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# **1** *Introduction*

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In this chapter, we will first discuss the scope of this book and the major themes of the developing field of international business transactions that we will be exploring in subsequent chapters.

## **I. *Some Background Considerations***

### **A. *Scope and Approach of This Book***

This book concerns international business transactions (IBTs), by which we mean private business transactions that are international in character. The international element exists when the parties have their places of business in different nation-states; when these transactions involve the movement of goods, services, capital, or technology across the boundaries of different nations; or when transactions between parties of one state have a direct effect in a different state.

IBTs may be categorized, at least in general terms, according to the extent of penetration in international markets. The very first level of penetration is a simple export-import transaction, for example, a contract for the sale of goods involving a seller from the United States and a buyer from Germany. If this is successful, and the company finds a sufficient and continuing demand for its products, the seller may decide to become more involved in dealing with the German and European markets by establishing a sales agent in Germany or a distributor of its products who will attempt to increase the seller's penetration of the targeted markets. After this step, the seller may decide to undertake a third level of penetration of the European market by licensing a German entity to manufacture its products in Germany for sale and distribution in Germany and other European countries. A significant issue in such a licensing transaction is technology transfer, as the seller will need to allow the German manufacturer some access to the seller's intellectual property rights, know-how, and other forms of proprietary information. Alternatively or after the term of the licensing agreement, the company may decide to establish its own operations in Germany by establishing a business entity of which it is the sole or part owner. Technology transfer issues are also important in this transaction as the levels of technology involved in foreign investment can often be more advanced than those involved in licensing. The U.S. company would have the choice of establishing its own operations from scratch or of buying an existing German business entity. In either case, this would be what is termed foreign direct investment (FDI). This would also involve incorporating a German or European subsidiary company or, rarely, a branch office.

If there is sufficient demand for the company's products, not only in Germany and Europe, but around the world, our imaginary U.S. company may employ

similar strategies in many nations and many foreign markets. If it is successful, our company will become a world-class business known as a transnational corporation (TNC) or multinational enterprise (MNE). A similar scenario would exist if the seller in the example above were selling services, such as financial services or insurance, instead of products.

This book will examine all of these transactions and trace this progression from the simple contract of sale to the establishment of foreign direct investment and the many collateral issues involved. Of course, each international transaction has its own particular character, and real IBTs are variations on the themes just described. Nevertheless, we believe this progression is a useful way of studying the subject in an academic setting. After this introductory chapter provides some background considerations, the next five chapters of this book will trace this progression. Chapters 2, 3, and 4 concern the international sales transaction and Chapters 5 and 6 examine agency/distributorships, contract manufacturing, and foreign direct investment. Although we weave intellectual property issues into most of the earlier chapters, we devote all of Chapter 7 to the protection of intellectual property rights, an issue of fundamental importance in international business today. Chapter 8 then turns to dispute resolution in an international business context. Finally, Chapter 9 concerns corporate social responsibility and examines the obligations of multinational enterprises concerning issues of human rights, labor conditions, and the environment.

Note that the transactions that are the focus of this book are private transactions by which we mean transactions that affect the commercial, economic, and business interests of private or nongovernmental parties. The parties to most of the transactions examined in this book are business entities, companies, or MNEs. In some cases, however, one or more of the parties to the transaction may be a government entity or a business entity under the control of a government. These transactions are also included within the scope of this book when the government entity is acting in a commercial or entrepreneurial capacity. We want to distinguish the transactions that are the subject of this book from international transactions that affect public rights such as where government entities engage in commercial activity that may affect the rights of its citizens as a whole and the rights of other nations such as when one nation engages in the sale of military equipment to another or when one nation assists another in rebuilding its economy and industry after some calamity, such as war.

The IBTs that we examine in this book not only involve private parties or entities acting in a commercial or private capacity but they also involve areas of commerce traditionally deemed as areas of private law such as contracts, property, and torts. Public laws that affect IBTs such as antitrust, securities, customs, exchange controls, and general economic regulation will be discussed by way of background but will not be the focus of this book. Note that one of the hallmarks of private law is that the parties have the freedom and authority to contractually alter private law rights and obligations. One of the major themes that will be explored throughout this book is the way in which parties can structure IBTs to protect and further their interests against a background of private laws that permit bargains to be formed by contract. By contrast, public laws are generally mandatory in nature and do not permit parties to alter their impact or effect. The distinction between private and public law brings us to another important point about the focus and orientation of this book.

We want to distinguish the scope and subject matter of this book from another field, the regulation of international trade and economic relations among nations.

While this field is related to the field that is the subject matter of this book, we believe that it is fruitful to view international business transactions and the regulation of international trade and economic relations as separate, although related fields that should be the subject of separate courses in the law school curriculum. The regulation of international trade concerns the attempts by nations, acting in their sovereign capacities, to regulate economic and commercial activity between themselves and the conduct of such activity by their nationals through mandatory public laws. For example, export and import controls such as customs classifications, quotas, tariffs, and other customs controls belong to the field of international trade and economic regulation. Laws governing unfair trade practices that allow import nations to impose sanctions on unfairly priced imports also belong to the field of international trade law. Transnational antitrust and anticompetition laws are another example. The principal intergovernmental international organization that is involved in the regulation of world trade and economic relations is the World Trade Organization (WTO). Another important body in the regulation of world trade is the European Union (EU), consisting of 25 states (as of May 1, 2004), including virtually all the nations of western and central Europe. On trade and economic issues, the EU is charged with the complete economic integration of its member economies by eliminating all trade barriers and by adopting a common economic policy, including customs duties, with respect to nonmember states. While we consider the WTO, the EU, and other international and regional economic institutions in this book and how they impact the private transactions that are the subject of this book, the WTO, regional economic institutions, and domestic implementation of WTO obligations will not be our focus as in a course on the regulation of international trade and economic regulations.

One other area in which this book differs from some other approaches is that we include the topic of foreign investment within our treatment of private international transactions. Foreign investment is commonly treated under other approaches as part of the field of international economic regulatory law and "international trade and investment" is commonly referred to as a specialty or field of study. While the public law aspects of foreign investment are treated in regulatory courses, the transactional aspects of foreign investment are often not treated at all in private law courses. While there are, of course, many important regulatory issues concerning foreign investment, in this book we take a close and detailed look at the transactional aspects of foreign direct investment, including how to establish and operate a foreign investment enterprise in a developing country. We believe that FDI is best understood as the final step in a progression from the most simple type of IBT, the simple export sales transaction, to the most complex. We do not, however, treat the regulatory aspects of foreign investment in complete fashion and include such treatment only by way of background and introduction.

To be sure, we wish to emphasize that we cover topics relating to the regulation of international trade in this book and that some of this coverage will be in depth because all international business transactions operate against the background of international economic regulation. You will find that in many chapters we blend and interweave topics of international trade law into our materials on private transactions. Our approach is to select those topics of international trade law that are most pertinent as the necessary background for understanding the progression of topics that we cover: The sales contract, distribution, licensing, and foreign direct investment. Moreover, although you will find that some parts of this

book will cover certain international trade topics in detail, our coverage of international trade is selective as it is for the primary purpose of understanding the private transaction. We do not attempt to provide systematic coverage of international trade and international economic law as we would be in a casebook devoted to that important field.

To give you a sense of how we use and select international trade law topics in this book, consider that in our materials covering the sales transaction we will cover the importer's compliance with U.S. customs laws, a trade law topic, in detail. We believe that this is the trade law topic that is most closely connected to the transactional issues related to the sale of goods and that affects the IBT practitioner on a micro level on a day-to-day basis. Our assumption is that when our students go on to represent one of the parties in an international sale they are most likely to represent a U.S. party. The trade law issues of most importance to the U.S. party will generally occur when the U.S. party is the buyer-importer. The buyer must satisfy U.S. Customs laws governing all imports as this compliance will usually determine the amount of tax or customs duty that must be paid by the buyer-importer. As the amount of duty that must be paid is a significant issue for most buyers, we cover this topic in depth. On the other hand, we believe that the trade law issues are generally less complex when the U.S. party is the seller. In this case, the U.S. seller must comply with U.S. export controls and related laws, but these issues are generally less complex in most cases so we cover this topic in less detail, reflecting its lower level of complexity. Of course, there are other trade law issues and some of them are quite important macro law issues that implicate important issues concerning economic relations between states. If this were a casebook in international trade and economic relations, we would cover the export trade compliance issues in depth. As for our coverage of imports, after import customs compliance issues we would then go on to consider unfair competition issues such as dumping, that is, when imported goods are sold at a lower price than in the exporter's home market, which can result in the imposition of an antidumping duty to offset the margin of dumping. We would also cover subsidies, that is, payments by the country of export to the exporter that provides a price advantage, which can be offset by the imposition of a countervailing duty. We would then go on to cover "safeguards," that is, measures available to a state to limit fairly traded imports that are causing harm to domestic industries. However, we do not go on to cover all of the trade law topics in our consideration of an international sales contract. Rather, our approach to the trade law topics is selective and reflects our best judgment on what international trade topics are most vital for understanding the private transaction that is taught within the confines of a three- or four-credit course on international business transactions. Note that our approach to treating the trade law issues in a sales contract discussed above reflects how we treat the trade law issues in all of the areas covered in this book: We cover selected trade law materials that are most important to the private transaction. In some cases, you will find that we introduce the selected trade law materials at the end of a chapter (Chapter 2 on the sales contract and Chapter 7 on the protection of intellectual property), at the beginning (Chapter 6 on foreign direct investment), and in some cases we interweave the trade law material throughout the materials on the private transaction (Chapter 5 on technology transfer).

We believe that a book focusing on the private business transaction against a carefully selected set of materials relating to international economic regulation offers enough materials and challenges for a separate course. We also believe

that a fruitful course of study for the student interested in international business law would be a course on international business transactions followed by a separate, advanced course on the regulation of international trade and economic relations between nations.

### NOTES AND QUESTIONS

1. As the fields of international business transactions and international trade law are different, will a lawyer practicing in both fields need different skills? If so, how do the skills necessary for IBTs differ from those necessary for international trade law issues? In the area of IBT, the focus is on *negotiating* and *structuring* transactions against a background of private laws that allow flexibility for bargains altering rights and obligations by contract. In IBTs, the party sitting across the table is usually another private party. In international trade law, the focus is on *compliance* with mandatory public laws, and the party that one normally deals with is a governmental authority with regulatory and enforcement powers. In some cases, the distinction that we draw here is blurred as in the case of doing business in some developing countries where the issue of compliance is often a process of negotiation with local governments. However, we believe that this distinction is useful in an academic setting to demonstrate that the skills needed by a lawyer in each area are different. Both types of skills are necessary to help clients take full advantage of business opportunities. Many IBTs also concern international trade law issues so a lawyer will need to exercise both sets of skills.

2. We introduce a number of basic technical concepts throughout this chapter that you may be unfamiliar with but that you will need to master. Do not confuse *public law* discussed above with *public international law*, which we introduce shortly, or *private law* with *private international law*, also introduced later in this chapter.

### B. Counsel in International Business

Another topic that we wish to introduce in this first chapter is the role of the lawyer in international business transactions. It should not be surprising that the growth of international business and trade of all kinds in the latter part of the twentieth century has also transformed the legal profession. As MNEs expand abroad, many will require their company lawyers to spend extended assignments overseas and advise their overseas businesses. As many of the world's most successful law firms have multinational enterprises as their clients and as their clients have expanded their reach around the world, law firms have also expanded their capabilities and offices in order to meet their clients' changing needs. We are now in the era of the multinational law firm as many firms believe that it is essential to have international capability in order to survive in today's competitive marketplace. Some of the world's largest law firms have branch offices around the world and follow a business model that is similar to that of MNEs.

### NOTES AND QUESTIONS

1. Large law firms are routinely engaged in international transactions and some of them are global firms with branch offices in many countries around the