

BUSINESS AND TRADE LAW

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Summary

There are many reasons why nations and people choose to trade and do business internationally rather than isolate themselves in an endeavor to protect domestic industry. Reasons to trade include the need to gain natural resources, products or services otherwise unavailable domestically; the desire to obtain the same products more cheaply than the cost of domestically produced goods; the desire to achieve an economic benefit by exporting domestic natural resources, products or services which pay for the cost of imports; the desire to help less advantageous nations achieve development; and the need to maintain political or military alliances with trading nations.

This article provides an overview of international business transactions and the numerous domestic and international organizations involved in regulation of international trade. It also offers a summary of the modalities of the formation of an agreement for the international trading of a good, including the benefits and pitfalls of undertaking international business transactions.

1. Introduction

1.1 Overview of International Business Transactions

Once a country has decided to trade rather than to remain isolated, a trading country and its individual investors have three ways in which to undertake an international business transaction: import/export trade, licensing, or foreign direct investment.

1.1.1 Import/Export

Trade involves the exchange of imports and exports usually by means of currency, but sometimes by counter-trade or barter. Buy and sell contracts are negotiated and financed through documentary sales and letters of credit. The primary document in the documentary sale is the bill of lading, which follows the goods in their shipment from the seller to the buyer and which is a document of title. Once the goods reach their destination, these imports may be subject to protectionist measures, such as high tariffs or non-tariff barriers including import quotas, difficult import license requirements, the imposition of unusual safety procedures and higher than expected minimum manufacturing standards. Import tariffs are determined by customs procedures involving the classification, place of origin, and valuation of the goods.

Trade is regulated in order to control import competition that may be harmful to domestic industry. Legal responses to import competition include government procurement policies, antidumping statutes, government subsidies and countervailing duties against subsidies, escape clause proceedings (Section 201) and market disruption proceedings (Section 406). Dumping is the sale for less than fair value of imported goods causing material injury or the threat of material injury to domestic industry. Government subsidies are not always easy to identify, because they come in many different forms such as tax rebates, investment credits, tax holidays, and subsidized financing. Subsidies are forms of government financial support given to manufacturers of goods destined for export. If these imports cause material injury to domestic industry, countervailing duties may be imposed. Exports are also subject to commodity controls and limitations including licensing requirements, quotas, prohibitions, taxes, and boycotts in order to avoid depletion of the domestic supply of natural resources and to protect national security.

1.1.2 Licensing

Technology transfer of intellectual property in the form of trademarks, patents and copyright is accomplished primarily through licensing agreements which are regulated by domestic and international law. Despite adequate laws protecting intellectual property transfers, the failure by several developing nations and some developed nations to enforce these laws has resulted in the escalation of piracy and counterfeit goods. In the US, legal responses to piracy include seizure of goods, infringement action in federal court, criminal prosecution and treble damages, and Section 337 and Special 301 proceedings. Despite the abundance of legal procedures available to combat infringement of properly registered intellectual property, piracy remains one of the most serious and costly international trade issues today.

1.1.3 Direct Investment

The third form of international trade is direct investment. Forms of direct investment include the establishment of a partnership, joint-stock company or wholly-owned subsidiary in which the parent corporation enjoys full benefit of the profits as well as full management and control of the venture. Legislation regulating foreign investments includes joint venture laws, joint stock company laws or regulations, laws governing small enterprises, and privatization laws.

The risk assessment of a foreign direct investment is complex. The real possibility of a large return on investment is balanced by losses incurred due to: multiple mandatory internal approvals and bureaucratic red tape causing delays; hidden costs due to bribes; poor infrastructure and distribution of supplies and final products; unwritten laws limiting ownership by foreign entities of land and other necessary elements in the international transaction; difficulties in the repatriation of profits in dollars; the application of non-standard accounting procedures; differences in valuation of property; the non-convertibility of some currencies; and a host of significant, but subtle cultural differences hidden in a country's operational code, which frustrate the success of the international transaction. Unanticipated currency controls can greatly affect the success of a foreign investment.

When an international dispute arises between investing parties, the parties may choose to resolve their dispute by mediation, conciliation, litigation or arbitration. In international commercial disputes, litigation is less often chosen because of the cost and complexities of legal issues involving choice of forum, choice of law, subject matter and personal jurisdiction. International arbitration has become the dispute resolution mechanism of choice, and this option should be anticipated in the international contract by including a carefully worded arbitration clause.

1.2 Free Trade or Protectionism

There are many reasons why nations and people choose to trade and do business internationally, rather than isolate themselves in an endeavor to protect domestic industry. Reasons to trade include the need to gain natural resources, products or services otherwise unavailable domestically; the desire to obtain the same products more cheaply than the cost of domestically produced goods; the desire to achieve an economic benefit by exporting domestic natural resources, products or services, which pay for the cost of imports; the desire to help less advantageous nations achieve development; and the need to maintain political or military alliances with trading nations.

Early in the nineteenth century, David Ricardo and Adam Smith introduced the basic economic concept that nations should manufacture products in which they have a comparative advantage in order to increase their economic welfare and standard of living. When the notion of comparative advantage is adopted by trading nations, goods, services and workers tend to move more freely across borders. Since people tend to migrate from low to higher wage areas in order to enjoy a better life style, the freer flow of persons resulting from the adoption of a system of comparative advantage also

necessitates some regulation by immigration laws. When the influx of foreign goods and low wage earners threatens domestic products and labor, a nation may choose to impose protectionist measures. Nations may choose to regulate or even restrain trade in order to protect infant industry; to insure national security; to preserve national pride; to conserve natural resources; to assure a domestic food supply, and to prevent the loss of domestic jobs. Regulation of trade is achieved through the imposition of tariffs and non-tariff barriers.

1.3 Organizations Involved in International Trade

There are numerous domestic and international organizations involved in the regulation of international trade. While it is impossible to name all these organizations, one can identify some of the most important international organizations affecting trade.

1.3.1 The General Agreement on Tariffs and Trade

GATT is a multilateral trade agreement that was signed in 1947, revised in 1994, and incorporated into the World Trade Organization agreements. The GATT aims at expanding international trade and raising world welfare by promoting non-discrimination among member nations and by adhering to a policy of national treatment. It provides a regulatory framework for world trade. However, the GATT was not obeyed consistently by each of its member nations until the World Trade Organization was formed in 1995.

1.3.2 The World Trade Organization

The WTO is the modern day version of the international trade organization that was contemplated but never established at a historic meeting of developed nations in Havana, Cuba in 1948. In 1995 the WTO finally gave teeth to the GATT by establishing a much needed dispute resolution mechanism to enforce the WTO trade agreements and to resolve disputes among member nations.

1.3.3 The International Monetary Fund

The IMF is an international financial institution that was proposed in 1944 during the Bretton Woods Conference and established in 1946 to stabilize the international monetary system. The IMF monitors exchange rate policies of member nations, lends foreign exchange resources to support adjustment policies of member nations experiencing balance of payments problems, and provides financial assistance to developing nations if they adhere to stringent conditions imposed by the IMF.

1.3.4 The Organization for Economic Cooperation and Development

The OECD is an international organization based in Paris with a membership of 24 developed countries. The aims of the OECD are to achieve the highest sustainable economic growth and employment, to maintain financial stability, and to contribute to worldwide economic expansion and world trade on a multilateral, non-discriminatory basis.

1.3.5 Organization of Petroleum Exporting Countries

OPEC is a cartel of 13 leading oil-producing nations that coordinates oil production and pricing policies.

1.3.6 United Nations Conference on Trade and Development (UNCTAD)

UNCTAD is an organ of the United Nations General Assembly that focuses on economic measures to accelerate Third World development.

1.3.7 The International Institute for the Unification of Private Law

The UNIDROIT is working on an international trade law code to regulate the formation and interpretation of contracts, especially leasing agreements.

1.3.8 The World Bank

The World Bank is another institution that grew out of the Bretton Woods Conference in 1945, and is also known as the International Bank for Reconstruction and Development (IBRD). It is an intergovernmental financial institution based in Washington, DC whose goals are to help raise productivity and to reduce poverty in developing countries.

1.3.9 The World Intellectual Property Organization

The WIPO is located in Geneva and is a specialized agency of the United Nations that promotes international cooperation in the protection of intellectual property.

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Bibliography

Adriano (1995). The North American Free Trade Agreement and its Impact on the Micro-, Small- and Medium-sized Mexican Industries. *St. Louis Law Journal* **39**, 967. [This article discusses the affect of NAFTA on business in Mexico.]

Alford W. (1997). *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*. 236 pp. Stanford, California: Stanford University Press. [This book discusses the cultural, political, and historic background of Chinese intellectual property law.]

Bhagwati J.ed. (1996). *The Economics of Preferential Trade Agreements*. 168 pp. Washington, D.C.: AEI Press. [This book discusses the implications of preferential trade agreements as compared to multilateral agreements such as TRIPS, GATT, and the WTO.]

Cavusgil S. T. (1993). Symposium: The Globalization of Law, Politics and Markets: Implications for Domestic Law Reform, Globalization of Markets and Its Impact on Domestic Institutions. *Indiana Journal of Global Legal Studies* 1, 83. [This symposium issue discusses the affect of globalization on international trade in general.]

Folsom G. and Spanogle J. W. Jr. (1995). *International Business Transactions*. 967 pp, St. Paul, Minnesota. [This is a very complete hornbook on international business transactions.]

Gordon R. K. (1995). Symposium: privatization and legal development. *Boston University International Law Journal* 13, 367. [This symposium issue discusses the complexities of privatization and its affect on international trade.]

Haug D. (1992). The International transfer of technology: lessons that East Europe can learn from the failed Third World experience. *Harvard Journal of Law and Technology* 5, 209. [This article discusses the importance of technology transfers to developing nations.]

Lochner (1985). Guide to Countertrade and International Barter. *International Law* 19, 725. [This article discusses the importance of countertrade as a means of trade for communist nations.]

Lowenfeld (1983). *Public Controls on International Trade*. 775 pp. New York, NY: Matthew Bender. [This book discusses import and export controls and many facets of international trade.]

Tiefenbrun S. (1998). The piracy of intellectual property in China and the former Soviet Union and its effects upon international trade: A comparison. *Buffalo Law Review* 46(1), 1. [This article discusses the issue of piracy of intellectual property in China and the former Soviet Union and cultural reasons to explain its development.]

Biographical Sketch

Susan W. Tiefenbrun is an Associate Professor of Law at Thomas Jefferson School of Law, and the Director of the Hofstra University School of Law International Law Summer Program in Nice, France since 1993. She received an M.A. from the University of Wisconsin with honors, a Ph.D. from Columbia University with honors, and a J.D. from New York University School of Law. Her special interests are private international law, corporate law, securities law, European Union law, and international intellectual property. She speaks nine foreign languages, and she has traveled extensively in many parts of the world. Professor Tiefenbrun worked in a French law firm in Paris and in the New York office of Coudert Brothers where she handled international commercial transactions. She has written a book-length study of Soviet laws and eastern European joint venture laws and numerous articles on international intellectual property, the World Court, and international human rights. She is past coordinator of several bar association committees on Soviet Law and the Soviet-American Banking Law Committee. She lectures in English, French, and Russian on private international law transactions and international trade.