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Problems, Cases, and Materials



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International Trade Law

Problems, Cases, and Materials

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To my wife Ching and our son Alan.

DC

*To two colleagues for whom I have unbounded
admiration and affection: Eric Stein — my first
teacher of the GATT and simply the best as a professor
and friend. Mitsuo Matsushita — his brilliant mind
is only surpassed by his great heart.*

TJS

Preface

With this book we offer our colleagues, students, and practitioners a new approach to the increasingly important and complex subject of International Trade Law/International Economic Law. We promise that the user of this book will take a comprehensive tour of the subject within a manageable time frame designed to fit a one-semester, three-or four-hour law school or business school course.

With the advent of the World Trade Organization (WTO) and the extensive jurisprudence of the WTO's dispute settlement mechanism, International Trade Law has become, more than ever, a public international law subject, albeit rooted in national administrative and constitutional law. Accordingly we cover extensively and intensively not only the GATT, but all the principal WTO Agreements as well as (we believe) all the important WTO cases. We also do not neglect the practical aspects of how WTO agreements and norms are applied and implemented in the national legal order. As far as the latter is concerned, our focus is on the United States and (selectively) the European Union, because not only are American and European laws extremely important in themselves, but they are also widely emulated by other states. We also include materials that reflect the importance of Asian countries, particularly China.

We devote special attention to three areas that are increasingly important in International Economic Law: (1) developing countries; (2) the impact of trade on civil society; and (3) preferential trade agreements. The first two of these are covered in separate chapters as well as pervasively throughout the book. The third matter is extensively addressed in several places, especially in Chapter 7 on trade in goods and customs law.

Several aspects of this book are innovative and we hope will find favor. First, we adopt a "channels of trade" approach to the subject with intensive coverage not only of trade in goods but also of trade in technology, services, and investment, all of which have burgeoned in the recent past. We accordingly cover intellectual property, services, and investment before concentrating on trade in goods. However, we have designed the substantive chapters—after the first three introductory chapters—to be self-sufficient. Therefore, a teacher who wishes to concentrate on trade in goods or to cover this first can simply vary the order as he or she finds convenient.

Second, we believe that short problems in addition to study of the primary materials are an excellent pedagogical aid to learn the law, and we have included

many such problems. However, the problems are designed to be used selectively, and a teacher may wish to announce in advance which ones will be covered in class. We view the problem method as one that can and should be individualized by the classroom teacher.

Third, we believe that there is a fundamental conceptual distinction between International Trade Law/International Economic Law, on the one hand, and International Business Transactions (IBT), on the other. The latter field is primarily a private law subject with an important smattering of public and private international law. IBT is extremely important and complex in its own right, and we think that, although the legal practitioner will combine both fields, the student can best learn these two areas of law in separate courses. Accordingly we have designed this book to be a companion to our own IBT work, Chow and Schoenbaum, *International Business Transactions: Problems, Cases and Materials* (Aspen 2005). Although the two books can be used independently, we have specifically designed each book to complement the other, with virtually no overlap of coverage. For example, while this book covers the WTO law on investment, our IBT book covers other aspects of investment, such as NAFTA (North American Free Trade Agreement) and public international law. We believe that a student who takes two three-hour courses in both subjects will thereby acquire an excellent working knowledge of the entire subject of international business law. Ideally a law school or business school should offer separate courses in each subject rather than to try to combine these two difficult and different areas into one course, as has sometimes been done in the past.

We believe strongly that students should study and be familiar with primary materials on international trade law. To this end we have designed this book to be used in conjunction with study and reference to the WTO agreements as well as to selected statutes and regulations. Of course these materials are available on line (see the excellent WTO web site, www.wto.org), but for convenience we have gathered them into a printed Documents Supplement also available from Aspen Publishers.

Finally, we would appreciate hearing comments and criticisms. Teachers may want to share with us their experiences teaching the subject and what techniques and problems work well for them. We hope to incorporate some of this experience into future editions. Our goal is to provide the best possible tool for learning this complex and interesting subject.

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- Heritage Foundation, Backgrounder No. 261, *Abolish America's Costly Anti-Dumping Laws* (October 3, 1995). Reprinted with the permission of the Heritage Foundation.
- International Intellectual Property Alliance, *Worldwide Losses from Copyright Piracy (in millions of U.S. dollars)*. Reprinted with the permission of the International Intellectual Property Alliance.
- Irwin, Douglas A., *Free Trade Under Fire*, pp. 21-26, 29-30, 32-33, 35-36, 45-46, 70-72, 83-85, 87-94, 98-99 (2004). Reprinted with the permission of the Princeton University Press.
- Matsushita, Mitsuo; Schoenbaum, Thomas J.; Mavroidis, Petros J., *The World Trade Organization: Law, Practice, and Policy*, pp. 6-10, 133-138, 448-451 (2d ed. 2003). Reprinted with the permission of the Oxford University Press.
- Schoenbaum, Thomas J., *Market Contestability and Reform of the Anti-Dumping Laws*, 39 *German Y.B. of Int'l L.* 82, 83-88 (1996). Reprinted with the permission of the author and Duncker & Humblot GmbH.
- United Nations Conference on Trade and Development, *Royalties By Region Based on Income 2004*. Reprinted with the permission of the United Nations Conference on Trade and Development.
- Young, Michael K., *United States Trade Law and Policy*, pp. 52-53, 55-65, 68-70, 75-81 (2001). Reprinted with the permission of the Carolina Academic Press.

International Trade Law

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