The International Trade Law System Under Fire

FCIL Bootcamp-Advanced Training
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Economies by size of merchandise trade, 2015
Chart 4.1

World merchandise exports by major product groups, 2017
(Percentage share)

Manufactures 70%

- Fuels and mining products 15%
- Agricultural products 10%
- Others / non-specified 5%

Source: WTO estimates.

15%
Share of fuels and mining products in world merchandise exports.
Economies by size of trade in commercial services, 2015
Chart 2.10

World exports of other commercial services by main category, 2017
(Annual percentage change)

Source: WTO-UNCTAD-ITC estimates.

Note: For the definition of intellectual property related services, see Chapter VII.
Merchandise Trade as a Percentage of GDP

Wing box: Japan
Wing ice protection: UK
Centre fuselage: Italy
Rear fuselage: US
Doors & windows: US
Lavatories: Japan
Escape slides: US
Flight deck seats: UK
Flight deck controls: US
Engines: US, UK
Engine nacelles: US
Landing gear: France
Electric brakes: France
Tires: Japan
Centre wing box: Japan
Prepreg composites: Japan
Vertical stabilizer: US
Raked wing tips: Korea
Horizontal stabilizer: Italy
Auxiliary power unit: US
Passenger doors: France
Cargo doors: Sweden
Forward fuselage: Japan, US
What is “the trading system”?

• Private transactions governed by series of domestic and international rules. Combination of public and private. Applicable law often combination of international law, foreign law and domestic law.

• Key international rules:

2. Numerous bilateral investment treaties (BITs)
4. Numerous intellectual property treaties (Berne, Paris, Rome conventions + treaty on integrated circuits)
5. Hundreds of regional and bilateral trade agreements-- some covering only trade in goods, others covering trade in goods and services and others comprehensive agreements—biggest ones= EU, NAFTA, CP-TPP
GATT and WTO—primary source of int’l trade law

General Agreement on Tariffs and Trade (GATT) 1947—23 countries
Major disciplines = 1. Tariff bindings,
   2. National treatment (cannot discriminate against imports),
   3. Most Favored Nation (MFN) (cannot discriminate between members of GATT)

World Trade Organization (WTO) 1995—164 countries
Major disciplines added =
1. Agriculture
2. Services
3. Intellectual Property
4. Sanitary and Phytosanitary (SPS
5. Technical Barriers to Trade (TBT)
• 164 Countries are members
• Single undertaking
• Provisions governing trade in goods, services, agriculture
• Agreements on intellectual property, sanitary and phytosanitary measures, technical barriers to trade, trade-related investment
• Plurilateral agreement on Government Procurement
• Binding dispute settlement agreement
• Consensus decision making process
• Active committee structure
Characteristics of the WTO

• Contract—members commit to provide specified levels of access to their markets and to specific rules related to trade

• Member-driven institution—members negotiate directly with each other; limited power in executive

• Single undertaking—if agree to certain aspects of WTO rules, must agree to (almost) all of them (but schedules and much else differ by member)
WTO overlap-coordination with other international organizations?

- Goods and tariff classification = World Customs Organization
- Services = UN Central Product Classification system
- Currency manipulation = International Monetary Fund (IMF)
- TRIPs = World Intellectual Property Organization (WIPO)
<table>
<thead>
<tr>
<th>Type</th>
<th>Hallmark</th>
<th>U.S. Law</th>
<th>International Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trademark</td>
<td>Distinctiveness</td>
<td>Lanham Act, state law</td>
<td>Paris Convention, TRIPs, Nice Agreement classification, Madrid Agreement + Protocol; Vienna Trademark Registration, 1994 TM Law</td>
</tr>
<tr>
<td>Copyright</td>
<td>Originality</td>
<td>U.S. Copyright Act of 1976</td>
<td>Berne Convention, Universal Copyright Convention, Rome Convention, TRIPs</td>
</tr>
<tr>
<td>Geographical indications</td>
<td>Quality, reputation or identity tied to geographical region</td>
<td>As trademark</td>
<td>TRIPs</td>
</tr>
<tr>
<td>Industrial designs</td>
<td>Visual image/aesthetics</td>
<td>Patent + copyright</td>
<td>Hague Agreement Concerning the International Deposit of Industrial Designs, Paris Convention, TRIPs</td>
</tr>
<tr>
<td>Integrated circuit designs</td>
<td>Layout design of integrated circuit</td>
<td>Semiconductor Chip Protection Act</td>
<td>Treaty on Intellectual Property in Respect of Integrated Circuits; TRIPs</td>
</tr>
<tr>
<td>Trade secrets</td>
<td>Secret commercially valuable</td>
<td>Uniform State Secrets Act of 1979 + state law; Economic Espionage Act</td>
<td>TRIPs</td>
</tr>
</tbody>
</table>
WTO Dispute Settlement System

• More significant volume of cases than any other international tribunal of state-to-state disputes

• In its first 23 years, WTO Dispute Settlement Body has seen:
  • 586 complaints (requests for consultations) filed (average of 25/year)
  • 238 panel reports issued (199 + 39 Art. 21.5)
  • 140 Appellate Body reports issued (116 + 24 Art 21.5)

• GATT dispute settlement averaged 6.38 disputes per year, with many unadopted reports (300 disputes in 47 years)

• ICJ averages less than 1.5 judgments per year (48 judgments and 23 advisory opinions in 50 years)

• International Tribunal Law of the Sea-25 cases (1996-2016)
WTO Disputes by Country
<table>
<thead>
<tr>
<th>Complaining Member</th>
<th>No of cases initiated</th>
<th>Defending Member</th>
<th>No of cases defended</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>123</td>
<td>US</td>
<td>153</td>
</tr>
<tr>
<td>EC / EU</td>
<td>100</td>
<td>EC / EU</td>
<td>85</td>
</tr>
<tr>
<td>Canada</td>
<td>39</td>
<td>China</td>
<td>43</td>
</tr>
<tr>
<td>Brazil</td>
<td>32</td>
<td>India</td>
<td>25</td>
</tr>
<tr>
<td>Mexico</td>
<td>25</td>
<td>Canada</td>
<td>23</td>
</tr>
<tr>
<td>Japan</td>
<td>25</td>
<td>Argentina</td>
<td>22</td>
</tr>
<tr>
<td>India</td>
<td>24</td>
<td>Korea</td>
<td>18</td>
</tr>
<tr>
<td>Argentina</td>
<td>21</td>
<td>Brazil</td>
<td>16</td>
</tr>
<tr>
<td>Korea</td>
<td>20</td>
<td>Japan</td>
<td>15</td>
</tr>
<tr>
<td>China</td>
<td>20</td>
<td>Mexico</td>
<td>15</td>
</tr>
</tbody>
</table>
Compliance Record

- WTO panels and the AB have found WTO violations in nearly 90 percent of all cases decided to date
- Compliance with rulings in general very good
- 1 out of 6 has been subject to litigation under Article 21.5 to determine if the steps taken were sufficient to comply with the WTO panel or AB ruling
Key Features

- “Reverse consensus”
- Detailed procedures and deadlines
- Panel Process
- Appellate review
- Dispute Settlement Body (DSB) oversight over compliance
A Flow Chart of the Panel Process

Consultations:
(Members may request a panel if no solution found within 90 days - or request good offices, conciliation or mediation by Director-General)

DSB establishes panel
(no later than at 2nd DSB meeting)

Terms of reference
(standard terms unless special terms agreed within 20 days)
Composition
(to be agreed within 20 days or decided by Director-General)

Panel examination
(in general not to exceed 6 months, 3 months in cases of urgency)
Meetings with parties
Meeting with 3rd parties

Panel submits report to parties for comments
(first descriptive part of report, subsequently complete interim report)
Interim Review meeting - if requested

Panel circulates report to DSB

DSB adopts panel report
(within 60 days unless appealed)

Appellate Review
(not to exceed 90 days)

DSB adopts Appellate Report
(within 30 days)

DSB monitors implementation of adopted panel/Appellate Body recommendations
(to be implemented within defined "reasonable period of time")

Parties negotiate compensation pending full implementation

DSB authorizes "retaliation" pending full implementation (90 days after expiry of "reasonable period of time")
Main Players

• The Parties – WTO Members only
  *Representation by private counsel

• The Dispute Settlement Body (DSB)

• The Panel – ad hoc; 3 panelists

• The Appellate Body – 7 members, appointed for 4 year term subject to reappointment for 4 more years

• WTO Secretariat – Rules, Legal Affairs, Appellate Body
Crisis at the Appellate Body

1. Rule 15/holdover?
2. 90 Days?
3. Municipal law = fact
4. Overreaching, gap filling
5. Obiter dicta

Solutions?
1. Arbitration
2. Vote on new members
3. Send questions to WTO Committees
4. Waive appellate review
5. Others
Trump Administration: What’s happened?

- Withdrawal from the Trans-Pacific Partnership
- Imposition of Section 232 “national security” tariffs—25% on steel, 10% on aluminum
- Section 301 tariffs on China—25% on $50 billion in imports (two tranches) + 10%, raised to 25% on $200 billion in additional imports, threat of imposition of tariffs on remaining $300+ billion
- “Renegotiation” of US-Korea FTA (KORUS)
- “New” NAFTA—USMCA
- Blockage of appointment or reappointment of members to the WTO Appellate Body
- Trilateral cooperation with EU, Japan and US on approach to China
- Notice of intent to negotiate agreements with Japan, EU and UK
- Possible “national security” tariffs on autos
- Possible 301 tariffs on imports from France in retaliation for digital services tax
What’s different about the Trump approach?

1. Unilateral and unlawful
2. Focus on bilateral trade deficits
3. Disdain for multilateral rules and international organizations
4. Moving the goal posts for what constitutes a “good” or “new” trade agreement
Trade war impact

**GDP**
- Current: -$62B
- Wider: -$100B

**Employment**
- Current: -200K
- Wider: -360K

**Cost per household**
- Current: $490
- Wider: $800

**Current tariffs:**
Latest increase to 25 percent on half of U.S. imports from China. (Estimate assumes Beijing retaliates with additional tariffs on U.S. goods imported into China.)

**Wider tariffs:**
Trump has threatened to expand tariffs on all U.S. China trade. (Estimate assumes Beijing retaliates with additional tariffs on U.S. goods imported into China.)

SOURCE: Oxford Economics
Americans See Foreign Trade as an Opportunity Not a Threat

Do you see foreign trade more as an opportunity for economic growth through increased U.S. exports or a threat to the economy from foreign imports?

Source: Gallup survey, conducted Feb. 1-5, 2017.
And a Plurality Says Free Trade Helps the U.S.

Free trade between the United States and foreign countries has __ the United States

Note: Response option “Has not made much of a difference either way” not shown.

But Americans Are Split on the Value of Involvement in the Global Economy When Reminded of the Costs

Which statement comes closer to your view about U.S. involvement in the global economy?

- Bad thing because it lowers wages and costs jobs in the U.S. 49%
- Good thing because it provides U.S. with new markets and opportunities for growth 44%

Why?: Americans Believe Outsourcing and Imports Pose the Greatest Harm to U.S. Workers

**Overall, do you think __ has done more to help or hurt American workers?**

<table>
<thead>
<tr>
<th>Event</th>
<th>Helps American workers</th>
<th>Hurts American workers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increased outsourcing of jobs to other countries</td>
<td>15%</td>
<td>80%</td>
</tr>
<tr>
<td>More foreign-made products being sold in U.S.</td>
<td>22%</td>
<td>77%</td>
</tr>
<tr>
<td>Increased use of contract or temporary workers</td>
<td>35%</td>
<td>57%</td>
</tr>
<tr>
<td>Decline of union membership</td>
<td>33%</td>
<td>49%</td>
</tr>
<tr>
<td>Automation of jobs</td>
<td>42%</td>
<td>50%</td>
</tr>
<tr>
<td>Growing number of immigrants working in U.S.</td>
<td>42%</td>
<td>45%</td>
</tr>
<tr>
<td>More U.S.-made products being sold abroad</td>
<td>68%</td>
<td>26%</td>
</tr>
<tr>
<td>Internet, email and other office technology</td>
<td>70%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Failures of the trading system?

• Failure of communication?
  -- Job losses due primarily to technology and automation, not trade
  -- Trade deficits don’t reflect reality of global-supply chain driven trade

• Failure of substance?
  -- Inability to discipline subsidies
  -- Inability to address rise of China, Inc
  -- Inability to better distribute gains of trade

• Upcoming threats?
  -- China’s Non-Market Economy (NME) status
  -- National security questions