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EARLE  
AGUSTI

INTERNATIONAL  
BUSINESS LAW  
AND ITS  
ENVIRONMENT

Fifth Edition

FIFTH EDITION



# INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT

**Richard Schaffer**

Walker College of Business  
Appalachian State University

**Beverley Earle**

Bentley College

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R. S.

*To Julie, Anna and David, for their love and infinite patience,  
and for whom I now have many promises to keep, and to Theodore H. Gordon,  
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Schaffer has served as president and CEO of a major down products manufacturing firm, doing business both here and abroad. In that capacity he obtained broad experience in business, with extensive business relationships in Western and Eastern Europe, China and in other parts of Asia. Schaffer now works closely with firms in the international home textile and home furnishings industries, and will be on leave from his university to industry for 2001–2002.

BEVERLEY EARLE is a Professor in the Law Department at Bentley College and the McCallum Graduate School of Business, where she has been on the faculty since 1983. She teaches the legal environment of business and international business law at the undergraduate and graduate level. She graduated with a B.A. from the University of

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Mr. Agusti was law clerk to Judge William H. Timbers, U.S. Court of Appeals for the Second Circuit, 1977–78. He is a 1977 graduate of the Harvard Law School, where he was a senior editor of the Harvard Law Review. He graduated summa cum laude with a B.A. from the University of Illinois in 1974.

## List of Frequently Used Acronyms

AD	Antidumping Duty	EBRD	European Bank for Reconstruction and Development
ADA	Americans with Disabilities Act	EC	European Community
ADEA	Age Discrimination in Employment Act	ECJ	European Court of Justice
AID	Agency for International Development	ECU	European Currency Unit
APEC	Asia Pacific Economic Cooperation	EEA	European Economic Area
ASEAN	Association of Southeast Asian Nations	EFTA	European Free Trade Association
ATA	Admission Temporaire—Temporary Admission Carnet	EMC	Export Management Company
BEA	Bureau of Economic Analysis, U.S. Department of Commerce	EPO	European Patent Office
BOP	Balance of Payments	ERM	Exchange Rate Mechanism
BOT	Balance of Trade	ETC	Export Trading Company
BXA	Bureau of Export Administration, U.S. Department of Commerce	EU	European Union
CACM	Central American Common Market	EXIMBANK	Export-Import Bank of the U.S.
CAP	Common Agricultural Policy of the European Union	FCIA	Foreign Credit Insurance Association
CARICOM	Caribbean Common Market	FCPA	Foreign Corrupt Practices Act
CBI	Caribbean Basin Initiative	FDI	Foreign Direct Investment
CCC	Commodity Credit Corporation	FMC	Federal Maritime Commission
CCC	Customs Cooperation Council	FSC	Foreign Sales Corporation
CCL	Commerce Control List (formerly Commodity Control List)	FSIA	Foreign Sovereign Immunities Act
CCRA	Canadian Customs and Revenue Agency	FTAA	Free Trade Area of the Americas
CE	Conformité Européenne	FTC	Federal Trade Commission
CET	Common External Tariff (or CXT)	FTZ	Foreign Trade Zone
CISG	Convention on Contracts for the International Sale of Goods	GCC	Gulf Cooperation Council
CIT	Court of International Trade	GDP	Gross Domestic Product
CMI	Comite Maritime International	GSP	Generalized System of Preferences
COCOM	Coordinating Committee for Multilateral Export Controls	HTS	Harmonized Tariff Schedule (see HTSUS)
CODEX	Codex Alimentarius Commission	HTSUS	Harmonized Tariff Schedule of the United States
COE	Council of Europe	IBRD	International Bank of Reconstruction and Development
COGSA	Carriage of Goods by Sea Act	ICC	International Chamber of Commerce
CVD	Countervailing Duty	ICJ	International Court of Justice (World Court)
DFAIT	Department of Foreign Affairs and International Trade (Canada)	ICSID	International Center for the Settlement of Investment Disputes
DOC	Department of Commerce	IDA	International Development Association
DSU	Dispute Settlement Understanding (WTO)	IEEPA	International Emergency Economic Powers Act
		ILO	International Labor Organization
		IMF	International Monetary Fund
		IMO	International Maritime Organization

IPR	Intellectual Property Rights	PRC	People's Republic of China (China)
ISO	International Organization for Standardization	SADC	Southern African Development Community
ITA	International Trade Administration	SBA	Small Business Administration
ITC	International Trade Commission	SCM	Subsidies and Countervailing Measures
ITO	International Trade Organization	SDR	Special Drawing Rights
JETRO	Japan External Trade Organization	SECOFI	Secretaría de Comercio y Fomento Industrial (Mexico)
JIS	Japanese Industrial Standards Mark	SED	Shipper's Export Declaration
JPO	Japanese Patent Office	SWIFT	Society for Worldwide Interbank Financial Telecommunications
L/C	Letter of Credit	TAA	Trade Adjustment Assistance
LAFTA	Latin America Free Trade Area	TNC	Transnational Corporation (see MNC)
MAC	Market Access and Compliance (U.S. Department of Commerce)	TRIMS	Trade-Related Investment Measures
MERCOSUR	Mercado Common del Sur (Southern Common Market)	TRIPS	Trade Related Aspects of Intellectual Property Rights
METI	Ministry of Economy, Trade, and Industry (formerly MITI-Japan)	UCC	Uniform Commercial Code
MFA	Multifiber Arrangement	UCP	Uniform Customs and Practices for Documentary Credits
MFN	Most Favored Nation Trade Status (see NTR)	UNCITRAL	UN Commission on International Trade Law
MNC	Multinational Corporation	UNDP	United Nations Development Program
MNE	Multinational Enterprise	UNEP	United Nations Environmental Program
MOFTEC	Ministry of Foreign Trade and Economic Cooperation (China)	UNIDO	United Nations Industrial Development Organization
MOSS	Market-Oriented-Sector-Selective	UNIDROIT	International Institute for the Unification of Private Law
MOU	Memorandum of Understanding	USC	U. S. Code
MTN	Multilateral Trade Negotiations	USDA	U.S. Department of Agriculture
NAFTA	North American Free Trade Agreement	USITC	U.S. International Trade Commission
NIS	Newly Independent States	USPTO	U.S. Patent and Trademark Office
NME	Non-market Economy Nation	USTR	U.S. Trade Representative
NTB	Non-tariff Barrier	VRA	Voluntary Restraint Agreement
NTDB	National Trade Data Bank	WCO	World Customs Organization
NTE	National Trade Estimate Report	WIPO	World Intellectual Property Organization
NTR	Normal Trade Relations (formerly MFN)	WTDR	World Traders Data Report
OAS	Organization of American States	WTO	World Trade Organization
OECD	Organization for Economic Cooperation and Development		
OFAC	Office of Foreign Assets Control (Department of Treasury)		
OMA	Orderly Marketing Agreement		
OPIC	Overseas Private Investment Corporation		

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It has been said that America's interest in international education has peaked and ebbed with the changing tide of the American political climate, rising in times of economic expansion and ebbing during periods of political isolation or economic protectionism. Perhaps the cycle has finally been broken and industry leaders, government policymakers, and educators alike have come to understand the importance of making a permanent commitment to international education. In the last half of the twentieth century, America faced an increasingly competitive global marketplace and a mounting trade deficit. Rather than seek protection behind often-politicized trade laws, America's leaders committed themselves and the nation to policies of free trade and open investment. American firms realized that they had no choice but to compete aggressively with foreign competitors, in markets both here and abroad. Witness not just America's great multinational corporations, but also the successes of the many small- and medium-sized companies that today do business internationally. Among nations, the spirit of free trade became contagious. Examples can be seen everywhere: The rush of nations to join the World Trade Organization, the growth of regional economic integration, the privatization of national economies, and the opening of once tightly controlled markets in developing countries and in formerly communist countries as well. The outcome has been the globalization of the world's economy and of world markets for goods and services. It is in this climate that we have seen the greatest renewal of interest in international business education in America's history.

## **TRADE, INTELLECTUAL PROPERTY, AND FOREIGN DIRECT INVESTMENT: A THEMATIC APPROACH**

This book is intended for use in courses in International Business Law, International Business Transactions, or the Law of International Trade and Investment. Our thematic approach is patterned

after the basic market-entry strategies of most firms as they expand into foreign markets: Trade in goods and services, protection and licensing of intellectual property rights, and foreign direct investment. Through the study of law, we attempt to provide a fairly comprehensive treatment of each of these market-entry methods, as well as variations and combinations of each as they fit into the overall strategy of a particular firm. We begin our discussion with trade, which involves the least penetration into the foreign market, and progress to foreign direct investment, which immerses the firm completely in the social, cultural, and legal systems of its host country. This progression also mirrors the life cycle of many firms as they mature and move more aggressively into new foreign markets.

## **PRIVATE AND PUBLIC INTERNATIONAL LAW**

This text emphasizes both private and public law. The private law applicable to international business transactions, for example, includes the law of international sales, trade finance and letters of credit, distribution agreements, agreements with foreign sales representatives, licensing agreements, and other governing law. Public international law includes conventions, treaties, and agreements between nations that make up the legal framework within which international business takes place. The treaties of the European Union, the GATT agreements, and NAFTA are prime examples. Public international law provides the basis for the government regulation of international business. It affects the environment within which a firm's international business strategies are developed and the firm's responsibility under national laws and administrative regulations. Customs and tariff laws are good examples, as are laws that open markets to foreign investors. We also cover general principles of the law of nations, as well as the work of various intergovernmental organizations (such as UN agencies, the WTO, and the

OECD), because these are fundamentals needed for study.

## **INTERNATIONAL AND COMPARATIVE APPROACH**

No text can attempt to teach the law of every nation in which a firm might do business. We have resisted the temptation to simply catalog foreign laws. Instead, foreign laws and foreign case decisions are presented throughout the book for comparison purposes, to illustrate differences in legal or economic systems, or to illustrate differences in doing business in other countries. Where applicable, we compare civil law, common law, socialist law, Islamic law, and concepts from different legal systems. Examples include comparative sales law, labor law, advertising law, and agency law. For instance, our discussion of Chinese law provides U.S. readers with many interesting comparisons, because the United States and China are in different stages of development, with very different political systems. European law is discussed throughout the book. Of course, U.S. law and relevant international agreements, uniform codes, and the decisions of international tribunals are treated in greater detail.

## **A BUSINESS AND MANAGERIAL PERSPECTIVE**

We begin with the premise that the world of international business is a dangerous place, and that the management of international business is the management of risk. Whether one is developing and implementing an international business strategy, or managing an international business transaction, an understanding of the special risks involved will help assure a project's success. In keeping with our thematic approach, we examine the risks of trade (e.g., managing credit or marine risk), protecting and licensing intellectual property (e.g., dealing with gray market goods or registering foreign patents), handling foreign mergers and acquisitions (e.g., unexpected differences in foreign corporate or labor law), and evaluating political risk in less stable regions of the world. We then learn how to avoid, reduce, or shift the risk to other parties or intermediaries. The case study approach is excellent for this purpose, as readers

can see first hand the mistakes others have made, and how disputes are resolved.

We also stress strategic business decision making. For example, our chapter on imports, customs, and tariff law does not simply view importing as an isolated transaction. Rather, it addresses the importance of customs and tariff law on a firm's global operations, such as the selection of contractors or the location of overseas plants and factories. This technique is carried throughout the book.

## **CULTURAL, POLITICAL, SOCIAL, AND ECONOMIC CONCERNS**

We have made a special effort to discuss the cultural, political, social, and economic aspects of international business as they bear on differences in attitudes toward the law, their impact on trade relations, and how they affect the way we do business in a foreign country. In discussing trade issues, it is almost impossible to separate politics, foreign policy, and trade. Thus, we have devoted considerable attention to current events in Cuba, Myanmar, China, and elsewhere. Many topics require a historical perspective, such as Smoot-Hawley of the 1930s, the Suez Crisis of the 1950s, Cuba, the Iranian Revolution, and the Gulf War, and their impact on business. We also discuss U.S.-China relations and the potential impact on U.S. trade and investment there. Readers are asked to consider the impact of world current events on strategic business decisions, particularly in unstable regions or under hostile political and economic conditions.

## **DEVELOPING COUNTRIES**

The developing countries of Africa, Asia, Latin America, and the Caribbean present special problems for their richer trading partners. We have tried to paint a realistic picture of trade opportunities, colored by the realities of disease, poverty, and environmental degradation that threaten much of our planet. Trade and investment issues in developing countries are incorporated in all parts of the book. Examples include the 2000 *Cotonou Agreement* that will define relations between Europe and its trading partners in the developing world for much of the century to

come, the recent U.S. trade initiatives for Africa, and negotiations for a Western Hemisphere trade agreement.

## ETHICS AND SOCIAL RESPONSIBILITY

Because ethical questions can arise in varying contexts, we have chosen to integrate the subject throughout the book. Examples include bribery and corruption, child labor, environmental protection, export violations, prison and forced labor, special issues related to U.S. investment in Mexican maquiladora plants, and others.

## TO OUR FOREIGN READERS

We are pleased to know that our work is contributing to student learning at universities on virtually every continent and in every region of the world. Naturally, our audience is primarily an American one. We necessarily devote a major portion of the text to American law, to U.S. trade relations, and to the needs of the American firm. However, we have made every effort to maintain our international perspective, and to draw important international comparisons. Foreign cases appear throughout the book, as does discussion of foreign codes and practices. Moreover, the increased reliance on uniform rules, harmonized codes, and international standards makes the book suitable for any student interested in international business law.

## KEY REVISIONS TO THE FIFTH EDITION

The 5<sup>th</sup> Edition of *International Business Law and Its Environment* contains numerous revisions. The change most noticeable to our long-time users is that the European Union chapter (Chapter 14) has been moved to Part Three. This was done because we believe that issues of regional economic integration (including both the EU and NAFTA) should be addressed after the reader has been introduced to the GATT/WTO materials.

Another important change is that the materials on privatization are now integrated with the materials on expropriation and nationalization into a new Chapter 19, *Nationalization, Expropriation, and Privatization*. Privatization is the reversal of the nationalization process, and its mechanics are

more easily understood when learned together with the mechanics of nationalization. The risks of privatization are, to a large extent, renationalization, so this close interrelation suggests simultaneous treatment.

As with each new edition, we have updated to include many new cases. A few of these are: *Adler v. The Federal Republic of Nigeria*, *Compaq Computer Corporation v. Commissioner, DIP SpA v. Commune di Bassano del Grappa, United States v. Golden Ship Trading Co.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, *Hudson River Audubon Society v. United States*, *In the Matter of Cross Border Trucking, Made in the USA Foundation v. United States*, *Metalclad Corp. v. The United Mexican States*, *Ruhrigas AG v. Marathon Oil Co.*, and *United States—Sections 301–310*. Some decisions were handed down only days before the manuscript for this text was completed.

In addition, this edition contains more foreign law decisions, and decisions of international tribunals, than did previous editions. Where possible, cases deleted from prior editions have either been discussed in the text or included as end-of-chapter questions to provide continuity to users of previous editions.

Other updates throughout include:

## PART ONE: THE LEGAL ENVIRONMENT OF INTERNATIONAL BUSINESS

- Introduction to European business and case law in the first chapter.
- Updated trade and economic data discussion.
- Current political and economic changes in China, Russia, Eastern Europe, and the developing countries.
- New material on ethics and the OECD antibribery convention.
- Updated material on human rights issues.

## PART TWO: INTERNATIONAL SALES, CREDITS, AND THE COMMERCIAL TRANSACTION

- New material on conflict of laws.
- Analysis of the 1999 Unified Contract Law of China.

- Digital signatures and electronic commerce.
- New CISG case law is discussed.
- Standard contract terms in the United States, Germany, and China is compared.
- Inclusion of *Incoterms* 2000.
- Expanded treatment of air cargo, and the 1999 Montreal Convention (replacing the Warsaw Convention).
- Proposed amendments to the Carriage of Goods by Sea Act.
- New sections and case law on the liability of freight forwarders and other transportation intermediaries.
- U.S. ocean shipping reform.

### **PART THREE: INTERNATIONAL AND U.S. TRADE LAW**

- WTO trade negotiations and the resolution of trade disputes.
- U.S. trade relations with China, Russia, and Vietnam.
- Trade with Cuba, including historical overview, and the international response to *Helms-Burton*.
- Human rights and business issues in Myanmar and the U.S. response are analyzed.
- Updates and new case law on U.S. fast-track authority.
- New antidumping and countervailing duty law amendments.
- Analysis of new trade disputes and recent WTO panel decisions.
- Food safety laws and the European farm epidemics are addressed.
- Global financial services are updated.
- U.S. Section 301 “Carousel Law” updated and the WTO response.
- Complete revision of the chapter on Imports, Customs, and Tariff law, with all new material on compliance and enforcement, appeals, customs classification, rules of origin, African and Caribbean preferences, and more.
- Major revision and updates to the NAFTA chapter, including cross-border trucking (2001) and *Metalclad* (2000) decisions.
- EU materials are updated, including the 2001 Treaty of Nice expanding EU membership and defining the EU role in the twenty-first century.
- EU trade relations with developing countries and the 2000 Cotonou Agreement.

### **PART FOUR: REGULATION OF THE INTERNATIONAL MARKETPLACE**

- Updated treatment of laws governing termination of agents in a foreign jurisdiction, particularly in emerging economies.
- The Convention on Combating Bribery of Foreign Public Officials in International Business and other new international antibribery initiatives.
- Expanded and updated treatment of the Paris Convention, the WIPO international patent application process, and the Madrid Protocol.
- Discussion of the Internet Corporation for Assigned Names and Numbers and its new Uniform Domain Name Dispute Resolution Policy.
- Modifications to the Berne Convention associated with Internet intellectual property issues.
- Expanded discussion of the TRIPS agreement, including new litigation.
- Expanded discussion of EU directives mandating a “high disclosure” model of securities regulation.
- New treatment of the international taxation of E-Commerce.
- New techniques and development in privatization transactions.
- New international developments in gender discrimination legislation and judicial decisions.
- New materials on international child labor initiatives.
- New EU “Green Papers” seeking to create Union-wide environmental standards.
- The December 2000 Ban on Toxic Substances.
- New environmental decisions by CITES.
- Emerging distinctions between the European competition law and U.S. antitrust law, particularly in the contexts of technology development, product distribution, and enforcement.

### **OUR GREATEST CHALLENGE**

Perhaps the greatest challenge in preparing this edition has been simply to keep up with the rapid pace of political, economic, and legal changes. Revisions had to be made almost daily to keep abreast of cur-

rent developments. In our final days of editing, the EU ministers approved the *Treaty of Nice* that will open the EU to other European nations and establishes the direction of the European Union in the twenty-first century. Other issues that we followed are not yet resolved. The best example is in U.S.–China trade. No sooner had the United States granted normal trade status to China, than both countries started trading barbs over U.S. relations with Taiwan and the Chinese seizure of an American aircraft. Although the matter was not yet resolved at the time of this writing, its inclusion in the book will provide a discussion point of how the shifting winds of foreign policy can threaten U.S. business interests overseas.

As we go to press, there are bills and treaties still pending before Congress and appellate court cases not yet decided. One bill may completely overhaul the legal liability of ocean carriers for the first time since 1936. A pending international treaty will soon replace the seventy-year-old Warsaw Convention that defines the liability of air carriers. An upcoming decision by the U.S. Supreme Court will clarify the authority of the U.S. Customs Service. Yet, we did our best to discuss these and other important pending issues. And there are other areas of “unfinished business.” Will China gain membership in the WTO? What course will the negotiations take toward a Free Trade Area of the Americas? What lies ahead for the next round of multilateral trade negotiations at the WTO? These are questions that must be reserved for the next edition.

## PEDAGOGICAL FEATURES OF THE FIFTH EDITION

Pedagogical features of previous editions have been retained to facilitate student learning.

- Both landmark and cutting-edge cases from U.S. and foreign courts, including recent decisions of the WTO, NAFTA, ICSID, and other international tribunals.
- *Foreign Accents* boxes present current real-world issues.
- Expanded list of frequently used acronyms in international business.
- Expanded Internet links now include many explanatory notes.
- Figures and tables enhance topical coverage.

## SUPPLEMENTAL MATERIALS

- The Instructor’s Manual with Test Bank has been greatly revised and enhanced by Kimberlainne Podlas of Bryant College. In addition to answers to Case Questions, end-of-chapter Questions and Case Problems, and Managerial Implications, this edition of the Instructor’s Manual contains Chapter Summaries, lists of chapter cases, Supplemental Cases, Teaching Suggestions, Internet Activities, and Supplemental Exercises. In addition, the Test Bank has been revised and expanded.
- PowerPoint slides are available on the text website at <http://schaffer.westbuslaw.com>. These can be used by instructors as a lecture aid, and by students as a study aid.
- The text website at <http://schaffer.westbuslaw.com> contains updates to Internet addresses, whenever possible, and links to Court Case Updates, Author Updates, and the West Teaching Support site, among others.

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Richard Schaffer  
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