高等院校双语示范教材·法学系列

International Trade Law:
Theory and Practice

国际贸易法：理论与实务（英文版）

刘亚军 主编

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（英文版）

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序　言

二十一世纪以来，随着我国综合国力和对外经济贸易交往程度的不断提高，对高端涉外法律人才的需求也日益增加。为了满足我国经济建设和对外开放的实际需要，提高人才培养质量，教育部出台了《关于进一步加强高等院校本科教学工作的若干意见》等一系列规范文件，要求在法律等专业率先开展双语教学，并在全国范围内选择了数百门课程作为本科双语教学示范课程。本书是教育部、财政部支持的高等学校本科教学质量与教学改革工程项目本科双语教学示范课程“国际贸易法”（教高函［2010］11 号）建设成果之一。

本书内容涵盖国际贸易法导论、国际货物买卖合同法、国际货物运输法、国际货物运输保险法、国际贸易支付法、国际贸易争议解决，全面、系统地介绍了国际贸易中的商事法律规则，能够使读者在较短时间内掌握国际贸易法律的基本制度和规则，并具备一定的实务知识和操作技能，适用于高等院校法学专业本科生和研究生的双语教学。

在借鉴国内外国际贸易法著作和双语教材的基础上，本书在编写过程中注重突出以下几个特点：第一，对内容体系进行精心选择，不求面面俱到，而是注重章节之间的内部联系。由于国际贸易法内容庞杂，涉及国际货物贸易、国际技术贸易、国际服务贸易、国际贸易管制、国际贸易争端解决等多个领域，不仅包含国际贸易公法、同时也包含国际贸易私法，导致国际贸易法教材多为大部头的鸿篇巨著，内容繁多，使读者往往难以入手。本书以国际贸易私法为主线，舍弃国际贸易管制法等国际贸易公法方面的内容，也不涉及国际技术贸易法、国际服务贸易法等内容，根据国际货物贸易交易流程，从合同订立、合同履行到争议解决，系统地介绍了国际货物贸易相关的商事法律制度，重点突出，逻辑性强，便于读者掌握；第二，注重理论与实际相结合，突出实务性。国际贸易法是实践性很强的法律，学习国际贸易法不仅需要系统掌握理论知识，而且需要具备一定的实践技能。为此，本书收录了大量的实务资料，包括国际贸易合同范本、国际贸易单据范本、国际贸易票据范本等等，并且每章都选择典型案例加以分析，使读者能够运用章节中的理论知识解决实际问题；第三，参考国外经典国际贸易法教材，语言力求准确，既符合英美国家的习惯，又尽量避免采用过于晦涩的表达，便于读者掌握规范的法律语言和法律文体风格；第四，国际贸易法内容广泛，任何一本教材或者专著都难以将其尽纳其中，为了方便读者深入学习，扩展阅读，本书提供了关于国际贸易法的重要

网站资源以及其他学习辅助资源信息，可以使读者快捷地检索到所需的辅助资料。

尽管编者在主观上已经尽其所能，力求完善，但本书的疏漏在所难免，欢迎各位读者不吝赐教，批评指正。

刘亚军

2011 年 6 月

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Section A The Definition, Scope of International Trade Law
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I. Brief Introduction to International Trade

International trade, also referred to as world trade, is the exchange of capital, goods and services across international borders or territories. It is the main form that countries or regions relate with each other based on international division of labor and reflects the interdependence between countries or regions. Economic studies (Smith's Absolute Advantage Theory, Ricardian's Comparative Advantage Theory, Heckscher-Ohlin's Factor Proportions Theory, etc.) show that countries have different advantages or resources. Therefore, they should produce and export goods that require abundant resources or have lower opportunity cost and import goods that require resources in short supply or have higher opportunity cost. Each country will benefit from international trade because this will make it to exploit its advantages to the full.

International trade has a long history and even before the existence of modern sovereign countries, there are records of trans-boundary trade. International trade served as a link which connected different civilizations together and brought prosperity to the humankind in ancient times. In Africa, when ancient Egypt became a great empire in the 15th century B.C., it had trade relations with Greek peninsula, Aegean States and Anatolia. In Asia, the "Silk Road" began in the Han Dynasty (202 B.C.—220 A.D.) which set important paths for cultural, commercial and technological exchange between traders, merchants, pilgrims, missionaries, soldiers, nomads and urban dwellers from Ancient China, Ancient India, Persia, and Mediterranean countries for almost 3,000 years. In the 15th century, Zheng He's fleets of China visited Arabia, East Africa, India, the Malay Archipelago and Thailand, dispensing and receiving goods along the way.① In Europe, trades between the states or cities around the Mediterranean were very prosperous in the 16th to 17th century. Clothes from England, spices from Portugal and copperware and silverware from Germany were transported via main ports along the sea line of the Mediterranean Sea. The discovery of new continent made the trade between Europe and America possible. Tobacco, cotton, silver and gold, sugar, etc. from America were transported to Europe, and in exchange, textile products, wine, and metal products were shipped to America. Some large trading corporations, such as West India Company and East India Company were set up.

Industrial revolution (18th-19th century) is a milestone in the history of international trade. With the invention of steam power engine, inner combustion engine and other machines, industrialization appeared in England, France, Germany and other major European countries and productivity was improved. One of the results of industrialization is the increase of wealth. There were plenty of products in the market and there was international division of labor. The transportation industry developed very fast which made trans-boundary trade easier than ever before. The progress of industrialization influenced the economic and social development in many countries. Industrialized countries need minerals, agricultural products and other raw materials which were often imported from remote areas. Modern means of transportation made trans-continental transportation possible. Railways, ships, automobiles connected the whole world together and products could be transported to other countries more easily. International trade boomed in this period. Merchants from Europe searched for natural resources in America, Asia, Africa and Oceania and sold manufactured goods to the local people. For example, rubber is an important raw material used for fire making so European manufacturers imported it from Brazil, Malaysia and other origins of rubber for industrial purpose. Industrialization

① Tamura, Eileen H. Linda K. Mention, Noren W. Lush, Francis K.C. Tsui, Warren Cohen. China: Understanding Its Past. University of Hawaii Press, 1997:70.

brought prosperity and benefits to some European nations and the United States. Some European economies, particularly those of Great Britain, France, Belgium and the Netherlands were transformed, and many people, particularly the upper and middle classes, prospered. [①] The upper and middle classes exercised influences on the national laws and policies of the European countries and a more liberal world economy formed during this period.

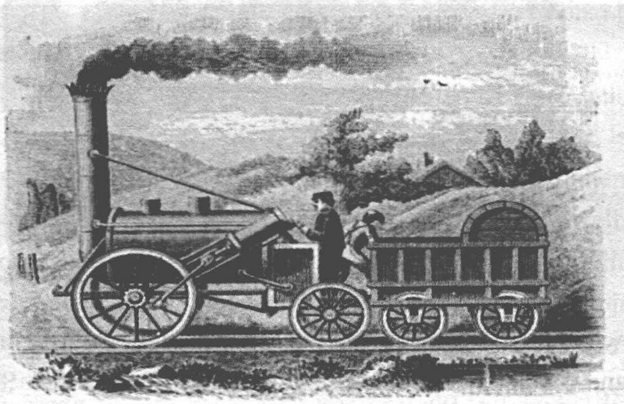


FIG. 55.—The "Rocket," 1829.

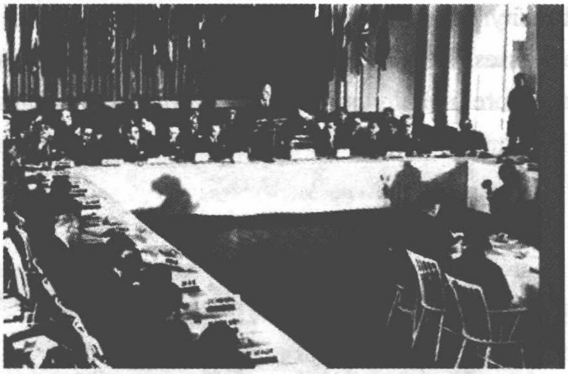
The Rocket Steam Locomotive invented by George Stephenson (1781-1848)

This prosperity of international trade continued until the breakout of World War I in 1914. During the period from 1914 to 1945, World War I and World War II caused great disasters to human civilization. It is estimated that some 60 million people lost their lives in World War II and most of the natural resources were used to produce tanks, aircraft, warships and other weapons for war purpose. Due to the strong confrontation between nations, the international trade was greatly hindered.

In 1944, the United Nations Monetary and Financial Conference, commonly known as the Bretton Woods conference, was held at the Mount Washington Hotel, situated in Bretton Woods, New Hampshire. 730 delegates from all 44 allied nations attended the conference to regulate the international monetary and financial order after the conclusion of World War II. The conference was held from 1—22 July 1944, when the agreements were signed to set up the International Bank for Reconstruction and Development (IBRD), the General Agreement on Tariffs and Trade (GATT), and the International Monetary Fund (IMF). But this

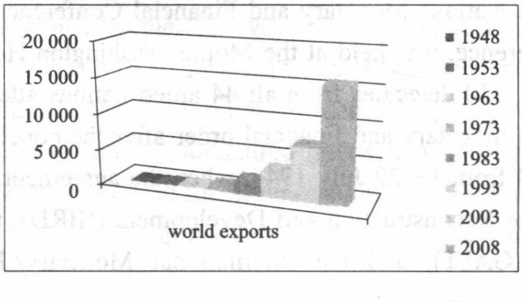
① Jerry Weiner, Mark Willner, George A. Hero. Global History, Volume Two: The Industrial Revolution to the Age of Globalization. Barrons Educational Series, Inc., 2008:36.

harmonization did not last long because of the so-called Cold War. Cold War lasted for almost 40 years and cut off the economic link between capitalist countries and communist countries.



United Nations Monetary and Financial Conference, 1944

The breakdown of the Berlin Wall and the collapse of the Soviet Union marked the end of Cold War. Peace and development has become the theme of the world. Since the foundation of the World Trade Organization (WTO) in 1995, international trade has increased sharply. In accordance with the International Trade Statistics published by WTO, the world merchandise exports in 1948 is 59 billion US dollars and the figure of 2008 is 15,717 billion dollars, over 260 times that of 1948. Due to the globalization of world economy, international trade has taken a great part in the total business transactions. Nowadays no one can deny that trade is by its nature boundless and international. The prosperity of international trade since the 1990s has raised the standards of living, ensured employment and a large and steadily growing of real income and effective demand, developed the full use of the resources of the world and expanded the production and exchange of goods.



Development of world merchandise exports (1948-2008) unit: billion dollars from International Trade Statistics 2009 published by WTO

II. Defination of International Trade Law

1. Definition of International Trade Law in General

International trade law is the body of rules and norms that regulates exchange relations concerning goods, technologies, services, and other relations relating to that exchange relations. These legal norms include international conventions, international business practices and domestic laws relating to foreign trade.

International trade law should be distinguished from the broader field of international economic law. The latter could be said to encompass not only WTO law, but also law governing the international monetary system and currency regulation, international taxation, international investment, international economic organizations, as well as the law of international development. International trade law is also different from traditional commercial law. The traditional commercial law, which takes merchants as main subject and based on "autonomy of will", "contract must be complied" principles, was restrained and restricted by state compulsory laws. Thus some parts of international commercial law were integrated into international trade law system. The latter includes not only "private law" rules of commercial law, but compulsory "public law" rules includes not only national regulations, but international regulations.

Traditionally, the definition of trade is restricted to merchandise trade which still covers the major part of international trade today. While in the multilateral trade negotiations in the Uruguay Round of GATT, there is a new explanation of international trade which covers merchandise trade, technology transfer and trade in service. Therefore, the scope of international trade law is extended to the coverage of all the three fields above. Specifically, the scope of international trade law covers international sale of goods, international carriage of goods, international cargo insurance, international payment, international trade regulation, settlement of international commercial disputes, etc.

International trade law includes the rules and norms regulating the business between parties which have the equal legal status, as well as rules and norms regulating the relationship between government and natural persons or legal persons whose legal status are unequal. The rules regulating the relationship between equals belong to the private law sector while the rules regulating the relationship between government and private parties belong to the sector of public law. Thus international trade law is a combination of both public law and private law and has features as follows:

Firstly, the subjects of international trade law include natural persons, legal persons, international organizations and states. For example, a simple trans-boundary sales transaction may involve in the participation of persons, legal persons, international organizations and states. A citizen of United States makes a contract of purchasing a hundred Camry cars from Toyota Company of Japan. Both United States and Japan are the members of WTO and they have their national trade regulation laws under the scheme of WTO multilateral trade treaties. In this transaction, the World Trade Organization, United States and Japan, US citizen and Japanese Company are involved.

Secondly, the sources of international trade law are international treaties, national foreign trade laws, international commercial practices and sometimes case law in common law countries.

Thirdly, the scope of international trade law covers a wide range of fields, such as international sale of goods and related transportation and insurance, international trade in service, international franchise, patents and trademarks, know-hows, international trade regulation. The wide range of international trade law make it almost impossible to cover all these aspects in one single book, so we limit the book to several basic matters: contract for the international sale of goods, international carriage of goods and cargo insurance, international payment in the sale of goods, international trade regulation and the settlement of international trade disputes.

2. Sphere of International Trade Law in This Book

As is defined, international trade law covers a wide range of fields, including international sale of goods, international carriage of goods, international trade regulation, etc. The sphere of international trade law is ranging from public law sector to private law sector, which makes it almost impossible to cover all these topics in one single textbook. Therefore, this book narrows the sphere of international trade law down and covers only private law sector involved in international trade, namely the international sale of goods, international carriage of goods, international cargo insurance, payment in international trade and dispute settlement.

III. History of International Trade Law

1. Law Merchant in Middle Ages

The body of rules for transnational trade in the 21st century derives from medieval commercial laws called the Lex Mercatoria (the law for merchants on land) and Lex Maritima (the law for merchants on sea) respectively. Modern trade law (extending beyond bilateral treaties) began shortly after the Second World War, with the negotiation of a multilateral treaty to deal with trade in goods: the General Agreement on Tariffs and Trade (GATT).

International trade law is based on theories of economic liberalism developed in Europe and later the United States from the 18th century onwards. In this sense, international trade law can be traced back to the formation of jus gentium and merchant law of the Middle Ages.

Law Merchant (Lex Mercatoria) is defined as a body of principles and regulations applied to commercial transactions and deriving from the established customs of merchants and traders rather than the jurisprudence of a particular nation or state. The Law Merchant is a legal system used by merchants in medieval Europe, including England. Rather than being the result of the edict of a final authority, it evolved based on common usage.

The Law Merchant was originally a body of rules and principles laid down by merchants themselves to regulate their dealings. It consisted of usages and customs common to merchants and traders in Europe, with slightly local differences. It originated from the problem that civil law was not responsive enough to the growing demands of commerce: there was a need for quick and effective jurisdiction, administered by specialized courts. The guiding spirit of the merchant law was that it ought to evolve from commercial practice, respond to the needs of the merchants, and be comprehensible and acceptable to the merchants who submitted to it. International commercial law today owes some of its fundamental principles to the Law Merchant as it was developed in the medieval ages. This includes choice of arbitration institutions, procedures, applicable law and arbitrators, and the goal to reflect customs, usage and good practice among the parties. The well-known medieval maritime laws include *Lex Oleron, Lex Consolato, Law of Visby,* etc.

The Law Merchant was administered by merchant courts, set up along trade routes and trade centers. A distinct feature of the Law Merchant was the reliance by merchants on a legal system developed and administered by them. States or local authorities seldom interfered, and surrendered some of the control over trade within their territory to the merchants. In return, trade flourished under the Law Merchant, increasing tax revenues.

2. National Legislation on Foreign Trade

Before the Industrial Revolution, international trade was carried out in small scale because of the limitation of products and geographic distance. The Industrial Revolution not only improved productivity, but also brought a revolution in the means of transportation. The result of this is the increase of international trade, which made many national governments