
International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 20, International Economic Law

Question 1. *How are the 'Bretton Woods' structured differently than other international organisations; and how does this shape their impact on international finance?*

Students would recall that the 'Bretton Woods Accords' of 1944 established both the IMF and the IBRD (World Bank Group) as independent organisations. What marks them out from other international organisations (IOs) is the departure from the one-State, one-vote model of most IOs. Instead, both the IMF and the World Bank group have adopted a structure akin to a private bank.

Because they are rather different, it is worth addressing them separately. The IMF is organized according to 'quotas', with each State being assigned a quota that is based on their relative economic standing, with the largest economies holding the largest quotas. The IMF is then run by an Executive Board with permanent Directors for each of the five largest developed economies (the US, Japan, Germany, the UK, and France). This structure in turn influences its functions, primarily of providing loans to States in financial difficulty. Arguably in line with the priorities of its largest quota-holders, borrowing States have to submit to a number of conditions in order to secure loans, such conditions often having far-reaching implications in relation to fiscal and monetary policy. It is these conditions that have attracted harsh criticism from civil society and scholarship.

The World Bank Group has a different function, to provide development assistance and resources to less-developed States; and it is organised into five connected bodies in order to discharge these functions relating to economic development, development finance, investment facilitation, etc. However, its structure is also not

one-State-one-vote but operates on the principle of weighted voting, with a Board of Governors with permanent directors from the six largest shareholders (US, Japan, China, Germany, UK and France). It too has come under fire for some of the conditions attached to its structural adjustment loans, in which far-reaching domestic reforms are demanded from borrowing States.

Though the IMF and the World Bank Group remain the dominant providers of international finance to States in need, the best answers might point to the fact that regional solutions (not only in Europe but in Latin America and Asia) have very recently taken form and may yet challenge the dominance of the 'Bretton Woods' institutions in favour of a more regionalised approach.

Question 2. *What is the relationship between the GATT and the WTO?*

In order to address this question, students will need to be able to identify the GATT as well as the WTO. The GATT, first, was the provisional agreement that came into force due to the failure to create an 'International Trade Organisation' in 1945. Its organizational structure was relatively flexible and through a number of reforms over decades, the GATT encouraged States to reduce progressively the tariffs between them and other measures to facilitate international trade. There were six multilateral rounds of negotiations through which the GATT evolved. However, it was seen to be insufficiently institutionalised, insufficiently concerned with the priorities of developing States, and lacking in enforcement mechanisms, all concerns that lead to the creation of the WTO in 1994.

Conversely, unlike the GATT, the WTO is an international organisation with a centralised institutional framework that built upon the GATT. As the GATT provided primarily for trade in goods, the WTO added trade in services, banking and finance, and other areas, in addition to a recognition of the role of the environment in issues of world trade. The WTO, in addition to its primary organs (which did not exist under GATT), added the compulsory dispute settlement mechanism (the DSM) and what would become a powerful appellate body. This is the only compulsory dispute settlement mechanism that includes the United States and China, for example.

The WTO did not replace the GATT; instead, it ‘absorbed’ its agreements and legal texts, and in particular, its important rules on ‘national treatment’ and ‘most-favoured nation’ status that governed trade agreements under GATT and are still central to the WTO Agreement. The best responses might also point out that though the WTO represents a paradigm shift institutionally, as well as covering services, finance and banking, and intellectual property rights, it has effectively *multilateralised* and *extended* the world trade regime away from the traditional conception of trade being primarily in goods. In this respect, it can be argued that the WTO Agreement is not so much a rupture with the past but a commitment to extending the same liberal viewpoint on free trade into other areas of international commercial activity.

Question 3. *What are the core principles found in most bilateral investment treaties (BITs), and how are they enforced?*

There are thousands of BITs in existence and despite this profusion of agreements, they share a number of core principles. Above all, the essence of BITs is that they seek to protect certain rights of foreign ‘investors’ on the international plane, and not leave them to the application and enforcement of domestic law.

Most BITs seem to adhere to a number of core principles or ‘standards of treatment’ that host States agree to accord to investors:

1. *Fair and equitable treatment*—a minimum obligation of fair treatment, without arbitrariness;
2. *Full protection and security* to investments, an obligation of diligence rather than of result;
3. *Non-discrimination* between foreign investors and domestic investors;
4. *National treatment* for foreign investors, or in other words, no separate regulatory or legal regime;
5. *Most-favoured nation* treatment, or the principle that any privilege given to another State must automatically be ‘read in’ to an existing BIT.

Moreover, the vast majority – if not all – of BITs allow for the creation of ‘investor-State’ tribunals, which allow private persons and corporations the standing before an international tribunal to enforce their rights. There are thousands of decisions of investor-State tribunals, many of which are applying consistent interpretations across BITs. These may also occur under a multilateral treaty such as the Energy Charter, but by and large operate as bilateral tribunals under the ICSID, UNCITRAL or International Chamber of Commerce rules. These investor-State tribunals issue binding judgments on the parties and often issue awards totalling billions of pounds/euros/dollars in damages.