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INTERNATIONAL TRADE REGULATION

*Readings, Cases, Notes,
and Problems*

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PREFACE

As its title suggests, the subject of this coursebook is the law of international trade regulation, sometimes referred to as international economic law. Its focus is on the international legal rules regulating the cross-border movement of goods, services, and capital. More specifically, the rules established at the World Trade Organization that regulate international trade, as well as U.S. implementing legislation that brings these international trade rules into domestic legal effect within the United States, are the central focus. Because it is designed specifically for use in law schools, not surprisingly the coursebook's emphasis is on the law of international trade that practitioners must deal with on a daily basis, rather than on legal theory, law and economics, or socio-economic policy. Of course, it is impossible to discuss WTO rules without also discussing legal theory, law and economics, and socio-economic policy. Thus, these topics do receive some coverage, especially in the chapters on trade remedies, but that coverage admittedly is not deep. The subject of international trade regulation has grown so immensely since the establishment of the World Trade Organization in 1995 that making tradeoffs in any course or coursebook on the subject is unavoidable. For those who would argue that such topics should receive extended coverage in a law school course, I won't disagree. My defense is that I have erred on the side of breadth versus depth of coverage.

The coursebook is a concise, streamlined presentation of almost all the WTO agreements and of the key U.S. implementing legislation in the areas of customs law, the antidumping and countervailing duty laws, and safeguards relief. In thinking about my pedagogical approach to the coursebook, I have taken to heart the following Chinese proverb: "I hear and I forget. I see and I remember. I do and I understand." Students will read the material, but will they understand it? The test of whether students have understood what they've read is their ability to solve problems. To that end, the coursebook takes a practical, problem-oriented approach to the subject of international trade regulation, with a strong focus on legal texts and case law and a secondary focus on trade policy and theory. Each chapter contains one or more Problems, plus Notes and Questions that follow chapter sections. The Problems are designed to help students focus on the material that they are reading and to put it into context. The Problems call for legal analysis, i.e., the application of law to a set of facts. The questions that are found in the Notes and Questions are designed to stimulate discussion.

The coursebook is a self-contained work, i.e., there is no separate documents supplement. The relevant provisions from WTO agreements and U.S. trade statutes are excerpted in the chapters. An appendix has been included at the end of the coursebook with the complete text of the most important WTO agreements. For example, in the appendix you'll find the Agreement Establishing the World Trade Organization, the complete text GATT 1994, and nearly all of the WTO multilateral trade agreements. A List of Abbreviations follows the Preface.

The coursebook is organized into 6 parts with 21 chapters. Part I is an introduction and overview of the subject. It is divided into 3 chapters. Chapter 1 is an introduction to the World Trade Organization, its functions, structure, and rules on membership. Chapter 2 introduces dispute settlement at the World Trade Organization. Chapter 3 is a short introduction to the powers and responsibility for shaping, enacting, and enforcing trade law and policy within the United States. There is a tendency in some coursebooks—and not just coursebooks on international trade regulation—to attempt to teach the entire course in the introductory chapters. Not only is such an attempt doomed to failure, but worse, it overwhelms the students with too much information, leaving them in a state of confusion right from the start. The goal of Chapter 1 is to introduce the *dramatis personae*, i.e., the players and the history of the international trade legal regime. The organizational structure and history of the WTO is considered, including the accession process. The goal of Chapter 2 likewise is to introduce the players and the rules of procedure governing dispute settlement at the WTO. In Chapter 3 the key players within the U.S. government responsible for international trade law and policy are briefly examined. The relationship between the federal government and the states in the field of international trade is also explored. The readings in Chapter 3 are short but put into context how the U.S. government interfaces with the WTO and with the states in the field of international trade regulation. The material will also give students a handle they can grasp by presenting them with reading on issues with which they should have had some exposure in other law school courses. In subsequent chapters we will revisit each of these topics in a specific context, using cases and problems to reach a better understanding of the interplay of WTO rules, U.S. trade law, and dispute settlement at the WTO. I assure my students that all will be revealed eventually and that their patience will be rewarded.

Part II is divided into five chapters that cover the core multilateral obligations or “pillars” of the WTO international trading system, namely, the most-favored-nation and national treatment obligations, tariff bindings, the prohibition on quantitative restrictions, and transparency. Chapter 5 also examines the main components of customs law: tariff classification, the valuation of imported goods, and rules of origin. I have presented the core obligations in the following order: the most-favored-nation obligation, tariff bindings, the national treatment obligation, the prohibition on quantitative restrictions, and transparency. Some teachers might prefer to discuss the most-favored-nation obligation and the national treatment commitment successively, rather than examine tariff bindings before considering the national treatment obligation. I readily admit that there is no magic in presenting the course material on the “five pillars” in the order that I’ve chosen. My rationale for the order is a primarily a pedagogical one: I think it is valuable for students to answer some nitty-gritty, “roll-up-your-sleeves” type problems at an early point in the course. To that end, the problems in Chapter 5 on tariff classification, origin of goods, and valuation are exactly

those kinds of problems, and an area where trade lawyers frequently render services for clients. In addition, I think that after exploring the rather abstract, elusive concept of “like product” in the most-favored-nation context, students need a short break before hitting that issue again in the national treatment setting.

Part III consists of four chapters that examine the exceptions to the core international legal obligations discussed in Chapters 4 through 8, namely, the GATT Article XX and XXI general and security exceptions, the Agreements on Sanitary and Phytosanitary Measures and on Technical Barriers to Trade, regional trade arrangements, and special and differential treatment of developing countries. There is a strong argument for giving certain regional trade agreements, such as the North American Free Trade Agreement and the European Union, separate treatment in their own dedicated chapter. Again, in order to keep the length of the coursebook within manageable limits, the discussion and analysis of specific free trade areas and customs unions had to be abbreviated. There is, however, an extended discussion of NAFTA’s preferential rules of origin. This material not only highlights one of the most controversial features of free trade agreements—controversial because rules of origin often have the consequence of protecting less efficient producers within the free trade area to the detriment of more efficient producers outside the free trade area—but it also reinforces what the students learned in Chapter 5 on non-preferential rules of origin. The discussion on NAFTA’s preferential rules of origin will also set the stage for the discussion in Chapter 12 on preferential rules of origin for goods originating from developing countries. The important topics of trade and labor and trade and environment are discussed at length in Chapter 9, with separate sections in that chapter devoted to trade and labor rights and trade and the environment. In lieu of giving these two topics their own dedicated chapters, I have endeavored to make the readings on them fairly expansive.

Part IV is divided into five chapters that consider four of the five key international trade remedy laws: the antidumping duty law, the countervailing duty law, Section 201 safeguards relief, and Section 301 of the Trade Act of 1974 on removing foreign barriers to U.S. exports. These chapters examine the WTO Agreement on Antidumping, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards, respectively, and then follow that presentation with a WTO Appellate Body report on each of the three agreements. The reading then juxtaposes the WTO case law with parallel adjudication in U.S. courts and administrative agencies. The students will see that the international dispute settlement forum and the domestic forum do not always reach consonant results on the identical issue. What happens when U.S. domestic law is found to be inconsistent with WTO obligations? The materials raise the important question of the role of international law in U.S. domestic law, thus building on the material in Chapter 3. The materials also raise the socio-economic consequences of liberalized trade. Thus, for example, Chapter 16 on safeguards relief examines trade adjustment assistance, a topic that generally receives short shrift in most international trade courses. The economic argument for free trade may be compelling, but how are workers who lose their jobs as a result of trade liberalization to be assisted? In the United States trade adjustment assistance has been the answer, but not a particularly satisfying one, as the readings make plain.

Part V is divided into two chapters with a focus on services trade and foreign investment. Chapter 18 takes up the General Agreement on Trade in Services; Chapter 19 examines foreign investment under NAFTA and at the WTO. Services trade

has become the growth sector of international trade. Developed countries have been pushing developing countries to open their services markets to foreign services providers, and developing countries have pushed back. One way or mode of providing services is through a foreign investment within the country where the services are being provided. The General Agreement on Trade in Services addresses what is called the “commercial presence” mode of supply, but some WTO Members have argued that the WTO should negotiate a comprehensive agreement on investment that covers not only trade in services but trade in goods as well. Chapter 19 examines foreign direct investment, using a NAFTA investment arbitration decision as the vehicle for exploring a few of the many issues involved in foreign direct investment. Chapter 19 also reviews the Agreement on Trade-Related Investment Measures and considers proposals for a WTO Agreement on Investment. Chapter 19’s treatment of foreign direct investment is not as extensive as you’ll find in a casebook on International Business Transactions or International Trade and Investment. The materials are intended to serve as an introduction, not a full-blown discussion of the vast topic of foreign direct investment.

Finally, in Part VI we study intellectual property protection. The three core intellectual property rights—patent, copyright, and trademark—are considered. Chapter 20 examines the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, including two WTO panel reports, one involving patents and the other copyright. In addition, the only amendment of any WTO agreement to date, that being the TRIPS amendment on public health and compulsory licensing of pharmaceuticals, is also considered. Chapter 21 reviews U.S. laws for the protection of intellectual property rights at the border, with a focus on trademark. In addition to a discussion of gray market and counterfeit goods, the fifth of the five major U.S. trade remedy laws, Section 337 of the Tariff Act of 1930, is also considered.

Let me briefly mention two other sectors that have not received treatment in separate chapters: (1) trade in agriculture and (2) trade in textiles and clothing. Agriculture is the subject of a WTO Agreement on Agriculture that covers three issues: (1) market access for agricultural products, (2) domestic subsidies to farmers, and (3) export subsidies on agricultural goods. All three issues are explored in several chapters. Chapter 5 on customs duties discusses the “tariffication” process and tariff-rate quotas on agricultural products. Chapter 13 on subsidies and countervailing duties examines domestic and export subsidies on agricultural products. Chapter 16 on safeguards relief discusses special safeguards relief for agricultural trade.

Regarding trade in textiles and clothing, the WTO Agreement on Textiles and Clothing was fully implemented in 2005. Market access for textiles and clothing now is subject to normal WTO disciplines. Nevertheless, trade in textiles and clothing remains an important issue for developing countries, and customs duties on such imports remain high in developed countries. However, given the pressure to keep the length of the coursebook within manageable limits, this topic has not been placed in a separate chapter. Instead, Chapter 12 on special and differential treatment of developing countries discusses the importance of textile and clothing trade for developing countries.

I have avoided trying to tightly compartmentalize all topics by boxing them into a single chapter, never to re-emerge in a different chapter. By design, I have sprinkled many topics throughout the book. I believe that certain core concepts should be introduced at an early stage in the course, and then later reintroduced to the student in a

different context. This pedagogical approach should help reinforce key concepts in the students' minds by presenting them from a slightly different angle. It also designed to help students integrate the course material, rather than view the various principles to which they're exposed as being disjointed and unrelated. For example, a separate chapter has been dedicated to the concept of transparency. However, the concept of transparency is first raised in Chapter 2 on WTO dispute settlement and in later chapters as well. Similarly, selected administrative law issues pepper the book. The course on Administrative Law is either required or strongly recommended at most law schools. But for the benefit of those students who have not or will not take that course, there are many opportunities in the book to explore the highpoints of administrative agency decision making.

The cases and secondary materials presented in this book have been edited. Ellipses (. . .) are generally used in places where I have edited material from the text of an opinion or secondary source. In some cases where opinions have numbered paragraphs (e.g., WTO panel and Appellate Body reports) I have not used ellipses to indicate deleted material. Instead, I have maintained the original paragraph numbering. A skip in the paragraph numbering will tell you that one or more paragraphs have been deleted. Almost all footnotes have also been deleted from the opinions and secondary materials. Text in brackets within an opinion indicates my additions, usually preceded by "[Ed.:]"

Because of their length, WTO panel and Appellate Body reports have been aggressively edited (many panel reports exceed 300 pages, and Appellate Body reports often exceed 100 pages). In the case of U.S. court decisions, however, I have tried to keep the editing to a minimum. Law students need the experience of reading unedited cases for the simple reason that that is what they will read as practitioners. Although aggressive editing permits more cases to be covered in a coursebook, in my view editing cases to the point where they resemble note cases is in the long run a disservice to students.

I've tried to keep the coursebook to a manageable length for a 3-credit, 14-week course. In an effort to make the material accessible and engaging, extensive explanatory material at the beginning of each chapter provides background and an overview of the legal text and case law to follow. There certainly is a legitimate place in the course for legal theory, law and economics, trade and human rights, trade and development, and the many other trade linkages that have developed over the past decade. The coursebook covers the basic economic theory of free trade and trade remedies, as well as most of the trade linkages, including trade and environment, trade and labor, and trade and investment. Inevitably, every teacher of the subject will have his or her own ideas about coverage. The coursebook is short enough that instructors can add supplementary materials as desired. I leave it to the discretion of individual professors whether to supplement these topics with their own materials. My own view is that students have a hard enough time seeing the forest for the trees without adding trees to further distract them. Helping students achieve their goal of mastering the law of international trade regulation can be undermined by overwhelming them with the many fascinating, but at times distracting, topics that academics find so stimulating. Thus, because of its straightforward and concise style, this coursebook is designed for instructors of international trade regulation who are new to law teaching, experienced teachers offering this course for the first time, and instructors at regional law schools.

In closing, for teachers searching for a coursebook that covers the entire corpus of WTO law and U.S. implementing legislation, is designed for a three-credit course, will not overwhelm the students with a mountain of reading, and will at the same time give students a comprehensive overview and thorough grounding in the subject, I believe this is your coursebook.



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LIST OF ABBREVIATIONS

ACTPN	Advisory Committee for Trade Policy and Negotiations
AD	antidumping
AGOA	African Growth and Opportunity Act
ALJ	administrative law judge
AMS	aggregate measure of support
APO	administrative protective order
ASEAN	Association of Southeast Asian Nations
ATC	Agreement on Textiles and Clothing
ATPA	Andean Trade Preference Act
ATPDEA	Andean Trade Promotion and Drug Eradication Act
BDC	beneficiary developing country
BISD	Basic Instruments and Selected Documents
BIT	bilateral investment treaty
BSE	bovine spongiform encephalopathy
CAFC	U.S. Court of Appeals for the Federal Circuit
CBERA	Caribbean Basin Economic Recovery Act
CBI	Caribbean Basin Initiative
CBTPA	Caribbean Basin Trade Partnership Act
CEP	constructed export price
CFIUS	Committee on Foreign Investment in the United States
CIF	costs, insurance, freight
CIT	U.S. Court of International Trade
COP	cost of production
CTE	Committee on Trade and Environment
CUSFTA	Canada-U.S. Free Trade Agreement
CVD	countervailing duty
DFAIT	Department of Foreign Affairs and International Trade
DOC	U.S. Department of Commerce
DR-CAFTA	Dominican Republic-Central American Free Trade Agreement
DSB	Dispute Settlement Body

DSU	Dispute Settlement Understanding
EC	European Communities
ECC	Extraordinary Challenge Committee
ECOSOC	United Nations Economic and Social Council
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
EP	export price
EPA	Environmental Protection Agency
EU	European Union
FCN	Friendship, Commerce, and Navigation treaty
FDI	foreign direct investment
FOB	free on board
FTA	free trade agreement
FTAA	Free Trade Area of the Americas
FTC	Free Trade Commission
GAO	Government Accountability Office
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GMO	genetically modified organism
GNI	gross national income
GNP	gross national product
GSP	Generalized System of Preferences
HS	Harmonized Commodity Description and Coding System
HTSUS	Harmonized Tariff Schedule of the United States
ICJ	International Court of Justice
ICSID	International Convention on the Settlement of Investment Disputes
IF	Integrated Framework for trade-related assistance to LDCs
IMF	International Monetary Fund
ITC	International Trade Center
ITC	U.S. International Trade Commission
ITO	International Trade Organization
LDBDC	least-developed beneficiary developing country
LDC	least-developed country
LTFV	less than fair value
MAI	Multilateral Agreement on Investment
MEA	multilateral environmental agreement
MEP	member of European Parliament
MERCOSUR	Common Market of the South
MFN	most favored nation
MTA	multilateral trade agreement
MTN	multilateral trade negotiation
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NME	non-market economy