr-usa-new-state-legislation-making-closer-to-reality.

In addition to those most important points, please note the following matters we consider noteworthy:

1) ***... regarding the Geneva Convention on Agency*** [page 322]: Participation in this treaty, referred to in the text and in footnote 25, has remained largely unchanged. Details on the five states that have ratified or acceded to the treaty can be found at https://www.unidroit.org/instruments/agency/status/.

2) ***... regarding the E-SIGN Act*** [page 327]: As a reflection of the strong trend favoring the use and recognition of digital/electronic signatures, proposals for streamlining the E-SIGN Act have gotten Congressional attention. As of late 2022, an "ESign Modernization Act" was under consideration. See https://www.signable.us/senates-esign-act-modernization/ and https://financialregnews.com/bill-introduced-in-u-s-senate-would-streamline-the-e-sign-law/. The global COVID-19 pandemic is cited as a reason for this initiative.

3) ***... regarding updates to the UCC to reflect electronic commerce*** [page 325]: Although the information shown here, especially in footnote 29, remains applicable, the Uniform Law Commission has recently adopted amendments to the UCC (in 2022) aimed at addressing emerging technologies, with special attention to virtual currencies, blockchain, artificial intelligence, and the like. For details, see https://www.uniformlaws.org/acts/ucc.

4) ***... regarding the UETA*** [page 328]: Now all US states except New York have adopted the UETA in some form. Some states have also specifically amended their laws to accommodate blockchain technology. See https://www.americanbar.org/content/dam/aba/publications/business_lawyer/2019/74_1/survey-cyberspace-blockchain-201902.pdf.

5) ***... regarding the EU's Electronic Commerce Directive*** [page 329]: The EU adopted the Digital Services Act in 2022 in order to update the EU's legal framework for handling illegal content and disinformation, with special attention to modernizing the E-Commerce Directive of 2000. Affected service providers will have until early 2024 to comply with its provisions, but

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some other online platforms will be affected sooner. For details, see https://en.wikipedia.org/wiki/Digital_Services_Act.

6) ***... regarding the Electronic Communications Convention*** [page 332]: This treaty now has 15 parties; none of them is a G-7 country or major international commercial country except for Russia. However, some countries (notably Australia) have declared their intention to adopt the Convention, and some other major countries (notably China, South Korea, and Saudi Arabia) have signed it. Both Canada and the USA have seen legislation promoted that would facilitate the Convention's adoption. Moreover, the Convention's aims and provisions have prompted numerous states to follow the guide in the UNCITRAL Model Law also discussed on page 332. For more details, see https://en.wikipedia.org/wiki/Electronic_Communications_Convention.

7) ***... regarding electronic bills of lading and electronic letters of credit*** [pages 337-340]: Work proceeds in development of e-bills and eL/Cs, but the results remain disjointed because of the hurdles described on these pages of the *Global Business Law* text. For some updated details on electronic bills of lading, see https://www.prnewswire.com/news-releases/digital-ltl-council-establishes-new-industry-standard-for-electronic-bills-of-lading-seeks-widespread-adoption-301657529.html (explaining how "less-than-load" transport companies have developed e-bills within their own industry's operations) and https://www.hfw.com/Electronic-Bills-of-lading-is-this-time-different (explaining how various countries such as Singapore recognize e-bills in some cases, but acknowledging that e-bills largely "are currently used only in closed systems" such as BOLERO, also mentioned on page 338 of the *Global Business Law* text). See also https://www.researchgate.net/publication/261298984_Electronic_Bill_of_Lading's_Title_Transfer_in_International_E-commerce (noting that although electronic bills of lading have evolved in recent years, legal risks can occur.) The same theme applies to proposals for electronic letters of credit. Such proposals continue to emerge, but for reasons explained in the text they have not gained much traction yet. See https://financialtribune.com/articles/economy-business-and-markets/59792/electronic-letter-of-credit-faces-struggles-to-gain (noting the "icy reception" that bankers have given to eL/Cs, notwithstanding the ICC's introduction of the notion of eL/Cs). According to some observers, the global COVID-19 pandemic has spurred the use of eL/Cs – see https://www.tdsecurities.com/ca/en/electronic-letters-of-credit – but the risks that paper L/Cs are designed to address remain difficult to assess and manage with eL/Cs. See https://uncitral.un.org/sites/uncitral.un.org/files/media-

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documents/uncitral/en/uncitral-paper_feb2011-alan-davidson.pdf (focusing on the UCP's introduction of the so-called eUCP).

8) ***… regarding the Brussels Nomenclature Convention*** [pages 341-342]: The 1988 Convention's "harmonized system" of headings and subheadings (for classification of goods for customs purposes) gets updated every five years (under the auspices of the World Customs Council) to take into account changes in technology and in patterns of international trade. The most recent (seventh) amendment took effect in 2022. See https://mag.wcoomd.org/magazine/wco-news-86/the-harmonized-system-30-years-old-and-still-going-strong/. The pertinent Wikipedia page provides a good overview: https://en.wikipedia.org/wiki/Harmonized_System.

9) ***… regarding the online version of the HTSUS*** [page 342, footnote 67]: it can now be found at Harmonized Tariff Schedule PDFs (usitc.gov).

10) ***… regarding Column 2 countries*** [page 344]: After many years of applying to only two countries, Column 2 status now applies to four: Cuba, North Korea, Russia, and Belarus. The latter two were added in April 2022.

11) ***… regarding the EAR*** [page 348-350]: The EAR, now existing under the auspices of the new Export Control Reform Act (as explained above), are under constant revision. For details of changes in recent years, see https://www.bis.doc.gov/index.php/federal-register-notices.

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Chapter 7

Here are some rather minor updates for the information in Chapter 7, which focuses on licensing of production abroad – and, in its first several sections, on the array of intellectual-property treaties that bear importantly on this type of international business transactions

1) ***… regarding the "first-to-file" approach now taken in US patent law*** [page 371, footnote 7]: The reference here to the change in US law deserves some further elaboration. Here is one:

   > The Leahy-Smith America Invents Act amended federal patent law to define the "effective filing date" of a claimed invention as the actual filing date of the patent or the application for patent containing a claim to the invention (thus replacing the current "first to invent" system with a "first inventor to file" system), except as specified. The statute requires the effective filing date for a claimed invention in an application for reissue or reissued patent to be determined by deeming the claim to the invention to have been contained in the patent for which reissue was sought
   > (Source: https://www.congress.gov/bill/112th-congress/house-bill/1249.)

2) ***… regarding the PCT*** [page 373, main text and footnote 15]: The Patent Cooperation Treaty now has 156 contracting states. The description of the treaty given on this page is still valid, and an illustration of the significance of the PCT in modern global intellectual property law can be found in a set of revised regulations issued in 2021 and taking effect in mid-2022. Those amendments are as follows:

   > – Amendments to PCT Rules 5, 12, 13ter, 19 and 49 relate to implementation in the PCT of WIPO Standard ST.26 ("Recommended Standard for the Presentation of Nucleotide and Amino Acid Sequence Listings using XML (eXtensible Markup Language)") and will apply to any international application with an international filing date that is on or after 1 July 2022;
   >
   > – Amendments to Rule 82quater relate to strengthening safeguards for applicants and third parties in the case of a general disruption that affects meeting time limits under the Regulations and will apply to any time limit fixed in the Regulations that expires on or after 1 July 2022. –

   (Source: https://www.wipo.int/edocs/pctndocs/en/2022/pct_news_2022_6.pdf)

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3) ***… an update on the participation by states in the key international trademark-protection treaties*** [pages 377-379]: For the treaties mentioned in this segment of Chapter 7, the current participation numbers as of late 2022 (according to the WIPO website, which shows details on all WIPO-administered treaties) are … 179 parties for the Paris Convention of 1883
   - 91 parties for the 1957 Arrangement of Nice
   - 20 parties to the 1973 Trademark Registration Treaty
   - 55 parties to the Madrid Agreement of 1891 – current
   - 112 parties to the Madrid Protocol of 1989. Known as the Madrid Union.

4) ***… regarding other WIPO-administered treaties*** [pages 377-379]: Another pair of treaties that could usefully be added to the list appearing on page 377-379 are the Trademark Law Treaty and the Singapore Treaty on the Law of Trademark. Here is the summary one source provides (along with some links) for those two treaties, which date from 1994 for the Trademark Law Treaty (currently with 54 states as parties) and from 2006 for the Singapore Treaty (currently with 52 states as parties):

> The Trademark Law Treaty and the Singapore Treaty on the Law of Trademarks are administered by the World Intellectual Property Organization. Both treaties serve to simplify trademark application and registration procedures in their member countries. The Trademark Law Treaty entered into force in the United States in August 2000 and the Singapore Treaty in March 2009.
>
> The Trademark Law Treaty simplifies and harmonizes trademark application and registration procedures by member states. It facilitates renewals, the recordation of assignments, name and address changes, and powers of attorney. It also requires members to register service marks and establishes a 10-year renewal period for trademarks.
>
> The Singapore Treaty on the Law of Trademark modernizes the international trademark system by expanding protectable subject matter to include nontraditional marks, such as sensory marks, color, position, and movement marks, among others. Members are permitted to require submissions to be filed electronically. Members must provide measures to reinstate an application or registration that was unintentionally abandoned. And, very importantly, the treaty establishes maximum requirements for recordal, amendment, or cancellation of recordal of a license, so as not to jeopardize the trademark application or registration. The Singapore Treaty does not replace the Trademark Law Treaty; countries can belong to both.

(Source: https://www.uspto.gov/ip-policy/trademark-policy/trademark-law-treaty-and-singapore-law-treaty)

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Chapter 8

We bring attention here to only one rather minor update for the information in Chapter 8, which focuses on the legal aspects of international franchising operations. The update – or potential update – relates to the **FTC Franchise Rule** referred to on page 409. Here is what one source says about the possibility of an update of the FTC Franchise Rule:

> There are potential changes [under consideration] to the FTC Franchise Rule. [In 2021] the Federal Trade Commission held a virtual public workshop as part of its regular review of its regulations and focused on three issues: (1) Financial performance representations; (2) The use of disclaimers; and (3) The format of the Franchise Disclosure Document.
>
> While the FTC has not directly stated what, if any changes will be made to the FTC Franchise Rule, it is likely that modest revisions will be proposed. It remains to be seen whether the FTC will adopt changes to the FTC Franchise Rule, and if so, the nature of the changes. Among the most likely changes that we anticipate are the following:
>
> - Incorporation of the Recent NASAA Financial Performance Representation Commentary into the FTC Franchise Rule. This change is a relatively easy one for the FTC. The commentary has been vetted by the franchise administrators of the roughly fifteen states that regulate the offer and sale of franchises and addresses the Item 19 requirements of the FTC Franchise Rule. It imposes additional requirements regarding FPRs, such as the inclusion of both a mean and median where only one of the two would have otherwise been included. Moreover, because the NASAA commentary has, for all practical purposes, been adopted by the state franchise administrators, franchisors that are lawfully offering and selling franchises in one or more of these fifteen states are already complying with the NASAA commentary. As a result, the FTC's adoption of the NASAA commentary would have little impact on most franchisors.
> - Clarity Regarding Prohibited Disclaimers. The use of disclaimers in Item 19 has been prohibited for quite some time. However, it is often unclear whether a statement is an unlawful disclaimer or a permitted description. The FTC could, and likely should fill this void. A uniform definition or set of guidelines would reduce the uncertainty and thus reduce the unnecessary legal risk that has resulted from it.
> - Additional Regulations to Promote Electronic Disclosure. The FTC Franchise Rule currently permits franchisors to deliver their FDDs through electronic means and a significant number and percentage of franchisors do so. However, the FTC Franchise Rule prohibits the inclusion of any content and links beyond the FDD itself, other than basic navigational tools. The FTC may loosen this regulation, permitting hyperlinks to, among other things, the FTC and state websites. It may also encourage franchisors to post their FDDs on their websites.

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> We do not expect that the FTC will mandate financial performance representations or the addition of a summary document to the FDD. These changes would be far more substantive and significant than the changes we anticipate and would likely cause confusion and uncertainty (as well as heightened legal risk and disputes resulting from that confusion and uncertainty).

[source: https://www.franchise.org/blog/potential-changes-to-ftc-franchise-rule]

Although this potential set of changes to the FTC Franchising Rule would not seem to have any special or unique impact on *international* franchising operations, the above account reflects the sustained significance of the Rule and gives a general indication of the character of issues it currently poses.

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Chapter 9

As an overarching matter that is relevant to the treatment of foreign direct investment ("FDI") in Chapters 9, 10, and 11, bear in mind that **the law of foreign investment is currently undergoing substantial change** – perhaps *wrenching* change – as a consequence of several combined forces. A 2021 edition of the treatise by Sornarajah, *The International Law on Foreign Investment*, offers this synopsis of these forces and their effect:

> The international law on foreign investment has become an arena of deep contest between different interest. While investment protection remains the main interest, inflexible investment protection through compliance mechanisms like arbitration have met with considerable opposition. Such opposition was once confined to the developing nations. But with the rise of states like China and India and other smaller states with a capacity to invest overseas, developed states are seeking changes to the system they once created. New actors such as environmental and human rights lobbies also seek changes to the fragmented international law that hitherto has emphasized investment protection over other interests. Populism resents investment protection, due to the belief that it sends capital and with it jobs overseas. Climate change demands that restrictions are placed on the liberal regimes that see unrestricted flows of foreign investment.
>
> [Source: M. Sornarajah, *The International Law on Foreign Investment* (5th ed., 2021), at fronticepiece and back cover.]

Chapters 9, 10, and 11 all deal with foreign direct investment ("FDI"), and although investor *protections* feature most prominently in Chapter 11, the trends that Sornarajah emphasizes also have implications for other topics addressed in Chapters 9 and 10 – namely, the reasons for FDI, the forms of FDI, the regulation of FDI (mainly by host governments but increasingly also by home governments of the investors), and the array of risks that FDI faces. Sornarajah's perspective leans, by his own acknowledgement, toward the interests of developing countries more than toward the interests of developed countries, but his projections for the coming few years are almost surely valid ones; those projections include (i) increased regulatory authority by host countries over FDI within their borders, (ii) an unraveling of the system of investor-protection that Western countries (and international institutions that they control) created and supported for so long, (iii) deep uncertainty over how China's exploding outbound FDI activities will help shape new FDI rules, (iv) slim chances that multilateral treaty regimes will emerge to establish new rules, (v) a shift away from arbitration as a means of state-investor

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dispute settlement, (vi) protectionist and populist/nationalist ideologies gaining ascendancy in the policies and politics of many countries, and (vii) continued (perhaps accelerating) uncertainty over the international-law standards for "fair and equitable treatment" and for compensation following expropriation of FDI assets by host governments.

All these trends bear on the advice that international business lawyers need to be prepared to provide to their clients considering or undertaking FDI adventures. To generalize in this regard: (a) the advantages of (and expansion in) FDI as a worldwide phenomenon should be regarded (by lawyers and their clients) with more skepticism, (b) the regulation (especially host-country regulation) of FDI should be expected to expand at the expense of the trend toward globalization we have seen over the past several decades, and (c) the protections available for foreign investors should be expected to narrow, leading their legal advisors to rely ever more heavily on insurance. These points should serve as a "gloss" to the materials appearing in Chapters 9, 10, and 11 of *Global Business Law*.

In addition to those observations, please note the following matters we consider noteworthy in order to update Chapter 9:

1) ***… in the general discussion of joint ventures*** [concentrated mainly in pages 449-464]: It is worth noting that the trend toward production-sharing arrangements in the extractive industries (especially petroleum) has continued to strengthen, away from the "concession" arrangements that predominated in earlier years. Under a "concession" arrangement, a host government permitting an FDI to operate an extractive activity in its borders would typically grant ownership rights to the investor in return for some royalty or profit-proportion payment arrangement by the investor to the host government. Under a "production-sharing" arrangement, ownership remains with the host government (consistent with the increasing vitality of the principle of "national sovereign over natural resources"), and the foreign investor has only production rights – which it pays for by transferring to the host government the revenues from that production, from which revenue the investor can withhold some share earmarked for itself, usually on a downward-sliding scale over time. For details, see Sornarajah (5th edition, 2021, cited above) at p. 150.

2) … ***regarding the flows of FDI*** [page 430, especially note 4]: Updating the information about the largest host countries for FDI – now they are, according to the OECD, the USA, China, Canada, and Brazil, and overall flows of FDI have reached over US$1.8 trillion. See https://www.oecd.org/investment/statistics.htm.

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3) ***… regarding the illustrative information on de novo investment operations in Japan*** [page 438-439, especially footnote 16]: The current website address for the Japan External Trade Organization (JETRO), as it relates to FDI establishment, is https://www.jetro.go.jp/en/invest/setting_up/guide/. As noted in these pages, detailed regulations change, and the information set forth here is illustrative only.

4) ***… regarding legal frameworks for privately-financed infrastructure projects*** [pages 484-486, especially footnote 75]: For an updated version of the UNCITRAL/World Bank document on public-private partnerships, see https://ppp.worldbank.org/public-private-partnership/library/uncitral-legislative-guide-2019.

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Chapter 10

Please see the overarching comments made above for Chapter 9 (but relating to Chapters 9, 10, and 11), drawing especially from observations by Sornarajah about the trends in the international legal rules and principles governing FDI.

The most significant update specific to Chapter 10 relates to the adoption of the **Foreign Investment Risk Review Modernization Act** (FIRRMA) in 2018. The key aim of this legislation was to expand CFIUS jurisdiction over the review of proposed transactions involving foreign investors. Here is how one source summarizes the FIRRMA:

> On August 13, 2018, President Trump signed into law the National Defense Authorization Act ("NDAA"), which included the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"). This marks the most significant change in over ten years in the law governing the Committee on Foreign Investment in the United States ("CFIUS"). FIRRMA, in essence, codifies certain existing CFIUS practice with respect to covered transactions (as defined below), expands CFIUS's jurisdiction to address perceived evolving national security threats due to the use of investment structures that previously have been outside of CFIUS jurisdiction, and seeks to modernize CFIUS's processes to promote more timely and effective reviews of covered transactions. In particular, FIRRMA authorizes CFIUS to review certain non-controlling investments by foreign companies; enhances restrictions on investments in certain critical technologies or infrastructure and sensitive personal data; targets real estate transactions in proximity to sensitive US government sites; and requires mandatory filings for certain investments by foreign government-owned entities.
>
> [Source: Norton Rose Fulbright firm, President Trump signs into law CFIUS reform bill | Knowledge | Global law firm | Norton Rose Fulbright. A more detailed survey of the FIRRMA, as prepared by the US Congressional Research Office, appears here: CFIUS Reform Under FIRRMA (fas.org).]

In addition to that CFIUS-related legislation, we also consider the following matters noteworthy in respect of Chapter 10:

1) ***… regarding caselaw on the US Alien Tort Claims Act*** [pages 555-559]: It appears that as of late 2022, no significant extensions of the ATCA's "reach" have occurred in US caselaw (linking specifically to the *Beanal* and *Kiobel* judgments). To this extent, then, the risks to companies whose foreign investment operations might be thought to give rise to ATCA

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jurisdiction have evidently not expanded into the areas of international environmental degradation.

2) ***... regarding Canadian caselaw on private corporate liability for breach of international law*** [pages 555-559]: Although the *Global Business Law* text does not examine how other countries' legal systems handle disputes like those involved in Alien Tort Claims Act cases, a 2020 Canadian case shows that some other countries are prepared to apply international law to private companies. Here is a synopsis of the 2020 *Nevsum Resources* case:

> *Nevsun Resources Ltd v Araya*, 2020 SCC 5 is a landmark case in which the Supreme Court of Canada held, in a 5–4 decision, that a private corporation may be liable under Canadian law for breaches of customary international law committed in other countries.
>
> The case concerned human rights violations allegedly committed against workers at an Eritrean mine majority-owned by Nevsun Resources, a Canadian firm. The Supreme Court held that the alleged victims' case against Nevsun could proceed in the courts of British Columbia. It also established that the act of state doctrine is not recognized in Canadian law.

[Source: https://en.wikipedia.org/wiki/Nevsun_Resources_Ltd_v_Araya]

3) ***... regarding the OECD Guidelines*** [pages 559-560]. Likewise, there seems to have been no revision to or expansion of the OECD Guidelines since 2011 – including in respect of environmental protection.

In this Update-Summary document, we have generally not commented on matters as to which material changes in international business law have *not* occurred in the years since the 4th edition of *Global Business Law* was published. In respect of environmental protection/degradation, however, we have drawn attention to the "non-changes" referred to above (ATCA and OECD Guidelines). Why? Because the growing avalanche of environmental crises facing the planet makes it noteworthy that legal frameworks have *not* changed significantly in response … not yet. International business lawyers should watch for a tipping point at which legal consequences for environmentally damaging activities *do* expand rapidly.

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Chapter 11

Please see the overarching comments made above for Chapter 9 (but relating to Chapters 9, 10, and 11), drawing especially from observations by Sornarajah about the trends in the international legal rules and principles governing FDI.

Key updates specific to Chapter 11 are as follows:

- **USMCA replaces NAFTA**. At the insistence of the Trump Administration in the USA, the North American Free Trade Agreement ("NAFTA"), in place since the early 1990s, was scuttled in favor of the U.S.-Mexico-Canada Agreement ("USMCA"). Those provisions of the USMCA relating to FDI largely resemble the investment FDI provisions of the NAFTA, which are described in section IID of Chapter 11 of *Global Business Law*. As explained there, the NAFTA provisions on FDI appeared in Chapter 11 of NAFTA; NAFTA Chapter 11A focused on substantive protections for FDI, while NAFTA Chapter 11B focused on the procedural means of handling investor-state disputes – that is, complaints lodged by private sector-investors from one of the three countries in another of the three countries alleging that a host country had failed to abide b the substantive protections of NAFTA Chapter 11A.

  Although in many respects "USMCA = NAFTA" (in terms of FDI-relevant provisions), there are some differences between the two treaties. In general, the USMCA differs from the NAFTA on FDI issues in these main ways:
    - Some aspects of the "fair and equitable treatment" standard found in NAFTA Chapter 11A were "softened", providing somewhat less protection (under that concept) than under the NAFTA system.
    - Canada is no longer involved in the investor-state dispute-settlement system of arbitration, although Mexico and the USA remain covered by it.

  Details on these NAFTA-to-USMCA changes can be found in Sornarajah (5th edition, 2021, cited above) at pp. 39, 312-313.

- **Other multilateral FDI-liberalization treaties**. The negotiations to create a Trans-Pacific-Partnership agreement ("TPP") and a Transatlantic Trade and Investment Partnership ("TTIP") – both of which are referred to on page 585 of *Global Business Law* (4th edition) – were in an uncertain status at the time that book was published. Much has changed in the intervening years. Although the *Global Business Law* text does not attempt any comprehensive examination of

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international trade regulation, it is important for international business lawyers to understand the general contours of the landscape of multilateral treaties that bear on trade relations and (especially in the context of Chapter 11 of *Global Business Law*), those that bear on foreign investment. The current status of the TPP and the TTIP initiatives – and the successor to the TPP, which is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership – is as follows:

- ***TPP***. The Trans-Pacific Partnership (TPP), or Trans-Pacific Partnership Agreement, was a highly contested proposed trade agreement between 12 Pacific Rim economies – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States. The proposal was signed on 4 February 2016 but not ratified, being opposed by many Democrats and Republicans in the USA, including both major-party presidential nominees, Donald Trump and Hillary Clinton. After taking office, the newly elected President Donald Trump formally withdrew the United States from TPP in January 2017; therefore the TPP could not be ratified as required and did not enter into force. The remaining countries negotiated a new trade agreement called Comprehensive and Progressive Agreement for Trans-Pacific Partnership … see the next bullet-point.

- ***CPTPP***. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) incorporates most of the provisions of the TPP. It entered into force on 30 December 2018 among all the TPP negotiating countries except the USA. The eleven signatories have combined economies representing 13.4 percent of global gross domestic product, at approximately US$13.5 trillion, making the CPTPP one of the world's largest free-trade areas by GDP, along with the USMCA, the European Single Market, and the Regional Comprehensive Economic Partnership. Several other countries have applied to join the CPTPP (this would require unanimous support among existing members). The UK is furthest along in that process; Taiwan (the Republic of China) and the Peoples Republic of China have both applied (the latter's chances are regarded as slim); and Ecuador has also applied. A few other countries, not including the USA, have expressed interest in joining as well. The investment-protection provisions are summarized thus on a Canadian government website:

  How the CPTPP benefits investors

  > The CPTPP investment chapter is innovative and modern, establishing high-standard protections for investors while upholding the Parties' right to regulate to achieve legitimate public policy objectives. The core obligations of the chapter include:

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- *National treatment:* trading partners should not discriminate against each other's investors to favour their own investors
- *Most-Favoured Nation treatment:* trading partners should not discriminate against each other's investors to favour investors from any other country
- *Minimum standard of treatment:* trading partners should treat investments based on customary international law, including fair and equitable treatment, due process, and full protection and security
- *Expropriation and compensation:* covered investments are protected from expropriation or nationalization, except in specific circumstances and where accompanied by adequate compensation
- *Performance requirements:* conditions are prevented from being placed on covered investments that favour domestic industry, such as requirements that the investor purchase local goods, export a certain percentage of goods the investment produces or transfer technology to the host country, and
- *Transfers:* investors are able to freely transfer capital and profits related to an investment into and out of the host country, subject to some exceptions (for instance, in the event of a financial crisis).

These obligations are backed up by a fair, impartial and effective investor-state dispute settlement (ISDS) mechanism. Where Canadian investors feel they have been discriminated against or treated unfairly, the CPTPP's ISDS mechanism allows them to resolve the dispute without relying on the host government's domestic court system. However, this isn't a blank cheque: investors are only able to claim damages where the specific obligations of the treaty have been breached. These obligations are coupled with careful carve-outs that preserve Canada's policy flexibility in important areas (see "non-conforming measures" section below). ISDS tribunals are never able to overturn a Party's domestic measures – they can only provide investors with compensation for damages that result from breaches of the treaty.

- ***TTIP***. The Transatlantic Trade and Investment Partnership (TTIP) was a proposed trade agreement between the European Union and the United States, with the aim of promoting trade and multilateral economic growth. According to Karel de Gucht, European Commissioner for Trade between 2010 and 2014, the TTIP would have been the largest bilateral trade initiative ever negotiated, not only because it would have involved the two largest economic areas in the world but also "because of its potential global reach in setting an example for future partners and agreements". TTIP Negotiations were halted by US president Donald Trump, who then initiated a trade conflict with the EU. Trump and the EU declared a truce of sorts in July 2018, resuming talks that appeared similar to TTIP. On 15 April 2019, however, the negotiations were declared "obsolete and no longer relevant" by the European Commission. Among the various grounds for criticism of the TTIP were (i) the fact that negotiations and proposals were classified out of public view, (ii) the

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> expectation that the TTIP would (by reducing regulatory barriers to trade for big business, undermine food safety law, environmental legislation, banking regulations and the sovereign powers of individual nations more generally. Despite the secrecy surrounding the negotiations, most observers assumed that the investment provisions of the TTIP would closely resemble the investment-liberalization regimes favored by Western countries, and particularly by the USA as reflected in its investment-liberalization efforts through other multilateral and bilateral negotiations in recent years.

[Sources: Canadian government sources; Sornarajah (5th edition, 2021, cited above) at pp. 335-336; and other accounts summarized in Wikipedia pages on TPP, CPTPP, and TTIP.]

- **BIT disillusionment**. The trend away from bilateral investment treaties ("BITs"), referred to especially in pages 594-609, has continued. Sornarajah (5th edition, 2021, cited above) notes that the number of such BITs has now dropped from about 3,300 at the first decade of the 2000s to about 2,900, and he cites these as two key reasons for this change: (i) some "mega-treaties" (Sornarajah's term) on investment protection, such as the CPTPP noted above, address investment issues multilaterally, making BITs unnecessary; (ii) some BITs have been terminated in view of the perceived costs disadvantages and unfairness they impose on developing states. (*Id*. at 209-210). Another reason is probably more pedestrian: many of the provisions previously included in a treaty labeled as a bilateral *investment* treaty (BIT) have in recent years been placed instead in treaties labeled as bilateral (or "free") *trade* agreements (FTAs). Expressed differently: although inter-state agreements labeled as BITs are declining somewhat in popularity and number, their content still shows up in other types of inter-state agreements.

- **The OPIC and the DFC** [pages 624-625]: After several decades of operation, the US Overseas Private Investment Corporation (OPIC) was in 2019 absorbed into a newly-created US International Development Finance Corporation (DFC). The insurance products summarized in section IVA of Chapter 11 of *Global Business Law* remain largely unchanged – so that the general contours of OPIC support described there also apply under the new DFC framework. However, the merger of the OPIC operations with those of the Development Credit Authority of the US Agency for International Development (AID) was designed to strengthen US bilateral development finance capability. Here is how the US government website regarding the DFC describes the new entity:

> On October 5, 2018, the Better Utilization of Investments Leading to Development (BUILD) Act was signed into law. This landmark legislation reformed and strengthened U.S. development finance capabilities into a new federal agency to help address development challenges and foreign policy priorities of the United States.

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U.S. International Development Finance Corporation (DFC) is a modern, consolidated agency that brings together the capabilities of OPIC and USAID's Development Credit Authority, while introducing new and innovative financial products to better bring private capital to the developing world. The U.S. will have more flexibility to support investments in developing countries to drive economic growth, create stability, and improve livelihoods. . . .

[DFC, like OPIC, provides …] political risk insurance. [This includes] [c]overage of up to $1 billion against losses due to currency inconvertibility, government interference, and political violence including terrorism. DFC also offers reinsurance to increase underwriting capacity.

How is DFC different from the Overseas Private Investment Corporation? Key changes include:

- Equity Authority In addition to debt financing DFC has the ability to make equity investments, a tool widely used in development finance
- A Higher Investment Cap DFC has a total investment limit of $60 billion, more than double OPIC's $29 billion investment cap
- Technical Assistance and Feasibility Studies DFC has new tools that will enable it to be more proactive in identifying and addressing development needs around the world
- Increased Cooperation with the State Department and USAID DFC supports and complements other U.S. Government tools that advance development and American foreign policy
- Strong Focus on Lower-Income Countries DFC is focused on promoting inclusive economic growth in the world's least developed countries

[source: https://www.dfc.gov/who-we-are/overview.]

In addition to those most important points, please note the following matters we believe warrant attention in respect of Chapter 11:

1) ***… regarding the key pillars of the GATT*** [page 575]. As noted above, a new summary of international trade law – with special attention to the GATT/WTO system of trade liberalization – is now being provided to supplement Chapter 6 material. That summary appears as Annex A to this Update-Supplement document.

2) ***… regarding the NAFTA and the USMCA*** [pages 572 (especially Study Question 11.4) and 588-594]. Because of the replacement of the NAFTA with the

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USMCA, as summarized above, the specific information in Chapter 11 relating to the NAFTA – and the Study Questions asking about the NAFTA – should be read as relating to (or asking about) the USMCA. As noted above, in most respects "USMCA = NAFTA" in terms of the general contours of FDI protections. Where differences between the two treaties do arise, they are minor enough that the information appearing in Chapter 11 (of *Global Business Law*) regarding NAFTA will suffice for a general understanding of the USMCA. However, for purposes of the discussion from pages 588-594 that turns importantly on investment protections – particularly in Article 1102, 1104 – the key provisions of USMCA Chapter 14 are provided as Annex B to this Update-Supplement document. These in effect serve as a substitution for Appendix #14 of *Global Business Law*. Furthermore, the citations to various practitioners guides to the NAFTA – these appear in footnote 28 on page 588 – could usefully be supplemented with this "nutshell" guide on the USMCA: Ralph H. Folsom and W. Davis Folsom, *The USMCA: NAFTA Re-Negotiated and Its Business Implications* (2020).

3) ***… regarding the US model BIT*** [pages 609-611, and Appendix 15]: An updated website address for the model BIT (from the US State Department) is https://2009-2017.state.gov/documents/organization/188371,pdf. (Here is another website address that should work for the same purpose: https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf .) The text of the model BIT remains unchanged.

4) ***… regarding the list of US BITs*** [pages 611-612]: The current website address for the list is this: https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/. Here is another link that should provide the same list: https://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp.

5) ***… regarding the Act of State Doctrine*** [pages 620-621]: As one of the defenses applicable to an expropriation claim, the Act of State doctrine is odd. For a student or practitioner wishing to explore a bit more into the character of it, with special emphasis on explanations offered by various scholars, see this short synopsis/bibliography by Alfonso Iglesias, written in 2020: https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0207.xml. The Act of State doctrine is recognized in some form in English law. As noted above in the updates regarding Chapter 10, the Act of State doctrine is not recognized in Canadian law (see the reference to the 2020 *Nevsun Resources* judgment).

6) ***… regarding the sovereign immunity doctrine and the FSIA*** [pages 621-622]: Illustrating the fact that the doctrine of sovereignty immunity – and the exceptions that can apply to it (thereby affecting private players in international

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investment operations) – are still alive and well, a recent US appellate decision explored the circumstances in which a state is to be regarded as having waived its sovereign immunity. For a description of that judgment, see Will O'Brien and Ulyana Bardyn, "Recent US law developments on sovereign immunity", in *Global Arbitration Review*, 24 March 2022. The authors there conclude that "one thing is clear: when a state that is a signatory to an international instrument on enforcement of arbitral awards [in this case the New York Convention] agrees to arbitrate in another state-signatory, it will likely be viewed to have forfeited its sovereign immunity with respect to that particular arbitration". [Source: https://us.eversheds-sutherland.com/mobile/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdErW3Cm83!/fileUpload.name=/GAR%20-%20Recent%20US%20law%20developments%20on%20sovereign%20immunity%20(003).pdf]

7) ***… regarding the Fourth Restatement on Foreign Relations Law*** [page 622, footnote 59]: In this footnote, and occasionally elsewhere in *Global Business Law*, references is made to the so-called "Third Restatement" on Foreign Relations Law of the United States. That work has now been partially succeeded by a "Fourth Restatement". This is of little direct significance to international business lawyers, inasmuch as (i) international law, not US foreign relations law, is more directly relevant to international business lawyers and (ii) the Fourth Restatement only covers certain topics. One source offers this description:

> A reexamination of this Restatement began in October 2012. When the Council approved the project, it decided not to launch a full revision of the Restatement Third at that time. Instead, it limited the scope of the project to three areas, with limitations: Treaties but not other forms of international agreements; U.S. views on Jurisdiction, but not generally on separation of powers or federalism; and Sovereign Immunity, but not other immunities required or regulated by international law.

[Source: https://www.lawbookexchange.com/pages/books/69034/american-law-institute/restatement-of-the-law-fourth-foreign-relations-law-united-states]

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Chapter 12

We bring attention here to only three rather minor updates for the information in Chapter 12, which focuses on dispute resolution in international business transactions. The points are …

1) ***... regarding the NAFTA and the USMCA*** [page 639 (especially Study Question #12.16) and 664]. Because of the replacement of the NAFTA with the USMCA, as summarized above (in the updates relating to Chapter 11 of *Global Business Law*), the specific information in Chapter 12 relating to the NAFTA – and Study Question #12.16 asking about the NAFTA – should be read as relating to (or asking about) the USMCA. The discussion of the NAFTA appearing on page 664 currently focuses on the dispute-resolution provisions found in section B of NAFTA Chapter 11. Under the USMCA, those dispute-resolution provisions (with a few modifications) now apply to Mexico and the USA but *not* to Canada. Bottom line: most of the *substantive protections* offered in Chapter 11A of the NAFTA (and now appearing in Chapter 14 of the USMCA) remain in place, but the *procedural/arbitration/dispute-resolution* mechanisms put in place by Chapter 11B of the NAFTA now relate (under the USMCA) only to Mexico and the USA, but not to Canada.

2) ***... constitutional limitations to exercise of personal jurisdiction over foreign defendants*** [pages 650-652]: Although the caselaw emerging from courts facing jurisdictional questions continues to evolve, the general principles explained on these pages of *Global Business Law* still hold. For a useful survey, see https://constitution.congress.gov/browse/essay/amdt5-4-7-1-1/ALDE_00000907/. For a recent international-perspective analysis, see https://www.lawfareblog.com/personal-jurisdiction-due-process-and-transnational-litigation.

3) ***... regarding the Choice of Court Convention*** [pages 653-654]: This treaty has now entered into force but still has only six parties to it. However, one of those parties is the EU, encompassing most European countries, and several other parties are important international-business countries (notably, the UK and Mexico). China and the USA signed the Convention but have not ratified it.

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Chapter 13

We bring attention here to only a few rather minor updates to the information in Chapter 13, which focuses on the legal means of combatting bribery and corruption in international business settings. The points are …

1) **… *regarding the Transparency International Index*** [page 673]: In the last five years, several countries have fallen significantly down the "least corrupt" portion of the index). Canada dropped eight places, and three Latin American countries (Nicaragua, Honduras, and Venezuela) dropped several places as well. (Expressed differently, Venezuela and the others *rose* significantly on the "*most* corrupt" portion of the index.) Bear in mind, however, that the TI Index ranks *perceived* corruption. (Source: https://www.transparency.org/en/cpi/2021.)

2) **… *regarding participation in the Inter-American Convention Against Corruption*** [pages 666-667, especially footnote 9]: Barbados has now ratified the Convention (as of January 2018).

3) **… *regarding the FCPA Resource Guide*** [pages 685-686]: A new version of the Resource Guide was issued in 2020. It can be found at https://www.justice.gov/criminal-fraud/file/1292051/download – or in a form that shows edits to identify specific changes in the new version, at https://www.steptoe.com/a/web/204989/3ZEQPg/fcpa-resource-guide-comparison.pdf. Here are some highlights of changes made in the new version:

> 1. Increased emphasis on the accounting provisions, especially in the criminal arena, while clarifying the *mens rea* requirement for criminal violations [Chapters 1 and 3]
> 2. Continued emphasis on aggressive jurisdictional theories for anti-bribery liability, especially involving foreign persons [Chapter 2]
> 3. Pushback on adverse judicial decisions, at least from the lower courts [Chapters 2 and 3]
> 4. Acknowledgement that compliance programs and internal accounting controls are not coterminous (to what ultimate effect remains to be seen) [Chapter 3]
> 5. Increasing focus on "lessons learned" as a hallmark of an effective compliance program along with other important updating of compliance program expectations [Chapter 5]
> 6. Possible increased benefits of a properly risk-grounded compliance program when a problem arises [Chapter 5]

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7. Reiteration of third-party liability standards (while raising some questions regarding risk management practices) [Chapter 5]
8. Some refinement of the theory of parent/subsidiary liability [Chapters 2 and 5]
9. Continued de-emphasis of successor liability risks [Chapters 2 and 5]
10. Clarifying the priority of "issuer" over "domestic concern" status when a firm qualifies as both [Chapter 2]

[Source: https://www.steptoe.com/en/news-publications/top-ten-changes-to-the-dojsec-fcpa-resource-guide.html.]-

4) ***... regarding the OECD Antibribery Convention*** [page 693, especially footnote 23]: The current number of states that have ratified the Convention is 44, not 43; Peru ratified it in May 2018. In 2021, parties to the Convention adopted a new "recommendation for further combatting bribery of foreign officials in international business transactions", aimed at complementing the Convention's provisions and application in several ways. For further information on that, see 2021 OECD Anti-Bribery Recommendation - OECD (https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm).

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Annex A – Synopsis on GATT/WTO law and international trade regulation more generally

International Trade Regulation in a Nutshell

David Halliwell

1. Table of Contents [abbreviated]

1. Table of Contents
2. *Definitions* of International Trade
3. *History* of International Trade
   a. Smoot-Hawley Tariff
   b. GATT and ITO
   c. WTO and GATT Rounds
4. *Rules* of International Trade
   a. GATT and WTO Agreement
   b. Regional and Bilateral Agreements
5. *Institutional Aspects* of International Trade
   a. WTO
   b. Other Institutions
6. Conclusion

2. Definitions

More so than other areas of law, international trade law is filled with terms of art. Below are some definitions of important trade terms to hopefully serve as a convenient guide when you read the following sections.

A. Absolute Advantage: the ability of an individual or group to carry out a particular economic activity more efficiently than another individual or group. For example, China may have more natural resources and more skilled textile workers than any other country. As such, relative to other countries, China could have an absolute advantage in raw minerals and textiles, as it can produce these goods more efficiently, and therefore sell them cheaper than other countries. The thought is that under free trade, by all countries producing what they are best at making, the world will be more prosperous as more goods are able to be produced. *See below for "comparative advantage."*

B. Anti-dumping Measures: Measures taken by country A to offset the damage caused by country B dumping cheap goods into country A's borders. *To give more of an explanation*: if a company exports a product at a price lower than the price it normally

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charges on its own home market, it is said to be "dumping" the product. The WTO Anti-Dumping Agreement sets forth detailed rules and disciplines prescribing the manner and basis on which Members may take action to offset the injurious dumping of products imported from another Member.[1]

C. Bilateral Trade Agreement: An agreement between *two* countries whereby the countries confer some kind of trade benefit on each other.

D. Bound Rates (a.k.a. Binding Tariffs): A tariff that countries set under GATT. If a country raises its tariffs above this amount, other WTO members can use the dispute settlement process of the WTO to seek relief.

E. Bretton Woods: The Bretton Woods Conference was the gathering of delegates from Allied nations at the Mount Washington Hotel, situated in Bretton Woods, New Hampshire, U.S. in 1944. The conference took place for nations to set up the international financial order after the war. Out of this conference, the so called "Bretton Woods Institutions" were to be created: the International Trade Organization (ITO) to regulate trade/tariffs, the International Monetary Fund (IMF) to prescribe and enforce rules to stabilize currency rates and encourage currency convertibility among states, and the International Bank for Reconstruction and Development (IBRD) (part of the World Bank) to serve as a financial intermediary between investors and the reconstruction projects in Europe (this purpose was later expanded). The ITO was the one institution that failed to come into being.[2]

F. Comparative Advantage: the ability to produce a particular good or service at a lower opportunity cost than its trading partners. This is a modification on the idea of absolute advantage. The idea of comparative advantage helps to explain why countries engage in international trade even when one country's workers are more efficient at producing every single good than workers in other countries. For example, if China can produce jeans, electronics, and shoes more efficiently than every other country, China would have an absolute advantage in each of these goods. However, China can make shoes *most* efficiently of the three goods. Therefore, China may be incentivized to only produce shoes. This allows India, for example, to then have a comparative advantage in jeans as it can produce jeans at a lower opportunity cost than other trading partners, even though China technically would have the advantage if it so chose to make jeans.

G. Countervailing Duties: "also known as anti-subsidy duties, [countervailing duties] are trade import duties imposed under World Trade Organization rules to neutralize the negative effects of subsidies."[3]

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[1] https://U.S.tr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/trade-remedies/anti-dumping
[2] https://en.wikipedia.org/wiki/Bretton_Woods_Conference; https://en.wikipedia.org/wiki/Bretton_Woods_system
[3] https://en.wikipedia.org/wiki/Countervailing_duties

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H. Customs Union: "an agreement between two or more countries to remove trade barriers and lower or eliminate tariffs. Members of a customs union generally apply a common external tariff on imports from non-member countries."[4]

I. Export: a commodity, article, or service sold abroad.

J. Free Trade: international trade left to its natural course without tariffs, quotas, or other restrictions. *See the definition of "Trade Liberalization" below.*

K. General Agreement on Tariffs and Trade (GATT): "a legal agreement between many countries, whose overall purpose was to promote international trade by reducing or eliminating trade barriers such as tariffs or quotas."[5] The original 1947 GATT was updated with the WTO Agreement, and the score of treaties that accompanied it, in 1994.

L. Import: a commodity, article, or service brought in from abroad for sale.

M. Intellectual Property (IP): "a category of property that includes intangible creations of the human intellect. There are many types of intellectual property . . . [including] copyrights, patents, trademarks, and trade secrets."[6]

N. International Bank for Reconstruction and Development (IBRD): an international financial institution established in 1944 primarily to finance the reconstruction of Europe following World War II, but also to assist in the economic development of other countries. It is one of the Bretton Woods Institutions. The IBRD and the International Development Association (IDA), which was founded in 1960 to provide lower-cost loans to poorer countries unable to afford the lending terms offered by the IBRD, are together referred to as the World Bank.

O. International Monetary Fund (IMF): a global financial institution established in 1944, whose main purpose after WWII was to prevent countries from devaluing their currency. Today, the IMF's primary purpose is to make loans to countries with balance-of-payments difficulties that the country encounters because of certain economic & financial policies it adopts. *How is the IMF and World Bank different?* Think of the IMF as giving loans to help countries survive financially during a severe economic downturn, whereas the IBRD/IDA will provide loans to finance projects (new infrastructure, etc.) in countries.

[4] https://www.bdc.ca/en/articles-tools/entrepreneur-toolkit/templates-bU.S.iness-guides/glossary/cU.S.toms-union#:~:text=A%20cU.S.toms%20union%20is%20an,example%20of%20a%20cU.S.toms%20union.
[5] https://en.wikipedia.org/wiki/General_Agreement_on_Tariffs_and_Trade
[6] https://en.wikipedia.org/wiki/Intellectual_property

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P. International Trade Organization (ITO): Failed international trade institution that was to have been created by the Havana Charter. That treaty failed in 1950 when the U.S. did not ratify it. Decades later, the World Trade Organization (WTO) was created, which served the same purpose the ITO was supposed to fulfill.

Q. International Trade Administration (ITA): an agency in the U.S. Department of Commerce that promotes U.S. exports.

R. International Trade Commission (ITC): an agency of the U.S. federal government that advises the U.S. Congress and the president on matters of trade.

S. Isolationism: a policy of remaining apart from the affairs or interests of other groups, especially the political affairs of other countries.

T. Most Favored Nation Treatment (MFN Treatment): a status or level of treatment accorded by one state to another in international trade. It is the most favorable level of treatment a country gives, characterized by favorable trade terms, such as low tariffs. Under the WTO MFN rule, when one country in the WTO grants MFN treatment to a second country (the second country can be a WTO member, but doesn't have to be), that first country must now grant equally favorable trade treatment to every other WTO member.

U. Multilateral Agreement: treaty to which two or more sovereign states are parties.

V. Multilateralism: multiple countries pursuing a common goal. An embrace of globalism.

W. National Treatment: the principle of giving other countries the same treatment as one's own nationals (domestic industries).

X. North American Free Trade Agreement (NAFTA): a 1994 trade agreement between the U.S., Canada, and Mexico. Its main purpose was to eliminate all tariff and non-tariff barriers of trade and investment between the three countries. Superseded by the USMCA.

Y. Non-Tariff Barrier: any measure, other than a tariff, that acts as a barrier to international trade. The GATT and WTO aim to reduce both tariffs and non-tariff barriers.

Z. Protectionism: the theory or practice of shielding a country's domestic industries from foreign competition. This is usually characterized by a country implementing high tariffs and other non-tariff barriers.

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AA. Quantitative Restrictions: "Limits on the quantity or value of goods that can be imported or exported during a specific time period."[7] For example, a country could state that it will only allow 500 violins to be imported into its country during any given year; the GATT aims to eliminate restrictions such as this.

BB. Regional Trade Agreement: "A regional trade agreement (RTA) is a treaty between two or more governments that define[s] the rules of trade for all signatories."[8] Often, but not always, regional trade agreements, as their name implies, are between countries in one geographic area.

CC. Reverse Consensus (a.k.a. negative consensus or inverted consensus): A voting method where what is being voted on is automatically adopted unless there is a consensus to reject a ruling. This means that every voter would have to vote against something for it to fail. This makes it extremely easy for whatever is being voted on to pass. The WTO dispute settlement system uses this method to, inter alia, adopt panel (dispute settlement) outcomes.

DD. Round: a particular episode of trade negotiations between GATT/WTO members. There have been nine such rounds: Geneva (1947), Annecy (1949), Torquay (1950-51), Geneva (1956), Dillon (1960-61), Kennedy (1964-67), Tokyo (1973-79), Uruguay (1986-94), and Doha (2001+).

EE. Services (as distinct from goods): one sector of an economy that consists of the provision of services instead of end products. Examples of services (also known as "intangible goods") include teaching, housekeeping, tours, and nursing.

FF. Smoot-Hawley Tariff: a 1930 law, enacted at the start of the Great Depression, that implemented protectionist trade policies in the U.S.; countries responded by implementing retaliatory tariffs. The law is blamed for prolonging the Great Depression.

GG. Tariff: "a tax or duty to be paid on a particular class of imports or exports" into the customs territory of a country.

HH. Trade Liberalization: the removal or reduction of restrictions or barriers on the free exchange of goods between nations. These barriers include tariffs, such as duties and surcharges, and nontariff barriers, such as licensing rules and quotas. Economists often view the easing or elimination of these restrictions as steps to promote free trade.[9]

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[7] https://stats.oecd.org/glossary/detail.asp?ID=4991
[8] https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements
[9] https://www.investopedia.com/terms/t/trade-liberalization.asp

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II. Treaty of Versailles: The treaty that ended World War I (WWI). It required Germany to pay the victors substantial reparation payments. As a result, it crippled Germany's economy for years. Hitler took advantage of this resentment to gain power.

JJ. Trade-Related Investment Measures (TRIMs) Agreement: an agreement that is part (along with the WTO Agreement) emerging from the Uruguay Round of trade negotiations. TRIMS deals with Foreign Direct Investment (FDI) and requires national treatment for foreign and domestic industries that are directly invested in a country.

KK. Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement: an agreement between WTO members that "establishes minimum standards for the regulation by national governments of different forms of intellectual property."[10]

LL. U.S.–Mexico–Canada Agreement (USMCA): The 2020 trade agreement between the U.S., Mexico, and Canada that replaced NAFTA.

MM. U.S. Trade Representative (USTR): "a Cabinet-level position that serves as the U.S. President's primary advisor, negotiator, and spokesperson on trade matters." "The *Office* of the [USTR] is an agency of the U.S. federal government responsible for developing and promoting American trade policy."[11]

NN. World Trade Organization (WTO): an intergovernmental organization that regulates and facilitates international trade. It was founded on January 1, 1995, emerging from the Uruguay Round of trade negotiations.

3. There and Back Again? A History of Trade Liberalization in the Twentieth and Twenty-First Centuries

This section gives a brief overview of the history of international trade in modern times. At risk of gross oversimplification, trade can be thought of moving from protectionism to free trade as the twentieth century progressed. Specifically, (i) the disastrous consequences of trade protectionism during the Great Depression, paired with (ii) the growing post-WWII mantra that world peace could be achieved through world trade, led to a global movement towards trade liberalization. However, in recent years, the movement towards global free trade has begun to be stifled, or at least viewed with deep skepticism. Regional or bilateral trade deals are often favorable to nation states, and in some cases, isolationism and protectionism have breathed new life. Due to the strong influence the U.S. has on world trade, the history of trade is also characterized by the U.S. unilaterally championing or sinking global trade institutions.

[10] https://en.wikipedia.org/wiki/TRIPS_Agreement
[11] https://en.wikipedia.org/wiki/Office_of_the_United_States_Trade_Representative

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(a) The Smoot-Hawley Tariff: The Failure of Protectionism in the Early Twentieth Century

In late 1929, the Great Depression brought its full fury to the U.S. The Great Depression lasted roughly a decade, until 1939. Why did the Great Depression last so long and have devastating global consequences? Part of the blame can be attributed to the Smoot-Hawley Tariff and the protectionist policies it exemplified.

"The Tariff Act of 1930, commonly known as the Smoot-Hawley Tariff, was a law that implemented protectionist trade policies in the U.S. Sponsored by Senator Reed Smoot and Representative Willis C. Hawley, it was signed by President Herbert Hoover on June 17, 1930. The act raised U.S. tariffs on over 20,000 imported goods. The tariffs under the act . . . were the second highest in U.S. history . . . Economists and economic historians have a consensus view that the passage of the Smoot-Hawley Tariff worsened the effects of the Great Depression."[12]

U.S. protectionists thought that by raising tariffs, people in the U.S. would be more likely to buy U.S. goods as they would now be cheaper (than imports) due to the tariffs. In turn, proponents thought the tariff would help American businesses. However, it failed spectacularly, as foreign countries who were the U.S.'s trading partners responded to the tariffs by implementing their own tariffs on American goods coming into their countries. This made it much more difficult for American businesses to trade their goods abroad, as people in foreign countries now had to pay considerably more for American goods. As a result, trade worldwide was stifled, and experts agree the result was a worsened Great Depression.

Apart from creating devastating economic consequences, the Smoot-Hawley Tariff Act and the reaction of retaliatory tariffs it set off also deteriorated the relationships between nations. With international trade stifled, less international business intercourse was taking place, and as a result, less good will was being exchanged by trading partners in different nations. In a similar vein, the harsh economic policies imposed on Germany after WWI by the Treaty of Versailles crippled the German economy, deteriorated relations Germany had with the rest of Europe, and subsequently served as a catapult to launch Adolf Hitler into the German Chancellorship. As such, harsh economic policies, like the Smoot-Hawley Tariff and the Treaty of Versailles, became to be seen as antithetical to peace on earth. The alternative was free trade.

(b) The GATT and ITO: Failure of Institutionalized Trade Despite Post-War Multilateral Fervor

Months before the U.S.'s formal entry into WWII, the United Kingdom and the U.S. created a framework for a post-war world. In 1941, U.K. Prime Minister Winston Churchill and U.S. President Franklin Delano Roosevelt issued the Atlantic Charter, which outlined key goals. The goals included: "no territorial aggrandizement, no territorial changes made against the wishes of the people, restoration of self-government to those deprived of it, *reduction of trade restrictions*, global co-operation to secure better economic and social conditions for all, freedom

[12] https://en.wikipedia.org/wiki/Smoot%E2%80%93Hawley_Tariff_Act

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from fear and want, freedom of the seas, abandonment of the use of force, and disarmament of aggressor nations."[13] As made clear by these goals, the Atlantic Charter exemplified the belief that free trade and multilateralism generally was integral to promoting global peace following the defeat of the Axis Powers (Germany, Japan, Italy).

In line with the goals of the Atlantic Charter, delegates from all 44 Allied nations met in 1944 at the Bretton Woods Conference to establish a plan to "regulate the international monetary and financial order after the conclusion of World War II."[14] During this conference, a plan was put together to form different institutions, referred to as the Bretton Woods Institutions, to handle different aspects of the post-WWII international monetary and financial order. "An International Trade Organization ("ITO") was to be established; it would prescribe and enforce rules to limit tariff and non-tariff barriers to trade among states. For currency matters, the International Monetary Fund ("IMF") was to be established; it would prescribe and enforce rules to stabilize currency rates and encourage currency convertibility among states. For rebuilding Europe, the International Bank for Reconstruction and Development ("IBRD") was to be established; it would serve as a financial intermediary between investors in countries with wealth and the reconstruction projects in Europe."[15] The latter two of these (IBRD and IMF) were established through the Bretton Woods negotiations; the ITO followed a separate path, slightly later.

To serve provisionally to govern international trade until the ITO was created, the General Agreements on Tariffs and Trade (GATT) was written and began being applied in 1948. Its purpose is the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis." The ITO was negotiated in Cuba from November 1947 to March 1948. The document seeking to create the ITO was called the Havana Charter; "the document provided for the establishment of the ITO, and set out the basic rules for international trade and other international economic matters. It was signed by 56 countries on March 24, 1948."

However, due to protectionism once again gaining sway in American politics, U.S. President Harry S. Truman did not have the votes to ratify the ITO in the U.S. Senate. Accordingly, despite the momentum toward multilateralism that appeared in the creation of the IMF, the IBRD, and the UN, the Havana Charter (to establish the ITO) failed to be ratified by the U.S. Without U.S. approval, other countries refused to ratify the ITO. Therefore, the ITO failed to emerge as an institution.

The result was that the GATT turned from temporary to permanent. International trade was conducted according to the trade-liberalization rules set forth in the GATT, despite the absence of an institution to actually implement those rules. It is only a slight exaggeration to assert that a study of international trade law is primarily a study of the contents of the GATT.

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[13] https://en.wikipedia.org/wiki/Atlantic_Charter
[14] https://en.wikipedia.org/wiki/Bretton_Woods_Conference
[15] Professor John Head – Global Challenges appendixes.

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(c) The WTO and GATT Rounds: Rebirth and Later Atrophy of Institutionalized Trade Liberalization

The GATT continued to govern international trade law for the second half of the twentieth century. However, in 1995, the World Trade Organization was created as a central work-product of the Uruguay Round of trade negotiations. The WTO is in essence a rebranded ITO; a global trade institution was finally created. The WTO Agreement takes precedent over GATT; however, the WTO Agreement adopted (a slightly updated version of) the GATT. Therefore, the text of the GATT – and especially its main principles – can be seen as still omnipresent in trade law.

Why was the WTO finally created in 1995? One explanation is that the recent passage of the North American Free Trade Agreement (NAFTA) that was ironed out between the U.S., Canada, and Mexico in 1994 made U.S. legislators poised to support trade liberalization more generally. Hence, without much of a second thought, the U.S. Congress ratified the WTO, despite the significance and power the institution would have – including vis-à-vis the U.S. itself. With the U.S. decision to ratify the WTO assured, other countries followed suit.

Notably, there was resistance to the newly formed WTO. For example, in 1999, tens of thousands of people protested the WTO's Ministerial Conference in Seattle, Washington. Protestors were concerned that the WTO, and the international trading system more broadly, had negative "implications for the environment, labor standards and human rights."[16]

The lead-up to the creation of the WTO in 1995, together with the period following the creation of the WTO, is characterized by a number of "Rounds", which are multi-year periods of negotiation over some aspect/s of trade. Here is a summary of these different rounds:

Year	Place/name of round	Topic & Notable Outcomes	Participating countries
1947	Geneva	45,000 tariff cutes; average 35% cut	23
1949	Annecy (France)	Tariff reductions	13
1951	Torquay (England)	Tariff reductions	38
1956	Geneva	Tariff reductions	26
1960-1961	Dillon Round	Tariff reductions	26

[16] https://urban.uw.edu/news/impact-of-wto-protests-in-seattle-still-felt-2-decades-later/

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1964-1967	Kennedy Round	35% average cut on industrial goods; commitments on use of anti-dumping laws	62
1973-1979	Tokyo Round	34% average cut on industrial goods; commitments on non-tariff measures	102
1986-1994	Uruguay Round	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc.	123
2001-	Doha Round	Tariffs, non-tariff measures, agriculture, labor standards, environment, competition, investment, transparency, patents etc. The round has not yet concluded.	148+ [17]

As the chart above indicates, the Doha Round is still technically ongoing. However, many commentators declared the round dead years ago. Disagreements between developed and developing countries and disagreements over agricultural subsidies have created a stalemate. As a consequence, an agreement has not been achieved under the Doha Round.

The failure of the Doha Round is characteristic of the increasing ineffectiveness of the WTO as the 21st century has progressed. At the launch of the WTO in 1995, the dispute settlement body of the WTO was considered by many to be extremely effective in comparison to other dispute settlement bodies in international institutions. Under the WTO's dispute settlement process (i.e. the "Disputed Settlement Understanding"), voting is by reverse consensus. This means that once the judicial process of the WTO occurs (which involves a (i) ruling by a dispute settlement panel and (ii) potentially a ruling by the appellate body of the WTO if a nation state appeals), the outcome of the judicial process is accepted unless all the countries vote *against* the ruling. This made enforcing rulings under the WTO considerably easier than other systems.

However, in recent years, the U.S., which has been unhappy with the WTO appellate body for not ruling in its favor, has refused to appoint judges to the appellate body. By doing so, the U.S. has been able to single-handily kill the appellate body, as there are no longer enough

[17] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm ; https://www.hinrichfoundation.com/research/tradevistas/wto/gatt-rounds/ ; https://en.wikipedia.org/wiki/Template:GATT_and_WTO_trade_rounds

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judges on the appellate body to review cases. Therefore, if a state appeals a ruling by a panel, the case is in limbo and the parties cannot find resolution through the WTO appellate process.

The breakdown of the dispute settlement process in the WTO is characteristic of more recent global trends of shifting attention (and buy-in) away from multilateralism and trade liberalization in particular. Countries today often prefer regional or bilateral trade deals that are smaller in scope. Furthermore, there has been a rise of the popularity of leaders around the world with more of an isolationist and anti-multilateralist bent, including Donald Trump (U.S.), Jair Bolsonaro (Brazil), and Marine Le Pen (France). Given these developments, the future of trade liberalization is uncertain. Certainly, the mantra of "world peace through world trade" is not as strongly endorsed now as it was around WWII.

4. Rules of International Trade

(a) The GATT and WTO Agreement

The GATT is the most fundamental document in international trade and is therefore a good place to begin when discussing key documents in international trade. The GATT has been characterized as having 5 main pillars, which are essentially the most important parts of the GATT. The 5 pillars, extremely summarized, require contracting parties to the GATT to do the following:

I. **Most Favored Nation (MFN)**: Countries must give MFN treatment immediately and unconditionally to contracting parties for "like products." MFN treatment forces a contracting party to extend a trade benefit it gives to one trading partner to all other contracting parties of the GATT. In other words, the GATT's MFN rules prevent a country from giving more favorable trade treatment to certain countries over other contracting members.

i. Note that under Article XX of the GATT, there are general exceptions to being forced to extend MFN treatment. No exceptions can be arbitrary or unjustified; exceptions include, inter alia, protecting morals, protecting the environment, and preserving national treasures.

ii. There are also national security and emergency exceptions built into the GATT.

II. **Binding Tariffs**: Contracting parties must set a set of limits (called bound rates) for how high they can raise their tariffs. The country cannot raise its tariffs above this without being guilty of a violation of its treaty commitments.

III. **National Treatment**: Foreign products must be treated just as favorably as domestic products.

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IV. **Quantitative Restrictions (QRs)**: Quantitative restrictions, which include a country setting quotas for goods entering their country or implementing import or export licenses, must be eliminated.

V. **Transparency and Participation**: Laws, regulations, judicial decisions, and administrative rulings involving trade must be published by contracting parties. These rules must be fair.

For a summary of all the GATT articles, see this link: https://www.lancaster.ac.uk/staff/ecarar/gatt%20articles.doc.

The 1994 WTO Agreement that came out of the Uruguay Round adopted the 1947 GATT, while updating some parts of it. However, there were many more achievements out of the Uruguay Round. Here are some of the most important achievements that arose out of the Uruguay Round (and are therefore part of the 1994 WTO Agreement):

I. **WTO:** The WTO was established, giving institutional heft to trade liberalization.

II. **Dispute Settlement:** A dispute settlement process was created to handle disputes between WTO members.

III. **1994 GATT**: The 1947 GATT was updated, essentially by incorporating certain understandings that had emerged regarding the proper meaning of various 1947 GATT provisions.

IV. **Foreign Direct Investment:** The Trade-Related Investment Measures (TRIMs) Agreement was reached. This agreement deals with Foreign Direct Investment (FDI) and requires national treatment for foreign and domestic industries that are directly invested in a country.

V. **Services:** The General Agreement on Trade in Services (GATS) was reached. "The treaty was created to extend the multilateral trading system to *service* sector, in the same way the General Agreement on Tariffs and Trade (GATT) provides such a system for merchandise trade."[18]

VI. **Intellectual Property:** The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was reached. This agreement "establishes minimum standards for the regulation by national governments of different forms of intellectual property (IP) as applied to nationals of other WTO member nations."[19]

VII. **Agriculture:** The Agreement on Agriculture was reached. The "Agreement provides a framework for the long-term reform of agricultural trade and domestic policies, with the aim of leading to fairer competition and a less distorted sector. The Agreement covers: (i) Market access — the use of trade restrictions, such as tariffs on imports; (ii) Domestic support — the use of subsidies and other support programmes that

[18] https://en.wikipedia.org/wiki/General_Agreement_on_Trade_in_Services
[19] https://en.wikipedia.org/wiki/TRIPS_Agreement

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directly stimulate production and distort trade and; (iii) Export competition — the use of export subsidies and other government support programmes that subsidize exports."

VIII. **Subsidies and Countervailing Measures:** The Agreement on Subsidies and Countervailing Measures (SCM Agreement) was reached. The Agreement "disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. Under the agreement, a country can use the WTO's dispute-settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge extra duty ("countervailing duty") on subsidized imports that are found to be hurting domestic producers."[20]

IX. **Anti-Dumping:** The Anti-Dumping Agreement was reached. This Agreement provides "further elaboration" on the anti-dumping principles set out in the GATT, "to govern the investigation, determination, and application, of anti-dumping duties."[21] In general, anti-dumping laws prevent a country from "dumping" tons of cheap goods into a foreign market at a price lower than the domestic goods.

Although the intricate details of all these agreements are beyond the scope of this Update-Supplement, loosely understanding GATT's pillars and the purpose behind the WTO Agreements summarized above will contribute to an understand of any aspect of international trade law.

(b) Regional and Bilateral Trade Agreements

The WTO Agreement binds the roughly 164 members of the WTO, and therefore, by being an agreement a significant number of countries are party to, is classified as a multilateral agreement. However, there are other agreements that countries enter into that are smaller in scope and have fewer countries as parties. These agreements have an array of different names, including: regional trade agreements (RTA), free trade agreements (FTA), Customs Unions (CU), and bilateral agreements.

FTAs and RTAs are nearly identical and are trade agreements between two or more countries. They cover the exportation and importation of goods and sometimes cover intellectual property, FDI, etc. FTA parties, in respect to third-party countries, retain their own sovereign tariff schedules. CUs, on the other hand, are a bit different, as all members of a CU have the same tariff rates on the same merchandise with third party countries. Members of the CUs may also have the same currency. This creates a more integrated system compared to FTAs/RTAs.

An obvious question arises – how can regional trade agreements exist when the WTO requires countries to extend MFN treatment to all other WTO members? The answer is that an exception to the WTO Agreement has been created. The WTO Agreement allows countries who

[20] https://www.wto.org/english/tratop_e/scm_e/scm_e.htm
[21] https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

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enter into these smaller side agreements to give preferential treatment to each other, and, inter alia, violate the MFN rules of the WTO Agreement. This is because these side agreements "have generally been viewed as vehicles of trade liberalization."[22] In other words, the drafters of the WTO Agreement allowed FTA/RTA/etc. agreements to exist because (i) these agreements (arguably) contribute to the overall goal of trade liberalization, and (ii) because without this concession, fewer countries would have ratified the WTO Agreement.

One example of a regional trade agreement is between the U.S., Canada, and Mexico. This agreement was called NAFTA; today, it has been renegotiated and is called the USMCA. NAFTA came into force on January 1, 1994; its main purpose was to eliminate all tariff and non-tariff barriers of trade and investment between the U.S., Canada, and Mexico.[23] USMCA came into force on July 1, 2020. This agreement is similar to NAFTA. However, there are some differences, including: a greater percentage of an automobile's parts having to be made in one of the three countries; more vehicle parts being made by workers making $16 or more an hour; labor laws are strengthened mainly to prevent jobs from being sent to Mexico where wages are lower; U.S. and Canadian markets will be further opened to allow dairy farmers to trade between the country more easily; updates to provide rules for a modern electronic world; and funding for environmental concerns.[24]

On the other hand, one example of a customs union is the European Union (EU). The EU Customs Union has 27 member states; there are additional bilateral agreements in place that bring other countries and territories into the EU's customs union as well.[25] "There are no tariffs or non-tariff barriers to trade between the members of the customs union and members of the customs union impose a common external tariff on all goods entering the union."[26] The common external tariff makes the "customs duties, import quotas, preferences or other non-tariff barriers to trade apply to all goods entering the area, regardless of which country within the area they are entering."[27] Additionally, "The European Commission negotiates for and on behalf of the Union as a whole in international trade deals, rather than each member state negotiating individually."[28]

Bilateral agreements have also been popular in the past couple of decades. As the name suggests, it involves a trade agreement between two countries, and is therefore smaller in scope than other types of trade deals. They are easier to negotiate as they involve fewer countries. However, they can trigger competing bilateral trade agreements among other countries.[29]

[22] https://www.everycrsreport.com/reports/RS21554.html
[23] https://www.federalregister.gov/north-american-free-trade-agreement-nafta-#:~:text=The%20agreement%20came%20into%20force,United%20States%2C%20Canada%20and%20Mexico.
[24] https://www.cnn.com/2019/12/10/politics/nafta-us-mexico-canada-trade-deal-differences
[25] https://en.wikipedia.org/wiki/European_Union_CU.S.toms_Union
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] https://www.thebalance.com/what-are-bilateral-trade-agreements-pros-cons-and-list-3305911

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5. Institutional Aspects of International Trade

(a) WTO

This section briefly explains the functions and governance structure of the WTO. In terms of the general functions of the WTO, the WTO lists its primary functions as:

- Administering WTO trade agreements
- Providing a forum for trade negotiations
- Handling trade disputes
- Monitoring trade policies
- Offering technical assistance and training for developing economies
- Engaging in cooperation with other international organizations[30]

In terms of membership: the WTO has 164 members, and 25 countries are in the process of negotiating membership.

[31]

The WTO is structured by a hierarchy of different decision-making bodies. "The WTO's top level decision-making body is the Ministerial Conference, which meets usually every two years. Below this is the General Council (normally ambassadors and heads of delegation based in Geneva but sometimes officials sent from members' capitals) which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body. At the next level, the Goods Council, Services Council and Intellectual Property (TRIPS) Council report to the General Council. Numerous specialized committees, working groups and working parties deal with the individual agreements and other

[30] https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm
[31] https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm

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areas, such as the environment, development, membership applications and regional trade agreements."[32]

In terms of voting, "all major decisions are made by the membership as a whole, either by ministers (who meet at least once every two years) or by their ambassadors or delegates (who meet regularly in Geneva)."[33]

As detailed in sections above, the dispute settlement process is one of the major differences between the WTO and the GATT. "There are three main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling." Under the unique reverse (i.e. negative) consensus method of voting, the outcome of the judicial process is accepted unless all the countries vote against the ruling. In recent years however, the U.S. has been able to hold up nominations of Appellate Body judges. The U.S. claims the WTO Appellate Body has been judicially (too) active. Recently, all the terms of the judges expired, and there are no more judges on the Appellate Body as a result. This means that if any panel ruling is appealed, the appeals process is backed up, and parties can find no resolution under the WTO dispute settlement process.

(b) Other Global and National Institutions

This section will briefly discuss the functions of other national and international trade institutions. We begin with the EU. One of the major components of the EU involves managing trade. Tariffs and other trade barriers are removed between countries within the EU. The EU represents all its members at the WTO. Trade agreements outside of the WTO framework require approval of all EU members.

Two other institutions, under the auspices of the United Nations, also are related to trade. The United Nations Economic and Social Council (ECOSOC) is one of the six principal organs of the United Nations. It is responsible for, as its name implies, the coordination of the economic and social work of the United Nations. Its purposes include, among other things, working with trade institutions to give concessions to lesser developed countries and helping to eradicate poverty. Also, the United Nations Commission on International Trade Law (UNCITRAL) "plays a key role in developing that framework in pursuit of its mandate to further the progressive harmonization and modernization of the law of international trade. UNCITRAL does this by

[32] https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm

[33] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm#:~:text=There%20are%20three%20main%20stages,by%20the%20losing%20party%20tohttps://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#:~:text=The%20WTO%20is%20run%20by,are%20normally%20taken%20by%20consensU.S..

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drafting and promoting conventions, model laws, and other instruments"[34] "that address key areas of commerce, from dispute resolution to the procurement and sale of goods."[35]

The U.S. federal government also has multiple institutions where international trade is handled and where U.S. international trade authority rests. The International Trade Administration (ITA) is an agency in the U.S. Department of Commerce that promotes U.S. exports. The mission of the agency is to "create prosperity by strengthening the international competitiveness of U.S. industry, promoting trade and investment, and ensuring fair trade and compliance with trade laws and agreements."[36] The International Trade Commission (ITC) is an agency of the U.S. federal government that advises the U.S. Congress and the president on matters of trade. The agency "investigate[s] and make[s] determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights, provide[s] independent analysis and information on tariffs, trade and competitiveness; and maintain[s] the U.S. tariff schedule."[37] "The Office of the U.S. Trade Representative (USTR) is an agency of the U.S. federal government responsible for developing and promoting American trade policy. Part of the Executive Office of the President, it is headed by the U.S. Trade Representative, a Cabinet-level position that serves as the U.S. President's primary advisor, negotiator, and spokesperson on trade matters."[38]

6. Conclusion

Our whirlwind tour of international trade law comes to a close. This summary only touches the surface of the complexity of international trade law, but hopefully this snapshot serves as helpful context and provides the groundwork for understanding fundamental aspects of international trade law.

A final thought: As with any important topic, it is worth zooming out and asking big questions. The main argument for free trade continues to be promoting good relations among countries, and on the individual level, improving the standard of living of people across the globe. However, it is worth asking: has free trade improved the relations between nations? Has the standard of living of people been improved as a consequence of trade liberalization? If so, who exactly has benefitted? What are the cultural consequences of free trade? What are the environmental consequences? The answer to each of these questions is almost assuredly complex and nuanced.

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[34] https://uncitral.un.org/
[35] https://en.wikipedia.org/wiki/United_Nations_Commission_on_International_Trade_Law
[36] https://www.commerce.gov/bureaU.S.-and-offices/ita#:~:text=The%20mission%20of%20the%20International,with%20trade%20laws%20and%20agreements.
[37] https://www.U.S.itc.gov/press_room/about_U.S.itc.htm
[38] https://en.wikipedia.org/wiki/Office_of_the_United_States_Trade_Representative

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Annex B – USMCA Chapter 14 excerpts

CHAPTER 14

INVESTMENT

Article 14.1: Definitions

For the purposes of this Chapter:

covered investment means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter;

enterprise means an enterprise as defined in Article 1.5 (General Definitions), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, or a branch located in the territory of a Party and carrying out business activities there;

freely usable currency means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*;

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include:

(a) an enterprise;

(b) shares, stock and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[1]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

[1] Some forms of debt, such as bonds, debentures, and long-term notes or loans, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due, are less likely to have these characteristics.

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(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law;[1] and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases,

but investment does not mean:

(i) an order or judgment entered in a judicial or administrative action;

(j) claims to money that arise solely from:

(i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i);

investor of a non-Party means, with respect to a Party, an investor that attempts to make,[2] is making, or has made an investment in the territory of that Party, that is not an investor of a Party; and

investor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party, provided however that:

(a) a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship; and

(b) a natural person who is a citizen of a Party and a permanent resident of another Party is deemed to be exclusively a national of the Party of which that natural person is a citizen.

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[1] Whether a particular type of license, authorization, permit, or similar instrument (including a concession to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under a Party's law. For greater certainty, among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

[2] For greater certainty, the Parties understand that, for the purposes of the definitions of "investor of a non-Party" and "investor of a Party", an investor "attempts to make" an investment when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or license.

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Article 14.2: Scope

1. This Chapter applies to measures adopted or maintained by a Party relating to:

   (a) investors of another Party;

   (b) covered investments; and

   (c) with respect to Article 14.10 (Performance Requirements) and Article 14.16 (Investment and Environmental, Health, Safety, and other Regulatory Objectives), all investments in the territory of that Party.

2. A Party's obligations under this Chapter apply to measures adopted or maintained by:

   (a) the central, regional, or local governments or authorities of that Party;[1] and

   (b) a person, including a state enterprise or another body, when it exercises any governmental authority delegated to it by central, regional, or local governments or authorities of that Party.[2]

3. For greater certainty, this Chapter, except as provided for in Annex 14-C (Legacy Investment Claims and Pending Claims) does not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.

4. For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

Article 14.3: Relation to Other Chapters

1. In the event of any inconsistency between this Chapter and another Chapter of this Agreement, the other Chapter shall prevail to the extent of the inconsistency.

2. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 17 (Financial Services).

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[1] For greater certainty, the term "governments or authorities" means the organs of a Party, consistent with the principles of attribution under customary international law.

[2] For greater certainty, governmental authority is delegated to any person under the Party's law, including through a legislative grant or a government order, directive, or other act transferring or authorizing the exercise of governmental authority.

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3. A requirement of a Party that a service supplier of another Party post a bond or other form of financial security as a condition for the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to the cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that the bond or financial security is a covered investment.

4. For greater certainty, consistent with Article 15.2.2(a) (Scope), Article 15.5 (Market Access), and Article 15.8 (Development and Administration of Measures) apply to measures adopted or maintained by a Party relating to the supply of a service in its territory by a covered investment.

Article 14.4: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that government to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 14.5: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than the treatment it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

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2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that government to investors in its territory, and to investments of those investors, of any other Party or of any non-Party.

4. For greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 14.6: Minimum Standard of Treatment[1]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

[1] This Article shall be interpreted in accordance with Annex 14-A (Customary International Law).

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Article 14.7: Treatment in Case of Armed Conflict or Civil Strife

1. Notwithstanding Article 14.12.5(b) (Non-Conforming Measures), each Party shall accord to investors of another Party and to covered investments non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

2. Notwithstanding paragraph 1, if an investor of a Party, in a situation referred to in paragraph 1, suffers a loss in the territory of another Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for that loss.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 14.4 (National Treatment) but for Article 14.12.5(b) (Non-Conforming Measures).

Article 14.8: Expropriation and Compensation[1]

1. No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and

(d) in accordance with due process of law.

2. Compensation shall:

(a) be paid without delay;

[1] This Article shall be interpreted in accordance with Annex 14-B (Expropriation).

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(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment[1] – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. For greater certainty, whether an action or series of actions by a Party constitutes an expropriation shall be determined in accordance with paragraph 1 of this Article and Annex 14-B (Expropriation).

6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that the issuance, revocation, limitation, or creation is consistent with Chapter 20 (Intellectual Property) and the TRIPS Agreement.[29]

[1] For greater certainty, for the purposes of this paragraph, the currency of payment may be the same as the currency in which the fair market value is denominated.
[2] For greater certainty, the Parties recognize that, for the purposes of this Article, the term "revocation" of an intellectual property right includes the cancellation or nullification of that right, and the term "limitation" of an intellectual property right includes exceptions to that right.

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Article 14.9: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. These transfers include:

(a) contributions to capital;[1]

(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance, and other fees;

(c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(d) payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement or employment contract; and

(e) payments made pursuant to Article 14.7 (Treatment in Case of Armed Conflict or Civil Strife) and Article 14.8 (Expropriation and Compensation).

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. A Party shall not require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits, or other amounts derived from, or attributable to, investments in the territory of another Party.

4. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of another Party.

5. Notwithstanding paragraphs 1, 2, and 4, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws[2] relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

[1] For greater certainty, contributions to capital include the initial contribution.
[2] For greater certainty, this Article does not preclude the equitable, non-discriminatory, and good faith application of a Party's laws relating to its social security, public retirement, or compulsory savings programs.

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(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

6. Notwithstanding paragraph 4, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict those transfers under this Agreement, including as set out in paragraph 5.

Article 14.10: Performance Requirements

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:[1]

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to a good produced or a service supplied in its territory, or to purchase a good or a service from a person in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment;

(e) to restrict sales of a good or a service in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a technology, a production process, or other proprietary knowledge to a person in its territory;

(g) to supply exclusively from the territory of the Party a good that the investment produces or a service that it supplies to a specific regional market or to the world market;

(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of a person of the Party,[2] or

[1] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "requirement" or a "commitment or undertaking" for the purposes of paragraph 1.
[2] For the purposes of this Article, the term "technology of the Party or of a person of the Party" includes technology that is owned by the Party or a person of the Party, and technology for which the Party or a person of the Party holds an exclusive license.

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(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a technology; or

(i) to adopt:

(ii) a given rate or amount of royalty under a license contract, or

(iii) a given duration of the term of a license contract,

in regard to any license contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future license contract[1] freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that license contract by an exercise of non-judicial governmental authority of a Party. For greater certainty, paragraph 1(i) does not apply when the license contract is concluded between the investor and a Party.

2. No Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use, or accord a preference to a good produced in its territory, or to purchase a good from a person in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment;

(d) to restrict sales of goods or services in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings; or

(e) (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party, or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a technology.

[1] A "license contract" referred to in this subparagraph means a contract concerning the licensing of technology, a production process, or other proprietary knowledge.

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3. In relation to paragraphs 1 and 2:

   (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment of an investor of a Party or of a non-Party in its territory, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

   (b) Paragraphs 1(f), 1(h), 1(i), and 2(e) do not apply:

      (i) if a Party authorizes use of an intellectual property right in accordance with Article 31[1] of the TRIPS Agreement, or to a measure requiring the disclosure of proprietary information that fall within the scope of, and is consistent with, Article 39 of the TRIPS Agreement, or

      (ii) if the requirement is imposed or the commitment or undertaking[2] is enforced by a court, administrative tribunal, or competition authority, after judicial or administrative process, to remedy an alleged violation of competition laws.[3]

   (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a), and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures:

      (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement,

      (ii) necessary to protect human, animal or plant life or health, or

      (iii) related to the conservation of living or non-living exhaustible natural resources.

   (d) Paragraphs 1(a), 1(b), 1(c), 2(a), and 2(b) do not apply to qualification requirements for a good or a service with respect to export promotion and foreign aid programs.

   (e) Paragraphs 1(b), 1(c), 1(f), 1(g), 1(h), 1(i), 2(a), 2(b), and 2(e) do not apply to government procurement.

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[1] The reference to "Article 31" includes any waiver or amendment to the TRIPS Agreement implementing paragraph 6 of the *Doha Declaration on the TRIPS Agreement and Public Health* (WT/MIN (01)/DEC/2).

[2] For greater certainty, for the purposes of this subparagraph, a commitment or undertaking includes a consent agreement.

[3] The Parties recognize that a patent does not necessarily confer market power.

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(f) Paragraphs 2(a) and 2(b) do not apply to requirements imposed by an importing Party relating to the content of a good necessary to qualify for preferential tariffs or preferential quotas.

(g) Paragraphs 1(h), 1(i), and 2(e) shall not be construed to prevent a Party from adopting or maintaining measures to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary or unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade or investment.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, if a Party did not impose or require the commitment, undertaking, or requirement.

Article 14.11: Senior Management and Boards of Directors

1. No Party shall require that an enterprise of that Party that is a covered investment appoint to senior management positions a natural person of a particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 14.12: Non-Conforming Measures

1. Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), and Article 14.11 (Senior Management and Boards of Directors) do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I, or

(iii) a local level of government;

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(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), or Article 14.11 (Senior Management and Boards of Directors).

2. Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), Article 14.10 (Performance Requirements), and Article 14.11 (Senior Management and Boards of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out by that Party in its Schedule to Annex II.

3. No Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. (a) Article 14.4 (National Treatment) does not apply to any measure that falls within an exception to, or derogation from, the obligations imposed by:

(i) Article 20.8 (National Treatment), or

(ii) Article 3 of the TRIPS Agreement, if the exception or derogation relates to matters not addressed by Chapter 20 (Intellectual Property Rights);

(b) Article 14.5 (Most-Favored-Nation Treatment) does not apply to any measure that falls within Article 5 of the TRIPS Agreement, or an exception to, or derogation from, an obligation imposed by:

(i) Article 20.8 (National Treatment), or

(ii) Article 4 of the TRIPS Agreement.

5. Article 14.4 (National Treatment), Article 14.5 (Most-Favored-Nation Treatment), and Article 14.11 (Senior Management and Boards of Directors) do not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

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Article 14.13: Special Formalities and Information Requirements

1. Nothing in Article 14.4 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that these formalities do not materially impair the protections afforded by the Party to investors of another Party and covered investments pursuant to this Chapter.

2. Notwithstanding Article 14.4 (National Treatment) and Article 14.5 (Most-Favored-Nation Treatment), a Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or its covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 14.14: Denial of Benefits

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise:

(a) is owned or controlled by a person of a non-Party or of the denying Party; and

(b) has no substantial business activities in the territory of any Party other than the denying Party.

2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non- Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

Article 14.15: Subrogation

If a Party, or an agency of a Party, makes a payment to an investor of the Party under a guarantee, a contract of insurance, or other form of indemnity that it has entered into with respect to a covered investment, the other Party in whose territory the covered investment was made shall recognize the subrogation or transfer of any right the investor would have possessed with respect to the covered investment but for the subrogation, and the investor shall be precluded from pursuing that right to the extent of the subrogation, unless a Party or an agency of a Party authorizes the investor to act on its behalf.

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Article 14.16: Investment and Environmental, Health, Safety, and other Regulatory Objectives

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.

Article 14.17: Corporate Social Responsibility

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.

[**NOTE**: Other provisions of Chapter 14 of the USMCA address …

- Customary international law rules regarding treatment of international investment
- Expropriation [pretending, contrary to general expert opinion, that the "prompt, adequate, and effective" standard is accepted in international law as the standard of compensation]
- Mexico-US investment dispute procedures]