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International Business Transactions

Problems, Cases, and Materials

Second Edition

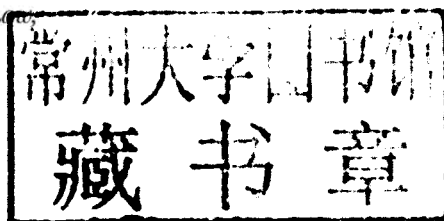
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To my wife Ching and our son Alan

DC

*To my children—Geoffrey, Elizabeth, Lucius, Cecilia,
and Kelsey—from a proud and admiring father*

TJS

Preface

We are gratified by the warm reception that our law school colleagues and students have given to the first edition of this book. *International Business Transactions* grew out of our conviction that the traditional way of teaching this immensely complex field—to combine the study of international business transactions with international trade—was outmoded given the expanding law of both areas. Accordingly, we designed two coordinated casebooks that facilitate systematic coverage of the field of International Business by separating it into two parts: (1) the private-based law of international business transactions and (2) the public-based law of international trade. We believe that this division is the ideal pedagogical approach to learning this complicated field. Accordingly, the first edition of this book was followed by our companion casebook, *International Trade Law: Problems, Cases, and Materials* (Aspen 2008).

The second edition of this book was motivated by the nature of the field, which changes in small but significant steps rather than through large and well-publicized developments. This second edition retains the organizational framework of the original book and adds eighteen new cases, some in substitution for the original materials. We continue to include many of the classic cases that define the field, but we also include many cases from the past five years to show the current attitude of courts regarding the problems of international business law. Every chapter has been updated significantly as well.

As in the first edition, the second edition includes many short problems to give students practice in applying the legal concepts learned to actual fact situations. The problem method has proven to be an excellent classroom learning tool for us. We realize, however, that professors who adopt this book will have their own ideas about pedagogical methods. We have included more problems than may appear necessary so as to give professors a selection from which to choose in addition to the option of adding some of their own. The cases and materials are written to stand alone so that professors who prefer to use a different classroom method may omit the problems.

Finally, we have carefully devised a casebook that covers the field and that can be completed within the limits of the usual three-credit, one-semester course meeting for forty-five hours. Of course, coverage of the entire book in forty-five hours will require a fast pace, and professors who wish to devote more time to certain segments or who wish to supplement our materials may make appropriate cuts to fit their own course syllabus.

We are indebted to many colleagues who took the time to email us with suggestions for improving the first edition. We would like especially to thank Associate Dean Susan

Karamanian of the George Washington University School of Law for her continuing commentary on many aspects of the book and for her suggestions concerning the Documents Supplement. We are also indebted to Jenny Pursell, Alan deVries, Chris Burch, Jessica Guard, and Judy Kim for their help in preparing this edition.

We welcome further suggestions and criticisms and would like to hear from our colleagues in this interesting and complex field of law.

March 2010

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- “The Bhopal Settlement,” by Shyam Divan, and Armin Rosencranz, 1989 *Environmental Policy and Law*, 166. Reprinted with the permission of IOS Press B.V. and the authors.
- “Book Review: Changing Course: A Global Business Perspective on Development and the Environment,” by Anita Margrethe Halvorsen, 4 *Colorado J. of International Environmental Law & Policy* 241, 243-48 (1993). Reprinted with the permission of University of Colorado School of Law.
- “Brazil: A Strategic Approach,” by Raul Gouvea, *Thunderbird Int’l Business Review*, John Wiley & Sons, Inc. Reprinted with the permission of the John Wiley & Sons, World Bank Publications, Melhores e Maiores/Exame/ Editora Abril, Target Semonsen Associados/ Brasil em Exame/Editora, and the author.
- “Confronting Industrial Pollution in Rapidly Industrializing Countries: Myths, Pitfalls and Opportunities,” by H. Jeffrey Leonard, 12 *Ecology Law Quarterly* (1985). Reprinted with the permission of the Regents of the University of California and the author.
- “The Convention on Civil Liability for Damages Resulting from Activities Dangerous to the Environment,” by M. J. Bowman, *Centre for Environmental Law*, University of Nottingham, *Environmental Liability*, (1994) Vol. 2, Issue 1, pp. 11-13. Reprinted with the permission of the Lawtext Publishing Ltd., www.lawtext.com.
- “Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution,” Organization for Economic Co-operation and Development, 28 *I.L.M.* 1320 (1989). Reprinted with the permission of the American Society of International Law.
- “Disclosure Responsibilities for Exporters,” by Michael P. Walls, 1990, *Natural Resources & Environment*, 4:3, p. 10. Copyright 1990© by the American Bar Association.

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- “Human Rights Responsibilities of Private Corporations,” by Jordan J. Paust, 35 *Vanderbilt Journal of Transnational Law*, 801, 802-12 (2002). Reprinted with the permission of the Vanderbilt University Law School.
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- Lanco v. Argentine Republic*, 40 ILM 457 (2001) March 2001, Vol. XL, pp. 457-473.
- "The Legal System of the People's Republic of China in a Nutshell," by Daniel C.K. Chow; pp. 21-35 - excerpt (words only) and p. 33 - Chart: GDP of Top Ten Countries Reprinted with the permission of Thomson West and the author.
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- LG&E Energy Corp. v. Argentine Republic*, 46 ILM 40 (2007) January 2007 Vol. 46, pp. 40-76.
- "The OECD Guidelines for Multinational Enterprises," Organization for Economic Cooperation and Development, 40 I.L.M. 237 (2000). Reprinted with the permission of the American Society of International Law.
- "The Road to the Tribunal and Beyond: International Arbitration and the United States," by Susan Karamanian, 34 George Washington International L. Rev. 17, 19-21. Reprinted with the permission of the George Washington University.
- "The Role of Organized Crime, Local Protectionism and the Trade in Counterfeit Goods in China," by Daniel C.K. Chow, 14 China Economic Review, Text pp. 473-481, Table p. 482, Map p. 477. Reprinted with the permission of Elsevier Science and the author.
- "Sarbanes-Oxley and the Changing Face of Environmental Liability Disclosure Obligations," by Francis Lyons, 2004, *Trends*, 35:1, pp. 10-11. Copyright 2004© by the American Bar Association. Reprinted with permission. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
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- "Transnational Corporations and Developing Public International Law," by Jonathan Charney, Duke L.J. 748, 762-69 (1983). Reprinted with the permission of the Duke University School of Law.
- "U.S. Courts Can Obtain Jurisdiction Over a Foreign Parent Company," by Sturgis M. Sobin, in the International Business Law Update, Winter 1999/2000. Reprinted with the permission of the author: www.Ablondifoster.com.
- Wena Hotels Ltd. V. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), p. 129 41 ILM 881 (2002).
- "The World Trade Organization," by M. Matsushita, T. J. Schoenbaum, & P.C. Mavroids, 2nd ed. (2006), pp. 3-14. Reprinted with the permission of the Oxford University Press and the authors.

*International
Business Transactions*

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