### **Table of Contents**

### Volume 1

### CHAPTER 1. INTERNATIONAL SALES LAW

#### I. INTRODUCTION

- § 1:1 Introduction to CISG
- § 1:2 United Nations Commission on International Trade Law (UNCITRAL)
- § 1:3 Short history of the drafting of CISG

#### II. SCOPE AND GENERAL PROVISIONS OF CISG

- § 1:4 The sphere of application of CISG
- § 1:5 Choice of law clauses
- § 1:6 Transactions excluded from the convention
- § 1:7 Types of sales transactions excluded from the convention
- § 1:8 Issues excluded from the convention
- § 1:9 General provisions of CISG

#### III. CONTRACT FORMATION

- § 1:10 Contract formation in general
- § 1:11 Offer
- § 1:12 Firm offers
- § 1:13 Acceptance

#### IV. RIGHTS AND OBLIGATIONS OF THE PARTIES

- § 1:14 Seller's obligations—Delivery
- § 1:15 —Quality of the goods
- § 1:16 —Property issues
- § 1:17 Buyer's obligations
- § 1:18 Buyer's inspection and notice of defects
- § 1:19 Cure
- § 1:20 Risk of loss
- § 1:21 Excused performance
- § 1:22 Interpretation in U.S. courts

#### V. REMEDIES

- § 1:23 Remedies in general
- § 1:24 Suspending performance

- § 1:25 "Avoidance" of a contract—Refusal to accept nonconforming performance
- § 1:26 Non-judicial price adjustment
- § 1:27 Reclamation of the goods
- § 1:28 Judicial remedies
- § 1:29 Seller's action for specific performance
- § 1:30 Buyer's action for the contract price
- § 1:31 Damages
- § 1:32 Buyer's damages
- § 1:33 Seller's damages

#### VI. SAMPLE INTERNATIONAL SALES AGREEMENTS

- § 1:34 Sample international product sales agreement (PRC) with accompanying irrevocable bank guarantee
- § 1:35 Sample international sales agreement (PRC)
- § 1:36 Sample international commodity sales agreement (PRC)
- § 1:37 Volume purchase agreement (Germany) (electronics)
- § 1:38 License to manufacture agreement (Germany) (electronics)
- § 1:39 International contract for sale of secondary galvanized metal (Selective CISG Application)
- § 1:40 Purchase and sale agreement (chemicals industry)
- § 1:41 Third party labor conditions and supply chain accountability clause
- § 1:42 Sample vendor standard terms and conditions of purchase
- § 1:43 Sample vendor nondisclosure agreement

#### VII. PRACTITIONER COMMENTARY

- § 1:44 The controversy of good faith in the United Nation Convention on contracts for the international sale of goods, by Jennifer Mays, Esq.
- § 1:45 Afghanistan's Accession to Convention on Contracts for the International Sale of Goods (CISG), by Mohammad Ali Hemmat, Esq.

#### CHAPTER 2. COMMERCIAL TERMS

#### I. INTRODUCTION

- § 2:1 Introduction
- § 2:2 The purpose of commercial terms

#### II. INCOTERMS

- § 2:3 Incoterms as a trade usage
- § 2:4 Categories of commercial terms
- § 2:5 Revisions of Incoterms
- § 2:6 The format of Incoterms

#### III. THE INDIVIDUAL TERMS OF INCOTERMS

§ 2:7 The Ex Works (EXW) term

#### Table of Contents

§ 2:8 The Free	Carrier (FCA) term
----------------	--------------------

- § 2:9 The Free Alongside Ship (FAS) term
- § 2:10 The Free on Board (FOB) term
- § 2:11 The Cost, Insurance and Freight (CIF) term
- § 2:12 The Cost and Freight (CFR) term
- § 2:13 The Carriage and Insurance Paid To (CIP) term
- § 2:14 The Carriage Paid To (CPT) term
- § 2:15 Destination terms
- § 2:16 The Delivery Ex Ship (DES) term (eliminated in 2010)
- § 2:17 The Delivery Ex Quay (DEQ) term (eliminated in 2010)
- § 2:18 The Delivery at Frontier (DAF) term (eliminated in 2010)
- § 2:19 The Delivery Duty Unpaid (DDU) term (eliminated in 2010)
- § 2:20 The Delivery Duty Paid (DDP) term
- § 2:21 The Delivered at Place (DAP) term
- § 2:22 The Delivered at Terminal (DAT) term
- § 2:23 Interpretation of gaps in Incoterms, electronic communications

#### IV. CISG, THE UCC AND INCOTERMS

- § 2:24 Comparison of Incoterms with UCC and CISG
- § 2:25 The EXW term and default rules under CISG and UCC
- § 2:26 The UCC "F.O.B. place of shipment" term
- § 2:27 The UCC "F.A.S. vessel" term
- § 2:28 The UCC "F.O.B. vessel" term
- § 2:29 The UCC "C.I.F." term
- § 2:30 The UCC "F.O.B. place of destination" term

#### CHAPTER 3. BILLS OF LADING

#### I. INTRODUCTION

- § 3:1 Bills of lading in international business transactions
- § 3:2 Descriptive terms for bills of lading

#### II. TYPES OF BILLS OF LADING

- § 3:3 Non-negotiable or straight bills of lading
- § 3:4 Negotiable or order bills of lading

#### III. GOVERNING LAW

- § 3:5 International conventions
- § 3:6 Overview of United States law
- § 3:7 The Harter Act
- § 3:8 Carriage of Goods by Sea Act (COGSA)
- § 3:9 Federal Bills of Lading Act

#### § 3:10 Choice of law

#### IV. THE "PAYMENT AGAINST DOCUMENTS" TRANSACTION

- § 3:11 Overview
- § 3:12 The necessity of a negotiable bill of lading
- § 3:13 Payment
- § 3:14 Risks of the parties
- § 3:15 Seller's risks
- § 3:16 Buyer's risks

### V. INHERENT RISKS AND LIABILITIES REGARDING BILLS OF LADING

- § 3:17 Misdelivery
- § 3:18 Misdescription
- § 3:19 Forged bills of lading

#### VI. ELECTRONIC BILLS OF LADING

- § 3:20 Introduction
- § 3:21 Establishing a system and format for electronic bills of lading

#### VII. SELECTED DOCUMENTS

- § 3:22 Sample bill of lading
- § 3:23 Sample logistics service provider contract

# CHAPTER 4. SALES AGENT AND DISTRIBUTORSHIP AGREEMENTS

#### I. INTRODUCTION

- § 4:1 Need for a written agreement
- § 4:2 Problems most prevalent upon termination
- § 4:3 Effect of changing export laws in the United States

#### II. FORMS OF DISTRIBUTION

- § 4:4 Choice of form
- § 4:5 Independent foreign agent
- § 4:6 Independent foreign distributor
- § 4:7 Laws protecting agents and distributors

#### III. ABILITY TO CONTROL AGENT OR DISTRIBUTOR

§ 4:8 Aspects of control

#### § 4:9 Areas to consider

#### IV. CHOOSING THE AGENT OR DISTRIBUTOR

- § 4:10 Individual or business entity
- § 4:11 Nationality of the agent/distributor
- § 4:12 Special problems

#### V. THE AGREEMENT—PROVISIONS TO CUSTOMERS

- § 4:13 Language
- § 4:14 Agreement is the full agreement
- § 4:15 Definitions
- § 4:16 Services to be performed by agent/distributor
- § 4:17 Compensation and payment
- § 4:18 Choice of law and venue
- § 4:19 Termination
- § 4:20 —Right to terminate
- § 4:21 —Notice of termination
- § 4:22 —Rights upon termination
- § 4:23 —Waiver of termination rights
- § 4:24 —Denial of import privileges
- § 4:25 —Denial of export privileges
- § 4:26 Duration of agreement
- § 4:27 Rights retained by the U.S. company

#### VI. REGISTRATION OF THE AGREEMENT

§ 4:28 Notification or approval

#### VII. JURISDICTION OVER UNITED STATES PRINCIPAL

§ 4:29 Who asserts jurisdiction?

#### VIII. INTERNATIONAL UNIFICATION OF THE RULES OF AGENCY

- § 4:30 1983 Geneva Convention on Agency in the International Sale of Goods
- § 4:31 European Union unification of the rules affecting agents
- § 4:32 European Union rules affecting agent termination rights
- § 4:33 European Union competition law applicability to agency agreements
- § 4:34 European Union rules affecting distributorship agreements
- § 4:35 International Chamber of Commerce

#### IX. FINAL CONSIDERATIONS

- § 4:36 Laws affecting exports and imports
- § 4:37 Strategic alliances between different nation manufacturers

§ 4:38 Doing business by a sales agent in Mexico

### X. SAMPLE INTERNATIONAL AGENCY AND DISTRIBUTION AGREEMENTS

- § 4:39 Sample manufacturer's international representative agreement (gas turbines)
- § 4:40 General manufacturer's agent agreement
- § 4:41 Authorized repair facility agreement (Aerospace)
- § 4:42 Maintenance support agreement (Aerospace)
- § 4:43 International distributorship agreement (Germany) (electronics)

#### CHAPTER 5. COUNTERTRADE AGREEMENTS

#### I. INTRODUCTION

- § 5:1 Countertrade in the post—World War II years
- § 5:2 Why engage in countertrade?

#### II. FORMS OF COUNTERTRADE

- § 5:3 Barter
- § 5:4 Counterpurchase
- § 5:5 Compensation or buyback
- § 5:6 Offsets
- § 5:7 Switch trading
- § 5:8 Bilateral clearing accounts
- § 5:9 Investment commitment

### III. THE COUNTERTRADE AGREEMENT

- § 5:10 Single versus three agreements
- § 5:11 The first agreement
- § 5:12 The second agreement
- § 5:13 The third agreement—The protocol

#### IV. NEGOTIATING A COUNTERTRADE AGREEMENT

- § 5:14 Understanding countertrade
- § 5:15 Length of time to negotiate
- § 5:16 Definition of the goods
- § 5:17 Quality
- § 5:18 Quantity
- § 5:19 Prices
- § 5:20 Other trade rules applicability
- § 5:21 Percentage of countertrade demanded
- § 5:22 Discount for costs of disposing countertrade goods
- § 5:23 Nonperformance penalties

#### Table of Contents

- § 5:24 Selection of goods
- § 5:25 Release of United States party
- § 5:26 Renegotiation
- § 5:27 Dispute resolution

#### V. COUNTERTRADE IN THE CONTEXT OF A JOINT VENTURE

§ 5:28 Compensation countertrade and a joint venture

#### VI. POLICY POSITIONS CONCERNING COUNTERTRADE

- § 5:29 Governments and international organizations
- § 5:30 United States government policy
- § 5:31 United States trade law
- § 5:32 United States antitrust law
- § 5:33 Western European nations
- § 5:34 Nonmarket economy nations
- § 5:35 Developing nations
- § 5:36 Middle-East nations
- § 5:37 United Nations
- § 5:38 GATT/WTO
- § 5:39 OECD

#### VII. CONCLUSIONS

§ 5:40 Future of countertrade

#### VIII. SAMPLE COUNTERTRADE AGREEMENTS

- § 5:41 Counterpurchase contract with India
- § 5:42 Counterpurchase contract with Russia (production of polyester fibers, polyester threads and their raw materials and delivery of chemicals and cotton)
- § 5:43 Offset agreement with Israel
- § 5:44 General guide for the offset program of the Korean Telecommunication Authority
- § 5:45 International buy-back contracts (UN ECE)

#### CHAPTER 6. DOCUMENTARY LETTERS OF CREDIT

#### I. INTRODUCTION

- § 6:1 Introduction—The transactional problem
- § 6:2 The documentary sale transaction
- § 6:3 Risk allocation in the letter of credit transaction—In general

#### II. BASIC CONCEPTS AND SOURCES OF RULES

§ 6:4 The governing rules

- § 6:5 Applicable law
- § 6:6 Basic legal principles

#### III. HONOR AND DISHONOR

- § 6:7 Wrongful dishonor of a credit
- § 6:8 Wrongful honor of the credit
- § 6:9 Examination of the documents for discrepancies
- § 6:10 Notification of discrepancies
- § 6:11 The documents in the letter of credit transaction

#### IV. OTHER TRANSACTIONS

- § 6:12 Electronic letters of credit
- § 6:13 Back-to-back and revolving credits

#### V. SAMPLE FORMS

§ 6:14 Letter of credit—Confirmed, irrevocable

#### CHAPTER 7. STANDBY LETTERS OF CREDIT

#### I. INTRODUCTION

- § 7:1 Introduction
- § 7:2 Transaction pattern of the standby letter of credit
- § 7:3 Differences with commercial letter of credit

#### II. TRADITIONAL SOURCES OF RULES

- § 7:4 Sources of law and rules/governing rules
- § 7:5 Revised UCC Article 5
- § 7:6 Uniform Customs and Practices for Documentary Credits (UCP)

#### III. NEW SOURCES OF RULES

- § 7:7 New international rules for standby letters of credit
- § 7:8 United Nations Convention on independent guarantees and stand-by letters of credit (1995)
- § 7:9 Rules on International Standby Practices (ISP 98)—Drafting history
- § 7:10 The rules of ISP 98
- § 7:11 Use of ISP 98
- § 7:12 The debate over ISP 98

#### IV. THE ISSUE OF FRAUD

- § 7:13 The "fraud defense"
- § 7:14 Fraudulent or abusive demands for payment under the United Nations Convention on independent guarantees and stand-by letters of credit

#### CHAPTER 8. INTERNATIONAL ELECTRONIC COMMERCE

#### I. INTRODUCTION TO E-COMMERCE TRANSACTIONS

- § 8:1 Introduction
- § 8:2 Private contractual measures enabling e-commerce—Trading partner agreements
- § 8:3 —Shrinkwrap and clickwrap agreements
- § 8:4 Legislative measures enabling e-commerce

#### II. INTERNATIONAL MODEL LAWS

- § 8:5 UNCITRAL Model Law on Electronic Commerce—In general
- § 8:6 —Non discrimination
- § 8:7 —Contract formation
- § 8:8 —Specialized provisions
- § 8:9 UNCITRAL Model Law on Electronic Signatures

#### III. REGIONAL LAWS

- § 8:10 European Union—Background to the eEurope Initiative
- § 8:11 —Distance Selling Directive
- § 8:12 —Electronic Signature Directive
- § 8:13 —Electronic Commerce Directive
- § 8:14 —Personal Data Protection Directive

#### IV. UNITED STATES LAWS

- § 8:15 United States—Federal laws
- § 8:16 —State laws

#### V. PRACTITIONER COMMENTARY

§ 8:17 The EU-U.S. Data Privacy Shield, by Marco Fortades, Esq.

# CHAPTER 9. AN INTRODUCTION TO INTERNATIONAL TRADE—THE WTO, U.S. CUSTOMS, AND TRADE LAW

#### I. INTRODUCTION

§ 9:1 Scope

#### II. THE WORLD TRADE ORGANIZATION (WTO)

- § 9:2 Introduction
- § 9:3 The General Agreement on Tariffs and Trade (1947)
- § 9:4 —Trade in goods: Core GATT principles

- § 9:5 —GATT procedures
- § 9:6 The GATT/WTO multinational trade negotiations (rounds)
- § 9:7 The World Trade Organization (WTO) and GATT 1994
- § 9:8 WTO decision-making: Admission
- § 9:9 WTO decision-making: Consensus rules
- § 9:10 WTO decision-making: Admission to the WTO
- § 9:11 WTO agreements and U.S. law
- § 9:12 WTO dispute settlement/U.S. disputes/China disputes
- § 9:13 Import quotas and licenses under the WTO
- § 9:14 GATT/WTO Nontariff Trade Barrier Codes
- § 9:15 The WTO Agreement on Agriculture
- § 9:16 WTO Public Procurement Code
- § 9:17 The General Agreement on Trade in Services (GATS)
- § 9:18 The WTO and Rules of Origin
- § 9:19 The WTO TRIPs Agreement

#### III. CLEARING U.S. CUSTOMS

- § 9:20 Introduction
- § 9:21 Entry formalities
- § 9:22 Customs documentation and liability
- § 9:23 Customs classification
- § 9:24 Customs valuation
- § 9:25 Rules of origin

#### IV. REGULATING U.S. TRADE

- § 9:26 Introduction
- § 9:27 International Trade Administration (ITA)
- § 9:28 International Trade Commission (ITC)
- § 9:29 Court of International Trade (CIT)
- § 9:30 The USTR, Fast Track and U.S. Trade Agreements
- § 9:31 U.S. Import Regulation (chart)
- § 9:32 U.S. Export Regulation (chart)

#### V. PRACTITIONER COMMENTARY

- § 9:33 Afghanistan and the WTO: Did Afghanistan Pay Too Heavy a Price for Membership?, by Ismaeil Hakimi, Esq.
- § 9:34 China as an Open Market Economy: How The WTO Should Rule, by Jordan Golden, Esq.
- § 9:35 WTO Jurisdiction In The Case Of The Gatt, Article XXI: Testing the Authority of the WTO under the Trump Administration, by M. T. Barikbin, Esq.
- § 9:36 Intensive Care or the Morgue? The Current State of the WTO Appellate Body and Prognosis for Its Future, by Ian Carstens, Esq.

# CHAPTER 10. UNITED STATES TARIFFS AND DUTY FREE IMPORTS

#### I. THE U.S. HARMONIZED TARIFF SCHEDULE

- § 10:1 Introduction
- § 10:2 Origins of United States tariffs
- § 10:3 Column 1 tariffs and the GATT/WTO
- § 10:4 Column 2 tariffs
- § 10:5 The Jackson-Vanik Amendment
- § 10:6 Duty free entry
- § 10:7 HTS sample

#### II. FOREIGN TRADE ZONES AND BONDED WAREHOUSES

- § 10:8 Foreign trade zones
- § 10:9 Bonded warehouses

#### III. THE U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP)

- § 10:10 Statutory authorization
- § 10:11 USTR petition procedures
- § 10:12 Competitive need limitations
- § 10:13 Country eligibility
- § 10:14 Product eligibility
- § 10:15 Graduation
- § 10:16 Judicial and administrative remedies

### IV. CARIBBEAN BASIN INITIATIVE, ANDEAN AND AFRICAN TRADE PREFERENCES

- § 10:17 Introduction
- § 10:18 CBI country eligibility
- § 10:19 CBI product eligibility
- § 10:20 Andean trade preferences
- § 10:21 African trade preferences

#### V. GOODS INCORPORATING UNITED STATES COMPONENTS

- § 10:22 Section 9802.00.80 of the HTS
- § 10:23 Maguiladoras
- § 10:24 Section 9802.00.80 case law
- § 10:25 Metals processed abroad

# CHAPTER 11. CUSTOMS CLASSIFICATION, VALUATION AND ORIGIN

#### I. THE ROLE OF CLASSIFICATION, VALUATION AND ORIGIN

- § 11:1 Purpose of classification, valuation and origin
- § 11:2 The actors who classify and value—The Customs Service
- § 11:3 —Secretariat of the Customs Cooperation Council (CCC)
- § 11:4 The sources of law for classification, valuation and origin

### II. CLASSIFICATION—THE FRAMEWORK OF THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

- § 11:5 Sample provisions of the Harmonized Tariff System
- § 11:6 Classification—The meaning of the headings in the HTS
- § 11:7 —The meaning of the notes in the HTS
- § 11:8 —The meaning of the columns in the HTS

### III. CLASSIFICATION—DETERMINING THE PROPER RATE OF DUTY

- § 11:9 Classification—Applying the General Rules of Interpretation
- § 11:10 —The Additional U.S. Rules of Interpretation
- § 11:11 —United States Customs Service, Guidance for Interpretation of Harmonized System
- § 11:12 —Decisions of United States courts

#### IV. COUNTRY OF ORIGIN

- § 11:13 Introduction—Substantial transformation
- § 11:14 Rules of origin—Sources of law
- § 11:15 —Applicable legal theories

### V. VALUATION—THE FRAMEWORK OF VALUATION LAW IN THE UNITED STATES

- § 11:16 United States law on valuation
- § 11:17 Valuation—The law of the GATT/WTO

#### VI. VALUATION—DETERMINING THE PROPER VALUE

- § 11:18 Valuation—Appraisal of imported merchandise
- § 11:19 —Transaction value
- § 11:20 —Deductive value
- § 11:21 —Computed value
- § 11:22 Value when other methods are not effective

#### VII. PRACTITIONER COMMENTARY

§ 11:23 Taxing Art: EU Regulation No. 731/2010 and the problem of classification, by Mariam Babayan, Esq.

### CHAPTER 12. ANTIDUMPING DUTIES

#### I. INTRODUCTION

§ 12:1 Dumping—What is it and why is it done?

#### II. GATT/WTO ANTIDUMPING LAW

- § 12:2 GATT and the Tokyo Round Antidumping Code (1979)
- § 12:3 The WTO Antidumping Code (1994)
- § 12:4 U.S. implementation of the WTO Antidumping Code
- § 12:5 —WTO U.S. dumping law disputes

#### III. U.S. ANTIDUMPING LAW

- § 12:6 The evolution of U.S. antidumping law
- § 12:7 The dumping determination, zeroing
- § 12:8 Foreign market value
- § 12:9 United States price
- § 12:10 Sales below cost
- § 12:11 Nonmarket economies included
- § 12:12 Nonmarket economy constructed values
- § 12:13 Market economy constructed values
- § 12:14 Similar merchandise and price adjustments
- § 12:15 The injury determination
- § 12:16 Like domestic products
- § 12:17 Material injury
- § 12:18 —Volume of imports
- § 12:19 —Price effects
- § 12:20 —Domestic industry impact
- § 12:21 Threat of material injury
- § 12:22 Causation
- § 12:23 Cumulative causation
- § 12:24 Antidumping procedures—Petition and response
- § 12:25 Administrative determinations
- § 12:26 The importance of the ITA preliminary dumping determination
- § 12:27 AD duties and anti-circumvention
- § 12:28 Appeals

#### IV. EUROPEAN ANTIDUMPING LAW

§ 12:29 GATT/WTO Code adherence

- § 12:30 Administrative determinations
- § 12:31 Settlements
- § 12:32 Anti-circumvention and other controversies

#### V. PRACTITIONER COMMENTARY

§ 12:33 Boeing v. Bombardier: Material Injury Analysis At The International Trade Commission, by Justin Shields, Esq.

# CHAPTER 13. SUBSIDIES AND COUNTERVAILING DUTIES

#### I. INTRODUCTION

§ 13:1 Subsidies and international trade

#### II. GATT/WTO SUBSIDIES AND CVD LAW

- § 13:2 Tokyo Round Subsidies Code (1979)
- § 13:3 Uruguay Round WTO Subsidies Code (1994)

#### III. U.S. SUBSIDIES AND CVD LAW

- § 13:4 Historical introduction
- § 13:5 Two statutory regimes
- § 13:6 U.S. implementation of the WTO Subsidies Code—Countervailable subsidies
- § 13:7 National or WTO proceedings
- § 13:8 Non-countervailable subsidies (expired)
- § 13:9 Export subsidies
- § 13:10 Upstream subsidies
- § 13:11 De minimis subsidies
- § 13:12 Nonmarket economies
- § 13:13 The injury determination
- § 13:14 Like domestic products
- § 13:15 Material injury
- § 13:16 Causation
- § 13:17 Cumulative causation
- § 13:18 Countervailing duty procedures
- § 13:19 Administrative determinations
- § 13:20 The importance of the ITA preliminary subsidy determination
- § 13:21 CVD duties and anti-circumvention
- § 13:22 Appeals

#### IV. EUROPEAN SUBSIDIES AND CVD LAW

§ 13:23 GATT/WTO Code adherence

#### V. PRACTITIONER COMMENTARY

§ 13:24 The Solar Dispute Between the United States and India: The United States Won the Dispute but Did India Win the War?, by Lauren Wood, Esq.

# CHAPTER 14. UNITED STATES IMPORT CONTROLS AND NONTARIFF TRADE BARRIERS

#### I. INTRODUCTION

- § 14:1 Import quotas and licenses
- § 14:2 GATT/WTO Nontariff Trade Barrier Codes
- § 14:3 U.S. import restraints
- § 14:4 U.S. participation in international commodity agreements
- § 14:5 U.S. participation in the multi-fiber arrangement

### II. AGRICULTURAL QUOTAS

- § 14:6 Section 22 of the Agricultural Adjustment Act
- § 14:7 Meat imports
- § 14:8 Sugar imports
- § 14:9 Agricultural marketing orders
- § 14:10 The WTO Agreement on Agriculture

#### III. NONTARIFF TRADE BARRIERS (NTBs)

- § 14:11 Introduction
- § 14:12 Food products
- § 14:13 Seeds, plants and animals
- § 14:14 Consumer products
- § 14:15 Motor vehicles
- § 14:16 Environmental regulation
- § 14:17 Public procurement
- § 14:18 Product standards, GATT/WTO and NAFTA Challenges
- § 14:19 Product markings (origin, labels)
- § 14:20 Maritime transport

#### IV. NATIONAL SECURITY IMPORT RESTRAINTS

- § 14:21 Section 232 of the Trade Expansion Act
- § 14:22 Trade embargoes, Cuba, Iran and Libya

#### V. PRACTITIONER COMMENTARY

- § 14:23 Pharmaceutical trade barriers in Indian law, by Jonathan Duffield, Esq.
- § 14:24 Trading Traditional Chinese Medicine into the United States, By Yan Ren, Esq.

# CHAPTER 15. IMPORT SAFEGUARDS AND TRADE ADJUSTMENT ASSISTANCE

#### I. INTRODUCTION

- § 15:1 Prospects for relief
- § 15:2 Special rules for Canada and Mexico
- § 15:3 The impact of limited judicial review
- § 15:4 The WTO Safeguards Agreement
- § 15:5 U.S. implementation and compliance with of the WTO Safeguards Agreement

#### II. ESCAPE CLAUSE PROCEEDINGS

- § 15:6 Petitions
- § 15:7 ITC investigations
- § 15:8 Statutory criteria
- § 15:9 Substantial causation
- § 15:10 Serious injury
- § 15:11 Relief recommendations of the commission
- § 15:12 Presidential relief decisions
- § 15:13 Orderly Marketing and Voluntary Restraint Agreements

#### III. MARKET DISRUPTION PROCEEDINGS

- § 15:14 Statutory criteria
- § 15:15 Relief measures

#### IV. TRADE ADJUSTMENT ASSISTANCE

- § 15:16 Individual and company assistance criteria
- § 15:17 Secretary of Labor determinations
- § 15:18 NAFTA trade adjustment

#### CHAPTER 16. UNITED STATES EXPORT CONTROLS

#### I. INTRODUCTION

- § 16:1 Governance of imports
- § 16:2 Governance of exports
- § 16:3 The meaning of a "license"
- § 16:4 Export administration regulations

#### II. DETERMINING WHEN A LICENSE IS NEEDED—THE 29 STEPS

- § 16:5 General information
- § 16:6 Steps for using the export administration regulations
- § 16:7 Steps one through six—Scope of the EAR

Table of C	CONTENTS
------------	----------

§ 16:8	Steps seven through nineteen—The general prohibitions
§ 16:9	Steps twenty through twenty-six—Exceptions

§ 16:10 Steps twenty-seven through twenty-nine—Shipping documentation and records

#### III. SCOPE OF THE EXPORT ADMINISTRATIVE REGULATIONS

§ 16:11 Function of the scope regulations

#### IV. GENERAL PROHIBITIONS

- § 16:12 Introduction
- § 16:13 Determination of the applicability of the general prohibitions

### V. COMMERCE CONTROL LIST OVERVIEW AND THE COUNTRY CHART

- § 16:14 Introduction
- § 16:15 The Commerce Control List (CCL)
- § 16:16 License requirements, license exceptions and list of items controlled sections
- § 16:17 The commerce country chart
- § 16:18 Determining the need for a license

#### VI. SPECIAL CONTROLS

- § 16:19 Country control list based controls
- § 16:20 End-user and end-use based controls
- § 16:21 Embargoes and other special controls
- § 16:22 Short supply controls

#### VII. SPECIAL COMPREHENSIVE LICENSE

- § 16:23 Consolidation of previous separate licenses
- § 16:24 Eligible activities, items and countries
- § 16:25 Procedures for obtaining a SCL

#### VIII. APPLICATION FOR A LICENSE AND ADVISORY OPINIONS

- § 16:26 The application procedure
- § 16:27 Advisory opinions

#### IX. REVIEW OF APPLICATIONS

- § 16:28 Issuance and/or denial of applications
- § 16:29 Review by BIS and other departments or agencies
- § 16:30 Timetable for application review
- § 16:31 Issuance of a license
- § 16:32 Revocation or suspension of a license

- § 16:33 Appeals
- § 16:34 Review of export applications by international agencies

#### X. EXPORT CLEARANCE REQUIREMENTS

- § 16:35 Responsibilities
- § 16:36 Shipper's Export Declaration (SED)

#### XI. ENFORCEMENT

- § 16:37 Fines, suspensions and revocation of export authority
- § 16:38 Administrative proceedings
- § 16:39 Denial orders

#### XII. PRACTITIONER COMMENTARY

- § 16:40 When good deals go bad: A lawyer's guide to ITAR, by Joshua Summers, Esq.
- § 16:41 Why Is ITAR-Controlled Technical Data So Difficult To Control And What Is The Best Way To Control It?, by Sara Crossman, Esq.
- § 16:42 U.S. Defense ITAR Importing and Exporting Controls, PPT by Sara Crossman, Esq. of FTI Consulting

#### XIII. APPENDICES

§ 16:43 Framework for OFAC Compliance Commitments

# CHAPTER 17. THE FOREIGN CORRUPT PRACTICES ACT AND ILLEGAL PAYMENTS ABROAD

#### I. INTRODUCTION

- § 17:1 Foreign policy-based law—the FCPA
- § 17:2 History of the FCPA
- § 17:3 Amendments in 1988
- § 17:4 Amendments in 1998
- § 17:5 Responses from other nations, OECD and United Nations Conventions, British Bribery Act
- § 17:6 Foreign Extortion Prevention Act (FEPA)

#### II. SCOPE OF THE FCPA

- § 17:7 Definitional challenges
- § 17:8 Exempting minor payments
- § 17:9 Who is covered?
- § 17:10 Prohibited payments

#### III. ACCOUNTING STANDARDS

§ 17:11 Approach of accounting standards

#### Table of Contents

- § 17:12 ABA/SEC disagreement
- § 17:13 First standard: books, records and accounts
- § 17:14 Second standard: internal accounting control
- § 17:15 Sole exemption: National security

#### IV. PERSONS SUBJECT TO THE FCPA

- § 17:16 Issuers, domestic concerns and other persons
- § 17:17 Issuers of securities
- § 17:18 Domestic concerns other than issuers
- § 17:19 Foreign natural and legal persons who commit acts while in the United States
- § 17:20 Foreign subsidiaries of U.S. companies

#### V. THE ACT OF OFFERING, PROMISING OR GIVING CORRUPTLY

- § 17:21 What is given?
- § 17:22 Acting "corruptly"

#### VI. PROHIBITED PERSONS (RECIPIENTS) AND PURPOSES

- § 17:23 Foreign official
- § 17:24 Foreign political party, official or candidate
- § 17:25 Any person "while knowing"

#### VII. ROUTINE GOVERNMENTAL ACTION EXEMPTION

- § 17:26 De minimis or "grease" payments
- § 17:27 "Facilitating or expediting routine governmental action"

#### VIII. AFFIRMATIVE DEFENSES

- § 17:28 Lawful under "written" laws
- § 17:29 "Reasonable and bona fide expenditures"

#### IX. ENFORCEMENT AND PENALTIES

- § 17:30 Enforcement authority
- § 17:31 Consent decrees
- § 17:32 Charges of accounting and illegal payment violations
- § 17:33 Additional charges
- § 17:34 Penalties: Record keeping and accounting violations
- § 17:35 Penalties: Illegal payment violations

#### X. DEPARTMENT OF JUSTICE REVIEW PROCEDURE

- § 17:36 Review process
- § 17:37 When to use review process?

#### XI. RIGHTS OF ACTION

- § 17:38 Actions by the government
- § 17:39 Private right of action
- § 17:40 Employee suits
- § 17:41 Suits charging competitor with violation of FCPA

#### XII. COMPANY RESPONSES

- § 17:42 Responses to foreign officials' requests for payments
- § 17:43 Company policy and programs to prohibit payments in violation of the FCPA Company Policies

### XIII. FOREIGN NATION AND MULTINATIONAL ORGANIZATION CONTROLS ON CORRUPT FOREIGN PAYMENTS

- § 17:44 Specific nations' laws and U.S. agency procedures
- § 17:45 Organization for Economic Cooperation and Development (OECD)
- § 17:46 General Agreement on Tariffs and Trade (GATT/WTO)
- § 17:47 United Nations
- § 17:48 Other organizations

#### XIV. CONCLUSIONS

- § 17:49 Repeal unlikely
- § 17:50 Warning signs of violations of the FCPA
- § 17:51 FCPA compliance programs

#### XV. SAMPLE FCPA POLICY AND CONTRACT CLAUSES

- § 17:52 Company policy regarding the FCPA
- § 17:53 Officer contract provision regarding making unlawful payments
- § 17:54 Third party FCPA compliance clause
- § 17:55 DOJ and SEC Resource Guide to FCPA
- § 17:56 DOJ FCPA Corporate Enforcement Policy (2019)

#### XVI. PRACTITIONER COMMENTARY

- § 17:57 Reforming the law and culture of corruption in Nigeria, by Nkiruka Cynthia Uzodi, Esq.
- § 17:58 How To Build A Strong Corruption Risk Compliance Program in Mexico, by Lic. Carlos A. Larios, Esq. (Mexico)
- § 17:59 Why the FCPA needs a compliance defense, by Alexandra Frick, Esq.
- § 17:60 The High premium of Self-Reporting: Why the FCPA Enforcement Policy Fails to Curb Transnational Bribery, by Sharon Choi, Esq.
- § 17:61 A Commentary on the Globalization of Foreign Corrupt Practices Law, by Professor Ralph H. Folsom
- § 17:62 How Should Pharma Companies Design An Effective FCPA Compliance Program?, by Julie Kim, Esq.

Appendix 17A. Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Mar. 2024)

### CHAPTER 18. UNITED STATES BOYCOTT AND ANTI-BOYCOTT LAW

#### I. INTRODUCTION

- § 18:1 Boycott and anti-boycott laws
- § 18:2 Boycott laws and international law

#### II. UNITED STATES BOYCOTTS

- § 18:3 Structure and coverage of United States boycott laws
- § 18:4 Trade restrictions: The case of Cuba

#### III. ENACTING THE ANTI-BOYCOTT LAWS

- § 18:5 United States reaction to the Arab boycott of Israel: The anti-boycott laws
- § 18:6 Addressing boycotts contrary to United States interests by other laws

#### IV. THE ANTI-BOYCOTT LAW

- § 18:7 Export Administration Act
- § 18:8 Export Administration regulations

#### V. ANTI-BOYCOTT LAW—PROHIBITED CONDUCT

- § 18:9 Prohibited actions must be done intentionally
- § 18:10 Refusals to deal
- § 18:11 Discriminatory actions
- § 18:12 Furnishing information regarding race, religion, sex or national origin
- § 18:13 Furnishing information regarding business relationships—The use of "blacklists"
- § 18:14 Furnishing information regarding charitable or fraternal organizations
- § 18:15 Use of letters of credit

#### VI. ANTI-BOYCOTT LAW—EXCEPTIONS

- § 18:16 Function of the exceptions
- § 18:17 Import requirements of the boycotting country
- § 18:18 Import and shipping document requirements
- § 18:19 Compliance with unilateral selection
- § 18:20 Compliance with shipment and transshipment requirements
- § 18:21 Compliance with immigration, passport, visa or employment requirements
- § 18:22 Compliance with local law

#### VII. ANTI-BOYCOTT LAW—MISCELLANEOUS

§ 18:23 Prohibition of intentional evasion

- § 18:24 Reporting requirements
- § 18:25 Supplements to the regulations
- § 18:26 Violations and enforcement
- § 18:27 Private right of action

#### VIII. COMPANY ANTI-BOYCOTT POLICY

- § 18:28 Responses to requests from Arab nations
- § 18:29 Company policy to comply with law

### IX. SELECTED DOCUMENTS (COMPLIANCE GUIDE)

- § 18:30 Ashland Chemical Anti-boycott Compliance Guide and Policy Statement
- § 18:31 Third party OFAC compliance clause

### CHAPTER 19. UNITED STATES SECTION 301 PROCEEDINGS—SUPER 301 AND SPECIAL 301 PROCEDURES

#### I. INTRODUCTION

- § 19:1 Foreign country practices and market access
- § 19:2 The evolution of Section 301
- § 19:3 The impact of WTO Dispute Settlement Understanding

#### II. SECTION 301 PROCEEDINGS AND REMEDIES

- § 19:4 Mandatory versus discretionary offenses and remedies
- § 19:5 Statutory definitions
- § 19:6 Petitioning and consultation procedures
- § 19:7 USTR determinations
- § 19:8 Section 301 in action

#### III. SUPER 301 PROCEDURES

§ 19:9 The Gephardt Amendment alternative

#### IV. SPECIAL 301 PROCEDURES

§ 19:10 Prioritization of U.S. intellectual property rights disputes with foreign countries

### CHAPTER 20. ANTITRUST LAWS (U.S. AND EUROPE)

#### I. INTRODUCTION

§ 20:1 The impact of antitrust law

η	٦,	ът	т.	OF	$\alpha_{\alpha}$	N. Tr	nraz	Tn	10
	ΙA	. KI	.H:	( ) H.		) [N]	L.H.I	NΊ	

- § 20:2 DOJ International Antitrust Enforcement Guidelines
- § 20:3 Concurrent Federal-State jurisdiction
- § 20:4 Antitrust and economics

#### II. STATE ANTITRUST LAW

- § 20:5 The revival of state antitrust
- § 20:6 State law and remedies

#### III. FEDERAL ANTITRUST LAW

- § 20:7 Sherman Act prohibitions and remedies
- § 20:8 Reasonable and unreasonable (per se) restraints of trade
- § 20:9 Monopolization
- § 20:10 Clayton Act prohibitions
- § 20:11 Mergers and acquisitions
- § 20:12 Price discrimination, exclusive dealing and tying offenses
- § 20:13 The Federal Trade Commission Act
- § 20:14 Extraterritorial U.S. antitrust in perspective—Blocking statutes

#### IV. EUROPEAN COMPETITION LAW

- § 20:15 The goals of competition policy
- § 20:16 Article 101—Restraints of trade
- § 20:17 Regulation 17 and Regulation 1—Commission investigations, attorney-client privilege, shared prosecutorial powers
- § 20:18 Commission prosecutions and sanctions
- § 20:19 Individual exemptions, negative clearances and comfort letters (until May 1, 2004)
- § 20:20 Article 101—Group exemptions
- § 20:21 —Competitive impact
- § 20:22 Article 102
- § 20:23 —Dominant positions
- § 20:24 —Abuse
- § 20:25 Articles 101 and 102—National litigation and remedies
- § 20:26 Conflict of European competition laws
- § 20:27 The extraterritorial reach of Articles 101 and 102

#### V. COOPERATIVE INTERNATIONAL ANTITRUST ENFORCEMENT

- § 20:28 United States antitrust cooperation agreements
- § 20:29 United States-European antitrust cooperation

#### VI. U.S. EXPORT ANTITRUST EXEMPTIONS

- § 20:30 Webb-Pomerene export associations
- § 20:31 Export trade certificates of review

Appendix 20A. DOJ and FTC Antitrust Guidelines for International Enforcement and Cooperation (2017)
 Appendix 20B. DOJ Criminal Division: Evaluation of Corporate Compliance Programs Guidance (Mar. 2023)
 Appendix 20C. Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (2020)

# CHAPTER 21. FREE TRADE AGREEMENTS AND CUSTOMS UNIONS

§ 21:1	Introduction
§ 21:2	GATT Article 24
§ 21:3	GATS Integrated Services Agreements
$\S~21:4$	Developing World Integration
$\S 21:5$	The Association of Southeast Asian Nations (ASEAN)
§ 21:6	East Asian Integration
§ 21:7	NAFTA
§ 21:8	The proliferation of free trade agreements
§ 21:9	U.S. fast track procedures
§ 21:10	The Trans-Pacific Partnership (TPP)
§ 21:11	Post-NAFTA U.S. Free Trade Agreements—NAFTA Plus and Minus
§ 21:12	A Model Agreement for Asia's Regional Comprehensive Economic
	Partnership (RCEP), by Ayushi Agarwal, Esq.

### Volume 2

# CHAPTER 22. FRANCHISING AND TRADEMARK LICENSING

#### I. INTRODUCTION

$\S 22:1$	Franchising abroad
§ 22:2	Trademark protection
§ 22:3	Quality controls
§ 22:4	Copyright protection in franchising
$\S 22:5$	Protection of franchise trade secrets
§ 22:6	The franchise agreement
§ 22:7	Regulation of international franchising

#### II. INTERNATIONAL TRADEMARK TREATIES

§ 22:8	The Paris Convention as applied to trademarks
§ 22:9	The Nice Agreement on Trademark Classification
§ 22:10	International trademark registration treaties

#### III. FRANCHISING IN EUROPE

- § 22:11 The Pronuptia case
- § 22:12 Regulations 4087/88, 2790/1999 and 330/10

#### IV. FRANCHISING IN THE UNITED STATES

- § 22:13 Introduction
- § 22:14 State franchise disclosure requirements
- § 22:15 FTC Franchising Rule
- § 22:16 Uniform franchise offering circular
- § 22:17 Termination of franchises
- § 22:18 Automobile dealer franchises
- § 22:19 Petroleum distribution franchises
- § 22:20 Good cause for termination

#### V. CALIFORNIA FRANCHISING LAW

- § 22:21 Franchise investment law
- § 22:22 Termination of California franchises
- § 22:23 California petroleum franchises
- § 22:24 California automotive franchises

#### VI. SAMPLE INTERNATIONAL FRANCHISE AGREEMENTS

- § 22:25 Hotel International Franchise Agreement (Mexico)
- § 22:26 Holiday Inns, Inc. International License Agreement
- § 22:27 Standard International Hotel Management Agreement
- § 22:28 Master Restaurant License Agreement (Mexico)
- § 22:29 Restaurant License Agreement (International)
- § 22:30 Restaurant Development Agreement (Mexico)

### CHAPTER 23. PATENT AND KNOWHOW LICENSING

#### I. INTRODUCTION

- § 23:1 Protecting patents and knowhow
- § 23:2 The nature of patents
- § 23:3 The nature of knowhow and trade secrets

#### II. INTERNATIONAL PATENTS AND KNOWHOW

- § 23:4 International patent and knowhow licensing
- § 23:5 International acquisition of patents
- § 23:6 European patents
- § 23:7 European patent and knowhow licensing
- § 23:8 European transfer of technology regulation

#### III. TRANSFERRING TECHNOLOGY

- § 23:9 Introduction
- § 23:10 Regulations in the country of the transferee

#### IV. THE TRANSFER OF TECHNOLOGY AGREEMENT

- § 23:11 Different kinds of agreements
- § 23:12 Agreement to license a patent
- § 23:13 Agreement to license knowhow or trade secrets
- § 23:14 Agreement as part of a foreign direct investment
- § 23:15 Other forms of agreement

#### V. ELEMENTS OF A TRANSFER OF TECHNOLOGY AGREEMENT

- § 23:16 Introduction
- § 23:17 Definitions
- § 23:18 The grant of the license
- § 23:19 Duration
- § 23:20 No competition arrangements
- § 23:21 What the licensor promises to provide
- § 23:22 What the licensee promises to undertake
- § 23:23 Quality control
- § 23:24 Payment
- § 23:25 Government approval
- § 23:26 Termination
- § 23:27 Dispute resolution
- § 23:28 Miscellaneous provisions

### VI. MULTINATIONAL GOVERNANCE OF TECHNOLOGY TRANSFERS

- § 23:29 The United Nations transfer of technology code efforts
- § 23:30 The GATT/WTO and TRIPs
- § 23:31 NAFTA and technology transfers

# VII. SAMPLE TECHNOLOGY TRANSFER AND LICENSING AGREEMENTS

- § 23:32 Basic transfer of technology agreement (Mexico) (oil and gas)
- § 23:33 Technical assistance and management services agreement (Indonesia) (oil and gas)
- § 23:34 Basic management agreement (linked to previous technical assistance and management services agreement) (Indonesia) (oil and gas)
- § 23:35 Information exchange agreement (chemicals industry)
- § 23:36 Technology license agreement (Ireland) (telecommunications and equipment)
- § 23:37 Omnibus confidentiality and nondisclosure agreements (knowhow, trade secrets)

#### VIII. PRACTITIONER COMMENTARY

- $\$  23:38 Legal protection of software in the European union, by Benjamin Kaiser, Esq.
- § 23:39 Patents in Europe, by Otto Steinbusch, Esq.
- § 23:40 Should American Companies Patent Their Pharmaceutical Inventions in China?, by R. Kelly Moore, Esq.
- § 23:41 Patent Issues in Global Supply Chain Management, by John-Paul Fryckman, Associate at Fish and Richardson (San Diego)
- § 23:42 The Odd Couple: an emerging relationship between sovereign wealth funds and private technology companies, by Nina Sugar, Esq.
- § 23:43 PACTE and French Patent Law: Why? And Will It Work?, by Victoire Marqué, Esq.

# CHAPTER 24. COUNTERFEIT, INFRINGING AND GRAY MARKET IMPORTS—UNITED STATES SECTION 337 PROCEEDINGS

#### I. INTRODUCTION

- § 24:1 Technology transfers
- § 24:2 The WTO TRIPs Agreement and Technology Disputes

#### II. COUNTERFEIT GOODS

- § 24:3 Introduction
- § 24:4 Customs Service seizures
- § 24:5 Section 337 proceedings (intellectual property), patent validity disputes
- § 24:6 Infringement actions
- § 24:7 Criminal prosecutions
- § 24:8 International solutions

#### III. GRAY MARKET GOODS

- § 24:9 Introduction
- § 24:10 The U.S. customs service position
- § 24:11 Trademark and copyright remedies
- § 24:12 Gray market goods in other jurisdictions

# IV. SECTION 337 PROCEEDINGS (NON-INTELLECTUAL PROPERTY)

- § 24:13 Statutory criteria
- § 24:14 Domestic injury
- § 24:15 Proof of a U.S. industry

#### V. SECTION 337 PROCEDURES

§ 24:16 Complaint and response

<ul> <li>§ 24:17 Temporary 1</li> <li>§ 24:18 Administrat</li> <li>§ 24:19 Sanctions</li> <li>§ 24:20 Settlements</li> </ul>	ive process

#### VI. SECTION 337 REMEDIES

$\S 24:21$	ITC public interest review
$\S 24:22$	ITC general exclusion and cease and desist orders
§ 24:23	Presidential veto
§ 24:24	ITC opinion letters

#### VII. SECTION 337 VERSUS FEDERAL COURT REMEDIES

- § 24:25 Concurrent jurisdiction
- § 24:26 Res judicata

# CHAPTER 25. INTRODUCTION TO FOREIGN DIRECT INVESTMENT

#### I. INTRODUCTION

- § 25:1 Why invest abroad?
- § 25:2 The language-of investment barriers—TRIMs

#### II. WHO GOVERNS FOREIGN INVESTORS?

- $\S~25:3$  Governance by home nations
- § 25:4 Governance by host nations
- § 25:5 Governance by multi-nation organizations and international law

#### III. WHEN INVESTMENT RESTRICTIONS ARE IMPOSED

- § 25:6 Restrictions upon entry
- § 25:7 Restrictions during operations
- § 25:8 Restrictions upon withdrawal

#### IV. THE FORM OF INVESTMENT RESTRICTIONS

- § 25:9 Prohibitions and limitations on ownership
- § 25:10 Limitations on acquisitions
- § 25:11 Limitations on management
- § 25:12 Performance requirements
- § 25:13 Limitations on transfer of capital and earnings
- § 25:14 Current trends in enacting and enforcing restrictions

#### V. REVIEWING PROPOSED FOREIGN INVESTMENT

§ 25:15 The institutions of review

§ 25:16 The process of review

#### VI. FOREIGN INVESTMENT RULES UNDER THE NAFTA

- § 25:17 Investment rules
- § 25:18 Dispute resolution

#### VII. FOREIGN INVESTMENT RULES UNDER THE GATT/WTO

§ 25:19 TRIMs

#### VIII. FOREIGN INVESTMENT TREATIES

- § 25:20 General
- § 25:21 United States investment treaties

#### IX. OPERATIONAL CODE—THE WAY THINGS REALLY WORK

§ 25:22 The unwritten law

#### X. SOME MISCELLANEOUS ASPECTS OF FOREIGN INVESTMENT

- § 25:23 Other forms of foreign investment
- § 25:24 Taxation of foreign investment

#### XI. APPLICABLE LAW AND DISPUTE RESOLUTION

- § 25:25 The applicable law
- § 25:26 Bilateral investment treaties (BITs)
- § 25:27 International Centre for the Settlement of Investment Disputes (ICSID)
- § 25:28 North American Free Trade Agreement (NAFTA)
- § 25:29 The General Agreement on Tariffs and Trade and World Trade Organization (GATT/WTO)

#### XII. SAMPLE FOREIGN INVESTMENT AGREEMENTS

- § 25:30 Electricity Plant Project Development (Heads of Agreement)
- § 25:31 Electricity Plant Project Development (MOU)
- § 25:32 Electricity Plant Project Development (Consortium Agreement)
- § 25:33 Mutual confidentiality agreement
- § 25:34 Request for proposal (RFP)
- § 25:35 Professional engagement letter

# CHAPTER 26. CHOICE OF STRUCTURE: BRANCH OR SUBSIDIARY

#### I. INTRODUCTION

§ 26:1 Decision to invest abroad

#### § 26:2 Choosing the appropriate form

#### II. STRUCTURES—THE CHOICES

- § 26:3 Choice of branch or subsidiary
- § 26:4 Choice of form of subsidiary

### III. WHO IS LIABLE FOR WHOM? LIABILITY AND RISK CONSIDERATIONS

- § 26:5 Minimizing the risk
- § 26:6 Liability imposed on the foreign entity
- § 26:7 Liability imposed on the parent
- § 26:8 Other substantive law differences

#### IV. ECONOMIC CONSIDERATIONS

- § 26:9 Introduction
- § 26:10 United States taxation
- § 26:11 Host country taxation
- § 26:12 Financing
- § 26:13 Exchange controls
- § 26:14 Bankruptcy

#### V. ORGANIZATIONAL CONSIDERATIONS

- § 26:15 Government consent
- § 26:16 Registration
- § 26:17 United States regulation

#### VI. OPERATIONAL CONSIDERATIONS

- § 26:18 Risk, ownership and control
- § 26:19 Corporate administration
- § 26:20 Labor
- § 26:21 Reports and reserves
- § 26:22 Marketing considerations

#### VII. TERMINATION OR WITHDRAWAL CONSIDERATIONS

- § 26:23 Branch
- § 26:24 Subsidiary

#### VIII. CONCLUSIONS

§ 26:25 Factors in the decision

#### IX. SAMPLE MEXICAN INCORPORATION FORM

§ 26:26 Sample articles for the creation of a Mexican corporation (S.A. de C.V.)

# CHAPTER 27. CHOICE OF OWNERSHIP: JOINT VENTURES

#### I. INTRODUCTION

§ 27:1 Defining the joint venture

#### II. APPLICABLE LAW

- § 27:2 Host nation law
- § 27:3 Bilateral investment treaties
- § 27:4 Regional Free Trade Agreements
- § 27:5 The General Agreement on Tariffs and Trade and the World Trade Organization (GATT/WTO)
- § 27:6 Recent trends

#### III. JOINT VENTURE LAWS OF FOREIGN NATIONS

- § 27:7 Introduction
- § 27:8 Nonmarket and developing nations
- § 27:9 Developed nations

#### IV. GENERAL PATTERN OF JOINT VENTURE LAWS

- § 27:10 Reason for the joint venture law
- § 27:11 Scope of coverage of joint venture laws
- § 27:12 Permitted foreign equity
- § 27:13 Performance requirements
- § 27:14 Additional controls
- § 27:15 Administration of joint venture laws

#### V. JOINT VENTURE PARTICIPANTS

- § 27:16 Choosing the local partner
- § 27:17 Private partners
- § 27:18 The state as a partner

## VI. MAJORITY, MINORITY OR 50-50 PARTICIPATION IN EQUITY AND MANAGEMENT

- § 27:19 Mandates or free choice
- § 27:20 Majority equity and management
- § 27:21 Minority equity but majority control
- § 27:22 Minority equity and control
- § 27:23 50-50 joint venture

#### VII. THE AGREEMENTS

§ 27:24 Introduction

§ 27:25 § 27:26 § 27:27	Pre-incorporation agreement The corporate charter The joint venture agreement
VIII.	THE JOINT VENTURE AGREEMENT
§ 27:28	Purpose of the joint venture
§ 27:29	Management of the joint venture
§ 27:30	Intellectual property
§ 27:31	Government approval
§ 27:32	Taxes
6 04 00	m: 1 1 1 1

- Title to real and personal property § 27:33
- § 27:34 Language
- Duration § 27:35
- Intended markets § 27:36
- Applicable law for dispute resolution § 27:37

#### IX. SAMPLE JOINT VENTURE AGREEMENTS

- § 27:38 Mining joint venture agreement (Mexico)
- § 27:39 Manufacturing joint venture agreement (Mexico)
- § 27:40 Manufacturing joint venture memorandum of understanding (Mexico)
- Manufacturing joint venture shareholders' agreement (Mexico) § 27:41
- § 27:42 Sample contract for joint venture using Chinese and foreign investment
- Prime contractor/sub-supplier MOU § 27:43

### CHAPTER 28. INVESTING IN EUROPE

#### I. INTRODUCTION

Introduction

§ 28:1 Foreign Investment Law, National Champions

#### THE GROWTH OF EUROPE AS A REGIONAL MARKET AND II. LEGAL JURISDICTION

· ·	
§ 28:3	Where to invest in the European Union
§ 28:4	The European Economic Community (1957)
§ 28:5	The European Community (1993)
§ 28:6	The European Free Trade Area (1959)
§ 28:7	Reconciliation of EFTA and the EEC (1973)
§ 28:8	The European Economic Area (1991)
§ 28:9	The Maastricht Treaty on European Union (1993)
§ 28:10	Growth in membership
§ 28:11	The Amsterdam Treaty (1999)
§ 28:12	The Treaty of Nice (2003)

§ 28:2

- § 28:13 The Convention on the Future of Europe and Defeat of its Constitution (2005)
- § 28:14 The Reform Treaty of Lisbon (2009)

#### III. THE EUROPEAN COMMON MARKET

- § 28:15 Introduction
- § 28:16 A single market
- § 28:17 Company law: European companies
- § 28:18 The EURO—Preparing for the EURO: the European monetary system
- § 28:19 —Admission to the EURO zone
- § 28:20 —European Central Bank
- § 28:21 —Financial bailouts
- § 28:22 —Treaty on Stability, Coordination and Governance (TSCG), ECB Bond Buying
- § 28:23 Free movement of goods
- § 28:24 Article 36 and the problem of nontariff trade barriers
- § 28:25 Intellectual property rights as European trade barriers
- § 28:26 NTBs and the single market
- § 28:27 Product standards and testing
- § 28:28 Freedom to provide and receive services across European borders
- § 28:29 Equal pay and equal treatment (comparable worth)
- § 28:30 Social policy—Occupational safety, the social fund and social charter
- § 28:31 European Union Free Trade Agreements (FTAs), BREXIT

### IV. MERGERS AND ACQUISITIONS

- § 28:32 Introduction
- § 28:33 Early law on mergers and acquisitions
- § 28:34 Commission regulation of "mergers and acquisitions: Case examples
- § 28:35 Employee rights in mergers and acquisitions
- § 28:36 Hostile takeovers

#### V. PRACTITIONER COMMENTARY

- § 28:37 Does the European union need a uniform contract law? by Marion Schuster, Esq. (Germany)
- § 28:38 Could Coronavirus End Schengen? How COVID-19 Is an Existential Threat to the Open Borders of the European Union, by Cassandra Dougherty, Esq.
- § 28:39 The EU's Carbon Border Adjustment Mechanism: At Odds Against WTO World Trade Policy or the New Standard for Global Climate Policy?, by Alexandra I. Cumberland, Esq.
- § 28:40 Foreign Investment Screening in the EU, by Simon Bonde, Esq.

#### CHAPTER 29. INVESTING IN THE NAFTA/USMCA AREA

#### I. INTRODUCTION

§ 29:1 Domestic rules and NAFTA/USMCA rules: two investment frameworks

- § 29:2 Canadian and Mexican perceptions toward foreign investment
- § 29:3 NAFTA 1994 and the development of a common scheme of investment rules

### II. THE INVESTMENT LAWS OF CANADA, MEXICO AND THE UNITED STATES

§ 29:4 Overview

#### III. FOREIGN INVESTMENT IN CANADA

- § 29:5 Investment laws of Canada
- § 29:6 Canadian trade and investment restraints on cultural industries

#### IV. FOREIGN INVESTMENT IN MEXICO

- § 29:7 Investment laws of Mexico
- § 29:8 1993 Foreign Investments Law of Mexico
- § 29:9 Mexican free trade treaties as an investment incentive

### V. FOREIGN INVESTMENT IN THE UNITED STATES

- § 29:10 Overview
- § 29:11 The view from abroad
- § 29:12 Contrasting departmental goals
- § 29:13 The reason for restrictions
- § 29:14 United States as a host nation
- § 29:15 U.S. securities registration and disclosure requirements and exemptions for foreign issuers

### VI. EXON-FLORIO/FINSA/FIRRMA REGULATION OF FOREIGN INVESTMENT

- § 29:16 Introduction
- § 29:17 History of CFIUS and evolution of Exon-Florio/FINSA/FIRRMA
- § 29:18 When and how CFIUS reviews proposed foreign investment
- § 29:19 Application of Exon-Florio/FINSA/FIRRMA—Cases
- § 29:20 Defenses to Exon-Florio/FINSA
- § 29:21 Exon-Florio viewed from abroad

# VII. INDUSTRY SPECIFIC RESTRICTIONS ON FOREIGN INVESTMENT

- § 29:22 Introduction
- § 29:23 Federal prohibitions of foreign investment
- § 29:24 Federal regulation of foreign investment
- § 29:25 State regulation of foreign investment
- § 29:26 State foreign investment real estate restrictions and disclosure requirements

#### Table of Contents

8	29:27	Registration	and	data	collection	requiremo	ents
•		Trocator autori	ullu	autu	COLLCCTIOLL	I Cquii Cili	

- § 29:28 Federal foreign investment real estate disclosure requirements
- § 29:29 Federal foreign investment real estate restrictions

#### VIII. OPERATIONAL LEVEL RESTRICTIONS

- § 29:30 Introduction
- § 29:31 Labor laws
- § 29:32 Taxation

#### IX. TERMINATING FOREIGN INVESTMENT

§ 29:33 Cross-border issues

#### X. CONCLUSIONS

§ 29:34 United States laws comparatively unrestrictive

#### XI. NAFTA/USMCA RULES

- § 29:35 NAFTA 1994: The Agreement
- § 29:36 NAFTA: Foreign Investment
- § 29:37 The 2019/2020 USMCA Agreement
- § 29:38 USMCA Overview

### XII. SAMPLE NAFTA/USMCA FOREIGN INVESTMENT AGREEMENTS

- § 29:39 Sample power of attorney/poder (English/Spanish)
- § 29:40 Maquiladora assembly contracts
- § 29:41 Maguiladora land acquisition
- § 29:42 Typical legal checklist for forming a Mexican corporation to engage in Maquiladora industrial activities

#### XIII. PRACTITIONER COMMENTARY

- § 29:43 The dance around foreign ownership of U.S. airlines, by Stephen R. Dupourque, Esq.
- § 29:44 Textile Apparel Trade and Labor: The Race to The Bottom from NAFTA to USMCA, by Alyssa Aiello, Esq.

Appendix 29A. 2020 CFIUS Investment Regulations Regarding Critical Technologies

#### CHAPTER 30. INVESTING IN EMERGING MARKETS

#### I. INTRODUCTION

- § 30:1 Defining the developing nation
- § 30:2 Defining nonmarket and transition economies

- § 30:3 Developing nations contrasted with nonmarket/transition economies
- § 30:4 Nonmarket economy nations in transition

### II. THE PATTERN OF INVESTMENT LAWS IN DEVELOPING NATIONS

- § 30:5 Patterns of foreign investment laws in developing nations
- § 30:6 Investment restrictive laws of the 1970s and early 1980s
- § 30:7 Investment encouraging laws of the late 1980s to the present

# III. TRADING WITH DEVELOPING AND NONMARKET/TRANSITION ECONOMY NATIONS

- § 30:8 Introduction
- § 30:9 Tariffs
- § 30:10 Support for East European Democracy Act (SEED)
- § 30:11 Nonmarket economy FTOs or STOs—A dying entity
- § 30:12 Distribution of goods
- § 30:13 Currency issues
- § 30:14 Countertrade
- § 30:15 United States trade laws
- § 30:16 Developing nations and the GATT/WTO

### IV. INVESTING IN DEVELOPING AND NONMARKET/TRANSITION ECONOMY NATIONS

- § 30:17 Introduction
- § 30:18 Enforcement and corruption
- § 30:19 Government oversight
- § 30:20 The workforce and expatriate employees
- § 30:21 Credit, banking and currency issues
- § 30:22 Accounting procedures
- § 30:23 Taxation
- § 30:24 Miscellaneous

#### V. INVESTMENT BY THE USE OF JOINT VENTURES

- § 30:25 Nature of the joint venture—Developing nations
- § 30:26 —Nonmarket economy nations
- § 30:27 Principal characteristics
- § 30:28 Joint venture partners
- § 30:29 Joint ventures in transition

#### VI. INVESTMENT BY PRIVATIZATION

- § 30:30 Goals of privatization
- § 30:31 Obstacles to privatization

#### VII. INVESTMENT BY FRANCHISING

- § 30:32 Franchising in the developing world
- § 30:33 Laws governing franchising
- § 30:34 Nonmarket economy laws tend not to address the franchise

#### VIII. INSURING INVESTMENTS

§ 30:35 Sources of insurance

#### IX. CONCLUSIONS

- § 30:36 Causes of change
- § 30:37 Effect of GATT Uruguay Round
- § 30:38 Regional integration

#### X. PRACTITIONER COMMENTARY

- § 30:39 The merits of special economic zones in India, by Alfred Von Kessler, Esq.
- § 30:40 Who Finished 1st in the KOREU and KORUS FTA regarding the Automobile Industry?, by Daniel Kim, Esq.
- § 30:41 Investments in the Arab Gulf region with focus on the Kingdom of Bahrain, by Elie Yazbeck, Esq. (Lebanon)
- § 30:42 The Regulation of Foreign Investment in the Oil and Gas Industry of Brazil, by Vardan Ramazyan, Esq.
- § 30:43 Chinese Investment in Africa, by Chapman Chan, Esq.
- § 30:44 Dubai, trailblazing for sustainable prosperity, by Gayatri Gupta, Esq.
- § 30:45 The Implications of Arab-Israel Normalizations by Fahad Alquawee, Esq.
- § 30:46 The Principle of Responsibility to Protect: Implementation Perspective in Middle East and North Africa, by Shorouq B. Al-Othman
- § 30:47 Western Sahara: How Is Trade Affected by Unresolved Conflicts That Involve Disputes of Territory?, by Sergio Harim del Pino, Esq. (Spain)

#### XI. EMERGING MARKET COUNTRY OVERVIEWS

- § 30:48 Investing in Vietnam, by Vu Thi Chau Quynh, Esq. and Dinh Anh Tuyet,
- § 30:49 Investing in the Philippines, by Justin Shields, Esq., Ernst & Young (San Diego)
- § 30:50 Investing in Malaysia, by Hana Farquhar, Esq.
- § 30:51 Investing in India, by Patrick Kelley, Esq.
- § 30:52 Investing in Indonesia by Patrick Kelley, Esq. (PricewaterhouseCoopers)
- § 30:53 Investing in Thailand, by Justin Shields, Esq. (Ernst & Young, San Diego)

#### CHAPTER 31. INVESTING IN CHINA AND EAST ASIA

#### I. OVERVIEW

§ 31:1 The investment climate and new normal of China

§ 31:2	A retreat from and the continuation of state enterprise
§ 31:3	A planned economy
§ 31:4	Cartels, monopolies and competition
§ 31:5	China and the world: from isolation to open doors and beyond
§ 31:6	United States export controls: From trading with an enemy to an ally
§ 31:7	United States—PRC trade and investment disputes
§ 31:8	United States tariffs on PRC goods: the issue of human rights
§ 31:9	Restrictive international trade practices of the PRC prior to WTO membership
§ 31:10	GATT/WTO membership for the PRC
§ 31:11	Made in China 2025
§ 31:12	Rule of Law—Ease of doing business
§ 31:13	Foreign economic contracts of the PRC
§ 31:14	Foreign economic contract law
§ 31:15	Preferential trade and investment zones
§ 31:16	Sector opportunities and the foreign investment climate in the PRC
§ 31:17	Foreign investment guidance: The Catalogue
§ 31:18	Foreign investment options, VIEs
§ 31:19	Equity joint ventures
§ 31:20	Problems at the Chrysler Jeep joint venture
§ 31:21	Wholly foreign owned enterprises
§ 31:22	Contractual joint ventures (partnerships)
§ 31:23	PRC stock companies and class B shares
§ 31:24	Mergers and acquisitions
$\S 31:25$	Intellectual property under PRC Law
§ 31:26	Technology transfers to the PRC
§ 31:27	Technology piracy in the PRC
§ 31:28	PRC regulation of technology import contracts
§ 31:29	Dispute resolution
§ 31:30	Hong Kong and Macao
§ 31:31	The return of Chinese sovereignty in 1997 and 1999

# II. FORMS: SAMPLE CHINA INVESTMENT AGREEMENTS AND DOCUMENTS

- § 31:32 Wholly Foreign-Owned Enterprises (China) Due Diligence Checklist
- § 31:33 Wholly Foreign-Owned Enterprise (China) Due Diligence Report

#### III. PRACTITIONER COMMENTARY

- § 31:34 E-Commerce and Selling Directly to Chinese Consumers: What Are Your Options and Risks as a Foreign Company, by Ryan Rigney, Esq.
- § 31:35 A Guide to Trademark Protection in the People's Republic of China, by Ana Patricia McMillon, Esq., LLM San Diego, Attorney California and Madrid
- § 31:36 Challenging the CIETAC giant: ICSID, BAC, HKIAC and SIAC as Emerging Arbitration Center Competitors, by Amy J. Song, Esq.

#### Table of Contents

- § 31:37 China's film censorship program and how Hollywood can enter China's film market, by Tiffany Kwong, Esq.
- § 31:38 Protection against Copyright Infringement and Pirating in the PRC: Microsoft as a Case Study, by Samantha Baldwin, Esq.
- § 31:39 Healthcare and Pharmaceutical Investment in the PRC, by James Grant, Esq.
- § 31:40 China Dispute Resolution 2017, James Zimmerman, Esq.
- § 31:41 Why China Joined the WTO? And What Have Been the Consequences?, by Fahad H. Alsuwailem, Esq. (LLM USD Law School)
- § 31:42 Can Hong Kong Survive as Asia's Financial Hub under the PRC National Security Law?, by Christy Dresch, Esq.
- § 31:43 Overview of investing in South Korea, by Robert Bowen, Esq.

### IV. EAST ASIA COUNTRY OVERVIEWS: INVESTING IN JAPAN, SOUTH KOREA AND TAIWAN

- § 31:44 Overview of Investing in Japan, by Patrick Kelley, Esq.
- § 31:45 Overview of Investing in Singapore, by Patrick Kelley, Esq.
- Appendix 31A. Foreign Investment Law of the Peoples Republic of China (adopted Mar. 15, 2019; effective Jan. 1, 2020)

Appendix 31B. The 2020 Vietnam Investment Law

# CHAPTER 32. SPECIAL PROBLEMS: CURRENCY CONTROLS

#### I. INTRODUCTION

- § 32:1 Regulating possession and access
- § 32:2 Dynamics of controls
- § 32:3 Requirements of international business persons
- § 32:4 Why a currency is controlled
- § 32:5 Variations in controls

#### II. FORMS OF CURRENCY CONTROLS

- § 32:6 Restrictions on foreigners' access to domestic borrowings, even in local currency
- § 32:7 Restrictions on any access to local borrowing of foreign hard currency holdings
- § 32:8 Restrictions on access to and transfer of local foreign hard currency holdings
- § 32:9 Mandated transfers from abroad into the country to obtain approval of investment projects
- § 32:10 Requirements that a percentage of borrowing of foreign currencies by a resident be deposited locally
- § 32:11 Requirements that the proceeds of sales or services abroad be returned to and deposited in local institutions

- § 32:12 Requirements that earnings of residents in foreign currencies be deposited in domestic accounts
- § 32:13 Requirements that deposits of foreign hard currencies be converted to domestic currency accounts
- § 32:14 Requirements that a foreign investor's demands for hard currency be met by hard currency earnings from exports

#### III. ACTIONS WHICH AFFECT THE VALUE OF A CURRENCY

- § 32:15 Government intervention in the market by the purchase of its own declining-value currency
- § 32:16 Government linking the currency to another nation's currency
- § 32:17 Government devaluation of its currency
- § 32:18 Government decision that the currency will float freely as opposed to being fixed in relation to another currency (or gold)
- § 32:19 Government adoption of a foreign currency as the nation's official currency

#### IV. INFLATION AND INDEXATION

- § 32:20 Interrelationship of currency controls
- § 32:21 Business responses to indexation and inflation

#### V. DUAL OR MULTI-LEVEL EXCHANGE RATES

- § 32:22 The use of dual or multi-level rates
- § 32:23 Business use of different rates

#### VI. SANCTIONS FOR VIOLATIONS OF CURRENCY CONTROLS

- § 32:24 Breach of contract
- § 32:25 Breach of government rule

#### VII. REGULATION BY THE INTERNATIONAL MONETARY FUND

- § 32:26 Article VIII, 2(b) and the regulation of exchange contracts
- § 32:27 "Exchange contracts" under Article VIII, 2(b)
- § 32:28 "Involve the currency" under Article VIII, 2(b)
- § 32:29 "Exchange control regulations" under Article VIII, 2(b)
- § 32:30 "Overriding public policy" under Article VIII, 2(b)
- § 32:31 Other issues under Article VIII, 2(b)
- § 32:32 Interpretation and application of the agreement
- § 32:33 Contractual provisions in view of IMF regulations

#### VIII. EXCHANGE CONTROLS AND THE ACT OF STATE DOCTRINE

- $\S$  32:34 The act of state doctrine as an alternative defense to Article VIII, 2(b) of the IMF agreement
- § 32:35 Act of state applied to exchange controls

#### IX. FOREIGN EXCHANGE CONTRACTS

- § 32:36 The operation of a foreign exchange contract
- § 32:37 The foreign exchange market
- § 32:38 Oral exchange contracts
- § 32:39 Settlement and delivery

#### X. FOREIGN EXCHANGE RISK

- § 32:40 An example of exchange risk
- § 32:41 Lessening the risk
- § 32:42 Currency swaps
- § 32:43 Use of the dollar in trading
- § 32:44 Insuring against the foreign exchange risk

#### XI. CONCLUSIONS

- § 32:45 Currency versus tariff fluctuations
- § 32:46 Monitoring currency

# CHAPTER 33. PROTECTING AGAINST LOSS OF INVESTMENT, OPIC, MIGA

#### I. INTRODUCTION

- § 33:1 The taking of foreign investment
- § 33:2 Predicting expropriation

#### II. THE LANGUAGE OF TAKING

- § 33:3 In search of a term
- § 33:4 Intervention
- § 33:5 Nationalization
- § 33:6 Expropriation
- § 33:7 Confiscation

#### III. AVOIDING OR LESSENING THE RISK

§ 33:8 The usefulness of risk analysis

### IV. INSURING THE RISK

- § 33:9 Government insurance
- § 33:10 Private insurance
- § 33:11 Mandatory and optional insurance

#### V. THE OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC)

§ 33:12 OPIC—History and structure

§ 33:13	—Investor eligibility
§ 33:14	—Insurance programs
§ 33:15	—Investment insurance terms
§ 33:16	—Eligible investments
§ 33:17	-Claims and dispute settlement
§ 33:18	—Private insurers
§ 33:19	OPIC model documents

#### VI. THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA)

§ 33:20	Investment insurance on an international level
§ 33:21	MIGA—Insurance programs
§ 33:22	—Eligible investments
§ 33:23	—Eligible investors
8 33.24	—Scope of coverage

#### VII. EXPROPRIATION IN FREE TRADE AGREEMENTS

§ 33:25 Expropriation under the NAFTA

### VIII. CONCLUSIONS

§ 33:26 Does insurance lessen the risk? Bilateral investment treaties § 33:27

### CHAPTER 34. EXPROPRIATION OF AN INVESTMENT, FOREIGN SOVEREIGN IMMUNITY, ACTS OF STATE

#### I. INTRODUCTION

- § 34:1 Avoiding the risk of expropriation
- § 34:2 Legal choices following expropriation

#### II. EXPROPRIATION LAW

- § 34:3 What law applies and what is that law? Applying domestic law of the taking nation § 34:4 Applying international law § 34:5
- § 34:6 Investment treaties

#### III. EXPROPRIATION—PUBLIC PURPOSE

- § 34:7 Public purpose under international law
- § 34:8 Defining public purpose
- § 34:9 Who measures public purpose?

#### IV. EXPROPRIATION—RETALIATION AND DISCRIMINATION

§ 34:10 Retaliation and discrimination defined

§ 34:11 Retaliation and discrimination subordinated to compensation	§ 34:11	Retaliation a	nd disc	crimination	subordinated	to	compensation
---	---------	---------------	---------	-------------	--------------	----	--------------

${f V}$	EXPROPRIATION—	-COMPENSATION
w -		

- § 34:12 The uncertainty of international law
- § 34:13 Prompt, adequate and effective compensation
- § 34:14 Appropriate compensation
- § 34:15 Fair compensation
- § 34:16 Just compensation
- § 34:17 Restitution as a substitute for compensation
- § 34:18 Mandatory questions under any standard

#### VI. AFTER EXPROPRIATION

- § 34:19 Exhaustion of local remedies
- § 34:20 Assistance of the government—The "Calvo clause"
- § 34:21 Lump-sum agreements and claims commissions
- § 34:22 Suing in United States courts

## VII. FOREIGN SOVEREIGN IMMUNITIES ACT IN EXPROPRIATION CASES

- § 34:23 Introduction
- § 34:24 History and rationale
- § 34:25 The Foreign Sovereign Immunities Act of 1976
- § 34:26 Who is a sovereign?
- § 34:27 Jurisdictional issues
- § 34:28 Exceptions to sovereign immunity—Waiver
- § 34:29 —Commercial activity
- § 34:30 —Violations of international law

#### VIII. ACT OF STATE IN EXPROPRIATION CASES

- § 34:31 Introduction
- § 34:32 History
- § 34:33 Act of state and the expropriation of property
- § 34:34 Act of state encounters some limits
- § 34:35 Act of state and the separation of powers
- § 34:36 Act of state and some exceptions

#### CHAPTER 35. INTERNATIONAL BUSINESS LITIGATION

#### I. INTRODUCTION

- § 35:1 Introduction
- § 35:2 Litigation strategy

#### II. LOCATION OF THE LITIGATION

- § 35:3 United States
- § 35:4 Foreign nation

#### III. BEFORE THE TRIAL

- § 35:5 Personal jurisdiction
- § 35:6 Subject matter jurisdiction
- § 35:7 Service of process
- § 35:8 Choice of forum
- § 35:9 Forum non conveniens
- § 35:10 Choice of law
- § 35:11 Anti-suit injunctions

#### IV. AT THE TRIAL

- § 35:12 Proving foreign law
- § 35:13 Depositions and document discovery abroad

#### V. AFTER THE TRIAL

§ 35:14 Recognition and enforcement of foreign judgments

## VI. HUMAN RIGHTS AND ENVIRONMENTAL BUSINESS LITIGATION

§ 35:15 Alien Tort Claims Act

### VII. JURISDICTION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS IN EUROPE

- § 35:16 Brussels and Lugano Conventions
- § 35:17 —Jurisdiction
- § 35:18 —Party autonomy
- § 35:19 —Recognition and enforcement

# CHAPTER 36. INTERNATIONAL COMMERCIAL AND FOREIGN INVESTMENT ARBITRATION

#### I. INTRODUCTION

- § 36:1 Overview
- § 36:2 Why arbitrate?
- § 36:3 Types of international commercial arbitrations
- § 36:4 Mandatory law
- § 36:5 Arbitration rules and local law: the Swedish example

#### Table of Contents

§ 36:6	Elements of an agreement to arbitrate
§ 36:7	International Arbitral Rules and Model Laws: UNICITRAL
§ 36:8	International arbitration rules: ICSID
§ 36:9	ICC and LCIA arbitral rules and clauses
§ 36:10	Arbitration of NAFTA investor-state disputes
§ 36:11	Investor claims against states under NAFTA
§ 36:12	Compelling arbitration and enforcement of arbitral awards: the New York Convention
§ 36:13	Arbitration agreements, arbitrators and awards under U.S. Law
§ 36:14	Domain name arbitrations
§ 36:15	Foreign investment arbitrations, bilateral investment treaties

#### II. PRACTITIONER COMMENTARY

- § 36:16 The U.S.-Mexico Sugar/Sweetener Dispute, by Daniela De La Torre, Esq.
   § 36:17 NAFTA's utility and U.S. hostility: CBP impedes Mexican motor carriers' rights and violates NAFTA, by Annu Grewal, Esq.
   § 36:18 NAFTA: The effect on the auto industry in Mexico, by Robert Rodriguez, Esq.
- § 36:19 Arbitration of the invalidation of Eli Lilly's patents by the Canadian courts under NAFTA Chapter 11 Foreign Investment Rules, by Priti Phukan, Esq.

# CHAPTER 37. BUSINESS IMMIGRATION TO THE UNITED STATES

#### I. INTRODUCTION

- § 37:1 The Immigration Act of 1990
- § 37:2 Categories to be considered
- § 37:3 Legislative updates

#### II. CITIZENSHIP

- § 37:4 The status of a citizen
- § 37:5 The citizenship option for business
- § 37:6 Is the applicant a citizen?
- § 37:7 The dynamics of citizenship law

#### III. IMMIGRANT VISAS—GENERAL

- § 37:8 Lawful permanent resident status
- § 37:9 Immigration categories mutually exclusive
- § 37:10 Bars to immigration

#### IV. EMPLOYMENT BASED IMMIGRATION

§ 37:11 Employment as an immigrant basis

§ 37:12	Labor certification
§ 37:13	Preference categories
§ 37:14	—Priority workers
§ 37:15	-Professionals with advanced degrees and aliens of exceptional ability
§ 37:16	—Skilled workers, professionals and other workers
§ 37:17	—Special immigrants
§ 37:18	—An investment-based classification: The million dollar green card
§ 37:19	Summary

#### V. FAMILY BASED IMMIGRATION

§ 37:20	Introduction
§ 37:21	Immediate relatives of citizens
§ 37:22	Unmarried sons and daughters of citizens
§ 37:23	Family of lawful permanent residents
§ 37:24	Married sons and daughters of citizens
§ 37:25	Brothers and sisters of citizens
§ 37:26	Derivative beneficiaries
§ 37:27	Summary

#### VI. DIVERSITY IMMIGRATION

§ 37:28	Introduction
§ 37:29	Permanent diversity
§ 37:30	Summary

#### VII. NONIMMIGRANT VISAS—GENERAL

§ 37:31	Introduction
§ 37:32	Dual intent

### VIII. NONIMMIGRANT VISA CATEGORIES

§ 37:33	Introduction
§ 37:34	Professionals and the H-1 visa
§ 37:35	Multinational employees and the L-1 visa
§ 37:36	Treaty traders, investors and E visas
§ 37:37	Business visitors and the B-1 visa
§ 37:38	Aliens of extraordinary ability and performers (O, P visas)
§ 37:39	Non-professionals (H-2A, H-2B, H-3)
§ 37:40	NAFTA and the TN visa

#### IX. CONCLUSIONS

§ 37:41 Proper focus in choosing visa category

#### X. PRACTITIONER COMMENTARY

§ 37:42 Benefits and Faults of EB-5 Visas and Regional Centers, by Edward Lee, Esq.

### **CHAPTER 38. CONTRACTS AND TAX**

### I. OVERVIEW

§ 38:1	Introduction
0	Drafting tax provisions in contracts
§ 38:3	Pass throughs
§ 38:4	—Qualification of a real estate investment trust (REIT)
§ 38:5	— — Tax protection agreements
§ 38:6	——S corporations
§ 38:7	——Tax sharing and tax receivable agreements

### II. SAMPLE DOCUMENTS

§ 38:8	Thermo Fisher Scientific Inc. senior notes: gross up or yield protection
§ 38:9	provisions Pfizer/Allergen merger agreement: Tax provisions relating to pre-closing changes in tax law
§ 38:10	Baxter/Baxalata tax matters agreement (relating to Baxter's tax-free spin-off of Baxalta)
§ 38:11	Armor All Products settlement agreement
§ 38:12	British Petroleum Prudhoe Bay royalty trust (formed by affiliates of BP)
§ 38:13	Form of REMIC trust (organized by Federal National Mortgage Association ("Fannie Mae"))
§ 38:14	Empire State Realty Trust, Inc.: charter provisions
§ 38:15	Brookfield (a REIT) acquisition of Rouse Properties (a REIT): "Tax matters" provisions in the merger agreement
§ 38:16	Empire State Realty Trust tax protection agreement
§ 38:17	Rouse Properties and Plaza Camino Real tax protection agreement
§ 38:18	Income tax receivables agreement (tax benefits of net operating losses and basis step-up to a corporation going public)
§ 38:19	Lazard Ltd tax receivable agreement: Benefits to Lazard of a step-up in basis in assets resulting from redemptions and exchanges of interests held by Lazard partners
§ 38:20	Wendy's/Arby's consolidated return group: Tax sharing agreement among members

**Table of Cases** 

**Index**