

2017

International Law in a Turbulent World

Lawrence L. Herman

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>



Part of the [Transnational Law Commons](#)

Recommended Citation

Lawrence L. Herman, *International Law in a Turbulent World*, 41 Can.-U.S. L.J. 51 (2017)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol41/iss1/4>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

International Law in a Turbulent World

Erratum
speech

INTERNATIONAL LAW IN A TURBULENT WORLD

Lawrence L. Herman[†]

The following is the text of the 10th Annual Canada-United States Law Institute Distinguished Lecture given at Western University Faculty of Law by Lawrence L. Herman on November 14, 2016.

TABLE OF CONTENTS

I. Introduction.....	51
II. The Challenges.....	53
III. Setting the Stage.....	54
IV. Conventional and Customary International Law	55
V. International Law in the Classical Period.....	56
VI. Institution Building in the Bretton Woods Era	56
VII. International Law Today	57
VIII. International Law Applied in Canada	58
IX. Law of the Sea and the Rule of Law.....	60
X. The Rule of Law in International Trade.....	62
XI. An Array of Challenges	65
XII. Some Conclusions – A Lasting Legacy?.....	67

I. INTRODUCTION

I am honored to have been asked to present the 10th Annual Canada-United States Law Institute (“CUSLI”) Distinguished Lecture. This has been particularly humbling given the venerable history of the Institute as a repository of debate, discussion, and education on Canada and the United States’ shared interests in the area of law and policy.

I attended my first CUSLI meeting in 1986. I have the good fortune to have known its founder, Professor Sydney Picker, since those days, and to have collaborated for many years with its esteemed Executive Director, Henry T. King Jr. Both men are admirable American scholars dedicated to fostering closer relations and better understanding between our two countries. In that respect, I must dedicate this address not only to the CUSLI, but to these two visionary Americans.

[†] Lawrence Herman, Herman & Associates, Toronto. Mr. Herman is a member of the CUSLI Executive, was a diplomatic officer at the Canadian Mission to the United Nations and the General Agreement on Tariffs and Trade in Geneva in the 1970s, and has practiced international trade and public policy since leaving diplomatic service.

This address is given from the perspective of a practicing, non-academic lawyer with continued involvement in public international law issues. I have mainly practiced in the private sector, and have some experience working in the government. This piece is not intended as a scholarly contribution. I ask for forgiveness if the discussion here is not up to the high standard of those who have written broadly and have great expertise on the subject.¹

I have been fortunate to take part in some major international law issues, having served as a member of the Legal Bureau of the former Department of External Affairs, as an Officer at Canada's United Nations Mission in Geneva, and as Canada's delegate to the United Nations Law of the Sea Conference. Later, in private practice, I was part of the Canadian legal team in the *Gulf of Maine Case* that went to the International Court of Justice ("ICJ").²

What I gained from these experiences is that when faced with unsettling events, including the unexpected election of Donald Trump as U.S. president,³ public international law is critical in bringing an element of stability to a chaotic, fragmented, and destabilized world.

Some may say that this is a naively optimistic view. They may argue that lawyers' involvement in the game of diplomacy has stunted global progress. It is impossible not to see the many challenges that face those engaged in international law, whether as diplomatists, teachers, government officials, or lawyers in the private sector.

Public international law has emerged from the shadows over the last forty or so years. From being championed mostly by academics and a select handful of practitioners in the musty corners of foreign ministries, international law today is a forceful element in inter-state relations.

Its evolution is too broad and varied to encapsulate in a single analysis. International law today covers a wide range of formerly untrodden fields, including human rights, climate change, the environment, war, and terrorism. It is impossible to summarize this area of law's many achievements in a few pages.

I have chosen two milestone achievements to bring focus to this discussion: the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") and the 1994 World Trade Organization ("WTO") Agreement. Both are fitting

¹ As examples, see MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008); *THE GLOBALIZED RULE OF LAW* (Oonagh E. Fitzgerald ed., Irwin Law, 2006).

² *Delimitation of Maritime Boundary in Gulf of Maine Area (Can./U.S.)*, Judgment, 1984 I.C.J. Rep. 246. I also had the privilege of working with international jurists during this period, each of whom impressed me with not only the degree of their scholarship but also with their sense of practical realism in understanding the limitations to which recourse to law alone could resolve international disputes. Among those were Robert Jennings, Prosper Weil, Derek Bowett, and Ian Brownlie.

³ The unexpected election of Donald Trump as U.S. president in 2016 has produced a flood of commentary and countless journalistic post-mortems: *US Election: World Prepares for a New Era Following Surprise Trump Win*, BRIDGES, Nov. 10, 2016 [hereinafter *US Election*]. For a thoughtful view of reasons for the rise of Trump-inspired populism in the 2016 election, see Francis Fukuyama, *American Political Decay or Renewal? The Meaning of the 2016 Election*, 95 FOREIGN AFF. 58 (2016).

subjects to discuss how international law brings an essential ingredient of coherence, and a semblance of order to a turbulent world. Each case was groundbreaking, not only in the breadth of its results but in the process leading to its conclusion.

I posit that the UNCLOS and the WTO Agreement are extraordinarily important examples of how international law anchors the global community in two critical aspects of inter-state relations.⁴ These two multilateral treaties are not applied consistently, nor are they interpreted uniformly. Nonetheless, the rules and institutions that each treaty encompasses are beacons of light and their broad principles serve the global community in a wider sense.

The point here is that the progressive development of international law and the emergence of norms, as exemplified by these two cases, transcend political upheaval. While the world may stumble from crisis to crisis, these norms, developed through the discipline of public international law, remain as guideposts for defining acceptable state conduct.

II. THE CHALLENGES

There are two profoundly destabilizing factors that threaten the UNCLOS and the WTO Agreement's achievements:

□ First, growing anti-globalization forces in developed and developing countries have radically changed the political landscape. Nothing illustrates this better than the election of Donald Trump, whose antipathy to trade agreements has reached astonishing proportions. Similar pushback is seen in Europe. These forces seriously impinge on the ability of governments to pursue multilateral solutions to global problems, particularly in the field of trade.⁵

□ Second, global economic growth and rise of newly industrialized states, a welcome development in itself, may well have rendered the post-Bretton Woods multilateral consensus a thing of the past. The collapse of the Doha Round in the WTO, for example, has signaled a paralysis of the legislative arm of that organization and represents a setback in multilateral law-making.⁶

⁴ The United Nations Convention on the Law of the Sea ("UNCLOS") was concluded in 1982 and entered into force in 1994; the World Trade Organization ("WTO") Agreement, as successor to the 1947 General Agreement on Tariffs and Trade ("GATT"), was concluded in 1994 and entered into force in 1995.

⁵ See *An Open and Shut Case; the World Economy*, ECONOMIST, Oct. 1, 2016 ("The backlash against trade is just one symptom of a pervasive anxiety about the effects of open economies... [T]he idea that globalization is a scam that benefits only the rich could scarcely be more wrong"). Nevertheless, the fact remains that fear of globalization and open borders is a political reality. Witness the recent rejection of parts of the Canada-European Union Comprehensive Economic and Trade Agreement by the Belgian region of Wallonia.

⁶ Some advances are being made on a more restricted basis, such as the negotiations within the WTO on an Environmental Goods Agreement. These have been frustratingly lengthy. As well, there are more advanced negotiations outside the WTO among twenty-three countries, including Canada, on a Trade in International Services Agreement ("TISA"). There is a possibility that the TISA negotiations could conclude by the end of 2016.

In addition to these two factors, the achievements of the WTO and other advances in international law are in danger of being hindered by over-legalization, excessive involvement of lawyers, and short-term institutional rigidity. This has particularly infected the WTO dispute settlement process and has endangered the achievements of that regime.⁷

Finally, somewhat less critical but nonetheless important, is the tendency to conflate political statements and declarations, including declarations of the United Nations General Assembly, with legally binding rules. Political declarations and statements of intention are often claimed to be norms or rules with the status of international law. This clouds the development of the law by overlaying it with rhetorical declamations of an impermanent nature.

Thus, the question is whether the breakdown of the post-World War II consensus, which respected rules-based international order, reduces the significant achievements of law-making in the UNCLOS and the Uruguay Round. Have we reached the stage where any semblance of coherence in the law of the sea and in the world trading system has been shattered?⁸ I will subsequently attempt to answer this question.

III. SETTING THE STAGE

The last three decades have produced far-reaching changes in the discipline of public international law. These transformations have occurred as the world has been shaken to the core in positive ways, such as the 21st century's information technology revolution, and also in negative ways, such as the spread of terrorism and violence on a global scale. Much of the global order emerging after the collapse of the Soviet Union and communist ideology has dissipated.

Somewhat paradoxically, the international law emerged onto the mainstream at the same time as these de-stabilizing events took hold. From a relatively small area of expertise practiced by a handful of jurists, academics, and governmental lawyers, international law expanded to impact geopolitics and inter-state relations on a vast scale.⁹ This expansion is often referred to as the globalization of the rule of law.

⁷ Alan Wolff, *The WTO Appellate Body at 30: Exploring the Limits of WTO Dispute Settlement in the Next Decade*, INT'L CTR. FOR TRADE SUSTAINABLE DEV., <http://e15initiative.org/publications/the-wto-appellate-body-at-30-exploring-the-limits-of-wto-dispute-settlement-in-the-next-decade> [hereinafter Wolff].

⁸ For a recent and penetrating analysis of these issues in the realm of international trade, far beyond the confines of these few pages, see Robert Wolfe, *Canadian Trade Policy in a G-Zero World*, in REDESIGNING CANADIAN TRADE POLICIES FOR NEW GLOBAL REALITIES, (Stephen Tapp et al. eds., INST. FOR RES. ON PUB. POLICY, 2016).

⁹ In the 1970s when I served in Canada's United Nations Mission, there were no private sector law firms following the trade and economic work of the United Nations, including at the GATT or in United Nations agencies such as the United Nations Conference on Trade and Development and the various Economic Commissions. Few Non-Governmental Organizations ("NGO") followed the United Nations' trade and economic work at the time. Now there are dozens of NGOs and many large law firms in Geneva that are closely involved in these activities.

What forces have produced this burgeoning growth in the rule of law? Is it triumphal or chimeric? Are these achievements of historic proportions or just transitory and largely insignificant in a long-term sense? These are questions that have to be asked by any jurist, student, or practitioner that has faith in the continual evolution of the rule of law.

The elements at play are varied and difficult to distil into neat chapters. For present purposes, it is useful to look at the story, at least in a Canadian context, in three phases: first, the classical period of the first half of the 20th century up to 1945; second, the modern or post-War period from 1945 to the mid-1990s; and third, the contemporary world of today.

Each phase has hallmarks that inform the next. From that vantage, we can then peer forward and get a sense of what the future holds for international law and to discern whether it is continuing to grow or, as some predict, decreasing in influence.

IV. CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW

Whether by treaty or custom, the core of international law reflects the course and status of inter-state relations, which lead to agreements that are eventually distilled into treaty language. Additionally, consistently accepted patterns of State behavior can be distilled into customary law. Over time, this forms the corpus of public international law.

Running through this review is this distinction known by every first-year law student between conventional law, which includes treaties and international agreements, and customary international law, or the widespread conduct and accepted practice of States that achieves the level of a legal rule or principle.

These two sources of international law are enshrined in Article 38 of the *Statute of the International Court of Justice*.¹⁰ It is impossible to address the current and future prospects of international law as a discipline without being aware of the interplay between the two sources.¹¹ There is also much scholarly debate about whether the concept of *jus cogens*, as articulated in Article 53 of the *Vienna Convention on the Law of Treaties* is a separate source of international law. *Jus cogens* is a “peremptory norm of general international law... accepted

¹⁰ Statute of the International Court of Justice, art. 38(1), June 26, 1945, T.S. 993 (“The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”)

¹¹ A discussion of the often-illusory factors that need to be demonstrated to sustain the existence of customary law was expressed by the International Court of Justice in *North Sea Continental Shelf*, Ger./Den., Ger./Nor. 1969 I.C.J. Rep. 3, ¶ 60-62 [hereinafter *North Sea Continental Shelf*].

and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”¹²

For the sake of economy, I am not going to delve into this arcane field of legal scholarship and debate.¹³ I will focus on the treaty-making process and law crystalized in State practice and customs.

V. INTERNATIONAL LAW IN THE CLASSICAL PERIOD

The classical period covers the three centuries following the 1648 *Treaty of Westphalia* and includes the notion of the sanctity of State sovereignty. International law in the Westphalian period was based on the doctrinal concept that only the States were the subjects of international law and rules had to respect the fundamentals of State sovereignty.¹⁴ International law could not reach into domestic regulation and other internal matters of governance.

Beginning in the 17th century and continuing into the early 20th century, aspects of customary law evolved into multilateral treaty-making efforts. A prominent example of these efforts are the Hague Conventions of 1899 and 1907,¹⁵ especially provisions dealing with disarmament, the laws of war and war crimes, and the creation of an international court for inter-State dispute resolution. All these changes flowed from the Westphalian doctrine.

The conventional rules were seriously assaulted during the First and Second World Wars, and were subsequently laid to rest. The world of international law, as we know it today, began afresh in 1945 with consensus-building around the Bretton Woods institutions and all they represent.

VI. INSTITUTION BUILDING IN THE BRETTON WOODS ERA

The post-1945 period up to the early part of the 21st century was the halcyon era of achievements in international law. Political consensus in the aftermath of the Second World War led governments to build new institutions with rules that were sustainable over time and helped lift the world into vistas of peace and prosperity. In this new approach, the governments did not repeat the mistakes of the Treaty of Versailles, nor those of the League of Nations and the disasters of the 1930s.

¹² Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1151 U.N.T.S. 331.

¹³ A very good review of these various sources of international law under the Statute of the International Court of Justice can be found in HUGH M. KINDRED ET AL., *INTERNATIONAL LAW, CHIEFLY INTERPRETED AND APPLIED IN CANADA* 31 (8th ed. 2014) [hereinafter Kindred].

¹⁴ Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty* 21 *INT’L HIST. REV.* 569 (1999); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57 (7th ed. 2008).

¹⁵ The *Hague Conventions* of 1899 and 1907 are a series of international treaties and declarations negotiated at two international peace conferences, dealing with the laws of war and peaceful settlement of inter-State disputes. The effectiveness of these treaties was shattered by the outbreak of World War One. *Hague Convention*, *ENCYC. BRITANNICA* (Aug. 30, 2010), <https://www.britannica.com/topic/Hague-Conventions>.

The creation of the United Nations in 1945 and the agreements on Bretton Woods institutions – the International Monetary Fund (“IMF”), the World Bank and the *General Agreement on Tariffs and Trade* (“GATT”) – were milestone achievements. They were grounded on principles of order, stability and economic progress with the aim of uniting the world.¹⁶ The function of these new and progressive global institutions was underpinned by the rule of law.

There has been recent criticism of the governance structure and voting systems of the Bretton Woods institutions.¹⁷ However, it would be a disservice to deny the fact that the IMF and the World Bank, and the Bank’s subsidiary bodies such as the International Finance Corporation and Center for the Settlement of Investment Disputes, continue to function as milestone achievements in international institution-building buttressed by the rule of law.¹⁸ The same can be said of the GATT, the third element in the Bretton Woods structure, now operating as the WTO.

The continuity of the IMF, the World Bank and the fundamentals of the international trading system laid out in the 1947 GATT, is testimony to the soundness of these institutions and their legal underpinnings. The challenge is whether there is sufficient inter-governmental consensus, either by way of treaty or conduct, to continue the progressive developments that we saw in the second half of the 20th century.

VII. INTERNATIONAL LAW TODAY

The Westphalian doctrine has been radically transformed in recent decades. While the nation state undoubtedly remains the central player on the international plane, many developments have altered the impermeability of state sovereignty. Three examples illustrate this point:

- (1) Building on the post-World War II Nuremberg trials and the present-day International Criminal Court, the adjudication of individuals before international tribunals for war crimes and crimes against humanity is now regarded as well-established international legal rules.
- (2) Bilateral investment and trade treaties agreements like the North American Free Trade Agreement (“NAFTA”), the Comprehensive Economic and Trade Agreement (“CETA”) and the Trans-Pacific Partnership (“TPP”) Agreement give private investors rights to bring binding arbitration against states under Investor-State dispute settlement.

¹⁶ See *generally About the Bretton Woods Institutions*, BRETTON WOODS COMM. <http://www.brettonwoods.org/page/about-the-bretton-woods-institutions>.

¹⁷ See, e.g., *Bretton Woods Observer*, BRETTON WOODS COMM. <http://www.brettonwoodsproject.org/publications/observer-summer-2016>.

¹⁸ The health of the WTO, however, is another matter, as that body has been under stress in the recent period; see Wolff, *supra* note 7. These strains on the multilateral system will be addressed below.

- (3) The *United Nations Framework Convention on Climate Change* and its subsidiary protocols now reach well into domestic matters not contemplated under Westphalian orthodoxy.¹⁹ This change has been a result of the pressure from civil society and broadly-accepted scientific evidence.

These examples and other developments have moved international law outside the strict confines of the Westphalian framework, embracing a range of acts by individuals and corporate players that would have been inconceivable before.

VIII. INTERNATIONAL LAW APPLIED IN CANADA

A review of the application of international law in Canada over the recent decades sheds some light on its penetration into the domestic sphere. After the 1931 *Statute of Westminster* until the end of the century, there was fairly limited interaction between domestic law and international law in the Canadian jurisprudence.

One of the few examples of the application of international law in the Canadian jurisprudence was the *Foreign Legations Reference* in 1943. In this case, the Supreme Court of Canada held that Canadian municipalities could not tax foreign embassies and legations because of accepted rules under international law.²⁰ This decision was before Canada had ratified any treaty in this field, and the issue focused on the extent of the customary international effect on Canadian domestic law.²¹

In *Newfoundland Continental Shelf Reference*, the Supreme Court of Canada advanced the notion of “incorporation,” affirming the critical role of the 1958 *Convention on the Continental Shelf* in defining the sovereign rights of Canada over the resources of the shelf. This was significant as the Court considered and applied a treaty that had not been legislated into domestic law by the Canadian Parliament.²²

¹⁹ Major advances in this regard were cemented in the *Paris Agreement*, 12 December 2015, reached at the 21st Conference of the Parties (COP 21) to the United Nations Framework Convention on Climate Change: *The Paris Agreement*, U.N. CLIMATE CHANGE NEWSROOM, http://unfccc.int/paris_agreement/items/9485.php. Whether that Agreement survives in light of the election of Mr. Trump is now an open question, *US Election, supra* note 3.

²⁰ Reference Re: Power to Levy Rates on Foreign Legations, [1943] S.C.R. 208 (Can.).

²¹ *Id.* at ¶ 141-42. The essence of the judgement in the Reference was that where international law was clear and unambiguous, Canadian law had to be interpreted in consistent fashion. This gave some indication that there was a body of external law that could become part of Canadian law without legislative action. The clearest expression of this point was by Taschereau J.: “The question is whether under International Law, a property belonging to a foreign State may be assessed for municipal purposes... I have come to the conclusion that practically in all the leading countries of the world, it is a settled and accepted rule of International Law, that property belonging to a foreign Government, occupied by its accredited representative, cannot be assessed and taxed for state or municipal purposes.”

²² Reference Re: Newfoundland Continental Shelf, [1984] 1 S.C.R. 86 (Can.).

Canadian law must be applied and interpreted consistently with Canada's international obligations. Initially, the Privy Council cast some doubt on this approach in the Labour Conventions Reference, clouding the issue of the division of constitutional jurisdiction.²³

*National Corn Growers*²⁴ settled the controversy surrounding the use of international law when applying and interpreting domestic legislation. In this case, the decision stated that courts could make reference to an international agreement to resolve an ambiguity in domestic legislation. Where that ambiguity exists, international law can be invoked to clarify the matter.²⁵

What about situations where Canada has not ratified an international treaty and no legislative enactment exists? Can the courts refer to general rules of international law in applying domestic law? In *Baker v. Canada (Minister of Citizenship & Immigration)*,²⁶ L'Heureux-Dubé J. suggested that an international treaty, even if not implemented domestically, can guide interpretation of domestic law.²⁷ This proposition was taken a step further in *Suresh v. Canada (Minister of Citizenship & Immigration)*,²⁸ where the Supreme Court said,

“International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice [in the context of that case]. We look to international law as evidence of these principles and not as controlling in itself.”²⁹

²³ Can. (Att'y Gen.) v. Ont. (Att'y Gen.), [1937] A.C. 326 (Eng.).

²⁴ Nat'l Corn Growers Ass'n. v. Can. (Import Trib.), [1990] 2 S.C.R. 1324 (Can.).

²⁵ See *Id.* The case came to the Supreme Court of Canada on appeal from the Federal Court of Appeal following its dismissal of a judicial review application by certain parties contesting the decision of the (then) Canadian Import Tribunal that applied countervailing duties on imported corn from the United States. Interpreting provisions of the *Special Import Measures Act*, the Supreme Court of Canada concluded that since the legislation was designed to implement Canada's GATT obligations, the provisions of the statute had to be interpreted in the context of the GATT as an international treaty to clarify any uncertainty.

²⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (Can.).

²⁷ *Id.* at ¶ 70. “The values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.” However, it is difficult to overlook the disagreement voiced by Iacobucci J. in his own opinion. *Id.* at ¶ 79. “I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.”

²⁸ *Suresh v. Canada (Minister of Citizenship and Immigrations)*, [2002] 1 S.C.R. 3 (Can.).

²⁹ *Id.* at ¶ 60.

These cases demonstrate that in the Canadian context, international law can be invoked to clarify where there is ambiguity in a domestic statute. It is less clear whether international treaties, customary law, or other sources of law listed in Article 38 of the Statute of the ICJ form part of the *corpus* of Canadian law in the absence of legislative enactment.³⁰ Nonetheless, over the last fifty years, the presence of international law in Canadian law cannot be denied. If not a direct source of law *per se*, international law is certainly a means of interpretation of Canadian law, including the *Charter of Rights and Freedoms*.

IX. LAW OF THE SEA AND THE RULE OF LAW

Few areas of public international law have been of greater interest and significance to Canada than the law of the sea. Canada has the world's longest coastline and vast oceanic resources. Not surprisingly, the law of the sea has been an area of major concern for the Canadian government.³¹

Norms governing uses of the seas reflect the evolution of customary law up to the middle of the 20th century. While there were no multilateral treaties, States followed fairly consistent practices, generally respecting freedom of the high seas, state sovereignty within territorial sea, and the right of innocent passage through straits used for international navigation.

State practices left unsettled certain areas of concern. For example, in the 1949 case of Corfu Channel,³² the issue was whether warships could exercise the right of innocent passage through the territorial sea during peace times. Other controversial issues include the rights of coastal states over adjacent maritime zones and continental shelves, and the uses of the ocean floor beyond the limits of national jurisdiction.

The need for more comprehensive rules led to the First Law of the Sea Conference in 1955-1958, followed by four 1958 UNCLOS conventions: the territorial sea and contiguous zone, the continental shelf, the high seas, and the fisheries convention. These were remarkable achievements in law-making through consensus³³ and paralleled the triumphs of the GATT and the multilateral trading system.

The 1958 Law of the Sea conventions did not settle all legal matters. As illustrated by the North Sea Continental Shelf Case in 1974,³⁴ the right of states beyond the territorial sea and contiguous zone, fisheries conservation, and issues

³⁰ Vast amounts of academic material have been generated on this point, far too vast to review here. For a very good discussion of where matters stand, see Stéphane Beaulac, *International Law and Statutory Interpretation: Up with Context, Down With Presumption*, in THE GLOBALIZED RULE OF LAW 331 (Oonagh E. Fitzgerald ed., Irwin Law, 2006).

³¹ Kindred, *supra* note 13, at 654.

³² Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

³³ Barbara Bean, *Law of the Sea*, AM. SOC'Y INT'L L. (Apr. 27, 2015) https://www.asil.org/sites/default/files/ERG_LOS.pdf.

³⁴ North Sea Continental Shelf, *supra* note 11.

of maritime delimitation, remained unresolved. There was growing consensus that peaceful use of the world's oceans required additional rules.³⁵

A second United Nations conference was convened in the 1960s to address this need, but it failed to achieve lasting results, largely due to inadequate preparatory work. This conference was followed by the UNCLOS III, which was started in 1973 by United Nations General Assembly, and concluded in 1982 with the adoption of the omnibus *Law of the Sea Convention*. The Convention came into force in 1994 and was ratified by Canada in 2004.

The Convention folds in the four 1958 law of the sea treaties. A range of new matters were added, including rules respecting coastal state jurisdiction over areas of adjacent waters, navigation rights and transit regimes, archipelagic status, the exclusive economic zones, continental shelf jurisdiction, deep seabed mining, fisheries, protection of the marine environment, and a host of other matters. The Convention established three new international institutions: the International Seabed Authority, the Commission on the Outer Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea.

With more than 160 nations participating, the 1982 Convention was by all standards a historical achievement. The nine years of negotiations was not an undue length of time to reach agreement on such a broad and varied set of national interests.³⁶ Despite the United States remaining outside the Convention due to its concerns over rights of navigation, the Convention plays an extraordinarily significant role in stabilizing the uses of the world's oceans.

The UNCLOS negotiating process was also an important element. As opposed to voting blocs, agreement through consensus was employed, reducing the possibility of larger and powerful states dominating the process. Surprisingly, the consensus-based method delivered results, even though there was never a clear definition of "consensus."

Presently, there are serious strains on the Law of Sea ("LOS") regime. Claims by China over vast areas of the South China Sea are regrettably putting the UNCLOS dispute settlement system to the test.³⁷

Even with these tensions, the Convention embodies rules that are widely respected *de facto* if not *de jure*. These rules continue to serve the international community remarkably well. In 2016, few would deny the legitimacy of the territorial sea regime, the exclusive economic zone, the coastal state's rights to exclusive control over resources, or exploitation of its adjacent continental shelf.

³⁵ See Kindred, *supra* note 13, at 654.

³⁶ The definitive history of the 1982 Convention, in all its detail, can be found in UNIV. VA. SCH. L., UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (2002).

³⁷ On July 12, 2016, the Permanent Court of Arbitration in The Hague issued its ruling on a claim brought against China by the Philippines, ruling in favor of the Philippines on almost every count. While China is a signatory to the United Nations Convention on the Law of the Sea, which established the tribunal, it refuses to accept the Court's authority. See *Territorial Disputes in the South China Sea*, U.S. COUNCIL FOREIGN REL. (Sept. 27 2016), <http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/territorial-disputes-in-the-south-china-sea>.

The jurisdiction of the International Seabed Authority over the seabed beyond national jurisdiction is settled.

Despite some shortcomings, UNCLOS III represents a milestone in the progressive development of international law.³⁸ While the current South China Sea dispute is causing serious tensions with potentially geopolitically destabilizing consequences, nevertheless, the rules have facilitated years of peaceful uses of the seas, reflecting the validity of the Convention rules.

States, such as the United States, that have not ratified the Convention, are behaving according to its rules or largely accept those rules as applicable in interstate relations. Pressure continues on the U.S. Congress to ratify the treaty, given the generally-accepted rules it enshrines and the gains that the United States will derive in having a defined legal relationship with the rest of the LOS community.³⁹

X. THE RULE OF LAW IN INTERNATIONAL TRADE

Post-World War II Bretton Woods agreements included the GATT, which emerged as a compromise after the U.S. Congress refused to approve the proposed International Trade Organization (“ITO”) in the *Havana Charter*. Together with the IMF and the World Bank, the International Trade Organization was designed as the third global economic institution.⁴⁰

The GATT, despite being a treaty or a contractual arrangement, had all the *de facto* attributes of an international organization. It had a secretariat headed by a Director General, headquarters in Geneva, and all of the immunities accorded to the international organizations within the United Nations system. States joined

³⁸ There is a short but illuminating personal reflection on the UNCLOS III by Alvaro de Soto, who was one of the senior representatives of Peru at the Conference and a major force in the negotiations. De Soto subsequently became Special Assistant to the Secretary General of the United Nations. See generally Alvaro De Soto, *Reflections on UNCLOS III: Critical Junctures*, 46 L. & CONTEMP. PROBS. 65 (1983).

³⁹ In terms of the gains to the United States, should the United States ratify the UNCLOS III, it has been said that “[i]f we are not party to UNCLOS, it is difficult for the United States to rely on the treaty to determine the legal entitlements of mid-ocean features, which claims are lawful, and what exactly constitutes the high seas. It’s also harder for us to suggest it as the basis for resolving claims and arbitrating disputes – or to rely on [Exclusive Economic Zones] drawn under UNCLOS’s auspices. Moreover, a broad set of stakeholders including the U.S. Chamber of Commerce, environmental organizations, the military, and industry specific trade groups representing commercial fishing, freight shipping and mineral extraction all support U.S. accession to the treaty.” Ben Cardin, *The South China Sea is the Reason the US Must Ratify UNCLOS*, FOREIGN POL’Y, (July 13 2016), <http://foreignpolicy.com/2016/07/13/the-south-china-sea-is-the-reason-the-united-states-must-ratify-unclos/>.

⁴⁰ The *Havana Charter* was rejected by the U.S. Congress on the basis that the new International Trade Organization would be involved in internal domestic economic issues, the sole prerogative of national governments; an argument oft-heard today in many contexts, including in the 2016 U.S. presidential election. For the history of the *Havana Charter* and the development of the GATT, see *The WTO: An Historical, Legal and Organizational Overview*, INT’L ECON. STUDY CTR. <http://internationalecon.com/wto/ch1.php> (last updated Apr. 1, 1998).

the GATT and became Contracting Parties, accepting all of the treaty's rules in conducting their trade relations.

The GATT's *raison d'être* was the liberalization of world trade and, where possible, the elimination of protectionism that had devastated the world during the 1930s depression. The agreement embodied core principles of non-discrimination and national treatment, together with contractually bound tariffs applied to imports from all GATT members on a most-favoured-nation ("MFN") basis.

Notwithstanding its many shortcomings, and reflecting American dominance in the world stage, the GATT provided decades of coherence and stability in global trade. With its consensus-based dispute settlement process, the GATT allowed contracting parties to bring forth complaints against the party breaching its rules. If proven in breach of the GATT, the guilty party suffered the "nullification and impairment" of their GATT benefits.

The GATT dispute settlement process was not as highly-refined and technically complex as the procedure we have today under the WTO Agreement. The GATT's procedure lacked the discipline of a mature system of inter-state adjudication as the implementation of GATT panel decisions allowed for prevarication and outright refusal of compliance.⁴¹

Yet even as an imperfect system, the GATT process resolved trade disputes through an enforcement mechanism that allowed the successful disputant to withdraw GATT benefits from the defending party if this party did not implement the decision of the panel. The consensus-based system was effective because both sides of a dispute had to accept the panel's report. The political and diplomatic pressures amongst the contracting parties forced the losing member to abide by the panel's recommendations.⁴²

The effectiveness of the GATT process is evidenced by its longevity. Lasting from 1947 to 1994, the GATT anchored the global trading system by means of bound tariff rates, MFN, and national treatment and prohibitions on import and export restrictions. Additionally, the GATT tied the commercial world together, reduced the chaos of the 1930s, and lowered the trade protectionism that was one of the hallmarks of the Great Depression. The GATT provided the underpinnings for the present day prescriptive rules of the WTO Agreement.

⁴¹ There is a massive amount of legal and historical literature on the GATT system. The foremost authority for many years was John H. Jackson and his massive text, *WORLD TRADE AND THE LAW OF GATT* (1969) is a classic. In terms of the history of the GATT, none is more useful than the story of the WTO's own website under the heading, "The system under GATT 1947 and its evolution over the years", found at *Historic Development of the WTO Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm (last visited Mar. 13, 2017). See also Erwin P. Erlichman, *Procedural Aspects of GATT Dispute Settlement: Moving Towards Legalism*, 8 INT'L TAX & BUS. L. 38 (1990).

⁴² MICHAEL TREBILCOCK, ROBERT HOUSE, & ANTONIA ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 172 (4th ed. 2012).

After coming into force in 1948, there were a series of GATT negotiating rounds aimed to further reduce trade barriers through progressive lowering of tariff rates over time.⁴³ These rounds continued until the launch of the omnibus Uruguay Round in 1986, so named because the ministerial meeting that inaugurated the negotiations was convened in the Uruguayan resort city of Punta del Este.

The Uruguay Round, held from 1986 to 1994, was a lasting success. Some might say that the results were overlain with complexities once lawyers entered the negotiating process. Nevertheless, in just eight years, a relatively short period of time in the context of multilateral treaty-making standards, the Uruguay Round produced the WTO. This new agreement moved the GATT a quantum step forward towards the establishment of a true intergovernmental organization, with all of the attributes of the other Bretton Woods institutions.

A number of key issues were left unsettled by the Round, notably in the agriculture sector. Under the WTO *Agriculture Agreement*, governments committed to re-convening trade negotiations in this sector and other relevant issues. In 2001, as part of the Doha Development Round,⁴⁴ a new round was launched to resolve these matters. These latest discussions inherited some difficulties:

- First, the launch of the Round lacked the collective political will that characterized the Uruguay Round and its predecessors;
- Second, the issues list for the Round covered complex areas of law and policy that strained the ability to find solutions;
- Third, the consensus-based negotiating process, which required decision unanimity, made it impossible to arrive at solutions;
- Finally, a cumbersome process overlaid these political and legal complexities that required the outcome to be a “single undertaking.” WTO members had to accept the entire Doha Round package. There could be no “cherry-picking” of discrete portions of the deal. The consensus that had been present in the previous WTO negotiations was absent. Changes in geopolitical power relationships were papered-over during the Uruguay Round. The negotiating parameters harkened back to the Tokyo Round of the mid 1970s, which were no longer relevant. The United States was no longer able to provide leadership in the negotiations. Additionally, absent was the kind of critical mass needed to balance competing interests in agriculture in order to secure a comprehensive package deal.

⁴³ In the so-called Tokyo Round, GATT members concluded a number of Codes in 1979 that gave greater precision to the anti-dumping and anti-subsidy provisions of the GATT. See *Tokyo Round Agreements*, WORLDTRADELAW.NET, <http://www.worldtradelaw.net/static.php?type=public&page=tokyoround> (last visited March 13, 2017).

⁴⁴ See Anne McGuirk, *The Doha Development Agenda*, 38 FIN. & DEV. 3 (2002).

Due to the lack of consensus, the WTO negotiations soon dissipated. After years of effort, the Doha Round eventually came to a halt. The academic literature and financial press has extensively analyzed reasons for this failure. In my opinion, the underlying cause of this outcome was the absence of collective political will, and unwillingness to compromise by an increasingly fractious international community.⁴⁵

XI. AN ARRAY OF CHALLENGES

As this brief survey shows, the UNCLOS and the Uruguay Round were products of a world that is vastly different from the one that exists today. The number of new and newly-independent sovereign states that have come into the United Nations is testimony to this fact.

When the UNCLOS III was underway, the United Nations had 120 members. Today, there are 193 members. The United Nations developing country group, formed as the Group of 77 in 1964, presently includes some 150 countries. The vast range of members with vastly different interests poses a barrier in a consensus-based negotiating system. However, this is not the only issue.

The growth of the global economy, thanks largely to the GATT and the WTO Agreement, has enhanced the influence of many countries that once had substantially less economic and political weight. Ironically, this economic growth has added to the challenges of finding consensus on a multilateral basis.

The case of China best illustrates this point. The critical economic and political importance of China today is undeniable, a factor that was much less significant twenty or thirty years ago. The same proposition is true of the oil producing States in the Middle East.

The rapid pace of global business places additional pressures on the continuing development of international law. In the past, businesses were willing to spend years waiting as governments negotiated tariff reductions and other border matters. Today, international business and transactions have in effect left international law behind. As a result, the relevance of international law in trade has been compromised. Frustrated with the slow pace of the Doha Round, businesses moved ahead without the need for trade deals. This example illustrates the challenge that the pace of global events presents in the development of international rules, whether on the multilateral, regional, or bilateral level.

⁴⁵ See *The Doha Round Finally Dies a Merciful Death*, FIN. TIMES (Dec. 21, 2015), <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879>. (“Three problems rapidly became evident. One, behind the mask of solidarity between developing countries lay deep divisions, for example between agricultural net importers and exporters, preventing constructive proposals for liberalization. Two, countries such as China transformed beyond recognition during the round, becoming global export powerhouses yet continuing to plead developing country status. Three, the U.S. in particular proved to be largely spineless in taking on its own farm lobby, which demanded improbable amounts of market access abroad in return for subsidy cuts at home.”)

The question now is whether multilateralism is dead, and with it the continued evolution of international law. The election of Mr. Trump as the next U.S. president is likely to reveal the dramatic impact that changes in American political leadership can have on world affairs. With Trump as president, the United States will likely retreat further into isolationism, regressing to “America first” policies.

Even before the emergence of Mr. Trump, the U.S. and other governments’ pursuit of bilateral and regional trade solutions pointed to the attenuated support for the multilateral process.⁴⁶ Preferential or Regional Trade Agreements are, in addition to the several thousand investment protection agreements now in force, a testament to this conclusion. The proliferation of these agreements makes it even more difficult to find consistency. These agreements are a major challenge to the universality of the WTO system and the hopes and aspirations for a more “globalized” rule of law.⁴⁷

Another barrier is the complexity of trade disputes that come to the WTO Dispute Settlement Body and enter the panel process. This complexity has resulted in lengthy delays in reaching a resolution, only to further be stuck in the enormously long and complex WTO panel and Appellate Body stages. These long delays and convoluted decisions seriously compromise public acceptance and legitimacy of the WTO dispute settlement system.⁴⁸

The emergence of private industry regulation outside the scope of governmental action has been another growing phenomenon.⁴⁹ The growth of the Corporate Social Responsibility (“CSR”) standards, instituted by the private sector alone, is a testament to the diminishing role of the government legislation and regulation. Currently, the CSR is a widespread phenomenon in the corporate world, particularly in the extractive sector. When faced with the collapse of a large garment factory in Bangladesh in 2013, the industry responded by establishing new private standards to ensure safety in production facilities.

⁴⁶ M. Trebilcock, *The Fracturing of the Post-War Free Trade Consensus: The Challenges of Reconstructing a New Consensus* (Oct. 2016) (unpublished manuscript).

⁴⁷ See REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM (Rohini Acharya ed., 2016) [hereinafter AGREEMENTS] (examining issues in regional trade agreements (“RTAs”) and how RTAs relate to the WTO’s legal framework, and addressing the current debate on the role of the WTO in regulating international trade and how WTO rules relate to new rules being developed by RTAs).

⁴⁸ In order to address this and other problems in the process, in June 2016, Canada introduced a new set of proposals that members could voluntarily adopt to streamline and make more transparent the WTO dispute settlement proceedings, with the ultimate goal of codifying the proposals in the Dispute Settlement Understanding. See *Canadian Proposal Aimed at Fixing DSB Delays Met with Neutrality at WTO*, WORLD TRADE ONLINE (June 23, 2016), <http://insidetrade.com/inside-us-trade/canadian-proposal-aimed-fixing-dsb-delays-met-neutrality-wto>.

⁴⁹ LAWRENCE L. HERMAN, C.D. HOWE INST., *THE NEW MULTILATERALISM: THE SHIFT TO PRIVATE GLOBAL REGULATION* (2012); Frederick W. Mayer & Gary Gereffi, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, 12 BUS. & POLITICS, 1 (2010).

The discussion thus far illustrates the challenges that the fast pace of today's world pose, and how governments struggle to keep up with these daily changes. How can the complexity and slow pace of international treaty-making, and international law generally, manage to not be overwhelmed – if not overtaken – by the magnitude and sheer pace of change?

XII. SOME CONCLUSIONS – A LASTING LEGACY?

Taking all of this into account, the challenges facing the profession and discipline of international law seem unconquerable. Dispersion of political will, fragmentation, and incoherence seem to rule global politics. The multilateral process of global law-making seems to have come to a halt.

Yet, there is room for optimism. Even if the achievements of UNLCOS and the WTO Agreement can't easily be repeated, at their core, these institutions encapsulate the rules that, even if not universally respected, are widely adhered to, and transcend short-term political controversy.

In the LOS context, states continue to abide by the principles and rules of the Convention. Even with the tensions in the South China Sea, there is stability in the use of the world's oceans and its resources. The international fisheries industry is relatively dispute free, even if depletion of certain living natural resources like fish stocks is a source of concern. Maritime trade is benefiting from legal rules respecting transit. Seabed issues are evaluated peacefully through the workings of the International Seabed Authority.

As these examples illustrated, the rules in the Convention stand, notwithstanding the fact that the conventional LOS law-making processes are impossible to resurrect.

In the trade arena, even with the weakening of post-World War II consensus on multilateralism, the achievements of the GATT era are not to be underestimated. GATT-based rules, embodied in the WTO Agreement, are respected and applied well beyond the multilateral orbit and in many regional and bilateral agreements, including NAFTA, CETA and the ill-fated TPP.

There are major challenges to the universality of the WTO system and the aspirations for a more globalized rule of law.⁵⁰ The collapse of the Doha Round is an unfortunate reminder of the limits of multilateral trade negotiations in a world with numerous players and their divergent interests. It reveals the realities of global politics today and the paralysis of the WTO's legislative arm.

In a similar way, the vaunted TPP experiment seems to be at an end due to U.S. domestic politics and Mr. Trump's presidency, showing the difficulty of even a restricted group of countries coalescing around a set of treaty provisions on liberalizing trade.

The essential point is that the proliferation of bilateral and regional trade agreements and the retrenchment from multilateralism hasn't reduced the sanctity of bound tariffs and non-discrimination (MFN and national treatment).

⁵⁰ AGREEMENTS, *supra* note 47.

Both are time-honored legal rules that remain the mainstay of the GATT-inspired international trading system.

Notwithstanding the setback of multilateral negotiations and the failure of the Doha Round, regional and bilateral trade and investment agreements are grounded in the rules set down in the 1947 GATT.

The WTO dispute settlement procedures are the legacy of the GATT dispute settlement process, which was substantially changed and refined in the WTO Agreement. These changes have been brought on by means of adjudication and an enforcement mechanism. Under this system, a successful complainant can retaliate by withdrawing trade benefits from a losing party who refuses to implement the WTO panel or Appellate Body report.⁵¹

The significance of this kind of “self-enforcement” in the WTO process is often overlooked. It embodies a lasting achievement in international law, a triumph of an effective enforcement system that is based on the rule of law in a world of sovereign states.⁵²

While it would be misleading and naive to ignore the harsh realities of today’s world, the discussion above provides cause to celebrate the gains in public international law in the last five decades. The rules governing global trade and the uses of the oceans still stand, even if the processes of further rule-making are at a temporary halt. These rules are critical stabilizing elements that international law has provided to a turbulent and uncertain world.

For jurists and those following the law outside the profession, the quest for coherence, integration, and rules-based inter-state relationships remains. The beacons on that route are the achievements in the LOS and the legacy of the WTO Agreement, providing guiding light to broader vistas.

⁵¹ DAVID PALMETER & PETER C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION; PRACTICE AND PROCEDURE 13 (2004); *see also* Marc L. Busch & Eric Reinhardt, *The Evolution of GATT/WTO Dispute Settlement*, http://faculty.georgetown.edu/mlb66/TPR2003_Busch_Reinhardt.pdf; PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION (2005) (providing some of the best materials on the evolution and functioning of the WTO dispute settlement mechanism).

⁵² John H. Jackson, Robert E. Hudec & Donald David, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, BROOKINGS TRADE FORUM 179 (2000).