

Prognostications are risky, but one may anticipate that plaintiffs will argue (and courts may be inclined to conclude) that the *Jam* decision requires finding that at least some official activities of international organizations taken within the scope of their mandates nonetheless fall within one or more of the FSIA exceptions. While the commercial activities exception is likely to be a main focus of concern, the decision did not cabin the rule to that exception, so that arguments under other FSIA exceptions are foreseeable.<sup>28</sup>

## VI.

As Okeke rightly emphasizes, “[i]mmunity is not a carte blanche or franchise for officials to be lawless” (p. 12). Arguing in favor of jurisdictional immunity from domestic courts is not the same as rejecting the importance of providing individuals access to effective remedies in order to avoid denials of justice. That is the dilemma posed by principles of jurisdictional immunity, no less for international organizations than for states. One can read the majority’s opinion in *Jam*, and Judge Pillard’s concurrence in the court below,<sup>29</sup> as implicitly endorsing the principle that immunity must not lead to impunity.

The real question—and the challenge posed by *Jam*—is where (and how) such disputes are best resolved. The answer need not always be in U.S. courts—or even, as Okeke observes, in the courts of the states where international organizations are headquartered (as opposed to where the harm took place), or for that matter in any domestic court. It would seem prudent, if not essential, for international organizations generally to heed the underlying message and take action promptly to fashion appropriate mechanisms by which those claiming to have been aggrieved by their actions or inactions can have their claims heard and, if valid, appropriately remedied.

DAVID P. STEWART  
*Of the Board of Editors*

<sup>28</sup> In the end, Congress will likely need to resolve the issues legislatively.

<sup>29</sup> 860 F.3d 703, 708–13.

*The Wealth of a Nation: A History of Trade Politics in America.* By C. Donald Johnson. New York, New York: Oxford University Press, 2018. Pp. xxi, 639. Index.  
doi:10.1017/ajil.2019.29

I am a Tariff Man. When people or countries come in to raid the great wealth of our Nation, I want them to pay for the privilege of doing so. It will always be the best way to max out our economic power. We are right now taking in \$billions in Tariffs. MAKE AMERICA RICH AGAIN.<sup>1</sup>

High tariffs and import quotas, including many that are almost certainly illegal under General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) rules, have been a principal feature of the Trump administration’s trade policy, probably affecting more imports and at higher levels than at any time since the enactment of the GATT in 1947. Beginning June 1, 2018, the administration invoked national security concerns to impose trade restraints on steel and aluminum imported from all major source countries. The restraints consisted of 25 percent tariffs on steel, 10 percent tariffs on aluminum, and quotas on steel and aluminum representing a 30 percent reduction from current exports levels from a few countries.<sup>2</sup> In the course of its ongoing trade “war” with China, the Trump administration has imposed tariffs of 25 percent and 10 percent (in addition to any normal MFN tariffs) on \$250 billion worth of imports from China based on China’s

<sup>1</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2018, 7:03 AM), at <https://twitter.com/realdonaldtrump/status/1069970500535902208?lang=en>; Josh Boak, *AP Fact Check: Economists Say Trump Off on Tariffs’ Impact*, BOSTON.COM (Dec. 5, 2018), at <https://www.boston.com/news/politics/2018/12/05/ap-fact-check-economists-say-trump-off-on-tariffs-impact> (quoting President Donald J. Trump).

<sup>2</sup> U.S. Customs and Border Protection Press Release, Section 232 Tariffs on Aluminum and Steel (Apr. 2, 2019), at <https://www.cbw2qgov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel>.

policies regarding intellectual property, technology, and innovation that allegedly violate Section 301 of the 1974 Trade Act.<sup>3</sup> In retaliation, China imposed tariffs on \$110 billion of U.S. exports to China.<sup>4</sup> As of June 2019, the administration is considering whether to impose 20–25 percent tariffs (in addition to the current 2.5 percent MFN tariff) on imports of automobiles and automobile parts, again on national security grounds,<sup>5</sup> and to increase the current MFN tariffs on \$200 billion worth of Chinese imports by 10 percent to 25 percent.<sup>6</sup> Under such circumstances, C. Donald Johnson's fine history of trade politics in America, which won the 2019 American Society of International Law Certificate of Merit for High Technical Craftsmanship and Utility to Practicing Lawyers and Scholars, could not be timelier. Given the handwringing over the Trump administration's tariff policies by economists, trade lawyers, and many others, the opportunity to view these current measures in the context of nearly two hundred and fifty years of American tariff policies is most welcome. For if anything is obvious after reviewing this study of trade policy in the United States since well before the War of Independence, it is that American protectionism is a very old habit! The high 1930 Smoot-Hawley tariffs were hardly an aberration, although the Trump trade policies are receiving attention because they are a departure from over seventy years of post-World War II trade liberalization led by the United States.

<sup>3</sup> See Wayne M. Morrison, *Enforcing U.S. Trade Laws: Section 301 and China*, CONG. RES. SERV. (Mar. 14, 2019), available at <https://fas.org/sgp/crs/row/IF10708.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> See David Lawder & David Shepardson, *U.S. Agency Submits Auto Tariff Probe Report to White House*, REUTERS (Feb. 18, 2019), at <https://www.reuters.com/article/us-usa-trade-autos/us-agency-submits-auto-tariff-probe-report-to-white-house-idUSKCN1Q706C>.

<sup>6</sup> Spencer Kimball, *Trump Says Tariffs on \$200 Billion of Chinese Goods Will Increase to 25%, Blames Slow Progress in Trade Talks*, CNBC (May 5, 2019), at <https://www.cnbc.com/2019/05/05/trump-says-tariffs-on-200-billion-of-chinese-goods-will-increase-to-25percent-on-friday.html>.

Johnson's book, as the ASIL Book Award Committee recognized, is a

thoughtful historical study of the law and policy of U.S. tariff and trade policies. Covering the colonial era to the present, the book offers invaluable assistance in understanding the legal and political complexities surrounding international trade through a historical lens.<sup>7</sup>

Johnson brings an unusual range of experience to his historical writing, having served in the Georgia State Senate; U.S. Congress; the staff of its Ways and Means Committee; as a partner in a major Washington, D.C. law firm; as a senior textile negotiator in the Office of the U.S. Trade Representative (USTR); and as director of the Dean Rusk International Law Center at the University of Georgia. He also spent eight summers teaching a course in Beijing on U.S.-China trade issues under the WTO. Johnson's understanding of Congress and the executive branch, as well as the interests of constituents and other stakeholders involved in the formation and implementation of American trade policies, informs the historical analysis throughout the volume.

*The Wealth of a Nation* is divided into three major sections. Part One, "The Rise and Fall of the U.S. Protectionist System," covers the period from Alexander Hamilton at the time of the Revolution to the Smoot-Hawley tariff of 1930. Part Two discusses "[t]he Creation of the Liberal Economic Order" from the beginning of trade liberalization under President Franklin Roosevelt and Secretary of State Cordell Hull in 1933 to the negotiation of the Havana Charter in 1946. Part Three, somewhat ominously titled "The Survival of the System," begins with the "new economic order" represented by the Havana Charter and the GATT and extends through the first year of the Trump administration.

Although predominantly providing a history of American trade policy, Johnson begins his

<sup>7</sup> 35 ASIL NEWSLETTER, at 5 (Jan./Mar. 2019) (disclosure: David Gantz was a member of the Committee).

volume with a discussion of the cultural, naval, and trade expansionist policies of fifteenth century Ming Dynasty Emperor Zhu Di. These policies were ultimately followed by a period of “xenophobic resistance to the outside world” that, in Johnson’s view, continues to shape the policies of modern China over six hundred years later under Communist Party Leader Xi Jinping (pp. xiii–xv). The implication is clear: periods of generally open trade and liberal economic institutions do not necessarily last forever. It is also abundantly clear where Johnson’s sympathies lie:

The world-changing history that followed 1776, I believe, is no coincidence. While we owe a multitude of different factors for our growth as the most powerful and prosperous nation in world history, certainly one of the most influential is that we have led the world in applying the liberal insights of both Adam Smith and our own founders in structures and institutions that support broad prosperity, particularly for the working class. This book tells how it happened in all its fits and starts. (P. xvii)

A review of selected chapter titles helps to explain both the diversity of trade policies followed in the United States over the past two hundred and fifty years and the fact that the current shift from freer trade (given that no WTO Members other than Hong Kong and Singapore actually practice “free” trade) to greater protectionism is far from the first in U.S. history. Thus, in Part One, the chapters include “Crisis, Compromise and Free Trade in the Jacksonian Democracy,” “The Gilded Age of Protectionism” (beginning in the 1880s), and “The Roaring Twenties and the Path to Smoot-Hawley.” The history covered in Part Two, from the Roosevelt era to the failure of the Havana Charter to be approved by the U. S. Senate, ends on a sour note for advocates of lower tariffs and agreed global rules on trade, but sets the stage for a discussion of the modern period of mostly liberalized trade beginning with the provisional entry into force of the GATT in 1947.

Given the length of the volume and its extensive coverage, this review focuses on several of the

most thoughtful and incisive sections, one from each of the three major parts of the book.

#### FROM HAMILTON TO SMOOT-HAWLEY

Perhaps more than any other section of the book, the early history of American trade and tariff policy up to the 1930 Smoot-Hawley tariff will be new to many readers. For example, the chapter entitled “The Gilded Age of Protectionism” addresses the period from Grover Cleveland’s presidency beginning in 1885 to the assassination of President William McKinley in 1901, when the United States rejected a series of efforts to lower the then extraordinarily high tariffs designed to protect the Northern states’ growing industrial base. This result was not surprising, as during this period members of both the Republican and Democratic parties were more or less equally protectionist. Cleveland took up the cause for “moderate” tariff reform primarily because in those long-gone days, government revenue from tariffs significantly exceeded budgetary needs; Johnson suggests that Cleveland intentionally avoided supporting either free trade or protectionist principles (p. 110). Still, Cleveland’s reforms went nowhere, largely because while moderate Democrats controlled the House, protectionist Republicans held a majority in the Senate (*id.*).

Further efforts to reduce high tariffs in 1886, citing the struggles of America farmers to penetrate foreign markets where tariffs had been raised in retaliation, along with excessive costs to consumers as a result of high and “inequitable” protective tariffs, proved to be no more successful. The reaction again was swift, with the Republicans asserting that the reduction (only 7 percent, to an average of 40 percent) would wreck the economy (p. 117). In an eerie parallel with the Trump administration’s domestic steel-industry-focused protectionism, among the leaders of the opposition were members representing the iron and steel industry, arguing that the tariff reduction would “paralyze the enterprise and energy of the people” (p. 117). The proposals did not pass.

Rather, with the support of then Senator William McKinley, the Republicans proposed

and enacted an increase in average tariffs to nearly 50 percent, reducing pig iron, iron, and steel imports over five years (p. 123). Cleveland's second term, with his election due in part to the economic downturn resulting from the McKinley tariff, despite significant efforts, produced only limited reductions in U.S. tariff levels, again because of Senate opposition (pp. 127–28). Once McKinley was elected president, defeating the Democratic candidate William Jennings Bryan, he again supported new tariff protection for American industry (particularly iron, steel, and wool interests that had been major campaign contributors, purchasing, in Johnson's view, a controlling stake in the GOP). The 1897 legislation again raised average tariffs to 50 percent (pp. 133–34).

In recent decades, the roles of the two major parties have been reversed compared to the 1890s, with the Republicans tending to favor freer trade and the Democrats increased protectionism. By 2019, the distinctions have become blurred. Today, the Republican president has endorsed high levels of tariff protection, with the steel industry again a primary beneficiary. The Republicans in the Senate, despite some grouching, have declined to confront President Trump on his trade policies.<sup>8</sup> At the same time, U.S. labor unions and their supporters in Congress have typically welcomed such protection.<sup>9</sup> How all of this will unfold in the next two years, or in a second Trump term if he is reelected, is anyone's guess.

<sup>8</sup> Seung Min Kim, *Farm-State Republicans Chafe at Trump's Trade Policies but are Reluctant to Confront Him*, WASH. POST (Apr. 19, 2018), at [https://www.washingtonpost.com/politics/no-did-he-do-that-republicans-chafe-at-trumps-trade-policies-but-are-reluctant-to-confront-him/2018/04/19/203b492a-4313-11e8-bba2-0976a82b05a2\\_story.html?utm\\_term=.fa0ac9e94110](https://www.washingtonpost.com/politics/no-did-he-do-that-republicans-chafe-at-trumps-trade-policies-but-are-reluctant-to-confront-him/2018/04/19/203b492a-4313-11e8-bba2-0976a82b05a2_story.html?utm_term=.fa0ac9e94110).

<sup>9</sup> See Bob Bryan, *Trump's China Tariffs Turn Congress on Its Head as Democrats Cheer and GOP Slams the Move*, BUS. INSIDER (June 15, 2018), at <https://www.businessinsider.com/trump-china-tariff-democrats-praise-gop-slams-2018-6>.

## THE CREATION OF THE NEW ECONOMIC ORDER

Chapters 7 and 8 address the efforts of President Franklin Roosevelt and Secretary of State Cordell Hull to reverse the protectionist Smoot-Hawley tariff. This is the period, which in the view of many historians,<sup>10</sup> is the beginning of the liberal economic order, even though it preceded the Havana Charter and the GATT by more than a dozen years. In this section of the book in particular, Johnson demonstrates skill at developing the context behind the revolutionary changes in trade policy developed in the initial Roosevelt term, adding significantly to the understanding of those changes. While most readers will be familiar with events over several decades leading up to the election of Franklin Roosevelt as president, many will find the detailed descriptions of the policy views and political development of Cordell Hull from a young age, and Johnson's take on that development, to be new and valuable information.

Born in a log cabin in Appalachia in a poor family with none of the patrician benefits of a young Franklin Roosevelt, Hull's education was primarily at teachers' colleges in Kentucky and Ohio (p. 210). Hull nevertheless revealed himself as a free trader and an advocate of more open markets, with a first speech supporting tariff reform delivered before he was seventeen years old (*id.*). Elected at age twenty-one to the Tennessee Legislature, he served in the U.S. Congress in his mid-thirties and later in the U.S. Senate. From the outset, Hull was a staunch opponent of Republican policies favoring protective tariffs and also became an expert in tax policy (pp. 210–11). By the time World War I was underway, Hull as a member of Congress proposed a "permanent international congress" that would "consider all international trade practices that create commercial disputes and bitter economic wars and to reach agreements to promote fair trade relations among the world's nations" (p. 213). The concept, even though not espoused

<sup>10</sup> See, e.g., DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY*, ch. 9 (2017).

by President Wilson and in retrospect far ahead of its time, further confirmed the depth of Hull's dedication to more open world trade.

Then Senator Hull strongly supported Roosevelt's nomination as the Democratic candidate for president, sharing his views, including but not limited to those relating to tariffs. Given this history, and the broad respect Hull had generated as a senator, it was probably not surprising to anyone but Hull that he was asked by Roosevelt to be his secretary of state—a position he accepted only after a month's introspection (pp. 231–32).

Even when others in the early days of the Roosevelt administration, including the president, wavered—as during the ill-fated London Conference in June 1933—Hull remained committed to reciprocal tariff reduction (pp. 239–42). Hull regarded that conference as “an opportunity to begin putting into effect the views he had entertained on trade reform for thirty years” (p. 242). It is apparent that Hull was primarily, if not single-handedly, responsible for convincing Roosevelt that a series of reciprocal tariff reduction agreements was critical to bringing the United States out of the Great Depression. Most of the United States' significant trading partners had retaliated against the Smoot-Hawley tariffs with substantial tariff increases of their own, as indeed has been the case today with foreign governments' reactions to the U.S. steel and aluminum tariffs. Hull thus saw mutual tariff reductions as a major first step toward rebuilding the U.S. economy at a time when Roosevelt (with some logic) wanted to focus first on domestic measures (p. 235). However, as Johnson observes, “Hull continued to believe that Roosevelt fundamentally supported trade liberalism, but with the White House continuing to hedge its bets politically [in mid-1933] the issue remained in flux” (p. 255).

#### THE SURVIVAL OF THE SYSTEM

Even if this volume is most useful for its detailed historical analysis of the rise and fall of protectionism in the United States, many contemporary readers will be interested in

Johnson's detailed history of the post-World War II economic expansion under the influence of the GATT and other factors, such as the introduction of the shipping container<sup>11</sup> and the enormous reduction in communications costs worldwide. In my view, this section is both highly readable and objective; Johnson is clearly inclined in principle toward free trade but he recognizes and discusses many of the long-standing challenges, including the protection of workers' rights both in the United States and abroad.

The reader's understanding of the difficulties of convincing other nations, particularly developing ones, to liberalize trade and to consider labor rights issues affected by trade liberalization is enhanced in the chapter entitled “Advancing Worker Rights Beyond the WTO.” This discussion benefits from Johnson's personal experience as a member of Congress who ultimately supported the North American Free Trade Agreement (NAFTA) after the side agreement on workers' rights<sup>12</sup> was added by the Clinton administration. Yet he concedes, accurately in my view, that “because the side agreements were not an integral part of the agreement with the same enforcement power as the commercial dispute settlement provisions, the NAFTA labor provisions were only a modest first step and proved largely ineffective” (p. 491).

One of the most instructive and perceptive sections of the book is a thirteen-page discussion of the U.S.-Cambodia Textile Agreement, negotiated and entered into force in the late 1990s while Johnson was serving as the USTR's textile ambassador (pp. 491–503). Perhaps more than any other discussion of U.S. trade policies in the 1990s and 2000s, the history of these negotiations is rich with Johnson's analysis of competing stakeholder interests and the government's task working with them in order to successfully complete the bilateral trade agreement. Among

<sup>11</sup> See MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* (2016).

<sup>12</sup> North American Agreement on Labor Cooperation (U.S.-Can.-Mex.), Dec. 17, 1992, available at <http://www.sice.oas.org/trade/nafta/Labor1.asp>.

these were U.S. and Cambodian labor groups, as well as the conflicting objectives of American textile importers and American textile producers. Also highly relevant were U.S. foreign policy objectives strongly supported by President Bill Clinton, both advancing labor standards in U.S. trade relations and supporting Cambodia's "emergence from the wilderness" in 1996. The challenges of establishing respect for workers' rights through improved labor laws, in a country which never really considered workers' interests significant until they were faced with the loss of tariff preferences under the Generalized System of Preferences (GSP), were extreme.

U.S. unions opposed Johnson's "carrot" approach that would have rewarded Cambodia with an increased textile quota for progress on worker rights. Textile importers wanted increased imports regardless of labor issues, while the American textile industry opposed imports more generally. The ultimate package followed the carrot approach and depended on training by the International Labor Organization (ILO) in Cambodia (largely financed by the United States) and regular assessments by the American Embassy in Phnom Penh. A package that survived for six years, until Cambodia became a member of the WTO in 2004, and in principle for some years thereafter because of that nation's generally good record on labor rights,<sup>13</sup> was attractive to many U.S. importers, such as GAP and Levi Strauss, and was successful, despite competing interests, unbalanced reporting by the *Wall Street Journal*, and some unhappy members of Congress. Johnson is justly proud of his pivotal role in constructing a mechanism that the Carnegie Endowment for International Peace concluded "has been one of the most successful and cost-effective programs to promote worker rights abroad the US government has ever funded" (p. 503).<sup>14</sup>

<sup>13</sup> By 2017, the situation in Cambodia had changed. See *Stitched UP: The Cambodian Government Threatens Labor Rights*, *ECONOMIST* (Oct. 26, 2017), at <https://www.economist.com/business/2017/10/26/the-cambodian-government-threatens-labour-rights> (reporting a squeeze on garment workers by the government).

<sup>14</sup> Citing Sandra Polaski, *Central America and the U.S. Face Challenge—and Chance for Historic*

Among the broader lessons offered by this example, Johnson concludes:

[I]t is impossible to make all the competing interests happy with trade negotiations . . . . Therefore, I revised my approach . . . . [M]y goal was not to try to please all of the interest groups but to try to make all of them only moderately unhappy." (P. 500)

Even for those who consider themselves trade experts in the period under discussion, the insights that Johnson provides will enhance readers' understanding of one of the few U.S. government successes in promoting labor rights abroad. Unfortunately, relatively few U.S. diplomats write in detail about the negotiations they chaired. This first-person history adds significantly to the value of the discussion and strongly reinforces my belief that *The Wealth of a Nation* is required reading for lawyers, economists, policy officials, and academics who pride themselves on an understanding of American trade policy.

DAVID A. GANTZ  
*The University of Arizona,*  
*James E. Rogers College of Law*

*Beyond Human Rights: The Legal Status of the Individual in International Law.* By Anne Peters. Cambridge, UK: Cambridge University Press, 2016. Pp. xxxv, 602. Index.

doi:10.1017/ajil.2019.32

In *Beyond Human Rights: The Legal Status of the Individual in International Law*, Anne Peters, Director of the Max Planck Institute for Comparative Public Law and International Law and a professor at the universities of Heidelberg, Free University of Berlin, and Basel, undertakes an ambitious project regarding the international legal status of the individual.

*Breakthrough—on Workers' Rights* (Carnegie Endowment for International Peace Issue Brief: Trade, Equity and Development Project, Feb. 2003).