

ASPEN CASEBOOK SERIES

International Trade Law

Problems, Cases, and Materials

Third Edition

Daniel C.K. Chow

*Frank E. and Virginia H. Bazler Chair in Business Law
The Ohio State University Michael E. Moritz College of Law*

Thomas J. Schoenbaum

*Research Professor of Law
George Washington University, Washington, DC*



Wolters Kluwer

Copyright © 2017 CCH Incorporated. All Rights Reserved.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.WKLegaledu.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-5797-6

Library of Congress Cataloging-in-Publication Data

Names: Chow, Daniel C. K., author. | Schoenbaum, Thomas J., author.

Title: International trade law : problems, cases, and materials / Daniel C.K.

Chow (Frank E. and Virginia H. Bazler Chair in Business Law, the Ohio State University, Michael E. Moritz College of Law), Thomas J. Schoenbaum, research professor of law, George Washington University, Washington, DC).

Description: Third edition. | New York : Wolters Kluwer, 2017. | Series:

Aspen casebook series | Includes index.

Identifiers: LCCN 2016051223 | ISBN 9781454857976

Subjects: LCSH: Foreign trade regulation—United States—Cases. | Foreign trade regulation—Cases. | Foreign trade regulation—United States—Problems, exercises, etc. | Foreign trade regulation—Problems, exercises, etc. | LCGFT: Casebooks.

Classification: LCC KF1976 .C455 2016 | DDC 343.7308/7—dc23

LC record available at <https://lcn.loc.gov/2016051223>

International Trade Law

Problems, Cases, and Materials

David C. Mervin

Second Edition

Copyright © 1998 by West Group

Published by West Group, a division of West Publishing Company

1234567891011121314151617181920212223242526272829303132

ISBN 0-314-20000-0

Printed in the United States of America

Library of Congress Cataloging in Publication Data

International trade law. / David C. Mervin. -- 2nd ed.

1. International trade law. I. Mervin, David C. II. Title.

341.3--dc22

Published by West Group, a division of West Publishing Company

1234567891011121314151617181920212223242526272829303132

ISBN 0-314-20000-0

Printed in the United States of America

Library of Congress Cataloging in Publication Data

International trade law. / David C. Mervin. -- 2nd ed.

1. International trade law. I. Mervin, David C. II. Title.

341.3--dc22

Published by West Group, a division of West Publishing Company

1234567891011121314151617181920212223242526272829303132

ISBN 0-314-20000-0

EDITORIAL ADVISORS

Rachel E. Barkow

Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law

Erwin Chemerinsky

Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law

Richard A. Epstein

Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law
The University of Michigan Law School

Tracey L. Meares

Walton Hale Hamilton Professor of Law
Director, The Justice Collaboratory
Yale Law School

Richard K. Neumann, Jr.

Professor of Law
Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff

John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky

Stanley Morrison Professor of Law
Stanford Law School
Faculty Co-Director
Stanford Criminal Justice Center

Preface to the Third Edition

This third edition of our book, *International Trade Law: Problems, Cases and Materials*, is published at a time when international trade and investment are under attack from virtually all quarters. The Doha Development Agenda, begun with great fanfare by the World Trade Organization in 2001, has died a slow, ignominious death, although WTO members refuse to bury its corpse. In the United States, both major candidates for President have attacked international trade, and the Republican Party, which historically has supported new trade deals, seemingly has reversed course to become anti-trade.

To the uninitiated observer, these developments might seem to make a course in international trade law superfluous; but this is not the case. On the contrary, knowledge of the economics and rules of international trade are more important than ever. The importance of international trade continues to grow: in 2015, merchandise trade constituted 45 percent of world GDP. In the United States, exports of goods and services constitute 14 percent of U.S. GDP, while international trade as a whole amounts to 21.2 percent of the U.S. economy. Thus, there is great need to understand the specifics of the international trade debate and to move past the generalized attacks on trade by politicians. This may only be accomplished by studying the technical legal and economic rules and principles of international trade. We present this book as a handy means to this end.

We acknowledge, however, that International Trade Law is in transition. While the rules of the global, multilateral trading system are still primary, there is a distinct movement toward concluding regional and preferential trade deals to supplement and enhance the global rules. To this end, the United States and eleven Pacific Rim nations have negotiated the Trans-Pacific Partnership Agreement (TPP), which comprises over 45 percent of world GDP. The United States and the European Union are negotiating an even more comprehensive trade deal, the Trans-Atlantic Trade and Investment Partnership (TTIP). At this writing the fate of these new blockbuster trade agreements is uncertain; but this book expands coverage of these regional and preferential trade deals, which may in the future eclipse the global trade rules in certain key areas of law.

In preparing this new edition, we retain the salient characteristics of the previous editions:

We are convinced more than ever of the pedagogical necessity to separate the teaching and study of *International Trade Law* and *International Business Transactions*. While the traditional approach is to cover these subjects together, we believe that this is confusing and unwise for several reasons. International Trade Law is primarily a specialized branch of public international law while International Business Transactions (IBT) is largely private law with an important smattering of public and private international law. Moreover, the jurisprudence in both subjects is now enormous, and we think that, although the practitioner may handle both subjects in an integrated fashion, the student can best learn these two complex areas in different courses. Accordingly, we have designed this book to be a companion book to our own IBT book, Chow and Schoenbaum, *International Business Transactions* (Aspen 3d ed. 2015). Although each of these two books can be used independently, we have carefully designed each book to complement the other with virtually no overlap of coverage. We believe that these two compact books together provide an excellent coverage of the entire field of international business/economic law.

We continue to believe that students studying international trade law must study the primary materials of the law: the texts of the WTO agreements and WTO jurisprudence, as well as trade law cases decided by the WTO panels and Appellate Body. Accordingly, we have kept use of secondary materials to the absolute minimum. Our second edition is up to date, including some 70 principal cases as well as scores of cases discussed in the notes. Although most of the cases are WTO cases, we have also included many U.S. cases since most trade lawyers will encounter WTO rules through their implementation into U.S. law by federal and state statutes. We have, of course, edited the principal cases extensively to keep the book a manageable size. We publish herewith a Documents Supplement containing the text of the WTO trade agreement and other relevant materials.

Since International Trade Law is international economic law, the student must understand the basics of the economics of international trade and the economic basis and impacts of trade law provisions. We have included enough materials on economics throughout the text so that, in our experience, this need is served.

We believe that solving short problems is an excellent pedagogical aid to learning the law so there are many problems in this edition. The problems are designed to be used selectively by professors and students: the teacher may wish to announce in advance the problems he or she wishes to cover in class or ask the students to write an answer to a problem as an exercise.

We also retain the “channels” approach to international trade law as in the first edition. Although trade in goods is the most important channel of international business, three other “channels” are very important as well: trade in services, trade in technology (i.e., intellectual property), and foreign direct investment. Although we have revised this edition to reflect the overriding importance of trade in goods, this is not to downgrade the importance of the other three channels and the WTO agreements relevant to them.

The new edition of this book also reflects the growing importance of China and emerging-market and developing-member countries of the WTO. We emphasize as well the growing importance of preferential trade agreements and their sometimes uneasy fit with the law of the WTO. We have expanded our coverage of “linkage” issues, such as trade and environment and human rights. At the same

time, we have carefully pruned outdated materials from the first edition and have developed a concise teaching tool that can be covered in a one-semester, three- or four-hour course in law school or business school. At less than 700 pages, this book is one of the most concise international trade law casebooks available on the market.

We enjoy hearing comments and criticisms on our work. We hope that teachers who use this book will share their experiences teaching the subject with us and let us know what techniques and problems work best for them. We promise to consider all comments carefully and to adapt as many as we can.

Daniel C.K. Chow
chow.1@osu.edu

Thomas J. Schoenbaum
tjschoen@uw.edu

November 15, 2016

Contents

Preface

xxvii

Acknowledgments

xxxii

1 *The Law of International Trade and the Multilateral Trading System*

1

I.	Some Background Considerations	1
A.	What Is the Law of International Trade?	1
B.	Distinguishing the Law of International Business Transactions and the Law of International Trade	3
1.	The Law of International Business Transactions	3
2.	The Law of International Trade	4
3.	Three Levels of Analysis	5
	Notes and Questions	6
	Problem 1-1	7
	Problem 1-2	7
II.	International Trade Flows	8
	Problem 1-3	9
A.	Trade in Goods	9
B.	Services Trade	14
C.	Foreign Direct Investment	14
D.	Technology Trade	14
	Problem 1-4	15
	Notes and Questions	15
	Problem 1-5	17
	Problem 1-6	17
III.	The Principal Global Economic Institutions	18
A.	The World Bank	19
B.	The International Monetary Fund	19
	Notes and Questions	21

Note on the Global Financial Crisis and the Role of the World Bank, IMF, and the WTO	23
Problem 1-7	25
C. The World Trade Organization	26
1. GATT 1947	26
2. The WTO	28
IV. The Case for and Against Free Trade: A Brief Look at International Economics	30
A. Arguments in Favor of and Against Free Trade	31
Problem 1-8	31
<i>Douglas Irwin, Free Trade Under Fire</i>	32
Notes and Questions	42
Problem 1-9	42
Problem 1-10	43
B. United States-China Economic Relations	43
Problem 1-11	43
1. The Growing U.S. Trade Deficit with China	43
2. Currency Valuation Issues and "Hoarding" by China	45
3. Risks Created by the Trade Deficit with China	47
Notes and Questions	49
V. Negotiating Trade Concessions	49
A. The Doha Development Agenda of 2001	49
Notes and Questions	50
B. The Future of the WTO	50
VI. Preferential Trade Agreements	51
A. Introduction	51
<i>Turkey—Restrictions on Imports of Textile and Clothing Products</i>	53
Notes and Questions	55
B. Customs Unions and Free Trade Areas: Two Types of Preferential Trade Areas	55
Problem 1-12	57
Problem 1-13	57
Problem 1-14	58
C. The North American Free Trade Agreement: An Overview	58
Problem 1-15	60
Note on Labor and Environmental Standards in Preferential Trade Agreements	60
Note on Dispute Settlement and Preferential Trade Agreements	61
Notes and Questions	62
D. The Proposed Trans-Pacific Partnership Agreement	62
1. Introduction	62
2. Approval and Entry into Force	64
3. Trade Policy Debates	64
4. International Political and Economic Consequences	65
5. Relation to Other Agreements	65
6. Trade in Goods	65
7. Import Tariffs	66
8. Export Tariffs	68

9. Rules of Origin	68
10. Customs Administration and Trade Facilitation	70
11. Electronic Commerce	71
12. Government Procurement	71
13. Sanitary and Phytosanitary (SPS) Measures	72
14. Technical Barriers to Trade	72
15. Trade Remedies	73
16. Investment	74
17. General Services Trade	75
18. Financial Services	75
19. Telecommunication	76
20. Competition and State-Owned Enterprises (SOEs)	76
21. Intellectual Property	77
22. Labor	78
23. Environment	78
24. Economic Development, Cooperation and Small- and Medium-Sized Enterprises	79
25. Regulatory Coherence, Transparency and Anti-Corruption	79
26. Dispute Settlement and Administration	80
27. Conclusions	81
Notes and Questions	81

2 *Dispute Settlement Within the WTO* 83

I. General Considerations	83
Notes and Questions	86
Problem 2-1	86
Notes on Implementation and Remedies	87
Problem 2-2	90
Problem 2-3	90
Problem 2-4	90
Note on Trade Remedies	90
II. Nullification or Impairment	91
Problem 2-5	91
Problem 2-6	92
<i>United States—Taxes on Petroleum and Certain Imported Substances</i>	92
Problem 2-7	93
<i>EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins</i>	94
<i>Japan—Measures Affecting Consumer Photographic Film and Paper</i>	96
Notes and Questions	100
III. Burden of Proof	100
<i>India—Additional and Extra-Additional Duties on Imports from the United States</i>	101

	Notes and Questions	104
IV.	Principles of Interpretation and Status of Adopted Reports	105
	Problem 2-8	105
	<i>Japan—Taxes on Alcoholic Beverages</i>	106
	Notes and Questions	108
V.	Trade Retaliation Under National Laws	109
	Problem 2-9	110
	<i>United States—Sections 301-310 of the Trade Act of 1974</i>	110
	Notes and Questions	113
	Problem 2-10	114

3 *The Implementation of International Trade Obligations in the Domestic Legal Order* 115

I.	Introduction	115
II.	Domestic Implementation of International Trade Obligations	116
A.	The United States	116
1.	The Executive Branch	117
2.	The Legislative Branch	119
3.	The Judicial Branch	121
4.	State and Local Government	121
5.	Problems in the Allocation of Power over Trade	121
a.	Negotiating a Trade Agreement	121
b.	Treaty versus Executive Agreement	122
	<i>United States Department of State, Foreign Affairs Manual</i>	123
	Notes and Questions	123
	Problem 3-1	123
c.	Presidential Power over International Trade	123
	Problem 3-2	124
	<i>United States v. Capps, Inc.</i>	124
	<i>Dames & Moore v. Regan</i>	126
	Notes and Questions	131
d.	The Clash Between State and Federal Power	131
	Problem 3-3	131
	Problem 3-4	132
	<i>Crosby v. National Foreign Trade Council</i>	132
B.	The European Union	134
	Notes and Questions	136
III.	The Effect of International Trade Agreements on Domestic Law and Resolving Conflicts Between International and Domestic Law	137
A.	The United States	137
	Problem 3-5	137
	Problem 3-6	137
	<i>The Uruguay Round Agreements Act (1994) Title I—Approval of, and General Provisions Relating to, the Uruguay Round Agreements</i>	138
	Problem 3-7	141

Problem 3-8	141
Notes and Questions	141
B. The European Union	142
Problem 3-9	142
<i>Portuguese Republic v. Council</i>	143
Notes and Questions	145
Note on the Relationship Between the International and Domestic Legal Orders	146

4 *The Core Principles of the WTO: Most Favored Nation and National Treatment* 149

I. Introduction	149
II. The Most Favored Nation Principle	149
Problem 4-1	151
Problem 4-2	151
Problem 4-3	151
Problem 4-4	151
A. Scope of the MFN Obligations	151
Problem 4-5	152
<i>Belgian Family Allowances (Allocations Familiales)</i>	152
Notes and Questions	153
Problem 4-6	154
B. The "Like Product" Issue	154
<i>Treatment by Germany of Imports of Sardines</i>	154
Notes and Questions	157
Problem 4-7	157
C. De Facto Discrimination	157
<i>Canada—Certain Measures Affecting the Automotive Industry</i>	157
Notes and Questions	160
D. Exceptions to MFN Obligations	161
III. National Treatment	162
Problem 4-8	163
Problem 4-9	164
Notes and Questions	164
Problem 4-10	164
Problem 4-11	164
A. Internal Taxes and Charges	165
Problem 4-12	165
<i>Japan—Taxes on Alcoholic Beverages</i>	165
Note on Philippines—Taxes on Distilled Spirits	171
<i>Canada—Certain Measures Concerning Periodicals</i>	172
Notes and Questions	179
B. Government Regulation	179
Problem 4-13	180
<i>Italian Discrimination Against Imported Agricultural Machinery</i>	180
Problem 4-14	183

Korea— <i>Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i>	183
Notes and Questions	190
Problem 4-15	192
C. Government Procurement	192
Problem 4-16	192
Norway— <i>Procurement of Toll Collection Equipment for the City of Trondheim</i>	194
Notes and Questions	196

5 Trade in Goods: Customs and Tariff Law 199

I. Introduction	199
A. Tariff Concessions	199
1. Types of Tariffs	200
2. Calculation of Tariffs Under U.S. Law	200
Problem 5-1	201
B. Economic and Social Policy Implications of Tariffs	201
II. GATT Rules on Tariffs and Customs	202
Problem 5-2	202
Problem 5-3	202
Argentina— <i>Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i>	203
Problem 5-4	204
Problem 5-5	205
Problem 5-6	205
Notes and Questions	205
Note on Freedom of Transit in International Trade	206
Problem 5-7	207
III. The Harmonized Tariff System	208
Problem 5-8	209
Problem 5-9	209
Notes and Questions	209
IV. Customs Procedures	213
V. Product Classification	215
A. The WTO Rules	215
Problem 5-10	215
European Communities— <i>Customs Classification of Frozen Boneless Chicken Cuts</i>	216
Notes and Questions	217
Problem 5-11	218
Canada/Japan— <i>Tariff on Import of Spruce, Pine, Fir (SPF) Dimension Lumber</i>	218
Spain— <i>Tariff Treatment of Unroasted Coffee</i>	220
Notes and Questions	220
B. The United States	221

Problem 5-12	221
Problem 5-13	222
<i>Bausch & Lomb, Inc. v. United States</i>	222
<i>Mead Corporation v. United States</i>	225
Problem 5-14	228
Problem 5-15	229
C. The European Union	229
<i>Council Regulation 2658/87 of July 23, 1987</i>	229
<i>E. I. DuPont deNemours, Inc. v. Commissioners of Customs and Excise</i>	230
Notes and Questions	231
VI. Valuation	231
A. The WTO Rules	231
Problem 5-16	232
Problem 5-17	232
B. United States Law	233
<i>Century Importers, Inc. v. United States</i>	233
<i>Luigi Bormioli Corp., Inc. v. United States</i>	236
Notes and Questions	241
Problem 5-18	241
C. European Union Law	242
<i>Hans Sommer GmbH v. Hauptzollamt Bremen</i>	242
Notes and Questions	243
VII. Rules of Origin	243
A. WTO Standards	243
B. United States Law	244
Problem 5-19	244
<i>Koru North America v. United States</i>	245
<i>SDI Technologies, Inc. v. United States</i>	248
Notes and Questions	252
C. European Union Law	252
<i>Brother International GmbH v. Hauptzollamt Giessen</i>	252
VIII. Customs and Free Trade Areas	255
<i>Cummins Inc. v. United States</i>	256
Problem 5-20	259
Problem 5-21	259
Problem 5-22	259
Note on Determining Origin under NAFTA	260
<i>NAFTA: A Guide to Customs Procedures</i>	260
Notes and Questions	264

6 Non-Tariff Trade Barriers

265

I. Introduction	265
II. Quotas	265
A. Background	265
Problem 6-1	267

B.	GATT Rules on Quotas	268
1.	Overview	268
2.	Article XI: The "General Elimination" Rule	269
	Problem 6-2	270
	<i>Japan—Trade in Semi-Conductors</i>	270
	Problem 6-3	273
	Problem 6-4	274
	Problem 6-5	274
	Notes and Questions	274
	Problem 6-6	275
	Problem 6-7	275
	<i>Canada—Import Restrictions on Ice Cream and Yoghurt</i>	275
	Notes and Questions	279
3.	The Administration of Quotas	279
	<i>European Communities—Regime for the Importation, Sale and Distribution of Bananas</i>	280
	Notes and Questions	284
III.	Agricultural Trade	286
A.	Overview of the AoA	287
1.	Quotas and NTBs	287
2.	Domestic Support	288
	a. Green Box Subsidies	288
	b. Blue Box Subsidies	289
	c. De Minimis Exceptions	289
	d. Special and Differential Treatment Box Subsidies	289
	e. Amber Box Subsidies	289
3.	Export Subsidies	289
	Notes and Questions	290
	Problem 6-8	292
	Problem 6-9	292
	<i>Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i>	293
	Notes and Questions	295
IV.	Technical Regulations and Product Standards	296
	Problem 6-10	298
	Problem 6-11	298
	Problem 6-12	298
	Problem 6-13	299
	<i>European Communities—Trade Description of Sardines</i>	299
	Problem 6-14	309
	Problem 6-15	309
	Note on the TBT Agreement and Food and Product Labeling Standards	310
V.	State Trading Enterprises	313
	Problem 6-16	313
	<i>Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain</i>	314
	Notes and Questions	317

7 General Exceptions: Trade and Civil Society 319

I.	Introduction	319
	Notes and Questions	320
	Note on GATT Article XXI on Security Exceptions	320
II.	Environmental Protection	321
	Problem 7-1	323
	Problem 7-2	323
	<i>United States—Standards for Reformulated and Conventional Gasoline</i>	324
	Problem 7-3	328
	<i>United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp/Turtle Case)</i>	328
	<i>United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia</i>	334
	Notes and Questions	338
	<i>European Communities—Measures Prohibiting the Importation and Marketing of Seal Products</i>	338
	Notes and Questions	344
III.	Product Safety	344
	<i>European Communities—Measures Affecting Asbestos and Asbestos-Containing Products</i>	345
	Note on the “Necessary” Requirement in GATT Article XX	349
	Notes and Questions	351
	Note on Domestically Prohibited Goods and Dangerous Products in International Trade	352
IV.	Food Safety: Sanitary and Phytosanitary Measures	352
A.	Introduction	352
	Problem 7-4	353
	Problem 7-5	353
	Problem 7-6	354
	Problem 7-7	354
	<i>European Communities—Measures Concerning Meat and Meat Products (Hormones Case)</i>	354
	Notes and Questions	361
	Problem 7-8	364
	Note on the EC—Biotech Products Case	364
V.	Waste Minimization and Disposal	365
	<i>Brazil—Measures Affecting Imports of Retreaded Tyres</i>	366
	Notes and Questions	372
VI.	Culture and Trade	372
	<i>China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i>	373
	Notes and Questions	381