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Global Business Law

Principles and Practice

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To Xandy and Julianna, my daughters, with love.

D.J.F.

*To Dad, with an admiration and respect that
even this wordsmith cannot describe.*

R.K.B.

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Preface to the First Edition

Perhaps it will come as a surprise to admit that I took on this book project with an impending sense of doom, and that my excellent co-author and dear friend, Professor David Frisch, and I complete it with a sense of failure.

Global Business Law, and the accompanying *Documents Supplement* and *Teacher's Manual*, are designed for what is now a standard course in the curriculum of American, and indeed many overseas, law schools: "International Business Transactions" (frequently abbreviated as "IBT"), which sometimes is called "International Business Law." The rubric is of no consequence. The real problem is that after teaching the course two or three times, every professor should realize that it is an impossible one. Not even the best of professors with the most gifted of students can cover all aspects of international business law in one semester. There is no clear way to determine what topics should be covered, and what should be omitted. There is no obvious way to focus the course. There is no one best way to organize the voluminous subject matter. In short, teaching a second or third year law student, or LL.M. candidate, the transactional, legal, and policy aspects of global business in one semester is about as easy as explaining to a foreign guest what America is like in one hour.

Given the inherent impossibility of the course, why should I have enlisted Dave, and why should we together have started what is possibly a march of folly? We offer five reasons.

First, because we believe that whatever topics are covered, wherever the emphasis is placed, whichever organizational framework is used, the course can "globalize" law students and professors alike. In other words, as "impossible" as an IBT course is, we believe there is no simpler, more efficient, or more practical alternative. The course can make the second or third year law student, or LL.M. candidate, more conscious of the global dimensions of legal practice. She can become better able to "spot" cross-border issues, and thus be better prepared for the global economy of the 21st Century. In this respect, the course makes the notoriously parochial American legal curriculum just a little less so. That is a good thing.

In turn, this introductory survey course in international business course can provide the necessary foundation for advanced courses in the specialty areas of international business law, which ought — both in a positive and normative sense — to be offered with increasing frequency in American law schools in the New Millennium. Such courses include International Trade Law, International Dispute Resolution, and International Tax Law. (Indeed, I use *Global Business Law* in my IBT course. This course is followed by International Trade Law, in which I use *International Trade Law: Cases and Materials* (published by Lexis Law Publishing).) Using *Global Business Law* in an IBT course also can provide the foundation for advanced classes, sometimes offered as seminars, in Foreign Direct Investment, International Banking Law, International Commercial Law, and International Negotiations.

Second, because while we believe that there are excellent course books available for use in the course, we believe we offer a distinct and attractive alternative. We very much believe in “letting 100 flowers bloom.” A large number of books in a legal field bespeaks the growing importance and continued maturation of that field. Indeed, we submit that any author of any worthwhile work who claims to be content with the *status quo* is either lying or engaged in self-deception. Each of us in the legal academy is motivated to write a law review article, treatise, or casebook, in part because we are profoundly dissatisfied with some of the “flowers.” That dissatisfaction is healthy, because it forms part of the basis for our passion to create, to contribute to scholarship and pedagogy, and most of all, to help.

Professor Frisch and I have enormous respect for the courageous scholars who have gone before us down the treacherous path on which we now find ourselves. But, we put ourselves on this path because we are not complacent about many of the extant course books. Many try to be all things to all readers. Many are characterized by a very large number of very short excerpts on an uncontrollably wide array of topics. Many lack vision. As regards personal finance, you would be right to invest your savings with a financial consultant who (among other virtues) has a clear perspective on global capital flows and market movements. Why be less demanding when it comes to your international business law education? You would be right to expect a book that prioritizes subject matter coverage based on a keen and articulated sense of what will be important in global business in the New Millennium. Mindful of the law and economics movement, we are idealistic (naive?) enough to believe that at least as much rational planning ought to be put into decisions about human capital growth as household wealth accumulation!

Yes, the IBT course is supposed to be a survey. But, the law student and, dare we admit, law professor ought not be left as confused as she is stimulated, as frustrated as she is enthusiastic. As lawyers, we yearn for depth, to know more and more, and thus rarely are we happy with “snippets.” Moreover, as international business lawyers, we must have a thorough understanding not only of relevant law and policy, but also — indeed first — of how the transaction at hand “works,” and what potential risks are involved. Indeed, so important are risks in particular that we would be prepared to defend the proposition that much of the practice of international business law consists of the effective identification of risks and management thereof.

We would also be prepared to defend the proposition that the multinational corporations (MNCs) are as — if not more — important actors in the global economy than all but a handful of sovereign national governments. The stark fact is that of the top 100 economies in the world, 51 are MNCs. The size of the Ford Motor Company, for example, is larger than the economy of either Saudi Arabia or Norway (both of which are major oil producing countries). You would not go to a Green Bay Packer football game to watch the food and beverage vendors (unless you were participating in a sociological experiment!). Why would you select a casebook that does not emphasize risks and risk management in the conduct of multinational corporate affairs, and that fails to grapple with the possible relationship of MNCs to corruption, human rights abuses, and environmental degradation? Put differently, in the New Millennium, understanding how the MNC is destroying traditional distinctions between business and legal judgments, and between public and private international law, is crucial — and, therefore, a theme that resonates in this Casebook.

Professor Frisch and I, therefore, have tried to prepare *Global Business Law* with the “big game” in mind. We endeavor to cover a still-impressive array of topics, but not at the expense of depth. We strive to choose excerpts in *Global Business Law* that convey the range of legal and policy problems, and risk issues, in global business, but

then edit them in a way that allows the reader to get as complete a picture as possible about these problems. Thus, we have a smaller number of challenging readings, but the average length of each reading is longer, than most other course books. We make no apologies, in particular, for not trying to teach International Trade Law, International Dispute Resolution, or substantial chunks of International Tax Law through this Casebook. Those specialties are far too rich to capture in a few weeks. Better to leave them to a full course of its own, and target *Global Business Law* on the principles and practice of the most important types of wealth-generating, wealth-spreading transactions known to the global economy. Whatever trade, dispute resolution, or tax issues the student of *Global Business Law* misses, she certainly makes up for with a profound knowledge — and thus a keen ability to “issue spot” — with respect to exporting, foreign direct investment, and attendant regulatory matters.

Third, and closely related to the second, because we believe that exporting and foreign direct investment (FDI) are the essential foundations of contemporary international business. Here, then, is the vision: the most essential global business transactions a law student must understand are exporting and FDI. These two transactions are the “big game” in global business (excluding finance). Indeed, they reflect the life-cycle of many companies. A firm begins to sell its product or offer its services in a domestic market, and thereafter realizes there are ready, willing, and able buyers in overseas locations. Indeed, many prospective consumers are likely to be in newly industrializing and less developed countries of the non-western world. So, the company commences exporting. Later, the exporter finds that making its goods in overseas locations, or offering its services with a base in those locations, is desirable for an array of economic, political, and cultural reasons. Therefore, the exporter sets up operations in one or more other countries, hence becoming an MNC.

Exporting — if it is to be understood thoroughly — entails an array of contract, carriage, and payments issues. Thus, Part I (the first four Chapters) of *Global Business Law* are dedicated to exporting. The FDI transaction — again, if it is to be understood thoroughly — entails an array of negotiating and structuring, financing, political risk, and currency risk issues. Thus, Part II (the subsequent four Chapters) of *Global Business Law* are dedicated to FDI. Both exporting and FDI raise many cross-border regulatory challenges. Thus, Part III (the last four Chapters) of *Global Business Law* cover the regulation of FDI flows, the new social responsibilities of MNCs, technology transfer, countertrade, government procurement, telecommunications, and antitrust. The learning experience is cumulative, not *ad hoc*, *i.e.*, each Part, and each Chapter of each Part, builds on its predecessor in a logical fashion.

Fourth, because we believe our alternative is user-friendly. As just suggested, there are three Parts to *Global Business Law*, each with four Chapters. Most law school academic semesters are fourteen weeks. We have constructed *Global Business Law* so that most of the Chapters are of roughly equal length and difficulty, and thus can be covered in one week’s worth of classes (*i.e.*, assuming a three-credit course, two 75 minute classes, or three 50-minute classes, per week). This plan leaves two weeks, to be used at the discretion of the professor. One possibility is to spend an extra week on the longer chapters — namely, Chapter 3, on Cross-Border Payments, Chapter 10, on Regulating Multinational Corporate Conduct, and Chapter 12, on International Antitrust Issues. Another possibility is to spend an extra week on one of the longer Chapters, and the final week of the semester on review sessions. Still another possibility is for the instructor to spend either or both of the extra weeks covering material she finds interesting that is not covered in *Global Business Law*.

Of course, there is more to being user-friendly than organizing a casebook in a way that fits naturally with the academic calendar. We — and our friends at Carolina

Academic Press—have done our best to minimize errors, which obviously annoy us all and, to a certain degree, are inevitable. But, we also have taken a few editing liberties to make the excerpts in *Global Business Law* and the accompanying *Documents Supplement* easier on the eye to read. It is a wonder what **bold**, *italics*, and Small Caps can do for the naked eye, especially late the night before class. Tab sets, indenting, and centering also can be a fillip that enhances learning simply by clarifying a text, and we have used these devices when appropriate.

Fifth, because we believe our alternative is a uniquely cosmopolitan one. The word “global” in the title of this Casebook is no accident. This is not simply a book for Americans who are interested in “going international,” any more than it is a book for a law student—or again, dare we say, law professor—who does not want to take the time to read learn about exporting, FDI, and related regulatory issues in depth. *Global Business Law* aims at the present or aspiring *world* citizens who are going to practice, and *world* law professors who are going to teach, in an increasingly borderless business world. There are, for example, cases and case abstracts in *Global Business Law* from all over the world. Moreover, *Global Business Law* tries to probe differences across legal cultures without providing the reader with a false sense of certainty. To the contrary, perhaps the most valuable pedagogical contribution *Global Business Law* can make is to leave the student and teach alike with a higher level of comfort with, and a greater understanding of, uncertainty.

Thus, while many of the “classics” are found between the covers of *Global Business Law*, throughout the casebook, readings—often from overseas sources—challenge conventional wisdom and reflect non-American perspectives. In this (and other) respects, the Casebook is not easy. We want to challenge the sophisticated student and professor who already has traveled widely abroad. At the same time, we seek to stimulate in the reader who has not yet done that sense of adventure that compels her to get her passport and get on a plane the day after the exam.

So, if, for these five reasons, we believe sincerely in the course and are proud of the alternative we offer you, then why do we confess a sense of failure? Because we know from researching and writing *Global Business Law* how vast international business law is, how there is no end to detail, and—most importantly—how there are legitimate competing visions. There are always those readings not included, those organizational frameworks not selected, and those themes not highlighted, that give us pause, indeed doubt, about our own work. In brief, we know that our choices are not necessarily “right,” and that in truth it is impossible for anyone to get it “right.” The more we learn, the more we realize that there are no right—much less easy—answers, only hard questions that cry out for exploration. Thus, we commend *Global Business Law* to you with intellectual humility.

Because we know there is room for improvement, we look to you to help us through your comments and suggestions. Please direct them anytime to me at the coordinates below. With all good wishes.

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Throughout *Global Business Law*, we have endeavored to ensure that the excerpted material appears as it was originally published. However, we have taken the editorial liberty of making minor typographical, spelling, and punctuation corrections, and occasionally putting special titles (particularly those of international agreements conventions) in *italics* (e.g., the *Agreement on Trade-Related Investment Measures*). Also, in some cases we have altered slightly the format (e.g., tab spaces, centering, and indents, and the use of **bold**, *italics*, or Small Caps) of headings and sub-headings. These changes are designed only to make the text as readable as possible. In no way do they alter the substantive content of the material.

We have, like most casebook authors, omitted virtually all of the footnotes from the material we excerpt, preserving only those citations that seem to have a strong pedagogical value. Some of the Notes prepared for *Global Business Law* do have footnotes, which may provide useful information for further study and research.

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